TOWARDS PARTICIPATORY DEMOCRACY, OR NOT: THE REASONABLENESS APPROACH IN PUBLIC INVOLVEMENT CASES*

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ABSTRACT
Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution require the national and provincial legislative bodies to facilitate public involvement in their legislative and other processes. This article considers the jurisprudence developed by the Constitutional Court thus far in the five cases concerning the facilitation of public involvement in legislative decision-making processes. The court adopted a reasonableness standard of review for purposes of determining whether, in each case, the constitutional obligation to facilitate public involvement has been met. Drawing on literature and a comparison with work in the field of socio-economic rights, I argue that to be meaningful and effective, a reasonableness enquiry requires a substantive engagement with the purposes underlying the relevant provision[s] in the Constitution. In the first two public involvement cases, I contend that the court’s development of the reasonableness enquiry was promising, as it sought to engage substantively with the understanding of democracy that is envisaged in the Constitution. The court developed an approach to the use of reasonableness, as a standard of review, in a manner that achieves participatory democracy, as an element of South Africa’s deep vision of democracy envisaged in the Constitution. However, unfortunately, the last three public involvement cases tend to show the court as working with a compliance- or process-oriented reasonableness enquiry. The court here evinces a weak engagement with the purposes and values which the constitutional obligation to facilitate public involvement seeks to achieve. I argue that, for the future development of jurisprudence and our constitutional democracy, the court should revert to its earlier coherent and constitutionally principled approach.

Key words: Constitutional Court, Constitution of South Africa, democracy, reasonableness, separation of powers, socio-economic rights, public participation

I INTRODUCTION
Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution of the Republic of South Africa, 1996 state that the National Assembly, the National Council of Provinces (NCOP) and the provincial legislatures must, respectively, ‘facilitate public involvement in [their] legislative and other processes [and those of their] committees’. Accordingly, these provisions place a positive

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obligation on the national and provincial legislative bodies to take steps to facilitate participation by members of the public in the law-making and other processes engaged in by these bodies.\(^1\)

In this article, I consider the jurisprudence developed by the Constitutional Court thus far in the five cases decided by the court concerning the facilitation of public involvement in legislative decision-making processes.\(^2\) I argue that the court in the first two of these cases, *Doctors for Life International v Speaker of the National Assembly*\(^3\) and *Matatiele Municipality v President of the Republic of South Africa (2)*,\(^4\) developed an approach to the use of reasonableness, as a standard of review, in a manner that achieves participatory democracy, as an element of South Africa’s deep vision of democracy envisaged in the Constitution. I refer to these as the ‘early public involvement cases’ or ‘early public involvement jurisprudence’. I show that, in these cases, the court managed to stretch the use of reasonableness beyond the limits it has set before in another context, leading to an effective and principled enforcement of the right of members of the public to be involved in legislative decision-making. I argue further that, despite the ground-breaking jurisprudence developed in the early public involvement cases, in aspects of the court’s subsequent cases\(^5\) the court, worryingly, showed a strong preference for a procedural account of the obligation to facilitate public involvement – viewing it somewhat as a mere obligatory procedural requirement – without a thorough engagement with the purposes and values which this constitutional obligation seeks to achieve. In this regard, I argue that these subsequent cases demonstrate less commitment to the deep vision of democracy developed in the early public involvement cases.

I begin, in part II, by setting out the factual background of the public involvement cases. In part III, I articulate what I consider to be the best reading of the early public involvement cases. I do so with a particular focus on the court’s placing of the obligation on legislative bodies to facilitate public involvement within South Africa’s broader conception of democracy. In this part, I also analyse the notion of reasonableness as a standard developed in the early public involvement jurisprudence for the judicial review of whether the relevant legislative body has fulfilled its obligation to facilitate public involvement in any particular case. I do so with particular reference to how

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\(^1\) In this article, where appropriate, I refer to the National Assembly, the NCOP, the provincial legislatures and their respective committees, collectively as ‘legislative bodies’.

\(^2\) These cases were all decided between 2006 and 2011. Section 167(4)(e) provides that only the Constitutional Court may decide that Parliament (including the National Assembly and the NCOP) has fulfilled a constitutional obligation. Therefore, whenever the national legislative process is at play and a claim arises that the obligation to facilitate public involvement has not been met, only the Constitutional Court will have jurisdiction to decide such a matter.

\(^3\) 2006 (6) SA 416 (CC) (*Doctors for Life*).

\(^4\) 2007 (6) SA 477 (CC) (*Matatiele*).

\(^5\) I shall refer to them as ‘the more recent public involvement cases’. They are *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) (*Merafong*); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) (*Poverty Alleviation Network*); and *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC) (*Moutse*).
the court overcame the criticisms associated with the reasonableness standard when used in the context of socio-economic rights. In part IV, I examine each of the more recent public involvement cases insofar as the reasonableness inquiry is applied to these cases, and point out the ways in which aspects of these cases appear to be inconsistent with the approach developed in the early public involvement jurisprudence. I conclude the article in part V with an analysis of the trend that seems to be developing in the more recent public involvement cases and the potential consequences thereof.

II  FACTUAL BACKGROUND OF THE PUBLIC INVOLVEMENT CASES

Essentially, all the five public involvement cases before the Constitutional Court involved the question whether the constitutional obligation to facilitate public involvement in the legislative processes of the National Assembly, the NCOP or the provincial legislatures, as the case may be, was met. If this obligation were found not to have been met, this would lead to a finding of constitutional invalidity of the statutes which ensued from the legislative process concerned.

Four of the five public involvement cases (Matatiele, Merafong, Poverty Alleviation Network and Moutse) all concerned the question whether the relevant provincial legislatures forming part of the NCOP facilitated public involvement, in compliance with the Constitution, before voting in favour of the parliamentary Bills which sought to alter various provinces’ provincial boundaries.\(^6\) According to s 74(8) of the Constitution, where a parliamentary Bill or any part thereof concerns only a specific province or provinces, the NCOP may not pass the Bill without approval of the provincial legislature of such specific province or provinces. Naturally, alteration of provincial boundaries affects each specific province differently, and thus a Bill altering provincial boundaries falls under the auspices of s 74(8) of the Constitution. Before deciding on whether to approve an alteration of a provincial boundary, the affected provincial legislature is obliged to facilitate public involvement in terms of s 118(1)(a) of the Constitution.\(^7\)

In 2005, a Bill proposing an amendment to the Constitution and a related statute were passed by the National Assembly and, accordingly, sent to the NCOP for consideration by provincial legislatures. The two Bills had the twin objectives of: (a) redrawing provincial boundaries by using a criterion of municipal boundaries instead of magisterial districts; and (b) phasing

\(^6\) In addition, Moutse also concerned whether the National Assembly had met its obligation to facilitate public involvement before it voted in favour of Bills proposing to alter provincial boundaries.

\(^7\) Section 74(3)(b)(ii) provides that any amendment to the Constitution which alters provincial boundaries, must enjoy a supporting vote by at least six provinces in the NCOP. Thus, in addition to a province approving alterations to boundaries which affect that province specifically, each province represented in the NCOP is required to vote on the Bill concerned as a whole. This too may trigger the obligation on the part of provincial legislatures to facilitate public involvement.
out cross-boundary municipalities. The government viewed the prevailing state of affairs at the time as having resulted in some practical difficulties, particularly in respect of service delivery, thus necessitating the re-drawing of boundaries. The Bills were ultimately approved by the various provinces and culminated in the enactment of the Constitution Twelfth Amendment Act of 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 (Repeal Act). The applicants in the four cases challenged the validity of these pieces of legislation, inter alia, on the basis that adequate facilitation of public involvement had not taken place before they were enacted.

Matatiele, in particular, concerned the contention that the Constitution Twelfth Amendment Act and the Repeal Act were invalid on the basis that the KwaZulu-Natal Provincial Legislature failed to meet its s 118(1)(a) obligation to involve the Matatiele community in approving these Acts, which resulted in Matatiele ceasing to be part of KwaZulu-Natal and instead falling within the Eastern Cape. The KwaZulu-Natal legislature had neither invited any submissions from the public nor conducted any public hearings before approving the two Acts.

In Doctors for Life, on the other hand, Doctors for Life International (an organisation representing the interests of various health professionals)
contended that ss 72(1)(a) and 118(1)(a) of the Constitution required the NCOP and provincial legislatures, respectively, to invite written submissions and hold public hearings in respect of four parliamentary Bills affecting health professionals or, at least, to do so whenever there was evidence that the proposed legislation under consideration was controversial, as was the case in this matter. While all the parties agreed on the existence of the duty on law-makers to involve the public in the legislative process, they disagreed on the scope of the duty. The applicants insisted that all the provincial legislatures and the NCOP were each obliged to invite submissions and hold public hearings; whilst the respondents, consisting mainly of the heads of the various legislatures, argued that what was required was ‘some opportunity to make either written or oral submissions on the legislation under consideration [at some point in the national legislative process]’, this having been the case in the National Assembly process. In this case, the NCOP and the majority of the provincial legislatures had neither invited written submissions nor held any public hearings. The four Bills concerned were the Choice on Termination of Pregnancy Amendment Bill (which inter alia required health practitioners to perform abortions at certain health facilities); the Sterilisation Amendment Bill (which concerned sterilisation and the role of health practitioners therein); the Traditional Health Practitioners Bill (which made provision for the recognition and regulation of traditional healers); and the Dental Technicians Amendment Bill (regulating, inter alia, how informally trained persons may perform the work of a dental technician).

It should be noted that the two early public involvement cases, Doctors for Life and Matatiele, were heard and decided around the same time, and the majority judgments in both cases were written by Ngcobo J. Therefore, the approach of the court in these two cases is similar.

III THE CONSTITUTIONAL COURT’S APPROACH IN THE EARLY PUBLIC INVOLVEMENT CASES

(a) The court’s interpretative approach

In Doctors for Life and Matatiele, the Constitutional Court’s starting point was to find meaning for the obligation to facilitate public involvement in legislative processes, enshrined in ss 72(1)(a) and 118(1)(a) of the Constitution. To do so, it first looked to the whole Constitution and to the social and historic context linked to public involvement in legislative decision-making. It explored whether this obligation is linked to rights in the Bill of Rights and other constitutional values. It also analysed the relevance of international law concerning public involvement in legislative decision-making. For purposes

13 Doctors for Life (note 3 above) paras 4–5 & 76.
14 Ibid paras 5, 7 & 75–8.
15 Ibid paras 5, 7 & 76.
16 Ibid paras 90–147. Matatiele (note 4 above) paras 50–69.
of this article, I shall refer to this consideration of the Constitution as a whole and its social and historic context as contextual interpretation. 17

The court in the early public involvement cases recognised that the Constitution embraces both representative and participatory elements which are mutually supportive. 18 In *Doctors for Life*, the court held that ‘the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation’. It also held:

> Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy. 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. 19

The said mutually supportive representative and participatory elements are discernible from particular provisions of the Constitution. The court held that this is implicit in the Preamble to the Constitution and s 1 of the Constitution which sets out the founding provisions of the Constitution. 20 The representative element is implicit in the notion that citizens will delegate law-making power to elected representatives by participating in periodic elections based on ‘universal adult suffrage, a national common voters roll … and multi-party system of democratic government’. 21 Complementarily, the participatory element is implicit in the notion that a government is one ‘based on the will of the people’ where elected representatives must exercise power in an accountable, responsive and open manner, by facilitating public involvement in their governing processes. 22

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17 The term ‘contextual interpretation’ was used by the court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*) para 22: ‘Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.’ In *Matatiele* (note 4 above) para 36, Ngcobo J eloquently stated: ‘Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it “has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate”’. Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole’ (footnote omitted).

18 *Doctors for Life* (note 3 above) paras 111, 115 & 122; and *Matatiele* (ibid) paras 40, 59, 50 & 129. Theunis Roux correctly observes that ‘democracy is a noun permanently in search of a qualifying adjective’. T Roux ‘Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2006) 10-1. The adjective at issue in the public involvement cases is the term ‘participatory’, not as the ultimate description of South Africa’s constitutional democracy but as an important element of it.

19 *Doctors for Life* (ibid) para 122; *Matatiele* (ibid) paras 59–60.

20 *Doctors for Life* (ibid) paras 110–11 & 115; *Matatiele* (ibid) para 65.

21 *Doctors for Life* (ibid); see also s 1(a) & (d) of the Constitution.

22 *Doctors for Life* (ibid); see the Preamble to the Constitution & s 1(d).
The court held that the foundational constitutional values, accountability and human dignity, were relevant to this enquiry. It found that public participation in the law-making processes was the goal contemplated in s 72(1)(a) of the Constitution and that to hold otherwise would be contrary to, inter alia, the principles of accountability, responsiveness and openness enshrined in s 1(d) of the Constitution. The court also found that facilitation of public involvement also serves the purpose of enhancing the ‘civic dignity’, ‘human dignity’ and ‘self-respect’ of those who participate, by enabling their voices to be heard and taken account of.

The court has previously developed the notion that foundational constitutional values inform the interpretation of the whole Constitution and set positive standards with which all law must comply. As a result, a constitutional right or obligation may be given greater weight when it is furthering foundational constitutional values. Therefore, the holding that the requirement of public involvement is linked to founding provisions of the Constitution shows that the court recognises this requirement as a core part of the principle of democracy envisaged in the Constitution.

In Matatiele, the court considered the relevance of the right to freedom of movement and residence to the question of public participation. Analysing the rights in the Bill of Rights that inform the obligation to facilitate public involvement, the court found the Constitution Twelfth Amendment Act to affect citizens’ right ‘to enter, to remain in and to reside anywhere in the Republic’ which is enshrined in s 21(3) of the Constitution. It found that this right includes citizens’ right ‘to live in the province of their choice’ and ‘to enter any province for purposes of establishing residence therein’, which are adversely impacted when provincial boundaries are changed.

In Doctors for Life, the court interpreted the relevant constitutional provisions in light of South Africa’s peculiar historical background and relevant international law. It considered apartheid’s exclusion of people, on a racial basis, from having any meaningful participation in the making of the laws which affected them; thus resulting in oppressive laws against the majority of South Africans. It also recognised that it was direct participation of the ordinary people in different communities of South Africa in the political

23 Doctors for Life (ibid) paras 110–11 & 115; Matatiele (note 4 above) para 65.
24 Doctors for Life (ibid) paras 141, 111, 116 & 230; see also Matatiele (ibid) paras 48 & 65.
25 Doctors for Life (ibid) para 115; and Matatiele (ibid) para 66. In Doctors for Life, endorsing the approach of Ngcobo J, Sachs J held that: ‘Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to’ para 234.
26 United Democratic Movement v President of the Republic of South Africa (No 2) 2003 (1) SA 495 (CC).
28 Matatiele (note 4 above) para 80. The court held that the attachment of individuals to the provinces in which they live should not be underestimated.
29 Doctors for Life (note 3 above) para 112.
discourse which helped bring an end to apartheid. This highlights the importance of ensuring that citizen participation in political decision-making processes is not undermined in the quest for social justice, which is also one of the foundational values of the new democratic system.

Lastly, the court in *Doctors for Life* gave considerable credence to international law in determining the meaning of the obligation on the part of legislatures to facilitate public involvement in their legislative processes. It interpreted art 25, together with art 19, of the International Covenant on Civil and Political Rights (1966) (ICCPR) to ‘guarantee not only the positive right to public participation, but simultaneously impose a duty on the states to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised’. It recognised that in terms of international law, periodic elections coupled with permissibility of ‘public debate and dialogue with elected representatives’ constitutes the minimum requirement as far as public participation is concerned. The standard gets higher when the legislative body(ies) of a particular state is mandated with a duty to facilitate more direct participation by the public. Thus, States Parties can choose between the minimum requirement and the higher standard. This may be anything from mere consultation of the public to the holding of referendums.

The court categorised South Africa as one of the countries which has, through its Constitution, ‘opted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process’.

The contextual interpretation of ss 51(1)(a), 72(1)(a) and 118(1)(a) of the Constitution by the court, as described above, resulted in the court holding that meaningful and effective public involvement in the legislative process is an element of the South African conception of democracy. The court found that its role when these provisions are invoked in a dispute on whether the constitutional obligation to facilitate public involvement has been met in particular circumstances is to determine ‘whether what [the legislative body] has done is reasonable in all the circumstances’.

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30 Ibid. This refers to the development of the concept of ‘the people’s power’, where ‘people took part in community structures that were set up [in the struggle against] the system of apartheid’.

31 See the Preamble to the Constitution.


33 *Doctors for Life* (ibid) para 106.

34 Ibid paras 107–8.


36 Ibid paras 107–8. The *Doctors for Life* court’s views on the relevance of international law are referred to with approval in *Matatiele* (note 4 above) para 54.

37 *Doctors for Life* (ibid) para 129; *Matatiele* (ibid) paras 78 & 97.

38 *Doctors for Life* (ibid) paras 146 & 125–49 (my emphasis). It held that the judiciary was empowered to review the legislature’s compliance with this obligation by determining in appropriate cases ‘whether there has been the degree of public involvement that is required by the Constitution’ (para 124).
of reviewing legislative bodies’ compliance with the obligation to facilitate public involvement is one of reasonableness.

In *Doctors for Life*, the court concluded that it was unreasonable for the various provincial legislatures not to hold public hearings on the Choice on Termination of Pregnancy Amendment Bill and the Traditional Health Practitioners Bill. In *Matatiele*, the court concluded that the KwaZulu-Natal legislature acted unreasonably in failing to hold public hearings or invite written representations, and thus declared as invalid that part of the Constitution Twelfth Amendment Act which relocated Matatiele from KwaZulu-Natal to the Eastern Cape.

In the following section, I analyse the court’s reasonableness enquiry in these two cases. Before doing so, it is appropriate that I give a conceptual account of the use of the notion of reasonableness by courts as a standard of reviewing the constitutionality of the conduct of government. I also lay out some of the criticisms of the manner in which the court has applied reasonableness in other constitutional contexts, focusing on the court’s socio-economic rights cases.

(b) The conceptual character of reasonableness as a standard of review and some criticisms

Reasonableness is a mechanism or standard of judicial review. In public involvement cases, the concern is with judicial review in a constitutional sense, that is, the power of the courts to scrutinise and strike down conduct of legislative bodies which offends against the constitutional obligation to facilitate public involvement. This derives from the constitutional power of courts to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. The application of reasonableness by courts in this sense can be described as the requirement for a kind of justification of a decision made by the decision-maker, the absence of which renders such decision unreasonable and thus unconstitutional. In other words, the requirement of reasonableness in constitutional matters can be seen as a standard which courts must apply in order to enforce certain obligations that the government is required to perform in a manner that is consistent with constitutional goals. In addition to public involvement cases, other constitutional contexts in which the notion of reasonableness has been applied by courts as a standard of review include the right to vote, the right

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39 The court held that public hearings were not required with regard to the Dental Technicians Amendment Bill, as it did not generate any interest from the public (ibid para 192). The court also dismissed the challenge related to the failure to facilitate public involvement before passing the Sterilisation Amendment Bill, because that Bill had yet been signed by the president when the application was made to the court (ibid paras 57–8).

40 Ibid paras 84 & 90. However, the declaration of invalidity was suspended for eight months.

41 Constitution s 172(1)(a).
to just administrative action and socio-economic rights. The comparative analysis I undertake in this article is limited to public involvement and socio-economic rights cases.

The character of the reasonableness standard is such that the scrutiny of the judicial review of state conduct can be more intrusive or less intrusive, in varying degrees. The variance in the intensity of scrutiny is considered to be a desirable feature of the reasonableness standard, as it allows courts to afford a measure of deference to the other branches of government as required. The basis for allowing such a measure of deference is the principle of separation of powers. This principle is said to emerge from the structure of the Constitution and purports to produce an acceptable level of respect and checks and balances between the judiciary on the one hand and the legislature or the executive on the other. The doctrine of separation of powers has been described by the court as involving the notion that where the legislature has before it ‘differing reasonable policy options’, the courts will allow it due deference and hold in its favour. Thus, courts must guard against violating this principle in the course of adjudication by restricting themselves in appropriate cases and circumstances. In this regard, reasonableness tends to create controversies in regard to the degree of deference that a court will allow to the government in a particular case.

The following are some of the main criticisms of the manner in which the Constitutional Court has applied the standard of reasonableness in socio-economic rights cases:

42 In the context of socio-economic rights, see the cases referred to in notes 47 & 48 below. In the context of the right to vote, see the minority judgment of O’Regan J in *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) (*NNP*) (reviewing constitutionality of a statute that effectively disenfranchised approximately five million eligible voters on the basis that they did not have specific forms of identification books). In administrative law, s 33(1) of the Constitution provides that everyone has the right to administrative action that is reasonable. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) (reviewing whether the decision of the chief director of the Department of Environmental Affairs and Tourism in the allocation of fishing quotas was reasonable as envisioned by s 33(1) of the Constitution).


44 See *I Currie & J de Waal The Bill of Rights Handbook* 5 ed (2005) 18. The doctrine of the separation of powers was described in Constitutional Principle IV in schedule 4 of the interim Constitution as ‘a separation of power between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness’. See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 22–6.

45 *S v Makwanyane* 1995 (3) SA 391 (CC) 107. The notion that a decision-maker in circumstances of a particular case may have various reasonable choices has been called by Hoexter as ‘area of “legitimate diversity”’. C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484, 510; and Hoexter (note 43 above) 347.

46 See Currie & De Waal (note 44 above) 22.
In its first socio-economic rights case, the court associated reasonableness with the minimally-intrusive or highly deferential rationality standard of review.\(^{47}\)

In socio-economic rights cases,\(^{48}\) various authors have argued that the court’s reasonableness enquiry is not adequately informed by a clear normative content of socio-economic rights enshrined in the Constitution, consequently weakening it as a standard of reviewing the constitutionality of state conduct.\(^{49}\) This lack of normative content for socio-economic rights has been criticised for rendering the reasonableness enquiry to be a ‘relatively process oriented’ model of judicial review and thus failing to give effect to the substantive elements of the socio-economic rights enshrined in the Constitution.\(^{50}\) This is because the court focused on whether the government’s conduct was consistent with ‘structural good governance standards’ instead of defining and giving effect to concrete values and goals which the rights enshrined in ss 26(1) and 27(1) of the Constitution seek to achieve.\(^{52}\)

\(^{47}\) In the court’s first socio-economic rights case, \textit{Soobramoney v Minister of Health, KwaZulu-Natal} 1998 (1) SA 765 (CC) para 29 (reviewing and finding constitutionally valid the decision of a government hospital to deny a terminally ill patient renal dialysis), the court held that it ‘will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters’. This is despite the relevant provision, s 27(2) of the Constitution, referring to the term ‘reasonable’ and not ‘rational’. Rationality is a standard that is designed to be minimally intrusive in its character, and in this regard has been associated with the terms ‘plausibility’ and ‘common sense’ and has been described as ‘relatively deferential’ (E Mureinik ‘Reconsidering Review: Participation and Accountability’ in TW Bennett et al (eds) \textit{Administrative Law Reform} (1993) 35, 41; \textit{Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission} 2002 (3) SA 143 (C) 155G-H, 164H-I). It is noteworthy that the right to administrative action that is reasonable (s 33(1) of the Constitution) was also for a long time mainly limited to rationality review (see \textit{Hoexter \textit{Administrative Law in South Africa} (2007) 295 & 306–9). In \textit{NNP} (note 42 above) paras 18 & 24 the majority of the court declined to apply the broad reasonableness standard suggested by the minority and instead adopted the rationality standard, holding that ‘decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament’.

\(^{48}\) \textit{Soobramoney} (ibid); \textit{Grootboom} (note 17 above) (whether government’s failure to cater for the housing needs of members of a particular community which lived under harsh conditions in informal dwellings was consistent with s 26 of the Constitution); and \textit{Minister of Health v Treatment Action Campaign (No 2)} 2002 (5) SA 721 (CC) (TAC) (the adequacy of the state policy to confine the drug for the prevention of mother-to-child transmission of HIV (Nevirapine) to a significantly few research and training sites around the country).


\(^{52}\) Ibid.
(c) Without a normative content for socio-economic rights, the meaning of reasonableness tends to be vague. Such vagueness ‘does not help provide any certainty as to the nature of the government’s obligations in terms of the Constitution’. 53

(d) It has also been argued that the reasonableness standard has been applied in such a manner that the court devotes most of its energy devising and applying the abstract compliance-measuring standard of reasonableness and, as such, fails to place the needs or urgent interests of citizens at the centre of its enquiry. 54

The above criticisms demonstrate concerns that the court in socio-economic rights cases failed to develop a substance-oriented reasonableness enquiry and that its use will result in a highly deferential approach to judicial review. I argue in the next section that the court in the early public involvement cases developed an approach which significantly averted some of the shortcomings identified above.

(c) Analysis of the reasonableness approach in the early public involvement cases

As stated above, in its contextual interpretation of ss 51(1)(a), 72(1)(a) and 118(1)(a) of the Constitution (ie the consideration of the Constitution as a whole and in its social and historic context in interpreting these provisions), the Constitutional Court found that our Constitution embraces representative and participatory elements which are mutually supportive. 55 It is discernible from the majority decisions in *Doctors for Life* and *Matatiele* that the term ‘mutually supportive representative and participatory elements’ means that no hierarchy of importance is recognised between representative democracy and participatory democracy in our Constitution. 56 Borrowing from Roux, I shall refer to this as ‘the deep principle of democracy’. 57 The deep principle of democracy signifies an understanding of democracy not as a mere right of citizens to elect representatives of their choice periodically, but one which involves participation by the public in representatives’ decision-making processes and the holding of representatives accountable to the values of the

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53 Bilchitz (note 43 above) 176. Bilchitz has also criticised the court’s approach in *TAC* for standing ‘for whatever the Court regards as desirable features of state policy’ (Bilchitz (note 49 above) 10). Dennis Davis has argued that ‘the court refused to engage with the contours of the rights, thereby leaving as vague as possible the determination of the anchor point from which reasonable conduct can be determined’ (Davis (note 49 above) 312).


55 *Doctors for Life* (note 3 above) paras 111, 115 & 122; *Matatiele* (note 4 above) paras 40 & 129.

56 The requirement is that the two must complement one another in the manner described above.

57 Roux (note 18 above) 10-63. Upon scrutinising the text and aspirational aspects of the Constitution and some earlier jurisprudence of the Constitutional Court, Roux eloquently articulates the participatory and representative elements of the South African conception of democracy – ‘the deep principle of democracy’. In his view, these elements cannot be considered separately but as concepts complementing one another or in a ‘constructive tension’ which becomes resolved ‘on a case-by-case basis in accordance with the democratic values of “human dignity, equality and freedom”’. 
Constitution. This suggests that public involvement in the legislative process is fundamental to South Africa’s governance system and is thus a constitutional right which must be given effect to by the fulfilment of the obligations in ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution. This approach signifies an intensive effort by the court to declare the place and meaning of public involvement in the legislative process within our conception of democracy.58 Such a place and meaning can be seen as warranting a constructive relationship between the government and the governed, where the people elect representatives who are in turn mandated to govern by guaranteeing the meaningful consideration of the views and concerns of the public in the law-making process.59

Once the court had found that the Constitution makes the requirement of the facilitation of public involvement such a key part of the South African conception of democracy as described above and held that ‘participation is the end to be achieved’,60 there was considerably limited room to define the applicable standard of reviewing the conduct of legislative bodies in a restrictive manner. The court explained the reasonableness standard of review widely as follows:

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 may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in decision-making’.61

By engaging in an in-depth exercise of what public participation meant as a right which members of the public have, the court averted the possibility of applying a reasonableness enquiry that was not adequately informed by a clear normative content of the right in question or in a manner that is weak and vague. Its value-laden approach thus helps to avert the criticisms directed at the use of reasonableness in the court’s socio-economic rights jurisprudence. Thus, I contend that while the standard of reasonableness is characterised broadly in public involvement cases, it is not overly abstract or vague. This is

58 The cardinal judicial role of the court to interpret the Constitution and articulate its meaning and to give effect to such meaning was emphasised by the court. See Doctors for Life (note 3 above) para 38. The court repeated the statement it had said in President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC) para 72, that the court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values’.
59 Indeed, this is a point of contrast between the majority and minority decisions in both cases. The minority of the court in both Doctors for Life and Matatiele preferred to interpret the Constitution restrictively, emphasising the superiority of representative democracy over the participatory element. Thus, at the outset, the minority placed lower value on the constitutional obligation to facilitate public involvement and this influenced the minority’s narrow interpretation that ss 59(1), 72(1) & 118(1) do not require legislative bodies to facilitate public involvement reasonably.
60 Doctors for Life (note 3 above) para 141.
61 Ibid para 129.
as a result of a deep engagement with the notion of participatory democracy enshrined in the Constitution. I turn to consider what reasonableness actually entails in light of the above.

It should be said at the outset that the majority of the court in *Doctors for Life* and *Matatiele* did not even consider whether the separation of powers demanded an adoption of the less intrusive rationality standard as the only appropriate review standard for adjudication of public involvement cases. This is despite reasonableness not having been expressly stated in the Constitution as the applicable threshold for public involvement cases. In this regard, a rationality test would have entailed the question whether the conduct of the legislative body concerned was objectively capable of furthering public involvement in legislative processes. Characteristically, a strict rationality test does not allow space for the importance of the constitutional rights and the impact of conduct on such rights to allow for an intensive scrutiny of the government conduct. Thus, the deep vision of democracy articulated by the court would have had little impact on whether the conduct of a legislative body was constitutionally valid or not. The majority of the court preferred the reasonableness standard despite the reservation by the minority of the court that reasonableness was too onerous a standard.

The court in *Doctors for Life* described the relevant provisions as imposing a duty on the NCOP and provincial legislatures to ‘promote’, ‘help forward’ or ‘make it easy or easier’ for the public to participate in its decision-making processes and those of their committees. A consistent message from the court has been that the conduct of the legislature must result in interested members of the public having had a meaningful and effective opportunity to be heard before the proposed legislation is enacted.

Giving further content to reasonableness as a review standard for all public involvement cases, the court found that legislative bodies are, at least, required to undertake a two-step approach. This involves (a) making a sufficient effort to ensure that members of the public are equipped with adequate information

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62 Ibid paras 244, 302, 306 & 317; *Matatiele* (note 4 above) paras 125–6. The minority of the court, per Yacoob J, in both *Doctors for Life* and *Matatiele* preferred to interpret the Constitution restrictively, emphasising the superiority of representative democracy over the participatory element. Yacoob J rejected that the view that the obligation to facilitate public involvement finds its foundation in the Constitution’s founding values of accountability, responsiveness and openness in s 1(d) of the Constitution (*Doctors for Life* (ibid) paras 274–5). He held that: ‘Parliament is not obliged to ensure that reasonable steps to facilitate public involvement in [its legislative processes] are taken’, and that ‘public opportunity to be heard or to comment on legislation’ cannot be ‘a pre-condition to validity of legislation’ (*Doctors for Life* (ibid) para 319). He concluded that ss 59(1), 72(1) & 118(1) oblige legislative bodies to do no more than ‘make rules with due regard to the obligation to facilitate public involvement in [their legislative processes]’ (*Doctors for Life* (ibid) para 322, see also paras 321–6). In full agreement with this view, Skweyiya, Van der Westhuizen & Yacoob JJ subsequently held in *Matatiele* that ‘reasonable public involvement [in the legislative process] is not a prerequisite to the validity of constitutional amendments’ (*Matatiele* (ibid) para 126).

63 *Doctors for Life* (ibid) para 119. In *Matatiele* (ibid) para 51, this was described as requiring ‘the legislature to take positive measures to facilitate public participation in the law-making process relating to any particular bill under consideration’.

64 *Doctors for Life* (ibid) para 129; and *Matatiele* (ibid) paras 78 & 97.
to appreciate their right to be involved, which includes ensuring that people are aware of the different options through which they can influence the process in a particular legislative process; and (b) taking steps to ensure that, where there is public interest to participate in a particular legislative process, interested members of the public are given a meaningful and effective opportunity to be heard and their views considered by members of the legislative body.

Describing this process, the court held that the Constitution contemplates that ‘participation [a constitutional right] is the end to be achieved’ and that ‘our Constitution demands no less’. In this manner, the Constitutional Court avoided the trap it set for itself in socio-economic rights cases, where the achievement of adequate housing and health-care services were not seen as the goal to be achieved, but, instead, ‘reasonable’ conduct of the government became the very end to be achieved.

Thus, conduct of a legislative body that fails to meet these two steps, which are applicable in all public involvement cases, is unlikely to pass constitutional muster. It is for this reason that I call this the minimum content for what reasonable facilitation of public involvement amounts to. Without these two steps, at least, it seems to be inconceivable that public participation of interested or affected members of the public (as an integral element of our conception of democracy) can be said to be achieved, and anything less would render the requirement of public involvement meaningless for the public. Although the court did not describe the said two-step approach of a reasonableness enquiry using the term ‘minimum content’, I consider this to be the correct and best reading of the majority judgments in Doctors for Life and Matatiele.

Upon being satisfied that the above described minimum standard has been met by the conduct of the legislative body, a court must undertake a second exercise in order to determine the standard which must be met by the legislative body in terms of the particular circumstances of the case at hand. This is in the recognition that reasonableness is ‘an objective standard which is sensitive to the facts and circumstances of a particular case’. Accordingly, circumstances

65 Doctors for Life (ibid) paras 129 & 132. Examples of how this can be achieved include road shows, regional workshops, radio programmes and general educational events about the legislative process.

66 Ibid paras 129, 141 & 193. There may of course be times when it may be unreasonable to expect legislative bodies to meet these requirements. For example, the court held that ‘there may well be circumstances of emergency that require urgent legislative responses and short timetables’ (para 194). The court has also indicated the failure to invite written representations or hold public hearings will not be unreasonable where the proposed legislation concerned did not generate any interest from the public (para 192).

67 Ibid paras 141 & 145, respectively. Writing about the standard of review developed in Doctors for Life, Karen Syma Czapanskiy & Rashida Manjoo submit that ‘legislators may reject [the opinions of the participating public], but they cannot do so without having exposed themselves to the arguments, the feelings, and insights of those who are affected by the decision’ (KS Czapanskiy & R Manjoo ‘The Right of Public Participation in the Law-making Process and the Role of Legislature in the Promotion of this Right’ (2008) 19 Duke J of Comparative and Int Law 1, 17).

68 The court in Matatiele largely endorsed the approach developed in Doctors for Life. See Matatiele (note 4 above) paras 40–69.

69 Doctors for Life (note 3 above) para 127.
of a case may call for a more intensive or intrusive scrutiny than the bare minimum described above. As the court mentioned, courts have the authority to determine in cases before them whether there has been the degree of public involvement that is required by the Constitution. The maximum content of public involvement is not defined, thus leaving space for courts to define reasonableness as requiring a more extensive effort from the legislature, if the circumstances of a particular case so demand. The idea is that such an extensive effort, based on the circumstances of the case concerned, would in a way be the substantive content of reasonableness for that particular case. A good example of such a higher content of reasonableness would involve continued consultation even after having already facilitated one round of consultation with concerned persons. I argue in part IV that this was required in Merafong.

When defining the content of reasonableness in particular circumstances, the court takes into account that in order to achieve the deep principle of democracy as a constitutional goal, the facilitation of public involvement must result in meaningful and effective participation by the members of the public concerned. This requires the consideration of factors including (a) ‘the nature and importance of the legislation and the intensity of its impact on the public’; (b) ‘that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process’; and (c) ‘regard to what Parliament itself considered to be appropriate public involvement in light of the legislation’s content, importance and urgency’. The first of the three factors is instrumental in the determination of meaningfulness and effectiveness in particular circumstances. The requirements of meaningfulness and effectiveness are significant in that they avoid a compliance- or process-oriented facilitation of public involvement, and thus demand that public involvement must be facilitated in such a manner that it will be of value and benefit to the people so participating. As Arnstein argues:

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**Notes:**

70 Ibid para 124.

71 In stating that public involvement may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in decision-making’, the court effectively envisaged that if the circumstances of a case so demand the reasonableness enquiry could require ‘partnering in decision-making’. The idea of government partnering with members of the public is argued by Sherry R Arnstein as a legitimate form of citizen participation. This author submits that this is a process whereby power is ‘redistributed through negotiation between citizens and power-holders. They agree to share planning and decision-making responsibilities through such structures as joint policy boards, planning committees and mechanisms for resolving impasses. After the ground rules have been established through some form of give-and-take, they are not subject to unilateral change’ (SR Arnstein ‘A Ladder of Citizen Participation’ (1969) 35(4) J of the American Institute of Planners 216).

72 Doctors for Life (note 3 above) paras 105, 129, 131, 132, 145 & 171; and Matatiele (note 4 above) paras 78 & 97.

73 Doctors for Life (ibid) para 128.

74 For example, the court held that ‘it is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made’ (Doctors for Life (ibid) para 171).
[Inviting citizens’ opinions, like informing them, can be a legitimate step toward their full participation. But if consulting them is not combined with other modes of participation, this [method] is still a sham since it offers no assurance that citizen concerns and ideas will be taken into account.\(^7\)]

The separation of powers doctrine is embedded in the third of the factors referred to in the preceding paragraph. In *Doctors for Life*, the court held that legislatures:

> have broad discretion to determine *how best* to fulfil their constitutional obligation to facilitate public involvement in a given case [which ‘may be fulfilled in different ways and is open to innovation on the part of the legislatures’], so long as they act reasonably.\(^8\)

Different methodologies may be employed in this regard, including the invitation of written representations, the holding of public hearings for any party interested to attend or the holding of hearings with interested persons or groups.\(^7\) Thus, there may be various reasonable ways to give effect to the constitutionally required public involvement in the legislative process, allowing ‘an area of ‘legitimate diversity’’.\(^7\) It is significant that consideration of the doctrine of separation of powers finds application only at this stage, and therefore does not affect the court’s exercise of determining and interpreting the constitutional rights and values which inform the meaning of the requirement of facilitation of public involvement. The basis of the court’s refusal to set minimum standards for socio-economic rights (the minimum core approach) was that this was inconsistent with the separation of powers doctrine, resulting in content for socio-economic rights being insufficiently defined.\(^8\) The court’s approach in *Doctors for Life* and *Matatiele* should be seen as placing the doctrine of the separation of powers within appropriate parameters, thus ensuring that the doctrine is considered not as a principle which is in adverse tension with the enforcement of rights, but as part of the enforcement of rights itself.\(^8\) This is because the true meaning of the Constitution is first construed, the minimum standards are then defined and, lastly, the court defines the substantive content of reasonableness for that particular case while allowing the legislative body some autonomy to choose the best way to achieve the constitutional goal.

\(^{75}\) Arnstein (note 71 above).

\(^{76}\) *Doctors for Life* (note 3 above) paras 123, 124 & 146. See also *Matatiele* (note 4 above) para 67 (my emphasis).

\(^{77}\) See *Doctors for Life* (ibid) paras 136–44.

\(^{78}\) Hoexter (note 45 above) 510. As observed by Hoexter and Anashri Pillay in different contexts, a court cannot substitute the opinion of the elected representatives on how best to achieve a particular goal, with its own view. See Hoexter (note 43 above) 352 & 357; and A Pillay ‘Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction’ (2005) 122 SALJ 419, 439.

\(^{79}\) See the discussion of socio-economic rights in s III(b) above. See also TAC (note 48 above) 37–9.

\(^{80}\) This accords with the purpose of the principle of constitutional deference articulated in *Makwanyane* (note 45 above) 107, wherein the court held that where the legislature has made ‘differing reasonable policy options’, the courts will allow the government the deference due to legislators.
IV THE APPROACH IN MERAFTONG, MOUTSE AND POVERTY ALLEVIATION NETWORK

Some interesting observations of the use of reasonableness can be made from the Constitutional Court judgments in its subsequent public involvement cases. In this part, I seek to make brief observations on what I consider to be the controversial aspects of these decisions. I argue that the more recent public involvement cases all reveal some reluctance on the part of the court to apply the laudable substantive approach developed in the early public involvement jurisprudence. I analyse the nature of the trend that seems to be developing in these cases in the conclusion.

(a) Merafong

The community of Merafong (made up of various local organisations) challenged the validity of the Constitution Twelfth Amendment Act on the basis that the Gauteng legislature did not comply with the constitutional obligation to facilitate public involvement before it approved the amendment. The Constitution Twelfth Amendment Act altered the provincial boundaries such that 74 per cent of the municipal area of Merafong Local Municipality would no longer be part of the Gauteng Province and would be incorporated into the North West Province. The Gauteng Legislature’s Local Government Portfolio Committee (the committee) and the North West legislature, purporting to fulfil their obligations to facilitate public involvement, had received written submissions and held a joint public hearing event with the community of Merafong. The result of the consultation process was that the people of Merafong were opposed to their municipality being incorporated into North West, a view with which the committee appeared to fully agree. Accordingly, the Gauteng legislature in the NCOP process opposed the proposed amendment in as far as it incorporated Merafong into North West. Under the impression that the Gauteng legislature was not entitled to seek alteration of the proposed constitutional amendment to suit its position, the Gauteng legislature subsequently, without any further consultation, reversed its decision and finally voted in favour of the incorporation of Merafong into North West. The community of Merafong complained that the Gauteng legislature’s consultation with the community amounted to consultation in form whereas the Constitution required consultation in substance. The

81 The Constitution Twelfth Amendment Act also affected other municipal boundaries in Gauteng, which the Gauteng legislature agreed with.

82 The court agreed with this, holding that Gauteng had to either vote in favour or against the Bill, and that it could not vote for the Bill conditionally or seek amendment thereof to suit its position. Merafong (note 5 above) paras 82 & 95. The correctness of this holding is extremely questionable. For a criticism of this, see M Bishop ‘Vampire or Prince? The Listening Constitution and Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others’ (2009) 2 Constitutional Court Review 313, 345.

83 Merafong (ibid) paras 29–41.

84 See the applicants’ Heads of Argument <http://www.constitutionalcourt.org.za/Archimages/10822.PDF> para 5.
reason for this argument was that the people of Merafong were not heard by the provincial legislature in any ‘real’ and ‘meaningful’ way. Their representations, with which the Gauteng legislature had appeared to agree, had been discarded for an alleged technical reason and without further consultation.\(^85\)

In what can be described as a strange and seemingly compliance- or process-oriented application of the *Doctors for Life* precedent, the Merafong court (per Van der Westhuizen J) found that it was enough that one public hearing event was held with the people of Merafong, notwithstanding the subsequent disregarding of their views.\(^86\) Rejecting an argument that the reversal of the initial decision to represent the community’s views triggered the need for continued consultation, he held that such ongoing dialogue was not required by the court’s previous public involvement decisions.\(^87\) For him, it was enough that the community had ‘had a proper opportunity [at some point during the Gauteng legislature’s processes] to air their views’.\(^88\) He also found that it was unlikely that the community would have been sufficiently impressed by any further consultation to change its strongly-held views. It would merely have persisted in its original position which the Gauteng legislature was in any event not ‘bound’ by, and thus would likely have proceeded to support the passing of the Bill.\(^89\) He held that ‘politicians … who fail to fulfil promises without explanation, should be held accountable [through] the democratic system [provided for by] regular elections’.\(^90\)

The nature of the reasonableness test laid out in *Doctors for Life* necessitates, in each case, an investigation of what the circumstances of a particular case require. Van der Westhuizen J appears not to have considered the meaningfulness of the Gauteng legislature’s engagement with the community of Merafong in light of the special circumstances of the impact of the Constitution Twelfth Amendment Act on the community. We have learned from *Doctors for Life* and *Matatiele* that reasonableness forms ‘a continuum that ranges from providing information and building awareness, to partnering in decision-making’.\(^91\) ‘Partnering in decision-making’ potentially requires an ongoing dialogue between the concerned legislature and interested members of the public.\(^92\) Did the holding of one public hearing suffice, or was a higher standard called for?

The only consideration of particular circumstances emphasised by Van der Westhuizen J was that nothing would have been achieved by continued consultation.\(^93\) This is an incorrect supposition, as further consultation could

\(^{85}\) *Merafong* (note 5 above) paras 43 & 44.

\(^{86}\) Ibid paras 59 & 116.

\(^{87}\) Ibid para 59.

\(^{88}\) Ibid paras 53 & 59.

\(^{89}\) Ibid para 59.

\(^{90}\) Ibid para 60.

\(^{91}\) *Doctors for Life* (note 3 above) para 129; and *Matatiele* (note 4 above) para 54.

\(^{92}\) See the reference to Arnstein’s views (note 71 above) on ‘partnering’.

\(^{93}\) *Merafong* (note 5 above) para 59.
have motivated the Gauteng legislature to use political channels to lobby members of the National Assembly for an amendment of the Bill. Moreover, it remained open to the Gauteng legislature not to support the Bill altogether.\footnote{In terms of s 74(8) the Gauteng legislature had the power to veto the Bill insofar as the Bill applied to it.} This could have had the effect of impressing upon the National Assembly to amend the Bill in order not to derail the purpose of the constitutional amendment, which was to abolish cross-boundary municipalities. Further, the majority judgment gives insufficient regard to the notion that the constitutional value of accountability calls for a culture of justification for state conduct.\footnote{See E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32, referred to in Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) para 25.}

That the Gauteng legislature could have reneged on the position it reached on the influence of strongly-held views of the Merafong community without more deliberation with them is incompatible with such a culture.

The finding that it was enough that the community of Merafong had aired their views which were willingly considered by the committee at some point during the Gauteng legislature’s processes, fails to consider the substance of whether public participation had indeed been achieved in the circumstances of this particular case. Instead, the court seemed to be focused on whether the procedure that was found to be reasonable in \textit{Doctors for Life} was technically complied with or not – without giving impetus to the special circumstances of this particular case. Such an approach is inconsistent with the deep vision of democracy developed in the early public involvement cases. A thorough regard for the deep principle of democracy must inform reasonableness as a review standard in each case, and also serves to keep deference to a minimum. It is thus a worrying development that Van der Westhuizen, Yacoob and Skweyiya JJ defied this by insisting that politicians should be held accountable during periodic general elections.\footnote{In his concurring judgment, Skweyiya J (whose views Van der Westhuizen J expressly said he associated himself with) emphasised that the court has no role to play in the differences between the legislature and members of the public in the process of deciding what is right and wrong. He held that in such situations of discourteousness, disrespect and dishonesty by politicians, they should be held accountable by the public in periodic elections; and that the court cannot be asked to be a ‘panacea’. He further found that the issue of where Merafong should be located was ‘a political decision which must be made elsewhere’, emphasising the reluctance to contradict decisions of the legislature in such circumstances (\textit{Merafong} (note 5 above) paras 7 & 305–10).}

This appears to be a deliberate invocation of the doctrine of the separation of powers to interpret the Constitution restrictively in a manner that exposes the preference for representative democracy, thus undermining the principle that our democracy embraces a mutual operation of both representative and participatory elements. This sends somewhat conflicting signals about the court’s commitment to the deep principle of democracy in public involvement cases, as in other parts of the majority judgment Van der Westhuizen J appears to fully endorse the \textit{Doctors for Life} and \textit{Matatiele} decisions.

In a separate minority judgment, Sachs J, correctly in my view, held that the ‘abrupt about-turn’ in the position of the Gauteng legislature required that, at
a minimum, a continued consultation with the community should have been conducted.\textsuperscript{97} At the outset, Sachs J re-emphasised, as Ngcobo J had done in \textit{Doctors for Life}, that without hierarchy ‘our constitutional democracy has two essential elements which constitute its foundation: it is partly representative and partly participative’.\textsuperscript{98} He pointed out that ‘participation by the public on a continuous basis’ serves the importance of preserving civic dignity in between periodic elections.\textsuperscript{99} He concluded that the Gauteng legislature failed to exercise its responsibilities in a reasonable manner, and thereby rendered the Constitution Twelfth Amendment Act invalid insofar as it relates to Merafong.\textsuperscript{100}

Roux correctly suggests that the enforcement of the deep principle of democracy lies in ‘the best reading of the constitutional text and the accompanying case law’.\textsuperscript{101} The \textit{Merafong} court failed to have a thorough regard for the deep principle of democracy developed in the court’s previous jurisprudence, resulting in a reasonableness test that lacked sufficient substance and that appeared to be focused on whether the procedure that was found to be reasonable in \textit{Doctors for Life} was technically complied with or not.

\textbf{(b) \textit{Poverty Alleviation Network}}

The fourth public involvement case decided by the Constitutional Court was \textit{Poverty Alleviation Network}. Upon the order in \textit{Matatiele} that the Constitution Twelfth Amendment Act was invalid insofar as it concerned Matatiele, the relevant legislatures undertook a fresh public participation process, which culminated in the enactment of the Constitution Thirteenth Amendment Act. The Constitution Thirteenth Amendment Act incorporated Matatiele in the Eastern Cape from KwaZulu-Natal. The applicants (interested groups based in Matatiele) in \textit{Poverty Alleviation Network} challenged the validity of the Constitution Thirteenth Amendment Act on the basis that the National Assembly, the NCOP and the KwaZulu-Natal legislature failed to fulfil their obligations to facilitate public involvement in incorporating Matatiele in the Eastern Cape. One of the claims made by the applicants is that the decision to relocate Matatiele was pre-determined, in that the ruling party had instructed its representatives on how to vote and that the public hearings were a formalistic sham.\textsuperscript{102}

\textsuperscript{97} Ibid paras 289, 292 & 300. In Sachs J’s view, a candid expectation had been created by the authorities that Merafong would not be incorporated into North West (paras 291–8).
\textsuperscript{98} Ibid para 291.
\textsuperscript{99} Ibid para 292. He also considered ‘the nature of the legislation under consideration’ and ‘the discrete nature of the community affected and the intense impact on their interests’ (paras 295 & 295).
\textsuperscript{100} Ibid para 301.
\textsuperscript{101} Roux (note 18 above) 10-62.
\textsuperscript{102} \textit{Poverty Alleviation Network} (note 5 above) paras 59 & 72.
In considering whether the conduct of the legislative bodies concerned was rational, the court, per Nkabinde J, held that it had no role to concern itself with individual motives of legislators. The judgment insinuates that an enquiry into motives of legislators would violate the doctrine of separation of powers. It seems that the court arrived at this decision because, in dealing with the question of motives of legislators, it confined itself to an enquiry into the rationality of the Constitution Thirteenth Amendment Act based on its stated objective.

The issue of motives of legislators is also relevant to whether the legislature complied with the constitutional obligation to facilitate public involvement reasonably. The relevant question to pose in this regard would have been whether the facilitation of public involvement can be considered to be reasonable if the motives of the legislators included the idea that the views of the public did not matter because legislators had to vote in line with the instructions of their political parties. I fail to see how the unwillingness of legislators to consider the views of the public can result in the fulfilment of the obligation to be reasonable in facilitating public involvement. It would have been understandable if the court had simply said that there was no evidence showing that legislators had the motive to ignore the views of the public; however, an outright dismissal of the relevance of motives of legislators seems wholly inconsistent with the deep principle of democracy developed in the court’s previous jurisprudence. How can public involvement be meaningful and effective if the legislators will not listen to the views of the public? Michael Bishop describes this problem as making it permissible to ‘hear’ the views of the public but not to listen to such views. He asserts that mere hearing of public views is a passive activity which must be supplemented by listening to such views (which is an active exercise requiring real engagement and willingness to change one’s mind), in order to meet the constitutional requirement of public participation in legislative processes.

Credible allegations of the unwillingness on the part of the legislators to listen to the public should be taken seriously by courts and where possible interrogated. One way to interrogate such allegations is to consider whether the legislature’s reasons for not being influenced by the views of the public, support the assertion that legislators were indeed open to persuasion. Such an approach would constitute a very intrusive scrutiny on legislators. Accordingly, before such an approach is taken a court should consider whether

103 In this matter the applicants had contended that in addition to being inconsistent with the constitutional obligation to facilitate public involvement, the decision of the legislature was also irrational and thus violated the constitutional principle of the rule of law.
104 Poverty Alleviation Network (note 5 above) para 73.
105 Ibid para 74.
106 Bishop (note 82 above) 323.
107 Bishop advances the notion of ‘reason-giving’. He submits that it will be more difficult for legislators to refuse to listen to the participating members of the public if they are required to provide reasons for rejecting their submissions. Such a requirement would, in his view, make the public participation process meaningful (ibid 340). See also G Staszewski ‘Reason-giving and Accountability’ (2008/2009) 93 Minnesota LR 1253.
circumstances of a particular case warrant such scrutiny. An interrogation of such allegations could possibly have the effect that legislators would be deterred from mechanically giving effect to the party line without giving serious consideration to the views of the public and thus advancing the deep vision of democracy and accountability.\(^{108}\)

Admittedly, this was an easy case for the court to dismiss the contention that legislators harboured a motive not to listen to the public, as there is no indication that the applicants had adduced evidence to this effect. However, the judgment is worrying, as it could be interpreted as having set the precedent that motives of legislators should never be interrogated in public involvement cases.

(c) **Moutse**

The most recent public involvement decision decided by the Constitutional Court is *Moutse*. One of the main points argued by the community of Moutse was whether the manner in which the views of the public (collected by the relevant portfolio committee) were conveyed to the rest of the legislature, made the public involvement process unreasonable. The applicants argued that the report prepared for members of the legislature by the portfolio committee was ‘skeletal’, a claim the court agreed with.\(^{109}\) The court, per Jafta J, dismissed a view that this could make the facilitation of public involvement unreasonable. It held that it could not assume that there was no other source of information containing the concerns of the people of Moutse, other than the skeletal report which legislators who did not form part of the committee relied upon. More concerning, however, is the holding of the court that:

> Even if they had the skeletal report of the Portfolio Committee only, that does not entitle a court to pronounce on the adequacy of the information at the disposal of a deliberative body such as the legislature before it makes a decision. Bearing in mind that the Provincial Legislature has a discretion 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.\(^{110}\)

This signals a willingness (somewhat similar as in *Merafong*) on the part of the court to accept that as long as the public, during public hearings conducted by the committee, had an opportunity to air their views, the process will be considered reasonable. This would of course be inconsistent with the notion that the whole process of public involvement (including airing of public views and consideration of those views by the legislative body concerned) must be meaningful and effective. It is insufficient to have a public hearing, but members of the legislature who ultimately make the decision whether or not to vote for the proposed legislation, are not provided with an adequate account of the views made in such public hearing. In this regard, the statement of the

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108 This is not to say that legislators should not be accountable to their political parties too; nothing prevents legislators from consulting their political parties on the views of the public before making a final decision to be influenced by such views or not.

109 *Moutse* (note 5 above) para 75.

110 Ibid para 80.
court above seriously lacks the spirit of a deep vision of democracy developed in the early public involvement cases.

Of course, this was a difficult question that the court was faced with. In this case, the contention of the applicants was not that the portfolio committee did not have sufficient information before them to inform them of the views and concerns of the people of Moutse, but that the remainder of the legislature had had privy only to a skeletal report. Legislatures are arranged such that each political party represented in the legislature will enjoy representation in the committees of the legislature. Therefore, other members of the legislature who do not have a seat on a certain committee will likely have member[s] of their party who serve as their eyes and ears insofar as public involvement is concerned. Under such circumstances, it will often seem unreasonable that each member of the legislature must be well-versed about all the concerns and views of the public presented in a committee in which they have no seat.

V CONCLUSION

I have argued above that the early public involvement decisions of the Constitutional Court, Doctors for Life and Matatiele, have developed an approach to the use of the reasonableness standard of review in a manner that achieves the deep principle of democracy envisaged in the Constitution.

However, Merafong, Poverty Alleviation Network and Moutse reveal some reluctance on the part of the Constitutional Court to apply the more substantive approach developed in the early public involvement jurisprudence articulated in this article. In all these cases, the court appears to have denied itself the power to apply a more intrusive reasonableness enquiry than was the case in Doctors for Life and Matatiele. This is despite the test that was developed in the early public involvement jurisprudence permitting such a more substantive reasonableness enquiry in appropriate circumstances. The court’s approach in this regard is akin to what Brand has termed proceduralisation of the adjudication of socio-economic rights, which he argues has weakened the court’s reasonableness enquiry in that context. Brand contends that, in that socio-economic rights context, the court failed to address the question ‘what are socio-economic rights … for?’, and that as an answer to this question the court would likely be satisfied with ‘the assurance that government, in attempting to alleviate poverty and hardship, will act in a manner consistent with good governance, and only that’ – without determining what the substantive constitutional goal is and whether such a goal is likely to be achieved. Accordingly, proceduralisation has a tendency of resulting in the overlooking of the substantive content of constitutional rights or goals, and thus limits the effectiveness of adjudication in relation to such rights or goals.


112 Brand (note 51 above) 36–7, 44 & 46.
The process of facilitating public involvement, envisaged in ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, is not just an obligatory procedural requirement, but one which has the objective of achieving the substantive constitutional goal of participatory democracy (which, as has been argued, constitutes part of the South African deep principle of democracy). In Merafong, Poverty Alleviation Network and Moutse, the court seems to have been pre-occupied with whether the conduct of the legislature was consistent with the procedure for facilitating public involvement developed in previous cases, rather than engaging in the exercise of whether the conduct of the legislative bodies in these particular cases accords with the purposes and underlying values of public participation in legislative decision-making.\(^{113}\) For example, in Merafong, the majority of the court found that the early public involvement decisions ‘do not require an on-going dialogue’.\(^ {114}\) In Moutse, it found that ‘Merafong does not impose an obligation on the Portfolio Committee to relay representations fully and faithfully’ to the rest of the legislature before voting on the Bill concerned.\(^ {115}\) In Poverty Alleviation Network, it held that ‘the Court cannot concern itself with the individual motives of legislators’, arguing that to do so would be inconsistent with the separation of powers principle as elaborated in Doctors for Life.\(^ {116}\)

The common feature of these more recent public involvement cases is that the legislative bodies concerned had either invited written submissions from the public or held hearings with the affected people or done both. The main contention of the applicants in these cases was that the facilitation of public involvement undertaken by the relevant legislative bodies was not enough. On the other hand, in the early public involvement cases, some of the relevant legislative bodies neither invited written submissions nor held public hearings. If this is anything to go by, it could be deduced that the court will likely rule that as long as written submissions were invited or public hearings held by the relevant legislative bodies, the conduct of the legislative body concerned will be reasonable. Such an approach would be inconsistent with the context-specific character of the reasonableness test, where the review of the conduct of the legislature is appropriately individualised by enquiring into what the deep principle of democracy requires in that particular case. This involves determining whether the minimum level of fulfilment of the obligation to facilitate public involvement has been achieved as well as whether circumstances of a particular case require more onerous measures to fulfil the reasonableness standard than the bare minimum.

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\(^{113}\) The failure to engage in such an exercise often leads to the court deferring to the views or position of the legislature. As demonstrated in this article, undue deference by courts to the other branches of government can only be appropriately limited by giving due regard to the constitutional rights or goals concerned.

\(^{114}\) Merafong (note 5 above) para 59.

\(^{115}\) Moutse (note 5 above) para 73. Here the court showed clear reluctance to apply reasonableness at all stages of the legislative decision-making process, particularly at the stage of the legislature’s consideration of the representations made by the public.

\(^{116}\) Poverty Alleviation Network (note 5 above) paras 73–4.
This is a worrying development, as it could have the effect that the reasonableness standard in public involvement cases will become no more than a constricted set of minimum procedural requirements to be met by the legislature when facilitating public involvement. This could hamper the importance of the courts, in each public involvement case, posing the deeper question of whether the goal of public participation, as an element of the deep principle of democracy envisaged in the Constitution, has been achieved. However, as demonstrated in this article, all of the more recent public involvement cases were difficult cases in which the legislative bodies concerned had taken significant (albeit arguably not enough) procedural steps to facilitate public involvement. It thus remains to be seen if in future public involvement cases, the Constitutional Court will apply the substantive reading of the early public involvement jurisprudence advanced in this article or whether it will increasingly embrace the relatively compliance- or process-oriented reasonableness enquiry described above. I hope that, for the sake of achieving a stronger democracy, the more coherent and constitutionally principled approach to reasonableness as developed in Doctors for Life and Matatiele is followed.