

# The Role of Public Participation Viewed in the Context of Adjudicating Socio-economic Rights

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## ABSTRACT

This article examines how the courts have applied and interpreted the principles of public participation in the context of adjudicating socio-economic rights. In this light, this article adds to the contributions paying tribute to Justice Ngcobo in the following ways. First, it examines the role of public participation viewed in the context of adjudicating socio-economic rights. Secondly, it reflects on the jurisprudence of the South African courts with regard to the application and interpretation of the principles of public participation in the course of adjudicating socio-economic rights. Thirdly, it examines the dynamics of public participation, and then revisits the strategies for achieving it.

**Keywords:** public participation; socio-economic rights; poverty; adjudication; public involvement.

\* My appreciation goes to the anonymous reviewers of this article for their valuable comments; the remaining errors are my own.

## Introduction

One of the fundamental characteristics of the Constitution<sup>1</sup> is the inclusion of economic and social rights.<sup>2</sup> In addition, section 7(2) of the Constitution mandates the State to respect, protect, promote and fulfil these rights. Furthermore, courts, tribunals and forums are entrusted with the obligation in terms of section 39(2) to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. In the context of socio-economic rights, the courts may hand down judgments that have major policy implications without giving large sections of the population who may be affected by the decision the opportunity to be heard.<sup>3</sup> One of the major features of adjudication is to develop interpretations of rights that are responsive to the lived experiences of those affected by a particular social and economic issue.<sup>4</sup> At the same time,

[t]hroughout the process of making binding decisions, citizens ought to have adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.<sup>5</sup>

South Africa's democracy is founded on principles of accountable governance and public participation. Public participation plays a key role insofar as monitoring government performance, strengthening public accountability, and driving service-delivery improvement are concerned. Ngcobo J succinctly captured the very essence of public participation when he stated:

[o]ne of the purposes of the public participation ... is to afford people the opportunity to express their views on [matters] that will impact on [their] socio-economic conditions.<sup>6</sup>

Kapindu argues that socio-economic rights are empowerment rights as they allow socially vulnerable and marginalised individuals and groups to use the legal process in order to obtain the satisfaction of their essential socio-economic needs.<sup>7</sup> He further notes that socio-economic rights empower people who are subject to the jurisdiction of a State

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1 The Constitution of the Republic of South Africa, 1996 ('the Constitution').

2 Section 27(1) of the Constitution provides that everyone has the right to have access to healthcare services, sufficient food and water, and social security—including, if they are unable to support themselves and their dependants—appropriate social assistance. Similarly, s 26(1) provides that everyone has the right to have access to adequate housing.

3 Sandra Liebenberg, 'Participatory Approaches to Socio-economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32(4) *Nordic J of Human Rights* 316.

4 *ibid.*

5 Robert Dahl, *Democracy and its Critics* (Yale University Press 1989) 109.

6 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (10) BCLR 1059 (CC) para 76.

7 Redson Kapindu, 'Courts and the Enforcement of Socio-economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities' (2013) 13 *African Human Rights LJ* 126.

to demand that the State act reasonably and progressively to ensure that all enjoy the basic necessities of life. In the process, these rights enable citizens to hold government accountable for the manner in which it seeks to pursue the achievement of social and economic welfare and development. Similarly, Liebenberg posits that human rights norms are fundamental to a deliberative conception of democracy while allowing ample space for dialogic engagement with their concrete entailments in a range of different contexts.<sup>8</sup> She notes that deliberative democracy enriches and deepens representative democracy by expanding the opportunities for people's active participation in a broad range of decision-making processes.<sup>9</sup> Liebenberg also acknowledges that in creating multiple sites of dialogue and avenues of participation, the aim is to encourage greater participation in the public and private institutions that affect various aspects of people's lives. Indeed, Ngcobo J, in *Doctors for Life International*, has held that the concept of

[public] participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who themselves should participate in government, though their participation may vary in degree.<sup>10</sup>

Ngcobo J further notes that the Constitution lays 'the foundations for a democratic and open society in which government is based on the will of the people.'<sup>11</sup> In giving effect to these constitutional precepts, the courts play the important role of infusing principles of participatory democracy whenever they adjudicate socio-economic rights.

It is in this regard that I argue that the adjudication of socio-economic rights and the principles of public participation are mutually inclusive. It is therefore important to examine how the courts have applied and interpreted the principles of public participation in the context of adjudicating socio-economic rights. In this light, this article adds to this issue in tribute to Justice Ngcobo in the following ways: first, it examines the role of public participation viewed in the context of adjudicating socio-economic rights. Secondly, it reflects on the jurisprudence of the South African courts with regard to the application and interpretation of the principles of public participation in the course of adjudicating socio-economic rights. Thirdly, it examines the dynamics of public participation, and then revisits the strategies for achieving public participation. The last part of this article is the conclusion.

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8 Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement' (2012) 12 African Human Rights LJ 8.

9 *ibid* 10.

10 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 110 ('*Doctors for Life International*').

11 *ibid*.

## The Content and Scope of the Notion of Public Participation and the Duty to Facilitate Public Involvement

South Africa's constitutional democracy is representative and participatory in nature. The representative aspect embraces multi-party democracy, which is achieved through regular elections based on a common voters' roll and proportional representation.<sup>12</sup> The participatory aspect goes further than regular elections every five years in that it guarantees the involvement of each citizen in public life in between elections. In defining the content of participatory democracy Ngcobo J, in *Albutt v Centre for the Study of Violence and Reconciliation & Others*,<sup>13</sup> held that 'what our Constitution demands, is participatory democracy; the democracy our Constitution demands is not merely a representative one, but it is also, importantly, a participatory democracy.'<sup>14</sup> In this regard, public participation plays a key role insofar as democracy is concerned because it enhances the will of the people. The citizenry is at liberty to determine their political, economic, social and cultural systems and their full participation in all aspects of their lives. The foundation of any democratic system lies in the protection of basic human rights for all, including minorities, who should have their proportionate share in the exercise of power, along with the right to have their interests carefully considered if threatened in proposed legislation and to practise their own culture.

The overarching conceptual values of public participation include, but are not limited to, inclusiveness, openness, access, consultation, shared decisions and transparency. Through participation, citizens express their preferences to governing officials and convince them to respond to those preferences.<sup>15</sup> Furthermore, in clarifying the concept of public participation, scholars define public participation as grassroots community engagement.<sup>16</sup> In other words, the notion of public participation is to a certain extent intrinsically linked to the concept of 'meaningful engagement'. This concept was first properly defined by the South African Constitutional Court in the *Olivia Road* case,<sup>17</sup> which is dealt with later in this article.

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12 See s 1 of the Constitution.

13 *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (5) BCLR 391 (CC) ('*Albutt*').

14 *ibid* para 90.

15 Clarence Tshoose, 'Dynamics of Public Participation in Local Government: A South Africa Perspective' (2015) 8(2) *African J of Public Affairs* 15–16.

16 Sarah White, 'Depoliticising Development: The Uses and Houses of Participation' (1996) 16 *Development in Practice* 6–17; J Forester, 'Making Participation Work When Interest Conflict' (2006) 72 *Journal of the American Planning Association* 447–456; Claire B nit-Gbaffou, 'Introduction: The Place of Participation in South Africa' (2008) 66 *Transformation* 1–7; Vishal Surbun, "'Hearing the People on the Street": Testing the Extent of Public Participation in Durban's Street Renaming Process' (2003) 34(2) *Obiter* 369–376.

17 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & Others* [2008] ZACC 1 ('*Olivia Road*').

The Constitution requires the National Assembly, the National Council of Provinces and the provincial legislatures to facilitate public involvement in the legislative and other processes of the National Assembly and its committees. Section 59(1) of the Constitution stipulates that:

(1) The National Assembly must— (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken— (i) to regulate public access, including access of the media, to the Assembly and its committees; and (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.<sup>18</sup>

One cannot discuss the meaning of public involvement and public participation without referring to Justice Ngcobo’s judgments. In this respect, in *Matatiele Municipality & Others v The President of the Republic of South Africa & Others*,<sup>19</sup> Ngcobo J commented on the phrase to ‘facilitate public involvement’ in the context of section 59 of the Constitution as follows:

Public involvement is necessarily an inexact concept, with many possible facets, and the duty to ‘facilitate’ it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content.

Ngcobo J has also acknowledged that public participation is not foreign to South Africa. Essentially, the traditional means of public participation is the *imbizo*, *lekgotla* or *bosberaad*.<sup>20</sup> According to Ngcobo J, this is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. A significant characteristic of *imbizo/lekgotla/bosberaad* is the fact that the entire community is involved at various levels in trying to find a solution to a problem that is viewed as threatening its social cohesion.<sup>21</sup>

On the duty to facilitate public participation, Ngcobo J has held that:

[In the context of public participation] what is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement

18 See also ss 72 and 118 of the Constitution in relation to the provincial and local legislatures.

19 *Matatiele Municipality & Others v The President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC) para 64 (*‘Matatiele’*).

20 *Doctors for Life International* (n 10) para 101. See also *Albutt* (n 13) paras 90 and 91.

21 Tim Murithi, ‘African Approaches to Building Peace and Social Solidarity’ (2006) 6(2) *African J on Conflict Resolution* 20–22.

may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in decision making’. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.<sup>22</sup>

The courts also play a role in ensuring that public participation is facilitated. Thus, Ngcobo J has held that

[the] Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid.<sup>23</sup>

It is clear that the Constitution demands that the Legislature facilitate public involvement as has been explained and held by the Constitutional Court, *per* Ngcobo J. In the following section, this article discusses selected judgments from the Constitutional Court that deal with the principles of public participation in the adjudication of socio-economic rights. The aim is to demonstrate the importance of public participation in the adjudication of socio-economic rights.

## Discussion of Selected Case Law on the Principles of Public Participation and Adjudication of Socio-economic Rights

Very often, when courts deal with the realisation of socio-economic rights, they focus on the litigation aspect associated with these rights. Thus, the role of public participation in the adjudication of socio-economic rights is often neglected. Liebenberg asserts that participatory modes of socio-economic rights enforcement offer a number of attractive features. First, they lower the heat of democratic legitimacy concerns by removing the judicial role in rights definition and enforcement from the limelight. Secondly, participatory models of adjudication aim to stimulate a process of deliberation between state institutions, rights beneficiaries, civil society organisations and even business entities.<sup>24</sup> Furthermore, according to Liebenberg, during such deliberations

22 *Doctors for Life International* (n 10) para 129. See also *Moutse Demarcation Forum & Others v President of the RSA & Others* 2011 (11) BCLR 1158 (CC) para 49, where Jaftha J cites this paragraph with approval.

23 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (6) SA 214 (CC) para 106.

24 Liebenberg (n 3) 319.

the stakeholders attempt to reach agreement on what specific policy measures the right requires in the particular context and on the reforms and policies that would give optimal effect to the right.<sup>25</sup> Therefore, involving the Judiciary in processes aimed at realising people's material needs co-exists with the emphasis on citizen participation that lies at the heart of modern development discourse and praxis.<sup>26</sup> But Liebenberg argues that litigation and legal discourse traditionally do not constitute broadly participatory processes or spaces; instead, they play a limited role in the discourse of public participation. This is because they involve a limited range of parties, and the specialised, expert discourse of legal rules and processes constitutes a barrier to meaningful participation by those whose rights are affected.<sup>27</sup>

There are, however, exceptional cases where the courts have interpreted and applied principles of public participation. This article specifically discusses select socio-economic rights judgments, where the courts have pronounced on the role of public participation in the adjudication of socio-economic rights. The first case is *Port Elizabeth Municipality v Various Occupiers*,<sup>28</sup> where the Supreme Court of Appeal set aside the order of eviction granted by the High Court<sup>29</sup> and agreed with the respondents that the applicant (Port Elizabeth Local Municipality) was under an obligation to provide alternative accommodation to unlawful occupiers.<sup>30</sup> The municipality applied to the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal and to have the eviction order restored. The municipality sought a ruling that it was not constitutionally obliged to find alternative accommodation for the unlawful occupiers. Justice Sachs reasoned that in cases where there is a conflict between section 25 (dealing with property rights) and section 26 (concerned with housing rights) of the Constitution,<sup>31</sup> the sections must be read together in order to find a fair and equitable outcome.<sup>32</sup> The Court held that 'a potentially dignified and effective mode' of achieving a sustainable resolution of the clash between property and housing rights in a case such as this was for courts 'to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.'<sup>33</sup> The Court emphasised that:

those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical

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25 *ibid.*

26 *ibid.*

27 *ibid* 313.

28 *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) ('*Port Elizabeth Municipality*').

29 *ibid* para 4.

30 *ibid* para 5.

31 *ibid* paras 19–23.

32 *ibid* paras 27–37.

33 *ibid* para 39.



approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to 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 possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land.<sup>34</sup>

Secondly, in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*,<sup>35</sup> the Court expounded on the meaning of a ‘meaningful engagement’ once it became apparent that the City of Johannesburg had not complied with the obligations to engage with the occupiers in terms of section 26(3) of the Constitution.<sup>36</sup> One of the reasons given for the City of Johannesburg’s failure to comply was that it was impractical to have a meaningful engagement with more than 67 000 occupiers. The Court rejected this argument and found that it must ‘have been apparent that the eviction of a large number of people was inevitable’. The Court concluded that the municipality was required to have a meaningful engagement with the occupiers collectively and individually.<sup>37</sup> In this respect the Court held:

Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—

- a. what the consequences of the eviction might be;
- b. whether the city could help in alleviating those dire consequences;
- c. whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- d. whether the city had any obligations to the occupiers in the prevailing circumstances; and
- e. when and how the city could or would fulfil these obligations.<sup>38</sup>

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34 *ibid* para 41.

35 2008 (3) SA 208 (CC) (*‘Olivia Road’*).

36 Section 26(3) of the Constitution provides that: ‘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.’ See also *Olivia Road* at para 13, where the Court notes: ‘It became evident during argument that the City had made no effort at all to engage with the occupiers at any time before proceedings for their eviction were brought.’

37 *Olivia Road* para 13.

38 *ibid* para 14.



The Court also emphasised that ‘the process of engagement will work only if both sides act reasonably and in good faith.’<sup>39</sup>

Thirdly, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,<sup>40</sup> the Court granted an eviction order against some 20 000 members of the Joe Slovo informal settlement in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>41</sup> in order to facilitate the upgrading of the site, but it imposed detailed conditions regarding the relocation of the community to a temporary resettlement area some 15 km away pending their return to the upgraded settlement. The authorities were required to engage meaningfully with the community concerning the details of the implementation of the eviction order and the relocation of the community to the temporary resettlement area. The Court also imposed strict meaningful engagement requirements in order to carry out the eviction and relocation orders, but allowed the authorities considerable leeway in the engagement processes with the community pertaining to the manner in which the informal settlement upgrade would take place.<sup>42</sup>

Lastly, in *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality*,<sup>43</sup> the remedy of meaningful engagement accompanied by judicial supervision was granted to facilitate the right of return for more than 3 000 persons removed from a residential complex close to the Pretoria city centre. The residents had been forcibly removed from the buildings they were occupying on the grounds of alleged health and safety concerns by national and municipal law-enforcement and fire brigade officials. The Constitutional Court held that this conduct amounted to an eviction of persons from the residents’ homes without a court order in contravention of section 26(3) of the Constitution. The Court re-emphasised that the Constitution as interpreted by various judgments of the Court requires ‘the substantive involvement and engagement of people in decisions that may affect their lives’.<sup>44</sup> Therefore these have,

enabled us to appreciate [...], first, the interrelation between different rights and interests and second, that the exercise of these often-competing rights and interests can best be resolved by engagement between the parties.<sup>45</sup>

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39 *ibid.*

40 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC) (‘*Joe Slovo Community*’).

41 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

42 *Joe Slovo Community* (n 40): the Order in para 7.

43 2013 (1) SA 323 (CC) (‘*Schubart Park Residents Association*’).

44 *ibid* para 43.

45 *ibid* para 44.

## The Court found that

[not] only did their inherent right to dignity entitle them to be treated as equals in the engagement process, but also their legal entitlement to return to their homes absent a court order for their eviction.<sup>46</sup>

In this respect, the Court held:

The City's tender was an inadequate basis for a proper order of engagement between the parties. It proceeds from a 'top-down' premise, namely that the City will determine when, for how long and ultimately whether at all, the applicants may return to Schubart Park. Unfortunately, the history of the City's treatment of the residents of Schubart Park also shows that they appeared to regard them, generally, as 'obnoxious social nuisances', who contributed to crime, lawlessness and other social ills. If there were individuals at Schubart Park who were guilty of, or contributed to, these ills, they should have been dealt with in accordance with the provisions of the law relating to them.<sup>47</sup>

In summary, it should be clear from the discussion above that the principles of public participation have played a pivotal role in the adjudication of disputes involving socio-economic rights. In fact, the Constitutional Court has made it clear that in cases of eviction the communities ought to be engaged and provided with alternative accommodation before eviction can be effected. Furthermore, in resolving disputes involving socio-economic rights the Constitution encourages public participation between the government and its citizenry. However, it is submitted that in most cases the principles of public participation are either ignored or not applied by the authorities. The next section examines the dynamics of public participation.

## The Dynamics of Public Participation

The literature analysing public participation suggests that the participatory processes and systems in South Africa lack transformative qualities and are marred by neglect, lack of service delivery, corruption, infrequent feedback, limited involvement and inexperience on the part of planners and officials.<sup>48</sup> Access to information, for instance, is said to be inadequate and uneven, as are the capacities of citizens (and officials) to understand the technical formats in which information is presented.<sup>49</sup> The participation that does occur

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46 *ibid* para 49.

47 *ibid* para 50.

48 Liezel Lues, 'Citizen Participation as a Contributor to Sustainable Democracy in South Africa' (2014) 80(4) *International Review of Administrative Sciences* 802–804; J Tsheola, N Ramonyai and M Segae, 'Twenty Years of Faltering "Democracy": Service Delivery Planning and Public Participation in South Africa' (2014) 49(1) *Journal of Public Administration* 393–403; Betty Mubangizi and Mel Gray, 'Viewpoints Putting the "Public" into Public Service Delivery for Social Welfare in South Africa' (2011) 20 *International J of Social Welfare* 212–218.

49 Gregory Houston, 'The Social Dynamics in Public Participation in Legislative Processes in South

tends to be brief and in the shape of sporadic inputs that decorate particular stages of planning and programming cycles. When they do occur, feedback is perfunctory.<sup>50</sup>

The perception among members of the community is that public participation, if and when it occurs, involves presenting predetermined positions and programmes for limited feedback or information-sharing only.<sup>51</sup> On the contrary, when community inputs are solicited, they are often accompanied by poor facilitation of the participatory processes. It is submitted that the key to effective participation can be determined by the government's willingness to be accessible to citizens in general and to the poor in particular. The poor cannot gain a voice through structured participation forums because they are usually disorganised and therefore they lack the capacity to participate.<sup>52</sup> Many of the poor do not participate in grassroots survivalist organisations because the government does not provide participatory spaces in which they will be free to express themselves.<sup>53</sup>

Ideally, the creation of these democratic spaces is meant to enable the ordinary masses to engage with the government from an empowered position where they can have their voices heard. In terms of the broader public discourse, participatory spaces will provide opportunities to strengthen the relations between government and citizens and enhance accountability among government representatives, civil society and citizens.<sup>54</sup> Accordingly, this discourse is burdened with the question whether the establishment of these systematic participatory arenas will be transformative and inclusive.

The construction of a participatory space is considered to be inherent in power and could be used by citizens for meaningful engagement in shaping public policy debates in the area of socio-economic rights.<sup>55</sup> The concern with how and by whom spaces for participation are shaped intersects with debates about the places and arenas where critical, social, political and economic power reside.<sup>56</sup> The conflicting nature of

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Africa' in *Public Participation in Democratic Governance in South Africa* (Human Sciences Research Council 2001) 207–278.

50 Steven Friedman, 'Participatory Governance and Citizen Action in Post-apartheid South Africa' 2006 *International Institute of Labour Studies* 8–11.

51 Imraan Buccus and Janine Hicks, 'Assessing the Effectiveness of Community Based Involvement' 2006 *Critical Dialogue* 2.

52 *ibid* 11.

53 *ibid*.

54 Francois Theron and Ntuthuko Mchunu, 'Contextualising Public Protests, the Case of Khayelitsha' (2013) 21(2) *Administratio Publica* 106.

55 Caroline Kerfoot, 'Making and Shaping Participatory Spaces: Resemiotization and Citizenship Agency in South Africa, (2011) 5 *International Multilingual Research Journal* 87–100; I Steyn, 'Exploring the Legal Context of Informal Trade in South Africa' (2011) Study commissioned by the ecumenical service for socio-economic transformation <<http://www.esset.org.za>> accessed 25 November 2016.

56 Oliver Escobar, 'The Work of Participation: Local Deliberative Policy Making as Mediated by Public Engagement Practitioners' *Deliberative Democracy and the Policy Process* 2011 Conference of the Political Studies Association, London, 5–11.

participatory and representative democracy plays itself out while the electorate criticises the ostensible involvement of the ordinary masses and the exclusiveness of the exercise of public power by elected representatives. Of grave concern is the fact that gaining entry into these spaces does not in any way result in the alteration of power hierarchies that would genuinely empower the marginalised citizens to participate substantively, thus guaranteeing that their voices will be heard.

Cornwall and Coelho assert that state participatory spaces not only provide venues for civil society engagement but can actively stimulate the creation of new political collectivities.<sup>57</sup> Participatory institutional spheres potentially contribute along all three dimensions that are multiplying spaces in which growing numbers of people come to take part in political life, giving rise to new political subjectivities and opening more areas of decision-making to public engagement.<sup>58</sup> Cornwall understands space-making in terms of a continuum of spaces involving spaces chosen, fashioned and claimed by those at the margins (organic spaces), and spaces into which those considered marginal are invited (invited spaces).<sup>59</sup>

Hickey and Mohan assert that in order to be genuinely empowering, participation must be located within a wider radical political project which pushes for development as a process of social change, involving a re-articulation of substantive citizenship rights in favour of marginalised groups.<sup>60</sup> The general view among communities indicates that these spaces are viewed as merely being ceremonious and consultative, and that they lack the requisite dynamism and political will to shape the programmes in a continued and purposeful manner.<sup>61</sup>

Therefore, for people living in poverty who are subject to discrimination and exclusion from mainstream society, the experience of entering a participatory space can be extremely intimidating. A persuasive challenge associated with substantive inclusion is, therefore, overcoming the embedded inequalities in status, technical knowledge and power that persistently undermine the linguistic and epistemic authority of subaltern actors.

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57 Andrea Cornwall and Vera Schatten Coelho, 'Spaces for Change: The Politics of Participation in New Democratic Arenas' (2007) 15–70 <<http://www.dfid.gov.uk/Cornwall-intro.pdf>> accessed 25 November 2016.

58 Andrea Cornwall 'Making Spaces, Changing Places: Situating Participation in Development' (2002) Institute of Development Studies, University of Sussex Working Paper No 170, Brighton, Sussex, 2–16 <[http://www.powercube.net/wpcontent/uploads/2009/11/making\\_spaces\\_changing\\_places.pdf](http://www.powercube.net/wpcontent/uploads/2009/11/making_spaces_changing_places.pdf)> accessed 25 November 2016.

59 *ibid.*

60 Samuel Hickey and Giles Mohan, 'Relocating Participation within a Radical Politics of Development' (2005) *Development and Change* 237–262.

61 Imraan Buccus, 'Public Participation and Local Governance' (2007), Research report prepared by the Centre for Public Participation, University of KwaZulu-Natal, 18–19 <<http://www.cpp.org.za/docs/reports/2007/lg-report0507.pdf>> accessed 25 November 2016.

## Revisiting Strategies for Achieving Public Participation

There are several possibilities for re-engineering the present system of public participation and they would include the following: first, by recognising existing community structures and spaces that could feed into the invited spaces provided by government, for example, community policing forums, ratepayers' associations, traditional institutions, citizen assemblies and religious bodies. Secondly, by educating citizens to participate actively in promoting their own developmental needs. In addition, the government should develop partnerships with non-governmental organisations that have been working in local communities on similar issues. Councillors in the local sphere should be assessed by community representatives according to identified key deliverables, and political parties should be held accountable if they fail to deliver.<sup>62</sup> This could be made concrete through a mandatory annual review process in which the councillors and the council are called upon to account to the communities whom they purport to represent.

With regard to the ultimate agents holding public government accountable, Haque argues that it is necessary to ensure such accountability not only to the affluent users or customers of public-sector services, but to all groups and classes of citizen, including low-income households.<sup>63</sup> In this regard, the top policy-makers must re-examine the current tendency to view citizens as customers.<sup>64</sup> The author argues that the concept of customer, as used in the marketplace, is devoid of entitlements or rights associated with citizenship. Haque notes that the marginalisation of citizenship rights, as a result of the customer principle being applied, implies that the government is less responsive and accountable to underprivileged citizens who cannot qualify financially as customers. On the other hand, Roberts contends that the governance process, in which community planning is combined with benchmarking and performance monitoring, is a vital link with which to reconnect citizens through the participatory process and develop a more visible measure of accountability.<sup>65</sup> Communities and government organisations should engage residents and partner with them in all aspects of programming and policy-making in order to define performance standards and measures of success, because doing so would enhance public perceptions of accountability.<sup>66</sup>

Scholars agree that the notion of public participation can be improved through the use of meaningful engagement.<sup>67</sup> For example, in the context of eviction applications, the

62 Roger Deacon and Laurence Piper, 'Party Politics, Elite Accountability and Public Participation: Ward Committee Politics in the Msunduzi Municipality' (2008) *Transformation* 63–64.

63 Shamsul Haque, 'Significance of Accountability under the New Approach to Public Governance' (2000) 66 *International Review of Administrative Sciences* 610–611.

64 *ibid.*

65 Nancy Roberts, 'Public Deliberation: An Alternative Approach to Crafting Policy and Setting Direction' (1997) 57 *Public Administration Review* 124–132.

66 *ibid.*

67 Wendy Mackenzie, 'Reclaiming the Commons: Participatory Democracy and Revitalising Citizens' Role in the Management of Community Halls' (2012) *Practice Reflexions* 55–59; B Ray, '*Occupiers*

courts have frequently made mandatory orders requiring the parties to engage with each other with a view to exploring mutually acceptable solutions to disputes, including the possibility of securing suitable alternative accommodation for the occupants. Liebenberg notes that such orders may be accompanied by a reporting order through which judicial supervision over the engagement process is maintained.<sup>68</sup>

As was seen earlier, the Court in *Olivia Road*,<sup>69</sup> held that meaningful engagement is a two-way process in which communities and government talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal. It is a neutral space where people and the State can discuss and shape options and solutions to difficult issues. This would imply that if the government is developing a strategy to meet its constitutional obligation of realising a specific socio-economic right, it must engage with the community during the decision-making, planning, implementation and evaluation processes.<sup>70</sup> I therefore agree with Liebenberg when she suggests that for democracy to function efficiently it must have the following ingredients:<sup>71</sup>

- good and properly functioning mechanisms for human rights protection;
- viable strategies for economic growth and wealth distribution;
- public participation;
- relative stability (for growth and development); and
- the freedom to argue and organise peacefully for a change of government (or even of a political system).<sup>72</sup>

## Conclusion

This article has examined the role of public participation as clarified by Ngcobo J and as viewed in the context of socio-economic rights adjudication. It also examined selected Constitutional Court judgments on public participation and the adjudication of socio-economic rights. It identified some of the key limitations in the current discourse on citizen-led accountability initiatives. Considering the intricate challenges faced by the government in its effort to improve public participation, it becomes clear that there is a

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*of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through Engagement*' (2008) 8 Human Rights LR 703–707.

68 Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 16–22.

69 *Olivia Road* (n 35).

70 Ray (n 67).

71 Ian Liebenberg, 'The African Renaissance: Myth, Vital Lie, or Mobilising Tool' (1998) 7(3) African Security Review 42.

72 *ibid* 47. See also Martin Rode, 'Do Good Institutions Make Citizens Happy, or do Happy Citizens Build Better Institutions?' (2013) 14 Journal of Happiness Studies 1480–1498.

need to improve the mechanisms for public participation. For example, municipalities must establish participation mechanisms that accommodate all types of people in their areas. These mechanisms must take into account the realities and disparities that exist among the vulnerable and poor people of South Africa. Equally, the Judiciary, in interpreting socio-economic rights, may hand down judgments that may have major policy implications without the opportunity for large sections of the population, who may be affected by decisions, to be heard.

In view of the above, the courts have embraced a more expansive transformative vision of socio-economic rights, one that encapsulates the principles of public participation. It is submitted that this approach by the courts will go a long way towards resolving the socio-economic ills faced by our country. Liebenberg asserts that the institutions of representative democracy which deliver socio-economic rights to the citizenry ought to make policy and the values of active engagement between government and citizenry more concrete in law.<sup>73</sup> In order to improve public participation in the context of socio-economic adjudication, community structures must be supported and engaged with in the process of realising these rights. Most importantly, there is no doubt that Ngcobo J has contributed significantly in the area of public participation. This, in turn, has had a direct influence on the adjudication of socio-economic rights.

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73 Liebenberg (n 3) 318.



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