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GIVING EFFECT TO THE RIGHT TO PARTICIPATORY DEMOCRACY IN THE AREA OF SOCIO-ECONOMIC RIGHTS

A thesis submitted by

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Under the supervision of Professor Marius Pieterse

DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work that has not been submitted for any degree or examination in any institution or published in any journal, textbook or media.

Elizabeth Christine Power

Signed 

Date 17/2/2021

To

Marius

Bob, Michael and Tina

Thank you

Abstract

Disadvantaged communities are disproportionately affected by the persistent failures of government to deliver services, especially at local level. The South African Constitution demands progressive realisation of socio-economic rights, subject to available resources, and the Constitutional Court has interpreted our democracy to include both representative and participatory elements. This thesis examines how the public's right to participatory democracy can be employed to enhance the delivery of socio-economic rights. It engages with three platforms for participation: first, the obligation of Parliament and provincial legislatures to involve interested members of the public in their legislative and other processes; second, the meaningful engagement mechanism developed by the Constitutional Court to oblige local authorities to engage with unlawful occupiers facing eviction; and third, the various opportunities for community participation created in local government legislation. The focus of the thesis is on how the Constitutional Court, as the ultimate guardian of the Constitution, has positioned itself with regards to the other branches of government and how it has used its remedial powers innovatively to develop the right to participation, to protect socio-economic rights and to guide transformation. From the judgments reviewed, it is clear that there are multiple failures of process and implementation at all levels of participation and that existing platforms for participation are under-used. The thesis seeks direction from Western democratic theories and African theory and practice. Locally, guidance is sought from three informal participatory events in our history: the drafting of the Freedom Charter; informal governance under the United Democratic Front and Mass Democratic Movement; and the constitution-making process. At national level, the inquiry covers the Court's interpretation of the substantive and procedural aspects of the right to public involvement, the corresponding obligation to facilitate public involvement, and what constitutes reasonable public involvement. The focus then shifts to avenues for participation at local government level. Both with regards to the Court's judgments on meaningful engagement and the judgments dealing with local participatory platforms the emphasis is on how local authorities should interact with the communities they serve. The inquiry further covers international guidelines and best practices on the effect of corruption and governance failures on socio-economic delivery; the benefits of decentralisation and the strengthening of local authorities to improve access to basic services; and draft guidelines on the effective implementation of the right to participate. It also discusses two international experiments in participatory budgeting and decentralised planning. Drawing from these sources, the thesis concludes with guidelines for ameliorative reforms.

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Chapter 1

Foundations for the progressive realisation of participatory democracy

1 INTRODUCTION

In the preface to 'The Real Utopias Project', a project aimed at encouraging discussions on radical alternatives to existing social institutions, Erik Olin Wright explains the link between dreams and practice.

> The Real Utopias Project embraces a tension between dreams and practice. It is founded on the belief that what is pragmatically possible is not fixed independently of our imaginations, but is itself shaped by our visions.[1]

In his 2012 presidential address to the American Sociological Association, he explains the concept further.

> The idea of real utopias embraces this tension between dreams and practice: *utopia* implies developing visions of alternatives to dominant institutions that embody our deepest aspirations for a world in which all people have access to the conditions to live flourishing lives.[2]

Wright identifies two foundational propositions that need to be considered in order to convert human suffering into human flourishing: first, an acknowledgement that '[m]any forms of human suffering and many deficits in human flourishing are the result of existing institutions and social structures' and, second, that '[t]ransforming existing institutions and social structures in the right way has the potential to substantially reduce human suffering and expand the possibilities for human flourishing'.[3] Alternatives to dominant institutions, he explains, can be achieved in two ways, which he respectively calls ameliorative reforms and real utopian transformations.

> Ameliorative reforms look at existing institutions, identify their flaws, and propose improvements that can be enacted. … Real utopias, in contrast, envision the contours of an alternative social

[1] Archon Fung & Erik Olin Wrights (eds) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance: The Real Utopias Project IV* (2003).
[2] Erik Olin Wright 'Transforming capitalism through real utopias' (2012) 78(1) *American Sociological Review* 1, 3.
[3] Ibid 2.

world that embodies emancipatory ideals and then look for social innovations we can create in the world as it is that move us toward that destination.[4]

First in the Freedom Charter[5] and thereafter in the Constitution of the Republic of South Africa, 1996 the people of South Africa expressed their utopian dream of an alternative social world.[6] Though their contributions were obtained informally, they were active participants in the drafting of both these extraordinary national documents. Extensive countrywide consultations were enabled by a leadership confident in its ability to deliver the vision contained in the first document and the rights secured in the second one.

The drafters of the Constitution created several opportunities for the public to informally guide their leadership. Multiple provisions are included to ensure that the historical denial of voice never recurs, that the right of people to speak and be heard is safeguarded, and that equal access to justiciable socio-economic rights is protected and realised progressively. The Preamble to the Constitution proclaims the need to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. It also proclaims that in a 'democratic and open society, government [should be] based on the will of the people'. In its founding values the Constitution links democracy to human rights, the rule of law, and accountable, responsive and open governance.[7]

Amartya Sen, in response to the question what he thought was the most important event of the 20th century, answered the rise of democracy. During the 19th century, he argues, democratic theorists asked whether a country was 'fit for democracy'. This thinking, he contends, changed during the 20th century when the question became whether a country had become 'fit through democracy'.[8] A further major shift occurred with the change in emphasis from government to

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[4] Ibid 9.
[5] Congress of the People *Freedom Charter* (1955).
[6] Richard Turner *The Eye of the Needle: Towards Participatory Democracy in South Africa* (1972) 5: '[U]nless we think in utopian terms about South African society we will not really come to understand how it works today. We will take for granted inequalities, power relationships, and behaviour patterns that need to be explained. Nor will we be able to evaluate the society adequately. We will not understand on how many different levels there are alternatives, and so the possibility of choice, and so the possibility of moral judgment.'
[7] Section 1 of the Constitution.
[8] Amartya Sen 'Democracy as a universal value' (1999) 10(3) *Journal of Democracy* 1–2.

governance. This, Frank Fischer explains, was necessitated by the failure of traditional solutions and the search for new ways of problem-solving.[9]

The World Bank defines good governance as 'epitomized by predictable, open and enlightened policy-making, a bureaucracy imbued with a professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs'.[10] Michael Johnston lists similar requirements but suggests that good governance requires institutions for public participation and that not only government, but also citizens should be involved in integrated long-term strategies.[11]

Internationally, the core rationale for participatory democracy is the need to strengthen democracy and improve accountable, responsive and open governance. In South Africa we are charged with the additional constitutional imperative of transforming our society. Several academics have defined what they understand by transformation or transformative constitutionalism. Karl E Klare's definition includes 'transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[12] For Catherine Albertyn and Beth Goldblatt, transformation includes the 'redistribution of power and resources', the 'eradication of systematic forms of domination and material disadvantage' and the 'development of opportunities which allow people to realise their full human potential'.[13] Ultimately, transformation is the pursuit of Pius Langa's permanent ideal, 'a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant'.[14] Transforming our society remains an aspirational goal; realising socio-economic rights and meaningfully embedding participatory democracy is an ongoing challenge.

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[9] Frank Fischer 'Participatory governance as deliberative empowerment: The cultural politics of discursive space' (2006) 36(1) *American Review of Public Administration* 19–40.
[10] Available at http://www.gdrc.org/u-gov/governance-understand.html.
[11] Michael Johnston 'Good governance: Rule of law, transparency and accountability' 1, 27, available at https://etico.iiep.unesco.org/sites/default/files/unpan010193.pdf.
[12] Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146, 150.
[13] Catherine Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248, 249.
[14] Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch L. Rev.* 351, 354.

Theunis Roux, in his book on the Chaskalson Court, argues that the first Court's success in political terms was due to its ability to 'assert its constitutionally assigned role immediately and effectively, without triggering any significant political attack'.[15] Chaskalson CJ retired on 31 May 2005, two months after *Minister of Health v New Clicks South Africa (Pty) Ltd* (*New Clicks*)[16] was heard, and a few months before the first major judgment on the nature of our democracy, *Doctors for Life International v Speaker of the National Assembly* (*Doctors for Life*).[17] During the terms of his successors, Langa CJ, Ngcobo CJ, and Mogoeng CJ, the political climate gradually deteriorated. *Merafong Demarcation Forum v President of the Republic of South Africa*[18] was decided just three months before the 'redeployment' of President Mbeki by the ANC. Under the leadership of President Zuma ordinary South Africans increasingly turned to service delivery protests to communicate their discontent.[19]

As the ANC and the executive asserted their power, the legislature became more subordinate resulting in people seeking relief through the courts. This resulted in the gradual escalation of tension between the executive and judiciary, which reached a low point two months after the *Moutse Demarcation Forum v President of the Republic of South Africa*[20] judgment. In his official address to the National Assembly on the departure of Chief Justice Ngcobo and the arrival of Mogoeng CJ, President Zuma said: 'The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.'[21] The Constitutional Court in its judgments in *New Clicks* and *Doctors for Life* concluded that our democracy contains both representative and participative elements. Through platforms for participatory democracy, members of the public are entitled to direct their government. However, as the various judgments illustrate, government has largely failed to facilitate effective and

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[15] Theunis Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 38.
[16] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).
[17] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); the judgment was heard on 23 August 2005 and judgment delivered on 21 February 2006.
[18] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).
[19] DM Powell, M O'Donovan & J de Visser *Civic Protests Barometer 2007–2014*. In 2007 there were fewer than 100 protests; by 2009 the number of protests had more than doubled to over 200.
[20] *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC).
[21] Official Address in the National Assembly issued by the Presidency, 1 November 2011, available at https://www.gov.za/address-president-jacob-zuma-occasion-bidding-farewell-former-chief-justice-sandile-ngcobo-and.

meaningful participation and failed to deliver socio-economic rights, which has resulted in members of the public seeking redress through the courts.

The Constitutional Court, as guardian of the Constitution, is obliged to safeguard the right to participatory democracy and to ensure the progressive realisation of socio-economic rights. This thesis focuses on the Constitutional Court's jurisprudence at the point where the right to participatory democracy intersects with socio-economic rights. In protecting these rights the Court is often obliged to issue orders that encroach on the terrain of the executive and legislative branches of government. This thesis engages with how the Court positions itself when this becomes necessary. The thesis also focuses, at local government level, on how effective local government–community interaction has the potential to address many service delivery problems. The thesis engages with both constitutional and high court judgments for insight into the nature of our participatory democracy and its potential to empower and enhance socio-economic rights delivery.

The rest of this chapter provides background. It briefly engages with relevant, predominantly Western democratic theories and then proceeds to African democratic theories and practices. It looks at pre-colonial African participatory practices and the disruption caused by colonialism and the resultant imposition of Western democratic practices. The section concludes with contemporary African thinking on participation. This is followed by a brief look at early participatory practices in South Africa and their gradual denial. The focus then shifts to the three most significant political moments of participation in our history, which culminated in the adoption of the Constitution. First, the drafting of the Freedom Charter, with its vision of an alternative social world. Second, the functioning of the United Democratic Front (UDF) and Mass Democratic Movement as examples of informal participatory governance. Finally, informal participation during the constitution-making process.

2 PARTICIPATION THEORY AND PRACTICE

2.1 Predominately Western democratic participation theories

In 1927 John Dewey stated that 'the cure for the ailments of democracy is more democracy' and that the changes required would 'be of a sort to make the interest of the public a more supreme guide and criterion of governmental activity'. He identified the public's problem as how to

improve the 'methods and conditions of debate, discussion and persuasion' and advised that 'secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance' should be replaced with 'inquiry and publicity'.[22] He believed that the local community should be the home of democracy, where participation should be encouraged, as the absence of participation would lead to disinterest, disengagement and the absence of responsibility.[23]

In 1969 Sherry R Arnstein published an important article on the potential of citizen participation and the integrity, or lack thereof, with which power-holders either encourage or abuse participation. She created a ladder with eight rungs that represent ascending levels of citizen involvement, ranging from non-participation to degrees of citizen power. At each level she looked at participants' ability to influence decisions or change the status quo and the degree to which power-holders either controlled participation for their own benefits or delegated control. For Arnstein, citizen participation is about the realignment of power between the have and have-not citizens, to bring about social reform.[24]

> It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future. It is the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated, and benefits like contracts and patronage are parcelled out. In short, it is the means by which they can induce significant social reform which enables them to share in the benefits of the affluent society.[25]

Outside representative democracy, Carole Pateman argues for participation by ordinary people in what she describes as alternative areas such as workplaces or institutions of higher education. Structured interaction between private individuals and public representatives in defined areas would enable individuals to have more control over their lives and the development of their immediate environments. An additional benefit would be that participation would advance a better

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[22] John Dewey *The Public and Its Problems* (1927) 146, 208–9 and 213.
[23] John Dewey 'Democracy as a way of life' in RR Ammerman & MG Singer (eds) *Introductory Readings in Philosophy* (1960) 357.
[24] Sherry R Arnstein 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216. The rungs range from non-participation (rubberstamping and public relations exercise), to degrees of tokenism (feedback is not encouraged and participants cannot influence decisions), to degrees of citizen power (partnerships, delegated power and citizen control).
[25] Ibid 216.

understanding of the connection between public and private spheres. Participants would be better equipped to assess the performance of elected representatives at national level and gain a better understanding of how decisions by elected representatives would affect their lives and immediate environments.[26]

Benjamin Barber developed the theory of 'strong democracy'. He describes constituents of thin democracy as 'normally stirred into action only by constitutional crises and governmental defalcations; otherwise, they are content to leave the governing to others and to reserve their energies for the boundless private sphere'.[27] Strong democracy, on the other hand,

> envisages politics not as a way of life but as a way of living – as, namely, the way that human beings with variable but malleable natures and with competing but overlapping interests can contrive to live together communally not only to their mutual advantage but also to the advantage of their mutuality.[28]

Representation, he asserts, endangers freedom because political will is delegated. Majoritarianism constitutes democratic failure because of its inability to deal with private interests. Instead, he argues that active consent is required.

> For what is crucial is not consent pure and simple but the active consent of participating citizens who have imaginatively reconstructed their values as public norms through the process of identifying and empathizing with the values of others.[29]

Strong democracy demands of ordinary people 'common deliberation, common decision, and common work', and will result in 'the development of a citizenry capable of genuinely public thinking and political judgment and thus [able] to envision a common future in terms of genuinely common goods'. Their preferences and opinions are forced to 'run the gauntlet of public deliberation and public judgment' and become legitimised and transformed in the process. In this way, strong democracy delivers civic education and democratic legitimacy.[30]

Henry Steiner also favours a broader conception of political participation that supplements, rather than substitutes, electoral voting. Advocates of participatory democracy need to address

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[26] Carole Pateman *Participation and Democratic Theory* (1970) 109–10.
[27] Benjamin R Barber *Strong Democracy: Participatory Politics for a New Age* (1984) 221, 145, 198, 133, 197.
[28] Ibid 118.
[29] Ibid 137.
[30] Ibid 136.

questions such as: 'what type of participation, by which groups or classes or interests, through what institutional arrangements, for what individual or collective purposes, with what likely consequences?'[31] Steiner points out that, due to the size of central governments, participatory democracy is more likely to devolve to local government level from where it can influence national policy, and that legislation should be used to overcome 'socio-economic barriers to participation, and open new ways for citizens to "take part in the conduct of public affairs"'.[32] In his view, governments are obligated to look at forms of political participation, an obligation that has become part of liberal ideology. He argues that the right to political participation should be viewed as programmatic and aspirational – as a right that is 'responsive to a shared ideal but to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character'.[33]

Amy Gutmann and Dennis Thompson's contribution to the debate on deliberative democracy is substantial, especially with their principle of moral reciprocity. People, they argue, should not be treated as mere 'objects of legislation' or 'passive subjects to be ruled' but as 'autonomous agents who take part in the governance of their own society, directly or through their representatives'.[34] For them, reason-giving is at the core of deliberation because it enables us to 'mutually respect one another as moral agents who share the goal of reaching deliberative agreement even when we disagree with one another's conclusions'. [35]

They identify four characteristics of deliberative democracy: first, the 'reason-giving' requirement; second, that the reasons should be communicated in a manner accessible and understandable to all citizens, third, that the decisions should be binding for some time and influence the eventual decision by government, and, finally, they emphasise the dynamic nature of

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[31] Henry J Steiner 'Political participation as a human right' (1988) 1 *Harv. Hum. Rts. Y. B.* 77, 99–100, 130; see also C Sunstein 'Beyond the Republican revival' (1988) 97 *Yale LJ* 1539, 1549; he too regarded '[t]he republican belief in deliberation [as] aspirational and critical rather than celebratory and descriptive'.

[32] Steiner (n 31 above) 110; Steiner used 'take part' as used in art 25*(a)* of the International Covenant on Civil and Political Rights.

[33] Ibid 130; see also Sunstein (n 31 above) 1549; he too regarded '[t]he republican belief in deliberation [as] aspirational and critical rather than celebratory and descriptive'.

[34] Amy, Gutmann & Dennis, Thompson *Why Deliberative Democracy?* (2004) 3.

[35] Amy, Gutmann & Dennis, Thompson *Democracy and Disagreement* (1996) 14.

the deliberative process, by allowing for ongoing dialogue and correction of previous decisions.[36] This last characteristic accounts for the uniqueness of their theory because 'its provisional status invites ongoing challenge to its own principles as well as those of other theories. It constructively embraces – without exalting – the moral conflict that pervades contemporary politics'.[37] In this context they define deliberative democracy as

> a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.[38]

The authors make two concessions: first, in the absence of deliberative agreement, government is required to determine the way forward, provided they give reasons for their decision; and second, not all decisions require deliberation – deliberative democracy accommodates other forms of decision-making, provided those decisions too are justified at some point. They argue that all parties to an engagement should commit to moral reciprocity and its core principle of accommodation. The basic premise of reciprocity is 'that citizens owe one another justification for the institutions, laws, and public policies that collectively bind them. Reciprocity suggests the aim of seeking agreement on the basis of principles that can be justified to others who also share the aim of reaching reasonable agreement'.[39]

They further distinguish between the standards that regulate the conditions of deliberation and the components of the content of deliberation (the substantive principles). The former are reciprocity, publicity and accountability and the latter basic liberty, basic opportunity and fair opportunity. In what they describe as the economy of moral disagreement, they explain that their principle of reciprocity allows scope for citizens, who disagree on some issues, to find agreement on others, and, through the practice of moral disagreement, to engage in respectful co-operation in those areas where agreement is possible.[40]

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[36] Gutmann & Thompson (n 34 above) 4–6.
[37] Ibid 7.
[38] Ibid.
[39] Gutmann & Thompson (n 35 above) 53, 77–79.
[40] Ibid 133–4.

Archon Fung and Erik Olin Wright argue that representative democracy no longer accomplishes the central ideals of democratic politics. These they identify as:

> facilitating active political involvement of the citizenry, forging political consensus through dialogue, devising and implementing public policies that ground a productive economy and healthy society, and, in more radical egalitarian versions of the democratic ideal, ensuring that all citizens benefit from the nation's wealth.[41]

For them, the challenge is to develop transformative democratic strategies that will give effect to the traditional values of 'egalitarian social justice, individual liberty combined with popular control over collective decisions, community and solidarity, and the flourishing of individuals in ways that enable them to realize their potentials'.[42] They argue for strategies that will empower ordinary people and entitle them to reasons for decisions taken in their name; this they named 'Empowered Deliberative Democracy': 'it is empowered because it utilises participation by, and capacities of, ordinary people, and, it is deliberative because of the reason-giving requirement.[43]

They identify three general principles: '(1) a focus on specific, tangible problems, (2) involvement of ordinary people affected by these problems and officials close to them; and (3) the development of solutions to these problems'.[44] They identify three institutional design features: devolution, centralised supervision and co-ordination, and state-centred institutions that guide and support. The basic principles to stabilise and deepen democracy are:

> (1) the devolution of public decision authority to empowered local units; (2) the creation of formal linkages of responsibility, resource distribution, and communication that connect these units to each other and to superordinate, more centralized authorities; and (3) the use and generation of new state institutions to support and guide these decentered problem solving efforts rather than leaving them as informal or voluntary affairs.[45]

To assess the quality of the deliberative process, six questions need to be addressed:

> How genuinely *deliberative* are the actual decision-making processes? How effectively are the decisions made through this process translated into real action? To what extent are the deliberative

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[41] Archon Fung & Erik Olin Wright 'Deepening democracy: Innovation in empowered participatory governance' (2001) 29 *Politics & Society* 5–41, 5.
[42] Ibid 6.
[43] Ibid 7.
[44] Ibid 17.
[45] Fung & Wright (n 1 above) 15–16.

> bodies able to effectively monitor the implementation of their decisions? To what extent do these reforms incorporate recombinant measures that coordinate the actions of local units and diffuse innovations among them? To what extent do the deliberative processes constitute real 'schools for democracy'? Are the actual outcomes of the entire process more desirable than those of prior institutional arrangements?[46]

Nancy Fraser argues that parity of participation is required if the aim is to achieve social justice within a capitalistic society. Parity of participation is at risk in societies with class structures and social hierarchies.

> To say that a society has a class structure is to say that it institutionalizes economic mechanisms that systematically deny some of its members the means and opportunities they need in order to participate on a par with others in social life. To say, likewise, that a society has a status hierarchy is to say that it institutionalizes patterns of cultural value that partners in social interaction. The existence of either a class structure or a status hierarchy constitutes an obstacle to parity of participation and thus an injustice.[47]

Social justice has two dimensions of social ordering – distribution and recognition. Distribution injustices are income inequality, exploitation, deprivation, marginalisation and exclusion. Among the suggested remedies are the transformation of property ownership and the democratising of investment decisions. Recognition injustices include cultural domination, non-recognition and disrespect. Here reform should aim at 'upwardly re-valuing disrespected identities and the cultural products of maligned groups but also efforts to recognise the symbolic order, deconstruct the terms that underlie existing status differentiation and thus change everyone's social identity'.[48]

To bring these two dimensions together requires the application of the principle of parity, which requires 'social arrangements that permit members of society to interact with one another as peers' and is subject to two conditions: one objective and the other intersubjective. The former requires independence and 'voice' and the latter, 'equal respect and equal opportunity for all participants to achieve social esteem'.[49] Societies whose 'institutionalised norms impede parity of

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[46] Ibid 30.
[47] Nancy Fraser 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Fraser & A Honneth *Redistribution or Recognition? A Political–Philosophical Exchange* (2003) 31, 49.
[48] Nancy Fraser (1998): Social justice in the age of identity politics: Redistribution, recognition, participation, WZB Discussion Paper, No. FS I 98-108, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin.
[49] Ibid 4–6.

participation [are] morally indefensible *whether or not they distort the subjectivity of the oppressed*'.[50] To avoid injustice, participatory parity must achieve two objectives: the 'objective condition' requires redistribution of material resources to ensure independence and 'voice'. The 'intersubjective condition' demands 'equal respect for all participants and ensure equal opportunity for achieving social esteem'.[51]

The Western democratic theorists discussed here were selected because their work identifies aspects of the international right to participation that fit within our constitutional framework. There are four noteworthy areas that will be expanded on in the concluding recommendations. The first relates to the relationship between the parties and how incremental change to existing power dynamics can result in transformation and social reform. Examples are Gutmann and Thompson's moral reciprocity, Arnstein's realignment of power, Fung and Wright's empowered deliberative democracy and Fraser's parity of participation. The second relates to progression. Arnstien's ladder identifies ascending levels of participation. Her focus on ascertaining the real objectives of power-holders is significant. The third relates to transforming participatory platforms and processes. Barber's civic education, Gutmann and Thompson's reason-giving and Fung and Wright's institutional design requirements are instructive. The fourth relates to participatory options for specific communities and their specific needs as they change over time. Examples are Steiner's programmatic approach, Fung and Wright's focus on specific areas and Pateman's defined areas of participation.

2.2 African democratic theory and practice

In pre-colonial Africa, political structures and socio-economic systems in traditional rural communities were structured in terms of the Doctrine of Communalism.

> Communalism is the doctrine that the group constitutes the main focus of the lives of the individual members of that group, and that the extent of the individual's involvement in the interests, aspirations, and welfare of the group is the measure of that individual's worth.[52]

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[50] Friday (n 47 above) 32. (Italics in original).
[51] Ibid 36.
[52] Kwame Gyekye *An Essay on African Philosophical Thought* (1987) 12 (quoted in Munyaradzi Felix Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 392, 424); see also Henry Steiner, (n 31 above) 105, where he noted the psychological benefit of citizen participation: 'The inherent good of political

Participation meant 'active involvement in a process of setting goals and making decisions about the health of the society'.[53] Traditional leaders were assisted by their councils of elders.[54] They were regarded as trustees, not absolute rulers. Their actions were subject to traditional checks and balances,[55] which included institutional restraints and conventions in customary law and religion. Traditional leaders who failed to consult could be deposed.[56] Consequently they enjoyed legitimacy.[57]

The link between members of a community and communal life also found expression in the cultural concept of ubuntu, defined as 'our interconnectedness, our common humanity and the responsibility to each other that deeply flows from our deeply felt connection'.[58] In socio-economic terms, communal ownership of property, solidarity and consensus ensured that everyone gave according to their capabilities and received according to their needs.[59] According to Benezet Bujo, the less fortunate in communities received priority care and 'no one starved, either for food or for human dignity'.[60]

Colonialism disrupted traditional participatory democratic values and practices and replaced them with a form of 'democracy' that was geared towards promoting the interests of the colonisers.

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participation stems from this possibility of self-realization through development of the social self as a member of the polity.'

[53] Claude Ake *Democratization of Disempowerment in Africa* (1994) 6.

[54] Benezet Bujo 'Springboards for modern African constitutions and development in African cultural traditions' in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) (n 52 above) 392.

[55] Kofi A Busia *Africa in Search of Democracy* (1967) 27, quoting Republic of Kenya: Sessional Paper No. 10 of 1963/5 para 9.

[56] Gyekye (n 52 above) 11; Murove (n 52 above) 425; see also Murove (401): a traditional chief's worth was measured by the extent to which he looked after the welfare of his people.

[57] Zola ST Skweyiya 'Chieftaincy, the ethics question and the democratisation process in South Africa' 3, available at https://dullahomarinstitute.org.za/about-us/our-historical-publications/chieftaincy-the-ethnic-zola-skweyiya.pdf.

[58] Barbara Nussbaum 'African culture and ubuntu, reflections of a South African in America' (2003) 17(1) *Perspectives* 1, 2. Justice Sachs in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37 described it as follows: 'The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.' See also Van der Westhuizen J in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) paras 36 and 38; in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) *(Afriforum)* para 11 Mogoeng CJ translated it as 'a person is a person because of others'.

[59] Ake (n 53 above) 8; see also Murove (n 52 above) 395–6.

[60] Bujo (n 54 above) 396.

This included the manipulation and alteration of traditional laws and traditional justice.[61] Governors, either military officers or career civil servants, ruled with dictatorial powers without consulting those directly affected by their decisions. Traditional leaders who collaborated became part of colonial political structures. They were granted extensive powers over their subjects, but without customary restraints.[62] As long as these leaders provided labour and paid taxes, the colonial powers provided no oversight. Chiefs became very powerful but were regarded as agents of their colonial masters and lost legitimacy in the process.[63]

Granting political independence to African nationalists, in line with Western democratic principles and capitalist interests, without taking African culture and traditions into account, resulted in an era of neo-colonialism.[64] This had serious consequences for the continent. Many newly independent African states were confronted with the dilemma of preserving customs and traditions or embracing modernism.[65] Under the guise of liberation and democracy, Africa's 'big men' pursued power and self-enrichment. They ignored core liberal democratic safeguards and traditional African values and practices. This resulted in different forms of internal and external dictatorships.[66] Confronted with the traditional versus modern dilemma, many compromised and ended up with one-party states whose leaders maintained their authority through national 'democratic' elections and rural domination through the appointment of traditional leaders in the so-called Native Authorities.[67]

> The single party was simultaneously a way to contain social and political fragmentation reinforced by ethnically organized Native Authorities and a solution imposed from above in lieu of democratization from below, for the militants of the single party came to distrust democracy, by which they understood a civil society-centred electoral reform.[68]

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[61] Skweyiya (n 57 above) 5.
[62] Apollos O Nwauwe 'Concepts of democracy and democratization in Africa revisited' in Charles Nieman (ed) *Democracy and Globalization* (2005) 13.
[63] Skweyiya (n 57 above) 3.
[64] Nwauwe (n 62 above); Bujo (n 54 above) 398.
[65] Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 298–9.
[66] Bujo (n 54 above) 399.
[67] Mamdani (n 65 above) 289–290.
[68] Ibid 290.

The dilemma of preserving customs and traditions (particularly with regard to political and social traditions) or embracing modernism and constitutionalism continues to challenge African leaders at both national and local level. Authoritarianism, one-party states and self-enrichment did not form part of traditional African values or political structures.[69] As Bujo reminds his fellow Africans: 'Whoever does not have the people's welfare at heart, and is not willing to share with them, is no longer worthy to be chief.'[70] It is therefore not surprising that Claude Ake claims that all over Africa, ordinary people, who directly link their desperate circumstances to current leadership, are demanding a 'second independence' from 'incompetent and exploitative indigenous rulers'.[71]

African participation theory and practice was historically characterised by active participation, recognition of the interconnectedness of human beings, consensus, and a focus on the health and common good of the community. Credibility of the leadership was important. The theory that underlies the Doctrine of Communalism and the cultural practice of ubuntu has been acknowledged by the Constitutional Court, either by implication or explicitly. Its practice at local government level would immeasurably enrich participation.

2.3 History of participation and constitution-making in South Africa

(a) Early history

One of the early interactions between the state and natives, as black South Africans were then referred to, was through the Treaty System. In 1833 Sir Benjamin D'Urban received a Colonial Office Despatch which suggested cultivating 'an intercourse with the Chiefs of the Caffre tribes'.[72] In a report of the Commons Select Committee of 1836–7 the Committee recommended that treaties should be concluded with most of the tribes in the Cape.[73]

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[69] Busia (n 55 above) 27.
[70] Bujo (n 54 above) 401.
[71] Ake (n 53 above) 2.
[72] Edgar H Brookes *History of Native Policy in South Africa* (1924) 14.
[73] Page 80 of the report is referenced in Brookes (n 72 above) 19; see also South African History Online (SAHO) 'Land: Dispossession resistance and restitution': 'Conquest and land seizure were achieved through warfare complemented by dubious "treaties", which colonists claimed were signed by chiefs or leaders of communities.' Available at https://www.sahistory.org.za/article/land-dispossession-resistance-and-restitution.

As early as 1881 public consultations took place in the autonomous Native area known as the Transkeian Territories. The practice of 'constant public consultation' was introduced by Mr Sauer, the Minister of Native Affairs in Prime Minister Thomas Scalen's cabinet.[74] Consultations with natives living in locations within so-called white areas seldom took place, with little attention being paid to their deplorable living conditions.[75]

The failure to listen to or acknowledge the rights of native South Africans led to the formation of the South African Native National Congress (SANNC) on 8 January 1912.[76] Native leadership unsuccessfully approached the colonial authorities, including the British monarch, for assistance to prevent the enactment of the Natives Land Act 27 of 1913. The consequences of its enactment were substantial. Native-owned land and means of production were confiscated and a tax was levied to secure labour for farmers and the mines. The socio-economic upheaval that resulted was devastating, its effects still being felt today.[77]

At the ANCs annual conference, held in Bloemfontein on 24 May 1923, a resolution was passed calling for a Bill of Rights, in which clause four dealt with 'equality of treatment and equality of citizenship' and clause five demanded 'an equal share in the management and direction of the affairs of this land … and direct representation by members of their own race in all legislative bodies'. The 1941 Atlantic Charter influenced the ANC's thinking on socio-economic rights. The Charter called for collaboration by all nations to improve 'labor standards, economic advancement and social security' and assurances that 'all men in all the lands may live out their lives in freedom from fear and want'.[78]

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[74] Debates 334, Vol. XIV, 1889 recorded by Brookes (n 72 above) 73–4.
[75] *The Lantern*, a Cape newspaper, published an exposé in 1881 showing the degradation of natives living in the slum of Woodstock. https://www.sahistory.org.za/topic/cape-town-timeline-1300-1997.
[76] Renamed the African National Congress (ANC) in 1923.
[77] *Afriforum* (n 58 above) para 4: '[C]olonialism or apartheid is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy.' See also Patrick Heller 'Moving the state: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre' (2001) 29 *Politics Society* 131, 143: 'the staggering inequalities of apartheid and its perverse and disarticulate economic and social geographies, the result of determined and brutal racial engineering …'.
[78] Albie Sachs *Advancing Human Rights in South Africa* (1992) 10; Clauses 5 and 6 of the Atlantic Charter. The Charter was a joint declaration issued by President Roosevelt and Prime Minister Churchill on 14 August 1941, available at http://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html.

Throughout its existence the ANC has felt strongly that its decisions should be 'shaped by popular mass endorsement', as expressed by President Oliver Tambo in his opening address at the ANCs 48th National Conference, 1991:

> [W]e considered it important that decisions of the ANC were to be shaped by popular mass endorsement at all times. Even if such decisions were acceptable within the Movement, they would have come to naught unless they enjoyed popular support beyond the bounds of the ANC itself. Whilst our policies were in terms of our beliefs and convictions, they also reflected and served the people`s interests. Above all, we sought to make the people part and parcel of our decisions.[79]

Popular mass endorsement resulted in the Freedom Charter and the Constitution and guided the leadership of the United Democratic Front and the Mass Democratic Movement.

(b) The Freedom Charter

The concept of a Congress of the People was first raised by Zacharia K Matthews during his presidential address at the Cradock Conference of the African National Congress (Cape) in August 1953.[80] The logistics in preparing for the event and the strong democratic character that would underpin the drafting of the Freedom Charter was described in a report submitted to the 1954 annual conference of the ANC:

> The first task will be to make the whole country conscious of the Congress of the People, and to imbue them with the feeling of the tremendous importance of such a gathering. This can only be done through the greatest possible campaign of printed propaganda material side by side with a string of hundreds of meetings, house to house canvasses and group discussions. The central aim of all these activities will be to get citizens of the country to speak for themselves, and to state what changes must be made in their way of life if they are to enjoy freedom.
>
> Every demand made by the people at these gatherings, however small the matter, must be recorded and collected for consideration by the Congress of the People for inclusion in the

[79] President OR Tambo's opening address to the ANC's 48th National Conference Durban, 2 July 1991, available at http://www.anc.org.za/content/president-or-tambos-opening-address-ancs-48th-national-conference.
[80] Zacharia K Matthews *Freedom for My People: The Autobiography of Z. K. Matthews: Southern Africa 1901 to 1968* Memoir by Monica Wilson (1981) 173–5.

> Freedom Charter. In this way, it will become the Charter of the People, the content of which has its source in their own homes, factories, mines and reserves.[81]

At the first meeting held after the Conference, the National Executive agreed to invite the National Executives of the South African Indian Congress, the South African Coloured People's Organization, and the South African Congress of Democrats, to a preliminary meeting to discuss the idea.[82] A National Action Council was formed consisting of five representatives from each of the organisations. A large number of pamphlets, 'Call to the Congress of the People,' were distributed and South Africans were asked to voice their demands. In a subsequent meeting held in Uitenhage, Chief Luthuli called for 50 000 'freedom volunteers'. The freedom volunteers had to publicise the event and collect demands for inclusion in the Charter. According to reports, demands flooded the Congress of the People headquarters. They were written on 'sheets torn from school exercise books, on little dog-eared scraps of paper, [and] on slips torn from COP leaflets.'[83]

The demands were collated and published in the Freedom Charter (also known as the People's Charter). Mathews highlighted the historic significance. It was the first time that large numbers of disenfranchised South Africans came together to 'give expression to their vision of the South Africa of the future' and produce a document that set forth their 'desires and aspirations'.[84] The first demand was that the people shall govern. The Charter also called for work security, free and equal education, decent housing, a preventative health scheme, free medical care and hospitalisation, and state care for the aged, orphans, the disabled and the sick.[85]

The Freedom Charter was adopted by the Congress of the People on 26 June 1955.[86] The process followed provides a powerful example of participatory democracy in action and was repeated in a signature campaign launched by the National Action Council after the event. To

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[81] Document 7c 'The Congress of the People' Annexure A to the Report of the National Executive Committee of the ANC presented at the annual conference of the ANC held from 16–19 December 1954, reproduced in Thomas Karis & Gwendolin M Carter (eds) *From Protest to Challenge: A Documentary History of African Politics in South Africa, 1882–1966* vol 3 *Challenge and Violence, 1953–1964* (1977) 162.
[82] Matthews (n 80 above)181–2.
[83] Gilbert Marcus 'The Freedom Charter: A blueprint for a democratic South Africa' Centre for Applied Legal Studies Occasional Paper 9 June 1985, 9 ,11.
[84] Matthews (n 80 above) 181.
[85] *Freedom Charter* (n 5 above).
[86] The ANC adopted the Freedom Charter as part of its policy in March 1956; see Matthews (n 80 above) 182.

ensure broad-based and formal adoption of the Charter, organisations at their national conferences and individuals throughout the country were encouraged to sign lists endorsing the Charter.[87]

The Freedom Charter contains a set of core principles that set South Africa on a trajectory towards a constitutional democracy. Many of the demands proclaimed in the Freedom Charter formed part of the 'solemn pact'[88] that was recorded as Constitutional Principles in the Interim Constitution Act 200 of 1993, which in turn informed the Constitution. It also confirmed the capacity of South Africans to informally, yet effectively, guide their leaders with regards to their needs and demands. The process reaffirmed the importance the early leadership attached to reporting back to their communities and obtaining their endorsement of decisions taken in their name. Its significance, even today, is evidenced by the prominent place the Freedom Charter enjoys in the nation's heart and its political rhetoric.

(c) The United Democratic Front

During the 1960s and 1970s opponents to apartheid were more concerned with power than rights, and liberation than democracy.[89] During this period prominent leaders were either jailed, underground, or in exile, and political parties like the ANC were banned. It was not until the early 1980s that a political structure was formed to give ordinary South Africans voice and to channel anti-apartheid opposition.

In an address to the Transvaal Anti-SAIC Conference,[90] held in Johannesburg on 23 January 1983, Allan Boesak, in an unscripted portion of his speech, called for a 'united front' of churches, civic associations, trade unions, student organisations, women's organisations and sports bodies to fight oppression.[91] At the Conference a committee was formed to establish regional committees to liaise with local organisations. The actual launch of the United Democratic Front (UDF) took

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[87] Ibid.
[88] Paragraph 2 of the Preamble to the Interim Constitution, 1993.
[89] Jeremy Seekings *The UDF: A History of the United Democratic Front in South Africa 1983–1991* (2000) 8.
[90] The Transvaal Anti-SAIC Committee (TASC) was formed to boycott, successfully so, the elections of the South African Indian Congress. At the January 1983 conference it was decided to revive the Transvaal Indian Congress, which was formed by Mahatma Gandhi, available at https://www.sahistory.org.za/archive/congress-resister-1983–1989).
[91] In a 2013 interview with the *Mail & Guardian* Popo Molefe claimed that in a 1981 speech to the National Conference of the Council of Churches he called for a front of organisations to resist apartheid, available through http://www.mg.co.za.

place at Mitchells Plain, Cape Town on 20 August 1983. Delegates of 565 organisations were present, of which 400 were already affiliated to the UDF.[92] Its initial purpose was to oppose the introduction of a Tricameral Parliament by the apartheid government.[93] Eventually, 642 organisations were affiliated to the UDF with a combined membership of two million.[94] The structure of the UDF was federal. The UDF proudly proclaimed its status as non-racial and non-sexist. Women played a significant role and all decisions were referred for grassroots approval.[95]

Jeremy Cronin describes the process through which approval was obtained in an article published in 1986 in the *Upfront Journal* headed 'Democracy takes to the streets'.

> Beyond white suburbs, in South Africa's increasingly impoverished townships, a remarkable stirring is at work. Over the last 20 months, in a surprisingly methodic and deeply democratic manner, black communities have begun to take control over their lives and destinies. … From house to house meetings street committees are formed. These in turn are linked, by elaborate processes of elections, mandates and report-backs, to zone and area committees and to township Civic Associations. It is through such networks that political decisions – on consumer, rent and school boycotts – are taken.[96]

In his address to the IDASA Conference held in May 1987, Murphy Morobe, a member of the Transvaal Regional Executive of the UDF, called for a future democracy that would include representative democracy but would not be limited to representative democracy. He also highlighted the link between participatory democracy and socio-economic rights.

> The key to a democratic system lies in being able to say that the people in our country can not only vote for a representative of their choice, but also feel that they have some direct control over where and how they live, eat, sleep, work, how they get to work, how they and their children are

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[92] These included community-based organisations, youth and women's organisations.
[93] Approval for the Tricameral Parliament was sought from white voters in a referendum held on 2 November 1983; elections took place on 22 August and 2 September 1984.
[94] On 24 February 1988 the UDF was effectively banned when many of its activities were restricted.
[95] Historical Papers Colin Purkey Collection A1984/B1.13 UDF.
[96] *Upfront: Journal of the Observatory and Claremont UDF Area Committees* no 4, June 1986 at 12; *Isizwe The Nation: Journal of the United Democratic Front* vol 1 no 2, March 1986 'Building people's power' 5–6. One of the first townships to introduce street committees in the 1980s was Lingelihle, a Cradock township with 17 000 residents. Under the guidance of the Cradock Residents' Association and its chairperson, Matthew Goniwe, Lingelihle was divided into seven zones. About 40 activists were assigned to these different areas and were responsible for holding meetings in each zone. Meetings were held in each zone to select officials and each household could vote for their street representative.

> educated, what the content of that education is; and that these things are not done for them by the government of the day, but the people themselves. In other words, we are talking about direct as opposed to indirect political representation, mass participation rather than passive docility and ignorance, a momentum where ordinary people feel that they can do the job themselves, rather than waiting for their local MP to intercede on their behalf.[97]

The ANC was unbanned on 2 February 1990 and took over many of the functions of the UDF, which was dissolved on 20 August 1991.[98] From a participatory democratic perspective in an informal democratic environment the UDF was effective. Within six years of the UDF's formation, the South African government committed itself to democracy for all, and four years later, nationwide, non-racial democratic elections were held. As Jeremy Seekings puts it: '[i]n just over a decade anti-apartheid politics shifted from protest to confrontation, to negotiation and finally to government'.[99] Although Seekings emphasises that the UDF was part of the Mass Democratic Movement, he credits it for its 'emphasis on unity and non-racialism, and the prominence of discourses of rights' as well as the 'articulation of "people's power"'.[100]

(d) The constitution-making process

In 1992 Albie Sachs argued that the advancement of human rights in democratic South Africa should involve a bottom-up approach as 'people are not an abstraction in the name of whom power is exercised, but active participants in deciding issues which determine their fate'.[101] 'We,' he asserted, 'do not want freedom without bread, nor do we want bread without freedom, but rather, we want freedom, and we want bread.'[102] He demanded that all South Africans should participate in the transformation of their society and through their 'work, intelligence and imagination' reconceive a new society. What was needed, he proclaimed, was freedom, bread and bottom-up participation.[103]

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[97] Murphy Morobe 'Towards a people's democracy' IDASA Conference May 1987, according to *Isizwe The Nation: Journal of the United Democratic Front* vol 1 no 4, March 1987 at 22–3.
[98] http://www.sahistory.org.za/dated-event/united-democratic-front-udf-dissolved.
[99] Seekings (n 89 above) 2.
[100] Ibid 22–3.
[101] Sachs (n 78 above) 64.
[102] Ibid 190.
[103] Ibid Introduction xii, 64, 190.

In preparation for the constitution-making process the ANC, on 8 April 1991, released a discussion document on the structures and principles for a constitution for a democratic South Africa. The document restated the ANC's belief that all people of South Africa should participate in the drafting and adoption of the Constitution. Their constitutional committee published various documents, including 'What is a Constitution? – To identify issues in the Constitution-Making process' and 'A Draft Bill of Rights – To identify fundamental human rights which should be enshrined in a Bill of Rights'. The purpose was to ensure discussion, debate and popular participation. The documents were widely distributed within the ANC's own structures but also to trade unions and other organisations within the broad democratic movement. The discussion document specified:

> It is imperative that, regions, trade unions, democratic formations generally, as well as a broad spectrum of our people – sympathetic or unsympathetic – discuss the issues raised and submit comments, criticisms and suggestions.[104]

People were asked to suggest provisions that would 'avoid over-centralization and ensure democratic participation in government at central, regional and local levels'.[105] The document also explained that, while the ANC was happy for the Constitutional Assembly to adopt the new Constitution, they wanted earlier discussions to ensure that representatives at the formal discussions were 'fully informed and mandated, and that popular participation in constitution-making is ***real***'.[106]

The Constitutional Assembly commenced drafting the Final Constitution after the first democratic elections were held on 27 April 1994. To ensure that South Africans felt part of the process and that the Constitution reflected their views, the Constitutional Assembly embarked on a large-scale public participation programme. The programme included countrywide community liaison, media liaison and advertising. The Assembly broadcast its messages via newsletters, television and radio programmes, an Internet home page, a telephonic Constitutional Talk-line and

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[104] African National Congress *Discussion Document on the Structures and Principles of a Constitution for a Democratic South Africa* (1991).
[105] Ibid para 2.3.
[106] Ibid 5.

advertising. More than 200 members of the Constitutional Assembly took part in public meetings. Importantly, a Constitutional Educational Programme was launched.[107]

Hassen Ebrahim describes the process in his book *The Soul of a Nation: Constitution-making in South Africa*.

> In keeping with the policy of the Constitutional Assembly to ensure maximum public participation, members of the public and civil society were invited to send in submissions. In this regard, it is also important to note that many of these submissions came from ordinary citizens in all official languages. The submissions were translated and processed as reports, which effectively recorded the convergence of ideas and agreements, points of contention, and possible approaches in dealing with the areas of contention. The reports were then debated in the Constitutional Committee. Theme Committees were therefore the Constitutional Assembly's initial interface with the public.[108]

According to Ebrahim, 4.5 million copies of the draft constitution were distributed throughout the country. Public responses included 1 438 submissions and 248 504 petitions. Twenty-six public meetings were organised in all nine provinces; 20 549 people attended workshops; 717 organisations participated; and 596 civil society structures were consulted. Radio programmes reached over 10 million South Africans each week and the Constitutional Assembly's official newsletter, *Constitutional Talk*, was distributed bi-weekly to 160 000 people. The Constitutional Talk-line was available in Afrikaans, English, Tswana, Xhosa and Zulu and was used by over 10 000 people. The Internet home page was used by approximately 107 people per day or 6 655 over the relevant period. Seven million copies of the Constitution in all 11 official languages were distributed during the week 17–21 March 1997.[109] On 10 December 1996, International Human Rights Day, President Nelson Mandela signed the draft Constitution into law.

South Africa's history of informal participation was characterised by shared objectives, individual sacrifice for the greater good, servant leadership and bottom-up participation. The leadership was accountable, responsive and transparent. This thesis discusses the many court challenges that have since resulted from government's failure to fulfil its constitutional obligations.

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[107] http://www.sahistory.org.za/article/drafting-final-constitution.
[108] Hassen Ebrahim *The Soul of a Nation: Constitution-making in South Africa* (1998) 179.
[109] Ibid 182–90, 194, 244–6.

The aim of these court cases was to resurrect the quality and effectiveness of that historic relationship and to enforce constitutionally protected rights.

3 AIMS AND OBJECTIVES OF THIS THESIS

The focus of the thesis is on how the South African Constitutional Court fulfils its obligation to safeguard democratic spaces and protect the progressive realisation of socio-economic rights. The thesis engages with and critiques the Constitutional Court's jurisprudence in relation to participation on three platforms: the legislatures constitutional obligation to facilitate public involvement in their legislative and other processes, and their committees; the meaningful engagement mechanism; and the formal avenues for participation created by Parliament for local government and the communities they serve. The emphasis is on whether progressive standards of accountability, transparency and responsiveness advance social justice.

As the highest Court of the land and guardian of the Constitution, the Court has been granted extensive powers.[110] These include the Court's power to decide disputes between organs of state; to decide on the constitutionality of any parliamentary or provincial Bill; to decide on the constitutionality of any amendment to the Constitution; and to determine whether the President or Parliament has failed to fulfil a constitutional obligation. The Court also decides whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional. Finally, the Court has the power to declare any law or conduct inconsistent with the Constitution and invalid, and to make any order that is just and equitable.[111]

Through what Heinz Klug describes as 'the self-allocation of the interpretative power',[112] the Court has deferentially and incrementally devised various strategies to develop a more activist role for itself. Prafullachandra N Bhagwati argues that judicial activism is essential because 'a modern judiciary can no longer obtain social and political legitimacy without making a substantial

[110] Section 167(3)–(5) of the Constitution.
[111] Section 172(1) of the Constitution.
[112] Heinz Klug 'Introducing the devil: An institutional analysis of the power of constitutional review' (1997) 13 *SAJHR* 185, 188.

contribution to issues of social justice'.[113] Through its orders the Court has, with varying degrees of success, engaged other branches of government in inter-institutional dialogue and allowed them scope within which to fulfil their own constitutional and transformative mandate to the poor. However, the Court has also resorted to what Currie described as 'decisional minimalism', which he defined as 'the making of decisions that are shallow and narrow (minimally theorised and minimal in impact on future decisions) rather than deep and wide (highly theorised and with maximal impact on future decisions)'.[114] Brian Ray argues that the Court's focus on pro-poor results in eviction cases, its concern with the separation of powers doctrine and institutional incompetence at executive level has resulted in 'substantively limited analyses and procedural remedies that avoid strong constitutional principles'.[115] Katharine Young, on the other hand, views the Court's socio-economic jurisprudence as dynamic rather than static, and active rather than obstructive. She commends the Court for its pragmatic approach.[116]

Our constitutional scheme makes provision for three platforms for participation. First, the right to be involved in the legislative and other processes of the legislatures creates opportunities for members of the public to influence legislation before they are enacted. Second, the meaningful engagement mechanism affords unlawful occupiers who are facing eviction an opportunity to engage their local authority on their housing needs. Third, through participation in various local government platforms, communities can guide their local government on local issues and influence service delivery decisions. A review of the judgments confirms that procedural and implementation failures put the right to democratic participation most at risk. The risk is exacerbated by systemic failures, the absence of political will and institutional weaknesses. At local government level service delivery failures affect disadvantaged communities disproportionately. At this level participation was historically most effective. At this level ameliorative reforms or institutional innovation should be addressed.

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[113] Prafullachandra N Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia J of Transnational Law* 561, 566.
[114] Ian Currie 'Judicious avoidance' (1999) 15 *SAJHR* 138, 147.
[115] Brian Ray 'Evictions, aspirations and avoidance' (2014) 5 *Constitutional Court Review* 173–232, 231.
[116] Katharine Young 'The avoidance of substance in constitutional rights' (2014) 5 *Constitutional Court Review* 233–43, 238.

This is the context within which the thesis engages with, and critiques, the Constitutional Court's jurisprudence. The emphasis is on whether progressive standards of accountability, transparency and responsiveness are demanded and whether the judgments have progressively advanced social justice. The thesis devotes a chapter to each platform for participation.

The first platform is the legislatures' constitutional obligation to facilitate public involvement in their legislative and other processes, and their committees. Chapter 2 engages with the Court's interpretation of the substantive issues that underline the right to public involvement. These include the nature of our democracy, the nature and scope of the duty to facilitate public involvement, the role of public involvement in the national legislative process, the review standard, and separation of power concerns. The focus then shifts to the public involvement process. The Court has granted the legislatures wide discretion to select processes fit for purpose, provided the choices pass constitutional muster. An overview of the case law provides guidance on how the Court has applied its reasonableness standard to challenged processes, and how effectively it has used its remedial powers.

The second platform is the meaningful engagement mechanism. Chapter 3 sets out the constitutional and statutory framework and discusses the judgments that preceded *Port Elizabeth Municipality v Various Occupiers*.[117] The emphasis then shifts to the meaningful engagement mechanism developed by the Court in the *P E Municipality* judgment. In terms of this mechanism unlawful occupiers and their local authority are required to seek a solution jointly and meaningfully to an impending eviction. The judgment placed meaningful engagement and the rights of unlawful occupiers within a broader social context. It set out the responsibilities of all parties to the engagement, the review standard, and dealt with meaningful engagement as democratic participation. Other considerations are identified. The importance of dignified and respectful engagement; equal access to information; equal participation and separation of powers concerns. The legislatively stipulated relevant circumstances inquiries are then discussed, including the courts' interpretative function; the constitutional rights of unlawful occupiers; and

[117] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*P E Municipality*).

avoidance as practised by local authorities. The chapter interrogates court orders and concludes with a discussion on the scope for judicial activism and transformation.

The third platform focuses on the formal avenues for participation created by Parliament for local government and the communities they serve. Chapter 4 sets out the constitutional provisions with regards to co-operative governance and local government, before engaging with the avenues for participation created by local government legislation. The chapter deals with the challenges faced by local government and local communities, the impact of political interference, and service delivery protests. It also engages with the evolving nature of the right and the role of civil society and social movements. Extensive engagement with the judgments provides guidance on what constitutes community involvement, how the courts view the various participatory processes, how they apply the reasonableness test, who represents the communities, and how activist the courts' orders are.

The penultimate chapter seeks guidance in international law. The focus is on local government–local community partnerships. The chapter looks at the position of international law under our Constitution and the indivisibility of human rights under international law. The focus then shifts to international and regional instruments that deal with the two areas that hamper effective service delivery most, the absence of good governance practices and the impact of corruption. International guidelines on decentralisation and strengthening of local authorities, access to basic services, and the right to participate under international instruments, as well as guidelines on the effective implementation of the right to participate are discussed. This is followed by a discussion of two international experiments in local government–local community partnerships: participatory budgeting in Porto Alegre, Brazil and decentralised planning in Kerala, India. The final section compares South Africa's approach to participatory democracy with the approaches adopted by Porto Alegre and Kerala.

The concluding chapter gives an overview of the key findings of the thesis and presents proposals for credible and constitutionally compliant democratic participation. The focus is first on democratic education and its potential for transformation through empowerment, then on the central role of accountability, transparency and responsiveness for meaningful public involvement. The final proposal engages with the need for institutional innovation to make ongoing community involvement more feasible, and to provide an effective democratic space where the constitutional

and legislative objectives of community involvement in local government can be achieved. This is followed by suggestions for further research and a brief conclusion to the thesis.

Chapter 2

Public involvement as democratic space

1 INTRODUCTION

Participants in the constitution-making process wanted to ensure that the historical denial of voice would never recur, and that public participation would be ongoing and not restricted to general elections. Their guidance, together with our history of informal participation, inspired the framers of the Constitution of the Republic of South Africa, 1996 to provide constitutional protection to the public's right to be involved in the legislative and other processes of Parliament and the provincial legislatures. This chapter discusses the legislatures' obligation to facilitate public involvement.[1]

Other provisions in the Constitution support a commitment to democratic participation in Parliament's legislative processes between national elections. The three legislatures, the National Assembly, the National Council of Provinces and the Provincial Legislatures may determine and control their internal arrangements and may, when making rules and orders concerning their business, have due regard to representative and participatory democracy, accountability, transparency and public involvement.[2] The legislatures are also instructed (*must*), when conducting their business, to do so in an open manner and the public may only be excluded if it is reasonable and justified to do so in an open and democratic society.[3] The values and principles that govern public administration include accountability, transparency, responsiveness and participation. Specifically, the section provides that '[p]eople's needs must be responded to, and the public must be encouraged to participate in policy-making'; '[p]ublic administration must be accountable'; and '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information'.[4]

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[1] Sections 59(1)*(a)*; 72(1)*(a)* and 118(1)*(a)* of the Constitution.
[2] Ibid ss 57(1); 70(1) and 116(1).
[3] Ibid ss 59(1) and (2), 72(1) and (2) and 118(1) and (2).
[4] Ibid s 195(1)*(e)*, *(f)* and *(g)*.

The legislatures' primary role is to give effect to socio-economic rights. Sections 26 and 27 of the Constitution deals with the rights to housing, health care, food, water and social security. Sub-sections 26(2) and 27(2) provide that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Section 152 of the Constitution sets out the objectives of local government. Here too there is an explicit link between sustainable service delivery, social and economic development and community involvement

The public's interest in laws that govern them is protected at several stages during the lawmaking process and involves all three branches of government. Through representative democracy the voters elect their representatives in Parliament and the provincial legislatures and mandate them to protect their interests during lawmaking processes. Through the public's right to involvement in the legislative and other processes of the legislatures the public is entitled to be consulted and have their voices heard. The provisions are peremptory: the legislatures *must* facilitate public involvement. Before signing a Bill into law, the President, as representative of the people, is empowered to challenge its constitutionality by either referring it back to Parliament for reconsideration or referring it to the Constitutional Court for a ruling.[5]

The Constitution is not prescriptive on how public involvement should be facilitated and the Court has confirmed that lawmakers have considerable discretion in this regard.[6] The focus of this chapter is on public hearings. Hearings create platforms for democratic participation and empower interested members of the public to influence laws before they are enacted. The perception that community concerns are not conveyed to legislatures, that their concerns do not influence legislation, that outcomes are predetermined, and that timelines make meaningful participation impossible poses a serious threat to ongoing public involvement.[7] The right will only be safeguarded if the public continues to respond to invitations to become involved.

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[5] The Constitution s 79.

[6] *Doctors for Life v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 145. The judgment was delivered on 17 August 2006 and concerned four national health Bills; see also Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 630; and *Merafong Demarcation Forum v President of the Republic of South Africa Merafong* 2008 (5) SA 171 (CC) para 27.

[7] *Doctors for Life* (n 6 above) para 171. The public hearing on the Traditional Health Practitioners Bill in the Northern Cape Province took place after the final mandate had been obtained. See also *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) paras 17–18, 49, 59.

The public involvement sections do not define who 'the public' is. While many sections in the Constitution either include or exclude different groups of people,[8] the public involvement sections do not. Children, foreigners or non-citizens are not excluded, nor are only voters included. President Ramaphosa, in his then capacity as chairperson of the Constitutional Assembly, referred to people involved in the constitution-making process as people who 'want to be part of the process'.[9] In *Doctors for Life International v Speaker of the National Assembly* (*Doctors for Life*) Ngcobo J referred to 'interested members of the public'[10] and 'interested persons who wish to contribute to the law-making process'.[11] In the context of the public involvement sections the 'public' is interested persons who respond to the legislatures' invitations to participate in the various public involvement opportunities.

The obligation to safeguard the right to public involvement as democratic space is especially important when Bills affect poor and vulnerable communities disproportionately. Meaningful public involvement empowers, and the Bill of Rights protects, the most vulnerable members of our society.[12] Where the right to public involvement intersects with rights protected under the Bill of Rights and both are under threat, the role of the Constitutional Court becomes especially significant. Through the lens of constitutional jurisprudence this chapter engages with the role of the Court, how the Court has interpreted the legislatures' obligations to facilitate public involvement, and how the Court can safeguard the right.

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[8] 'all people in our country' – s 7(1); 'everyone' or 'anyone' – ss 9(1); 10; 11; 12; 14; 15(1); 16(1); 17; 18; 21; 23(1) (sub-ss (2) and (3) refer respectively to every worker and every employer); ss 24; 25(1); 26(1); 27(1); 28(1); 29; 30; 32(1); 33(1) and (2); 34; and 38; 'no one' – ss 9(4); 13; 25(1); 26(3); 27(3); or 'citizens' – ss 19; 20 and 22.

[9] MC Ramaphosa, chairperson, of the Constitutional Assembly, 24 January 1995, quoted in The Constitutional Assembly: Annual Report, 1996 'It is therefore important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own, a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate. A constitution that will represent the aspirations of our people'. Available at http://www.polity.org.za/, See also OC Chabane, MP, African National Congress, Constitutional Assembly, 24 January 1995, quoted in The Constitutional Assembly: Annual Report, 1996: 'Our priority is to ensure that the process is not confined to these walls. We need to ensure that the communities along the Limpopo Valley also have their views heard in this Chamber and in our committee rooms. The draft must reflect the views of our people in the villages, informal settlements, hostels, factories, towns and cities.' Available at http://www.polity.org.za/.

[10] *Doctors for Life* n 6 above) paras 171; see also Sachs J in para 235 'all parties interested in legislation'.

[11] *Doctors for Life* (n 6 above) para 221.

[12] *Doctors for Life* (n 6 above) para 126: public involvement – ss 59(1)*(b)*, 59(2), 72(1)*(b)*, 72(2), 118(1)*(b)* and 118(2); socio-economic rights ss 25(5), 26(2), 27(2), 33, 36, 59, 72 and 118 of the Constitution.

The chapter demonstrates that since the Court's first seminal judgment on public involvement, *Doctors for Life*, there have been conflicting views among its members on the substantive nature of constitutional democracy in relation to participation and, flowing from that, on the nature and scope of the duty to facilitate public involvement. In relation to these, the chapter shows through an overview of jurisprudence that a more permissive, progressive (and ultimately more judicial interventionist) view of these prevailed in initial cases. There was a shift midway through the jurisprudence towards a more deferential stance that tilts more towards upholding electoral democracy. The chapter critically engages with this stance. The chapter then reviews, across the same line of jurisprudence, the Court's approach to balancing the powers and mandate of the democratic legislature against the entitlement of the public to be involved in the legislative processes. Thereafter the chapter scrutinises the public involvement processes adopted in specific cases. Finally, the chapter reflects on the role the Court sees for itself, and has displayed, in striking the balances that were discussed earlier and in positioning itself in relation to the ideals of representative and participatory democracy.

2 OVERVIEW OF PUBLIC INVOLVEMENT JUDGMENTS

The Constitution vests the country's legislative authority in the national, provincial and local spheres of government, which it describes as distinctive, inter-dependent and inter-related. The Constitution provides for co-operative governance and obliges the three spheres of government to observe and adhere to the principles of co-operative government and inter-governmental relations.[13] The Court has stressed the importance of institutional co-operation between the various legislatures, not only because of its importance to the national legislative process, but also to our democracy.[14] Many of the cases discussed below demonstrate the impact the absence of institutional co-operation has on public involvement processes.

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[13] The Constitution ss 40, 41 and 43.

[14] *Doctors for Life* (n 6 above) para 81; *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 (1) BCLR 47 (CC) (*Matatiele 2*) paras 40–1); *Merafong* (n 6 above) para 26. See also s 41(1) of the Constitution, which provides: 'All spheres of government and all organs of state within each sphere must – *(h)* co-operate with one another in mutual trust and good faith by – (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of and consulting one another on, matters of common interest; (iv) co-ordinating their

There are three opportunities for public involvement during the legislative process. These are release for public comment after approval by Cabinet, portfolio committee hearings and involvement facilitated by the NCOP. After a draft Bill has been approved by Cabinet, it may be released for public comment. After the Bill has been tabled in Parliament, the Portfolio Committees of both the National Assembly (NA) and the National Council of Provinces (NCOP) must facilitate public involvement. The NA represents the voice of the people. The NCOP represents provincial interests and must ensure that provincial interests are considered in the national sphere of government. The provincial legislatures (PLs) represent the interest of their respective provinces. Neither the NCOP nor the PLs may rely on representations that were submitted to the NA in the course of their public involvement processes.[15] They must conduct their own investigations and give the people of the relevant province an opportunity to play a role in the lawmaking process.[16] The failure to facilitate public involvement by any legislature affects the validity of a Bill.[17] Several of the public involvement challenges related to the alteration of provincial borders and required an amendment to the Constitution.[18] Here the PL of the province directly affected plays a more significant role. In terms of ss 74(3)*(b)*(ii) and 74(8) of the Constitution, the province concerned must signal its approval twice. The affected province is therefore constitutionally empowered to veto a constitutional amendment in the NCOP.[19]

The Constitutional Court's public involvement judgments can be divided into several categories. The first relates to Acts of national importance with widespread application. An example is *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* (*LAMOSA 1*),[20] which concerned the extension of the date by which land claims could

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actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.'

[15] *Matatiele 2* (n 14 above) paras 63 and 64, where Ngcobo J, for the majority, rejected the government's argument that s 118(1)*(a)* of the Constitution should be interpreted narrowly and that a constitutional amendment need only be considered by elected representatives.

[16] *Doctors for Life* (n 6 above) para 151; s 65(1) of the Constitution provides for the voting mandate of the province: 'Except where the Constitution provides otherwise – *(a)* each province has one vote, which is cast on behalf of the province by the head of its delegation.'

[17] *Doctors for Life* (n 6 above) para 29; *Matatiele 2* (n 14 above) paras 45–8; *Merafong* (n 6 above) paras 18 and 24.

[18] Section 74 of the Constitution. In the NA a two-thirds majority is required, in the NCOP support of six provinces is required.

[19] *Matatiele 2* (n 14 above) paras 28–31; *Merafong* (n 6 above) para 24.

[20] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).

be lodged. An extension was proposed under the Restitution of Land Rights Amendment Act 15 of 2014. The restitution of land rights is an emotive national issue,[21] with many dispossessed South Africans linking socio-economic advancement to land ownership.[22] The Court acknowledged the importance of the Act, the widespread public interest in the land claims process, and the need for effective public involvement.[23]

The second category refers to Bills and enactments that have more focused application. The Traditional Health Practitioners Bill was challenged in *Doctors for Life* because the NCOP and the PLs failed to comply with their obligations to facilitate public involvement in respect of four national health Bills.[24] The intention behind the Traditional Health Practitioners Act was to formally recognise traditional medicine and traditional health practitioners and to put measures in place for regulation and control. Traditional healers' organisations in Gauteng were given one day's notice of the public hearing. No invitations were extended to approximately 80 per cent of patients countrywide, especially in rural areas, who relied on traditional healers for their primary health care needs.[25] Consequently, a large number of practitioners and patients directly affected by the Act were effectively excluded.

South African Veterinary Association v Speaker of the National Assembly (*SAVA*) provides another example. The challenge related to the inclusion of the word 'veterinarians' in s 16 of the Medicines and Related Substances Amendment Act 14 of 2015. During a public hearing the Pharmaceutical Society of South Africa suggested that veterinarians should be included in the list of professionals who would require a licence from the Director-General of Health before they could dispense and compound medicines. The amendment materially affected a specific group, the

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[21] *LAMOSA 1* (n 20 above) para 1; *Speaker of the National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 para 1.

[22] *LAMOSA 1* (n 20 above) para 11; *LAMOSA 2* (n 21 above) para 46. According to the Commissioner's affidavit 163 383 interdicted claims had been received. A Regulatory Impact Assessment conducted by government estimated that an additional 397 000 valid land claims were expected.

[23] *LAMOSA 1* (n 20 above) para 64.

[24] These Bills were enacted as the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Dental Technicians Amendment Act 24 of 2004, the Sterilisation Amendment Act 3 of 2005, and the Traditional Health Practitioners Act 35 of 2004.

[25] *Doctors for Life* (n 6 above) paras 175 and 178; see also para 171 with regard to the public hearing on the Traditional Health Practitioners Bill in the Northern Cape Province, which took place after the final mandate had been obtained; see further para 182 in respect of the controversial Choice on Termination of Pregnancy Amendment Bill, which generated much public interest, though the promised hearings were not held.

veterinarian profession. Failure to include them in the *Government Gazette* notices effectively excluded the entire profession from participating in the hearings.[26]

A further category relates to Bills and executive decisions introduced to give effect to political decisions and the implementation of policy decisions. The examples illustrate the potential of interest group capture and the use of public involvement processes to prioritise group interests over broader national, regional or local interests. The implementation of an executive policy was challenged in *City of Tshwane* Metropolitan *Municipality v Afriforum* (*Afriforum*).[27] *Afriforum* obtained an interim interdict in the High Court to prevent the removal of old street names and replace those already removed.[28] The old street names were valued by the Afrikaner nation, while the new names had more relevance to black South Africans, their history, institutions, leaders and heroes. Chief Justice Mogoeng, on behalf of the majority, concluded that it was in the interest of justice that the interim interdict be appealable but held that *Afriforum* did not meet the requirements of irreparable harm nor did the balance of convenience favour them. Afriforum's challenge in the Constitutional Court included the failure to facilitate appropriate public participation before the resolution was passed.[29]

The abolition of cross-border municipalities was also dictated by political decisions and the implementation of government policies. Relocations were deemed necessary to alleviate problems experienced with the administration of cross-border municipalities and to create viable and sustainable municipalities. The abolition required the redefining of geographical areas in the provinces concerned and resulted in the relocation of communities from one province to another, 'by the stroke of the proverbial pen'.[30] Several communities resisted their relocation.[31]

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[26] *South African Veterinary Association v Speaker of the National Assembly* 2019 (2) BCLR 273 (CC) In the NA no public consultation took place after the inclusion of the word 'veterinarian'. The NCOP referred the Bill to its Select Committee but failed to alert the Committee to the inclusion of the word 'veterinarian'.

[27] *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) (*Afriforum*).

[28] *Afriforum* (n 27 above) paras 23–4 The City conceded that only 10 of the affected 76 wards were afforded an opportunity to participate in the name-changing process.

[29] *Afriforum* (n 27 above) para 44.

[30] *Matatiele 2* (n 14 above) para 79; *Merafong* (n 6 above) para 22.

[31] *Matatiele 2* (n 14 above) para 79; *Merafong* (n 6 above) para 22; *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC); *Poverty Alleviation Network* (n 7 above).

The policies were developed to advance local, regional and national interests but directly impacted the socio-economic well-being of affected communities. In *Matatiele Municipality v President of the Republic of South Africa (2)*[32] Ngcobo J described the symbolic and practical significance of relocations, and the social, economic and political consequences for affected communities.[33] Peoples' identities were affected, and the move impacted their welfare payments, health services and education. Relocations were reminiscent of forced removals under apartheid and affected individuals' rights to dignity, to freedom of movement and to the right to reside anywhere in the Republic. In *Merafong Demarcation Forum v President of the Republic of South Africa* (*Merafong*),[34] the community's strong objections were informed by the perception that service delivery would be less effective and employment opportunities limited. In adjudicating these challenges, the Court had to protect the rights of disadvantaged communities within a broader policy and political context.

The next section engages with two substantive issues. The nature of our democracy and the role of public involvement as an aspect of the right to participatory democracy.

3 THE CONSTITUTIONAL COURT'S UNDERSTANDING OF THE DUTY TO FACILITATE PUBLIC INVOLVEMENT

The Court's understanding of the substantive nature of our democracy is entwined with its understanding of the nature and scope of the duty to facilitate public involvement. Together these have influenced the Court's approach to adjudicating the public involvement matters before it.

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[32] *Matatiele 2* (n 14 above) para 22 dealt with the transfer of the Matatiele Municipality from KwaZulu-Natal to the Eastern Cape Province. At issue was the Constitution Twelfth Amendment Act of 2005, the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005, and the failure by the KwaZulu-Natal PL to facilitate public hearings.

[33] *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) (*Matatiele 1*) para 89; *Matatiele 2* (n 14 above) paras 79–81; *Merafong* (n 6 above) paras 22–3.

[34] *Merafong* (n 6 above) concerned the relocation of the Gauteng Merafong community to North West Province; 74 % of Merafong's 308 237 residents lived in Gauteng and were destined for relocation.

3.1 The nature of our democracy

The nature of our democracy first came before the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* (*New Clicks*). Chaskalson CJ, with reference to s 57(1)*(b)* of the Constitution, held that 'the democratic government contemplated for South Africa is a participatory democracy that is accountable, transparent and makes provision for public involvement'.[35] He held, further, that our Constitution 'calls for an open and transparent government, and requires public participation in the making of laws by Parliament and other deliberative legislative assemblies'.[36] *Doctors for Life* was the case in which the Court first and most elaborately engaged with these issues, and where a fundamental difference of opinion emerged.

Ngcobo J delivered the majority judgment in *Doctors for Life*.[37] He first looked at the international right to political participation. Various international and regional human rights instruments provide that the right to political participation is a fundamental human right that consists of two elements – 'a general right to take part in the conduct of public affairs, and a more specific right to vote and/or be elected'.[38] The right to political participation guarantees the positive right to participate in public affairs, which includes 'engaging in public debate and dialogue with elected representatives at public hearings' and the state's duty to facilitate participation. The duty includes making relevant information available and creating effective opportunities for participation.[39]

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[35] *New Clicks* (n 6 above) para 111.

[36] *New Clicks* (n 6 above) para 113. The case concerned an amendment to the Medicines and Related Substances Control Act 101 of 1965, which introduced measures to make medicines more affordable.

[37] *Doctors for Life* (n 6 above).The majority judgment was delivered by Ngcobo J with Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J concurring. Sachs J brought out a separate judgment. Yacoob J wrote the minority judgment with Skweyiya J and Van der Westhuizen J concurring. Van der Westhuizen J wrote a separate judgment.

[38] *Doctors for Life* (n 6 above) paras 90–4. The judgment quoted arts 19 and 25 of the UN General Assembly *International Covenant on Civil and Political Rights* (1966); arts 9, 13 and 25 of the Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights ('Banjul Charter')* (1981); art 23 of the Organization of American States (OAS) *American Convention on Human Rights ('Pact of San Jose')* (2001); art 4 of the British Commonwealth *Harare Commonwealth Declaration* (1991) arts 2 and 6 of the OAS *Inter-American Democratic Charter* (2001); UN Human Rights Committee (HRC) *CCPR General Comment No. 25: art 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (1996).

[39] *Doctors for Life* (n 6 above) para 105.

The international right to political participation was domesticated into our law through s 19 of the Constitution.[40] The evolving nature of the international right to political participation aligns with our Constitutional Court's view that human rights evolve over time and are 'open to elaboration, reinterpretation and expansion'.[41] Under our Constitution the right to partake in the conduct of public affairs, goes beyond the international right, it provides for a very specific right, members of the public are entitled to be involved in the legislative and other processes of the various legislatures, and the legislatures are obligated to facilitate public involvement.[42]

For Justice Ngcobo, our struggle history, the founding values of accountability, responsiveness and openness, our commitment to government based on the will of the people and the legislatures' obligation to facilitate public involvement supported an interpretation that our democracy contains both representative and participatory elements.[43] For the majority, this is a 'defining feature' of our democracy,[44] with the duty to facilitate public involvement 'an aspect of the right to political participation'.[45] The majority Court held that the participatory and representative elements were not in conflict with each other but were mutually supportive. Ngcobo described the relationship as follows:

> The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory

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[40] Section 19 of the Constitution provides: '(1) Every citizen is free to make political choices, which includes the right – *(a)* to form a political party; *(b)* to participate in the activities of, or recruit members for, a political party; and *(c)* to campaign for a political party or cause. (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. (3) Every adult citizen has the right – *(a)* to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and *(b)* to stand for public office and, if elected, to hold office.'
[41] *Doctors for Life* (n 6 above) para 97.
[42] *Doctors for Life* (n 6 above) paras 106–8.
[43] *Doctors for Life* (n 6 above) para 111; Preamble and s 1 of the Constitution.
[44] *Doctors for Life* (n 6 above) para 111
[45] *Doctors for Life* (n 6 above) para 89.

> democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[46]

On behalf of the majority, Ngcobo J concluded that our democracy is 'partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes'.[47]

Sachs J, in his separate concurring judgment referred to the 'ancient origins' of public involvement in our history. For him, 'consultation and involvement has become a distinctive part of our national ethos'.[48] He argued that the principles of accountability, transparency and openness could not be assumed to be included in the concept of electoral democracy but must add something more.[49] He described his understanding of our democracy and the constitutional right to some involvement in the legislative process as follows:

> True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the side-lines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government.[50]

For Justice Sachs participatory democracy and ongoing public involvement is not 'just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation'.[51] He referred to the historical denial of voice, and the importance the right to speak and be heard has to

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[46] *Doctors for Life* (n 6 above) para 115.
[47] *Doctors for Life* (n 6 above) para 116; see also *Matatiele 2* (n 14 above) para 40.
[48] *Doctors for Life* (n 6 above) para 227.
[49] *Doctors for Life* (n 6 above) para 228.
[50] *Doctors for Life* (n 6 above) para 230.
[51] *Doctors for Life* (n 6 above) para 231.

an individual's dignity, especially the dignity of 'those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections'.[52]

In his dissenting judgment Justice Yacoob fundamentally disagreed. He understood the inquiry before the Court to be an interpretation of public involvement in the context of the Constitution, our history and the relationship between the representative and participatory elements of our democracy.[53] With reference to the values set out in s 1*(d)* of the Constitution, he argued that our democracy consists of four 'ingredients': universal adult suffrage, a national common voters' roll, regular elections, and a multi-party system of democratic government. Together these four ingredients ensure accountability, responsiveness and openness. The first three contain participatory elements and the fourth is representative. He disagreed that accountability, responsiveness and openness imply ongoing public participation and pointed out that public involvement in the legislative process is neither a founding value nor is it constitutionally entrenched to the same degree as the founding values in the Constitution.[54]

He understood our democracy to mean that voters elect representatives who must be accountable, responsive and open in the way they perform their duties[55] and that the right to vote 'is a participatory element which is both essential to our democracy and fundamental to it'.[56] With reference to the political rights contained in s 19 of the Bill of Rights, he argued that citizens, through their right to participate in the activities of their political parties, are provided with an avenue to influence their representatives in the various legislatures.[57] Their representatives in the National Assembly ensure government by the people.[58] For Justice Yacoob 'laws passed by representatives of the people must be regarded as government by the people and as laws passed by the people'.[59] For him '[t]his is a vital contextual factor in determining what "public involvement"

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[52] *Doctors for Life* (n 6 above) para 234.
[53] *Doctors for Life* (n 6 above) para 270.
[54] *Doctors for Life* (n 6 above) paras 274–5.
[55] *Doctors for Life* (n 6 above) para 275.
[56] *Doctors for Life* (n 6 above) para 291; by contrast the majority argued in para 108 that the framers of the Constitution '[were] not content only with the right to vote as an expression of the right to political participation. It opted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making processes'.
[57] *Doctors for Life* (n 6 above) para 278.
[58] Section 42(3) of the Constitution.
[59] *Doctors for Life* (n 6 above) para 284.

in the Constitution means'.[60] In the context of our struggle history he defended the role of elected representatives:

> The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy. In the circumstances it would, in my view, require the clearest language to justify the construction of any 'public involvement' provision to mean that these elected representatives exercising the power of the people consequent upon their vote cannot pass a law unless they have public hearings or give the public an opportunity to make written or oral submissions before that law can be validly passed.[61]

The Court's finding that the participatory and representative elements of our democracy are mutually supportive and that public involvement is an aspect of the right to participatory democracy, confirmed that the Court developed a more substantive or deeper conception of our democracy.[62] Ngwako Raboshakga, with reference to *Doctors for Life* and *Matatiele 2*, argues that the Court achieved this deeper understanding by focusing on the 'objective of achieving the substantive constitutional goal of participatory democracy'.[63] The Court accomplished this by looking for the meaning that informed the obligation, by interpreting the obligation within the context of the Constitution as a whole, and by taking into account the social and historical context.

But there was to come a shift in the dominant view on these matters towards the minority view, though not quite all the way towards Justice Yacoob's view – starting in *Merafong*, the majority of the Court would come around to Justice Van der Westhuizen's position (which was somewhat more interventionist than Justice Yacoob's stance, but certainly far more deferential than that of Justice Ngcobo, to begin with).

In *Merafong* the judgment that followed *Matatiele 2*, Van der Westhuizen J compared the public involvement processes in the Eastern Cape Province in *Matatiele* 2, with those followed in

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[60] *Doctors for Life* (n 6 above) para 284; Ngcobo J in *Matatiele 2* (n 14 above) para 56 disagreed with the interpretation that elected representatives speak on behalf of the people and that facilitation of public involvement is therefore unnecessary. This, he argued, 'would render the public involvement provisions meaningless and would reduce our democracy to a representative democracy only'. This is based on a misunderstanding of the nature of our democracy.
[61] *Doctors for Life* (n 6 above) para 294; see also Van der Westhuizen J para 244(5).
[62] Sandra Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) 30. See also Henk Botha 'Representing the poor: law, poverty and democracy' in Sandra Liebenberg & Geo Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 79, 97.
[63] Ngwako Raboshakga 'Towards participatory democracy, or not: The reasonableness approach in public involvement cases' (2015) 31 *SAJHR* 4, 9.

Merafong. In both instances public hearings were held. In the Eastern Cape an appropriate degree of involvement was attained, while no public involvement took place in KwaZulu-Natal.[64] In *Merafong* he therefore focused on the quality of the hearings and applied the reasonableness test to the procedures that were followed. On the facts he concluded that an appropriate degree of public involvement had been achieved.[65] Raboshakga argues that the Court's failure in *Merafong* and subsequent judgments to engage with the constitutional purpose and values of the obligation and its focus on 'a compliance- or process-oriented reasonableness enquiry' reduced public involvement to a more shallow understanding of our democracy.[66] Brian Ray describes this as a 'thinner, representative understanding of democracy', and a more deferential approach by the Court.[67]

Raboshakga further points out that the *Doctors for Life* majority did not rank the two types of democracy but emphasised that the participatory and representative elements of our democracy were mutually supportive. Van der Westhuizen J subordinated participatory democracy to representative democracy when he stated that participation 'is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them'.[68] In this regard, Michael Bishop argues that, by confirming that lawmakers have the option to use or discard the views expressed during the involvement process, the *Merafong* judgment confirmed that public involvement will always be subservient to

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[64] *Matatiele 2* (n 14 above) paras 71–3. Hearings were held in seven areas, both rural and urban; written submissions were received from individuals, municipalities, political parties and traditional leaders. The Portfolio Committee's report contained recommendations and community concerns. Further deliberations took place in the NCOP and the province. The Court held that the duty to facilitate had been complied with.

[65] See also *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) para 43, where Justice O'Regan in her separate judgment confirms that the Constitution does not require endless debate, consultations cannot satisfy all demands and after a proper consultation process binding decisions must be taken.

[66] Raboshakga (n 63 above) 5 and 12.

[67] Brian Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 323.

[68] *Merafong* (n 6 above) para 50; see also Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 51 *VRU* 12, 22, who agreed with Justice Van der Westhuizen that interest group capture poses a real threat to legislative processes.

representative democracy and that '[p]articipation [will] only be relevant if and when representatives want it to be'.[69]

3.2 The nature and scope of the duty to facilitate public involvement

The ideological divide on the nature of our democracy also pervades and explains the divide in the members of the Court's view of the nature and scope of the duty. The same shift towards Van der Westhuizen J's minority-aligned view in *Doctors for Life* has taken place here. The majority Court's finding in *Doctors for Life* that the people of South Africa constitutionally reserved for themselves 'part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created',[70] and the minority's view that legislative authority vests in Parliament illustrate this. The divide is discussed as it relates to the nature and scope of the duty to facilitate public involvement; the place of public involvement within the national legislative process; and review standard, remedy and separation of powers concerns.

(a) *Doctors for Life* majority judgments

The *Doctors for Life* majority judgments confirmed the finding of the Supreme Court of Appeal in *King v Attorneys Fidelity Fund Board of Control*[71] that the use of the word 'must' in the constitutional text of the respective public involvement sections created an obligation for the various legislatures to facilitate public involvement.[72]

For Justice Ngcobo, the duty gave rise to two complementary duties. The first is to provide meaningful opportunities for public involvement in the lawmaking process; the second to facilitate effective involvement ('take measures to ensure that people have the ability to take advantage of the opportunities provided').[73] The majority Court provided some guidance and identified the basic elements of public involvement. Members of the public must be given notice of the proposed legislation, be provided with relevant information (including the objectives of the legislation) and

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[69] Michael Bishop 'Vampire or prince? The listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313, 343.
[70] *Doctors for Life* (n 6 above) para 110.
[71] *King v Attorneys Fidelity Fund Board of Control* 2006 (4) BCLR 462 (SCA) (*King*).
[72] *Doctors for Life* n 6 paras 14 and 75; *King* (n 71 above) para 19.
[73] *Doctors for Life* (n 6 above) para 129.

must be informed of opportunities for participation. This included information about when and where submissions may be made.[74] Justice Ngcobo described the scope of the legislatures' obligation to facilitate public involvement as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making'.[75]

Sachs J described what people could expect from their participation: 'All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.'[76] The benefit to the legislatures is that through participation they will be informed of community concerns and therefore be in a better position to make the best possible laws.[77] The participation would only be meaningful if both parties acted in good faith.[78]

The legislatures' obligation to facilitate public involvement in their respective legislative and other processes raised the question whether public involvement was part of the national legislative process. Chapter four of the Constitution deals with Parliament. The chapter is divided into three sections, dealing respectively with the National Assembly, the National Council of Provinces and the National Legislative Process. Chapter six of the Constitution deals with the provinces and includes a section on the Provincial Legislatures. The national legislative process is set out in the Constitution under that heading with different procedures stipulated for different kinds of Bill.[79] The public involvement sections are not located under the National Legislative Process. Instead the sections appear under the sections devoted to the National Assembly, the National Council of Provinces and the Provincial Legislatures.[80]

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[74] *Doctors for Life* (n 6 above) paras 131–2 and 221.
[75] *Doctors for Life* (n 6 above) para 129.
[76] *Doctors for Life* (n 6 above) para 235.
[77] *Doctors for Life* (n 6 above).
[78] In *Matatiele 2* (n 14 above) para 97 the Court held that for public involvement to be meaningful the mere holding of meetings was not enough. The legislatures must also 'listen to their concerns, values and preferences, and to consider these in shaping their decisions and policies'. In *Merafong* (n 6 above) para 51, Van der Westhuizen J stated that involvement 'cannot be meaningful in the absence of a willingness to consider all views expressed by the public' and in para 26 that public involvement 'enhances responsible citizenship and legitimate government'.
[79] The National Legislative Process includes ss 73–7. Section 73 refers to all Bills; s 74 to Bills amending the Constitution; s 75 to Ordinary Bills not affecting provinces and s 76 to ordinary Bills affecting provinces.
[80] NA s 59(1); NCOP s 72(1) and PLs s 118.

Ngcobo J in *Doctors for Life* referred to the powers and duties of the legislative organs of state and argued that the Constitution contemplates participation by the public in the lawmaking process.[81] Justice Ngcobo looked at the objectives of public involvement from the perspective of the legislatures. These included the need for the legislatures to be informed and responsive to the public's concerns and views; the importance this has for the legitimacy and acceptance of the legislation; and its potential to enhance our democracy. He concluded that the obligation to facilitate public involvement was a material part of the lawmaking process.[82]

The obligation to facilitate public involvement requires legislatures to take concrete steps to ensure that the public participates in the legislative process.[83] The majority Court agreed that the Constitution is not prescriptive and that lawmakers have considerable discretion in deciding how to fulfil their public involvement obligations. Ngcobo J described the duty as follows:

> [T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.[84]

In effect the Court vested the legislative branch with the responsibility to determine the balance between public involvement, as an aspect of participatory democracy, and representative democracy.[85] To determine constitutional compliance the majority Court adopted the objective

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[81] *Doctors for Life* (n 6 above) para 135; see also *Matatiele 2* (n 14 above) para 44, where the Court stated that a purposive interpretation within the constitutional context means that provinces participate in the national law-making process.
[82] *Doctors for Life* (n 6 above) paras 205, 207 and 211.
[83] *Doctors for Life* (n 6 above) para 120.
[84] *Doctors for Life* (n 6 above) para 145; see also *Merafong* (n 6 above) para 27.
[85] *Doctors for Life* (n 6 above) para 122.

standard of reasonableness, because it is context sensitive and is the standard used in socio-economic rights challenges.[86] This raised concerns around the separation of powers.

First the Court engaged with the South African separation of powers doctrine. In *Certification of the Constitution of the Republic of South Africa, 1996* the Court described the 'distinctively South African model of separation of powers' as a partial separation that 'anticipates the necessary or unavoidable intrusion of one branch on the terrain of another'.[87] To ensure that an intrusion only occurs if mandated by the Constitution a delicate balance is required between 'separating powers and enforcing checks and balances'.[88]

Thereafter, the Court interpreted, and engaged with, its constitutional responsibilities under ss 2, 167(4)*(e)* and 172 of the Constitution, before discussing their application in *Doctors for Life*. Section 2 provides that the Constitution is the 'supreme law of the land', any obligation 'imposed by it must be fulfilled', and any 'law or conduct that is inconsistent with it is invalid'. All three branches of government are obliged to act in accordance with and within the limits of the Constitution.[89] Section 167(4)*(e)* grants the Constitutional Court exclusive jurisdiction to decide whether Parliament has failed to fulfil a constitutional obligation.[90] Section 172 of the Constitution provides that all courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable, including … an order suspending the declaration of invalidity'. The Court's exclusive jurisdiction under s 167(4)*(e)* and the jurisdiction of all courts under s 172 may involve disputes in 'crucial political areas' with 'important political consequences'.[91] While the *Doctors for Life*

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[86] *Doctors for Life* (n 6 above) paras 126–7; see also ss 26(2) (housing) and 27(2) (health care, food, water, and social security) of the Constitution in terms of which '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'; see further the discussion on social and historical context in section 2.2 of chapter 3 of this thesis.

[87] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 109.

[88] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 60; *Doctors for Life* (n 6 above) paras 26, 37–8, 70; see also *Afriforum* (n 27 above) para 68–70: in para 68 Mogoeng CJ stated: 'Comity among branches of Government requires extra vigilances, but obviously not undue self-censorship, against constitutionally-forbidden encroachments into the operational enclosure of the other arms.' See also the discussion in chapter 3 section 3.4 on separation of powers as it relates to socio-economic rights.

[89] Sections 2, 44(4), 92(3), 104(3) and 165(2) of the Constitution.

[90] *Doctors for Life* (n 6 above) paras 27–8; *Glenister v President of the Republic of South Africa* 2011(3) SA 347 (CC) (*Glenister*) para 23.

[91] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) BCLR 725 paras 72–3; *King* (note 71 above) para 23; see also *Doctors for Life* (n 6 above) para 27.

majority acknowledged the importance of the doctrine, Ngcobo J confirmed that the doctrine could not be used 'to avoid the obligation of a court to prevent the violation of the Constitution'.[92]

The majority confirmed that there were limitations to the legislature's 'broad discretion'. '[H]owever great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution.'[93] In conducting the inquiry the Court will look at the measures taken by Parliament in a particular instance and will balance the legislatures' institutional autonomy with the public's right to be involved in public affairs.[94] Ngcobo J listed some of the factors the Court may take into consideration when evaluating the reasonableness of the facilitation process: the rules adopted by the various legislatures to facilitate public involvement;[95] the nature and importance of the legislation; the intensity of its impact on the public; and practicalities such as time and expense and what measures the legislatures decided were appropriate given the legislation's content, importance and urgency.[96] With emphasis on the legislatures' choice of measures, the Court stressed that the crux of the inquiry was whether measures put in place by the legislatures 'afforded the public a reasonable opportunity to participate effectively in the law-making process'.[97] Justice Ngcobo concluded that legislation must comply with both manner and form requirements. Failure to comply with either would result in the invalidity of the legislation and would trigger the Court's power and duty to declare the legislation invalid.[98]

(b) *Doctors for Life* minority judgments

The minority judgments focused on Parliament as the source of South Africa's legislative authority. The judgments produced different perspectives on what the nature and scope of the duty to facilitate public involvement are. Their views informed their approach to whether public

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[92] *Doctors for Life* (n 6 above) para 200.
[93] *Doctors for Life* (n 6 above) para 124.
[94] *Doctors for Life* (n 6 above) para 146.
[95] *Doctors for Life* (n 6 above) para 146; ss 57, 70 and 116 of the Constitution; Rule 6 of the Joint Rules of Parliament; and Rule 5 of the NCOP.
[96] *Doctors for Life* (n 6 above) paras 128 and 146; *Matatiele 2* (n 14 above) para 68; *LAMOSA 1* (n 20 above) paras 60–1.
[97] *Doctors for Life* (n 6 above) para 129; *Matatiele 2* (n 14 above) para 67; see also *Glenister* (n 90 above para 37.
[98] *Doctors for Life* (n 6 above) paras 208 and 209; see also the discussion under Compliance below.

involvement formed part of the national legislative process and what the appropriate review standard should be. The Justices also addressed separation of power concerns and an appropriate remedy.

Justice Yacoob agreed that legislatures are obliged to facilitate public involvement but argued that the obligation was to engage in an ongoing process of facilitation.[99] For him the focus was on the process:

> The facilitation of public involvement would in general therefore mean the putting in place a process which is necessarily long term ensuring that more and more people and a wider range of people become involved in a wider range of ways as time progresses.[100]

With reference to various sections in the Constitution where variations of the word 'participate' and 'involvement' appear,[101] he argued that there was a distinction between citizen participation and public involvement, and that the latter meant something less than participation. He conceded that public involvement imposed an obligation but argued that because the term was so broad, it could not give rise to a specific duty or an obligation to give the public an opportunity to be heard before legislation was passed. He disagreed that public involvement meant the public must be given an opportunity to comment on draft legislation, instead he argued that all legislative bodies are required 'to facilitate public participation in *all* their processes' and that this did not translate into doing 'anything specific in relation to specific processes'.[102] For him the relevant legislature was obliged to put in place a process by which public involvement was facilitated, and suggested voter education as a facilitation process.[103]

Justice Yacoob also disagreed with the majority judgment that public involvement formed part of the national legislative process. He pointed out that there is no reference to public involvement

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[99] *Doctors for Life* (n 6 above) para 306.
[100] *Doctors for Life* (n 6 above) para 312; in para 232 Sachs J disagreed. For him the peremptory language of the Constitution, the foundational principles and the national ethos mean that public involvement must be implemented immediately.
[101] 'Participate' (or variations thereof) appears in ss 19(1)*(b)*, 23(2)*(b)*, 23(3)*(b)*, 30, 42(2), 42(4), 57(2)*(b)*, 70(2)*(c)*, 116(2)*(b)*, 70(2)*(b)* and the Heading of ss 66 and 67; 'involvement' (in relations to the legislatures) appears in 57(1)*(b)*, 59(1)*(a)*, 70(1)*(b)*, 72(1)*(a)*, 116(1)*(b)* and 118(1)*(a)*; see also Van der Westhuizen J in *Doctors for Life* (n 6 above) para 244(3).
[102] *Doctors for Life* (n 6 above) para 313. Emphasis in judgment.
[103] *Doctors for Life* (n 6 above) paras 311.

in the sections that are located under the National Legislative Process heading[104] and stressed the importance of legislative steps being clearly defined.[105] He read sub-s (1)*(a)* and *(b)* of the public involvement sections together and held that legislatures were obliged to make rules with due regard to the obligation to facilitate public involvement. These rules may contain manner and form provisions, provided they are not inconsistent with the national legislative process. In his view, additional manner and form provisions could not by implication be introduced into the national legislative process[106] 'To infer a requirement of this kind when it was not expressly provided for was to impermissibly undermine the legislature and the right to vote,' he stated.[107] For Yacoob this interpretation was consistent with the legislatures' right to determine how public involvement should be facilitated.

Justice Yacoob further disagreed with reasonableness as the review standard. First, he pointed to the absence of reasonableness as a criterion in sub-s (1)*(a)* and its presence in sub-ss (1)*(b)* and (2) of the public involvement sections.[108] For him this was a deliberate choice by the framers of the Constitution. Second, he pointed out that s 70(1)*(b)* of the Constitution, dealing with the legislatures' powers to make rules and orders concerning its business, demanded only that 'due regard' be paid to public involvement. Third, Justice Yacoob found it significant that s 45 of the Constitution, dealing with joint rules and orders, and joint committees, required procedures to facilitate the legislative process but did not require public involvement. Fourth, public involvement was not mentioned as part of the national legislative process. Fifth, he was concerned that the interpretation of what constituted reasonable measures may be contested and would then require the Court, rather than the Constitution, to determine an element of the national legislative process, and that the reasonableness criteria may result in similar Bills being processed differently, depending on the circumstances.[109] He concluded that it was up to Parliament to decide how to facilitate public involvement and that Parliament was not obliged to take reasonable steps in this

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[104] The public involvement sections appear under the heading 'Internal arrangements, proceedings and procedures of' … (the respective legislatures); see also Van der Westhuizen J *Doctors for Life* (n 6 above) para 244(2).
[105] *Doctors for Life* (n 6 above) para 294**.**
[106] *Doctors for Life* (n 6 above) paras 320 and 323.
[107] *Doctors for Life* (n 6 above) para 339.
[108] Sections 59, 72 and 118 of the Constitution.
[109] *Doctors for Life* (n 6 above) para 317(a)-(f). In para 318 he mentions five additional factors against applying the reasonableness criteria to the NCOP.

regard. Such a requirement would constitute a limitation on the power of elected representatives and would be an 'impermissible intrusion' that would affect the value of the right to vote.[110]

Finally, he disagreed with the majority Court's interpretation that failure to comply with the manner and form requirements of the obligation to facilitate public involvement would result in the invalidity of the legislation. He argued that there were three ways in which the Constitution could be infringed: when law was inconsistent with the Constitution; when conduct was inconsistent with the Constitution; and when there was a failure to comply with a constitutional provision. When law or conduct was inconsistent with the Constitution, a court, in terms of s 172, must declare it invalid. He read s 2 with s 167(4)*(e)* and argued that the Constitution does not specify that the failure to fulfil a constitutional obligation results in the invalidity of legislation. Only if the failure to fulfil a constitutional obligation results in the invalidity of law or conduct, does the failure to comply with the constitutional obligation result in invalidity.[111] In his view an order of invalidity could only be made if public involvement were a prerequisite of national legislation being validly passed.[112]

The ideological shift towards Yacoob J's position, and Van der Westhuizen J's view in *Doctors for Life* exposited here, came to dominate from *Merafong* onwards. Van der Westhuizen J agreed with the majority in *Doctors for Life* that the public involvement sections created a constitutional obligation that was justiciable. His difficulty was with the majority's conclusion that failure to facilitate an appropriate degree of public involvement would result in the invalidity of legislation. His conclusion was based on the wording of the section and the fact that the sections were not located under the National Legislative Process. In his view, facilitating public involvement was not a legislative step and requirement for the passing of Bills. Unlike the majority view that our democracy consisted of separate and mutually supportive participatory and representative elements, he saw the two as 'often inter-twined and overlapping'.[113] He firmly supported

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[110] *Doctors for Life* (n 6 above) para 319.
[111] *Doctors for Life* (n 6 above) para 263: 'The only material distinction is whether the case is about the invalidity of law or conduct or whether it is about the fulfilment of an obligation that is not necessary concerned with the invalidity of law or conduct.'
[112] *Doctors for Life* (n 6 above) para 268.
[113] *Doctors for Life* (n 6 above) para 244(4).

parliamentary representation as 'the basis of government's authority to legislate',[114] and did not view the minority position as deferential.

Van der Westhuizen J also expressed reservations with using reasonableness as the review standard when evaluating Parliament's conduct, especially when it was not expressly provided for in the Constitution. He argued that '[a]s a yard-stick for the concrete and formal process of passing legislation it is too open to different interpretations, and not specific enough'.[115] His concern was that it left too much to judicial discretion over the conduct of Parliament. He expressed his discomfort as follows:

> I do not necessarily know how I might respond if members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public, which I may regard as eminently more reasonable. If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation – or to make sure that hearings are not promised as in this case – participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.[116]

4 THE CONSTITUTIONAL COURT'S APPROACH TO PUBLIC INVOLVEMENT

4.1 Striking the balance between legislative power and the community's right to involvement

This section and the next discuss the approach the Court adopted from *Merafong* onwards, after the ideological shift, although the section is still informed by insights from *Doctors for Life* and *Matatiele* 2. The approach is clearly informed by the Court's (now shifted) ideological view on the nature of our democracy and its (now shifted) ideological view on the nature and scope of the duty to facilitate public involvement.

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[114] *Doctors for Life* (n 6 above) para 244(5).
[115] *Doctors for Life* (n 6 above) para 244(6).
[116] *Doctors for Life* (n 6 above) para 244(10).

In *Merafong* the issue was whether the Gauteng PL facilitated an appropriate degree of public involvement and whether it acted rationally in the exercise of its legislative powers. After extensive public hearings, the Gauteng Local Government Portfolio Committee issued a negotiating mandate. The mandate expressed support for the phasing out of cross-border communities but was conditional upon the Merafong community, situated in the North West Province, being incorporated into the Merafong community of Gauteng province. At a meeting of the Select Committee on Security and Constitutional Affairs, the Portfolio Committee delegate suggested this amendment. He was advised that an amendment was not permissible; Gauteng could adopt or reject only that part of the Bill that directly affected the province.[117] Without further consultation the Committee reviewed its position and declared unconditional support in its final voting mandate.[118]

The applicants approved the quality of the initial public involvement hearings and agreed that proper notices of meetings were issued and that the community's concerns were included in the report that accompanied the negotiating mandate.[119] Their concern was that the PLs failed to consult them again before the final mandate was issued. They argued that the negotiations were prematurely terminated, and the outcome predetermined.

Justice Van der Westhuizen found that the hearings that preceded the negotiating mandate were conducted in good faith. The community's views were discussed in considerable detail and recorded in the negotiating mandate. On the facts the Court found that further hearings were unlikely to change views, that previous decisions of the Court did not require ongoing dialogue and that the PL facilitated an appropriate degree of public involvement.[120] He conceded that an

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[117] *Merafong* (n 6 above) paras 36 and 154; Moseneke DCJ in paras 180 and 192 of his minority judgment argued that the Province misconceived its obligations because it could have accepted the phasing out of cross-border municipalities but declined to accept the removal of the Merafong community from Gauteng.

[118] *Merafong* (n 6 above) para 37.

[119] *Merafong* (n 6 above) paras 43 and 145–6. The negotiating mandate listed community concerns with regards to social and economic development. These included concerns about the low quality, or absence of, essential services in North West, specifically social grants, official documentation, health, emergency services, education, water sanitation and unemployment. Economic concerns included attachment to Johannesburg and the community's past contribution to the city; employment opportunities and existing employment; the additional financial burden and inconvenience of inconveniently located public institutions; the superior road and rail network in Gauteng; and easier access to manufactured goods and financial services, among many concerns, clearly recording the community's overwhelming opposition.

[120] *Merafong* (n 6 above) paras 43, 47, 49 and 58–61.

'understandable expectation' had been created[121] but held that the meetings could not be characterised as a 'cynical charade'.[122] The Committee's failure to consult the community again, though 'possibly disrespectful',[123] did not 'rise to the level of unreasonableness'[124] and the invalidity of the legislation.[125]

For the majority Court the parties had become so entrenched in their respective positions that further negotiations would have been futile. Theunis Roux describes this as a 'tipping point':

> Rather, deliberation and participation in decision-making are stressed for the contribution these processes can make to better informed and more legitimate decisions. But there is always a tipping point at which participation and deliberation cease to be useful, and instead become counterproductive.[126]

The concern with counterproductive interaction raises the question of when and how a public involvement process should be concluded. For Van der Westhuizen J the aim of public involvement is for the legislature to be sufficiently informed, and the community given 'a proper opportunity to air their views'.[127] Provided the process followed passed the reasonableness threshold no further interaction would be required. Justice Sachs, in his minority judgment, was more concerned with the integrity of the process and the impact a sudden and unexplained cessation of dialogue would have on the relationship between the parties.

> In some ways an interrupted dialogue, when expectations of candour and open-dealing have been established and certain unambiguous commitments have been made, can be more disruptive of a relationship than silence from the start might have been.[128]

Once communication had been established 'it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the

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[121] *Merafong* (n 6 above) para 55.
[122] *Merafong* (n 6 above) para 49.
[123] *Merafong* (n 6 above) para 55.
[124] *Merafong* (n 6 above) para 56.
[125] *Merafong* (n 6 above) paras 60–1.
[126] Theunis Roux 'Democracy' in S Woolman et al (eds) *Constitutional Law of South Africa* (2 ed, 2006) 10–42; Bishop (n 69 above) 352, argued, in terms of his 'Vampire' interpretation, that the tipping point identified by Van der Westhuizen J was too differential.
[127] *Merafong* (n 6 above) para 59.
[128] *Merafong* (n 6 above) para 291.

complete deviation'.[129] The failure to do so 'violated the integrity of the participatory process' and 'breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government'.[130] For Sachs J it was not about 'a lack of appropriate political respect' but a breach of a constitutional obligation.[131] With reference to *Doctors for Life*, he argued that the community's civic dignity was diminished; the spirit of accommodation was denied; and the legitimacy of the process was affected, which resulted in the perception that the outcome was predetermined.[132]

Justice Sachs advanced several reasons why the legislature's failure to resume communication with the community was unreasonable: first, the nature of the legislation, which involved the direct interests of a discrete community and a unique veto to a particular province; second, the extent of the potential impact, which the majority judgment described as extensive and ongoing; third, the expectations that were created when the Municipal Demarcation Board rejected a previous proposal for incorporation, when the negotiating mandate, inclusive of community concerns, was adopted; and finally, the technical nature of the about-turn.[133]

> In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve.[134]

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[129] *Merafong* (n 6 above) para 300 The NCOPs calendar provided a two-week space for consultations and nine days for explaining the about-turn.
[130] *Merafong* (n 6 above) para 301.
[131] *Merafong* (n 6 above) para 287.
[132] *Doctors for Life* (n 6 above) para 115; *Merafong* (n 6 above) para 292.
[133] *Merafong* (n 6 above) paras 295–7; see also Madala J's description in *Merafong* para 199: 'The flames of discontent raging in the community require a serious effort in dousing those flames, and should not be dismissed lightly on technicalities.'
[134] *Merafong* (n 6 above) para 300; see also para 47: the applicants believed that the respondents' reluctance to provide reasons for their change of heart supports their contention of a predetermined outcome.

Through his focus on an 'appropriate civic relationship',[135] Justice Sachs acknowledged our history of participation and the social pact that informed the Constitution. Concluding the process by reporting back to the community and providing reasons for the change in mandate would have been more respectful and would have demonstrated a more nuanced understanding of the power dynamics at play during public involvement. This approach aligned closer to the *Doctors for Life* majority's more substantive understanding of our democracy and the role of public involvement as participatory democracy.[136]

By contrast, the *Merafong* Court's deferential approach (to government) and its dismissive approach (of the community) can be viewed as disrespectful and re-enforcing existing power imbalances.[137] Justice Van der Westhuizen's statement that disrespectful politicians, who fail to fulfil their promises, should be held accountable through the ballot, tipped the scale in favour of representative democracy and reduced public involvement to information gathering and listening.[138] In this way the majority Court set the bar for procedural compliance very low. This low threshold has made it very difficult for disadvantaged communities to challenge procedural compliance against the democratic principles of accountability, transparency and responsiveness.

Justice Van der Westhuizen predicted in *Doctors for Life* that the involvement process may become mechanical and meaningless, as the view of Parliamentary majorities would inevitably prevail.[139] In the judgments that followed *Merafong*, the problems identified illustrate why the legislatures' commitment to the involvement process could justifiably be questioned. It also demonstrates in *LAMOSA 1* how a deferential Court became more assertive as the legislatures became less respectful of the process, of the people and of the historical, social and constitutional significance of public involvement. Whether hearings are conducted in good faith or are formulaic box-ticking exercises, they affect how ordinary people view their right to public involvement, view

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[135] *Merafong* (n 6 above) para 293,
[136] *Doctors for Life* (n 6 above) paras 115–16.
[137] Van der Westhuizen J's approach reflects a bias. Under representative democracy all participants are equal. His judgment fails to address the inherent power imbalance of the public involvement process.
[138] *Merafong* (n 6 above) para 60.
[139] *Doctors for Life* (n 6 above) para 244(10). In *Merafong* (n 6 above) para 49 he concluded that the public hearings were not a 'cynical charade, but held in good faith'.

their public representatives and, significantly, view public involvement as participatory democracy.

4.2 Public involvement processes

Given that Justice Van der Westhuizen's views were informed mostly by his concerns around adjudicating the process adopted in specific involvement cases, and how these have informed the way the majority of the Court has been striking the balance since *Merafong*, this subsection takes a closer look at the degree of scrutiny to which the Court subjected various participation processes.

Two further cross-border relocation judgments followed *Merafong*. *Poverty Alleviation Network* was delivered in 2010 and was followed a year later by *Moutse Demarcation Forum v President of the Republic of South Africa* (*Moutse*).[140] In *Poverty Alleviation Network* the applicants argued that the invitation for submissions and the hearings were 'a formalistic sham'. Parliament and the KwaZulu-Natal legislature went 'through the motions of public participation without considering, in good faith, what was submitted'. In their view the national government ordered the provincial legislature to vote in favour of the Constitution Thirteenth Amendment Act 23 of 2007. Parliament's public involvement process therefore lacked good faith, was politically dictated and predetermined.[141] The Court agreed with the majority judgment in *Merafong* that 'the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate' and that public involvement 'cannot be meaningful in the absence of a willingness to consider all views expressed by the public'.[142] A unanimous Court concluded that, provided Parliament took cognisance of the public's views, it 'should not necessarily be swayed by public opinion in its ultimate decision' and dismissed the application.[143]

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[140] *Poverty Alleviation Network* (n 7 above) followed the judgments in *Matatiele 1* and *2*. In terms of *Matatiele 2* (n 14 above), the Constitutional Amendment Bill had to be reintroduced with full compliance with all constitutional and procedural requirements. *Moutse* (n 31 above) dealt with a challenge to the relocation of the Moutse 1 and 3 communities from Mpumalanga Province to Limpopo Province.
[141] *Poverty Alleviation Network* (n 7 above) paras 17–18, 49 and 59.
[142] *Merafong* (n 6 above) para 51.
[143] *Poverty Alleviation Network* (n 7 above) para 62.

In *Moutse* the community claimed that the report submitted to the PL by the Portfolio Committee did not 'fully and faithfully disclose the community's concerns', nor did it contain information concerning the relevant political history.[144] Each member of the legislature was therefore not in a position to independently come to an informed decision.[145] The Court noted that the Forum did not complain about the short notice period nor did it request more time to prepare. The hearing lasted for two hours and was attended by approximately 500 people, the minutes reflected that representations were made by organisations, including the Forum, and that the meeting only concluded after there were no more representations.[146] Despite a 'skeletal report', a unanimous Court noted that members of the PL could have requested more information or they could have been exposed to other sources of information.[147] In the absence of proof and given the PL's discretion to determine the public facilitation process, the Court concluded that there was reasonable compliance with the obligation to facilitate public involvement.[148]

Other concerns the Court has had to address in the course of adjudicating the legislative choice of process have been the potential harm of interest group capture and the impact disinterested and disengaged elected public representatives have on the quality of the public involvement process. In *Matatiele 2* the Court stressed the importance of correctly identifying the people most directly affected by the proposed legislation.[149] In *SAVA* the most directly affected group, the veterinarian profession, was excluded.[150] This was especially problematic as they could have brought a perspective that was unique to the profession from which the legislatures would have benefited.

In *Afriforum* the litigants challenged the public hearings, not in the public interest, but to 'overthrow, disrupt or circumvent' a local government policy with which they disagreed.[151] Chief

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[144] *Moutse* (n 31 above) para 68.
[145] Ibid paras 68 and 72.
[146] Ibid paras 63–7.
[147] Ibid para 75.
[148] Ibid paras 80 and 82.
[149] *Matatiele 2* (n 14 above) para 68; see also *Doctors for Life* n 6 paras 175 and 178 relating to the THP Bill, where the applicants argued that stakeholders, including the applicant and many organisations that responded to the initial call for comments, were neither adequately identified nor invited. However, note para 196. The Court did not find the respondents' actions unreasonable in the Dental Technicians Amendment Act because a limited number of technicians were involved, and the public interest was limited when the Bill was first published.
[150] *SAVA* (n 26 above) para 45.
[151] Pieterse (n 68 above) 20.

Justice Mogoeng recognised that the change in street names was an emotional issue but saw public participatory processes as an appropriate forum for engaging with controversial issues. He confirmed that the involvement process must be 'objectively genuine' and 'deliberately designed to gather as wide a diversity of views as possible' to ensure that the City is 'reasonably well-informed'. Specifically, he stated that the process should not be reduced to a 'sheer box-ticking exercise'.[152] While affirming Afriforum's right to meaningful involvement, he stressed that all other residents had the same right.[153]

LAMOSA 1 illustrates the Court's response to the NCOP and PLs' indifferent attitude to their public involvement obligations. The right to land restitution (or equitable redress) enjoys protection under s 25(7) of the Constitution. Because of the Bill's profound social, political and legal significance the Bill triggered huge public interest.[154] Lawmakers elected to hold public hearings across the country to ensure 'direct and formal input' from people directly affected by the Bill.[155] The consultation processes followed by the National Assembly were comprehensive.[156] However, many of the hearings conducted at the NCOP and PL levels could be described as being held mechanically, as a 'cynical charade' and as a 'box-ticking' exercise.[157]

A few examples demonstrate these failures. PLs, because of their proximity to the people in their provinces, were meant to reach deep into both urban and rural communities. Justice Madlanga described these as the 'nooks and crannies' of the country.[158] The Northern Cape Province held a single hearing in one of 27 municipalities. In doing so the PL effectively excluded the majority of people living in the province.[159]

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[152] *Afriforum* (n 27 above) paras 51–2.
[153] *Afriforum* (n 27 above) para 60.
[154] *LAMOSA 1* (n 20 above) para 63. The original deadline for the Restitution of Land Rights Act 22 of 1994 was the end of 1998. By then 80 000 had been filed. A Regulatory Impact Assessment undertook in 2013 indicated that an additional 397 000 valid claims were expected under the Amendment Act.
[155] *LAMOSA 1* (n 20 above) para 74.
[156] *LAMOSA 1* (n 20 above) para 13. Initiatives of the NA Portfolio Committee included advertisements on radios and in national, provincial and regional print media. The Bill was explained during a three-month public consultation tour that visited 18 locations and was attended by 14 000 people.
[157] *Doctors for Life* (n 6 above) para 244(10); *Merafong* (n 6 above) para 49; *Afriforum* (n 27 above) paras 51–2.
[158] *LAMOSA 1* (n 20 above) para 74.
[159] *Doctors for Life* (n 6 above) para 43; the Court noted that the Northern Cape is the largest province in terms of land mass, and that dirt roads and poor infrastructure make accessibility difficult for remote communities.

Tight timelines affect the reasonableness of the involvement process. The *Doctors for Life* majority acknowledged the practical relevance of time and expense but cautioned against using urgency and cost as a justification, emphasising that '[t]he timetable must be subordinate to the rights guaranteed in the Constitution, and not the rights to the timetable'.[160] In *LAMOSA 1* the only justifications for the self-imposed 'urgent' timeline set by the NCOP were the need to finalise the Bill before the end of Parliament's term and concern that the Bill would otherwise lapse. The Court described the timeline as 'inherently unreasonable' and found that the NCOP should have taken the 'magnitude of the right at issue' into account when it drew up the timeline.[161]

Tight timelines also affect how meaningful the involvement process is. At the *LAMOSA 1* hearing in Mthatha, the Bill was considered together with four other Bills and was presented after the others, with less than two hours left for consultation.[162] In Gauteng attendees were informed that no questions would be allowed and that the purpose of the hearing was to receive comments. During a hearing in Limpopo province only 15 people, of whom 10 were traditional leaders, were allowed to comment.[163]

The *LAMOSA 1* judgment further demonstrated how tight timelines made notice of hearings difficult and preparation impossible.[164] Public hearings were held in seven provinces. In Gauteng, Mpumalanga and North West only two days' notice was given. Written submissions were

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[160] *Doctors for Life* (n 6 above) paras 194 and 171–2. The hearing in the Northern Cape Province took place after the final mandate had been given to its delegation. Participants could therefore not influence the legislation, were not accorded respect for their possible contributions, and the legislature did not benefit from their input. Neither the Eastern Cape, which requested extra time, but was refused, nor KwaZulu-Natal was afforded sufficient time to organise public hearings. In the Traditional Health Practitioners Bill six of the nine provinces considered public hearings necessary but only three provinces actually held meetings; see also *Matatiele 2* (n 14 above) paras 73 and 84. Despite the significant impact of cross-border relocations, no hearings were held in KwaZulu-Natal, while the Eastern Cape attained an appropriate degree of involvement. Hearings were held in seven areas, both rural and urban, written submissions were received from individuals, municipalities, political parties and traditional leaders. The Portfolio Committee's report contained recommendations and community concerns. Further deliberations took place in the NCOP and the province.

[161] *LAMOSA 1* (n 20 above) paras 65, 67 and 70; see also *SAVA* (n 26 above) para 13. The NCOP held public hearings in seven provinces: Gauteng, Mpumalanga and the North West were given one to two days' notice, no hearings took place in the Eastern Cape or KwaZulu-Natal, and no evidence was provided to show that notice of the hearings was given in the other four provinces.

[162] *LAMOSA 1* (n 20 above) para 21. The hearing was concluded before several people could speak; see also para 23 as its relates to the Queenstown hearing; and para 30 as it relates to the Gauteng hearing where the consultation lasted three hours for the discussion of three Bills.

[163] *LAMOSA 1* (n 20 above) para 36.

[164] *LAMOSA 1* (n 20 above) para 77.

requested for the following day in one province and within three days in another. The three days included a Saturday and Sunday. Tight timelines for written submissions effectively exclude rural communities where access to emails or faxes is limited.[165]

How the Court balances the legislatures' institutional autonomy with the public's right to be involved in public affairs[166] affects the positioning of public involvement within our democracy and has consequences for disadvantaged communities. On the one hand, the Court clearly takes process seriously and intervenes when failures blatantly have an impact on socio-economic rights. Examples are the large number of patients who relied on traditional healers in *Doctors for Life*, and the many communities whose hopes and dreams were linked to land restitution in *LAMOSA 1*. On the other hand, the Court has been cautious when the impact of national or local policies extends beyond the litigating communities, as demonstrated in the relocation judgments, and in *Afriforum.*

Prafullachandra N Bagwhati, in his article on judicial activism, refers to the 'value accountability' of judges (as opposed to the electoral accountability of government) and stressed that '[t]he poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing'.[167] The Court has been reluctant to become prescriptive with regards to process. There is, however, scope for the Court to become more activist. Brian Ray suggests that courts should use individual cases to 'systematically address broader policies and initiate systemic changes in ways that more effectively enforce social rights'.[168] Applying Charles Epp's 'legalized-accountability model', he argued that Courts should use procedural enforcement to bring about institutional reforms.[169]

The Court could also play a more inquisitorial role and routinely request to be addressed on the extent to which lawmakers complied with the democratic principles of accountability,

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[165] *LAMOSA 1* (n 20 above) paras 76–9.
[166] *LAMOSA 1* (n 20 above) para 145; see also *Afriforum* (n 27 above) paras 52 and 68, where Chief Justice Mogoeng reminded courts that they are 'not meant or empowered to shoulder all the governance responsibilities of the South African State'. He also cautioned that care should be taken 'not to stultify or undermine government's ability' to perform its duties.
[167] Prafullachandra N Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia J of Transnational Law* 576.
[168] Ray (n 67 above) 274.
[169] Ray (n 67 above) 277–8.

transparency, and responsiveness, and inquire what concrete steps were taken to advance transformation.

In *Mazibuko v City of Johannesburg* the Court held that the progressive realisation of socio-economic rights 'imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised'.[170] Similarly, the majority Court in Doctors for Life espoused the view that the right to political participation is an evolving right which, in line with other human rights, is open to 'elaboration, reinterpretation and expansion'.[171] The Court stressed that this was 'particularly so for programmatic rights like the right to take part in the conduct of public affairs, which must be realised through the programs and policies of states'.[172] The Court could therefore inquire about incremental compliance in the course of its reasonableness inquiry and through judicial guidance emphasise the important link between education and incremental compliance.

Finally, the state's obligation to respect, protect and fulfil the rights in the Bill of Rights should receive more attention. The informal nature of public involvement and the need to encourage ongoing participation means that putting parity of participation at risk, puts participatory democracy at risk. Parity of participation – and its constituent elements, dignity and respect, equal access to information, and equal participation – is more extensively explored in chapter 3, but finds equal application here.[173] Favouring traditional leaders in *LAMOSA 1* and being dismissive of disrespect in *Merafong* are betrayals of the historical sacrifices and ideals that informed participatory democracy and will reduce public involvement to the mechanical exercise Justice Van der Westhuizen foresaw in *Doctors for Life*.[174]

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[170] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 67.
[171] *Doctors for Life* (n 6 above) para 97.
[172] *Doctors for Life* (n 6 above) para 97.
[173] Chapter 3 section 32.
[174] *Doctors for Life* (n 6 above) para 244(10).

5 REFLECTIONS: THE ROLE OF THE COURT

In his article on *Merafong* Bishop identifies three types of participation: traditional participation, radical participation and mutual participation.[175] He argues that public involvement is a form of traditional participation. The process is initiated and controlled by government. The aim is to educate members of the public on the proposed legislation and for legislatures to benefit from public input. Radical participation takes place outside official channels, is initiated by members of the public, and is used to exert pressure on public representatives. It comes with its own problems, as Marius Pieterse points outs, as it can be used to 'intentionally damage or destroy public goods, violate the rights of vulnerable groups or forcefully subjugate collective interests to militant minority demands'.[176] Mutual participation falls somewhere in between. Bishop describes it as 'a joint venture aimed at solving a common problem'.[177] Bishop argues that the three participatory processes fulfil different needs and present different problems. Traditional participation can be captured; radical participation can compromise the quality of participation;[178] and mutual participation is time consuming and better suited to participation at local level.

Bishop demonstrates his theory through *Merafong* and suggests that the three participatory processes were used in a variety of combinations that benefited the communities and ultimately halted their relocation.[179] Under pressure from the various participation processes, the Portfolio Committee recommended a 'focused intervention approach' to address service delivery challenges. Problems were identified and corrective steps recommended. The national government committed itself to transitional arrangements to ensure sustained and improved service delivery.[180]

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[175] Bishop (n 69 above) 358–61. He applied seven factors to guide his classification. These are: '(a) who organises participation; (b) goals; (c) relationship to representative democracy; (d) formality; (e) the role of the courts; (f) who is involved; and (g) the level of government where participation occurs'.

[176] Pieterse (n 68 above) 19.

[177] Bishop (n 69 above) 360–1. Mutual participation is similar to Gutmann and Thompson's deliberative democracy discussed in chapter 1 section 2.1.

[178] In this regard, note Pieterse's caution that public protests can be used to 'intentionally damage or destroy public goods, violate the rights of vulnerable groups or forcefully subjugate collective interests to militant minority demands'. Pieterse (n 68 above) 19.

[179] Bishop (n 69 above) 364. The Merafong communities used different institutional and extra-institutional ways strategically to attract their government's attention. They participated in public hearings, litigated, lobbied their elected representatives, boycotted local government elections and entered into sustained community protests.

[180] *Merafong* (n 6 above) para 276.

The provincial governments entered into various service-level agreements with reciprocal duties.[181] Bishop concludes that the Merafong community's experience focused the public's attention on different ways of participation and that a 'complicated "listening" democracy exists in South Africa'.[182]

As an empowerment tool public involvement has serious limitations. Participants do not know to what extent their participation impacted the legislation or contributed towards the improvement of their socio-economic well-being. Empowerment through civic education, as envisaged in the earlier public involvement judgments, has not been realised. There are well-founded concerns that the legislative branches do not value public input or understand the significance of public involvement as a democratic space. The role of the Court is limited to ensuring constitutional compliance with the public involvement sections and evaluating the reasonableness of the facilitation process. There is little scope for the Courts to enforce or protect socio-economic rights or to use its orders to empower participating members of the public. Instead of an evolving democratic space where meaningful involvement takes place; where learning and understanding is facilitated; where empowerment is advanced; where the democratic principles of accountability, transparency and responsiveness are respected; where legitimacy and acceptance are achieved; and where democracy is protected and enhanced, communities are compelled to resort to multiple strategies to be heard, of which public protests are the most destructive.[183]

Ray, with reference to the two conceptions of democracy identified by Henk Botha – a 'deep democracy' (the majority judgments in *Doctors for Life*) and a more 'formalist and election-centric' democracy (the minority judgments in *Doctors for Life*) – looks at the role of the Court under each conception. Under a deep democracy the Court defends the citizen's right to democratic participation and plays a more active role in 'policing legislative and bureaucratic decisions'. Under a more 'formalist and election-centric' democracy the Court is more deferential and only intervenes when there are clear violations of the Constitution.[184]

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[181] *Merafong* (n 6 above)paras 276–7.
[182] Bishop (n 69 above) 366.
[183] Pieterse (n 68 above) 18.
[184] Ray (n 67 above) 281–2.

It has been 14 years since *Doctors for Life* and 12 years since *Merafong*. Under the Court's watch, public involvement has dwindled from participatory democracy to an ineffective listening 'democracy'. This raises the question whether it is not time for the Court to move away from Currie's 'decisional minimalism', to play a more active role in 'policing legislative and bureaucratic decisions' and to defend the public's right to effective and meaningful involvement more actively in the laws that govern their daily existence. This would require the Court to navigate a difficult course, partly of its own making. The Court needs to promote a culture of justification and advance the transformation ideals that informed participatory democracy. The Court also needs to allow lawmakers to use their broad discretion to facilitate public involvement, while simultaneously ensuring that lawmakers progressively use public involvement to advance those same transformation ideals.

The next two chapters engage with two further democratic spaces. The meaningful engagement mechanism, as developed by the Court in eviction cases, is an example of Bishop's mutual participation. The frustration that follows when community involvement fails finds expression in radical participation, which currently dominates community–local government interaction around service delivery failures. Both chapters interrogate the Court's role in strengthening existing dispute resolution institutions, other mechanisms and democratic spaces, while encouraging good governance, protecting the rights of the public (not only those who have access to courts), and respecting government's ability to govern.[185]

[185] Pieterse (n 68 above) 12 and 14.

Chapter 3

Meaningful engagement as democratic space

1 INTRODUCTION

The racially discriminatory policies of the colonial and apartheid governments, with their ideologically based evictions and dispossessions, wreaked havoc on land ownership and land occupation for the majority of South Africans. These policies demanded constitutional redress. For unlawful occupiers, rapid urbanisation and its associated social and economic problems added further layers of distress. Constitutional redress came in the form of s 26(3) of the Constitution of the Republic of South Africa, 1996, when the people of South Africa placed evictions and the demolition of homes under the protection of courts.

With his characteristically compassionate insight, Sachs J reminded us in *Port Elizabeth Municipality v Various Occupiers* (*P E Municipality*) of the importance of a home, and the consequences to both society and the integrity of the Constitution if we do not act responsibly when the destruction of another's home is at risk.

> Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence.[1]

[1] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 17–8; see also *Molusi v Voges NO* 2016 (3) SA 370 (CC) para 46.

Pursuant to s 26(3) of the Constitution, the legislature enacted the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 91 of 1998 (the PIE Act) and in this way signalled a powerful rejection of the past.[2] Unlawful occupation is no longer governed by legislation designed to prevent illegal squatting.[3] Instead a more humane, value-based legislative framework focuses on preventing illegal evictions and regulating evictions in a fair manner by providing protection to vulnerable unlawful occupiers.[4] Under the protection of a judicial safety net, unlawful occupiers and local government officials are required to enter into a dialogue to resolve specific housing issues. A further safety net is provided for the elderly, children, disabled persons and households headed by women.

The PIE Act is constitutionally designed to be open-ended and envisages orderly land reform. Landless people cannot seize land, nor can landowners evict unlawful occupiers without a court order. Courts must consider all relevant circumstances before issuing eviction orders.[5] In finding solutions to a complex social problem the legislative protection requires co-operation between the judicial and executive branches of government. Finding an acceptable solution must involve unlawful occupiers and may involve private landowners. In the course of his judgment Justice Sachs addressed the constitutional approach to the 'interrelationship between land hunger, homelessness and respect for property rights'.[6] The Constitution allows for a 'reconceived' understanding of land ownership and land occupation that, in the context of our history, has been a source of ongoing tension. Our 'reconceived' understanding of democratic participation provides opportunities to manage this tension.

This chapter considers the intersection between the rights to housing and participatory democracy, specifically in the context of evictions. The focus is first on how the Constitutional Court developed a legislative requirement under the PIE Act to create a democratic space for meaningful engagement between local government and unlawful occupiers facing eviction, and

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[2] *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (*Jaftha*) para 29, where the Court identified s 26(3) as a 'decisive break from the past'; see also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 36.
[3] Prevention of Illegal Squatting Act 52 of 1951.
[4] *P E Municipality* (n 1 above) paras 11 and 13; see also *Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) SA 453 (CC) para 233.
[5] *P E Municipality* (n 1 above) paras 20–2.
[6] *P E Municipality* (n 1 above) para 20.

second, on how participatory democracy has been embedded in judicial engagement with relevant circumstances under the Act.

Section 3 then discusses the requirement and remedy of meaningful engagement developed and applied by the Constitutional Court in certain eviction cases by first outlining these, then discussing the Court's approach and then contemplating how meaningful engagement processes should, could, or do function in order to give effect to participatory parity. The meaningful engagement discussion concludes with a contemplation of the Court's role with regards to the doctrine of separation of powers, contextualised within the courts' broader role in socio-economic rights cases.

Section 4 similarly discusses the other judicial space in which participatory democracy has been advanced in the PIE Act context, namely relevant circumstance inquiries, where the focus is first on the courts' interpretive function, and second on the courts' engagement with relevant circumstances and the knowledge and perspectives that may be taken into account in this inquiry.

In conclusion, section 5 steps back and reflects on the jurisprudence discussed in relation to the court's role.

2 LEGISLATIVE FRAMEWORK AND SOCIAL AND HISTORICAL CONTEXT

2.1 Legislative framework

Section 26(3) of the Constitution forms part of the housing rights protected under the Bill of Rights. Section 26(1) provides for the right of everyone to have access to adequate housing, while s 26(2) comes with internal limitations. Access to housing is subject to the state taking reasonable legislative and other measures within available resources in order to achieve the progressive realisation of the right. Section 26(3) provides protection for people facing eviction:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The PIE Act was enacted with the 'manifest objective of overcoming the abuses of eviction'.[7] An unlawful occupier is defined in the Act as a person 'who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'.8 Under the PIE Act, to 'evict' someone, means 'to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will'.

Section 4 deals with the eviction of unlawful occupiers by owners (as opposed to evictions by organs of state) and provides in s 4(2) that 'the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction'. The same subsection also places an obligation on the court to consider all relevant circumstances before exercising its discretion as to whether it is just and equitable to grant the eviction order. The provision in s 4(6) prescribes what should be included as a relevant circumstance: 'the rights and needs of the elderly, children, disabled persons and households headed by women.' In terms of s 4(7), if occupation is for a period longer than six months, then, 'whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier' becomes a relevant circumstance. Once the court has exercised its discretion and has found no valid defence to the proposed eviction it must grant the eviction order. This then triggers a second discretion. The court, when determining a just and equitable date by when the eviction order may be carried out, must again in terms of s 4(9) 'have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question'. Section 5 deals with urgent eviction proceedings and also contains legislative guidelines.

In the case of evictions by an organ of state, s 6 applies. Here the just and equity enquiry by courts includes a public interest component as a relevant circumstance. The Act specifies that 'public interest' 'includes the interest of the health and safety of those occupying the land and the public in general'. Other circumstances that courts must have regard to are listed in s 6(3): '*(a)* the

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[7] *Joe Slovo* (n 43 below) para 233.

[8] In terms of this definition, a person who is an occupier under the Extension of Security of Tenure Act 62 of 1997 (ESTA) is excluded, as is a person whose informal right to land, but for the provisions of the PIE Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.

circumstances under which the unlawful occupier occupied the land and erected the building or structure; *(b)* the period the unlawful occupier and his or her family have resided on the land in question; and *(c)* the availability to the unlawful occupier of suitable alternative accommodation or land.'

Section 7 of the Act provides for mediation. If the municipality is not the owner of the property, but the property is situated within its jurisdiction, then the municipality may initiate mediation. If the municipality is the owner of the property, then mediation may be initiated by the member of the Executive Council designated by the Premier of the province concerned. This is significant because it creates an additional space for democratic participation, similar to the meaningful engagement mechanism to be discussed later in this chapter. Sections 7(1) and (2) include a provision that the parties may, by agreement, appoint another person to facilitate the mediation, but the municipality, or the member of the Executive Council, as the case may be, will determine the conditions. Section 7(3) provides that any party may request the municipality to initiate mediation in terms of s 7(1) and (2).

In this way the PIE Act sets the stage for the judiciary to acquaint itself with all relevant circumstances pertaining to individual unlawful occupiers before making a ruling, and the executive to include unlawful occupiers as parties to dispute resolution. The implementation of s 26(3) of the Constitution and the PIE Act poses new challenges to both the judiciary and the executive.

The rights protected under ss 25(9) and 26(3) require judicial interpretation, guidance and a new judicial vision.[10] Both the Constitution and the legislature tasked the judiciary with the duty to balance these conflicting rights in a manner that is constitutionally compliant, socially just and

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[9] Section 25(1) of the Constitution provides that 'no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property'.

[10] In *Baron v Claytile (Pty) Limited* 2017 (5) SA 329 (CC) (*Baron*) paras 10 and 20, Pretorius AJ, with reference to ESTA, explains that the legal principles and balance developed under the PIE Act also find application when the competing rights of landowners under s 25(1) of the Constitution and the land tenure rights of lawful occupiers of farms under ESTA are involved. See also Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50, where Ackermann J states that the 'purpose of section 25 has to be seen as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto'.

transformative. The challenges faced by the judiciary are described by Horn J in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* (*Peoples Dialogue*).

> On the one hand there is the traditional real right inherent in ownership reserving the exclusive use and protection of his property to the landowner. On the other hand there is the genuine despair of people in dire need of adequate accommodation. It is with regard to these two opposing interests that the legislature had by virtue of the provisions of the Act set about implementing a procedure which envisages the orderly and controlled removal of informal settlements. It is the duty of the court in applying the requirements of the Act to, with the wisdom of Solomon, balance these opposing interests and bring out a decision which is 'just and equitable'. … a court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment.[11]

There is an overlap between land rights and socio-economic rights. Ongoing unlawful occupation strains the implementation of government housing policies. The challenge to the executive is to comply with all its constitutional obligations.

2.2 Social and historical context

In *Government of the Republic of South Africa v Grootboom* (*Grootboom*) Justice Yacoob articulated the importance of social and historical context when interpreting rights contained in the Bill of Rights.[12] *Grootboom* dealt with the eviction of unlawful occupiers, including parents and children, from their informal homes, which they had erected on privately owned land that was earmarked for low-cost housing. The issue before the Constitutional Court was how to enforce

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11 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) (*Peoples Dialogue*) 8–9; see also *P E Municipality* (n 1 above) paras 33–5; *Baron* (n 10 above) para 35, where the Constitutional Court reaffirmed that land ownership comes with duties and responsibilities that did not attach to ownership before the Constitution came into effect.

[12] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 22 and 43; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 11; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 25; *P E Municipality* (n 1 above) paras 8–10; *Jaftha* (n 2 above) paras 26–7; *Joe Slovo* (n 4 above)) paras 163, 169, 191–7; *Blue Moonlight* (n 2 above) para 35.

socio-economic rights, given their internal limitations of reasonable legislative and other measures and progressive realisation within available resources.[13]

The Court developed a reasonableness standard against which to measure state action and found that the obligation went beyond legislative measures. To ensure constitutional compliance the measures had to be supported by policies and programmes that were reasonable in their 'conception and implementation'.[14] Justice Yacoob confirmed that all rights in the Bill of Rights were interrelated and mutually supporting, and their interpretation required two contexts: their contextual setting within the Constitution as a whole, and their social and historical context.[15]

> The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.[16]
>
> In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme.[17]

Khosa v Minister of Social Development, Mahlaule v Minister of Social Development (*Khosa*) deals with the exclusion of vulnerable permanent residents from access to social assistance and represents another example of comprehensive contextual interpretation.[18] Here the Court, in addition to the rights to dignity and the availability of human and financial resources, took the prohibition on unfair discrimination into account.[19] The Court extended access to social assistance

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[13] Sections 26(2) and 27(2) of the Constitution.
[14] *Grootboom* (n 12 above) para 42.
[15] *Grootboom* (n 12 above) paras 22–5 and 43; *P E Municipality* (n 1 above) para 36; see also the public involvement judgments *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 112 and 270; and *Matatiele Municipality v President of the Republic of South Africa 2* 2007 (1) BCLR 47 (CC) para 36.
[16] *Grootboom* (n 12 above) para 83. Human dignity is protected under s 10 of the Constitution.
[17] *Grootboom* (n 12 above) para 43.
[18] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).
[19] The right to equality enjoys protection under s 9 of the Constitution.

to permanent residents because 'the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies'.[20]

The importance of social and historical context featured prominently in the various judgments in *Daniels v Scribante* (*Daniels*).[21] *Daniels* dealt with the Court's response to an attempt at constructive eviction. The applicant enjoyed security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and wished to effect modest improvements to her residence. The improvements were basic, would be paid for by the applicant and would ensure dignified residence for her and her family. The respondents conceded that the residence was not fit for dignified occupation but refused to grant consent as required by s 6(1) of ESTA.

Five separate judgments were handed down, two of which contained extensive engagement with historical context.[22] In a forceful demonstration of judicial activism, two of the judgments raised the importance of historical context mero motu, while a third, though concurring, expressed some reservations in this regard.[23] *Daniels* delivered a strong and powerful message to private landowners, in this instance farmers, and to society as a whole. Legislation will be interpreted within its historical context. In deeply personal judgments, the Justices called on the beneficiaries of apartheid policies to acknowledge and apologise for historical harm and injustices.

> With all this background in mind, the mischief that section 25(6) of the Constitution and ESTA are seeking to address is not far to seek. Addressing that mischief is not only about securing the tenure of ESTA occupiers. It is also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes. We must adopt an interpretation that best advances this noble purpose of section 25(6) and ESTA. That purpose provides context.[24]
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> The Constitution affords us all the opportunity to attempt to develop a society where the injustice of the past can be addressed without the denial of the dignity, freedom and equal treatment of all the inhabitants of this country. It is an opportunity that we dare not ignore. However, the preamble

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[20] *Khosa* (n 18 above) paras 44 and 82; see also Ngcobo J's separate judgment para 104, where he expresses a similar sentiment about the intersectionality of the rights contained in the Bill of Rights.
[21] *Daniels v Scribante* 2017 (4) SA 341 (CC) Madlanga J paras 1 and 14–24; Froneman J paras 116–31 and 134; see also the extensive engagement by Mogoeng CJ in *City of Tshwane Municipality v Afriforum* 2016 (6) SA 279 (CC) paras 2–18.
[22] *Daniels* (n 21 above) Madlanga J paras 14–21; Froneman J paras 116–31, 134; see also Cameron J paras 146–8.
[23] *Daniels* (n 21 above) Cameron J paras 149–53.
[24] *Daniels* (n 21 above) Madlanga J para 23; also referenced is *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

> to the Constitution asks more of us before we can seize the opportunity it grants, and that is that the injustices of the past be acknowledged.[25]
>
> [T]he past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice.[26]

The tension between ss 25(1) and 26(3), exacerbated by historical and social context, exposes deep fault lines within our society. On the one hand, the Constitution aspires to 'heal divisions of the past and establish a society based on democratic values, social justice and fundamental human rights',[27] where everyone has the right to have access to adequate housing. On the other, there is the deep divide between landowners and the lived reality of unlawful occupation. The judiciary has been entrusted with the bridging of this divide and has been constitutionally and legislatively empowered. *P E Municipality* is the Constitutional Court's aspirational judgment that set the stage, though did not actually implement, a form of participatory democracy. Under judicial supervision, parties are encouraged to explore ways to solve their overlapping problems.[28] The interaction was first implemented in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*[29] (*Olivia Road*) and became known as meaningful engagement.

3 MEANINGFUL ENGAGEMENT

3.1 *P E Municipality*

The respondents in *P E Municipality* lived in shacks they had erected on privately owned land situated within the jurisdiction of the Port Elizabeth Municipality. Pursuant to a petition signed by 1 600 people in the neighbourhood where the shacks were located, a compromised municipality applied for, and was granted, an eviction order in the High Court. The SCA set the order aside. One of the concerns raised by the municipality in its appeal to the Constitutional Court was the so-

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[25] *Daniels* (n 21 above) Froneman J para 110.
[26] *Daniels* (n 21 above) Cameron J para 154.
[27] Preamble to the Constitution.
[28] Brian Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 185. This, according to Ray, turns the Constitutional Court into a forum for 'informal dispute resolution'.
[29] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

called practice of queue jumping, in terms of which unlawful occupiers occupied private land in order to demand alternative accommodation. This, they argued, caused disruption of housing programmes and resulted in preferential treatment. They therefore wanted an order from the Court to the effect that the municipality was not obliged to provide temporary alternative accommodation pursuant to an eviction order.

In the course of his judgment Sachs J explained that s 26(3) demanded 'special judicial control of a process that is both socially stressful and potentially conflictual'.[30] Courts could not address all 'systemic unfairness' in society, but could 'at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entail'.[31] Unlike the restrictions under which courts operated during the pre-democracy era, the Constitution and the PIE Act 'humanise procedures' and focus on 'fairness to all'. Courts had to recognise the vulnerability and dignity of unlawful occupiers, and their special circumstances, and balance unlawful occupation against the prevention of unlawful occupation.[32]

> Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[33]

With regards to the PIE Act Justice Sachs emphasised that the judicial discretion granted to the courts by the legislature was very broad. In fulfilling their new role courts could therefore go beyond the information presented by the parties and find ways to ascertain information needed for

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[30] *P E Municipality* (n 1 above) para 18.
[31] *P E Municipality* (n 1above) para 38.
[32] *P E Municipality* (n 1 above) paras 13, 23.
[33] *P E Municipality* (n 1 above) para 37; also quoted by Van der Westhuizen J in *Blue Moonlight* (n 2 above) para 38.

them to properly perform their function. The Court went so far as to say that courts may be obliged to obtain all information pertinent to their enquiry.[34]

The Court then turned its attention to the constitutional responsibilities of the municipality towards residents within its jurisdiction. In fulfilling their obligations municipalities could not benefit one side at the cost of the other but had to be equally accountable to both.[35] Nor may a municipality regard unlawful occupiers as 'faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances'.[36] Their constitutional duty was to treat all residents with dignity, to develop housing schemes, and when evictions became necessary, to attempt to resolve the problem before approaching the courts for an eviction order.[37] Within the context of our constitutional values a municipality may not assume 'that the greatest good for the many can be achieved at the cost of intolerable hardship for the few'. Instead, the Court indicated that a programme designed to benefit many may provide context and be a factor a court will consider in the course of its just and equitable enquiry.[38]

Unlawful occupiers, the Court stated, should not invade land nor disrupt housing programmes. They should not regard themselves as helpless victims. Instead, justice and equity demanded that the tenacity, ingenuity and resourcefulness they relied on to survive should be harnessed 'in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land'.[39] Within this context the Court developed the meaningful engagement innovation. Whenever possible parties should engage with each other respectfully and together, or through mediation, find mutually acceptable solutions.[40] The Court identified the benefits of mediation as reducing the costs of litigation, facilitating mutual give-and-take, and promoting respect for human dignity, given the sensitive context of access to housing in South Africa.

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[34] *P E Municipality* (n 1 above) para 32; Sandra Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) 278.
[35] *P E Municipality* (n 1 above) para 61.
[36] *P E Municipality* (n 1 above) para 41.
[37] *P E Municipality* (n 1 above) para 56.
[38] *P E Municipality* (n 1 above) para 29.
[39] *P E Municipality* (n 1 above) para 41.
[40] *P E Municipality* (n 1 above) para 39; see also paras 42–3 and 47.

The Court did not order meaningful engagement in the circumstances of *P E Municipality.* After conducting the just and equitable enquiry under the PIE Act, it declined to order the eviction as the unlawful occupiers had lived on the property for a long period, no evidence had been led to show that either the municipality or the owners needed the land, nor did the municipality listen to, or consider, the community's problems despite their obvious genuine despair.[41] With reference to its earlier statement that the circumstances identified in s 6, though peremptory, were not exhaustive, the Court added a further requirement. Irrespective of whether the unlawful occupation was for more or less than six months, a court, in the course of the just and equitable enquiry, will consider whether 'reasonable steps were taken to get an agreed, mediated solution'.[42] Whether meaningful engagement had reasonably been attempted was further developed by the Constitutional Court in the judgments of *Olivia Road* and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (*Joe Slovo*).[43]

3.2 Reasonable engagement: the Constitutional Court's decisions in *Olivia Road* and *Joe Slovo*

Olivia Road was an appeal against an order granted by the Supreme Court of Appeal (SCA) in *City of Johannesburg v Rand Properties (Pty) Ltd* (*Rand Properties*).[44] The City of Johannesburg applied for an eviction order on the basis that unlawful occupiers occupied buildings that were unsafe and unhealthy. The Court's unanimous judgment was authored by Yacoob J.[45] At issue was the City's constitutional obligation under s 26(3) and its relationship with s 12 of the National Building Regulations and Building Standards Act 103 of 1977. Section 12 provided for summary evictions from buildings deemed a risk to the safety of their inhabitants. No court order was required. Section 12 of the Act criminalised continued occupation.

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[41] *P E Municipality* (n 1 above) para 59; see also Ann Skelton 'Face to face: Sachs on restorative justice' (2010) 25 *SA Public Law* 94, 97–8, where she argues that Sachs J's judgment advocates restorative justice. It contains many of the key elements: an encounter through mediation, which requires mutual respect and commitment, social justice as objective and reintegration into society.

[42] *P E Municipality* (n 1 above) para 61.

[43] *Olivia Road* (n 29 above); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo*).

[44] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA).

[45] Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concurred in the judgment of Yacoob J.

The City failed to engage, either individually or collectively, with the unlawful occupiers before litigation was initiated,[46] consequently the Court, with reference to previous judgments,[47] issued an interim order in terms of which the parties were ordered to engage with each other in a meaningful way. The Court considered the agreement reached between the parties to be a reasonable response to the engagement order and approved the agreement.[48] In the final judgment the Court provided detailed guidelines on the responsibilities and obligations of the parties to the engagement.

Commentators have generally welcomed meaningful engagement as a standard and remedy as developed in *Olivia Road*, regarding it as a potentially useful space for participatory democracy. They are concerned at the Court's failure to provide guidelines for the process, which they fear could lead to unjust outcomes because of the power imbalance in the meaningful engagement space.[49]

Whether meaningful engagement had reasonably been attempted had to be considered in the course of the relevant circumstances inquiry under s 26(3) of the Constitution.[50] Engagement should commence prior to litigation unless it was 'not possible or reasonable to do so because of urgency or some other compelling reason'.[51] With reference to *Grootboom*, the Court reminded

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[46] *Olivia Road* (n 29 above) para 13.
[47] *Grootboom* (n 12 above) paras 82–3 and 87; *P E Municipality* (n 1 above) para 39.
[48] *Olivia Road* (n 29 above) paras 28–9.
[49] See Danie Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' *Stellenbosch L. Rev.* 22 (2011) 614, 635–6; Lilian Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' (2009) 2 *Constitutional Court Review* 373, 381–2, 384; Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 150–1; Sandra Liebenberg (n 34 above) 301–2; Sandra Liebenberg 'Engaging the paradoxes of the universal and particular human rights adjudication: The possibilities and pitfalls of "meaningful engagement"' (2012) 12 *African Human Rights Law Journal* 17–8: Brian Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 109, 113–14; Brian Ray (n 28 above) 249–55, 289–90, 318–19; Margot Strauss & Sandra Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13 *Planning Theory* 428, 437; Sandra Liebenberg 'Social rights and transformation in South Africa: Three frames' (2015) 31 *South African Journal on Human Rights* 468–70; Stuart Wilson & Jackie Dugard 'Constitutional jurisprudence: The first and second waves' in Malcolm Langford et al (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 46–7; Brian Ray 'Evictions, aspirations and avoidance' (2014) 5 *Constitutional Court Review* 173, 186.
[50] *Olivia* Road (n 29 above) paras 18 and 21.
[51] *Olivia* (n 29 above) para 30; See also *Lingwood* (n 168 below), where Mogagabe AJ declined to issue an eviction order because the City of Johannesburg had not been joined and no engagement had been undertaken. The court ordered the parties to engage meaningfully and endeavour to find mutually acceptable solutions.

the municipality that '[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing'.[52] If a municipality applied for an eviction order that would result in homelessness, then a court, assessing the reasonableness of the engagement process, would take that into account. The failure by the municipality to engage with the unlawful occupiers or to respond reasonably to the engagement would receive 'weighty consideration' by a court.[53] The City also reminded different departments that they could not make decisions independently of one another; the City as a whole was constitutionally responsible for both healthy buildings and access to housing.[54]

The Court placed the duty to initiate engagement firmly within the City's area of responsibility. The duty is located within the founding values of the Constitution, the Preamble, the objectives of s 152 and the obligations imposed by ss 7(2), 10 and 11 of the Bill of Rights.[55]

> In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.[56]

The judgment reiterated the importance of good faith engagement by both parties but demanded more from the City. Vulnerable occupiers may fail to understand the importance of the process and refuse to participate.

> If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.[57]

In order for the engagement to be meaningful, unlawful occupiers had to act reasonably and in good faith. The Court warned them not to display 'an intransigent attitude or nullify the

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[52] *Grootboom* (n 12 above) para 82; *Olivia Road* (n 29 above) para 17.
[53] *Olivia Road* (n 29 above) paras 18 and 21.
[54] *Olivia Road* (n 29 above) para 44.
[55] Section 152 sets out the objectives of local government; s 7(2) provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'; and s 11 affirms the right to life.
[56] *Olivia Road* (n 29 above) para 16.
[57] *Olivia Road* (n 29 above) para 15.

engagement process by making non-negotiable, unreasonable demands'. The Court encouraged unlawful occupiers to be proactive, not defensive and not to regard themselves as disempowered.[58]

Whether there was reasonable engagement was extensively discussed by various judgments in *Joe Slovo,* where the City of Cape Town wanted to relocate residents of the Joe Slovo community to Delft to implement its Breaking New Ground policy and the N2 Gateway project.[59] The residents argued that they were not unlawful occupiers, so the PIE Act did not apply; alternatively, that it was not just and equitable to evict them.[60] The Court granted the eviction order even though it was contested whether there was meaningful engagement before eviction proceedings were initiated. Following the relevant factors enquiry, the Court provided a detailed order in terms of which the City had to engage meaningfully with residents with regards to the date and manner of the relocation.[61] The order to apply meaningful engagement at the implementation stage expanded the application of the mechanism.

One of the issues raised by the *amici* in *Joe Slovo* was that there was insufficient engagement.[62] Yacoob J stated that 'the state could and should have been more alive to the human factor and that more intensive consultation could have prevented the impasse that resulted'.[63] However, he was satisfied that there was reasonable engagement 'almost all the way',[64] as was evidenced by the community's initial support for the project, and the fact that some people moved pursuant to the engagement.[65]

> It would have been ideal for the state to have engaged individually and carefully with each of the thousands of the families involved. But reasonableness involves realism and practicality. There has been reasonable engagement. The representatives of the City have reasonably engaged with

[58] *Olivia Road* (n 29 above) para 20.
[59] *Joe Slovo* (n 43 above) para 8: the relocation involved 4 386 households comprising approximately 20 000 people.
[60] Justice Yacoob concluded that they did not have consent and Justices Moseneke, Ngcobo, O'Regan and Sachs that the initial consent was subsequently revoked.
[61] *Joe Slovo* (n 43 above) para 7.11 of the Order.
[62] *Joe Slovo* (n 43 above) para 112.
[63] *Joe Slovo* (n 43 above) para 113.
[64] *Joe Slovo* (n 43 above) para 117.
[65] *Joe Slovo* (n 43 above) para 28; see also para 80 where he refers to: 'much evidence of interaction between authorised representatives of the applicants and the representatives of the City about the physical conditions of their accommodation and about the voluntary relocation of the applicants to Delft'.

> the community through its representatives during the period 2004 to the time when proceedings were instituted.[66]

Ngcobo J identified engagement as a key requirement of an implementation programme. When a large section of a community faced relocation then meaningful engagement required respectful and dignified engagement with individual residents, as well as the community. The aim was to gain a better understanding of the individual and collective needs and concerns and, where possible, to address those. It required good faith and reasonable participation by all parties and a willingness to listen and find mutually acceptable solutions. In the process, a common goal should be acknowledged – the need for government to fulfil its constitutional obligations by providing adequate housing to those in need and eradicating informal settlements.[67]

On the facts Ngcobo J found that engagement had taken place. Officials of all spheres of government had addressed the residents at various stages. Specifically, he referred to the evidence from the mayor.

> She stated that the community was informed of the plans to develop Joe Slovo to provide access to adequate housing. The community was also informed that, as Joe Slovo was densely populated, it would be impossible for all residents to be allocated houses in Joe Slovo after development. In addition, the community was informed that it would be necessary for them to move to temporary accommodation, pending the allocation of permanent houses to them. The record therefore shows that there was engagement with the residents on the project.[68]

Justice Ngcobo therefore accepted that the project had been explained to the residents.[69] For Ngcobo J, the absence of '[s]tructured and co-ordinated meaningful engagement' created mistrust and was the reason for the litigation.[70]

O'Regan J was very critical of the respondents' admission that there was no 'coherent or adequate process of consultation' with the residents and other affected parties, and described the

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[66] *Joe Slovo* (n 43 above) para 117.
[67] *Joe Slovo* (n 43 above) paras 117, 238, 244 and 261.
[68] *Joe Slovo* (n 43 above) para 246; see also O'Regan J para 286 where she referred to the meetings held to inform the residents of the N2 Gateway Project, however in para 290 she concluded that the City's consent to occupy was terminated because after the announcement of the Gateway N2 Housing Project consultations with the occupiers had taken place.
[69] *Joe Slovo* (n 43 above) para 245.
[70] *Joe Slovo* (n 43 above) para 247.

absence of a proper strategy of consultation as deplorable. However, she concluded, with reference to several public meetings and meetings with the committees representing the residents, that there was engagement, though the respondents did not 'engage fully and meaningfully with the applicants and the other communities who have an interest in the housing project'.[71] On balance, she found that this did not make the implementation of the Project unreasonable and offered several reasons for her conclusion: first, it was a pilot project involving large numbers of people; second, there was some engagement; third, thousands of other households would be affected by a further delay; and finally, the Court's order would, to some extent, remedy past failure to engage meaningfully.[72]

Sachs J, with reference to *P E Municipality* and *Olivia Road* emphasised the need for the parties themselves to find 'functional solutions' to competing needs and interests.[73] This should precede eviction proceedings. In this regard he referenced *Grootboom*.[74]

> 'Every step at every level' does not start with eviction proceedings. It begins with the initial tolerance of settlement on the land, proceeds to the devising of the Project, follows with the programme of actual implementation, and only concludes with the ultimate decision to institute eviction proceedings. The question to be asked in relation to each of these steps is: does the conduct of the Council measure up to the test of reasonableness as required by the Constitution?[75]

While he agreed that the Project was reasonable, his concern was with implementation. He was very critical of the top-down approach employed by the government. With reference to *Olivia Road*, he pointed out that the processes followed involved reporting decisions to the community rather than involving them in the decision-making process.[76] Specifically, the 'modes of consultation'[77] were often chaotic, and there was a 'failure to maintain dependable and meaningful lines of communication'.[78] Despite extensive negotiations, the engagement towards the end was inadequate.

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[71] *Joe Slovo* (n 43 above) para 301.
[72] *Joe Slovo* (n 43 above) para 302.
[73] *Joe Slovo* (n 43 above) para 338.
[74] *Grootboom* (n 12 above) paras 82–3.
[75] *Joe Slovo* (n 43 above) para 353.
[76] *Olivia Road* (n 29 above) paras 17, 18 and 20; *Joe Slovo* (n 43 above) para 378.
[77] *Joe Slovo* (n 43 above) para 379.
[78] *Joe Slovo* (n 43 above) para 380.

Importantly, Justice Sachs referred to the heightened responsibility of the City as landowner with constitutional responsibilities.

> [i]n the present matter the Council was not just another landowner entitled to do what it pleased with the land, subject only to normal regulatory controls and, in relation to eviction, to the provisions of PIE. On the contrary, the Council was a landowner of a special type, obliged to use the land for purposes designated by the Constitution and the Housing Act. It owed a duty to the homeless who could not be treated simply as strangers waiting at the gate for charitable assistance. They had rights to adequate housing, and the state was obliged to take reasonable measures to enable them to realise these rights. It follows that in dealing with the rights of the homeless within its boundaries, the Council was called upon to act in a manner that in constitutional terms would be regarded as reasonable.[79]

Justice Sachs compared the future benefits to residents against the inconveniences involved in relocations, many of which the Court would mitigate through its order.[80] He balanced the demands of the community against the obligation on the state to fulfil its constitutional obligations and pointed out that 'the means used were not so disproportionately out of kilter with the goals of the meritorious Project as to require a court to declare them to be beyond the pale of reasonableness'.[81] In this way he protected democratic processes against demands of disaffected communities and echoed the approach adopted by the Court in the public involvement cases.

In conclusion, Sachs J restated, with reference to *Grootboom, P E Municipality*, and *Olivia Road*, the respective duties and responsibilities of the judiciary, the local authority and the unlawful occupiers in the engagement process.[82] The Courts should consider all relevant circumstances and 'give a full hearing to the occupiers' and in this way 'an administrative decision based on the discretion of the officials concerned would be converted into a judicial decision'.[83] Municipalities, when engaging, should not regard unlawful occupiers as 'faceless and anonymous squatters' or 'obstinate and obnoxious social nuisances' but should perform their duties in a

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[79] *Joe Slovo* (n 43 above) para 344; see also paras 347–8.
[80] *Joe Slovo* (n 43 above) para 384.
[81] *Joe Slovo* (n 43 above) para 381.
[82] *Grootboom* (n 12 above) para 83; *P E Municipality* (n 1 above) paras 41 and 56; *Olivia Road* (n 29 above) paras 14–16.
[83] *Joe Slovo* (n 43 above) para 393.

respectful manner with insight and humanity, treating everyone as 'an individual bearer of rights entitled to respect for his or her dignity.[84] Unlawful occupiers should not regard themselves as helpless victims but should be proactive, show resourcefulness, refrain from making non-negotiable and unreasonable demands, and enter into the engagement with reasonable and good faith intent.[85] For Ray, the meaningful engagement mechanism empowers courts to 'reject unconstitutional outcomes on procedural grounds and then influence the subsequent party directed process for resolving the dispute'.[86]

Some authors are critical of the *Joe Slovo* Court's approach to meaningful engagement, feeling that it let the City off the hook too easily, and too easily accepted the City's version of events, by stepping back from the substantive notion of meaningful engagement in *Olivia Road* to merely paying lip-service to meaningful engagement.[87] This criticism is similar to the criticism the Court received for the shift in its approach in the public involvement cases, discussed in chapter 2, where the majority Court's approach in *Doctors for Life International v Speaker of the National Assembly* (*Doctors for Life*) shifted in *Merafong Demarcation Forum v President of the Republic of South Africa* (*Merafong*) towards the minority's approach in *Doctors for Life,* as articulated by Van der Westhuizen J.[88] The shift is perhaps more subtle here.

3.3 Meaningful engagement, democracy and participatory parity

In the penultimate paragraph of his judgment in *Joe Slovo* Sachs J reminded us what it means to live in a constitutional democracy. Government is responsible for providing the people of South Africa with the benefits promised under the Constitution, and citizens, in addition to exercising their right to vote, are expected to contribute towards the realisation of their constitutional entitlements in an active, participatory and responsible manner.[89] Meaningful engagement is one such participatory mechanism. It gives voice to a particularly vulnerable group of citizens and

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[84] *Joe Slovo* (n 43 above) para 406.
[85] *Joe Slovo* (n 43 above) para 407.
[86] Brian Ray (n 28 above) 23.
[87] See Chenwi (n 49 above) 382; Liebenberg (n 34 above) 308–10; Liebenberg (n 49 above) 22–3, 25; McLean (n 49 above) 159; Strauss & Liebenberg (n 49 above) 440–3.
[88] *Doctors for Life* (n 15 above); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).
[89] *Joe Slovo* n 4 para 408.

allows them direct access to their local authority, under judicial supervision. Public involvement in lawmaking, discussed in chapter 2, is another, provided members of the public respond to the invitations issued by lawmakers. In *Mazibuko v City of Johannesburg* (*Mazibuko*),[90] O'Regan J characterised socio-economic rights litigation as a form of participatory democracy. Under judicial supervision, litigants can demand detailed accounting from government in between elections on specific policy decisions and they can have an impact on policymaking. Ongoing litigation requires government to regularly revise its policies and fulfil its obligation to progressively realise socio-economic rights.[91] In this way transparency, accountability and responsiveness are enhanced and our democracy deepened.

The relevant circumstance enquiries are legislatively stipulated and provide a further democratic space. The enquiries enable courts to engage the executive branch in inter-institutional dialogue and exact detailed accounting. It also provides an opportunity for unlawful occupiers to engage with their local authority on their housing needs. This is discussed below. Here the focus is on the democratic credibility of meaningful engagement. Democratic credibility depends on whether participatory parity, the concept developed by Nancy Fraser, has been achieved.[92]

In South Africa participatory parity is underwritten by a cluster of constitutional provisions and constitutional obligations. Constitutional rights include the rights to dignity, to access to information and to access to courts. Constitutional obligations include the obligation of all organs of state to be accountable, responsive and transparent, to fulfil constitutional obligations and to assist courts.[93] Fraser's parity of participation requires that unlawful occupiers are treated with dignity and respect, have equal access to relevant information and are granted equal participation

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[90] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).
[91] *Mazibuko* (n 90 above) paras 71, 96 and 160–3. *Mazibuko* dealt with the right to have access to water in terms of s 27(1)*(b)* of the Constitution. Specifically, the judgment addressed the City's water policy as it relates to free access and the installation of prepaid water meters. See also PN Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia J of Transnational Law* 561, 577, who described public interest litigation as 'one of the most powerful weapons invented by the Court for the purpose of delivering distributive justice to disadvantaged groups of people'.
[92] Nancy Fraser 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Fraser & A Honneth *Redistribution or Recognition? A Political–Philosophical Exchange* (2003) 31–2, 36 and 49.
[93] Sections 10, 32, 38, 41(1), 152(1)*(a)* and *(e)*, and 165(4) of the Constitution.

in pursuit of 'functional solutions'.[94] Through their meaningful engagement orders courts go some way in countering disparities when they arise.

(a) Participatory parity: Dignity and respect

Dignity relates to how people live, and whether they have access to health care, education, employment and involvement in public life.[95] It is an essential component of the participatory parity enquiry and has special significance within the context of our history. It acknowledges peoples' right to be involved in decisions that affect their lives. Liebenberg described it as follows.

> A major factor contributing to a sense of powerlessness and lack of autonomy is the absence of the opportunity to voice our concerns in relation to decisions which have a major impact on our lives. Meaningful participation in decisions that affect our lives affirms the close relationship between freedom and human dignity … It not only gives people a sense of control over their lives, but it affirms their equal worth as members of a political society … Participation in public and private processes of decision-making is not only an affirmation of individual dignity and freedom, but gives substance to a participatory and deliberative concept of democracy. This is the best reading of the value of accountable, responsive and open democracy in the Constitution.[96]

In *Grootboom* the Court confirmed that respect for the inherent dignity of human beings was 'fundamental to an evaluation of the reasonableness of state action'.[97] The interconnectedness of rights in the Bill of Rights was reaffirmed in subsequent judgments. In their submissions the *amici* in *Joe Slovo* argued that the 'right to have a say in decisions affecting one's constitutional rights is fundamental to the affirmation of one's dignity as a human being'.[98] Ngcobo J agreed, saying

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[94] *Joe Slovo* (n 43 above) para 338.
[95] Albie Sachs *Advancing Human Rights in South Africa* (1992) 114.
[96] Liebenberg (n 34 above) 167–8.
[97] *Grootboom* (n 12 above) para 83; see also *P E Municipality* (n 1 above) para 56; *Jaftha* (n 2 above) para 21; *Olivia Road* (n 29 above) paras 14–16; *Joe Slovo* (n 43 above) paras 65, 238; 261; and 406: 'Justice and equity require that everyone be treated as an individual bearer of rights entitled to respect for his or her dignity'; Albie Sachs *The Strange Alchemy of Life and Law* (2009) 203, where Justice Sachs listed human dignity, along with proportionality, as the constitutional elements he would take – if allowed only two – if he were stranded on a desert island; *Blue Moonlight* (n 2 above) para 84; *Pheko v Ehurhuleni Metropolitan Municipality (1)* 2012 (2) SA 598 (CC) para 44, where the Court found that 'the rushed destruction of the applicants' homes by the "Red-Ants" at the instance of the Municipality not only infringed their right under section 26(3) but also their right under section 10'; disrespect was also manifested in the applicants' attitude in *Peoples Dialogue* (n 11 above) 16–17 'that the respondents should return to where they came from'; and in *Schubart Park Residents' Association v City of Tshwane Metrpolitan Municipality* 2013 (1) SA 323 (CC) para 50, where the Court indicated that the City regarded the residents as 'obnoxious social nuisances'.
[98] *Joe Slovo* (n 43 above) *amici* submissions para 2.

that the requirement of engagement itself 'flows from the need to treat residents with respect and care for their dignity'.[99] Moseneke J regarded the City's failure to engage meaningfully with residents before it initiated eviction proceedings as both discourteous and disrespectful.[100] For Sachs J the individualisation of the relocation process was evidence that the occupiers' dignity was being respected.[101]

> The authorities responsible for housing must have a wide discretion in respect of how they should best manage programmes that are eminently reasonable in their objectives. At the same time, they must deal with the people most affected in a fair manner that invites their participation and respects their dignity.[102]

In *Mnisi v City of Johannesburg* (*Mnisi*), Berger AJ pointed out that the dignity requirement was one of substance, not form, and directly affected the legitimacy of an agreement.

> Above all, the respondent must realise that the need to consult with those affected by its decisions is not a formalistic requirement. Rather, genuine consultation respects the dignity of those consulted and ensures that any agreement reached as a result will sustain itself because of its legitimacy.[103]

Even the way in which unlawful occupiers are labelled speaks to whether their dignity is respected, and this has been raised by Justices of the Constitutional Court.[104] In *Joe Slovo* O'Regan J criticised the PIE Act for labelling people who have nowhere else to go as 'un lawful occupiers' .In *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* (*Schubart Park*), the Court held that the right to be treated as equals in the engagement process arose directly

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[99] *Joe Slovo* (n 43 above) para 238.
[100] *Joe Slovo* (n 43 above) para 167.
[101] *Joe Slovo* (n 43 above) para 399; see also Sandra Liebenberg (n 34 above) 276, where she pointed out that this 'individualised assessment' of actual needs is essential 'if socio-economic rights are to fulfil their role as a meaningful human rights guarantee'.
[102] *Joe Slovo* (n 43 above) para 403.
[103] *Mnisi v City of Johannesburg* [2009] ZAGPJHC 55 para 31. The residents of Protea South were facing eviction and sought to uphold their rights to adequate housing and basic services.
[104] *Joe Slovo* (n 43 above) para 291; see also *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC) (*Skurweplaas*) para 3, where Yacoob J criticised PPC Quarries for labelling people as 'unknown people who intend invading' land'; a similar description received Yacoob J's ire in *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 (2) SA 337 (CC) (*Mooiplaats*) para 4.

from the occupiers' inherent right to dignity.[105] In *Daniels* the Court linked security of tenure under ESTA to the right to dignity.

> An indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity. Though said in relation to the right to life, the words of O'Regan J are apt: 'without dignity, human life is substantially diminished'.[106]

The first part of an enquiry into the democratic credibility of a meaningful engagement therefore entails an assessment of the way in which the unlawful occupiers were treated throughout the entire engagement process, not only by the local authority but also by the courts. The *Olivia Road* Court's order required affidavits from both parties to the engagement process.[107] This evidenced a respectful acknowledgement of the applicants' perspective and experience of the engagement process.

(b) Participatory parity: Equal access to information

The second part of the democratic credibility enquiry requires an assessment of the extent to which unlawful occupiers were entrusted with relevant information before the actual engagement. Access to information is crucial for the engagement to be meaningful and credible. Its importance was also stressed in *Doctors for Life*.[108] It encourages a culture of justification, as the local authority is required to justify in advance its decision to evict rather than upgrade. It is empowering and speaks to equality of respect and equality of opportunity.

In both *Olivia Road* and *Joe Slovo* the Court indicated what kind of information needed to be provided by the local authority.

> (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the

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[105] *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) para 49.
[106] *Daniels* (n 21 above) para 2, quoting from *S v Makwanyane* 1995 (3) SA 391 (CC) paras 327 and 328; *Daniels* para 31, 34.
[107] *Olivia Road* (n 29 above) paras 5.3 and 21–2.
[108] *Doctors for Life* (n 15 above) paras 131–2 and 221.

occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations.[109]

While the information required is case specific, the primary objective is to provide residents with relevant information and to assist a judge in the just and equitable enquiries. Berger AJ's judgment in *Mnisi* demonstrated the effect that uncaring and disrespectful bureaucrats have on the engagement process and the challenges this poses for unlawful occupiers. The unlawful occupiers, through their attorney, made frequent attempts to enter into 'open and proper' consultations with the City of Johannesburg. Instead, they had to deal with what Berger AJ described as 'a disturbing pattern of official indifference', shameful conduct,[110] and 'a wild goose chase, from official to official, without anyone engaging meaningfully with the real and legitimate concerns of the residents'.[111] Berger AJ stipulated the nature of the information required and emphasised the importance of a 'community approved strategy'.[112]

Olivia Road required that engagement should commence prior to litigation. Unlawful occupiers who were not given access to relevant information, were not properly organised or resourced, and who had to deal with indifferent officials enter into the engagement at an immediate and fatal disadvantage,[113] especially as the court's oversight role comes into play only when the agreement is presented for approval.

(c) Participatory parity: Equal participation

The last element of participatory parity is equal participation. This requires responsiveness and transparency from local authorities. Wilson and Dugard pointed out that a community needs to be aware of what they can reasonably expect from the engagement, otherwise the perception may arise that the outcome was predetermined. Communities need to be confident that their actual

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[109] *Olivia Road* (n 29 above) para 14; *Joe Slovo* (n 43 above) para 242.
[110] *Mnisi* (n 103 above) para 23.
[111] *Mnisi* (n 103 above) para 24.
[112] *Mnisi* (n 103 above) para 30; see also para 47. The information required included copies of the plans (past and present) relating to the proposed development of both Protea South and Doornkop/Greenfields; the identification of areas earmarked for development; information about available parcels of land and other information relevant to the development of low-income housing.
[113] *Olivia Road* (n 29 above) para 30; see also Wilson & Dugard (n 49 above) para 3.1 They emphasised the importance of unlawful occupiers being well-informed, well-organised and well-resourced and the need for local authorities to be sympathetic, respectful and act in good faith.

needs were considered.[114] According to Moseneke DCJ in *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* (*Abahlali)*, this requires 'proper engagement', which includes 'taking into proper consideration the wishes of the people who are to be evicted'.[115] This concern was also raised in *Merafong,* as discussed in chapter 2. The negotiating mandate was the product of an extensive public involvement process, but the mandate was changed without reverting to the community. This reinforced the community's perception that the outcome was predetermined.

Equal participation is also threatened when authorities approach the engagement 'from a "top-down" premise'. In *Schubart Park* the residents were removed from their residences during an emergency. They applied to the Court for restoration of occupation. The Court found the City of Tshwane's approach to engagement incompatible with the values of transparency and responsiveness. The City's attitude was that it would 'determine when, for how long and ultimately whether at all, the applicants may return to Schubart Park'.[116]

In *Joe Slovo* Ngcobo J distinguished between an agreement and mutual understanding and accommodation of each other's concerns. Ngcobo J confirmed that the ultimate decision was the government's responsibility but stressed that the decision could only be made after the engagement process had been concluded and the government was fully informed.[117] In *Merafong* Justice Van der Westhuizen concluded that the hearings were held in good faith, that the provincial legislature was sufficiently well informed, and that further hearings were unlikely to change entrenched positions.[118]

To redress the power imbalance in the engagement process the *Olivia Road* Court suggested that supporting civil society organisations should facilitate the engagement process.[119] This does not take into account the funding and availability problems that are faced by many civil society organisations. Nor does it assist unlawful occupiers who may be unaware that civil society

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[114] Wilson & Dugard (n 49 above).
[115] *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) para 114; see also *Joe Slovo* (n 43 above) para 393 'give a full hearing to the occupiers'.
[116] *Schubart Park* (n 105 above) para 50.
[117] *Joe Slovo* (n 43 above) para 244.
[118] *Merafong* (n 88 above) paras 49 and 59.
[119] *Olivia Road* (n 29 above) para 20.

assistance is available. The option in the *Mnisi* order that the occupiers could have access to legal representation,[120] though helpful and respectful, does not cater for an engagement process that precedes litigation, or a community so disempowered and poor that it does not consider legal assistance an option. The courts have stipulated that whether engagement had been attempted is a relevant circumstance. Unlawful occupiers would be further empowered if there were another judicially stipulated factor: that they have been made aware of, or referred to, appropriate legal representatives before the engagement.[121]

(d) Meaningful engagement orders

Courts use their remedial function to guide other branches on the 'intricacies of implementation'.[122] Pieterse argues that where dispute resolution through deliberative democracy processes are ordered, as in the case of meaningful engagement, occupiers are given direct voice and therefore direct participation in a political forum. In this sense judicial review gives both expression to and implementation of the will of the people.[123] The following judgments illustrate this and expand on some of the problems courts have had to address.

In *Rand Properties* Harms ADP granted the eviction order but instructed the City of Johannesburg to provide occupiers in need of temporary housing with housing that had to comply with specified minimum standards. The City was ordered to compile a register, assisted by the occupiers' attorneys, of the occupiers who qualified for assistance. If requested, the City had to consult on the location of alternative accommodation.[124] In the subsequent appeal in *Olivia Road*, the parties were ordered to engage meaningfully in an effort to resolve their differences 'in the light of the values of the Constitution, the constitutional and statutory duties of the municipality

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[120] *Mnisi* (n 103 above) para 47.2.

[121] In this regard see the discussion in *Occuipiers of Erven 87 and 88 Berea v De Wet NO* 2017 (5) SA 346 (CC) paras 47, 49 and 50; see further *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) (*Changing Tides*) para 48. In *Changing Tides*, the SCA suggested that courts could issue a rule *nisi* and note explaining to unlawful occupiers their right to temporary emergency accommodation and an invitation to attend the hearing and express their views. In *Berea*, with reference to *Changing Tides*, the Court suggested that courts should explain to unlawful occupiers their right to apply to legal aid and direct them to a legal aid clinic.

[122] Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 414.

[123] Ibid 392.

[124] *Rand Properties* (n 44 above) paras 78(c) 21.1–3.

and the rights and duties of the citizens concerned'.[125] The subsequent agreement made provision for interim measures to render both properties 'safer and more habitable'; these included installing chemical toilets and fire extinguishers, and closing a lift shaft.[126] The agreement also made provision for the removal of the occupiers to alternative buildings and specified the nature and standard of the accommodation and the rent payable.[127]

In *Joe Slovo*, the parties were ordered to engage meaningfully on the date, timetable and other relevant issues relating to the relocation of the community. In addition, individual engagements were ordered in respect of each relocation. The order provided for alternative accommodation in the form of temporary relocation units (TRUs) that had to comply with detailed specifications. The order further provided for the allocation of 70 per cent of the *Breaking New Ground* houses to current and former residents of Joe Slovo.[128] Ray argued that the detailed specifications in the *Joe Slovo* judgment created a de facto precedent. It established the constitutional right to negotiate on the relocation process, and the detailed specifications created a potential model for lower courts.[129]

The various judgments in *Pheko v Ekurhuleni Metropolitan Municipality* illustrate a problem that local governments and courts face in the engagement process. Communities, both large and small, do not always speak with one voice or have the same demands.[130] In *Pheko1* the demolition and relocation of the Bapsfontein Informal Settlement Community was declared unlawful, and the municipality was ordered to make alternative land available in the area from where the occupiers were removed. The order made provision for meaningful engagement to identify the land and the applicants were granted an opportunity to respond to the report the municipality had to compile.[131] However, in *Pheko v Ekurhuleni Metropolitan Municipality 2* (*Pheko 2*), the Bapsfontein

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[125] *Olivia Road* (n 29 above) para 5.1.
[126] *Olivia Road* (n 29 above) para 25.
[127] *Olivia Road* (n 29 above) paras 25–7.
[128] *Joe Slovo* (n 43 above) paras 7, 30 and 37. Two years later the order was discharged, save for the cost order, because there was no longer any intention to relocate the residents, the timetable had become irrelevant, there was little to no engagement and the original orders contained in paras 5–20 of the original judgment became meaningless. The Court listed exceptional circumstances to justify the discharge.
[129] Brian Ray (n 49 above) 186–7.
[130] *Pheko v Ekurhuleni Metropolitan Municipality (1)* 2012 (2) SA 598 (CC) (*Pheko 1*); *Pheko v Ekurhuleni Metropolitan Municipality (2)* 2015 (5) SA 600 (CC); *Pheko v Ekurhuleni Metropolitan Municipality (3)* 2016 (10) BCLR 1308 (CC).
[131] *Pheko 1* (n 130 above) paras 53.5–9.

Community had divided into two groups, the N12 Community and the Mayfield Community. The former was satisfied with the engagement and identified land, whereas the latter was unhappy with both and in addition demanded permanent housing with running water and sewerage.[132] In the end, the structural interdict in *Pheko 1* was discharged in *Pheko v Ekurhuleni Metropolitan Municipality 3* (*Pheko 3*) and the matter referred back to the High Court for oral evidence and consideration of technical reports. The order made provision for dealing with the demands of the two communities separately.[133]

Meaningful engagement, though a democratic space, is not a formal space where equality of voice is guaranteed through a ballot. There is therefore the potential of interest group capture. In two public involvement judgments, *Merafong* and *City of Tshwane Metropolitan Municipality v Afriforum* (*Afriforum*), the Court had to deal with the disruption and implications for the broader communities, when participation opportunities were captured by interest groups.[134] In *Joe Slovo* the Court also had to take cognisance of the potential of interest group capture and to disallow litigants intent on scuppering the broader participatory process.[135]

The problems associated with engagement with large communities were raised in both *Joe Slovo* and *Olivia Road*. In *Olivia Road* the Court suggested that ad hoc engagement may be appropriate for small communities but where large communities were involved 'structured, consistent and careful engagement' was required.[136] In *Joe Slovo* the Court suggested that realism and practicalities should be taken into account and that community representatives may be used.[137] This raises the issue of how representative the representatives are. The very informal nature of the engagement process, the vulnerability of the occupiers, and the court's broad supervisory powers demands that the court should at least enquire into the mandates of the representatives. Alternatively, when communities do not have representatives, the court should follow the approach

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[132] *Pheko 2* (n 130 above) para 8.
[133] *Pheko 3* (n 130 above) para 3 of the Order.
[134] *Merafong* (n 88 above) para 50; *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) para 60.
[135] Marius Pieterse, 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court (2018) 51(1) *VRU* 27 and 30–1.
[136] *Olivia* Road (n 29 above) para 19. Evidence before the Court indicated that as many as 67 000 people lived in Johannesburg inner city in buildings that were similarly unsafe and unhealthy.
[137] *Joe Slovo* (n 43 above) para 117.

recommended in *Changing Tides* and *Occupiers of Erven 87 and 88 Berea v De Wet NO* (*Berea*).[138]

Where the implementation of large-scale government projects is concerned, the Court is more cautious. In *Joe Slovo* the Court looked at the government's attempts to address housing shortages and, in *Mazibuko*, water services. Provided the government's actions are reasonable the Court's approach has been that the necessary trade-offs implied in these processes were best achieved through participatory processes.[139] However, neither judgment provided any guidelines that would both protect and empower occupiers in the negotiation.

P E Municipality's aspirational requirement that courts should establish whether 'serious negotiations had taken place with equality of voice for all concerned'[140] remains elusive. It is regrettable that neither *P E Municipality* nor subsequent judgments provided guidance on how equality of voice should be achieved or what would constitute equality of voice. Although courts insist on case-specific solutions, more detailed guidance in their orders may enhance the potential for precedent-setting guidelines. As an instrument for transformation, meaningful engagement can play a major role in empowering a very vulnerable section of society, and simultaneously educate local authorities on their constitutional obligations. Its democratic credibility ultimately depends on how courts evaluate the engagement process, manage the power imbalance and, most importantly, whether communities accept the integrity of the process.

3.4 The judicial role in meaningful engagement/socio-economic rights cases

Etienne Mureinik argues that the purpose of the Bill of Rights is to provide courts with a powerful guide and the responsibility to use the guide 'properly' and 'make it a potent weapon for bringing about democracy'.[141] Evictions significantly affect the socio-economic rights of unlawful occupiers. In the course of the engagement, local authorities are constitutionally obliged to act reasonably in their interaction with unlawful occupiers. Meaningful engagement as democratic

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[138] *Occupiers of Erven 87 and 88 Berea v De Wet NO* 2017 (5) SA 346.
[139] *Joe Slovo* (n 43 above) paras 113, 117, 238 and 244; *Mazibuko* (n 90 above) para 167; see also Pieterse (n 135 above) 26.
[140] *P E Municipality* (n 1 above) para 30.
[141] Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31, 48.

space, when used effectively, can contribute towards deepening of our democracy. The relevant circumstances inquiries were introduced in the PIE Act but were expanded by the Court in the course of developing the meaningful engagement mechanism. Courts, in adjudicating constitutional compliance with socio-economic rights, in assessing appropriate public involvement processes, and in conducting relevant circumstance enquiries encroach on the terrain of the other two branches of government. This has raised separation of powers concerns. This section engages with how the Court has addressed the concern in socio-economic cases.

In *Certification of the Constitution of the Republic of South Africa, 1996* the Court held that both socio-economic and civil and political rights have budgetary implications. Though the enforcement of socio-economic rights does not breach the separation of powers doctrine,[142] the Court has to maintain a very delicate balance which is informed 'both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest'.[143]

The Court first addressed the implication of the doctrine for socio-economic rights in *Soobramoney v Minister of Health (KwaZulu-Natal)* (*Soobramoney*). The discussion is relevant because the socio-economic rights of unlawful occupiers are implicated in eviction cases, as demonstrated in *Olivia Road* and *Joe Slovo.* In *Soobramoney* the applicant suffered from chronic renal and kidney failure, an irreversible condition. He did not qualify for a kidney transplant because of underlying conditions. He was refused regular renal dialysis based on budgetary and policy constraints. The applicant brought an application in terms of ss 27(3) and 11 of the Constitution to oblige the respondent to provide him with medical care.[144] Chaskalson P pointed out the difficult choices health departments have to make, at both political and functional levels, when setting priorities and held that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal

[142] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 77.
[143] *De Lange v Smuts NO* 1998 (3) SA 785 para 60, where Ackermann J refers to our distinctly South African separation of powers doctrine.
[144] *Soobramoney* (n 12 above) paras 1–7.

with such matters'.[145] Sachs J, in his separate judgment, expressed similar restraint: 'Courts are not the proper place to resolve the agonising personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious.'[146]

In *Grootboom* the Court was equally cautious: 'A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.'[147]

The first real test for our distinctly South African separation of powers doctrine, as it relates to socio-economic rights enforcement, came before the Court in *Minister of Health v Treatment Action Campaign 2* (*TAC 2*). The case concerned the government's health policy. The antiretroviral drug, Nevirapine, which prevents mother-to-child transmission of HIV, was restricted to two research sites per province (one rural and one urban), irrespective of whether the drug was medically indicated for other patients. At issue was whether the policy was reasonable and comprehensive enough to prevent mother-to-child transmission of HIV. Based on the separation of powers doctrine, the government argued that the Court could not make a mandatory order that would have the effect of ordering government to pursue a particular policy. After stating that there were 'no bright lines that separate the roles of the legislature, the executive and the courts from one another', that certain matters were 'pre-eminently within the domain of one or other of the arms of government' and that sensitivity and respect were required by all three branches,[148] the Court firmly set out its position.

> The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should

[145] *Soobramoney* (n 12 above) para 29.
[146] *Soobramoney* (n 12 above) para 58.
[147] *Grootboom* (n 12 above) para 41.
[148] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 98.

> hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[149]

With reference to previous judgments,[150] the Court pointed out that simple declaratory orders can also have policy and budgetary consequences. With reference to s 38 and 172(1)*(b)* of the Constitution, the Court stated: 'What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation'.[151] The Court issued a detailed order that specified that government was not precluded from adapting its policy to ensure constitutional compliance, provided it was equally appropriate or better.[152]

In *Mazibuko* O'Regan J explained the three ways in which courts would enforce socio-economic rights.

> If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom,* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No* 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.[153]

In his article on an appropriate separation of powers doctrine for South Africa, Sandile Ngcobo describes the interaction between the judiciary and the other two branches of government as a 'constitutional dialogue'. This is required by their shared obligation to uphold the Constitution.[154]

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[149] *TAC 2* (n 148 above) para 99.
[150] *Premier, Mpumalanga, v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *August v Electoral Commission* 1999 (3) SA 1 (CC).
[151] *TAC 2* (n 148 above) para 11. In *Joe Slovo* (n 43 above), Ngcobo J para 253 and O'Regan J para 295, the Court reiterated that it would be 'slow to interfere in the legitimate policy choices made by government'; see also Sachs J para 366. See *Doctors for Life* (n 15 above) para 200, where Ngcobo J confirmed that the doctrine could not be used 'to avoid the obligation of a court to prevent the violation of the Constitution'.
[152] *TAC 2* (n 148 above) paras 135 and 114.
[153] *Mazibuko* (n 90 above) para 67.
[154] Sandile Ngcobo 'South Africa's transformative Constitution: Towards an appropriate doctrine of separation of powers' (2011) 22 *Stellenbosch L. Rev.* 37, 48.

In this context, meaningful engagement makes an innovative contribution to the separation of powers dilemma. By demanding meaningful engagement before litigation is initiated, alternatively pursuant to a court order, the executive branch and unlawful occupiers are encouraged to solve the problem through democratic participation. The judicial branch only becomes involved once an agreement has been reached, or, if no agreement is reached, when conducting the reasonableness enquiry. A second inter-institutional dialogue follows when both branches, in terms of their respective constitutional obligations, seek an effective solution to a challenging social issue.

As is discussed in chapter 2, though within a different context, there comes a point in the socio-economic rights/meaningful engagement dialogue when the Court seems to step back and allow democratically elected representatives to govern. The Court looked at the government's attempts to address housing shortages in *Joe Slovo*, and water services in *Mazibuko*, and concluded that the necessary trade-offs implied in these processes were best achieved through participatory processes.[155] As both judgments demonstrate, the Court will not block government projects if the engagement has been reasonable.

4 RELEVANT CIRCUMSTANCE ENQUIRIES

During the engagement process local authorities and unlawful occupiers search for solutions to intractable problems. With the relevant circumstance enquiries under s 4(6) and (9) of the PIE Act, the focus shifts to the courts. The enquiries give rise to two dialogues, a constitutional dialogue between courts and local authorities to ensure constitutional compliance, and a dialogue between local authorities, unlawful occupiers and the courts relating to relevant circumstances. The inquiries create an opportunity for courts, within a democratic space, to use their remedial function as an avenue for judicial activism. The rest of the section engages with the court's interpretive function, as well as various orders pertinent to the relevant circumstances enquiries.

[155] Pieterse (n 135 above) 30–1.

4.1 The courts' interpretive function

Through their declaratory orders, structural interdicts and supervisory jurisdiction, courts educate local authorities. Pieterse describes this function as the Court's interpretive task and suggests that it should ideally be viewed 'as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive'.[156] Here, as Bhagwati points out, courts are not acting as a parallel government, but are enforcing the occupiers' rights and ensuring that government fulfils its constitutional obligations.[157] The discussion that follows refers to a broad range of judgments where courts used their interpretive function to educate local authorities on their constitutional obligations.

Local authorities have used various tactics to avoid complying with their constitutional responsibilities and courts are frequently called upon to remind local authorities that evictions occur within a social context with complex socio-economic implications of which they are obliged to take cognisance.[158] They are further obliged to act in accordance with the 'spirit and purpose' of constitutional values[159] and comply with constitutional duties. The failure by local authorities to comply has a harmful effect on unlawful occupiers. Instead of participating in a safe enabling environment, occupiers are confronted with hostile officialdom that erodes their constitutional rights and their trust in the state. Examples of avoidance include 'passing the buck'; offering waiting lists as compliance; refusing to co-operate; denying occupiers temporary alternative accommodation when evictions occur at the instance of private landowners; resorting to legislation that does not require court orders; and deferring responsibility to other levels of government within the co-operative government structure. These are illustrated in the discussion that follows.

In *City of Cape Town v Rudolph* (*Rudolph*), the City, in an attempt to circumvent its obligations, placed the names of unlawful occupiers who were living under intolerable conditions

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[156] Pieterse (n 122 above) 406.
[157] Bhagwati (n 91 above) 576. Note that chapter 4 deals with communities' democratic right to participate and local authorities' constitutional obligation to progressively realise their constitutional right to access to housing; many of the cases under this section are explored in greater detail there.
[158] *P E Municipality* (n 1 above) para 56.
[159] *Joe Slovo* (n 43 above) para 231; *Ritama* (n 163 below) paras 6, 14.

on medium- to long-term waiting lists.[160] The court compared their conditions to those highlighted in *Grootboom* and reprimanded the City for its failure to make provision for short-term relief, for failing to prioritise the occupiers' needs, for failing to allocate resources and for considering waiting lists as the only relevant criterion. The court held that the City's housing programme failed to acknowledge its constitutional obligation to realise access to housing progressively.[161]

In *Pheko 2* senior management tried to deny responsibility for the municipality's failure to comply with the order in *Pheko 1* by blaming a junior official. The Court was particularly scathing and unsympathetic. The Court pointed out sternly that the failure by officials to fulfil their obligations affected the lives of the citizens they were meant to serve.

> These disclaimers were unseemly and highly inappropriate. Who in a local authority, if not the Mayor and Municipal Manager, is responsible for its failings of function? The offices they hold exist for the purpose of oversight in the interests of the community they serve. It is wrong for them to shrug off responsibility when their own municipal structure, the one at whose symbolic and operational head they stand, conspicuously fails to fulfil a duty imposed by a court order. Nor can or should they be able to plead ignorance. The order this Court issued on 6 December 2011 affected hundreds of families and households, perhaps thousands of people. Their daily living, human dignity and security and comfort were directly at stake. It is precisely because of the leadership entrusted to the Mayor and the Municipal Manager, that they have a duty to undertake responsibility for implementing Court orders.[162]

In *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* (*Ritama*) the court expressed its frustration at the City's failure to co-operate. This was not only disrespectful to the court but also constituted non-compliance with constitutional obligations. Bertelsmann J ordered specific officials, including the MEC for Housing, to attend the proceedings in person and instructed them to come prepared for cross-examination.[163] The uncompromising stand taken by judges was also illustrated in *Sailing Queen Investments v Occupants La Colleen Court* (*Sailing Queen*), where

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[160] *City of Cape Town v Rudolph* [2003] ZAWCHC 29, 64.
[161] *Rudolph* (n 160 above) para 2 of the Order.
[162] *Pheko 2* (n 130 above) para 63.
[163] *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* (30782/05) [2006] ZAGPHC para 4 of the Order and p 15 of the judgment; see *Olivia Road* (n 29 above) para 28, where the Court credits the City for becoming more humane in the course of the proceedings and ultimately responding reasonably to the engagement order.

Jajbhay J expressed his disapproval about the City's failure to attend the hearings; its failure to engage with the respondent or address their needs; and for dismissing their obligations on the basis that they had no land or alternative accommodation available.[164] In *Baron v Claytile (Pty) Limited* (*Baron*) the City of Cape Town attempted to deny its constitutional responsibility by submitting reports stating that no TRA housing units were available. With reference to the provisions of ESTA and s 26 of the Constitution, the Court reminded the City of its obligation to provide suitable alternative accommodation when evicting occupiers and their families.[165]

Private landowners learned early that evictions under the Constitution and the PIE Act affected their s 25 rights.[166] It took longer for local authorities to come to terms with their constitutional obligations when private landowners were involved. In *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Dear Investments (Pty) Ltd* (*Shorts Retreat*), the SCA had to explain to the municipality that because of its constitutional obligations, its involvement in eviction proceedings differed from those of private landlords, so the municipality was obliged to become involved.[167] In *Lingwood v Unlawful Occupiers of R/E of ERF 9 Highlands* (*Lingwood*) the court held that it was *not* the obligation of the private landlord to find suitable alternative accommodation.[168] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (*Blue Moonlight*), the City's claim that it had neither the resources nor alternative accommodation available, and was therefore not obliged to provide accommodation

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[164] *Sailing Queen Investments v Occupants La Colleen Court* 2008 (6) BCLR 666 (W) paras 5 and 10; see also *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA) para 35, where the local authority, which was not joined, filed a report that simply stated that it could neither accommodate nor provide alternative land to the occupiers.

[165] *Baron* (n 10 above) para 46.

[166] *Ndlovu v Ngcobo, Bekker v Jika* [2002] 4 All SA 384 (SCA) 87 para 17, where the SCA pointed out that the PIE Act merely suspends or delays the landowners' property rights; see also *Brisley v Drotsky* [2002] ZASCA 35 para 40; *Blue Moonlight* (n 2 above) para 40; *Skurweplaas* (n 104 above) para 11; *Mooiplaats* (n 104 above) para 17; *Changing Tides* (n 121 above) paras 16, 18 and 39; *Baron* (n 10 above) paras 35–6 and 46; *Berea* (n 138 above) para 80; and *Daniels* (n 21 above) paras 41, 48–9, as well as para 39, where the Court lists a number of factors that may be considered when assessing whether private persons bear a positive obligation. After considering these factors the Court may impose an obligation as envisaged by s 8(2) of the Constitution.

[167] *Shorts Retreat* (n 164 above) para 14; see also *Joe Slovo* (n 43 above) paras 344 and 347–8.

[168] *Lingwood v Unlawful Occupiers of R/E of ERF 9 Highlands* 2008 3 BCLR 325 (W) para 25; however, see the discussion in *Baron* (n 10 above) paras 36–7 where the Court indicates that the exceptional circumstances of s 10(2) of ESTA has a narrow scope, and only applies when there has been no breach/breakdown in the employment relationship. Then a private landowner who wishes to evict occupiers may be expected to assist with finding alternative accommodation.

when an eviction was at the instance of a private property owner was rejected. The Court emphasised the City's duty to plan and budget for emergencies. A response that it had not budgeted for such an eventuality would not suffice when it should have budgeted for it. Furthermore, its policy in terms of the Housing Report was unconstitutional because it excluded people evicted by private landowners and did not 'meaningfully and reasonably' consider the needs of individuals facing eviction.[169]

Local authorities have also attempted to evict unlawful occupiers under legislation that did not require court orders.[170] In *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* (*Abahlali*), the issue was whether s 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act, Provincial Act 6 of 2007 (the Slums Act) complied with the Constitution, the PIE Act, the Housing Act 107 of 1997 and the National Housing Code, 2009. The Slums Act aimed to eliminate slums; prevent their re-emergence; and to upgrade and control existing slums. The applicants argued that the section prevented meaningful engagement and undermined the procedures and protection provided under the PIE Act. Justice Moseneke, on behalf of the majority, pointed out that s 16 of the Slums Act obliged an owner or municipality, after receipt of a notice from the MEC, to institute eviction proceedings. The notice removed the discretion of the owner or municipality, even if they were of the view that it was not just and equitable to do so. Because of the coercive nature of the word 'must' in s 16(1) and (2) and its disruption of the protections afforded to unlawful occupiers, Justice Moseneke held that s 16 was unconstitutional.[171]

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[169] *Blue Moonlight* (n 2 above) paras 57, 74 and 92. See also *Mooiplaats* (n 104 (above) para 11, where the Court held, with reference to *Blue Moonlight* para 67, that the City had both the power and the obligation to reasonably provide and fund emergency housing.

[170] *Olivia Road* (n 29 above) – s 12 of the National Building Regulations and Building Standards Act 103 of 1977; *Abahlali* (n 115 above) – the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007; *Pheko 1* (n 130 above) – s 54 of the Disaster Management Act; and *Schubart Park* (n 105 above) – s 11(2) of the City of Tshwane Metropolitan Municipality Fire Brigade Services By-Laws, published under LAN 267 in Gauteng *Provincial Gazette* 42 of 9 February 2005; see also *Shorts Retreat* (n 164 above) para 4, where eviction proceedings were initiated by the private owner after being instructed to carry them out by the municipality because of by-law violations.

[171] *Abahlali* (n 115 above) paras 102, 111 and 122; however, see para 69, where Justice Yacoob disagreed. In his view reasonable engagement has not been excluded by s 16 because all evictions are subject to the Constitution, the PIE Act and 'all other requirements that have been judicially stipulated'.

In *Pheko 1* the Ekurhuleni Metropolitan Municipality argued that evacuation under s 55 of the Disaster Management Act 57 0f 2002 did not constitute an eviction in terms of s 26(3) of the Constitution and the PIE Act. In terms of s 55(2)*(d)*, a local council may issue directions to evacuate people from a disaster area (or threatened disaster area) to preserve life. The Court held that evacuation did not mean eviction, indefinite removal or demolition. The municipality therefore acted unlawfully and unconstitutionally.[172] In *Schubart Park* the eviction also occurred during an emergency. The applicants argued that the City used the crisis as an excuse to evict them unlawfully,[173] while the City asserted that the evacuation was lawful in terms of its by-laws. The Court disagreed and ordered the parties to engage 'with the view to reaching agreement' on specified items.

The courts have also had to educate local authorities with regards to their constitutional responsibilities within the co-operative governance structure and the need for regular inter-institutional dialogue among the various spheres of government. In *P E Municipality* the Court made it clear that the City could not postpone its constitutional obligations towards individual unlawful occupiers by arguing that their policies were geared towards the greater good and the achievement of long-term goals.[174] Nor could they argue that they had neither the resources nor available accommodation to assist the respondents.[175] The argument in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* that the local authority did not have the responsibility or resources to provide for emergency housing and that this responsibility resided with the Gauteng provincial government was not sustained by the Court.[176] Nor did the City succeed in *Blue Moonlight* when it maintained that it had discharged its constitutional responsibility by submitting an application to the provincial government for assistance, even though it was refused.

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[172] In *Pheko 1* (n 130 above) paras 39–40, 51 and 53. Supervisory relief was ordered and the municipality had to file a report with the Court by a specified date confirming compliance with the order.
[173] *Schubart Park* (n 105 above) para 39.
[174] *P E Municipality* (n 1 above) paras 29 and 51: 'The Municipality indicates that it had no obligation to house these particular families. It states that it had established a "four peg housing programme" to provide site and service facilities to the homeless in its area and that the applicants can apply to be part of that programme, though it admits it will take some time for them to be provided with appropriate site and service facilities.'
[175] *Sailing Queen* (n 164 above) para 7; see also *Blue Moonlight* (n 2 above) para 74.
[176] *Skurweplaas* (n 104 above) para 6; see also *Mooiplaats* (n 104 above) para 11 where the City again argues that it was the province's responsibility to fund emergency housing under the National Housing Code.

> The duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to cooperate. In *Grootboom* this Court made it clear that – a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other … Each sphere of government must accept responsibility for the implementation of particular parts of the program‖.[177]

Through their interpretive function courts assist in the incremental education of local authorities and the incremental improvement of unlawful occupiers' lives. A constitutionally compliant environment is essential to establish a relationship of trust between unlawful occupiers, local authorities and courts, while the absence of trust diminishes the potential for dialogue, co-operation, and empowerment.

4.2 Judicial guidance on relevant circumstances

Section 26(3) and the PIE Act demand that courts acquaint themselves with all relevant circumstances in terms of the s 4(6) and (9) enquiries. Some information, especially with regards to the availability of alternative accommodation, policy choices and progressive realisation of housing rights, fall pre-eminently within the knowledge of the executive branch of government. This necessitates inter-institutional dialogue between the two branches and provides an ideal opportunity for courts to advance a culture of justification. Other information falls pre-eminently within the knowledge of unlawful occupiers. In the course of the dialogue with unlawful occupiers, the two branches of government best positioned to improve their lives are made aware of their lived realities, and courts acquire knowledge and perspectives essential to the enquiries. The enquiries also present an opportunity for courts to redress power imbalances, introduce fairness and enhance the legitimacy of the engagement process.[178]

In *P E Municipality* the Court emphasised that relevant circumstances were not limited to the ones stipulated in the PIE Act, and that each enquiry took place within its own unique context.[179]

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[177] *Blue Moonlight* (n 2 above) para 33; see also para 67: 'Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme'; *Grootboom* (n 12 above) para 40.
[178] *Machele v Mailula* 210 (2) SA 257 (CC) (*Machele*) paras 14–5.
[179] *P E Municipality* (n 1 above) para 31; see also Wallis JA in *Changing Tides* (n 121 above) para 10.

Through these enquiries courts obtain knowledge and perspectives. Sachs J indicated that relevant circumstances may include the degree of emergency and desperation; the reasonableness of offers made; timescales; the degree of disruption, especially in the case of settled communities; the willingness of occupiers to respond to reasonable alternatives, and whether mediation had been attempted.[180] Other judgments included factors such as the response of organs of state to the occupation; whether in situ upgrades were considered; the impact on employment, schooling and social amenities when occupiers are removed to distant locations; the reasonable prospect of permanent homes, once a housing project had been completed;[181] and the hardship that would follow eviction.[182]

Through their orders courts can demand compliance with the democratic values of accountability, transparency and responsiveness, and promote a culture of justification. This is especially so when structural interdicts are issued, and local authorities have to engage with unlawful occupiers and explain their decisions and policy choices.

> The most effective sort of structural remedy orders the government to say what it proposes to do to remedy the breach, thus leaving important operational and policy choices in the hands of the government. This requires the government to engage on their choices with those affected, thus opening up the democratic processes, and authorises the parties to bring the matter back to the court if necessary, thus retaining the court's position as the arbiter, where necessary, of what the Constitution requires.[183]

The discussion that follows demonstrates how courts have used reporting orders to obtain information necessary for the relevant circumstances enquiries; how courts have determined what constitutes, or does not constitute, a relevant circumstance; and how courts have used their orders to obtain information on the local authority's proposed remedial actions.

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[180] *P E Municipality* (n 1 above) paras 26–7, 30 and 47.
[181] *Joe Slovo* (n 43 above) paras 162,165–6,168 and 171–2.
[182] In *Rudolph* (n 160 above) 35, the court held that 'hardship' in s 5(1)*(b)* of the PIE Act went beyond mere balance of convenience and 'connotes a degree of suffering and privation and indicates a state of affairs more weighty than "convenience"', which in the case of the eviction of the respondents would constitute 'grave hardship'; in *Machele* (n 179 above) para 33 the Court held that 'while the applicants will suffer irreparable harm consequent upon their eviction, Mr Mailula will not suffer any material harm, let alone irreparable harm, if the eviction order is not executed'.
[183] Geoff Budlender 'People's power and the courts: Bram Fischer memorial lecture, 2011' (2011) 27 *South African Journal on Human Rights* 582, 588.

In *Rudolph* the Court ordered the City to deliver a report stating under oath what steps it had taken to comply with its obligations, what future steps it would take and by when. The respondents were afforded an opportunity to comment on the report.[184] In *Hlophe v City of Johannesburg Metropolitan Municipality*, the third High Court order in the *Blue Moonlight* saga, Satchwell J, after consulting the parties, issued a detailed reporting order.[185] The report had to be signed in person by the Executive Mayor, the City Manager and the Director of Housing and had to address each question. It is relevant to note that Satchwell J's reporting order was subsequently set aside in *City of Johannesburg Metropolitan Municipality v Hlophe*. Van der Merwe AJA held that the order was made mero motu, that the information had to be furnished irrespective of whether temporary shelter had been provided, and that the order infringed the principles of the separation of powers.[186]

In *Ritama* the court found that the s 4(2) notice to the municipality under the PIE Act was not merely a notice to an interested party. As the organ of state primarily concerned with providing temporary emergency housing, it was best placed to inform the court of available alternative accommodation.

> If no land or housing is available the court ought to be informed of whatever plans that exist to deal with the homeless in that area. If such information is not made available to the court as a matter of course, it must surely be made available at the court's specific request. Normally the information regarding available housing for the homeless will be critical to determine on what terms and conditions justice and equity would best be served if an eviction order has to be made.[187]

The judgment demonstrated both the level of accountability that can be exacted as well as judicial recognition of the occupiers' contribution to the proceedings. Bertelsmann J postponed the matter for hearing of oral evidence and provided a detailed order, including issues to be addressed by the

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[184] *Rudolph* (n 160 above) paras 2.1 and 3–5 of the order.
[185] *Hlophe v City of Johannesburg Metropolitan Municipality* 2013 (4) SA 212 (GSJ) paras 31–2. The report had to address specific questions including whether the City had established a specialist task team to implement housing arrangements for persons facing eviction, their specialist skills, who would be responsible for inter-departmental liaison and available budget. If this had not been done, the report had to detail alternative arrangements made. The report had to include an estimate of the number of persons facing eviction, their gender and age, information on the number of beds and buildings available for rehousing, and the allocated budget.
[186] *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 All SA 251 (SCA) paras 27–8.
[187] *Ritama* (n 163 above) 14; see also *Sailing Queen* (n 164 above) paras 10, 15 and 19; *Changing Tides* (n 121 above) paras 20 and 35–8: 'Municipalities have a direct and substantial interest because of the constitutional responsibilities.'

City of Johannesburg and the MEC for Housing. The order stipulated the names of 12 witnesses who had to appear and remain present until called or excused; in addition, the occupiers were granted permission to call their own witnesses. The fourth and fifth respondents respectively the Metropolitan Municipality of Johannesburg and the MEC of Housing, Gauteng Province were ordered to file affidavits recording the evidence to be presented. They were further ordered to facilitate inspection by the other parties.[188]

In *Shorts Retreat* the municipality was joined and then ordered to file a report, confirming by affidavit what steps would be taken to provide alternative land/emergency accommodation, what the effects would be if alternative land/emergency accommodation was unavailable, and what steps would be taken to alleviate those effects. The occupiers were afforded an opportunity to respond to the report and the matter was postponed sine die to consider inter alia whether mediation was appropriate.[189] In *Skurweplaas* the City was ordered to report on the availability of alternative accommodation; to 'gather complete information on the personal circumstances of all occupiers';[190] and to present the information to the occupiers' attorneys.

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* (*Changing Tides*) the application for eviction was remitted to the High Court for determination of the date and terms of the eviction. The order stipulated that temporary emergency accommodation had to be provided to occupiers whose names appeared on a list prepared by their attorneys. The City of Johannesburg had to prepare a report on the accommodation, specifically dealing with issue of proximity to previous accommodation, reasons for the choice, and details of the engagement. The occupiers were afforded an opportunity to respond to the report.[191]

Courts have also demanded information on the impact the eviction would have on occupiers' lives. In *Pitje v Shibambo* the Court reiterated that courts could not passively apply the PIE Act, particularly not when an occupier facing eviction was vulnerable. The Court reaffirmed that courts must 'probe and investigate' the surrounding circumstances. In this case the occupier was 76 years

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[188] *Ritama* (n 163 above) paras 3–7 of the Order. The case related to the Alexandra Renewal Project, and the information requested included available finances, stage of project, relocation and rehousing of people 'living in challenged urban environments', suitable alternative land or accommodation, and time frames.
[189] *Shorts Retreat* (n 164 above) paras 2(c)–(e).
[190] *Skurweplaas* (n 105 above) para 16.3.
[191] *Changing Tides* (n 121 above) para 65.

old and in ill-health. He had purchased the property from his brother, though the sale was never registered. He paid the bond fees to the bank. His brother sold the property without his knowledge. The Court rejected the respondents' contention that the applicant failed to disclose his relevant circumstances. (These included homelessness, alternative accommodation options, health and disability, and circumstances of other occupants). The Court held that the High Court's failure to inquire into these circumstances meant that the court had failed to engage adequately with relevant circumstances for the purpose of the enquiry.[192] The Court remitted the matter to the High Court for reconsideration. The parties were granted permission to file further affidavits and the High Court was instructed, in the light of further evidence, to determine whether the eviction could be justified under the PIE Act.[193] Similarly, in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*, the SCA, with reference to *P E Municipality*, discussed the new proactive role imposed on courts by the PIE Act. The SCA concluded that the High Court, in granting the eviction order, failed to proactively acquaint itself with all relevant circumstances. This was informed by how little information was before the court, which should have alerted the High Court to the need to obtain further information from the municipality.[194]

The respondent in *Berea* had invested his pension in the relevant building and by the time the matter came before the Court, he too, was financially stressed and had to rely on pro bono assistance. The Court pointed out that further delay would have unintended and irreversible consequences for him. However, as the City was not joined, the Court could not grant a just and equitable remedy. The Court joined the City mero motu as a party, remitted the matter to the High Court for expeditious resolution, and ordered the City to file a report, similar to the one ordered in *Shorts Retreat.*[195]

A similar issue was raised in *Berea*, where the occupiers were not legally represented and therefore unaware that the consent given on their behalf was not informed and therefore not legally valid and enforceable. The obligation was on the parties and their legal representatives to provide

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[192] *Pitje v Shibambo* 2016 (4) BCLR 460 (CC) paras 19–20; see also *Machele* (n 178 above) para 15.
[193] *Pitje* (n 192 above) paras 23–4.
[194] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) paras 12 and 14–5; see also *Shorts Retreat* (n 164 above) para 14; see also *P E Municipality* (n 1 above) paras 32, 13 and 36.
[195] *Berea* (n 138 above) para 84; *Shorts Retreat* (n 164 above) para 1.

relevant information to ensure that the court was in a position to make a just and equitable order. In the absence of legal representation, the court's proactive role would require it to inform occupiers of their right to legal aid and direct them to where such assistance could be obtained.[196] The Court reiterated that the 'absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction'.[197]

In *Occupiers of Portion R2 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* (*Mooiplaats*), where the occupation was less than six months, the City was ordered to compile a report that contained information about the 200 families and details about who would be rendered homeless. In addition, the report had to include information about the effects on the occupiers and surrounding residents, if the eviction went ahead without the provision of temporary emergency accommodation. The Court also required information on whether the City was reasonably capable of providing alternative land, whether the respondents needed to use the property in the foreseeable future, and whether it would suffer any prejudice if the unlawful occupiers remained on the property until alternative land became available.[198] In *Blue Moonlight* relevant circumstances included the fact that the occupation was once lawful, that Blue Moonlight was aware of the occupation when it purchased the property, and that Blue Moonlight would not suffer to the same degree as the occupiers when they were evicted and became homeless.[199]

Baron v Claytile (Pty) Limited (*Baron*) dealt with an eviction under ESTA. The majority of applicants' accommodation was linked to their employment, which was terminated following disciplinary hearings. The fact that the occupiers remained in occupation for a further five years was for the Court a factor that weighed 'heavily against imposing a further obligation on the first respondent'.[200] Their occupation could not in fairness continue at the expense of the first respondent's current employees. Further, the applicants could not delay their eviction by claiming that the alternative accommodation on offer was unsuitable and far from their places of employment, schools, clinics and shopping centres. The applicants' main concern regarding their

[196] *Berea* (n 138 above).
[197] *Berea* (n 138 above) paras 51 and 54.
[198] *Mooiplaats* (n 104 above) paras 16, 18 and 21.4.
[199] *Blue Moonlight* (n 2 above) para 39.
[200] *Baron* (n 10 above) para 43.

children's schooling had been addressed and, though the applicants complained about the unsuitability of the alternative accommodation, they failed to submit any evidence to support this, or evidence of the hardship they claimed would result.[201]

Other relevant circumstanced identified by the courts included in *Changing Tides* the offer of assistance by the applicants to move the respondents' possessions to the new location,[202] and a settlement agreement in *Berea*, provided the court was satisfied that the parties 'freely, voluntarily and in full knowledge of their rights' agreed to the eviction. Even then a court had to ensure that the local authority had been joined and would fulfil its constitutional obligations.[203]

With reference to *P E Municipality*,[204] Wallis JA described the more active role required by a court when conducting the relevant circumstances enquiry.

> What they are obliged to do in eviction cases is ensure that all the relevant parties are before them, that proper investigations have been undertaken to place the relevant facts before them and that the orders they craft are appropriate to the particular circumstances of the case. If, despite appropriate judicial guidance as to the information required, the judges are not satisfied that they are in possession of all relevant facts, no order can be granted.[205]

Courts have also engaged with whose obligation it is to place relevant information before the court. In *P E Municipality* the Court held that all parties to the enquiry were obliged to make relevant information available. If a court was not satisfied with the information before it the court may be obliged 'to procure ways of establishing the true state of affairs, so as to enable it properly to have regard' to relevant circumstances.[206] In *Ndlovu v Ngcobo, Bekker v Jika* (*Ndlovu*), Harms JA, in his majority judgment, stated that relevant circumstances would almost invariably be within the knowledge of the occupiers. The SCA left open the question whether the onus was on the owner or occupier to furnish courts with information.[207]

Wallis JA discussed the onus in *Changing Tides.* The City had argued that it was the duty of the occupiers. Wallis JA disagreed. Even though the court could, in terms of *P E Municipality*,

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[201] *Baron* (n 10 above) paras 32–3 and 49–50.
[202] *Changing Tides* (n 121 above) paras 32–3.
[203] *Berea* (n 138 above) para 5 of the order and para 62 of the judgment.
[204] *P E Municipality* (n 1 above) para 36.
[205] *Changing Tides* (n 121 above) para 27.
[206] *P E Municipality* (n 1 above) para 32.
[207] *Ndlovu* (n 166 above) para 19.

request further information, in his view it was the initial responsibility of the applicants to place information before the court. Most applicants, he suggested, could reasonably ascertain some information, such as the names of occupiers and some of their personal circumstances. In the case of so-called hijacked buildings, information could be obtained from police and security officers by way of affidavit. Some information was known only to the City and became a relevant circumstance if the eviction triggered constitutional obligations. Under these circumstances, joinder became necessary and the City must inform the court whether suitable temporary alternative accommodation was available. Wallis JA ordered the attorneys of the occupiers to compile a list of the occupiers and specified special circumstances that the Court required.[208]

Information relating to occupiers is often deeply personal. Many of the orders placed this responsibility on local authority and there is concern that the information could be reduced to impersonal lists and box-ticking exercises. Although many of the report orders afforded occupiers an opportunity to respond to the reports, this may not be adequate. Bringing relevant information before courts constitutes an important opportunity for unlawful occupiers to bring their plight to the attention of relevant authorities. The participatory opportunity that the enquiries present are denied when occupiers are not encouraged to present their own circumstance, make their preferences known or influence decisions that directly affect them.

5 REFLECTIONS

Ray contends that judicial enforcement of constitutional rights may be more effective if courts were to develop processes where non-judicial actors work directly with the state to bring about institutional reform. He argues that procedural interventions geared towards enforcing participatory rights will enhance democratic legitimacy and enable effective socio-economic rights enforcement.[209] Meaningful engagement and the relevant circumstance inquiries are two examples of the kind of procedural interventions Ray envisages.

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[208] *Changing Tides* (n 121 above) paras 28, 30–8 and 66.5(a).
[209] Ray (n 28 above) 345–6, 278 and 337.

Meaningful engagement is also close to Carole Patemen's structured interaction, discussed in chapter 1, which in this instance is between unlawful occupiers and their local authority. The interaction occurs within a defined area (evictions), it gives unlawful occupiers some control over their lives, and benefits the state because it advances a better understanding of the connection between public and private spheres.[210] Meaningful engagement also gives expression to the three general principles identified by Archon Fung and Erik Wright, also discussed in chapter 1. These are first, 'a focus on specific, tangible problems'; second, 'involvement of ordinary people affected by these problems and officials close to them'; and third, 'the development of solutions to these problems'.[211]

In terms of Michael Bishop's classification, meaningful engagement presents as mutual participation. Bishop's description of 'a joint venture aimed at solving a common problem' is apt.[212] Here unlawful occupiers can directly and immediately, though not necessarily permanently, improve their socio-economic well-being. They are provided with a court-sanctioned space where they can interact with their local authority to jointly find solutions to their housing problem. Their participation is required and is monitored and protected by the courts. The focus remains on the parties to find a solution through their engagement rather than through the courts. It has real potential for empowerment and transformation.

In terms of Hank Botha's conceptual understanding of democracy, meaningful engagement presents as 'deep democracy'.[213] The role of the court is substantial and allows for judicial activism. Through the relevant circumstance inquiries, the court is not constrained by the information presented by the parties but has a broad judicial discretion 'to go beyond the facts established on the papers before it and play a more inquisitorial role'. The Court in *P E Municipality* went so far as to say that courts may be obliged to establish the true state of affairs.[214]

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[210] Carole Pateman *Participation and Democratic Theory* (1970) 109–10.
[211] Archon Fung & Erik Olin Wright 'Deepening democracy: Innovation in empowered participatory governance' (2001) 29 *Politics & Society* 5, 17.
[212] Michael Bishop 'Vampire or prince? The listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313, 361.
[213] Ray (n 28 above) 281; Henk Botha 'Representing the poor: law, poverty and democracy' in Sandra Liebenberg & Geo Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 79.
[214] Sandra Liebenberg (n 34 above) 278; *P E Municipality* (n 1 above) para 32; see also *Changing Tides* (n 121 above) para 27.

Courts, while conducting their relevant circumstances inquiries, are empowered to play a more active role in 'policing legislative and bureaucratic decisions'. In addition to the democratic benefits of accountability, transparency and responsiveness, that derive from the inquiries, and the direct protection of the unlawful occupiers' socio-economic rights, the meaningful engagement space provides another benefit. Through meaningful engagement orders and the relevant circumstances enquiries, the courts, local authorities and private landowners are confronted with the conditions under which unlawful occupiers live and the hardships they endure.

There is a difference between unlawful occupiers and the applicant in *Daniels*.[215] Ms Daniels had a lawful right to occupation under ESTA. The Court, by confirming her constitutional right to dignity, redressed the power imbalance between her and her employer, granted her equality of voice and participation, and guarded the democratic legitimacy of the engagement process. It is comparatively easier for the courts to enforce the rights protected under the Bill of Rights when there is one applicant as opposed to a diverse and often large group who may not speak with one voice or agree on one solution, as was demonstrated in the *Pheko* judgments.[216] The position of unlawful occupiers is therefore more precarious. Their rights are limited in the short term to the right to temporary emergency accommodation and in the long term to the s 26 right to access to housing and the section's internal limitations. In addition, evictions under s 26(3) and the PIE Act enjoy only limited protection from the courts. The courts' role in improving the socio-economic well-being of unlawful occupiers is therefore constrained.

Within the context of socio-economic delivery, Pieterse credits the Court with successfully walking the tightrope between acknowledging government's good faith attempts to fulfil its socio-economic and participatory responsibilities and responding when government wilfully neglects to do so. He argues further that the Court has 'sought avenues through which to ensure meaningful and participatory balancing of competing socio-economic rights and interests, and the fair and constitutionally consistent resolutions of disputes'.[217] Pieterse argues that the Court is aware of its limitations as a deliberative and participatory space and would prefer to 'direct and oversee

[215] *Daniels* (n 21 above).
[216] *Pheko* judgments (n 130 above).
[217] Pieterse (n 135 above) 30.

[credible] "external" institutional processes'.[218] Chapter 4 engages with the role of the courts in safeguarding legislatively protected community involvement in local government. The focus is on service delivery failures that directly affect communities' socio-economic rights and the effectiveness of the ward committee system as a credible institutional democratic space.

[218] Ibid.

Chapter 4

Local government as democratic space

1 INTRODUCTION

Racial segregation under the Group Areas Act 41 of 1950 had a significant impact on local government. Through a policy of 'own management for own areas', white communities disproportionately benefited from revenue generated through property taxes and services within their own areas, while being insulated from providing services or contributing to infrastructure development in areas allocated to impoverished Black, Indian and Coloured communities. Kriegler J referred to the 'tragic and absurd' consequences of fragmented apartheid cities that 'systematically favoured white urban areas at the cost of black urban and peri-urban areas'.[1] The iniquity of living under a racial system of local government was described by O'Regan J in *Democratic Alliance v Masondo* (*Masondo*).

> The combined effect of the Group Areas Act, the Natives (Urban Areas) Consolidation Act, the Reservation of Separate Amenities Act and other similar legislation was to ensure that residential areas were divided along racial lines and that high-quality facilities, including sports grounds, libraries, community centres and municipal parks were reserved for the white community. The provision of basic services including water, power and the removal of refuse were often provided only to the white suburbs and not to the black townships; and paved roads and water reticulated sewerage were often to be found in white areas but not in the adjacent black areas. The legacy of the apartheid era therefore is that our towns are deeply divided. Eight years after the dawn of the democratic era, this remains so.[2]

[1] Kriegler J in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC) para 122; see also *Western Cape Provincial Government: In re: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) paras 41–7, where Ngcobo J provided historical context to Proclamation R293 of 1962, which was issued under the Natives Administration Act 38 of 1927.

[2] *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) paras 56–7.

Before democracy, black people's discontent with local government was frequently expressed through service delivery protests and boycotts.[3] During this period, community leaders went to great lengths to encourage community involvement in decision-making. This gave rise to a form of grass roots democracy which was influenced by an emphasis on consensus-building/unity. In the process, community leaders acquired specialised skills and organisational capabilities and communities learnt the value and power of proactive involvement.

Thus empowered, local communities and their leaders played a significant role in the election of the ANC as the new democratic government. On the wave of overwhelming popular support and huge electoral victories, the ANC presented itself as the sole legitimate representative of the people with an historical entitlement to govern.[4] The ANC was immediately faced with what Patrick Heller describes as arguably 'the greatest transformative challenge ever faced by a democratic government'.[5] In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development, Executive Council of KwaZulu-Natal v President of the Republic of South Africa*, Ngcobo J stressed how profound and enormous the challenge for local government was. As the sphere of government closest to the people, local government was where service delivery had to be seen to take place.[6]

Political preparation for democratic local government started in the Local Government Negotiating Forum, where the Local Government Transition Act 209 of 1993 was negotiated. The Local Government Transition Act deracialised the system of local government by amalgamating racially based structures and setting out a three-phased process for change. The pre-interim phase established local negotiating forums in each town. The interim phase dealt with municipal elections in 1995 and the election of interim local councils. The final phase ended with the election

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[3] EP Ababio 'Enhancing community participation in developmental local government for improved service delivery' (2004) 39 *Journal of Public Administration* 272, 276.

[4] Laurence Piper, 'From party-state to party-society in South Africa: SANCO and the informal politics of community representation in Imizamo Yethu, Cape Town' in Claire Benit-Gbaffou (ed) *Popular Politics in South African Cities: Unpacking Community Participation* (2015) 28.

[5] Patrick Heller 'Moving the state: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre' (2001) 29 *Politics & Society* 131–63, 143.

[6] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development, Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC) para 44.

of municipal councils in 1999. The democratic government's vision for the future of local government was set out in the White Paper on Local Government of 1998, which also identified some of the weaknesses of the Local Government Transition Act. These included its urban bias and its failure to provide for structural support during the transition period.[7]

During the same year, the Local Government: Municipal Demarcation Act 27 of 1998 (the Demarcation Act) was enacted to provide criteria and procedures for determining municipal boundaries, as well as the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act), which provided for the establishment of municipalities. This was followed by the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), which sets out the core principles, mechanisms and processes of municipalities.

The ANC government engaged with its 'profound and enormous' transformative challenge through a policy that became known as the Reconstruction and Development Programme (RDP). The RDP was described as 'an integrated, coherent socio-economic policy framework (that) [sought] to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future'.[8] The focus on decentralisation enjoyed both government and opposition support.[9] In 1996 the RDP was replaced by the Growth Employment and Redistribution Programme (GEAR). The government defended its strategy for rebuilding and restructuring the economy and claimed that it was in keeping with the goals set out in the RDP. It described the government's role as resolving trade-offs and competing claims and, though it claimed commitment to an 'open and consultative approach', it emphasised that the 'ultimate responsibilities for a credible and coherent policy framework lie with Government'.[10]

In 2005 GEAR was replaced by the Accelerated and Shared Growth Initiative for South Africa (ASGISA) and, finally, in 2013 by the National Development Plan. Heller concluded that the

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[7] Section A of The White Paper on Local Government 9 March 1998, available at https://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/whitepaper-on-loca-gov.pdf.
[8] The Reconstruction and Development Programme, 1994 para 1.1.1, available at omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm.
[9] Heller (n 5 above) 144.
[10] Growth, Employment and Redistribution: A Macroeconmic Strategy para 10, available at https://www.gov.za/documents/growth-employment-and-redistribution-macroeconomic-strategy-south-africa-gear.

ANCs embrace of neo-liberal policies shifted the focus to 'streamlining management systems, cutting costs, and emphasizing administrative performance rather than mobilizing participation, training ordinary citizens, and engaging in sustained consultation, much less deliberation'. Reliance on private-sector consultants and outsourcing further frustrated bottom-up participation.

> [T]he ANC's technocratic concern with getting the institutions right has all but obviated efforts to build local democracy and mobilize participation. In a context of fiscal constraint and tighter regulatory frameworks, outsourcing and increasing technocratic dominance, community-driven and politically negotiated initiatives have been marginalised.[11]

In a society still haunted by its past, the reality of implementing effective community involvement is far removed from the community participation described by Jeremy Cronin in 1986.[12] Instead of house meetings, street committees and civic organisations, united behind a common goal, 278 municipal councils are required to encourage and facilitate involvement by 58.78 million people in a country covering a land surface area of 1 220 813 square kilometres.[13]

This chapter is devoted to the constitutional and legislative promise to local communities that they have a role to play in local government. In *South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality* (*SAPOA*), Southwood AJA, with reference to the preamble to the Systems Act, confirmed that 'a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities in which they are an integral part, and, in particular, in planning, service delivery and performance management'.[14]

The next section looks at the constitutional and legislative framework. The focus is on the mechanisms, processes and procedures for community involvement. Section 3 looks at how effective these mechanisms, processes and procedures are, and the extent to which involvement translates into social and economic upliftment and the attainment of the developmental goals

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[11] Heller (n 5 above) 146.
[12] Jeremy Cronin *Upfront: Journal of the Observatory and Claremont UDF Area Committees* Number 4 June 1986 at 12 (see chapter 1 n 97 above).
[13] Available at http://www.gov.za/about-government/government-system/local-government; http://www.gov.za/about-sa/south-africa-glance; http://www.statssa.gov.za/publications/P0302/P03022019.pdf.
[14] *South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality* 2013 (1) SA 420 (SCA) para 8.

envisaged by the Constitution of the Republic of South Africa, 1996. Section 4 focuses on strategies local communities employ when local government fails them. These strategies are designed to enforce their right to involvement in decisions that affect their lives. The chapter concludes with some reflections.

2 CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR COMMUNITY PARTICIPATION

2.1 Constitutional framework

The Constitution provides for a co-operative form of government that consists of national, provincial and local spheres that are distinctive, interdependent and interrelated.[15] In *City of Cape Town v Robertson* (*Robertson*), Moseneke J confirmed that we had moved away from a 'hierarchical division of governmental power and have issued in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to the constraints permissible under our Constitution'.[16]

Jaap de Visser distinguished between the three elements as they relate to local government. Distinctiveness derives from councillors being democratically elected. Local government is further distinctive because of its constitutional powers and functions under s 156, its fiscal powers under s 229, its entitlement to an equitable share of national revenue under s 227(1), and its status under s 151(4) of the Constitution. Section 151(4) provides that the national or provisional governments may not 'compromise or impede a municipality's ability to exercise its powers or perform its functions'.

Interdependence has its source in national and provincial support under s 154, provincial monitoring under s 155(6), and national and provincial oversight over effective performance under s 155(7) of the Constitution. Interrelatedness arises from the principles of co-operative and intergovernmental relations set out in s 41 of the Constitution and the provisions of the

[15] Section 40 of the Constitution of the Republic of the Republic of South Africa, 1996.
[16] *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) para 60.

Intergovernmental Relations Framework Act 13 of 2005.[17] In terms of s 40(2) of the Constitution 'all spheres of government must observe and adhere to the principles of co-operative government and intergovernmental relations and must conduct their activities within the parameters of chapter 3 of the Constitution'.

Chapter 7 of the Constitution provides for local government. Municipalities must be established for the whole country and the executive and legislative authority of each municipality vests in its municipal council. A municipality is entitled to govern the local government affairs of its community. Its '"original" and constitutionally entrenched powers, functions, rights and duties … may [only] be qualified or constrained by law and only to the extent the Constitution permits'.[18]

The objectives of local government are set out in s 152(1) of the Constitution. A municipality is obliged to 'strive' to achieve these objectives within its financial and administrative capacity. The objectives are:

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

Section 153 deals with the developmental duties of municipalities. A municipality must prioritise the basic needs of local communities when it structures and manages its administration and in respect of its planning and budgeting processes. It must do so in a manner that promotes the 'social and economic development of the community'. Municipalities must also participate in national and provincial development programmes.

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[17] Jaap de Visser 'Developmental local government in South Africa: Institutional fault lines' (2009) 2 *Commonwealth Journal of Local Governance* 7, 12–14. See also Nico Steytler & Yonatan Tesfaye Sessha 'Defining local government powers and functions' (2007) 124 *SALJ* 320, 338–9 on the problems that flow from the overlap of powers and functions in a decentralised system of government and the impact on service delivery, accountability and development when lines of responsibility are unclear.

[18] *Robertson* (n 16 above) para 60.

The Constitution makes provision for three categories of municipalities.[19] In addition to its monitoring and support function, each provincial government is also obliged to 'promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs'.[20] In terms of s 155(7) the national government and provincial governments have the legislative and executive authority to provide oversight and ensure that municipalities perform their Schedule 4 and 5 functions effectively.[21] Section 156 sets out the powers and functions of a municipality and provides that a municipality has executive authority and is entitled to administer local government matters listed in Parts B of Schedules 4 and 5,[22] together with any other matter assigned to it by national or provincial legislation. It may make and administer by-laws. By agreement and subject to conditions, the national or provincial government must assign the administration of matters listed in Parts A of Schedules 4 and 5,[23] if they relate to local government, provided the municipality has the capacity, and the matter would most effectively be administered locally.

2.2 Local government legislative framework

(a) Local Government: Municipal Structures Act

The Structures Act refers in its preamble to the country's vision of a democratic and developmental local government in terms of which municipalities would fulfil their 'constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic

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[19] Section 155 of the Constitution. A category A municipality has exclusive municipal executive and legislative authority in its area. A category B municipality shares municipal executive and legislative authority with a category C municipality. A category C municipality has municipal executive and legislative authority in an area that includes more than one municipality.

[20] Section 155(6)*(b)*.

[21] See nn 22 and 23 below.

[22] Part B of Schedule 4 relates to air pollution; child care facilities; electricity and gas reticulation; municipal health services; public transport; storm water management; water and sanitation; and domestic waste-water and sewage disposal systems. Part B of Schedule 5 relates to licensing and control of undertakings that sell food to the public; local amenities; local sport facilities; markets; municipal abattoirs, parks and recreation, roads; noise pollution; pounds; public places; refuse removal, refuse dumps and solid waste disposal; street trading; lighting; traffic and parking.

[23] Part A of Schedule 4 includes education at all levels, excluding tertiary education; environment; health services; housing; urban and rural development; and welfare services. Part A of Schedule 5 includes abattoirs, ambulance services, archives, libraries, museums, liquor licences, provincial planning, cultural matters and recreation facilities, sport, road and traffic, and veterinary services.

development, encourage a safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives'. The Act provides for the establishment of the various categories of municipalities identified in the Constitution. The municipal objectives are set out in s 19. These include an annual review of '*(a)* the needs of the community; *(b)* its priorities to meet those needs; *(c)* its processes for involving the community; *(d)* its organisational and delivery mechanisms for meeting the needs of the community; and *(e)* its overall performance in achieving the objectives'. In terms of the section, a municipality is also obliged to 'develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers'.[24]

In terms of s 61, metropolitan municipalities referred to in s 8*(b)*, *(d)*, *(f)* and *(h)* may choose to establish metropolitan sub-councils. Under s 72, only municipalities referred to in s 8*(c)*, *(d)*, *(g)* and *(h)*, as well as municipalities referred to in s 9*(b)*, *(d)* and *(f)* may choose to have ward committees. The objective of a ward committee is to enhance participatory democracy in local government. Once a municipality has exercised its choice in favour of establishing ward committees it is obliged to establish one in each ward. Each ward committee has a councillor who represents the ward and acts as chairperson. The committee may include a further 10 persons. The municipality is obliged to make rules regulating the election process, ensure equitable and diverse representation and provide for administrative arrangements. Payment of out-of-pocket expenses is allowed but no remuneration may be paid to ward committee members. A ward committee may make recommendations affecting its ward to either the ward councillor, or through the ward councillor, to the executive. Its duties and powers are delegated under s 32 of the Structures Act.[25]

(b) Local Government: Municipal Systems Act

The Systems Act proclaims in its preamble that it not only seeks to deliver services but is 'fundamentally developmental in orientation'. It therefore aims to 'empower municipalities to move progressively towards social and economic upliftment' and states that a 'fundamental aspect of the new local government system is the active engagement of communities in the affairs of

[24] Section 81 of the Systems Act makes provision for the participation of traditional leaders. Traditional leaders identified in terms of Schedule 6 may attend and participate in council meetings.
[25] Sections 72–4 and 77 of the Structures Act.

municipalities of which they are an integral part'. With regard to the legal status of municipalities, s 2 of the Act provides that a municipality 'is an organ of state within the local sphere of government' that exercises legislative and executive authority and consists of both political and administrative structures and the community of the municipality.

Section 4(2) sets out the municipal council's duties. These include the responsibility to use municipal resources in the best interests of the community; to encourage local community involvement; and to consult the community on the level, quality, range and impact of municipal services. A municipal council is also obliged to promote and undertake development. The rights and duties of members of the local community are contained in s 5. These include the right to contribute to decision-making and the right to submit written or oral recommendations, representations and complaints.

Chapter 4 of the Systems Act deals with community participation. Municipalities are obliged to develop a culture of participatory governance. To achieve this a municipality must encourage, and create conditions for community participation in the affairs of the municipality, contribute to building capacity, use its resources, and annually allocate funds for this purpose. Participation includes involvement in the preparation, implementation and review of the integrated development plan; the establishment, implementation and review of performance management systems, budget preparation; and involvement in strategic decisions. Significantly, the opportunities granted for participation 'must not be interpreted as permitting interference with a municipal council's right to govern and to exercise the executive and legislative authority of the municipality'.[26]

Section 17 deals with the mechanisms, processes and procedures for community participation.[27] Participation must take place through the political structures created in the Structures Act, the Systems Act or through any structure created by the municipality or councillors. These include public meetings, notification and public comment procedures, consultative sessions with community organisation and traditional leaders, report-back meetings, and the establishment

[26] Section 16(2) of the Systems Act.
[27] Goosen J confirmed in *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP) that the s 17 mechanisms did not constitute a closed list and that there was scope for expanding community involvement.

of advisory committees.[28] A municipality is obliged to inform members of the community of these and must encourage and facilitate participation. A municipality is also obliged to take into account various special needs.[29] Sections 18 to 20 set out the municipality's responsibility in relation to communicating information for community participation.

Chapter 8 deals with the municipality's general duties with regards to municipal services. These include its obligation under s 73(1) to '*(a)* give priority to the basic needs of the local community; *(b)* promote the development of the local community; and *(c)* ensure that all members of the local community have access to at least the minimum level of basic municipal services'. In terms of s 73(2), services must be provided in an equitable and accessible manner and must be financially and environmentally sustainable. The section also provides for regular review to ensure upgrades, extensions and improvements.

(c) Integrated development planning

Chapter 5 of the Systems Act deals with integrated development planning.[30] The intention behind an integrated development plan (IDP) is to achieve the objects and developmental duties contained in ss 152–3 of the Constitution. The IDP must provide for participation in national and provincial development programmes and must, in conjunction with other organs of state, include plans that will contribute towards the progressive realisation of socio-economic rights. It must ensure compliance with the principles of co-operative government and must align with the development plans of other affected municipalities and organs of state.

After each election, each municipal council is obliged to adopt a single, inclusive, strategic IDP. The IDP must express the municipality's long-term development vision. It must assess and identify needs; identify communities who do not have access to basic municipal services or land; must contain operational strategies, a financial plan, key performance indicators and performance targets; and must align with national or provincial sectoral plans and planning requirements.

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[28] Section 17 of the Systems Act.

[29] These include illiterate people, people with disabilities, women and other disadvantaged groups.

[30] The Act defines 'development' as: **'**sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at—*(a)* improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and *(b)* ensuring that development serves present and future generations'.

In drafting the IDP the municipality must follow appropriate mechanisms, processes and procedures to ensure that local communities are consulted on development needs and priorities. Organs of state, traditional leaders and other role players must be identified and consulted. Local communities are entitled to participate in the drafting of the plan. They are also entitled to be involved in the development, implementation and review of the municipality's performance management system and its key performance indicators and targets. Once adopted, the public must be informed. The IDP becomes the basis of all planning and development. Municipalities are obliged to conduct their affairs in a manner that is consistent with the IDP.[31] Communities are also entitled to be consulted on external service delivery agreements.[32]

(d) Ward committee guidelines

On 24 June 2005, the Minister for Provincial and Local Government gazetted simplified and uniform guidelines for the establishment and operation of municipal ward committees under the Systems Act.[33] The guidelines stipulate that a ward committee is an advisory, representative and independent body whose objective is to enhance participatory democracy in local government and to act in the best interest of the community. Its functions and powers are set out in guideline 5. Its duties and powers are delegated under s 59 of the Systems Act and exclude executive powers. Its duties and powers include providing advice and recommendations; assisting with identifying challenges and needs; and assisting with the dissemination of information relating to the IDPs, budgets, performance management, and service delivery options. A ward committee may receive and channel complaints and queries and provide feedback. Through its meetings and community development forums a ward committee ensures 'constructive and harmonious interaction' between the municipality and the community it serves. Dissatisfaction with the performance of its ward councillor may be reported in writing to the municipal council and the committee may conduct annual satisfaction surveys.

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[31] Sections 25, 26, 29, 35–6, 42 and 45 of the Systems Act.
[32] Sections 78, 80–3 and 85 of the Systems Act.
[33] GN 965 of 2005 in *GG* 27699 of 24 June 2005, available at https://www.gov.za/sites/default/files/gcis_document/201409/276990.pdf.

The election criteria are set out in guideline 8. Ward committee members must be registered voters in their ward; may not be in the employ of the municipality; and may not be in arrear with their rates and service charges for more than three months. They cannot be unrehabilitated insolvents; under curatorship; of unsound mind; or convicted of an offence and sentenced to imprisonment without the option of a fine after February 1997. They should be motivated and committed. Guideline 9 deals with the election procedure.

A code of conduct is contained in guideline 10 which committee members must sign. Members must perform their functions in good faith, without fear, favour or prejudice; may not use their positions for personal gain; may not compromise the credibility, impartiality, independence or integrity of the committee; must be accountable, accessible, transparent, sincere and honest; and must recognise diversity and embrace all views and opinions. In addition, they must safeguard community interests and avoid political influence.

Guidelines 11 to 12 deal with ward committee meetings and public meetings. Ward committees are chaired by the ward councillor. Members submit agenda items. Voting requires a majority of members present and though consensus is recommended, decisions are made by simple majority. Public meetings are held to register concerns and inputs on service delivery, general development, disaster management, other municipal concerns and to provide report back. The guidelines provide guidance on notice of meetings to encourage the attendance of the greatest number of people. At the public meeting the meeting procedures must be explained, and attendees must be informed that minutes of both ward committee and public meetings are public documents to which they have access. They must be informed of the issues for discussion and options available to the committee. Representatives must answer relevant questions, allow members of the public to express their views on the issues and provide feedback on previous issues. The guidelines specify that public meetings are not political platforms and that neither ward committee members nor members of the public should use the occasion to make political statements, campaign or canvass.[34]

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[34] Guidelines: Section 11. Guideline 11(6) deals with the committee's ward programme and provides: 'The ward committee: (a) must submit a programme with specific outputs of work for one year to the office of the speaker or other designated political functionary in July of each year; (b) must perform the functions as set out to achieve and indicated in the work programme; (i) on own initiative; (ii) on request by the ward councillor; (iii) on request by the speaker or other designated political functionary; and (iv) in accordance with priorities and reasonable time frames determined by the speaker or other designated political functionary.'

Guideline 12 deals with administrative support. Municipalities must enable ward committees to perform their functions and exercise their powers effectively. Their annual budgets must allow for community participation.[35] Support includes informing communities about the roles and responsibilities of ward committees and developing and providing capacity building and training programmes for ward committees on an ongoing basis.

The ward councillor's reporting duties are set out in guideline 17. These include keeping records; ensuring that resources are appropriately spent; submitting recommendations of the ward committee to the speaker; reporting any views adopted by the ward committee and, where applicable, his or her disagreement; submitting reasoned progress report on achievements and failures and implementing corrective measures suggested by the speaker or designated official to ensure effective and efficient performance of the committee.

(e) Local Government: Municipal Finance Management Act

The Local Government: Municipal Finance Management Act 56 of 2003 (Finance Act) deals with the budget preparation process. Immediately after an annual budget is tabled, the accounting officer of the municipality must, in accordance with Chapter 4 of the Municipal Systems Act, make public the annual budget and the documents referred to in s 17(3) of the Finance Act and invite and consider representations submitted by the local community on the budget.[36] The council meeting where an annual report is discussed must be open to the public and must allow time for discussion of written submissions received from the local community and for members of the local community to address the council.[37] As part of the municipality's obligation to develop a culture of municipal governance, a municipality must encourage and create conditions for the local community to participate in the preparation of its budget.[38]

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[35] Section 16 of the Systems Act.
[36] Sections 22–3 of the Finance Act.
[37] Finance Act s 130(1).
[38] Section 16(1)*(a)*(iv) of the Systems Act.

(f) Local Government: Municipal Property Rates Act

The Local Government: Municipality Property Rates Act 6 of 2004 (Rates Act) also provides for community participation. Before a municipality adopts its rates policy, the municipality must follow the community participation process set out in Chapter 4 of the Systems Act. In terms of s 4 of the Finance Act all comments and representations received must be considered.

2.3 Executive programmes for community involvement

In his 2003 State of the Nation Address, President Thabo Mbeki announced the introduction of the Community Development Worker Programme (CDWP).[39] The Handbook for Community Development Workers (CDW) specifies that CDWs operate across different levels of government to assist people with accessing government services. [40]

The objective of the programme is: 'To improve social equity and justice; To enhance service delivery; To deepen our democracy; To contribute to citizen education.'[41] The programme envisages at least one community development worker per municipal ward who is formally employed by the municipality, and whose function is 'to serve as … [an enabler] in the process of service delivery and representative of government's commitment to improve the lives of all South Africans'.[42] The Resource Book proclaims that 'better communication through CDW intervention will deepen democracy and allow the people to influence government service delivery to meet their needs'.[43] The Resource Book specifically deals with how to make the Batho Pele Principles practical in the workplace.[44] Batho Pele means 'People First' in Sesotho.[45] The Batho Pele

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[39] Available at https://www.gov.za/state-nation-address-president-south-africa-thabo-mbeki-houses-parliament-cape-town-14-february-2003.

[40] A Handbook for Community Development Workers (2007), available at http://www.dpsa.gov.za/dpsa2g/documents/cdw/SDR_vol_5_no_2_2006.pdf.

[41] Ibid 9; The objective of the CDWP is also set out in the Resource Book for Community Workers para 1.1: 'to assist with improving service delivery and accessibility to public services; facilitate development, interaction and partnership between government and communities; and support participatory democracy.' Available at http://www.dpsa.gov.za/dpsa2g/documents/cdw/2012%20CDW%20RESOURCE%20BOOK.pdf.

[42] Resource Book (n 41 above) para 1.1.

[43] Ibid 13.

[44] Ibid Unit 1.

[45] Ibid para 4.1.

Principles were first introduced by President Nelson Mandela's administration in 1997. They focus on improving and making government services more accessible.[46]

In 2009 Minister Richard Baloyi, Minister for Public Service and Administration, elaborated on what he expected from these new public sector workers. CDWs 'must solve problems; know where people live; know what they think and act fast on issues they raise'.[47] CDWs are expected to live in the community. The handbook explains the different roles of ward committee members, ward councillors and CDWs.[48] Ward committee members are community or sectoral representatives elected at a ward general meeting to represent sectoral interests. Ward councillors are politically elected representatives who live in and service their wards. CDWs are appointed public servants governed by the Public Service Act 103 of 1994. Although their mandates and structures are different, they are meant to work together collaboratively.

> [T]heir task is to be active development agents and to ensure government programmes aimed at improving the lives of people in the communities are implemented. The nature of their collective task means they have to communicate constantly with each other and with the community, so that government programmes can make the greatest possible impact.[49]

Co-ordination and monitoring of the CDW programme is done by the provincial government.[50]

There are also other executive outreach or public participation programmes. Thusong Service Centres were introduced in 1999. The centres are one-stop, integrated community development centres with a rural focus, where the three spheres of government, together with other sector service providers, offer services and developmental information to local communities.[51] The centres are integral to independent development planning and promote the Batho Pele principles.

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[46] In para 4.4 the eight Batho Pele Principles are listed: '1 Consultation – Citizens should be consulted about their needs. 2 Service Standards – Citizens should know what service levels to expect. 3 Access – Citizens should have equal access to services. 4 Courtesy – Citizens should be treated courteously. 5 Information – Citizens are entitled to full, accurate information. 6 Openness and Transparency – Citizens should know how decisions are made. 7 Redress – Citizens should be offered an apology and solutions when standards are not met. 8 Value for money – Services provided should offer value for money.'

[47] Ibid para 6.1.

[48] CDW Handbook (n 40 above) 23.

[49] Ibid 22.

[50] Ibid 42.

[51] Available at https://www.gcis.gov.za/content/newsroom/media-releases/media-releases/thusong-service-centres-one-stop-centres-services-and-information.

3 COMMUNITY PARTICIPATION AND INFLUENCE

The International Association for Public Participation has identified seven core values for the practice of public participation.[52] This section interrogates whether existing mechanisms, processes and procedures accommodate and facilitate effective and meaningful community involvement and questions the extent to which local communities are in fact able to influence decisions made by their local municipal council. It highlights current failures at council and ward committee level and questions whether the existing mechanisms, processes and procedures are achieving the goals envisaged by the enabling legislation. The enquiry takes place within the overall context of the constitutional objectives, the basic values and principles governing public administration,[53] and the demand for accountable transparent and responsive local government.

3.1 Municipal councils

During local government elections voters in metropolitan municipalities vote directly for a ward councillor and, in terms of a second ballot, for their political party. Half of the municipal council comprises ward councillors and the remaining councillors are allocated from party lists on the basis of proportional representation.[54] The ability of communities to influence decisions by municipal councils through their ward councillors and ward committees is constrained by the

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[52] These are: '1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. 2. Public participation includes the promise that the public's contribution will influence the decision. 3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers. 4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision. 5. Public participation seeks input from participants in designing how they participate. 6. Public participation provides participants with the information they need to participate in a meaningful way. 7. Public participation communicates to participants how their input affected the decision.' Available at https://www.iap2.org/page/corevalues.

[53] Sections 152 and 195 of the Constitution and guideline 10 of the Uniform Guidelines for Ward Committee Members (n 33 above).

[54] Municipal councils are elected for five-year terms. Councils of metropolitan and local municipalities are elected by a system of direct and proportional representation. District municipal councils are partly elected by proportional representation and partly appointed by the councils of constituent municipalities. In district municipalities each voter receives three ballot papers, one for a ward councillor, one for the council of the local municipality and one for the council of the district municipality. Available at http://www.elections.org.za/content/Elections/2016-Municipal-Elections/More-about-municipalities/. There are currently 278 municipalities comprising 8 metropolitan municipalities; 44 district municipalities; and 226 local municipalities. Available at https://www.gov.za/about-government/government-system/local-government. The City of Johannesburg Metropolitan Municipality has 130 wards and 266 councillors.

influence of mayoral committees; the complexity of integrated development planning; the requirement for national alignment of IDPs; and coalition governance.

(a) Mayoral committees

The Structures Act makes provision for executive mayors for specified municipalities.[55] An executive mayor is elected by the municipal council and once elected may appoint a mayoral committee. The mayoral committee consists of the lesser of 10 councillors or 20 per cent of all councillors. Traditionally, mayors do not choose their committees on the basis of proportional representation. This practice was challenged by the Democratic Alliance, who demanded proportional representation in the mayoral committee of the Metropolitan Municipality of Johannesburg. The majority Court in *Masondo* pointed out that at national and provincial level the legislative and executive functions were separate, while at local level they were combined. The municipal council, as the forum for deliberation, required minority representation in the interest of democracy. However, it was important for the mayor, assisted by his mayoral committee, to perform his executive functions without multi-party deliberation to ensure effective and efficient service delivery.[56] The DA's challenge therefore failed.

In her minority judgment Justice O'Regan disagreed. In her view s 60 of the Structures Act should be interpreted to give effect to s 160(8) of the Constitution. This interpretation would require proportional representation. She referred to the transition period when the focus was on 'local resolution for local problems', and the local negotiating forums and interim councils as participants were 'forced to co-operate and jointly address the inequitable legacy of the past'.[57] Broader representation and diverse views would deepen and legitimise democracy and facilitate transformation and give effect to the fundamental constitutional purpose 'to undo the separation, exclusion and inequality of the past by ensuring that there is shared involvement in deliberation subject … to the right of the majority to make decisions'.[58]

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[55] Municipalities mentioned in s 8*(e)*, *(f)*, *(g)*, *(h)*; s 9*(c)* and *(d)*; and s 10*(b)* of the Structures Act. The appointment of the mayoral committee is set out in s 60 of the Structures Act and the functions and powers of the executive mayor are set out in s 57 of the Structures Act.
[56] *Masondo* (n 2 above) para 22.
[57] *Masondo* (n 2 above) para 59.
[58] *Masondo* (n 2 above) para 72.

An executive mayor and his committee make important decisions based on access to documentation and information flows from which other councillors are excluded. De Visser pointed to concerns in this regard and the risks this poses to the democratic values of accountability responsiveness and openness.[59] In the absence of proportional representation on mayoral committees, members of the community who elected opposition councillors are effectively excluded from the highest level of local decision-making.

(b) Integrated development planning and the requirement of national alignment

Extensive community participation is envisaged in the IDP. Jaap de Visser lists many of the benefits of IDPs. They require coherent planning across three spheres of government. The plans are reviewed annually and form the basis of annual budgets and spatial planning. Senior managers are held accountable through performance management. Communities are involved, and municipal councils must prioritise needs and plan beyond their terms of office. There are also disadvantages. These include the demanding requirements of integrated developmental planning. The process must be accommodated within an annual budget and presupposes a level of expertise and capacity that may not exist. This results in extensive and costly reliance on consultants, far removed from local needs and local community participation.[60]

De Visser also expresses concern about the requirement of national alignment. This may be perceived as a vote of distrust and the antithesis to bottom-up participation. He warns that the 'tightly regulated process' that 'must absorb the input of a multitude of development actors' may have a 'pressure cooker' effect when the inputs of disaffected communities are not reflected or are ignored.[61]

Many of the problems with participation in integrated development planning were reflected in research conducted by Simon Mbelengwa in Alexandra, Johannesburg. He concludes that participation lacked credibility and that it was neither meaningful nor effective. This applied both to officials and the community. He highlights several further problems: community participants did not understand budget issues and were not appropriately trained; there were no awareness

[59] De Visser (n 17 above) 16.
[60] Ibid 22–3.
[61] Ibid 23.

campaigns; and there was a general perception that community inputs were not valued, especially not during the initial stages when priorities were set. There was widespread discontent with the absence of consultation and active participation in decision-making. He recommends better communication between all parties and the importance of encouraging 'a sense of ownership and accountability in the IDP process'.[62] Heller also points out that integrated development planning at local level suffered from 'fiscal restraint and fiscal determinism', which affected local government plans and community-driven projects.[63]

To address community exclusion, implicit in the demand for national alignment, De Visser suggests that a limited number of national key priorities should be identified for alignment in order to afford municipalities opportunities to 'develop their planning capabilities, devise mechanisms for genuine interaction with communities, and display creativity'.[64]

(c) Coalition government

Since 2016 approximately 20 hung municipal councils have had to govern with the assistance of smaller parties when dominant political parties failed to win outright majorities. This has resulted in councillors prioritising their own and their party's interests over voter and community interests. Lulamile Hanabe and Unathi Malinzi point to the negative impact coalition governments have on service delivery and community participation. Coalitions or partnerships of convenience do not represent voters' choices. They encourage opportunism and self-interest. Minority parties focus on increasing their influence, while trying to diminish the influence of dominant parties. While a coalition may increase consensus-based politics, it also destabilises administrations when parties refuse to co-operate with officials loyal to previous administrations. It weakens leadership and, because a coalition government does not represent voters' choices, it influences voter behaviour

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[62] Simon Mbelengwa 'Community participation in the integrated development of the city of Johannesburg municipality'. His mini-dissertation focused on Alexandra (2016) 67, available at https://repository.up.ac.za/bitstream/handle/2263/60390/Mbelengwa_Community_2017.pdf?sequence=1 .
[63] Heller (n 5 above) 147.
[64] De Visser (n 17 above), para 23.

in future elections and results in local government becoming more chaotic and less focused on community involvement.[65]

(d) Failures at council level

Several authors have discussed reasons why municipal councils and their administrative officials were failing local communities. These related to service delivery; the failure to ensure institutional incorporation in budget and IDP processes; the failure to establish ward committees, and a general failure to facilitate infrastructural and administrative capacity or to provide training.[66] In rural communities, the failure to provide improved standards is exacerbated by the slow pace of service delivery; high levels of poverty and unemployment; widespread corruption and nepotism; low levels of participation in IDPs, budgeting, monitoring and evaluation processes; increased demand due to population growth; lack of responsiveness, accountability and transparency, which undermines trust; political and administrative conflict between the interests of municipalities and tribal authorities; and weak inter-departmental collaboration.[67]

With regards to community participation in the preparation, implementation and review of IPDs[68] Thanyani Madzivhandila and A Asha list three reasons why municipal councils are failing to fulfil their developmental goals: first, the absence of meaningful community and stakeholder participation, second, poor interdepartmental co-operation and horizontal integration, and third, institutional weakness due to skills and capacity shortages and financial mismanagement. In their view, this has resulted in the incorrect identification of community needs and priorities, has impacted effective local development planning, has undermined effective implementation and has resulted in 'crippling service delivery'.[69] They also highlight the lack of consultation and

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[65] Lulamile D Hanabe and Unathi Malinzi 'Party coalition as a model to govern municipalities in South Africa'(2019) 54 *Journal of Public Administration* 41, 48.
[66] Laurence Piper and Roger Deacon 'Too dependent to participate: Ward committees and local democratisation in South Africa' (2009) 35(4) *Local Government Studies* 415, 428–9.
[67] Thanyani S Madzivhandila & A Asha 'Integrated development planning process and service delivery challenges for South Africa's local municipalities' (2012) 47 *Journal of Public Administration* 369, 376–7.
[68] Section 16(1)*(a)*(i) of the Systems Act.
[69] Madzivhandila & Asha (n 67 above) 372.

involvement in decision-making and the absence of transparency when councils deal with peoples' needs or fail to attend to people's complaints.[70]

RS Masango identifies three requirements for responsiveness by policymakers and public officials that are especially relevant to local government. These are:

> [t]he public should express its needs; [t]here should be adequate recognition of the expressed public needs by policy makers and/or public officials; and [p]olicy makers and public officials should not only be willing to take the identified expressed public needs into account during policy-making and implementation processes, but should actually take them into account.[71]

3.2 Ward committees

Claire Benit-Gbaffou and Eulenda Mkwanazi argue that the restructuring of participatory spaces depends, among other requirements, on the legitimacy of leadership. This is dependent on political power and political influence, which should be 'more-or-less institutionalised through an official position in the party and in the state; and considered more-or-less able to mobilise resources and constituencies'.[72] However, the policy of cadre deployment and the silencing of opposition voices by calling opponents 'counter-revolutionaries'[73] has had disastrous consequences for local communities. At local government level ANC cadres and party loyalists are deployed to head or dominate civil society organisations and to influence elections to community policing forums and ward committees.[74] Even in wards run by opposition parties the ANC has reportedly hijacked ward committees. Though ward councillors are elected during local government elections, the calibre of candidates are often influenced by party loyalty, rather than leadership skills or organisational capabilities. Competent community leaders are either incorporated into government or marginalised by the ANC.[75]

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[70] Ibid 375.
[71] RS Masango 'Public participation: An imperative for sustainable democracy and effective service delivery' (2009) 44(1) *Journal of Public Administration* 123, 128.
[72] Claire Benit-Gbaffou & Eulenda Mkwanazi, 'Constructing communities in public meetings: Local leaders and the management of xenophobic discourses in Yeoville' in Claire Benit-Gbaffou (ed) *Popular Politics in South African Cities: Unpacking Community Participation* (2015) 129, 130.
[73] Piper (n 4 above) 29.
[74] Ibid 28.
[75] Heller (n 5 above) 134.

(a) Ward committee structures

Ward committees are the vehicle local government uses to engage with local communities. Benit-Gbaffou and Mkwanazi describe them as the 'sole conduit of information'. They are designed around the ward councillor and together they are at the core of local democracy. Unlike higher rungs of government, they have to listen to community concerns and bear the brunt of community expectations and discontent.[76] For Lawrence Piper and Roger Deacon their success in deepening democracy depends on the competence of the ward councillor and the political will of the dominant local political party. They depend materially and institutionally on support from their municipal council.[77]

The effectiveness of ward committees is closely tied to their ward councillor. Committee members may be willing to fulfil their functions but require the ward councillor to convene meetings.[78] Ward councillors have official positions and are able to influence resource allocation. They set the tone and boundaries for interaction, provide guidance and, through their interventions, diffuse conflict situations, especially during protests. Their personal legitimacy gives credibility to both the forum and the debate.[79]

In their report on the performance of ward committees in the Msunduzi municipality, Piper and Deacon conclude that ward committees could contribute towards the deepening of local deliberation but that they were 'overly dependent' on the performance of ward councillors. Ward councillors convened and chaired meetings, set the agenda (though members could submit agenda items for discussion), determined how often they met and were then solely responsible for reporting recommendations to council. Problems included delay in establishing ward committees, the election process, and the fact that some committees quickly become defunct and ceased to exist. In some instances there were no elections and members were co-opted. Ward councillors often regarded ward committee members as both 'useless' and a burden, or as competitors for their

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[76] Benit-Gbaffou & Mkwanazi (n 72 above) 130.
[77] Piper & Deacon (n 66 above) 415.
[78] PS Reddy & BH Sikhakane 'Public participation: A case study of ward committees in the Buffalo City Municipality' (2008) 43 *Journal of Public Administration* 680, 691–2.
[79] Benit-Gbaffou & Mkwanazi (n 72 above) 130.

positions.[80] Terence Smith and Jaap de Visser also raise the lack of influence ward committees had, because their access to Council was through the ward councillor, who either failed to submit their complaints or, if he or she submitted the complaint to the Speaker, it was not passed on to the relevant portfolio committee or placed on the council agenda. In some instances ward councillors lacked the necessary confidence to raise the complaints directly at council meetings.[81] Smith and De Visser also point out that ward committees were often regarded as 'extensions of party structures', did not represent 'the full range of interests in communities', and that councillors, as chairpersons, manipulated discussions and decisions to favour their party rather than the community.[82] Marius Pieterse refers to ward committee meetings as 'tedious "talk shops" where the same concerns and frustrations [were] perpetually vented without any real resolutions' and ascribed this to the limited power of the ward councillor and his or her 'beholden-ness' to a political party.[83]

Some ward councillors see their appointment as a vehicle to transform their personal socio-political and economic space or as an entrance into mainstream politics and commercial benefits.[84] They misuse participatory spaces to strengthen their own authority or to discredit political opponents.[85] The politicisation of participatory structures[86] has led to internal conflicts between officials and politicians fighting for positions.[87] This negatively impacts the interests of the community,[88] and often results in 'gross displays of greed and corruption from within the political

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[80] Piper & Deacon (n 66 above) 422.
[81] Terence Smith & Jaap de Visser 'Are ward committees working? Insights from six case studies' (2009) 56, available at https://dullahomarinstitute.org.za/multilevel-govt/publications/ward-committ-pdf.pdf.
[82] Ibid 16.
[83] Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 51 *VRU* 12, 17.
[84] This was confirmed in the questionnaire by Reddy & Sikhakane on citizen participation in the Buffalo municipality (n 78 above) 691.
[85] Glyn Williams 'Postscript: Viewing South Africa's urban governance from an "Indian" perspective' in Claire Benit-Gbaffou (ed) *Popular Politics in South African Cities* (n 72 above) 287.
[86] Madzivhandila & Asha (n 67 above) 375; see also Susan Booysen 'Public participation in democratic South Africa: From popular mobilisation to structured co-optation and protest' (2009) 28 *Politeia* 1, 13–14, where she pointed out that even on the IDP platforms, which ideally should have included civil society participation, ANC-aligned participants ensure that popular criticisms are silenced.
[87] Reddy & Sikhakane (n 78 above) 691; see also Ababio (n 3 above) 276, who pointed to the potential of clashes within diverse communities when some members pursue self-serving interests.
[88] Obvious Katsaura 'Ritualistic spaces? Re-examining invited spaces of participation' in Claire Benit-Gbaffou (ed) (n 72 above) 108.

elite and their corporate allies'.[89] Perceived party political alliances also create problems for ward committees. Chloé Buire questions whether it is possible for a committee member to steer clear of politics if they assist a politically aligned ward councillor.[90] The perception of party influence impacts the committee's independence and affects their ability to effectively engage (through their ward councillor) with council about issues that reflect their community's needs.[91]

Currently, the only incentive for ward councillors to perform their duties is to impress their superiors. Responses to the Reddy and Sikhakane questionnaire in Buffalo City reveal that councillors (and ward committees), when performing their functions, believed that they were doing local communities a favour. Councillors did not consider it their duty to listen to local complaints or to report complaints to council. They did not adhere to the Batho Pele principles, nor did they attend to the needs and demands of the community they were meant to serve. Councillors were not visible, and, once elected, often moved to the suburbs, where community members did not know how to contact them.[92]

The guidelines for the establishment and operation of municipal ward committees provide that ward committees serve as official specialised structures within municipalities.[93] Although ward committees enjoy institutional recognition, they do not have access to state resources and their role is limited to making recommendation. This limits their ability to challenge dominant norms.[94] Although they receive attendance allowances for monthly committee meetings, they have to pay their own transport costs upfront and await reimbursement. Poverty and unemployment make this very difficult. Poverty and unemployment also account for poor attendances at quarterly ward meetings.[95] Ward committee members argue that CDWs fulfil similar functions, but are state employed and receive monthly salaries. Many of the duties of ward committees are also duplicated

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[89] Sahara Ryklief 'South Africa's 2016 municipal elections – why the excitement?' in *GroundUp* 23 August 2016.
[90] Chloé Buire, 'Bringing government closer to the people? The daily experience of subcouncils in Cape Town' in Claire Benit-Gbaffou (ed) (n 72 above) 226.
[91] Piper & Deacon (n 66 above) 420–1 and 429–30; the authors found that there was no public consultation about the IDP or budget, and insufficient financial and other resources. In their view 30–50% of the 37 ward committees in Msunduziwere were not functioning properly and were dominated by councillors and political parties, rather than community representatives; furthermore, they were neglected by the municipality.
[92] Reddy & Sikhakane (n 78 above) 691.
[93] Section 5(3)*(a)* of Notice 965 of 2005 Systems Act.
[94] Benit-Gbaffou & Mkwanazi (n 72 above) 130.
[95] Reddy & Sikhakane (n 78 above) 692–3.

within traditional councils, whose members receive remuneration from the state. These include identifying community needs and participating in the IDP.[96]

Reddy and Sikhakane focus on the challenges ward committee members' face. Community involvement is a relatively new phenomenon and community members do not know how to engage constructively, nor do they appreciate the significance of their constitutional and legislative power with regards to local development. Low literacy levels affect their understanding of technical and other issues and impact their ability to make meaningful contributions. Professionals are reluctant to volunteer their expertise. Community members are often poor and unemployed, their contributions are voluntary and time-consuming, and ward committee members have to deal with the volunteers' expectations that their participation would lead to formal employment. The absence of capacity, organisational skills and resources make participation less meaningful, and often result in internal conflicts which threaten to collapse participatory structures.[97]

Pieterse points out that, though metropolitan councils encourage communities to participate, especially in the preparation of the IDP, communities often experience this as 'technical, and substantively empty', and a top-down approach where outcomes have been predetermined and their input meaningless. Communities also complain about grievance procedures, which they find to be 'cumbersome, unresponsive and ineffective'.[98]

(b) Recommendations

The failure of effective and meaningful community involvement in local government requires reform. This can be achieved through implementation reform, education or structural reform. This should be addressed at every level from community needs identification to executive implementation.

Reddy and Sikhakane suggest that local communities should be educated on the role of ward committees, what can be expected of committees, their own legislative rights and duties,

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[96] Piper & Deacon (n 66 above) 11; Traditional Leadership and Governance Framework Act 41 of 2003 s 20(2)*(g)*: 'promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery through the allocation of roles and functions'. In their case studies Smith & De Visser (n 81 above) 58 found that ward committees generally had good relationships with officials, CDWs and traditional leaders.
[97] Reddy & Sikhakane (n 78 above) 683.
[98] Pieterse (n 83 above) 17.

participatory opportunities available to them, and the code of conduct with which officials should comply. Specifically, local communities should be informed of their rights to hold officials to account.[99] Masango argues that to ensure responsiveness, effective policy implementation, and to limit abuse, communities should exercise continuous control through ongoing participation in community participation processes. He conceded that this is predicated on proper education and an understanding of the functioning of state processes.[100] Ababio also suggests that communities should play a more active role by taking an interest in municipal elections and council activities, by voting, and by participating in civic organisations.[101]

At the ward committee level, capacity building, needs assessments and training are required. Mbelengwa points to the absence of awareness campaigns, the lack of training and the absence of access to relevant information.[102] Ward committees should be representative of their community. Legislative compliance with women and youth representation should be enforced. In the Buffalo City questionnaire, the participants pointed out that there was no official body within the council that focused on the youth.[103] Ignorance, apathy and ineffectiveness impacted the effectiveness of participatory governance structures. Reddy and Sikhakane suggest that ward committee members should receive performance-related incentives. These incentives should be linked to the continuing privilege of serving on ward committees.[104] Smith and De Visser agree. They argue that an allowance or stipend that goes beyond the reimbursement of expenses would constitute official acknowledgement of the contribution ward committee members make.[105] Reddy and Sikhakane further suggest that ward committee members should sign performance agreements.[106]

Smith and De Visser make a range of recommendations. These include greater involvement by ward committees in integrated development planning; the need for institutional mechanisms for direct communication with council; municipalities should respond to ward committee input to safeguard their credibility within communities; ward committees should be representative,

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[99] Reddy & Sikhakane (n 78 above) 694.
[100] Masango (n 71 above) 130–1.
[101] Ababio (n 3 above) 281–2.
[102] Mbelengwa (n 62 above) para 5.3.
[103] Reddy & Sikhakane (n 78 above) 691.
[104] Ibid 692–3.
[105] Smith & De Visser (n 81 above) 57.
[106] Reddy & Sikhakane (n 78 above) 692–3.

independent, democratically elected and accountable to their communities; and information sharing between ward committees should be encouraged.[107]

At ward councillor level, Piper and Deacon suggest that ward councillors should be obliged to call regular meetings with advance notice and a minimum quorum before decisions are taken. Issues raised by the committee should become agenda items of the next council meeting. Complaints against ward councillors should be investigated and, where appropriate, should lead to disciplinary hearings and sanctions.[108] They suggest training councillors to make them aware of their position within the community. The training should focus on councillors being part of the community rather than being superior to any members and emphasise the importance of their relationship with the ward committee. They also suggest monthly reports about ward activities both to council and the ward that should be monitored by the mayor.[109] Smith and De Visser suggest that an alternative reporting channel should be created where ward committees could submit their complaints directly to the relevant portfolio committee.[110]

Reddy and Sikhakane agree that municipalities are not contributing towards capacity building of local communities or councillors. They suggest that there should be regular capacity building and training needs assessments (if possible, at three monthly intervals), and annual capacity building and training programmes that respond to needs assessments. They also suggest that municipalities should provide more administrative and financial support.[111] Smith and De Visser are highly critical of how councillors handle public relations. Although they are assigned to specific wards and ward councillors, they are mostly 'invisible' except when they have to stand in for an absent ward councillor.[112]

From the discussion it is evident that local government is not living up to its obligations. While the recommendations and suggestions for reform may improve community involvement, there are other remedies and strategies available to local communities through which they can express themselves, bring their grievances to the attention of local government, and demand their rights.

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[107] Smith & De Visser (n 81 above) 60–2.
[108] Piper & Deacon (n 66 above) 431.
[109] Reddy & Sikhakane (n 78 above) 693.
[110] Smith & De Visser (n 81 above) 56.
[111] Reddy & Sikhakane (n 78 above) 692–3.
[112] Smith & De Visser (n 81 above) 58.

3.3 Strategies to empower and improve service delivery

Regrettably, local government failures and neglect, so reminiscent of our colonial and apartheid past, have forced local communities to challenge their local authorities. Unlike historical challenges, communities are now empowered by constitutional tools not previously available to them. These include the power of the ballot, socio-economic rights, the right to demand accountable, transparent and responsive governance, and the right to be involved in local government. These rights should be seen in the light of the evolving nature of socio-economic rights and of the right to participation.

In her typology for public participation, Susan Booysen suggests other platforms for participation. These include participation in core institutions; participation in ward committees and CDW programmes; co-optive and co-operative civil society participation; and protest participation.[113] Pieterse points out that communities often use one of these strategies or a combination of them, depending on their motivation and their 'perceived chances to be heard'.[114]

So far the thesis has dealt with participation in the legislative and other processes of Parliament and provincial legislatures; participation through the meaningful engagement mechanism; and participation in local government. This section engages with other avenues through which communities communicate their grievances. They can use, or not use, their vote to demonstrate apathy and loss of faith in their government. They can resort to civil protests. They can co-opt civil society and social movements. Or they can turn to the courts to secure judicial enforcement of their rights.

(a) Apathy and protest as strategies

Ababio ascribes low participation in consultative forums to the 'historical factor'. This relates to apathy, lack of education, lack of public accountability, disillusioned communities, the absence of ethical conduct by officials, corruption, non-representativeness and the poor skills of municipal officials.[115] Many of these factors influenced the electorate during the 2016 local government elections. Before 2016, the ANC believed in its own 'enduring' party popularity and political

[113] Booysen (n 86 above) 10–14; 17–18.
[114] Pieterse (n 83 above) 18.
[115] Ababio (n 3 above) 277–9.

'dominance'. This had been reinforced by strong electoral support at national level before 2016, and again during the 2019 national elections.[116] However, at local government level the 2016 local elections were a wakeup call for the ANC. Forty-two point two eight per cent of registered voters did not vote in the local elections, and the voter profile changed. Gwede Mantashe, the ANC General Secretary at the time, was compelled to admit that the low number of voters could be attributed to dissatisfaction among township and rural voters.[117]

The right to protest peacefully enjoys protection under s 17 of the Constitution. In a report produced by the International Network of Civil Liberties Organization the authors linked democracy and peaceful protests.

> If freedom of expression is the grievance system of democracy, the right to protest and peaceful assembly is democracy's megaphone. It is the tool of the poor and marginalized – those who do not have access to the levers of power and influence, those who need to take to the streets to make their voices heard.[118]

Many communities have turned to protest action to voice their grievances, which has often been accompanied by violence.[119] Siphiwe Segodi, secretary of the Thembelihle Crisis Committee during the 2016 local elections, explains that though protests were disruptive, frustrated workers and communities were forced to resort to violent actions because authorities were 'deaf'. One of the respondents interviewed in connection with the protests that followed the government's decision to relocate the Gauteng portion of Merafong into North West province explained that the protests became violent because of the government's insensitivity and failure to communicate its decisions effectively.

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[116] 1994 – 62.65%; 1999 – 66.35%; 2004 – 69.69%; 2009 – 65.90%; 2014 – 62.15%; 2019 – 57.50%.

[117] Free State 13.34%; North West – 18%; Limpopo – 14.7%; and Northern Cape – 7.67%. Available at http://www.groundup.org.za/article/south-africas-2016-municipal-elections-why-excitement/. See also Paternoster Group 'What now? South Africa's 2016 local government elections' (August 2016), available at http://thepaternostergroup.com/wp-content/uploads/2016/11/african-political-insight-1.pdf. Tshwane: ANC 41% (-14), DA 43% (+8), EFF 10% (+10); Johannesburg: ANC 45% (-14), DA 38% (+3), EFF 11% (+11); Nelson Mandela Bay: ANC 41% (-9), DA 47% (+7), EFF 5% (+5). There were 27 municipalities in which no party managed to win an absolute majority, spread across 8 provinces as follows: Western Cape (8), KwaZulu-Natal (7), Gauteng (4), the Northern Cape (3), Limpopo (2), North-West (1), Free State (1), and the Eastern Cape (1). Available at http://thepaternostergroup.com/wp-content/uploads/2016/11/african-political-insight-no-2.pdf.

[118] International Network of Civil Liberties Organization (INCLO) 'Take back the streets: Repression and criminalization of protest around the world' (2013), available at https://www.inclo.net/pdf/take-back-the-streets.pdf.

[119] Pieterse (n 83 above) 18.

> It was never decided to riot, but we got the message from our leaders that we cannot allow a government we voted for to take us for granted. Immediately after the announcement in Pretoria, we rushed into the streets and hurled stones, in fact anything that we could lay our hands on, at the police. The police reacted by firing rubber bullets at us. It was then that we decided to target the houses of councillors.[120]

In *South African Transport and Allied Workers Union v Garvas* the issue before the Court was whether the South African Transport and Allied Workers Union, who had organised a gathering, could be held accountable for damages caused in the course of the protest. With reference to the denial of public assembly and protest under apartheid and the central role protests played in ending apartheid, Mogoeng CJ affirmed the importance of organised protest and demonstration for marginalised communities.

> The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns.[121]

According to Municipal IQ, reporting on the period 2004 to 2018, protests increased from 10 major protests in 2004 to 237 in 2018. The increase in protests is linked to economic recession, unemployment and service delivery failures. The first quarter statistics for 2019 indicates a further increase. Here the researchers suggest that the increase may have been opportunistic to highlight community grievances before the 2019 national elections.[122]

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[120] Sethulego Matebesi & Lucius Botes 'Khutsong cross-border protests: The triumph and failure of participatory governance' (2011) 30 *Politeia* 4, 15, where the initial peaceful protests turned from consumer boycotts and stay-aways to violence, including burning tyres and looting shops; see also Boitumelo Matlala & Claire Benit-Gbaffou 'Against ourselves – Local activists and the management of contradicting political loyalties. The case of Phiri, Johannesburg' (2012) 43(2) *Geoforum* 207, 215: 'When you stage sit-ins or peaceful demonstrations they think you are happy, while you are hurting. It is only when you do something with your hands to make blood flow, that they pay attention …. It is simple to kill a person, you drop a stone on their head or you put a spade through their head.' (Activist 8, interview in 2008).

[121] *South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC) para 61; see also para 62.

[122] Municipal IQ 'Municipal Data and Intelligence' (24 October 2017), available through http://www.municipaliq.co.za; see also SA History Online 'Public Protest in Democratic South Africa' (2014), available through http://www.sahistory.org.za. See further, Peter Alexander, Carin Runciman & Boitumelo Maruping 'South African Police Service Data on Crowd Incidents: A preliminary analysis' Social Change Research Unit, University of Johannesburg (2015) Table 8. During the period 2009–2013 protests motivated by dissatisfaction with service delivery came to 4 493 (or 10,8%) and protests demanding the resignation of councillors came to 520 (or 1.2%) of all protests.

By using 'unconventional forms of public participation', Booysen argues, communities hope to achieve two goals: '[T]o pressure public representatives to improve representation of citizen interests, and for citizens to focus government's attention on continuous deprivation, despite progress in delivery.'[123] She describes this 'dual repertoire of action' as a combination of 'the ballot and the brick'.[124] Using both methods to express disaffection, communities hope to improve service delivery and advance transformation.[125] She further argues that through protest action communities has 'signalled substantial popular rejection of participation as ritualistic action in favour of the instrumental notion of participation as measure for response and delivery'.[126]

Pieterse cautions against dismissing official channels for participation and romanticising hostile forms of engagement. He points out that protests 'can be motivated by anti-democratic or illegal objectives' and are sometimes intentionally used to '[damage] and [destroy] public goods, [violate] the rights of vulnerable groups or forcefully [subjugate] collective interests to militant minority demands'.[127]

Neither government nor communities benefit from violent protest action, whereas constructive engagement benefits both. Local authorities attain legitimacy and communities benefit from positive interaction with their councillors and local officials.[128] It encourages a 'sense of cohesiveness in society',[129] and produces a host of other benefits.

> Participation helps government to address the basic needs of poor community members. Participation ensures an improved sense of ownership of community development projects and builds self-confidence by breaking the so-called 'dependency mentality'. It allows active involvement of various stakeholders such as government, developmental agencies, private sector organisations and NGOs to alleviate poverty. It is a vehicle for promoting and instilling a culture

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[123] Booysen (n 86 above) 17–18.
[124] Susan Booysen 'With the ballot and the brick: The politics of attaining service delivery' (2007) 7(1) *Progress in Development Studies* 21, 31.
[125] Ibid 26
[126] Ibid 2.
[127] Pieterse (n 83 above)18–19.
[128] Ababio (n 3 above) 274; Matebesi & Botes (n 120 above) 17.
[129] SF Tau 'Citizen participation as an aspect of local governance in municipalities: A South African perspective' (2013) 48(1) *Journal of Public Participation* 152, 155–6.

of good governance at local government level. It enhances accountability and transparency in development projects at grassroots level.[130]

A change of culture and behaviour will require education in constitutionally compliant protest behaviour. More importantly, protest action would be averted if local government was to fulfil its constitutional and legislative obligations and involve communities and their civil society partners in seeking solutions to the many service delivery challenges.

(b) Civil society and social movements

The Systems Act expressly obliges municipalities in s 17(2) to 'establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality'. Under s 17(2)*(d)* this includes making provision for 'consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities'. This empowers local government to decide who is, and who is not, a locally recognised organisation and becomes problematic when abused by officials for political purposes. As Piper pointed out, 'once marginalised from the ANC hegemony, social movements are treated as morally suspect and quickly become vulnerable to acts of repression'.[131] Marginalisation also makes it difficult for activists to participate in, or influence, decision-making processes[132] and may affect their independence.

Matlala and Benit-Gbaffou argue that many activists have accepted the ANC's 'propagandist justification' for its policy strategies and have distanced themselves from the many failures at local level. In their case study on local activists in Phiri, Soweto they engaged with the contradiction between ANC loyalty and ANC betrayal.[133] What interested the researchers was not the contradiction but the justification. Activists expressed their loyalty to the 'spirit' of the anti-apartheid struggle in which many of them were involved.

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[130] Madzivhandila & Asha (n 67 above) 374.
[131] Piper (n 4 above) 37.
[132] Luke Sinwell, 'Social movements, mobilisation and political parties: A case study of the Landless People's Movement, South Africa' in Claire Benit-Ghaffou (ed) (n 72 above) 87–8.
[133] This is where the water privatisation pilot project of Operation Gcin'amanzi was first introduced by the City of Johannesburg. The pilot project was discussed in the *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) judgment in which civil society played an active role and the Centre for Housing Rights and Evictions acted as *amicus curiae*.

> Loyalty to the belief in freedom, loyalty to the belief that collective struggle can achieve this freedom, are reaffirmed as constant ideals by activists as if to balance what they construe as a betrayal of these ideals by the ANC. They indeed constantly affirm their attachment to what they call 'the real' ANC, while the current ANC is described as 'false', misled, corrupt.[134]

During this period Justice O'Regan, in her judgment in *Mazibuko v City of Johannesburg* (*Mazibuko*), referred to how fortunate South Africans were because there were so many, and such a range, of NGOs devoted to improving the lives of the poor. She specifically highlighted the expertise acquired from working in the legal arena.[135]

Although there are various legislative provisions that provide for civil society participation,[136] Sinwell considers the institutional mechanisms designed by the state as weak platforms for interaction between civil society and state interaction. The interaction is almost always confrontational. Civil society participation at a local level is further negatively affected by 'state bureaucratisation, the adoption of neoliberal policies and the focus on quantitative service delivery targets'.[137] Nonetheless, NGOs and CSOs are not without options. In the area of socio-economic rights they have successfully conducted public interest litigation and have used *amici* briefs to bring community concerns to the attention of the courts. Their contribution should be valued. Pieterse's view that the poor are 'relegated' to representation by NGOs[138] and Booysen's characterisation of civil society litigation as having been reduced to 'high-profile actions by a modest number of organisations',[139] are unfortunate. High-profile cases not only vindicate rights

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[134] Matlala & Bénit-Gbaffou (n 120 above) 215.
[135] *Mazibuko* (n 133 above) paras 160–5.
[136] Section 152(1)*(e)* of the Constitution – Local government should encourage involvement of community organisations; s 19(3) of the Structures Act – 'a municipal council must develop mechanisms to consult community organisations in performing its functions and exercising its powers'; s 17(2)*(d)* of the Systems Act – municipality must provide for 'consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities'; s 29(1)*(b)*(iii) of the Systems Act – 'organs of state, including traditional authorities, and other role players to be identified and consulted on the drafting of the integrated development plan'; Guidelines para 5(3)*(b)*(v) provides – 'ensure constructive and harmonious interaction between the municipality and community through the use and co-ordination of ward residents meetings and other community development forums'; and (vi) – 'interact with other forums and organisations on matters affecting the ward'. See also Tau (n 129 above) 154 where the author stated that 'citizen participation is a community-based process, where citizens organise themselves and their goals at the grassroots level and work together through nongovernmental community organisations to influence the decision-making process.'
[137] Sinwell, (n 132 above) 87–8.
[138] Pieterse (n 83 above) 19.
[139] Booysen (n 86 above) 13.

and draw lines in the sand for officials, but also empower NGOs and SCOs. Following successful public interest litigation, judicial confirmation of a right ripples out and the mere production of a letter from an NGO or CSO may ensure official compliance. An option for social activists is to use the threat of personal cost orders against recalcitrant officials as a negotiating tool[140] or to focus on the hierarchical responsibilities placed on the state by s 139 of the Constitution, especially as so many municipalities are dysfunctional or failing.

While funding and agendas are a reality for social movements, another reality is that there are many grassroots organisations who, despite funding challenges, play a meaningful role within their communities. At this level, NGOs and CSOs could be co-opted to educate communities about their rights and educate officials about their duties. Likewise, local communities, in co-operation with local civil society organisations and community forums, could influence decision-making,[141] access information, and explore other avenues for community participation.

(c) Litigation as strategy

Litigation as strategy is out of reach of most marginalised communities. In the overview of judgments that follow there are only two cases where the right to be involved in local government intersected with service delivery and the enforcement of socio-economic rights. In *Beja v Premier of the Western Cape* (*Beja*) the community's complaints and the involvement process were hijacked by the ANC Youth League and in *Mazibuko* the Court held that there was adequate community involvement.[142] As the majority of cases demonstrate, accessing courts to enforce the right to community involvement has largely been driven by interest groups and powerful

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[140] See, for example, the cost order against the public protector in *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP), which was subsequently confirmed in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC); see also *South African Social Security Agency v Minister of Social Development* 2018 (10) BCLR 1291 (CC), where a unanimous Court ordered the former Minister of Social Development, Ms Bathabile Dlamini, and the acting Chief Executive Officer of SASSA, to personally pay the costs; see further *Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC), where a unanimous Court ordered the first three respondents to pay 80% of the applicants' costs, including the cost of two counsel. Minister Dlamini was ordered to pay the remaining 20% in her personal capacity. Former Rural Development and Land Reform Minister Maite Nkoana-Mashabane was ordered to pay personal costs after the department failed to comply with a court order to draft a plan to redevelop District Six.

[141] Tau (n 129 above) 154.

[142] *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC); *Mazibuko* (n 133 above) para 167.

lobbyists.[143] This is not necessarily a negative outcome, as it has created opportunities for courts to interpret and expand on the right to community involvement.

Beja concerned an alleged agreement between the Makhaza community and the City of Cape Town in terms of which the City would install individual open toilets and the Makhaza community would pay for their enclosures. The City claimed that the unenclosed toilets were agreed upon, while the community denied the existence of the agreement. The meeting where this purported agreement was reached was attended by approximately 60 community members, the ward councillor, community leaders and the project manager. The provision of open toilets, though raised, was not an agenda item. No minutes were kept. Neither the independent subcontractor, appointed by the City to consult with the community, nor the paid community liaison officers were present during the meeting. Fifty-five of the toilets in the community remained unenclosed and formed the basis of the dispute.[144]

Judge Erasmus looked at the mathematics of representation. Could 60 people, less than one per cent of a community of six thousand, conclude an agreement that would govern the entire community's living conditions? Could a ward councillor, in the absence of a proper mandate, conclude an agreement on behalf of the community resident in his ward? The court addressed this by stipulating in its minimum requirements that representatives must be duly authorised by the community and that sufficient notice should precede meetings in order for the community to properly mandate its representatives. In addition, the court pointed to the need for evidence of actual participation, proof of representative capacity and the importance of keeping proper minutes of meetings.[145]

In particular, Judge Erasmus looked at the second applicant who claimed to represent the community. Though a resident, he was an executive member of the ANC Youth League and therefore politically aligned. He was also a community liaison worker in the employ of a contractor and as such paid to represent the interests of the City. In the court's view his role 'undermined the

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[143] *Ethekwini* (n 151 below), a political party; *SAPOA* (n 14 above), the South African Property Owners Association; *Borbet* (n 27 above), five large corporations; *Kalil N.O. v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA), business property owners.
[144] *Beja* (n 142 above) paras 17, 77, 81–3.
[145] *Beja* (n 142 above) paras 100 and 103.

principle of community participation'. The court also reprimanded both the second applicant and the mayor of Cape Town for their failure 'to rise above their political contest' rather than focus on the needs of the poor and vulnerable.[146] It is clear from the judgment that the status of representatives, including ward committee members, should be scrutinised by the courts.

Judge Erasmus agreed that it was commendable for municipalities to enter into agreements with local communities regarding their socio-economic rights. However, he found that a 'vague agreement [was] simply not good enough' and that consent could not be inferred from 'happy letters' or the absence of objections.[147] With reference to Annexure A of the guidelines, which identified issues that should be addressed in an agreement,[148] Erasmus J set out the minimum requirements for an enforceable agreement:

> (i) it must be concluded with duly authorised representatives of the community; (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies, (iii) it must be properly minuted and publicised. (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement.[149]

The High Court also looked at the nature of the consent. There was no proof of who was present during the meeting; there was no proof of the alleged agreement; no indication that the meeting considered the costs of enclosing the toilets or whether community members could afford to do this; and no indication what the City would do if members could not afford to enclose the toilets. After applying the facts to the specified minimum standards, the court found that the installation of unenclosed toilets was unreasonable, unfair and violated community members' constitutional rights, especially as no provision had been made for the needs of the most vulnerable – the poor, the disabled, and women and girls. The purported agreement also violated the Makhaza

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[146] *Beja* (n 142 above) paras 3 and 104.
[147] *Beja* (n 142 above) paras 93–4 and 96.
[148] *Beja* (n 142 above) para 71. These included the following clauses: '(a) A clear indication on how the membership of the parties to the agreement is structured, who is represented by each party, and in terms of what mandate. (b) The responsibilities of each party to the agreement. This could include a list of functions to be performed in terms of the agreed development process, and "should be specific so that all members know what is required of them". (c) The processes and proceedings of the agreement including where, when and how often the parties will meet, the description of the quorum for the meeting etc. (d) The signatures of members to indicate acceptance of the terms of the contract.'
[149] *Beja* (n 142 above) para 98.

community's constitutional rights protected under ss 10, 12, 14, 24, 26 and 27 and was unlawful and inconsistent with the City's constitutional obligations. The City was ordered to enclose 1 316 toilets.[150]

In *Democratic Alliance v Ethekwini Municipality* (*Ethekwini*), the applicant, a political party with representation on the Ethekwini municipal council, questioned the municipality's street renaming policy and the public consultation processes. The 2001 policy provided for consultation with all affected parties. The implementation was carried out in two phases. In 2005, during phase I, advertisements were published in the media inviting proposals; two hundred submissions were received. This was followed by further advertisements which included the date of the council meeting, when the proposals would be considered, and an invitation to all interested persons and organisations to comment in writing within seven days. A large number of proposals were received and considered, before a decision was made by majority vote.

Phase II commenced in 2007. New notices calling for renaming proposals were published in major local newspapers, on posters in public offices (40), and libraries. More than 27 000 proposals were received. Due to the large number of responses, the period for public comment was extended by a further month. The 2001 policy was amended by replacing consultation with affected parties to consultation with ward committees. Seventy-six of the one hundred ward committees responded. The judgment did not deal with the quality of consultation during the ward committee meetings. Further postponements followed to allow for consideration by party caucuses. Initially, 83 street names were shortlisted, but council agreed to change 99 names. The DA argued that statutory provisions about public consultation were not complied with, that no proper deliberation took place during council committee meetings, and that council failed to comply with its street naming policy.

The Supreme Court of Appeal confirmed that the duty to facilitate public involvement in terms of ss 59(1), 72(1) and 118(1) of the Constitution did not apply to municipal councils. Nonetheless, municipal councils had to facilitate public involvement in the exercise of their executive and legislative functions. This, the court concluded, was implied, first, by the constitutional obligation

[150] *Beja* (n 142 above) paras 146, 102 and 192.

to provide democratic and accountable government to local communities in terms of s 152(1)*(a)* of the Constitution, and second, by the various statutory provisions that require municipalities to establish mechanisms for local community participation.[151]

Brand JA then applied the reasonableness test formulated by Ngcobo J in *Doctors for Life v Speaker of the National Assembly* (*Doctors for Life*) to the renaming decisions by the Ethekwini council.[152] With regards to Phase I, the court found that council did not comply with its 2001 policy. The information provided in the advertisements was insufficient and could not be regarded as proper notice to the public, and the seven days' time period for written submissions and comments was too short. The decision by council therefore failed to pass the reasonableness test. The court also pointed out that council's own procedures followed during Phase II illustrated the unreasonableness of its actions during Phase I. With regards to Phase II, the Court approved that ward committees should become the centre for consultations and concluded that the consultation processes were reasonable. The SCA set the council's decision in Phase I aside and ordered the Ethekwini council to remove and replace nine specified street names within three months. The appeal against the decision in respect of Phase II was dismissed.[153]

In *City of Tshwane Metropolitan Municipality v Afriforum* (*Afriforum*) the Metropolitan City of Tshwane challenged an interim interdict granted to *Afriforum* in the High Court.[154] *Afriforum's* attempt to stall the implementation of a policy with which it disagreed, through an interdict, found little favour with the Court.[155] The majority Court found that the policy was formulated by the Council in the exercise of its constitutional and executive powers and that '[p]ublic participation should not be elevated to co-governance or equal sharing of executive and budgetary responsibilities'. Further, it found that the Court was not prepared to 'intrude into the Council's

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[151] *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) para 23; ss 17(2) and 51(1)*(e)* of Systems Act; see also *Afriforum* (n 154 below), where Mogoeng CJ in para 34, fn 7 stated: 'I assume without deciding that *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) could be relied on as authority for the proposition that this section is the constitutional basis for public participation at the local government level.'
[152] *Doctors for Life v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 125–9.
[153] *Ethekwini* (n 151 above) paras 24, 26–7, 29 and 30–1.
[154] *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC). The judgment is discussed in chapter 2, section 2.
[155] *Afriforum* (n 154 above) para 71.

sole operational space',[156] and that 'orders that have the effect of altogether derailing policy-laden and polycentric decisions of the other arms of the State should not be easily made'.[157] The Chief Justice also pointed out that a court would only rarely consider whether a flawed participation process was a basis for an interim interdict[158] and that it would have been more appropriate for *Afriforum* to pursue their rights through a review process.[159] Nonetheless, Mogoeng CJ set out the requirements to be met when assessing the reasonableness of a participation process. The process must be 'objectively genuine' and 'deliberately designed to gather as wide a diversity of views as possible for Council to be fully or reasonably well-informed about the key reasons for the objection', and that this should not be reduced to a 'box-ticking' exercise, nor should it be about quantity.[160] What is required is:

> substantive quality and representivity of particularly opposing views that determine the adequacy or otherwise of the participatory process. It is the wide-ranging quality of opposing views that must be allowed to be properly ventilated and engaged with to avoid unfairness to those opposed to the proposed change.[161]

SAPOA concerned a rates increase by the metropolitan council after the conclusion of the participatory processes. The increase affected business, commercial and industrial properties. The City's finance department communicated the decision by sending email invitations to various business organisations to attend a meeting to discuss the increase.[162] The email did not specify the proposed increase but stated '[t]hese proposals are not necessarily the same as the draft tariffs published for public comment'.[163] Due to the misleading nature of the email, SAPOA did not think

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[156] *Afriforum* (n 154 above) para 67.
[157] *Afriforum* (n 154 above) para 68; in this regard see also para 52.
[158] *Afriforum* (n 154 above) para 70.
[159] *Afriforum* (n 154 above) para 67.
[160] *Afriforum* (n 154 above) 52.
[161] *Afriforum* (n 154 above).
[162] *SAPOA* (n 14 above).
[163] *SAPOA* (n 14 above) para 25. With regards to misleading public statements, see also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) paras 56, 77 and 79, where the applicant sued the respondent for arrear service charges. The respondent refused to pay, based on his constitutional right to equality. The applicant's new policy, which provided for neighbouring suburbs to be charged differential tariffs for service charges, was implemented without consultation and with public officials issuing untrue and misleading public statements. Decisions to institute legal action to enforce payment were also differentially applied. In the course of his judgment, Langa DP criticised the Pretoria City Council for failing to deal openly with residents, as the Council's attitude was contrary to the new constitutional values of accountability, openness and democracy. Sachs J in para 140 agreed – while it is acceptable

it necessary to attend the meeting. The meeting was attended by the Johannesburg Business Forum and Johannesburg Inner-City Business Coalition, whom the City regarded as the representatives of business. The City's explanatory memorandum circulated at the meeting was subsequently obtained by SAPOA from the Johannesburg Chamber of Commerce. The proposal was advertised on 8–9 May, requesting comments by 11 May. An extension was granted to SAPOA until 15 May. SAPOA's request for a further extension was denied. Neither the Business Forum nor Coalition accepted the proposal, with both complaining about the time constraints.[164]

The SCA held that municipal rates formed an integral part of the budget process and as such were subject to the provisions of the Finance and Systems Acts. The Finance Department failed to comply with the City's legislatively stipulated community participation obligations and instead 'adopted their own truncated procedure which was not in accordance with the relevant Acts and which, in any event, was quite inadequate to ensure that the local community could participate in the preparation and approval of the budget'.[165] The declaratory order stipulated that material amendments to a budget after it had been tabled, required compliance with the Systems Act, the Finance Act and the Rates Act.

The applicants in *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* (*Borbet*) were five large corporations who did business within the Nelson Mandela Bay municipality. They challenged the 2011/2012 budget on the basis that the public consultation process failed to comply with constitutional and legislative requirements.[166] The budget was tabled on 31 March and adopted on 28 June. The respondents argued that there was no public consultation during the preparation of the budget, or after the budget had been tabled. The proposed budget and accompanying documentation did not appear on the municipality's website. Attempts by the Ratepayers Association to engage with the executive mayor were unsuccessful and further consultations only took place after the mayor deferred consideration of the budget.

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to have a policy that rationally and objectively promotes substantive equality, public officials should be open about it to all affected persons.

[164] *Ethekwini* (n 151 above) paras 27, 29 and 37.

[165] *Ethekwini* (n 151 above) para 40.

[166] *Borbet* (n 27 above). Section 160 of the Constitution; Community participation as set out in chapter 4 of the Systems Act; ss 16(1), 24(1) and 25(1) of the Finance Act and s 30(5) of the Structures Act.

With reference to *Ethekwini*, the court affirmed the importance of consultations at local government level as it was 'at that level that the interests of directly affected communities [could] more readily be taken into account and promoted in the process of decision-making'.[167] The court accepted that there was consultation during the budget preparation process but was critical of the fact that ward committees did not play a more significant role. With regards to the process that followed after the budget was tabled, the court noted that, though the budget was published, no details were provided regarding the identification of interest groups and affected communities nor was there any reference to submissions received and considered. There was no information about whether public consultation hearings were facilitated and held, what mechanisms were in place, what resources were allocated to tasks, or what steps were taken to build capacity.[168] Access to this quality of information would enable disadvantaged communities in future to effectively hold their local authorities to account.

The court dismissed the respondents' argument that publication of the amendments was unnecessary because the applicants suffered no prejudice, as the proposed tariffs and rates were reduced. The court found that the respondent misunderstood the nature of public participation.

> Public participation is not premised upon potential prejudice or upon the notion of legal interest.
>
> Public participation is a necessary feature of the democratic process at local government level.[169]

In applying the reasonableness test the court found that the municipality was not constrained by resources or practical considerations; that the municipality failed to fulfil its developmental and capacity-building obligations; and that significant changes to the budget were not published. Judge Goosen held that, given the 'centrality of the budget in all efforts by a municipal council to meet its development obligations', the steps taken by the municipality were not reasonable and did not constitute effective and meaningful public participation in the budget process.[170]

This 2014 judgment stands in stark contrast to the role played by ward committees in the 2012 *Ethekwini* judgment and the 2009 judgment in *Mazibuko*. In the latter the City of Johannesburg used the formal structures of ward committees to communicate the proposed installation of pre-

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[167] *Borbet* (n 27 above) para 72.
[168] *Borbet* (n 27 above) paras 72, 74, 75, 77.
[169] *Borbet* (n 27 above) para 78.
[170] *Borbet* (n 27 above) paras 82 and 112.

paid water meters as part of a project that became known as Operation Gcin'amanzi. Meetings and workshops were held in the 43 wards that represented Greater Soweto. In Phiri, the suburb most directly affected, public meetings were organised by the ward councillor, at times bi-monthly. In addition, 20 community workers were employed to visit individual households and explain the project. Justice O'Regan concluded that the community involvement processes were 'thorough and comprehensive' and complied with the provisions of s 4 of the Systems Act, even though an individual applicant was not informed of her different options.[171] This seemingly informed Justice O'Regan's decision that the City's water meter policy was reasonable and therefore constitutionally compliant.

In *Kalil N.O. v Mangaung Metropolitan Municipality* (*Kalil*) [172] the council of the Manguang Metropolitan Municipality resolved to approve the 2013/2014 budget, which included an increase in rates for commercial properties. Shortly before the proposed council meeting the applicants, representing the municipal ratepayers, launched an application to prevent the municipality from approving the budget. Before the application, the municipality was requested to provide the formula it intended to use for the calculation of the rates. The municipality failed to provide the information. A further request followed to meet with the Executive Mayor. At this meeting the rates ratio was discussed, and written submissions were requested, with which the applicants complied.

The applicants argued that the municipality failed to take notice of their representations; failed to properly publish the proposed budget and required documentation; and failed to comply with the provisions of the Rates, Finance and the Systems Acts as it relates to public participation. The SCA, with reference to *Ethekwini*, confirmed that a municipality has statutory obligations with regards to public participation and that compliance was measured against the reasonableness standard, which depends on the circumstances of each case.[173] The SCA agreed that the court a quo erred in not finding that the public participation process was inadequate and that the municipality failed to comply with its statutory obligations.[174] However, a year had passed since

[171] *Mazibuko* (n 133 above) paras 129, 133 and 167.
[172] *Kalil* (n 143 above).
[173] *Kalil* (n 143 above) para 9; *Ethekwini* (n 151 above) para 24.
[174] *Kalil* (n 143 above) para 13.

that decision and the City was in the process of preparing its next budget. In the circumstances, the SCA found that the budget should not be set aside 'solely by the lack of proper public participation'[175] and that it was 'too late for any meaningful declaratory relief to be granted to the appellants'.[176]

4 REFLECTIONS

In terms of Bishop's classification, community involvement at local government level is envisaged as traditional participation because local government legislation obliges local government to initiate and control the process. In reality it presents as radical participation due to the failures of local government and the ward committee system. It also suffers from the problems Bishop identified. It is frequently captured by political or other interests, and the quality of the interaction is compromised when frustrated communities resort to protest action. Ideally, it should present as mutual participation, where a caring and competent municipality focuses on the problems of communities within its jurisdiction and involves them in finding appropriate solutions.

In terms of Henk Botha's classification, community involvement cases follow a similar trend to the ones evidenced in the meaningful engagement and public involvement cases as they relate to a deeper or shallower understanding of participatory democracy. The majority judgment in *Doctors for Life* supported a deeper conception of democracy, while the minority judgments leaned towards a more 'formalist and election-centric' form of democracy.[177] The approach was reinforced in Merafong *Demarcation Forum v President of the Republic of South Africa* (*Merafong*), when Justice Van der Westhuizen advised disaffected communities to hold politicians accountable through the ballot.[178] In the meaningful engagement space the Court in *Port Elizabeth Municipality v Various Occupiers* (*P E Municipality*) and *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* (*Olivia Road*) advanced a deeper understanding of democracy through the development (*P E* Municipality) and then implementation (*Olivia Road*) of the

[175] *Kalil* (n 143 above) para 14.
[176] *Kalil* (n 143 above) para 28.
[177] Brian Ray *Engaging with Social Rights Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 281–2.
[178] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 60.

meaningful engagement mechanism, while the Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (*Joe Slovo*) accepted a flawed participatory process. Justice Yacoob expressed this as meaningful engagement 'almost all the way'.[179]

The trend is also evident in the local government space. In *Masondo* the majority Court rejected proportional representation on the mayoral committee in favour of executive decision-making in the interest of effectiveness and efficiency. Justice O'Regan, however, in her minority judgment argued for a deeper form of democracy, where representatives of minority parties could influence decision-making at the highest level of local government. In *Ethekwini* Brand JA, while confirming that ss 59(1), 72(1) and 118(1) of the Constitution did not apply to municipal councils, used s 152(1)*(a)* and the duty to facilitate community involvement in various local government legislations to find that a municipal council, in the exercise of its executive and legislative functions, had to facilitate public involvement.[180] Judge Goosen in *Borbet* also supported a deeper understanding of community involvement when he confirmed that public participation was 'a necessary feature of the democratic process at local government level'.[181]

The trend also extends to how various courts view the potential of participation. The majority in *Doctors for Life* envisaged public participation as an evolving right that would empower disadvantaged communities over time. For the majority in *Merafong* and *Afriforum* the focus was on information gathering. The participation process concluded once officials were reasonably well informed. Regrettably, the deferential judgments failed to use the democratic tools of accountability, transparency and responsiveness to expand the potential of participatory democracy. In the local government space the focus on evidential proof of participation (*Beja* and *Borbet*), the focus on the best interests of the community (*Beja*), the focus on legislative compliance (*Beja* and *SAPOA*) and encouraging the use of the ward committee system (*Ethekwini*), demonstrate the judiciary's appreciation of the potential of meaningful community involvement.

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[179] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 117; Ray (n 177 above) 279, with reference to *Joe Slovo* and *Mazibuko*, criticised the Court's 'embrace of the rhetoric of participatory democracy' while failing to respond to the 'procedural arguments that could have implemented that vision'.

[180] *Ethekwini* (n 151 above) para 23.

[181] *Borbet* (n 27 above) para 78.

With regard to the separation of powers doctrine and the reasonableness standard, the *Doctors for Life* majority favoured a balanced approach to institutional autonomy versus the public's right to be involved in public affairs, and cautioned that the doctrine should not be used 'to avoid the obligation of a court to prevent the violation of the Constitution'.[182] Its embrace of the reasonableness standard was directly influenced by the constitutional requirement of reasonable measures and progressive realisation of socio-economic rights. The minority judgments by Yacoob J and Van der Westhuizen J were more concerned with how the reasonableness standard would affect the power of elected officials.[183] While *Afriforum* dealt with the narrower issue of interest group capture and the threat interest groups pose to participatory democracy, Chief Justice Mogoeng's concern with public participation as 'co-governance or equal sharing of executive and budgetary responsibilities'[184] resulted in him tilting the balance in favour of institutional autonomy. This aligns with the approach adopted by the minority in *Doctors for Life* and the majority judgment in *Merafong*.

What all three democratic spaces have in common is that effective and meaningful participatory democracy is hampered by systemic failures and recalcitrant and disinterested government officials who are either unaware of their constitutional and legislative obligations and the constitutional values that inform them or are deliberately obstructive. The challenges around legislative and constitutional compliance at the most basic level remain formidable. This impacts empowerment and impedes the progressive realisation of socio-economic rights.

The implementation of participatory democracy is complicated. In this informal space it is difficult to determine who represents disadvantaged communities and who represents disadvantaged groups within disadvantaged communities. Government officials must learn how to deal with a diversity of views and how to determine whether community views were considered before final decisions were made. Alternative forms of participation and access to information are even more challenging when illiteracy may be a factor and access to printed and electronic media cannot be assumed. It is also difficult to balance group interests over individual rights. Judge

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[182] *Doctors for Life* (n 152 above) para 200.
[183] *Doctors for Life* (n 152 above) paras 317 and 244.
[184] *Afriforum* (n 154 above) para 67.

Erasmus pointed out that a collective agreement cannot result in the waiver of an individual's constitutional rights to dignity and privacy.

> These rights are of a fundamentally, individual nature, and in this regard the objects of the constitution would be subverted if a majority group within a community, even an overwhelming majority within a community, could agree to a program from which they stood to gain, even in circumstances where that program violated the fundamental rights to dignity and privacy of a small and vulnerable minority within that community.[185]

Local governments remain obligated to 'use the municipal resources in the best interests of the community', to provide municipal services 'in a manner that is conducive to the improvement of standards of quality over time', and to 'develop a culture of municipal governance that complements formal representative government with a system of participatory governance', even when faced with financial, administrative and practical constraints.[186]

In the local government space, courts could adopt a more activist role by providing guidance on transformation and guidance on how the constitutional vision of government based on the will of the people could be achieved. The obligation to constantly improve public service can be inferred from the evolving nature of the right to political participation and the obligation to extend and deepen democratic processes; the obligation to progressively realise socio-economic rights; the duty to improve standards of quality over time; and the constitutional requirement to adhere to the values and principles governing public administration.[187] Activist judges could measure local government performance against evolving standards and sanction inefficiency and neglect accordingly.

What this chapter demonstrates is that the ward committee system as currently constituted has failed to achieve its objective and that individual ward committees are often dysfunctional. The reasons for this failure need to be investigated and the effectiveness of the ward committee system should be questioned, or alternative participatory structures considered. The contributions

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[185] *Beja* (n 142 above) para 101.
[186] Sections 4(2)*(a)*, 73(2)*(b)*(ii) and 16(1) of the Systems Act.
[187] *Doctors for Life* (n 152 above) paras 97 and 129; UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, (1996); ss 26 and 27 of the Constitution; *Borbet* (n 27 above) para 15; the Batho Pele principles (n 46 above). Though aspirational, the seven core values articulated by the Association for Public Participation (n 52 above) are also relevant.

and sacrifices made by local communities contributed substantially to the attainment of democracy. The government's failure to deliver on the constitutional and legislative undertakings have greatly harmed the transformation project. In this context the next chapter seeks guidance from international law, international norms and foreign best practices, as envisaged in s 39(1) of the Constitution.

Chapter 5

Guidance from international law, international norms and foreign best practice

1 INTRODUCTION

In his article 'Why do nations obey international law?' Harold Koh refers to the internalisation of international social, political and legal norms. Social internalisation occurs when a norm 'acquires so much public legitimacy that there is widespread general obedience to it'.[1] Political internalisation is achieved when international norms are incorporated into executive policies. Legal internalisation requires the incorporation of international norms in executive and legislative action and judicial interpretation.[2]

Many international social norms have been incorporated into the Bill of Rights of the Constitution of the Republic of South Africa, 1996 and through binding international agreements.[3] The Constitution and various domestic laws share the international community's focus on participatory governance. Previous chapters have engaged with various participatory spaces where communities can communicate with national and local government continuously. Notwithstanding a generous constitutional and legislative framework and progressive policies, the executive and legislative branches have failed disadvantaged communities in the implementation of improved service delivery and effective public participation. This has placed an undue burden on the judiciary.

The Constitution provides the judiciary with what Chaskalson P referred to as 'tools of interpretation'. The judiciary, when interpreting the state's obligation under the Bill of Rights must, in terms of s 39(1), consider binding international law and may consider non-binding foreign law.[4] In terms of s 231(2), international agreements become binding law domestically when approved by Parliament.[5] With reference to *S v Makwanyane*, John Dugard concludes that international human rights law as applied domestically can no longer be construed narrowly or interpreted to 'cover only clear rules of customary law and those human rights conventions to

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[1] Harold Hongju Koh 'Why do nations obey international law? (1997) 106 *Yale Law Journal* 2599, 2656.
[2] Ibid 2656–7.
[3] Section 231(2) of the Constitution.
[4] *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.
[5] See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 99 and 106.

which South Africa is a party'.[6] This has provided scope for a broader engagement and is why guidance is sought in international law, international norms and foreign best practices.

The protection of human rights and the improvement of service delivery at local government level require conducive environments where good governance principles are practised and where the insidious effect of corruption is curtailed. The international community believes that local communities can play a meaningful role, provided national and local governments display the necessary political will[7] and create appropriate enabling environments.[8] The focus of this chapter is on how international law and best practices can be used to guide the South African government and benefit disadvantaged communities.

The first section looks at the indivisibility of human rights and how governance failures and corruption affect human rights and service delivery. The focus then shifts to international guidelines as they relate to decentralisation and the strengthening of local government, and on improving access to basic services. Thereafter, the chapter engages with how the right to participate is framed in various international instruments. This is followed by a discussion of the international guidelines on the effective implementation of the right to participate in public affairs. Finally, the chapter looks at two global experiments in public participation in local government, their historical context, institutions, processes and impact. The chapter concludes by examining and comparing South Africa's approach to the three areas the two experiments focused on, participation, education and the role of social movements.

2 INTERNATIONAL LAW

2.1 The indivisibility of human rights

The link between socio-economic rights and political participation rights in international law lies in the interdependence principle and as such underlies several treaties. The understanding that

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[6] John Dugard et al *International Law: A South African Perspective* (3 ed 2005) 65.

[7] African Union *African Charter on Democracy, Elections and Governance* (2007) art 44.1 provides: 'To give effect to the commitments contained in this Charter individual State Parties commit themselves to implement the objectives, apply the principles and respect the commitments enshrined in this Charter as follows: c. State Parties shall promote political will as a necessary condition for the attainment of the goals set forth in this Charter.'

[8] For example, the UN General Assembly *Declaration on the Right to Development* (1986) recognises in its Preamble that 'the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States'.

these rights are indivisible was recognised by the international community at an early stage. Since the end of apartheid South Africa has ratified most of the core international treaties.[9] All of them are relevant under s 39 of our Constitution. Most confirm either directly, or by implication, the indivisibility of first and second generation rights and, later, third generation rights.[10] In the Universal Declaration of Human Rights (UDHR), first and second generation rights appear in arts 21(1) and 25(1) respectively.[11] In art 21(1) the right to participate directly in the government of a country is generally interpreted as authority for participatory democracy, while art 25 confirms the right to an adequate standard of living as referring to socio-economic rights.[12]

The UDHR was followed by the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICSECR). The ICCPR recognises in its Preamble that: '[T]he ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and

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[9] UN General Assembly *International Convention on the Elimination of All Forms of Racial Discrimination* (1965). South Africa signed the convention in 1994 and ratified it in 1998; UN General Assembly *International Covenant on Civil and Political Rights*, (1966). South Africa signed the Covenant on 3 October 1994 and ratified it on 10 December 1998; UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (1966). South Africa signed the Covenant on 3 October 1994, and ratified it on 12 January 2015; UN General Assembly *Convention on the Elimination of All Forms of Discrimination against Women* (1979). Signed by South Africa on 29 January 1993 and ratified on 16 December 1995; UN General Assembly *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). Signed by South Africa on 29 January 1993 and ratified on 16 June 1995; UN General Assembly *Convention on the Rights of the Child* (1989) Signed by South Africa on 29 January 1993 and ratified on 8 September 1997; UN General Assembly *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990), Not yet ratified by South Africa; UN General Assembly *International Convention for the Protection of All Persons from Enforced Disappearance* (2006); UN General Assembly *Convention on the Rights of Persons with Disabilities* (2007). Not yet signed or ratified by South Africa.

[10] First generation rights are freedoms and civil and political rights. Second generation rights are social, economic and cultural rights, and third generation rights include rights to a healthy environment, development and self-determination. Frans Viljoen 'International human rights law: A short history' (2009) XLVI (1 & 2) *UN Chronicle*.

[11] UN General Assembly *Universal Declaration of Human Rights* (1948) Section 21(1) provides: 'Everyone has the right to take part in the government of his country, either directly or through chosen representatives.' Section 25(1) provides: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.

[12] See also art 11 of the ICSECR (n 9 above); see further UN Human Rights Council *The Human Right to Safe Drinking Water and Sanitation* (2011) art 1: '*Welcomes* the recognition of the human right to safe drinking water and sanitation by the General Assembly and the Human Rights Council, and the affirmation by the latter that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity'.

cultural rights.'[13] In the case of the ICSECR, State Parties are required to take appropriate steps 'to achieve progressively the full realization of the right'.[14] Other international instruments confirm that political and socio-economic rights are indivisible. These include the 1987 Limburg Principles,[15] in which all State Parties are required to act in good faith when it comes to the fulfilment of their obligations under the ICSECR.[16] The Limburg Principles suggest that, while socio-economic rights may be realised progressively, some should immediately be justiciable, while others may become justiciable over time[17] and that State Parties should 'move as expeditiously as possible towards realization of the rights'.[18] Other international declarations, conferences and guidelines confirm that human rights are indivisible and interrelated.[19]

South Africa ratified the regional African [Banjul] Charter on Human and Peoples' Rights (ACHPR), which recognises that third generation rights are also inextricably linked to first and second generation rights.[20] The ACHPR, to which South Africa has a special allegiance because of its regional affiliation, links, in its Preamble, the performance of duties, the right to development, civil and political rights and economic, social and cultural rights:

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[13] ICCPR (n 9 above); the contains a similar recognition in its Preamble.

[14] ICSECR (n 9 above) art 2(1) provides: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[15] UN Commission on Human Rights *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')* (1987) Part I art A.3: 'As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.'

[16] Ibid art A.7, which provides: 'States Parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.'

[17] Ibid art A 8.

[18] Ibid art B.21.

[19] UN General Assembly *Vienna Declaration and Programme of Action* (1993). The Conference took place before South Africa became a democratic state in 1994 and, though South Africa could therefore not formally attend the conference, it did send representatives as special delegates. Pursuant to the Conference South Africa drafted the National Action Plan for the Promotion and Protection of Human Rights. It was launched on 10 December 1998 and lodged with the UN. Paragraph 5 of the Declaration provides: 'All human rights are universal, indivisible and interdependent and interrelated.' See also the Preamble to the Organization of American States (OAS) *American Convention on Human Rights* ("*Pact of San Jose")* (1969); International Commission of Jurists (ICJ) *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) art I.4; *Declaration on the Right to Development* (n 8 above) arts 6.2 and 3.

[20] African Union *African Charter on Human and Peoples' Rights* ('*Banjul Charter*') (1981) It was ratified by South Africa on 9 July 1996. The other regional conventions include the Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) and the *Pact of San Jose* (n 19 above).

> Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; [c]onvinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Civil, political, economic, social and cultural rights are protected in the body of the ACHPR,[21] as are the performance of duties[22] and the right to development.[23] The interdependence of rights was also confirmed in the Vienna Declaration and Programme of Action:

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.[24]

Resolution 54/175 adopted by the General Assembly on the Declaration on the Right to Development (DRD) also affirms that democracy, development and respect for all human rights and fundamental freedoms, are interdependent and mutually reinforcing.[25]

The interdependence of human rights and the link between rights and duties are important to participatory democracy and human rights enforcement. Individuals are not only rights bearers but have a responsibility towards each other, the global community and future generations. According to the Global Campaign on Urban Governance:

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[21] ACHPR (n 20 above) Civil and Political Rights in art 13(1): 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.' Economic, social and cultural rights in art 22(1) 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'

[22] Ibid art 29 provides: 'The individual shall also have the duty: (2) To serve his national community by placing his physical and intellectual abilities at its service;' see also the *Pact of San Jose* (n 19 above) art 32.1 'Every person has responsibilities to his family, his community, and mankind.' 32 2. 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'

[23] Ibid art 22(2): 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'; see also DRD (n 8 above).

[24] *Vienna Declaration and Programme of Action* (n 19 above).

[25] DRD (n 8 above) art 3.

> People are the principal wealth of cities; they are both the object and the means of sustainable human development. Civic engagement implies that living together is not a passive exercise: in cities, people must actively contribute to the common good. Citizens, especially women, must be empowered to participate effectively in decision-making processes. The civic capital of the poor must be recognized and supported.[26]

Among the most effective ways in which to exercise this responsibility are to hold governments to account and to partner them in decision-making. The next section looks at international law for guidance on good governance principles, specifically on how good governance practices promote the socio-economic well-being of the poor.

2.2 Human rights protection and good governance

Resolution 2000/64 of the Commission on Human Rights provides guidance on the role of good governance in the promotion of human rights. The Commission recognised that transparent, responsible, accountable and participatory government, which is responsive to the needs and aspirations of the people, is the foundation of good governance and the sine qua non for the promotion of human rights.[27] Part III of the United Nations Millennium Declaration (UNMD), deals with development and poverty eradication. The UNMD states that the '[s]uccess in meeting these objectives depends *inter alia* on good governance within each country. It also depends on good governance at the international level and on transparency in the financial, monetary and trading systems'.[28] Resolution 54/175, adopted by the General Assembly on the right to development, further affirms that the 'existence of widespread poverty inhibits the full and effective enjoyment of all human rights and renders democracy and popular participation fragile'.[29]

The resolutions passed by the Commission on Human Rights on the role of good governance have evolved since 2000. In 2003 the Commission resolved that good governance was not only necessary for the realisation of human rights but also necessary to ensure sustainable

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[26] UN Habitat The Global Campaign on Urban Governance, Concept Paper (2 ed 2002) 24. See also Patrick Heller 'Local democracy and development in comparative perspective' in Mirjam van Donk et al (eds) *Consolidating Developmental Local Government* (2008) 153, 169.
[27] UN Commission on Human Rights *Commission on Human Rights resolution 2000/64 The Role of Good Governance in the Promotion of Human Rights* (2000).
[28] UN General Assembly *United Nations Millennium Declaration, Adopted by the General Assembly* (2000).
[29] DRD (n 8 above) art 3(a).

development.[30] In 2004 the Commission reaffirmed the special role of good governance in the development and eradication of poverty,[31] and, in 2005 the Commission specifically included members of vulnerable and marginalised groups, and urged respect and protection for judges and lawyers in order to achieve the full realisation of human rights.[32] With reference to a joint seminar between the Office of the Commission and the UN Development Programme in Seoul, September 2004, the resolution mentions the themes that were discussed, which included the need for human rights education, that service delivery should be adapted to the specific needs of the population, the importance of deepening democracy beyond free and fair elections, and the importance of taking measures that promote transparency and combat corruption.

In their overview of good governance and human rights the Office of the High Commissioner affirms that there is no exhaustive definition of good governance, but that good governance should include the following attributes:

> full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.[33]

The overview acknowledges that good governance and human rights are mutually reinforcing and interconnected and that without good governance human rights cannot be respected and protected in a sustainable manner. It also emphasises the importance of a conducive and enabling environment to which effective participation is key. The overview links good governance and human rights to democratic institutions, service delivery, rule of law and anti-corruption practices.[34] It mentions that institutional reform can create avenues for public participation or informal consultations that would contribute to good governance and that the inclusion of civil

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[30] UN Commission on Human Rights *Commission on Human Rights Resolution 2003/65: The Role of Good Governance in the Promotion of Human Rights* (2003).
[31] UN Commission on Human Rights *Commission on Human Rights Resolution 2004/70: The Role of Good Governance in the Promotion of Human* Rights (2004).
[32] UN Commission on Human Rights *Human Rights Resolution 2005/68: The Role of Good Governance in the Promotion and Protection of Human Rights* (2005).
[33] UN Office of the High Commissioner for Human Rights (OHCHR) *About Good Governance*.
[34] OHCHR *Good Governance Practices for the Protection of Human Rights* (2007), with chapters on the same categories: the strengthening of democratic institutions, improvement of service delivery, the rule of law and combating corruption.

society and local communities on issues important to them should be encouraged. With regards to service delivery, the overview stresses the importance of improving the state's capacity to deliver the right to education, health and food and that it is necessary to develop mechanisms of accountability and accessibility to ensure that services are accessible and acceptable.

The Global Campaign on Urban Governance,[35] with reference to the United Nations Development Programme's definition of governance, highlights two aspects of the definition. First, 'governance as a concept recognize[s] that power exists inside and outside the formal authority and institutions of government', and second, that governance 'emphasizes "process". It recognizes that decisions are made based on complex relationships between actors with different priorities'.[36] The Campaign defines urban governance as follows:

> Urban governance is the sum of the many ways individuals and institutions, public and private, plan and manage common affairs of the city. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action can be taken. It includes formal institutions as well as informal arrangements and the social capital of citizens.[37]

The norms of good urban governance identified in the concept paper are sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement, and citizenship and security.[38]

A study conducted under the auspices of the United Nations Human Settlements Programme (UN-HABITAT) looked at legally binding international conventions in the human rights arena for authority and guidance towards a better understanding of good governance.[39] Specifically, the study focused on equity, civic engagement, transparency and accountability as basic principles of good governance. The study argued that authority can be sourced in international conventions and that Member States are already legally bound to apply them.[40] The article referred to an UN inter-

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[35] The Global Campaign on Urban Governance (n 26 above).

[36] Ibid 13 'The exercise of political, economic and administrative authority in the management of a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their difference.'

[37] Ibid 14; See also UN Habitat The Global Campaign for Good Urban Governance (Draft 4A 2000).

[38] The Global Campaign on Urban Governance (n 26 above) 20–4.

[39] J Jokinen (ed) *International Legal Instruments Addressing Good Governance* (2002). The Global Campaign on Urban Governance (n 26 above) identified norms of good governance. These are sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement and citizenship, and security.

[40] Equity: ICCPR (n 9 above) arts 2(1), 3 and 25; ICESCR (n 9 above) arts 3, 11 and 14 (further clarification in Limburg Principles (n 15 above)); UN Human Rights Committee (HRC) *CCP.R General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* (2000) para 29; HRC *CCPR General Comment No. 25: Article 25*

agency meeting on good urban governance principles held in New York in June 2001 where five core principles were agreed upon: equity, effectiveness, accountability, participation and security. Although the principles of sustainability, subsidiarity, efficiency and security, identified in the Global Campaign on Urban Governance Concept Paper, were not directly linked to international human rights instruments, the study argued that they form part of the international development agenda and therefore part of international commitments.[41] The study concluded that under existing binding international law there already exists de facto consensus on the content of good governance. Local government is obligated to comply with good governance practices because the rights attach to all human beings and therefore all members of the communities they service.[42]

South Africa is a State Party to the African Charter on Democracy, Elections and Governance (ACDEG).[43] In terms of the ACDEG, State Parties undertake to strive to institutionalise good political governance, inter alia through an accountable, efficient and effective public administration.[44] State Parties are also obliged to institutionalise good economic and corporate governance through effective and efficient public sector governance; by promoting transparency in public finance management; by preventing and combating corruption and related offences; through the prudent and sustainable use of public resources; and through poverty alleviation.[45] State Parties are also obliged to promote and deepen democratic governance by implementing the principles and core values of the New Partnership for Africa's Development (NEPAD) and, where applicable, the African Peer Review Mechanism (APRM).[46]

Good governance is the procedural link between civil and political rights and socio-economic rights, and participation is key to good governance, especially when it comes to the processes

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(Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (1996) paras 5 and 23; UN General Assembly *International Convention on the Elimination of Discrimination Against Women* (n 9 above) Preamble and art 7 and 16; UN Human Rights Committee (HRC) *Committee on the Elimination of Racial Discrimination*, art 5;
Civic Engagement: *ICCPR* (n 9 above) Preamble and art 25; *CCPR General Comment No. 25*: (n 40 above) paras 9, 10, 12, 19, 25, 5, 6, 7; *ICCPR* (n 9 above) arts 19, 21 and 22; Accountability and Transparency: UN General Assembly *Convention against Transnational Organized Crime* (2000) arts 8 and 9; *ICCPR* art 19(1); *CCPR General Comment 25* para 7; HRC *CCPR General Comment No. 10: Article 19 (Freedom of Opinion)* (1983) para 2.

[41] *International Legal Instruments Addressing Good Governance* (n 39 above) 5–8.

[42] Ibid 9.

[43] ACDEG (n 7 above).

[44] Ibid art 32.1.

[45] Ibid art 33.1; 2; 3, 5, and 7.

[46] Ibid art 37.

through which socio-economic rights are actualised. In South Africa good governance is the conceptual bridge between socio-economic rights, the developmental duties of local government and the principles governing public administration in s 195 of the Constitution. South African courts can draw upon international law on good governance to give substance to these links.

2.3 Corruption and its impact on human rights and service delivery

As the ACDEG demonstrates, preventing and combating corruption is part of good governance and essential for the protection of human rights and effective service delivery. South Africa is a State Party to the United Nations Convention against Corruption (UNCC).[47] The Preamble to the UNCC expresses concern about the seriousness of corruption and the threats it poses. In particular, it mentions the potential of corruption to undermine the institutions and values of democracy, ethical values and justice; its ability to jeopardise sustainable development when vast quantities of state resources are misdirected; and its threat to the rule of law. The UNCC also expresses its conviction that the illicit acquisition of personal wealth is damaging to democratic institutions, national economies and the rule of law. It further asserts that the proper management of public affairs and public property, and the need to promote fairness, responsibility and equality before the law, are required to safeguard integrity and foster a culture that rejects corruption.

States and State Parties are responsible for the prevention and eradication of corruption and for this purpose must develop and implement appropriate policies, including measures for public participation. To enhance effective participation and improve transparency, access to information and education programmes are required. The right 'to seek, receive, publish and disseminate information concerning corruption' may only be limited if provided for in law or considered necessary.[48]

The UNCCs purpose includes the need to promote and strengthen measures to prevent and combat corruption efficiently and effectively, as well as the need to promote integrity,

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[47] UN General Assembly *Convention Against Corruption* (2003) The Convention was signed by South Africa on 9 December 2003 and ratified on 22 November 2004, subject to reservation of art 66(2) relating to the compulsory jurisdiction of the International Court of Justice. The preamble to the South African Act the Prevention and Combatting of Corrupt Activities Act 12 of 2004 states: 'And whereas the Republic of South Africa desires to be in compliance with and to become Party to the United Nations Convention against Corruption adopted by the General Assembly of the United Nations on 31 October 2003'.

[48] Ibid art 13.1; see also Chapter II art 5.1.

accountability and proper management of public affairs and property.[49] The roles of accountability and transparency are repeatedly endorsed.[50] The code of conduct for public officials demands that State Parties promote integrity, honesty and responsibility among their public officials in order to fight corruption.[51]

The African Union Convention on Preventing and Combatting Corruption (AUCPCC)[52] also expresses in its Preamble concern about the negative impact of corruption and impunity on the 'political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples'. It lists among its objectives the need to establish conditions to foster transparency and accountability in the management of public affairs. It expects each State Party 'to promote and strengthen mechanisms to prevent, detect, punish and eradicate corruption and to promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights, as well as civil and political rights'.[53] It expects State Parties to adopt and strengthen mechanisms to promote the education of populations to respect the public good and public interest and awareness in the fight against corruption. These should include 'school education programmes, sensitisation of the media and the promotion of an enabling environment for the respect of ethics'.[54]

The AUCPCC further expects State Parties to abide by several principles, which include respect for democratic principles and institutions, popular participation, the rule of law and good governance, transparency and accountability in the management of public affairs, promotion of social justice to ensure balanced socio-economic development, and condemnation and rejection of acts of corruption.[55]

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[49] Ibid art 1(a) and (c).
[50] Ibid chapter II arts 5.1; 7.1(a); 7.3–4; 9.1–2; 10;12.1(c).
[51] Ibid art 8(1).
[52] African Union *African Union Convention on Preventing and Combating Corruption* (2003). South Africa ratified the Convention on 11 November 2005. The Preamble to the South African Act on the Prevention and Combatting of Corrupt Activities Act 12 of 2004 states: 'Whereas the Southern African Development Community Protocol against Corruption, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventative and deterrent measures and by strictly enforcing legislation against all types of corruption.' Southern African Development Community (SADC) *Protocol against Corruption* (2001). South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.
[53] AUCPCC (n 52 above) art 2.
[54] Ibid art 5.8.
[55] Ibid art 3.

The Convention acknowledges the need for each State Party to adopt legislative and other measures to give effect to the right to access information in the fight against corruption.[56] State Parties must provide for civil society participation in the monitoring process and must consult civil society on the implementation of the Convention.. Civil society and the media must be encouraged to demand transparency and hold all levels of government to account. State Parties must further ensure that the media is given access to information in cases of corruption.[57]

Participation and co-governance is also a central element of accountability. Courts must interpret norms on accountability and participatory governance in tandem with rights to, for instance, have access to information when judging processes for giving effect to socio-economic rights.

3 INTERNATIONAL GUIDELINES

The intersection between rights and duties, of individuals and communities,[58] the duties of the state and civil society, and the right to participate are dealt with in several international instruments and international guidelines, which provide a better understanding of the potential that community–local government partnerships offer poor communities.[59]

Since local government is the sphere that is most closely associated with delivering socio-economic rights through good governance, the international guidelines pertaining to the power, autonomy and functions of local government, as well as the ways in which it ought to go about delivering basic services, are important – especially since these guidelines have participation at

[56] Ibid art 9.
[57] Ibid art 12.
[58] Christof Heyns 'Study on the Right to Equal Participation in Political and Public Affairs in Africa' – Regional consultation on draft guidelines on the effective implementation of the right to participate in public affairs, (Economic Commission for Africa, 2017) para 4.2.2, pointed out that the ACHPR (n 20 above) recognises peoples' or collective rights. Heyns refers to art 20(1) which provides: 'All peoples shall have the … right to self-determination', to art 22(1): 'All peoples shall have the right to their economic, social and cultural development …', and to art 22(2) 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development.' He concludes that 'political participation is not simply an individual right under the African Charter – it is also a collective element.'
[59] DRD (n 8 above); UN Economic Committee for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)* (1998); UN Habitat *International Guidelines on Decentralisation and Access to Basic Services for All* (2009); African Union *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (2014). South Africa has neither signed nor ratified the Charter. OHCHR *Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs* (2018).

their core. In both these instances the guidelines hold forth a vision of governance from below through participation – so there must be meaningful participation at local government level which then filters up, through co-operative governance structures, to influence the entire state machinery for delivering socio-economic rights. In South Africa, there is quite strong decentralisation and devolution in terms of the constitutional framework and local government legislation, in terms of which it is indeed local government that is primarily responsible for essential service delivery – so these guidelines can be used by courts to interpret and evaluate the role played by local government and the workings of the principles of co-operative government when it comes to democratising essential service delivery.

3.1 Decentralisation and strengthening of local authorities

The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (ACVPDLGLD), defines decentralisation as 'the transfer of power, responsibilities, capacities and resources from national to all lower levels of government with the aim of strengthening the ability of the latter to both foster people's participation and delivery of quality services'. The Charter includes among its core values community-based participation and inclusiveness, respect for human and peoples' rights, civic responsibility and citizenship, transparency and accountability, and responsiveness.

Its objectives are to promote, protect and act as a catalyst for decentralisation, local governance and local development in Africa. It aims to promote local governance and local democracy, and promote civil society, private sector and people's participation in decentralisation and developmental initiatives. Article 6 deals with subsidiarity and obliges central government to enable local government to participate in decision-making, policy and programme development from initiation to adoption and implementation.[60] The obligation includes empowering local government to fulfil their duties and responsibilities. Under the ACDEG, State Parties are obliged to decentralise power to democratically elected local authorities as provided in national laws.[61]

UN-HABITAT produced the International Guidelines on Decentralisation and the Strengthening of Local Authorities (Decentralisation Guidelines) in 2007. The guidelines

[60] ACVPDLGLD (n 59 above) arts 4; 2(a), (b) and (i); 12(1)–(6); and 6.1.
[61] ACDEG (n 7 above) art 34.

emphasise the importance of political decentralisation and a role for participatory democracy at local government level. The guidelines stress the importance of inclusiveness. This includes non-discrimination, participation by women and young people, and the importance of empowerment. A role for civil society, the private sector and other stakeholders is envisaged, and local authorities are encouraged to enter into partnerships with them. Local authorities should create new fora for popular participation and civic engagement. Authorities should encourage representation by socially and economically weaker sections of society, including ethnic, gender and other minorities. The fora may include neighbourhood councils, community councils, e-democracy, participatory budgeting, civil initiatives, referenda, and children and youth councils. Dialogue with younger members of society is encouraged.

The Decentralisation Guidelines also deal with how local officials should exercise their duties. They should act responsibly, be accountable and transparent, act with integrity, avoid conflicts of interest and act in the common good. The code should be made public, and mechanisms should be put in place for citizens to hold local officials to account. Public records should be kept and made available to increase efficiency and to enable citizens to enjoy their rights and participate in local government.[62]

Section B deals with the powers and responsibilities of local authorities. The Decentralisation Guidelines stress the importance of subsidiarity. Locally elected officials are the closest to citizens and, though many functions are shared concurrently with provincial and national governments, this should not diminish the powers of local authorities or prevent their development as full partners in government. The guidelines suggest that decisions should be delegated to the appropriate level and that constitutions and legislation should clearly set out powers and guarantee access to resources. The guidelines allow for incremental action. Measures should be put in place to build capacity. If decentralisation is a new policy, implementation should be done on an experimental basis before it is enacted into law. It should make provision for provincial or national intervention. The participation of local authorities at provincial and national level should be promoted.[63]

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[62] Decentralisation Guidelines (n 59 above) A.1 1–9; A.2. 10–14.
[63] Ibid B.1 1-6; B.2 7–13.

The guidelines also deal with the administrative relationship between local authorities and other spheres of government. Legislation and constitutions should recognise that local authorities are autonomous and have roles to play in national planning and development. Their roles should be clearly defined. Unless otherwise stipulated, their powers should be exclusive and not undermined, limited or impeded by other authorities. Similarly, unless otherwise stipulated, they should have full responsibility in areas of local interests and local communities. With regard to empowerment the guidelines stipulate that local authorities should freely exercise their powers. Other spheres of government should consult them before amending legislation pertaining to them and should assist and support them.[64]

Sub-section D.1 deals with capacities and human resources. Other spheres of government should assist with developing administrative, technical and managerial capacities. The importance of financial autonomy is dealt with extensively. The guidelines stress that effective decentralisation can only be achieved with appropriate financial autonomy to ensure sustainability, self-reliance and responsible exercise of functions.[65]

Clearly, the fact that local government is closest to the people and is the sphere through which participatory government filters bottom-up to colour the entire governance mechanism is central to the international community's preference for devolution and associated co-operative government as pillars of good governance. In devolved systems, as in South Africa, participation should thus be a central feature of both local government autonomy and co-operative governance, especially when it comes to essential service delivery.

3.2 Access to basic services

Within decentralised systems, local government is primarily responsible for service delivery, which is core to the realisation of socio-economic rights. There are several international guidelines that illustrate how community participation is crucial to effective and equitable service delivery. Through these participatory processes of essential service delivery, local government is thus in a position to give effect to the interdependence of political and socio-economic rights.

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[64] Ibid C.1.1-5; C.2. 6–9.
[65] Ibid D.1. 1-6; D. 2. 7–19.

Under the ACDEG, State Parties are obliged to provide and enable access to basic social services to the people.[66] The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development requires local government to have regard to local realities, values and customs.[67] Inclusiveness, equity and equality should guide service delivery. Attention should be given to historically marginalised groups, poor communities and vulnerable groups.[68] Pro-poor initiatives should be developed.[69]

State Parties are obliged to ensure that local governments involve other levels of government, private sector and civil society actors in the development and implementation of local development plans and programmes.[70] The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development also provides for co-operative governance. Central and local governments 'are bound by law to establish mechanisms to cooperate and support each other to attain global, continental, regional, national, and local development priorities'. Local governments are accountable to local communities with regards to local development decisions, policies and implementation, as well as the management of financial resources.[71]

The Guidelines on Basic Services for All (Basic Services Guidelines) were designed to be flexible. Local circumstances will dictate how the challenges of basic service delivery are dealt with.[72] The definition of basic services is '[b]asic infrastructure and services at the community level [that] include the delivery of safe water, sanitation, waste management, social welfare, transport and communication facilities, energy, health and emergency services, schools, public safety and the management of open spaces'.[73] The HABITAT Agenda also points out that:

> The lack of adequate basic services, a key component of shelter, exacts a heavy toll on human health, productivity and the quality of life, particularly for people living in poverty in urban and rural areas. Local and state/provincial authorities, as the case may be, have the primary

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[66] ACDEG (n 7 above) art 41.
[67] ACVPDLGLD (n 59 above) art 8.
[68] These include the elderly, persons with disability, HIV/AIDS-affected households, child-headed households, street children, the indigent, the illiterate, slum dwellers, poor rural households, the unemployed and underemployed, refugees, the homeless and displaced minorities.
[69] ACVPDLGLD (n 59 above) art 10.
[70] Ibid art 11(b).
[71] Ibid art 11(d) and (f).
[72] Basic Services Guidelines (n 59 above) Objectives para 1.2.
[73] The definition appears in UN Habitat *Habitat Agenda: Goals and Principles, Commitments and the Global Plan of Action* (1996) Chapter IV B para 84.

> responsibility to provide or enable delivery of services, regulated by appropriate legislation and standards. Their capacity to manage, operate and maintain infrastructure and basic services must be supported by central Governments. There are, however, a host of other actors, including the private sector, communities and nongovernmental organizations, that can participate in service provision and management under the coordination of Governments at the appropriate levels, including local authorities.[74]

Basic services affect human dignity and quality of life, and, as the objectives indicate, 'are a prerequisite to the provision of other services and to improving the potential of each person to engage in economic activity'.[75]

Under various headings the Basic Services Guidelines set out guiding principles which are followed by allocating responsibilities to national and local governments, and, where appropriate, to civil society and other stakeholders. Under the heading 'Transparency, Participatory and Effective Governance', the first guiding principle deals with the two dimensions of governance: the political dimension, which 'requires participation, decision-making and leadership'; and the technical dimension, which requires 'needs assessment, planning, the negotiation of contracts, accounting mechanisms, monitoring and impact assessments'. The second guiding principle focuses on the benefits that flow from beneficiary participation.[76]

The Basic Services Guidelines specify that when service delivery is needs oriented and community specific, communities take responsibility and ownership. They care for infrastructure and pay for services. The guidelines suggest mechanisms where relevant stakeholders can participate to ensure compliance with national and international technical rules and norms. These relate to monitoring service delivery to ensure that rights are respected, protected and fulfilled; to assess how management can be improved; and to supervise budget allocations. In the process, participation skills and capacities in the areas of consultations and negotiations will be developed and stakeholders will become more effective.[77]

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[74] Ibid.
[75] Basic Services Guidelines (n 59 above) para 1.2 In terms of para 1.3 improving access to basic services is a key to achieving the Millennium Development Goals and to realising 'the commitments made at the Earth Summit, the World Summit on Social Development and the World Summit on Sustainable Development.
[76] Ibid para A. 9(a) and (b).
[77] Ibid para A. 10.

The guidelines further suggest that national governments should, in very practical terms and in the interest of effective community participation, recognise the rights of all stakeholders (including leaders of traditional and marginalised communities and excluded groups); provide access to relevant information; and enable participation in decisions that directly affect stakeholders. National government should also ensure that local governments engage in participatory democratic practices. It should further consult regularly with local authorities, civil society organisations (CSOs) and service providers and together discuss policies that relate to basic services. In this way national government will encourage and develop a culture of dialogue.[78]

The responsibilities of local government include consumer education and awareness building, awareness of ombudsmen, the holding of public hearings and participatory planning. Local governments are also charged with the responsibility of ensuring that stakeholders' voices are heard on matters of public concern. This requires effective channels for participation in a language, and through means, that participants understand. Here projects should be devised that benefit the poor, marginalised and excluded communities. Local authorities should further acknowledge and, where appropriate, encourage community management of basic services and local projects (including self-help initiatives) to improve local employment. They should also encourage the use of local skills for project implementation and management, in consultation with all sectors of the community.[79]

Civil society is encouraged to represent poor and vulnerable groups in public conversations around service delivery; assist with programme preparation and financial planning; and assist local authorities with identifying local priorities and acceptable minimum standards, in accordance with local and international law.[80] Civil society is also encouraged to monitor services delivery at all levels of government and by service providers; expose corrupt practices; and assist victims of corruption and human rights violations. Further, civil society should provide assistance with accessing information, participate in decision-making processes, and encourage public–community–private partnerships and interaction.[81]

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[78] Ibid para A. 13 (a)–(c).
[79] Ibid para A. 17 (a)–(e).
[80] Ibid para A. 20 (a)–(d).
[81] Ibid para A. 21(a)–(e).

The first guiding principle, under the heading 'Decentralization and the Role of Local Authorities', confirms that local authorities, assisted by civil society and local communities, are best placed to do needs assessments and define priorities. Then, with the assistance of different stakeholders, they can decide on the best way to provide the identified services. The second principle is that local authorities should be granted extended responsibilities because national policies meet local communities within their sphere of influence. Subject to national legislation, and in accordance with the principle of subsidiarity, they should enjoy full discretion and adequate financial resources to ensure effective service delivery.[82]

Under 'Enabling Institutional Frameworks for Partnerships', the first guiding principle acknowledges the co-responsibility of national government, local authorities, public and private service providers and CSOs for the delivery of basic services. The second principle recognises the need to negotiate and formalise partnerships through appropriate legal and regulatory frameworks. These include results-oriented contracts and monitoring mechanisms. It acknowledges the need for co-operation between formal and informal partnerships and stresses the importance of accessible, affordable, acceptable and good quality basic services and sound economic management.[83]

International norms make it clear that essential service delivery is not just about government – it is about government, the private sector, civil society and the community. This is also a key feature of the understanding of good governance in international law exposited above. Enjoyment of socio-economic rights is just as much about the content of essential services as it is about the process through which they are delivered.

[82] Ibid paras B.24 and 25.
[83] Ibid paras C.32 and 33.

4 THE RIGHT TO PARTICIPATE

4.1 International instruments

The right to participate directly in government has received both universal[84] and regional approval.[85] The institutional mechanism through which this should occur has received less attention. The Declaration of the Right to Development (DRD) acknowledges that the right to development is an inalienable human right. The right 'entitles every human person, and all peoples, to participate in, contribute to, and enjoy economic, social, cultural and political development'.[86] Importantly, it confirms that 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development'.[87] The DRD also emphasises our collective responsibility:

> All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.[88]

The DRD places the responsibility on states to formulate national development policies that benefit individuals and the entire nation, and that make provision for the 'active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.[89]

The belief that individuals have both rights and duties, including duties to their communities is universally accepted.[90] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) recognises the duties of individuals, in association with others, to protect and improve the

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[84] UDHR (n 11 above) art 21(1); ICCPR (n 9 above) art 25(a).
[85] ACPHR (n 20 above) art13.1; ACDEG (n 7 above) Art 3 articulates the Charter's principles. 3.7 provides: 'State Parties shall implement this Charter in accordance with the following principles – Effective participation of citizens in democratic and development processes and in governance of public affairs.'
[86] DRD (n 8 above) art 1.1.
[87] Ibid art 2.1.
[88] Ibid art 2.2.
[89] Ibid art 2.3.
[90] UDHR (n 11 above) art 29(1); Preamble to the ICCPR (n 9 above); Preamble to the ICESCR (n 9 above); Preamble and arts 27 and 29.2 of the *ACHPR* (n 20 above), art 29.2 is quite specific: 'The individual shall have the duty to serve his national community by placing his physical and intellectual abilities at its service.'

environment for the benefit of present *and future* generations.[91] Implied in the duties of individuals and communities is the responsibility to take part in public participation processes. The DRD provides that all states should encourage popular participation in all spheres of government and that this is an important factor in development and the realisation of all human rights.[92] It provides that states are obliged to formulate policies to improve the well-being of individuals and the population as a whole. Participation should be active, free and meaningful.[93] However, the DRD does not provide guidance on how participation should be facilitated.

The Aarhus Convention provides some guidance with regard to public participation. In terms of its objectives each Party must guarantee public participation in decision-making and must endeavour to ensure that officials and authorities assist, guide and facilitate participation. Each Party is obliged to promote environmental education and awareness.[94] Article 6.2 deals with public participation and the right to be informed of environmental decision-making procedures, either by public notice or individually, in an adequate, timely and effective manner. The article provides in detail the nature of the information the public is entitled to, from where it may be sourced, details of the public authority involved, and information about public participation opportunities.[95] Of particular significance is the reminder to public authorities, at all levels of government, that they hold environmental information in the public interest.[96]

The public participation process should include reasonable time frames for different phases to ensure effective participation. Participation should begin at an early stage, when participants can still influence decisions. The participation process may provide for written submissions or public hearings. Parties are obliged, before making a decision, to take the outcome of the public participation process into account. The public should be informed promptly of the decisions and provided with reasons and considerations that influenced the decision.[97]

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[91] Aarhus Convention (n 59 above) Preamble.
[92] DRD (n 8 above) art 8.2.
[93] Ibid art 2.3.
[94] Aarhus Convention (n 59 above) art 1, 3.3 and 3.4.
[95] Ibid art 6.2 (a)–(d).
[96] Ibid art 2.2(a).
[97] Ibid art 6. 6.6 specifies what information is regarded as relevant: '(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions; (b) A description of the significant effects of the proposed activity on the environment; (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions; (d) A non-technical summary of the above; (e) An outline of the main alternatives studied by the applicant; and (f) In accordance with national legislation, the main

The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development stipulates that national legislation should guarantee the rights and responsibilities of citizens to participate in public life at local level. At this level, democracy includes both participation and representation. Participation of all segments of society in the planning, implementation, monitoring and evaluation of policies, programmes and projects should be promoted. This should take place through structured community and other platforms to ensure delivery of quality services. Local governments are obliged to promote and develop innovative democratic and peaceful public expression platforms, where meaningful participation by communities, civil society and other actors can take place.

With regards to transparency, accountability and ethical behaviour, the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development provides for the annual publication of local government performance reports and financial statements. The Charter reiterates the need to establish mechanisms to combat all forms of corruption.[98] Communities, civil society and citizens should benefit from capacity development to enable them to effectively contribute to local public administration and development.[99] Local governments are obliged to demonstrate the necessary political will to ensure that the objectives, values and principles of the Charter are implemented. This should be supported by central governments through the provision of adequate resources.[100]

The African Charter on Democracy, Elections and Governance demands several commitments from State Parties. The ACDEG includes the objective to 'promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs'.[101] State Parties undertake to 'implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace'.[102] Other commitments relate

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reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.'; 6.7–9

[98] ACVPDLGLD (n 59 above) art 14.2–3.

[99] Ibid art 16.3((d).

[100] Ibid art 18.1(a)(iv) and 18.1(b)(v).

[101] ACDEG (n 7 above) art 2.10.

[102] Ibid art 12; see also art 13: 'State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and trust;'

to the establishment of public institutions;[103] to the advancement of political, economic and social governance;[104] and to conditions for active participation by women and other social groups with special needs.[105] State Parties are also obliged to 'promote citizen participation in the development process through appropriate structures'.[106]

4.2 Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs

The Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs (the Participation Guidelines) were adopted by consensus by the Human Rights Council in October 2018 in Resolution 39/11. In terms of the resolution the Human Rights Council 'took note with interest of the guidelines and presented them as a set of orientations for states and other relevant stakeholders'.[107] In the introduction to the Participation Guidelines the role of participation as it relates to human rights and empowerment is endorsed.

> Participation enables the advancement of all human rights. It plays a crucial role in the promotion of democracy, the rule of law, social inclusion and economic development. It is essential for reducing inequalities and social conflict. It is also important for empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating marginalization and discrimination.[108]

This section deals with non-electoral participation and practical recommendations as they relate to institutional frameworks and meaningful participation during the different stages of decision-

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[103] Ibid art 15.1 'State Parties shall establish public institutions that promote and support democracy and constitutional order. 2. State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution. 3. State Parties shall ensure that these institutions are accountable to competent national organs. 4. State Parties shall provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.'

[104] Ibid art 27: 'In order to advance political, economic and social governance, State Parties shall commit themselves to: 2. Fostering popular participation and partnership with civil society organizations; 5. Improving efficiency and effectiveness of public services and combating corruption; 7. Development and utilisation of information and communication technologies.'

[105] Ibid art 29.2: 'State Parties shall create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture; art 31; see also the Protocol on the Rights of Women in Africa which provides that women shall have the right to fully enjoy their right to sustainable development and requires of State Parties to take appropriate measures to give effect to this right.'

[106] Ibid art 30.

[107] Participation Guidelines (n 59 above).

[108] Ibid Introduction para 1.

making. This is followed by a brief reference to the recommendations and role of Information and Communications Technology (ICT).[109]

The Participation Guidelines recommend formal permanent structures 'to ensure that participation in decision-making processes is widely understood, accepted and routinely realized by both public authorities and rights holders',[110] and they suggest various co-ordinating bodies. To ensure meaningful participation, the minimum requirements are that the structures and mechanisms must allow relevant rights holders to be involved in the design; that they 'impartially channel the views of the rights holders concerned into actual decision-making processes'; that adequate budget and human resources, with the requisite expertise, are provided; and that they are 'accessible, inclusive, gender-responsive and representative'. The structures must be accessible to, and provide for, marginalised, and disadvantaged communities, indigenous peoples, minorities and people with disabilities. Where appropriate, children should be allowed to participate. The Participation Guidelines also recommend that structures and procedures should be assessed and evaluated and, where necessary, improved.[111]

The Participation Guidelines acknowledge three stages of participation. These are before decisions are made, during the decision-making process, and participation afterwards. With regards to the first stage, the Participation Guidelines recommend that rights holders should be involved in setting the agenda to ensure that their needs and priorities are included. Various methods for participation are listed.[112] The guidelines also recommend that rights holders should be identified and notified in an effective and timely manner. In order to manage expectations, rights holders should have access to information about 'clear, realistic and practical goals'. The Participation Guidelines stipulate the minimum information that should be provided for the process. Further, information should be made available as early as possible and in a manner that takes local conditions and special needs into account. This includes free access and 'non-technical' summaries for members of the public. The information should be 'clear, usable, accessible, age-

[109] Ibid paras 49–86; 'Information and communications technology to strengthen equal and meaningful participation' paras 87–94.
[110] Ibid para 9. The guidelines explain that rights holders 'include forms of participation, encompassing initiatives that involve all individuals affected or concerned by the decisions at stake.'
[111] Ibid paras 58–62.
[112] Ibid para 60. '[T]hrough online consultations, public hearings or forums, or working groups or committees composed of representatives of public authorities and members of the society.'

appropriate and culturally appropriate', should be provided in local languages, including indigenous and minority languages, and should be widely distributed.[113]

During the decision-making process rights holders should be enabled to participate at an early stage, before irreversible decisions are made and when they can still influence decisions. Revised, new or updated drafts should be made public as soon as they become available. Rights holders should be afforded sufficient time to make their contributions and be allowed to submit these directly to the public authority involved. Online submissions should be combined with in-person participation. Participation should be free of charge at neutral and accessible venues. Where necessary, reasonable accommodation should be provided. The guidelines also recommend that the technical capacities and expertise of the public officials responsible for the participatory processes should be strengthened in areas such as information collection, meeting facilitation, strategy formulation, action planning and reporting. Finally, the guidelines suggest developing appropriate data collection and management systems for collecting, analysing and archiving information, as well as transparency in the design and use of these systems and on how data is processed, deleted and retained.[114]

During the final stage, after the decisions had been made, the guidelines recommend dissemination of the outcome in a 'timely, comprehensive and transparent manner'. The rights holders should be provided with reasons for the decisions; provided with reasoned feedback on how their contributions influenced, or did not influence, decisions; and information about appropriate administrative and judicial review mechanisms. The guidelines also suggest that participants should be afforded opportunities to assess the participatory process, and be afforded opportunities to participate in monitoring, implementation and evaluation of the decisions. To make this effective, the guidelines list the information that should be provided. They also suggest strategic partnerships with civil society actors.[115]

With regards to ICTs, the guidelines deal with how they can strengthen equal and meaningful participation. The guidelines emphasise that the technologies for participation should be guided

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[113] Ibid para 67 and include 'The type or nature of the decision under consideration … (b) The range of options to be discussed … c) The timelines for participation … (d) The identification of public officials and institutions involved … (e) The identification of the public authority … (f) The procedures envisioned for the participation of rights holders, including information …' as it relates to dates and times etc.; see also para 69.
[114] Ibid paras 70–8.
[115] Ibid paras 79–86.

and regulated by international human rights law. Effective measures should be developed and implemented to make ICTs available to women, disabled persons, older persons, persons living in rural communities and indigenous peoples. ICTs should be widely available, accessible and affordable. '[S]ocial, financial and technological barriers restricting access to the Internet' should as far as possible be restricted or removed. Different stakeholders including civil society actors and businesses should be involved in the design, development and use of ICTs.[116] Specifically, the guidelines provide that ICTs should create opportunities for meaningful participation 'in a variety of activities that extend beyond communication and information-sharing'. In addition to opportunities to influence decisions the guidelines suggest that the technology should enable submission and commentary on 'voting, legislative and policy proposals'. [117]

4.3 Lessons for South Africa

This exploration highlights many of the fundamental weaknesses in the South African government's approach to participatory governance, despite our well-intended and comprehensive legislative framework. Many of the elements of good governance, identified by the Office of the High Commissioner, are acknowledged in the founding values and basic values and principles governing public administration. These elements of good governance have been reinforced in legislation and various judgments, and, as the UN-HABITAT study indicates, is sourced in binding international law.

Structurally the South African Constitution has embraced devolution by situating essential service delivery and socio-economic rights delivery functions predominantly with local government and indicating that local government must fulfil its developmental and essential service delivery functions, first in a participatory manner, and second, through co-operative government with the national and provincial tiers. Yet, despite the South African government's constitutional obligations to co-operative and participatory governance, its top-down approach has made the practice of co-governance very difficult and is a denial of its historical commitment to collective responsibility and the potential of broad-based partnerships.

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[116] Ibid paras 87–94.
[117] Ibid para 90.

The Global Campaign on Urban Governance's definition emphasises the potential of the 'social capital of citizens'. The ANC used the social capital of its supporters to achieve democracy but is failing to re-engage its citizens in a meaningful and participatory manner to protect the democracy they fought for, or to assist in the fight against corruption and official incompetence.[118] The ANC government is also failing to capitalise on its historical relationships with the media and CSOs or to engage them, together with other private actors, in partnerships for the common good. This is especially evident at local government level and in the manner in which all these role players are side-lined in the processes of essential service delivery at local government level.

In previous chapters the focus has been on implementation failures rather than structural shortcomings, but the international instruments demonstrate the need for South Africa to re-examine existing institutions and mechanisms. The many limitations of the ward committee system, for instance, require reassessment. What is helpful is that the international community encourages incremental implementation and favours an experimental approach before introducing formal reforms. South Africa's problem is not that we do not have the required framework, but that too often public officials lack the necessary political will or are reluctant to harness the potential of co-governance and collective responsibility.

Accordingly, the next section looks at two international experiments in local community participation. Participatory budgeting in Porto Alegre, Brazil and decentralised planning in Kerala, India. Their conception and implementation occurred long before the international community provided guidelines on decentralisation, access to basic services and participation. They are internationally celebrated examples of participatory democracy. The experiments, when first conceptualised, were unique to the prevailing circumstances in the two countries. The value to South Africa is in the lessons that can be learned. These examples show that, with political will, it is possible to turn one-sided local government structures and processes into sites for participatory co-governance, so this comparative exercise both illustrates what is possible and highlights, with more precision, some of the imperatives for reform.

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[118] See *Glenister* (n 5 above) para 106, where the Constitutional Court confirmed that 'corruption has a deleterious impact on a number of rights in the Bill of Rights and that the state has a positive duty under section 7(2) to prevent and combat corruption and organised crime.'

5 TWO GLOBAL EXPERIMENTS IN PUBLIC PARTICIPATION AT LOCAL GOVERNMENT LEVEL

5.1 Participatory budgeting in Porto Alegre, Brazil

Participatory budgeting (PB) was introduced in Porto Alegre, a city in Rio Grande do Sol in 1989 after the Partido dos Trabalhadores, the Worker's Party, won the elections. Between 1965 and 1985 Brazil was ruled by a military dictatorship that concentrated political and economic power within the federal government. After the 1988 Constitution came into effect, and in an effort to overcome inequality within its society, the City of Porto Alegre introduced innovative reforms, including PB. According to Heller, PB was promoted as 'an alternative to the traditional local clientelistic state and as a means for dislodging oligarchical party control'.[119] The return to democracy also meant that civil society became more influential.[120]

A report by the Nelson Dias organisation explains that the idea behind participatory budgeting was 'to permit non-elected citizens to have a role in the allocation of public money, with direct decision-making power at the local level, the power of co-decision at the city level, and oversight capacity at all levels'.[121] According to Boaventura de Sousa Santos, the three principles that guide popular participation are:

> (a) All citizens are entitled to participate, community organizations having no special status or prerogative in this regards; (b) participation is governed by a combination of direct and representative democracy rules and takes place through regularly functioning institutions whose internal rules are decided upon by the participants; (c) investment resources are allocated according to an objective method based on a combination of 'general criteria'.

The 'general criteria' include both substantive and technical criteria. The participatory institutions define the 'substantive criteria' in terms of which priorities are identified, while the executive, at federal, state and city level, identify the 'technical criteria' as they relate to economic and technical viability and legal compliance.[122]

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[119] Heller (n 26 above) 152, 159.
[120] Ibid 158.
[121] *Hope for Democracy: 25 Years of Participatory Budgeting Worldwide* published by Nelson Dias (org) in April 2014, 32.
Available at http://www.in-loco.pt/upload_folder/edicoes/1279dd27-d1b1-40c9-ac77-c75f31f82ba2.pdf.
[122] Boaventura de Sousa Santos 'Participatory budgeting in Porto Alegre: Toward a redistributive democracy' (1998) 26(4) *Politics & Society* 461, 468–9, available at https://www.ssc.wisc.edu/~wright/santosweb.

(a) Institutional design

According to De Sousa Santos, the institutional design of participatory budgeting consisted of three parallel streams.[123] The first set of institutions were administrative units within the municipal executive and were responsible for managing budgetary debates with citizens. These consisted of the Gabinete de Planejamento (the Planning Office (GAPLAN), Forum das Assessorias de Planejamento (the Planning Advisors Forum (ASSEPLAS), Fórum das Assessorias Comunitarias (Community Advisors Forum (FASCOM), Coordenadores Regionais do Orçamento Participativo (regional co-ordinators of participatory budgeting (CROPs) and Coordenadores temáticos (thematic co-ordinators (CTs). The Coordenadoria de Relações Comunitária (CRC) and the GAPLAN were the most important. The CRC, through the CROPs and CTs, was the link between the municipal government and community leaders, while GAPLAN's function was to give expression to community demands and ensure compliance with general and technical criteria. The executive co-ordinated and set the agenda for the GAPLAN and CRC meetings.

At the second level, the institutions were the Conselhos Populares (Popular Councils), Unioes de Vilas (Township Unions), and Articulaq es Regionais (Regional Articulations). These were regionally based community organisations that mediated 'citizen participation and choice of priorities for city regions'.

The third set of institutions were permanent and set up to mediate and interact between the first two sets of institutions. These were the Conselho do Plano do Governo e Orçamento (Government Planning and Budget Council (COP)), the Conselho do Orçamento Participativo (the Regional Budgeting Forum), Assembleias Plenárias Regionais (Regional Plenary Assemblies) and the Assembleias Plenárias Temáticas (Thematic Plenary Assemblies) and Forum Temitico do Orçamento (Thematic Budgeting Forum).

FASCOM consisted of 16 regional and five thematic delegates. They met once a month to supervise works and to act as intermediaries between the COP and the regionsal thematic committees. They had consulting, controlling and mobilising functions. The COP was the main participatory institution. Meetings took place weekly. Here elected citizens learnt about municipal finances, set criteria for resource allocation and defended regional or thematic priorities.

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[123] Ibid 468–9.

(b) Process

Participatory budgeting processes in Porto Alegre followed an annual cycle. In March or April, the city government presented a review of the previous year's investment plan. This was followed in April and May by citywide, regional and neighbourhood assemblies, where priorities were identified, councillors elected, and local-level budgets reviewed. During May and July, assemblies set priorities and elected delegates to participate in the funding request review process. Fund allocations related to areas such as water and sewage, street paving, parks and schools.[124] New councillors began work on a draft investment plan in July; the investment plan became part of the city budget and was presented at regional forums in late summer and early autumn. During November and December, residents proposed and considered revisions to the participatory budgeting statute.

Participation at neighbourhood meetings was important because turnout determined the number of elected representatives at the regional meetings. Greater representation at regional meetings improved the chance of local projects being selected. During this round of meetings local government's role was to determine the time and place for the meetings and to provide technical information and logistical support. The neighbourhood meetings mobilised around projects and policies, elected oversight committees and approved technical plans. Participants discussed priorities and specific projects as well as preselected public works. Deliberation was informal and participants were given approximately three minutes each to speak. Deliberation included negotiations on proposed projects.

The Quality of Life Index was drawn up by local government and ranked regions in terms of poverty, population and infrastructure. By allocating more resources to less advantaged communities better social justice was achieved.[125] Local government also distributed financial information, assigned officials to regions and presented its own projects for approval. Participants

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[124] 'Empowerment case studies: Participatory budgeting in Brazil' prepared by a team comprising Deepti Bhatnagar and Animesh Rathore at the Indian Institute of Management (Ahmedabad) and Magüi Moreno Torres and Parameeta Kanungo at the World Bank (Washington DC) 2.
http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/14657_Partic-Budg-Brazil-web.pdf.

[125] Brian Wampler & Mike Touchton "Brazil let its citizens make decisions about city budgets. Here's what happened' *The Washington Post* (22 January 2014), available at https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/22/brazil-let-its-citizens-make-decisions-about-city-budgets-heres-what-happened/.

mobilised citizens, held capacity-building meetings, analysed financial information and entered into preliminary discussions on available resources.

(c) Impact

A case study conducted under the auspices of the World Resources Institute identifies six positive outcomes from the PB processes in Porto Alegre. First, the 'urban under-served' became part of decision-making. Second, instead of 'clientelist decision-making' public deliberation became the norm. Third, funds and spending were adjusted to focus on under-served communities and their infrastructural needs. Fourth, CSOs became more democratic, new ones were formed and participation encouraged. Fifth, administrative capacities were developed to accommodate increased access to information and expanded monitoring. Finally, the reforms promoted a more 'radical form of democracy', with the poor becoming active participants in the governing of their City and empowered to influence their priorities. But there were also some negatives. PB did not adequately accommodate essential large-scale projects and, when these were undertaken by the national government, the needs of the poor were not necessarily considered. The effectiveness of PB was also dependent on the commitment of different administrations.[126]

Some of the challenges identified by the Bhatnagar case study are that, while low-income groups participated, the 'very poor' did not; that 'clientelism' still persisted; that financial allocations were insufficient; that once demands were met participation decreased; and that the media favoured privatisation over public initiatives. Positive outcomes included that the poor gained access to facilities and services previously unavailable to them, including public housing, sewerage and water connections, and more schools, as well as benefiting from increased spending on health. The poor could direct public spending to less advantaged communities; over time participation increased; and accountability was strengthened; and through transparency, unreasonable demands were managed. Local solidarity and environmental concerns resulted in some 'bold decisions'.[127]

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[126] Rebecca Abers, Igor Brandão, Robin King & Daniely Votto 'Towards a more equal city, Porto Alegre: Participatory budgeting and the challenge of sustaining transformative change' (2018), published under the auspices of the World Resources Institute, 19, available at https://www.wri.org/wri-citiesforall/publication/porto-alegre-participatory-budgeting-and-challenge-sustaining.

[127] Empowerment case studies (n 124 above) 1–6.

The research conducted by Michael Touchton and Brian Wampler also confirm some of the benefits of participatory budget programmes. Governments become more accountable and efficient, and citizens perceive the state to be more effective. The increase in health care and sanitation spending, and the decrease in infant mortality, contributed towards improved individual well-being.[128]

PB in Porto Alegre is no longer the celebrated example of participatory democracy it once was. Its decline started in the 2000s when the federal government decided that federal funding would no longer be conditional upon citizen participation. It was suspended in 2016 when the centre-right social democrats, the Partido da Social Democracia Brasileira, came into power. The suspension was justified on the basis of financial constraints and the need for reform. The impact of the Porto Alegre experiment should not be underestimated. Based on a set of criteria developed by the Nelson Dias Organisation[129] the Organisation concluded that during 2013 there were between 1 269 and 2 778 participatory budgetary processes internationally.[130]

5.2 Decentralised planning Kerala, India

Amendments to the Indian Constitution in 1993 resulted in constitutional recognition of rural and urban local governments.[131] The 73rd amendment applied to panchayats (rural local governments) and the 74th to municipalities (local urban governments). Implementation of the amendments was left to individual states. When a coalition of left-wing parties, the Left Democratic Front (LDF), came into power in Kerala in 1996, the government, led by the Communist Party of India (CPI), delivered on a campaign promise and launched the People's Campaign for Decentralized Planning

[128] Michael Touchton & Brian Wampler 'Improving social well-being through new democratic institutions' (2014) 47 *Comparative Political Studies* 1442, 1463.
[129] *Hope for Democracy* (n 121 above) 29. The criteria were 1) 'Discussion of financial/budgetary processes; PB is dealing with scarce resources; 2) The city level has to be involved, or a (decentralized) district with an elected body and some power over administration and resources (the neighborhood level is not enough); 3) It has to be a repeated process over years (If it is from the outset planned as a unique event, it is not a PB process); 4) Some forms of public deliberation must be included within the framework of specific meetings/forums (The inclusion of ordinary citizens into the institutions of "classic" representative democracy represents no PB process); 5) Some accountability on the results of the process is required.' There is therefore considerable support for participatory budgeting as a mechanism for participatory democracy in South Africa.
[130] Ibid. The continental spread of qualifying processes are: Europe 474–1317; Latin America 626–1138; Asia 58–109 and Africa 110–211.
[131] The amendments came into force on 24 April 1993.

(the Campaign).[132] Heller and Isaac wrote that Kerala achieved 'some of the most dramatic social and redistributive gains in the developing world … (and) the site of one of the boldest, most self-conscious and most extensive experiments in empowered participatory governance'.[133] Today the Kerala State's official website proudly proclaims the leading role the state continues to play in decentralised participatory governance.[134]

The LDF realised that any changes would be resisted by vested interests.[135] To counter this they created administrative support structures, new organisational procedures and information bases, redeployed government staff and trained current and new employees and volunteers.[136]

(a) Institutions

The Panchayati Raj, the Indian system of local government in rural areas is a three-tier system of governance that consists of the Gram Panchayat, the village council; the Panchayat Samiti, or Block Panchayat, which oversees a group of villages, and the Zila Parishad, or District Panchayat, which represents the entire district. Local governments in urban areas are run by municipalities and municipal corporations. According to the official website of the Kerala government, local self-

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[132] The LDF currently holds the majority in the Kerala Legislature (2016), available at https://kerala.gov.in/legislature.

[133] Patrick Heller & TM Thomas Isaac 'The politics and institutional design of participatory democracy: Lessons from Kerala, India', available at https://www.ces.uc.pt/emancipa/research/en/ft/kerala.html.

[134] 'Kerala has been the trend setter for decentralised development in the country. In fact the mooring for the grassroots-level decentralised democratic functioning of administration was laid by the first EMS Ministry. In 1997, the government took the bold initiative of transferring power, finance and expertise to Local Self Government institutions to initiate developmental works at the grass roots level. Till then the results of development did not percolate to the lowest strata. Local initiatives and local participation were fully encouraged by the Government of 1996–2001 through decentralisation. The result of this approach was epoch making. The Panchayati Raj System here was hailed as the best in the country. Experts came from inside the country and abroad to see the miracle that happened here. The Government is engaged in consolidating those gains and taking decentralized development to new heights while plugging the loopholes and closing lacunae in the earlier experience.' Available at https://kerala.gov.in/departmentnew.

[135] Heller & Isaac (n 133 above) para 2; see also Frank Fischer, 'participatory governance as deliberative empowerment: The cultural politics of discursive space' (March 2006) 36(1) *American Review of Public Administration* 19, 27.

[136] Heller & Isaac (n 133 above) para 4.2: 'In the first year, in seven rounds of training at state, district and local level, some 15,000 elected representatives, 25,000 officials and 75,000 volunteers were given training. About 600 state level trainees—called Key Resource Persons (KRP)—received nearly 20 days of training. Some 12,000 district level trainees—District Resource Persons (DRP)—received 10 days of training and at the local level more than 100,000 persons received at least 5 days of training. All the elected representatives were expected to participate in the training program at one level or another. Each round of training focused on specific planning activities. Separate handbooks and guides, amounting to nearly 4,000 pages of documentation, were prepared and distributed for each round.'

government currently comprises 941 gram panchayats; 152 block panchayats; 14 district panchayats; 87 municipalities and 6 municipal corporations.[137]

Representatives to the gram panchayat are elected for a five-year term at the gram sabha, a meeting of adults 18 years or older who are resident in the area covered by the panchayat. The gram sabha elects members of the gram panchayat, makes plans for the development of the village and holds elected members of the gram panchayat to account. Each village is divided into wards, and each ward elects a representative to the gram panchayat. The gram panchayat has a government-employed secretary who calls meetings of both the gram sabha and panchayat.

(b) Process

Gram sabhas must meet four times per year. At the first meeting, residents identify local developmental problems and discuss priorities. Sub-sector seminars are formed where proposals are drawn up. At the second meeting the proposals that have been approved by the panchayat council are presented to the gram sabhas, changes are discussed, and projects selected. Representations from various gram sabhas are integrated into a development report and submitted to development seminars. Delegates are elected at gram sabhas and officials and experts are invited to attend. Recommendations are presented to a plenary for adoption.

The deliberative process starts at the lowest level of elected officials, the gram panchayats and municipalities, with the collection of local data, and culminates in the formalisation of a comprehensive plan that Heller and Isaac described as an 'extended exercise in practical problem-solving'.[138] An annual budget of 35 to 40 per cent of the annual developmental budget is allocated to local self-governing institutions (LSGIs) subject to the LSGIs preparing comprehensive five-year developmental plans. Consultations occur at different levels with different objectives.

Information relevant to the local community is obtained. Data gathering is conducted by local citizens within their own communities. The volunteers' selection is not predicated on academic qualifications: they receive training in data collection, and questions are framed to accommodate local conditions, in local languages and in a way that would assist the community to understand the social and economic implications. Volunteers have to identify what the economic,

[137] Available at https://kerala.gov.in/panchayaths.
[138] Heller & Isaac (n 133 above) introduction.

environmental and social resources are and how and where they are located within their community. Volunteers are not only involved in data collection but also generate discussions within their communities. The data is supplemented with rigorous scientific research.[139]

Once collected, the information is collated in a development report, which forms the basis of the deliberative discussions. The community's needs and specific developmental problems are identified, and local strategies formulated during gram sabhas (ward level assemblies). Citizens are encouraged to make suggestions and propose solutions. At the conclusion of gram sabhas local representatives are selected to represent the community at decentralised development seminars. Deliberation at this level results in integrated solutions at district level.

After the conclusion of the development seminars, task forces are constituted to prepare project proposals subject to a set of criteria. At this stage experts are engaged to advise and direct citizen deliberations. During the final stage of the planning process, priorities are set and integrated into the final plan document and voted on by the council. Subsequent innovations have encouraged dividing into smaller groups to facilitate discussions. The gram panchayat's main task is to implement the development programmes for villages. The gram panchayat reports back to the people at the level of the gram sabha.

Sectoral task forces, comprising non-official experts and volunteers, prepare reports and projects. Government departments provide overviews of their development programmes. Plans are then formulated at grassroots tiers – municipalities and grama panchayats (village councils). This is followed by formulation of plans at the higher tiers – block panchayats and districts panchayats. Finally technical volunteers, including non-official experts, appraise and approve the plans.[140]

During all phases, citizens, elected representatives and officials participate, deliberate and prioritise goals. Various stages of the planning process include clear objectives, key activities and training programmes. The emphasis is on bottom-up participation, development planning and implementation, capacity building, mobilisation of civil society and empowerment of marginalised groups (women, adivasis (tribals) and dalits (untouchables)).[141] During the process intensive training is provided. Manuals are published on issues such as education and schools, water

[139] Fischer (n 135 above) 32–3.
[140] Heller & Isaac (n 133 above) Table 1.
[141] Ibid Introduction.

management, sanitation and drinking water, and environmental protection.[142] A guidebook has been published and local communities are encouraged to use trained resource facilitators and volunteer experts, who act in advisory capacities. Ongoing emphasis is placed on encouraging local communities to participate, to give them voice and empower them, as well as finding local solutions for local conditions rather than a one-size fits all approach.[143] Decentralisation has significantly decreased costs and mass training has improved the input from ordinary citizens.

(c) Impact

Kerala promoted education as an essential component for the upliftment of its citizens. This was first done by Sri Narayana Guru during the late 1800s and early 1900s. He believed in empowerment through self-reliance and self-improvement.[144] He encouraged lower-caste citizens to empower themselves through education and employment to counter the injustices of the caste system.[145] The formation of the Kerala Sastra Sahitya Parisha (KSSP), the People's Science Movement, in 1962 resulted in renewed interest in civic participation.[146] Mobilisation during the 1970s produced significant land reform, and a successful literacy campaign was conducted in 1991.[147] KSSP played an active grassroots support role and understood that local communities needed skills to organise; to understand the issues; to deliberate successfully; and to influence local development.[148]

The commitment of the Kerala government to prepare local citizens for decentralised planning is illustrated by the training programmes that were instituted during the first year of decentralised planning. There were seven rounds of training at all three levels of government. Training involved 15 000 elected representatives (they were expected to attend), 25 000 officials, and 75 000

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[142] Ibid para 7 Conclusion.
[143] Fischer (n 135 above) 34.
[144] Mohan Gopalan Gopal 'Lessons from Kerala's Social Reform Movement Led by Narayana Guru' 94 *Am. Soc'y Int'l L. Proc.* 308 (2000); Narayana Guru, also known as Sri Narayana Guru (c. 1856–20 September 1928), was a social reformer of India. He was born into a family of the Ezhava caste in an era when people from such communities, which were regarded as Avarna, faced much injustice in the caste-ridden society of Kerala.
[145] The emphasis on education stands in sharp contrast to South Africa's 'liberation before education' mantra.
[146] Fischer (n 133 above) 30–1. The KSSP initially made scientific knowledge more accessible to schools and citizens and encouraged scientific questioning. They soon became a mass movement. Their mantra was 'science for revolution'. They too believed in self-empowerment and change and played a significant role in the literacy campaign and in preventing the building of a hydroelectric dam. The movement received the Alternative Nobel Prize in 1996.
[147] Heller & Isaac (n 133 above) para 3.
[148] Fisher (n 135 above) 35.

volunteers. At state level 600 trainees received 20 days of training; at district level 12 000 received 10 days of training; and at local level 100 000 received 5 days of training. In addition, handbooks and guides were prepared and distributed.[149]

To enhance civic engagement in Kerala the campaign devolved planning to local areas. Incentives were offered to encourage participation. The campaign emphasised the potential of deliberative processes to diminish patronage, partisan politics and excessive bureaucratic control. Channels for decision-making were created and NGOs, CBOs, professionals, academic institutions and communities were encouraged to offer their expertise for the benefit of their communities.[150] NGOs and CSOs guided and motivated citizens to participate; brought different perspectives; and raised new issues. They also counter-balanced unequal power relationships in bureaucracies and special interest groups. The electronic and printed media were co-opted, and methods used during the literacy campaign were reintroduced, such as dances, local festivals, street theatre, popular assemblies and audio-visual presentations based on folk art. Teams of volunteers paid home visits and meetings were scheduled to take place on work holidays.[151]

> In short, the objective of the People's Campaign for Decentralised Planning has not been simply to draw up a plan from below. The very process of planning has been conceived as a means to fundamentally transform the character and scope of participation and the nature of interest mediation. Such a transformation cannot be secured through government directives alone. It requires the creativity and the social logic of a movement.[152]

Participatory initiatives were introduced in Kerala to transform local government into governing institutions. The CPI focused on decentralisation and advocated the principle of subsidiarity. According to Heller and Isaac, there were several reasons for the introduction of decentralised planning. The CPI hoped to improve its electoral mandate. It also recognised the challenges posed by vested interests that were opposed to democratic reform; ongoing economic problems; the deterioration of public services in the areas of health and education (generally ascribed to top-down development); bureaucratic failures; and the cost-cutting demands imposed

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[149] Heller & Isaac (n 133 above) para 4.2.
[150] Ibid para 4.3.
[151] Fischer (n 135 above).
[152] Heller & Isaac para 4.3, quoting TM Thomas Isaac 'The socio-economic and political context of People's Planning Campaign.' National Workshop on Decentralised Governance, organised by Kerala Institute of Local Administration and Swiss Agency for Development and Cooperation, Thrissur.

by globalisation and neoliberalism. The CPI hoped that decentralised planning and popular participation would reinvent and reinvigorate the public sector and would ensure ongoing accountability, transparency and responsiveness.

The positive impact of education and decentralised planning is reflected in a Health and Education Report published in Kerala on 31 August 2018. Kerala's infant mortality and malnutrition were found to be among the lowest in India. Very few households in Kerala practised open defecation and adults attaining secondary school education were higher than in most states. There was also significant progress in secondary and tertiary education, and learning outcomes were among the highest in the country.[153]

5.3 Lessons for South Africa

In his comparative analysis, Heller compares participatory initiatives in Porto Alegre, Kerala and South Africa. He deals with both commonalities and differences.[154] All three states have 'robust' democracies; all three have strong and well-organised civil societies; in all three inequality and social exclusion were extensive; and, in all three left-leaning political parties promoted and legislated for direct participation in local government. What Porto Alegre and Kerala demonstrate is the importance of decentralisation; the contribution popular participation can make to the health and well-being of individuals and disadvantaged communities; the central role of education; and the need to co-opt CSOs. Particularly significant is the importance of political commitment. In both examples the success of participation fluctuated with changes in government. Both demonstrate the flexibility of informal participation, and the way in which it allows for further institutionalisation and ongoing bureaucratic reform.[155]

(a) Participation at local government level

The first major difference Heller identifies is that South Africa, unlike Porto Alegre and Kerala, has a dominant party system. The ANC government, emboldened by its initial strong voter support, was more concerned with strengthening control over public institutions than strengthening political

[153] http://documents.worldbank.org/curated/en/607901504168997380/Kerala-Health-and-education.
[154] Heller (n 26 above) 153.
[155] Heller & Isaac (n 133 above) para 3.

support,[156] while the CPI and the PT introduced reforms in order to strengthen political support. Since Heller wrote his article, the ANC has lost considerable support at local government level as evidenced by the 2016 local government elections. However, the ANC received strong endorsement during the national elections in 2019. In view of this dichotomy, participatory reform at local level will likely be dictated by factors such as dissatisfaction with the ANC government's top-down style of governance, its failure to adequately capacitate local government, corruption, and ever-increasing service delivery protests, rather than the need to strengthen its political support.

The second difference Heller identifies is that the ANC government, unlike the ruling parties in Porto Alegre and Kerala, started off from a strong base when it took over from the apartheid government. There was good infrastructure, strong technical capacity, efficient tax collection and generally well-functioning local bureaucracies. Heller identifies efficiency and participation as the two imperatives for successful developmental local government.[157] At the time of publication, Heller was of the view that South Africa was efficient, but had failed to implement effective participatory structures, while Porto Alegre and Kerala had institutionalised participation better, but were less efficient.[158]

The combined advantage of state capacity and strong political support should have placed South Africa in a strong position for successful participatory local governance.[159] However, ordinary citizens no longer believe in the power of democracy. This can be ascribed to the gradual decline in confidence in the integrity of the South African state, especially at local government level; a failure by the state to curtail corruption; and the state's failure to visibly improve service delivery. The decline in state capacity and efficiency, inadequate financial support, the lack of political will and the absence of effective formally structured institutions for participation explain why South Africa is failing at developmental local government. Other contributing factors are the ANC's policy of cadre deployment, a deterioration in the quality of local leadership, the ever-increasing economic disparity and the failure to encourage civic education, especially at ward

[156] Heller (n 26 above) 155.
[157] Ibid 153.
[158] Ibid 157.
[159] Ibid 157.

councillor and ward committee level. If the government is truly committed to addressing the failure of participatory democracy this is the level at which reforms should be introduced.

There is a stark contrast between ward committees and the multiple structures and processes for participation and community–local government interaction in Porto Alegre and Kerala. There is a clear need for reform in South Africa. Should the government retain the ward committee system, the committees should, at the very least, be capacitated and provided with administrative, technical and financial support to enable them to meaningfully mobilise their communities to identify local goals, to participate effectively in IDPs, and to provide appropriate oversight over officials, budget preparation and spending. This will require ongoing education and civil society support.

(b) The role of education

South Africa has a rich history of active citizenship and community participation. This was demonstrated during the drafting of the Freedom Charter, participation in the constitution-making process and community involvement in the United Democratic Front (UDF). However, liberation came at the cost of black education, a legacy attributable to the apartheid government's neglect of black education as part of social engineering, and the liberation movement's focus, expressed in its famous mantra, 'liberation before education'.

The effect of years of neglect of formal educational is reflected in several statistics. The Global Competitiveness Index 2017–2018 ranked South Africa 116 out of 137 on the quality of primary education, and 114 out of 137 on the quality of higher education and training. The ranking of higher education in maths and science is even worse – 128 out of 137.[160] The Stats SA Education Series, 2016, reported that, though there had been improvement in enrolment since 1994, insufficient progress had been made and large inequalities remained between population groups. In terms of transition from secondary to tertiary education, participation ratios demonstrated the racial divide with the decline in registrations of coloured and black students. A similar profile is reflected in early education where the transition for black students from Grade 3 to Grade 9 is low

[160] Available at http://www3.weforum.org/docs/GCR2017-2018/03CountryProfiles/Standalone2-pagerprofiles/WEF_GCI_2017_2018_Profile_South_Africa.pdf.

compared to the rest of the population.[161] A March 2019 report by Stats SA indicated that 51 per cent of young people between the ages of 18 and 24 did not have the financial means to further their education, while 18 per cent of the same age group indicated that their poor academic performance had prevented them from accessing educational institutions.[162]

The 2018 budget allocated 246.8 billion rand to education in South Africa of which 3.8 billion rand was allocated to school infrastructure backlogs. This, the Minister of Finance at the time, Malusi Gigaba, explained, would be used to replace 82 'inappropriate and unsafe schools' and to provide water to 325 schools and sanitation to 286 schools.[163] In a response to a parliamentary question addressed to former Finance Minister Nhlanhla Nene during 2018, Minister Nene advised that only 94 of 193 accounting officers and 79 of the 218 CFOs at local government level complied with minimum competency levels. This problem was compounded by high vacancy rates and high staff turnover.[164] In the same year Minister Nene introduced regulations in terms of which municipal officials had 18 months (previously 8 years) 'to qualify for their positions if they weren't upon appointment'.[165]

The strong focus by the international community on education and the direct impact education had in upliftment and citizen participation in Kerala should guide the South African government. The ANC has been governing since 1994 and has had 26 years to address infrastructural inequalities, to build stronger technical capacity and to produce well-functioning bureaucracies. The government's failure to address the challenges of formal education, its policy of cadre deployment instead of qualified local officials, and its failure to promote education, including civic education, explains why local government is failing and why South Africa is not reaping the benefits that come from active and involved citizen participation.

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[161] Stats SA Education Series Volume III 'Educational enrolment and achievement, 2016, Summary and conclusion para 1.7, available at http://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf.
[162] Report Statistics South Africa, available at http://www.statssa.gov.za/?p=12040.
[163] Tamaryn Africa '#BudgetSpeech2018: Basic education allocated R246.8 billion' *IOL* (21 February 2018), available at http://www.iol.co.za/news/politics/budgetspeech2018-basic-education-allocated-r2468-billion-13407118.
[164] Khulekani Magubane 'Nene cracks down on unqualified local government officials' *Mail & Guardian* (9 August 2018), available at https://mg.co.za/article/2018-08-09-nene-cracks-down-on-unqualified-finance-and-supply-chain-officials/.
[165] Linda Ensor 'Less than half of SA's municipal accounting officers properly qualified' *Times Live* (19 September 2018), available at https://www.timeslive.co.za/news/south-africa/2018-09-19-less-than-half-of-sas-municipal-accounting-officers-properly-qualified/.

(c) Social movements

The Kerala and Porto Alegre local governments, and international instruments, acknowledge the important role played by CSOs, voluntary organisations, social networks and community organisations. The World Resource Institute Report found that Brazil's history of strong civic and neighbourhood organisations, their capacities and the country's progressive traditions played a considerable role in the success of participatory budgeting.[166]

The significant role civil society and social movements played during the liberation struggle in South Africa and during the transition to democracy have been emphasised in previous chapters. This chapter discusses the importance the international community assigns to civil society and social movements in its various instruments and guidelines. NGOs and CSOs are uniquely qualified to facilitate local government–community interaction. They come with a breadth of experience, invaluable expertise, and local knowledge. Often they enjoy standing in their communities that are denied to local officials. They also have vested interests in ensuring that democracy is preserved in their communities. Their willingness to contribute towards the protection and advancement of socio-economic rights and democracy is evidenced in their mission statements, annual reports and the public interest litigation they initiate or participate in.

In their annual report, Section 27 pointed out that democracy is about how we participate in our society and how we exercise our constitutional rights. Bringing about change starts with an individual decision, but change can only be brought about in co-operation with others by combining power, skills, perspectives and resources.[167] In terms of their mission statement the Legal Resources Centre seeks 'creative and effective solutions by using a range of strategies'. These include 'law reform; participation in partnerships and development processes; [and] education and networking', both nationally and internationally.[168] Lawyers for Human Rights takes pride in the role it played during the transition to democracy, particularly with regards to voter education. They acknowledge that joint ventures with government institutions may be

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[166] Abers et al (n 126 above) 19.

[167] Section 27 *2016–17 Annual Report* (available through www.section27.org.za). Section 27 often works in collaboration with Treatment Action Campaign. The latter was formed in 1998 to campaign for access to AIDS medication. They challenged the government's health policy as it relates to antiretroviral medication to prevent HIV transmission between pregnant women and their newborn babies in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721.

[168] Legal Resources Centre *Annual Report 2015/2016* (available through www.lrc.org.za)

necessary to promote their organisation's objectives.[169] The Organisation Undoing Tax Abuse (OUTA) promotes the Constitution and democratic processes, and focuses on holding to account persons or officials who squander public funds, either through maladministration or corruption.[170] In addition, there are a range of national and community-based organisations that can be co-opted into facilitating meaningful local government–community interaction.

As previously stated, the potential of public interest litigation as a tool for participatory democracy was endorsed by Justice O'Regan in *Mazibuko v City of Johannesburg*, where she stressed how fortunate South Africans were to have many competent NGOs that use public interest litigation to protect socio-economic rights and improve the rights of the poor. Although public interest litigation is expensive it is a form of participatory democracy 'that holds government accountable and requires it to account between elections over specific aspects of government policy'.[171]

6 CONCLUSION

The South African Constitution protects socio-economic rights, but service delivery to disadvantaged communities has fallen far short of expectations. This is directly related to poor governance, particularly at local government level, and is exacerbated by corruption. The international community believes that local communities can assist in improving good governance practices and assist in the fight against corruption through their right to public involvement.

As indicated in the introduction to this chapter, courts, tribunals or forums, when interpreting the rights protected under the Bill of Rights, have been provided with tools of interpretation that include the obligation to consider international law. Section 39 of the Constitution provides that a court, tribunal or forum – '*(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *(b)* must consider international law; and

[169] Lawyers for Human Rights home page, available at http://www.lhr.org.za/about-lawyers-human-rights.
[170] OUTA (available at https://outa.co.za/). In *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) OUTA challenged an extensive upgrade of highways in Gauteng. One of their challenges related to the failure by the Minister of Water and Environmental to take into account the impact of the upgrade on socio-economic rights. In *New Nation Movement NPC v President of the Republic of South Africa* 2019 (9) BCLR 1104 (CC) they acted as *amicus* and argued for the change in our electoral system to accommodate independent candidates.
[171] *Mazibuko v City of Johannesburg* 2010(4) SA 1 (CC) para 160.

(c) may consider foreign law.' Subsection (2) deals with legislation; here the Constitution provides that a court, a tribunal or forum 'must promote the spirit, purport and objects of the Bill of Rights'.

In *Doctors for Life International v Speaker of the National Assembly* (*Doctors for Life*) the majority Court engaged extensively with international and foreign law, as it relates to the right to political participation.[172] The Court concluded that the duty to facilitate public involvement must be 'understood as a manifestation of the international law right to political participation'.[173] The Court endorsed Henry Steiner's view that 'the right to political participation, be viewed as a programmatic right, one responsive to a shared ideal but to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character'.[174] The Court linked Steiner's understanding of the progressive realisation of the right to public participation, to the Court's view that the right to political participation should evolve over time.

> The idea of an evolving human right to political participation comports with this Court's view of human rights as open to elaboration, reinterpretation and expansion. As the Court has explained, 'rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on a new texture and meaning.' This must be particularly so for programmatic rights like the right to take part in the conduct of public affairs, which must be realised through the programs and policies of states. But more importantly, the right to political participation must be left to gather its meaning and content from historical and cultural experience. What is required is for 'States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.'[175]

Despite our comprehensive constitutional and legislative framework, this chapter has shown that compared to international standards there are significant shortcomings. However, there are also many international standards to draw on, as well as the two global experiments in public participation. The important role the Constitution has assigned to international law, and the Court's endorsement of the progressive realisation of political participation means that developments in international law, international norms and foreign best practice can guide incremental change to

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[172] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 90–107.
[173] *Doctors for Life* (n 173 above) para 107.
[174] Henry J Steiner 'Political participation as a human right' (1988) 77(1) *Harv. Hum. Rts. Y. B.* 130.
[175] *Doctors for Life* (n 173 above) para 97.

the ‘mechanisms, processes and procedures’ provided for public involvement in local government.[176] Ideally, government should take the lead on reform. However, should government continue to fail to fulfil its obligations, the courts should use their constitutional tools for the benefit of disadvantaged communities.

[176] Section 17 of Local Government: Systems Act 32 of 2000.

Chapter 6

The shared obligation to convert human suffereing into human flourishing

1 INTRODUCTION

In the context of Erik Wright's first foundational proposition that existing institutions and social structures may be the reason for human suffering, this thesis engages with and critiques the Constitutional Court's jurisprudence on public involvement.[1] It questions whether the right to public involvement, as expressed in the Constitution and developed by the Court, has sufficiently empowered disadvantaged communities to use the various democratic spaces to advance their socio-economic rights and whether the Court has achieved the optimum balance between holding government to account, protecting the public's rights and fulfilling its own constitutional obligations.

The focus of the thesis is community involvement at local government level. At this level communities are directly affected by poor governance, service delivery failures and the impact of corruption. Also, ongoing public involvement can best be facilitated at this level. Local level participation is promoted by the Western democratic theorists discussed in chapter 1, and by international law, international norms and foreign best practice, as discussed in chapter 5. It was historically practised in tribal communities[2] and is provided for in the local government legislation discussed in chapter 4.

The democratic spaces discussed in this thesis involve all three branches of government. Chief Justice Ngcobo aptly characterised the interaction between the three branches of government as a constitutional dialogue required by a shared obligation to uphold the Constitution. When the legislative and executive branches fail to comply with their constitutional obligations, the Court, as the ultimate guardian of the Constitution, is compelled to safeguard these democratic spaces and protect socio-economic rights. At times this has given rise to sensitivities around the separation of powers doctrine and on several occasions the Court has had to address these concerns. Brian Ray argues that, through its judgments in *Doctors for Life International v Speaker of the National*

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[1] Erik Olin Wright 'Transforming capitalism through real utopias' (2012) 78(1) *American Sociological Review* 1, 2–3.

[2] See discussion in chapter 1 para 2.2.

Assembly (*Doctors for Life*), *Matatiele Municipality v President of the Republic of South Africa 2*, *Glenister v President of the Republic of South Africa* and *Mazibuko, v City of Johannesburg* (*Mazibuko*), the Court confirmed its power to scrutinise 'claims that raise democratic objections and to reject policies and institutional structures that are inconsistent with that vision'.[3]

The thesis engages with the different approaches the Court adopted and provides examples of when the Court intervened, when it stepped back to allow the democratically elected government to govern, and when it created democratic spaces for direct interaction between the public and their local government.

The Court's comparative institutional weakness, its need to defend its independence and its reliance on the other branches of government for enforcement and financial support[4] pose some challenges. But these pale against its obligation to protect individual rights and democratic spaces within what is increasingly becoming a hostile environment. It calls for judicial activism and demands innovative ways in which to fulfil the Court's transformation mandate. For Dikgang Moseneke, this means that '[j]udgments should acknowledge the socioeconomic conditions of the groups concerned in the light of social patterns, power relations and other forms of relevant systematic deprivations'.[5] The thesis therefore questions whether the Court has sufficiently used 'interpretive creativity and innovation' to protect and empower disadvantaged communities, whether it has enforced accountability, transparency and responsiveness, and whether it has advanced social justice.

In the overview that follows the emphasis is on how various judgments expanded or contracted the right to participatory democracy and the consequences that expansion or contraction had for our democracy. A further focus is whether the courts used their judgments to empower disadvantaged communities, improve their ability to enforce their socio-economic rights and improve their ability to demand accountable, transparent and responsive governance.

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[3] Brian Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 287; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa 2* 2007 (1) BCLR 47 (CC); *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

[4] Heinz Klug 'Introducing the devil: An institutional analysis of the power of constitutional review' (1997) 13 *SAJHR* 185, 189.

[5] Dikgang Moseneke 'The Fourth Bram Fisher Memorial Lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 318–19.

2 OVERVIEW OF THE ARGUMENTS ADVANCED IN THIS THESIS

The introductory chapter provides background to the thesis and engages with some of the fundamental elements of public involvement identified by Western democratic theorists. Of these the Court has endorsed the need for participatory parity, incremental implementation, the transformative potential of civic education, and the importance of accountable, responsive and transparent governance. Chapter 1 also looks at the values that inform the Doctrine of Communalism and the cultural practice of ubuntu. These values are deeply rooted in African culture and directly affect the well-being of communities. Research indicates that, at times, these values were subverted and undermined by colonial masters and autocratic leaders. This is of particular relevance as many of the judgments demonstrate the impact disengaged officials and party-political interests have on effective public involvement and socio-economic advancement.

Finally, the introductory chapter engages with South Africa's history of informal grass roots participation. Communities were involved in identifying the demands expressed in the Freedom Charter, which included their belief in their ability to govern, and their demands for access to land, housing, social security, health care and education. Grassroots approval was at the core of decision-making within the UDF. Similarly, the Constitution was informed by extensive engagement with local communities in a process facilitated and encouraged by the national leadership. Civic education and respectful report-back was at the core of past leadership–community interaction.

The Freedom Charter and the Constitution were the culmination of exceptional national events of immense significance to the majority of South Africans. Ongoing involvement, as envisaged by the Constitution (and relevant legislation), is designed to deliver on the vision that government is based on the will of the people and is intended to grant communities opportunities to be involved in addressing their as yet unfulfilled demands.

Chapter 2 focuses on the Court's interpretation of the nature of our democracy and the positioning of public involvement within our democracy. In the course of several challenges the Court either expanded or contracted the right to public involvement. The majority judgment in *Doctors for Life* represents an expansion of that right. Justice Ngcobo, writing for the majority, confirmed that public involvement was an aspect of participatory democracy. Together, participatory democracy and electoral democracy ensure a deeper understanding of the nature of

our democracy.[6] In interpreting the right to public involvement the Court was guided by international law and emphasised the dual obligation it creates for the state.

In discussing the substance of the right, the Court drew a clear link between public participation and its jurisprudence on socio-economic rights. The Court confirmed the importance of social and historical context,[7] and the importance of interpreting the right within the setting of the Constitution as a whole. The Court adopted the higher standard of reasonableness to test constitutional compliance and confirmed that this decision was informed by the reasonableness standard required for the progressive realisation of socio-economic rights. The Court, with reference to international law, endorsed the incremental development of the right. In balancing 'the need to respect parliamentary institutional autonomy' with 'the right of the public to participate in public affairs' the Court granted legislatures wide discretion but confirmed that the Court would determine whether the legislatures' choices complied with the degree of public involvement required by the Constitution.[8]

The Court also spotlighted socio-economic issues that are important to disadvantaged communities. In *Doctors for Life* the majority Court reminded the National Council of Provinces (NCOP), and the provincial legislatures, of the important role traditional health practitioners play, especially in rural communities. In *Land Access Movement of South Africa v Chairperson of the National Council of Province* (*LAMOSA 1*) the Court reminded the provincial legislatures of the historic significance of land claims.[9] When Parliament failed to comply with its Order, the Court in *Speaker of National Assembly v Land Access Movement of South Africa* (*LAMOSA 2*) reaffirmed the importance of expeditious land reform and its 'potential to be a catalyst for structural change in our society'.[10] The Court then fashioned a remedy that granted interdicted land claimants a voice in the proceedings before the Land Claims Court in respect of original land claims.

The Court linked the objectives of public involvement with the benefits of meaningful participation in the law-making process and engaged with the transformative potential of public involvement. It emphasised the importance of civic education and access to information to ensure

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[6] *Doctors for Life* (n 3 above) paras 89, 111–12, 116, 121.
[7] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 22; see also other examples quoted in chapter 3 fn 12.
[8] *Doctors for Life* (n 3 above) para 124.
[9] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).
[10] *Speaker of National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) para 65.

meaningful participation. However, it failed in subsequent judgments to develop this aspect, or to hold the legislature accountable for incremental implementation. In this respect the Court failed disadvantaged communities.

Moreover, Justice Van der Westhuizen's focus on procedural compliance in *Merafong Demarcation Forum v President of the Republic of South Africa* (*Merafong*) represents a contraction of the right to public involvement.[11] Through its more deferential approach, the *Merafong* Court focused on one aspect of public involvement – the need for legislatures to be informed of community concerns. It engaged less with the values of accountability, transparency and responsiveness, all of which are important to members of the public, and their right to be treated with dignity and respect. The Court, when faced with the complex relationship between participatory and electoral democracy, failed to optimally balance the obligations of the legislatures with the rights of the public. This represents a thinner understanding of our democracy. In this regard, the minority judgment by Justice Sachs with his focus on the 'integrity of the process' and the importance of good-faith interaction between the state and the public is more reflective of our constitutional values and the historical context.

Chapter 3 engages with the Court's response to the serious challenge of evictions and homelessness in a constitutional democracy with enforceable socio-economic rights. The Court, confronted with the tension between land ownership and homelessness, in a bold act of judicial activism, used 'interpretive creativity and innovation' to create and then develop the meaningful engagement mechanism.[12] The mechanism opened up another democratic space. For Geoff Budlender, this innovation illustrats the Court's use of its power to deepen our democracy and directly impact peoples' lives.[13]

> People who were powerless became powerful, because they were the holders of rights and were treated accordingly. They became citizens, not subjects. The use of 'meaningful engagement' is a major breakthrough in the conceptual approach to how courts can broaden and deepen the processes of democracy.[14]

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[11] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 301.
[12] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
[13] It is important to point out that the legislature, through its provision for mediation under s 7 of the Prevention of Illegal Eviction and Unlawful Occupation of Land, Act 91 of 1998 also created a space for democratic participation.
[14] Geoff Budlender 'People's power and the courts: Bram Fischer memorial lecture, 2011' (2011) 27 *South African Journal on Human Rights* 582, 592.

The meaningful engagement mechanism uses a political right to advance a socio-economic right. Through this mechanism the Court achieved several objectives. First, by demanding an interpretation that considers the context of the Constitution as a whole and by emphasising the importance of social and historical context, the Court paved the way for more socially just remedies.

Second, the Court took advantage of its power to demand accountability, transparency and responsiveness on behalf of disadvantaged communities. Justice O'Regan in *Mazibuko* not only confirmed litigation as a form of participatory democracy, but also advised litigants to use participatory democracy to demand accountability, transparency and responsiveness, and, through ongoing public interest litigation, contribute towards the progressive realisation of socio-economic rights. In this regard, *Mazibuko* represents an expansion of the right to participatory democracy. Meaningful engagement is a good example of Karl Klare's transformative constitutionalism because of its potential to transform 'power relationships in a democratic, participatory, and egalitarian direction'.[15]

The mechanism also provides courts (and local authorities) with what Heinz Klug describs as 'an extraordinary window into the lives of [disadvantaged] communities'. This has compelled courts to look beyond policies to implementation.[16] Similarly, local governments have been confronted with the impact of their policies and the human cost of their constitutional failures. Through various judgments the Court has emphasised the importance of access to information as an empowerment tool and as a way in which affected members of the public can demand accountability, transparency and responsiveness from their government.

Third, the Court managed separation of powers concerns by providing an opportunity for local authorities and courts to fulfil their respective constitutional obligations. The mechanism creates a platform for direct interaction between unlawful occupiers and their local authority. Where appropriate, the engagement may include private landowners, which demonstrates the Court's preference for a more inclusive approach to seeking solutions. The Court placed the responsibility on local government to initiate the engagement process and demanded that when required, local

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[15] K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146, 171.
[16] Heinz Klug 'Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the Court's decision making' (2010) 3 *Constitutional Court Review* 1, 16.

government should endeavour to overcome community resistance. The Court also exhorted local communities to embrace the meaningful engagement process in an active, participatory and responsible manner. The Court framed the mechanism in a way that requires courts to step back and allow the democratically elected government and unlawful occupiers space within which to resolve their respective problems before litigation is initiated. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (*Joe Slovo*) and *Mazibuko*[17] demonstrate the Court's reluctance to interfere when local authorities have undertaken bona fide, though procedurally flawed, steps to engage communities, provided the local authority acted reasonably, especially when constitutional obligations extend beyond litigants to other affected members of the public. Once an eviction application is initiated the court must consider all relevant circumstances before deciding whether it is just and equitable to grant an eviction order, and again, must consider all relevant factors before determining a just and equitable date for vacating the property or when the eviction order may be carried out. The Court has interpreted its powers generously and has confirmed that courts can go beyond the factors stipulated in the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 91 of 1998 and the information provided by the parties. The extension of meaningful engagement to the implementation stage in *Joe Slovo* represents a further opportunity for community–local government interaction.

Fourth, the constitutional and inter-institutional dialogues that take place during the inquiries provide courts with insight into the difficult choices that confront government. They present courts with opportunities to extract information from government for the benefit of vulnerable communities or to provide judicial guidance to government officials on their constitutional responsibilities. Fifth, through their remedial and interpretive functions, courts can engage in judicial activism by protecting democratic spaces and protecting vulnerable communities. This can be achieved by addressing or mitigating power imbalances between litigants or issuing orders that are pragmatic and focused on solutions.[18] The Court can be criticised for its failure to follow its

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[17] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) and *Mazibuko* (n 3 above).

[18] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 43. The Court held that the only appropriate relief was constitutional damages for the breach of a constitutionally entrenched right. The specific circumstances of the case included the large number of occupiers; the advantage to the occupiers to remain in situ; the intractable problems faced by the owners; financial benefit to them and the fact that the state could concentrate on medium- and long-term solutions rather than urgently finding alternative accommodation. Another example is the so-called linkage orders. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight*

own guidelines. While it has acknowledged the importance of parity of participation and the significance of equality of respect, equality of opportunity and equal access to information, the Court has not always ensured that these protections are enforced.

Chapter 4 focuses on the legislatively stipulated requirements for local community involvement in local government. Community involvement at this level comes closest to the demands contained in the Freedom Charter and expectations raised in the Constitution. It is at this level that the structures designed for community–local government interaction should be most accessible and effective to allow communities to have their voices heard and to demand accountable, transparent and responsive governance. Regrettably, it is in this democratic space that government has failed its citizens most egregiously.

One of the most serious threats to effective and meaningful community involvement is the attitude of public officials. In all three democratic spaces and in the course of socio-economic rights challenges, courts have had to sanction public officials for abuse of power, for incompetence, for lacking the requisite political will, and for failing to understand their roles as public servants and service providers. The courts have acknowledged the impact that disengaged and recalcitrant officials have on the effectiveness of public involvement processes, especially as it relates to disadvantaged communities whose socio-economic rights are directly and disproportionately affected.

Several judgments illustrate how the courts have dealt with these challenges. In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* (*Ngxuza*) the state, despite its obligations under s 7(2) and its duty to respond to peoples' needs under s 195(1)*(e)* of the Constitution, used legal processes to avoid liability for the rightful claims of its citizens. Cameron JA pointed out that the poor face two obstacles when their rights are infringed. The first is access to the law and the second obtaining justice. For Judge Cameron the state's misuse of the

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Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC) paras 40 and 99–100, the eviction was linked to a specific date, two weeks prior to the eviction. The Court took into account the City's need to source temporary emergency accommodation, the need not to test the owners' patience unreasonably, and space for the occupiers to make suitable alternative arrangements. See also *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC) paras 13 and 16, where similar arrangements were made.

'mechanisms of the law' against its people '[spoke] of a contempt for people and process that [did] not befit an organ of state'.[19]

> The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere.[20]

The conduct of municipal officials was also criticised by the court in *Kalil N.O. v Mangaung Metropolitan Municipality*. The affidavits deposed by municipal officials, and their conduct, failed to live up to what a community could expect from public servants and organs of state.

> [T]he community at large has the right to insist upon [public servants] acting lawfully and within the bounds of their authority' … the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.[21]

Similar disrespect was evidenced in *Mnisi v City of Johannesburg* (*Mnisi*), where Berger AJ described 'a disturbing pattern of official indifference', shameful conduct, and 'a wild goose chase, from official to official, without anyone engaging meaningfully with the real and legitimate concerns of the residents'.[22] In handing down his declaratory order in *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* (*Borbet*), Judge Goosen described the order as 'an indictment which should not be taken lightly' that served to 'vindicate the rights of citizens' and would hopefully 'serve as a timely reminder' that the right to local participatory democracy is enshrined in the Constitution and of critical importance to our constitutional democracy.[23]

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[19] *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* [2001] ZASCA 85 para 15.

[20] *Ngxuza* n 19 para 15; see also *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 237 where the Court stated: 'Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous "misstatements", like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report.'

[21] *Kalil N.O. v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) para 30.

[22] *Mnisi v City of Johannesburg* [2009] ZAGPJHC 55 paras 23–4; see also *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2006] ZAGPHC 6.

[23] *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP) para 110.

The judgments in *Beja v Premier of the Western Cape* (*Beja*)[24] and *Borbet* illustrate many of the problems courts have had to address when adjudicating community involvement at local government level and the decline in the effectiveness of the ward committees' system. In 2009, Justice O'Regan found in *Mazibuko* that the ward committees system ensured local community involvement in the processes that preceded the installation of the pre-paid water meters.[25] Five years later, in *Borbet* Goosen J observed that there was no evidence that ward committees participated in the budget preparation process.[26]

The chapter also illustrates the problems faced by ward committees and highlights the impact disinterested officials and cadre deployment have on achieving the objectives set out in the various local government statutes. In practice the ward committee system is dysfunctional. The failure to ensure meaningful involvement in IDPs, municipal budgets, rates policies and service delivery challenges has effectively silenced the voices of disadvantaged communities and curtailed the potential of a significant democratic space. Well-intentioned but ineffectively implemented legislation and dysfunctional local government structures lie at the core of many of the hardships suffered by disadvantaged communities. Other factors are the lack of commitment by government, its failure to understand its constitutional obligations, the failure of officials to understand their role as service providers or that accountability is to the people not a political party, and government's failure to engage with the transformation opportunities democratic participation presents.

In all three democratic spaces the Court has confirmed the significance of access to information and education for the preservation of our democracy and for transformation. While courts are constrained by the matters before them, they have to date failed to demand and enforce incremental compliance or to adequately address the efficacy of the ward committee system. In this regard courts have failed disadvantaged communities.

To address these failures chapter 5 searches for guidance in international law, international norms and foreign best practices. Many of the international guidelines and best practices can in

[24] *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC).
[25] *Mazibuko* (n 3 above).
[26] *Borbet* (n 23 above) paras 74–5 and 80.

broad strokes be accommodated within our existing constitutional and legislative framework and form part of the final proposal on institutional innovation.

3 PROPOSALS FOR REFORM

From the conclusions of this thesis as summarised above, this section offers a number of proposals for reform. These proposals acknowledge the invaluable role of the courts but recognise that facilitating effective and meaningful public involvement is firstly the responsibility of government. Public involvement presents an important transformation opportunity and is a significant empowerment tool. Through their involvement disadvantaged communities can demand accountability, transparency, responsiveness and social justice from their government. The implementation of the proposals requires national leadership and support and a re-engagement by elected officials with the historical roots of public involvement and its constitutional vision. The proposals recognise the limitations of the current economic climate and the need for a cautious and experimental approach through pilot projects and incremental implementation.

3.1 Transformation through education

(a) Civic education – a role for government

The *Doctors for Life* majority paid considerable attention to the role of education.[27] The Court referenced official reports on the importance Parliament attached to education and its initiatives in this regard.[28] It emphasised the impact of past discrimination. Unequal access to education, financial resources and knowledge made effective involvement almost impossible. In this context the Court suggested that these historical inequalities meant merely facilitating involvement was insufficient to make involvement meaningful. The Court expressed the view that meaningful

[27] *Doctors for Life* (n 3 above) para 132: road shows, regional workshops, radio programmes, publications.
[28] *Doctors for Life* (n 3 above) paras 113–14 The People's Assembly, 2005; para 133 the recognition South Africa received in the report on the Inter-Parliamentary Union on Parliamentary Involvement in International Affairs for initiatives by Parliament to advance public education on its processes and legislation; see also *Matatiele 2* (n 3 above) para 61.

involvement for 'ordinary citizens' would require the facilitation of learning and understanding.[29] The Court further suggested that it would be desirable to build capacity through public education.

Accordingly, the first proposal for reform flowing from this study deals with civic education. A three-phased approach is proposed. During phase one civic education programmes and training manuals should be developed for local officials and community volunteers. Volunteers should have standing within their communities and their views should be representative of the communities they represent.[30] Phase two will involve the training of officials and volunteers. During phase three trained volunteers will educate local communities on their rights and responsibilities. To ensure a diversity of experience and perspectives the development of the manuals, training programmes and workshops should involve all three spheres of government, multi-party representatives, civil society organisations, local community organisations, traditional leaders and ward committees (or a reconceived equivalent). The manuals and programmes should be flexible and adaptable to accommodate community specific problems and needs.

Second phase training will involve officials and community volunteers as coaches. The training should be interactive and participatory. It should prepare officials to facilitate effective involvement and prepare coaches to guide communities on becoming effective participants. As many of the judgments illustrate, government officials do not understand their constitutional and legislative responsibilities or their role as service providers. The training should therefore focus on their constitutional and legislative responsibilities. The programmes should include engagement with the values that inform the Constitution, the rights protected under the Bill of Rights, the basic values and principles that govern public administration and the Batho Phele principles. Special attention should be given to good governance practices and the Rule of Law. Officials should be made aware that community members can be both active participants and beneficiaries. Compulsory attendance should be required for senior officials and differentiated training at other levels of government.[31]

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[29] *Doctors for Life* (n 3 above) para 131. In this regard the Court also reference the obligation imposed by art 25 of the African Charter on State Parties to '"promote and ensure through teaching, education and publication" the right to political participation'.

[30] Volunteer coaches can be compared to data collection volunteers in Kerala and Chief Luthuli's freedom volunteers.

[31] The Kerala approach is instructive. See chapter 5 para 5.2(c).

The focus should then shift to the constitutional and legislative rights and corresponding obligations of community members and their right to demand accountable, transparent and responsive governance. Particular attention should be given to what officials and communities can expect from their participation. The Participation Guidelines describe this as having 'clear, realistic and practical goals'. This should include information on how community demands will be processed and reported on, and what communities can expect from their participation and from officials.

Participants (officials and volunteer coaches) should be encouraged to engage with what it means to cultivate an appropriate civic relationship; the link between community trust and effective governance; and ways in which parity of participation can be achieved. Guidance should be given to officials on how to interact with disadvantaged communities. Officials and coaches should discuss the potential of transformation through involvement and the important contribution they can make in this regard. An interactive training programme will be successful only if it enjoys support from all levels of government and if it becomes a requirement for employment and career advancement. Incentives for volunteer coaches should be discussed.

Given the financial constraints and management failures in many municipalities, it is recommended that the second and third phases are introduced as pilot projects in selected municipalities, or defined service delivery areas within selected municipalities. The programmes should be re-evaluated before they are rolled out to other municipalities or defined service delivery areas.

(b) Facilitating learning and understanding – a role for the courts

The Court has provided substantial guidance on the need to facilitate learning and understanding and how fundamental this is to meaningful participation. Effective public involvement is dependent on members of the public making informed and meaningful contributions. This can only be achieved if participants understand the participation process and understand the information that will inform their contributions. The Court has recognised that government has an obligation here and has recognised the transformation potential of facilitating learning and understanding but has failed to enforce it. The proposal is therefore that the Court elevates the facilitation of learning and understanding to a procedural requirement for public involvement and then ensures, through its orders, that there is reasonable compliance. The Court's confirmation that

the right to participation is an evolving right empowers courts to ensure that the facilitation of learning and understanding occurs at an accelerated rate.[32]

3.2 The right to demand accountability, transparency and responsiveness

Public involvement in local government is currently failing to achieve the level of oversight required to ensure that government complies with its constitutional obligations. The courts have a role to play in assisting disadvantaged communities to access relevant information in order to demand accountability, transparency and responsiveness. The government's role is to create an institutional environment where public involvement will secure accountability, transparency and responsiveness.

(a) A role for the courts

The Aarhus convention reminds us that public authorities hold information in the public interest and the Participation Guidelines demonstrate the in-depth information required from officials during the various stages of the participation process. Access to information is the gateway to challenging the legitimacy of a public involvement process and to demanding accountability, transparency and responsiveness. The failure by South African officials to recognise their custodial function and their reluctance to provide quality information, when and where needed, and in an understandable format, need urgent redress.

The absence of relevant information, or the extent, depth and technical nature of relevant information[33] affects the ability of disadvantaged communities to participate meaningfully. Here the courts can assist communities to source technical information, can enforce official record-keeping of the involvement process by making it a procedural requirement, and empower

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[32] Henry J Steiner 'Political participation as a human right' 1 *Harv. Hum. Rts. Y. B.* 77 (1988), 130 Steiner suggested that the right to political participation 'should be viewed as a programmatic and aspirational right "one responsive to a shared ideal but to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character"'.

[33] The judgments in *Mnisi* (n 22 above); *Ritama Investments* (n 22 above); *Hlophe v City of Johannesburg* 2013 (4) SA 212 (GSJ); *Pheko v Ekurhuleni Metropolitan Municipality (1)* 2012 (2) SA 598 (CC), *Pheko v Ekurhuleni Metropolitan Municipality (2)* 2015 (5) SA 600 (CC); *Pheko v Ekurhuleni Metropolitan Municipality (3)* 2016 (10) BCLR 1308 (CC) demonstrate the depth of information the public is required to understand in order to engage meaningfully.

communities to demand accountability, transparency and responsiveness through reason-giving as a further procedural requirement.

In his 2011 article Brand makes several suggestions about how expert evidence may be sourced by courts. With reference to joinder of the local authority in *Blue Moonlight,* he suggests that courts, rather than resorting to judicial deference, should employ judicial prudence, and order joinder of parties who may have no direct interest, but who possess particular expertise or represent particular interests. Alternatively, courts could invite *amici* participation or appoint *curators ad litem* to report on complex issues.[34] In India socio-legal commissions of inquiry are appointed to gather relevant material in public interest litigation. The reports are considered to be prima facie evidence and copies are provided to the parties who can respond by affidavit.[35] A fact-finding commission can be appointed in South Africa in terms of s 38(1) of the Superior Courts Act 10 of 2013,[36] or the Chief Justice could issue directives. Ray, with reference to Satchwell J's judgment in *Hlophe v City of Johannesburg*, suggests that the meaningful engagement mechanism and the court's procedural authority could be used to access the kind of expert advice necessary to find turnaround and long-term solutions.[37] Through strategies such as these, courts could assist disadvantaged communities to gain access to information that will empower them to demand social justice, accountability, transparency and responsiveness.

Given the non-prescriptive nature of the public involvement requirements, official records of the involvement processes are essential to assure communities that there was effective compliance. *Poverty Alleviation Network v President of the Republic of South Africa* demonstrated that it is possible for lawmakers to produce evidence of how meetings were advertised, and to produce transcripts of public hearings, attendance registers and copies of written submissions.[38] In other judgments, courts have expressed frustration at the absence of proper records. In *Beja* there was no evidence of actual participation, proof of representative capacity or proper minutes of

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[34] Danie Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa (2011) 22 *Stellenbosch L. Rev.* 614, 634.
[35] *Bandhua Mukti Morcha vs Union of India and Others* 1992 AIR 38, 1991 SCR (3) 524.
[36] Section 38(1) provides that the 'Constitutional Court and, in any civil proceedings, any Division may, with consent of the parties, refer *(a)* any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or *(b)* any matter which relates wholly or in part to accounts; or *(c)* any other matter arising in such proceedings, for enquiry and report to a referee appointed by the parties, and the court may adopt the report …'.
[37] *Hlophe* (n 33 above).
[38] *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) paras 38, 61.

meetings.[39] In *Borbet* no details were provided with regards to who the interest groups or affected communities were; there were no details to show that the hearings were facilitated and held, what mechanisms were in place, what resources were allocated to the task, or what steps were taken to build capacity.[40]

The absence of official records makes it difficult for disadvantaged communities to mount legal challenges or for courts to adjudicate on procedural compliance. Ray suggests that authorities should be required to create a system of record-keeping of the engagement process, especially when there are several authorities involved.[41] A similar record should be required from Parliament and the provincial legislatures to enable members of the public to track participatory processes as they relate to a specific Bill. Local government should also be required to record community involvement processes. Reliable official records will enhance the integrity of the public involvement process.

Much of the unhappiness around public involvement relates to the fact that officials are not required to provide feedback. Communities are invited to attend hearings and are in theory, often not in practice, afforded an opportunity to voice their concerns, after which the public involvement process is concluded. This has reduced public participation to a public relations exercise and has denied the public the opportunity to use their right to demand accountability, transparency and responsiveness.

In the legislative space Michael Bishop suggests that lawmakers should be required to provide reasons for their decisions. He argues that a reason-giving component to the legislatures' obligations would have the dual benefit of making participation more meaningful and securing ongoing participation.[42] Ngwako Raboshakga agrees with Bishop's reason-giving proposal. Legislative reasons will indicate whether the views of the public were considered and whether the legislature was open to persuasion. He also suggests that '[c]redible allegations of the

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[39] *Beja* (n 24 above) paras 100 and 103.
[40] *Borbet* (n 23 above) paras 72, 74, 75, 77.
[41] Ray (n 3 above) 289.
[42] Michael Bishop 'Vampire or prince? The listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa* (2009) 2 *Constitutional Court Review* 313, 342. The emphasis A Gutmann & D Thompson, in *Why Deliberative Democracy?* (2004) 4–6, placed on reason-giving, communicated in an accessible and understandable manner, is particularly relevant to South Africa given its multilingual population. Reason-giving is also a core requirement of Fung and Wright's Empowered Deliberative Democracy; Archon Fung & Erik Olin Wright 'Deepening democracy: Innovation in empowered participatory governance' (2001) 29 *Politics & Society* 5.

unwillingness on the part of the legislators to listen to the public should be taken seriously by courts and where possible interrogated'.[43] By making reason-giving a procedural requirement for public involvement and community involvement the Court will empower communities to use procedural requirements to enforce accountability, transparency and responsiveness. Such a requirement will also enhance the legitimacy of the involvement processes.

The proposal is therefore that record-keeping and reason-giving become procedural requirements. Records should be kept from inception to conclusion of the involvement process. The process will only conclude after the public is provided with reasons for decisions reached. Compliance in both instances will be subject to the reasonableness test.

(b) Empowerment through institutional innovation – a role for government

The ward committee system as currently constituted has failed to achieve the objectives of public involvement as set out in various local government statutes. The question is therefore whether the ward committee system should be reformed or whether institutional innovation would better serve disadvantaged communities? The answer to the former should be informed by Wright's second foundational proposition that 'transforming existing institutions and social structures in the right way has the potential to substantially reduce human suffering and expand the possibilities for human flourishing'.[44] As chapter 4 demonstrates, community involvement through the ward committee system has failed to achieve human flourishing, has failed to advance transformation and has failed as a platform for disadvantaged communities to demand accountability, transparency and responsiveness. The ward committee system has also been discredited by partisanship and, as the increase in public protests demonstrates, speaks to community disillusionment. Institutional innovation is clearly required. What the new institutional arrangement should be falls outside the scope of this thesis but based on the research, this proposal provides some guidelines.

Much can be gained from the two international experiments discussed above: participatory budgeting in Porto Alegre and decentralised planning in Kerala. Both were designed to balance community participation, technical expertise and official implementation. What is especially

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[43] Ngwako Raboshakga 'Towards participatory democracy, or not: The reasonableness approach in public involvement cases' (2015) 31 *SAJHR* 4, 26.
[44] Wright (n 1 above) 1, 2.

evident are the clearly defined institutions and processes; the multiple levels of interaction; the importance attached to administrative and technical support, the emphasis on government support and a defined role for civil society organisations. Both experiments were implemented regionally rather than nationally and were designed to accommodate unique local conditions. The Guidelines on Basic Services for All emphasise the importance of service delivery that is needs oriented and community specific.

The international community believes that the facilitation of community involvement requires expertise, financial resources, regional and national support, civic education and a role for civil society, the private sector and other stakeholders. Two further aspects are relevant. The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development suggests incremental implementation.[45] The *Doctors for Life* judgment endorsed the evolving nature of the right. Although the right to involvement is currently participatory rather than deliberative, the institutional design should accommodate this development and should provide for incremental implementation.

The proposal is therefore that the process commence with first identifying the problems impacting effective public involvement and effective service delivery in South Africa. Thereafter the objectives of the institutional design should be determined in line with the Constitution and local government legislation. The design should make provision for formal permanent structures that allow for multi-level interactions. It should provide for independent expertise and technical support, require adequate financial resources, provide for regional and national support, and a role for civil society, the private sector, and other stakeholders. It should include administrative and judicial review mechanisms. In accordance with the Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs, the structures and procedures should be regularly assessed and evaluated, and participants should be afforded opportunities to assess the participatory process and, where appropriate, participate in monitoring, implementation and evaluation of the decisions.

Critical to successful participation is the belief that involvement is meaningful. This will require that officials provide feedback and that independent complaints procedures are established

[45] African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development: B.1 1–6; B.2 7–13; D.1 1–6; D.2 7–19.

through which members of the public can channel their grievances. Complaint procedures should be transparent, be dealt with timeously and linked to performance reviews. Official and reasoned responses should be communicated to the individual or community who lodged the complaint.

Local problems include the challenges around parity of participation, the very real potential of interest group capture, the scourge of corruption, community distrust in law enforcement agencies and local government officials, and the top-down approach favoured by government. It is therefore suggested that any institutional arrangement should include credible independent structures where communities can demand accountability, transparency and responsiveness, and where communities can report corruption, service delivery failures and incompetent officials. In general the structures should minimise top-down interference. Addressing the trust deficit would require interactive civic education as proposed above. Finally, if government is really committed to transformation, the design will make provision for education programmes designed to improve participatory parity and produce informed participants and provide for effective government–community partnerships.

4 SUGGESTIONS FOR FURTHER RESEARCH

The thesis engaged with the right to public involvement and its potential for disadvantaged communities to advance their socio-economic well-being. It focused on the constitutional and legislative framework, on how the Court has developed the right and questioned whether the courts have sufficiently empowered disadvantaged communities to effectively impact legislation and service delivery. With the exception of the final proposal, the proposals for reform elaborated in the previous section explore ways in which government and the judiciary can meaningfully embrace the transformation potential of the right. The final proposal acknowledges that real change is needed to give effect to the constitutional and legislative objectives and the current challenges facing South Africa. Guided by international law, the proposal suggests government endorsed institutional innovation that makes provision for effective government–community partnerships.

As indicated above, the design of new institutional arrangements falls outside the scope of this thesis. Research into different institutional mechanisms or models is required. The design process will require input from multiple disciplines, and include experts in the field, interested parties, and the three levels of government, communities and civil society organisations. The challenges around education, easier access to information, illiteracy, transport and access to venues should be

considered, as well as a role for independent and impartial facilitators. In particular, research should be conducted on whether participatory budgeting is an appropriate model for South Africa, on which aspects of decentralised planning can be introduced locally, and whether meaningful engagement can be extended beyond its current application.

5 CONCLUSION

Much of the thesis has focused on the role of the Court. Max du Plessis argues that in 'cases involving national moral issues the Court, as the ultimate guardian of the Constitution, must respect individual rights, acknowledge public opinion and respond to it in a manner that is 'constitutionally inspired and judicially crafted'.[46] The failure by government to honour the constitutional promise that government will be based on the will of the people represents a national moral issue. In both *Doctors for Life* and *Port Elizabeth Municipality v Various Occupiers* the Court addressed individual rights within the context of broader societal problems and interpreted the right to public involvement to empower individuals and communities. Through these judgments the Court acknowledged public opinion and responded in a 'constitutionally inspired and judicially crafted' manner.[47]

The kind of moral leadership we expect from the Court to protect individuals in the public involvement space was displayed by Froneman J in *Daniels v Scribante*. Justice Froneman pointed out that poverty is the result of socio-economic policies over which governments, not individuals, have control. He identified three preconditions that South Africans will have to meet before our constitutional ideals could be realised: 'an honest and deep recognition of past injustice'; 'a re-appraisal of our conception of the nature of ownership and property'; and 'an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change'.[48] Then, with the standing he commands as a Justice of the Constitutional Court, he offered a deeply personal and passionate apology for past injustices, gave judicial approval for the need to reappraise the nature

[46] Max du Plessis, 'Between apology and utopia – The Constitutional Court and public opinion' (2002) 18 *SAJHR* 1,39–40.
[47] *Doctors for Life* (n 3 above); *P E Municipality* (n 12 above).
[48] *Daniels v Scribante* 2017 (4) SA 341 (CC).

of land ownership,[49] and, finally, reminded us that we can no longer deny others the constitutional rights we demand for ourselves.[50]

The ideal of making South Africa fit through democracy remains elusive and raises the question why so many of the leaders who played such an important role in facilitating informal participation are now unwilling to listen and unwilling to enter into the kind of partnerships required for good governance and the progressive realisation of socio-economic rights? Endorsing and supporting institutional arrangements that would make public involvement truly meaningful would go some way and may offer some redemption.

[49] *Daniels* (n 48 above) para 136 quoting Van der Walt *Property in the Margins* 16.
[50] *Daniels* (n 48 above) para 132.

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