Equality of the graveyard: Participatory democracy in the context of housing delivery*

*WA Holness***

> This is the true toxic inheritance of apartheid ... Yes, we dismantled an elaborate legal apparatus of segregation and repression. Yes, we made the transition from repressive police state to democracy... conducted a mass ritual to deal with decades of state-sponsored violence ... But we did not expunge from ourselves the terrible talent of seeing members of our own community as radically other, signified by some arbitrary feature. It used to be race … These days the more dangerous signifier is class. To be poor is to be inhuman. To be poor is to be a different kind of citizen. And, of course, race is never far from class in this country.[1]

1 Introductory remarks

The spate of service delivery protests in recent times is an indicator of how the poor see themselves as 'radically other' from the privileged few. The general lack of responsiveness of political representatives to citizen's needs and concerns has an alienating effect, rendering the vulnerable communities concerned frustrated, angry and disempowered.[2] Despite the promise of universal adult suffrage, and the potential for positive change to attitudes and policies in decisions such as *Grootboom* and post-*Grootboom*,[3] citizens are increasingly disillusioned and frustrated with the lack of access to adequate housing and basic services. When the elected are too

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**BA, LLB (Rhodes), LLM (UKZN) Attorney, Legal Resources Centre, Durban.

[1]Rosenthal 'Apartheid replaced with apathy' *The Mail & Guardian* (2009-11-11) 20.

[2]See Wilson 'Judicial enforcement of the right to protection from arbitrary eviction: Lessons from Mandelaville' (2006) 22/4 *SAJHR* 535 at 556 where residents felt that the court's rationale indicated a lack of sympathy and explained it as follows: 'The Judge shouted a lot ... He said we smelled bad ... He didn't want to know our story. When people don't want to listen, they just call you "tsotsi" and chase you away. That's what he was doing to us. Just because we are living in shacks, we don't have lives.'

[3]*The Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). This article discusses housing jurisprudence post-*Grootboom* and does not critique that decision.

slow to deliver, when direct and representative democratic methods fail, often the last resort for the people is to place their faith in participatory fora to communicate their concerns and hopes to the elected with the hope that they will listen. When these also fail, the disillusionment is most evident in radical participation initiatives that combine social networking, protests, marches, use of the media and boycotts.[4] The formal participatory fora such as ward committee meetings can be used simultaneously to protest action: there is not necessarily a hierarchy of mechanisms.

Some communities are convinced that the only way to make government listen and act on their grievances is through protests and riots that cause damage to public and private properties and that generally disrupt service-delivery,[5] escalating particularly around upcoming local government elections. Some commentators blame the recent escalation of service delivery protests on gross inequality in our society,[6] saying that '[a]rguments about a lack of resources for service delivery carried no weight among people who were living in shacks but who encountered people with seemingly limitless resources living only a few kilometres away'.[7] Others blame corruption[8] and incapacity on the part of government.[9] Ultimately, whatever the cause, actual service delivery is lagging behind and a series of cases have come before our courts on issues relating to service delivery.[10]

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[4]Thorn describes the multiple identities that participatory methods, including social networking, transpose for citizens attempting to consolidate their claims to remain in their settlement. Thorn 'Housing struggles, land occupation and eviction processes: Negotiating lived experiences in Zille-Raine Heights, Cape Town' (October 2008) BSocSci Honours Thesis UCT at 30. See Tadesse, Ameck, Christensen, Masiko, Atlhakola, Shilaho and Smith *The people shall govern: A research report on public participation in policy processes* (2006) CSVVR and Action for Conflict Transformation 22, describing methods used by Mandela Park residents in the Anti-Eviction Campaign.

[5]For instance the protests about service delivery in November 2009, see SAPA 'Protests "about inequality"' *News24* (2009-11-11).

[6]See Craven's comments: '... the recent protests were part of a revolt against people elected by the community who had become corrupt, moved out of the community, lived a life of affluence at the people's expense and did nothing to help those they had left behind' quoted in SAPA 'Protests "about inequality"' *News24* (2009-11-11). See also Tadesse *et al* (n 4) 19: 'A resident in Site C, Khayelitsha was angered by a decision by a local government official who left her neighbourhood immediately after he was elected as a ward councillor. She felt that the councillor abused people's trust and electoral mandate by moving out of an overcrowded informal area into one that had access to running water and flush toilets. They tend to remember the community only "when they are looking for votes from the community" she commented.'

[7]*Ibid.*

[8]In April 2008, 31 000 government employees were being investigated nationally for fraudulent acquisition of government houses. Wilson 'Officials took housing for the poor' *Business Day* (2008-04-23).

[9]Naidu 'Deepening local democracy and participation: Experience from practice' in De Villiers (ed) *Review of provinces and local governments in South Africa: Constitutional foundations and practice* (2008) 83.

[10]For example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Western Cape Provincial Government: In re DVB*

Despite having all the hallmarks of democracy, including direct, representative and participatory democratic principles, our Constitution left it to the executive and legislature to determine how the government would give effect to these principles; whether with regard to policy, law-making, executive or administrative decisions. The Constitution is not prescriptive with regard to how these are to be fulfilled or measured, but court challenges against the state's interpretation of participatory democracy, and the failure of the state's participatory obligations in effecting their positive duties may and have been brought by disillusioned citizens.[11] These applications include municipal bids to evict occupiers from state owned land.[12]

Inadequate housing is one of the hallmarks of pervasive poverty and inequality in South Africa. The newly elected democratic government's task to address a housing backlog of 1.5 million in 1994, was estimated to increase by 178 000 households per year.[13] Almost seventeen years later, according to estimates of the eThekwini Municipality, the metropolitan municipality rated last in terms of actual service-delivery,[14] it would take a further 28 years to address the housing backlog.[15] Yet the official backlog does not include the 'invisible demand' from citizens that live in overcrowded township houses and municipal flats, doubling that estimated period at current rates of construction.[16] The increasing need for service provision such as water and sanitation, electricity, local roads, storm water drainage and refuse removal (all essential components of delivery of adequate housing)[17] indicates a bleaker crisis. While housing is a concurrent

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Behuising (Pty) Ltd 2001 1 SA 500 (CC).

[11]The Constitutional Court's jurisprudence on participatory democracy in cases such as *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC*); Matatiele Municipality v President of RSA* 2006 5 SA 47 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); and *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 3 SA 208 (CC) are most notable.

[12]See *inter alia The City of Cape Town v The Other Occupiers Unknown to the Applicants who Unlawfully Occupy Erf 18332, Khayelitsha, in the City of Cape Town, Western Cape* Cape High Court case number 395/04 (unreported); *Kayamandi Town Committee v Mkhwaso* 1991 2 SA 630 (C); *The Unlawful Occupiers of the School Site v The City of Johannesburg* Supreme Court of Appeal case number 36/2004 (unreported).

[13]Department of Housing (1994) *White Paper on a New Housing Policy and Strategy for South Africa GG* 16178 GN 354 of 1994-12-23.

[14]Da Costa and Mbonambi 'SA's worst municipalities' *The Mercury* (2009-10-21) citing the research by Empowerdex, a research entity that rates service delivery across municipalities.

[15]COHRE (Centre on Housing Rights and Evictions) *Business as usual? Housing rights and 'slum eradication' in Durban, South Africa* (2008) 104 estimates that: 'In fact, between June and December 2006 the Municipality was only able to build 4 402 houses – indicating a slow down to a rate of around 8 000 houses a year.' See also Goldstone 'Building 2.4m units by 2014 Will need a miracle' *The Mercury* (2007-03-06) 5.

[16]COHRE (n 15) 104.

[17]See Department of Provincial and Local Government *White Paper on Local Government Transformation* (1998).

national and provincial function, local government also bears responsibility for the proper implementation of national and provincial government housing policies, plans and programmes in providing these services.[18] However, since the nature of what constitutes 'adequate' housing is highly contentious, municipalities still grapple with basic issues such as the efficacy of *in situ* upgrading of informal settlements, which, despite being the choice of residents, is not the norm.[19]

Certain novel legislative enactments in line with constitutional imperatives are a step in the right direction. This includes Chapter 4 of the Local Government: Municipal Systems Act and section 4 of the Promotion of Administrative Justice Act[20] which provides the impetus and framework for public participation at municipal and administrative levels. However, the implementation thereof remains problematic if the intent of the relevant officials is merely perfunctory, without having regard to what information or concerns transpire from the participation.[21] This is because the actual provision of housing and the corollary of basic services provision cannot be approached from a top-down perspective, with government as omnipotent patriarch supposedly percolating socio-economic stability to the poor masses below. Yet this is what happens when participation is treated as a formalistic procedural requirement. It will be argued that a substantive understanding of the principle of public participation is imperative not only to better informed decision-making, but could result in the necessary buy-in from the electorate to service provision that affects them on a personal level, something that the top-down approach does not engender.

Organisations such as the South African Shack and Rural Dwellers' Organisation and Abahlali baseMjondolo are some of the widely popular and publicised movements that take part in street marches and service delivery protests in the eThekwini metropolis to voice their choices and to object to this top-down approach. Reportedly 65 such protests took place in 2005/6 with only 42% of residents reporting that they are satisfied with housing in the municipality.[22] The participation of these citizens and landless movements has

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[18]Department of Housing (2000) *Housing Code* 8.

[19]COHRE (n 15) 10.

[20]Sections 16 to 22 of the Local Government: Municipal Systems Act 34 of 2000. Section 16, in particular, provides for the development of a culture of municipal governance that complements formal representative government with a system of participatory governance by encouraging and creating conditions for the local community to participate in the affairs of the municipality, including: in the preparation, implementation and review of its integrated development plans performance; the preparation of its budget; and strategic decisions relating to the provision of municipal services. See also PAJA Act 3 of 2000.

[21]See Naidu's discussion on the challenges facing ineffective ward committees (n 9).

[22]Erasmus, Francis, Kok, Roberts, Schwabe and Todes (2006) *State of the Cities Report 2006* HSRC Commissioned by the South African Cities Network, Department of Provincial and Local Government www.hsrc.ac.za/Research_Publication-19666.phtml 57.

evolved into radical participation, aptly described by Pithouse[23] as radical politics built on:

> [t]he fundamental political principle must be that everybody matters …. for most squatters the fight begins with these toilets, this land, this eviction, this fire, these taps, this slum lord, this politician, this broken promise, this developer, this school, this crèche, these police officers, this murder. Because the fight begins from a militant engagement with the local its thinking immediately pits material force against material force – bodies and songs and stones against circling helicopters, tear gas and bullets.

This radical participation is robust and can become violent, but it is the only remaining option of a frustrated and disappointed electorate. They are dissatisfied with the fragility and inadequacy of the flawed participation methods and fora provided for grappling with cross-boundary municipal disputes,[24] service delivery failures and allocation of housing, particularly relocations preceded by wide-scale evictions. The focus of this paper is on housing and service delivery failures. Radical participation is aimed at putting or keeping 'items on government's agenda, by expressing disapproval with the status quo or with proposed changes and to encourage government to act by threatening political consequences or social disruption'.[25] This is a backlash to municipalities and legislatures making decisions based on formalistic and procedural aspects of public participation. The judicial review of public participation, consultation or engagement in some instances does not reflect a judiciary that is cognisant of the potential and value of radical democracy initiatives in bringing about municipal or legislative decisions that are not only informed decisions but also legitimate decisions that will work in practice. Increasingly, these radical movements utilise the courts to vindicate socio-economic rights violations, to achieve demands that are left unanswered by traditional and mutual participatory methods.

This article will provide an outline of the obligations of the state to facilitate participation of citizens and will explicate the pre-determined nature of public participation in some instances. Various housing and eviction decisions[26] will be

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[23]Pithouse 'Thinking resistance in the shanty town' 8 www.abahlali.org.za.

[24]For example the disputes about Matatiele and Khutsong, culminating respectively in *Matatiele Municipality v President of RSA* (n 11); and *Merafong* (n 11). The most recent decision of the Constitutional Court in the Matatiele saga is that of *Poverty Alleviation Network* (n 11).

[25]Bishop 'Vampire or prince: The listening constitution and *Merafong Forum and Others v President of the Republic of South Africa and Others'* (2010) 2 *Constitutional Court Review* 313-368 [http://www.pulp.up.ac.za/cat_2009_04.html].

[26]Other relevant cases include socio-economic, predominantly housing, cases such as *Abahlali Basemjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC); *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC); *Joseph v City of Johannesburg* CCT 43/09 (as yet unreported); *Mazibuko* (n 10); *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 2 BCLR 150 (CC); *Nokotyana*

utilised as contextual background to participatory democracy and a critique of how this is being responded to by different organs of state. It will be demonstrated that the jurisprudence of our courts to date, by-and-large, lean towards mutual participation, and sometimes even traditional participation, whilst radical participation remains the preference of citizens' grass-roots and social justice movements and civil society organisations.[27] These three types of participation suffice to indicate at the outset that these can be classified on a factor-based classification, namely: who organises the participation, goals, the relationship to representative democracy, formality, the role of the courts, who is involved, and the level of government where participation occurs.[28]

For the most part, the doctrinal line between participation in the legislative process and participation in executive decision-making which has been required in the eviction cases are deliberately blurred in this paper. It makes no attempt to do so. It must be acknowledged that although they both involve some form of participation, the practical context and the textual basis for each are very different. The blurring is necessary in order to draw from the wealth of jurisprudence interpreting the public involvement or public participation facilitated by these branches of government. This is then juxtaposed with the perceptions and lived experiences of citizens when they are affected by law-making or executive decisions. The jurisprudence, as a collective, must transcend strict categorisations in order to allow for more robust decisions by the judiciary; and for more legitimate decisions by the legislative and executive branches that are open, accountable and responsive.

Then I will consider what is required to move beyond procedural formalism. The prevailing use of participatory democracy as a means for the judiciary to avoid dealing with the realisation of socio-economic rights will be discussed. It will be concluded that meaningful public participation is an imperative to not only better informed decision-making, but could gain the necessary support from the electorate in respect of service provision that affects them. This will result in less violent and less frequent protests and better long-term social cohesion and satisfaction with service delivery. A caution remains, however, that the hallowed separation of powers doctrine should not continue to hamper an enlightened

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(n 10); *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); *Joe Slovo* (n 10). Certain recent High Court decisions are notable: *Mnisi v City of Johannesburg South Gauteng* High Court case no 08/17819 (unreported); and *Rademeyer v Western Districts Council* 1998 3 SA 1011 (SECLD).

[27]An organisation that continues to receive media coverage for their activism is Abahlali Basemjondolo, a slums-dwellers' movement based in Kennedy Road, Durban. Their activism, especially in opposition to the proposed KwaZulu-Natal Slums Elimination Act, culminated in litigation in *Abahlali Basemjondolo Movement* (n 26). Other organisations are the Poor People's Alliance, the Western Cape Anti-Eviction Campaign, Khayelitshastruggles, Landless People's Movement and the Rural Network.

[28]Bishop (n 25) 359.

judiciary from giving real content to the rights of citizens in socio-economic plight, as exposed by radical democratic initiatives.[29]

2 The obligations of the state to facilitate the participation of citizens

Amartya Sen advocates that the significance of democracy to service delivery and human security flows from three 'distinct virtues' of democracy, one of which is the instrumental value of 'constructive importance'.[30] This value is present in the provision of a public platform for the formation of values and priorities in society by allowing and facilitating public discussion and debate, the exchange of information, identification of needs, setting priorities, making choices and building consensus around decisions that affect people's lives.[31] Our Constitution and jurisprudence recognises this: Justice Ngcobo in the seminal *Doctors for Life* judgment stressed that 'participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist'.[32] This prompts three questions. Firstly, what does participatory democracy in South Africa entail? Secondly, what are the obligations of the government (at all levels) to facilitate the participation of our citizens? Thirdly, does the public participation actually result in consensus-building and the appropriate identification and prioritisation of needs?

2.1 What does participatory democracy in South Africa entail?

International law[33] obliges member states to achieve a minimum threshold of

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[29]Grassroots movements have mobilised their members and have litigated to the highest court to vindicate their rights. An example of this is the *Abahlali* judgment (n 26).

[30]Sen 'Democracy as a universal value' (1999) 10/3 *Journal of Democracy* 3-17, 11.

[31]See the description in Tadesse *et al* (n 4) 6.

[32]*Doctors for Life* (n 11) para 108. This matter dealt with legislation on contentious issues such as 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 applicant's complaint is that during the legislative process leading to the enactment of these statutes, the National Council of Provinces and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required respectively by the provisions of ss 72(1)(a) and 118(1)(a) of the Constitution. Due to the nature of the interest elicited by the dental bill, participation was thought to be adequate (para 191); while the public participation facilitated around the abortion (paras 188 and 189) and traditional healers' bills (paras 175 and 181) was deemed to be inadequate primarily because not all the provinces held public hearings. As for the sterilisation bill, the challenge was dismissed on the ground that the court was precluded from having to declare it invalid as it had since been enacted into law and the court's jurisdiction was held to be determined as at the time when the proceedings were instituted, not at the time when the court considered the matter (para 57).

[33]See *inter alia* art 13 of the African Charter on Human and Peoples' Rights of 1981 (Banjul Charter); art 25 of the International Covenant on Civil and Political Rights of 1966.

participatory rights[34] and accordingly the primary role of domestic law should be to 'provide the infrastructure necessary for the exercise of participatory rights by citizens'.[35] Our Constitution provides for representative,[36] direct[37] and participatory forms of democracy.[38] There is a tension between the representative elements of our governance system and that of participatory democracy, but both are inherently supposed to serve the people, albeit in different ways. Voting in an election, the main representative component, aptly described by Mureinik[39] as 'snapshot' democracy, at local level, is not enough, since 'the increasing diversity and complexity of urban society makes it very difficult for elected representatives to know the wishes of the citizens they purport to represent'.[40] In Durban, for instance, there is often a conflict between the wishes of the executive and legislature compared to that of the citizens in what is required to elevate Durban to a 'world class city'[41] with concomitant first world developmental goals.[42] This exercise requires an acknowledgement that its electorate is disparate in socio-economic needs, necessitating social, transformative and redistributive decision-making. However, this is negated by the rhetoric in the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007. The Slums Act provides

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[34] *Doctors for Life* (n 11) para 96 and 106.

[35] Aman *The democracy deficit: Taming globalization through law reform* (2004) 14.

[36] Section 19 of the Constitution in particular, with regard to the right to make political choices, the right to free, fair and regular elections and the right to vote.

[37] This type of democracy has been described as 'a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives'. Roux 'Democracy' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) (2nd ed) 10-4. By its sheer nature, factors such as South Africa's high population and geographical disparity, makes this form almost impossible to apply. However, s 17, regarding the right to assemble, demonstrate, picket and present petitions, as well as ss 84(2)(g) and 127(2)(f), with regard to calling of a referendum, retain direct democratic elements.

[38] The matrix provided by the South African Constitution for the principle of public participation can be found in various sections, *inter alia*: s 55(2)(a), s 59(1)(a), s 72(1)(a), and s 118(1)(a), and arguably the overarching rationale that informs the constitutional interpretation of democratic governance is the founding values found in s 1(d), which require a multi-party system that ensures accountable, responsive and open governance. See *Doctors for Life* (n 11) para 111.

[39] Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 10 31-48, 35; and see Mureinik 'Reconsidering review: Participation and accountability' in *Administrative law reform* (1993) 35.

[40] Atkinson *Techniques of public participation in local government* (1997) Electoral Institute of South Africa 3, quoted in Hoexter 'The control of administrative power' *Administrative law in South Africa* (2007) 77.

[41] The Bantu World 'Campaign activities' *WCCA Conference Reports* 10 (www.streetnet.org). Eviction of street vendors and 'slum clearance' programmes in terms of which the poor and vulnerable lose their livelihoods or homes for the sake of government's creation of 'world class cities' ahead of high profile international events, including the 2010 World Cup Soccer.

[42] See the Early Morning Market debacle which is *sub judice* in *Mbali v eThekwini Municipality* case number 11559/2009 Durban High Court (review proceedings); *Mbali v eThekwini Municipality* case number 9/2009 Durban High Court (barrow operators).

procedures for the progressive elimination of slums, measures for the prevention of the re-emergence of slums and the upgrading and control of existing slums. These measures include the power of the municipality to evict slum dwellers and monitor informal settlements and provides for transit camps. One of the criticisms of the Act is that the measures are draconian for they do 'not recognise insecurity of tenure as a problem and [this] deepens the insecurity of slum dwellers as a first step to eliminating slums'.[43]

It is widely believed that such pre-determined decision-making is an unfortunate trademark of so-called 'participatory' methods employed at local government level in South Africa and there is consequently no real buy-in from the citizens most affected by the decision. Where government seeks public input not because 'it really wanted to listen but because it felt that this would win support for that which it had already decided'[44] then such participation is at best watered down and at worst meaningless.

The infrastructure for participatory democracy[45] has nonetheless been provided at constitutional and legislative level, whether in the form of izimbizos,[46] parliamentary inquiries, surveys, workshops, local meetings or public comment invitations. The type of decision that is being made should determine the apposite procedure in a particular situation.[47] Participatory fora do exist, but their efficacy in transforming society is disputed below.

2.2 What are the obligations of the government (at all levels), in facilitating the participation of our citizens?

In terms of our constitutional matrix, the National Assembly, National Council of Provinces and the Provincial Legislatures *must* facilitate public involvement. This is a peremptory enactment. According to both the minority and majority decisions in *Doctors for Life*, the special duty to facilitate public participation is highly discretionary in so far as the legislature must 'determin(e) how best to achieve' the balance between representative and participatory democratic elements.[48]

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[43]Huchzermeyer 'Uplift slums don't destroy them' *The Mercury* (2007-07-12).

[44]Friedman and McKaiser 'Civil society and the post-Polokwane South African state: Assessing civil society's prospects of improved policy engagement' (2009) *Centre for the Study of Democracy* Rhodes University and University of Johannesburg, commissioned by Heinrich Böll Foundation 14.

[45]See the discussion of civic republicanism, premised on deliberation, equality of political actors, universalism and citizenship in Sunstein 'Beyond the republican revival' (1988) *Yale LJ* 1539 at 1542. Decentralisation of power and decision-making at a local level, where the citizens participate in the decision-making process, is integral to this phenomenon.

[46]Imbizo or lekgotla or bosberaad. See *Doctors for Life* (n 11) para 101 where the symbolic and practical aspect of this traditional African forum is praised.

[47]See fn 38 in Hoexter (n 39).

[48]Ngcobo J (majority) in *Doctors for Life* (n 11) para 122. For the minority perspective of Van der Westhuizen J, see *Doctors for Life* (n 11) para 244 (3), that 'facilitate' implies a 'considerable degree of generality and softness, rather than a specific requirement'.

Since it can be accepted, as articulated by Sachs J, that participatory democracy is a matter of constitutional obligation and 'not just a matter of legislative etiquette or good governmental manners', the nature and scope of participatory democracy is a bone of contention. The stark diversion between the majority decision[49] and the dissents of Yacoob J and that of Van der Westhuizen J,[50] lies, primarily, in the measuring of the 'degree of public involvement', ie the standard of reasonableness test' which was articulated in the majority judgment.[51]

Another important aspect central to the *Doctors for Life* majority decision (and that of Sachs J), is the understanding that respect and dignity are 'components of political citizenship'.[52] The majority court adopted a social and historical context approach, which meant that *certain* statutes would require mandatory public consultation. Various factors would influence which statutes would qualify for consultation,[53] but the test would ultimately be that of reasonableness. These were *inter alia* the nature and importance of the bill; requests received from the public for consultations; and whether the legislature had promised consultation in response to requests received.

One particular factor is the historical development of our democracy; that historically the majority of people were excluded from political processes, with the legislation enacted during Apartheid egregiously affecting the majority without them having any say in it. The voicelessness of the masses was also stark in municipal decision-making and will remain so today if participative democracy does not begin to counter it. Sachs J points to the 'historical silencing' of the marginalised, which requires the methods of participatory democracy not just to give citizens 'a chance to speak, but also to enjoy the assurance that they will be listened to'.[54]

The expectation of the poor that their lives will be materially improved and transformed with the advent of democracy that provides the 'chance to speak' has been bolstered by the promises of change from their representatives, election after election.[55] In meeting these promises, the logical conclusion is that people's lives will be affected on a real and material level. Where delivery of housing is concerned, evictions and relocation have severe consequences such as the

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[49]See the Ngcobo J interpretation in *Doctors for Life* (n 11) para 126.
[50]Van der Westhuizen's view on the reasonableness test is explicated in *Doctors for Life* (n 11) para 244 (6).
[51]The appropriateness of this test will not be discussed in this paper. See Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *SALJ* 264.
[52]Syma Czapanskiy and Manjoo 'The right of public participation in the law-making process and the role of legislature in the promotion of this right' (2008) 19 *Duke Journal of Comparative and International Law* 4.
[53]*Doctors for Life* (n 11).
[54]Sachs J in *Doctors for Life* (n 11) para 234.
[55]See Wilson (n 2) 542.

disruption of the social and economic networks upon which poor people depend.[56] Where the government does not adequately consult with or facilitate participation by those affected, perceptions of relocations as forced removals or of transit camps as concentration camps abound.[57]

2.3 Does public participation actually result in consensus-building and appropriate identification and prioritisation of needs?

In practice, the facilitation of public participation falls far from the mark of meaningful and reasonable, nor does it promote an open, responsive and accountable government. Modalities such as izimbizos are criticized for including only a small portion of the public affected by a decision, without providing effective means of testing majority opinion, thus giving the illusion of effective engagement.[58] At a recent izimbizo aimed at giving citizens the opportunity to influence municipal council decision-making, organised by the Community Participation and Action Support Unit of the eThekwini Municipality, the Mayor of Durban, Mr Obed Mlaba, unequivocally told the residents to 'appreciate what they had already received'.[59] The Mayor urged the desperately poor residents of Bayview, Chatsworth to 'take responsibility and build your own houses. People might not want to hear the truth, but it is time for them to take responsibility and build up their own houses, because the RDP initiative is only for the poor'.[60] This municipal unit is tasked in terms of section 16(1)(a)(iii) of the Municipal Systems Act to encourage the local community to participate in the affairs of the municipality, including that they monitor and review the municipality's performance, and the outcomes and impact of such performance. Unfortunately, this example indicates that instead officials utilise a 'tick box' approach. This empty form of public participation has been criticised as being reduced to 'periodic features of participation from above rather than continuously engaged and autonomously driven forms of local participation' carried out to meet performance criteria.[61] This meeting failed to meet the requirements in the Act in three ways. Firstly, the municipality did not share information on what housing development it had already facilitated in the

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[56]Wilson (above n 2) 544.

[57]baseMjondolo 'Siyanda win in the Durban High Court: The struggle against corruption and transit camps continues'www.abahlali.org.za 2010-03-06. In other parts of the country citizens have also voiced their struggles, such as the resistance of Joe Slovo residents against their relocation to Delft which culminated in the *Joe Slovo* judgment.

[58]Friedman and McKaiser (n 42) 15.

[59]Ngcongo 'Housing self-help urged' *Metro Ezasegagasini* (2009-12-04) 4.

[60]*Ibid.*

[61]Karuru-Sebina, Hemson and Carter 'Putting people first versus embedding autonomy: Responsiveness of the democratic developmental state to effective demand side governance in South Africa's Service Delivery' *Springer Science & Business Media* 2009-07-10 (published online, available from www.hsrc.ac.za).

area. Secondly, the community was also not informed about the short-, medium- or long-term goals for this particular area and could not provide input or feedback on these goals. Thirdly, the community is left out of the process, which means that, effectively, it is disenfranchised from the municipality and any possible partnerships between the community and the municipality would not emerge. Any future housing developments may possibly lead to strife if the community is not brought into the processes. Such future processes may also be the poorer for lack of possibly innovative input from the community itself.

Van der Westhuizen J[62] and Yacoob J,[63] in their respective judgments in *Doctors for Life,* highlight that even in apartheid, government held imbizos or indabas with traditional leaders and interest groups, but ignored the inputs they received. Justice Van der Westhuizen remarks *obiter* that:

> If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation ... participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.

Despite this acknowledgment, Van der Westhuizen J concurs with Yacoob J's interpretation of facilitation of public participation, in what he terms a 'realistic view of meaningful public involvement' based on both the wording and structure of the Constitution, interpreted literally, contextually and purposively.[64] The nature of public involvement will depend on the context. If the context of izimbizos is considered, their failure renders public involvement meaningless from conception when this forum is used merely to promote political agendas. Despite being a process fashioned for fostering equal footed deliberation, and with the potential of validating participants' moral agency, it raises public expectations and where these do not address real concerns and proper follow-ups on concerns, discontent arises.[65] Realistically then, the concept of fora such as izimbizos are doomed to failure.

An illuminating example of how public participation can be perceived as meaningless and empty is that of the third judgment in the Matatiele saga, *Poverty Alleviation Network.*[66] An overwhelming majority of the residents of Matatiele were

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[62]Van der Westhuizen J in *Doctors for Life* (n 11) para 244 (5).
[63]Yacoob J in *Doctors for Life* (n 11).
[64]*Doctors for Life* (n 11) para 244.
[65]Tadesse *et al* (n 4) 20.
[66]*Poverty Alleviation Network* (n 11). This issues for consideration were *inter alia* whether Parliament complied with its constitutional obligations in terms of ss 59(1)(a) and 72(1)(a) of the Constitution, alternatively that the KwaZulu-Natal provincial legislature failed to facilitate public involvement in terms of s 118(1)(a) of the Constitution in its approval of two statutes despite opposition from various interest groups. These statutes are the Constitution Thirteenth Amendment Act 23 of 2007, that alters the boundary of the Eastern Cape province and the KwaZulu-Natal province; and the Cross-boundary Municipalities Repeal and Related Matters Amendment Act 24 of 2007, that regulates the transfer of the Matatiele Local Municipality from KwaZulu-Natal to the Eastern Cape.

in favour of the municipality remaining within KwaZulu-Natal province; however, the Bill was passed, despite this support, to redraw the boundary with the town falling within the Eastern Cape province. The applicants sought to provide oral submissions to parliament regarding the alteration of the provincial boundary, but the request was not granted. The applicants consequently submitted that had they been afforded such an opportunity, they would have been able to 'dispel the notion that the issue was solely one of service delivery and also to dispel myths about service delivery'.[67] The applicants also submitted that the KwaZulu-Natal Legislature merely went through the motions of public participation towards a pre-ordained politically decided result. This was submitted to be irrational since the dictates of the political leadership were followed, irrespective of the merits involved.[68] In their failure to meet the section 118 obligations, the applicants submitted that the process was a 'formalistic sham'. Instead, what was required was meaningful and effective involvement or genuine and effective engagement of minds.[69]

Nkabinde J, writing for a unanimous Court, reiterated that the Court's role, in line with the *Doctors' for Life dicta*, is to determine the reasonableness of the participatory process to determine whether there had been the degree of participation required by the Constitution.[70] The hallowed separation of powers doctrine checked the Court's powers, where the court held that it is crucial to: '[strike] a balance between the need to respect parliamentary autonomy on the one hand, and the right of the public to participate in the legislative process on the other'.[71] The Court, in evaluating all the meetings and submissions that did take place stressed that objectively, participation was facilitated.[72] With regard to the issue around the need for oral submissions, the Court stressed that the procedures chosen must be reasonably related to the material they have to consider[73] and if challenged, that the decision-makers 'must account for the procedures they have adopted'. Emphasising the discretion of the legislature, the Court again stressed that citizens must be provided with a 'meaningful opportunity to be heard' in the processes that precede the adoption of the laws that will govern them.[74]

To be heard however, requires active listening, actual consideration of the issues and, should the submissions be legitimate, these should have the potential to impact on the decision of the legislature concerned. This is not what happened in this matter. The Court accepted the respondents' assertion that there was no

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[67] *Poverty Alleviation Network* (n 11) Applicants' Heads of Argument para 5.14.
[68] *Poverty Alleviation Network* (n 11) 14.
[69] *Poverty Alleviation Network* (n 11) Applicants' Heads of Argument para 7.6.
[70] *Doctors for Life* (n 11) para 124 cited in *Poverty Alleviation Network* (n 11) 24.
[71] *Id* 24.
[72] *Id* 32.
[73] *Minister of Health v New Clicks South Africa (Pty) Ltd: In re: Application for Declaratory Relief* 2006 2 SA 311 (CC) para 633.
[74] *Doctors for Life* (n 11) para 145 cited in *Poverty Alleviation Network* (n 11) 36.

need for oral submissions when it decided that no further clarity on the submissions were required. The Court does not address the reasonableness of this assertion and does not entertain the version of the applicants. The Court's decision with regard to two important issues ended any illusions the applicants may have had as to the potential of public opinion to inform the legislature's ultimate decision. These issues were the pre-determined political decision, and the submission that compliance with the Constitution depends 'on the outcome of the participation, which must have an impact on the final decision'. The Court held: 'Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself'.[75]

The simple fact remains that overwhelmingly, the residents of Matatiele did not support the redrawing of the provincial boundary. If a government is to be by the people and not for the people, then the actual concerns of the populace must not merely be 'considered' in a formalistic and procedural sense, but it must have the possibility to change the minds of the decision-makers in a substantive sense. Granted, the legislature cannot be said to be 'bound' by the views of the public, but if the decision has no support from those most deeply affected by it, nor is it grounded in their lived reality, then it cannot be said to be truly democratic. The Court relied[76] on the fallacy in the *Merafong* judgment, that public participation in the legislative process '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'.[77] Public participation is not merely supplementary, it is part of our constitutional make-up equal to that of direct and representative democracy and as such requires substantive, not merely formalistic and procedural application. Where a conflict occurs between the will of the elected (representative democracy) and the will of the people (expressed in formal and informal public participation processes), a balance must be struck that gives credence to the prescripts of accountability, responsiveness and openness.

This judgment, unfortunately, does not adequately address the core issues concerned. The reasonableness test, as espoused by the *Doctors for Life* judgment, is not applied and the discretion of parliament is endorsed without discussing the limits of such discretion. The court had the opportunity, in a matter representative of the disillusionment of citizens in participatory fora, as borne out by the protests of recent times, to contextualise participation and give real content to how much consideration is necessary and adequate to meet the constitutional obligations of reasonable public participation. The Court could have given content

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[75] *Poverty Alleviation Network* (n 11) 40.
[76] *Ibid.*
[77] *Merafong* (n 11) para 50 (emphasis added).

to the meaning of 'responsiveness' within public participation. Instead, it held that the fact that the outcome of the public participation was not reflected in a change to the legislation or accommodation of the submissions in the legislation did not equate to unreasonable public participation.[78]

This judgment ignores the potential of efficient fora, methods or procedures for democratic legitimacy, in line with the dynamic and ongoing nature of participatory democracy.[79] It must be accepted that this was a formal process of participation (also classed as traditional participation) which by necessity will have limited potential to be dynamic and rarely places stakeholders on an equal footing compared to mutual or radical participation methods such as protests or the efforts of social and landless movements like Abahlali Basemjondolo. This understanding of a dynamic process could potentially negate the problem that 'politicians are concerned primarily with the initial decision to formulate a plan and with its final adoption or rejection', resulting in the views of the public not being infused into the earlier planning stages, including the formulation of alternatives,[80] or, of course, with the final result as in law-making. Judges must be cognisant of their responsibility to craft proper and effective remedies where alternatives have not been considered.[81] The availability of alternatives is imperative in a housing context, especially where eviction is a possibility, as discussed in the housing jurisprudence below.

The mere implementation of these fora without regard for citizens' expressed concerns and demands does not fulfil the constructive value of democracy. The section on transformative constitutionalism will provide some answers as to how the executive, and legislature, can fulfil this value.

What then is the court's role where the participation was rendered unmeaningful because the legislature had already decided on the outcome and was merely going through the motions? While this obviously diminishes the value of participation, from the Court's point of view it is difficult to think of a workable way to ascertain whether or not the members of the legislature were indeed open to persuasion. The residents say that they were not, the MPs claim they were indeed open to persuasion, but after carefully considering the issue came to a different decision about where the boundary for Matatiele should be redrawn. How does the Court know whether the MPs are insincere? Some commentators may

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[78] *Poverty Alleviation Network* (n 11) 41.

[79] See the description of Sachs J in *Doctors for Life* (n 11) para 230: Through participatory democracy, citizens are 'accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are, of necessity, periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government.'

[80] Hoexter (n 39) 77 and Atkinson (n 39) 2.

[81] See Chenwi 'Enforcing housing rights' (2009) 10/2 *ESR Review* 17 and the discussion on the *Dada* matter (n 167) below on this point.

find it a really strong step for the Court to find that MPs failed to fulfil their constitutional obligations, and then lied about it. It would require really strong evidence, which arguably was not present in *Poverty Alleviation*.

How does the Court differentiate between real and meaningful participation that meets the constructive value of democracy as opposed to 'cynical charades'. The Court could interrogate evidence led in this regard – as indeed requested by the applicants in this case. In instances where the case is heard directly by the Constitutional Court, it is difficult to lead oral evidence to resolve the factual dispute, but not impossible. Courts are fact finders and logic dictates that with sufficient evidence provided as to the depth of the participatory method utilised and the substance of the input provided by participants Courts could resolve such disputes. The applicants brought this matter to Court precisely because they thought that the disingenuousness of the legislature would be addressed. Instead the separation of powers doctrine was employed to avoid delving into what could become a messy endeavour.

What follows next will show that ineffective participation translates into ill-advised decisions and lack of consensus, prompting communities to resort to violent protests.

3 Radical democracy

To date, our constitutional jurisprudence has embraced the concept of traditional participation, best illustrated by the *Merafong* judgment[82] discussed earlier. Bishop[83] describes it as 'subservient' to representative democracy since government simply may choose which concerns they will consider or even ignore them totally. The Courts' role here is to 'ensure that government acts reasonably to ensure the formal process happens and to uphold – in addition to the specific protections of the Constitution – a minimum level of rationality in the governments' ultimate decision'. In this method, the government thus decides just 'how much' participation occurs, often paying lip-service to the concerns of citizens. Traditional participation is not a two-way street.

Radical participation, on the other hand, is often a response to the inadequacies of traditional participation – for instance lack of legitimacy and rigidity. Mutual participation is suited to discretely defined groups and specific issues where real engagement between the state and citizens can take place, but since it is time-consuming, it cannot be utilised where national issues require decisions. It is thus utilised where *ad hoc* decisions need to be made. This participation is evident in the reasoning of Yacoob J in *Occupiers of 51 Olivia Road*, which will be discussed below.

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[82] *Merafong* (n 11).
[83] Bishop (n 25) 359.

The doctrinal differences between the type of participation employed and sanctioned by the government, whether traditional, mutual or radical participation, will determine the level of buy-in from the electorate, and the longevity of the end product. These are doctrinal differences because the proponents of these methods of participation have very different conceptions as to the desired outcome of participation and of course have different motivations and agendas. Each of these three participation methodologies has a different set of norms that attach to the perceived role of each participant and to the outcome. In their interpretation of public participation, the executive, legislative and judicial branches of government prefer the traditional or mutual conceptualisations, whereas poor people's movements are pushing for an acceptance of radical participation as reflective of governance by the people, similar to the struggle initiatives of the underground movements during the reign of the Apartheid government. Some judges, however, do heed the complaints where communities are merely informed of the *fait accompli* decision with participation rendered nugatory. One such example is discussed below.

3.1 Informing the community of the fait accompli and ignoring their legitimate concerns

In *Mnisi v City of Johannesburg*,[84] the lack of consultation between the city and the residents' representatives was described by Berger J as 'shameful'.[85] The residents of Protea South were living in dire, inadequate housing, with the prospect of being forcibly removed from their homes, and very importantly, basic interim services such as water, sanitation, refuse removal and high mast lighting were absent. In response to the applicants' allegations of lack of consultation the city's report indicated, repeatedly, by citing various meetings, that the residents were 'informed' of decisions that had been made with regard to the development. To this, Berger J responded: 'There is clearly a profound difference between informing the community of decisions taken and engaging the community in arriving at agreed or mediated solutions'.[86] This absolute disregard for meaningful engagement prompted an order of meaningful consultation:

> ... with the intention of agreeing on a comprehensive and co-ordinated programme that would progressively realise their right to access to adequate housing. However, if no agreement is reached after *bona fide* discussions have deadlocked

[84]See *Mnisi v City of Johannesburg South* (n 26) para 20 – for the relevant extract from the report as cited in the judgment indicating how throughout the process, the community was at all times *informed* of the development through various meetings.

[85]*Mnisi* (n 26) para 23: 'I have traversed the correspondence attached to the founding affidavit in some detail because it reveals a disturbing pattern of official indifference to the plight of the residents of Protea South' where the legal representatives were 'sent on a wild goose chase, from official to official, without anyone engaging meaningfully with the real and legitimate concerns of the residents'.

[86]*Id* para 21.

> … the respondent must nevertheless ensure that its housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution.[87]

Berger J commented on a fact often highlighted by communities and grassroots organisations, namely, that 'lip-service' is paid to the issue of consultation while unilateral decisions win the day and without a 'community approved relocation strategy in place nor ... any attempt ... made to secure one'.[88] Even though this judgment dealt with evictions and housing decisions at the executive level, which could be said to affect the relevant community on a level more direct compared to law-making decisions, for instance such as those in the Matatiele saga, the higher level of commitment to meaningful consultation is required that encompasses a measure of community approval. A legislative or executive decision that does not in any way show how the participation impacted on the end product cannot be legitimate. Going much further than the landmark decisions in *Olivia Road* and *Rudolf,* the judgment gave real content to the role of public participation by finding that there was insufficient consultation and this could be ameliorated by requiring that the community be consulted at every turn, even where the original reason for consultation is subsumed by later decisions.[89] As to the formalism and lack of legitimacy, the court stressed that: '[t]he respondent must realise that the need to consult with those affected by its decisions is not a formalistic requirement. Rather, genuine consultation respects the dignity of those consulted and ensures that any agreement reached as a result will sustain itself because of its legitimacy'.[90]

This structured order illuminated an aspect often neglected by state officials: citizens can only be truly informed of how decisions about them will impact on their daily lives if they are aware of all the information at the disposal of the state, in particular developmental plans. The problem remains that decisions are made 'about' citizens, and not 'with' citizens. Genuine and meaningful participation should turn this around. The poor, however, are often thought of as ignorant and illiterate, with the result that official development debates and policies that flow from these debates are premised on a lack of awareness of the choices of the poor. Tomlinson cites the example of the debate of the National Housing Forum in the 1990s regarding the extension of mortgage finance to the poor, despite overwhelming evidence that the poor did not want mortgages[91] nor are they aware of and sufficiently informed about

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[87] *Id* para 26.
[88] *Id* para 27.
[89] *Id* paras 30-31 where Berger J stressed that 'consultations will only be meaningful if the respondent, in advance, makes available all relevant information, including development plans and technical reports ... in advance of the consultations'. Further, that the community must be able to contribute by identifying alternatives to eviction.
[90] *Ibid.*
[91] Tomlinson 'From rejection to resignation: Beneficiaries' views of the government's housing subsidy scheme' (1997) *Centre for Policy Studies*.

the consequences of home loans.[92] The wisdom of that choice is evident in today's recessionary consequences and the discontent of those who were uninformed of the possible negative consequences of home loans. It is also evident in protests and litigation around low cost housing developments such as the N2 Gateway project which culminated in the *Joe Slovo* judgment.[93]

Friedman and McKaiser argue that the wave of grassroots protests are incorrectly explained as 'service delivery protests', effectively silencing and belittling the protestors 'by substituting an elite-generated explanation of their actions … because it assumes, inaccurately, that people at the grassroots are passive recipients of government "delivery" rather than choosing and thinking citizens who demand to be part of the discussion on the way in which government is to serve them'.[94] This rhetoric then means that the participation sought by the poor remains doomed to the level of securing 'collective sustenance' or what is termed 'survivalist mutual aid activities' rather than advocacy for policy change.[95] The legislatures' dismissal of the submissions of the applicants in the *Poverty Alleviation Network* discussed above, with regard to service delivery issues and the refusal to allow oral submissions advances this rhetoric further.

This is changing, however, with the radical participatory methods employed by movements such as Abahlali, and others, including anti-privatisation forums, ratepayers' committees and electricity crisis committees, that challenge current government policies, where necessary through litigation. The other side of the coin, however, is that the deep-set frustration of the poor can turn violent and take on completely different dimensions. The outbreak of xenophobic violence that escalated in early 2008 in various shack settlements around the country has, amongst others, been blamed on anxiety and anger about housing, requiring government to reassess and deliver on access to adequate housing in order to promote substantive citizenship and social cohesion.[96]

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[92]One example is the violent protests of Mandela Park (Khayelitsha) residents in 2001, including rioting and destruction of property, due to issues around mortgage bonds, the slow pace of transformation and infrastructure development, discussed in Tadesse *et al* (n 4) 17. Fortunately, the national government intervened and promised to support the community by covering a significant part of the outstanding loans using the housing subsidy system. The community learned that, when all other measures fail, an effective way to get the attention of government is to protest.

[93]For an analysis of the factors required in terms of 'access to housing' and an indication of where the *Joe Slovo* consultation process was lacking, see COHRE *N2 Gateway Project: Housing rights violations as 'development' in South Africa* (2009) www.cohre.org 27. Some of these factors are location dependent – proximity to work, schools, clinics and access to public transport. See also Cross *Housing delivery as anti-poverty: Where is the bottom line?* (2006) HSRC for a discussion on the affordability of shack dwellings; for instance, many destitute households cannot sustain subsidy housing on grants alone. Whereas grant income can cover living costs in shacks, it may not enable low cost housing recipients to afford to run a township house especially since living costs are partly socially defined.

[94]Friedman and McKaiser (n 42) 10.

[95]*Ibid.*

[96]COHRE (n 15) 144.

Another aspect of the current state rhetoric is the language of 'eradicating slums', most notoriously utilised in the Slums Act. Such language supports coercive strategies to prevent new settlements and to constrain the growth of already existing settlements. As the facts of *Nokotyana v Ekurhuleni Metropolitan Municipality*[97] illustrates, such an understanding could encourage politicians 'not to worry about the immediate provision of life saving services to settlements because they are considered "temporary"'.[98] For many years the community sought to engage with the municipality to have *in situ* upgrading of their settlement rather than to be relocated. Citizens' preference for *in situ* upgrading, remains under-utilised by the 'planning elite'.[99] *In situ* upgrading of shack settlements (through tenure security and support services) whilst developing strategies to improve the quality of housing structures and greater number of formal housing allocation, could stave off some of the immediate squalor experienced by millions of South Africans. Such measures could occur whilst the affected inhabitants wait, patiently, for housing delivery. Some will remain in 'temporary' informal shelters for their whole lives.

In *Nokotyana* the Court ordered the provincial authority to take a decision within 14 months as to the municipality's application to have the settlement upgraded. This period was envisaged so that a new feasibility study could be commissioned. It is not clear why such a long period of time was needed. The case is further discussed below.

If the preferences of the people remain ignored, protests will further escalate as dissatisfaction with government policies and practices increases. The lived experiences of the people can inform government decisions if public participation is accepted as being an active and substantive requirement in housing processes, as discussed below.

3.2 The lived experiences of the homeless

Where informal housing is formalised into low-income housing, residents can find the transition difficult. Smit indicates how skewed formal housing projects, based on the 'illusion of modern urbanity', fail to provide the meaningful environmental, economic and social benefits, including security of tenure, that formalisation of housing can provide if it is informed by the lived experiences of the relevant community.[100] Case studies[101] of the communities' perceptions of informal

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[97] *Nokotyana v Ekurhuleni Metropolitan Municipality* also known as the Harry Gwala case (n 26).
[98] COHRE (n 15) 104.
[99] *Ibid.*
[100] Smit 'The impact of the transition from informal housing to formalized housing in low-income housing projects in South Africa' *Development Action Group* paper presented at the *Nordic Africa Institute Conference on the Formal and Informal City: What happens at the Interface?* (2000-06-15/18) Copenhagen at 18.
[101] These case studies were conducted by the Built Environment Support Group and the Development Action Group respectively.

settlements indicates that 'the formalised area may provide the illusion of prosperity, but for many, their financial position may be considerably worse off after formalisation because of the loss of informal economic opportunities and the need to pay rates, service charges and loan repayments'.[102] Smit sees the utilisation of 'imported models of urbanity that ignore the complexities of African cities'[103] as the primary reason for the failure of formalisation to make a more positive impact on communities' lives since it does not promote community cohesion, it restricts labour mobility and breaks down social support systems, thus increasing social differentiation.[104]

Instead, he presses for a more informed understanding of the social, economic and biophysical context within which formalisation takes place which requires a change in perceptions of government officials, professionals, politicians and the residents themselves, to accommodate a better understanding of how to achieve and maintain adequate and sustainable urban environments.[105] Deep seated in such an understanding is that 'greater involvement of individual households in decision-making on the design and construction of their houses results in a much richer, more varied urban environment'.[106] If officials continue to view participation in a tick box fashion, however, the benefits from effective consultation will not be realised and social cohesion will further disintegrate.

Superficial consultation leaves citizens feeling even more powerless where open contempt for the poor continues and where the poor experience the 'consultative' approach as 'contemptuous and intimidatory'.[107] The desperation that resonates from this perceived rejection of the poor is evident in a statement by an activist on the current housing policy:

> They are pushing people out of the city centres without taking into account the reasons why people are living in the city centres away from work and schools. Housing delivery is doubling the people's poverty ... If they want to push people out there they must build schools, clinics, libraries, factories – all the institutions out there. The City fails to understand that people need a livelihood more than they need a house ... They are failing to consult the affected communities and this failure to consult is a symbol of a deep disrespect.[108]

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[102]Smit (n 100) 17.
[103]*Id* 18. See also Swilling, Abdou Maliq and Firoz '"My soul I can see:" The limits of governing African cities in a context of globalisation and complexity' paper presented at Conference on Associational Life in African Cities: Urban Governance in an Era of Change 1998-08-28/30, Bergen; Adebayo *Cities in Africa: A search for identity and sustainability* (2000) paper presented at the African Regional Conference on African Solutions: Towards Sustainable Urban Development 2000-03-27/28, Pretoria.
[104]Smit (n 100) 18. See also Swilling *et al* (n 100).
[105]Smit (n 100) 19.
[106]*Ibid.*
[107]Phillip 'No room for the poor in our cities?' *The Witness* (2009-03-03).
[108]*Ibid.*

This lived experience belies the constitutional promise of participation.[109] The facts in the *Mnisi* judgment display government's preference for treating public participation as a procedural aspect that plays second fiddle to the will of the elected and for ignoring the substantive input from the lived experiences of the electorate.

4 Beyond procedural formalism

In order for participatory democracy to move beyond procedural formalism and to be a substantive part of our constitutional scheme, it must promote accountable, responsive and open governance. Transformative constitutionalism may provide the impetus for the elected to change their attitudes away from rejecting the poor and instead towards listening to their lived experiences and accommodating these experiences into their decisions. As for the courts' role in this regard, it must be accepted that efficient administration requires that decisions are made without undue delay, lest it is frustrated. That is why the separation of powers doctrine is part of our law. The judiciary, however, is not some rogue arm of our democracy. It is the watchdog armed with both procedural and substantive ammunition. Courts can indeed change attitudes: through transformative jurisprudence it has sucessfully done so for the rights of equality and dignity. It can also do so in interpreting participatory democracy.

Next follows a discussion of the democratic elements of our Constitution.

4.1 Democratic imperatives: Accountability, responsiveness and openness

The principles of accountability and participation instil a notion that 'promotion of legality carries with it a right to participate. This right in turn promotes the possibility of an enhanced democracy as it legitimises the decisions underscored by these notions'.[110] In *Doctors for Life*,[111] stressing the principle of accountability, Justice Ngcobo for the majority, held that: 'Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive … [I]t also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy'.[112] An accountable government[113] admits to mistakes, corrects them,

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[109]Sachs J in *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 627 explains this promise as follows: 'The right to speak and be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity.'

[110]Davis and Corder 'Globalisation, national democratic institutions and the impact of global regulatory governance on developing countries' (2009) *Acta Juridica* 68, 80.

[111]*Doctors for Life* (n 11).

[112]*Id* para 205.

[113]See *Ngcuza v Secretary, Department of Welfare Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E) at 1328.

learns from them and delivers effective remedies.[114] Service provision must therefore be affordable, of adequate standard and accessible.[115] Responsive governance refers to a government that 'is alert to the needs of its people and addresses these needs'.[116] Surely this can only be achieved by listening and responding to the people? Transparency and openness is understood in terms of reasons for decisions and the right to access to information as 'timely, accessible and accurate information will assist in establishing a culture of openness and transparency'.[117]

In *Doctors for Life,* a dissenting Yacoob J did not agree that accountability, openness and responsiveness, in terms of section 1(d) of the Constitution,[118] entrenches public involvement as an essential principle of the Constitution.[119] Instead, he asserted that the representative elements in a multi-party democracy place an obligation on the political parties to 'ensure that they take account of what members say within their structures … to ensure accountability, responsiveness and openness'.[120] Although it may be accepted that there is a measure of interpretive gymnastics involved in the majority's *ratio* on reasonableness, the entrenchment of the founding value of openness, responsiveness and accountability will not be realised even from a representative perspective should officials and political parties continue to disregard what their electorate say within their structures. That is how the meaningfulness of participation as espoused by the majority decision would fill the lacuna left by unresponsive and unaccountable representatives on the representative democratic reading of the Constitution. Public participation provides an additional check and balance to that of representative accountability required by section 1(d). Ultimately, it remains true that: 'The participation by the public ... promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation ... [and] acts as a counter-weight to secret lobbying and influence peddling'.[121]

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[114]HSRC Democracy and Governance 'National Study of Service Delivery in District Management Areas' *Study undertaken for the South African Local Government Association and the Department of Provincial and Local Government* (2005) 20. According to Friedman, accountability also means that elected representatives are duty bound to explain and justify their actions to the electorate, and that these arguments must be acceptable to all in Friedman *Human rights transformed: Positive rights and positive duties* (2008) 03.

[115]HSRC Democracy and Governance (n 114) 20.

[116]Burns 'A rights-based philosophy of administrative law and a culture of justification' (2002) 17 *SAPR/PL* 279 at 289.

[117]*Id* 290.

[118]Section 1(d) of the Constitution provides: The Republic of South Africa is one sovereign democratic state founded on the following values: Universal suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

[119] *Doctors for Life* (n 11) para 275.

[120]*Id* para 278.

[121]*Doctors for Life* (n 11) para 115.

Passive provision for participation is not sufficient in our democracy as it negates the true spirit of participation: an active citizenry. Justice Ngcobo acknowledged the imbalances in social power and indicated that the state has to take steps to facilitate effective channels of communication of any views, including proper 'notice of and information about the legislation'[122] and an effective opportunity for the public to exercise their rights.[123] But is this 'participation' sufficient to equalise the power imbalances? Will access to information and notice enable citizens to assert and realise their rights?

The importance of access to information is highlighted in the judgment of Revelas J in *Public Service Accountability Monitor v Director-General, Office of the Premier: Eastern Cape Provincial Government,*[124] where the Eastern Cape Government was compelled to release an unabridged copy of a survey conducted amongst households concerning their perception of government performance and service delivery.[125] Revalas J held that withholding of information from the public domain suppresses peoples' views and inhibits 'candid debate' on critical issues of public concern.[126] The withholding of information from the public is often justified on the condescending basis that the public would not be able to understand it, or would take the information out of context. Davis and Corder indicate that effective public participation relies on information that allows citizens to make 'informed judgments so that they may enter into meaningful political debate about policy issues which … affect their rights and interests' which will allow 'their views taken into account during the decision-making process'.[127] The right of access to information is a passive part of participation but without it, the active engagement with the information provided is not possible. This is equally true whether one is talking about the information given to the public and information that the elected obtained from public views.

Govender stresses that 'snapshot democracy' that depends merely on the elected, using direct and representative aspects of democracy at election time to articulate the electorate's concerns and suggestions, does not fulfil the

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[122] *Id* paras 129-131. See *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 2 SA 67 (C) at 75 and *Cape Killarney Properties Investments (Pty) Ltd v Mahamba* 2001 4 SA 1222 (SCA) 1229.

[123] *Doctors for Life* (n 11) para 105.

[124] *Public Service Accountability Monitor* Case no 6047/07 (E) unreported judgment of 2008-05-29.

[125] The Premier refused to release the unabridged copy of the survey, in violation of s 44(1) of the Promotion of Access to Information Act 2 of 2000 for reasons, *inter alia,* that it was an internal planning document which was in the process of being incorporated into the plans of relevant provincial departments and municipalities; that public disclosure would result in perceptions of service delivery being formed on the basis of information taken out of context; that the report would be sensationalised in the media; that candid communication and deliberation of the report amongst government departments would be inhibited. See paras 6, 9 and 15 of the judgment.

[126] *Id* para 25.

[127] Davis and Corder (n 110) 85.

constitutional requirements of accountability and responsiveness.[128] It is not enough for the judiciary to merely cite a competing principle, such as separation of powers, to trump participation principles, instead the judiciary should, to meet the values of accountability, responsiveness and openness, seek an open explanation from the decision-maker rather than to 'substitute their opinion on the relative weights to be given to different principles'.[129]

4.2 Transformative constitutionalism: Equality, dignity and freedom

In a nation with one of the world's greatest disparities in wealth and power, the promise of equality, dignity and freedom cannot remain illusory.[130] Liebenberg and Goldblatt argue that socio-economic rights should advance the basic needs of the people and greater equality in access to socio-economic services and resources. Such an equality perspective would, they say, 'advance one of the primary goals of transformative constitutionalism – the transformation of "a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction"'.[131] Equality is thus a central value that the state should bear in mind in its redistributive policies and programmes. It is also trite to say that participation is necessary to ensure, much more than merely promoting survival rights,[132] that the 'transformative concept of dignity' remains a key element in addressing those 'conditions of poverty' that limit people's development and participation.[133] This is a concept central to the Constitutional Court's conception of substantive equality.[134] The element of dignity requires acceptance of the poor and not a rejection of their views.

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[128]Govender 'An assessment of section 4 of the Promotion of Administrative Justice Act 2000' (2003) 18 *SAPR/PL* 404, 408 and see Mureinik (n 38).

[129]Friedman (n 114) 104.

[130]The income gap between the rich and poor segments of society is one of the highest in the world, with the UNDP indicating that between 1995 and 2001, the Gini coefficient increased which suggests that income inequality is actually worsening in South Africa; and income percentages at 1.5% for the poorest quintile and 65% for the richest quintile. United Nations Development Programme (UNDP) *South Africa: Transformation for human development* (2000) 64; and UNDP *South Africa: Human development report 2003 – the challenge of sustainable development in South Africa: Unlocking people's creativity* (2003) 42.

[131]Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 146.

[132]See Young 'The Minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* Part II; and Liebenberg & Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 335, 355.

[133]Liebenberg and Goldblatt (n 132) 343.

[134]Notably the jurisprudence of Justice Ackermann in, *inter alia*, *Ferreira v Levin NO National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at para 28.

Commentators indicate that the 'equality perspective' imbeds the realisation that 'socio-economic programmes may be designed or implemented in such a way that they exclude or are practically inaccessible for disadvantaged groups'. These commentators cite the example of a housing programme that failed to make provision for abused women who seek refuge from their abusive partners, effectively restricting women's ability to participate in the programme.[135] Such exclusions highlight the need for understanding the links between poverty and other forms of group disadvantage 'that are necessary to ensure that programmes which are designed to extend access to socio-economic rights benefit all groups equally. It also avoids the false impression that the poor are a homogenous group with uniform experiences of injustice and socio-economic needs'.[136]

Since true equality lies in redistribution of wealth, where resource-based justifications are cited as reasons for the state's failure to fulfil the basic socio-economic needs of everyone, public participation could provide the necessary scrutiny with regard to existing budgetary allocations and the 'holistic' range of state resources.[137] The 'constraints of resources' argument is often utilised to prioritise the needs of certain groups who are particularly disadvantaged or vulnerable, creating 'categories of vulnerability among the poor as a class'. This line of thought has been criticised as potentially legitimating existing distributions of wealth and the 'pervasive class-based inequalities' of South African society[138] which will not facilitate the much needed transformation in the direction of a society that is participatory and egalitarian. The Bayview example cited earlier[139] demonstrates the stark divisions that categorising of the poor can create. It is difficult for citizens to contemplate any system that categorises their need for services or housing on a scale where their need may be less than that of others which would mean that their immediate needs are not prioritised. Categorising the poor, along with a tick-the-box approach to participation has the consequence of disenfranchising the affected communities from their local government. Participatory budgeting processes have worked in other jurisdictions and the Women's Budget Project in South Africa tracks the implications of budget decisions for women across the fiscal system, which provides data for the politicians struggling with the system and for the people desirous of understanding

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[135]Liebenberg and Goldblatt (n 132) 351. See also Combrinck 'Access to housing for women who are victims of gender-based violence' (2009) 10/2 *ESR Review* 4; and Combrinck 'Living in security, peace and dignity: The right to have access to housing of women who are victims of gender-based violence' (2009) *Socio-Economic Rights Project* Research Series 5.

[136]Liebenberg and Goldblatt (n 132) 351.

[137]*Id* 360. See Hernancez Crespo 'Building the Latin America we want: Supplementing representative democracies with consensus-building' (2009) 10 *Cardozo Journal of Conflict Resolution* 425 (utilising consensus-building to create channels for meaningful participation in public decision-making in order to supplement representative democracies in Latin America).

[138]Liebenberg and Goldblatt (n 132) 359.

[139]Cited at (n 58).

how government will address their interests'.[140] Where there are levels of inequality, as in South Africa, such participatory budgeting processes may bridge categorisation to include all segments of society when finding a solution to their specific problems and immediate needs, whilst also providing more legitimacy for the process as a whole.

A corollary of the inclusive approach required by equality within the transformative context is the need to go beyond paternalistic notions of socio-economic rights as 'commodities conferred on passive beneficiaries by benevolent legislatures, bureaucratic agencies or courts'.[141] This means that part of peoples' right to freedom is their entitlement to participate in defining their needs and of course how to realise these needs as agents. Simply put, this entitlement affirms the value of agency and autonomy in participation, which requires that socio-economic rights be conceptualised and implemented cognisant of the value of freedom. The lived experiences of communities should therefore be at the forefront of any embarkation of public participation processes. Such participation is highlighted by Sachs J in *Port Elizabeth Municipality v Various Occupiers*:[142]

> Thus those seeking eviction should not be encouraged to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution: justice and equity require that everyone be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibility of personal moral agency.

Again, the emphasis here is on ensuring that the poor are not seen as dehumanised or as 'radically other' in our transforming democracy. Instead, the state is expected to speak and listen to the homeless, and find housing delivery solutions attentive to their needs. Consequently, the importance of mediation and considering the needs of occupiers for suitable alternative accommodation are relevant factors in determining whether eviction is 'just and equitable'.[143] The facts in eviction cases often demonstrate where the government falls short of the responsiveness obligation.

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[140]See Budlender (ed) *The fourth women's budget* IDASA (1999); and Murray and Simeon 'South Africa's financial constitution: Towards better delivery? (2000) 15 *SAPR/PL* 477 at 498.

[141]Liebenberg 'The value of freedom in interpreting socio-economic rights' (2008) *Acta Juridica* 149, 168-169.

[142]*Port Elizabeth Municipality* (n 26) para 14.

[143]The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to give effect to access to housing as mandated by s 26(3) of the Constitution. Section 26(3) provides: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

In *Occupiers of 51 Olivia Road v City of Johannesburg*[144] a case dealing with the municipality's eviction of the residents of a building deemed to be hazardous on health and safety grounds,[145] 'meaningful engagement' was heralded as the key to unlocking constitutional obligations of municipalities, mainly pertaining to service provision, in terms of section 152(1) of the Constitution.[146] As ever cognisant of context, the Court held that 'meaningful engagement' has to be tailored to the particular circumstances of each situation, which means that, for instance, 'the larger the number of people potentially to be affected by the eviction, the greater the need for structured, consistent and careful engagement'.[147] This is a key example of mutual participation. Bishop explains that here, as in the *Joe Slovo* judgment, the courts' role was to facilitate a 'joint venture' between the interests of the residents and that of government.[148] He stresses that the court's role was to initiate the engagement and to ensure that the process remains deliberative.[149] It does however not have to be a court ordered process only. The success of such a process is predicated on the government's willingness to engage with those affected on equal terms.[150] There is therefore a willingness to reach consensus. In cross-boundary disputes, the courts are lax to order government to 'accept' a solution arrived at through negotiation, argues Bishop.[151]

Cases such as *Port Elizabeth* and *Occupiers of 51 Olivia Road* clearly show that people must be at the forefront of the participation, with the scope of the engagement dependent on the number of people affected. Liebenberg cautions that participation must be 'genuinely empowering' for disadvantaged groups, and not merely perfunctory consultative processes, or a *post facto* information-sharing exercise where decisions have already been taken.[152] Consultation and participation are thus only realised if 'participants are open to revising their initial positions in the light of information, arguments and views exchanged'.[153]

In the *Abahlali* judgment the constitutionality of section 16 of the KwaZulu-Natal Slums Elimination Act was challenged and this again brought the meaningfulness of engagement under fire. Moseneke DCJ, for the majority, held that 'no

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[144] *Occupiers of Olivia Road* (n 11).
[145] The relevant legislation included section 12(4)(b) of the National Building Regulations and Standards Act 103 of 1977.
[146] *Occupiers of Olivia Road* (n 11) para 16. This provision requires that services to communities are provided in a sustainable manner, mandated by subsection (b); to promote social and economic development, mandated by subsection (c); and to encourage the involvement of communities and community organisations in matters of local government, mandated by subsection (e).
[147] *Id* para 19.
[148] Bishop (n 25) 360.
[149] *Ibid.*
[150] *Id* 361.
[151] *Ibid*.
[152] Liebenberg (n 141) 173
[153] *Ibid*.

evictions should occur until the results of the proper engagement process are known' ... which 'would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ;* and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction'.[154] On its face, this interpretation could not conflict with the interests of either party to engagement. In a dissenting judgment, Yacoob J, on the issue of engagement, went a little further: 'If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process'.[155] This 'reasonableness' standard has found its way into the jurisprudence through the *Doctors for Life* majority judgment. What is noteworthy is that Justice Yacoob heeded the necessity of alternatives to eviction from the view of those who will be most actively affected by the decision.

In another matter spearheaded by a shack dwellers' movement, preceded by various protests and again culminating in litigation, the residents of Joe Slovo[156] were victorious in at least one important aspect – the Constitutional Court found a 'duty to engage' in the date and timetable for the relocation process, practically reading it into the wording of the Constitution. The controversial N2 Gateway project apparently necessitated moving residents of the informal settlements along the N2 highway to Delft, situated 15 km away from the original settlement. The majority would be housed in temporary housing in Delft whilst upgrading of the Joe Slovo settlement was taking place and would be resettled in the new formal housing at Joe Slovo once the project was completed. Some would not be resettled at Joe Slovo but would be settled at Delft. The sheer size of the community as well as the complexity of the upgrading was highlighted at various points in the judgments, as well as the fact that a preference for relocation as opposed to *in situ* upgrading was not unreasonable.[157] These factors overshadowed the poor consultation processes on the part of the City. In the end, the Court merely ordered further engagement on the process of relocation.

The usual expressions of respecting the dignity of residents were present in the various judgments,[158] but that of Ngcobo J was premised on an understanding of mutual participation where a 'mutually acceptable solution' to the issues is the aim; but, '*[u]ltimately, the decision lies with the government.* The decision must, however, be informed by the concerns raised by the residents during the process

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[154] *Abahlali* (n 26) para 97.
[155] *Id* para 67.
[156] *Joe Slovo* (n 10).
[157] Yacoob J paras 18, 107-8, Moseneke DCJ paras 167, 174; Ngcobo J paras 183, 198, 253; O'Regan J paras 295, 302-303, 321.
[158] See paras 75, 119, 173, 191, 209, 218, 234, 238, 261, 265, 329, 353, 399, 403 and 406.

of engagement'.[159]

The government remains the decision-maker but cannot simply turn a blind eye to legitimate concerns or possibilities raised by the participation of affected communities. Justice O'Regan stressed that the purpose of engagement is to allow affected parties the opportunity to be heard 'before' a decision is 'finally made'.[160] It is trite that it should occur *before* the decision is made, but does it mean that the decision can be made tentatively, not finally? The dilemma remains that engagement is a nebulous concept and for the two parties, government and citizens, there is no consensus on what constitutes *adequate* engagement or even *successful* engagement. For government, it may mean that the officials went through the motions, rubber-stamping the decision – which would be a legitimate interpretation on the reading of the dissent of Justice Van der Westhuizen in *Doctors for Life*. While, for citizens, it may require an indication that their concerns are legitimately considered, weighed and that their concerns have the potential to *change* the minds of the decision-makers, even if only in part.

It bears reiteration that this concept of the potential to *change* the minds of decision-makers is crucial to giving content to participatory democracy, yet it requires decision-makers, whether legislators, administrators or executives to be open to change, to be responsive to change and to be transparent about their decisions and the rationale for reaching a decision. That is the true hallmark of the democratic democracy our Constitution envisages. Yet, similar to the interpretation of Ngcobo J, for O'Regan J the qualifier remains that the decision is for the executive to make, not for the residents: 'it should not result in unnecessary and prolix requirements that may strangle government action'.[161]

That being said, in *Masondo,* O'Regan J stressed that deliberation (as opposed to engagement in *Joe Slovo*) is 'subject ... to the right of the majority to make decisions'.[162] Who in fact determines the prolixity and necessity of the requirements? If it remains within the executive prerogative to make policy decisions, not informed by citizen's choices, but merely taken *after* citizens have ventilated their concerns in the proper forum, then participatory democracy is a misnomer, as 'participation' is a two-way street. The doctrine of separation of powers, if rigidly applied, continues to constrain our courts from fully accepting a measure of quid pro quo required by participatory democracy. Such a measure would encompass citizens walking away from the process feeling validated by the ultimate decision and not necessary require quid pro quo in the strict sense. This aspect will be elaborated upon below, when 'judicial avoidance' is discussed.

Some hope is found in Justice Sachs' concurring judgment in *Joe Slovo*, which is premised on the notion that democracy entails more than voter

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[159] *Id* para 296 (emphasis added).
[160] *Ibid.*
[161] *Ibid*.
[162] *Democratic Alliance v Masondo* 2003 2 BCLR 128 (CC) paras 72 and 78.

participation and includes 'the full substantive benefits and entitlements envisaged by the Constitution'; as well as 'the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole'.[163] This could be considered to edge more towards substantive participation, and much closer to radical participation than to mutual participation. It is closer to radical participation in the sense that it is an ongoing dynamic process and not an ad hoc process as mutual participation initiatives often are.

Taken as a collective then, the eviction decisions in *Mnisi, Port Elizabeth Municipality, Occupiers of 51 Olivia Road, Joe Slovo and Abahlali,* compared to the interpretations in *Doctors' For Life, Masondo, Merafong and Poverty Alleviation Network* indicate a contrast between acceptance of the validity of the poor's concerns and their right to not just be consulted on aspects of legislation or executive decisions that will materially and adversely affect them, but to be part of finding a solution to the problem; and a fundamental rejection of their dignity and concerns. The former fosters transformative constitutionalism and the latter harks back to apartheid government decision-making complete with the window dressing of 'consultation' that arrives at an outcome that does not reflect the people's input. These cases do not usually lend themselves to such sweeping and easy categorisation: it is acknowledged that each judgment is nuanced to reflect the interpretations of the role of the stakeholders and the outcome of each participatory method employed in each case. Be that as it may, for the purposes of this paper, the division is clear.

4.3 Participatory democracy as judicial avoidance

Many commentators have indicated that the principle of participatory democracy is sometimes the straw at which the courts grasp. Granted, this often occurs in seemingly complex cases. However, instead of interrogating the existence and level of public participation, courts should have interrogated the ambit of the socio-economic rights at risk in these cases.

It should also have interrogated the corollary: government's meeting of its obligations to its citizens. Dugard argues that the judiciary 'remains institutionally unresponsive to the problems of the poor and it fails to advance transformative justice'.[164] Using *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg*[165] as a starting point, Dugard criticizes the Constitutional Court for its 'judicious' avoidance – a style of adjudication characterised by a 'reluctance on the part of the Court to pronounce on any issue that does not have to be

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[163] *Joe Slovo* (n 10) para 408.
[164] Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) *SAJHR* 214 at 215.
[165] *Occupiers of 51 Olivia Road* (n 11).

decided for the purposes of settling the case'.[166] Dugard illustrates this line of argument with regard to the *Olivia Road* judgment where she argues that *inter alia* three distinct socio-economic issues required adjudication: a) whether the right of access to adequate housing requires a consideration of location in the provision of alternative accommodation;[167] b) whether or not, in failing to make any provision for the poor in its inner city housing plan, the City of Johannesburg's housing policy was unconstitutional; and c) whether a law which gave a local authority the right to evict occupiers of buildings that were considered to be unsafe, without considering the availability of alternative accommodation, was inconsistent with the Constitution.

Instead, of dealing with these issues, the court remained 'institutionally remote from the majority of South Africans' lives'[168] by focussing on the requirement for a local authority to meaningfully engage with occupiers facing eviction which, however helpful, is a concept that does not protect the poor against eviction, and Dugard argues further that it also does not delineate the right to housing.[169] Even more scathingly, Dugard comments that the Court 'failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial development and it failed to establish critical rights-based safeguards for extremely vulnerable groupings, despite having all the material before it to do so'.[170] This is a criticism that is increasingly being levelled at the judiciary.

The *Nokotyana* case[171] also exposes this issue where residents of an informal settlement in Ekhurhuleni wanted to force the municipality to install communal taps, temporary sanitation facilities and high-mast lighting. In the Constitutional Court, the residents argued that they were entitled to demand ventilated pit latrines for each household and lighting in the common area. The decision as to whether or not the settlement should be upgraded to a formal township had been delayed by the MEC concerned since August 2006. The court ordered the MEC to make a final decision on the status of the settlement within

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[166]See Dugard and Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in Gargarella, Domingo and Roux (eds) *Courts and social transformation in new democracies* (2006) 107, 110. See also Dugard (n 64) 237.

[167]Dugard aptly describes this as the weight to be attached to the benefits that poor people facing eviction derive from the present location of shelter or housing.

[168]*Id* 238.

[169]See the preference for mediation in *Port Elizabeth Municipality v Various Occupiers* (n 26) para 36 explained as follows: 'one potentially dignified and effective role of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.'

[170]Dugard (n 164) 238.

[171]*Nokotyana* (n 10).

14 months. Again, the court's judgment in this matter is indicative of the court's concern with the separation of powers doctrine, which Bilchitz describes as 'formalism' and which leads the court to ignore the pressing substantive concerns of the vulnerable citizens before it. In this case, the court effectively avoided dealing with the constitutional obligations in relation to sanitation and electricity. Bilchitz notes that: '[The court] often engages in analysis at a level of abstraction far removed from the concrete suffering of individuals. All in all, this is leading to a jurisprudence which places deference to the government above vulnerability of individuals'.[172] The court held that it would not be just and equitable to make an order that would benefit only those who caused sufficient embarrassment by litigation, and not others in a similar situation.[173] The municipality was opposed to accepting assistance from the provincial and national government on the basis that such acceptance would constitute discrimination against communities in a similar situation. Bilchitz remarks that '[q]uite incredibly, the court agreed with this equality argument of the municipality and in doing so, it entrenched an "equality of the graveyard", seeking to ensure that everyone was equally badly off'.[174] Communities and social movements will consequently, despite partial successes of movements such as Abahlali BaseMjondolo in the Slums Act judgment, think twice before bringing their claims before the courts. Whilst the *Nokotyana* case did not deal with participatory democracy, it remains a useful illustration of yet another instance in which judicial avoidance wins the day, where the courts had shied away from the opportunity to give real content to the socio-economic rights concerned.[175]

Bishop, in the same vein as Dugard and Bilchitz, acknowledges the weakness, from a socio-economic perspective, where courts, citing separation of powers, utilise 'engagement' to allow the other branches of government 'significant room to define the right' in housing cases.[176] Engagement may not be as 'effective in promoting the right to housing in the vast majority of cases that do not get litigated as a more substantive attitude to section 26(2) might be'.[177]

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[172]Bilchitz cited in Naidoo 'Formally unsettled' *Financial Mail* (2010-01-08).
[173]*Nokotyana* (n 10) 27.
[174]*Ibid.*
[175]See also *Ekhurhuleni Municipality v Dada NO* Case no 280/2009 (SCA) paras 13-14 where the SCA overturned the High Court decision to direct the municipality to buy the land which had been unlawfully occupied by approximately 76 families. Cassim AJ in the High Court held that 'a court of law must interfere in appropriate cases when an organ of state is consistently failing in its functions and obligations, particularly, insofar as the plight of poor people is concerned. Indigent people cannot look after themselves and when the executive fails them, a court must come to their assistance'. The SCA, in paying homage to separation of powers and judicial deference, held that the High Court's 'pre-conceived notion ... that it was time "to get things moving"' in ordering the purchase of the land was 'well outside the limits of [the Judge's] power'. Chenwi argues that even though the SCA was arguably correct in holding that the remedy ordered was overly broad, the judgment did not say what the appropriate relief would be in this particular case, Chenwi 'Enforcing housing rights' (2009) 10/2 *ESR Review* 17.
[176]Bishop (n 25) 358 fn 179.
[177]Bishop (n 25) 358.

The mutual participation cases, such as the *Olivia* judgment and the *Joe Slovo* judgment, pay tribute to participation as a 'joint venture aimed at solving a common problem', where both residents and government utilise 'engagement' as the tool to arrive at a 'mutually acceptable solution'.[178] The process is deliberative, in which parties are expected to discuss the issues in good faith and as equals.

However, equality of arms is not the reality[179] in housing delivery cases: the size of the government purse is inevitably the deciding factor and the attitude of the government is often one of: be grateful for what you are getting.[180]

5 Concluding remarks

Governance without meaningful citizen participation results in supply-driven, instead of demand-driven, policy formulation and implementation as well as inefficient and inadequate delivery of public services leading to increasingly violent protests and opposition to government, whereas it could have 'instead [harnessed] citizens' energy for more useful decision-making'.[181] Genuine public participation espouses 'democratic legitimacy'[182] to policy decisions, local municipal decisions and statutory frameworks, reducing the potential for disillusionment and violent conflict attributable to loss of public trust.[183]

The long-term goal of redressing the imbalance in distribution of housing opportunities is to 'reduce the levels of dependency and to provide for the widest possible variety of housing provision mechanisms ... [ideally] ... the process should be driven by the communities themselves'.[184] Lack of participation remains a major obstacle in housing delivery. Where citizens are included in decision-making from the start, it leads to a better end product in line with the 'specific housing needs of the community' and beneficiaries that are better informed of their responsibilities.[185] At a local level, fragmentation, inefficiency and lack of participation can be addressed by gearing staff 'towards a more facilitative and implementation-oriented approach' where:

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[178] *Ibid.*

[179] Friedman *Power in action: Democracy, collective action and social justice* Research Report Submitted to the Institute for Democracy in South Africa and the Ford Foundation (publication forthcoming 2011).

[180] Ngcongo (n 59).

[181] Tadesse *et al* (n 4) 7.

[182] International Institute for Labour Studies *Workshop on Participatory Governance: A New Regulator Framework* (2005) Geneva 2.

[183] Tadesse *et al* (n 4) 9.

[184] Pienaar 'The housing crisis in South Africa: Will the plethora of policies and legislation have a positive impact?' (2002) 17 *SAPR/PL* 336, 361.

[185] *Id* 362. For instance, lack of information can be dire when many beneficiaries do not understand the subsidy scheme, thinking that they would receive a house for free and not realising that it would be a 'starter house' which would have to be extended by themselves.

Local authorities will have to become more responsive to the needs of the communities they serve. The communication channels will have to be open and transparent ... The participatory approach could extend beyond service improvement to include the community's role in managing local affairs and to interact more effectively with government authorities and other role players.[186]

The illusion of participation begs the question: has the executive and legislature forgotten the tenacity of the people's power in bringing down apartheid through struggle?[187] The judiciary, in keeping with traditional and mutual participation espoused by the other branches, is not transforming their jurisprudence in line with the radical participation movements of the people. All branches of government continue to see the poor as radically other and this entrenches the equality of the graveyard. By-and-large, the housing cases discussed in this paper indicate that the judiciary remains institutionally remote from the people's concerns instead of ensuring that legislative and executive decision-making meet constitutional imperatives of accountability, responsiveness and openness.

The leader of the slum dwellers' movement *Abahlali* pleaded for the humanity of slum dwellers in Durban to be recognised so that the provision of adequate housing becomes a reality within the lifetime of those who have suffered under apartheid and remain dehumanised:

> Those in power are blind to our suffering. This is because they have not seen what we see, they have not felt what we are feeling ... My appeal is that leaders who are concerned about peoples' lives must come and stay at least one week in the jondolos. They must feel the mud. They must share 6 toilets with 6 000 people. They must dispose of their own refuse while living next to the dump ... They must chase away the rats and keep the children from knocking the candles. They must care for the sick when there are long queues for the tap ... For us the most important struggle is to be recognised as human beings. During the struggle prior to 1994 there were only two levels, two classes – the rich and the poor. Now after the election there are three classes – the poor, the middle class and the rich. The poor have been isolated from the middle class. We are becoming more poor and the rest are becoming more rich. We are on our own. We are completely on our own.[188]

This sense of hopelessness and abandonment fuels protests that will become increasingly more violent when there is no end in sight for service delivery backlogs. The interpretation of participatory democracy by the

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[186]Pienaar (n 184) 369.

[187]See *Doctors for Life* (n 11) para 112, citing Proceedings of the National Council of Provinces (2005-11-04) at 104: 'They were also seen as crucial in laying the foundation for the future participatory democracy that [the people] were fighting for and that we are operating under. This is strongly reflected in our democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.'

[188]Zikode 'We are the third force' at http://www.abahlali.org/node/17 (accessed 2009-10-10).

Constitutional Court and other courts has the capacity to evolve into a jurisprudence embedded in recognising the rights to equality and dignity of those who are without adequate shelter or homes. However, this jurisprudence cannot continuously defer to the government,[189] in Bilchitz' words 'above [the] vulnerability of individuals'.[190] The jurisprudence will remain empty illusions if the actions of the officials belie the constitutional obligation, with their attempts at participation remaining perfunctory. If an active citizenry is required in terms of the Constitution and statutory developments,[191] then passive procedural provision for participation is not sufficient. Nor can the provision of participatory methods be used as a judicial avoidance smokescreen, to distort the reality that socio-economic delivery is lagging behind. The true markers of the success of participatory methods are the values of accountability, openness and responsiveness, without which true and meaningful participation remains an illusion, and without which our progressive Constitution's capacity to transform our society will remain hollow. If it is true that 'between elections ... voters have no control over the conduct of their representatives' but rather that their remedy lies in recasting their vote in the next election[192] then public participation will be meaningless.

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[189]On the contrary, see the jurisprudence that indicates that separation of powers is not absolute, notably: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of RSA* 1996 4 SA 744 (CC) para 111; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 53-59; *President of the Republic of South Africa v South African Football Union* 2000 1 SA 1 (CC) paras 240-245; *In re Constitutionality of the Mpumalanga Petitions Bill* 2002 1 SA 447 (CC) para 26; *Minister of Health v Treatment Action Campaign No 2* 2002 5 SA 721 (CC) at para 113; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

[190]Bilchitz cited in Naidoo 'Formally unsettled' *Financial Mail* (2010-01-08).

[191]Such as the Local Government: Municipal Systems Act and the Promotion of Administrative Justice Act (n 21).

[192]*United Democratic Movement v President of the Republic of South Africa* (No 2) 2003 1 SA 495 (CC) paras 49-50.