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**A CRITICAL ANALYSIS OF THE ROLE AND EFFECT OF PUBLIC
PARTICIPATION IN THE CREATION AND ENFORCEMENT OF
MUNICIPAL BY-LAWS IN SOUTH AFRICA**

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DEDICATION

I take this opportunity to dedicate this mini- dissertation to the following people:

To my daughter Tshenolo Moses and my son Otsile Moses (nick-named by my classmates as “Master of Laws, a.k.a. Masters”): This mini-dissertation is mostly dedicated to you, Masters. When I was starting this LLM course work module, I was pregnant with you Masters, and I must say that, at times it was hard to even think that I would be able to finish this course work module due to pregnancy complications that I had to endure before your birth. I am proud to say that you are alive today and I have finally managed to complete my dissertation despite all the hardship.

To my mom Ellen Kgwedi and dad Emios Kgwedi, thank you for your nanny support in desperate times. To my sister Maria Mothibe and brother Mpho Kgwedi, thank you for taking care of our parents’ home when all the nanny issues presented themselves.

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TABLE OF CONTENT

CHAPTER 1

INTRODUCTORY

1.1	INTRODUCTION.....	1
1.2	BACKGROUND AND RATIONALE.....	3
1.3	THESIS STATEMENT AND RESEARCH QUESTIONS.....	7
1.4	STUDY OBJECTIVES.....	8
1.5	DEFINITIONS OF TERMS.....	10
1.6	PRELIMINARY LITERATURE OVERVIEW.....	11
1.7	RESEARCH METHODOLOGY.....	12
1.8	LIMITATIONS.....	12
1.9	STRUCTURE.....	13
1.10	CONCLUSION.....	14

CHAPTER 2

A BRIEF OVERVIEW OF SOUTH AFRICA’S CONSTITUTIONAL FRAMEWORK ON LOCAL GOVERNMENT AND THE APPLICABLE LEGISLATION ON PUBLIC PARTICIPATION

2.1	SOUTH AFRICA’S CONSTITUTIONAL FRAMEWORK ON LOCAL GOVERNMENT.....	16
2.2	KEY CONSTITUTIONAL LAW PRINCIPLES.....	18
2.2.1	DEMOCRACY AND ITS FORMS.....	19
2.2.2	PARTICIPATORY DEMOCRACY.....	20
2.2.3	REPRESENTATIVE DEMOCRACY.....	20
2.3	THE RELATIONSHIP BETWEEN DEMOCRACY AND PUBLIC/COMMUNITY PARTICIPATION IN LOCAL GOVERNMENT.....	21
2.4	THE APPLICABLE LOCAL GOVERNMENT LEGISLATIVE AUTHORITY: PUBLIC PARTICIPATION	23

2.4.1	THE APPLICABLE LEGISLATION.....	23
2.4.1.1	THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.....	23
2.4.1.2	THE MUNICIPAL SYSTEMS ACT.....	25
2.4.1.3	THE MUNICIPAL STRUCTURES ACT.....	28
2.4.1.4	POLICIES DEALING WITH PUBLIC PARTICIPATION.....	29
2.5	CASE LAW HIGHLIGHTING PUBLIC PARTICIPATION AS A CRITICAL COMPONENT OF SOUTH AFRICA'S DEMOCRACY.....	31
2.5.1	DOCTORS FOR LIFE CASE.....	31
2.6	CONCLUDING COMMENTS.....	33

CHAPTER 3

THE ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE CREATION OF MUNICIPAL BY-LAWS

3.1	INTRODUCTION.....	34
3.2	THE PROCEDURAL REQUIREMENTS FOR CREATING A BY-LAW.....	36
3.3	A CRITICAL ANALYSIS ON WHAT SHOULD BE THE ROLE OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESSES IN OUR COUNTRY, SOUTH AFRICA.....	36
3.3.1	JUDICIAL DEVELOPMENT ON THE ROLE OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESS.....	37
3.3.1.1	<i>DOCTORS FOR LIFE INTERNATIONAL V SPEAKER OF NATIONAL ASSEMBLY</i>	37
3.3.1.2	<i>MATATIELE MUNICIPALITY AND OTHERS V THE PRESIDENT OF RSA AND OTHERS</i>	40
3.3.1.3	<i>MERAFONG DEMARCATION BOARD V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</i>	41
3.3.1.4	<i>MOUTSE DEMARCATION FORUM V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</i>	43
3.3.1.5	<i>POVERTY ALLIEVATION NETWORK V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</i>	45
3.4	A CRITICAL ANALYSIS OF THE CASES.....	46

3.5	<i>WHAT THEN SHOULD BE THE ROLE OF PUBLIC PARTICIPATION IN THE CREATION OF BY-LAWS</i>	51
3.6	WHAT KIND OF EFFECT SHOULD BE BROUGHT ABOUT BY EFFECTIVE PUBLIC PARTICIPATION IN THE CREATION OF BY-LAWS.....	55
3.7	ASSESSING THE REASONABLENESS OF PUBLIC PARTICIPATION IN LEGISLATIVE MATTERS.....	57
3.8	CONCLUSION.....	59

CHAPTER 4

THE ROLE AND THE EFFECT OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF MUNICIPAL BY-LAWS

4.1	INTRODUCTION.....	61
4.2	MUNICIPAL BY-LAW ENFORCEMENT PROCESS.....	63
4.3	DISTINGUISHING THE PROCESS OF MAKING A BY-LAW FROM THAT OF IMPLEMENTING A BY-LAW.....	63
4.4	A CRITICAL ANALYSIS ON WHAT SHOULD BE THE ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS.....	64
4.4.1	APPLICABLE CASE LAW.....	64
4.4.1.1	<i>CITY OF CAPE TOWN V HENDRICKS AND ANOTHER</i>	64
4.4.1.2	<i>THE SOUTH AFRICAN INFORMAL TRADERS FORUM V THE CITY OF JOHANNESBURG</i>	66
4.4	WHAT THEN SHOULD BE THE IN ROLE OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS.....	70
4.5	WHAT KIND OF EFFECT SHOULD BE BROUGHT ABOUT BY AN EFFECTIVE PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS.....	75
4.6	CONCLUSION.....	78

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1	INTRODUCTION.....	80
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5.2	THE ENVISAGED ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE CREATION AND ENFORCEMENT OF MUNICIPAL BY-LAWS.....	82
5.3	THE ADVANTAGES AND CHALLENGES OF THE ENVISAGED ROLE AND EFFECT OF PUBLIC PARTICIPATION IN CREATION AND ENFORCEMENT OF MUNICIPAL BY-LAWS.....	88
5.4	RECOMMENDATIONS.....	92
5.5	CONCLUSION.....	93
	BIBLIOGRAPHY.....	96

CHAPTER 1

INTRODUCTORY

1.1 INTRODUCTION

An important case of the South African legal jurisprudence indicated that public participation in the law-making process can be defined as an opportunity, given to the people likely to be affected by a proposed law, to make representation either orally or in writing.¹ The fundamental question that arises is: why is there a need for the people likely to be affected by proposed legislation to make representation either orally or in writing? Some writers on the topic of public participation are of the view that the principles of participatory democracy require that the people affected by a legislative proposal be consulted about it, and have their views considered before the legislative policy is enacted.² They further outline that this process requires the legislatures to consult with the public before making laws in order to ascertain the wishes of the public

¹ *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) 1408-1409J, (hereafter referred to as the Doctors for Life case); MR Phooko “What should be the form of public participation in the law-making process? An analysis of South African Cases” (2014) OBITER, at 39–41, (hereafter referred to as Phooko (2014)); EMS Matshe “The promotion of public participation in local government: the case of ditsobotla municipality”, Master’s degree thesis, North-West University, 2009, 6, (hereafter referred to as Matshe (2009)).

² Phooko (2014) 58; K Callahan *Elements of effective governance: Measurement, accountability and participation* (2007) 157, (hereafter referred to as Callahan (2007)); L Nyati “Public Participation: What has the Constitutional Court given the public?” (2008) 12, *Law, Democracy and Development Journal*, 102, 104, (hereafter referred to as Nyati (2008)); S Skjelten *A people’s constitution: Public participation in the South African constitution-making process* (2006), 13, 31, (hereafter referred to as Skjelten (2006)); and T Mzimakwe “Public participation and engagement in local governance: A South African Perspective”, *Journal of Public Administration* (2010) 45, 504, (hereafter referred to as Mzimakwe (2010)).

and to ensure that the laws or policies to be created are informed by these wishes.³ Though various opinions on the matter exist, most writers on the topic agree that laws that are to be respected by all, be it the government or the citizens themselves, do not lose their value in the society. Subsequently, it is argued that it will be easier for the government to implement and enforce those respected laws.⁴ From this argument, one thing that is inevitably clear is that, it should be an objective for any government to ensure that the laws it creates do not lose their value in the public society. This argument can be taken a step further, by arguing that any law created by legislature is created for a reason, and that this reason includes the intention to add some value to the public society. In essence, such an argument can be regarded as a more logical approach for any government that calls itself a government that is based on the will of the people.

It is well noted that under the South African constitutional scheme, the government is constituted by three spheres, namely: the national, provincial and local spheres. According to the Constitution these three spheres are distinctive, interdependent and interrelated.⁵ The Constitution further provides that the legislative authority of the local sphere of government is vested in a municipal council and that councils may not dispose of this power by delegating it to any committee, office-bearer or municipal

³ Phooko (2014) 58; Callahan (2007) 157; Nyati (2008) 12; Mzimakwe (2010) 504. Further refer to S Mngoma “Public participation in the informal trading by-laws amendment: the case of Johannesburg inner city”, Master’s degree thesis, University of Witwatersrand, 2010, abstract pg. iii, (hereafter referred to as Mngoma (2010)); and *S v Makwanyane* 1995 (6) BCLR 665 (CC), per O’Regan J, para 329, (referred to further as the Makwanyane case). Also see G Houston (ed) *Public participation in democratic governance in South Africa* (2001), at 52–53, referred to further as Houston (2001)).

⁴ Skjelten (2006) 31; H Embrahim *The soul of a nation: constitution-making in South Africa* (1998), at 259–260, (referred to further as Embrahim (1998)).

⁵ Refer to s 40 (1) of the Constitution of the Republic of South Africa of 1996 (referred to further as the Constitution (1996)).

officials.⁶ This means that the power of municipal councils to make law is protected in the Constitution and it cannot be taken away without amending the Constitution.⁷

Against the aforementioned background, it will be submitted in this dissertation that by-laws have a specific role in the public society and that their value in the public society should be protected. This dissertation is underpinned by the desire to ensure that the value of by-laws in our society is protected, and as such, a critical analysis on the role and effect of public participation in the creation and enforcement of municipal by-laws will be conducted.

1.2 BACKGROUND AND RATIONALE

As mentioned above, the power of municipal councils to make laws is protected in the Constitution and it cannot be taken away without amending the Constitution. This is a radical change from the circumstances before the first democratic elections in 1994, in which the principle of parliamentary sovereignty was applicable and municipal legislative powers were regarded as delegated powers.⁸ This meant that by-laws were regarded as subordinate legislation and exposed to judicial review on the basis of reasonableness and the rules of natural justice, as if they were executive acts.⁹ Therefore, a court of law could review any by-law made by a municipality on the same grounds as it would an executive act of that municipality. But this has been changed by the Constitution and this status quo has been well explained by the case of *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,¹⁰ in which the Constitutional Court affirmed the status of local government as an independent and distinct sphere of government. The Court held that municipal councils are legislative assemblies and their legislative acts, which include the levying of taxes and the adoption of budgets, are not

⁶ The Constitution (1996), s 151 (2) and S 160 (2)(a).

⁷ See s 43 (a)–(c) and s160 (2) of the Constitution.

⁸ N Steytler and J De Visser *Local government law* (2007), 5–10 (referred to further as Steytler and De Visser (2007)).

⁹ Steytler and De Visser (2007), at 5–11.

¹⁰ 1998 (2) All SA 325 (CC)(referred to further as the *Fedsure* case).

subject to administrative review.¹¹ This was because in making by laws, the council was considered to be acting as a deliberative legislative body and thus exercising original law-making power.¹² Although it must be noted that the fundamental principles of the rule of law (recognised as one of the founding values of our Constitution) still requires local government to act within the powers conferred on it by law, and the fact that by-laws are proper legislative Acts and thus not subject to administrative review, does not make them immune from review by the courts.¹³ This has been clearly shown by a recent judgement in the Constitutional Court in which the Court reviewed the nature and scope of the constitutional obligation of a state's legislative organ to facilitate public participation in its legislative processes.¹⁴

However, it should be noted that public participation in the creation of laws is a new trend in the current South African democratic dispensation. Furthermore, it should be noted that during the apartheid era, public participation in the creation and enforcement of laws was not supported by legislation.¹⁵ The South African "Constitutions" of 1910, 1961 and 1983 made no specific provision on the public's right to participate in the creation and enforcement of laws.¹⁶ The Constitutions of those eras, as fully described by Skjelten, were characterised by racial exclusivity, the absence of a justifiable Bill of Rights, a lack of separation of powers and the supremacy of Parliament.¹⁷ In those eras, Parliament was supreme. This meant that any law created and enforced by Parliament

¹¹ *Fedsure* case, paras 33–36, at 30–31.

¹² Steytler and De Visser (2007), at 5–13.

¹³ South African Local Government Association, N Steytler *et al*, "Making law: A guide to municipal councils", (2004), at 24, (referred to further as Steytler *et al* (2004)).

¹⁴ *Doctors for Life International* case, paras 106–107, at 59–60.

¹⁵ Skjelten (2006) 15; Institute for Security Studies, monograph no. 67, J Rauch *et al* "Municipal policing in South Africa: Development and challenges", Nov 2001, 5, (referred to further as Rauch *et al* (2001)); and United Nations Human Settlement Program, Prof J de Visser, "Local law making in Cape Town: A case study of the Municipal Planning by-law process", 2015, 6, (referred to further as De Visser (2015)).

¹⁶ Skjelten (2006), at 15.

¹⁷ Skjelten (2006) 15; in addition, refer to Steytler *et al*, (2004) 24; B Bekink *Principles of South of African Local Government Law* (2006), 6, (referred to further as Bekink (2006)); and Steytler and De Visser (2007), at 5–10.

was immune (to a certain degree) from any form of judicial review. This form of sovereignty in Parliament rendered it to be the highest, most competent legislative authority, which in turn allowed the then government to make laws that subjected the majority of South Africans to a system of racial discrimination that affected every aspect of their daily lives.¹⁸ During the apartheid regime the opinion and views of the majority of the public did not matter when Parliament was creating laws or when it was enforcing laws. Democracy in this logic was afforded to the white population and the people who enjoyed it voted every five years, and participated in the legislative making processes via their representatives in Parliament.¹⁹ White people enjoyed full citizenship while all other racial groups enjoyed only very limited benefits of citizenship.²⁰ According to Nyalunga, the apartheid government even went as far as creating race based municipalities to facilitate and regulate the suppression of participation by African, Indian and Coloured communities in order to advance its agenda of racial segregation and exclusions.²¹ The laws created then did not only discriminate and exclude the majority of the people but they further created a sense of lawlessness amongst the society.²² According to Skjelten, this exclusion led to the formation of community structures, outside the institutionalised ones, in which those excluded could raise their dissatisfaction with the creation and enforcement of those laws.²³ Meaningful public participation could not be endeavoured by the apartheid government's legal system as its mission and mandate was to divide and rule the majority of the populace.

¹⁸ Skjelten (2006) 15; Steytler *et al* (2004) 24; B Bekink (2006) 6; and Steytler and De Visser (2007), 5–10.

¹⁹ Without Prejudice, O'Regan, "History and justice", May 2009, 33, 33-34, (referred to further as O'Regan (2009)). SF Tau "Citizen Participation as an aspect of local governance in municipalities: A South African perspective" (2013) 48, *Journal of Public Administration*, 152, (referred to further as Tau (2013)).

²⁰ J De Visser (2015), at 4.

²¹ D Nyalunga "An enable environment for public participation in local government" (2006), *International NGO Journal*, Vol. 1.

²² Skjelten (2006), at 15.

²³ Skjelten (2006), 16–17 and KS Czapanskiy and R Manjoo "The right of public participation in the law-making process and the role of legislatures in the promotion of this right" (2008), 19:1, *Duke Journal of Comparative and International Law*, 1, 11, (referred to further as Czapanskiy and Manjoo (2008)).

Our current situation is totally different from that of before April 1994, in that our current state is founded on the principles of constitutional supremacy rather than the principles of parliamentary sovereignty.²⁴ The centralised system of government that existed before 1994 was replaced by a system of government that separated the significant powers and functions amongst the national, provincial and local spheres of government.²⁵ The introduction of the above mentioned democratic constitutional dispensation in 1994, opened up an opportunity for public participation in the creation and enforcement of laws for all citizens in South Africa irrespective of their race. This is due to the fact that the Constitution makes provision for the national, provincial and local legislatures to facilitate public involvement in its legislative processes.²⁶ Although this has not been specifically mentioned by the Constitution for local government, there is however a case in which the Constitutional Court can be seen as making provision to that effect.²⁷ The Court held that municipal councils are original legislative assemblies, thus whenever the Court addresses legislatures in its judgements, local legislatures are not excluded.²⁸ In so doing the Court held that municipal councils are as much obliged to facilitate public participation in its legislative processes just like national and provincial legislatures. Steytler and De Visser further indicate that the principle of facilitating public participation in local government's legislative processes is not only applied by the key principles outlined in the *Fedsure* judgement, but it can be applied with additional force by a number of constitutional and statutory provisions that compel

²⁴ B Bekink Principles of the South African Constitutional Law 2^{ed} (2016), at 160–165 (referred to further as Bekink (2016)).

²⁵ Bekink (2006), at 15.

²⁶ See s 72 (1) (a) and 118 (1) (a) and s 59 (1) (a) of the Constitution. Read also s 152 and 162 of the Constitution respectively.

²⁷ Also see the Centre for the Study of Violence and Reconciliation, M Memeza, "By-law enforcement in South African Cities", 2000, 1, (referred to further as Memeza (2000)); Bekink (2006), at 15.

²⁸ *Fedsure* case, see fn 10 above; see also G Mettler and R Baatjies "The duty to involve the public: The Constitutional Court speaks" (2006) Local Government Bulletin, 3, 5, (referred to further as Mettler and Baatjies (2006)).

local government to not only strive towards encouraging public participation in general, but to also adopt and adhere to participatory processes.²⁹

Taking into consideration the issues raised above about the apartheid legal system, it can be assumed that the principle of public participation in the law-making processes has been entrenched in the Constitution in order to avoid the apartheid-like legal system that excluded a majority of the people from participating in the law-making processes. This exclusion triggered riots, protests and campaigns in defiance of those created laws as a result of the fact that those laws did not represent the wishes of all the affected people.³⁰ The question is: Has the situation changed in our current constitutional dispensation specifically when looking at local municipalities as local legislatures? It is submitted in this dissertation that, unfortunately not much has changed although public participation is provided for in our local system, underpinned by a supreme Constitution. It is submitted that there seems to be a problem in understanding what the actual role of public participation in the creation and enforcement of by-laws is as well as what kind of effect should be brought about by public participation in the creation and enforcement of by-laws.

1.3 THESIS STATEMENT AND RESEARCH QUESTIONS

A government that is based on the will of the people and in which every citizen is equally protected by the law, must be a government that is able to encourage and allow the citizens of its country to be actively involved in public affairs, to be able to identify themselves with the institutions of government and to become familiar with the laws as they are made. In order for the public to be able to familiarise itself with the laws as they are made, there is a need for the public to be able to actively participate in the law-making processes as well as in the process of law enforcement. In so doing, the legitimacy of those laws will be strengthened and will also be respected. It is however

²⁹ Steytler and De Visser (2007), at 2–4.

³⁰ BC Mubungizi and MO Dassah, *Public participation in South Africa: Is intervention by the courts the answer?* (2014) 39(3) *Journal of Social Sciences (Kamla-Raj)*, at 275–283, (referred to further as Mubungizi and Dassah (2014)); and Czapanskiy and Manjoo (2008), at 11.

important to note that some writers are of the view that people will not actively participate if they are of the view that their wishes are only to be heard but will not be properly considered by those governing and will also not be reflected in the laws being created and enforced upon them by the government of the day.³¹

The manner in which the law supported the apartheid regime gave rise to certain implications for our modern South African conception of justice. These implications are firstly the absence of a deep, value-based commitment to the respect of law in our society and secondly the deep scepticism about the possibility of achieving justice.³² In order for our elected representatives in all spheres of government to be able to heal the divisions of the past, and in order for them to be able to establish a society based on democratic values, there is a need for them to create and enforce laws that reflect the support of the society at large. Municipal councils as local legislatures have a responsibility to ensure that the laws they create and the process of law enforcement within their municipalities get the respect that they deserve across their jurisdictions. Laws created, but which cannot be enforced are of no value. It is therefore important for municipal councils to ensure effective public participation in the creation and enforcement of by-laws within their municipalities. Effective public participation in the creation and enforcement of by-laws within local municipalities can be developed through an appreciation of a comprehensive critical analysis into the question: what should be the role and effect of public participation in the creation and enforcement of by-laws? The aim of this research is therefore to critically analyse the role and effect of public participation in the creation and enforcement of municipal by-laws.

1.4 STUDY OBJECTIVES

³¹ Phooko (2014), at 57–59; Skjelten (2006), 42–43; Callahan (2007, 157–158 and Mubungizi and Dassah (2014), at 282.

³² O'Regan (2009) 33; and H van As 'By-law and law enforcement as management: Educational and moral rejuvenation mechanisms', IMFO. Summer 2006, The Official Journal of the Institute of Municipal Finance Officers, 6, (referred to further as van As (2006)).

This study thus aims to describe, critically analyse and evaluate the role played by public participation in the creation and enforcement of municipal by-laws in general. It further seeks to ascertain the kind of effect that should be conveyed through effective public participation processes in the creation and enforcement of municipal by-laws. Through case law, this study will investigate how the process of public participation in the law-making and implementation processes of a municipal council (as local legislatures) can be strengthened and made more effective. Currently, the lack of knowledge about by-laws and the process of public participation in the creation of by-laws within our local communities are some of the challenges faced by our local municipalities, which subsequently leads to poor or ineffective implementation of such laws within their municipalities.

In addition to these challenges, our country is still faced with a dearth of literature on the subject of public participation in the law-making processes at the local sphere of government as well as illiteracy or inadequate participation skills. It is therefore of importance that while the research question is investigated, a further examination is conducted as to whether effective public participation in the creation and enforcement of municipal by-laws could bring about a more involvement of local communities. In other words, there is a need to observe as to whether the communities are aware of their democratic rights and freedom, and specifically through the newly acquired opportunities of interaction with government representatives. The majority of the South Africans that were discriminated from the law-making process during apartheid are now given an opportunity to voice out their opinions and wishes, which could ultimately be reflected in the laws that will govern them. However, due to the challenges mentioned above, the majority tend to neglect this opportunity of public participation. This neglect and its significance to the topic of this research will also be investigated in this study.

The constitutional provisions, statutory provisions and policy provisions applicable to the scope of public participation in the creation and enforcement of laws will further be described and articulated. It will be noted that our constitutional and statutory provisions reflect good intentions about public participation. However, due to lack of knowledge about such provisions and inadequate interaction between public participation, law-

making and law enforcement within the local sphere of government, an effective process of participation which could strengthen the legitimacy of our by-laws would indeed remain a naïve ideal. Solutions, which can be used towards eliminating this naivety, will be investigated and recommendations will be made in the last chapter of the study.

1.5 DEFINITIONS OF TERMS

The terms most utilised throughout the thesis are defined below.

1.5.1 **Participation** - means taking part with others in an exercise.³³

1.5.2 **Public participation** - means people who are or may be affected by an exercise, taking part in such an exercise.³⁴

1.5.3 **Democracy** - can be described as a system that is based on the notion that every citizen is directly consulted in every decision of the government.³⁵

1.5.4 **Participatory democracy** - can be defined as a democratic government in which the people are governing or at the very least they are actively involved in government.³⁶

1.5.5 **Representative democracy** - can be defined as a democratic government in which the powers of the sovereignty are delegated to a body of men and women, who are elected from time to time in free and fair elections, who in turn will exercise the power given to them for the benefit of the whole society.³⁷

³³ Mngoma (2010), at 12.

³⁴ Mngoma (2010), at 12.

³⁵ G Houston (ed) *Public participation in democratic governance in South Africa* (2001), 52, 53, referred to further as Houston (2001)); and AJ Geldenhys, *Analysing democracy for local government*, K Bekker (ed), *Citizen Participation in local government*, 1996, at 11–12 (referred to further as Geldenhys (1996)).

³⁶ Houston (2001), at 56.

³⁷ Callahan (2007), at 145.

1.5.6 **By-law** - can be defined as legislation passed by the council of a municipality binding in the municipality on the persons to whom it applies.³⁸

1.5.7 **Law- making** - is the process of creating legislation.³⁹

1.5.8 **Law-making process** - is a form of the state activity intended on the creation (or revision) of the legal norms. The term 'law' has two meanings. It may mean positive law (legislation, or acts adopted by the governmental bodies) or natural law. For the aim of this thesis the law will be used in the first meaning.⁴⁰

1.5.9 **Law enforcement** - the activity of making certain that the laws of an area are obeyed.⁴¹

1.6 PRELIMINARY LITERATURE OVERVIEW

Judicial precedents concerning public participation in law-making processes or policy making processes as well as court decision regarding the enforcement of by-laws will form part of the backbone for this research. Due to the fact that this research work will only be limited to public participation in the creation and enforcement of laws at the local sphere government, it is intended to only discuss relevant legislation applicable to this topic. The provisions elaborated by these laws will form part of the theoretical framework of this research.

Certain constitutional principles (such as the principle of democracy) will also be briefly identified and deliberated upon in relation to their applicability to the topic. In so doing, the readers will be provided with a historical background of the right to have public participation in our current constitutional dispensation.

³⁸ The Constitution of the Republic of South Africa, 1996.

³⁹ Wikipedia internet dictionary, <https://en.wikipedia.org/wiki/Lawmaking> (accessed 19 October 2016).

⁴⁰ I Bogdanovskaia 'The legislative bodies in the law - making process' <http://www.nato.int/acad/fellow/97-99/bogdanovskaia> (accessed 19 October 2016), (referred to further as Bogdanovskaia (accessed 19 October 2016)).

⁴¹ Cambridge internet dictionary, <http://dictionary.cambridge.org/dictionary/english/law-enforcement> (accessed 19 October 2016).

Views expressed in books, publications, theses and journal articles concerning public participation will be discussed and analysed where applicable. However, emphasis will be given to those sources that deal with public participation in the law-making processes and in the law enforcement processes within South Africa.

1.7 RESEARCH METHODOLOGY

An understanding into the term “by-law” as well as an understanding into the processes involved in the creation and enforcement of by-laws will form part of the theoretical and conceptual framework of the dissertation. This work is a critical analysis of public participation within the South African contemporary legal system, as underpinned by a supreme Constitution.

The research will further interpret and analyse legislation as it stands and where possible address its application to the topic at hand via case law. Challenges around the practically envisaged role and effect of public participation in the creation and enforcement of laws will be discussed. Consideration will be given to the criticism around the current role and effect of public participation in the creation and enforcement of laws. This discussion and consideration can be used to identify opportunities for improving public participation processes involved in the creation and enforcement of municipal by-laws.

The research will conclude with an ethical approach towards determining the precise significance of the role and effect of public participation in the creation and enforcement of municipal by-laws.

1.8 LIMITATIONS

This research only aims to address the role and effect of public participation in the creation and enforcement of laws at the local sphere of government and not in the other spheres of government.

1.9 STRUCTURE

Chapter 1: Introductory chapter

This chapter is an introductory chapter. It sets out the framework used in conducting the research. It will cover the background to the study, the problem statement, objectives, methodology and the overview of the research structure.

Chapter 2: A brief overview of South Africa's constitutional framework on local government and its legislative framework on the issue of public participation

This chapter will provide a brief history of local government in South Africa. It will also present, analyse and explain some of the key constitutional law principles that are related to the topic of the dissertation. Lastly, it will conclude with a theoretical framework on the legislative provisions dealing with the duty of municipalities to facilitate public/community participation in the creation of municipal by-laws.

Chapter 3: The role and the effect of public participation in the creation of municipal by-laws

Through views expressed in case law, books, publications, thesis and journal articles concerning public participation, this chapter will seek to critically analyse the role of public participation in the creation of municipal by-laws. It will further seek to identify the kind of effect that should be brought about by an effective public participation processes in the creation of by-laws.

Chapter 4: The role and the effect of public participation in the enforcement of municipal by-laws

Through views expressed in books, publications, thesis and journal articles concerning public participation, this chapter will seek to critically analyse the role of public participation in the enforcement of municipal by-laws. It will further seek to identify the kind of effect that should be brought about by an effective public participation processes in the enforcement of municipal by-laws

Chapter 5: Conclusion and Recommendations

The research findings (explained in chapter 3 and 4) regarding the role and effect of public participation in the creation and enforcement of municipal by-laws will be discussed and conclusions will be reached in line with the legislative requirements (illustrated in chapter 3). This chapter also presents recommendations that could guide municipalities to effectively instil public participation in the processes of creation and enforcement of municipal by-laws.

1.10 CONCLUSION

Our history informs us that the way in which the apartheid legal system excluded the majority of the population from law-making and law enforcement processes, led to the formation of community structures, outside the institutionalised ones, in which those excluded could raise their dissatisfaction with the creation and enforcement of those laws.⁴² As such the public's ferocious force of public-opinion formation made it difficult for the then political system to continue to uphold political order.⁴³ It is therefore of importance for the local sphere of government as an organ of state closest to the people and which must ensure that the political order is upheld, to further ensure that its institutionalised structures supporting public participation are effective and properly functioning. But most importantly, local government should be able to reflect the wishes and views of its communities in the laws it creates and enforce so as to ensure that law and order are upheld by all the people within their municipalities.

As mentioned above, laws that cannot be enforced nor supported, are of little value to our society.⁴⁴ It is purported in this thesis that, although by-laws are created by municipalities, their implementation is often neglected. In order to revive the value of by-laws within our communities, an investigation needs to be conducted as to why there is a lack of interest in supporting laws amongst the majority of the South African population. A more logical approach could be that, this lack of interest, which could be

⁴² Skjelten (2006), at 16; Mubungizi and Dassah (2014), at 283; and Czapanskiy and Manjoo (2008), at 11.

⁴³ Skjelten (2006), at 17.

⁴⁴ Skjelten (2006) 31; Embrahim (1998), at 259–260.

rooted in other reasons such as lack of knowledge about by-laws, ignorance, illiteracy and inadequate participation skills, could be the cause of the problem in many of community members not understanding the actual role of public participation in the creation and enforcement of municipal by-laws. Possibly through this research, the root causes of disinterest in public participation with regard to the creation and enforcement of by-laws may be uncovered, and the importance of by-laws revived.

CHAPTER 2

A BRIEF OVERVIEW OF SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK ON LOCAL GOVERNMENT AND THE APPLICABLE LEGISLATION ON PUBLIC PARTICIPATION

2.1 SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK ON LOCAL GOVERNMENT

Before 1994, the system of local government that applied in South Africa was characterised by the fact that municipalities were by their very nature regarded as subordinate institutions of government that derived their powers from the provincial legislatures.⁴⁵ According to the Supreme Court of Appeal as explained in the *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitaanse Munisipaliteit*,⁴⁶ “they owed their existence to and derived their powers from the provincial ordinances”.⁴⁷ These ordinances were passed by the provincial legislatures which had limited law-making power, conferred on them by parliamentary legislation.⁴⁸ During this era, parliament was regarded as the highest, most competent legislative authority. This meant that legislation duly enacted by parliament was immune from any form of judicial review because of parliamentary supremacy.⁴⁹ As stated by Joubert *et al*, “Parliament’s law making power could determine how much legislative power provinces exercised and in turn the provinces could largely determine the powers and capacities of local authorities”.⁵⁰

⁴⁵ WA Joubert *et al* “The law of South Africa” (2012) Vol 12 (1), para 203, (referred to further as Joubert).

⁴⁶ 2007 4 SA 276 (SCA), (referred to further as the *CDA Boerdery* case).

⁴⁷ *CDA Boerdery* case, para 3.

⁴⁸ Joubert (2012), at 203.

⁴⁹ Steytler and De Visser (2007), at 5–10.

⁵⁰ Joubert (2012), at 203.

However, after 1994 the legal status of local government changed fundamentally. This fundamental change is captured very well by the Constitutional Court judgement in the case of *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*.⁵¹ In this case the Constitutional Court affirmed the status of local government as an independent and distinct sphere of government.⁵² The Court held further that municipal councils are legislative assemblies and their legislative acts, which include the levying of taxes and the adoption of budgets, are not subject to administrative review.⁵³ This means that, local governments have an entrenched place in the new constitutional order. Their legislative and executive powers are recognised by the Constitution which is now the supreme law of our country.⁵⁴ The provisions of Chapter 3 of the Constitution captures this new constitutional status of local government by clearly providing that the government of the Republic of South Africa consists of the national, provincial and local spheres and that these spheres are distinctive, interdependent and interrelated.⁵⁵ This Chapter further provides that the national and provincial governments must, *inter alia*, respect the constitutional status, institutions, powers and functions of municipalities, and that the national and provincial government may not exercise their powers or perform their functions in a manner that encroaches upon the geographical, functional or institutional integrity of municipalities.⁵⁶

The aforementioned status constitutional status of local government is further elaborated in Chapter 7 of the Constitution. Chapter 7 provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.⁵⁷ It

⁵¹ 1998 (2) All SA 325 (A), (referred to further as the *Fedsure* case).

⁵² *Fedsure*, para 26.

⁵³ *Fedsure*, para 26.

⁵⁴ I M Rautenbach "Rautenbach-Malherbe Constitutional Law" (2012) 6th edition, 230, (referred to further as Rautenbach (2012)).

⁵⁵ The Constitution, s 40 (1); Rautenbach (2012), 228; Joubert (2012), para 203 and Bekink (2006), 15.

⁵⁶ The Constitution, s 41 (1) (e) and 41 (1) (g) as well as Joubert (2012), para 203.

⁵⁷ The Constitution, s 151 (3) as well as Joubert (2012), para 203.

further prohibits the national and provincial governments from compromising a municipality's ability or right to exercise its powers or perform its functions.⁵⁸ It also requires the national and provincial spheres to respect the constitutional status, institution, powers and functions of municipalities and further prohibits them from exercising their powers or performing their functions in a manner that encroaches upon the geographical, functional or institutional integrity of municipalities.⁵⁹ This chapter also imposes a duty on the national and provincial governments by further providing that they must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions.⁶⁰ From the constitutional provisions mentioned above it is clear that local government, as one of the spheres of governments is now recognised as such and its legitimate position as such is indeed protected by the Constitution.

2.2 KEY CONSTITUTIONAL LAW PRINCIPLES

Although the Constitution specifically recognises local government, it also provides for certain key principles which are relevant to the powers and functions of local government. According to the Constitution, the Republic of South Africa is one sovereign, democratic state founded on the values (amongst other values) of universal adult suffrage, a national common voters roll, regular elections and multiparty systems of democratic government, to ensure accountability, responsiveness and openness.⁶¹ The Constitution further stipulates that the National Assembly and Provincial Legislatures are to be elected for a term of 5 years.⁶² This represents an element of representative democracy in which the elected bodies exercise the power of decision-making for the benefit of the whole society. But it is important to note that the Constitution does not end here, it further stipulates that the National Assembly, National

⁵⁸ The Constitution, s 151(4) as well as Joubert (2012), at 203.

⁵⁹ The Constitution, s 41(1)(e) and 40(1)(g) as well as Joubert (2012), at 203.

⁶⁰ The Constitution s 154(1) as well as Joubert (2012), at 203.

⁶¹ See the Constitution s 1 (d).

⁶² The Constitution s 49 (1) and s 108 (1).

Council of Provinces and the Provincial Legislatures must facilitate public involvement in the legislative and other processes of the Assembly, the Council and the Legislature and its committees.⁶³ This represents some form of participatory democracy in which citizens are actively involved in the decision-making processes of government. Although our Constitution bases South Africa's constitutional democracy on universal adult suffrage as one of the values, it also places emphasis on public participation; hence from the statement of the Constitution above, one can define our country's constitutional democracy as both representative and participatory in nature.⁶⁴ In order to understand the constitutional democracy of South Africa, one has to define the three key constitutional principles highlighted in the above explanation being the term democracy, representative democracy and participatory democracy.

2.2.1 DEMOCRACY AND ITS FORMS

Democracy can be described as a system that is based on the notion that every citizen is directly consulted in every decision of the government.⁶⁵ The term democracy is derived from the Greek words for "people" and "power" and it referred to the right of the citizens of the former Greek city states to participate directly in the actions of government.⁶⁶ Democracy can further be defined as the power exercised by the people as a whole, where all the citizens have an opportunity and even a duty to take part in decision-making.⁶⁷ Some writers are of the opinion that for a democratic government to exist the people must govern or at the very least be actively involved in government.⁶⁸ It should however be noted that democracy can only fulfil this function, if and when there

⁶³ The Constitution, Ss 59 (1) (a), 72 (1) (a) and 118 (1) (a) thereof.

⁶⁴ *Doctors for life International case.*

⁶⁵ Geldenhys (2013), at 12–16 and Matshe (2009), at 7.

⁶⁶ Geldenhys (1996), at 12.

⁶⁷ Geldenhys (1996), at 12.

⁶⁸ Houston (2001), at 56.

is an organized civil society which is capable and willing to articulate its own wishes and demands openly to the representative bodies they have elected to govern.⁶⁹

2.2.2 PARTICIPATORY DEMOCRACY

Participatory democracy can be defined as one in which every citizen plays an active role in the government. The powers of the sovereignty may be delegated to a body of men and women but at the same time each and every citizen must also play an active role in exercising these powers.⁷⁰ But this does not mean that every decision taken by government must first be subjected to a public hearing nor does it mean that the rights and responsibilities of the citizens in political decision-making would in totality be reflected by a body of elected representatives. This type of democracy seeks a balance between the power of the people and the power entrusted to the elected representatives in a democratic country. However, its main basis is a democratic country in which citizens are actively involved in the decision-making processes of government.

2.2.3 REPRESENTATIVE DEMOCRACY

It should however be noted that the abovementioned day-to-day participation in the management of the country by its citizens can be time consuming and demanding for the society. Therefore, it is suggested that the people could elect representatives to act on their behalf, which will entail that the people will be participating in the management of the country through elected representatives.⁷¹ This position can be defined as representative democracy, a democracy in which the powers of the state are delegated to a body of men and women, elected from time to time in a free and fair elections and in which each adult citizen's vote is equally weighted. The elected representatives will in turn exercise the power for the benefit of the whole society.⁷² This also represents the term "indirect democracy".

⁶⁹ Callahan (2007), at 154–155.

⁷⁰ Houston (n 3 above), at 54

⁷¹ Houston (n 3 above), at 53.

⁷² Callahan (n 4 above), 156-157.

2.3 THE RELATIONSHIP BETWEEN DEMOCRACY AND PUBLIC/COMMUNITY PARTICIPATION IN LOCAL GOVERNMENT

From the brief explanation of the concepts above, it becomes obvious that without public participation, the government will cease to function as a democratic government, for democracy requires people to participate in the actions of governance. Democracy further requires that public participation be positively encouraged by those in power. This means that the right of the people to participate in government decisions, policies and actions that directly affect them must be legally protected. Those in power must therefore initiate mechanisms, processes and procedures to ensure that the people are able to participate effectively in the actions of government. Democracy can be best described by the following three elements⁷³:

- Representative governance;
- Accountability; and
- Participation.

These elements form part of the primary objectives of local government. The Constitution has clearly indicated that the objects of local government is to provide a democratic and accountable government for local communities and that local governments are to encourage the involvement of communities and community organisations in the matters of local government.⁷⁴ Steytler, De Visser and Mettler define these elements as follows:

- “Representative governance - means that councillors are elected by the residents of the municipality to be their representatives and to lead their municipality;
- Accountability - means that residents can demand explanations from, and be given reasons by, the municipality for policies and decisions, or the lack thereof;

⁷³ N Steytler *et al* (2004), at 24.

⁷⁴ The Constitution, sec 152(1)(a) and (d).

- Participatory governance - refers to an ongoing process of debate, dialogue and communication between the local government authority and the community”.⁷⁵

Comparing the abovementioned objectives of local government and the defined elements of democracy outlined above, it clearly shows that public participation is one of the integral parts of democracy. This comparison further supports the view that our country’s constitutional democracy can be characterised as both representative and participatory in nature. Hence it can be said that there exists a relationship between democracy and public participation in local government. Since democracy is about involving people in the decisions that affect their lives in the political processes, the question follows as to how the people, who are often be 1busy with their own private business, may get involved in the day-to-day decisions taken by the governing representatives? What methods can be used to ensure that they do get involved without neglecting their other duties? The answer could be that both representative and participatory democracy could play a vital role in ensuring this involvement.

Firstly, the representatives elected by the people can ensure that their views are taken into account when decisions are tabled in all spheres of government. Secondly the people themselves can ensure that their views are taken into account by participating in public hearings and meetings conducted by the government before a decision is taken. It has been noted by some writers that these two forms of democracy are initially not supposed to be in conflict with each other, but rather they should support one another, given that continuous participation by the public provides vitality to the functioning of representative democracy.⁷⁶ South Africa has seen this view as an integral part of its constitutional transformation and has ensured that all the spheres of government are entrusted with a duty to facilitate public participation within the spheres of governance and this duty has been enshrined in the Constitution and also other legislation that govern the local government sphere.⁷⁷

⁷⁵ Steytler *et al* (2004), at 24–25.

⁷⁶ Phooko (2014), at 57–59, and Mubungizi and Dassah (2014), 282.

⁷⁷ Steytler and De Visser (2007), 6-4.

2.4 THE APPLICABLE LOCAL GOVERNMENT LEGISLATIVE AUTHORITY: PUBLIC PARTICIPATION

Public participation in the law-making processes requires a basis in law. It is therefore important to note that in the Republic of South Africa this legal authority is provided for and highlighted in a range of laws, case law, policies and guidelines. However, in relation to the topic of this thesis, it proposes to give a detail elaboration on legislation, case law, policies and guidelines relating particularly to the local government sphere. There are three important legal instruments which provide for public participation at the local government sphere: The Constitution, the Local Government Municipal Structures Act,⁷⁸ and the Local Government Municipal Systems Act.⁷⁹ These laws are further discussed below.

2.4.1 THE APPLICABLE LEGISLATION

2.4.1.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

As stated earlier, local government is recognised as the third sphere of government, a sphere closest to the people, and one through which the local community is encouraged to participate in the affairs of government.⁸⁰ The Constitution establishes three categories of municipalities (category A, B and C)⁸¹ and further requires all of them to provide a democratic and accountable government in order to ensure the provision of services in a sustainable manner and to promote social and economic development; a safe and healthy environment for its local communities.⁸² According to the Constitution, one of the main aims of local government is to nurture public participation and to ensure

⁷⁸ Act 117 of 1998 (referred to further as the Municipal Structures Act).

⁷⁹ Act 32 of 2000 (referred to further as the Municipal Systems Act).

⁸⁰ Rautenbach (2012), at 227.

⁸¹ The Constitution s 155 (1) (a) – (c).

⁸² The Constitution s 152 (1) (e).

that communities and community organisations are encouraged to participate and get involved in matters of local government that affect their lives.⁸³

Certain provisions within the Constitution requires the National Assembly, National Council of Provinces and the Provincial Legislatures to facilitate public involvement in legislative and other processes which these committees facilitate.⁸⁴ A similar mandate is also given to the local government by section 152(1) (e) of the Constitution. It provides that one of the objects of local government is to encourage the involvement of communities and community organisation in the matters of local government and it further provides that municipalities must strive, within their financial and administrative capacity, to achieve the objects provided for in the Constitution.⁸⁵ This mandate seeks to ensure that there is an ongoing process of debate, dialogue and communication between the local government authority and the community. In turn, the local government becomes accountable for policies and decisions it takes or that it does not take by giving reasons to the communities when the demand for such explanation arises.⁸⁶ The Constitution further makes provision for municipalities to create and administer by-laws for the effective administration of matters which it has the right to administer.⁸⁷ It further provides that no by-law may be passed by a municipal council unless all the members of council have been given reasonable notice; and the proposed by-law has been published for public comment.⁸⁸ This provision thus ensures that no

⁸³ The Constitution s 155(1) (a)–(c).

⁸⁴ The Constitution s 59 (1) (a); see also s 72(1) (a) and s 118 (1)(a) thereof.

⁸⁵ See s 152(1) (e) and s 152(2) of the Constitution.

⁸⁶ In support of this view is section 195(1) (e) of the Constitution, Chapter 10 thereof, which clearly provides that in the delivery of public services, “people’s needs must be responded to, and the public must be encouraged to participate in decision-making processes.” Furthermore, see section 195(1) (g) of the Constitution, it states that “transparency must be fostered by providing the public with timely, accessible and accurate information.”

⁸⁷ The Constitution s 156(2); s 156(1) further articulates the matters which the local government can administer as those mentioned/listed in Part B of the Schedule 4 and Part B of Schedule 5 of the Constitution.

⁸⁸ The Constitution ss 160(4) (a) and (b).

proposed by-law can be approved by the Council without first getting the opinion of the public about it. Section 162 then further emphasises that a by-law can only be enforced after it has been published in the official gazette of the relevant province in which the applicable municipality falls. This provision further details how the proposed by-law should be publicised for public comment.⁸⁹

From the sections mentioned above it can be argued that South Africa's Constitution is one that advocates for a state that has a greater concern for public participation and it does so for a variety of reasons such as: to promote democracy; build trust; increase transparency; enhance accountability; reduce conflict; and ascertain priorities just to name a few. As to whether such demand is being respected by the local government sphere, is a question that begs to be answered and shall unfold in the chapters that follow.

2.4.1.2 THE MUNICIPAL SYSTEMS ACT

The Municipal Systems Act clearly outlines what it truly means to have public participation in local government. Chapter 4 of the Municipal Systems Act deals with public participation and section 16 thereof specifically requires municipalities to develop a culture of municipal governance that complements formal representative government with a system of participatory governance.⁹⁰ Municipalities in this regard are expected not to only create conditions for public participation, but to also contribute to building the capacity of local communities to participate in governance affairs, and to annually allocate funds to this effect.⁹¹ The Municipal Systems Act also prescribes that public participation should take place through political structures identified by the Municipal

⁸⁹ See the Constitution ss 162(1)–(3) provide for the publication of municipal by-laws; and those published municipal by-laws must be accessible to the public.

⁹⁰ See s 16 (1) of the Municipal Systems Act.

⁹¹ The Municipal Systems Act, s 16(1)(a), (b) and (c).

Structures Act.⁹² It further stipulates that the council and its committees must not exclude the public when considering or voting on a draft by-law tabled in the council.⁹³

Section 17 of the Municipal Systems Act further outlines that public participation can also take place through the mechanisms, processes and procedures defined in the Act.⁹⁴ These mechanisms, processes and procedures are identified as:

1. The receipt, processing and consideration of petitions and complaints lodged by members of the local community.⁹⁵
2. The notification and public comment procedures.⁹⁶
3. Public meetings and hearings by municipal council and other political structures and political office bearers of the municipality.⁹⁷
4. Consultative sessions with locally recognised community organisations and, where appropriate traditional authorities.⁹⁸
5. And lastly, the report-back to the local community.⁹⁹

A key aspect of public participation in the Municipal Systems Act is that it is mindful of marginalised members of society who could, by virtue of their position in society, be left out of decision-making processes. In this regard, the Act stipulates that a municipality when establishing mechanisms, processes and procedures through which public participation will be facilitated, must take into account the special needs of people who

⁹² See s 17(1)(a) of the Municipal Systems Act. Structures such as the ward committees can be used to facilitate public participation in the local government. Councillors who are elected to represent citizens at municipal councils, should be the leaders of these political structures legislated by the Municipal Structures Act. See s 72(3) of the Municipal Structures Act in this regard.

⁹³ See s 20(1) (b) of the Municipal Systems Act.

⁹⁴ See s 17(1) (b) of the Municipal Systems Act.

⁹⁵ The Municipal Systems Act, s 17 (2) (a).

⁹⁶ The Municipal Systems Act, s 17 (2) (b).

⁹⁷ The Municipal Systems Act, s 17 (2) (c).

⁹⁸ The Municipal Systems Act, s 17 (2) (d).

⁹⁹ The Municipal Systems Act, s 17 (2) (e).

cannot read or write; people with disabilities; women and other disadvantaged groups.¹⁰⁰ Section 18 further requires the municipalities to communicate information about community participation and requires municipalities to share information about the available mechanisms, processes and procedures used to encourage and facilitate community participation within their municipality; matters with regards to which community participation is encouraged; and about the rights and duties of the members of the local community and about their municipal governance, management and development.¹⁰¹ The Act further instructs municipalities to be mindful of language preference and usage within their municipality as well as the special needs of the people who cannot read or write.¹⁰²

History tells us that if people are not taken into account they might create their own “illegal” opinion platforms outside the institutionalised structures which might lead to strikes and violence.¹⁰³ This can cause distrust and disrespect for legally established institutions. Against the background mentioned above, it is submitted that the Municipal Structures Act has laid down clear principles on public participation in order to avoid problem-situations in the local government. However, questions still remain, as to the exact role of public participation in the creation and enforcement of municipal by-laws and what kind of effect can one expect when they have been effectively used in facilitating public participation in the creation and enforcement of by-laws.

¹⁰⁰ The Municipal Systems Act, s 17 (3)(a)–(d).

¹⁰¹ The Municipal Systems Act, s 18 (1)(a)–(d).

¹⁰² The Municipal Systems Act, s 18 (2)(a)–(b).

¹⁰³ BC Mubungizi and MO Dassah ‘Public participation in South Africa: Is intervention by the courts the answer?’ (2014) 39(3) *Journal of Social Sciences (Kamla-Raj)* 283, (referred to further as Mubungizi and Dassah (2014)); KS Czapanskiy and R Manjoo ‘The right of public participation in the law-making process and the role of legislatures in the promotion of this right’ (2008) 19:1 *Duke Journal of Comparative and International Law* 11, (referred to further as Czanpanskiy and Manjoo (2008)); and; S Skjeltlen A people’s constitution: Public participation in the South African constitution-making process (2006), 16.

2.4.1.3 THE MUNICIPAL STRUCTURES ACT

The Municipal Structures Act mandates municipalities to consult communities on key municipal processes, and establishes ward committees – which are an essential element in the participation process.¹⁰⁴ These committees serve as a conduit of communication between municipalities and local communities. It further states that, the purpose of ward committees is to enhance participatory democracy in government.¹⁰⁵ This indicates that our local government political leaders have a duty in terms of the South Africa Act, to develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers.¹⁰⁶

One of the functions of a ward committee is to make recommendations on matters affecting its ward to the ward councillor or through the ward councillor to a metropolitan or local council, executive committee, executive mayor, or metropolitan subcouncil.¹⁰⁷ This is one way in which the community/public can participate in local government matters that affect them. The Municipal Structures Act also requires councils to make administrative and financial arrangements to enable ward committees to perform their functions and exercise their powers effectively.¹⁰⁸ South Africa's municipal councils are not only required to comply with the abovementioned duty alone, they are further required by the Municipal Structures Act to annually review the processes that they have put in place to facilitate public participation.¹⁰⁹ Since the apartheid legal system excluded the majority of South Africa's population from law-making processes, it does not come as a surprise that there is crucial responsibility placed by legislation on local government leaders to ensure the existence of an ongoing process of debate between

¹⁰⁴ See also s 17(1)(a) of the Municipal Systems Act. It prescribes that councillors who are elected to represent citizens at municipal councils – should be the leaders of public structures of ward committees and other committees legislated under the Municipal Structures Act.

¹⁰⁵ The Municipal Structures Act s 72(3).

¹⁰⁶ The Municipal Structures Act s 19(3).

¹⁰⁷ The Municipal Structures Act s 74(a).

¹⁰⁸ The Municipal Structures Act s 73(d).

¹⁰⁹ The Municipal Structures Act s 19(2)(a)–(d).

the local government officials and its communities is upheld. The aim of this responsibility is to ensure accountability on the part of the government.

2.4.1.4 POLICIES DEALING WITH PUBLIC PARTICIPATION

Policies such as the White Paper on Transforming Public Service Delivery and the White Paper on Local Government are particularly relevant to this topic.¹¹⁰ The former stipulates that in delivering public services, citizens should be consulted about the level and quality of services they receive,¹¹¹ while the latter stipulates that municipalities should develop mechanisms to ensure citizen participation in policy initiation and formulation, and the monitoring and evaluation of decision-making and implementation.¹¹² The purpose of the White Paper on Transforming Public Service Delivery is to provide a policy framework and a practical implementation strategy for the transformation of public service delivery.¹¹³ It further explains how public services are provided in South Africa, and it also makes provision about how government should at all times try to improve the way in which services are delivered to the public. This in turn ensures that the public can hold public servants accountable for the quality of services delivered to them by the government. The purpose of White Paper on Local Government is to establish the basis for a system of local government which is centrally concerned with working with local citizens and communities in order to find sustainable ways to meet their needs and improve the quality of their lives.¹¹⁴ It provides a policy framework and programme in terms of which the existing local government system will be radically transformed into a sphere of government in its own right, which is no longer

¹¹⁰ The Department of Provincial and Local Government, The White Paper on Transforming Public Service Delivery, 18 September 1997 (referred to further as The White Paper 1997). The Department of Cooperative Governance and Traditional Affairs, The White Paper on Local Government, 9 March 1998 (referred to further as The White Paper 1998).

¹¹¹ The White Paper on Local Government 1998, para 3.3 and Mubungizi and Dassah (2014), at 279.

¹¹² The White Paper on Local Government 1998, para 3.3.

¹¹³ The White Paper on Transforming Public Service Delivery 1997, par 4.1.

¹¹⁴ The White Paper on Local Government 1998, para 3.3.

a function of national or provincial government.¹¹⁵ In so doing, the existing local government is given a distinctive status and role in building democracy and promoting socio-economic development.

Taking into consideration that there is currently no final national policy on public participation in our country, it is important to note that there are however some policy guidelines put in place by the Department of Cooperative Governance and Traditional Affairs which clearly show that our government values public participation. Policy guidelines such as the Draft National Policy Framework for Public Participation and the Community Participation Framework Document are also available for consideration and inputs into the topic at hand.¹¹⁶ As Mubungizi and Dassah have outlined, these policy guidelines give insight into the Department of Cooperative Governance and Traditional Affairs' thinking on public participation.¹¹⁷ These writers stipulate that the former policy "proposes active participation" and the latter indicates assumptions underpinning participation, the levels of participation, the initiatives requiring participation and the key principles of public participation".¹¹⁸ Furthermore the writers are of the view that although the legislative and policy levels of public participation is held in high regard and prominence, these legislations and policies are deliberately designed not to instil public participation with any genuine power.¹¹⁹ They further explain that this is caused by the fact that these so called ward committees and public meetings envisaged by legislation to facilitate public participation only have a consultative or deliberative role.¹²⁰ In their arguments, these writers also present an innovative vision of what should be the role of public participation in ward committees and public meetings. Their arguments envisage that the public should be given the power to influence both the process and outcome of

¹¹⁵ The White Paper 1998, the introductory part of the policy.

¹¹⁶ Mubungizi and Dassah (2014), at 279.

¹¹⁷ Mubungizi and Dassah (2014), at 279.

¹¹⁸ Mubungizi and Dassah (2014), at 279.

¹¹⁹ Mubungizi and Dassah (2014), at 279.

¹²⁰ Mubungizi and Dassah (2014), at 279.

government's decision in policy formulation and implementation processes.¹²¹ In this context, the government is required to further adopt an inclusive approach by considering the wishes of the public, so that where necessary, such wishes may form part of decision-making and implementation processes. Some writers are of the view that in so doing the government will ensure that the decisions it takes and implements are a collaborative effort between the governing bodies and its populace, instead of a consultative or deliberative power by the authorities. In other words, one can argue that when the governing bodies do not afford the said participatory opportunity to the people, such bodies may become vulnerable to negative criticism on grounds of transparency, accountability and fairness.¹²²

2.5 CASE LAW HIGHLIGHTING PUBLIC PARTICIPATION AS A CRITICAL COMPONENT OF SOUTH AFRICA'S DEMOCRACY

2.5.1 DOCTORS FOR LIFE CASE

In the *Doctors for Life* case the Court confirmed that the idea of allowing the public to participate in the conduct of public affairs is not a new concept in South Africa. The Court explained that the traditional means of public participation in this country is imbizo/lekgotla/bosberaad, and are regarded as participatory consultation processes that were and are still followed within the African communities.¹²³ The Court held that they are used as a forum to discuss issues affecting the community and they are currently a traditional method of public participation which is widely used by the government.¹²⁴ This traditional method of public participation is seen by our courts as a practical and symbolic part of our democratic processes.¹²⁵ Accordingly, they are regarded as a form of participatory democracy.

¹²¹ Phooko (2014), 58; Mubungizi and Dassah (2014), at 279 & Callahan (2007), 157.

¹²² Mubungizi and Dassah (2014), at 279.

¹²³ *Doctors for Life International* case, paras 1436 F–G

¹²⁴ *Doctors for Life International* case, paras 1436G–H.

¹²⁵ *Doctors for Life International* case, para 1436H.

In elaborating on the meaning and importance of public participation, the Court held that participation can be defined as taking part with others in an action/matter or it can be defined as the active involvement of members of a community or organisation in decisions which affect them.¹²⁶ The court further commented that one of the basic objectives of South Africa's constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.¹²⁷ The court held that:

“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 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 be effective in practice. It strengthens the legitimacy of legislation in the eyes of people.”¹²⁸

Lastly, the Court pronounced that participatory democracy is of special importance to those who are relatively disempowered in a country such as South Africa, where great disparities of wealth and influence exist.¹²⁹

The points highlighted by the Court above clearly indicate that public participation is a vital concept to South Africa's democracy. The democratic government that is contemplated is one that makes provision for the public to participate in legislative, policy and other decision-making processes.¹³⁰ Local government as a local implementer of public goods and services must not only hear the voices of the people through their elected representatives, but it must also allow the people themselves to

¹²⁶ *Doctors for Life International case*, para 1443C.

¹²⁷ *Doctors for Life International case*, paras 1440G–1441A.

¹²⁸ *Doctors for Life International case*, para 1442B–C.

¹²⁹ *Doctors for Life International case*, para 1442D.

¹³⁰ *Doctors for Life International case*, para 1441G–H.

give opinions on how the administration of municipalities that fall within their communities is structured. This is in line with what the Constitution envisages.¹³¹

2.6 CONCLUDING COMMENTS

The fact that there are legislative and policy frameworks on the issue of public participation in South Africa does not mean that South Africa has successfully developed and implemented participatory practices to ensure that the public are directly involved in the decisions that affect their lives.¹³² Cases such as *Matatiele* and *Merafong* clearly show that effective participation still remains difficult to attain.¹³³ One of the reasons that could explain why South Africa is not attaining effective participation at a pace expected could be the fact that the government does not follow correct public participation procedures when consulting with its citizens.¹³⁴ Notwithstanding this reasoning, it will be argued later in this thesis that there are other reasons that exist that have been a blockage towards South Africa's objective to attain effective public participation. Before such reasons are discussed, it is first necessary to also investigate the role and effect of public participation in the creation of municipal by-laws.

¹³¹ *Doctors for Life International* case, paras 1441H–1442A.

¹³² Mubungizi and Dassah (2014), at 279.

¹³³ Mubungizi and Dassah (2014), at 282. *Matatiele v President of the Republic of South Africa* 2006 (5) SA 477 (CC); *Merafong v Dermacon Forum v President of the Republic South Africa* 2008 (5) SA 171 (CC).

¹³⁴ Mubungizi and Dassah (2014), at 282.

CHAPTER 3

THE ROLE AND THE EFFECT OF PUBLIC PARTICIPATION IN THE CREATION OF MUNICIPAL BY-LAWS

3.1 INTRODUCTION

Since municipalities are by law required to administer certain matters that fall within their competence as listed in schedule 4 and 5 part B of the Constitution,¹³⁵ there is a need for them to create local legislation that will assist in regulating activities that might violate the proper administration of the matters that fall within their competency. The proper administration of these matters ensures that local government is able to provide services to communities in a sustainable manner; promote social and economic development and enhances a safe and healthy environment.¹³⁶ It is therefore important that municipalities should be able to legislate on the safety and the comfort of its populace within their jurisdictions in order to ensure that certain anti-social behaviours are prohibited and punished if the prohibitions are not observed.¹³⁷ The Municipal Systems Act requires municipalities to pass by-laws.¹³⁸ This power to enact by-laws is derived from the Constitution which specifically provides that a municipality can make and administer by-laws for the effective administration of the matters which it has the right to administer.¹³⁹ Since municipal councils are regarded as deliberative legislative bodies, it can be argued that the principle laid down by the Constitutional Court in an earlier case, *The Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others*,¹⁴⁰ regarding public participation in the making of laws, is as much applicable to municipal councils. The Constitutional Court held that “the Constitution calls for an open

¹³⁵ S 156 (1)(a) of the Constitution.

¹³⁶ S 152 (1)(b)–(d) of the Constitution.

¹³⁷ Memeza (2000), at 2.

¹³⁸ S 11(3)(m) of the Municipal Systems Act.

¹³⁹ S 156(2) of the Constitution

¹⁴⁰ 2006 (1) BCLR 1 (CC), (referred to further as the *New Clicks* case).

and transparent government, and requires public participation in the making of laws by parliament and deliberative legislative assemblies”.¹⁴¹ Some writers are of the view that this mandatory obligation on the legislature to facilitate public involvement is further emphasized by the historical exclusion of the majority of people from political processes and the goals in the Constitution to support transformation.¹⁴² Clearly, from the provisions of South African Constitution regarding this mandatory duty, it becomes certain that South Africa’s constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy.

The South African Constitutional Court has always been an activist in supporting transformation in our country. The principles laid down by this Court are much respected by our society and politicians, and in many instances they help transform our country towards an open, accountable and transparent government. In one of its judgements, the Constitutional Court recognized two aspects of the duty to facilitate public involvement as: the duty to provide meaningful opportunities for participation in the law-making process and the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.¹⁴³ However, the Court acknowledged its own limitations and the Constitution’s design to leave certain matters to other branches of government based on the principle of the separation of powers. The Court acknowledged that the legislature will have considerable discretion in determining how best to achieve the duty to facilitate public participation.¹⁴⁴ But the Court further confirmed that, it is the ultimate guardian of the Constitution and its values, and it held that in as much as the legislatures are given a wide discretion in deciding how best to achieve the duty to facilitate public participation, the Constitutional Court can in appropriate cases determine whether there has been the degree of public

¹⁴¹ *The New clicks case*, para 113, at 67.

¹⁴² *Czapanskiy and Manjoo* (2008), at 12.

¹⁴³ *Doctors for Life International*, para 1445D-E.

¹⁴⁴ *Doctors for Life International case*, para 1444 D-E.

involvement that is required by the Constitution.¹⁴⁵ It can therefore be argued that the Court has a role in deciding whether legislatures have fulfilled this obligation and further decide whether the legislatures have provided citizens with a meaningful opportunity to be heard.¹⁴⁶ As indicated by some writers, this rule laid down by the Constitutional Court applies with equal force to local government, and thus, municipal councils, in their capacities as legislatures, when creating by-laws have a duty to ensure that the public is afforded 'meaningful opportunities' to be heard and contribute to the decisions that affect them.¹⁴⁷ It can be argued further that the Constitutional Court has the ultimate authority to decide what is the role and effect of public participation in the law-making processes in the country. What is to follow is to determine the Constitutional Court's view about what should be the role and effect of public participation in the law-making processes in the South African current democratic legal order.

3.2 THE PROCEDURAL REQUIREMENTS FOR CREATING A BY-LAW

There are five procedural steps involved in the making of a by-law:

1. Firstly, a draft by-law is prepared by a councillor or a committee of the council.¹⁴⁸
2. Secondly, the council must consult with the community with regard to the draft by-law. In this instance it must at least publish the by-law for comment by the public.¹⁴⁹
3. Thirdly, the by-law is introduced in and debated by the council in a council meeting.¹⁵⁰
4. Fourthly, the municipal council votes on the by-law.¹⁵¹

¹⁴⁵ *Doctors for Life International* case, para 1444E.

¹⁴⁶ As observed in the case of *Doctors for Life International*, at para 1451B.

¹⁴⁷ Steytler and De Visser (2007), at 6-4 and 6-16 and Bekink (2006), 478-480.

¹⁴⁸ See Steytler *et al* (2004), 41 as well as s 11 (3) (m) of the Municipal Systems Act.

¹⁴⁹ See Steytler *et al* (2004), 42 s 160(4) of the Constitution and s 16(1) of the Municipal System Act.

¹⁵⁰ See Steytler *et al* (2004), 43-45.

¹⁵¹ See Steytler *et al* (2004), at 45.

5. Lastly, if passed by the council, the by-law is published in the provincial gazette and becomes law on that date or a later date set out in the by-law.¹⁵²

The process of consulting the community about the draft by-law as well that of publishing the by-law for comment by the public need to reflect some sense of participatory democracy. Clearly, the will of the people in the legislative process is considered as an integral part of our democratic government. Local government as a sphere of government closest to the people cannot turn a blind eye on the views of the people that may be affected by a draft by-law nor can it turn a blind eye to the concerns of the public about the consequences that might be brought about by that law. It is therefore of utmost importance to critically evaluate what is the role of public participation in creation of municipal by-laws. Put differently, in an inquisitive form, what is the role of involving the public in the creation of municipal by-laws? In order to answer this question one needs to critically evaluate the conclusions reached by South African courts about the role of public participation in the law-making processes in the country.

3.3 A CRITICAL ANALYSIS ON WHAT SHOULD BE THE ROLE OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESSES IN SOUTH AFRICA.

3.3.1 JUDICIAL DEVELOPMENT ON THE ROLE OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESS

3.3.1.1 *DOCTORS FOR LIFE INTERNATIONAL V SPEAKER OF NATIONAL ASSEMBLY*

In this case, the applicant alleged that during the legislative process that resulted in the promulgation of four statutes namely, the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004, and the Dental Technicians Amendment Act 24 of 2004, the National Council of Provinces and the provincial legislatures did not comply

¹⁵² See Steytler *et al* (2004), 45–46 as well as s 162(1) of the Constitution.

with their constitutional obligation to facilitate public participation in the law-making process as required by the Constitution.¹⁵³ Regarding South Africa's constitutional democracy, the Court indicated that South Africa is founded on an open and democratic society in which governance was based on the will of the people and it held that the Constitution clearly expresses this principle through a number of provisions which places a duty on the national and provincial legislatures to facilitate public participation in the law-making processes.¹⁵⁴ According to the Court these provisions entail that the people of South Africa have reserved themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.¹⁵⁵ The Court thereafter explained that our democracy must be understood in the context of its history, as has been observed, during the struggle against apartheid, in which the majority of the people were denied a say in the making of the laws which governed them.¹⁵⁶ The people thereafter developed the concept of the people's power as an alternative to this apartheid system. This ensured that people took part in community structures that were set up to fight this system.¹⁵⁷

The Court went further to elaborate that South Africa's current constitutional democracy, as envisaged by the Constitution contemplates both a representative and participatory democracy which is transparent, responsive and accountable and that further gives the public the opportunity to participate in law-making processes.¹⁵⁸ It stated that there should be a balance between the representative and participatory elements of our South African democracy and the Court further commented that both these elements should not be regarded as being in tension with each other, but should be seen as mutually supportive to one another.¹⁵⁹ The Court explained that this is because

¹⁵³ *Doctors for Life International* case, para 1408H-I.

¹⁵⁴ *Doctors for Life International* case, para 1440C-D; see also s 59 (1) (a) and 72 (1) (a) of the Constitution.

¹⁵⁵ *Doctors for Life International* case, para 1440D & Phooko (2014), at 43.

¹⁵⁶ *Doctors for Life International* case, para 1441B.

¹⁵⁷ *Doctors for Life International* case, para 1441B.

¹⁵⁸ *Doctors for Life International* case, para 1440F-G.

¹⁵⁹ *Doctors for Life International* case, para 1442A.

elections as the foundation of representative democracy would be meaningless without massive participation by the voters and that the continued participation of the public provides vitality to the function of representative democracy. Public participation also encourages the citizens to be more active in public affairs of the government thereby assisting them to familiarize themselves with the institutions of government and the laws as they are made.¹⁶⁰ The Court highlighted that this enables their voices to be heard and to be taken into account by the governing representatives.¹⁶¹ However, the Court pronounced that the Constitution did not prescribe how Parliament had to fulfil its duty to facilitate public participation, rather it had a discretion on how best to facilitate public engagement.¹⁶²

Nevertheless, the Court stressed its oversight role in that “the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution”.¹⁶³ The Court was of the view that what is required by section 72(1) (a) of the Constitution differs from case to case. However, the Court observed that the legislature has the duty to act reasonably in doing its duty to facilitate public participation.¹⁶⁴ What the Court highlighted was that the duty to facilitate public participation was meaningless if there was no effort to ensure that the public did participate.¹⁶⁵ In this regard participation was meaningful when the public was given time to participate before decisions by the legislatures were made and not when they were about to be made.¹⁶⁶ The Court further emphasized that:

¹⁶⁰ *Doctors for Life International* case, para 1442B.

¹⁶¹ *Doctors for Life International* case, para 1442C.

¹⁶² *Doctors for Life International* case, para 1444B.

¹⁶³ *Doctors for Life International* case, para 1444A.

¹⁶⁴ *Doctors for Life International* case, para 1444E-G.

¹⁶⁵ Phooko (2014), at 44.

¹⁶⁶ Phooko (2014), at 44.

“[T]he basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participation in the process and consultation on the legislation”.¹⁶⁷

The Court’s remarks above put public participation at the heart of the process of creating a by-law from the consultation stage until the implementation stage thereof.

3.3.1.2 *MATATIELE MUNICIPALITY AND OTHERS V THE PRESIDENT OF RSA AND OTHERS*¹⁶⁸

In this case, Parliament adopted the 2005 Twelfth Amendment of the Constitution and Cross-boundary Municipalities Laws Repealed and Related Matters Act to alter boundaries of KwaZulu-Natal and Eastern Cape.¹⁶⁹ In terms of these amendments the local municipality of Matatiele would be transferred from the KZN Province into the Eastern Cape Province.¹⁷⁰ The applicants challenged the constitutional validity of the aforesaid laws on the basis that they re-demarcated Matatiele municipality without consulting the affected people which meant that the legislature failed to discharge its constitutional duty to facilitate public participation and as such these laws affecting the Matatiele community were inconsistent with the Constitution.¹⁷¹ Regarding South Africa’s constitutional democracy, the Court held that our constitutional democracy has essential elements which constitute its foundation, it is partly representative and partly participative.¹⁷² It further outlined that these two elements reflect the basic and fundamental objective of our constitutional democracy and that these provisions of the Constitution must be construed in a manner that is compatible with these principles of South Africa’s democracy.¹⁷³

¹⁶⁷ *Doctors for Life International case*, para 1468B-C

¹⁶⁸ 2007 (6) SA 477 (CC), (referred to further as the *Matatiele Municipality case*).

¹⁶⁹ 23 of 2005

¹⁷⁰ *Matatiele Municipality case*, para 1–2, at 480.

¹⁷¹ *Matatiele Municipality case*, para 3, at 480.

¹⁷² *Matatiele Municipality case*, para 57, at 494.

¹⁷³ *Matatiele Municipality case*, para 36, at 487–488.

The Court further observed that our system of government requires that people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances, and that the law-making process will in turn produce a dialogue between the people themselves.¹⁷⁴ The Court thereafter warned that the representative and participatory elements should not be seen as being in tension with each other as they are mutually supportive.¹⁷⁵ The Court confirmed what has been held in the *Doctors for Life* case above. However, the Court illustrated that our constitutional scheme requires that there be an achievement of a balanced relationship between representative and participatory democracy and that is because the public involvement provisions in the Constitution address this symbolic relationship, which relationship lies at the heart of the legislative function.¹⁷⁶ According to the Court, the Constitution contemplates that the people will have a voice in the legislative processes of the state, not only through elected representatives, but also through participation in the law-making process.¹⁷⁷

3.3.1.3 *THE MERA FONG DEMARCATION BOARD V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA*¹⁷⁸

This case, similar to the facts of the *Matatiele* case above, related to the Twelfth Constitutional Amendment Act 23 of 2005 which altered provincial boundaries. As a consequence of the proposed laws, Merafong City Local Municipality was to be relocated from Gauteng Province to the North West Province.¹⁷⁹ The applicants in this case also challenged the constitutionality of the Twelfth Amendment Act on the basis that the Provincial Legislature had failed to comply with its constitutional obligation to facilitate public involvement in its processes leading up to the approval of the Twelfth

¹⁷⁴ *Matatiele Municipality* case, para 58, at 494.

¹⁷⁵ *Matatiele Municipality* case, para 59, at 494–495.

¹⁷⁶ *Matatiele Municipality* case, para 60, at 495.

¹⁷⁷ *Matatiele Municipality* case, para 60, at 495.

¹⁷⁸ 2008 (10) BCLR 969 (CC), (referred to further as the *Merafong* case).

¹⁷⁹ *Merafong* case, para 1, at 2–3.

Amendment Bill by the National Council of Provinces.¹⁸⁰ The applicants alleged that during the public hearings regarding this Bill, the majority of the people in the area were opposed to the decision of being relocated to the North West Province and chose to remain in Gauteng. Accordingly, the applicants' refusal to be transferred to the North West Province was supported, and a "negotiating mandate was adopted" in light of the majority's wishes.¹⁸¹ Despite such mandate, the Gauteng Provincial Legislature, without further consultations with the public, unilaterally deviated from the negotiating mandate and supported the Amendment Bill that included the Merafong Municipality in the North West Province.¹⁸²

One of the issues before the Court was whether the Gauteng Provincial Legislature complied with its obligation to facilitate public involvement when it considered and approved that part of the Twelfth Amendment Bill which concerned Merafong.¹⁸³ The Court found that there was no evidence to suggest that the Gauteng Legislature did not facilitate public involvement.¹⁸⁴ It further held that participating in the law-making process did not mean that one's view should be taken into account or that such views bound the legislature.¹⁸⁵ The Court therefore has shifted from the position it adopted in *Doctors for Life*. It held that all what was required was that the legislature should have been open-minded to the views of the people and have been willing to consider them, but there was no legally binding mandate to consider or follow through on them.¹⁸⁶

In assessing the reasonableness of the actions of the legislature in this instance, the Court refused to acknowledge that the discourteous behaviour of the legislature amounted to a failure to facilitate reasonable measures to facilitate public involvement as required by section 72(1)(a) and section 118(1)(a) of the Constitution as alleged by

¹⁸⁰ *Merafong* case, para 1, at 2–3.

¹⁸¹ *Merafong* case, paras 33–34, at 18.

¹⁸² *Merafong* case, paras 36–39, at 19–21.

¹⁸³ *Merafong* case, paras 40–41, at 21.

¹⁸⁴ Phooko (2014), at 48.

¹⁸⁵ *Merafong* case, para 50, at 26.

¹⁸⁶ *Merafong* case, para 51, at 27.

the applicants.¹⁸⁷ However, earlier in *Doctors for Life*, the Court had stated that in assessing the reasonableness of the legislatures' actions, special attention would be paid to the "nature and importance of the legislation and the intensity of its impact on the public".¹⁸⁸ This issue was never properly taken into account and the Court with respect, failed to condemn the deceptive and manipulative actions of the legislature which ignored the public. Instead, the Court just acknowledged that the attachment of people to provinces in which they live should not be underestimated, but should be left to the legislatures to decide and not the courts.¹⁸⁹ The Court, nonetheless, held that the deceptive and manipulative actions of the legislature do not equate unconstitutional conduct, which has to result in the invalidity of the legislation. The people could hold the government that deceived it accountable in the next elections.¹⁹⁰ The Court in this regard, seemingly disregarded its own views in the *Doctors for Life* case that there should not be a conflict between the representative and the participatory elements of the South African democracy, but that rather there should be a balance.

3.3.1.4 *THE MOUTSE DEMARCATION FORUM V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA*¹⁹¹

The applicants in this case were of the view that the provincial legislator failed to facilitate public participation when it did not take their views, wishes and concerns into account when its municipality was being relocated to the Limpopo Province;¹⁹² taking into consideration that the people there, did not want to go to the Limpopo Province. In this case, the Court ruled in favour of the provincial legislature. In reaching its conclusion, it acknowledged that the community of Moutse was a discrete group, and

¹⁸⁷ *Merafong* case, para 60, at 31.

¹⁸⁸ *Doctors for Life International* case, para 144, at 80.

¹⁸⁹ *Merafong* case, para 114, at 58.

¹⁹⁰ *Merafong* case, para 60.

¹⁹¹ 2011 (11) BCLR 1158 (CC), (referred to further as the *Moutse* case)

¹⁹² *Moutse* case, paras 21–22, at 12–13.

that it had to be given an opportunity to be heard in the formation of any law that affects the alteration of their boundaries.¹⁹³

The Court then stated that compliance with section 118(1) of the Constitution meant two things, first, that the legislature had to invite the public to participate in the hearing and give them sufficient time to prepare, otherwise there would be no meaningful participation of the public because they would not have had time to “to study the Bill, consider their stance and formulate representations to be made, secondly, the time or stage the hearings were made should not have been just before the final decisions were to be made by the legislature, otherwise that would not have afforded the public the opportunity to participate meaningfully”.¹⁹⁴

The Court further indicated that the process of participation should have been able to influence the decisions to be taken by the legislature, and as such the question of sufficient notice would depend on a case-by-case basis.¹⁹⁵ On the issue of notice, the Court accepted that the Moutse community had not received sufficient notice to hold a meeting with the provincial legislature.¹⁹⁶ However, it stated that they should have complained about this issue and their failure to do so was a sign that the hearing was appropriately set down.¹⁹⁷ On the issue of whether the time allocated for the hearing was sufficient to meet the standard of public participation given the huge turnout of people, the court rejected the applicants’ arguments which claimed that more time should have been given because the submissions were made on behalf of organizations and not individuals.¹⁹⁸

¹⁹³ *Moutse case*, para 57, at 28.

¹⁹⁴ *Moutse case*, paras 61–62, at 29–30.

¹⁹⁵ *Moutse case*, para 62, at 30.

¹⁹⁶ *Moutse case*, paras 64–65, at 31.

¹⁹⁷ Phooko (2014), at 48.

¹⁹⁸ *Moutse case*, paras 66–67, at 31–32.

Finally, the community also contended that the Portfolio Committee of the provincial legislature had presented a skeletal report to the legislature which did not “include a full and faithful discussion and consideration of, *inter alia*, the *Moutse* hearing of 8 December 2005”.¹⁹⁹ The Court in this instance observed that the report was skeletal but it was not entitled to pronounce “on the adequacy of the information at the disposal of a deliberative body such as the legislature before it makes a decision”.²⁰⁰ It indicated that the provincial legislature could use its discretion in the adoption of the approach towards the facilitation of public participation, that the Court could not dictate the format of such an approach.²⁰¹

3.3.1.5 *POVERTY ALLEVIATION NETWORK V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA*²⁰²

The *Poverty* case (which has analogous facts as the *Matatiele* case) could be viewed as a case where the Government was found to have equally failed to facilitate public participation as in the *Matatiele* case.²⁰³ In following on the *Matatiele* case and in order to fulfil the duty to consult with the affected people, the Government merely went back to consult with the people as a procedural requirement and arrived at the same conclusion that relocated the people of Matatiele from KwaZulu-Natal to the Eastern Cape.²⁰⁴ This second similar decision, brought this application to the attention of the Court for the second time around.²⁰⁵ The applicants in this regard, amongst other issues contended that the failure on the part of the National Assembly to receive oral submissions from interested parties constituted non-compliance with the constitutional obligation to facilitate public participation and in addition, they contended that the National Assembly and the KwaZulu-Natal Legislature had failed to consider the

¹⁹⁹ *Moutse* case, para 77, at 36.

²⁰⁰ *Moutse* case, para 80, at 38.

²⁰¹ *Moutse* case, para 80, at 38.

²⁰² 2010 (6) BCLR 520 (CC), (referred to further as the *Poverty Alleviation Network* case).

²⁰³ *Poverty Alleviation Network* case, paras 10–16, at 8–11.

²⁰⁴ *Poverty Alleviation Network* case, paras 10–16, at 8–11.

²⁰⁵ *Poverty Alleviation Network* case, paras 10–16, at 8–11.

representations made by the residents of Matatiele.²⁰⁶ The Court ruled that provincial legislatures had leeway in determining how to facilitate public involvement, and that the fact that the views of the public were not reflected in the final legislation, did not mean that the public had not been consulted.²⁰⁷

3.4 A CRITICAL ANALYSIS OF THE CASES

It is submitted that the court in its oversight role of determining whether there has been the degree of public involvement that is required by the Constitution, should in appropriate cases also develop the role of public participation in the law-making process.²⁰⁸ However, in all the cases elaborated above the court seems to be just giving an opinion about the role of public participation in the law-making process. In the *Doctors for life International* case the court was of the view that the role of public participation in the law-making process symbolically and practically means that: the persons affected by the laws concerned will be shown the respect due to them as concerned citizens and that through public participation the legislators would get the benefit of all inputs that would enable them to produce the best possible laws.²⁰⁹ In the *Matatiele* case the court was of the view that the role of public participation meant that the people will have a voice in the legislative organs of the state not only through elected representatives, but also through participation in the law-making process.²¹⁰ In the *Moutse* case, the court further indicated that it was of the view that the opportunity afforded to the public to participate in a legislative process must be an opportunity capable of influencing the decision to be taken by the legislature.²¹¹

In summarising the Court's view in relation to the above mentioned three cases, it can be argued that the Court is of the view that the role of public participation in the law-

²⁰⁶ *Poverty Alleviation Network* case, para 17, at 12.

²⁰⁷ *Poverty Alleviation Network* case, paras 54–58, at 32–34.

²⁰⁸ See s 173 of the Constitution.

²⁰⁹ *Doctors for Life International* case, para 171, at 92.

²¹⁰ *Matatiele Municipality* case, para 60, at 495.

²¹¹ *Moutse* case, para 62, at 30.

making process is to ascertain the views of the public on the laws created by the legislatures and to ensure that the laws to be created are informed by these views. This position actually supports the argument that agrees with the fact that, the views received by the legislator in the process of public participation are not only meant for hearing, but they are also meant to influence the decisions to be taken by the legislature.²¹² Clearly such an opinion is in support of the views illustrated by some of the writers mentioned in chapter 1, who are of the view that the principles of participatory democracy require that the people affected by a legislative policy be consulted about it and to have their views considered before the legislative policy is drafted. These writers further expressed the view that this requires the legislatures to consult with the public before making laws in order to ascertain the wishes of the public and to ensure that the laws or policies to be created are informed by these wishes.²¹³

Since South Africa's constitutional democracy is partly representative and partly participative, as indicated by case law,²¹⁴ it is submitted that there is a need for the role of public participation in the creation of laws to have a balance between these two elements. One element cannot be seen as suppressing the other element. Therefore, representative democracy must not overpower participatory democracy. In other words, there must be a balance between the two. In these three cases, the Court balanced these elements by acknowledging that the legislator has the power to make laws, which power has been given to it by the citizens when they voted them into power.²¹⁵ However, the Court further acknowledged that through constitutional provisions which place a duty on the national and provincial legislatures to facilitate public participation in the law-making processes, the citizens have reserved part of the sovereign legislative

²¹² Phooko (2014), at 48.

²¹³ Phooko (2014), at 58; Callahan (2007), at 157; Nyati (2008), at 12; Skjelten (2006), at 31; and Mzimakwe (2010), at 504.

²¹⁴ *Doctors for Life International* case, para 116, at 65.

²¹⁵ *Doctors for Life International* case, para 53, at 29; *Matatiele Municipality* case, para 60, at 495; and *Moutse* case, para 48, at 24.

authority that they otherwise delegated to the representative bodies they created.²¹⁶ This is further supported by the values enshrined in the preamble of the Constitution, which indicates that our government is based on the will of the people.²¹⁷ As indicated by Cora Hoexter, in a country such as South Africa, the courts should be able to show willingness to appreciate the legitimate decisions that are taken by the legislatures in terms of their constitutional mandate. This appreciation includes the comprehension of the challenges facing administrative bodies that deals with the interpretation of the concerned legislative mandates as well as the financial constraints under which they operate.²¹⁸ However, in doing this they also should not forget the injustices of our past which saw the views of the majority of our people being disregarded in the creation and enforcement of laws, due to the fact that so much respect was given to the legislators of the then government.²¹⁹

Facilitating public participation in law-making process as envisaged by the views of the Court in these three judgements should not be seen as a waste of time, neither should it be seen as a financial constrain. To the contrary, it should be viewed as a way in which the government can develop the concept of 'people's power' as an alternative to the apartheid system which failed to hear and take into account the views of the majority of the people. In this way, citizens will be encouraged to be more active in public affairs of the government. It is submitted that if citizens are aware that their views will be reflected in, for example, final by-laws, they will become more active in public participation initiatives arranged by municipalities, in order to seek their opinion regarding a drafted by-law which must be approved by council.

Nevertheless, in the *Merafong* and the *Poverty Alleviation Network* cases, the Court indicated that although the role of public participation is for the legislature to hear the

²¹⁶ *Doctors for Life International* case, para 110, at 60.

²¹⁷ See the preamble of the Constitution of the Republic of South Africa.

²¹⁸ C Hoexter "The future of judicial review in South African administrative law" (2000) 117 *South African Law Journal* 484, at 501.

²¹⁹ O' Regan (2009), 33.

views of the public, the legislature is not bound by such views as the legislature would not function if it had to uphold every view.²²⁰ It further contended that the fact that the views of the public were not reflected in the final legislation, did not mean that the public had not been consulted.²²¹ Unfortunately, it is this kind of attitude by the legislature that is the problem that makes citizens not to be interested in participating in the law-making processes. As such, it can be submitted that, if the role of public participation is to hear my views but not to consider them and reflect them in the final legislation, the whole purpose of the exercise will be a waste of time. Even Arnstein is of the view that there is a critical difference between going through an empty ritual of participation and having the real power to affect the outcome of the process.²²² Clearly the role of public participation in the law-making process as envisaged by these two cases is one that represents the empty ritual of participation. Moses Phooko describes this kind of participation as public participation in the context of obtaining the views of the public but does not mean that those views will prevail and produce an end result. The end result in such cases will be determined by the representatives of the people after taking into account all submissions and other factors. As stated eloquently by Phooko, the court should never condone the law making process in which the legislation reflects nothing about the views of the people.²²³

The Constitutional Court has a duty to safeguard and protect the people from a government that is not open minded to its views, or not responsive to their views and which shows no accountability towards the wishes of its own people. As such, it can be argued that in the cases of *Merafong* and *Poverty Alleviation Network*, the Court misinterpreted its role and gave more consideration on the legislative deference principle and the maintenance of the separation of powers principle. In so doing, the Court followed a more “formal vision of law” to the “substantive vision of law”. The

²²⁰ *Merafong* case, paras 51–53, at 27–28; and *Poverty Alleviation Network* case, para 62, at 35.

²²¹ *Merafong* case, para 53, at 28; and *Poverty Alleviation Network* case, para 63, at 37.

²²² SR Arnstein “A Ladder of Citizen Participation” (1969), at 35, issue 4” *Journal of the American Institute of Planners*, 216, para 1.1 (referred to further as Arnstein (1969)).

²²³ Phooko (2014), at 59.

“substantive vision of law” requires judges to engage with “substantive reasons” in the form of moral and political values as opposed to the “formal reasons” (which are the principles of law as laid down in legislation).²²⁴ As Ntlama puts it, “[I]t is incumbent upon the court to ensure that law is not isolated from politics, since the two are interdependent, intertwined and interrelated”.²²⁵

It is submitted that if the Court had been able to engage on the issue of facilitating public participation in a more “substantive vision of law” as indicated by Phooko it would have been able to insist satisfactory that facilitating public participation is more than just hearing people’s views, rather the views should have an influence in the end product.²²⁶ In so doing, the Court would have realised a balance between the two constitutional principles (participatory democracy and representative democracy), envisaged by the Constitution. Cockrell takes this position even further when he explains that this explicit intrusion of constitutional principles into the adjudicative process signals a transition from a formal vision of law to a substantive vision of law in South Africa.²²⁷ When the courts follow the more formal vision of law as it did in the two cases, it becomes apparent that the process of obtaining the views of the people through public participation in law-making process is just an exercise, but that does not necessarily mean that such views will be reflected in the final legislation. Instead, as Phooko explains, it could be regarded “as a process which promotes accountability of representatives to the people”.²²⁸ In such cases, it is submitted that the role of the courts in enforcing public participation is limited to procedural issues rather than substantial issues. Clearly this will create a tension between the two constitutional values which would mean that the views of those who are likely be affected by the

²²⁴ A Cockrell ‘Rainbow jurisprudence’ (1996) 12 *South African Journal on Human Rights* 1, at 3 (referred to further as Cockrell (1996)).

²²⁵ N Ntlama “The “deference” of judicial authority to the state” (2012) *Obiter* 33 (1) 135, at 144 (referred to further as Ntlama (2012)).

²²⁶ Phooko (2014), at 58.

²²⁷ Cockrell (1996), at 3.

²²⁸ Phooko (2014), at 57.

legislation would not be regarded, but the decision of their representatives regarding their views about the legislation that will affect them will be enforced. As such the principle of representative democracy will be enforced in the legislative process above that of participatory democracy as it has been done in the two cases. It is submitted that in such instances the political representatives are turning a blind eye to the wishes of the citizens who voted them in power. The *Merafong* case puts a perfect perspective to this argument as it indicates that even if the people have voted on a particular stance, their representative may change and adopt a new position unilaterally as they are the representatives of the electorate, however, the electorates could hold such political representative accountable in the next elections.²²⁹ What this basically means, is that, the representatives are now purporting to know more about what is best for the people they represent. Clearly in such instances the views of the minority will be disregarded, and the courts by continuing to condone such a behaviour, are not protecting the rights of the minorities and others who cannot protect their rights adequately through the available democratic processes. A logical approach would be that the role of public participation as envisaged by the two court judgements does not show any willingness by the courts to protect the social outcasts and marginalized people of the South African society. It is submitted that such an approach bestows more power to the governing than in the will of the people. Evidently, it takes us back to an apartheid like system that failed to reflect the views of the people in the laws it created and enforced.

3.5 WHAT THEN SHOULD BE THE ROLE OF PUBLIC PARTICIPATION IN THE CREATION OF BY-LAWS

As indicated in chapter 2, municipalities are regulated by various laws, these laws have put in place mechanisms, processes and procedures which can be used by the municipalities in facilitating community participation in their communities. With such legislative provisions in place municipalities cannot escape the legal duty imposed upon them to facilitate public participation. However, in practice, it seems as if the municipalities are implementing these mechanisms, processes and procedures for the

²²⁹ *Merafong case*, para 60, at 31.

sake of complying with the procedural requirements involved in the drafting of by-laws. In most instances municipalities are obtaining the views of the public just for compliance sake. These views do not change the decision already taken by council and officials of the municipalities about a draft by-law which council intends to approve. As indicated by the cases above, the highest court in our land has in most instances distanced itself from laying down law that will indeed ensure that the views of the people are reflected in the final legislation. It appears as if this is the very reason why many community members within municipalities do not actively participate in consultation meetings arranged by the municipalities about a draft-law they intend to approve. When the government refuse to reflect the views of the people in the creation of by-laws that will have direct effect on them, it shows that such a government has no respect for participatory democracy. If the public participates in such meetings, it would mean that it has wasted its time, for the final decision has already been made on their behalf by those that purport to be the experts (the elected representatives and the municipal officials delegated to deal with by-laws in a municipality) in developing legislation or policy.

It is important for any government to acknowledge that there exist a possibility, that people will participate more when they know that their role in the process is not just for hearing purposes, but it is for real consideration and to further be further reflected in the outcome of the decision if and when it is in the best interest of the whole society.²³⁰ Indeed legislation or policy should be reflective of public views. However, some writers have supported the view that public opinion alone should not dictate legislation or policy. Others have asserted that what should dictate legislation or policy should be the various factors that our country is currently faced with at the time when that legislation or policy is being created.²³¹ Such include the views of the minority or majority, our constitutional values and the effects of such policy or legislation on the people.²³² It is submitted that the views reflected in the judgement handed down in the *Merafong* and

²³⁰ Phooko (2014), 57-59; Mubungizi and Dassah (2014), 282-283; and Nyati (2008), 108-109.

²³¹ Phooko (2014), 57.

²³² Phooko (2014), 57.

the *Poverty Alleviation Network* cases are not reflective of any of these factors, instead they are reflecting the legislative deference principle and the maintenance of the separation of powers principle. In both these cases the Court can be seen relegating its judicial authority to determine the extent to which democratic values have been compromised by the legislature in creating this so called Twelfth Amendment Bill. Accordingly, it could be argued that the court relegated its authority to the “political appointees” by suggesting that they are better equipped to address the political issue such as deciding which municipality should fall within a given province. In this instance the Court put more reliance on the principles of law as laid down by legislation and in so doing it neglected participatory democracy as one of the core principles enshrined in the Constitution. Such reliance moves our courts to a more formalistic approach to administrative law adjudication. Formalism is described by Cora Hoexter:

“as a judicial tendency to rely on technical or mechanistic reasoning instead of substantive principles and to prefer formal reasons to moral, political, economic or other social consideration.”

In contrast to this kind of adjudication, Chief Justice Langa opposes as follows:

“The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or the technical readings of legislation as providing justifications for their decision. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.”²³³

From the content of the *Merafong* and the *Poverty Alleviation Network* cases it is submitted that the idea of a government that is based on the will of the people was not defended by the Court’s role in the maintenance of democratic values. The Court just

²³³ Chief Justice Langa “Transformative Constitutionalism” (2006) 17 Stellenbosch Law Review 353, (referred to further as Langa (2006)).

merely relegated this power to those that are in political power, to decide what the will of the people is.

However, the Court followed a different approach in the *Doctors for Life International* case, the *Matatiele* case and the *Moutse* case. The Court followed a more explicit application of constitutional values into the adjudicative process. Cockrell explains this explicit application of constitutional values into the adjudicative process as a transitional signal from a formal vision of law to a substantive vision of law in South Africa.²³⁴ The views on the role of public participation in law making processes as indicated by these judgements envisage a balance between the two elements of democracy. These cases show that the representatives of the electorate can create laws or take decisions on behalf of the people they represent, however, those laws or decisions must be tabled before the public for public opinion before being finally approved by the representatives. Furthermore, the opinions tabled by the public are not just for hearing purposes, but should be reflected in the final legislation or decision taken. Factors such as the views of the minority or majority, South African constitutional values and the effects of such policy or legislation on the people at the time when that law or decision is being made are very vital for consideration. Although these cases did not confirm that this is the kind of role envisaged by the Constitution for public participation in the law-making processes in South Africa, they all indicated that this kind of role shows some sensitivity towards the legitimate interest of the public, which interest is indeed protected by the Constitution. This interest is the will of the people, which represents a participatory democracy element as one of South Africa's constitutional values. It is submitted that this kind of administrative law adjudication justifies the decision of the Court to the ideas and values as envisaged by the Constitution. It ensures that South Africa's judges became more expressive about the factors that really have jurisprudential impact, such as moral, political, economic and any other social considerations and do not relegate their role in maintaining democratic values to the representatives of the electorate.

²³⁴ Cockrell (1996), at 3.

3.6 WHAT KIND OF EFFECT SHOULD BE BROUGHT ABOUT BY EFFECTIVE PUBLIC PARTICIPATION IN THE CREATION OF BY-LAWS?

When one looks at the role of public participation in the creation of by-laws as envisaged by the legislative provisions outlined in the Municipal Systems Act, it can be argued that there exists a conflict in relationship between the public and the government. On the one hand, the council and the officials of municipalities (the administrators) are delegated to deal with the creation of by-laws in favour of the government's political agenda. On the other hand, the officials are expected to facilitate the process of public participation and allow such participation to influence the outcome of the process. Kathe Callahan indicates that this kind of participation can be defined as conventional participation, in which, the administrators invite the public to participate when they deem it appropriate to do so and this is usually after the issues have been discussed and a decision has been made.²³⁵ Callahan further indicates that they typically select participants, limit access to the process, and determine the time, location and the format of the process which will definitely influence how the public participates.²³⁶ The involvement of the public in the process, according to Callahan, only serves to validate that the process of the administrators is open, representative and democratic.²³⁷ Section 12, 13, 15, 16, 17, 18, 21A and 21B of the Municipal Systems Act, do not define the role of public participation, instead, the legislators have made provisions detailing the mechanisms, processes and procedures that can be used to facilitate public participation in the creation of by-laws. The provisions clearly suggest that the views of the public should be considered when creating by-laws, however, they are silent on the issue of what is the role of public participation in the creation of by-laws or to the issue of what should happen when the views of the public have not been considered. Furthermore, these provisions do not even elaborate as to whether the public has a right to seek clarity on why their views were not reflected in a by-law or to seek clarity as to why their views were not considered? The Act is also silent on the

²³⁵ Callahan (2007), at 159.

²³⁶ Callahan (2007), at 159.

²³⁷ Callahan (2007), at 159.

remedies that are available to the public when the municipalities have failed to facilitate public participation in the law-making processes.

All the cases discussed above do not answer this question and courts as such have only created commented on what should be the role of public participation in the law-making process. It is submitted that if the courts had made a clear ruling regarding the role of public participation in the law-making process it would be easier to predict the kind of effect envisaged by that role. So far, various authors on this subject have emphasized on the need for the courts to expressly comment on the significance of public participation. As Phooko argues, if the public's wishes are properly considered by the legislature, such legislative bodies would be transparent about the processes through which the public's views are evaluated. The role of public participation as envisioned by the *Doctors for life international*, the *Matatiele* and the *Moutse* cases clearly requires that the views of the public be properly evaluated even if such views may not prevail. Reasons should be readily available as proof for the adoption or rejection of the public views. However, the rulings in the *Merafong* and the *Poverty Alleviation Network* cases do comment on the significance of proper consideration of public's views. The rulings in the latter two cases seem to put emphasis on ensuring that the legislatures comply with their duty to facilitate public participation in the law making process. It can be argued that mechanical compliance may lead to lack of transparency in the proper consideration of the public's views.

It is contended that this latter kind of outcome does not reflect the constitutional demands envisaged by South Africa's Constitution, which visualises the country as an open society based on the will of the people. Clearly, in such an instance, the will of the people should undergo proper evaluation. However, as indicated by the cases, perhaps one can argue that the will of the public is not properly evaluated, particularly where mechanical compliance is encouraged to fulfil the government's order of the day. In most instances when the public masses realise that the views are not properly considered, a conflict arises between the masses and the government authorities. As a result, the public become unsupportive of the process and the outcome. They further

tend to frustrate or challenge the decisions. This conflict makes it difficult for the government to implement or enforce laws created. In this regard, it is submitted that the effect of public participation in the creation of by-laws should be one that is supportive of the views of the public. Laws that are not reflective of the views of the public should properly be explained by government why those views were rejected so as to ensure that the people have sufficient knowledge on why a particular action was taken against or in their interest.²³⁸ It is also asserted, that if such an action is taken by the government, the people will be receptive to those laws and will also take ownership of those laws. In so doing, harmony will be maintained between the parties even in instances when the outcome of the process did not follow the views of the public. This should ensure that the political system will continue to uphold the political order without difficulty and frustration from the public as was the case during the apartheid system.

3.7 ASSESSING THE REASONABLENESS OF PUBLIC PARTICIPATION IN LEGISLATIVE MATTERS.

From the analysis made above, it is clear that the role and effect of public participation in the creation of municipal by-laws is of vital importance to ensuring that the laws created by the local government are better attuned to the needs and aspirations of the communities it affects. The court in the *Doctors for life case* conducted a further analysis into whether the legislature had acted reasonably in discharging its duty to facilitate public participation in the law-making processes. It must be noted that this thesis does not seek to address the issue of the appropriate degree of participation in the creation and enforcement of municipal by-laws. However, the approach which was used by the Constitutional Court to assess the reasonableness of public participation in legislative matters can be used in order to ascertain the reasons why municipalities are unable to effectively facilitate public participation in the creation of by-laws.

²³⁸ Phooko (2014), at 57.

The Court held that reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case.²³⁹ The Court also explained that the “context is all important”.²⁴⁰ As explained further by writers such as Jaap de Visser and Reuben Baatjies the test is not rigid, but it is rather a set of factors that jointly determine whether or not the municipality’s regulations, mechanisms and efforts towards community participation are reasonable.²⁴¹ In order to address this question, the courts took certain factors into account and further stated that in evaluating the reasonableness of Parliament’s conduct, it will:

*“[T]ake regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency and this means that the Court will pay particular attention to what Parliament considers to be appropriate public involvement.”*²⁴²

The Court indicated that factors such as the nature and importance of legislation and the intensity of its impact on the public are relevant to address this question. The Court went further to indicate that reasonableness also requires that appropriate attention be paid to practicalities such as time and expenses.²⁴³ These factors relate specifically to the efficiency of the law making process. However, the Court warned that the saving of money and time in itself does not justify inadequate opportunities for public involvement.²⁴⁴ The Court further stressed that the duty to facilitate public participation entails two aspects, the first being the duty to afford the opportunity for participation, and the second being the duty to ensure that communities are enabled to seize the

²³⁹ *Doctors for Life International* case, paras 1445A.

²⁴⁰ *Doctors for Life International* case, paras 1445A.

²⁴¹ J de Visser and R Baatjies ‘Community participation: the cornerstone of (Local) participatory democracy’ <http://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-9-issue-1-february-march/vol-9-no-1-community-participation.pdf> (accessed on the 14/11/2017 and referred to further as Visser & Baatjies accessed 14/11/2017)

²⁴² *Doctors for Life International* case, paras 1445C.

²⁴³ *Doctors for Life International* case, paras 1445 B-C.

²⁴⁴ *Doctors for Life International* case, paras 1445C.

opportunity.²⁴⁵ This means that the municipalities have a duty to ensure that their communities have the necessary information and effective opportunities to exercise their right to participate in matters of local government that affect them.

The factors raised above clearly show that there exist different ways to facilitate an appropriate degree of participation in the law making process and these ways are capable to bring forth immeasurable change in what Parliament considers to be appropriate public involvement in a given case. However, it is worth conceding that what remains important is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to have an adequate say about the creation and implementation of local by-laws. It is therefore submitted that the notion wherein municipalities strive to cut costs and save time to avoid effective facilitation of public participation in the process of the creation by-laws, should be dismissed as an excuse in courts.

3.8 CONCLUSION

Understanding the role and effect of public participation in the creation of by-laws should as clearly indicated by the arguments above assist South Africa's municipalities to create laws that have the support of the public. Laws that are created but that are not supported, create an impression that the government is a government that lacks credibility.²⁴⁶ As explained by Van As, the current situation relating to municipal by-laws is that they are put in place, crossed off the to do list, filed and put on a shelf waiting for implementation, which implementation never sees the light of the day.²⁴⁷ Simply put, the argument is that South Africa's by-laws are not properly implemented. However, once the public becomes aware of the role and effect of public participation in the creation of by-laws, they may take the initiative to effectively participate in the processes of by-law making within their municipalities. This awareness may also encourage follow up practice by the public, which could in turn prevent the tendency of shelving the created

²⁴⁵ Visser & Baatjies (accessed 14/11/2017).

²⁴⁶ Skjelten (2006), at 17.

²⁴⁷ Van As (2006), at 7.

by-laws. Indeed one of the purposes of the annually allocated funds to municipalities is to ensure proper training and creation of awareness within communities, on the role and effect of public participation in the creation of by-laws.²⁴⁸ Logically, this will contribute in building the capacity of the communities to actively participate in the affairs of the municipalities in which they live.

²⁴⁸ S 152 (2) of the Constitution.

CHAPTER 4

THE ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF MUNICIPAL BY-LAWS

4.1 INTRODUCTION

During the apartheid system, when the majority of the people became reluctant to abide by the laws put in place to govern them, the then government began to deploy poorly trained and often violent police in the townships in order to create an illusion of political stability in the country.²⁴⁹ The laws created by the then government contained criminal sanctions which resulted in many people getting arrested, prosecuted and convicted for merely unjust reasons.²⁵⁰ This enforcement of unjust laws by the apartheid government created a sense of none respect for the law in our society and some sense of scepticism towards the justice system.²⁵¹ Former president Thabo Mbeki records this sense of lawlessness “as a collapse in society of the moral wall which deterred citizens from crossing the boundary between right and wrong”.²⁵²

It is therefore important for our current government to understand that due to these injustices of the past, it now carries a bigger burden of removing this sense of lawlessness that prevails in our society. In support of this argument is the statement that was made by the former President Nelson Mandela when he stated the following during a morals summit in 1998:

²⁴⁹ Skjelten (2006), at 17; and O'Regan (2009), at 33.

²⁵⁰ O'Regan (2009), at 33.

²⁵¹ O'Regan (2009), at 33.

²⁵² Van As (2006), at 6.

*“The society we are seeking to create is not one in which we are all whistle blowers and crime-busters fighting the symptoms of a moral crisis, rather it is one in which such crisis does not exist”.*²⁵³

Kate O’Regan further attests that for South Africa to build a society that respects the law and that has confidence in the justice system we need laws and law enforcement processes that can earn the respect from the society.²⁵⁴ She attests further that from this respect, confidence in justice will grow.²⁵⁵ Therefore the local government as government closest to the people is also burdened with this duty of removing the sense of lawlessness that prevails in our society.

Mzi Memeza explains that the rationale behind by-law enforcement emanates from the need to control people’s behaviour, and he further attests that local government has a duty to legislate on the safety and comfort of their communities within a municipal area in order to ensure that certain kinds of anti-social behaviour are prohibited and punished if the prohibitions are not observed.²⁵⁶ South Africa’s municipalities are therefore required to enforce laws that will guard against anti-social behaviours amongst its community members.²⁵⁷ As indicated in the previous chapters, municipalities are by law allowed to create and enforce by-laws within the areas that fall under their jurisdiction.²⁵⁸ However, the manner in which they create and enforce these laws must also guard against the injustices of the past as illustrated above. The only way in which they can do this, as put perfectly by O’Regan above, is by creating laws and by having law enforcement processes that are respected by their communities.

²⁵³ Van As (2006), at 6.

²⁵⁴ O’Regan (2009), at 33.

²⁵⁵ O’Regan (2009), at 33.

²⁵⁶ Memeza (2000), at 4.

²⁵⁷ Memeza (2000), at 4.

²⁵⁸ The Municipal Systems Act s 3 (m).

4.2 MUNICIPAL BY-LAW ENFORCEMENT PROCESS

When a person contravenes a by-law there are certain actions that can be taken against his or her offence, such as:

- “Giving them a notice for the infringement;
- A notice can result in the issuing of a fine if not respected;
- Failure to pay a fine, would result in summons being served;
- Failure to respond to summons requesting the offender to appear before a court would result in the issuing of a warrant of arrest by the Magistrates Court.”²⁵⁹

The abovementioned processes can only be properly implemented when the public is receptive to the laws being enforced on them.²⁶⁰ As history has shown, the public will only be receptive of laws when they have been involved in the process of making them.²⁶¹ Not only should they be involved in the process, but the process must further allow them an opportunity to give their input about the laws to be created; and the input given should be able to form part of the final draft of those laws, taking into consideration the seriousness of the effect that those laws might have on their lives.²⁶² Looking at the abovementioned process for the implementation of by-laws, a clear distinction can be made between it and the process of making by-laws (see chapter 3, paragraph 3.2). It must be noted that this chapter seeks to address an inquisitive question as to what will be a role and effect of public participation in the enforcement of municipal by-laws in cases where municipal officials were also required by-law to facilitate public participation during the process of implementing by-laws.

4.3 DISTINGUISHING THE PROCESS OF MAKING A BY-LAW FROM THAT OF IMPLEMENTING A BY-LAW.

²⁵⁹ Memeza (2000), at 4.

²⁶⁰ O’Regan (2009), at 33.

²⁶¹ Callahan (2007), at 26.

²⁶² Phooko (2014), at 56.

As indicated in chapter 3, the municipal council is empowered by the Municipal Systems Act to adopt by-laws. What this means in simple English is that the municipal council of a municipality (whether it be the City of Tshwane, City of Johannesburg, City of Cape Town etc.) will draft a by-law, debate it in a council meeting and vote for its adoption. If the majority of the council members agree with the adoption of the by-law, the by-law will be passed as law for that municipal area and the community members within that area must abide by that law. However, the fact that municipal councils can pass by-laws as required by the Municipal Systems Act does not automatically indicate that the by-laws passed will automatically self-enforce. There is a need for some members of the society to act in an organised manner to enforce the law by discovering, deterring, rehabilitating or punishing people who violate the rules and norms governing that society. According to the dictionary, the term law enforcement can be used to refer to a task typically carried out by the police or another law enforcement agency. In most South African municipalities, by-laws are enforced by the metro police or law enforcement officials (also called as Peace Keepers).

Many writers are advocating for public participation in the law-making process, however, there is rarely any writer advocating public participation in the enforcement of laws. In this regard, it should be noted that there exists definite benefit in advocating public participation in the enforcement of by-laws. It is suggested that an investigation into the role and effect of public participation in the enforcement of by-laws could assist in educating our communities about laws and the dangers of a lawlessness society. It will further stimulate, encourage and empower them to actively assist law enforcement officers in enforcing by-laws fairly. Below, two cases are critically evaluated to highlight the role and effect of public participation in the enforcement of by-laws and its importance for the local government.

4.4 A CRITICAL ANALYSIS ON WHAT SHOULD BE THE ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS

4.4.1 APPLICABLE CASE LAW

4.4.1.1 CITY OF CAPE TOWN V HENDRICKS AND ANOTHER

In the *City of Cape Town v Hendricks and Another* case,²⁶³ a law enforcement official of the City of Cape Town municipality issued a notice to street traders that had erected structures in violation of the city by-laws.²⁶⁴ The traders were instructed to remove the structures, failing which they would be fined and the structures would be removed by the municipality at their expense.²⁶⁵ When serving this notice the law enforcement officer informed the respondents that the notices did not prohibit the respondents from trading on the property and that the respondents could erect temporary structures at the beginning of the day, but that they would have to dismantle them at the end each day.²⁶⁶ According to the Court it should have been clear to the respondents that they would be entitled to erect such structures only if they have received the municipality's permission.²⁶⁷ However, after receiving the notice, the respondents did not seek permission from the municipality. Instead they launched a judicial review proceeding against the notice and they urgently sought relief thereof. The High Court granted a *rule nisi* interdict which restrained the municipality from removing their structures or interfering with their right to trade from those structures.²⁶⁸ Both orders were granted in the absence of the municipality.

The Court a quo held that the notices were issued and served after a decision that had been taken by the municipality, and as such, the notices themselves qualified as a decision.²⁶⁹ It contended that the decisions threatened the respondents right to trade and also that the decisions constituted administrative action and were reviewable.²⁷⁰ The Court further held that the municipality was obliged to afford the respondents sufficient opportunity to make representations prior to the issue of the notice and in this

²⁶³ [2012] ZASCA 90; 2012 (6) SA 492 (SCA) (referred to further as the *City of Town* case).

²⁶⁴ *City of Cape Town* case, para 4, at 3.

²⁶⁵ *City of Cape Town* case, para 4, at 3.

²⁶⁶ *City of Cape Town* case, para 4, at 3.

²⁶⁷ *City of Cape Town* case, para 10, at 5.

²⁶⁸ *City of Cape Town* case, para 6, at 4.

²⁶⁹ *City of Cape Town* case, para 9, at 4.

²⁷⁰ *City of Cape Town* case, para 9, at 4.

instance the municipality had not done so.²⁷¹ The Court found that decisions violated the respondents' legitimate right to operate their businesses.²⁷² But on appeal, Southwood AJA of the Supreme Court of Appeal held that the notice did not constitute administrative action.²⁷³ He further pronounced that by issuing and delivering the notices to the respondents, the municipality did not take a decision that the respondents are obliged to remove and rebuild their business structures daily on their trading sites, and that the notices cannot reasonably be construed to mean that.²⁷⁴ The Court further held that the notice did not have any direct and immediate consequences for the respondents. It was just a warning or a notification that the by-laws were going to be enforced and it did not have any external or direct effect.²⁷⁵

4.4.1.2 THE SOUTH AFRICAN INFORMAL TRADERS FORUM V THE CITY OF JOHANNESBURG

In the *South African Informal Traders Forum v The City of Johannesburg* case,²⁷⁶ the South African Informal Traders Forum brought an application against an order of the South Gauteng High Court, Johannesburg, in terms of which the Forum's application for interim relief was struck off the urgent roll. The informal traders who have been trading in the city of Johannesburg for several years, alleged that they had the necessary authorisation to trade informally in terms of the city's informal trading by-laws.²⁷⁷ However, during October 2013 they were removed from their trading locations and had their goods impounded by city officials.²⁷⁸ They were apparently told that they had been removed as part of "Operation Clean Sweep" with the aim of ensuring that only traders legally entitled to trade in the inner city do so.²⁷⁹ However, in implementing "Operation Clean Sweep" the city did not bother to distinguish between the traders who have

²⁷¹ *City of Cape Town* case, para 9, at 4.

²⁷² *City of Cape Town* case, para 9, at 4.

²⁷³ *City of Cape Town* case, para 10, at 5.

²⁷⁴ *City of Cape Town* case, para 10, at 5.

²⁷⁵ *City of Cape Town* case, para 11, at 5.

²⁷⁶ 2014 (6) BCLR 726 (CC), (referred to further as the *South African Informal Traders Forum* case).

²⁷⁷ *South African Informal Traders Forum* case, para 4, at 4.

²⁷⁸ *South African Informal Traders Forum* case, para 6, at 5.

²⁷⁹ *South African Informal Traders Forum* case, para 7, at 6.

always been doing business legally and other informal traders who have not.²⁸⁰ Faced with indiscriminate evictions, the applicants opened discussions with the city respondents to negotiate a return to their lawful trading activities.²⁸¹ During the negotiations the city and the applicants agreed to a process of “verification”.²⁸² This meant that all the traders would submit to a process in which their rights to trade their goods would be verified and they would be “re registered”.²⁸³ The parties further agreed that the traders would be allowed to return to their trading stalls once they had been “verified” as lawful traders and had “re registered” themselves.²⁸⁴ However, after the applicants had been verified as lawful traders and after they had re-registered themselves, they were not permitted to return to their stalls.²⁸⁵ Those who did so were again forcibly removed by metro police who also dismantled the stalls previously used by the traders.²⁸⁶

After the removal by the metro police, the applicants saw a need to again engage the city in a further attempt to give effect to their initial agreement.²⁸⁷ During the following negotiation it became clear to the applicants that the “Operation Clean Sweep” was not an attempt to verify and re-register the lawful informal traders in the inner city.²⁸⁸ Instead, it was an initiative to remove them permanently from their trading stalls and relocate some or all of them to unknown “alternative designated areas” and prohibit them from trading in the interim.²⁸⁹ Since the High Court refused to grant them the interim order and struck the matter from the urgent roll for lack of urgency, the applicants thereafter brought an urgent application for leave to appeal against the order

²⁸⁰ *South African Informal Traders Forum case*, para 7, at 6.

²⁸¹ *South African Informal Traders Forum case*, para 8, at 6.

²⁸² *South African Informal Traders Forum case*, para 8, at 6.

²⁸³ *South African Informal Traders Forum case*, para 8, at 6.

²⁸⁴ *South African Informal Traders Forum case*, para 8, at 6.

²⁸⁵ *South African Informal Traders Forum case*, para 9, at 7.

²⁸⁶ *South African Informal Traders Forum case*, para 9, at 7.

²⁸⁷ *South African Informal Traders Forum case*, para 10, at 7.

²⁸⁸ *South African Informal Traders Forum case*, para 10, at 7.

²⁸⁹ *South African Informal Traders Forum case*, para 10, at 7.

of the High Court. In this Court, the applicants argued that they have suffered, and continued to suffer, serious and irreparable harm as a result of Operation Clean Sweep.²⁹⁰ They further submitted that if they are not granted the interim relief they sought, their deprivation will become more severe.²⁹¹ They further contended that the effect of the High Court's order was to breach their rights in terms of section 34 of the Constitution which guarantees access to court.²⁹² Finally, the applicants argued that the interim relief they sought was narrow, it would not be prejudicial to the city and would do no more than place them in a position to continue with their trading until the full review of the lawfulness of the city's conduct is determined.²⁹³

However, the respondents opposed this application and argued that it was not in the interests of justice for the Court, as the final appellate Court in the country, to entertain a direct appeal of a High Court order that is discretionary and interlocutory, and has no final effect.²⁹⁴ Although the respondents accepted that the applicants may be suffering a loss of income and financial prejudice and insecurity as a result of being prevented from trading, they argued that the prejudice was temporary, and was being steadily alleviated upon the verification and reallocation of traders' locations.²⁹⁵ In his judgement, Justice Dikgang Moseneke, condemned "Operation Clean Sweep" as an act of "humiliation and degradation", which rendered thousands of people, and their children, destitute.²⁹⁶ The Court expressed concern that the city had described the eviction of several thousand informal traders as "convenient" and instead characterised "Operation Clean Sweep" as "indiscriminate" and "flawed". The Constitutional Court held that the city had "gone about achieving its objectives in flagrant disregard of the traders' rights".²⁹⁷ The Court

²⁹⁰ *South African Informal Traders Forum case*, para 11, at 8.

²⁹¹ *South African Informal Traders Forum case*, para 11, at 8.

²⁹² *South African Informal Traders Forum case*, para 11, at 8.

²⁹³ *South African Informal Traders Forum case*, para 12, at 8.

²⁹⁴ *South African Informal Traders Forum case*, para 14, at 9.

²⁹⁵ *South African Informal Traders Forum case*, para 14, at 9.

²⁹⁶ *South African Informal Traders Forum case*, para 31, at 17.

²⁹⁷ *South African Informal Traders Forum case*, para 31, at 17.

further held that the city did not comply with its own by-law when it evicted the legal traders in enforcing the project “Operation Clean Sweep”.²⁹⁸ It further did not comply with the Business Act when it failed to follow the prescribed steps for designate a trading area for informal trading as envisaged by the provisions of the Act.²⁹⁹ The Court contended that when men and women in government disregard the law, their conduct may very well cause much hardship, particularly for the vulnerable amongst us.³⁰⁰ Justice Moseneke quoted the following words of former President Nelson Mandela:

*“Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order”.*³⁰¹

Against the aforementioned background, the Constitutional Court granted the applicants leave to appeal on the basis that it was in the interests of justice to do so, holding that a refusal to grant leave to appeal would cause the traders to suffer irreparable harm.³⁰² According to the Court the undisputed evidence showed that the applicants and their families’ livelihood depended on their trading in the inner city.³⁰³ It contended that at the time of the hearing, they had been rendered destitute and unable to provide for their families for over a month and seeing that an application for leave to appeal to the High Court would have been heard in February 2014 at the very earliest, the traders would not have been able to provide for their families until that time.³⁰⁴ The Court held that the

²⁹⁸ South African Informal Traders Forum case, para 33, at 18.

²⁹⁹ South African Informal Traders Forum case, para 27, at 15.

³⁰⁰ South African Informal Traders Forum case, para 3, at 4.

³⁰¹ South African Informal Traders Forum case, para 3, at 4.

³⁰² South African Informal Traders Forum case, para 21, at 13.

³⁰³ South African Informal Traders Forum case, para 29, at 16.

³⁰⁴ South African Informal Traders Forum case, para 29, at 16.

city's conduct impaired the dignity of the traders and their children and had a direct and ongoing adverse effect on their rights to basic nutrition, shelter and basic healthcare services.³⁰⁵ The Court reasoned that, if allowing the traders to continue trading while the verification process was underway were to cause any prejudice to the residents of the City, such prejudice would have been temporary.³⁰⁶ The Court held that the immediate and irreversible harm that the traders were facing rendered their application manifestly urgent.³⁰⁷

4.5 WHAT THEN CAN BE LEARNED AND WHAT SHOULD BE THE ROLE OF PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS?

Philosophers such as Thomas Hobbes are of the opinion that in a place where laws do not exist, insecurity and chaos are the norm.³⁰⁸ He is of the view that civilization cannot occur in a world that is lawless.³⁰⁹ However, others also highlight that law is not absolute and it can be amended or revised based on societal needs.³¹⁰ This means that laws to a large extent depend on societal values.³¹¹ It is also an indication that laws cannot be effective if the society does not enforce and obey the laws.³¹² Law by definition means a set of rules that are prescribed by a given authority with an objective

³⁰⁵ *South African Informal Traders Forum case*, para 31, at 17.

³⁰⁶ *South African Informal Traders Forum case*, para 32, at 17.

³⁰⁷ *South African Informal Traders Forum case*, para 35–38, at 19–20.

³⁰⁸ T Hobbes *Leviathan* 1998, at 242 (referred to further as Hobbes (1998)). In his own words Hobbes states that: "For the use of laws (which are but rules authorized) is not to bind the people from all voluntary actions, but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as hedges are set, not to stop travellers, but to keep them in the way".

³⁰⁹ Premium essay.net, "The importance of obeying laws and commands", (<http://www.premiumessays.net>), and see also Hobbes (1998), 256. Accessed 04 June 2017.

³¹⁰ See (<http://www.premiumessays.net>). Accessed 04 June 2017.

³¹¹ See (<http://www.premiumessays.net>). Accessed 04 June 2017.

³¹² Hobbes (1998), 242. As stated clearly by Hobbes "A good law is that which is needful, for the good of the people, and withal perspicuous and therefore a law that is not needful, having not the true end of a law, is not good".

of maintaining law, order and peace in the society.³¹³ The main purpose of laws and commands is based on their ability to maintain peace and order in the society.³¹⁴

However, in the *City of Cape Town* case, the manner in which the street traders resorted towards the notice issued by the City of Cape Town law enforcement official clearly shows a sense of confusion and uncertainty about their conduct (street trading under a none designated area for trading) which has been perceived as a violation of a law by the City. Analysing their conduct, one could argue that they were puzzled that such a law exists. Their aim, for referring this matter to the high court, could be perceived as a way to ensure that the municipality is stopped from making a decision that seemed to be unfair to them. From their perspective, they seem to understand the notice to be a final decision by the municipality, stopping them from trading in totality. The High Court agreed with them.³¹⁵ Nonetheless, Judge Southwood of the Supreme Court of Appeal disagreed with their perspective and held that the notices could not reasonably be construed to mean that their trade will be barred altogether.³¹⁶ According to the Judge, it was just a warning or a notification that the by-law was going to be enforced.³¹⁷ On the other hand, one could ask whether he would have arrived at the same conclusion had the Court enquired if they were aware of the by-law that gave rise to the notice, and they answered him negatively. Taking into consideration the constitutional obligation of the municipality to encourage the involvement of communities and community organisations in the matters of local government. Perhaps a different approach by Judge Southwood would have been a response similar to that of the high court (the Court a quo in the matter). One may suggest that generally acceptable response would have been that the municipality is obliged to afford the respondent sufficient opportunity to make a representation prior to the issuing of the

³¹³ See (<http://www.premiumessays.net>) and F Fukuyama, *The origins of political order*, 2011, at 245 (referred to further as Fukuyama (2011)). Accessed 04 June 2017.

³¹⁴ Fukuyama (2011), at 250 and see also Hobbes (1998), at 242.

³¹⁵ *City of Town* case, para 9, at 4.

³¹⁶ *City of Town* case, para 10, at 5.

³¹⁷ *City of Town* case, para 11, at 5.

notice. This argument could be taken a step further though; by arguing that, after the municipality has made an investigation that a by-law has been contravened it should make a further investigation on whether those assumed to have contravened the by-law are aware of that by-law, and its implications to them as the affected parties prior to issuing a notice of contravention.

Such an approach is indeed supported by the Constitution and can be seen unfolding in the real-life situation in the *South African Informal Traders Forum case*.³¹⁸ In this case the municipality saw a need to enforce its by-law on informal trading due to the “prejudice suffered by residents of the city who according to the municipality no longer have access to ATMs, walking banks, cinemas, departmental stores, restaurants and other amenities because of criminals that hides among the illegal hawkers”.³¹⁹ However, the city forgot that they were those that indeed had permission to trade. The municipality in its initiative to promote a safe and healthy environment for its community implemented “Operation Clean Sweep” in order to ensure the enforcement of its informal trading by-law within the City. However, the manner in which it implemented its by-law was questioned by the Constitutional Court on the basis of its unfairness to the constitutional rights of the traders to be able to provide basic nutrition, shelter and healthcare services to themselves and their families. These traders took it upon themselves to engage the City in good faith on this unfairness before taking the matter to the courts. However, the City during those engagements clearly did not negotiate with the traders in good faith. It merely concealed the truth about the initial plan for implementing “Operation Clean Sweep”. From the facts of the Constitutional Court’s judgement it is clear that the City was aware that “Operation Clean Sweep” was an initiative to remove all informal traders (whether with permission or no permission to trade) permanently from their stalls and relocate them to alternative designated area

³¹⁸ S 152(1)(e) of the Constitution compels municipality to involve its communities and community organisations in matters of local government and since by –laws are a matter of local government; the municipality should have consulted with the two members of the society about their contravention before issuing a notice.

³¹⁹ *South African Informal Traders Forum case*, para 32, at 27.

(not yet known by the City).³²⁰ This meant that traders would be prohibited to trade in the meantime while this process was unfolding.³²¹ However, this was never mentioned to the traders in their first meeting with the City.³²² The traders, not knowing, agreed to the verification process on the basis that they will continue to trade after the verification process was finalised.³²³ However, it transpired at a later stage of the engagements that the traders will not continue to trade as agreed in the first meeting conducted before the verification process.³²⁴

When looking at the whole process that unfolded after the implementation of “Operation Clean Sweep” it could be argued that some form of participation to the implementation of the informal trading by-law of the City was facilitated by the municipality. Writers such as Callahan view this kind of participation as a conventional participation.³²⁵ They define this kind of participation as a form of participation in which public managers, through the administrative structures and procedures that are in place, control the ability of the public to influence the agenda and the process of engagement.³²⁶ This form of participation gives the administrators the authority to control and orchestrate the process so that the citizens are invited to the table when the manager deems it appropriate, and this is usually when the issues have been framed and decisions have been made.³²⁷ It further reinforces the importance of administrators and their centrality to the issue, yet opening the process to the public to allow the administrator to present the process as being open, representative and democratic.³²⁸ Callahan further argues that this kind of participation is typically ineffective and often leads to conflict.³²⁹ She

³²⁰ *South African Informal Traders Forum case*, para 10, at 7.

³²¹ *South African Informal Traders Forum case*, para 8, at 6–7.

³²² *South African Informal Traders Forum case*, para 8, at 6–7.

³²³ *South African Informal Traders Forum case*, para 8, at 6–7.

³²⁴ *South African Informal Traders Forum case*, para 10, at 7.

³²⁵ Callahan (2007), at 158.

³²⁶ Callahan (2007), at 158.

³²⁷ Callahan (2007), at 159.

³²⁸ Callahan (2007), at 159.

³²⁹ Callahan (2007), at 159.

elaborates that due to the fact that the participation happens late in the process, after issues have been framed, the agenda set, and most decisions made, a sense of frustration and distrust can develop on both sides.³³⁰ She indicates further that citizens can become reactive and judgemental, often critical and unsupportive of the process and the outcome.³³¹ While public administrators may be parochial and territorial; reluctant to share information, they often choose to rely on their professional and technical expertise and deny the citizens a voice in the process.³³² As a result, citizens may attempt to block and challenge decisions, while openly criticizing and shaming the public officials.³³³ And on the other end, the public officials may choose to habitually exclude citizens in the process, citing as their reason the confrontational attitudes of citizens.³³⁴

Taking into consideration the above arguments raised by Callahan it could be argued that when the City of Johannesburg engaged with the informal trader's organisation after it had seen that its decision to implement its informal trading by-law brought about indiscriminate evictions amongst the informal traders in the city, it was indeed facilitating public participation in its by-law implementation process. It seems that the role of public participation envisaged by the city in this regard was to ensure that its implementation process was seen as being open, representative and democratic. However, since the decision had already been made by the City to evict all informal traders including those that had permission to trade, it was impossible for the City to accommodate the wishes of the traders with permission at this late stage of the process. In order for the city to ensure that the informal traders with permission are supportive of the process, through its officials, continued to engage with the informal traders in bad faith, thereby misleading the informal traders to believe that those with permission will continue to

³³⁰ Callahan (2007), at 159.

³³¹ Callahan (2007), at 159.

³³² Callahan (2007), at 159.

³³³ Callahan (2007), at 159.

³³⁴ Callahan (2007), at 159.

trade after the verification process had been concluded. Since the outcome of the process did not reflect the wishes of the informal traders, conflict arose.

In addressing this conflict, Justice Moseneke supported the view of many writers that are of the opinion that the outcome of any process of public participation should be reflective of the views that were initially raised by the public during the public participation process.³³⁵ In his judgement, Justice Moseneke confirmed that the City of Johannesburg was in breach of its own by-laws which initially gave permission to some informal traders to trade within the City.³³⁶ The Court confirmed that the manner in which “Operation Clean Sweep” was used in order to enforce the informal traders by-law within the City was humiliating and degrading and it further rendered thousands of people and their children destitute.³³⁷ One could argue that this prejudice raised by the implementation of the by-law was initially raised by the traders during their negotiations with the city, however it was disregarded by the city. A more logical approach supported by writers such as Phooko would have been for the City not to disregard these views but to consider them, thereby ensuring that the outcome was influenced by the people’s demand. In such an instance, the role of public participation would be to ensure that the outcome of the implementation is reflective of the wishes of its community members thereby ensuring a positive outcome. In this instance, the city would not have been faced with addressing a conflict in a court of law, but could have resolved this conflict during the public participation process.

4.6 WHAT KIND OF EFFECT SHOULD BE BROUGHT ABOUT BY AN EFFECTIVE PUBLIC PARTICIPATION IN THE ENFORCEMENT OF BY-LAWS?

As indicated above, Phooko argues that some tension exist between participatory democracy and representative democracy in cases where the public views have been

³³⁵ Callahan (2007), 157; Phooko (2014) 58; Skjeltlen (2006), 31 and Mzimakwe (2010), 504.

³³⁶ *South African Informal Traders Forum case*, para 33, at 18.

³³⁷ *South African Informal Traders Forum case*, para 31, at 17.

considered but not reflected in the outcome.³³⁸ He is of the view that there should be a provision in legislation allowing the public to seek clarity on why their views are not reflected, or if their views were at all considered and had any influence in the process.³³⁹ His further view is that if the legislature had indeed considered the public's wishes the outcome thereof would be influenced by the people's demands and that an otherwise negative outcome would show that public participation in the law-making process is a procedural matter and has no substantive value.³⁴⁰ Some writers confirm this, by arguing that the outcome should be informed by the wishes of the public.³⁴¹ Phooko takes this view even further by recommending that in instances where the views were considered but in the end were totally disregarded, there must be an avenue for explanation of why a particular route was chosen and that such a process should be mandatory. He suggests that the courts in such an instance should come into play as a matter of last resort.³⁴² He is further of the view that such a situation will enable people to have sufficient knowledge on why a particular action was taken against or in their interest, and as such, it will ensure that the representatives are accountable to their electorates.³⁴³

Taking into consideration the views outline above, a more logical approach to defining the kind of effect that should be brought about by an effective public participation in the enforcement of by-laws would be that the outcome in most instances should be positive. Put more clearly, one should come to the conclusion that the effect must be positive. Any negative outcome should be explained by the representatives of the electorate and the explanation must give people sufficient knowledge on why a particular action was taken against or in their interest. The representatives cannot just merely explain for the sake of explaining. They must give information to the people that will assist them to

³³⁸ Phooko (2014), at 58.

³³⁹ Phooko (2014), at 58.

³⁴⁰ Phooko (2014), at 57.

³⁴¹ Phooko (2014), at 58.

³⁴² Phooko (2014), at 58.

³⁴³ Phooko (2014), at 59.

make an informed decision in supporting or not supporting the decision taken by their representatives in their favour or against them. The *South African Informal Traders Forum case* clearly confirms Callahan's argument that when officials in government facilitate public participation for the sake of presenting the process as being open, representative and democratic, they create a sense of frustration and distrust amongst the communities which may cause them to become reactive and judgemental, often critical and unsupportive of the process and the outcome.³⁴⁴ The results of this, is that the public participation process becomes ineffective and this can lead to conflict as clearly shown by the analysis of the abovementioned case.

However, in instances where the officials understand that the effect of public participation, whether in the creation or enforcement of by-laws must in most instances be positive, there is no doubt that they will indeed follow a more logical approach. This logical approach will be that, once faced with a negative outcome they would continue to engage the community in order to give an explanation why a particular route was chosen against their interest. In so doing the communities will be informed about the problems that the officials are encountered with in order to ensure that the informal trading by-law is respected by all citizens in the City and at the same time the officials will be able to understand the wishes of the public thereby ensuring that those wishes become part of the decision to be taken. In such instances the officials must be able to share information with the public about plans they have made or that they are about to make in order to implement the by-law so as to give the public a chance to comment and provide suggestions that will also include their wishes into the official plans. In so doing, a conflict might be avoided. However, when the officials become reluctant to share information about their plans they make the public not trust them and in most instances the public ends up going to the courts in order to seek permission for their voices to be heard.

South Africa's courts should not be used as platforms for facilitating public participation because officials in the local government have failed to effectively facilitate public participation in their municipalities. The process of facilitating public participation must

³⁴⁴ Callahan (2007), at 159.

continue until such time that a positive effect can be seen by both parties. In such instances the public officials have to share their power with the public and relinquish some of the control they have over the process and the outcome of the process in order to ensure a positive effect for the public at large. Some writers are of the opinion that this view is politically naïve and that one cannot expect those in power to share their power with those who do not have the power.³⁴⁵ Naïve or not naïve, this view is supported by South Africa's Constitution which proclaims the government as based on the will of the people and not only on the will of its representatives.³⁴⁶ Therefore the wishes of the public must be respected by those who have elected them into governance. Indeed, in such circumstances power will have to be shared in order to bring a positive outcome. This argument could be taken a step further by pointing out that the City of Johannesburg officials had failed to effectively facilitate public participation in its by-law enforcement process due to the fact that the outcome of their process did not bring about any positive effect for the informal traders that had permission before to trade in the City.

4.7 CONCLUSION

When meaningful opportunities are created for the public to be able to raise their concerns in by-law enforcement processes, it ensures that they (the public) can play an active role in shaping public policy and framing solutions with public officials. This collaborative participation gives the public an opportunity to influence both the process and outcome of by-law enforcement within their municipalities. From the analysis of the two cases above it can be argued that the current enforcement process as outlined in paragraph 5.2 above does not allow the public this opportunity and as such the municipalities within South Africa find themselves with by-laws that are often not regarded as legitimate due to the fact that the government officials neglected to ask the public what they thought would work best for them or what was in their best interest before implementing the by-law.

³⁴⁵ Callahan (2007), at 159.

³⁴⁶ See the preamble of the Constitution of the Republic of South Africa.

Indeed, writers such as Callahan and Phooko have confirmed that when government officials tend to think that they know it all about the needs of the public, they create a conflict-ridden relationship between them and the public.³⁴⁷ Because in such instances, the government officials tend to use public participation as a tool to gain public support on specific issues rather than as a tool to build trust and increase accountability within the communities.³⁴⁸ One argument that can be safely made is that the public has public participation as an effective tool to hold the administrative authorities accountable.³⁴⁹ As such their right to public participation based on the democratic values of freedom, equality and individual rights becomes compromised. In such instances, a conflict arises between participatory democracy and representative democracy. However, as indicated by some writers a balance will have to be sought between these two competing interests.³⁵⁰ From the analysis above, it however seems as if the only way in which this balance can be reached is by ensuring that local government officials give the public a fair chance to influence the process and the outcome of by-law enforcement. The important fact at the end of the implementation of the by-law enforcement process is that the by-law being enforced must be known, understood and respected by all and this is the vision that the principle of public participation seeks to achieve.

³⁴⁷ Callahan (2007), at 159; Phooko (2014), at 58.

³⁴⁸ Callahan (2007), at 159; Phooko (2014), at 58.

³⁴⁹ Callahan (2007), at 159.

³⁵⁰ Phooko (2014), at 59; and Nyati (2008), at 109.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

Within a system of parliamentary sovereignty and in the absence of a justiciable Bill of Rights, the control of public power by the courts was done through judicial review, in essence by applying common-law constitutional principles.³⁵¹ Explained in detail by Chaskalson, it was an era in which:

“The exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what the courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.”³⁵²

The pre-democratic legislature used its sovereign power to confer wide and invasive discretionary powers on government officials and since the original legislation could not be attacked except on narrow procedural grounds, administrative law review was virtually the only method for challenging the invasion of rights.³⁵³ But, as indicated by Chaskalson above, this method could not completely protect the fundamental rights of the general public. However, after the adoption of the Constitution in 1996, a system of checks and balances was entrenched by the Constitution. According to Ntlama, this new system gives the general public a legislative and executive authority that is

³⁵¹ C Hoexter “The Principles of Legality in South African Administrative Law” (2004), at 4 *Macquarie Law Journal* 165, (referred to further as Hoexter (2004)).

³⁵² *In re: Ex Parte President of the Republic of South Africa and Others*, 2000 (3) BCLR (CC) 241, para 37.

³⁵³ Hoexter (2004), at 165.

accountable to them, subject to judicial review by an independent judiciary.³⁵⁴ She further contends that the system of checks and balances affirms the limited power of legislative and executive authorities, including the judiciary, which is confined within the constraints of constitutional values and principles.³⁵⁵ During this period South Africa saw a raise in constitutional transformation, an era in which the invasion of rights is protected by the Constitution. This constitutional transformation is what Etienne Mureinik elaborated as the shift towards a culture of justification, in which every exercise of power is expected to be justified.³⁵⁶ He argued that within such a culture, constitutional rights are standards of justification – standards against which to measure the justification of decisions challenged under them.³⁵⁷ This notion was further developed by Alfred Cockrell in his argument that:

“[T]he explicit intrusion of constitutional values into the adjudicative process signals a transition from the formal vision of law” to the substantive vision of law in South Africa in terms of which judges are required to engage with substantive reasons in the form of moral and political values as opposed to the formal reasons that characterise the pre-constitutional adjudication.”³⁵⁸

Taking the above arguments into consideration one would expect a totally different way of doing things from the post-democratic legislatures when it comes to discretionary authority. Simply put, one would logically expect the post-democratic legislatures to avoid conferring wide and invasive discretionary power on government officials. However, it seems as if our current legislatures are still continuing with the old style of law making and enforcement. When one looks at section 17(1)(c) of the Municipal Systems Act, it becomes clear that local governments have some discretion in

³⁵⁴ N Ntlama, “The “deference” of judicial authority to the state” (2012) *Obiter Journal*, 1, (referred to further as Ntlama (2012)).

³⁵⁵ Ntlama (2012), at 2.

³⁵⁶ E Mureinik “Abridge to where? Introducing the interim bill of rights” (1994) 10 *South Africa Journal on Human Rights* 31 (referred to further as Mureinik (1994)).

³⁵⁷ Mureinik (1994), at 31–33.

³⁵⁸ A Cockrell “Rainbow jurisprudence” 1996, 12 *South African Journal on Human Rights* 1,3 (referred to further as Cockrell (1996)).

determining how best to involve communities in their decision-making. Although local government's discretion is not as considerable as that of parliament and provincial legislatures due to the fact that the Municipal Systems Act has detailed regulations on how best local government can involve communities in decision-making in their municipalities.³⁵⁹ According Steyler and De Visser, even if a municipality has performed its duty to facilitate public participation, there still exist the question of whether there has been the degree of public involvement that is required by the Constitution.³⁶⁰ The courts can review the municipality's performance based on this ground. As indicated by Steyler and De Visser it is easy for the courts to measure compliance with the formal and procedural requirements but more difficult to answer the question of whether there has been substantive compliance.³⁶¹ In this regard, it is submitted that it will be easier for the courts to answer the question of substantive compliance if they could determine what the role of public participation is, according to the constraints of the country's constitutional values and principles.

5.2 THE ENVISAGED ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE CREATION AND ENFORCEMENT OF MUNICIPAL BY-LAWS

Supporting the arguments raised by sources and commentators above, it is submitted that local government, as legislatures, can easily prove their compliance with the formal and procedural requirements to facilitate public participation in the creation and enforcement of municipal by-laws.³⁶² However, as case law has revealed in chapter 3 and 4 of this thesis, the courts are reluctant to set a precedent on the issue of substantive compliance. Clearly, what our society needs is more defined from the Constitutional Court as to what should be the role and effect of public participation in the creation of laws in South African legal system. Yet, our society as clearly noted from cases elaborated in chapter 3 and 4 has been given different indications on this matter.

³⁵⁹ Steyler and De Visser (2007), at 6–16.

³⁶⁰ Steyler and De Visser (2007), at 6–6.

³⁶¹ Steyler and De Visser (2007), at 6–15.

³⁶² Steyler and De Visser (2007), at 6–15.

Some judges of the Constitutional Court gave views that supported the current nature of our constitutional democracy and some gave views that are contrary to the current nature of our constitutional democracy.

Writers such as Ntlama highlight that, the affirmation of the values and principles of judicial authority in the limitation of government power in this new constitutional dispensation is advanced by the evolving jurisprudence from the Constitutional Court.³⁶³ She outlines that, the view that the Court has, since the new dawn of democracy, signalled the development of the general tone of jurisprudence that is geared towards the advancement of the “broad-based approach” in constitutional interpretation.³⁶⁴ She further attest that this approach focuses on the socio-historical imbalances that South Africa inherited from its past and that this historical approach to constitutional analysis seeks to ensure that the democratic and founding values and principles, as entrenched in the Constitution, set the desired requirements for the interpretation, application and operationalisation of the Constitution and everything that depended on the Constitution.³⁶⁵ In support of this view is Chief Justice Langa who asserted in one of his articles that: “under a transformative Constitution, it is no longer sufficient for judges to rely on the say-so of parliament, judges in this phase of our democracy bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values”.³⁶⁶ It is submitted that, our government is based on the will of the people and not on the will of the representatives.³⁶⁷ Logically, the representatives of the populace must be guided by the will of the populace when making decisions as to how to manage the country on their behalf, in this instance, representatives cannot assume to know more about the needs and wishes of the populace. They need to consult with the populace in order to enquire what their needs and wishes are in a particular matter that concerns them.

³⁶³ Ntlama (2012), at 2.

³⁶⁴ Ntlama (2012), at 3.

³⁶⁵ Ntlama (2012), at 3.

³⁶⁶ Langa (2006), at 353.

³⁶⁷ See the preamble of the Constitution as it states that: “the Constitution lays down a foundation for a democratic and open society in which government is based on the will of the people”.

Nevertheless, we continue to see our Constitutional Court in different cases mentioned in chapter 3 and 4, distancing itself from developing the law. Put more precisely, the court is cautious to determine what should be the role and effect of public participation in the law-making processes. In one of the cases, for example the *Merafong case*, the Constitutional Court held that it is “not a sight for a political struggle” and further held that, it is not for the courts to decide in which province people must live or to second-guess the option chosen by the legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment Bill is.³⁶⁸ It further held that being involved does not mean that one’s views must necessarily prevail and there is no authority that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of the government.³⁶⁹ It is contended that politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable through regular elections.³⁷⁰ In some cases, the Court even went as far as turning a blind eye in the ill-conceived motive of Parliament and the ruling party to use public participation as a method of convincing the community to accept its already determined decision to place them in a province they did not want to be placed in.³⁷¹

By so doing the Court dissociated itself (as explained by Cockrell above) from developing the law to the “substantive vision of law” in terms of which judges are required to engage with “substantive reasons” in the form of moral and political values as opposed to the “formal reasons” that characterise the pre-constitutional adjudication processes of the apartheid system.³⁷² It must be mentioned that the majority of the people in the Merafong municipality preferred to be located in the Gauteng Province and this view was clearly indicated to the Gauteng Province legislature. But this view never changed the decision of the legislature to locate the municipality in the North

³⁶⁸ *Merafong case*, para 114, at 58.

³⁶⁹ *Merafong case*, para 50, at 26.

³⁷⁰ *Merafong case*, para 60, at 31.

³⁷¹ *Poverty Alleviation Network case*, paras 72–73, at 42–43.

³⁷² Cockrell (1996), 3.

West Province. Surely it could be questioned as to whether the legislatures as the representative of the populace of the Merafong municipality were proclaiming to know more about the needs of the people who have elected them. According to Ntlama it appears as if the Court is slowly developing a “political doctrine” system in constitutional adjudication which defers its authority to the state at the expense of affirming the principles of judicial review.³⁷³ It is submitted that the Court should have created a balance between the interest of the community and that of the legislature, by determining the role of public participation in the legislative process in a manner that will supplement and enhance the representative and participative elements of our democracy. According to case law one of these elements should not be seen as being in conflict with the other nor should one overrule or veto the other.³⁷⁴ Phooko even argues in this regard that:

*“The court should never condone it when legislation reflects nothing about the views of the people. It should strive to strike a delicate balanced between competing interests such as the rights contained in the Constitution, the demands of the majority and the wishes of the minority. It should apply the reasonableness test in assessing whether the views of the public have been duly considered as required in an open and democratic society.”*³⁷⁵

Although it is agreed that Phooko’s concept above logically makes sense, it is however submitted that the courts followed the applicable legal rule reasonableness man test to assess as to whether the views of the public have been duly considered as required in an open and democratic society. It is further submitted that in some instances the court still made a poor decision about the constitutionally envisaged role of public participation in the law-making processes and in some instances in the enforcement of by-laws. This thesis holds that the assessment should not stop with the reasonable man test, but should continue to a stage were judges seek a possible good decision in a particular given case. Professor Koos Malan describes this form of assessment as

³⁷³ Ntlama (2012), 18.

³⁷⁴ *Doctors for Life International case*, para, at 1442A; and *Matatiele Municipality case*, para 60, at 495.

³⁷⁵ Phooko (2014), at 59.

decisionism. Malan argues that this form of approach in the judicial review process requires judges to determine whether their strict application of the applicable legal rule in a particular given case would produce a good or bad decision. He asserts that if the strict application of the legal rule ensures a good decision, the rule should be followed. But if adherence to the rule would produce a bad decision or be harsh to the person/s in question or would lead to unacceptable (short term) political or other consequences, it should be departed from so that the best possible decision, viewed from the perspective of the parties in the case or considerations of strategy, tactics, politics etc. can be reached.³⁷⁶ It is submitted that if this approach is followed, our judges would be required to be more explicit about the factors that really move them such as moral, political, economic and any other social considerations including their doubts about their institutional competence in a given matter. As submitted by Malan, in this kind of an approach matters are approached and disputes are resolved not through deductive reasoning on the basis of strict and static legal rules, recorded in the corpus, but rather by way of an open-ended communicative process that allows matters to be talked through and thus for solutions to be reached in a manner that accommodates everyone.³⁷⁷ In such an approach judges would not veto participatory democracy at the expense of representative democracy, such as was done by the Constitutional Court in the *Merafong* case when the Court stated:

Before succumbing to the temptation to enter the debate on the merits raised by second leg of the applicants' rationality attack, one must be mindful of this Court's earlier-mentioned jurisprudence on rationality. What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are however available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice

³⁷⁶ K Malan "The rule of law versus decisionism in the South African constitutional discourse", (2012), 2 Dejure 272, 293, (referred to further as Malan (2012)).

³⁷⁷ Malan (2012), at 293.

*can be debated, but it is one for the legislature to make. It is not for this Court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is.*³⁷⁸

Consequently, if could be asked, why did the judge not comment on the decision taken by the Gauteng Legislature as he had doubts about the way in which the legislature could have achieved the objective envisaged by the Twelfth Amendment Bill? If there are indeed more ways than one to achieve this objective, maybe, he could have come up with a better decision that would have accommodated everyone. In not debating this issue the judge seems to have created an impression that general elections and the majority rule must always be supported by participatory democracy in the creation of laws, thereby supporting his statement that:

*“The public participation in the legislative process, which the Constitution envisages, 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.”*³⁷⁹

It must be noted that the view supported by this thesis, is one that acknowledges that there will sometimes be a tension between participatory and representative democracy during the process of making and enforcing of laws in our current democratic system. In order to avoid this tension, our courts, specifically the judges in the Constitutional Court should debate and determine, according to the Constitution, what is the role and effect of public participation in the creation or even further in the enforcement of laws. It is submitted that the views raised by the cases such as *Doctors for Life International, Matatiele* and the *Moutse* in regards to public participation in the legislative processes in our country and the one that is raised by the case of *South African Informal Traders Forum* in the process of enforcing municipal by-laws should be considered as guidelines in determining the role and effect of public participation in the creation and enforcement

³⁷⁸ *Merafong* case, para 114, at 58. See Bekink (2016), at 215, where he argues that, “Transformative constitutions are often also referred to as “radical” or “revolutionary” constitutions,” which have an aim of preserving certain values and norms that have evolved progressively.

³⁷⁹ *Merafong* case, para 50, at 26.

of municipal by-laws. Objectively, the judges in all these cases are seemingly applying their minds to the approach envisaged by the rules of substantive vision of law as well as the principle of decisionism as raised by writers above. The judges in all these cases acknowledged that, there is a tension between participatory and representative democracy and tried by all means to debate the issue of our historical politics, current politics, economic and social considerations currently facing the country as well as the ideas and values envisaged by the Constitution, in order to find the best possible decision in a given case. Put differently, to find a balance between the interest envisaged by the political representative and that which is envisaged by the populace in a given case. In all these cases the judges were of the view that the role of public participation in the creation of laws or in the enforcement of municipal by-laws should be to consider the views received during the process of public participation and to further reflect them in the outcome of the process. However, it is submitted that if a legislature has valid reasons to believe that the particular view raised by the public is not in their best interest in a particular case, the legislature can disregard the views in the outcome of the process. However, due to the constitutional values of our Constitution, the legislature is obliged to be open and transparent by providing reasons as to why the views were considered but disregarded.³⁸⁰

5.3 THE ADVANTAGES AND CHALLENGES OF THE ENVISAGED ROLE AND EFFECT OF PUBLIC PARTICIPATION IN THE CREATION AND ENFORCEMENT OF MUNICIPAL BY-LAWS

Professor Hennie van As indicates that the apartheid system and the accompanying struggle for freedom resulted in moral decay.³⁸¹ O'Regan argues this point further by elaborating that the enforcement of unjust laws with the effect of sending hundreds of people to jail over many years during apartheid, must have weakened any sense that

³⁸⁰ See s 1 (d) of the Constitution. Also see

³⁸¹ Van As (2006), 6.

law breaking or imprisonment are themselves wrongful.³⁸² Van As explains that this moral decline in our society could be caused by certain factors. He then states that:

“The generation of young people who grow up with violence and lack of respect for the law and life as part of their everyday life; the failure to enforce the law by the policies as well as local authorities; the criminal justice system that is unable to handle the work load; negligent, incompetent, unmotivated personnel and a very general sense of entitlement; e.g. You have a car/cell phone/ wallet/ laptop, I want it.”³⁸³

Comprehensibly, there are three other factors that could be added to the list such as illiteracy about the law, the ignorance of the law and a strong sense of corrupt leadership. In practical circumstances, one gets the impression that when a by-law is created, the officials of the municipality are mainly concerned with ensuring that the duty to facilitate public participation in the legislative process has been complied with. After publishing the by-law for comment by the public as indicated by the legislative processes for local government, it is not indicated as to what the officials should do with those comments. One should indeed question as to whether those comments should form part of the final draft by-law to be presented to council or not? If the question is answered in an affirmative, a further investigation should be asked as to whether the public has a right of recourse in a case where their views did not form part of the final draft, and whether the council voted for its approval or not. Phooko recommends that a further engagement with the public should be conducted in order to explain the reasons why these views were rejected or accepted.³⁸⁴ He further suggests that this open-ended communicative process will allow the people to have sufficient knowledge on why a particular action was taken against or in their interest and it will ensure that their representative (in this instance councillors) are accountable to their constituencies.³⁸⁵ It is submitted that the inclusion of such a process in the legislative processes for creating a by law, could assist in educating the public about the challenges faced by their

³⁸² O'Regan (2009), 33.

³⁸³ Van As (2006), 6.

³⁸⁴ Phooko (2014), at 58.

³⁸⁵ Phooko (2014), at 58–59.

representatives in balancing the two important elements of our democracy (representative and participatory democracy) when governing the country on their behalf.

This argument could be taken a step further, by asking the question of what would happen if a by-law is being enforced by the officials of the municipality and during the process of enforcement, the official is told by the contravening public members that they are not aware of such a law. Should the official continue to issue out a notice of contravention or should it be further investigated if the published by-law did reach the public members within the area or whether it was communicated to them in a language they understood or whether they could read the communication concerning community participation about the draft by-law. In this instance supporting a view as outlined by Phooko above will be logical. It is therefore submitted that the municipalities should have an open ended communicative process in their enforcement processes, in order to ensure that they have complied with their duties as stipulated by section 18, 19, 20, 21 A and 21 B of the Municipal Systems Act. It should not be left to the courts to ensure such compliance. As indicated by many writers our courts should be approached by the public as a last resort.³⁸⁶ Supporting the view that has been stressed by professor van As, it is submitted that such an approach to the enforcement of laws will manage the situation of illiteracy and ignorance of the law in our communities, educate the population about by-laws and improve morality and respect for the law. This should further ensure that the municipality will appoint competent and motivated personnel since incompetent and unmotivated personnel will be judged by our courts for not ensuring compliance with the prescribed rules and this will cost the municipality unbudgeted legal cost. Indeed, even competent and motivated enforcement officers will have to be appointed in order to ensure that the by-laws are enforced.

It must however be noted that in order to ensure that such an approach becomes successful, finance must be made available to the municipalities in order to reach their objectives. Looking at our current political situation in the local government sector,

³⁸⁶ Phooko (2014), at 59; and Mubungizi and Dassah (2014), at 282.

whereby municipalities cannot even meet clean audits due to tender scandals, one could often wonder if the money that is supposed to assist municipalities to meet such objectives is misappropriated to the wrong funds so as to continue to feed the corrupt activities in the supply chain management divisions of the municipalities. If money is indeed available but has been misappropriated by those governing the municipalities, it can logically be argued that the immoral acts of the government are causing a disadvantage for the populace. It is submitted that since the public is sometimes unaware of their rights and mechanisms available to hold their representatives accountable for not meeting the objectives as envisaged by the Constitution, it is suggested that institutions such as the National Prosecuting Authority, in coordination with the leadership of the Public Protector, should investigate such misappropriation of funds and through the courts in order hold the representatives of the populace in the local government sector accountable. To wait for the people to hold these politicians accountable by voting them out after five years of such mismanagement (such as was held in the *Merafong* case), is indeed absurd, especially when there are institutions put in place by the Constitution to ensure accountability in all spheres of government. Indeed, Ntlama is correct to indicate that:

“It was, therefore, incumbent upon the Court to be decisive in the Merafong matter and not let its adjudicative authority “hang in the balance” by relegating it to “political appointees” and fail to reconstruct the state and South African society.”³⁸⁷

In so doing, she further mentions that:

“Basically, the Court voluntarily abdicated its judicial function in total disregard of its independence and the distribution of state authority between itself and the legislature. As has been emphasised by Langa CJ, it is the Court that bears the ultimate responsibility for justifying its decisions – not only by reference to authority, but also by reference to the ideas and values entrenched in the Constitution.”³⁸⁸

³⁸⁷ Ntlama (2012), at 18.

³⁸⁸ Ntlama (2012), at 18.

5.4 RECOMMENDATIONS

Against the aforementioned background, it is submitted that the current provisions supporting the duty to facilitate public participation in the local government sphere as outlined by chapter 4 of the Municipal Systems Act should define what public participation should entail for the public in the creation or enforcement of municipal by-laws. It is further submitted that the current processes outlined for the enforcement of by-laws should include a procedure in which an enforcement officer of the municipality before issuing a notice of contravening a by-law, should enquire if the person contravening that by-law is aware of the by-law being contravened. With South Africa having the highest rate of illiterate adults, some writers are still of the view that the current government's systems of intervention (for example Adult Based Education and Training) to improve the level of literacy have for the past years, has not been successful.³⁸⁹ It is therefore of outmost importance for municipalities to invest in educating its community members so as to ensure that communication between it and its communities is effective and clearly understood by all. It is of no use to publish by-laws or have them accessible as required by the Systems Act and yet have only a few members within the communities to access, read and understand them.

Even the annual allocation of funds for public participation during municipal budgets in South Africa does not specifically outline what the funds will be used for in detail. It only stipulates that the funds are available for the community and public safety. In practice and in most instances the Speakers Offices in municipalities are left with a discretion on how to spend the funds. In most occasions these funds are used for arranging public meetings, publishing by-laws in newspapers and creating public notices about public meetings. Rarely are these funds used to create an awareness about by-laws. It is therefore also submitted that the Minister of Local Government Affairs as authorised by section 22 of the Municipal Systems Act should issue a regulation compelling municipalities to set a financial budget in their Integrated Development Plans for the

³⁸⁹ J Aitchison and A Harley "South African illiteracy statistics and the case of the magically growing number of literacy and ABET learners" (2006) No.39 Journal of Education, 90 at 99.

holding of seminars, conferences, meetings etc. in which the officials of the municipalities will educate and train their communities about by-laws as well as the role and effect of public participation in the creation and enforcement of laws in the local government sphere. This view is totally supported by section 152 (1) (e) and section 152 (2) of the Constitution.

In summary, it is suggested that such provisions in local government legislation will compel municipal officials delegated to deal with by-laws; not to limit their duties in only the drafting of by-laws; in complying with the procedural requirements of encouraging their communities and community organisations to get involved in the matters of local government; to set-up a code for by-laws and file it as compelled by legislation and thereafter issue out a copy of the by-law, if requested by the public. It is further submitted that their duties should go beyond this, it should also involve training and educating communities about the laws applicable in local government as well as ensuring that communities and community organisations are informed about their role in ensuring participatory democracy in our country. In this regard it can be safely argued that local government may be able to achieve this, as it is the sphere closest to the people.

5.5 CONCLUSION

In final conclusion, Geo Quinot indicates that there exists an important reason to know about the past, such as, to avoid a repetition of errors committed in history, and to be sensitive to the signs of similar practices rearing their heads in the present, so that speedy action can be taken to combat what may be unfair or unjust.³⁹⁰ When one critically analysis the judgements of the courts as outlined in chapter 3 and 4, it is important to note that in many of those judgements the judges of the courts when giving their views about the role of public participation in the creation and enforcement of laws, tendered more respect to the executive. They become too deferential. Quinot submits

³⁹⁰ G Quinot *Administrative justice in South Africa: An Introduction* (2015), 6 (referred to further as Quinot (2015)).

that the same tendency was present in the apartheid government.³⁹¹ He further asserts that during the apartheid government, both courts and parliament too easily submitted to the will of the executive and become too deferential.³⁹² Skjelten also outlines the effects of this tendency by referring to a South African law professor who once pointed out that: “one effect of parliamentary supremacy was that the judges were cast as mere technicians who could mitigate the effects of unjust laws only on procedural and technical grounds”.³⁹³ He further attests that under this circumstance, when examining rights issues, these judges were only able to interpret the law and review the procedures and according to him this allowed the government to make laws that subjected the majority of South Africans to a complete and all-encompassing system of racial discrimination that impacted upon every aspect of their lives.³⁹⁴

It is submitted that our judges in certain circumstances must be able to engage with “substantive reasons” in the form of moral and political values as opposed to the “formal reasons” so as to ensure that their decisions do not give too much authority to the executive, especially in instances where the conduct of the executive is contrary to the values and principles of the Constitution. As Rósaan Krüger has indicated reliance on the formal rule of law theory by the Courts can be construed as a constraint on administrative-law adjudication in a constitutionally transformed South Africa and does not reflect a broad normative commitment to the rule of law in the substantive sense which requires the content of laws to protect individual rights and to further realise the socio-economic welfare of the people.³⁹⁵ Thus it can be asserted that the view presented by this analysis is not one that favours substance over form. Rather it is one that prefers a bit of both including the rules envisaged by decisionism, provided that

³⁹¹ Quinot (2015), at 7–8.

³⁹² Quinot (2015), at 8.

³⁹³ Skjelten (2006), at 15.

³⁹⁴ See Skjelten (2006), at 15, where she narrates that, “The judiciary was only able to deal with procedural issues”. In this manner, the judges were strictly bridled away from developing the law.

³⁹⁵ R Krüger ‘The South African Constitutional Court and the Rule of Law: The Masethla judgement, a cause for concern?’ (2010) 13 Potchefstroom Electronic Law Journal 468, at 478–479. Also see Bekink (2016), at 215.

reference must be made to the Constitution in order to support the decision made.³⁹⁶ It seems though, that decisionism does assist judges to move towards transformative constitutionalism in administrative law matters. As already indicated above, it must be noted that if more reliance is placed on formal reasons, judges would never be explicit about the factors that really permit them to develop the law. These factors may be political, economic or even encompass other aspects such as the courts doubts about institutional competence in a given matter. In this specific argument, one such aspect is determining what is the role and effect of public participation in the creation and enforcement of laws in South Africa as guided by the Constitution.

³⁹⁶ See Malan (2012), at 302, when he attests that “decisionism cannot cite (written) sources” and that the rule of law and decisionism are simply irreconcilable. Clearly not in support with this view, it is submitted that the present and past can be reconciled, the rule of law must just try to accommodate it. In short, it is submitted that such a rule has not yet been tested by our courts. Our courts must be given a chance to test this rule jointly with the rule of law so that an outcome can be made and debated by writers in order to reveal the fundamental premises of the decisionism rule as outlined by Malan, at 305.

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