

# WHAT SHOULD BE THE FORM OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESS? AN ANALYSIS OF SOUTH AFRICAN CASES\*

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## SUMMARY

South Africa's new constitutional democracy places a duty on various legislators to facilitate public participation in the law-making process as mandated by the principles of participatory democracy provided for in the Constitution of South Africa, 1996. This has resulted in a series of court cases wherein the electorate, *inter alia*, challenged the legislation on the basis that the results did not reflect the views of the people. The courts' earlier jurisprudence seemed to be placing more emphasis on participatory democracy as opposed to representative democracy. However, recent court decisions indicate a shift towards representative democracy. The central question presented in this paper is whether the consideration of the views of the public by the provincial and national legislatures is merely a matter of procedure, or that those views are indeed considered in the law-making process. In an attempt to answer this question, the paper will evaluate and critique some of the Constitutional Court and the Supreme Court of Appeal decisions on public involvement in either the legislative or law-making process. The argument presented in this discourse is that, if the public's wishes are considered by the legislature, then the outcome would be influenced by the people's demands. An otherwise negative outcome shows that public participation in the law-making process is a procedural matter and has no substantive value.

## 1 INTRODUCTION

South Africa's constitutional democracy can be characterized as both representative and participatory in its nature.<sup>1</sup> The former includes participa-

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tion through elected representatives and is exercised through regular elections.<sup>2</sup> The people elect their representatives to act on their behalf because it would be too demanding for the public to take part in day-to-day management of the State.<sup>3</sup>

The latter concept includes participating in *inter alia* the law-making process and taking part in the decision-making processes.<sup>4</sup> This would, for example, refer to individuals making submissions at public hearings on draft laws. According to Heather, “consultation demands an engagement with the public in order to ascertain what the public’s wishes and demands are so that policy can reflect those views”.<sup>5</sup> Heather’s view seems to be implying that those who facilitate public participation are bound by the views obtained during the hearings. These views will be scrutinized further in the analysis of the cases. The views gathered during public participation are important in a constitutional democracy as they have an impact on public-policy choices.

The aforesaid forms of democracy are not supposed to be in conflict with one another but mutually supporting one another.<sup>6</sup> It is on this basis that the South African Constitution (Constitution) clearly indicates that South Africa is a democratic society in which the government is based on the will of the people and it places a duty on various institutions to facilitate public participation in the law-making process.<sup>7</sup> It is submitted that Czapanskiy and Manjoo have correctly observed that the right to political participation is further strengthened by *inter alia* the right to freedom of expression found in section 16 of the Constitution.<sup>8</sup> This observation has merit as public participation

<sup>1</sup> Nyati “Public Participation: What has the Constitutional Court Given the Public?” 2008 12 *Law, Democracy and Development* 102; Currie and De Waal are of the view that South Africa’s democracy is representative, participatory and direct in its nature (see Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 13.

<sup>2</sup> Nyati 2008 12 *Law, Democracy and Development* 102; Currie and De Waal *The Bill of Rights Handbook* 14.

<sup>3</sup> Nyirabikali “Participatory Democracy, Pluralistic Governance and Peace Education for Leaders: Lessons from the Kenyan Case” <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=101865> (accessed 2013-06-24).

<sup>4</sup> Chenwi “Meaningful Engagement in the Realisation of Socio-economic Rights: The South African Experience” 2011 26 *SA Public Law* 128 129; Rosa “Transformative Constitutionalism in a Transformative Developmental State” 2011 3 *Stell LR* 452 546; *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC) par 48; Quinot “Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Rights” 2009 25 *SAJHR* 392 397.

<sup>5</sup> Heather “A Critical Examination of the Democratic Transition in South Africa: The Question of Public Participation” 2002 40 *Commonwealth and Comparative Politics* 43 45.

<sup>6</sup> Nyati 2008 12 *Law, Democracy and Development* 102.

<sup>7</sup> Preamble to the Constitution; s 59(1), s 72(1), s 118((1), s 42(3) and (4) of the Constitution. S 59(1) requires the National Assembly to “(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees”. S 72(1) requires the NCOP to “(a) facilitate public involvement in the legislative and other processes of the Council and its committees”. S 118(1)(a) requires a provincial legislature to “(a) facilitate public involvement in the legislative and other processes of the legislature and its committees”.

<sup>8</sup> Czapanskiy and Manjoo “The Right of Public Participation in the Law-making Process and the Role of the Legislature in Promotion of this Right” 2008 19 *Duke Journal of International and Comparative Law* 1 6; Wambali “The Practice on the Right to Freedom of Political Participation in Tanzania” 2009 9 *African Human Rights LJ* 203 204.

cannot be enjoyed without democracy and protection of freedom of expression.

Whilst the Constitution recognizes the need for public participation there is no agreed universal definition of what it means. Nevertheless the Constitutional Court (hereinafter “the Court”) has held that at the very least participation by the public in the law-making process was an opportunity given to the people likely to be affected by the proposed legislation to make representations either orally or in writing.<sup>9</sup> This demands an engagement with the public in order to ascertain what the public wishes and to ensure that policy or law can be informed by these wishes.<sup>10</sup> The process of engaging the public should serve to obtain the concerns of those who are most likely to be affected by the proposed law so that they can influence its content. Consultation does not necessarily require reaching an agreement. For example, many people were against the promulgation of the Choice on Termination of Pregnancy Act 92 of 1996. However, Parliament enacted the law *inter alia* to give effect to the constitutional right to bodily integrity and to prevent illegal and dangerous abortions.

This paper analyzes the jurisprudence of the Court and the Supreme Court of Appeal (SCA) through selected cases regarding the duty of the provincial and national legislatures to facilitate public participation in the law-making process. The objective is to determine the form in which public participation should take place in the law-making process. The selected cases have been chosen because they present the Court’s progression from its initial focus on public participation being achieved through the structures of our participatory democracy to its more recent emphasis on representative democracy requiring the public to participate through the representative bodies they created. It argues that the right to public participation has been limited to procedural obligations. Thereafter concluding comments are made.

## 2 JUDICIAL DEVELOPMENT OF THE DUTY TO FACILITATE PUBLIC ENGAGEMENT

Public participation or the duty to facilitate public engagement in the law-making process has been at the centre of South African constitutional jurisprudence.<sup>11</sup>

The nature and scope of the duty to facilitate public participation was first outlined in *Doctors for Life International v Speaker of the National Assembly*.<sup>12</sup> In this case, the applicant alleged that during the legislative process that resulted in the promulgation of four statutes namely, the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004,

<sup>9</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) 1408–1409J; and *King v Attorneys Fidelity Fund Board of Control* BCLR 462 (SCA) par 26 24.

<sup>10</sup> Heather 2002 40 *Commonwealth and Comparative Politics* 45; and Nyati 2008 12 *Law, Democracy and Development* 102.

<sup>11</sup> See *inter alia* Moutse case and *Doctors for Life*.

<sup>12</sup> *Supra*.

and the Dental Technicians Amendment Act 24 of 2004, the National Council of Provinces (“NCOP”) and the provincial legislatures did not comply with their constitutional obligations to facilitate public participation in the law-making processes as required by the Constitution.<sup>13</sup> The Court referred to all the challenged laws collectively as “health legislation”.<sup>14</sup> The applicant argued that the NCOP and the various provincial legislatures were required to invite written submissions and hold public hearings on these statutes before passing them.<sup>15</sup> The respondents denied these allegations and insisted that both the NCOP and various provincial legislators had complied with their constitutional duty to facilitate public participation in the law-making process. In the respondent’s view, what was required from them was to provide the applicants an opportunity to make their submissions “at some point in the national legislative process”.<sup>16</sup>

There were five issues<sup>17</sup> presented before the Court but only three are central to this paper. The pertinent issues were, firstly, what was the nature and scope of the duty of a legislative organ to facilitate public participation in the law-making process?<sup>18</sup> Secondly, whether the NCOP and provincial legislators had complied with their constitutional obligations to facilitate public participation in enacting the health legislation.<sup>19</sup> Thirdly, the extent to which the Court could interfere in the work of the legislative body in order to ensure that it complies with its obligation to facilitate public participation in law-making.<sup>20</sup>

The Court stated that the duty to facilitate public participation had to be understood in light of “(a) the constitutional role of the NCOP in the national legislative process and, in particular, its relationship to the provincial legislatures; (b) the right to political participation under international and foreign law; and (c) the nature of our constitutional democracy”.<sup>21</sup> The Court then stated that the right to political participation (under the international law), the citizens own the sovereign authority of the nation and as such they should participate in its governance.<sup>22</sup>

Regarding South Africa’s constitutional democracy, the Court indicated that South Africa was founded on an open and democratic society in which governance was based on the will of the people.<sup>23</sup> The Constitution expresses this principle through a number of provisions which place duties on the

<sup>13</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1408E–F.

<sup>14</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1408H.

<sup>15</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1409B.

<sup>16</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1409C.

<sup>17</sup> See *Doctors for Life International v Speaker of the National Assembly supra* 1410C. The other issues not relevant in this case were (a) whether the Court had exclusive jurisdiction to hear the dispute under section 167(4)(e) of the Constitution. (b) Whether it was competent under the constitutional order for declaratory relief to be granted by a court in respect of the proceedings of Parliament. The Court answered these questions in the affirmative.

<sup>18</sup> See *Doctors for Life International v Speaker of the National Assembly supra* 1410C.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1428J.

<sup>22</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1440C.

<sup>23</sup> *Ibid.*

national and provincial legislatures to facilitate public participation in the law-making process.<sup>24</sup> To this end, the Court has said that “[t]hrough these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created”.<sup>25</sup>

The Court stated that the plain dictionary meaning of “public participation” was the participation of the public in something such as the law-making process. This in turn means that steps would have to be taken to ensure that the public participates in the law-making process.<sup>26</sup> It further specified that the Constitution contemplate both a representative and a participatory democracy which is transparent, responsive and accountable and gave the public the opportunity to participate in the law-making process.<sup>27</sup> There should be a balance between the representative and the participatory elements of the South African democracy.<sup>28</sup> To this end, the Court further said that:

“Section 72(1)(a), like section 59(1)(a) and section 118(1)(a), addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution.”<sup>29</sup>

In addition, it indicated that the Constitution did not prescribe how Parliament had to fulfill its duty to facilitate public participation; rather it had discretion on how best to facilitate public engagement.<sup>30</sup> Nevertheless the Court stressed its oversight role in that “the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution”.<sup>31</sup> Whilst what is required by section 72(1)(a) of the Constitution differs from case to case, the legislature has the duty to act reasonably in doing its duty to facilitate public participation.<sup>32</sup> The Court emphasized that the standard of reasonableness was used as a measure throughout the Constitution to measure the steps taken by the Government to fulfil her constitutional obligations to provide housing amongst others. Therefore, the aforesaid test should also be applied in relation to measuring the extent of compliance with the duty to facilitate public participation on the legislature. It stated further that the reasonableness of the actions of the legislature would be judged by a number of factors:

“The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and

<sup>24</sup> See s 59(1)(a) and 72(1)(a) of the Constitution (quoted in full in fn 52 and 53 below).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1443D.

<sup>27</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1443E.

<sup>28</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1443F.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1444B.

<sup>31</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1444D.

<sup>32</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1444E.

time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement."<sup>33</sup>

The Court held further that what was important was that the legislature took steps to give the public a reasonable opportunity to participate effectively in the law-making process.<sup>34</sup> It defined the duty to facilitate public involvement as having two legs "first is the duty to provide meaningful opportunities for public participation in the law-making process. The second was the duty to take measures to ensure that people had the ability to take advantage of the opportunities provided."<sup>35</sup> It further highlighted that the duty to facilitate public participation was meaningless if there was no effort to ensure that the public did participate.<sup>36</sup> Participation was meaningful when the public was given time to participate before decisions by the legislatures were made and not when they were about to be made. The Court further stressed that "[t]he requirement that participation had to be facilitated where it was most meaningful had both symbolic and practical objectives: the persons concerned had to be manifestly shown the respect due to them as concerned citizens, and the legislators had to have the benefit of all inputs that would enable them to produce the best possible laws".<sup>37</sup>

In *Doctors for Life*, the Court held that with regard to the health legislation in question the NCOP did not hold public hearings on the Choice on Termination of Pregnancy Amendment Act, 2004 and the Traditional Health Practitioners Act, 2004, and as such they did not comply with the obligation to facilitate public participation and their actions were inconsistent with the Constitution and accordingly invalid.<sup>38</sup>

This ruling demonstrated the ability of the Court to utilize the democratic principles enshrined in the Constitution in order to promote participatory democracy. In Nyati's words, "this judgment clearly breaks away from the history that saw arbitrary legislative decision and the marginalisation of the majority of South Africans".<sup>39</sup> This view is supported by the author, because under "apartheid", there was no democracy.

The duty to facilitate public participation in the law-making process was further spelt out in *Matatiele Municipality v President of the Republic of South Africa*.<sup>40</sup> In this case, Parliament adopted the Twelfth Amendment of 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 to alter boundaries of KwaZulu-Natal and the Eastern Cape. The

<sup>33</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1445B.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1445D–F.

<sup>36</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1447F.

<sup>37</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1456E–G.

<sup>38</sup> The constitutional challenges relating to the Dental Technicians Amendment Act 24 of 2004 and the Sterilisation Amendment Act 3 of 2005 were unsuccessful as they had not been passed by Parliament when the challenge was brought before the Court.

<sup>39</sup> Nyati 2008 12 *Law, Democracy and Development* 102.

<sup>40</sup> 2007 (6) SA 477 (CC).

affect of these new laws was that the local municipality of Matatiele would be transferred from KwaZulu-Natal Province into the Eastern Cape Province.<sup>41</sup> The applicants challenged the constitutional validity of the aforesaid laws on the basis that they re-demarcated Matatiele Municipality and removed it from KwaZulu-Natal into the Eastern Cape without consulting the affected people.<sup>42</sup> In particular, the applicants alleged that the KwaZulu-Natal legislature had failed in discharging its constitutional duty to facilitate public participation and as such the elements of the Twelfth Amendment that concerned Matatiele were inconsistent with the Constitution.<sup>43</sup> The Court observed that the KwaZulu-Natal legislature had considered public hearings as an effective way of facilitating public involvement. In addition, it stated that the legislature had acknowledged its duty to involve the public in making the law that would alter the boundaries of their province. However, the legislature failed to actually hold the public hearings or invite representations on the issue.<sup>44</sup> In this case the Court emphasized that the Constitution required public participation in the law-making process in order to offer the public an opportunity to influence the decision of law makers.<sup>45</sup> This meant that the law makers had to consider the representations of the public and then make informed decisions based on such representations.<sup>46</sup> After concurring with the description of the duty to facilitate public participation adopted in *Doctors for Life*,<sup>47</sup> the Court reinforced that the duty to facilitate public participation would have no meaning if the legislators did not “provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies”.<sup>48</sup> It also recognized that the Twelfth Amendment affected the *Matatiele* people’s right to citizenship enshrined section 21(3) of the Constitution.<sup>49</sup> Accordingly, the people of *Matatiele* had the right to enter in the Republic, to remain in the Republic and to be in the province of their choice.<sup>50</sup> As such, the provincial legislature of KwaZulu-Natal had a constitutional obligation to safeguard the interest and territorial integrity of the province. It ruled that the KwaZulu-Natal legislature was required by section 118(1)(a) of the Constitution to facilitate public involvement by holding public hearings in the area of *Matatiele*, and its failure to do so violated not only section 118(1)(a) but also section 74(8) of the Constitution as such part of the Twelfth Amendment that affected *Matatiele*. This decision was declared invalid. This case was built on *Doctors for Life* by reiterating that public participation is part and parcel of the law-making process and that this duty was also applicable to the provincial legislature in terms of section 118(1)(1) of the Constitution. Therefore, any law enacted in violation of section 118(1)(a) would be invalid.

<sup>41</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 2.

<sup>42</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 69.

<sup>43</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 3.

<sup>44</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 78.

<sup>45</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 97.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 88.

<sup>48</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 97.

<sup>49</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 80.

<sup>50</sup> *Ibid.*

The duty to facilitate public participation in the law-making process was also reinforced in *Tongoane v National Minister for Agriculture and Land Affairs*.<sup>51</sup> Among other issues, the applicants in this matter challenged the constitutionality of the Communal Land Rights Act 11 of 2004 (CLARA) on the grounds that Parliament had failed to comply with its constitutional obligations to facilitate public involvement in the legislative process in terms of sections 59(1)(a)<sup>52</sup> and 72(1)(a)<sup>53</sup> of the Constitution before enacting CLARA. The Court first stated that the requirements of facilitating public participation as they were dealt with in *Doctors for Life*. It further indicated that Parliament was no longer supreme and was therefore bound by the provisions of the Constitution when enacting laws.<sup>54</sup> In addition, it reasoned that, if the Constitution stated that the procedure of enacting certain laws involved public participation, Parliament should have followed that procedure.<sup>55</sup> To illustrate its position, the Court said:

“[c]onstitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out ... The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.”<sup>56</sup>

The Court then applied the principles that were utilized in the *Doctors for Life* case and declared CLARA as invalid.

The *Merafong Demarcation Forum v President of the Republic of South Africa*,<sup>57</sup> *Moutse, the Matatiele*, and *Poverty Alleviation Network v President of the Republic of South Africa*<sup>58</sup> cases all concerned the Twelfth Amendment of

<sup>51</sup> 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC). In this case the applicants were a group of communities who occupy rural land. Their use and occupation of the land were regulated by customary law. Parliament promulgated the Communal Land Rights Act 11 of 2004 (CLARA) in order to provide legally secure tenure to people or communities whose tenure of land was legally insecure because of “apartheid” laws. Parliament adopted CLARA following section 75 of the constitution (*ie*, Bills not affecting the provinces). The applicants challenged the procedure adopted on the grounds that CLARA in substantial measure deals with “indigenous and customary law” and “traditional leadership” which were functional areas listed in Schedule 4. As a result, CLARA was supposed to be enacted as a Bill affecting the provinces in terms of section 76 of the Constitution. The applicants’ concern was that CLARA would change their “indigenous-law-based system of land administration” and replace it by a new system that CLARA sought to introduce. The result was that CLARA would change the manner in which traditional leaders and tribal authorities administered their land and subjected it to the control of traditional councils.

<sup>52</sup> S 59(1)(a) of the Constitution provides: “The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees”.

<sup>53</sup> S 72(1)(a) of the Constitution provides: “The National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees”.

<sup>54</sup> *Tongoane v National Minister for Agriculture and Land Affairs supra* par 108.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Tongoane v National Minister for Agriculture and Land Affairs supra* par 104.

<sup>57</sup> 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC).

<sup>58</sup> 2010 (6) BCLR 520 (CC).

2005 (Twelfth Amendment) which altered provincial boundaries.<sup>59</sup> The Twelfth Amendment provoked many emotions amongst the communities that it affected. The affect of this legislation was that the Merafong City Local Municipality was to be relocated from Gauteng Province to the North West Province,<sup>60</sup> Moutse 1 and Moutse 2 would be relocated from the Mpumalanga Province to the Limpopo Province and that the local municipality of Matatiele would be transferred from KwaZulu-Natal Province into the Eastern Cape Province.

The applicants in all the three cases challenged the constitutionality of the Twelfth Amendment on the basis that the Provincial Legislature had failed to comply with its constitutional obligation to facilitate public involvement in its processes leading up to the approval of the Twelfth Amendment Bill by the NCOP.

The *Merafong* case shows that, despite the earlier principles established by the Court, more recent cases have adopted a more technical approach in which merely holding public hearings was held sufficient to comply with the duty to facilitate public engagement. For example, during the public hearings in *Merafong* case the majority of the people in the area were opposed to the decision of being relocated to the North West Province and chose to remain in Gauteng.<sup>61</sup> The applicants' refusal to be transferred to the North West Province was supported and a "negotiating mandate was adopted"<sup>62</sup> in light of the majority's wishes.<sup>63</sup> Despite such mandate, the Gauteng Provincial Legislature, without further consultations with the public, unilaterally deviated from the negotiating mandate and supported the Amendment Bill that included

<sup>59</sup> The Constitution's Twelfth Amendment provoked many emotions amongst communities it affected. It was the subject of challenge in the *Moutse* case, *Matatiele* case and *Poverty* case and *Merafong* case as communities argued that they were not consulted during the drafting of the law and if they were consulted, their views were not taken into account.

<sup>60</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 1.

<sup>61</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 103. The opposition to be relocated to the North West Province is better captured in the dissenting judgment of Moseneke J where he stated that:

"[there was a] vehement and public opposition of the affected community to the incorporation of their residential areas into North West. The record is replete with copies of written submissions to national, provincial and local spheres of government detailing why the community wishes to remain within Gauteng ... Often their resistance took the form of public gatherings or protest marches. The opposition played itself out well ahead of November 2005 when formal involvement of the community in the law-making process, as envisaged by section 118(1)(a) of the Constitution, took place. In other words, the Minister of Provincial and Local Government (Minister or second respondent) and the Provincial Legislature were well aware of the resistance of the majority of the affected communities to their incorporation into another province. It is so that the Bill was introduced and passed in the National Assembly on 15 November 2005, despite the protest and resistance of the overwhelming majority of the residents and formations of civil society concerned."

<sup>62</sup> The Portfolio Committee on Local Government in principle, supported the phasing-out of cross-boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005]; in light of the outcome, impact assessment and analysis of the public hearing submissions, agreed with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province; recommended to the House, amendment to Schedule 1A of the Constitution Twelfth Amendment Bill [B33B-2005], to provide for the inclusion of the municipal area of Merafong into the municipal area of the West Rand District Municipality of the Gauteng Province.

<sup>63</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 34.

the Merafong Municipality in the North West Province.<sup>64</sup> One of the issues before the court was, whether the Gauteng Provincial Legislature complied with its obligation to facilitate public involvement when it considered and approved that part of the Twelfth Amendment which concerned Merafong.<sup>65</sup> The Court found that there was no evidence to suggest that the Gauteng Legislature did not facilitate public involvement. The applicants' case was thus dismissed and the area was transferred to the North West Province.

In the *Moutse* case, the Court ruled in favour of the provincial legislature. In reaching its conclusion, it acknowledged that the community of Moutse was a discrete group<sup>66</sup> and that it had to be given an opportunity to be heard in the formation of any law that affects the alteration of their boundaries.<sup>67</sup> The Court then stated that compliance with section 118(1) of the Constitution meant two things, first, that the legislature had to invite the public to participate in the hearing and give them sufficient time to prepare, otherwise there would be no meaningful participation of the public because they would not have had time to "to study the Bill, consider their stance and formulate representations to be made".<sup>68</sup> Second, the time or stage the hearings were made should not have been just before the final decisions were to be made by the legislature otherwise that would not have afforded the public the opportunity to participate meaningfully.<sup>69</sup> The Court further indicated that the process of participation should have been able to influence the decisions to be taken by the legislature, and as such the question of sufficient notice would depend on a case-by-case basis. On the issue of notice, the Court accepted that the Moutse community had not received sufficient notice to hold a meeting with the provincial legislature.<sup>70</sup> However, it stated that they should have complained about this issue and their failure to do so was a sign that the hearing was appropriately set down. On the issue of whether the time allocated for the hearing was sufficient to meet the standard of public participation given the huge turnout of people, the court rejected the applicants' arguments which claimed that more time should have been given because the submissions were made on behalf of organizations and not individuals.<sup>71</sup> The community also contended that the Portfolio Committee of the provincial legislature had presented a skeletal report to the legislature which did not "include a full and faithful discussion and consideration of, *inter*

<sup>64</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 58.

<sup>65</sup> The other issue was whether the legislature exercised its legislative powers rationally.

<sup>66</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 57. The phrase "discrete group" was first used by this Court in *Poverty* case. It was employed to describe a group of people who were directly affected by an alteration of provincial boundaries as a result of being located where the change was effected. For example, this might occur if an area was relocated from one province to the other. In that context, both the relocated group and the residents of the municipality it joined in the other province constituted discrete groups, which the respective provincial legislatures were expected to hear before the changes were approved. The phrase is used in contradistinction to the wider community in a province.

<sup>67</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 57.

<sup>68</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 61.

<sup>69</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 63.

<sup>70</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 64–65.

<sup>71</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 67.

*alia*, the Moutse hearing of 8 December 2005".<sup>72</sup> The Court further said that the report was skeletal but it was not entitled to pronounce "on the adequacy of the information at the disposal of a deliberative body such as the legislature before it makes a decision".<sup>73</sup> It indicated that it was within the discretion of the "Provincial Legislature to choose the method of facilitating public participation, it is undesirable for this Court to prescribe to the Legislature what a report to it should contain".<sup>74</sup> The challenge of the public, based on failure of the legislature to facilitate public participation, failed.

In the *Poverty* case, the applicants amongst other issues contended that the failure on the part of the National Assembly to receive oral submissions from interested parties constituted non-compliance with the constitutional obligation to facilitate public participation. In addition, they contended that the National Assembly and the KwaZulu-Natal Legislature had failed to consider the representations made by the residents of Matatiele. The Court ruled that provincial legislatures had leeway in determining how to facilitate public involvement, and that the fact that the views of the public were not reflected in the final legislation, did not mean that the public had not been consulted.<sup>75</sup>

### **3 WHAT HAVE THE MERAFONG, MOUTSE AND POVERTY CASES GIVEN US?**

The *Merafong* case represents a clear indication that the obligation to facilitate public participation is a procedural rather than a substantive obligation. The residents of Merafong opposed their relocation to the North West Province.<sup>76</sup> They were promised that they would remain in the Gauteng Province. However, thereafter the Government unilaterally changed its position and voted in favour of the Bill that moved Merafong to North West Province.<sup>77</sup> In this instance the Court did not condemn the actions of the legislature; instead it stated that participating in the law-making process did not mean that one's view should be taken into account or that such views bound the legislature.<sup>78</sup> The Court therefore moved away from the position it adopted in *Doctors for Life*, where it held that all that was required was that the legislature should have been open-minded to the views of the people and have been willing to consider them, but there was no legally binding mandate to consider them.<sup>79</sup> In assessing the reasonableness of the actions of the legislature in this instance the Court refused to acknowledge that the discourteous behaviour of the legislature amounted to a failure to facilitate reasonable measures to facilitate public involvement as required by section 72(1)(a) and section 118(1)(a) of the Constitution. Earlier in *Doctors for Life*, the Court had stated that in assessing reasonableness of the legislatures

<sup>72</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 77.

<sup>73</sup> *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 80.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Poverty Alleviation Network v President of the Republic of South Africa supra* par 63.

<sup>76</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra*.

<sup>77</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 55–60.

<sup>78</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 50.

<sup>79</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 51.

actions, special attention would be paid to the “nature and importance of the legislation and the intensity of its impact on the public are especially relevant”.<sup>80</sup> This issue was never properly taken into account and the Court failed to condemn the deceptive and manipulative actions of the legislature which ignored the public. Instead, the Court just acknowledged that “the attachment of people to provinces in which they live should not be underestimated”,<sup>81</sup> and nonetheless ruled that “discourteous conduct [by the legislature] does not equal unconstitutional conduct which has to result in the invalidity of the legislation”.<sup>82</sup> The Court also disregarded its own views in *Doctors for Life* that there should not be a conflict between the representative and the participatory elements of the South African democracy, but rather there should be a balance. It is argued that the Court did not seek a balance between the wishes of the Merafong community and the wishes of the legislature. Rather, it stated that, although the Government had to consider the views of minority groups, the legislature would not function if it was bound by such views.<sup>83</sup> It appears that in this instance the Court erred by focusing on the importance of representative democracy and did not sufficiently consider the views expressed by individuals and groups within the community. It is argued, that at the very least, the Court ought to have found that the legislature should have consulted with the people and updated them about new developments on relocation. The legislature should not have left the people under the impression that they would remain in Gauteng.

In deciding the *Moutse* case, it was argued that the Court did not consider the substantive issue that the views, wishes and concerns of the Moutse people were not taken into account by the legislature. The Moutse people did not want to go to the Limpopo Province and that was never considered by the legislature. The views of legislators as representatives of the people regarding the demarcation of provinces are important and should be considered in compliance with the Constitution. The Court had earlier on stated that the representative and participatory elements of our democracy were not in conflict and should not be in conflict with one another, rather they should be balanced. However, it seems from the Court’s decision that it cemented the conflict between the public which had to participate and the legislature which had to represent the public interest. There was no attempt to balance the representative and participatory elements of our democracy in order that the views of the people could also have an impact in the Twelfth Amendment. Yet, “[t]he Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process”.<sup>84</sup> On the same point, the Court should have considered that more than 500 people in the Moutse community who were represented by one forum were opposed to the move.

The *Poverty* case (which is in all respects still the *Matatiele* case) could be viewed as a case where the Government was found to have failed to facilitate

<sup>80</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1445B.

<sup>81</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 22.

<sup>82</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 29.

<sup>83</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 50.

<sup>84</sup> *Matatiele Municipality v President of the Republic of South Africa supra* par 60–61.

public participation in the *Matatiele* case. Then, to fulfil the duty to consult with the affected people, the Government merely went back to consult with the people as a procedural requirement and arrived at the same conclusion that relocated the people of Matatiele from KwaZulu-Natal to the Eastern Cape. It is arguable that there was a pre-determined decision to relocate the people of Matatiele, as their insistence to remain in the Eastern Cape was simply ignored by the Legislature. The Court again did not consider what was stated in *Doctors for Life*<sup>85</sup> and rather reinforced the more recent decision in the *Merafong* case. Finding that “[a]lthough 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”.<sup>86</sup> It further said that the fact that legislation did not reflect the views of the public did not mean that they were never considered. In taking such a narrow procedural approach, the Court seemed to view representative and participatory elements of the South African democracy as distinct obligations rather than finding a synergy between the two. The public could only know that their views were taken into account if laws and policies reflected to some extent their wishes or at least addressed some of them.<sup>87</sup> The Court, however, reinforced the principle of representative democracy and found that the law making is “the function of parliament alone” and that it could not therefore decide where people should live.<sup>88</sup>

The *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd*<sup>89</sup> case could be seen as a matter wherein the people’s views are disregarded despite being clearly opposed to the Government’s law for collecting revenue through the “user-pays” and tolling system from Gauteng freeways. The applicants in this case included business people, voluntary associations and individual persons who are opposed to the tolling system.<sup>90</sup> The respondents included the South African Road Agency Limited (SANRAL), National Treasury and the Minister, Department of Transport. SANRAL is *inter alia* responsible for planning, construction and maintenance of national roads.<sup>91</sup> SANRAL upgraded the Gauteng freeways through a R20 billion loan whose repayment was guaranteed by government through the National Treasury.<sup>92</sup> The upgrades included construction of bridges, 43 overhead gantries, and off-ramps.<sup>93</sup> It was on 11 February 2011, after the

<sup>85</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1445H.

<sup>86</sup> *Poverty Alleviation Network v President of the Republic of South Africa supra* par 63.

<sup>87</sup> The exception would of course be where the public views supported a matter that was contrary to the Bill of Rights. Eg, in *S v Makwanyane* 1995 (3) SA 391 par 87–89, the majority of the people sought the retention of death penalty as capital punishment. However, the Court correctly identified the issues before it and said that the question before it was not what the majority of South Africans believed what the appropriate punishment for murder was, but whether the Constitution allowed the death penalty. The Court warned that there were instances where “public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour”.

<sup>88</sup> *Poverty Alleviation Network v President of the Republic of South Africa supra* par 71.

<sup>89</sup> [2013] 4 All SA 639 (SCA) (9 October 2013) (hereinafter “the *E-toll* case”).

<sup>90</sup> *E-toll* case par 5.

<sup>91</sup> *E-toll* case par 6.

<sup>92</sup> *E-toll* case par 13.

<sup>93</sup> *Ibid.*

upgrades had been completed, that the Director-General for Transport published the tolling tariffs in terms of the South African Road Agency Act 7 of 1998, and these triggered a vehement opposition of the system from the public.<sup>94</sup> The operational date of the tolling was postponed twice because of public outcry. A steering committee was set up to consider the concerns of those likely to be affected. The work of the steering committee was to review the tariffs and “not to revisit the mechanism of tolling itself”.<sup>95</sup> This appeared to have caused confusion as the appellants were under the impression that the tolling system would be withdrawn.<sup>96</sup> In fact, the appellants’ submissions wanted the tolling system to be discontinued. Several public hearings were held by the steering committee and it was explained that the principle of “user-pays” and tolling had been accepted in principle and that the work of the steering committee was only limited to receiving concerns about tariffs.<sup>97</sup> All in all, the appellants were not happy with the tolling system regardless of various reductions in tariffs. Instead, they proposed other alternative methods such as fuel levy, but this was not accepted.<sup>98</sup> The respondent clearly indicated that the tolling system was going ahead. Aggrieved by this, the appellants challenged the tolling system *inter alia* on the basis that there was no compliance with the comment procedure as envisaged by section 4 of the Promotion of Administrative Justice Act 3 of 2000 which requires the administrator to invite and consider comments from those likely to be materially affected amongst others.<sup>99</sup> In addition, the appellants contended that the tolling system was unreasonable because of its exorbitant costs and the impossibility to enforce it.<sup>100</sup> SANRAL opposed these contentions on the basis that there was consultation with the public *via* notices inviting the general public to make comments.<sup>101</sup> These included diagrams and six newspapers that were circulating in Gauteng.<sup>102</sup> In addition, SANRAL argued that the appellants’ review application was brought outside the 180 days prescribed time under the Promotion of Administrative Justice Act 3 of 2000 and therefore should be dismissed. With regard to the first contention, the SCA found that the tolling system was launched through *inter alia* media coverage and by “notification to State institutions representative of the public”.<sup>103</sup> The SCA also ruled that the respondents had held various consultations with the representatives of the civil society.<sup>104</sup> About the delay in launching the application for review, the SCA said that the appellants had brought their review challenge after the 180 days’ period required by the Promotion of Administrative Justice Act 3 of 2000 despite the fact that they had known about the system as early as 8 October 2007 when it was

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *E-toll case* par 17.

<sup>99</sup> *E-toll case* par 21.

<sup>100</sup> *Ibid.*

<sup>101</sup> *E-toll case* par 11.

<sup>102</sup> *Ibid.*

<sup>103</sup> *E-toll case* par 28.

<sup>104</sup> *E-toll case* par 12.

launched.<sup>105</sup> In fact, the SCA said that the appellants brought their challenge to court five years later after the tolling system was launched and that many developments such as the completion of the project including the absence of plan B had taken place.<sup>106</sup> Therefore, the SCA found that it was barred by the Provisions of Promotion of Administrative Justice Act 3 of 2000 to hear the review after such a protracted time had lapsed.<sup>107</sup>

The *E-toll* case is somehow similar with the *Merafong* case decision in that the people were opposed to the tolling system but the Government has ignored the public opposition of the system. The decision also appeared to be in favour of the representative democracy as it stated that people were informed about the tolling system through government institutions which represented the public. The reading of the judgment does indicate that the appellants challenged the tolling system outside the time limits prescribed by law and that all procedures were followed in considering the views of the public. However, this does not change the fact that there still is a conflict between participatory and representative democracy as the people prefer fuel levy. But the Government insists on “user-pays” system.

#### 4 GENERAL CRITIQUE OF THE CASES

It is submitted that, while the Court should respect the autonomy of the legislature, it must as per *Doctors for Life* use its powers in appropriate cases to determine whether there has been the degree of public involvement that is required by the Constitution.<sup>108</sup> The divergent approaches in the cases indicate that there is currently no clarity on how public involvement as required by the Constitution should take form. This issue, which answers the title of this discourse, is fully discussed in 4.1 below. The Courts have declared that the policy should be influenced by people’s views, but such views were not necessarily the end results or legislating. Based on this, it appears that Heather’s view, indicating that policy should reflect the views of the public,<sup>109</sup> is not entirely correct as people’s views do not mean legislating. The majority judgment in the *Merafong* case further stated that cases concerning the constitutional amendment like the Twelfth Amendment should be challenged in courts without delay because of logistics and resources that might be involved if the action was brought at a later stage.<sup>110</sup> The same principle was also applied in the *E-toll* case in that the challenge on the tolling system was brought too late when major developments had taken place, such as the completion of the development of the road infrastructure. It is doubtful whether bringing the review application would have made any difference as

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<sup>105</sup> *E-toll* case par 28.

<sup>106</sup> *E-toll* case par 31.

<sup>107</sup> *E-toll* case par 41.

<sup>108</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1444D–E.

<sup>109</sup> Heather 2002 40 *Commonwealth and Comparative Politics* 45.

<sup>110</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 15. See also *Doctors for Life International v Speaker of the National Assembly supra* par 216 or 2006 (12) BCLR 1399 (CC) 1467A–B; *Poverty Alleviation Network v President of the Republic of South Africa supra* par 27; and *Moutse Demarcation Forum v President of the Republic of South Africa supra* par 24.

another court regarding the tolling system had already ruled that it was not the duty of the courts to deal with issues relating to infrastructural funding of roads and how funds should be sourced as the answer “lies in the political process”.<sup>111</sup> Unfortunately, the *Merafong* case states that, if the voters feel that the legislature is failing to consider their views, it should be held accountable through elections and not necessarily through the courts.<sup>112</sup> These views are in the author’s view contradictory. On one hand the statement encourages those who are affected to approach the courts immediately for relief. On the other hand, it says the legislature should be held accountable through the elections. The elections come after five years and people have already been relocated to other provinces against their will. How will a period of five years solve this? The dissenting judgments of Sachs J and Moseneke J which found that the “approval by the Gauteng Provincial Legislature ... of the incorporation of Merafong into the province of North West was given in a manner that was inconsistent with the way it was obliged by the Constitution to exercise its powers” are supported.<sup>113</sup> People look up to the courts to vindicate their constitutional rights. Consequently, where the courts do not intervene in cases such as these where the views of the people were not updated about new developments, and their views disregarded, people would arguably have no faith in what is called “public participation in law-making process”.

The fact that the Moutse community did not object to the short notice does not justify the actions of the legislature. Given that the balance of power between the Parliament and the people is disproportionate, the Court should have seriously looked into the legislative action and evaluated it against the duty to facilitate public participation as it was laid down in *Doctors for Life*. The Court even stated that it had no place to tell the legislature what a report from the people should contain or how it should conduct its public participation meetings. The Court did not protect the people against the actions of legislators which were completely against their two-pronged duty to facilitate public participation outlined in the *Doctors for Life*. It follows that there are limited chances that future cases by the public will ever succeed on grounds that the legislators had failed to facilitate public hearings because of the principle of separation of powers. The Moutse community, despite its concerns about being relocated to the Limpopo Province, now finds itself in the province stripped of its powers to govern itself, in a dire financial crisis, and under the administration of the National Government. Also in the *E-toll* case, despite the public being united in opposing the tolling system, the Government has merely considered the concerns of those affected, but nonetheless proceeded with the tolling system. These cases show that the right to public participation in the legislative process exists in theory but that it has no substantial reality. It merely provokes the emotions of the people and consumes their time.

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<sup>111</sup> *National Treasury v Opposition to Urban Tolling Alliance supra* par 95.

<sup>112</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 60.

<sup>113</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 124 and 287.

It is submitted that the courts have deprived themselves of an opportunity to strengthen the right to public participation in the law-making process. The decisions reflect a preference of representative democracy over participatory democracy. Despite the fact that the legislature purported to facilitate public participation in the law-making process in *Merafong*, *Moutse* and *Poverty* cases, the disputed laws prevailed and the people were relocated.

In addition, the Court could perhaps have used the reasonableness test to ascertain whether the legislature had complied with the duty to facilitate public participation. This *inter alia* entails the nature, importance and impact of the legislation to those affected.<sup>114</sup> It is submitted that reasonableness should also entail that the demonstration by the legislature in regard to how it took the views of the public into account and reflected and or rejected them in the legislation.

All in all, these cases indicate that during the law-making process, the legislature has to give people a reasonable opportunity to make representations either orally or in writing. In facilitating public participation, the legislature has to be open-minded and consider the view submitted. In other words, it should not obtain the views of the people merely for complying with the requirement when it has in fact made a decision. In addition, the cases also emphasize that the views of the people do not bind the legislature. Further, they indicate that the final say lies with the legislature regardless of what the people say.

#### **4 1 When and how public opinion should shape policy or legislation**

In an attempt to address the crux of this paper, it is conceded that there is no straight answer to the question posed by the title of the paper. The normal way of gathering public opinion either orally or in writing should always be sought immediately after the Green Paper, as this discussion document states the idea behind the proposition of a particular policy. Those who facilitate public participation should take into account the nature of the targeted group when seeking the public views. They should *inter alia* devise a suitable procedure that would ensure that all the people affected are given an appropriate platform to make submissions. For example, expecting to receive written submissions in English from a remote area where there is a high level of illiteracy and where the majority of the people speak Sesotho may be unreasonable in the circumstances. However, receiving views from such people orally, in their mother tongue and in a community hall may be appropriate. This has the potential to persuade the public that the Government is prepared to consult and listen to their views when developing legislation and/or policy. This will demonstrate that people are in effect involved in the law-making process.

Hobley has claimed that “[v]iews on the use and role of public opinion in informing policy [or legislation] can be often be as diverse as the opinions

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<sup>114</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1445B.

themselves”.<sup>115</sup> In this regard it is complex to tell how public opinions received during consultation should shape legislation or policy.<sup>116</sup> As observed by Jaffe *et al* during an early review of abortion polls in the United States of America that “measuring public opinion is difficult, particularly when the subject is complex and has moral and religious overtones ...”<sup>117</sup> This view has merit because in *S v Makwanyane* the majority of people supported the retention of death penalty for violent crimes.<sup>118</sup> To this end, the Court warned about the dangers of following the views of the majority. In particular, Chaskalson P indicated that the protection of rights could be left to the Parliament as it has the mandate from the people and accountable to the constituency. However:

“[T]he constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities ...” (author’s emphasis added).<sup>119</sup>

Indeed, allowing the views of the majority to prevail would suppress the minority groups and sometimes even be contrary to the Constitution. Legislators and other representatives therefore “need not do what their constituents want on each and every issue” but should be open-minded to all factors including the dissenting views.<sup>120</sup> To be in the minority does not necessarily mean that one is right and therefore should be protected. This is illustrated by the Court’s interpretation of the right to freedom of conscience regarding the right of parents’ consent in reprimanding of their children in private schools in line with their Biblical beliefs.<sup>121</sup> Another recent example is the majority of the motorists who are opposed to the “user-pay” system on Gauteng highways and prefer a fuel levy. However, the representatives (Government) of the people strongly feel that the “user-pay” system is the solution.<sup>122</sup> This case highlights the tension between participatory and representative democracy.

In light of the above exposition, it is submitted that the extent to which public opinion can influence legislation and/or policy depends on *inter alia* the degree of consensus within the public itself and the extent of organized support against a particular legislation and or/policy. It also depends to the extent that the elected representatives are prepared to accommodate public

<sup>115</sup> Hobley “Public Opinion can Play a Positive Role in Policy Making” <http://www.theguardian.com/public-leaders-network/2012/sep/03/public-opinion-influence-policy> (accessed 01/08/2013).

<sup>116</sup> Adamek “A Review: Public Opinion and Roe V. Wade: Measurement Difficulties” 1994 58 *The Public Opinion Quarterly* 409 416.

<sup>117</sup> Jaffe, Lindheim and Lee *Abortion Politics: Private Morality and Public Policy* (1981) 99.

<sup>118</sup> *S v Makwanyane supra* par 87–89.

<sup>119</sup> *S v Makwanyane supra* par 88.

<sup>120</sup> Lax and Phillips “Gay rights in the States: Public opinion and policy responsiveness” 2009 103 *American Political Science Review* 367 370.

<sup>121</sup> *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051; *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (compare with *inter alia National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 where the Court protected the rights of minorities).

<sup>122</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

opinion in developing legislation or policy. This is so because law-making is the function of Parliament alone.<sup>123</sup>

I am therefore in agreement with Pudifin and Bosch, referring to prostitution, who suggest that public opinion alone should not dictate policy.<sup>124</sup> Instead, various factors such as the views of the minority, majority, the Constitution and the effects of such policy or legislation on the people should be carefully considered. In other words, understanding public opinion on the issues that have direct and/or indirect effect on the people has critical relevance in a constitutional democracy. As the Constitution clearly indicates that South Africa's democracy is established on *inter alia* "the will of the people".<sup>125</sup> Therefore, respect for participatory democracy cannot be gainsaid.

## 5 CONCLUSIONS

It is submitted that the conclusion reached is that the earlier decisions concerning public participation appeared to place more emphasis on participatory democracy. This required the people affected to be consulted<sup>126</sup> (which is a sign of respect), to have their inputs considered<sup>127</sup> and presumably be updated in cases of sudden changes of legislative policy.

However, recent decisions are in no doubt in favour of a representative democracy approach.<sup>128</sup> Even if the people had voted on a particular stance, their representatives may change and adopt a new position unilaterally as they are representative of the electorate.<sup>129</sup> It is therefore apparent that the process of obtaining the views of the people is an exercise that does not necessarily mean that such views will be reflected in the final legislation. Instead it could be said that it is a process which promotes accountability of representatives to the people. In other words, the role of courts in enforcing public participation is limited to procedural issues and not substantial ones.<sup>130</sup> In this context obtaining the views of the public does not mean that such views will prevail and produce an end result. The final answer will be determined by the representatives of the people after taking into account all submissions and other factors.

Whilst the Constitution has established a constitutional democracy where South Africa is said to be an open society based on the will of the people, the will of the people in the legislative process does not prevail. Whenever there is a tension between participatory democracy and representative democracy

<sup>123</sup> See *Poverty Alleviation Network v President of the Republic of South Africa supra* par 71.

<sup>124</sup> Pudifin and Bosch "Demographic and social factors influencing public opinion on prostitution: An exploratory study in KwaZulu Natal Province, South Africa" 2012 15 *Potchefstroom Electronic LJ* 1 4.

<sup>125</sup> Preamble to the Constitution.

<sup>126</sup> *Doctors for Life International v Speaker of the National Assembly supra* 1456E–G.

<sup>127</sup> *Ibid.*

<sup>128</sup> Quinot 2009 25 *SAJHR* 397–399. Interestingly, Quinot has arrived at a different conclusion than the one reached in this paper.

<sup>129</sup> *Merafong Demarcation Forum v President of the Republic of South Africa supra*.

<sup>130</sup> *National Treasury v Opposition to Urban Tolling Alliance supra*. This case represents an example of where the majority of road users are opposed to the e-tolling system. However, the Government insists that e-toll will go ahead.

in public participation in the public-participation context, representative democracy prevails. The Court has reinforced the principle of representative democracy in the legislative process and has not been bold enough to condemn some irresponsible actions of the legislature that fall short of what the Constitution requires in participatory democracy. Ntlama favourably captures the reluctance of the Court to intervene where the views of the people have been disregarded as follows:

“the concern relates to the court’s apparent deviation from its own previous record and abdicated its authority to political appointees. While the maintenance of separation of powers is a delicate matter, the court should always ensure that its duty towards people in South Africa is not easily eroded by consideration of legislative deference. It is incumbent upon the court to ensure that law is not isolated from politics, since the two are interdependent, intertwined and interrelated”<sup>131</sup>.

It is submitted that the Court has not been able to insist satisfactorily that facilitating public participation is more than just hearing people’s views, rather the views should have an influence in the end products. This does not mean that the views of the minority should be disregarded.<sup>132</sup> Instead, in a constitutional state, Government’s action should be conducted in a manner that is in line with the Constitution and by striking a balance between various competing interests. The few legislative members of Parliament cannot turn a blind eye on the people’s concerns and purport to know more about what is best for the people they represent. It is best for them to develop a culture of first putting the views of those who will likely to be affected, especially in matters that directly affect the people, like the demarcation of boundaries for provinces and the controversial e-toll system.

## 6 RECOMMENDATIONS

There appears to be a tension between participatory and representative democracy especially when public views have been considered but not reflecting in the outcome. In this regard, it is submitted that there must be legislation (Public Participation Act) enacted with *inter alia* provisions which define what public participation entails, a provision allowing the public to seek clarity on why their views are not reflected in the promulgated law and whether their views were at all considered and had had an influence in the process. In addition, there must be a clause containing an allowance to have reasons for rejecting the views of the public. Where the views were considered and totally disregarded, there must be an avenue for explanation of why a particular route was chosen. This process should be mandatory and the courts should come into play as a matter of last resort. This will enable

<sup>131</sup> Ntlama “The ‘Deference’ of Judicial Authority to the State” 2012 33(1) *Obiter* 135 142.

<sup>132</sup> *S v Makwanyane* 1995 (6) BCLR 665; 1995 (3) SA 391 par 30 the Court said “the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected”.

people to have sufficient knowledge on why a particular action was taken against or in their interest. More importantly, this process would hold the representatives accountable to their constituencies. Guidelines for the aforesaid proposed Public Participation Act can be drawn from the "Regulations on Procedures to be followed in Promoting Public Participation in Transport Planning Processes, 2012"<sup>133</sup> which *inter alia* requires the MEC for transport (MEC) to publish a notice in the Provincial Gazette and in a minimum of two newspapers alerting the public about a first draft of the Provincial Land Transport Framework.<sup>134</sup> The aforesaid notice must inform the public about where to find the draft and how to make comments.<sup>135</sup> After the comments had been received in terms of Regulation 6, the MEC is required to conduct a public-participation process through public hearings.<sup>136</sup> The MEC is required to give the public sufficient time to make oral submissions including written ones for consideration before finalizing the Provincial Land Transport Framework.<sup>137</sup> This first piece of legislation to give content to public participation is a good initiative as it spells out the procedure and time frames on what should be done in conducting public participation. Other departments can build on this in order to put forward a uniform policy on how public participation should be conducted. Although these regulations are a good example, they are silent about the remedies available to the public in cases where the MEC has failed to conduct public participation. In addition, they do not provide a platform for *inter alia* reconsideration of submissions wherein they were initially rejected. These concerns will be addressed in the proposed Public Participation Act.

It is also submitted that, whilst the Court should respect the autonomy of Parliament, it should not shy away from intervening where the legislature, as in the *E-toll* case,<sup>138</sup> *Matatiele*, *Poverty* and *Moutse* cases, failed to consider the wishes and demands of the people. The Court should never condone it when legislation reflects nothing about the views of the people. It should strive to strike a delicate balance between competing interests such as the rights contained in the Constitution, the demands of the majority and the wishes of the minority. It should apply the reasonableness test in assessing whether the views of the public have been duly considered as required in an open and democratic society.

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<sup>133</sup> Provincial Gazette for Gauteng No 266, 12 September 2013,

<sup>134</sup> Regulation 6(2).

<sup>135</sup> Regulation 6(3) and (4).

<sup>136</sup> Regulation 7(1).

<sup>137</sup> Regulation 8(1) and (2).

<sup>138</sup> Even though the case was dismissed on technical grounds, people remained opposed to the tolling system and had resorted to courts for protection.