Civil protest from the perspective of South African local government law

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ABSTRACT

One of the ideals of the *Constitution of the Republic of South Africa,* 1996 is to ensure developmental local government. Developmental local government is aimed at improvement of life in local communities and extends further than the provision of services. It denotes local government that is in tune with the needs of people. This requires municipalities to align its budget and planning structures to ensure that available resources are distributed to meet the needs and interests of their constituencies in pursuit of social and economic development. Municipalities must in principle also be able to deal with challenges as they appear without necessarily seeking assistance from national or provincial government.

Local government serves the function of a public development agent and is therefore expected to be democratic and accountable and to sustainably provide services to all. Post-apartheid, various mechanisms, processes and procedures exist to involve local communities by means of public participation in public decision-making. Despite the available mechanisms, the perception is that these mechanisms fail, which is why people resort to protest as a recourse to engage with local government effectively and meaningfully.

This thesis is premised on the assumption that there is a growing tendency in South Africa for members of the community to resort to civil protest at the local level. The statistics show that despite various participatory mechanisms that exist for residents to inform local authorities of their needs and interests or to communicate discontent and dissatisfaction when authorities fail them, people elect to air their grievances thought protests. Accordingly, the aim of this thesis was to determine to what extent civil protest is justified from a South African local government perspective given that mechanisms exist in law to facilitate public participation and community involvement. The study reveals that civil protest has the inherent ability to complement the legal framework and the participatory mechanisms it provides. Protest action allows for a measure of direct public participation to those who might perceive the available participatory mechanisms as ineffective due to specific failures and the real/perceived unresponsiveness of public authorities.

KEY WORDS

Civil disobedience, civil protest, local government law, participatory democracy, constitutional law, public participation, violent protest, South Africa

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3. Jegede AO and Stoffels MC "Climate Change Protests and Liberal Rights Approach in South Africa: Pitfalls and Potentials" *Stellenbosch Law Review* 2022 33 (2) 125-147

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AGSA	Auditor-General of South Africa
AHRLJ	African Human Rights Law Journal
AJDS	African Journal of Development Studies
Am Behav Sci	American Behavioural Scientist
ANC	African National Congress
ANCWL	African National Congress Women's League
APSR	American Political Science Review
Boston ULR	Boston University Law Review
Cardozo LR	Cardozo Law Review
CILSA	Comparative and International Law Journal of Southern Africa
CJLG	Commonwealth Journal of Local Governance
COGTA	Department of Cooperative Governance and Traditional Affairs
Constitution	Constitution of the Republic of South Africa, 1996
CSD	UC Irvine: Centre for the Study of Democracy
De Jure	De Jure Law Journal
DPLG	Department of Provincial and Local Government

DRMC	Declaration of the Rights of Man and of the Citizen
ECHR	European Convention on Human Rights
ECOHR	European Court of Human Rights
EM	Executive Mayor
EPSR	European Political Science Review
Fed Law Rev	Federal Law Review
Fiscal Powers Act	Municipal Fiscal Powers and Functions Act 12 of 2007
Hague JRL	Hague Journal on the Rule of Law
ICCPR	International Covenant on Civil and Political Rights
IDP	Integrated Development Plan
IEC	Independent Election Commission
IJCV	International Journal of Conflict and Violence
IJEBEG	International Journal of eBusiness and eGovernment Studies
IJMP	International Journal of Management Practice
IMFO	Official Journal of the Institute of Municipal Finance Officers
Indiana LJ	Indiana Law Journal
INGO	International NGO Journal
Int Rev Adm Sci	International Review of Administrative Sciences
Int'l Rev L & Econ	International Review of Law and Economics

Israel Law Rev	Israel Law Review
J Am Philos Assoc	Journal of the American Philosophical Association
J Am Plann Assoc	Journal of the American Planning Association
J Democr	Journal of Democracy
J Gov Devel	African Journal of Governance and Development
J Mod Afr Stud	Journal of Modern African Studies
J Philos	Journal of Philosophy
J Pol Philos	The Journal of Political Philosophy
J Public Adm	Journal of Public Administration
J Public Adm Policy	Journal of Public Administration and Policy
J Soc Political Econ Stud	The Journal for Social, Political, and Economic Studies
J Soc Sci	Journal of Social Sciences
JCH	Journal for Contemporary History
JLSD	Journal of Law, Society and Development
JNGS	Journal for New Generation Sciences
JP	The Journal of Politics
JPA	African Journal of Public Affairs
JPADA	Journal of Public Administration and Development Alternatives
JPL	Journal of Politics and Law
JSAS	Journal of Southern African Studies

JSDA	Journal of Sustainable Development in Africa
KZN	Kwa-Zulu Natal
LDD	Law, Democracy and Development
LGBT	Lesbian, Gay, Bisexual, and Transgender
Local Gov Stud	Local Government Studies
LRA	Labour Relations Act 66 of 1995
MFMA	Municipal Finance Management Act 56 of 2003
MENA	Middle East and North-Africa
MISA	Municipal Infrastructure Support Agent
MM	Municipal Manager
MPAC	Municipal Public Accounts Committee
NA	National Assembly
NCOP	National Council of Provinces
New Contree	New Contree: a Journal of Historical and Human Sciences for Southern Africa
NP	National Party
Osgoode Hall LJ	Osgoode Hall Law Journal
PELJ	Potchefstroom Electronic Law Journal
PP	Public Protector South Africa
Property Rates Act	Local Government: Municipal Property Rates Act 6 of 2004

Rev Polit	The Review of Politics
RGA	Regulation of Gatherings Act 205 of 1993
RJR	Rhodes Journalism Review
ROAPE	Review of African Political Economy
SACN	South African Cities Network
SACQ	South African Crime Quarterly
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SAJHRM	SA Journal of Human Resource Management
SALGA	South African Local Government Association
SALJ	South African Law Journal
SAPL	Southern African Public Law
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SDBIP	Service Delivery and Budget Implementation Plan
SDF	Spatial Development Framework
Stell LR	Stellenbosch Law Review
Structures Act	Local Government: Municipal Structures Act 117 of 1998
Systems Act	Local Government: Municipal Systems Act 32 of 2000
TD	The Journal for Transdisciplinary Research in Southern Africa

UDHR	Universal Declaration of Human Rights
USA	United States of America
ZRP	Zimbabwe Republic Police

CHAPTER 1 INTRODUCTION

1.1 Democracy

There are various interpretations of the meaning of democracy and the purpose and functions of democratic structures[1] such as local government.[2] In the most elementary sense, democracy means a government of the people or a regime where the people rule.[3] Democracy requires a government that is established by the people, exercised by the people, and that is intended to serve the needs and interests of people.[4] Democracy may be regarded as a government system in which every citizen as a member of the broader community participates in the process of government.[5] According to Beetham,[6] democracy furthermore entails processes where binding rules and policies of a collective nature are made involving all members of the public.[7] The opportunity for members of the public to participate in for example, the processes of government or government decision-making, are therefore characteristic of a democratic system.[8]

1 See sections 1.1, 2.5, 2.7, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7 and 4.5 for a more detailed discussion of these concepts.

2 In this thesis, the terms local government and municipalities are used interchangeably.

3 See Becker and Raveloson *What is Democracy?* 4; Goldman 2015 *Journal of the American Philosophical Association* 234-235; Celitakes, Kreide and Wesche "Introduction" 2; Weale *Democracy* 18.

4 Becker and Raveloson *What is Democracy?* 4. Also see Goldman 2015 *Journal of the American Philosophical Association* 234-235; Celitakes, Kreide and Wesche "Introduction" 2; Weale *Democracy* 18.

5 See Offor 2006 *The Journal for Social, Political and Economic Studies* 268; Bahmueller et al *Elements of Democracy: The fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12; Howard *Democracy in Brief* 1-2; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 2-3; Sisk *et al Democracy at the Local Level* 12; Goldman 2015 *Journal of the American Philosophical Association* 234-235; Celitakes, Kreide and Wesche "Introduction" 2; Weale *Democracy* 18.

6 Beetham 1992 *Political Studies Special Edition* 40.

7 Weale *Democracy* 18.

8 See section 3.4.1 below. See also Young *Inclusion and Democracy* 17; Goldman 2015 *Journal of the American Philosophical Association* 235; Dalton, Shin and Jou *Popular Conceptions of the Meaning of Democracy: Democratic Understanding in Unlikely Places* 2; Celitakes, Kreide and Wesche "Introduction" 2; Weale *Democracy* 18.

Democracy is also described as a government system with four basic characteristics.[9] These characteristics include the following: Firstly, a political system that enables free and fair elections. Free and fair elections mean the right to choose and replace the government of the day with whomever the electorate wish to vote for.[10] Secondly, the people as citizens should be able to participate in the social, economic as well as political matters of the country.[11] Thirdly, democracy requires a government system where the rights of all people are respected, protected, promoted and fulfilled.[12] Fourthly, the rule of law[13] must ensure that all people are treated in a manner which ensures that all laws or procedures apply to them equally.[14]

9 Diamond 2004 https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm. See also Becker and Raveloson *What is Democracy?* 4-7; Bahmueller *et al Elements of Democracy: The fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12- 13; Howard *Democracy in Brief* 4-10; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 3.

10 See section 1(c) of the *Constitution*; South African Human Rights Commission *The right to participate in public affairs* 2015 5; Diamond 2004 https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm; Becker and Raveloson *What is Democracy?* 4-7; Bahmueller *et al Elements of Democracy: The fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12- 13; Howard *Democracy in Brief* 4-10; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 3; Goldman 2015 *Journal of the American Philosophical Association* 235; Dalton, Shin and Jou *Popular Conceptions of the Meaning of Democracy: Democratic Understanding in Unlikely Places* 2.

11 Diamond 2004 https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm. See also Becker and Raveloson *What is Democracy?* 4-7; Bahmueller *et al Elements of Democracy: The Fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12- 13; Howard *Democracy in Brief* 4-10; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 3; Goldman 2015 *Journal of the American Philosophical Association* 235; Dalton, Shin and Jou *Popular Conceptions of the Meaning of Democracy: Democratic Understanding in Unlikely Places* 2; Celitakes, Kreide and Wesche "Introduction" 2; Weale *Democracy* 18; Weale *Democracy* 18.

12 Diamond 2004 https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm. See also Becker and Raveloson *What is Democracy?* 4-7; Bahmueller *et al Elements of Democracy: The Fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12- 13; Howard *Democracy in Brief* 4-10; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 3.

13 On the rule of law see section 1(c) of the *Constitution*. Also see Dyzenhaus 2007 *The South African Law Journal* 734-739; Kruger 2010 *PELJ* 479-485; Pieterse 2023 *Hague Journal on the Rule of Law* 307-308.

14 Diamond 2004 https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm. See also Becker and Raveloson *What is Democracy?* 4-7; Bahmueller *et al Elements of Democracy: The Fundamental Principles, Concepts, Social foundations, and Processes of Democracy* 12- 13; Howard *Democracy in Brief* 4-10; Okiror and Kamp *Concepts and Principles of Democratic Governance and Accountability* 3.

Democracy is the cornerstone of the *Constitution of the Republic of South Africa*, 1996 (*Constitution*).[15] The *Constitution* provides that South Africa is one sovereign, democratic state,[16] founded on a set of values which include:

> (1)(d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[17]

In the context of the provisions of section (1)(d) of the *Constitution*, Klare[18] argues that the *Constitution* strives towards inclusive, accountable, participatory, decentralised, and transparent institutions of governance. According to Klare,[19] these institutions[20] promote and deepen a culture of democracy underlined by values such as decentralisation,[21] accountability[22] and public participation.[23]

In general, democracy has two main characteristics, namely representative and participatory democracy.[24] In terms of representative democracy, a democratic system functions through representative institutions. Representative democracy also grants the opportunity for public participation[25] in decision-making processes besides the ordinary representative institutions[26] that already exist.[27] Public participation by the members of the community is regarded as an underlying principle of a democracy.[28] A system of government where every citizen participates

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15 *Constitution of the Republic of South Africa*, 1996. Hereafter referred to as the *Constitution*.
16 Section 1 of the *Constitution*.
17 See section 1(d) of the *Constitution*.
18 Klare 1998 *South African Journal of Human Rights* 155.
19 Klare 1998 *South African Journal of Human Rights* 155.
20 See section 234 of the *Constitution*.
21 See section 2.6 below.
22 See section 2.9 below.
23 See sections 3.5, 3.6, 3.7 and Chapter 4 below.
24 *Doctors for Life International v Speaker of the National Assembly and Others* CCT12/05) 2006 (CC). Hereafter referred to as the *Doctors for Life International* case. See *Doctors for Life International* para 115. Also see Brand 2011 *Stellenbosch Law Review* 622.
25 Public participation has different meanings and synonyms. In this thesis, public participation includes public involvement, community participation, the ability to comment on government actions and draft legislation, attendance of open meetings, participation in democratic structures, taking part in elections, making use of the Chapter 9 institutions to raise complaints, exercising one's right in terms of the *Constitution,* etc. Also see Chapters 3 and 4 in this regard.
26 These representative institutions include the Electoral System and the National Assembly in South Africa.
27 Brand 2011 *Stellenbosch Law Review* 622.
28 Offor 2007 *Journal for Sustainable Development in Africa* 135. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.

or at least has the opportunity to participate in the processes of government forms part of the ideals of a democracy.[29] Participatory democracy requires that public participation opportunities should be created.[30] Government should enhance the capacity of the people to participate.[31] The Constitutional Court[32] in *Doctors for Life International* stated that the representative and participatory elements of democracy in South Africa are regarded as co-operative and interrelated.[33] The Constitutional Court continued that general elections as the foundation of representative democracy would be meaningless without public participation by the people.[34] This envisaged public participation, according to the court, is important to the functioning of representative democracy as it encourages the people to actively participate in the affairs of government. This also creates the opportunity for the voiceless and marginalised in society to make their voices heard and to be taken into account.[35]

According to Nyati,[36] the participatory nature of the South African constitutional democracy guarantees the right to public involvement. Roelofse[37] argues that as part of participatory democracy, every member of the public is recognised as an individual and enabled as well as encouraged to participate in all matters of government that affect him / her.[38] The members of the public should directly and actively participate in the "dialogues and practices which define, build and sustain common life, the general will".[39] Public participation in this sense gives the public a

29 Offor 2007 *Journal for Sustainable Development in Africa* 135. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.
30 Offor 2007 *Journal for Sustainable Development in Africa* 136. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.
31 See section 19 of the *Systems Act*. Also see Brand 2011 *Stellenbosch Law Review* 622; Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.
32 Hereafter referred to as the CC.
33 *Doctors for Life International* case para 115.
34 *Doctors for Life International* case para 115.
35 *Doctors for Life International* case para 115.
36 Nyati 2008 *Law, Democracy and Development* 102.
37 Roelofse 1998 *The Review of Politics* 25.
38 Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.
39 Roelofse 1998 *The Review of Politics* 25.

voice as they can express opinions on matters of government which affect them as a community.[40]

Democracy demands accountability and responsiveness on the part of the elected authorities but also requires an active citizenry that participates and is engaged. Therefore, participatory democracy demands that opportunities be created for public participation in government decision-making, amongst others.[41] Public participation[42] refers to "an open, accountable process through which individuals and groups within selected communities can exchange views and influence decision-making".[43] Public participation is a means through which development and service delivery can be advanced, governance be improved and eventually democracy be enhanced.[44] Public involvement in the local government sphere is especially important.

1.2 South African local government framework and public involvement

The South African local government legislative framework makes provision for public involvement in governance matters.[45] The *Constitution*, the *Local Government: Municipal Structures Act* (*Structures Act*),[46] the *Local Government: Municipal Systems* (*Systems Act*)[47] and *Local Government: Municipal Finance Management*

40 Presidency of the Republic of South Africa http://goo.gl/MUCuzW 22.
41 See Nel, Du Plessis and Retief "Key elements for municipal action" 2-18.
42 The references to community participation and public participation are used interchangeably in this thesis.
43 Department Provincial and Local Government 2007 *National Policy Framework for Public Participation* 15.
44 Buccus *et al* 2015 *Public participation and local governance* 6. Also see Mubangizi and Dassah 2014 *J Soc Sci* 277.
45 The IDP as one of the key local government instruments will be referenced frequently as a demonstration of the importance of public participation in an attempt to meet the needs and interests of the local communities.
46 *Local Government: Municipal Structures Act* 117 of 1998. Hereafter referred to as the *Structures Act*.
47 *Local Government: Municipal Systems Act* 32 of 2000. Hereafter referred to as the *Systems Act*.

Act (MFMA)[48] encourage public participation or public involvement[49] at local government level.[50]

Section 152(1)(a) of the *Constitution* provides that the purpose of local government is to establish a democratic and accountable government closest to the people.[51] This democratic and accountable government should encourage the involvement of local communities and community organisations in the matters of local government.[52] In setting out the basic values and principles which ought to be guiding the public administration, section 195(1)I of the *Constitution* provides that the local government should encourage and enable the public to participate for example in policy-making on matters of local importance.[53] The public participation is not limited to policy-making but also extends to decision-making processes in municipalities. Furthermore, local government must provide information to the public, which is timely, accessible, and accurate in order to foster transparency which will contribute towards meaningful public participation.[54] This constitutional obligation highlights the important role the local public should play in the matters of local government, hence the necessity of public participation. The *Structures Act*

48 *Local Government: Municipal Finance Management Act* 56 of 2003. Hereafter referred to as the *MFMA*.

49 See Friedman "Participatory governance and citizen action in post-apartheid South Africa" 3; Munzhedzi 2020 *African Journal of Governance and Development* 93. According to Friedman, "participatory governance is described as a regulatory framework in which the task of running public affairs is not solely entrusted to government and the public administration, but involves co-operation between state institutions and civil society groups."

50 See Mubangizi and Dassah 2014 *J Soc Sci* 277.

51 Section 152(1)(a) of the *Constitution*. Also see section 2.9 below.

52 Section 152(1)(e) of the *Constitution*. According to section 152(2) of the *Constitution*, an important qualification to this obligation is that the envisaged public participation should take place within a municipality's financial and administrative capacity. The provincial legislature has a constitutional obligation to facilitate public involvement during the legislative process in terms of section 118(1)(a) of the *Constitution*. Also see the following case law on the meaning of meaningful public participation: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC).

53 Section 195(1)(e) of the *Constitution*.

54 Section 195(1)(g) of the *Constitution*. Also see Chapter 4 below.

and the *Systems Act* give effect to these constitutional provisions for public participation.[55]

The *Structures Act* in its preamble states that South Africa has a vision for a democratic and developmental local government.[56] In order to achieve the broad vision of developmental local government, municipalities have to work with their communities.[57] Municipal councils as part of municipalities must ensure that mechanisms are in place for them to consult with their communities in matters of local government.[58] By using public participation processes, municipalities could for example budget and plan to address the needs and interests of their communities as they arise.[59] Public participation processes should typically take place when councillors perform their functions and exercise their powers.[60] This also extends to annual budgeting and planning processes which the municipalities ought to undertake.[61]

The *Structures Act* compels municipalities to carry out an annual review of the needs and interests of communities,[62] their priorities in place to meet those needs[63] and also the mechanisms, processes and procedures[64] available for the involvement of the community.[65] Section 72(3) of the *Structures Act* provides, for example, for a participatory mechanism in local government namely the establishment of ward committees.[66] Ward committees are defined and regarded as important communication mechanisms between municipalities and the members of the

55 See sections 19 and 72 of the *Structures Act*. Also see section 4 and Chapter 4 of the *Systems Act*.
56 See sections 2.8 and 2.9 below. Also see Van der Walt "The statutory and regulatory framework for Local Government" 48; Nyalungu 2006 *International NGO Journal* 17; Munzhedzi 2020 *African Journal of Governance and Development* 90.
57 Preamble of the *Structures Act*.
58 Section 19(3) of the *Structures Act*. Also see Munzhedzi 2020 *African Journal of Governance and Development* 92, 101.
59 See section 19 of the *Structures Act*.
60 Section 19(3) of the *Structures Act*.
61 See section 3.4 below.
62 Section 19(2) (a) of the *Structures Act*.
63 Section 19(2) (b) of the *Structures Act*.
64 The reference to mechanisms will be used to include mechanisms, processes, and procedures in this thesis.
65 Section 19(2) (c) of the *Structures Act*.
66 See section 3.4.2.6 below.

community.[67] Ward committees have as their objective the enhancement of participatory democracy on local government level.[68] The *Structures Act* affirms the constitutional obligation to facilitate and enhance public participation in order to achieve the vision of developmental local government.[69] The ward committee system has the potential to play an important role in the facilitation and enhancement of public involvement.[70]

In terms of section 4 of the *Systems Act*, the municipal council has the duty to encourage public involvement in areas of local governance such as planning, service delivery and performance management within the municipality.[71] Here, public involvement is aimed at utilising municipal resources in the best interests of the local community,[72] making them part of the consultations on service delivery[73] and also ensuring the development of the local community.[74] The municipality must enable public participation by establishing various mechanisms, processes and procedures which provide for such public participation in the affairs of the municipality.[75]

The Constitutional Court in *Doctors for Life International*[76] set a reasonableness test in order to determine whether the duty to facilitate public participation undertaken in the legislative process was discharged reasonably by government, taking into account: (a) the nature of the legislation concerned; (b) the importance of the legislation; and (c) the impact of the legislation on the public.[77] According to the Constitutional Court, the duty to facilitate public participation includes two elements,

67 Naidu *Public Participation and Ward Committees* 2.
68 Section 72(3) (c) of the *Structures Act*.
69 See Fuo 2015 *African Human Rights Journal* 179.
70 Section 4(2)(c) of the *Systems Act*. The reference to public participation will be used to include the reference to public involvement in this thesis.
71 Preamble of the *Systems Act*. Also see section 6(1) of the *System Act* regarding the duties of the municipal administration.
72 Section 4(c) of the *Systems Act*.
73 Section 4(e) of the *Systems Act*.
74 Section 4(g) of the *Systems Act*. See section 5 of the *Systems Act*. Also see section 16(1)(a) of the *Systems Act* which places a duty on municipalities to involve local communities in the affairs of municipalities.
75 See sections 17(2) and 51(a) of the *Systems Act*.
76 *Doctors for Life International* case para 70.
77 *Doctors for Life International* case para 70.

namely (a) the provision of meaningful opportunities for public participation and, (b) the warranty that people will be able to use the opportunities presented.[78] It is argued that the reasonableness test as set out in *Doctors for Life International* may find general application where the extent or degree of the facilitated public participation is in question. The reasonableness test may be able to assist in the determination of whether the facilitated public participation in any matter of local government was reasonable by considering the nature of the local government matter, the importance, and the impact of the matter on the public.

Regardless of the legislative framework, the provisions for public participation are sometimes ignored,[79] as is evident from recent case law.[80] In *Democratic Alliance v Ethekwini Municipality* the court found that the *Constitution* specifically requires the National Assembly (*NA*),[81] National Council of Provinces (*NCOP*),[82] and provincial governments to facilitate public participation. Furthermore, the court stated that same is not specifically required from municipalities in terms of the *Constitution*, but regardless thereof, municipalities must facilitate public participation in the execution of their executive and legislative powers and functions.[83] Subsequently, the High Court in *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality* explicitly stated that the nature of the obligation to facilitate public participation at the local sphere of government (municipality) is more extensive and far-reaching than that of the other levels.[84] The Court continued that public participation by members of the public is more significant at the local sphere.[85] The Constitutional Court in *Poverty Alleviation Network and Others v President of the Republic of South*

78 *Doctors for Life International* case para 71.
79 Mubangizi and Dassah 2014 *J Soc Sci* 279.
80 Mubangizi and Dassah 2014 *J Soc Sci* 279. Also see *Democratic Alliance v Ethekwini Municipality* 887/2010 2011 (SCA) para 12. Hereafter referred to as the *DA* case. Also see *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality* 3751/2011 2014 (HC) para 72. Hereafter referred to as the *Borbet* case. Also see *Merafong Demarcation Forum and Others v President of the Republic of South Africa* CCT 41/07 2008 (CC) para 26-27. Hereafter referred to as the *Merafong Demarcation Forum* case.
81 Hereafter referred to as the *NA*.
82 Hereafter referred to as the *NCOP*.
83 *DA* case para 12.
84 *Borbet* case para 72.
85 *Borbet* case para 72.

Africa and Others[86] affirmed the importance and value of public participation.[87] The court held that public participation is integral to the legitimacy of a democratic state. Furthermore, that decisions made without public participation cannot be regarded as informed decisions.[88] The court continued that public participation creates an opportunity for the public to express their needs and interests.[89] Once those needs and interests are expressed, the municipality would be able to address them before the community demands the fulfilment thereof.[90] In *Merafong Demarcation Forum and Others v President of the Republic of South Africa*, the Constitutional Court stated that public participation is intended to supplement and support the democratic nature of general elections and the majority rule in South Africa. Public participation may not be intended to overrule or veto the majority rule.[91] The court furthermore stated that public participation will not be meaningful where there is a clear unwillingness to consider opinions and views expressed by the public.[92] The majority rule is exercised and determined by means of general elections. These elections support democracy along with public participation.

In light of the case law pertaining to public participation, as referenced above, Mubangizi and Dassah[93] argue that the step of approaching the court in order to enforce public participation (which is a constitutional and statutory right) is adversarial and unnecessary. They furthermore argued that requiring courts to determine whether public participation was facilitated or not, has a negative impact on the relationship between the municipal councillors, officials, and communities. The relationship between these role-players is important to pursue the developmental local government mandate, which requires all the role-players to act in accordance with their responsibilities.[94] Public participation enables municipalities

86 *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC). Hereafter referred to as the *PAN* case.
87 *PAN* case para 33-34.
88 *PAN* case para 33.
89 *PAN* case para 33.
90 *PAN* case para 33-34.
91 *Merafong Demarcation Forum* case para 26.
92 *Merafong Demarcation Forum* case para 27.
93 Mubangizi and Dassah 2014 *J Soc Sci* 251-275.
94 See sections 2.9, 3.4, 3.5, 3.6 and 3.7 below.

to, for example, determine the needs and interests of the local communities which will play an important role in the development of their communities.

Over and above the constitutional recognition of public participation and the public participation measures in local government legislation,[95] the members of the public also have, for example, a right of access to the courts.[96] The public can also approach the Chapter 9 Institutions,[97] such as the *Public Protector*,[98] the *South African Human Rights Commission* (*SAHRC*)[99] and *Auditor-General of South Africa* (*AGSA*) when they are, amongst others, dissatisfied with the decision-making and implementation of municipalities' obligations, also in relation to development.[100]

Local government has a developmental mandate.[101] The *Constitution* provides that local government has the obligation to ensure the provision of services to local communities in a sustainable manner[102] and to promote their social and economic development.[103] The rights entrenched in Chapter 2 of the *Constitution* bind all organs of state, including municipalities.[104] All of the relevant rights for purposes of fostering developmental local government, must be respected and protected.[105]

The *White Paper on Local Government* (*White Paper*)[106] defines developmental local government as:

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95 See section 4.5 below.
96 See section 4.6.2 below.
97 The reference to the Chapter 9 Institutions at the disposal of the public is relevant and within the scope of the study in addition relevant for the context of the study in respect of the existing participatory measures. This referral does not limit the availability of the Chapter 9 Instititions to the national and provincial governments.
98 See section 4.6.3.1 below.
99 Hereafter referred to as the *SAHRC*. See section 4.6.3.2 below.
100 Hereafter referred to as the *AGSA*. See section 4.6.3.3 below.
101 Section 152 of the *Constitution*. See *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC) para 60. Hereafter referred to as the *Robertson* case. Also see Van der Walt "The statutory and regulatory framework for Local Government" 48; Nyalungu 2006 *International NGO Journal* 17; Fuo 2015 *African Human Rights Journal* 171-172.
102 Section 152(1)(b) of the *Constitution*.
103 Section 152(1)(c) of the *Constitution* read with section 23 of the *Constitution*. Also see Tsatsire, Taylor and Raga 2010 *The Journal for Transdisciplinary Research in Southern Africa* 272; Van der Westhuizen, Dollery and Grant 2012 *The Journal for Transdisciplinary Research in Southern Africa* 268; Bekker and Leilde 2003 *Politeia* 3.
104 Section 7(2) of the *Constitution*.
105 Van der Walt "Municipal service delivery and the environment" 322.
106 GN 423 in GG 18739 of 13 March 1998. Hereafter referred to as the *White Paper on LG*.

> local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.[107]

According to the *White Paper*, developmental local government has four distinct and interrelated characteristics.[108] Firstly, maximising social development and economic growth requires local government to exercise its powers and functions to the benefit of the local community by addressing the basic needs and interests of communities. Local government should also ensure growth of the local economy.[109] Secondly, integration and coordination in local government is important in pursuance of sustainable and effective service delivery. Proper integrated development plans are expected to assist to effect sustainable and effective service delivery.[110] Thirdly, democratising development in local government requires public participation by the people. The envisaged democratising requires that the voiceless and marginalised groups in the municipality shall be encouraged to participate in matters of local government.[111] Lastly, leading and learning require changes relating to sustainable economies and the development of societies, protection of the environment, improvement of safety and the elimination of poverty. In order to pursue same, local governments need to rethink their organisation and governance.[112] The municipalities should consider these aspects in the development process to assist them in pursuing and achieving the developmental local government mandate which has to be to the advantage of the community. The eventual impact thereof should be the improvement of the livelihoods of local communities. If this does not happen, the community may become disgruntled.

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107 See Part "1 Characteristics of developmental local government" in the *White Paper on LG*.

108 See Part "1 Characteristics of developmental local government" in the *White Paper on LG*. Also see Nkuna 2011 *Journal of Public Administration* 630. Also see Parnell and Pieterse 1999 *Africanus* 74-76. According to these authors, there are four dimensions of developmental local government: changing the spatial framework of Apartheid; local government finance; integrated local government management; and democracy and local government.

109 See Part "1.1 Maximising social development and economic growth" in the *White Paper on LG*. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.

110 See Part "1.2 Integrating and coordinating" in the *White Paper on LG*. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.

111 See Part "1.3 Democratising development, empowering and redistributing" in the *White Paper on LG*. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.

112 See Part "1.4 Leading and learning" in the *White Paper on LG*. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.

Developmental local government should have the following key outcomes. Firstly, developmental local government should seek the provisioning of household infrastructure and services.[113] Secondly, it should ensure the creation of liveable, integrated cities, towns, and rural areas,[114] and lastly, community empowerment and redistribution should be achieved.[115] The provision of household infrastructure and services is one of the key outcomes which is entrusted to local government. Services such as water, sanitation, local roads, storm water, refuse collection and electricity are all included as part of the household infrastructure and services to be provided.[116] Matters such as land use planning and control, and transport planning, can be planned for through the adoption of integrated development plans.[117]

The achievement of the developmental local government outcomes is important for the social and economic development of the local communities[118] as entrenched in the *Constitution*.[119] Section 152(1)(c) of the *Constitution* provides that local government has the objective to promote the social and economic development of communities within the local government sphere.[120] However, local government faces many challenges in its attempt to fulfil its constitutional mandate. Some of these challenges relate to the capacity and structure of municipalities to fulfil their mandate.[121] De Visser[122] refers to it as the imperfect nature[123] of the local government mandate.

113 See Part "2.1 Provision of household infrastructure and services" in the *White Paper on LG*.
114 See Part "2.2 Creation of liveable, integrated cities, towns and rural areas" in the *White Paper on LG*.
115 See Part "2.3 Local economic development" in the *White Paper on LG*.
116 See Part "2.1 Provision of household infrastructure and services" in the *White Paper on LG* read with Schedules 4B and 5B of the *Constitution*.
117 Sections 23 to 34 of the *Systems Act*. Also see Asha and Madzirhandila 2012 *Journal of Public Administration* 371.
118 See Part "1 Characteristics of developmental local government" in the *White Paper on LG*.
119 Section 152(1)(c) of the *Constitution*, read with the *White Paper* 27.
120 Mathenjwa 2018 *Southern African Public Law* 2.
121 Nyalungu 2006 *International NGO Journal* 18.
122 De Visser 2009 *Commonwealth Journal of Local Governance* 12.
123 This refers to local government's poor service delivery record, corruption, and a lack of development within municipalities.

As a result of this failure, amongst others, the number of civil protests has increased over the years.[124] Regardless of the many participatory mechanisms[125] created by local government law for public participation by the community, communities' resort to or prefer civil protest action (in many instances violent protest action) to communicate their needs and interests but also their dissent and dissatisfaction with local government, and government in general.[126]

1.3 Civil protests

The frequency of civil protests,[127] experienced or noted, is not as evident as the wave experienced during the 1960s.[128] It is only since 2010, that a general account of multiple forms of civil protests have been recorded inclusive of violent to non-violent acts of expression.[129] In South Africa, the total number of civil protests has increased rapidly over the last decade.[130] Since 2013, a fluctuation between 125 to 175 protest actions with an approximate average of 150 protests per year, specifically directed at municipalities, were recorded.[131] The number of protests against municipalities initially declined in the period 2009 to 2017, but then protests

124 De Visser 2009 *Commonwealth Journal of Local Governance* 11.

125 See Chapter 4 below.

126 De Visser 2009 *Commonwealth Journal of Local Governance* 19. Also see Munzhedzi 2020 *African Journal of Governance and Development* 92, 101.

127 See section 2.4 below.

128 Wihl 2018 *Israel Law Review* 301-302, 319, 320. Also see McGuigan *The Canadian Bar Review* 222; Arce and Rice "The political consequences of protest" 11; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 1-2.

129 Wihl 2018 *Israel Law Review* 301. Wihl 2018 furthermore refers to the examples of Arab Spring opposed to the pro-Russian Ukrainian government and the Black Lives Matter movement in the United States of America. Also see Wihl 2018 *Israel Law Review* 301, 319. In addition to these mentioned by Wihl 2018, the following are also cited by Arce and Rice: anti-austerity protests in Greece, Spain, and Portugal; end of for-profit protests in Chile; income equality movement by means of Occupy Wall Street in United States of America. Also see Arce and Rice "The political consequences of protest" 1. In South Africa, the following student protest were widely published: #RhodesMustFall, #FeesMustFall, #EndOutsourcing. Also see Fuo 2020 *De Jure Law Journal* 370-372; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 4.

130 Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 3. Also see Netswera and Kgalane 2014 *Journal of Public Administration* 262; Municipal IQ 2023 https://www.municipaliq.co.za/publications/press/20230201102835343 8.doc; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.

131 See Dullah Omar Institute 2018 https://www.dropbox.com/s/s7slpahqfx2i8dj/Civic%20Protest%20Barometer%202018%20Fact%20Sheet%20%231%20%20FINAL.pdf?dl=0.

reached a record high for the periods 2018 and 2019.[132] More than 60% of the total number of protests recorded in 2017 were in response to municipal governance (13%),[133] municipal services (56%), socio-economic matters (17%), while party political protests (11%) and protests against other matters (1%) accounted for the rest. These protests appear to demand services that are beyond the mandate of local government and lie at the heart of the mandates of either national or provincial governments.[134]

The recorded number of protests for 2022 was higher than those recorded for the two preceding years.[135] The initial decline in protests in the 2020 and 2021 period may be ascribed to the Covid-19 pandemic lockdown measures.[136] In response to the pandemic, government adopted regulations[137] after a state of disaster was declared. The lockdown regulations instructed municipalities, amongst others, not to permit protest action,[138] which at the time was regarded as an unfair and unjustifiable limitation to the right to protest.[139] This manner of oppressing the right to protest, however, indeed led to fewer protests. However, the Covid-19 pandemic highlighted and exposed the socio-economic challenges in local communities and

132 Dullah Omar Institute 2018 https://dullahomarinstitute.org.za/acsl/barometers/civic-protest-barometer-2018-factsheet-4-grievances-of-protesters-final.pdf. Also see Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.

133 See Dullah Omar Institute 2018 https://dullahomarinstitute.org.za/acsl/barometers/civic-protest-barometer-2018-factsheet-4-grievances-of-protesters-final.pdf. Also see Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.

134 Dullah Omar Institute 2018 https://dullahomarinstitute.org.za/acsl/barometers/civic-protest-barometer-2018-factsheet-4-grievances-of-protesters-final.pdf. Also see Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.

135 Municipal IQ 2023 https://www.municipaliq.co.za/publications/press/20230201102835343 8.doc.

136 Municipal IQ 2023 https://www.municipaliq.co.za/publications/press/20230201102835343 8.doc. On Covid-19 protests elsewhere in the world, see on Covid-19 protests in Australia that does not have constitutional protection of the right to assemble, e.g Wood 2023 *Journal of Bioethical Inquiry* 169-176. Also see Della Croce and Nicole-Berva 2023 *Criminal Law and Philosophy* 155-174.

137 See GN R318 in GG 43107 of 18 March 2020. Hereafter referred to as the lockdown regulations.

138 See Reg 3 in GN R318 in GG 43107 of 18 March 2020.

139 Du Plessis *et al* 2019 *Journal of Law, Society and Development* 6-7. Also see Municipal IQ 2023 https://www.municipaliq.co.za/publications/press/20230201102835343 8.doc.

the disconnectedness of the politicians from these communities.[140] Corruption relating to the funds allocated to alleviate the impacts of the Covid-19 pandemic, considering the socio-economic challenges faced by communities, was an underlying issue to the poor performances by municipalities and central to the grievances that led to the resort to protest action during 2020 and 2021.[141] Although the dire state of affairs was exposed, it was nothing new, as the state of local government service delivery had been dire even before the Covid-19 pandemic. Protest action occurred and continues to occur, as the *AGSA*'s[142] annual reports formally indicate.[143]

In 2007, 46% of protest actions in municipalities were regarded as violent, while 54% were non-violent.[144] From 2010 onwards, more than 50% of all protest actions directed at municipalities involved an element of violence.[145] Since 2013, 90% of the total number of protests recorded had an element or threat of violence. The nature of the violence experienced during these protests varies. Intimidation by the protesters accounted for more than one-third of the violence recorded. The other two-thirds of the violent protests involved and extended to assault, looting, destruction of property and in some cases even resulted in death.[146]

A well-publicised example of a violent protest is the July 2021 civil protests following the arrest and imprisonment of former President Zuma.[147] The protests followed a Constitutional Court[148] decision that found that Zuma was in contempt of court and

140 Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.
141 See Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.
142 See Munzhedzi 2020 *African Journal of Governance and Development* 95.
143 See Munzhedzi 2020 *African Journal of Governance and Development* 95.
144 Also see Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government; Powell *et al* 2015 *Civic Protests Barometer 2007-2014 4* 3.
145 See Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.
146 Dullah Omar Institute 2018 https://dullahomarinstitute.org.za/acsl/barometers/civic-protest-barometer-2018-factsheet-4-grievances-of-protesters-final.pdf.
147 Du Plessis *et al* 2021 *Journal of Law, Society and Development* 3-4.
148 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 ZACC 18. Hereafter referred to as the *Zuma* case.

sentenced him to 15 months of direct imprisonment.[149] In response to the Constitutional Court judgment,[150] Zuma handed himself over to the South African Police Service (SAPS) at the Nkandla police station, where he was subsequently arrested on 8 July 2021.[151] After the arrest of Zuma and publication thereof to the general public, demands for the immediate release of Zuma increased. The relevant authorities ignored these demands, which enraged his followers. They embarked on a spate of violent protest which originated in Durban and quickly spread to other parts of KwaZulu Natal (KZN).[152] The violent protest eventually spread to the rest of the country. The purpose of the violent protests was to force the authorities to release Zuma.[153] The violent protests were characterised by trucks set on fire, sabotage of factories as well as the looting of malls and shopping centres. The protest action led to non-protesting people being injured, as well as numerous deaths reported.[154] Most, but not all of the looting that occurred, was politically motivated. Criminal elements were also present and hijacked the protests.[155] The looting also created opportunities for people who were experiencing poverty and disillusionment.[156] The July 2021 violent civil protest and unrest will form an important part of the history and trajectory of protest in South Africa. The violence that was evident during this protest demonstrated what might be perceived in the future as the new norm and benchmark for protests. Civil protest action, whether peaceful or violent, might be dictated or increased if the socio-economic circumstances of communities do not improve, and poverty is not alleviated.[157]

149 *Zuma* case para 142. Also see Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39.
150 *Zuma c*ase 142. Also see Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39.
151 Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39.
152 Hereafter referred to as KZN.
153 Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39. Also see Du Plessis *et al* 2021 *Journal of Law, Society and Development* 3-4.
154 Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39. Also see Du Plessis *et al* 2021 *Journal of Law, Society and Development* 3-4.
155 Phungula 2024 *Journal of Nation-Building & Policy Studies* 75.
156 Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39. Also see Du Plessis *et al* 2021 *Journal of Law, Society and Development* 3-4.
157 Africa *et al* 2021 *Report on the Expert Panel into the July 2021 Civil Unrest* 35-39.

As indicated, civil protest has different manifestations. The following section will briefly introduce the definitions of civil protest for purposes of this thesis.[158]

1.4 Definitions of civil protest

Authors interpret civil protest widely to include acts of civil disobedience,[159] peaceful protest action,[160] strikes,[161] self-help[162] as well as the defence of collateral challenge[163] and violent protest action.[164] Not all forms of protest action are necessarily justifiable in a constitutional democracy. Civil disobedience can be regarded as non-violent but transgressing the law in trying to ensure that government addresses social injustice, an unjust practice or to force Parliament to change laws or force the administration to introduce policies or to act in a certain manner.[165] Peaceful protests take place without any public disturbance or injury to a person.[166] Peaceful protest action is related to the right to assemble, picket and demonstrate and is guaranteed in international[167] and regional[168] human rights instruments as well as various constitutions[169] around the world. Section 17 of the *Constitution* specifically includes this right.[170] The South African courts sometimes colloquially refer to the right to assemble, picket and demonstrate as the right to

158 See section 2.3 for a more elaborate discussion on the definitions of civil protest.
159 See section 2.3.1 below.
160 See section 2.3.2 below.
161 See section 2.3.3 below.
162 See section 2.3.4 below.
163 See section 2.3.5 below.
164 See section 2.3.6 below.
165 See section 2.3.1 below. Also see Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/; Carbonara, Parisi and Von Wangenheim 2012 *International Review of Law and Economics* 285; Hall 2007 *Cardozo Law Review* 2085, 2086; Munzhedzi 2020 *African Journal of Governance and Development* 95; Rawls 1971 *A Theory of Justice* 364; Bleiker 2002 *Social Alternatives* 37.
166 Duncan *Protest Nation* 23. Also see Botes 2018 *African Journal of Public Affairs* 244.
167 See section 2.2.4.1 below.
168 See section 2.2.4.2 below.
169 See sections 2.3.2.1, 2.3.2.2 and 2.3.2.3 below.
170 See section 2.4 below. See *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 65. Hereafter referred to as the *Garvas* case. Also see Woolman "Assembly, Demonstrations and Petition" 378-379; Duncan *Protest Nation* 3, 180; Stoffels 2019 *Obiter* 409, 413-414; Offor 2007 *Journal for Sustainable Development in Africa* 137.

protest.[171] In a democracy, the right to assemble is an intrinsic element.[172] Peaceful protest does not include any form of violence,[173] as the presence thereof will reduce the constitutionality of such protest.[174]

The right to strike[175] is sometimes seen as a form of protest and is enshrined in the *Constitution*[176] as well as the *Labour Relations Act* (LRA).[177] In private law matters, people sometimes refer to self-help[178] when the law does not provide a remedy or a remedy in time. The courts usually have to determine whether the self-help is justifiable.[179] Similar to self-help in the context of private law, a defence of a collateral challenge[180] can be relied on to achieve the same purpose in public law although it manifests differently. A collateral challenge entails that the validity of an

171 See the following case law on the reference to the right to protest: *Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another* [2022] 3 All SA 466 (GJ); 2022 (5) SA 570 (GJ) para 1; *Go Touch Down Resort-Season CC and Another v Farm Rural Informal Dwellers Association and Another* (60735/2021) [2022] ZAGPPHC 50 (20 January 2022) paras 42-43 and *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* [2019] ZACC 40; 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC) para 9. The colloquial use of the right to protest also prevails elsewhere in the world. See in this regard Wall 2023 *International Journal of Human Rights* 1-16; DiMare and OConnor Tomlinson 2023 *GPSolo* 13-19. The reference to the right to protest will be used to include the right to assemble, picket and demonstrate. Also see section 2.2.3 below.

172 Celitakes, Kreide and Wesche "Introduction" 2.

173 See McGuigan 1971 *The Canadian Bar Review* 222 on the emergence of nonviolent techniques on the 1960's. Also see Wihl 2018 *Israel Law Review* 304.

174 See McGuigan 1971 *The Canadian Bar Review* 222. Also see Pscorn "Civil disobedience as a democratic practice" 4. The author further argues that the autonomy of the citizenry suggests that the respect therefor might be in line with the communicative aims of civil disobedience as it seeks to coerce and persuade the government in relation to the matter at hand. Also see Altigan 2019 *International Journal of Sociology and Social Policy* 169-183 on the communicative aims of civil disobedience. Some schools of thought do exist that suggest that violence during acts of disobedience may be justified as a form of democratic contestation if it has communicative aims to persuade.

175 See section 2.3.3 below.

176 Section 23(2)(c) of the *Constitution.*

177 Section 213 of the *Labour Relations Act* 66 of 1995. Hereafter referred to as the LRA.

178 See section 2.3.4 below.

179 See Gergen 2009 *Boston University Law Review* 1397; Theron 1997 *Law, Democracy and Development* 22.

180 See section 2.3.5 below. See the following case law on collateral challenge as a defence: *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA); *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA); *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA); *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 ZACC 6; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC); *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* 2018 ZACC 21; *Gobela Consulting v Makhado Municipality* 2020 ZASCA 180.

administrative decision in criminal or civil proceedings, instituted and sought to be enforced against the would-be challenger, are impugned by said party.[181] This would have a similar effect of a judicial review of an administrative decision without instituting such a process.[182] Violent protest,[183] as also demonstrated above, is regarded as protest which includes damage to property or injury to any person.[184] Violent protest may be distinguished from disruptive protests. Disruptive protests do exactly what they suggest – they disrupt the ordinary or normal functioning of social institutions without any injury to any person. It is submitted that protest may be disruptive but will not necessarily be regarded as violent due to the disruptive nature thereof. Also, the absence of injury to the person or destruction of property will distinguish a disruptive protest from a violent one. For purposes of this study, civil protest entails all forms of protest directed at or aimed against local government authorities, whether allowed in terms of the law, justified or not and whether it is peaceful or violent.[185]

1.5 Problem statement

As indicated above,[186] there is a growing tendency in South Africa for members of the community to resort to protest action with the presence of violence.[187] The number of recorded protests against local government and the subsequent grievances underlying these protests support the argument that protest is a regular

181 O' Donnel 2020 *Federal Law Review* 69.
182 O' Donnel 2020 *Federal Law Review* 69.
183 See section 2.3.6 below.
184 See Duncan *Protest Nation* 23; Botes 2018 *African Journal of Public Affairs* 244; Alexander *et al* 2018 *SA Crime Quarterly* 31, 33; Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 243.
185 See 2.3.8 for a definition of civil protest for purpose of this study. The study will not focus on strikes, as such a discussion needs a thesis in itself. Due to the focus on local government, strikes will only be referred to in passing. The same can be said of self-help and the defence of collateral challenge.
186 See section 1.4 above.
187 See section 2.4.6 below. Also see Karamako *Community Protests in South Africa: Trends, Analysis and Explanations* 1; Municipal IQ 2023 "Protest numbers for 2022 bounce back to pre-covid numbers" 1.

occurrence[188] and part of the South African political landscape.[189] It seems as if members of the community regard protest action as their preferred course of action to communicate their needs and interests but also their discontent and disapproval with a law, policy, or government decision-making.[190] This may be attributed to the fact that local government as the closest government sphere on ground level is held accountable regardless of which sphere of government is responsible for the lack of service delivery.[191] Local government is seen to be responsible for socio-economic development and the provisioning of services.[192]

There is a need to determine the content of the theoretical and normative foundations underpinning civil protest in the local government context. Municipal councils,[193] municipal officials[194] and local communities[195] have responsibilities with regards to public participation[196] in local governance and responsive developmental local government.[197] Against the background of the responsibilities of municipalities and local community members, the challenge is to determine to what extent civil protests are justified, given that several other mechanisms exist in South African law to inform local authorities of their needs and interests as well as communicated discontent and dissatisfaction, and by extension to hold local government

188 Municipal IQ 2023 https://www.municipaliq.co.za/publications/press/20230201102835343 8.doc. Also see Munzhedzi 2020 *African Journal of Governance and Development* 95.

189 See Wihl 2018 *Israel Law Review* 301,309. Also see Arce and Rice "The political consequences of protest" 1; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 4; Duncan *Protest Nation* 3; Munzhedzi 2020 *African Journal of Governance and Development* 95.

190 See Carbonara, Parisi and Von Wangenheim 2012 *International Review of Law and Economics* 285. Also see Munzhedzi 2020 *African Journal of Governance and Development* 95.

191 See Thornhill 2004 *Journal of Public Administration* 470; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 176-177; Fuo " Municipal service delivery and the environment" 10-1; Fombad "Cameroon and the Anomalies of Decentralisation with a Centralist Mindset" 344.

192 Dullah Omar Institute 2018 https://dullahomarinstitute.org.za/acsl/barometers/civic-protest-barometer-2018-factsheet-4-grievances-of-protesters-final.pdf. Also see Lancaster and Mulaudzi 2020 https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government.

193 See sections 3.4.2 and 3.5 below.

194 See sections 3.4.3 and 3.6 below.

195 See section 3.7 below.

196 See section 2.11 and Chapter 4 below.

197 See sections 2.8 to 2.9 and 3.2.

accountable for unmet responsibilities.[198] Given its impacts and consequences, it is further necessary to determine from the perspective of local government, under which circumstances civil protests would be justified in the event of failing and unresponsive local government.

1.6 Research question and aims

1.6.1 Research question

The central research question of this study is to what extent is civil protest directed at municipalities justified from a South African local government law perspective?

1.6.2 Aims

In support of the research question, the sub-aims of the study are to:

(i) determine the content of the theoretical and normative foundations underpinning civil protests and developmental local government, including the link between them; as well as to critically reflect on the features, scope, and impact of justified civil protest in the event of failing and unresponsive local government;[199]

(ii) determine the functions of local government as background to public participation and developmental local government[200] as well as to determine and critically analyse the responsibilities of municipal councils, municipal officials and local communities in relation to public participation in local governance and responsive developmental local government;[201]

(iii) analyse the mechanisms created in law to improve participative local governance including via the formal justice system and the processes of the constitutional Chapter 9 institutions;[202] and

198 See section 4.5 below.
199 See Chapter 2 below.
200 See section 3.2 below.
201 See sections 3.4, 3.5, 3.6 and 3.7 below.
202 See sections 4.6 and 4.7 below.

(iv) to propose when civil protest will be justified from a South African local government law perspective.[203]

1.7 Hypothesis and assumptions

The hypothesis of the study is that mechanisms for democratic public participation exist in South African local government law which limit the justification for the resort to civil protest when municipalities are unresponsive to people's needs and interests.

It is assumed that:

(i) South Africa has a developmental local government system which means local authorities must work with local communities in order to meet their needs and improve the quality of lives in a sustainable manner.

(ii) Protest action as a form of public participation is a constitutionally entrenched mechanism which may be used to show discontent and dissatisfaction with regards to local government matters.

(iii) Public participation by the local community is an essential element of the democratic dispensation.

(iv) Violent and non-violent protests are a regular occurrence in South Africa due to local government's failure to satisfy the service delivery and other needs of communities.

1.8 Research methodology

The research was conducted by means of a literature review of the relevant primary and secondary sources of law in order to determine the extent to which civil protest is justified from a South African local government law perspective.[204] In pursuance of this purpose, the relevant legislation, policies, and case law were investigated and analysed, supported by secondary sources such as relevant books, academic

203 See sections 2.3.7 and 2.12 below.

204 On research methods in law, see, amongst others, Venter *Legal Research: Purpose, Planning and Publication*; Fisher *Legal reasoning in environmental law*; Bhat *Idea and Methods of Legal Research*; Kerstemont *Handbook on Legal Methodology*.

journal articles and reports. The first step in this investigation was to determine the theoretical and normative foundations underpinning the definitions, descriptions, and justifications of civil protest. A literature review of the relevant literature (legal and non-legal) was conducted to achieve this step. The literature review included a discussion of the history of local government in South Africa as well as the developmental nature thereof. Relevant legislation and case law were analysed throughout the study to determine the responsibilities of the role-players in municipalities. A study of case law determined the scope and legal implications of unresponsive municipalities with regards to the notion of developmental local government, adequate service delivery and meaningful public participation. The next step entailed the determination of the existing mechanisms in law for community response and public participation as a potential counter-measure for civil protests. This was conducted by means of a critical analysis of the meaning of meaningful public participation as it is captured in relevant legislation, international instruments, case law, textbooks, and academic journal articles. Furthermore, the *Constitution*, the *Systems Act*, the *Structures Act*, and the *MFMA*, and case law were analysed to determine and critically evaluate the available mechanisms for public participation in local government. The last step was included to propose when civil protest will be justified from a South African local government law perspective.

1.9 Study outline

In order to address the central research question posed in this study,[205] Chapter 2 starts by determining the theoretical and normative foundations of the notions of civil protest and developmental local government in the South African context. The chapter continues to define and describe civil protest to determine its justification. It also analyses the idea and rationale behind local government in South Africa.[206] It provides the foundation for the pursuance of the main focus of this study, which is to determine the extent to which civil protest is justified from the South African local government perspective. Chapter 3 critically analyses the responsibilities of

205 See section 1.6.1 above on the research question and main purpose of the study.
206 See Chapter 2 below on the theoretical and legal foundations of civil protest and developmental local government.

municipal administrators, municipal councils, and local communities in terms of the *Constitution*, local government legislation and relevant case law. This is done to determine the responsibilities of the municipality in relation to developmental local government, which affect the provision of adequate services and public participation on local government sphere.[207] Chapter 4 embarks on a critical assessment of the mechanisms in law for public participation in local governance as well as other mechanisms available to community members to highlight their discontent.[208] Chapter 5 offers conclusions, key findings and recommendations aimed at determining the extent to which civil protest is justified from a South African local government perspective.[209]

207 See Chapter 3 below on the responsibilities of municipalities to facilitate public participation.
208 See Chapter 4 below on the law on meaningful public participation in local governance.
209 See Chapter 5 below on conclusions, key findings, and recommendations.

CHAPTER 2 THEORETICAL AND LEGAL FOUNDATIONS OF CIVIL PROTEST AND DEVELOPMENTAL LOCAL GOVERNMENT

2.1 Introduction

In general, organs of government have the fundamental function of serving the people, to promote and protect their interests and rights.[210] The South African government, more specifically local government, faces inefficiencies which hamper its ability to be responsive to the needs and interests of the citizenry.[211] The unresponsiveness of local government is discernible through the high levels of civil protest and may be attributed to government's failure to uphold democracy as well as to fulfil some of its fundamental functions such as the provisioning of adequate basic services impacting on the socio-economic development of local communities. The argument that citizens may have to exercise the right to freedom of assembly by resorting to protest when and if governments fail to fulfil their constitutional mandate, is explored in this chapter.[212]

The exercise of the freedom of assembly through protests is employed as a means to address or communicate discontent and dissatisfaction as a result of the unresponsiveness and failures of the local government system.[213] The citizenry has the right to resort to the freedom of assembly when they have a grievance. The resort to and exercise of the freedom of assembly is not dependent on the

210 Tomaschat "The right of resistance and human rights" 16. Also see Bellal and Bartkowski *Open Democacy* 2011 https://www.opendemocracy.net/en/human-right-to-resist/.

211 See Auditor-General of South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 87. Also see Munzhedzi 2020 *African Journal of Governance and Development* 94, 96-97, 101; Thoreau *Civil Disobedience* 3. The reference to citizens and citizenry is used in the general sense of the word by referring to the inhabitants of a country, individuals or the public that may exercise their rights in terms of their constitutions. The South African *Constitution* does not limit its right to protest to citizens only, for example.

212 See sections 152(1)(b) and 152(1)(c) of the *Constitution*. Also see Van der Walt "The statutory and regulatory framework for Local Government" 48; Nyalungu 2006 *International NGO Journal* 17; *White Paper* 23; Tsatsire, Taylor and Raga 2010 *The Journal for Transdisciplinary Research in Southern Africa* 272; Van der Westhuizen, Dollery and Grant 2012 *The Journal for Transdisciplinary Research in Southern Africa* 268; Bekker and Leilde 2003 *Politeia* 3.

213 See sections 2.2 to 2.4 below.

availability of other means or mechanisms by which the citizenry may communicate their discontent and dissatisfaction.

This chapter investigates the theoretical and normative foundations underpinning the phenomenon of civil protest, juxtaposed in the second part of this chapter, against the vision of responsive developmental local government in South Africa. The objective of this chapter is to provide the theoretical and normative foundations underpinning civil protest and the need for responsive developmental local government. Firstly, a brief discussion of the history of civil protest will reflect on some examples of instances of civil protest in the United States of America (USA) and social movements in various African countries to highlight the historical but also current necessity for these protests. The purpose of this discussion is to highlight the historical importance of civil protest around the world as it will provide some support for the resort thereto in a democratic South Africa. Also, it will show that civil protest always played an important role in, for example, revolting against oppressive laws and pursuing equality. Secondly, the development and content of civil protests are investigated with reference to international and regional legal instruments as well as examples of the recognition of the right in selected national constitutions. Thereafter, the discussion will proceed to civil protests in South Africa and show how the right to protest manifests in South Africa. The various forms of protest that occur in some democratic dispensations under civil protests are discussed. Thirdly, this chapter will shift to a discussion of the idea and rationale behind the existence and design of 'municipalities' that collectively form 'local government' as the sphere of government closest to communities.[214] The aim is to provide the theoretical background against which the role of the municipality in relation to developmental local government is considered and measured. This will provide the required contextualisation for the discussion as to whether or not the

214 See Thornhill 2004 *Journal of Public Administration* 470; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 176-177; Fuo "Municipal service delivery and the environment" 10-1; Fombad "Cameroon and the Anomalies of Decentralisation with a Centralist Mindset" 344.

municipality should be responsive to the needs and interests of the citizenry as members of local communities.

2.2 History of the development of forms of civil protest

One of the most prominent forms of civil protest or social movements between the 1950s and 1970s was civil disobedience.[215] As explained in Chapter 1,[216] civil disobedience is regarded as a non-violent[217] protest to publicly[218] demonstrate the

215 Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 39; Rawls *A Theory of Justice* 364; Bleiker *Social Alternatives* 37; Zinn *Disobedience and Democracy: Nine Fallacies on Law and Order* 32; Bedau *The Journal of Philosophy* 653; Bay *International Encyclopedia of the Social Sciences* 473; Bay "Civil Disobedience: Prerequisite for Democracy in Mass Society" 79; Offor *Journal of Sustainable Development in Africa* 137; Sharp *The Politics of Nonviolent Action part two of: The Methods of Nonviolent Action* 315; Hall *Cardoza Law Review* 2086; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Forji *Journal of Politics and Law* 157; Hook "Social protest and Civil Disobedience" 58; Kellner *The Journal of Politics* 899; Freeman *ILJ* 231.

216 See sections 1.3 to 1.4 above.

217 See the following authors regarding non-violence as an element of civil disobedience: Rawls *A Theory of Justice* 364; Bleiker *Social Alternatives* 37; Bedau *The Journal of Philosophy* 653; Sharp *The Politics of Nonviolent Action part two of: The Methods of Nonviolent Action* 315; Hall *Cardoza Law Review* 2085; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Hook "Social protest and Civil Disobedience" 58; Kellner *The Journal of Politics* 899; Freeman *ILJ* 231.

218 See the following authors regarding the public nature of the conduct as an element of civil disobedience: Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 39; Rawls *A Theory of Justice* 364; Bleiker *Social Alternatives* 37; Zinn *Disobedience and Democracy: Nine Fallacies on Law and Order* 32; Bedau *The Journal of Philosophy* 653; Bay *International Encyclopedia of the Social Sciences* 473; Bay "Civil Disobedience: Prerequisite for Democracy in Mass Society" 79; Offor *Journal of Sustainable Development in Africa* 137; Sharp *The Politics of Nonviolent Action part two of: The Methods of Nonviolent Action* 315; Hall *Cardoza Law Review* 2086; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Forji *Journal of Politics and Law* 157; Hook "Social protest and Civil Disobedience" 58; Kellner *The Journal of Politics* 899; Freeman *ILJ* 231.

disapproval of any law, policy, or course of action by the government.[219] This specific protest action is regarded as illegal since it occurs in contravention of the law.[220]

The following discussion will briefly highlight a few occurrences of civil disobedience in the USA from 1954 to 1968 which illustrate the opposition against the segregation measures. As indicated above, this discussion is relevant for the current purpose to discuss the extent to which it indicates the impact these acts of civil disobedience as civil protest had on the political landscape in the USA. Civil disobedience in the USA was largely aimed at the segregationist and prohibitive laws, similarly to the way social movements were employed in Africa against, for example suppression and colonisation,[221] and in South Africa in opposition to apartheid.[222] As stated in Chapter 1, in the South African local government space today, civil protest occurs and is aimed at government due to its failure to realise the rights of most people.[223] Civil protest, although far removed from the historical significance, is still relevant today in pursuance of development and improved living conditions in local communities.[224]

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219 See the following authors regarding the disapproval of any law, policy or course of action by the government as an element of civil disobedience: Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 36; Rawls *A Theory of Justice* 364; Bleiker *Social Alternatives* 37; Zinn *Disobedience and Democracy: Nine Fallacies on Law and Order* 32; Bedau *The Journal of Philosophy* 653; Bay *International Encyclopedia of the Social Sciences* 473; Bay "Civil Disobedience: Prerequisite for Democracy in Mass Society" 79; Offor *Journal of Sustainable Development in Africa* 137; Sharp *The Politics of Nonviolent Action part two of: The Methods of Nonviolent Action* 315; Hall *Cardoza Law Review* 2085; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Cameron *Civil Disobedience and Passive Resistance* 219; Forji *Journal of Politics and Law* 157; Kellner *The Journal of Politics* 899; Freeman *ILJ* 231.

220 See the following authors regarding illegality as an element of civil disobedience: Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 36; Rawls *A Theory of Justice* 364; Bleiker *Social Alternatives* 37; Zinn *Disobedience and Democracy: Nine Fallacies on Law and Order* 32; Bedau *The Journal of Philosophy* 653; Bay *International Encyclopedia of the Social Sciences* 473; Bay "Civil Disobedience: Prerequisite for Democracy in Mass Society" 79; Offor *Journal of Sustainable Development in Africa* 137; Sharp *The Politics of Nonviolent Action part two of: The Methods of Nonviolent Action* 315; Hall *Cardoza Law Review* 2085; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Cameron *Civil Disobedience and Passive Resistance* 219; Forji *Journal of Politics and Law* 157; Kellner *The Journal of Politics* 899; Freeman *ILJ* 231.

221 See para 2.2.2 below.

222 See section 2.4 below.

223 See sections 1.2 and 1.5 above.

224 See section 1.3 above.

2.2.1 Civil disobedience in the USA

The USA enacted racist legislation, commonly known as the Jim Crow Laws,[225] to segregate African Americans from their counterparts after 1890.[226] The Jim Crow Laws resulted in African Americans being prevented and alienated from fully participating as equal citizens in the American society.[227] African Americans campaigned against these laws via acts of civil disobedience.[228] They wanted to demonstrate their individual or communal disapproval of the Jim Crow Laws and the resultant segregation.[229]

In the state of Alabama, the seating arrangements in buses were segregated along racial lines in 1956.[230] Rosa Parks, who observed this injustice, engaged in civil disobedience in response to this discriminatory practice. She intentionally and non-violently boarded a bus and occupied a seat which was specifically reserved for white people. She was later instructed by the bus driver and police to give way to a white man, but she refused to vacate the seat. As a result of Parks' refusal to give up her seat, she was arrested, charged, and convicted for violating the ordinance in this regard.[231] Subsequently, the legal action taken against Parks gave rise to

225 Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21. The name Jim Crow was given to the segregationist laws after song and dance Jump Jim Crow which was performed by the white performers covered in blackface. See Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21.

226 Kousser *Dictionary of American History* 479-480; Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21. Jim Crow Laws regulated and prohibited social, economic, and political relationships between white and African-American people resulting in segregation. For example, the Jim Crow Laws placed a ban on interracial marriages and mandated racial segregation in public spaces. These laws segregated and subordinated African-Americans to white people and were biased to the last-mentioned group. See Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21.

227 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 217, 225, 227. Also see Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21.

228 See section 1.4 above. Also see section 2.3 below.

229 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 214.

230 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 218. Also see Moses "Separate but Equal: African Americans responds to the failure of reconstruction" 21; Urquhart "Charles Hamilton Houston and Thurgood Marshall: Launch the legal challenge to segregation" 26.

231 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 218. Also see Urquhart "Charles Hamilton Houston and Thurgood Marshall: Launch the legal challenge to segregation" 26, 30; Hare "We have a movement" 35-36,46-47; Kendall 2019 *The Journal of Social Encounters* 78.

African Americans successfully boycotting the Montgomery bus service between 1955-1956.[232]

The conduct by Parks, and the subsequent boycotting of buses by other African Americans, amounted to civil disobedience.[233] Importantly, there is no evidence to suggest or indicate that these acts were conducted in a violent manner.[234] The violation of the then laws, the city ordinance in the case of the Montgomery Bus Boycott, became common amongst black people during the civil rights movements which segregated black people from their counterparts.[235]

Racial segregation continued in 1960, in Greensboro, North Carolina.[236] For example, Woolworth Department Store employed a privately initiated racial segregation policy which prohibited black people from being served at its lunch counters. Four black men then decided to visit the store and requested to be served, being aware of the prohibiting policy. However, they were not served as expected and were requested to leave the store, but they refused to do so. As these four men persisted with the sit-ins, more people including white people, joined their cause.[237] The sit-ins received large-scale publicity, and thereby they expanded to other places in support of the movement. This pressure forced the store to do away with their racial segregation policy and finally to serve black people at their lunch counters.[238] The sit-ins at the

232 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 219. Also see Kendall 2019 *The Journal of Social Encounters* 78; Delmas 2016 *Philosophy Compass* 681; Kaul unknown http://www.blackpast.org/aah/montgomery-bus-boycott-1955-56.

233 See Delmas and Brownlee 2023 https://plato.stanford.edu/archives/fall2023/entries/civil-disobedience/; Delmas 2016 *Philosophy Compass* 681.

234 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 218. Also see Urquhart "Charles Hamilton Houston and Thurgood Marshall: Launch the legal challenge to segregation" 26, 30; Hare "We have a movement" 35-36,46-47; Kendall 2019 *The Journal of Social Encounters* 78.

235 See Kendall 2019 *The Journal of Social Encounters* 78; Delmas 2016 *Philosophy Compass* 681.

236 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 220. Also see Hare "We have a movement" 37.

237 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 220.

238 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 220, 221. Also see Hare "We have a movement" 36; Kendall 2019 *The Journal of Social Encounters* 81; Momodu unknown http://www.blackpast.org/aah/greensboro-sit-ins-1960.

Woolworth stores were undertaken in a non-violent manner to force the abolishment of the racist policy of the store.[239]

Towards the end of 1960, African American communities were frustrated with the progress or perhaps lack of significant progress made in their struggle against the institutionalised racism underpinned by the Jim Crow Laws.[240] They followed with more confrontational tactics.[241] In 1961, an interracial group of activists took freedom rides with interstate buses in order to challenge the fact that segregated interstate travels were not allowed. During the freedom rides, some African American activists were subjected to violence by being beaten by white males in South Carolina. In some other places these rides took place without incident. However, when the freedom riders reached Alabama, the violence towards them intensified, which included the freedom riders getting beaten with bats, pipes, and chains. White supremacists threw rocks at buses, slashed tyres, and bombed a bus.[242]

As the protesters embarked on further freedom rides, more and more violent incidents took place. Despite the violence that the freedom riders were exposed to and experienced, the police refused to intervene at any point. However, the violence that the freedom riders were subjected to, gained major international attention, which compelled the federal government to issue rules prohibiting discrimination in interstate travel.[243] The decision was not taken based on principles of human dignity or equality but more so for the impact it had on the government's international standing.[244] Again, the defiance of the segregation laws was done in a non-violent

239 "Also see Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 220; Hare "We have a movement" 36; Kendall 2019 *The Journal of Social Encounters* 81. Special workshops on non-violence, based to some extent on Gandhi's teachings, prepared those participating not to respond aggressively to brutal attacks. Presidential candidate John F Kennedy gave his support to this type of protest."

240 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 221. Also see Hall *American patriotism, American protest: social movements since the sixties.*

241 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 221.

242 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 221,222. Also see *Hare "We have a movement"* 36; Mack unknown http://www.blackpast.org/aah/freedom-rides-1961.

243 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 222. Also see *Hare "We have a movement"* 3; Mack unknown http://www.blackpast.org/aah/freedom-rides-1961.

244 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 222.

manner regardless of the violence the freedom riders were subjected to. As an element of civil disobedience, the freedom riders did not respond with violence while being attacked, at least there is no evidence to suggest otherwise.[245]

Further campaigns were mounted to desegregate public facilities in Birmingham, Alabama by 1963. The campaign sought to put pressure on merchants in Birmingham to address segregation. The campaign proceeded with public demonstrations which included mass meetings, sit-ins, marches, and the boycott of certain merchants. The local authorities sought and obtained a court order to prohibit the continuation of these protests.[246] After considering the court order that prohibited further demonstrations, the campaign leaders decided to proceed with same, but the authorities met this disregard by the protesters with violence[247] . After successful negotiations between the campaign leaders and local authorities, the public facilities were desegregated. Sadly, the violence towards the campaign or related individuals did not stop; segregationist and white supremacists rejected the accord. After this, both groups, that is the demonstrators, and oppressors, witnessed violence.[248] Nonetheless, this campaign, which was largely undertaken non-violently, was regarded as one of the most successful in the fight against segregation from 1954 to 1968.[249] The protesters violated laws as well as court orders condemning the undertaken action.

In 1964, the *Civil Rights Act* desegregated the southern part of the USA.[250] Regardless thereof, discrimination towards African American voters persisted and consequently civil disobedience continued.[251] People were killed during the African

245 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 221.
246 See Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 221 on the injunction sought by the local authorities to prevent further campaigns.
247 See Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 223. "The televised images that shook the country and the Federal Government was that of the use of dogs, fire hoses ("that stripped the bark of trees") and clubs against unarmed protesters, many of whom were children."
248 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 223.
249 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 224. Also see Momodu unknown http://www.blackpast.org/aah/birmingham-campaign-1963.
250 See Hare "We have a movement" 35.
251 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 224. Also see van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 18.

American communities' struggle for recognition. With the intention to protest against the killing of protesters, the community sought permission to protest but were denied the opportunity. Despite this refusal, they proceeded with their protest, but the police confronted them with brutal force and violence. Eventually, after all the pressure from civil campaigns, the *Civil Rights Act* was signed into law in July 1964.[252]

Similar to the violation of court orders pertaining to protests during the 1963 campaign, the movement for the *Civil Rights Act* to be signed into law also violated court orders prohibiting certain protests. Also, in both instances the protesters were subjected to force and violence by the authorities. Yet, the protesters remained non-violent in the course of their actions.[253] The *Civil Rights Act* eliminated the last vestiges of discrimination, at least with reference to access to public facilities. The importance of the *Civil Rights Act* was to guarantee the right of everyone to have access to public facilities.[254] In the case of the civil rights movement, civil disobedience achieved the eventual aim of the protest.[255] In the last few years, right-wing protest action characterised the USA, with protesters storming the Capitol during one of their campaigns.[256] This action shocked the psyche of the American nation.[257]

The experience of and resort to acts of civil disobedience in response to the segregation of African Americans in the USA is different to what was experienced in Africa. The resort to social movements was at the forefront of the African experience, which may have some global comparison and similarities but the

252 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 225. Also see Hare "We have a movement" 35; Kindig unknown http://www.blackpast.org/aah/bloody-sunday-selma-alabama-march-7-1965.

253 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 225. Also see *Hare "We have a movement"* 36.

254 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 224. Also see *Hare "We have a movement"* 36.

255 Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 18. Also see *Hare "We have a movement"* 36.

256 Caren 2023 *Socius: Sociological Research for a Dynamic World* 9. Also read Volk 2023 *European Politics & Society* 535-551 on the rise of right-wing protest in Europe

257 Lorenzano, Moon and Borah 2023 *Communication and the Public* 191-205; Hawkins and Simon-Roberts 2022 *American Behavioral Scientist* 1-18.

underlying narratives or rationales differ.[258] Social movements in parts of Africa were *sui generis*[259] and heavily relied on as a responsive mechanism by the aggrieved citizenry of the relevant countries to achieve social and political change.[260] The next section will proceed with a discussion of the relevant social movements in parts of Africa from 1950 onwards.

2.2.2 Social movements in Africa

In Africa, social movements were at the forefront of calls for social and political change from the 1950s onwards.[261] In this context, four periods necessitate attention: 1950-1960,[262] 1960-1975,[263] 1975-1989[264] and 1990-2010.[265] These periods will be dealt with briefly to provide an overview of the important role social movements historically played in some African countries.

2.2.2.1 Social movements aimed at nationalism during 1950-1960

The anti-colonial struggle marked the 1950s and 1960s, where African countries sought their freedom from the colonialists and to gain independence as states.[266] Mass movements, although not coherent and unified, took place during this period in order to gain political independence from the hands of the colonialists. African nationalists were also at the forefront with movements against economic, social,

258 Ellis and Van Kessel "Introduction: African social movements or social movements in Africa" 1,4.
259 Ellis and Van Kessel "Introduction: African social movements or social movements in Africa" 1,4.
260 Ellis and Van Kessel "Introduction: African social movements or social movements in Africa" 2-3.
261 Larmer 2010 *Review of Political Economy* 252. Ellis and Van Kessel "Introduction: African social movements or social movements in Africa" 2-3.
262 This period was characterised by social movements aimed at nationalism. See Larmer 2010 *Review of Political Economy* 254. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 30.
263 This period was characterised by social movements aimed at suppression and incorporation in Africa after post-colonialism. See Larmer 2010 *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 18, 23.
264 This period was characterised by social movements aimed at the economic crisis experienced in Africa. See Larmer 2010 *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 18, 23.
265 This period was characterised by social movements aimed at pro-democracy and other related matters. See Larmer 2010 *Review of Political Economy* 256. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 19.
266 Larmer 2010 *Review of Political Economy* 254. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23, 30; Ellis and VVn Kessel "Introduction: African social movements or social movements in Africa" 2-3.

and even cultural manifestations of the colonialists.[267] By the end of 1960, 17 African countries had gained independence.[268]

2.2.2.2 Social movements aimed at suppression and incorporation after post-colonialism during 1960-1975

After the anti-colonial struggle, during the early 1960s to 1970s, the post-independent states, dominated by centralised ruling parties, also suppressed social movements, and incorporated unions and organisations into party-state structures.[269] Social movements were regarded as a threat to the autonomy of the centralised ruling parties and therefore states quelled any social movement initiative dealing with development. Prompt responses with violence towards or against social movements were common.[270]

2.2.2.3 Social movements aimed at aimed at the economic crisis during 1975-1989

The period from 1975 to 1989 was characterised by an economic crisis in Africa.[271] It was evident that during this period that there were the following: a lesser form of sovereignty, changes to structural policies, and a level of exposure to state hegemony.[272] All those affected and directly exploited by the economic crisis attacked the low standard of living of the poor within African countries.[273] This led to food riots in the late 1970s and early 1980s in countries such as Tunisia and Egypt.[274] This unrest paved the way for social movements to address social and economic challenges. However, states were willing to allow certain social

267 Larmer 2010 *Review of Political Economy* 254. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23, 30.
268 Harsh 2010 *Africa Renewal* 10. Also see Everett 2020 https://origins.osu.edu/article/year-of-africa-1960-rumba-pan-africanism-Kariba?language_content_entity=en.
269 Larmer 2010 *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.
270 Larmer 2010 *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.
271 Larmer *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.
272 Larmer *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.
273 Larmer *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.
274 Larmer *Review of Political Economy* 255. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 23.

movements to deal with certain issues that they were unable to attend to as a state.[275] Organisations with no direct political agenda and pursuit were tolerated as they explored local solutions to deal with the growing social and economic challenges that the local communities faced.[276] These social movements were limited to the extent that they assisted the state to alleviate the challenges it was unable to mitigate and solve.[277] The silent and non-violent protests in for example Tunisia, Egypt and Algeria, later referred to as the Arab Spring,[278] inspired renewed protest in Africa and all around the world.[279]

2.2.2.4 Social movements aimed at pro-democracy and other related matters during 1990-2010

Social movements played an equally important role with the onset of the pro-democracy movements in the early 1990s.[280] This period signalled the possibility of radical political change across Africa. In fact, the transition to democracy in Africa was not as smooth as it could have been, as it is still evident in many African countries.[281] This process led to protest movements as well as mobilisation by trade unions and church bodies.[282]

Civil protest played an important role in Africa, as it was initially employed in the fight for independence. People resorted to civil protest in order to address social and political problems in their communities.[283] However, these actions were stifled

275 Larmer 2010 *Review of Political Economy* 255.
276 Larmer 2010 *Review of Political Economy* 255.
277 Larmer 2010 *Review of Political Economy* 255.
278 A street vendor in Tunisia set himself on fire which resulted in his death (referred to as self-immolation) whereafter a spate of peaceful protest was sparked in the Middle East and North-Africa (MENA). The series of events was symbolically termed the Arab Spring in analogy to the 1848 Springtime of the Peoples, alternatively the Springtime of the Nations. The Springtime of the Peoples or Springtime of the Nations comprised various acts of political revolution. See Plakondas "Causes of the Arab Spring: A Critical Analysis" 1. Also see Dalacoura 2012 *International Affairs* 63-79; Ozekin and Akkas 2014 *Alternatives: Turkish Journal of International Relations* 76-86; Sebopetsa and Odeku 2021 *African Journal of Peace and Conclict Studies* 46.
279 See in this regard Acre and Rice (eds) *Protest and democracy*.
280 Larmer 2010 *Review of Political Economy* 256.
281 Bates 2010 *Social Research* 133-1148; International Institute for Democracy and Electoral Assistance 2021 *Global State of Democracy Report on Africa and the Middle East* 1-7; Tar 2010 *Information, Society and Justice* 81-94.
282 Larmer 2010 *Review of Political Economy* 256.
283 See Larmer 2010 *Review of Political Economy* 256. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 19.

by the newly independent states, as they viewed protest action as a threat to their independence and perhaps their hold to power.[284] Regardless, people persisted with social movements and civil protest, as these fulfilled an important function in the search for democracy. This discussion, along with the brief overview of civil disobedience in the USA, evidently demonstrates the important role civil movements played not only in Africa and the USA, but it also resonates with the notion of the right to resist a government's laws, policies and action if they are found or perceived by the citizenry to be unlawful or unjust.

The right to resist government laws, policies and action remains relevant although the manifestation thereof may be different, as the dynamics in Africa have changed. The resort to civil protests is underlined by different reasons relating to the implementation of the progressive and developmentally orientated legislation.[285] The next section proceeds with establishing the link between the right to resist, civil resistance, freedom of assembly and the right to protest.

2.2.3 The link between the right to resist, civil resistance, freedom of assembly and the right to protest

The right to resist government laws, policies, and actions is recognised in cases of what is regarded as great and unendurable inefficiencies on the part of the state.[286] This right to resist is often also referred to as civil resistance, which is perceived as a means to address grievances and rights-based struggles of the citizenry.[287] Traditional and conventional measures in a democracy such as for example elections, may not always have the desired outcome in reference to grievance(s) levelled against government.[288]

284 See Larmer 2010 *Review of Political Economy* 256. Also see Van Stekelenburg and Klandermans "Social movement theory: Past, present and prospects" 19.
285 See sections 2.3, 2.9, 4.6 below.
286 Thoreau *Civil Disobedience* 3.
287 Tomaschat "The right of resistance and human rights" 14,15. Also see Bellal and Bartkowski 2011 https://www.opendemocracy.net/en/human-right-to-resist/.
288 See Tomaschat "The right of resistance and human rights" 14,15; Bellal and Bartkowski Open Democracy 2011 https://www.opendemocracy.net/en/human-right-to-resist/.

Due to the nature of democracy as underlying the principle that democratic governments exercise the will of the people, civil resistance is a practical manner of providing an additional participatory measure to the existing legislative measures to ensure public participation and hold government accountable.[289] The submission is further made that civil resistance is an additional measure to ensure public participation by the citizenry in matters that affect their livelihood and development.

Civil resistance in this context refers to those measures which the citizenry resorted to, in order to draw the attention of the government to their economic, social, or political challenges which may be detrimental to their development. This detrimental impact might be experienced at a personal or a community level. The purpose thereof is also to have the state respond to these challenges by addressing them. An important qualification to the resort to civil resistance is the non-violent nature thereof.[290] The notion of civil resistance is also recognised in international law.[291] Considering the provisions of the relevant sources of international law regarding civil resistance, the right to freedom of assembly is key to civil resistance.

The right to the freedom of assembly[292] and the right to the freedom of expression[293] are universally protected. The right to protest does not receive specific mention in international law but may be inferred from the recognition and protection afforded to the right to freedom of assembly as well as the freedom of expression.[294] It is noted that the right to freedom of assembly includes but is not limited to, the following ways in which this right may be exercised: assemblies, demonstrations, gatherings, meetings, strikes as well as protests.[295] It is submitted that the right to

289 Tomaschat "The right of resistance and human rights" 14,15.
290 Bellal and Bartkowski 2011 https://www.opendemocracy.net/en/human-right-to-resist/.
291 See article 20 of the *Universal Declaration of Human Rights*. Hereafter referred to as the *UDHR*. Also see article 21 of the *International Covenant on Civil and Political Rights*. Hereafter referred to as the *ICCPR*.
292 Article 20 of the *UDHR*.
293 Article 19 of the *UDHR*.
294 Tomaschat "The right of resistance and human rights" 16. Also see Bellal and Bartkowski 2011 https://www.opendemocracy.net/en/human-right-to-resist/.
295 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 22. Also see Office of the High Commissioner for Human Rights Date Unknown https://www.ohchr.org/en/peaceful-assembly; Human Rights Committee 2020 *General Comment No. 37 on the Right to Peaceful Assembly* 6. Hereafter referred to as *General Comment*.

freedom of assembly is often cited and referred to as the right to protest[296], as it is the most common form through which the right to freedom of assembly is exercised as a manner in which to express discontent and dissatisfaction.

Social movements and civil protests both seek to create social change by establishing a platform from which individuals and groups can communicate their grievances but also challenge government's decision-making or lack of development in communities. Social movements are not often as organised and formalised as civil protests although unrest or violence may occur, but both have a clear purpose underlying the occurrence thereof. Civil protest plays an important role in social movements, due to social movements including various manifestations of civil protests.

International and regional institutions developed and recognised the right to assemble, picket and demonstrate, which was later also recognised in constitutions[297] all over the world. The next paragraph discusses the history of the introduction of such a right in international and regional instruments.

2.2.4 The recognition of the right to assemble, picket and protest in international and regional instruments

The following international and regional instruments recognise, guarantee, and protect the right to freedom of assembly, which inadvertently provide for the right to protest, namely the *UDHR*; the *ICCPR*; the *European Convention on Human Rights* (*ECHR*);[298] the *Charter of Fundamental Rights of the European Union*

296 See the following case law on the reference to the right to protest: *Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another* [2022] 3 All SA 466 (GJ); 2022 (5) SA 570 (GJ) para 1; *Go Touch Down Resort-Season CC and Another v Farm Rural Informal Dwellers Association and Another* (60735/2021) [2022] ZAGPPHC 50 (20 January 2022) paras 42-43 and *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* [2019] ZACC 40; 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC) para 9. Also see Ngcamu 2019 *The Journal for Transdisciplinary Research in Southern Africa* 3; Nsibirwa 2016 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/394-protesting-against-other-s-rights; Lancaster 2016 *Institute for Security Studies* 2 2.

297 See section 2.3.2.1, 2.3.2.2 and 2.3.2.3 below.

298 *European Convention on Human Rights* (1950). Hereafter referred to as the *ECHR*.

(*European Charter*);[299] the *American Convention on Human Rights* (*ACHR*);[300] and the *African Charter on Human and People's Rights* (*ACHPR*).[301]

2.2.4.1 International instruments

In 1948, the *UDHR* provided for fundamental human rights which are universally protected. These fundamental human rights are regarded as the common standard by which all countries must abide and everyone is entitled to.[302] The *UDHR* was declared as customary international customary law to which all countries are universally obliged to follow.[303] Countries as member states to the *UDHR* committed themselves to the promotion of respect and observance of the fundamental human rights so contained in the *UDHR*.[304] One of the rights that was recognised, included the right to freedom of opinion and expression[305] as well as the right to freedom of peaceful assembly and association.[306] The *UDHR* and the subsequent recognition of the rights contained therein, followed as a result of an agreement between members of the international community after the Second World War to prevent similar occurrences in the future. The objective was to protect the rights and freedoms of all individuals which required protection to ensure freedom, equality, and dignity. These rights and freedoms extended to civil and political rights, which included the right to freedom of assembly.[307]

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299 *Charter of Fundamental Rights of the European Union* (2000). Hereafter referred to as the *European Charter*.

300 *American Convention on Human Rights* (1969). Hereafter referred to as the *ACHR*.

301 *African Charter on Human and People's Rights* (1981). Hereafter referred to as the *ACHPR*.

302 See the Preamble of the *UDHR*.

303 See Esterling 2021 *International Journal on Minority and Group Rights* 281. Also see Schabas *The Customary International Law of Human Rights* 9-39 on the emergence of customary international law and human rights.

304 See the Preamble of the *UDHR*.

305 Article 19 of the *UDHR*.

306 Article 20 of the *UDHR*. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 50-51.

307 See the following on the history of the *UDHR*: Waltz 2002 *Third World Quarterly* 437–448; Amnesty International date unknown https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/; United Nations date unknown https://www.un.org/en/about-us/udhr/history-of-the-declaration#:~:text=World%20leaders%20decided%20to%20complement,the%20General%20Assembly%20in%201946; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 50-51.

In 1966, the *ICCPR*[308] recognised the right to peaceful assembly.[309] The right also included a limitation that was absent from the *UDHR*. The right to peaceful assembly may be limited or restricted when it is "necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[310] The implication is that although the right to peaceful assembly is recognised as an important civil and political right, it may be justifiably limited or infringed should one of the abovementioned circumstances present itself. Thus, the right to protest should be exercised in a manner which does not pose a threat to public order, safety, and security.

The United Nations Human Rights Committee adopted the *General Comment No. 37 on the Right to Peaceful Assembly* in 2020 that highlighted some key viewpoints regarding the extent of the right.[311] The *General Comment* indicated that the right to peaceful assembly is important for the individual autonomy of the citizen.[312] This right is, however, mostly exercised in a collective[313] manner to advance the needs and interests of the community at large. Also, this right is key in the context of a system of participatory governance which is characteristic of a democracy.[314] It is submitted that the right to assembly enables the citizenry by means of protests, to pursue *inter alia* inclusive public participation in the affairs that affect their development.[315] The argument is therefore made that the right to peaceful assembly, considering the participatory nature thereof, includes resorting to protest to address grievances, communicate dissatisfaction and disapproval towards government laws, policies or actions.

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308 South Africa signed the *ICCPR* in October 1994 and later ratified it in December 1998.
309 Article 21 of the *ICCPR*. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 50-51.
310 Article 21 of the *ICCPR*. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 50-51.
311 See the provisions of article 21 of the *ICCPR* as the *General Comment* is providing a comprehensive overview on the right to protest.
312 *General Comment* 1.
313 *General Comment* 1, 4.
314 *General Comment* 1. Also see Munzhedzi 2020 *African Journal of Governance and Development* 93.
315 See *General Comment* 1-2.

The scope of the right to peaceful assembly suggests that it must be exercised in a peaceful or non-violent manner.[316] Put differently, the right to assembly is only legally protected when its exercise is not violent.[317] The conduct of the participants must not exceed the limits of violence.[318] Violence of authorities directed at the participants of a peaceful assembly does not place the assembly at jeopardy to lose its protection.[319] A key consideration in the context of the protection of assemblies is the fact that disruptions caused, for example, to the flow of the pedestrian or vehicular traffic will not result in the protection being negated.[320]

From the reading of the international instruments, it is clear that the right to assemble manifests as an important political and civil right in a democracy which is a key participatory measure. This right may only be restricted if the public order, national safety and security necessitate it. The right to protest is internationally recognised and protected as a collective individual right.

2.2.4.2 Regional instruments

Following on the international instruments,[321] regions also incorporated a right to assembly in their regional instruments. Article 11 of the *ECHR*, for example, provides for the freedom of assembly and association[322] which is deemed to be a right of all citizens in countries which ratified the *ECHR*. This right or freedom entails the fact that everyone has the right to assemble peacefully.[323] Furthermore, the *ECHR* provides for limitations on the right to peaceful assembly which are "prescribed by law and necessary in a democratic society".[324] It is submitted that the right to protest is considered central to participatory governance in a democracy and the

316 *General Comment* 15.
317 *General Comment* 15,18.
318 *General Comment* 7,18.
319 *General Comment* 18.
320 *General Comment* 377.
321 See section 2.2.4.1 above.
322 Article 11 of the *ECHR*.
323 Article 11(2) of the *ECHR*.
324 See article 11(2) of the *ECHR*. "…in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

ECHR made the commitment to protecting same. Participation is not the only reason why protest is resorted to; these other reasons will be addressed later.[325]

The case law of the *European Court of Human Rights* (European Court)[326] provides some insight into and guidance for the interpretation and protection of the right to protest within the region. It shows, for example, that a greater sense of tolerance exists towards non-violent protests which may be disruptive; the right to protest has limits and may be restricted, considering the violent nature thereof; and the dispersal of violent protests needs to be proportionate to the extent of the violence.

In *Primov and Others v Russia*, [327] the issue before the court dealt with the failure of the protesters to give notice of their intended protest within the prescribed timeframe. Regardless of this, the European Court found that the protesters could be pardoned for not abiding by the prescribed timeframe as they made a genuine attempt to notify the authorities of the intended protest.[328] The European Court also dealt with the dispersal of the protest by the police. The court found that in the instances where the protesters blockaded a road and attacked the police, the intervention by the police was justified to disperse the protesters and arrest the relevant violent protesters.[329]

The European Court in *Taranenko v Russia*[330] affirmed that although protest may cause a disturbance or public disorder, the peaceful nature thereof should not be discarded. The court made a favourable finding towards greater tolerance for disturbances of public order caused by non-violent protest, contrary to the instinctive prevention thereof due to the potential disturbance it may cause. In *Kudrevičius and Others v Lithuania*[331] the European Court condemned the arrest and conviction of protesters who were disruptive during a non-violent protest. The

325 See sections 2.3 and 2.9 below.
326 *European Court of Human Rights*. Hereafter referred to as the European Court.
327 *Primov and Others v Russia* 2014 17391/06 (European Court).
328 *Primov and Others v Russia* 2014 17391/06 (European Court).
329 *Primov and Others v Russia* 2014 17391/06 (European Court).
330 *Taranenko v Russia* 2014 19554/05 (European Court).
331 *Kudrevičius and Others v Lithuania* 2013 37553/05 (European Court).

court furthermore found that the arrest and conviction of the protesters were not proportionate to the non-violent disruptive nature of the protest.

In *Pentikäinen v Finland*[332] the court found that the police were justified when arresting protesters who refused to obey orders to disperse a violent protest. *Abdullah Yasa and Others v Turkey*[333] dealt with the use of force by law enforcement. In the last mentioned *case*, the court found that the use of teargas to disperse protesters during a violent protest was justified. However, the firing of teargas canisters directly at the protesters could not be justified due to the dangerous nature thereof. The court also noted that the legal rules applicable to the use of lethal force should be applied in this case.

In *Gün and Others v Turkey*, the European Court concerned itself with the 'fair balance' which is required where the protection of public safety and the freedom to demonstrate are in direct conflict.[334] The court emphasised that this freedom to demonstrate should not be arbitrarily restricted unless the relevant protester committed a reprehensible act, that is an unlawful act. This will typically include instances where the protesters resort to violence during the protest.[335]

The importance of the state's duty to protect the right to life when force is used to disperse violent protesters was the main legal issue in *Aydan v Turkey*.[336] In this case the deceased, a non-protesting person, was killed near an occurring protest when the police attempted to disperse the protest. The deadly force used by the police in this case was not required or necessary as the protest did not pose a threat to life or severe damage to property.

In the European context, the disruptive nature which protest may take, does not limit the protection afforded thereto by the *ECHR*. A consistent prohibition and curbing of violent protest remain clear as these exceed the limits of what is deemed

332 *Pentikäinen v Finland* 2014 11882/10 (European Court).
333 Abdullah Yasa and Others v Turkey 2013 44827/08 (European Court).
334 Also see *Kasparov and Others v Russia* 2013 21613/07 where the European Court dealt with the proportionality of forceful interventions by the police in order to prevent public disorder.
335 *Gün and Others v Turkey* 2013 8029/07 (European Court).
336 *Aydan v Turkey* 2013 16281/10 (European Court).

to be a peaceful assembly. Disruptive protest may be acceptable as long as it remains non-violent. A non-violent disruptive protest should be tolerated as only violent protests may be restricted and dispersed.

The European Charter recognises the *ECHR* and commits the member states to the rights and freedoms provided for in the *ECHR* as well as those set out in the European Charter.[337] The European Charter recognises and protects the freedom of thought,[338] freedom of expression,[339] and freedom of assembly and association.[340] A perusal of the provisions of both the *ECHR* and the European Charter demonstrates a strong connection between the two European instruments.[341] The provisions of the European Charter resemble those of the *ECHR* as the influence of the *ECHR* on the European Charter is evident.[342] The rights and freedoms provided for in these two instruments must be considered *in tandem*.[343]

In the African context, the *ACHR* also recognises and guarantees the right to the freedom of assembly. This right must be exercised without arms.[344] The *ACHR,* similar to the *ICCPR* and *ECHR,* also provides for the limitation of the right to protest in certain circumstances.[345] Consequently, the right to protest may only be exercised in a peaceful manner, without arms.[346] Importantly, the right to protest may also be limited where it will be in the interests of national safety and security as well as to protect the rights of others, for example, to prevent any injury to individuals or damage to their property.

For purposes of and importance to Africa, article 11 of the *ACHPR* states that "every individual shall have the right to assemble freely with others."[347] However, this right

337 See Preamble of the *European Charter*.
338 Article 10(1) of the *European Charter*.
339 Article 11(1) of the *European Charter*.
340 Article 12(1) of the *European Charter*.
341 See Tamba *The Relationship between the EU Charter and the ECHR in the EU and the EEA* 10.
342 Tamba *The Relationship between the EU Charter and the ECHR in the EU and the EEA* 12-13.
343 Tamba *The Relationship between the EU Charter and the ECHR in the EU and the EEA* 22.
344 Article 15 of the *ACHR*.
345 See article 11(2) of the *ECHR*. Also see article 21 of the *ICCPR*.
346 See article 20 of the *UDHR*. Also see article 11 of the *ECHR*; article 21 of the *ICCPR*; article 15 of the *ACHR*.
347 Article 11 of the *ACHPR*. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conclict Studies* 52.

may be limited in the interests of safety and security, amongst other circumstances.[348] In 2016, the African Commission on Human and Peoples' Rights developed and adopted *Guidelines on Freedom of Association as Pertaining to Civil Society and Guidelines on Peaceful Assembly* (*ACHPR Guidelines*)[349] in terms of article 45(1)(b) of the *ACHPR.*[350] These guidelines, although only a starting point, are aimed to set clear standards on the right to freedom of assembly and to provide some guidance to African countries so as to navigate the emerging challenges associated with this right.[351] A need was identified to guide African countries on relevant measures to respect, protect and fulfil the right to freedom of assembly.[352] What the *ACHPR Guidelines* also set out to do, is to strengthen the obligation set forth in article 11 of the *ACHPR*,[353] namely that African countries guarantee, respect and protect this right.[354] Not all of the states in Africa allow peaceful protests, despite the fact that these regional documents as well as their own constitutions protect the right to assemble. Nigeria is particularly known for its police brutality against protesters.[355]

The peaceful nature, as an element of assemblies, is an important qualification to the right to assembly as recognised by the above discussed instruments.[356] This is also an inherent element of the right in the *ACHPR* and *ACHPR Guidelines*.[357] Any

348 Article 11 of the *ACHPR*. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conclict Studies* 52.

349 African Commission on Human Rights African Commission on Human Rights *Guidelines on Freedom of Association and Assembly in Africa* 2016. Hereafter the *ACHPR Guidelines*. See *ACHPR Guidelines* 4.

350 See article 45(1)(b) of the *ACHPR*: "The functions of the Commission shall be to promote Human and Peoples' Rights and in particular to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations."

351 *ACHPR Guidelines* 4.

352 Preamble of *ACHPR Guidelines*.

353 *ACHPR Guidelines* 4.

354 See items 66-68 of the *ACHPR Guidelines*.

355 See in this regard Ekeke 2023 *Journal of African Law* 317-332; Aina-Pelemo 2023 *African Journal of Legal Studies* 504-528; Ecomo 2023 *AHRLJ* 156-181.

356 See article 20 of the *UDHR*. Also see article 11 of the *ECHR*; article 21 of the *ICCPR*; article 15 of the ACHR.

357 Item 70 of the *ACHPR Guidelines*. Also see article 11 of the *ACHPR*. "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others." From the reading of this

action by the protesters which temporarily hinders, impedes or obstructs the occurrence of activities in communities will not be regarded as being violent, but as peaceful.[358] It is submitted that these hinderances, impediments or obstructions should not be of a permanent nature as they are purposed to support and advance the objective of the undertaken assembly. In the context of Europe, the European Court viewed these hinderances, impediments or obstructions as disruptive but not as violent. According to the European Court, there must be greater tolerance towards the disruptive nature of peaceful protest.[359]

It is important to note that the *ACHPR Guidelines* state that isolated acts of violence during said assembly do not render the entire protest as violent.[360] Similarly, this is the view held by the European Court regarding isolated acts of violence during peaceful protest. The violent individual or individuals must be removed by the authorities (police) without them dispersing the assembly[361] in order to protect the fundamental right of the remaining protesters.

The *ACHPR Guidelines*, different to the other regional instruments, further provide that in order to exercise the right to assemble, no prior authorisation is needed from the authorities. The requirement of prior notification may only be imposed by the authorities (e.g. the police) to facilitate the execution of this right as well as to put the required measures in place to protect the rights of the larger community.[362] Where necessary, certain conditions may be imposed in order to protect the rights

article, violence is prohibited as inferred, as it may result in the limitation of the right to assemble as violence would for example pose challenges and risk to the safety of others. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.

358 Item 70 of the *ACHPR Guidelines*. "Peaceful" shall be interpreted to include conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes, or obstructs the activities of third parties."

359 See *Kudrevičius and Others v Lithuania* 2013 37553/05 (European Court). The European Court condemned the arrest and conviction of protesters who were disruptive during a non-violent protest. The court furthermore found that the arrest and conviction of the protesters were not proportionate to the non-violent disruptive nature of the protest. It would appear the court was more tolerant towards disruptive protest.

360 Item 70(b) of the *ACHPR Guidelines.*

361 Item 70(b) and 98 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

362 Items 71 and 72 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa.*

of others.[363] Thus, it seems that the intention of the notification regime is not to hamper the right to assemble but to protect the other members of the community. Also, assemblies may not automatically be regarded as illegal in cases where there is a failure to notify the relevant authority of the intended protests.[364] The *ACHPR Guidelines* furthermore state that where a notification regime exists and there is a failure to notify the authorities regarding the intended protests, the protests may not be dispersed merely due to such failure.[365] When authorities disperse an assembly, it must be the last resort available to the authorities. This may be the case "where there is violence or an imminent threat of violence or of a violation of rights outweighing the violation that will be caused through the dispersal".[366] The *ACHPR Guidelines* therefore strongly condemn violence by protesters or authorities during a protest.[367]

The *ACHPR Guidelines* also deal with the use of force by the authorities. Before the use of force, the authorities must take all steps to avoid the use of force.[368] As part of the fundamental principles of the *ACHPR Guidelines*, the use of force must be regarded as the last resort in order to police protests, and must be necessary and proportionate in the protection of the rights of others.[369] Lethal force must only be resorted to, to protect life.[370] Also, if there is a refusal by the protesters to disperse, force may never be used in such a case.[371]

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363 Items 71, 72, 83, 89, 90 and 91 of the *ACHPR Guidelines*.

364 Item 71(b) of the *ACHPR Guidelines*. If no notice is provided, the assembly must not be dispersed based mainly on the fact that no notification is file with the relevant authority. The *ACHR Guidelines* also do not favour "overly bureaucratic procedures" when referring to the notification regime.

365 Item 92 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

366 Item 92 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

367 Item 78 and 98 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

368 Item 98 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

369 Fundamental Principles of the *ACHPR Guidelines*. Also see item 85 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

370 Item 98 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

371 Item 85 of the *ACHPR Guidelines*. Also see African Commission on Human and Peoples' Rights *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*.

The abovementioned regional instruments all recognise, guarantee, and protect the right to freedom of assembly. They do not specifically refer to the right to protest as such, but such a right is inferred, considering that the freedom to assemble is prominently exercised and manifesting in the form of civil protest.[372] There appear to be no significant differences in the provision for the right to freedom of assembly. However, it is important that this right is guaranteed in a manner which has regard to the rights of others and the community at large.[373] Thus, a balance must be struck between the rights of the protesters and non-protesting members of a community.[374]

It is also important to note that these instruments also make provision for the limitation of the right to protest, as this right is not absolute. The *ECHR*, European Charter and *ACHR* all guarantee the right to peaceful protest whilst the *ACHR* goes further to state that these protests must occur unarmed.[375] The *ACHPR* merely states that this right is to be taken freely but may be limited when it is in the interests of safety and security.[376] Whilst the *UDHR* does not provide for the limitation of the right to protest, the *ECHR*, *ICCPR* and *ACHR* allow for the limitation of this right based on the law or when the democratic society necessitates it. The limitations to the right to protest may be based on "national security", "public safety", "public order", or the "protection of the rights of others".[377]

The international law regime suggests and affirms the importance of the right to protest, which is regarded as a universal right that everyone is entitled to. The regional instruments further emphasise the importance of this right and provide guidance to countries (member states) as to the implementation as well as the limits

372 See section 1.3 and 2.2.3 above.
373 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 12.
374 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 13.
375 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 13.
376 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 13.
377 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 13.

inherent to the execution of said right.[378] The right to protest as a civil and political right is fundamental in a democratic dispensation. Protest is an important mechanism in the pursuit of participatory governance. This mechanism provides the citizenry with a means to communicate their grievances, dissatisfaction, or disappointments beyond the other available means to do so. The right to protest has an enabling character as it may be resorted to in the enforcement of other important rights. In the next paragraph the emerging forms of civil protest action in South Africa are discussed in more detail.

2.2.5 Emerging forms of civil protest action in South Africa

> Activism and protest in a democratic dispensation requires a commitment to engagement in all the means at the disposal of the citizenry to drive collective action and create the critical mass needed to bring pressure to bear on power structures which may require reform.[379]

In a democratic dispensation, protest as a form of engagement fulfils an important role to drive matters of collective importance as well as the demand for reform. This may extend to protest as a means to address important matters which may, for example, be important for the development of municipalities.

Protest is regarded as a means of public participation or public involvement in a democratic dispensation.[380] The narrative which underlies protest is to put pressure on government and to make the functioning thereof challenging. Put differently, the aim of protest is to express discontent and dissatisfaction with the *status quo* by exerting pressure to achieve social change.[381]

South Africa has a well-documented history of protests[382] during the fight against the exploitation and oppression experienced by black people under the apartheid system.[383] Protests are regarded as a recurring fact of the political landscape which

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378 Commonwealth Secretariat "Freedom of Expression Association and Assembly: Best Practice" 13.

379 Binedell and Oosthuizen 2016 https://www.dailymaverick.co.za/article/2016-10-05-rethinking-protest-in-a-constitutional-dispensation/.

380 Woolman "Assembly, Demonstrations and Petition" 378.

381 See Binedell and Oosthuizen 2016 https://www.dailymaverick.co.za/article/2016-10-05-rethinking-protest-in-a-constitutional-dispensation/.

382 See section 2.4 below.

383 Duncan *Protest Nation* 1.

became prominent in a quest for reform or change in democracies.[384] It is submitted that protest action is often used to command and force change. It is further submitted that historically, protest played an important role in the fight for liberation from all kinds of oppression. For purposes of the current research, the recourse to protest action is considered through a different lens as a measure to express dissatisfaction and restore good governance.

According to Berrada,[385] history indicates and justifies that the citizenry will take a stand by addressing the *status quo* or to demand change. This resort to taking a stand is evident through the large wave of protests which started to shake the world from 2006 and increased significantly until 2013.[386] During this period, it is reported that the following mechanisms were the most commonly used: marches, protest assemblies, occupation of public spaces, and civil disobedience or direct action.[387] These are examples of conduct which may resort under protests although these examples might be peaceful, disruptive or violent.[388]

Underlining the occurrence of protests, Ortiz noted the following as the most common grievances and demands that were made during protests that occurred:[389] 'economic justice',[390] 'failure of political representation and political systems',[391]

384 See Wihl 2018 *Israel Law Review* 301,309. Also see Arce and Rice "The political consequences of protest" 1; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 4; Duncan *Protest Nation* 3; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.

385 Ortiz *et al* "World Protests 2006-2013" 12. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152.

386 Ortiz *et al* "World Protests 2006-2013" 12. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.

387 Ortiz *et al* "World Protests 2006-2013" 32.

388 See section 1.4 above.

389 Ortiz *et al* "World Protests 2006-2013" 14.

390 The following are listed to be included as part of the grievance or demand: reform of public services, fiscal justice, labour conditions, inequality, low living standards, land reform, pension reform, high fuel and energy prices, high food prices, and housing.

391 The following are listed to be included as part of the grievance or demand: lack of real democracy, corporate influence, deregulation and privatization, corruption, failure to receive justice from the legal system, transparency and accountability.

'global justice'[392] and the 'rights of people'.[393] Unsurprisingly, the target of most protests is the government or ruling party of the relevant country.[394] However, it is submitted that almost 63% of the recorded protests worldwide are unsuccessful in the sense that they do not achieve the intended grievance or demand.[395] The unsuccessful nature thereof is ascribed to the protests not achieving the intended outcome as determine in the conceptualisation of the purpose of the protest. In South Africa, the following reasons are used in the protests landscape: the lack of political will,[396] the urge for development,[397] political accountability,[398] poor service delivery,[399] financial and social hardship,[400] and the lack of consultation and public participation in service delivery and related matters.[401]

Significant evidence exists to suggest that communities more often than not have exhausted the peaceful methods inclusive of internal or natural processes to raise concerns.[402] However, South Africa has recorded a new trend in that the accepted governance structures by means of which communities should communicate, negotiate and participate, are jettisoned or regarded as failures.[403] In a response

392 The following are listed to be included as part of the grievance or demand: environmental justice, free trade and the G20.

393 The following are listed to be included as part of the grievance or demand: ethnic and racial rights, labour rights; women's rights, right to freedom of assembly, religious issues, rights of Lesbian, Gay, Bisexual, and Transgender (Hereafter referred to as LGBT) people, immigrants' rights.

394 Ortiz *et al* "World Protests 2006-2013" 34.

395 Green 2014 http://blogs.worldbank.org/publicsphere/world-protests-2006-13-where-how-big-about-what-did-they-achieve-anything.

396 Botes 2018 *African Journal of Public Affairs* 245. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

397 Botes 2018 *African Journal of Public Affairs* 247. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

398 Botes 2018 *African Journal of Public Affairs* 246. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

399 Botes 2018 *African Journal of Public Affairs* 248. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173, Munzhedzi 2020 *African Journal of Governance and Development* 95.

400 Botes 2018 *African Journal of Public Affairs* 249.

401 Botes 2018 *African Journal of Public Affairs* 250. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

402 Botes 2018 *African Journal of Public Affairs* 245. Also see Sokutu 2018 https://www.citizen.co.za/news/south-africa/1964505/violence-in-protests-becoming-bargaining-tool-iss-researcher/.

403 Botes 2018 *African Journal of Public Affairs* 245. Also see Sokutu 2018 https://www.citizen.co.za/news/south-africa/1964505/violence-in-protests-becoming-bargaining-tool-iss-researcher/.

thereto, violent conduct during protest has become an accepted method of engaging with government.[404] Lancaster[405] argues that communities are of the opinion and belief that they will be heard by government officials or decision-makers pertaining to their grievances or demands when they engage in violent protests.[406] Considering Lancaster's argument, it is submitted that the strength of the protest lies in the disruptive and violent nature of the protest, otherwise these marginalised communities will be ignored.[407]

2.3 Defining civil protest

As stated in Chapter 1,[408] the right to assemble, picket and demonstrate, is also referred to as the right to protest; these have many manifestations, including but not limited to, civil disobedience, peaceful protests, strikes, self-help, defence of a collateral challenge, and violent protests. The definitions of these manifestations are discussed in this paragraph in order to build on the definition provided in Chapter 1 and to formulate a definition of civil protest for purposes of this thesis. The discussion of the definitions draws on the historical context above, as well as the scholarship in this field.

2.3.1 Civil disobedience

Authors have different views on the meaning of civil disobedience. The views held by Keeping, Hall, Cohen, Rawls, Offor and Heyns, for example, merit brief introduction.

Keeping defines civil disobedience as a public, non-violent and conscientious violation of law.[409] It may typically put pressure on government to take steps to address injustices in society by amending or changing existing laws, policies and/or

404 Botes 2018 *African Journal of Public Affairs* 245. Also see Sokutu 2018 https://www.citizen.co.za/news/south-africa/1964505/violence-in-protests-becoming-bargaining-tool-iss-researcher/.
405 Lancaster 2016 *Institute for Security Studies* 5.
406 Also see Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 242-253.
407 See the arguments by Lancaster 2016 *Institute for Security Studies* 5 and Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 242-253.
408 See section 1.4 above.
409 Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/.

government actions.[410] Civil disobedience therefore involves the intentional violation of the laws of a country in order to achieve an outcome in the public interest.[411] This intentional violation is considered as a form of protest which is morally justified according to the belief of the civil disobedient.[412] Hall[413] describes civil disobedience as a form of "political protest over an unjust law or policy committed by violating law conscientiously, openly, and non-violently, with respect for the interests of others and with acceptance of punishment." It is submitted that the reference to unjust law or policy is broad enough to include the matters related to the failure as well as the unjust implementation of laws, policies or any other directive which are perceived to be just and legitimate.[414] Thus, civil disobedience may occur in response to the failure of public authorities to act in accordance with what would be regarded as just in relation to the implementation of relevant laws, policies or any other directives.[415]

The unjust implementation in the South African local government context may for example include instances where government does not adhere to the prescripts of legislation, policies, or directives when the implementation should be dictated by and be in accordance with the abovementioned.[416] Considering this context, the Integrated Development Plan (*IDP*)[417] as a strategic government plan / policy could be an example. Briefly, the *IDP* sets out what the municipality seeks to achieve over a five-year period within the demarcated area they are responsible for.[418] The *IDP* as a policy only has significance for municipalities when it is implemented by the municipal administration in line with the content thereof.[419] The failure to implement

410 Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/. Also see Carbonara, Parisi and von Wangenheim 2012 *International Review of Law and Economics* 285.
411 Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/.
412 Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/.
413 Hall 2007 *Cardozo Law Review* 2085, 2086. Also see Carbonara, Parisi and Von Wangenheim 2012 *International Review of Law and Economics* 285; Munzhedzi 2020 *African Journal of Governance and Development* 95.
414 See Munzhedzi 2020 *African Journal of Governance and Development* 90.
415 Also see Carbonara, Parisi and Von Wangenheim 2012 *International Review of Law and Economics* 285.
416 See Munzhedzi 2020 *African Journal of Governance and Development* 90.
417 See section 3.5.1.2 below. Hereafter referred to as the *IDP*.
418 See section 3.5.1.2 below. Also see Munzhedzi 2020 *African Journal of Governance and Development* 95-96.
419 Munzhedzi 2020 *African Journal of Governance and Development* 90.

will negatively impact on service delivery which may inadvertently have a similar impact on the developmental local government mandate of municipalities.[420]

Cohen[421] defines civil disobedience as an illegal, public, and non-violent protest. In order to establish the illegality of the act, the civil disobedient must actively do something, or must deliberately refuse to do something. The protest must be a public act in order to be regarded as an act of civil disobedience.[422] Cohen perceives non-violence as an essential element of civil disobedience.[423] In respect of the non-violent nature of civil disobedience, he argues that the civil disobedient must be willing to suffer the consequences of his or her actions and meet the violence directed at him or her with non-violence. [424]

Rawls'[425] definition of civil disobedience is similar to the abovementioned definitions except that his definition refers to a political act. It is submitted that Hall's reference to political protest and Rawls' political act are similar. According to Rawls, protest is regarded as a political act; hence the reference to political act[426] in this context assumes the extent of the reference thereto.[427] Rawls[428] warns that the injustice of a law, policy, or government decision-making does not automatically render the intended civil disobedience justified. However, civil disobedience may be needed when there is no longer cooperation between the relevant parties and the fundamental principle of the democratic regime provides for such action.[429] This implies that all other available remedies must first be exhausted in order for the

420 See section 2.5.5 below. Also see Munzhedzi 2020 *African Journal of Governance and Development* 90.
421 Cohen 1964 *The Nation* 258. Also see Cohen 1966 *Rutgers Law Review* 2.
422 Cohen 1964 *The Nation* 257. Also see Cohen 1966 *Rutgers Law Review* 2.
423 Cohen 1964 *The Nation* 257. Also see Cohen 1966 *Rutgers Law Review* 2.
424 Cohen 1964 *The Nation* 258. Also see Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 11.
425 Rawls 1971 *A Theory of Justice* 364. Also see Bleiker 2002 *Social Alternatives* 37; Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/
426 See Rawls 1971 *A Theory of Justice* 364 on what is a political act: "…civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally."
427 See Lipsky 1968 *The American Political Science Review* 1144. Also see Oser 2022 *American Behavioural Scientists* 511-512.
428 Rawls 1971 *A Theory of Justice* 353. Also see Bleiker 2002 *Social Alternatives* 38.
429 Rawls 1971 *A Theory of Justice* 382. Also see Bleiker 2002 *Social Alternatives* 38.

disobedient to seek justification for the acts of civil disobedience. The acts can be undertaken to address the injustices caused by law, policies, or government action, which can include the unjust implementation[430] of municipal laws and policies, for example.

In the South African context, the remedies may typically include those that are provided for in administrative law, available via the constitutional Chapter 9 institutions[431] e.g. the Public Protector,[432] the *SAHRC*[433] and the *AGSA*[434] as well as the judicial system.[435] It can be argued that these remedies all form part of the workings of the formal systems which were created to pursue justice and to facilitate accountability on the side of government, as the central aim of resorting to civil disobedience.[436]

Heyns[437] regards the following as characteristics of civil disobedience. The activity should be illegal,[438] non-violent,[439] open and motivated by conviction as well as political in nature.[440] According to Heyns,[441] any action taken as a form of disobedience falls outside the scope of what is regarded by the authorities as acceptable and tolerable behaviour. Therefore, when people take action in the form of civil disobedience, violence is normally not a part of such action.[442] An illegal, non-violent act must furthermore be executed in the open in order to qualify as an

430 Brynard 2007 *J Public Adm* 357-365; Hoeyi and Makgari 2021 *Public Service Delivery and Performance Review* 1-9.
431 See section 4.6.3 below.
432 See section 4.6.3.1 below.
433 See section 4.6.3.2 below.
434 See section 4.6.3.3 below.
435 See section 4.6.2 below.
436 On accountability, see section 2.9 below.
437 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22.
438 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22. Also see Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 13.
439 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22. Also see Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 14.
440 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22. Also see Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 15-16.
441 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22.
442 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22.

act of civil disobedience. According to Heyns,[443] the convictions of the civil disobedient must correlate with the interests to be advanced through the act of civil disobedience. An act of civil disobedience is further political in the sense that it challenges the authority of the government, either because the disobedient believes that the government leaves him or her no choice but to ignore its enactments, or because he or she exerts himself or herself to challenge the government.[444] The non-payment of toll fees in Gauteng, could serve as such an example.[445]

Keeping[446] argues that civil disobedience has the potential to strengthen the rule of law as well as democracy because it may lead to rectification of injustices and prevention of prevalent disrespect for a government system. Offor[447] states that the right to civil disobedience should be seen as one of the instruments of dissent. He continues that civil disobedience is not only aimed at registering and showing concern with the government, but also at motivating open public debates.[448] Therefore, a government must respect the public's acts of civil disobedience to sustain its democratic structures.[449]

According to McGuigan, civil disobedience is and has served as, a vehicle to achieve a specific purpose.[450] Civil disobedience is in essence illegal with no legal protection,[451] as it entails a clear and direct violation of a law, policy, or government decision-making. The disobedient accepts the punishment for the intentional conduct that exceeds the limits of what is permissible during civil protests.[452] An investigation and determination of the possible justification for any act of civil

443 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22.
444 Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22.
445 See for example *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* 2012 ZAGPPHC 63; Pumzi and Ash 2021 https://www.sowetanlive.co.za/news/south-africa/2021-03-11-e-tolls-standoff-intensifies-as-gauteng-government-says-it-has-made-a-compelling-case/.
446 Keeping 2013 https://www.lawnow.org/civil-disobedience-rule-of-law/.
447 Offor 2007 *Journal for Sustainable Development in Africa* 137.
448 Offor 2007 *Journal for Sustainable Development in Africa* 138.
449 Offor 2007 *Journal for Sustainable Development in Africa* 133.
450 See McGuigan *The Canadian Bar Review* 222-223. McGuigan further refers to various human purposes where civil disobedience served a decisive purpose for example where the act was aimed at the freedom of religion, racial equality, sexual equality, etc.
451 See Wihl 2018 *Israel Law Review* 312.
452 See 4.1 above on what civil disobedience entails.

disobedience depends on the intended purpose or cause it serves.[453] Thus, it needs to be determined what issues lie at the core of the act of civil disobedience and perhaps also the detrimental impact thereof on the broader community.

In extreme and exceptional circumstances civil disobedience will be deemed to be a democratising instrument[454] as the citizenry will be acting in accordance with their consciences, which is indicative of their perceptions and commitments to democracy.[455] On the contrary, it may be argued that their consciences might be in conflict with the nature of democracy and the emanating obligation to respect democracy. The fundamental issue with disobedience is premised on the justification thereof as it opposes the duty to respect and obey the democratic nature of the government to which the citizen has consented.[456] The government based on the representative as well as the participatory nature of democracy demands that the citizens, whether part of the majority or minority group or not, respect and adhere to the law, policy, or action of government.

Considering what democracy and disobedience entail at face value, it appears that disobedience of any sort will pose a problem for democracy.[457] In a constitutional democracy, civil disobedience maintains a fundamental part of the democratic process.[458] As one of the stabilising mechanisms, civil disobedience is aimed at dealing with inherent imperfections in the democratic processes.[459]

The abovementioned descriptions[460] denote civil disobedience as non-violent and peaceful protest to publicly demonstrate the disapproval by the public of a law,

453 McGuigan 1971 *The Canadian Bar Review* 223.
454 Pscorn "Civil disobedience as a democratic practice" 3.
455 Pscorn "Civil disobedience as a democratic practice" 6.
456 Pscorn "Civil disobedience as a democratic practice" 25. Also see Wihl 2018 *Israel Law Review* 310, 311.
457 Pscorn "Civil disobedience as a democratic practice" 25. Also see McGuigan 1971 *The Canadian Bar Review* 224.
458 Wihl 2018 *Israel Law Review* 308.
459 Wihl 2018 *Israel Law Review* 309.
460 See Cohen 1964 *The Nation* 257-258; Cohen 1966 *Rutgers Law Review* 2; Rawls 1971 *A Theory of Justice* 353, 36,382; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Hall 2007 *Cardozo Law Review* 2085-2086; Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 11,13-16; Offor 2007 *Journal for Sustainable Development in Africa* 137-138.

policy or action of government.[461] The non-violent character of civil disobedience requires the absence of any violence or the threat thereof.[462] It has been argued that the presence of violence may defeat the very purpose of civil disobedience, implying that the presence of violence may disregard the action as a form of civil disobedience.[463] Any public or political act aimed at showing dissent in respect of government actions or policy, which includes violence, will not be regarded as civil disobedience. The reason therefore is that violence will render the act as illegal, thus categorically speaking making it a violent protest. It is submitted that for any act or conduct to be regarded as resorting under what is considered as civil disobedience, the presence of violence will result in that act or conduct not falling under same. An important note is that civil disobedience remains contrary to laws of the country and is technically illegal.

Civil disobedience is generally perceived as a peaceful demonstration, gathering, or protest whereby the disobedient citizens communicate or demonstrate their dissatisfaction or disapproval with law, policy, or government decision-making. This may also include the failure of government to act on, or in accordance with, the needs and interests as communicated by the citizenry.[464] Authors and commentators are clear on the absence of violence as a requirement during acts of civil disobedience.[465] Arguments are made to suggest that the presence of violence during acts of civil disobedience will negate the purpose of civil disobedience. Thus, the presence of violence will defeat the purpose of the acts of civil disobedience as it will nullify the intended purpose of the act.[466] The submission in this context is

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461 See Cohen 1964 *The Nation* 257-258; Cohen 1966 *Rutgers Law Review* 2; Rawls 1971 *A Theory of Justice* 353, 36,382; Heyns *A Jurisprudential analysis of Civil Disobedience in South Africa* 22; Hall 2007 *Cardozo Law Review* 2085-2086; Daku-Mante *An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa* 11,13-16; Offor 2007 *Journal for Sustainable Development in Africa* 137-138.

462 Offor 2007 *Journal for Sustainable Development in Africa* 138.

463 Keeping 2013 *Civil Disobedience, Environmental Protest and the Rule of Law*.

464 See Cohen 1964 *The Nation*; Rawls 1971 *A Theory of Justice*; Heyns "A Jurisprudential analysis of Civil Disobedience in South Africa"; Hall 2007 *Cardozo Law Review*; Daku-Mante "An analysis of Civil Disobedience with specific reference to the role of the United Democratic Front in South Africa"; Offor 2007 *Journal for Sustainable Development in Africa*; Wihl 2018 *Israel Law Review* 301.

465 Offor 2007 *Journal for Sustainable Development in Africa* 138. Also see Wihl 2018 *Israel Law Review* 301, 304.

466 Also see Wihl 2018 *Israel Law Review* 301, 304.

that any demonstration, gathering, or protest as an act of civil disobedience that involves some degree of violence, or the threat violence, cannot be classified as an act of civil disobedience. Violence during civil disobedience will nullifiy the nature of civil disobedience and such acts will not be regarded as civil disobedience considering the inherent nature thereof is to be peaceful.

In a democratic society where the individual autonomy and freedom of the citizenry are the focus and are central to their being protected and promoted, it is argued that an obligation to respect the law exists.[467] Where such autonomy and freedom are guaranteed by democracy but are not protected and promoted, a lack of respect for the individual autonomy may be perceived, and the citizenry acting in disobedience of a law, policy, or government decision-making may do so in pursuance of democracy. Acts of disobedience do not pose a threat to the legitimacy of a democratic government as disobedience directed at a specific law, policy, or government decision-making might be in line with some democratic principles.[468] It is argued that civil disobedience is fostered and built into the nature of democratic practices where dissent, disruption, and violent methods are present.[469] Thus, civil disobedience has an important role to fulfil in a democracy.

2.3.2 Peaceful protest

According to Offor,[470] in a democratic government, the right to assemble, picket and demonstrate is guaranteed. The right as guaranteed is fundamental in a participatory democracy as it provides a means for critical engagement between the electorate and representatives.[471] As a mechanism in a democratic dispensation, the

467 Pscorn "Civil disobedience as a democratic practice" 3,7. Also see McGuigan 1971 *The Canadian Bar Review* 269. Also see Spitz 1954 *American Political Science Review* 392.

468 Pscorn "Civil disobedience as a democratic practice" 6. Also see McGuigan 1971 *The Canadian Bar Review* 269.

469 Wihl 2018 *Israel Law Review* 304-305.

470 Offor 2007 *Journal for Sustainable Development in Africa* 137.

471 See *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 65. Hereafter referred to as the *Garvas* case. Also see Woolman "Assembly, Demonstrations and Petition" 378-379.

voiceless and powerless may resort to and exercise the right to assemble in order to enforce and ensure the realisation of their democratic rights.[472]

The right to protest is recognised, guaranteed, and protected as a constitutional right in various constitutions across the world.[473] This section will briefly review the provision for the right to protest in selected European, North American, and African countries. The purpose of the discussion is to highlight the extent of the recognition and protection afforded to the right to protest and the way in which the right manifests in these constitutions. This discussion will also shed further light on the importance of the right to protest as recognised and protected in the international instruments.

2.3.2.1 Constitutional provision for the right to protest in selected European countries

As indicated above,[474] the *ICCPR*[475] and the *ECHR*[476] bestow an obligation on the member states to respect and protect the right of assembly. Several countries have this right in their constitutions, such as Germany, Italy, Portugal, Sweden, and Turkey. Some of these countries also introduced additional legislation to statutorily regulate gatherings. France and the United Kingdom (a former European Union country) do not have a constitutional right, but the United Kingdom has, for example, included such a right in its *Human Rights Act* (*Human Rights Act*).[477]

472 See *Garvas* case para 61, 63. Also see Woolman "Assembly, Demonstrations and Petition" 378.
473 See Du Pisani *et al* 1990 *Journal of Modern African Studies* 573. See sections 2.3.2.1, 2.3.2.2 and 2.3.2.3 below for the reference to the various constitutional provisions made for the freedom of assembly where the right to protest is inferred.
474 See sections 2.2.4.1 and 2.2.4.2 above.
475 See article 21 of the *ICCPR*.
476 See article 11 of the *ECHR*.
477 *Human Rights Act* (United Kingdom), 1998. Hereafter referred to as the *Human Rights Act*.

(i) Countries with constitutions including a right to assemble

The *Grundgesetz für die Bundesrepublik Deutschland* (*Basic Law*)[478] in article 8 gives all German people the right to assemble.[479] This right must be executed in a peaceful and unarmed manner.[480] Instances of physical violence directed against a person or damage to property, are regarded as a threat to the protection afforded to the right of peaceful assembly.[481] Where the protest commences peacefully but escalates into violence, inclusive of violence directed at a person causing harm or damage to property, same will render the protest as violent, consequently compromising the protected status of the protesters. Those individuals or groups who are responsible for the violence must be identified and removed by the police as their right would become restricted. Their removal protects the rights of other protesters and the general status of the protests as peaceful.[482]

An important observation is that the *Basic Law* provides that this right may be exercised without prior notice or permission from the authorities.[483] However, a form of notification pertaining to the protest may be requested in terms of article 8 (2) of the *Basic Law*. The article provides that a restriction may be imposed by a pursuant law where the protest extends to an outdoor assembly.[484] The submission is made that in instances where the protest is outdoor bound, a notice may be required as a restriction to the enjoyment of this fundamental right.

The purpose of the notice is generally to provide the local authorities with the opportunity to ensure that the rights of the non-protesting citizens as well as the protesters are protected. This notification should not be construed as a permission-seeking process. The notice which may be requested, will assist with the prevention of any infringement of rights of the citizenry. Should any risk be identified by the

478 *Grundgesetz für die Bundesrepublik Deutschland*, 1948. Translated from German to English as the *Basic Law for the Federal Republic of Germany*. Hereafter referred to as the *Basic Law*.
479 Article 8(1) of the *Basic Law*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 574; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 52.
480 Article 8(1) of the *Basic Law*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 574.
481 See *Brokdorf* 69 *BVerfGE* 315, 360 (1985).
482 See *Brokdorf* 69 *BVerfGE* 361 (1985).
483 Article 8(1) of the *Basic Law*.
484 Article 8(2) of the *Basic Law*.

local authorities, and they are not in the position to mitigate same, they may declare the intended assembly unauthorised or seek an alternative date for the holding of the assembly.[485]

It is important to note that the required notice period does not infringe on the freedom to freely assemble, but that the spontaneous nature of certain gatherings will excuse the protesters from abiding by the required notice. However, mere urgency by the protesters is not an exception to the notice requirement.[486] It is submitted that the protesters should immediately make their intentions known to the authorities by providing the (required) notice when they are ready to proceed with the intended protest.

Article 17 of the *Constitution of the Italian Republic*[487] acknowledges the right to peaceful assemble as a human right. This right must be utilised in an unarmed manner. No prior notice is required in respect of the exercise of this right. Public assemblies may only be prohibited for reasons relating to public safety and security.[488]

In the *Constitution of Spain*,[489] section 21(1) recognises the right to assemble in a peaceful and unarmed manner.[490] No prior authorisation from the authorities is required.[491] However, where the planned assembly is set to take place in public spaces, the authorities must be notified.[492] The authorities may subsequently only prohibit an assembly if it poses a threat to the public order by virtue of danger to persons or property.[493] The right to assemble is domestically further regulated by the *Organic Law* 9 of 1983 on the Right of Assembly. The right to protest is protected

485 See article 8(1) of the *Basic Law*.
486 *B v R* 850/88 1992 EuGR2 23.
487 *Constitution of the Italian Republic*, 1947. Hereafter referred to as the *Italian Constitution*.
488 Article 17 of the *Italian Constitution.* The *Royal Decree* 773 of 1931 on public order provides the implementing framework for the right to protest in Italy.
489 *Constitution of Spain*, 1978. Hereafter referred to as the *Spanish Constitution*.
490 See article 1 of the *Organic Law* 9 of 1983 on the Right of Assembly.
491 Article 21(1) of the *Spanish Constitution*. Also see article 3 of the *Organic Law* 9 of 1983 on the Right of Assembly.
492 See article 8 of the *Organic Law* 9 of 1983 on the Right of Assembly.
493 Article 21(2) of the *Spanish Constitution*. Also see article 5(b) of the *Organic Law* 9 of 1983 on the Right of Assembly.

in Spain and may only be limited if public order will be disturbed through injuries or death to persons or damage to property.

The *Constitution of Portugal*[494] formulates the right differently and provides that Portuguese citizens have a right to meet and demonstrate. This right entails that every citizen may assemble or demonstrate in public spaces without prior notification or authorisation from the authorities.[495] Similar to the abovementioned constitutions, this right must be resorted to in a peaceful and unarmed manner.[496] Portugal does not have specific legislation to regulate the exercise of this constitutional right. It is submitted that the commitment to the freedom of assembly is not negated by the lack of domestic legislation on the right as this is respected and protected by the *ICCPR* and *ECHR* to which they are a member state.

The *Constitution of Sweden*[497] follows a different approach and comprises four fundamental laws. Chapter 2 of the *Swedish Constitution* specifically deals with the fundamental rights and freedoms of all persons. Article 1 of Chapter 2 generally provides for the freedom of opinion. This encapsulates the provision for the freedom of expression,[498] freedom of assembly,[499] the freedom to demonstrate[500] as well as the freedom of association.[501] The right to protest may be inferred from the reading of these provisions. Chapter 2 of the *Swedish Constitution* further includes certain conditions and limitations for the exercise of the right to protest.[502] Emphasis is placed on the peaceful nature of such protest.[503] Similar to the other countries above, the right to protest may be limited to protect and preserve the public order and public safety should the exercise of the right to protest pose any danger

494 *Constitution of Portugal*, 1976. Hereafter referred to as the *Portuguese Constitution*.
495 Article 45 of the *Portuguese Constitution*.
496 Article 45 of the *Portuguese Constitution*.
497 *Constitution of Sweden*, 1972. Hereafter referred to as the *Swedish Constitution*.
498 See article 1(1) of Chapter 2 of the *Swedish Constitution*.
499 See article 1(3) of Chapter 2 of the *Swedish Constitution*.
500 See article 1(4) of Chapter 2 of the *Swedish Constitution*.
501 See article 1(5) of Chapter 2 of the *Swedish Constitution*.
502 See article 20 to 25 of Chapter 2 of the *Swedish Constitution*.
503 Article 24 of Chapter 2 of the *Swedish Constitution*.

thereto.[504] The limitation of the right to protest also extends to the infringement of the circulation of vehicular traffic.[505]

The *Constitution of the Republic of Turkey*[506] makes provision for the freedom of opinion,[507] freedom of expression[508] and the holding of meetings and demonstrations in an unarmed and peaceful manner.[509] The *Turkish Constitution* specifically states in article 34 that no prior permission is required to hold meetings and demonstrations, which is different from the other rights referred to above.[510] Provision is, however, made for the restriction of the right as is necessary in a democratic society. The following grounds are listed, namely national security, public order, crime prevention, protection of public health, public morals, and the protection of rights and freedoms of others.[511] Turkey is different from the abovementioned countries, in that Turkey's restrictions on gatherings are more severe. *Law No 2911 of 1983 on Meetings and Demonstrations* (*Law 2911*)[512] regulates and restricts the implementation of the right to protest.

Article 10 requires that all members of the organising committee of the intended meeting or demonstration have to sign a declaration. This declaration has to be submitted to the local authority within two days before the commencement of the intended protest. If the members fail to do so, the protest will be declared illegal and it will permit the local administration to resort to all means necessary to disperse the protesters.[513] It is submitted that the right to protest, although recognised in

504 Article 24 of Chapter 2 of the *Swedish Constitution*.
505 Article 24 of Chapter 2 of the *Swedish Constitution*.
506 *Constitution of the Republic of Turkey*. Hereafter referred to as the *Turkish Constitution*.
507 Article 25 of *Turkish Constitution*. Also see Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11.
508 Article 26 of *Turkish Constitution*.
509 Article 34 of *Turkish Constitution*. Also see Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11.
510 Article 34 of *Turkish Constitution*. Also see Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11.
511 See article 13 of the *Turkish Constitution* on the restriction of fundamental rights. Also see article 34 of the *Turkish Constitution* on the restriction of the right to hold meetings and demonstrations; Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11.
512 *Law No. 2911 of 1983 on Meetings and Demonstrations*. Hereafter referred to as *Law 2911*.
513 Article 10 of *Law 2911*. Also see Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 12.

the *Turkish Constitution,* does not enjoy the protection as envisaged per the provision in the Constitution[514] as well as the commitments to the international instruments,[515] which clearly set the peaceful and unarmed nature thereof as parameters.

(ii) Countries without a right to assemble

Since the French Revolution that continued from 1787 to 1799, French citizens are known to protest if they are dissatisfied with government or in general with proposed policies.[516] The *Constitution of France*[517] makes no explicit provision for the right or freedom of assembly. The *French Constitution* in its preamble proclaims the attachment and incorporation of the Declaration of the Rights of Man and of the Citizen (DRMC)[518] into the *French Constitution*.[519] Article 10 of the *DRMC* states that the manifestation of opinions should not be infringed upon as long as these opinions are manifested in a peaceful manner or pose a challenge to maintaining the public order.[520] Article 11 further provides that one of the most important rights, entails the freedom to communicate ideas and opinions.[521] It is submitted that based on articles 10 and 11 respectively, the freedom of assembly and expression may be inferred, manifesting in the form of protest. Furthermore, this inference of the right to protest is strengthened by obligations under the *ICCPR* as well as the *ECHR* although no explicit provision is made for the freedom of assembly.

514 See article 34 of *Turkish Constitution*. Also see Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11.
515 See article 21 of the *ICCPR*; article 11 of the *ECHR*; Hans 2020 "A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society" 11
516 See e.g. Murphy 2011 *Anthropological Quarterly* 977-1009; Franks 1994 *French Politics and Society* 23–40.
517 *Constitution of France*, 1958. Hereafter referred to as the *French Constitution*.
518 *Declaration of the Rights of Man and of the Citizen* (1789). Hereafter referred to as the *DRMC*.
519 Preamble of the *French Constitution*.
520 A 10 of the *DRMC*.
521 A 11 of the *DRMC*.

Although the United Kingdom left the European Union as indicated earlier,[522] it is still a state party to the *ICCPR*[523] and the *ECHR.*[524] The United Kingdom's Constitution does not include a Bill of Rights, which makes it different from the other countries in Europe. In terms of the United Kingdom's *Human Rights Act* (*Human Rights Act*),[525] every person in the United Kingdom has the right to freedom of peaceful assembly.[526] The right to protest can be restricted by the relevant authorities with the safeguard that such restrictions are deemed lawful, necessary, and proportionate to the necessity to limit the right. The legitimate claims which may justify the limitation of the right to protest may include but are not limited to the following: national security and public safety, disorder or criminal elements, health and moral convictions, and the consideration of the rights of others.[527] The legitimate claims may be relied on when lawful restrictions are imposed. These restrictions must be considered necessary in a democratic society.[528] It is submitted that the right to protest is a qualified right which is protected and may only be limited based on the possible legitimate claims which will pose a threat to the democratic society.

The United Kingdom recently passed the *Public Order Act*[529] which restricts public protest by permitting the police to stop and search protesters with[530] and without any suspicion,[531] and creates a range of new offences in relation to protests. These offences as they relate to protests, include the following: locking on to, for example,

522 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019; European Council 2020 https://www.consilium.europa.eu/en/policies/eu-relations-with-the-united-kingdom/the-eu-uk-withdrawal-agreement/.
523 See article 21 of the *ICCPR.*
524 See article 11 of the *ECHR*.
525 *Human Rights Act* (United Kingdom), 1998. Hereafter referred to as the *Human Rights Act*.
526 Article 11(1) of the *Human Rights* Act. Also see Equality and Human Rights Commission 2021 https://www.equalityhumanrights.com/human-rights/human-rights-act/article-11-freedom-assembly-and-association.
527 Equality and Human Rights Commission 2021 https://www.equalityhumanrights.com/human-rights/human-rights-act/article-11-freedom-assembly-and-association.
528 Article 11(2) of the *Human Rights Act*. Also see Equality and Human Rights Commission 2021 https://www.equalityhumanrights.com/human-rights/human-rights-act/article-11-freedom-assembly-and-association.
529 *Public Order Act* (United Kingdom) 2023.
530 See section 10 of the *Public Order Act*.
531 See section 11 of the *Public Order Act*.

an object,[532] obstructing transport works and infrastructure,[533] and interfering with abortion services.[534] Further provision is made for serious disruption prevention orders by a court where a protest-related offence was committed.[535] Since the passing of the Act, it seems that police violence against the protesters has increased.[536] The United Nation's High Commissioner for Human Rights was critical of the new *Public Order Act* in that it unduly restricts the right to protest as it is not necessary in a democratic society and contrary to the applicable international law.[537] As a state party to the *ICCPR* and *ECHR*, the United Kingdom has an obligation to respect and protect the right as canvassed in the international and regional instruments.[538] It is submitted that the *Public Order Act* exceeds the extent of powers necessary for the police to protect national security and public order.[539]

(iii) Preliminary remarks

The selected European countries, in accordance with the discussed international and regional instruments[540], recognise the right to assemble or demonstrate. None specifically refers to the right of protest, but such a right can be inferred from the provisions of the constitutions and the specific legislation regulating gatherings. Emphasis is placed on the peaceful nature thereof as an element and some countries specifically state that the protest should be conducted unarmed. The extent of the protection afforded to the right to protest is restricted in some of the countries. It has been noted above that restrictions must be lawful, necessary, and proportionate to the limitation of the right. Some of the constitutions, and legislation that regulates gatherings, list several limitations, including disruption of the public order, national

532 See sections 1-5 of the *Public Order Act*.
533 See sections 6-8 of the *Public Order Act*.
534 See section 9 of the *Public Order Act*.
535 See sections 20-29 of the *Public Order Act*.
536 See e.g. Braverman 2023 *Times* 9; Stephens-Griffin *et al* 2021 *Critical Criminology* 199-214.
537 Also see Feldman 2023 *Victoria University of Wellington Law Review* 155-182.
538 Office of the High Commissioner for Human Rights (United Nations) 2023 https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill.
539 Office of the High Commissioner for Human Rights (United Nations) 2023 https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill.
540 See section 2.2.4 above on international and regional instruments.

security, public safety, criminal activities, health, and moral implications as well as the limitation of the rights of others. If one takes the United Nations Human Rights Committee's General Comment, referred to above,[541] into account, traffic will not be regarded as a limitation. Regarding the legitimacy of protesting without authorisation, no prior permission is required by the protesters; however, a notification may be required in domestic legislation for purpose of the public order as well as the safety and security of all involved. Importantly, this notice may be required where it is regarded as necessary in a democratic dispensation to protect national safety and security as well as the rights of others.

2.3.2.2 Constitutional provisions for the right to protest in selected North American countries

Both Canada and the USA are members as state parties to the *ICCPR*,[542] while the USA is in addition, a signatory to the *ACHR*,[543] both of which bestow an obligation on the member states to respect and protect the right of assembly. Accordingly, the Constitutions of the two countries also make provision for the inclusion of such a right.

The United States of America in The First Amendment to the *Constitution of the United States of America*[544] makes provision for the right to assemble in a peaceful manner.[545] The First Amendment prohibits the drafting of any legislation which will infringe on the right to assemble peacefully.[546] Regardless of this, the right to assemble is not absolute.[547] It is important to note that the First-Amendment right does not guarantee the right to freedom of assembly if the danger of disorder exists. The First Amendment allows its citizens "to petition the government for a redress

541 See section 2.2.4.1.
542 See article 21 of the *ICCPR*.
543 See article 15 of the *ACHR*.
544 *Constitution of the United States of America*, 1787. Hereafter referred to as the *U.S Constitution*.
545 First Amendment of the *U.S Constitution*. Also see Smith 20 *Public Affairs Quarterly* 185-204; Du Pisani *et al* 1990 *Journal of Modern African Studies* 574.
546 First Amendment of the *U.S Constitution*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 574.
547 See article 15 of the *ACHR* which make provisions for inherent limitations and restrictions. The United States of America is a signatory to the *ACHR* which acknowledge the commitment to act in line with the provisions of the instrument although not being a member state.

of grievances." Furthermore, the limitation of the right to protest may occur where the use of force or violence seems more likely to occur during such action. The right to protest may be limited when violence or the threat of violence is present but local authorities are discouraged from limiting the right to protest in an arbitrary manner.[548] The argument is raised that some members of the public would trade their right to protest for a peaceful existence.[549] This is, however, not true in all instances, as most Americans will refuse any restriction of their fundamental rights.[550]

The Canadian *Constitution Act*[551] in Part 1 includes the Canadian Charter on Rights and Freedoms.[552] Section 1 of the Canadian Charter clearly sets the tone for the guarantee and protection of the rights and freedoms so provided for in this legal instrument. These rights and freedoms may only be limited or restricted by reasonable means which may be justified in a free and democratic society.[553]

Section 2 of the Canadian Charter deals with the fundamental freedoms everyone in Canada is entitled to. The freedom of assembly is listed as one of the fundamental freedoms.[554] The freedom of assembly may only be restricted or limited in line with the provisions of section 1, which seek justification in a free and democratic society for any limitation or justification through reasonable means. Obviously, the peaceful nature thereof is an inherent limitation in itself of the right to protest. In 2022 Canadian truckers embarked on a peaceful protest, blockading roads, and border posts in protest of the Covid-19 measures. Government used the *Emergencies Act* to end the blockade. This was challenged in the Federal court, where the Judge

548 See article 15 of the *ACHR*.
549 See for example Metcalfe and Pickett 2022 *Criminology: An Interdisciplinary Journal* 60-89; Dorf 2021 *Northwestern University Law Review* 111-137.
550 See Hudson 2021 *ABA Journal*; Bowie 2021 *Yale Law Journal* 1652-1745.
551 *Constitution Act*, 1982.
552 See Part 1 on the *Canadian Charter*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 574.
553 Section 1 *Canadian Charter*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 574.
554 Section 2 (c) of the *Canadian Charter*.

found that government acted unreasonably.[555] The Court did not pronounce on whether there were any infringements of the Bill of Rights.[556]

The position in the USA and Canada reveals similarities between North America and Europe pertaining to the right to assemble. This signifies the realisation of the importance of the right to come together to protest and the constitutional value it has for people who may be marginalised or excluded from public participation in the traditional forms, or who wish to express their dissatisfaction with government action or policy. In both jurisdictions, there is a strong emphasis on the peaceful nature of protests. The freedom to assemble and partake in protest is restricted to the peaceful realisation thereof. The peaceful requirement may be regarded as an inherent limitation of the right to assemble in a democratic society. If the exercise of this right poses a threat to public safety and security, this right may be limited by the authorities declaring it unlawful and prohibiting the continuation of the protests.

2.3.2.3 Constitutional provision for the right to protest in selected African countries

Egypt, Togo, Cameroon, Tunisia, Zimbabwe, and South Africa are state parties to the ICCPR and the ACHPR, which bestow an obligation on the member states to respect and protect the right of assembly.[557] As the focus of this study is on South Africa,[558] the freedom of assembly will be discussed separately from the other African countries.[559]

According to article 73 of the *Constitution of the Arab Republic of Egypt*,[560] citizens have the right to "organise public meetings, marches, demonstrations and all forms

555 *Canadian Frontline Nurses v Canada (Attorney General)* 2024 FC 42. Also see Gillies 2024 *Business News* 24 January.

556 *Canadian Frontline Nurses v Canada (Attorney General)* 2024 FC 42 para 373.

557 Also see Kuwali and Silunge 2022 *Journal of Comparative Law in Africa* 19-20 on popular protests in Malawi and Aboueldahab 2017 *African Yearbook on International Humanitarian Law* 98-108 on uprisings in Tunisia. Due to the scope of the study, not all the constitutions of African countries could be discussed and only a few were selected to illustrate how constitutions in Africa reflect the right to assemble.

558 See sections 1.5 and 1.6 above.

559 See section 2.3.2.4. and 2.4 below.

560 *Constitution of the Arab Republic of Egypt*, 2014. Hereafter referred to as the *Egyptian Constitution*.

of peaceful protest." The right to protest is explicitly provided for but must be exercised in a peaceful and unarmed manner. The carrying of any weapon is prohibited during protest.[561]

At a national level, *Law No. 107 of 2013 For organizing the right to peaceful public meetings, processions and protests* (*Law 107*)[562] both recognise[563] and set conditions for the exercise of the constitutional right as per article 73 of the Egyptian Constitution.[564] No weapons are permitted at the protests as an inherent limitation to this right.[565] The right to protest may be limited due to public order and security considerations. Furthermore, a notice is required for instances where a protest will be held in the public space contrary to where the protest is held in private. The right to protest does not receive the respect and protection as envisaged under the international and regional instruments to which Egypt is a member state, as *Law 107* allows that necessary measures can be taken as well as the dispersal of protesters.[566]

Article 30 of the *Constitution of Togo*[567] also recognises and guarantees the freedom of assembly. The exercise of this right must be peaceful without the use of any instruments which may cause or result in violence.[568] Legislation[569] regulating the freedom of assembly in Togo had a negative impact on the freedom of assembly due to the restrictive nature of certain provisions.[570] The holding of assemblies requires notification and may be prohibited if the public order so dictates. The local authorities are, for example, authorised to use force to disperse protests or even

561 See article 73 of the *Egyptian Constitution*. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 575.
562 *Law No. 107 of 2013 For organizing the right to peaceful public meetings, processions and protests*. Hereafter referred to as *Law 107*.
563 See article 1 of *Law 107*.
564 See article 7 of *Law 107*.
565 Article 6 of *Law 107*.
566 See for example articles 11 and 12 of *Law 107*.
567 *Constitution of Togo*, 1992. Hereafter referred to as the *Togolese Constitution*.
568 Article 30 of the *Togolese Constitution*.
569 The original legislative documents are available in French. The English translations of the legislative documents were used for reference purposes.
570 See the following Togolese legislation regulating the freedom of assembly: *Law on Peaceful Assembly* (2011), *Decree on Public Order* (2013), *Law on National Security and on Assemblies* (2019). Also see Amnesty International 2018 "Togo: Shadow Report to the African Commission on Human and Peoples' Rights" 8.

prohibit a planned protest before the commencement thereof.[571] It is submitted that the right to protest is constitutionally recognised and guaranteed but the restrictive manner in which the right is regulated domestically, infringes on the protection of the right.

The *Constitution of Cameroon*[572] affirms the freedom of assembly.[573] *Law No. 95/55 of 1990 on meetings and public demonstrations (Law 95*)[574] is the regulatory framework applicable to the holding of assemblies in Cameroon.[575] *Law 95* requires a notification[576] for the holding of meetings[577] and demonstrations[578] with specific details required. Several limitations are in place to suspend or even terminate the exercise of the right to assemble.[579] The limitations in place relate to public order, infringements of laws, freedom of speech obstructing public order, and the incitement to commit a crime.[580] It is submitted that the right to protest is provided for in the *Cameroonian Constitution* but the exercise thereof is subject to severe restrictions.[581]

The *Constitution of Tunisia*[582] guarantees the right to peaceful assembly and demonstrations.[583] Domestically, *Law No. 69-4 of 24 January 1969* regulates the holding of public meetings, processions, parades, demonstrations, and gatherings (*Law 69*).[584] Meetings, demonstrations and gatherings may take place without a notice[585] but a declaration with the details of the planned meeting, demonstration or gathering is required.[586] Several limitations of the freedom of assembly are

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571 Also see Amnesty International 2018 "Togo: Shadow Report to the African Commission on Human and Peoples' Rights" 8.
572 *Constitution of Cameroon*, 1996. Hereafter referred to as the *Cameroonian Constitution*.
573 Preamble of the *Cameroonian Constitution*.
574 *Law No. 95*/55 of 1990. Hereafter referred to as *Law 95*.
575 Article 1 of *Law 95*.
576 Article 3 of *Law 95*.
577 Article 4(3) of *Law 95*.
578 Article 7 of *Law No. 95*.
579 See article 5 (3) of *Law 95*.
580 Article 5(1) of *Law 95*.
581 See for example Afoba 2006 *University of Botswana Law Journal* 67-92.
582 *Constitution of Tunisia*, 2014. Hereafter referred to as the *Tunisian Constitution*.
583 Article 37 of the Tunisian Constitution.
584 Law No. 69-4 of January 24, 1969 regulating public meetings, processions, parades, demonstrations and gatherings. Hereafter referred to as *Law 69*.
585 Article 1 of Law *69.*
586 See articles 2, 3 and 9 of *Law 69*.

provided for in article 5 of *Law 69* as they relate to public order, protecting the meeting as per the declaration, freedom of speech obstructing public order, and the incitement to commit a crime. The exercise of the freedom of assembly is also restricted to public roads.[587] Furthermore, a meeting, demonstration or gathering may be dissolved[588] and provision is made for prohibiting them where they may result in disturbing the public order.[589] It seems that *Law 69* stands in violation of the *ICCPR* and the *ACHPR* above-mentioned instrument as it provides for absolute discretion on the side of the authorities to prohibit any protest.[590]

The *Constitution of Zimbabwe*[591] under what it regards as fundamental human rights and freedoms, recognises the right to freedom of assembly.[592] The provision recognises the voluntary nature of the right to freedom of assembly.[593] Also, the right to demonstrate peacefully is also recognised as a fundamental human right and freedom.[594]

Domestically, the *Maintenance of Peace and Order Act*[595] regulates the holding of gatherings and demonstrations in Zimbabwe as recognised in sections 58 and 59 of the *Zimbabwean Constitution*.[596] The *Peace and Order Act* requires a notice to be submitted when the right as per the Constitution is exercised.[597] The authorities may set conditions for the exercise of the right to freedom of assembly to prevent the disturbance of public order.[598] The law enforcement, for example the Zimbabwe Republic Police (ZRP), may use force in order to disperse a gathering.[599] There is a

587 Article 8 of *Law 69*.
588 Article 6 of *Law 69*.
589 See articles 7 and 12 of *Law 69*.
590 See Article 19 2022 "Tunisia Joint Submission to the UN Universal Periodic Review 41st Session of the UPR Working Group" 5.
591 *Constitution of Zimbabwe*, 2013. Hereafter referred to as the *Zimbabwean Constitution*.
592 Article 58 (1) of the *Zimbabwean Constitution*
593 Article 58 (2) of the *Zimbabwean Constitution*.
594 Article 59 of the *Zimbabwean Constitution*.
595 *Maintenance of Peace and Order Act*, 2019. Hereafter referred to as the *Peace and Order Act*.
596 See ICNL 2020 "Practical Guide: Zimbabwe's Maintenance of Peace and Order Act" 1.
597 For purposes of holding a demonstration, a seven-day notice is required contrary to a five-day notice for the holding of a public assembly. See articles 7(1)(a) and 7(1(b) of the *Peace and Order Act*. Also see sections 5 and 6 of the *Peace and Order Act*; ICNL 2020 "Practical Guide: Zimbabwe's Maintenance of Peace and Order Act" 5-7.
598 See article 8 of the *Peace and Order Act*. Also see ICNL 2020 "Practical Guide: Zimbabwe's Maintenance of Peace and Order Act" 1,6 and 8.
599 See article 13 of the *Peace and Order Act* on the powers of the police.

strong indication that the right to protest may not be respected or protected, as authorities may allow law enforcement personnel to use force in order to disperse a gathering.[600] In 2020, for example, the police cleared the streets in anticipation of possible anti-government protests, and in 2023 police violence escalated during the election period.[601]

It appears that the selected African countries recognise the right to protest by providing for the right to freedom of assembly in their constitutions. This right must be utilised in a peaceful and unarmed manner. The right may be restricted and in addition to those limitations mentioned in the discussion of the EU and North American countries, some countries refer also to infringement of laws and incitement to commit a crime. That implies, that civil disobedience will not be allowed. Also, it must be understood that no prior permission-seeking is needed when this right is exercised, except in Tunisia where a declaration as to the activities during the protest action has to be made. The organisers must indicate what measures they will implement to protect not only others but also the protesters themselves. Although the right is included in the constitutions, oppressive governments do not allow protests or if they occur, use the power of the state against the protesters. Protest action may be restricted, or the protest dispersed contrary to a liberated approach where the authorities will seek to protect the right to protest, as is expected in terms of international and regional documents. South Africa can learn from the implementation of the right to assemble as exercised in some of the above countries. As soon as the right is limited to a large extent or a wide discretion limits the right, it may lead to violent uprisings.

600 See article 13 of the *Peace and Order Act*.

601 Anonymous 2020 https://www.bbc.com/news/world-africa-53593492; Human Rights Watch 2021 https://www.hrw.org/world-report/2021/country-chapters/zimbabwe; Human Rights Watch 2023 https://www.hrw.org/report/2023/08/03/crush-them-lice/repression-civil-and-political-rights-ahead-zimbabwes-august-2023.

2.3.2.4 The right to protest in South Africa

In the South African context, section 17 of the *Constitution*[602] recognises the right to assemble, picket and petition. The right to assemble contains two internal limitations. First, the right must be exercised in a peaceful manner in order for the protection afforded to be enjoyed.[603] Secondly, the participants who exercise the right to assemble must also do so unarmed.[604] It is submitted that the failure to meet the peaceful and unarmed requirement will result in the protection being forfeited where the participants, for example, engage in violence. Following a generous interpretation of the peaceful requirement in the context of the presence of violence, the participants who engage in violence during the exercise of this right do not negate the general peaceful status of the protest.[605] In the instance where the majority of the citizens remain peaceful whilst the violence is conducted by a select few, those participants ought to be removed with their right to assemble limited.[606] The rights as protected in the *Constitution*, can be regarded as to protect peaceful protest.[607] The right is further regulated in the *Regulation of Gatherings Act* (*RGA*).[608]

2.3.3 Strikes

'Strikes' is defined in the *Labour Relations Act* (*LRA*)[609] as

> the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a

602 *Constitution of the Republic of South Africa*, 1996. Hereafter referred to as the *Constitution*. See section 2.3.4 below.
603 Woolman "Assembly, Demonstrations and Petition" 384. Also see Grogan *Labour and Employment Law* 833-835.
604 Woolman "Assembly, Demonstrations and Petition" 384-385.
605 Woolman "Assembly, Demonstrations and Petition" 384. Also see *Garvas* case para 53.
606 Woolman "Assembly, Demonstrations and Petition" 384.
607 See section 2.2.3 below. Also see Commonwealth Secretariat 2003 *Freedom of Expression Association and Assembly: Best Practice* 22; Office of the High Commissioner for Human Rights Date Unknown https://www.ohchr.org/en/peaceful-assembly; *General Comment* 37; Ngcamu 2019 *The Journal for Transdisciplinary Research in Southern Africa* 3; Nsibirwa 2016 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/394-protesting-against-other-s-rights; Lancaster 2016 *Institute for Security Studies* 2.
608 *Regulation of Gatherings Act* 205 of 1993. Hereafter referred to as the *RGA*. See section 2.3.4 below.
609 *Labour Relations Act* 66 of 1995. Hereafter referred to as the *LRA*.

> dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.[610]

It is clear from the abovementioned definition that a strike entails the refusal, retardation, or obstruction of work in order to address a grievance or dispute within the workplace.[611] Section 23(2)(c) of the *Constitution* protects the right to strike.[612] Strikes can be legal and illegal[613] and some strikes also involve legal or illegal protest.[614] The Marikana Massacre which occurred in 2012 is an example.[615] During the Marikana strikes, 44 people died, more than 70 people were injured and approximately 250 people were arrested.[616] Several instances of damage and destruction of property were reported.[617] In response to the deaths, injuries to persons, a large number of arrests as well as the reported large-scale damage to property during the strikes, the then President of South Africa, Jacob Zuma, appointed the Marikana Commission of Inquiry (*Farlam Commission*)[618] under the leadership of retired judge Ian Farlam of the Supreme Court of Appeal (SCA).[619] The purpose of the *Farlam Commission* was to investigate and report on the various

610 Section 213 of the *LRA*.
611 See Makama and Kubjana 2021 *Obiter* 42. Also see Grogan 2020 *Workplace Law* 384-434; Deacon 2014 *South African Journal of Education* 01-15; Chictay 2012 *Obiter* 260-277.
612 Section 23(2)(c) of the *Constitution*. Also see Makama and Kubjana 2021 *Obiter* 42.
613 See section 64 of the *LRA* with regards to the requirements for a legal strike. If these requirements are adhered to, the intended strike will be regarded as legal. The failure to fulfil these requirements will render the strike illegal. "(1) Every employee has the right to strike and every employer has recourse to lock out if- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and- (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless- (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation."
614 See for example *Garvas* case para 6, 10, 12. Also see Wallis 2012 *ILJ* 2257.
615 Reg 1(1.1) in GN 699 in GG 38978 of 10 July 2015. Also see Makama and Kubjana 2021 *Obiter* 42; Webster 2017 *Global Labour Journal* 139; Makama and Kubjana 2021 *Obiter* 42.
616 Reg 1(1.1) in GN 699 in GG 38978 of 10 July 2015. Also see Makama and Kubjana 2021 *Obiter* 42; Webster 2017 *Global Labour Journal* 139; Makama and Kubjana 2021 *Obiter* 42.
617 Reg 1(1.1) in GN 699 in GG 38978 of 10 July 2015. Also see Makama and Kubjana 2021 *Obiter* 42; Webster 2017 *Global Labour Journal* 139; Makama and Kubjana 2021 *Obiter* 42.
618 Hereafter referred to as the *Farlam Commission*.
619 Hereafter referred to as the SCA.

public, national and international concerns as a result of the Marikana Massacre.[620] The fact that the miners were armed and the extent of violence resorted to by the miners as well as the use of lethal force by the SAPS led to the events which transpired during the Marikana Massacre.[621] The presence of weapons and violence on both sides negated the constitutional protection for the right to strike. The presence of weapons and violence will have similar impact in the context of the freedom of assembly. The Marikana Massacre has raised the awareness as to the impact of violence during for example strikes and protests.

It is submitted that the constitutional protection for the right to strike does not extend to acts of violence or destruction of property as these will result in the workers forfeiting the embedded protection afforded for the exercise of this right in order to pursue their grievance or dispute.[622] This right may be exercised in pursuance of a grievance or dispute save for the requirements in section 64 of the *LRA* being met.

The difference between civil disobedience and strikes are twofold: Firstly, the relationship between the parties differs significantly. In the context of strikes, the relationship is one of an employers and employees. On the other hand, civil disobedience is directed at a more political relationship between the parties which involve the people opposed to the state. Secondly, civil disobedience involves an illegal public act which is not protected by law, while strikes are protected by law if the requirements as set out in the *LRA,* are adhered to. It is submitted that the presence of violence during the exercise of either of the two mechanisms to address

620 Reg 1(1.1) in GN 699 in GG 38978 of 10 July 2015. Also see Farlam, Henraj and Tokoto 2015 "Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province".

621 Also see Farlam, Henraj and Tokoto 2015 "Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province" 42.

622 See *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 (3) SA 752 (W) 759. The court found that section 17 of the *Constitution* as well as the provisions of the *LRA* in respect of assemblies and strikes does not extend the protection afforded to the infringement of rights of other persons as well as violence for example assault and intimidation.

their grievances, dissatisfaction or disappointments will negate the effect of resorting thereto.

2.3.4 Self-help

The concept of 'self-help'[623] is sometimes referred to in terms of private law where relief is obtained or to enforce legal rights without using legal processes (by using self-help remedies).[624] According to Gergen[625] self-help remedies are available where a breach of contract has occurred. These remedies are available to a party in order to address the aforementioned breach.[626] Self-help remedies are regarded as "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a civil wrong."[627] Furthermore, these remedies are viewed as an alternative to approaching the court to remedy the breach.[628] In the labour context, Theron argues that a resort to self-help by employees is not without a reason. However, whether the reason for resorting to self-help is justified or not, will have to be determined by the courts.[629] Theron[630] furthermore argues that the courts are ill-equipped to make this value judgment. It is important to note that the parties to the dispute are not compelled to use the remedies in order to solve the dispute outside of court.[631] Gergen[632] continues that these remedies grant the aggrieved party the power to withhold his or her performance in response to the breach of contract.[633] This enables the aggrieved party to use a "threat of non-performance" in an attempt to remedy the breach of contract.[634] Eventually, by successfully resorting to self-help remedies, the aggrieved party will be in a position that he or

623 See *Merafong City Local Municipality v AngloGold Ashanti Limited* 2016 ZACC 35 para 60. Also see *Gobela Consulting v Makhado Municipality* 2020 ZASCA 180 para 22.
624 Anon unknown https://definitions.uslegal.com/s/self-help/.
625 Gergen 2009 *Boston University Law Review* 1397.
626 Gergen 2009 *Boston University Law Review* 1397.
627 See Gergen 2009 *Boston University Law Review* 1397.
628 Gergen 2009 *Boston University Law Review* 1397. Also see Lichtman 2004 *How the Law Respond to Self-Help* 3 and Theron 1997 *Law, Democracy and Development* 18.
629 See Theron 1997 *Law, Democracy and Development* 22.
630 Theron 1997 *Law, Democracy and Development* 22.
631 Gergen 2009 *Boston University Law Review* 1401.
632 Gergen 2009 *Boston University Law Review* 1398.
633 Theron 1997 *Law, Democracy and Development* 22.
634 Gergen 2009 *Boston University Law Review* 1399.

she would have been in if the breach of contract had not occurred.[635] The difference between civil disobedience and self-help can be found in the fact that civil disobedience involves an illegal act while self-help is a legally permissible act. In both cases, violence must be absent.[636]

2.3.5 Defence of a collateral challenge

The defence of a collateral challenge is aimed at the enforcement of an administrative act or decision which is argued to be invalid, but such invalidity review has not been confined to and considered by the relevant appropriate proceedings.[637] A court of law can be approached to make a determination on the merits of the invalidity claim in relation to the administrative act or decision.[638] The court does not have the discretion to make a ruling on whether the defence of a collateral challenge may be raised or not; it is only mandated to make a ruling on the invalidity question based on the facts of the case before it.[639]

The argument is made that in protecting the rule of law, a court has the exclusive mandate to determine whether the administrative act or decision meets the requirement of legality.[640] This role and discretion can never be usurped by a party who seeks to pronounce the unlawfulness of an administrative act or decision by not acting in accordance therewith. It is important to emphasise that the perceived unlawful administrative act or decision remains legally effective until a court sets it

635 Gergen 2009 *Boston University Law Review* 1436. Also see Goviden 2014 *Without Prejudice* 3. In the case of a *madament van spolie*, the CC in *Ngqukumba v Minister of Safety and Security and Others* 2014 ZACC 14 (CC) warned against taking the law into your own hands by resorting to self-help. This may result in a breach of peace. Hereafter referred to as the *Ngqukumba* case. See *Ngqukumba* case para 10, 12.

636 See Lichtman 2004 *How the Law Respond to Self-Help* 5. Government has no obligation to defer violence as a form of self-help.

637 *Merafong City Local Municipality v AngloGold Ashanti Limited* 2016 ZACC 35 para 22-23, 41. Hereafter referred to as the *Merafong case.* Also see Pretorius 2020 *Stellenbosch Law Review* 4.

638 *Merafong* case para 32.

639 *Merafong* case para 32.

640 *Merafong* case para 42. Also see Hoexter & Penfold 2021 *Administrative Law in South Africa* 218-353.

aside.[641] Therefore, the relevant parties still need to act in accordance with the outcome of an administrative decision.[642]

The defence of a collateral challenge may not be relied on by government as it is not available to a public authority.[643] Government is not at liberty to disregard legally binding administrative acts or decisions. As indicated above, these have to be tested in the courts as the appropriate proceedings and government has no authority to invalidate them.[644] The opposite seems to be the position in the case of private parties.

Private parties, more specifically the public, will be able to raise the defence of a collateral challenge. This would be applicable in cases where an individual was threatened by a coercive action to act in accordance with the perceived unlawful administrative act or decision.[645] The coercive action must emanate from a public authority.[646] The submission is made that it would be detrimental to the rule of law if a person is coerced to act in terms of an unlawful administrative act or decision, hence the permissibility of a collateral challenge.[647] It is furthermore important to note that a citizen claiming this defence has no obligation imposed to initiate proceedings to have the invalid administrative act or decisions confirmed as such by a court. The invalid administrative act or decisions should be treated for what it purports to be, regardless of whether the relevant proceedings were instituted or not.[648]

Civil protest encompasses both indicators of individualism as well as collectivism. Individualism is focussed on the individual citizen's rights as opposed to collectivism, where the rights of the community are the central focus point. In the context of civil protests, individualism would focus on what is important for the individual, which might include the resort to violence to achieve the said purpose regardless of the

641 *Merafong case* para 41-42.
642 Hoexter & Penfold 2021 *Administrative Law in South Africa* 218-353.
643 *Merafong case* para 25.
644 *Merafong case* para 15, 41.
645 *Merafong case* para 25. Also see Pretorius 2020 *Stellenbosch Law Review* 15-16.
646 *Merafong case* para 25. Also see Pretorius 2020 *Stellenbosch Law Review* 15-16.
647 *Merafong case* para 31. Also see Pretorius 2020 *Stellenbosch Law Review* 15-16.
648 *Merafong case* para44. Also see Pretorius 2020 *Stellenbosch Law Review* 15-16.

detrimental impact it may have. Collectivism would have the greater good of the community as the focal point with an attempt to restrain violence.[649] Violence is often the result of specific individuals or a grouping of individuals which in some cases may even involve members of the relevant community with criminal or political intentions during these civil protests. The resultant violence has the unfortunate effect that these protests are deemed to be violent and illegal as they fall short of the constitutional protection for peaceful and unarmed civil protests.[650]

Increasingly, the disruptive and violent nature of protests is escalated and a preferred manner for advancing collective causes. As collective causes, inequality and economic exclusion contribute to an unstable social order wherein violence thrives.[651] Thus, violence during protest may be attributed to the unstable social order created by collective causes such as inequality and economic exclusion.

2.3.6 Violent protests

Violent protest is a common response to what is noted as social alienation; the continuous search for a sense of community is regarded as an underlying principle of this response.[652] Minority groups often experience social alienation due to not being heard, and considering the failures and unresponsiveness of the government as serious issues at the core of non-violent protests. If, for example, local authorities do not respond to a non-violent protest, protesters might be tempted and feel impelled to resort to violence.[653]

Violent protests have been defined as "those protests where some of the participants have engaged in physical acts that either cause immediate harm to some person or are substantially likely to result in such harm".[654] Violent protests are also defined as "those protests where some of the participants have engaged in

649 McGuigan 1971 *The Canadian Bar Review* 222, 224. Violence is furthermore deemed to be impractical and immoral by McGuigan.
650 See section 17 of the *Constitution*.
651 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 4. Also see Mamokhere *African Journal of Developmental Studies* 80-81.
652 McGuigan 1971 *The Canadian Bar Review* 270.
653 McGuigan 1971 *The Canadian Bar Review* 274. Also see Mamokhere *African Journal of Developmental Studies* 80-81.
654 Lancaster 2016 *Institute for Security Studies* 3.

physical acts that either cause immediate harm to some person or are substantially likely to result in such harm".[655] Chiwarawara[656] supports this view in that violent protest entails an attack or harm directed at the person. This view is limited to violence directed at the person. Chiwarawara[657] further argues that attacks on property should not be regarded as violent protest as the case should be where violence is directed at the person. The argument is further made that a new category or type of protest should be coined for instances where public or private property is attacked. Chiwarawara[658] in pursuance of this new category or type of protests for attacks on property suggests the reference to vandalistic protest. The suggestion stems from the meaning of the word vandalistic which entails damage to property.[659]

In a democratic society, members of the public have at their disposal mechanisms to communicate their needs and interests, but these are not always at the disposal of the minority and marginalised or they lack the means to communicate via the available mechanisms. The question whether these mechanisms are indeed at their disposal becomes irrelevant, especially when it leads to frustration for those regarded as powerless. Considering their powerlessness and the inability to have an impact on the democratic government, they argue that no effective alternative to violence exists as a mechanism to express and address their needs and interests, or communicate their discontent and dissatisfaction with a law, policy, or decision-making of the government.[660]

The submission is made that large numbers of citizens often participating in protest activities share the sentiment that the unarmed and peaceful character of protest negates the effectiveness thereof.[661] The reason for this view is based on the experience that local government would simply ignore these protests as well as the

655 Lancaster 2016 *Institute for Security Studies* 3.
656 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 243.
657 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 243.
658 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 243.
659 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 243.
660 McGuigan 1971 *The Canadian Bar Review* 274-275. Also see Mamokhere *African Journal of Developmental Studies* 83-84.
661 See Khumalo 2017 *SACJ* 23-24.

underlying causes. As a result thereof, the public employs radical disruptive measures and violent forms of protests with the full understanding that they would attract the necessary media attention to compel the local authorities to respond.[662] It is often said that government only listens when violence erupts.[663]

Violent methods are employed in support of political or social justice and these protests do not necessarily seek to overthrow the government of the day. The violent nature or extent of the mechanisms employed are synonymous with people's frustrations at not being heard. Sporadic or episodic occurrences of violent disorder or disruptions to the social order seem to have the effect that the public is heard.[664] It seems to be the case in South Africa that the relevant authorities will react to violent protests, hence the narrative that violent protests are more effective that other available mechanisms.[665]

South Africa has noted violent protests before and after the transition to democracy.[666] In the context of South African local government, violent protest involves any form of violence, threat of violence or intimidation.[667] In a broader sense, violent protest includes barricaded roads, destruction of property such as buildings, looting, arson as well as intimidation and attacks on others.[668] The violence occurring during the protest may also be directed against a person or the property of a person who might not be involved in government or decision-making.[669] Regardless of the aforementioned fact, it does occur where protests are directed at the properties of individuals in government for example councillors.[670] It is thus argued that all violent protests will result in disorderly public spaces due

662 Duncan *Protest Nation* 2.
663 See Khumalo 2017 *SACJ* 23-24.
664 Wihl 2018 *Israel Law Review* 305. It is furthermore argued that after a period of disruptions and disorder, greater order will be prevalent. Also see Wihl 2018 *Israel Law Review* 311.
665 Mamokhere *African Journal of Developmental Studies* 80-81.
666 See section 2.4 below. Also see Mamokhere *African Journal of Developmental Studies* 81.
667 See Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 13. Also see South African Cities Network *State of South African Cities Report 2016* 152.
668 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 244.
669 See Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 13. Also see South African Cities Network *State of South African Cities Report 2016* 152.
670 See for example Mbovane 2019 https://groundup.org.za/article/pe-councillors-house-burnt-andvehiclesabotaged/#:~:text=Councillor%20Mzuvukile%20Tom%20(ANC)%20of%20ward%2055%20in%20Motherwell%2C,him%20by%20residents%20of%20NU10.

to the nature and extent of the violence.[671] The damage to property is aimed at state properties as well as the property of private persons and businesses or general infrastructure. The violent protest can result in injuries to non-protesting bystanders; in some real examples, lives were lost; educational experiences of children were impacted upon, for example, by the burning of schools or libraries. In some instances, the health concerns of the community are ignored, resulting in the burning or destruction of clinics and hospitals.[672]

Violent protests are demonstrative of the fact that violent mechanisms are more effective in achieving the intended purpose.[673] As stated above, this view is widely held and is the underlying motivation for the resort to some of the violent protests.[674] The South African citizenry resorts to violent protest action due to the frustrations caused by a lack of participatory opportunities and spaces.[675]

Violence during protests may also be the result of aggressive reactions by the police during and towards protests. Evidence exists to support this ascertainment.[676] Criticism is often levied against the police action, that is deemed to be authoritarian and paramilitary policing.[677] The dismantling of the public order policing unit tasked with controlling protests contributed to the violent responses to protests by the police.[678] This unit was responsible and received the required training to be equipped to manage protests with the purpose of conflict avoidance or the escalation thereof. In the context of the violent nature of the protests, either instituted by the protestors or police, it remains clear that a specialised unit in the SAPS may be required to manage protest action in order to mitigate the risk of violence.

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671 Alexander *et al* 2018 *SA Crime Quarterly* 31.
672 Mamokhere *African Journal of Developmental Studies* 81.
673 McGuigan 1971 *The Canadian Bar Review* 226. Also see Mamokhere *African Journal of Developmental Studies* 81.
674 Mamokhere *African Journal of Developmental Studies* 81.
675 Mamokhere *African Journal of Developmental Studies* 83.
676 Mamokhere *African Journal of Developmental Studies* 80-81.
677 See for example Civilian Secretariat for Police Service "Demilitarisation and the Policing of public protest and events" 5-31; Perry *et al* 2017 *Law and Society Review* 602-634; Cornell *et al* 2022 *Policing* 1-13.
678 Duncan *Protest Nation* 52.

2.3.7 Defining civil protest – a working definition

Based on the above, civil protest can be defined for the purpose of this thesis as follows:

> Civil protest is a universally recognised civil and political right and may be exercised within the bounds of reasonable limitations as an indispensable tool in a participatory democracy which enables the voiceless and marginalised an effective mechanism to express their legitimate concerns and interests to government in a peaceful and unarmed manner.

This study focuses specifically on civil protest as defined above. The next section will proceed with a discussion of the development and content of the right to protest in South Africa.

2.4 Development and content of the right to protest in South Africa

Since 1910, the successive governments of South Africa enacted one after the other, oppressive laws to the detriment of Africans, Coloureds, and Indians.[679] This was done in an attempt to stifle dissent and outcry from the oppressed.[680] The governments of the day did not respect freedom of political expression or a right to protest, amongst other rights. During the Apartheid years, the government introduced several laws (and later introduced a state of emergency) to restrict freedom of expression, the right to strike, to picket and the freedom of movement.[681]

679 See Fuo 2020 *De Jure Law Journal* 370.

680 Woolman "Freedom of Assembly" 43-4. Also see Woolman "Assembly, Demonstrations and Petition" 380; Du Pisani *et al* 1990 *Journal of Modern African Studies* 576; Fuo 2020 *De Jure Law Journal* 373.

681 Du Pisani *et al* 1990 *Journal of Modern African Studies* 576. Also see Woolman "Assembly, Demonstrations and Petition" 380; Van der Vyver *Die Beskerming van Menseregte;* Van der Vyver *Seven Lectures on Human Rights*; Mathews *The Darker Reaches of Government*; South African History Online https://www.sahistory.org.za/article/states-emergency-south-africa-1960s-and-1980s.

The common law regulated the position with regards to assemblies before the 1950s in South Africa. Then, the common law provided that individuals were entitled to all rights, unless they were prohibited in terms of legislation.[682] In response to the common law position, the oppressive government used public violence as a "crime" to prevent the oppressed from resorting to the right to freedom of assembly in order to show their dissent. Also, public violence was used as a method to limit the right to freedom of assembly.[683]

Du Pisani, Broodryk and Coetzer[684] wrote a comprehensive article in 1990 on historic protest marches in South Africa and this is used to demonstrate the history of political protest in South Africa. Protest action against or in response to government decision-making is not a new feature associated with modern politics.[685] It was also not restricted to Black South Africans. In 1912, Botha expelled Hertzog from his cabinet. In response thereto, a mass meeting by Hertzog supporters was arranged to commence at Pretoria's Rose Park. The large group of supporters proceeded to demonstrate their dissatisfaction with the expulsion by marching the streets to the home of Hertzog.[686] In 1913, Gandhi led Indians from Natal to the Transvaal as these provinces were known at the time.[687] The protest was aimed at the discriminatory laws in relation to poll tax only payable by Indians when leaving Natal province. This discriminatory law infringed on the ability of Indians to move freely between Natal and other provinces in South Africa.[688] African women militantly responded to municipalities in the Orange Free State who sought to compel them to carry passes. Central to the militant resistance were urban African woman.[689]

682 Du Pisani *et al* 1990 *Journal of Modern African Studies* 577.
683 Woolman "Freedom of Assembly" 43-5. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 576.
684 See Du Pisani *et al* 1990 *Journal of Modern African Studies* 573-602.
685 Du Pisani *et al* 1990 *Journal of Modern African Studies* 577. Also see Woolman "Assembly, Demonstrations and Petition" 380; Fuo 2020 *De Jure Law Journal* 370.
686 Du Pisani *et al* 1990 *Journal of Modern African Studies* 577. Also see Woolman "Assembly, Demonstrations and Petition" 380.
687 The *Union of South Africa Act* of 1909 established four provinces, Transvaal, Orange Free State, Natal and the Cape Province.
688 Du Pisani *et al* 1990 *Journal of Modern African Studies* 577. Also see Alexander *et al* 2018 *SA Crime Quarterly* 31.
689 Unterhalter 1983 *Third World Quarterly* 889.

In 1914 some disgruntled Afrikaners staged a rebellion. The rebellion was terminated in 1915, whereafter De Wet as one of the leaders was arrested, prosecuted, and found guilty of treason. He was subsequently sentenced[690] which entailed a fine as well as direct imprisonment.[691] A large group of Afrikaner women protested the treatment that De Wet was receiving from the government and marched to the Union Buildings to hand over a petition signed by many supporters of the cause. The petition yielded no positive outcome as sought by De Wet's supporters.[692] Other examples, include major labour strikes during this period, such as the Rand Rebellion in 1922. The Rand Rebellion was a revolt by white miners against the mine owners who intended to replace them with underpaid black miners due to the economic crisis.[693] The Rebellion was quashed with violence when Jan Smuts ordered planes to fire at the striking miners with 687 casualties, including non-striking miners and black workers.[694]

The next almost two decades recorded no significant protests or marches.[695] The reasons for this position is twofold: on the one side the white population did not experience any serious disputes or disruptions which would have necessitated them to resort to protest action;[696] on the other hand due to poor organisation as well as disputes among the African and Coloured population, the arrangement of protests became challenging. Further to the organisational challenges and disputes, the government implemented more oppressive laws to restrict and prohibit the resort to the right to protest.[697] Gradually, periodic resistance by the African, Coloured, and Indian population increased which included disruptions, boycotts and strikes.[698]

In 1939, the Non-European United Front had a mass meeting in the Parade in Cape Town on the segregation measures put in place by the government.[699] The protest

690 Du Pisani *et al* 1990 *Journal of Modern African Studies* 577.
691 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
692 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
693 Krikler 1996 *Journal of Southern African Studies* 349-372.
694 Warwick 2022 *Litnet Opinion*.
695 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
696 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
697 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
698 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578. Also see Olzak and Olivier 1998 *European Sociological Review* 255-256.
699 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578

proceeded to the Parliament building to which some of the protesters gained entry. Smuts, to no avail attempted to restore order and summoned the police to assist in achieving same.[700] In 1940, a large number of women protested against the South African soldiers leaving the borders to fight alongside some of the country's known allies.[701] The women proceeded to Goodwood, Cape Town and others marched in George. Again, the protest yielded no results due to Smuts' unresponsiveness to withdraw the Union from the war.[702]

The Anti-pass Campaign took place in 1944. This protest was organised and took place in Johannesburg. The mass protest was aimed at the stringent segregation measures imposed by the government of the day.[703] Again, the protest had no result. The onset of the 1950s signified a change in the nature of protesting and resistance by the African, Coloured, and Indian population as they took up a more involved and active function against the white domination.[704] The 1950's also saw the emergence of the African National Congress (ANC)[705] Women's League (ANCWL).[706] The ANCWL played an active role in the political climate during the 1950's. For example, on 9 August 1956 a group of approximately 20 000 women protested at the Union Buildings in Pretoria to demonstrate their resistance to the extension of the passes to women.[707]

As a result in 1950, the National Party (NP)[708] adopted the *Suppression of Communism Act* (*Suppression Act*)[709] in a further attempt to eviscerate the freedom of assembly.[710] Section 9 of the *Suppression Act* provided that the then Minister of Justice had the power to prohibit an assembly when a reason existed to believe that

700 Du Pisani *et al* 1990 *Journal of Modern African Studies* 578.
701 Du Pisani *et al* 1990 *Journal of Modern African Studies* 579.
702 Du Pisani *et al* 1990 *Journal of Modern African Studies* 579.
703 Du Pisani *et al* 1990 *Journal of Modern African Studies* 579.
704 Du Pisani *et al* 1990 *Journal of Modern African Studies* 579. Also see Woolman "Assembly, Demonstrations and Petition" 380; Olzak and Olivier 1998 *European Sociological Review* 255.
705 Hereafter referred to as the ANC.
706 Hereafter referred to as the ANCWL.
707 Unterhalter 1983 *Third World Quarterly* 890.
708 Hereafter referred to as the NP.
709 *Suppression of Communism Act* 44 of 1950. Hereafter referred to as the Suppression Act. Also see Stoffels 2019 *Obiter* 411.
710 See Woolman "Assembly, Demonstrations and Petition" 380. Also see *Garvas* case para 62.

the assembly had the promotion of communism as a purpose.[711] The ANC started with the commonly known Defiance Campaign in 1952.[712] The Defiance Campaign was regarded as the largest non-violent resistance campaign against the apartheid laws in South Africa.[713] The government then enacted the *Criminal Law Amendment Act* (*CLAA*)[714] which increased the penalties for crimes committed during a protest or related to a protest.[715] Thereafter, the *Riotous Assemblies Act* (*Riotous Act*)[716] was adopted, which introduced more stringent and serious limitations on the resort to protest action as a means to demonstrate against the government of the day. The *Riotous Act* dealt with public violence and the prohibition of protest in order to maintain public peace and order.[717]

Between 1960 and 1970, government increased its attempts to suppress the resort of citizens to protest action.[718] As permission from the authorities was required to protest, the government increasingly made it almost impossible for them to acquire the needed permission during the late 1970s.[719] The mid-1980s was marked by

711 Section 9 of the *Suppression Act*. Also see Woolman "Freedom of Assembly" 43-5; Woolman "Assembly, Demonstrations and Petition" 380.

712 See Woolman "Freedom of Assembly" 43-5. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 580-581; Woolman "Assembly, Demonstrations and Petition" 380; Alexander et al 2018 *SA Crime Quarterly* 31.

713 See Woolman "Freedom of Assembly" 43-5. Also see Du Pisani *et al* 1990 *Journal of Modern African Studies* 580-581; Woolman "Assembly, Demonstrations and Petition" 380; Alexander *et al* 2018 *SA Crime Quarterly* 31.

714 *Criminal Law Amendment Act* 8 of 1953. Hereafter referred to as the *CLAA*.

715 Woolman "Freedom of Assembly" 43-5. Woolman "Assembly, Demonstrations and Petition" 380.

716 *Riotous Assemblies Act* 17 of 1956. Hereafter referred to as the *Riotous Act*. It is noted that the *Riotous Act* is still law and in operation within South Africa. However, several calls were made by Former President, Kgalema Motlanthe and the Leader of the Economic Freedom Front, Mr Julius Malema respectively, to review or repeal the *Riotous Act*. In *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2020 ZACC 25 (hereafter referred to as the *EFF* case), the judgment of the Gauteng Division of the High Court, Pretoria was confirmed by the Constitutional Court. Section 18(2)(b) of the *Riotous Act* as it relates to the crime of incitement as well as the sentencing therefor was declared unconstitutional. The premise for the unconstitutionality finding stems from the inconsistency of section 18(2)(b) of the *Riotous Act* with the freedom of expression as per the section 16(1) of the *Constitution.*

717 Woolman "Freedom of Assembly" 43-6. Also see *Garvas* case para 62; Woolman "Assembly, Demonstrations and Petition" 380; Du Pisani *et al* 1990 *Journal of Modern African Studies* 581; Stoffels 2019 *Obiter* 411.

718 Woolman "Freedom of Assembly" 43-6. Also see Woolman "Assembly, Demonstrations and Petition" 380.

719 Woolman "Freedom of Assembly" 43-6. Also see Woolman "Assembly, Demonstrations and Petition" 380.

extremely restrictive regulations dealing with assemblies, protests and demonstrations after the declaration of a state of emergency in the 1980's.[720]

2.4.1 Constitutional transitioning and the right to protest

In February 1990, most political parties agreed to the *National Peace Accord.*[721] This required that a balance be struck between the right to assemble and the protection of public order.[722] In 1991, then President FW de Klerk appointed a *Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation*[723] under the leadership of retired judge Richard Goldstone (Goldstone Commission). The Goldstone Commission was tasked to investigate the disruptive and violent nature of protest in South Africa and make recommendations regarding a new approach to curb the occurrence of these types of protests.[724] The drafting and enactment of the *RGA* is regarded as the "greatest achievement" of the Goldstone Commission in 1993.[725] It must be noted that the *RGA* only came into operation in 1996, after the final *Constitution* was approved. [726]

The *Constitution* provides that everyone has the right to freedom to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner.[727] The right to freedom of association is relevant to the right as provided for in section

720 See in this regard for example Du Plessis and Olivier 1987 *South African Public Law* 84-89; Du Plessis and Olivier 1987 *South African Public Law* 197-207; Du Plessis and Olivier 1988 *South African Public Law* 111-117; Du Plessis and Olivier 1988 *South African Public Law* 267-271; Du Plessis and Olivier 1989 *Koers* 226-239.

721 See Woolman "Freedom of Assembly" 43-6. Also see Woolman "Assembly, Demonstrations and Petition" 380. The National Peace Accord had as its aim to lessen political violence.

722 Woolman "Freedom of Assembly" 43-6. Also see Woolman "Assembly, Demonstrations and Petition" 380; Du Pisani *et al* 1990 *Journal of Modern African Studies* 58; Fuo 2020 *De Jure Law Journal* 373.

723 Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, 1992. Hereafter referred to as the Goldstone Commission. Also see Stoffels 2019 *Obiter* 411.

724 Ngcobo "Local authorities and the regulation of assemblies and demonstrations: the WSSD as a case study" 74. Also see Stoffels 2019 *Obiter* 411; Fuo 2020 *De Jure Law Journal* 373.

725 See Woolman "Freedom of Assembly" 43-8; Stoffels 2019 *Obiter* 411.

726 Woolman "Freedom of Assembly" 43-8.

727 Section 17 of the *Constitution*. Also see *Garvas case* para 52-53; *University of Cape Town v Davids and Others* 2016 3 All SA 333 (WCC) para 57 (hereafter referred to as *UCT v Davids*); *Hotz v University of Cape Town* 2016 4 All SA 723 (SCA) para 31 (Hereafter referred to as *Hotz* case); Alexander 2010 *Review of African Political Economy* 26; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 47, 48-50, 53-58; Fuo 2020 *De Jure Law Journal* 370.

17 of the *Constitution*.[728] It is, however, important to note that the right to freedom to assemble has an inherent qualification. The *Constitution* recognises the potential of violent protests, as expressed in the idea that the exercise of the right should take place in a peaceful and unarmed manner. This limitation is inherent to the right to protest[729] in order to prevent or limit the occurrence of any violence directed at persons but also extends to damage to public or private property.[730] The *Constitution* thereby condemns and prohibits violent protests. Protests may have an impact on the rights of the protesters as well as the other non-protesting citizens. The protesters have a constitutional right to exercise this right with its inherent limitations. The exercise of the right to protest is limited in that it must be unarmed and peaceful or not pose a threat to the safety of other persons or their property. The court in *UCT v Davids* reiterated and confirmed this in that the right to protest cannot be deemed to be a justification for instances where property is destroyed, people threatened and even physically assaulted.[731] The court went further by stating that the intention of the drafters of section 17 of the *Constitution* was never to justify and condone hooliganism and vandalism.[732]

The Constitutional Court in the *Garvas* case confirmed the importance of the right to protest as a central part of the South African constitutional democracy. This right provides the powerless and marginalised members of society a mechanism to voice their needs and interests; they may not have alternatives at their disposal due to a lack of political and economic power. The Constitutional Court furthermore stated that "it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms".[733] This supports the apparent importance of the right to protest in South Africa as mindful of the history of this country and central to pursuing participatory

728 See section 18 of the *Constitution*. Also see Alexander 2010 *Review of African Political Economy* 26; Fuo 2020 *De Jure Law Journal* 370.
729 Also see section 2.4 above.
730 See section 17 of the *Constitution*. Also see *Garvas case* para 52-53; *UCT v Davids* para 59; *Hotz* case para 31; Alexander 10 *Review of African Political Economy* 26.
731 *UCT v Davids* para 59. Also see *Hotz* case para 32.
732 *UCT v Davids* para 62. Also see *Hotz* case para 32.
733 *Garvas* case para 61. Also see Stoffels 2019 *Obiter* 413-414.

democracy.[734] As a mechanism at the disposal of those who do not have the means to demand and realise their democratic rights, this right is indicative of the power and value thereof in a democracy.[735]

The *RGA* furthermore gives effect to the constitutional right by providing a legal framework for the regulation of the right to protest.[736] The objective of the *RGA* is "to regulate the holding of public gatherings and demonstrations at certain places," amongst others.[737] The preamble of the *RGA* states that everyone has the right to freely assemble in public and to enjoy the protection of the state[738] in that regard. The exercise of this right must take place in a peaceful manner with respect to the rights of others who may be affected by the undertaken action.[739]

In terms of the *RGA*, the organisers must submit a notice of the intended protest to the relevant authority to ensure not only the protection of the rights of those participating, but also the rights of others by eliminating and preventing threats to public safety.[740] If the threat still exists after the consultation and negotiation meeting between the relevant parties, the local authority is authorised to prohibit the planned protests.[741] Protests may also be prohibited when the police receive information under oath which credibly indicates that the planned protest will result in the following which the authorities will not be able to curtail:[742] pedestrian or vehicular traffic will be severely disrupted; protestors or non-protestors may sustain injuries; or severe damages will be caused.[743] A discussion among the relevant stakeholders should be held to determine whether the threat can be contained

734 *Garvas* case para 62. Also see Stoffels 2019 *Obiter* 413-414.
735 *Garvas* case para 63. Also see Stoffels 2019 *Obiter* 413-414.
736 Lancaster 2016 *Institute for Security Studies* 2. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 47, 48-50, 53-58.
737 Long title of the *RGA*. Also see Seleoane "A critical review of the Regulations of Gatherings Act" 27. Also see Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 47, 48-50, 53-58.
738 See section 7(2) of the *Constitution*.
739 Preamble of the *RGA*.
740 See section 3 of the RGA. Also see Duncan *Protest Nation* 47-48; Fuo 2020 *De Jure Law Journal* 375.
741 Section 4 of the *RGA*. Also see Duncan *Protest Nation* 47-51; Fuo 2020 *De Jure Law Journal* 375.
742 Section 5 of the *RGA*. Also see Duncan *Protest Nation* 49, 51.
743 Section 5(1) of the *RGA*. Also see Duncan *Protest Nation* 49.

through policing.[744] If the threat cannot be contained, the protest could be prohibited in the interest of public safety, considering the nature of the threat.

Local authorities erroneously view the notification as a permission-seeking process. It is submitted that the notice prerequisite is limiting the right to protest since the local authorities have the power to prohibit any protest. A protest should not be prohibited on the basis that no notice was provided.[745] If a legitimate reason exists to prohibit the planned protest, then it should happen in terms of section 5 of the RGA.

Once a protest is prohibited, the relevant local authority must provide the protesters with reasons for such refusal. However, in certain cases the reasons provided are viewed as arbitrary and even politically motivated.[746] Lancaster[747] cautioned that local authorities should not seek to merely restrain the exercise of the right to protest as a form of political expression and public participation. Restraining protests may increase the anger and frustration among communities but also exacerbate perceptions of marginalisation and exclusion, which may possibly lead to more violent protests.[748] The discussion below of section 5 of the *RGA* will shed light on the circumstances in which the local authority can legitimately seek to prohibit a protest.[749] As part of the criticism against the notice period, it is argued that this period allows government to suppress dissent.[750] This appears to be a similar tactic used by the then apartheid government. Woolman[751] argues that as per *RGA*, the required notice period bodes ill for the freedom of assembly, protest, or demonstration. Furthermore, contrary to the required notice period, protest often occurs as an immediate response to a situation by the protesters.[752] In terms of the

744 Section 5(1) of the *RGA*. Also see Duncan *Protest Nation* 49.
745 See section 2.2.4.2 above.
746 Lancaster 2016 *Institute for Security Studies* 6.
747 Lancaster 2016 *Institute for Security Studies* 6.
748 Lancaster 2016 *Institute for Security Studies* 6.
749 See discussion below on section 5 of the *RGA*.
750 Woolman "Freedom of Assembly" 43-9.
751 Woolman "Freedom of Assembly" 43-13.
752 Woolman "Freedom of Assembly" 43-8.

RGA, if and when a protest takes place, the spontaneous nature thereof may be raised as a defence by the protesters.[753]

In *Mlungwana and Others v The State and Others*[754] the constitutionality of section 12(1)(a) of the *RGA* was challenged.[755] This section criminalised the holding of a gathering without a notification provided to the relevant local authority as required by section 3 of the *RGA*.[756] The argument by the respondents that the notice is required due to the situation that in the case of gatherings where no notice is provided, these situations tend to erupt in violence, was without any evidence to support such an ascertainment.[757] The court found that no link exists between the notice and the purpose proffered by the respondents which has a limiting impact on the freedom of assembly.[758] The court emphasised the importance of the freedom to assembly and regarded this limitation as significant with no justification thereof in terms of section 36 of the *Constitution*.[759]

It follows that in the case where a notice of intention to protest is submitted to a local authority and no permission is granted but the participants proceed with the action, it will be regarded as an unauthorised protest. However, it is submitted that the notification period is not a permission-seeking process but rather is required to allow the local authority to engage with all the relevant stakeholders in order to ensure that the planned protest occurs peacefully and unarmed in considering the safety of the citizenry as well as the prevention of damage to personal or public

753 Section 12(2) of the *RGA*; Fuo 2020 *De Jure Law Journal* 379.

754 *Mlungwana and Others v The State and Others* 2018 ZACC 45 (CC). Hereafter referred to as the *Mlungwana* case.

755 Also see Stoffels 2019 *Obiter* 408-416; Sebopetsa and Odeku 2021 *African Journal of Peace and Conclict Studies* 54-55; Fuo 2020 *De Jure Law Journal* 369-392; Barrie 2019 *TSAR* 405-418; Fuo 2020 *De Jure Law Journal* 369-392.

756 See section 3 of the RGA. Also see Stoffels 2019 *Obiter* 408-410; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 54-55; Barrie 2019 *TSAR* 405-418; Fuo 2020 *De Jure Law Journal* 369-392.

757 *Mlungwana* case 107. Also see Stoffels 2019 *Obiter* 410; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 54-55; Barrie 2019 *TSAR* 405-418; Fuo 2020 *De Jure Law Journal* 369-392.

758 *Mlungwana* case 74, 93 and 107. Also see Stoffels 2019 *Obiter* 410; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 54-55; Barrie 2019 *TSAR* 405-418; Fuo 2020 *De Jure Law Journal* 369-392.

759 *Mlungwana* case 93, 101 and 107. Also see Stoffels 2019 *Obiter* 410, 413-415; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 54-55; Barrie 2019 *TSAR* 405-418; Fuo 2020 *De Jure Law Journal* 369-392.

property. Regardless, in such a case the authorities have the following options at their disposal: they can negotiate with the involved parties; they may deviate from the chosen route; arrest and/or prosecute protesters and contain the gathering within a certain area. During the execution of the abovementioned options, the police may use minimum or necessary force. The use of force may only be applied and justified in extreme circumstances.[760]

In terms of section 5 of the *RGA*, local authorities may prohibit a protest based on information received under oath. Before such steps are taken, the information must indicate that the protest will turn violent and that the police will not be able to contain such violence.[761] This may include a threat of a serious traffic disruption, injuries to the person or damage to property[762] and infrastructure.[763] When such information is received under oath regarding the potential violence, such information must be investigated. Thereafter, a decision must be taken whether to prohibit the protest or not.[764]

If and when permission is granted to protest but it appears that there is a potential for violence to erupt, the relevant role-players must meet in order to discuss mitigation of said potential violence.[765] Thereafter, if no agreement can be reached pertaining to mitigation of the violence, certain stringent conditions may be imposed by the local authorities. The conditions imposed must be reasonable to ensure traffic flow with no or little disruption, appropriate distance between different groups of protesters, 'access to property and workplace', and no injury to persons or damage to property.[766] These conditions may only be imposed by the authorities to mitigate the potential violence.

760 Meyer "Police and the regulation of assemblies and demonstrations: how should "unauthorised" gatherings be handled? The WSSD as a case study" 80.
761 Seleoane "A critical review of the Regulations of Gatherings Act" 29.
762 Section 5(1)(a) of the *RGA*.
763 South African Cities Network *State of South African Cities Report 2016* 152. Also see South African Cities Network *State of South African Cities Report 2021* 89, 123, 131.
764 Section 5(1)(a) of the *RGA*.
765 Hereafter referred to as a *Section Four* meeting.
766 Section 4(4)(b) of the *RGA*. Also see Seleoane "A critical review of the Regulations of Gatherings Act" 28.

The *RGA* also regulates the conduct of the protesters to avoid any form of violence and to ensure the peaceful nature of the protest. Marshals must be appointed to control the protesters during the protest. They must take all necessary steps to ensure the peaceful nature of the protest.[767] In terms of section 8(4) of the *RGA*, laws relevant and applicable to the carrying of dangerous weapons must be complied with by the protesters.[768] Furthermore, participants are not allowed to incite hatred due to differences based on culture, race, sex, language or religion with the use of a banner, placard, speech or singing.[769] Section 8(6) of the *RGA* provides that:

> no person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.[770]

It is evident from the wording of section 8(6) that violence or the mere encouragement of violence is strongly prohibited during protest action. The *RGA*, in line with the *Constitution,* discourages the resort to violence during protest. It is submitted that it would be discourteous to argue that protesters are not impacted by violence or are even resorting to violence in an attempt to seduce or communicate with authorities.[771] There is always the possibility that the police will or may incite a violent response by the protesters.[772]

The police have a duty to protect protesters and the community at large. If the police are of the view that they will not be able to provide adequate protection to the relevant parties, they must notify the local authorities to that effect. The police must then take steps to protect the people and property.[773] It is important that the steps taken must be reasonable and appropriate in the given circumstances.[774] If the police, based on reasonable grounds, are of the view that the steps to protect

767 Section 8(1)(a) of the *RGA*.
768 Section 8(4)(a) of the *RGA*.
769 Section 8(5)(a) of the *RGA*.
770 Section 8(6)(a) of the *RGA*.
771 Woolman "Freedom of Assembly" 43-19.
772 Woolman "Freedom of Assembly" 43-13.
773 Meyer "Police and the regulation of assemblies and demonstrations: how should "unauthorised" gatherings be handled? The WSSD as a case study" 79.
774 Seleoane "A critical review of the Regulations of Gatherings Act" 30.

the person and property are insufficient, the protesters may be asked to disperse within a reasonable time.[775] If a reasonable time has elapsed and the protesters have not dispersed, the police have the power to ensure that the protesters disperse. This implies that the police may disperse the protesters themselves. The necessary force may be used to effect the dispersal of the protesters.[776] The force used to protect the person or property must be "necessary", "moderated" and "proportionate" to the circumstances.[777] The police also have the authority to take the necessary steps, which may include the use of firearms and weapons, to protect the person and property.[778] This may be used to control the protesting crowd and where the intention exists to injure or kill persons; or to damage or destroy property.[779]

It appears that the police are given a wide range of powers regarding the control of the protesters. Indeed, it is the police who have the duty to protect and serve. However, the police must assess the circumstances in an objective manner when taking steps to protect life or property. Consequently, the inference may be drawn that it is the task of the police to determine what firearms and weapons to have at their disposal and ultimately, when to use necessary force in the given circumstances.

Section 11 of the *RGA* deals with the liability for any damages which may arise from a protest. This would be applicable where non-participating members of the public suffer damage when, for example, their personal properties are set alight. The damage suffered as a result of the protest can be claimed from any protester as riot damage as they are jointly and severely liable as joint wrongdoers.[780] The destruction of property during violent protests indirectly creates the opportunity for

775 Meyer "Police and the regulation of assemblies and demonstrations: how should "unauthorised" gatherings be handled? The WSSD as a case study" 79. Only a police officer of the rank warrant officer or higher may make such a directive.
776 Section 9(2) of the *RGA*. Also see Seleoane "A critical review of the Regulations of Gatherings Act" 30.
777 Section 9(2)(e) of the *RGA*.
778 Seleoane "A critical review of the Regulations of Gatherings Act" 30.
779 Section 9(2)(d) of the *RGA*. Also see Meyer "Police and the regulation of assemblies and demonstrations: how should "unauthorised" gatherings be handled? The WSSD as a case study" 79.
780 Section 11 of the *RGA*. Also see Duncan *Protest Nation* 50.

looting to take place. This may contribute to the need to mitigate the risk created by the potential large scale of property damage.

Protest could have both a negative and positive eventual impact on socio-economic development in communities. Municipalities are often responsive to the purpose or cause of the violent protest in order to defuse the situation. This may involve making false promises to the protesters to achieve said objective. However, after successfully convincing the protesters to refrain from their prohibited conduct, the plight of those that continue protesting will still be disregarded. This may reignite and increase the violence used in a protest.[781] Resorting to violence often creates the impression of desperation and the need for urgent intervention by the municipality. On the other hand, peaceful protest harmonises working relationships and builds better relationships.[782] One can argue that the relationship between the community and the municipality ought to have been established, as the law dictates engagements between all stakeholders.[783]

As stated above,[784] the right to protest in South Africa is constitutionally provided for and legislatively regulated by the *RGA,* which sets out the framework inclusive of rights and responsibilities within which it may be exercised. These are democratically sound and in place to advance the democratic government. Active engagement by the citizenry is necessary to contribute to and advance democracy.[785] The ambit of the active engagement intended, is to be inclusive of constitutionally guaranteed and protected civil protests, acts of civil disobedience as well and the regular occurrence of violent protests. The circumstances under which this could be justified will be discussed later in this section.

The right of the citizenry to dissent is argued to be a great virtue in a democratic state. Furthermore, the citizenry may only exercise this right considering the inherent qualifications thereto, such as the unarmed and peaceful nature which, if

781 Mamokhere *African Journal of Developmental Studies* 84-84.
782 Mamokhere *African Journal of Developmental Studies* 85.
783 See sections 3.5, 3.6, 3.7 and 4.5.
784 See section 2.2.5 above.
785 Pscorn "Civil disobedience as a democratic practice" 30.

disregarded, may have illegal consequences.[786] This right to dissent is not protected and endorsed when it is exercised in a violent manner in opposition to laws or government decision-making which may result in injury of people or the destruction of property.[787]

This right to protest is an essential form of expression in a democracy.[788] As stated already, the right to protest is guaranteed and protected by the *Constitution* by means of the provisions of section 17. Constitutional recognition for this right also mitigates the threat that protest may be perceived to pose to democracy.[789] The right to freedom of assembly is qualified in that it may only be exercised in an unarmed and peaceful manner.[790] Any protest action, regardless of the form it takes, will be contrary to and in violation of section 17 if it includes the presence of any weapons, threat of violence or actual violence. The *RGA* governs and regulates the exercise of the right to protest.[791] Municipalities are often accused of employing myriad ways to stifle protests instead of adhering to their positive obligation and duties in terms of the *RGA*[792] to enable the exercise of this right.[793] In addition to municipalities frustrating the exercise of this right, police violence is also a hinderance to the exercise of this right.[794] It is submitted that peaceful protest in accordance with the *Constitution* is often escalated to violent protest due to the police conduct and individual instances of specific conduct by some protesters.

In the context of South African local government, violent protests are characterised as involving an element of violence, threat of violence or any form of intimidation. This violence may be directed against a person or the property of a person who is

786 Wihl 2018 *Israel Law Review* 305,307.
787 Wihl 2018 *Israel Law Review* 305.
788 Duncan *Protest Nation* 3,47. Also see section 1.1 above on democracy.
789 Duncan *Protest Nation* 3. Also see O'Brien 2015 *Contemporary Social Science* 337-348; Palma "The Securitization of Protests a challenge to Democracy" 510-539.
790 Section 17 of the *Constitution*. Also see Duncan *Protest Nation* 3.
791 See sections 3, 4, 5, 8 and 9 of the *RGA*. Also see Duncan *Protest Nation* 3.
792 See section 4 and 5 of the *RGA*.
793 Duncan *Protest Nation* 43.
794 Duncan *Protest Nation* 3.

not involved in government or decision-making.[795] Statistics for the period 2007-2014 on the occurrence of protest as well as the violent nature thereof indicate that since 2013, 90% of the recorded protests in South Africa have been regarded as violent.[796] The violence noted includes intimidation (33%), personal attacks (27%), arson (14%) and looting (7%).[797] Regardless of arson and looting which may be a threat to the person and his or her property, it appears that almost 60% of the violent protests that occurred during the indicated period included attacks on the person.

South Africans have a growing tendency to resort to violence and damage to property during protest as a means of engagement with government, specifically local government.[798] They resort to these actions as part of radical tactics to ensure that the local authorities respond quicker to their grievances.[799] In order to avoid violence, local government reacts to the violence and addresses the particular grievance in order to avoid further violence and damage to property.[800] The eventual

795 See Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 13. Instances where roads were barricaded and the freedom of citizens was impeded, were included in this view of violent protest. Also see South African Cities Network *State of South African Cities Report 2016* 152.

796 Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 13. Also see South African Cities Network *State of South African Cities Report 2016* 152. The following are a few examples of recent violent protests in South Africa: In Cathcart, Eastern Cape the protesters blockaded the N6. The mayor's house was attacked as malicious damage was caused. There were also reports of intimidation. In Eshowe, KwaZulu-Natal the streets were blockaded by burning tyres and the use of rubbish bins. A mobile police unit was also set alight. There was also an attempt to burn down the local ANC office. Elsies River, Cape Town saw the protesters burning tyres, furniture and mattresses and throwing rocks at members of the South African Police Service. This resulted in the use of rubber bullets, stun grenades and tear-gas by the SAPS in order to disperse the violent protesters. In Mbombela, Mpumalanga rubber bullets was also used to disperse the protesters who burnt tyres on the road leading to the Swaziland border. Coligny and Lichtenburg, North West saw violent protest as a result of the death of a 12-year-old boy who reportedly fell off a moving vehicle, and poor service delivery. The protesters barricaded streets, businesses and houses were damaged, vehicles were burnt and people were injured during the violent protest. See SA Local Government Information Centre 2017 *The SA Local Government Briefing Cape Town* 42-43.

797 Powell *et al* 2015 *Civic Protests Barometer 2007-2014* 15. Also see South African Cities Network *State of South African Cities Report 2016* 153. Also see South African Local Government "*Community Protest: Local Government Perceptions*" 7.

798 See Chiwarawara 2023 *Politikon: South African Journal of Political Studies: South African Journal of Political Studies* 242-253. Also see South African Cities Network *State of South African Cities Report 2021* 89, 123, 131; Sebopetsa and Odeku 2021 *African Journal of Peace and Conflict Studies* 46.

799 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 246.

800 Chiwarawara 2023 *Politikon: South African Journal of Political Studies: South African Journal of Political Studies* 242. Also see South African Cities Network *State of South African Cities Report 2021* 89,123, 131.

decision to resort to violence or cause damage to property is not an automatic and impulsive decision as it may seem.[801] Amongst the considerations in deciding on the tactics to be employed during a protest, the following are noted: the degree of anger of the community, frustrations with the local authorities, ineffectiveness of prior tactics and mechanisms, as well as the urgency by which grievances are addressed. As stated before, the use of these tactics amidst the highlighted considerations are aimed at ensuring a quicker response from government.[802] Evidence suggests that local communities experience an acceleration in government response to their grievances if, for example, certain buildings are destroyed.[803] The intended consequence of the protest, in the absence of service delivery and the lack of response to the grievances of the local communities, holds that the development in the communities will be promoted as a result of the quicker government response. It should be noted that government has limited resources at its disposal while local communities have pressing needs which require urgent attention.[804] Regardless of the limited resources challenge, government also faces other challenges which hamper its capacity to develop communities.[805]

In order to place the right to protest in context of this thesis, it is necessary to further explore the notion of democracy[806] and the role of local government therein. The next paragraph reflects on representative and participatory democracy with a view to contextualising and explaining the relation thereof to the right to protest.

2.5 Reflections on representative and participatory democracy

Democracy requires a government that is established by the people, exercised by the people, and that serves their needs and interests.[807] Democracy entails both

801 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 245-246.
802 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 246. Also see South African Cities Network *State of South African Cities Report 2021* 89, 123, 131.
803 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 246. Also see South African Cities Network *State of South African Cities Report 2021* 89, 123, 131.
804 Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 246.
805 See Chiwarawara 2023 *Politikon: South African Journal of Political Studies* 246. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173; Also see South African Cities Network *State of South African Cities Report 2021* 89,123, 131.
806 See section 1.1 above.
807 Becker and Raveloson "What is Democracy?" 4.

representative democracy and participatory democracy. Participatory democracy may be regarded as a government system in which every citizen as a member of the broader community participates in the affairs of government which have a direct impact on their development.[808] Democracy includes decision-making processes where binding rules and policies of a collective nature are made which involve all members of the community.[809]

The opportunity for members of the community to participate in the process of government or government decision-making is characteristic of a democratic system.[810] The citizenry must be provided with the necessary participatory mechanisms to partake in the affairs of government, and for purposes of this thesis, local government. The mechanism should enable members of the community to communicate their needs and interests.[811]

It is inherent in the nature of representative democratic governments that the citizenry subjected to the democratic rule must consent thereto,[812] which involves and requires an active form of public participation by means of, for example, voting.[813] This consent via free and fair elections as an active form of public participation legitimises a democratic government. Consenting to the democratic rule of the government imposes on citizens the political obligation to participate in

808 Offor 2006 *The Journal for Social, Political and Economic Studies* 268. Also see Bahmueller *et al* 'Elements of Democracy: The fundamental Principles, Concepts, Social foundations, and Processes of Democracy" 12; Howard "Democracy in Brief" 1-2; Okiror and Kamp "Concepts and Principles of Democratic Governance and Accountability" 2-3; Sisk *et al* "Democracy at the Local Level" 12; Pscorn "Civil disobedience as a democratic practice" 20; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9; Duncan *Protest Nation* 43.

809 Beetham 1992 *Political Studies Special Edition* 40. Also see Pscorn "Civil disobedience as a democratic practice" 10-11.

810 Young "Inclusion and Democracy" 17. Also see Pscorn "Civil disobedience as a democratic practice" 20; McGuigan 1971 *The Canadian Bar Review* 222.

811 See the discussion in Chapter 4.

812 Pscorn "Civil disobedience as a democratic practice" 9. Also see McGuigan 1971 *The Canadian Bar Review* 267; Spitz 1954 *American Political Science Review* 392; Wihl 2018 *Israel Law Review* 311.

813 Pscorn "Civil disobedience as a democratic practice" 10-11. Also see section 1(c) of the *Constitution*; South African Human Rights Commission *The right to participate in public affairs* 2015 5; Spitz 1954 *American Political Science Review* 392.

government, but also to obey and adhere to government directives.[814] Government directives include laws and government decision-making, which ought to be respected by the local community. However, democracy also has an enabling dimension, namely to introduce checks and balances that the local community can exercise.

Voting, as a measure to constitute the representative component of democracy, infers consent as well as obedience to laws and government decision-making.[815] This is essential for the maintenance of social order and the avoidance of anarchy.[816] It is furthermore argued that disobedience to laws and government decision-making constitutes an attack on the democratic government and may amount to a rebellion, undermining the foundations of a system of social order.[817] Although the importance of maintaining a system of social order is necessitated by democracy, it is endorsed that a degree of disobedience might be required for purposes of institutional safeguards.[818] Challenging laws or government decision-making does not automatically denote an attempt to overthrow the social order.[819] Democracy by its nature should have a positive impact on the social order.

In an ideal democratic society, the majority rule requires the government to implement the will of the people[820] in reference to laws and decision-making with due respect for the protection of the rights of minority groups. A majority rule may sometime create unjust conditions for minority groups as the majority dictates the extent of the conditions.[821] Both majority and minority groups are stakeholders and have a participatory role in the establishment and functioning of a democratic

814 Pscorn "Civil disobedience as a democratic practice" 9, 15. Also see McGuigan 1971 *The Canadian Bar Review* 267; Spitz 1954 *American Political Science Review* 392; Wihl 2018 *Israel Law Review* 311.
815 McGuigan 1971 *The Canadian Bar Review* 267. Also see section 1(c) of the *Constitution*; South African Human Rights Commission *The right to participate in public affairs* 2015 5; Spitz *American Political Science Review* 392.
816 Spitz 1954 *American Political Science Review* 392, 339. Also see Wihl 2018 *Israel Law Review* 311.
817 Spitz 1954 *American Political Science Review* 392, 396, 399.
818 Spitz 1954 *American Political Science Review* 394, 399, 401.
819 Spitz 1954 *American Political Science Review* 399.
820 Spitz 1954 *American Political Science Review* 399.
821 Spitz 1954 *American Political Science Review* 401.

government. When considering the needs and interests of both the majority and minority groups, some tensions and countervailing views may result if they are not aligned to the best interests of the community at large. The implications hereof are that some matters viewed as serious by a minority group, might not be similarly regarded by the majority group, which often leaves the minority behind with limited to no recourse.[822] The argument is further made that the strength of a democracy may be measured by the extent to which the minority groups are included and participating in the affairs of local government which affect the society at large, more specifically their local communities. It is furthermore argued that access to participatory mechanisms is important when determining the degree or at least the extent to which democracy is pursued.[823]

Considering representative as well as participatory democracy, it remains clear that all citizens are required to participate in the democratic system and to question causes and impacts of instances where the system fails. This entails that both majority groups and minority groups must be able to influence imperative societal matters and have access to the subsequent decision-making processes and accountability mechanisms.[824] According to McGuigan,[825] one of the evident deficiencies of democratic governments relates to the process of decision-making and ensuring that decision-making is democratic.[826] Inherently, citizens are beneficiaries of the rights and freedoms associated with a democracy. Democracy as a government system is not perfect,[827] but still demands that the citizenry should

822 McGuigan 1971 *The Canadian Bar Review* 267. Also see Spitz 1954 *American Political Science Review* 401.

823 See McGuigan 1971 *The Canadian Bar Review* 270. Also see Spitz 1954 *American Political Science Review* 396.

824 McGuigan 1971 *The Canadian Bar Review* 267,270. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.

825 McGuigan 1971 *The Canadian Bar Review* 267.

826 Also see Spitz 1954 *American Political Science Review* 396. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.

827 McGuigan 1971 *The Canadian Bar Review* 224. Also see Spitz 1954 *American Political Science Review* 396.

participate and comply with those demands in order to protect the fairness, integrity, and optimal functioning of the democratic procedures.[828]

Democracy is an ideal that is perceived as utopian and can never be realised to its full extent. Certain democracies are good or better than others, while the counter-argument may also be made that a democracy can always be or attempt to be more democratic or more just.[829] According to Spitz,[830] two classes or schools of thought exist regarding democracy: The first relates to the view that democracy is good, but the democratic nature of the government is objectifiable. The second relates to the view that the government is democratic, but the objection is aimed at democracy itself.[831] Considering these perceptions, it is notable that the imperfections and inadequacies of democracy are central to the scrutiny and objections formulated based on the lived experiences of the citizenry.

The perceived imperfections or inadequacies of democracy[832] may pave the way for non-traditional and 'illegal' participatory measures contrary to those available for example in local government.[833] These imperfections and inadequacies, but also the apparent fallacies of democracy, may offer some justification for people to opt for alternative ways of protesting as a manner of communicating their discontent and dissatisfaction.[834] These alternative measures may include (a) peaceful and unarmed civil protest which would be constitutionally protected, (b) acts of civil disobedience in violation of a law, policy, or government decision-making with an acceptance of the subsequent punishment, and (c) the prevalent and regular

828 Pscorn "Civil disobedience as a democratic practice" 21. Also see McGuigan 1971 *The Canadian Bar Review* 224; Spitz 1954 *American Political Science Review* 392; Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9; Duncan *Protest Nation* 43.

829 Pscorn "Civil disobedience as a democratic practice" 26. Also see McGuigan 1971 *The Canadian Bar Review* 224; Spitz 1954 *American Political Science Review* 396.

830 Spitz 1954 *American Political Science Review* 396.

831 Spitz 1954 *American Political Science Review* 396.

832 Pscorn "Civil disobedience as a democratic practice" 26. Also see McGuigan 1971 *The Canadian Bar Review* 224,267; Spitz 1954 *American Political Science Review* 396, 401.

833 See McGuigan 1971 *The Canadian Bar Review* 222. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.

834 Pscorn "Civil disobedience as a democratic practice" 26. Also see McGuigan 1971 *The Canadian Bar Review* 224; Mamokhere *African Journal of Developmental Studies* 80-81.

occurrence of violent civil protests.[835] A consideration of the extent to which civil protest may be justified, will necessitate the following: an investigation into the viability of the presumed and available legal remedies of contestation and a determination of whether these mechanisms function and/or are readily available and fully accessible to the citizenry.[836]

The political landscape in a democracy must be open and responsive, which may be achieved by means of the available participatory mechanisms or civil protests. The extent of the openness and responsiveness will promote access to the government by means of encouraging the citizenry to pursue change.[837] Also, a strong political party system which may be utilised as an effective "conveyor belt" is supposed to assist with directing the social struggles and lived experiences of the people towards the government.[838] The political landscape embedded with a strong political party system may, considering the impact as indicated above, contribute to the dampening of the discontent and dissatisfaction that lead to protests.

Participatory governance emphasises the need for public participation on a substantive level.[839] The substantive level of public participation is intended to ensure ongoing consultation with the citizenry.[840] An example of such a local government institution in South Africa is the institution of ward committees.[841]

The focus on local government in this thesis, necessitates a discussion of decentralisation, with the inherent principle of subsidiarity to the extent that it will contextualise local government as the closest sphere to the people as well as the

835 See McGuigan 1971 *The Canadian Bar Review* 222.
836 Pscorn "Civil disobedience as a democratic practice" 26. Also see McGuigan 1971 *The Canadian Bar Review* 224.
837 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
838 Arce and Rice "The political consequences of protest" 8.
839 See Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9. Also see Duncan *Protest Nation* 43; Munzhedzi 2020 *African Journal of Governance and Development* 93.
840 Duncan *Protest Nation* 43.
841 See Duncan *Protest Nation* 44. Also see Mamokhere *African Journal of Developmental Studies* 83.

best-positioned sphere to be responsible for developmental local government.[842] The following paragraph discusses what it means, the need for decentralisation as well as the link thereof with local government and public participation.

2.6 Decentralising governing power

Decentralisation is, amongst others, fundamental for purposes of strengthening and deepening democracy, improving development in the sub-national levels of government as well as curbing and potentially mitigating abuse by centralised governance.[843] Decentralisation is regarded as a vehicle to pursue the purpose of transformative development.[844] Development is one of the objectives for the existence of local government as the sphere closest to the people.[845] This will be dealt with further in the discussion below.

Decentralisation can be defined as the process by which specific power, responsibilities, capacities as well as resources are transferred from the national to the different sub-national levels of government.[846] Decentralisation thus entails that certain powers and functions are transferred to the sub-national levels of government from the national government.[847] These powers and functions would require the relevant sub-national level of government to exercise autonomy over

842 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 26. Decentralisation is also referred to as non-centralism. Also see Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 26.

843 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31.

844 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 26.

845 See Thornhill 2004 *Journal of Public Administration* 470; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 176-177; Fuo " Municipal service delivery and the environment" 10-1; Fombad "Cameroon and the Anomalies of Decentralisation with a Centralist Mindset" 344.

846 Article 1 of the African Union 2014 *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*. Hereafter referred to as the *African Charter on Decentralisation*. Also see Chigwata and Ziswa 2018 *Hague Journal on the Rule of Law* 295-316 on a review of the *African Charter on Decentralisation*; Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31; Fuo 2015 *African Human Rights Journal* 168; De Visser *Developmental Local Government: A case study of South Africa* 13-15.

847 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31. Also see Fuo 2015 *African Human Rights Journal* 168; De Visser *Developmental Local Government: A case study of South Africa* 13-15.

these matters and to make independent decisions in this regard.[848] Essentially, decentralisation is a division of powers between the sub-national levels of government based on the rule of law.[849]

Put differently, decentralisation refers to state authority which is subjected to restructuring from the central government to sub-national level in terms of the principle of subsidiarity.[850] In this regard, Fuo[851] states the following:

> Decentralisation in government refers to the restructuring of state authority, in accordance with the principle of (institutional) subsidiarity, in order to create a system of governance that ensures co-responsibility between institutions of government at the central, regional and local levels, in meeting the needs of citizens. In other words, central governments relinquish certain functions and powers to lower-level units, such as local authorities that are legally constituted as separate governance bodies.

The decentralisation of government, considering the principle of subsidiarity will ensure that local government is entrusted with certain functions and powers as the sphere closest to the people, in order to meet their needs and interests.

The principle of subsidiarity is an organising principle when decentralisation is considered. The implication hereof suggests that for certain matters for example, the needs and interests of communities will be effectively served by enabling the local authority to address the matter. Local government should essentially perform

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848 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31. Also see Fuo 2015 *African Human Rights Journal* 168; De Visser *Developmental Local Government: A case study of South Africa* 13-15, 257. Steytler furthermore submits that the viewpoint of the autonomous decision-making by the sub-national levels of government is not widely shared and supported. See Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 26.

849 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 26, 31. Also see Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31; Fuo 2015 *African Human Rights Journal* 168; De Visser *Developmental Local Government: A case study of South Africa* 13-15. On the rule of law see section 1(c) of the *Constitution*; Dyzenhaus 2007 *The South African Law Journal* 734-739; Kruger 2010 *PELJ* 479-485; Pieterse 2023 *Hague Journal on the Rule of Law* 307-308.

850 Fuo 2015 *African Human Rights Journal* 168. Also see Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 34; De Visser 2010 *Stellenbosch Law Review* 90-91; Mathenjwa 2018 *Southern African Public Law* 11-12; De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf. Also see Du Plessis 2006 *Stellenbosch Law Review* 207-231 for a discussion of the different modes of subsidiarity.

851 Fuo 2015 *African Human Rights Journal* 168.

the tasks which will be best performed at the local level.[852] The devolution of central government to the local level is specifically aimed at empowering same to meet the needs and interests of people.[853]

The principle of subsidiarity[854] recommends that governance should ideally be focussed on the sphere closest to the people.[855] This suggests that in line with decentralisation and the underlying principle of subsidiarity, local government be so tasked with governance as the sphere closest to the people. The role of local government is recognised and protected in the *Constitution*, whilst the other spheres of government "must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."[856] The principle of subsidiarity does not seek to or intend to deter the other government levels such as the national and provincial government from supporting the local level.[857] Furthermore, national and provincial government may not unnecessarily interfere[858] without sufficient reasons. The principle of subsidiarity supports and underlines the role and purpose of local government.[859]

Focussing on governance, the principle of subsidiarity maintains that certain powers and functions be allocated to lower levels.[860] The allocation of powers and functions to the lower levels must be done while one is mindful of the capacity of the relevant level to efficiently perform the allocated powers and functions.[861] According to Du

852 Du Plessis 2015 *CILSA* 296.
853 Du Plessis 2015 *CILSA* 299.
854 See Du Plessis 2015 *CILSA* 294-301.
855 De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf. Also see Fombad "Cameroon and the Anomalies of Decentralisatoin with a Centralist Mindset" 344.
856 Section 154(1) of the *Constitution*. Also see Du Plessis 2015 *CILSA* 299. Du Plessis states the following: "The assumption underpinning subsidiarity is, therefore, that no single type of governance actor or level of organisation is alone appropriate for all functions of governing."
857 Du Plessis 2015 *CILSA* 300.
858 See Du Plessis 2015 *CILSA* 300. Du Plessis discusses proposed criteria for intervention by for example, the central government with greater authority.
859 De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf. Also see Mathenjwa 2018 *Southern African Public Law* 11.
860 Mathenjwa 2018 *Southern African Public Law* 11.
861 Mathenjwa 2018 *Southern African Public Law* 11.

Plessis,[862] the principle of subsidiarity also intends to restrict the higher level of government to exercise powers and functions which may be appropriately disposed of at a lower level. The inference to be drawn does not suggest that the higher level is compelled to allocate powers and functions to the lower level, as the consideration is whether the lower level will be able to execute them effectively. This is in line with the argument that the principle of subsidiarity should be relied on to determine the functional competence of local government for purposes of the allocated powers and functions.[863] The submission is made that this will enable or at least provide municipalities with the relevant powers and functions to respond to the needs and interests of the people as determined by means of the employment of the available participatory mechanisms.[864] Having the power and functions to respond to the needs and interests of the people will also have an impact on the resort to protest as a result of frustration with local government and their lack of responsiveness to the needs of the people.[865]

National and provincial government are allowed to allocate additional responsibilities to municipalities based on the principle of subsidiarity.[866] Section 156(4) of the *Constitution* must be considered in the context of the principle of subsidiarity[867] and provides the following:

> The national government and provincial governments must assign to a municipality, by agreement, and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –
> (a) that matter would most effectively be administered locally; and
> (b) the municipality has the capacity to administer it.[868]

862 Du Plessis 2006 *Stellenbosch Law Review* 209.
863 Mathenjwa 2018 *Southern African Public Law* 12.
864 See Chapter 4 below.
865 See section 4.7 below.
866 Fuo 2015 *African Human Rights Journal* 172. Also see Mathenjwa 2018 *Southern African Public Law* 11.
867 See Mathenjwa 2018 *Southern African Public Law* 11-12; De Visser 2010 *Stellenbosch Law Review* 90-91; De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf.
868 Section 156(4) of the *Constitution.*

The reading of section 156(4) of the *Constitution* suggests both a duty and discretion on the part of national and provincial government when it comes to assigning additional matters to local government. The section contains the word "must" which implies a duty as this word is compulsory.[869] The compulsory nature of the word will take effect after the provisions in section 156(4) of the *Constitution* are met. The discretion lies in the determination of whether the municipality has the capacity to effectively administer certain powers and functions listed in Part A of Schedule 4 or Schedule 5. The duty to assign will only be relevant if the discretionary considerations are satisfied. It is however argued by De Visser[870] that national and provincial government would not be keen to be compelled into devolving certain powers and functions within their sphere to local government. De Visser[871] furthermore argues that section 156(4) of the *Constitution* is subjective in the sense that it is in favour of decentralisation of powers of functions to local government.

The *Constitution* urges the transfer of additional powers and functions from the central government to the local government.[872] It is important to note that the municipalities should be in a position to effectively manage the matter transferred, considering the capacity of the municipalities. This is aimed at the functional competence of the municipalities.[873] The guiding principle should be development whenever national government considers the transfer of powers and functions to local government.[874]

The purpose of the transfer of power, responsibilities, capacities as well as resources should be aimed at the delivery of quality service to the community, taking into

869 See De Visser 2010 *Stellenbosch Law Review* 90.
870 De Visser 2010 *Stellenbosch Law Review* 90.
871 De Visser 2010 *Stellenbosch Law Review* 94.
872 De Visser 2010 *Stellenbosch Law Review* 90. Also see De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf.
873 Mathenjwa 2018 *Southern African Public Law* 11.
874 De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf.

account their needs and interests via public participation mechanisms.[875] The necessity for public participation will be alluded to below in this paragraph.[876] The delivery of improved and quality services to the people is central to the existence of decentralisation.[877] Central government has the mandate to provide services to the people but also to respond to their needs and interests, which is complicated by their remoteness in relation to the people, which rationalises the decentralisation of powers and functions to the local level.[878]

In South Africa, the *Constitution* establishes three spheres of decentralised government which are distinctive, interdependent, and interrelated spheres of government, namely national, provincial, and local government.[879] These spheres of government ought to be regarded as co-responsible for attending to the needs and interests of the people.[880] This underlies decentralisation. Local government[881] as the closest sphere or government level to the people, is a manifestation of the decentralisation of the central government. Decentralisation with the inherent principle of subsidiarity posits that local government is better placed in terms of decision-making which will directly affect their communities.[882]

Local government is constitutionally recognised and established.[883] Local government as the closest sphere to the people fulfils important functions.[884] As the closest sphere to the people, municipalities have the right to govern their own

875 Article 1 of the *African Charter on Decentralisation*. Also see *Joseph & Others v City of Johannesburg & Others* 2011 7 BCLR 651 (CC) para 34-38. Hereafter referred to as the *Joseph* case. Also see Fuo 2015 *African Human Rights Journal* 168.

876 Also see Chapter 4 below.

877 Fuo 2015 *African Human Rights Journal* 168. Also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 25-26. Hereafter referred to as the *Blue Moonlight Properties* case.

878 See Fuo 2015 *African Human Rights Journal* 168. Also see *Blue Moonlight Properties* case para 25-26.

879 See section 40(1) of the *Constitution*. Also see Fuo 2015 *African Human Rights Journal* 169, 171.

880 Fuo 2015 *African Human Rights Journal* 168.

881 See Fuo 2015 *African Human Rights Journal* 171.

882 De Visser 2008 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-1-february-march-2008/vol-10-no-1-subsidiarity-in-the-constitution.pdf.

883 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 31. Also See Chapter 7 of the *Constitution*.

884 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 34.

affairs[885] while being mindful of the needs and interests of the communities. These include the provision of basic services for which the failure to deliver, permits the local community to hold the municipality accountable.[886]

The objectives of local government include that a bottom-up approach is constructed in relation to democracy[887] and that development is to be pursued due to the close proximity of municipalities to the people.[888] Local government forms the cornerstone of democratic governance considering the participatory nature of the local sphere.[889] Development as an objective of local government will only be effective and efficient if the available resources are distributed equitably to local government that is best placed to determine their deployment, taking into account the developmental needs of the community.[890] The municipality must ensure the development of the local community in a sustainable manner in light of the needs of the community.[891] This stems from the developmental local government mandate entrusted to municipalities.[892]

In addition, local government has the following characteristics or attributes: "legal personality"; "powers to perform functions" inclusive of being responsive to the needs and interests of the local communities; "budgetary and staffing autonomy subjected to control"; and "citizen public participation".[893] Considering these characteristics or attributes, the inference may be drawn that local government has the necessary autonomy to perform their duties subject to oversight from provincial and national government.[894]

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885 See section 151(3) of the *Constitution*. Also see *Robertson* case para 59-60; De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; Du Plessis and Nel "An introduction" 1-27; Fuo 2015 *African Human Rights Journal* 171; Fuo 2017 *De Jure* 325; Pieterse 2023 *Hague Journal on the Rule of Law* 309-314.

886 See section 2.9 on the discussion of accountability below. Also see Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 34.

887 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 35.

888 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 35-36.

889 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 35.

890 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa" 36. Also see *Robertson* case para 60.

891 See section 152(1)(b) of the *Constitution*; Fuo 2015 *African Human Rights Journal* 171-172.

892 Fuo 2015 *African Human Rights Journal* 172.

893 See definition of municipality in the *Systems Act*. Also see section 2 of the *Structures Act*.

894 See Mathenjwa 2018 *Southern African Public Law* 4-5.

The *Constitution*[895] therefore recognises and embraces decentralisation as a means to pursue and achieve the established constitutional developmental objectives.[896] Public participation[897] is underlined as an important mechanism that can be used in local government decision-making.[898] Such an obligation is imposed on the municipalities to encourage public participation during the decision-making process in local affairs.[899] South African law provides an elaborate legal framework that recognises and necessitates public participation in local government affairs as the sphere closest to the people. This indicates the importance thereof in local governance.[900]

In terms of "citizen public participation" as a characteristic of local government, public participation does not occur as frequently as required in a democratic dispensation.[901] However, it is submitted that the meaningfulness of the public participation pertaining to the affairs of local government is what really matters when the extent of public participation is determined.[902] Inasmuch as public participation should occur more frequently, the meaningfulness thereof when it does occur, should be the emphasis and not the mere occurrence thereof.[903]

As stated above, local government is best placed to address the needs and expectations of its communities, as the closest form of government to the people.[904] The essential nature of local government in the pursuance of development becomes more apparent and crucial due to the limitations of national and provincial governments.[905] Some of these limitations stem from the remoteness of the national and provincial government contrary to the closeness of local government to the

895 See section 40(1) of the *Constitution*.
896 See section 152 and 153 of the *Constitution*.
897 See section 195(1)(e) of the *Constitution*.
898 See Fuo 2015 *African Human Rights Journal* 169.
899 See section 195(e) of the *Constitution*. Also see Fuo 2015 *African Human Rights Journal* 170.
900 See Fuo 2015 *African Human Rights Journal* 172. Also see section 4.5 below.
901 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 51.
902 See section 4.5 on the mechanisms for public participation in local government.
903 See sections 2.10, 4.4 and 4.5 below.
904 Koma 2010 *Journal of Public Administration* 113. Also see Mathenjwa 2018 *Southern African Public Law* 2.
905 Steytler "Local government in South Africa: Entrenching decentralised government" 185.

people which will enable the last mentioned. The following paragraph delves into the rationale for the existence of a local sphere of government.

2.7 Justifications for the existence of a local sphere of government

As stated already,[906] local government is regarded as the cornerstone of democratic dispensations.[907] After the transition from the white minority regime to a non-racial regime, local governments as the closest government sphere to communities were tasked with building local democracy and promoting socio-economic development.[908]

In essence, local government was initially assigned the important role to rebuild local communities. For example, local government had to manage shared spaces and equally distribute the resources at its disposal. The eradication of spatial and other inequalities as well as the maintenance of shared infrastructure was also an important part of pursuing that role.[909] Local government is key in service delivery, playing an important role in the development of communities.[910]

In the South African context, national and provincial government may not be close enough to the people, which speaks to their inability to determine and attend to the needs of the local communities.[911] Regardless of their remoteness in relation to the people, national and provincial government consists, amongst others, of members of the various political parties they voted for.[912] These two spheres are representative of the people and must support and strengthen local government in order for the last-mentioned to perform its functions and powers.[913] This may be

906 See sections 1.1 and 1.2 above.
907 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 53. Also see Madumo 2015 *Administratio Publica* 158, 164. Also see Koma 2010 *Journal of Public Administration* 113.
908 Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118. Also see Mathenjwa 2018 *Southern African Public Law* 2.
909 See Steytler "Local Government in South Africa: Entrenching decentralized government" 184. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154. Also see Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.
910 De Visser and Steytler *Local Government Law of South Africa* 28.
911 Steytler "Local goverment in South Africa: Entrenching decentralised government" 185.
912 See section 4.5.2 below.
913 See section 2.6 above. Also see section 156(1) of the *Constitution*; Du Plessis 2015 *CILSA* 299.

viewed as part and parcel of the reason for the creation and existence of local government. Being the closest to the people, local government can determine the needs of the community, attend to the satisfaction thereof,[914] and be responsive thereto.[915]

While this researcher is mindful of the abovementioned reason why local government exists, additional reasons indicate the necessity of local government as sphere. These reasons include political education, political leadership, and government accountability. A brief discussion of these reasons will follow.

Firstly, political education requires local government to introduce programmes dealing with "active and meaningful political involvement". This assists in establishing a local government with the "spirit of political awareness and consciousness".[916] Local government must have measures in place to educate those involved in local government to best fulfil their duties and responsibilities as functionaries. The South African Local Government Association (*SALGA*)[917] developed an Integrated Councillor Induction Programme for newly and re-elected councillors. The local government environment is ever-changing and refresher training sessions are of great value for the existing and newly elected councillors, who have to act for the benefit of its constituency.[918]

Secondly, local government plays an important role in the leadership abilities or skills of politicians. Local government can be regarded as the training ground for politicians seeking to make the transition to provincial or national government. Without a doubt, local government provides officials with an opportunity to gain valuable experience which will assist them in future political endeavours.[919] It would

914 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 54.
915 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 55.
916 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 55.
917 Hereafter referred to as *SALGA*.
918 See SALGA 2021 http://www.salga.org.za/event/nma21/documents/14-05-2021/Rio%20Nolutshungu%20-%20Integrated%20Councillor%20Induction%20Programme.pdf
919 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 59.

seem that local government may be regarded as the steppingstone for officials in the political environment. However, the exposure and education provided by the local government obviously contributes to the leadership abilities or skills of the officials that they need to employ at the local level.

Lastly, local government can foster or facilitate accountability among politicians in local government.[920] Local government is perfectly poised to promote and facilitate good governance and accountability in that it is the closest to the people.[921] It is argued that in principle, local government provides for greater accountability due to the representative nature of democracy.[922] In order for the argument to succeed, local government must function properly by meeting the needs and interests of the local community. This will enhance the accountability of local governments in that they meet their responsibilities towards the local community. Should the local government fail to meet their responsibilities, local communities will revolt in an attempt to hold them accountable to their mandate, which is inclusive of the development of the local communities.[923]

Local government fulfils an important role as far as it concerns the development of the local community, considering their needs and interests. Local government is best placed to determine the needs of the community and to deliver on such determined needs. This refers to the responsiveness of local government. Local government should improve accountability and give the people greater access to local government which is responsible for the determination and satisfaction of their needs and interests which will contribute to the development of the community.

The inadequacies and imperfections of democracy as well as the government's response thereto need to be assessed in order to determine the progress made in

920 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 60. The reference to accountability (fostering accountability) as one of the reasons for the existence of local government must be read with the discussion on local government accountability as per section 2.9 below.

921 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 61.

922 These include elections, political pressure and political debate. See Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 60.

923 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 60.

pursuance of the ideals of democracy. When these inadequacies and imperfections are considered, one should also consider whether the protests or disobedience that followed democratic failures were justified or not. To determine whether or not an act of disobedience or a protest is justified or not, it is required that a proportional relationship exists between the shortcomings of democracy and the actual resort to protest action and acts of disobedience.[924] Unresponsive government may be deemed to be one of the manifestations of the shortcomings of democracy or failing democratic rule. Any subsequent response by the citizenry thereto needs to be proportional to the action taken.[925]

The following section discusses the concept of developmental local government and sets out the challenges faced in pursuit of developmental local government.

2.8 Developmental local government

Local government has a developmental mandate[926] as conferred in terms of the *Constitution*, which requires the delivery of basic services considering the limitations of the availability of resources to pursue them.[927] Municipalities must ensure that they manage their administrative responsibilities[928] as well as their budget[929] and planning[930] structures in a manner that enables the prioritisation of the needs and interests of the local communities. The obligations of municipalities also extend to the social and economic development of the local communities.[931] According to Field,[932] the constitutional obligations bestowed on local government underlie the notion of developmental local government.

924 Pscorn "Civil disobedience as a democratic practice" 26.
925 See section 2.2.4 above and section 3.3 below.
926 Also see section 3.3.3 below.
927 See section 195 of the *Constitution*. Also see *Blue Moonlight Properties* case para 25-26.
928 See section 3.6.2 below.
929 See section 3.5.1.1. below.
930 See section 3.5.1.2 below.
931 Section 153(a) of the *Constitution*. Also see Field "Local economic development and the pursuit of a green economy" 5-8.
932 Field "Local economic development and the pursuit of a green economy" 5-8.

The traditional responsibility[933] of municipalities was the provision of services to the local communities. A transition was evident from the municipality being a service provider based on the needs and interests of local communities to the constitutional developmental mandate.[934] The responsibilities of municipalities include for example the pursuit of local democracy as well as their being proactive in dealing with local challenges.[935] Municipalities have become developmental agents.[936]

In pursuing the developmental local government mandate, municipalities are tasked to introduce and adopt various processes with the purpose to achieve and ensure the realisation of the potential role-envisaged mandate, as well as to enable sustainable development[937] in local communities.[938]

Matebesi[939] argues in this regard that the processes and methods provided for in local government legislation often overwhelm municipalities, as they are faced with addressing historical shortcomings as well as having a transformative approach to eliminating them. In addition to the transformative approach to the historical shortcomings, the following problem areas are associated with service delivery and governance at the local level, namely service delivery backlogs;[940] poor communication with communities; lack of accountability towards communities; administration-related challenges; poor civil society involvement; issues relating to political parties; lack of scarce skills of administrators and state capture, which are

933 See sections 3.2 and 3.3.1 below.
934 See section 3.2 below. Also see Field "Local economic development and the pursuit of a green economy" 5-8; Ramodula and Govender 2021 *Africa Journal of Public Sector Development and Governance* 45.
935 Field "Local economic development and the pursuit of a green economy" 5-8.
936 See section 3.2 beloq. Also see Field "Local economic development and the pursuit of a green economy" 5-8; Ramodula and Govender 2021 *Africa Journal of Public Sector Development and Governance* 45.
937 See the following on sustainability and sustainable development: Du Plessis and Nel "An introduction" 1-4, 1-8 to 1-13, 1-29, 1-38 to 1-39; Nel, Du Plessis and Retief "Key elements for municipal action" 2-3, 2-16 to 2-30.
938 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 10.
939 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 11.
940 Munzhedzi 2020 *African Journal of Governance and Development* 91, 95, 101-102.

impacting municipal capacity.[941] Furthermore, municipalities are measured against this threshold of delivering a minimum standard of access to basic services, being mindful of the constraints they might experience. Certain functions within the responsibility framework of national or provincial government relating to, for example, health services and roads, amongst others, are relevant and applicable at municipal level, although municipalities might not have a direct responsibility for these functions. The local community, however, perceives the local municipality as responsible for these functions. These problem areas have been some of the prevalent causes for the deterioration of local government.[942] The communities scrutinise service delivery and make decisions based on the good or dire state of the circumstances in the municipality.

The challenges identified above pose a threat to the ideals of the notion of developmental local government and contribute to the perceptions of the citizenry on the state of local government.[943] It seems as if communities perceive local governments as failed and unresponsive.[944] In the context of this observation, due consideration must be given to contextual factors such as delegated powers in a local government system which is constrained by centralisation and also political expediency, complicated by the citizenry's demand for services.[945] It is submitted that the contextualisation of these factors does not negate the problem areas as mentioned above, which support the inference of a failed and unresponsive local government.

941 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 11. Also see Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2; Mamokhere *African Journal of Developmental Studies* 80-81; Munzhedzi 2020 *African Journal of Governance and Development* 95.

942 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2.

943 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 11. Also see Thornhill 2005 *Journal of Public Administration*; Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2.

944 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 11, 12. Also see Woolman 2011 *South African Journal on Human Rights* 346-353.

945 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 12.

Local government is not, however, the responsibility of the politicians and officials, but citizens as members of political communities are required to participate and be politically involved to advance the economic, political, and social development of local government[946] in order to achieve social justice.[947] This requires citizens along with fellow citizens to participate as a collective in promoting the broader public interest.[948] As indicated above, the notion of public participation by citizens requires more than just voting, as it requires civic engagements[949] or collective action such as civil protests. Protest as a prevalent phenomenon also redefined these dynamics in local communities in South Africa.[950] The following paragraph addresses the accountability of local government.

2.9 Local government accountability

According to Steytler,[951] local government is a form of decentralisation, considering that it meets the following two basic requirements: firstly, a democratically elected local government who are accountable to the electorate,[952] and secondly, a local government that has the autonomy to make decisions on matters of local importance.[953] Considering these two requirements, local government must

946 See section 1.1 above.

947 See the following on social justice: Rawls *A Theory of Justice* 136-137, 144, 152-153; Fraser "Social Justice in the Age of Id entity Politics" 72-91; Nussbaum 2003 *Feminist Economics* 33-59; Sen 2005 *Journal of Human Development* 151-166; Geduld *uBuntu as a constitutional value: A social justice perspective* 10-12.

948 Pscorn "Civil disobedience as a democratic practice" 29-30.

949 See McGuigan 1971 *The Canadian Bar Review* 222. It is argued that these engagements play an important role in the connectedness of citizens. Often a distinction is drawn between social capital and physical capital. Also see section 1(c) of the *Constitution*; South African Human Rights Commission *The right to participate in public affairs* 2015 5; McGuigan 1971 *The Canadian Bar Review* 222.

950 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 1; Duncan *Protest Nation* 11; Mamokhere *African Journal of Developmental Studies* 81.

951 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 35.

952 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 35. Also see Steytler "Local government in South Africa: Entrenching decentralization government" 194; Ghai "Ethnicity, Decentralisation, and Constitutionalism" 67.

953 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 35.

therefore regulate local affairs impacting on its people and subsequently be accountable[954] to this constituency who voted it into power.

As stated above, decentralisation[955] is a means to bring government closer to the people by assigning designated powers and functions to local government from central government. This will enable the people to participate in the local governance and effectively provide a means to hold government accountable.[956] Decentralisation not only enables participation and enhances accountability, it overtly supports democracy.[957] The extent of the support for democracy is noted in the improvement of transparency, enhancement of government's responsiveness as well as providing a voice to the marginalised members in local communities.[958] In a democratic government, accountability remains central thereto.[959]

In a democratic society, accountability seeks to curb and prevent the abuse of power which may manifests in various ways for example as corruption. Accountability in that context will ensure that certain checks and balances are in place for the intended purpose.[960] The use or abuse of power is monitored, and certain restraints may be implemented in that regard.[961] The importance of accountability in a democratic dispensation is noted.[962]

Accountability embodies the notion that the party who was entrusted with certain responsibilities have to account for the execution thereof or the failure to do so. Gardner[963] views accountability as encompassing more than a mere justification for one's conduct. The conduct must be rationalised and explained by providing reasons for said conduct. The provided reasons must furthermore be accepted as a

954 See Karsten *Local government accountability in South Africa: An environmental law reading* 19-90 on local government accountability.
955 See chapter 2.6 above.
956 Fombad "Cameroon and the Anomalies of Decentralisatoin with a Centralist Mindset" 346. Also see Du Plessis 2015 *Comparative and International Law Journal of South Africa* 292.
957 Fombad "Cameroon and the Anomalies of Decentralisatoin with a Centralist Mindset" 346.
958 Fombad "Cameroon and the Anomalies of Decentralisatoin with a Centralist Mindset" 346.
959 De Visser *Developmental local government: A case study of South Africa* 88.
960 Karsten *Local government accountability in South Africa: An environmental law reading* 19.
961 Karsten *Local government accountability in South Africa: An environmental law reading* 21.
962 Karsten *Local government accountability in South Africa: An environmental law reading* 19.
963 Gardner "Mark of Responsibility" 237.

justification for the conduct in question. Only then will the person responsible for the conduct be regarded as being held accountable.

Accountability also comprises of two elements which speaks to answerability and enforcement. What this suggests is that "the accounting party provides oversight in relation to the actions of the accountable party, and the accountable party will have to account to the accounting party for his or her conduct."[964] Considering for example the relationship[965] between the municipalities and local communities, the last mentioned may then exercise what is referred to as an oversight in respect of the conduct of the municipalities to ensure answerability and subsequently seek to enforce such accountability by holding someone responsible for such conduct. Considering the two elements of accountability, municipalities is then the accountable party while the local community is taking up the role of the accounting party.

Accountability entails a degree of acknowledgement and acceptance of responsibility on the side of the municipality.[966] This responsibility includes the obligation to report, explain and answer to the national and provincial government[967] as well as the local communities.[968] Generally, government, comprising of national, provincial, and local government, needs to be accountable[969] to the people.[970] Considering what accountability entails, the next paragraph deals with the downward and upward application of the extent of accountability.

964 Karsten *Local government accountability in South Africa: An environmental law reading* 22.
965 See section 3.5.2 above.
966 Nel, Du Plessis and Retief "Key elements for municipal action" 2-36. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 26.
967 Nel, Du Plessis and Retief "Key elements for municipal action" 2-36. See section 3.2.2 below; section 139 of the *Constitution*; *Executive Council of the Provice of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu Natal v President of the Republic of South Africa* 2000(1) SA 661 (CC) para 29. Hereafter referred to as the *Executive Council* case. Also see De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; Karsten *Local government accountability in South Africa: An environmental law reading* 26.
968 Nel, Du Plessis and Retief "Key elements for municipal action" 2-36. See also Karsten *Local government accountability in South Africa: An environmental law reading* 20.
969 Fuo 2017 *de Jure* 325.
970 Steytler and De Visser "Local Government" 22-37.

Accountability brings to the fore a downward as well as an upward approach application thereof in the context of local government (also sometimes referred to as bottom-up and top-down).[971] Downward accountability speaks to the extent that local communities can hold the local government to account.[972] This encompasses, for example, the local communities partaking in the election of local government as well as the recourse to other measures to participate in the affairs of local government before and after elections.[973] The downward application of accountability is associated with the responsibility of local government to local communities as referred to above. The upward application of accountability suggests the central government's supervision of the performance of local government.[974] This suggests, for example, that local government is required to report, explain, and answer to national and provincial government.[975]

Steytler[976] argues that the delegation of powers and functions from national and provincial government to local government poses a challenge in the form of elite capture[977] which manifests as corruption.[978] The extent and impact of corruption at local government is significant as it deepens inequality at the sphere closest to the people. This will have the consequence of an unaccountable local government and associated local government institutions.[979] Steytler further submits that the eventual outcome of the elite capture means that development in local government

971 Fombad "Regional and Continental Frameworks for Decentralisation in Africa" 75.
972 Fombad "Regional and Continental Frameworks for Decentralisation in Africa" 75. Also see Du Plessis 2015 *Comparative and International Law Journal of South Africa* 292.
973 Fombad "Regional and Continental Frameworks for Decentralisation in Africa" 75. Also see Steytler and De Visser "Local Government" 22-24.
974 Fombad "Regional and Continental Frameworks for Decentralisation in Africa" 75.
975 See Nel, Du Plessis and Retief "Key elements for municipal action" 2-36. See section 3.2.2 below. Also see section 139 of the *Constitution*; *Executive Council* case para 29; De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261.
976 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 44.
977 See Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 44. On elite capture, Steytler submitted the following: "…usually a politically and/or economically powerful group assumes control of decision-making, with the result that the available resources are not channelled to the masses but are used to benefit the elite."
978 See sections 3.2, 3.3.1 and 4.6.3.3 below on the reference to corruption as a challenge fced by local government.
979 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 44.

will be distorted, resulting in a lack of trust on the part of their constituencies.[980] The elite capture (corruption) has a deterrent effect on the ability of municipalities to pursue their developmental local government mandate and their associated responsibilities.

After 1994[981] one of the imperatives of local government in South Africa has been accountability.[982] The *Constitution* sets as an objective for local government, the provisioning of democratic and accountable government.[983] Associated to this objective is the section 152(1)I aim to encourage the communities' involvement in matters of local significance.[984] De Visser[985] submits that these two objectives relate to and establish the accountability of local government, as section 152 of the *Constitution* stems from the democratic dispensation premised on accountability and people-centred governance (although not only limited to these values).[986] Municipalities must execute their powers and perform their functions in the best interests of the local communities as these are fundamental to establishing an accountable government.[987]

Municipalities are first and foremost accountable to their local communities as their constituencies, considering their responsibility for the manner in which they govern the local affairs.[988] This accountability extends to, for example, the involvement of the local communities in the local affairs which the municipality governs.[989]

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980 Steytler "The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypotheses" 44.

981 See section 3.2 below.

982 De Visser *Developmental local government: A case study of South Africa* 89.

983 Section 152(1)(a) of the *Constitution*. Also see De Visser *Developmental local government: A case study of South Africa* 69.

984 Section 152(1)(e) of the *Constitution*. Also see De Visser *Developmental local government: A case study of South Africa* 70.

985 Section 152(1)(a) of the *Constitution*. Also see De Visser *Developmental local government: A case study of South Africa* 69.

986 See section 1.1 above. Also see for example section 152(1)(a) of the *Constitution*; section 46 of the *Systems Act* and section 121 of the *MFMA*.

987 Nel, Du Plessis and Retief "Key elements for municipal action" 2-36. Also see section 152(1)(a) of the *Constitution*.

988 Du Plessis 2015 *Comparative and International Law Journal of South Africa* 292. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-37; Ghai "Ethnicity, Decentralisation, and Constitutionalism" 67.

989 Nel, Du Plessis and Retief "Key elements for municipal action" 2-37. Also see section 152 of the *Constitution*.

Mechanisms exist to hold the municipality accountable for their actions as well as inactions, for example, elections[990] and public participation.[991] For example, the responsibility of the municipality for the provision of municipal services[992] depends on the standard of quality of the service.[993] The involvement of the local community by means of public participation can ensure that the municipality receives feedback on the quality of the service delivered. Public participation may be employed as a mechanism to hold local government accountable as an obligation exists for them to report, explain, and answer to the local communities for the manner in which they exercise their powers and functions. This brings to the fore the question of public participation for the purpose of this thesis and will be discussed in the next section.

2.10 The meaning and modes of 'meaningful public participation'

This section explores the notion of public participation relative to the work of local government. It further provides and discusses the different elements of meaningful public participation.

Public participation is regarded as a pillar of democracy[994] to provide all stakeholders the opportunity to participate in an equal manner in the affairs of the municipality. Public participation is of particular importance to promote good governance, transparency, and accountability[995] which ought to advance the development of communities.[996]

990 See Ghai "Ethnicity, Decentralisation, and Constitutionalism" 67. Ghai argues that politicians hoping to win local government elections need to meet the demands of the electorate.
991 Nel, Du Plessis and Retief "Key elements for municipal action" 2-37. Also see section 5 of the *System Act*.
992 See Van der Walt and Fuo " Municipal service delivery and the environment" 10-10. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-37.
993 See Van der Walt and Fuo " Municipal service delivery and the environment" 10-10. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-37. The following will be considered as part of the quality of the municipal services: "financial performance", "customer services", "community satisfaction" and the "Batho Pele principles".
994 See South African Human Rights Commission *The right to participate in public affairs* 2015 2.
995 See section 2.9 above. Also see Stuurman 2019 *Journal of Public Administration* 325, 328.
996 See section 2.8 above.

Citizens have, amongst others, the right to vote[997] as well as certain duties and obligations emanating from their citizenship.[998] The right to vote, as stated above, is regarded as a participatory mechanism to achieve representative democracy.[999] Citizens are required to actively participate in the relevant developmental and governance processes as part of what is perceived as social citizenship.[1000] The notion of social citizenship refers to the need for "full and effective participation in democratic processes (which) requires that every member of society has access to the basic necessities of life" and "captures the full dimensions of an individual's sense of belonging within society".[1001] Considering the individual's sense of belonging, the formal recognition and guarantee of civil and political but also socio-economic rights are indicative of public participation in the democratic institutions as well as social inclusion.[1002]

It is argued that social citizenship as noted above by Liebenberg[1003] is envisaged by the constitutional provisions on citizenship considering the role and impact it has on the development of communities.[1004] Communities fulfil an important role in the pursuance of the developmental local government mandate[1005] by influencing decision-making or policies and to contextualise the issues pertinent to that

997 See section 19(2) and (3) of the *Constitution*. Also see Klaaren "Citizenship" 60-1.

998 See section 3(2)(b) of the *Constitution*. Also see Klaaren "Citizenship" 60-1. It is noted that the right to vote is restricted to citizens while foreign nationals do not have the right to vote. These foreign nationals may however participate in any planned or spontaneous protest in response to the government's failure to fulfil its mandate to provide basic amenities and services as per the *Constitution*. The provision of basic human rights in terms of the *Constitution* refers to 'everyone' which is inclusive of foreign nationals. See for example *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) on the entitlement of foreign nationals, more specifically permanent residents on government-provided social grants. See also *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 42, 46, 47, 49, 79, 85 and 111 in this regard. Also see South African Human Rights Commission *Non-Nationals* 1-2.

999 See section 1.1 and 2.5 above. Also see 4.4.2 below. Also see *Doctors for Life International* para 115; section 16(1) of the *Systems Act*.

1000 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56. Also see Liebenberg 1999 *Agenda: Empowering Women for Gender Equity* 59.

1001 Liebenberg 1999 *Agenda: Empowering Women for Gender Equity* 59.

1002 Liebenberg 1999 *Agenda: Empowering Women for Gender Equity* 59.

1003 See Liebenberg 1999 *Agenda: Empowering Women for Gender Equity* 59.

1004 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56.

1005 See section 2.8 above.

community during public participation process.[1006] The involvement of communities in the local affairs is not only an important element of a democratic state[1007] but is advantageous to the community at large when challenges are faced.[1008]

The involvement of communities in political decision-making is recognised and involvement of the local community encouraged.[1009] It is submitted that by involving the community in the executive decision-making process, it will contribute to creating a sense of cohesion and position the members of the community in such a manner as to evaluate and balance their (perhaps narrow and selfish) needs and interests against those of the other members of the community.[1010] Public participation denotes that affected communities must be consulted in a meaningful manner, the views of these communities must be recognised and observed, and a level of responsiveness to the outcomes of the public participation must be pursued. Municipalities have the responsibility to provide the mechanisms[1011] by which communities can participate in the decision-making within their locality.[1012] This may result in the development of moral and responsible communities where the larger interest of the community is a priority.[1013] Typical mechanisms include for example the holding of regular elections[1014] and the functioning of ward committees.[1015]

Considering the diverse and fractured composition of communities, what the larger interest of the community entails, might be difficult to determine as it may vary

1006 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56. Alos see Madumo 2015 *Administratio Publica*

1007 See Madumo 2015 *Administratio Publica* 162-164.

1008 See for example Schermbrucker 2020 https://groundup.org.za/article/we-wont-fix-development-until-we-fix-our-municipalities/;Kaunda 2021 https://www.dailymaverick.co.za/opinionista/2021-09-12-public-participation-platform-municipalities-must-actively-engage-with-citizens-on-social-media/; Pieterse 2021 https://theconversation.com/local-government-in-south-africa-is-broken-but-giving-the-job-to-residents-carries-risks-155970.

1009 Saati "Participation – to unveil a myth" 14-15. According to Saati, the following five reasons or main points are advanced in support of public participation during the constitution making process: legitimacy is increased; an educational element present; social capital is built; former adversaries are reconciled; and improve levels of democracy. Also see Saati "Participation – to unveil a myth" 14-15.

1010 Saati "Participation – to unveil a myth" 14.

1011 South African Human Rights Commission *The right to participate in public affairs* 2015 4.

1012 See Chapter 4 below. Also see Saati "Participation – to unveil a myth" 14.

1013 Saati "Participation – to unveil a myth" 14.

1014 See section 4.5.2 below.

1015 See section 4.5.8 below.

from individual to individual within that community, depending on their personal and immediate circumstances. The rationale underlying public participation does not suggest that the community must agree to or have similar needs and interests but rather that those needs and interests identified should be presented to the municipality. It is then the responsibility of that municipality in collaboration with the community to prioritise those needs and interests to the extent that resources allow.[1016]

According to Saati,[1017] public participation requires that all members of the community should have access to the available participatory mechanisms. Creighton[1018] suggests that public participation must be considered as a two-way communication and collaborative process. Integral to this two-way process is the centralisation of the needs and interests of communities.[1019] Saati[1020] states that the yardstick by which this level of public participation is measured, should not focus on the total number of individuals who participated, or the number of submissions made, but the extent to which they have truly influenced the decision-making in the context of the needs and interest of the community.

Public participation is also regarded as a process by means of which all members of the community can actively contribute to the general good.[1021] This general good may be in line with the larger interest of the community argument as put forward by Saaiti.[1022] This will enable the community to pursue its needs and interests and contribute to the greater good. The vulnerable, marginalised, and under-developed communities are more often than not excluded from the decision-making process[1023], which may have adverse and detrimental implications for them. It is

1016 See section 4(2)(a) of the *Systems Act*. A municipality must utilise the available resources to the best interest of the community.
1017 Saati "Participation – to unveil a myth" 15.
1018 Creighton "The public public participation handbook: Making better decisions through citizen involvement" 7.
1019 Creighton "The public public participation handbook: Making better decisions through citizen involvement" 7.
1020 Saati "Participation – to unveil a myth" 16.
1021 Stuurman 2019 *Journal of Public Administration* 326.
1022 Saati "Participation – to unveil a myth" 14.
1023 Arnstein "A ladder of citizen participation" 246.

therefore important that citizen power[1024] be restored, and all communities afforded similar (or perhaps comparable) opportunities to actively participate.[1025]

The capacity of the community needs to be developed to actively participate as it is a crucial factor for community participation.[1026] Capacity in this context refers to modifiable traits and characteristics of communities.[1027] Participation by communities is influenced by their capacity to do so, considering that a lack of this capacity will have a negative impact on their engagement on community issues.[1028] This may require different efforts by a municipality as the challenges which may curtail or prevent active public participation will vary according to the diverse and fractured composition of the community. Socio-economic conditions, access to information (by means of the media and the internet) and the lack of education are some of the prominent challenges[1029] which may hinder meaningful public participation.[1030]

2.11 Reflections on the justification for civil protests

The citizenry may express their dissatisfaction with government in various ways as explained earlier.[1031] These are inclusive of civil protest, which is broad enough to

1024 Brynard "Planning: The participatory approach" 41. The argument is made that regardless of the shape or form of the public participation being mindful of the previously excluded communities, the power should remain with the members of the relevant communities. Brynard "Planning: The participatory approach" 41.

1025 Arnstein "A ladder of citizen participation" 246.

1026 Gamo and Park 2022 *World Development Perspectives* 1.

1027 Freudenberg, Pastor and Israel 2011 American Journal of Public Health 124-125. Also see Gamo and Park 2022 World Development Perspectives 1.

1028 Gamo and Park 2022 *World Development Perspectives* 1.

1029 Van Staden 2022 *Loadshedding and lockdown expose paperthin democracy*. See for example in addition to these challenges, the electricity crisis in South Africa as it may have a detrimental effect on public participation and create a power imbalance between government and citizens. Van Staden argues that the government never consulted the electorate on the electricity crisis resulting in rolling blackouts and the subsequent approval thereof. He further argues that it was a unilateral decision with no democratic approval. This is used as an example to showcase government's disregard for the electorate and public participation during their decision-making which will have a direct impact on them. This creates an imbalance of power considering what is purported by the notion of the will of the people.

1030 Selebalo 2011 *Challenges to Public Participation in South Africa's Parliament* https://issafrica.org/iss-today/challenges-to-public-participation-in-south-africas-parliament. Also see Fuo 2015 *African Human Rights Journal* 174.

1031 See section 2.3 and 2.10 above. Also see Spitz 1954 *American Political Science Review* 396, 397 399.

include civil disobedience. Violent protests also resort under civil protest regardless of the violent nature thereof.[1032] Civil protests are constitutionally guaranteed and the framework within which they must be exercised, is legislatively provided for.[1033] However, citizens are not constitutionally at liberty to simply ignore the mechanisms available in the *Constitution* as well as those provided for in local government through which their discontent and dissatisfaction can be communicated.[1034]

The circumstances surrounding protest action need to be assessed in relation to the availability of other mechanisms (those which were available will depend on the facts of the case) for participation or to communicate their dissatisfaction, as it will provide content to the circumstances within which the protest action took place. The assessment should also provide the necessary context as to the availability of other mechanisms to deal with the issue at hand. What should also be considered is the question of whether these remedies have been exhausted. Interestingly, McGuigan[1035] indicates that the efforts employed to reach an agreement in respect of the matter in dispute must also be considered. This speaks to the willingness of the parties, citizens, and government to engage on any platform available to prioritise the issues at hand. This leads to the question of whether the available mechanisms as per local government legislation should first be exhausted before civil protests can be justified.[1036]

It is important to keep in mind that the interests or issues communicated by the citizenry and the subsequent response thereto will not determine the status of democracy.[1037] In other words, should civil protests be reverted to as a mechanism to seek the required attention to the needs and interests of the community, it will simply be indicative of the successes, failures or unresponsiveness of the local government to the needs and interests of their local communities. Civil protest,

1032 McGuigan 1971 *The Canadian Bar Review* 226.
1033 See section 2.3 above.
1034 See section 4.5 below. Also see McGuigan 1971 *The Canadian Bar Review* 234.
1035 McGuigan 1971 *The Canadian Bar Review* 244.
1036 See section 4.5 below.
1037 Spitz 1954 *American Political Science Review* 399. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 2. Also see Mamokhere *African Journal of Developmental Studies* 80-81.

regardless of the available mechanisms, remains an avenue for the citizenry to communicate their needs and interests as well as their concerns and grievances.

An exploration of protests and the consequences thereof, brings to the fore the question of whether they enhance or undermine democracy. The argument is presented that democracy is generally strengthened by the surge in protest which challenged the elitist rule and the responsiveness of the government.[1038] The outbreak or regular occurrence of protests may be attributed to the lived experiences and the worsening of the conditions which give rise to the need of the aggrieved citizenry to hold those responsible, accountable.[1039] Considering who is directly responsible for development in local communities, local government is more often than not the target of protesters. The frequent nature of protests can also be attributed to the political landscape.[1040] The counter-argument is made that protests pose a threat to the legitimacy of the political system. The premise for this argument is the existence of mechanisms as part of the conventional channels of representative and participatory democracy which are ignored or rejected by the aggrieved citizenry.[1041]

A noteworthy link between protests, elections, and political parties also exists.[1042] As the political landscape shifts towards the holding of elections, a decrease in the frequency of protests is often recorded.[1043] This is largely attributed to political parties campaigning in the local communities where the protests would occur in relation to the social struggles they experience.[1044] Momentarily, these political

1038 Arce and Rice "The political consequences of protest" 3. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 2.

1039 Arce and Rice "The political consequences of protest" 5. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 2.

1040 Arce and Rice "The political consequences of protest" 4. Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 1, 2.

1041 Arce and Rice "The political consequences of protest" 7. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 2.

1042 Arce and Rice "The political consequences of protest" 9. Arce and Rice argue for example that a link exist between the being registered to vote and the subsequent public participation in a protest. See Arce and Rice "The political consequences of protest" 9.

1043 See Arce and Rice "The political consequences of protest" 8. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 1.

1044 Arce and Rice "The political consequences of protest" 8. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 1.

parties would alleviate some of these social struggles although they might not be the governing party. Furthermore, the argument is made that a strong political party system serves as an effective conveyor belt to establish a link between the citizenry and local government. Also, it can contribute to ensuring that social struggles are effectively directed to the relevant parties. If the political party systems are deemed weak or ineffective, a representation gap might be created which will contribute to the citizenry resorting to disruptive and perhaps confrontational mechanisms.[1045]

Should the available mechanisms be exhausted to no avail, the last resort available to citizens to communicate their discontent or dissatisfaction against the government would be participating in elections.[1046] The argument is made that elections, taking place every five years at a national, provincial, and municipal level[1047], are too far removed from the everyday lived experiences of communities. The sparse availability of elections and the limitation of the opportunity to vote against the government in five years after exhausting the mechanisms provided for in the *Constitution* and local government legislation, will have a detrimental impact on the economic, political and social development at a local level. Serious and urgent matters such as these will be impacting on the development of local communities and need to be escalated to receive the urgent attention by the government that they require. Thus, the government may experience the negative impact of their failures and unresponsiveness at a local level during the regular elections, but the livelihood of citizens needs to be protected.[1048] The responsibility to ensure and improve the livelihood of all members of communities lies with the government of the day.[1049] The argument that elections ought to be deemed as the last resort to communicate discontent or dissatisfaction against the government of the day and effectively holding them accountable, does not fully align with the developmental

1045 Arce and Rice "The political consequences of protest" 8.
1046 Pscorn "Civil disobedience as a democratic practice" 25. Also see McGuigan 1971 *The Canadian Bar Review* 224; Spitz 1954 *American Political Science Review* 396.
1047 See Anon Date Unknown https://www.elections.org.za/content/Elections/Election-types/. By-elections take place in circumstances such as the death, expulsion, or resignation of the ward councilor. In circumstances where one of these presents itself, a by-election must take place within 90 days after the seat becomes vacant. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 10.
1048 Munzhedzi 2020 *African Journal of Governance and Development* 91.
1049 Munzhedzi 2020 *African Journal of Governance and Development* 91.

mandate the government is constitutionally tasked with as it relates to matters that impact the relevant real and lived experiences of citizens.

Considering the discussion above in relation to elections as a last resort to communicate discontent and dissatisfaction with the government, only after elections as a mechanism have been explored may the argument be made to justify for example civil disobedience as a form of civil protest.[1050] What further complicates the justification of civil disobedience in a democratic society is the availability and openness of constitutional and legislative mechanisms to communicate the apparent discontent and dissatisfaction with the government of the day.[1051] These mechanisms[1052] will outweigh acting in accordance with conscience, especially considering the fact that the citizenry has consented to the democratic government and has the obligation to respect the outcomes of ensuing democratic processes.

2.12 Concluding remarks

The purpose of this chapter was to investigate the content of the theoretical and normative foundations underpinning civil protest and local government. In order to serve this purpose, the following were discussed: the history of the right to protest referring to civil disobedience in the USA and social movements in Africa; the development and content of the right to protest in international and regional instruments, national constitutions and South Africa; emerging forms of protest in democratic dispensations; the idea of and rationale behind local government by discussing what a local government is, the justification for the existence of local government as well as the notion of developmental local government. The chapter further provided a legal description for contemporary civil protest as experienced in local government.

Civil disobedience and social movements were employed in different circumstances by the USA and African countries. In the USA, civil disobedience was employed in

1050 Pscorn "Civil disobedience as a democratic practice" 25.
1051 Pscorn "Civil disobedience as a democratic practice" 25. Also see McGuigan 1971 *The Canadian Bar Review* 222.
1052 See Chapter 4 below.

the fight against segregation as the major reason. Characteristic of civil disobedience as a form of protest, the resort to these acts were non-violent. Africa was largely faced with colonialism and social movements were used to gain independence. Later, similar approaches were followed by the citizens of African countries to air their social and political needs. It was clear from the outset; civil movements will play a far greater role in decades to come in Africa and elsewhere.

The right to protest is recognised, guaranteed, and protected in international and regional instruments. In the international context, this right must be exercised in a peaceful and unarmed manner. The relevant regional instruments are in line with the international position with regards to the right to protest. The limitation of the right to protest as per the international and regional instruments relates to those circumstances necessary in a democracy including national security, public safety, public order or where the rights of others are being protected. The right to freedom of assembly or generally referred to as the right to protest is internationally, regionally, and constitutionally recognised in Europe, North America as well as Africa. The extent to which the right is respected and protected seems to vary based on the selected region. South Africa as a democratic state recognises, respects, and protects the right to protest. The recognition, respect and protection extend to the peaceful and unarmed nature thereof.

The discussed national constitutions provide, similarly to the international and national instruments, for the peaceful and unarmed right to assemble, subjected to constitutional and other limitations in legislation. It is important to stress that none of these instruments or national constitutions have any form of permission-seeking process or application embedded in the right to protest. However, it may be required by the authorities to be notified to allow them the opportunity to prepare adequately for the intended protest. This may be done in the interests of safety and security.

Based on the discussion regarding the right to protest in Europe, North America and Africa being considerate of the international and regional instruments, the following may be inferred:

- the right to protest must be conducted in a peaceful manner with respect to the rights of others;
- no prior notification should be required by the protesters as part of a permission-seeking process;
- prior notification should only be required by the authorities in the interests of safety and security;
- the right to protest may be limited when it is necessary in a democratic dispensation, taking into account the respect for the rights of others.

In South Africa, local government experiences an increasing rate of protest, becoming more violent. This is due to various reasons, which include the belief amongst communities that violent protest is more effective in addressing their needs and that it will draw the attention of key officials and decision-makers. This will then force government's hand in being responsive to the needs of the community, that is, fulfilling their developmental mandate. Local government, the closest sphere to the people, is mandated to be developmental in their approach, namely, to improving the quality of the lives of the community members. It is important that the community be consulted to determine their needs and shortcomings. This will give government the opportunity to prioritise certain aspects and attend to them. Ultimately, the success of local government will largely be measured against their developmental mandate.

The proposed definition of civil protest can therefore be extended[1053] to include the local government sphere as follows:

> Civil protest is a universally recognised civil and political right and may be exercised within bounds of reasonable limitations as an indispensable tool in a participatory local democracy which enables the voiceless and marginalised effective public participation mechanisms to hold local

1053 See section 2.3.7 above. The following definition was purposed for this thesis: Civil protest is a universally recognised civil and political right and may be exercised within the bounds of reasonable limitations as an indispensable tool in a participatory democracy which enables the voiceless and marginalised an effective mechanism to express their legitimate concerns and interests to government in a peaceful and unarmed manner.

government accountable and to express their legitimate concerns and interests to government in a peaceful and unarmed manner.

The following chapter discusses the functions of local government in general, with the purpose to peruse and analyse the framework of local government in South Africa to establish its powers, functions, and developmental mandate.

CHAPTER 3 RESPONSIBILITIES OF LOCAL GOVERNMENT IN SOUTH AFRICA

3.1 Introduction

This study requires the responsibilities of local government to be unpacked to sketch the conceptual canvas against which protest action against municipalities must be understood. The objective of this chapter is to peruse and analyse the framework of local government in South Africa to establish its powers, functions, and developmental mandate. The chapter further probes into the role which the law foresees for municipalities concerning service delivery, accountability, and inclusive governance. In order to understand the dynamics and challenges of the current local government dispensation, a brief history of local government in South Africa is provided right at the start.

This chapter captures what communities are entitled to (services, developmental initiatives etc.) and what they may legitimately expect of their municipalities in terms of the latter's governance processes and conduct. The discussion proceeds to the key annual processes undertaken by the municipality inclusive of the budget process, *IDP*, Performance Management System and Performance and Annual reporting.[1054] The importance of this discussion is to set out the role of each of the structures which the municipality consists of, and also to highlight the requirement of public participation during the key annual processes identified. The mechanisms for public participation are discussed in greater detail in Chapter 4.

3.2 A brief history of local government in South Africa: from service provider to developmental agent

The first democratic elections in South Africa were held in April 1994. Before then, local government was characterised by racism which inadvertently resulted in the spatial separation of African, Coloured and Indian (generically referred to as

1054 Also see Department Provincial and Local Government 2007 *National Policy Framework for Public Participation* 24-29.

Black)[1055] population and communities on the one side and the white population and communities on the other.[1056] The structure of the pre-1994 racial local government was a creature of statute which operated under the control of national government.[1057] The African, Coloured, and Indian population and communities each had their own respective local authorities. The so-called Black Local Authorities had to deal with the interests of the African population and communities [1058] and the Coloured and Indian Management Committees concerned with the interests of the Coloured and Indian communities.[1059] The premise of apartheid was racial division, which meant the white population and communities received proper services contrary to Black communities receiving inferior or no service at all.[1060] The local authorities for African, Coloured, and Indian communities had no meaningful authority and lacked the necessary resources to improve the services of their communities. The communities represented by the Black Local Authorities and Coloured and Indian Management Committees did not accept the leadership of these supposedly representative structures as they lacked the authority within the government system. Furthermore, they did not have the means to provide the needs and interests of their respective communities. This resulted in their leadership being rejected as illegitimate.[1061] The inherent restraints with reference to authority and access to resources to be applied to the development of the relevant communities

1055 The collective of African, Coloured and Indian is generally referred to as Black people unless specific individual reference is made to African, Coloured or Indian.

1056 Steytler "Local Government in South Africa: Entrenching decentralized government" 183. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

1057 Steytler "Local Government in South Africa: Entrenching decentralized government" 184. Also see Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118. Historically, municipalities were under the jurisdiction of provinces and the provincial ordinances regulated municipalities. See Mathenjwa 2018 *Southern African Public Law* 1-2.

1058 See Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 134.

1059 See Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 137.

1060 Steytler "Local Government in South Africa: Entrenching decentralized government" 184. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

1061 Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 146.

were the result of the apartheid government. The challenges associated with their authority as well as the resources were not the result of the Black Local Authorities and the Coloured and Indian Management Committees. The narrative pursued by the apartheid system, structure and government was to marginalise Africans, Coloureds, and Indians. Subsequent to the Soweto Uprising in 1976, more uprisings followed, and these authorities and management committees became dysfunctional. Services were disrupted and infrastructure destroyed when the local communities expressed their resistance against the apartheid government.[1062]

The characteristics of the local government period between 1948-1993 (apartheid era) included racial segregation, control of urbanisation at the expense of Black people and rights limitations of the other racial groups.[1063] This period was characteristic of a white minority regime.[1064] Inherent to the local government system before 1993, access to services and housing were informed by racial classification of the community.[1065] The injustices caused by this racists government approach contributed largely to the inequalities and the restrictive access to municipal services.[1066]

The *Constitution of the Republic of South Africa*, 1993 (*Interim Constitution*)[1067] formally recognised local government as an autonomous level of government with the power to manage its own affairs.[1068] Local government had its status as a sphere of government along with their objectives and character protected from national

1062 Tsatsire *et al New contree: a journal of historical and human sciences for Southern Africa* 133. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

1063 Tsatsire *et al New contree: a journal of historical and human sciences for Southern Africa* 133. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

1064 Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154.

1065 *Group Areas Act* 41 of 1950 and the *Population Registration Act* 30 of 1950. Also see Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 133. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154.

1066 See Van der Waldt and Fuo "Municipal service delivery and the environment" 10-1.

1067 See Chapter 10 of the *Interim Constitution* on local government.

1068 See section 174(3) of the *Interim Constitution*. Also see De Visser *Developmental Local Government* 63; Mathenjwa 2018 *Southern African Public Law* 1-2.

and provincial government.[1069] This was aimed at protecting local government from intrusion by national and provincial government. However, the character of local government would be determined by a competent authority which could be the national or provincial government. This did not have a positive effect on the autonomy of local government as their powers were subjected to national or provincial government.[1070] The eventual outcome was that the constitutionally recognised autonomy of local government was subjected to the two other spheres of government.[1071]

The *Interim Constitution* reduced local government to a service provider by providing them with a narrow mandate.[1072] In 1994, the face of local government in South Africa changed. However, local government was referred to as the coalface of government. This is since the impact of the previous government was significantly experienced at the local level with specific reference to service delivery and socio-economic matters.[1073]

Since 1994, local government has been transformed to do away with the racial basis of government.[1074] The aim was to integrate society and to ensure the resources at government's disposal were equitably redistributed to all communities[1075] and not only the traditional white communities at the expense of black communities. The transformation of the local authorities took place along the lines of different phases.[1076] A clean-out and replacement process of the local authorities constituted

1069 See section 174(4) of the *Interim Constitution*. Also see De Visser *Developmental Local Government* 63.
1070 De Visser *Developmental Local Government* 63.
1071 See De Visser *Developmental Local Government* 63.
1072 De Visser *Developmental Local Government* 64.
1073 Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 140.
1074 See De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261. Also see *Fedsure* case para 2-4; *Robertson* case para 9; Du Plessis and Nel "An introduction" 1-27; Van der Waldt and Fuo "Municipal service delivery and the environment" 10-1; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118; Fuo 2017 *De Jure* 324.
1075 Steytler "Local Government in South Africa: Entrenching decentralized government" 184. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 152-154.
1076 Steytler "Local Government in South Africa: Entrenching decentralized government" 187. Also see *Tsatsire et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 142.

based on race commenced with the latter substituted by "non-racial transitional councils".[1077] Thereafter, the transformation process commenced with the demarcation of the country into various municipalities.[1078] Eventually, a new local government system which was indicative of a centralised federal system was introduced with a developmental mandate.[1079]

The first and most important step to ensure local democracy, was for the racial boundaries to be reconsidered and replaced with non-racial demarcated boundaries.[1080] Initially, 842 municipalities were established as a result of the amalgamation of the historically segregated local authorities.[1081] The former Bantustans were abolished before the dawn of democracy and incorporated into the new dispensation but proceeded to exist *de facto*.[1082] The harsh reality was that the newly achieved political freedom did not alter and alleviate the dire socio-economic circumstances experienced by the Bantustans and they continued to provide basic services to their communities.[1083]

Local government was recognised in the *Constitution* of 1996 as sphere of government which ultimately improved its status from a government level to that of a government sphere.[1084] This brought a significant change in the manner local

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1077 Steytler "Local Government in South Africa: Entrenching decentralized government" 188. Also see Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 142.

1078 Steytler "Local Government in South Africa: Entrenching decentralized government" 188. Also see Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 142; De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; Du Plessis and Nel "An introduction" 1-27; Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

1079 Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 142. Also see Steytler "Local Government in South Africa: Entrenching decentralized government" 188; "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 151.

1080 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 170.

1081 See *Local Government: Demarcation Act* 27 of 1998. Hereafter referred to as the *Demarcation Act*. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 170.

1082 See King and McCusker 2007 *The Geographical Journal* 6.

1083 King and McCusker 2007 *The Geographical Journal* 6. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 170.

1084 See section 40(1) of the *Constitution*. Also see Mathenjwa 2018 *Southern African Public Law* 2.

government was mandated to operate in relation to the national and provincial spheres of government. Local government ought to operate in partnership with national and provincial government.[1085] Local government were entrusted with a specific mandate.

A vision of developmental local government was set to be pursued.[1086] In order to achieve the said vision, certain legislative measures were employed to facilitate and implement developmental local government. As part of the legislative measures, the *Local Government: Municipal Structures Act* (*Structures Act*)[1087] as well as the *Demarcation Act* were enacted.[1088]

Section 155(6)(a) of the *Constitution* compel the establishment of municipalities by the provincial government. The *Demarcation Act* established the Municipal Demarcation Board (Demarcation Board).[1089] The Demarcation Board has the function to determine municipal boundaries.[1090] Thus, it had to establish and demarcate according to three structures: metropolitan municipalities, local municipalities and district municipalities.[1091] In 2000, a total of 284 municipalities were demarcated by the Demarcation Board which consisted of the following different structures: 6 metropolitan municipalities, 47 district municipalities and 231 local municipalities.[1092] The demarcation of municipal boundaries resulted in what is referred to as wall-to-wall municipalities, due to the manner in which the

1085 See section 40 of the Constitution. Also see *Robertson* case para 59; De Visser and Steytler *Local Government Law of South Africa* 15; Madumo 2015 *Administratio Publica* 155,158; Du Plessis and Nel "An introduction" 1-26, 1-27; Fuo 2017 *De Jure* 326; Pieterse 2023 *Hague Journal on the Rule of Law* 309; Mathenjwa 2018 *Southern African Public Law* 2.

1086 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 171.

1087 *Local Government: Structures Act* 117 of 1998. Hereafter referred to as the *Structures Act*.

1088 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 171.

1089 See sections 2 and 3 of the *Demarcation Act*.

1090 Section 4 of the *Demarcation Act*.

1091 Section 166(1) of the *Constitution*. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 171.

1092 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 171. Also see De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; Du Plessis and Nel "An introduction" 1-27.

boundaries were demarcated.[1093] The demarcation of the municipal boundaries led and is still leading to several disputes and protests. Some of the cases landed up in court and in some instances the grievances of the protesting communities were taken into account.[1094]

After the formal demarcation of the municipal boundaries (demarcation of boundaries is a continuous process), the local level of government's autonomy within the territorial area was confirmed and it had authority to provide some free basic services to the poor communities.[1095] Regardless of the autonomy and authority to govern their own affairs,[1096] municipalities were struggling to meet the expectations as per the law, revenue collections were difficult, and the provision of adequate services was challenging.[1097] During the period 2000-2008, provincial governments undertook several interventions due to the failures and inability of local and district municipalities to meet their basic obligations.[1098]

1093 See Du Plessis and Nel "An introduction" 1-27. Also see *Robertson* case para 398; De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; De Visser *Development local government: A case study of South Africa* 75; Mathenjwa 2018 *Southern African Public Law* 4.

1094 See e.g. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC); *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC); *Masia Traditional Council and Others v Municipal Demarcation Board and Others* (1256/2016) 2016 ZALMPPHC 1 (; *Baviaans Municipality v Municipal Demarcation Board and Others* (2733/2015) 2015 ZAECGHC 65; *Democratic Alliance v Municipal Demarcation Board and Others* (70915/2015) 2015 ZAGPPHC 1090; *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC); *Matjhabeng Local Municipality v Municipality Demarcation Board and Others* (514/2011) 2011 ZAFSHC 193.

1095 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 171. Also see *Blue Moonlight Properties* case para 25-26; De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261; Du Plessis and Nel "An introduction" 1-27; Pieterse 2023 *Hague Journal on the Rule of Law* 309-314.

1096 See section 151(3) of the *Constitution.* Also see *Robertson* case para 59; See De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261. Also see Du Plessis and Nel "An introduction" 1-27; Fuo 2017 *De Jure* 325; Pieterse 2023 *Hague Journal on the Rule of Law* 309-314; Mathenjwa 2018 *Southern African Public Law* 4-5.

1097 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 172.

1098 See section 2.9 above. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173. Also see De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261.

The period aligning with the administration led by former President Jacob Zuma evidentially highlighted the failure of the government to meet the obligations at the local level.[1099] The reasons for the poor performance of municipalities in fulfilling their mandate were investigated[1100] by the newly renamed and formed Department of Cooperative Governance and Traditional Affairs (COGTA).[1101] The investigation indicated the following reasons for the failure of local governance, namely political and administrative tension within municipalities (sometimes between members of the same political party), incompetent councillors, issues relating to separation of powers between political parties and municipalities, lack of accountability, limited resources at the disposal of municipalities, and legislative and regulatory compliance challenges.[1102] The state of affairs was worrisome and a case for concern was evident.[1103]

During the Zuma administration service delivery protests constantly increased.[1104] Several municipal contracts were unlawfully concluded.[1105] The total number of provincial interventions in local government significantly increased.[1106] In 2014, one third of the municipalities was regarded as adequate, one third as just functioning, and the remaining third as dysfunctional. The dysfunctionality of one third of

1099 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

1100 See Department of Cooperative Governance and Traditional Affairs 2021 *State of Local Government in South Africa: Overview Report – National State of Local Government* 9-31.

1101 The Department of Cooperative Governance and the Department of Traditional Affairs falls under COGTA. The following entities reports to the Minister of Cooperative Governance and the Department of Traditional Affairs: Municipal Demarcation Board (MDB), South African Local Government Association (SALGA) and South African Cities Network (SACN) as well as the Municipal Infrastructure Support Agent (MISA). See Cooperative Governance and Traditional Affairs 2023 https://www.cogta.gov.za.

1102 Department of Cooperative Governance and Traditional Affairs 2021 *State of Local Government in South Africa: Overview Report – National State of Local Government* 10. Also see Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 173.

1103 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174.

1104 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174.

1105 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174. This was reported by the *AGSA* during 2010-2011.

1106 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174. This was reported by the *AGSA* during 2009-2015. Also see De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 266.

municipalities was ascribed to poor governance, inadequate financial management and poor accountability measures.[1107] Corruption and maladministration were the order of the day.[1108] Local government as the closest sphere to the people is an important site for the achievement of local democracy which were complicated and frustrated by the state of local government by 2014.[1109]

Many but not all of the 257 municipalities[1110] are currently facing numerous challenges[1111] which may be regarded as a hinderance to the pursuit of their developmental local government mandate. These challenges include, but are not limited to, the following: the historical legacies and service delivery backlogs that have not been eradicated,[1112] poverty alleviation and the ability to further develop sustainable communities, variances of municipal performances with interventions[1113] taking place at different municipalities due to the inability to execute their mandate, rapid urbanisation[1114] and disparity between the needs and interests of the administrative and political structures of the municipality.[1115]

In order to develop the local communities to ensure that society is integrated, and all have resources at their disposal, government recognised that a centralised approach would not suffice, hence the need arose for a local government to facilitate

1107 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174.

1108 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174,176-177 and 179. Also see Munzhedzi 2020 *African Journal of Governance and Development* 95.

1109 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 176-177. Also see Fuo "Municipal service delivery and the environment" 10-1; Fombad Cameroon and the Anomalies of Decentralisation with a Centralist Mindset 344.

1110 See Du Plessis and Nel "An introduction" 1-26. Also see Fuo 2017 *De Jure* 325.

1111 See Wright, Dube and Du Plessis 2022 *VRÜ Verfassung und Recht in Übersee* 105-109. Also see *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* 2021 ZACC 29 para 195; *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipalities* 2020 ZANWHC 9.

1112 See Du Plessis and Nel "An introduction" 1-31. Also see *Premier, Gauteng v Democratic Alliance; All Tshwane Councillors Who are Members of the Economic Freedom Fighters v Democratic Alliance; African National Congress v Democratic Alliance* 2021 ZACC 34*; Unemployed Peoples Movement v Eastern Cape Premier* 2020 3 SA 562 (ECG); Munzhedzi 2020 *African Journal of Governance and Development* 91, 95, 101-102.

1113 See Wright, Dube and Du Plessis 2022 *VRÜ Verfassung und Recht in Übersee* 109-114.

1114 Gambe, Turok and Visagie 2023 *Habitat International* 102747.

1115 See Du Plessis and Nel "An introduction" 1-32.

the equitable redistribution of resources.[1116] Furthermore, a centralised approach would have complicated "governments ability to effect social and economic development".[1117] Steytler[1118] suggests that "developmental efforts will founder on the rocks of central planning and bureaucracy" unless communities are engaged and fully participate. It became evident from the onset of the transition phase that local government would be key to capture and institutionalise community public participation to influence and determine the developmental needs of communities. Local government was therefore mandated to develop communities and its constitutional status as a sphere of government empowered them to deal with development and related matters.[1119]

3.3 Constitutional law framework on local government

3.3.1 Local government under the Constitution

The transition from the Apartheid regime to a democratic dispensation brought significant changes to the local government landscape. Local government was constructed to be inclusive and to ensure participatory democracy through relevant mechanisms. The court in the *Robertson* case affirmed that local government is not only a creature of statute but is a sphere of government which exercise original powers and functions as provided for in the *Constitution*.[1120]

The *Constitution* provides that municipalities have the right to govern the affairs of the communities in their demarcated areas of jurisdiction.[1121] This right to govern its affairs means that the national, as well as the provincial government, may not

1116 Steytler "Local Government in South Africa: Entrenching decentralized government" 184.
1117 Steytler "Local Government in South Africa: Entrenching decentralized government" 185.
1118 Steytler "Local Government in South Africa: Entrenching decentralized government" 186.
1119 Tsatsire *et al* 2009 *New contree: a journal of historical and human sciences for Southern Africa* 142. Also see Mathenjwa 2018 *Southern African Public Law* 2,4.
1120 *Robertson* case para 55, 60. Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 295.
1121 Section 151(3) of the *Constitution*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-7; Pieterse 2023 *Hague Journal on the Rule of Law* 309; Mathenjwa 2018 *Southern African Public Law* 4.

impede or hamper the exercise of said right.[1122] Therefore, a municipality has the autonomy to govern its affairs without any compromise or impediment from the national and provincial government. The Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu Natal v President of the Republic of South Africa*[1123] confirmed that the *Constitution* provides for the supervisory powers[1124] of national and provincial government over the performance by municipalities.[1125] The court, however, stressed that the national and provincial governments must be respectful of the autonomy of local government when they exercise their constitutional supervisory powers and functions.[1126]

Municipalities derive their powers and functions from the *Constitution*.[1127] The Constitutional Court in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council*[1128] confirmed that municipalities fulfil an important role in the constitutional order[1129] entrusted with legislative and executive power as entrenched in the *Constitution*.[1130] Although the *Fedsure Liife* case was decided under the *Interim Constitution*, the judgment is still relevant as it confirmed the status and autonomy of municipalities in the context of the final *Constitution*.

The Constitutional court in the *Robertson* case had to decide the matter as it related to the levying of property rates and whether the City of Cape Town as a municipality

1122 Section 151(4) of the *Constitution*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-7; Pieterse 2023 *Hague Journal on the Rule of Law* 309; Mathenjwa 2018 *Southern African Public Law* 4.

1123 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu Natal v President of the Republic of South Africa* 2000(1) SA 661 (CC). Hereafter referred to as the *Executive Council* case.

1124 See sections 151(3) and 155(7) of the *Constitution*.

1125 *Executive Council* case para 29.

1126 *Executive Council* case para 29.

1127 See section 156 of the *Constitution*. Also see *Blue Moonlight Properties* case para 22; De Visser *Developmental Local Government: A case study of South Africa* 113; Nel, Du Plessis and Retief "Key elements for municipal action" 2-7; Pieterse 2023 *Hague Journal on the Rule of Law* 309; Mathenjwa 2018 *Southern African Public Law* 5.

1128 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). Hereafter referred to as the *Fedsure* case.

1129 *Fedsure* case para 38. Also see Mathenjwa 2018 *Southern African Public Law* 4.

1130 *Fedsure* case para 26. Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 290; Fuo 2017 *De Jure* 325; Mathenjwa 2018 *Southern African Public Law* 4.

was permitted to do so.[1131] Chapter 13 of the *Constitution* often cited as the financial constitution deals with the fiscal powers of local government.[1132] This chapter essentially provides municipalities the power to impose and collect property rates as well as surcharges on fees.[1133] The fiscal powers of municipalities do not extend to for example tax and custom duty.[1134] Section 229 of the *Constitution* deals with what is regarded as the original revenue generating powers of municipalities.[1135] Relevant to local government, the *Local Government: Municipal Property Rates Act*[1136] regulates the power of municipalities to levy property rates while the *Municipal Fiscal Powers and Functions Act*[1137] provides for the power to levy surcharges on fees.[1138] De Visser argues that considering the size of municipalities in South Africa, sufficient opportunities exists to raise and collect revenue which should put municipalities in the position to meet their developmental mandate.[1139]

In the *Robertson* case, the property rates to be levied were published, with opposition to and discontent registered against those rates by affected members of the local community.[1140] The court confirmed that a municipality has legal personality[1141] with power to impose and recover property rates.[1142] Local government exercises what the court referred to as original powers, which enhance

1131 *Robertson* case para 9.
1132 See Chapter 13 of the *Constitution*. Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 303; De Vos and Freedman (eds) *South African Constitutional Law in Context* 303-310 for a discussion of the financial affairs of multilevel government; Bekink *Principles of South African Local Government Law* 341-469.
1133 Section 229(1)(a) of the *Constitution*. Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 303; De Visser *Developmental local government* 79-80.
1134 Section 229(1)(b) of the *Constitution*. The section continues to provide that "if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty." Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 303.
1135 De Visser *Developmental local government* 162.
1136 *Local Government: Municipal Property Rates Act* 6 of 2004. Hereafter referred to as the *Property Rates Act*.
1137 *Municipal Fiscal Powers and Functions Act* 12 of 2007. Hereafter referred to as the *Fiscal Powers Act*.
1138 See De Vos and Freedman (eds) *South African Constitutional Law in Context* 305.
1139 De Visser *Developmental local government* 166.
1140 *Robertson* case para 19.
1141 *Robertson* case para 4.
1142 *Robertson* case para 45; Mathenjwa 2018 *Southern African Public Law* 4.

their autonomy as a sphere of government.[1143] These powers extend to their legislative and executive authorities[1144] which are only subjected, qualified or limited by law or the *Constitution*.[1145]

Furthermore, the *Constitution* sets certain objectives in section 152 that municipalities must adhere and strive to achieve. These objectives must be achieved within the financial and administrative capacity of municipalities.[1146] Contemplating their financial and administrative capacity, municipalities must structure and manage their affairs in a manner to prioritise the needs as well as enhance the "social and economic development of the community". This is linked with the objective as per section 152(c) of the *Constitution*.[1147]

From the wording of the *Constitution*,[1148] municipalities are tasked with the development of communities to advance the social and economic affairs of said communities. However, the objectives of municipalities are not limited to social and economic development but include the promotion of a safe and healthy environment.[1149] Another important component of the constitutional developmental mandate, but also underlying the set objectives as per section 152 of the *Constitution*[1150] is the involvement of communities in the matters of every municipality.[1151] Local governance processes that are typically required to involve

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1143 *Robertson* case para 56, 58 and 60. Also see Pieterse 2023 *Hague Journal on the Rule of Law* 309; Mathenjwa 2018 *Southern African Public Law* 4-5.

1144 *Robertson* case para 59. Also see Pieterse 2023 *Hague Journal on the Rule of Law* 309

1145 *Robertson* case para 56,60. Mathenjwa 2018 *Southern African Public Law* 4-5.

1146 Section 152(2) of the *Constitution*. The *Constitution* provides the following: "The objectives of municipalities as provided for in the Constitution are as follows: (a) to provide democratic and accountable government for local communities;(b) to ensure the provision of services to communities in a sustainable manner;(c) to promote social and economic development;(d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government." Also see section 152(1) of the *Constitution;* section 19(1) of the *Structures Act*; *Joseph case* para 35; SALGA 2011 *Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials* 4; De Vos and Freedman (eds) *South African Constitutional Law in Context* 291.

1147 Section 153(a) of the *Constitution*. See *Joseph case* para 36; *Blue Moonlight Properties* case para 22; De Vos and Freedman (eds) *South African Constitutional Law in Context* 291.

1148 See section 152(2) of the *Constitution*.

1149 Section 152(1)(d) of the *Constitution*. Also see De Vos and Freedman (eds) *South African Constitutional Law in Context* 291.

1150 See section 3.7 below.

1151 See section 3.3 above.

community members are the drafting and adoption of the annual municipal budget,[1152] drafting and adoption of the *IDP*,[1153] setting up of the Performance Management System, as well as setting the indicators for performance and annual reporting.[1154]

The involvement of communities in the affairs of a municipality entails the processes that the public should be informed, consulted, and involved, depending on the nature of the matter at hand. To inform entails a passive form of communication to keep the community up to date and informed; it also implies that relevant information should be circulated to communities.[1155] To consult, implies that the objective is to ensure public participation from the communities and to receive feedback on specific relevant matters from said parties.[1156] Community involvement necessitates an active working relationship in which both the municipality and the community can interact. The concerns and issues raised by the community should therefore be reflected in the decisions and conduct of the municipality.[1157]

Municipalities' local government mandate, which is part of constitutional development, requires that they are responsive to the needs and interests of the communities.[1158] Suitable and adequate processes need to be created to engage with communities and determine these needs and interests.[1159] It is submitted that engaging with the community should extend wider than merely attending to the needs and interests of the local communities. This should, for example, include responding to complaints, acknowledging service-delivery problems, providing forums for collaborative planning, and decision-making. Having a holistic view of

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1152 See section 3.5.1.1 below.
1153 Hereafter referred to as the *IDP*. See section 3.5.1.2 below.
1154 See section 3.5.1.3 below. Also see Department Provincial and Local Government 2007 *National Policy Framework for Public participation* 24.
1155 Department Provincial and Local Government 2007 *National Policy Framework for Public participation* 45-46.
1156 Department Provincial and Local Government 2007 *National Policy Framework for Public participation* 47.
1157 Department Provincial and Local Government 2007 *National Policy Framework for Public participation* 48.
1158 See section 7(2) of the *Constitution*. Also see Van Donk and Williams "In Search of Responsible and Responsive Local Governance" 11-12.
1159 See section 3.3. above.

the needs and interests and general complaints and input from the community, will place the municipality in a better position to be responsive to same and develop their local area.[1160] It is further submitted that when local government neglects or fails to deliver on this constitutional mandate, then the risk for revolt or protest not only necessitates and manifests itself, but also increases the probability thereof in communities.[1161]

3.3.2 Role and place of local government in South Africa

The *Constitution* introduced the following principles pertaining to local government: local government as a distinctive sphere of government; local government with limited autonomy; local government received a developmental focus; democratic local government; local government as part of "intergovernmental relations and co-operative government".[1162] This section will proceed with reflections on what these principles entail.

Local government plays an important role in the democracy and needs to make sure of the involvement of the community in its affairs and local decision-making. Thus, the South African democracy will not be able to function as such without the existence of the local sphere of government.[1163] Local government is necessary for the execution of the developmental agenda which speaks to the duty of local government to work together with the community in the determination of its needs and the provision of goods and services to satisfy these needs.[1164]

It is important to proceed with the discussion as to what local government is with a brief look at the democratic nature of the South African government structure. In terms of the *Constitution*, local government must be democratic and accountable

1160 Van Donk and Williams "In Search of Responsible and Responsive Local Governance" 11.
1161 See section 2.8 and 2.9 above.
1162 See section 40 of the Constitution. Also see *Robertson* case para 59. Also see De Visser and Steytler *Local Government Law of South Africa* 15. Also see Madumo 2015 *Administratio Publica* 155,158. Also see Du Plessis and Nel "An introduction" 1-26, 1-27. Also see Fuo 2017 *De Jure* 326; Pieterse 2023 *Hague Journal on the Rule of Law* 309
1163 Havenga *The Restructuring of Local Government with specific reference to the City of Tshwane* 51.
1164 See section 152(1) of the *Constitution*. Also see *Blue Moonlight Properties* case para 25-26; Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 51; Madumo 2015 *Administratio Publica* 155.

towards the community.[1165] Local government is democratically elected by the community.[1166]

The South African form of democracy has two main elements: representative and participatory democracy.[1167] In terms of representative democracy, the democracy functions through representative institutions. Representative democracy also grants the opportunity for public participation in decision-making process besides the ordinary representative institutions that exist.[1168] The suggestion here with regards to local government is that the citizens or members of the community elect the councillors in municipalities, and they therefore represent the electorate. By virtue of this, the electorate also participates in and forms part of local government. Participatory democracy requires that public participation opportunities should be created for the members of the electorate to participate. Government should make this possible by enhancing the capacity of the people to participate.[1169] Public participation by citizens or members of the community in a democratic government also forms part of their obligations to participate in the affairs of the local government.[1170] Public participation by the members of the community is regarded as an underlying principle of a democracy, as set out in Chapter 2.[1171] A system of government where every citizen participates in the processes of government, forms part of the ideals of a democracy.[1172]

1165 Section 152(1) of the *Constitution*. Also see Madumo 2015 *Administratio Publica* 155.

1166 Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 51.

1167 See section 1.1 above. Also see *Doctors for Life International* case para 115; Brand 2011 *Stellenbosch Law Review* 622; De Visser and Steytler *Local Government Law of South Africa* 23.

1168 See De Visser and Steytler *Local Government Law of South Africa* 23. These representative institutions include municipal councils, provincial parliaments, Electoral System and the National Assembly in South Africa. See also Brand 2011 *Stellenbosch Law Review* 622.

1169 Brand 2011 *Stellenbosch Law Review* 622. Also see section 19 of the *Systems Act*; De Visser and Steytler *Local Government Law of South Africa* 23.

1170 Offor 2007 *Journal for Sustainable Development in Africa* 136. Also see the *Constitution*, *Structures Act* and *Systems Act* in this regard. Also see De Visser and Steytler *Local Government Law of South Africa* 23.

1171 Offor 2007 *Journal for Sustainable Development in Africa* 135. Also see De Visser and Steytler *Local Government Law of South Africa* 23. A system of government where every citizen participates in the processes of government forms part of the ideals of a democracy. Also see Offor 2007 *Journal for Sustainable Development in Africa* 135.

1172 See section 1.1 above. Also see Offor 2007 *Journal for Sustainable Development in Africa* 135; De Visser and Steytler *Local Government Law of South Africa* 23.

The Constitutional Court in the *Doctors for Life International* case stated "that the representative and participatory elements of South Africa's democracy" are regarded as co-operative and interrelated.[1173] The Constitutional Court continued that general elections as "the foundation of representative democracy would be meaningless" without people's participation.[1174] This envisaged public participation, according to the Constitutional Court, is important "to the functioning of representative democracy" as it encourages the people to actively participate in the affairs of government.[1175]

As one would expect, local government has an important role to play in ensuring and bringing democracy to the people.[1176] The involvement of the community should be encouraged and promoted. The vulnerable and excluded groups of the community must be encouraged to participate in these processes. However, the importance of public participation by the community should not curb or "capture" the development within communities when effective measures are already in place for the public participation in the affairs of local government. Still, effective, and even more effective ways must be found to enhance public participation by the community, which will assist local government to address their needs and ultimately propel development.[1177]

All government spheres in South Africa are distinctive but interdependent and interrelated spheres of government.[1178] Local government is therefore interdependent and interrelated with provincial and national government.[1179] The interrelatedness implies that local government is supervised through regulation, monitoring or intervention by provincial or national government.[1180] With regards to

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1173 *Doctors for Life International* para115. Also see *Robertson* case para 59; Du Plessis and Nel "An introduction" 1-26,1-28; Fuo 2017 *De Jure* 326.
1174 *Doctors for Life International* para115.
1175 *Doctors for Life International* para115.
1176 See Madumo 2015 *Administratio Publica* 158, 164.
1177 *White Paper* 25.
1178 Section 40 of the *Constitution*. Also see *Robertson* case para 59; Madumo 2015 *Administratio Publica* 155,158; Du Plessis and Nel "An introduction" 1-26,1-28.
1179 Havenga "The Restructuring of Local Government with specific reference to the Csity of Tshwane" 51. Also see Du Plessis and Nel "An introduction" 1-26, 1-28.
1180 See Chapter 2 above. Also see section 139 of the *Constitution*. Also see De Visser "Constitutionalisation of Local and Regional Government in Lesotho, South Africa, and Uganda" 261.

the interdependence, local government must co-operate with provincial and national government in the regulation of their affairs to the benefit of the larger community.[1181] These have obvious implications for the 'measure of autonomy' of local government.[1182] Based on the interdependent as well as the interrelated character of local government, local government does not have absolute autonomy since national and provincial government have the power of oversight or to intervene in the operations of municipalities.[1183]

The next section will continue with a discussion of what the notion of developmental local government means in the South African context. This will also serve as contextualisation to better understand the reasons and means for civil protest.

3.3.3 The notion of 'developmental' local government relative to the reasons and means for civil protest

As indicated earlier, developmental[1184] local government is a constitutional[1185] and statutory[1186] mandate of municipalities.[1187] The *Constitution* provides that local government has the obligation to ensure the provision of services to local communities in a sustainable manner[1188] and to promote their social and economic development.[1189] The rights entrenched in Chapter 2 of the *Constitution* are

1181 Section 40(1) of the *Constitution*. Also see *Robertson* case para 59; Du Plessis and Nel "An introduction" 1-28.

1182 Marshall *Local Government in the Modern World* 1. Also see Havenga "The Restructuring of Local Government with specific reference to the City of Tshwane" 51; Mathenjwa 2018 *Southern African Public Law* 4-5.

1183 See Fuo 2017 *De Jure* 326. Mathenjwa 2018 *Southern African Public Law* 4-5.

1184 See section 1 (a) of the *Systems Act*. Per definition, development entails the improvement of quality of life for the community. Specifically, the focus is on the poor and disadvantaged members of the community.

1185 See 152(1)(b) of the *Constitution*.

1186 See Preamble of the *Structures Act*: "…a vision of democratic and developmental local government in which municipalities fulfil their constitutional obligations to ensure sustainable effective and efficient municipal services promote social and economic development, encourage a safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives…"

1187 See section 2.8 above. Also see Van der Walt "The statutory and regulatory framework for Local Government" 48; Nyalungu 2006 *International NGO Journal* 17.

1188 Section 152(1)(b) of the *Constitution*.

1189 Section 152(1) (c) of the *Constitution*. Also see *Blue Moonlight Properties* case para 25-26; Tsatsire, Taylor and Raga 2010 *The Journal for Transdisciplinary Research in Southern Africa*

applicable to this mandate and bind all organs of state including municipalities.[1190] This constitutional mandate requires local government to take reasonable steps, within the available resources, to realise this developmental mandate.[1191] Thus, it is important to unpack what the notion of developmental local government entails in the South African context.

The *White Paper* defines developmental local government[1192] as

> local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic, and material needs and improve the quality of their lives.[1193]

Developmental local government is regarded as the "central responsibility of municipalities to work together with local communities to find sustainable ways to meet their needs and improve the quality of their lives."[1194] This implies that developmental local government is twofold: firstly, local government must work together with the community to determine their needs and interests, and secondly to meet their respective needs and interests which will improve the quality of their lives and ultimately contribute to the development in the community. Thus, local government and communities must cooperate in order to attend to the needs and shortcomings of the community, but they must also find ways to deal with it in a sustainable manner.

According to the *White Paper*,[1195] "developmental local government has four interrelated characteristics".[1196] Firstly, "maximising social development and economic growth" requires local government to exercise its powers and functions to the benefit of the local community by addressing the basic needs of communities.

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272. Also see Van der Westhuizen, Dollery and Grant 2012 *The Journal for Transdisciplinary Research in Southern Africa* 268. Also see Bekker and Leilde 2003 *Politeia* 3.

1190 Section 7(2) of the *Constitution*.

1191 *White Paper* 23.

1192 See section 2.8 above.

1193 *White Paper* 23.

1194 *White Paper* 23.

1195 Also see Nkuna 2011 *Journal of Public Administration* 630.

1196 Parnell and Pieterse 1999 *Africanus* 74-76. According to Parnell and Pieterse, there are four dimensions of developmental local government: changing the spatial framework of Apartheid; local government finance; integrated local government management and democracy and local government.

Local government should also ensure growth within the local economy.[1197] Secondly, integration and coordination in local government are important in pursuance of sustainable and effective service delivery. Properly integrated development plans will assist to effect sustainable and effective service delivery.[1198] Thirdly, democratising development in local government requires public participation. Such democratisation requires that the marginalised and excluded groups in the municipality be encouraged to participate in matters of local government. Lastly, leading and learning require changes relating to sustainable economies and the development of societies, protection of the environment, improvement of safety and the elimination of poverty. These aspects require local government to rethink their organisation and governance.[1199] The municipality should consider these aspects in the development process to assist the municipality in achieving the developmental local government mandate which should eventually be to the advantage of the community.[1200]

A strategic, visionary, and influential approach is required by local government to be developmental. This is relevant for purposes of policy-making and the mobilisation of resources to achieve the outcomes of developmental local government.[1201] Developmental local government has "the following key outcomes: the provision of household infrastructure and services; creation of liveable, integrated cities, towns and rural areas; local economic development; community empowerment and redistribution".[1202] The provision of household infrastructure and services as an essential component is one of the key outcomes of local government. This is important for the social and economic development of communities.[1203] The *White Paper* stresses that it is important that the provision of household

1197 *White Paper* 23. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.
1198 *White Paper* 24. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.
1199 *White Paper* 26. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 10.
1200 See Field "Local economic development and the pursuit of a green economy" 5-8; Ramodula and Govender 2021 *Africa Journal of Public Sector Development and Governance* 45.
1201 *White Paper* 26.
1202 *White Paper* 26. Also see De Visser and Steytler *Local Government Law of South Africa* 27.
1203 *White Paper* 26.

infrastructure and services must first be provided to those who do not have access or limited access to these services.[1204]

Household infrastructure and services include "water, sanitation, local roads, storm water, refuse collection and electricity",[1205] whereas "land use planning and control, and transport planning", are included in the *IDPs* and spatial development frameworks.[1206] The second outcome relates to the creation of liveable and integrated areas within local government. It is common knowledge that under Apartheid the spatial planning and structure of cities, towns, and rural areas negatively impacted communities, making communities unliveable and disintegrated. By creating liveable and integrated areas, the provision and delivery of services are possible and sustainable over longer periods. Also, it must contribute to the social development of the communities.[1207] The third outcome of developmental local government relates to the creation of jobs and the local economy.[1208] Lastly, the empowerment of the community and redistribution of resources in communities form part of the outcomes of developmental local government.[1209] It is important to note that these outcomes must be achieved within the capacity of local government.[1210] It is submitted that the constitutional qualification relevant to rights in the Bill of Rights which refers to the realisation of the right within available resources, is integral to the achievement of these outcomes as it may be regarded as a hinderance.

According to the White Paper, the following tools and approaches were supposed to assist with the achievement of the developmental local government mandate:

- "integrated development planning and budgeting";
- "performance management"; and
- "working together with local citizens and partners".[1211]

1204 *White Paper* 27.
1205 *White Paper* 27.
1206 Chapter 5 of the *Systems Act* read with the *Spatial Planning and Land Use Management Act* 16 of 2013. Also see Asha and Madzirhandila 2012 *Journal of Public Administration* 371.
1207 *White Paper* 27.
1208 *White Paper* 28.
1209 *White Paper* 26.
1210 Section 19(1) of the *Structures Act*.
1211 *White Paper* 29.

The idea of development and public participation in local government may be regarded as being intertwined.[1212] The rationale behind this suggests that development will not be able to take place if and when the community is not involved in the processes of local government. The involvement of the community will provide local government with the opportunity to determine their needs and accordingly put measures in place to be responsive to said needs.

The achievement of the developmental local government outcomes is important for the social and economic development of communities[1213] as entrenched in the *Constitution*.[1214] However, local government faces many challenges in its attempt to fulfil its constitutional and statutory mandate,[1215] as noted above, including but not limited to corruption, mismanagement, maladministration, and nepotism.[1216] This contributes to the inability of local governments to facilitate and enhance development within communities[1217] and amounts to the imperfect nature[1218] of local government to fulfil their developmental mandate.[1219] As pointed out above, this failure by local government is met with an increasing rate of protests,[1220] regardless of the many participatory mechanisms created by local government for public participation by the community.[1221]

1212 Madumo 2015 *Administratio Publica* 159.

1213 *White Paper* 27.

1214 Section 152 (1)(c) of the *Constitution* provides that local government has the objective to promote the social and economic development of communities within the local government sphere.

1215 Nyalungu 2006 *International NGO Journal* 18. These include challenges relating to the capacity and structure of municipalities.

1216 Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174; Madumo 2015 *Administratio Publica* 157; Munzhedzi 2020 *African Journal of Governance and Development* 95.

1217 See Du Plessis and Nel "An introduction" 1-31,1-32; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174; Madumo 2015 *Administratio Publica* 154,157.

1218 See Du Plessis and Nel "An introduction" 1-31,1-32; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174; Munzhedzi 2020 *African Journal of Governance and Development* 95. This refers to local government's poor service delivery record, corruption and a lack of development within municipalities.

1219 See De Visser 2009 *Commonwealth Journal of Local Governance* 12.

1220 See Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 174. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 11.

1221 See Chapter 4 of the Systems Act. Also see De Visser 2009 *Commonwealth Journal of Local Governance* 19.

The inadequacies and imperfections of democracy as well as the response thereto by the government need to be assessed in order to determine the progress made in pursuance of the ideal of democracy. When these inadequacies and imperfections of the democratic government are considered, this consideration should be done in relation to the determination of whether the protest action or act of civil disobedience that followed the democratic failures, was justified or not. To determine whether or not an act of civil disobedience or protest action is justified or not, it is required that a proportional relationship exists between the shortcomings of democracy and the actual resort to protest action and acts of disobedience.[1222] Thus, the reactions of the unresponsive government which may be deemed to be one of the manifestations of the shortcomings of democracy or failing democratic rule, and the subsequent response by the citizenry thereto, need to be proportional.

In conclusion, municipalities have certain rights and duties,[1223] while the community has certain responsibilities.[1224] This requires that any engagement with the municipality must be undertaken in an orderly manner by observing the available mechanisms, processes, and procedures within said local government.[1225] This is relevant for the purposes of public participation by the community. Therefore, considering that the right to protest may be regarded as a manner of public participation by the community, it must be considered whether the above-mentioned is applicable to the execution of said constitutional right. It seems that the duty to observe the available mechanisms, processes and procedures of the municipality has no impact on the constitutional right to protest, as the only qualification to this right has regard for the peaceful and unarmed manner thereof.

The submission is thus made that people are not prevented from protesting and not required to first exhaust the available participatory mechanisms to express their discontent and dissatisfaction. However, it would be meaningful for them to participate as the opportunities are presented by means of the participatory

1222 Pscorn "Civil disobedience as a democratic practice" 26.
1223 See sections 3.5 and 3.6 above.
1224 See section 3.7 above.
1225 De Visser and Steytler *Local Government Law of South Africa* 26.

mechanisms. Also, such an additional duty on the protester to first exhaust the existing participatory mechanisms will unfairly hamper their access to this right.

In the next paragraph an overview is provided of the municipal structures and role-players that have to physically deliver on the developmental mandate.

3.4 Overview of municipal structures and role-players

3.4.1 Introductory remarks

South Africa has three types of municipalities, Category A municipalities (metropolitan municipalities), Category B municipalities (district municipalities) and Category C (local municipalities).[1226] The relevant category (and sub-categories) determines the functions and responsibilities of each of these types of municipalities.[1227]

A municipality consists of political and administrative structures as well as the community.[1228] The political role-players are elected by the local communities, whilst the role-players in the administration are appointed to certain positions.[1229] These appointments in the administrative structure ought not to be politically motivated in the municipality but based on the qualifications as required.[1230] It does, however, happen that individuals who holds positions in political parties are appointed as staff members in the municipal administration. This may for example result in an accountability issues in relation to those individuals in the context of the party allegiance, which may have a detrimental effect on the municipality.[1231] The *Local*

1226 Sections 2-11 of the *Structures Act*.
1227 Chapter 5 of the *Structures Act* deals with the functions and powers of municipalities.
1228 See section 3.3 above. Also see section 2(b) of the *Systems Act*; Van der Waldt "Municipal Structures" 78.
1229 Van der Waldt "Municipal Structures" 78.
1230 See e.g. section 56A of the *Systems Act* that indicates that municipal managers or managers accountable to him or her may not hold any political office. This section was inserted in 2011 and was amended by the *Local Government: Municipal Systems Amendment Act* 3 of 2022.
1231 See De Visser 2009 https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-11-issue-5-november-december-2009/lgb-iss-11-5-assessing-the-quality-of-local-democracy.pdf

Government: Municipal Systems Amendment Act 3 of 2022 attempts to address this issue.[1232]

The following section briefly notes the different role-players in the political structure of a municipality and their role and involvement in the facilitation of public participation to determine and respond to the needs of the local community. Municipalities are created by the *Constitution*[1233] and the relevant primary legislation, case law and literature applicable, are referred to.

3.4.2 Political role-players in municipalities

The role-players in the political architecture of a municipality include the Executive Mayor (EM), Executive Mayoral Committees, Speaker, Chief Whip, Councillors and Ward Committees.[1234]

3.4.2.1 Executive Mayor

The EM is elected from the members of the municipal council[1235] and is regarded as the leading political figure of a municipality.[1236] Municipalities with a mayoral executive system elect an EM who will have the executive authority as the executive leadership. The EM is also supported by the mayoral committee.[1237]

The EM has the following responsibilities, namely to identify and prioritise the needs of the community;[1238] to manage the budget and planning to align it with the needs of the community;[1239] to be responsive to the needs of the community;[1240] to steer the drafting and approval of the *IDP* by council;[1241] and to develop and oversee the

1232 The Act substitutes sections 54A, 56, 57 and 57A to ensure that municipal and other managers have the requisite skills for their jobs, as well as to ensure political independence.
1233 Sections 3.2 and 3.3 above.
1234 See Nel, Du Plessis and Retief "Key elements for municipal action" 2-23-24. Also see Van der Waldt "Municipal Structures" 79-90.
1235 See section 55(1) of the *Structures Act*. Also see Van der Waldt "Municipal Structures" 81. The Executive Mayor should be elected within 14 days after the election.
1236 Van der Waldt "Municipal Structures" 82.
1237 See section 56 of the *Structures Act*. Also see section 3.4.2.2 below.
1238 Section 56(2)(a), 56(2)(b) and 56(2)(e) of the *Structures Act*. Also see Van der Waldt "Municipal Structures" 81.
1239 Section 56(2)(c) of the *Structures Act*. Also see Van der Waldt "Municipal Structures" 81.
1240 Section 56(2)(d) and (e) of the *Structures Act*.
1241 Section 56(2)(e) of the *Structures Act*. Also see Van der Waldt "Municipal Structures" 82.

Performance Management System to ensure accountability.[1242] The EM must set appropriate mechanisms, processes and procedures in order to encourage public participation.[1243] The EM also has the primary duty of political oversight over the municipality's administration.[1244] He or she must monitor the management of the administration and may assign certain responsibilities to the Municipal Manager (MM).[1245] However, the EM should not intervene with, for example, the professional management of the administration.[1246] This function lies with the MM and may lead to conflict between the latter and the EM.[1247]

3.4.2.2 Executive Mayoral Committee

The EM appoints a mayoral committee if the municipal council has more than nine members.[1248] An executive mayoral committee is appointed by the executive mayor, which is different from a municipal council committee.[1249] Municipal council committees are appointed in terms of section 79 of the *Structures Act* which deem it necessary where the committee will assist the municipal council to perform its functions in an effective and efficient manner.[1250] Section 80 of the *Structures Act* also provides that the municipal council may appoint a committee with the purpose of assisting the EM.[1251] This total number of members may not however, exceed the total number of the executive mayoral committee.[1252] The court in the *Masondo*

1242 Section 56(3)(a), 56(3)(b), 56(3)(c) of the *Structures Act*. Also see Van der Waldt "Municipal Structures" 82.
1243 Van der Waldt "Municipal Structures" 82.
1244 Section 56(3)(d) of the *Structures Act*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.
1245 Hereafter referred to as the MM. The relationship and the complexities thereof will be discussed later in this chapter. See section 3.4.4 below.
1246 Van der Waldt "Municipal Structures" 82.
1247 See for example, Thornhill 2008 *Journal of Public Administration* 725-735; Theletsane "Analysing the Relationship Between South African Mayors and Municipal Officials: A Case of the Western Cape".
1248 Section 60(1)(a) of the *Structures Act*.
1249 See *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC). Hereafter referred to as *Masondo* case. See *Masondo* case para 25.
1250 Section 79(1)(a) of the *Structures Act*. Also see *Masondo* case para 24, 27 and 33.
1251 Section 80(1) of the *Structures Act*. Also see *Masondo* case para 24, 27 and 33.
1252 Section 80(2) of the *Structures Act*. Also see *Masondo* case para 24, 27 and 33.

case made it clear that the executive mayoral committee is not a section 79 and 80 committee.[1253]

A mayoral committee is established from the elected councillors with the purpose to assist the EM.[1254] This committee may exercise any powers and functions delegated to it by the EM[1255] or any delegated powers and functions of the EM to it.[1256] The municipal council may delegate any powers and functions designated to be executed by the EM to the members of the executive mayoral committee. These delegated powers and functions designated for the EM may be executed by the executive mayoral committee with the support of the EM.[1257] It is important to note that the executive mayoral committee is accountable and responsible to the EM with reference to the delegated powers and functions.[1258]

The members of this committee are still councillors, having to fulfil an advisory role to the EM[1259] but also play an important role in service delivery to the community.[1260] It is submitted that the committee needs to engage the community in order to better understand their needs and interests. This extends to the IDP and budgeting processes as part of the strategic and guiding documents in a municipality.

3.4.2.3 Speaker

The Speaker is elected from the councillors[1261] and acts as the chairperson of the municipal council.[1262] The MM is tasked with overseeing the election of the Speaker of the municipality.[1263] The Speaker has to ensure political oversight of the different roles and responsibilities of the role-players in the municipality as per the *Systems Act.*[1264] The Speaker must perform any duty and exercise any delegated powers

1253 *Masondo* case para 24 and 33.
1254 Section 60(1)(a) of the *Structures Act*. Also see *Masondo* case para 13, 23 and 25.
1255 Section 60(1)(b) of the *Structures Act*. Also see *Masondo* case para 10, 12 and 23.
1256 Section 60(1)(c) of the *Structures Act*. Also see *Masondo* case para 10, 12 and 23.
1257 Section 60(3) of the *Structures Act*.
1258 *Masondo* case para 23.
1259 Section 60(1)(a) of the *Structures Act*. Also see van der Waldt "Municipal Structures" 83.
1260 Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.
1261 Section 36(2) of the *Structures Act*. Also see van der Waldt "Municipal Structures" 80.
1262 Section 36(1) of the *Structures Act*. Also see van der Waldt "Municipal Structures" 79.
1263 Section 36(3) of the *Structures Act*.
1264 Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.

assigned to same in terms of section 32 of the *Systems Act*.[1265] This section allows the municipal council to delegate duties and powers to "maximise administrative and operational efficiency and provide for adequate checks and balances".[1266] The *Structures Act*, as amended in 2021, assigned additional, yet key functions for the Speaker to perform.[1267] These entail the following: ensuring the effective functioning of the legislative authority,[1268] performing an oversight role in relation to the executive authority,[1269] ensuring effectiveness of the section 79 committee,[1270] responsible to ensure the accountability of the municipal council,[1271] and ensuring effective and functioning ward committees[1272] and the public participation process in general.[1273] The Speaker is assigned several additional oversight and compliance functions via the 2021 amendments which signify the fundamental role the Speaker fulfils to ensure that the municipal council executes its duties and functions. In effect, the Speaker must oversee that the municipal council's actions contribute to the development of the community. As such, the Speaker's exercise of his or her duties and functions must be sensitive to the needs and interests as indicated by the local community.

3.4.2.4 Whip of municipal council

The 2021 amendments to the *Structures Act* introduced section 41A on the election of a whip for the municipal council, the whip's functions are set out in the introduced section 41B. The whip is to be elected from the councillors in the municipal council[1274] under the supervision of the Speaker.[1275] The whip fulfils certain roles

1265 Section 37(b) of the *Structures Act*.
1266 Section 32(1) of the *Systems Act*.
1267 See *Local Government: Municipal Structures Amendment Act* 3 of 2021. Hereafter referred to as the *Structures Act* 2021.
1268 Section 37(g) of the *Structures Act* 2021.
1269 Section 37(h) of the *Structures Act* 2021.
1270 Section 37(i) of the *Structures Act* 2021. A section 79 committee can be established if "necessary for the effective and efficient performance of any of its functions or the exercise of any of its powers".
1271 Section 37(j) of the *Structures Act* 2021.
1272 See section 3.4.2.6 below.
1273 See Chapter 4 below. Also see section 37(k) of the *Structures Act* 2021; Van der Waldt "Municipal Structures" 80 in general with regards to the communication and public participation.
1274 Section 41A(1) and 41A(2) of the *Structures Act 2021*.
1275 Section 41A(3) of the *Structures Act 2021*.

and responsibilities in relation to the council and councillors. The responsibilities include ensuring the coordination of the political responsibility of the councillors. Another key responsibility refers to the monitoring and reporting on the performance of councillors.[1276] Other functions include, to maintain sound and professional relationships between different political parties in municipal council,[1277] communicate with the whips of the political parties regarding important matters placed on the agenda,[1278] facilitate the engagement between the executive and legislative oversight structures,[1279] and resolve conflict and disputes between the Speaker, EM or the executive mayoral committee.[1280] The main function of the municipal council's whip is therefore to coordinate and manage relations between the different political parties and to foster a sense of accountability.

3.4.2.5 Municipal councillors

The municipal council in municipalities is regarded as the most important municipal structure.[1281] The role-players, mentioned above, are first elected as councillors, and then elected or appointed to the specific office in which they serve. All municipalities must constitute a municipal council which consists of councillors.[1282] These councillors as part of the municipal council must strive to achieve the objectives of section 152 of the *Constitution*. As stated before, the section 152 objectives relate to accountability of the municipality,[1283] sustainable service delivery,[1284] social and economic development,[1285] safe and healthy environment[1286] as well as the involvement of the local community in the affairs of the municipality.[1287]

1276 Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.
1277 Section 41B(b) of the *Structures Act 2021*.
1278 Section 41B(c) of the *Structures Act 2021*.
1279 Section 41B(e) of the *Structures Act 2021*.
1280 Section 41B(f) of the *Structures Act 2021*.
1281 Nel, Du Plessis and Retief "Key elements for municipal action" 2-20.
1282 Section 18(1) and 18(3) of the *Structures Act*.
1283 See article 152(1)(a) of the *Constitution*.
1284 See article 152(1)(b) of the *Constitution*.
1285 See article 152(1)(c) of the *Constitution*.
1286 See article 152(1)(d) of the *Constitution*.
1287 See section 3.7 below. Also see article 152(1)(e) of the *Constitution*.

The *Structures Act* requires the municipal council on an annual basis to review how it is progressing in achieving the section 152 objectives.[1288] Additionally, the municipal council must also review the needs and interests of the community,[1289] their priorities to meet the identified needs and interests,[1290] as well as the processes and mechanisms employed to address these.[1291] In order for the municipal council to meet their section 152 objectives as well as receive constructive feedback during the annual review, the local community must be consulted.[1292] Although these provisions make specific reference to the municipal council, the municipal council comprises councillors, hence the onus would rest on them to pursue these prescripts, making use of the relevant mechanisms[1293] as set out in the *Systems Act*, such as ward committees and *IDP* forums.

Councillors are the representatives of the local community and are thus accountable to them. Therefore, councillors must report back to the communities on municipal council decisions which may affect them.[1294] The community must be informed of the mechanisms, procedures, and programmes available to participate in determining their needs and interests in order to contribute to the development of the community at large.

3.4.2.6 Ward committees[1295]

Ward committees are also part of the political structure of the municipality.[1296] A ward committee must be established within 120 days after the elections and establishment of the municipal council.[1297] Councillors, with the exception of proportional representative councillors, represent the ward which elected them to

1288 Section 19(1)(d) of the *Structures Act*.
1289 Section 19(1)(a) of the *Structures Act*. Also see van der Waldt "Municipal Structures" 84.
1290 Section 19(1)(b) of the *Structures Act*. See also Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.
1291 Section 19(1)(c) of the *Structures Act*. See also Nel, Du Plessis and Retief "Key elements for municipal action" 2-23.
1292 Section 19(3) of the *Structures Act*. Also see van der Waldt "Municipal Structures" 84.
1293 See section 4.5 below.
1294 Van der Waldt "Municipal Structures" 85.
1295 See section 4.5.8 below.
1296 See Nel, Du Plessis and Retief "Key elements for municipal action" 2-20.
1297 Section 73(1) of the *Structures Act 2021*.

the municipal council. The ward councillor also becomes the chairperson of the ward committee[1298] which consists of no more than ten elected members from the community. The establishment of a ward committee is key to promoting the development of the local community. The ward committees are largely dysfunctional and experience resource constraints which may impact the functionality of such committees.[1299] In addition to this, a lack of interest is noted in the operation of these committees.[1300] The ward committees may exercise powers and functions delegated to them in terms of section 32 of the *Structures Act*.[1301] The 2021 amendments to the Structures Act place an emphasis on the importance of the ward committee system.

Ward committees are designed to enhance participatory democracy. Generally, the ward committee also serves the purpose of establishing a formal and direct communication channel between the councillor and community members.[1302] This creates a platform from which the community can submit complaints and make suggestions to the ward councillor on the affairs of the local community.[1303] The committee is a mobilising agent to promote community public participation in for example the *IDP*, budgetary process and the Performance Management System. The ward committee may make any recommendations to the ward councillor on any matter which may affect the ward.[1304]

The following section elaborates on the different role-players in the administrative structure of the municipality.

1298 Section 73(2)(a) of the *Structures Act*. Also see Thornhill and Madumo 2011 *Administratio Publica* 132.
1299 See Fuo 2015 *African Human Rights Journal* 173.
1300 See Fuo 2015 *African Human Rights Journal* 173.
1301 Section 74(b) of the *Structures Act*.
1302 Nel, Du Plessis and Retief "Key elements for municipal action" 2-24. Also see Fuo 2015 *African Human Rights Journal* 173.
1303 See Fuo 2015 *African Human Rights Journal* 173.
1304 Section 74(a) of the *Structures Act*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-23. Also see Fuo 2015 *African Human Rights Journal* 169.

3.4.3 Administrative role-players in municipalities

The role-players as part of the administrative structure of the municipality include but are not limited to, the following: the MM, Heads of Departments or Directorates and municipal officials.[1305]

3.4.3.1 Municipal Manager

The municipal council appoints the MM. He or she fulfils a prominent role as the head of the administration of the municipality.[1306] The MM must have the required skills, expertise, competencies, and qualifications.[1307] In general, the MM is responsible for the management of the administration of the municipality.[1308] including administrative and financial duties for which he or she is responsible and accountable.[1309] The MM must ensure that the administration is effective, efficient and accountable.[1310] The effectiveness, efficiency and accountability relate to the implementation and the monitoring of the implementation of the *IDP*,[1311] operating the Performance Management Systems,[1312] as well as the extent to which the municipality is responsive to the needs of the local community.[1313] Some of the other relevant responsibilities of the MM entail assistance to the EM during the budget process,[1314] managing the delivery of service in a sustainable manner,[1315] implementing decisions of, for example, the municipal council; and ensuring the

1305 Nel, Du Plessis and Retief "Key elements for municipal action" 2-23-24. Also see Van der Waldt "Municipal Structures" 79-90.
1306 Section 54A(1)(a) of the *Local Government: Systems Amendment Act* 3 of 2022. Hereafter referred to as Systems Act 2022. Also see 55(1) of the *Systems Act*; Van der Waldt "Municipal Structures" 85.
1307 Section 54A(2) of the *Systems Act* 2022.
1308 Section 55(1)(b) of the *Systems Act*.
1309 Section 55(1) of the *Systems Act*. Also see Van der Waldt "Municipal Structures" 85-86.
1310 Section 55(1)(a)(i) of the *Systems Act*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-24.
1311 Section 55(1)(a)(ii) of the *Systems Act*. Also see section 55(1)(c) *Systems Act*.
1312 Section 55(1)(a)(iii) of the *Systems Act*.
1313 Section 55(1)(a)(iii) of the *Systems Act*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-24. Also see Van der Waldt "Municipal Structures" 85.
1314 Also see Van der Waldt "Municipal Structures" 86.
1315 Section 55(1)(d) of the *Systems Act*.

facilitation of public participation by the community in the affairs of the municipality.[1316]

The MM as the head of the administration therefore has an important role to fulfil in key strategic processes in the municipality.

3.4.3.2 Managers

The municipal council after consultation with the MM must appoint managers who are directly accountable to the MM.[1317] Before a manager is appointed, his or her suitability for the managerial position must be ascertained. The appointed manager must have the required skills, expertise, competencies as well as qualifications for the specific position.[1318] The following managers may be appointed by the municipal council in consultation with the MM: Finance, Corporate Services, Technical Services, Social Services, Public Safety, Housing, Health and Environment.[1319] The municipal council may delegate powers and functions to the appointed managers.[1320] The managers are primarily responsible for the day-to-day functions and duties as per the relevant department or directorate. Their responsibilities extend to the implementation of the *IDP*, managing the approved budget and ensuring compliance with the Performance Management System.[1321]

A municipality must, considering its administrative and financial capacity, organise its administration in a manner that would enable it to achieve the aspects listed in section 51 of the *Systems Act*.[1322] Here, the reference to the organisation of the administration implies the organisation and management of municipal officials. This includes the officials appointed in the various offices[1323] and departments in the

1316 Section 55(1)(n) of the *Systems Act*. Also see Nel, Du Plessis and Retief "Key elements for municipal action" 2-24. Also see Van der Waldt "Municipal Structures" 85.
1317 Section 56(1)(a) of the *Systems Act* 2022. Van der Waldt "Municipal Structures" 86.
1318 Section 56(1)(b) of the *Systems Act* 2022.
1319 Van der Waldt "Municipal Structures" 88-89.
1320 Section 59(1)(a) of the *Systems Act*.
1321 Van der Waldt "Municipal Structures" 87.
1322 See section 51 of the *Systems Act*. Also see Van der Waldt "Municipal Structures" 88.
1323 See Van der Waldt "Municipal Structures" 88-89. The offices referred to include for example the Office of the Speaker, Office of the Mayor and Office of the Municipal Manager.

municipality.[1324] The important responsibilities relate to the municipal officials, who are ultimately responsible for the implementation of municipal council decisions and to ensure service delivery. Those in the political structures ought to exercise power by making decisions which progress the development of the community, whilst the administration must ensure that those decisions are implemented.

3.4.4 Relationship between the two heads: Executive Mayor and Municipal Manager

The ability of the municipality's administration to be developmental and responsive to the needs and interests of the community is impacted by the relationship between political and administrative structures.[1325] This relationship is important and may have a detrimental impact on the development of the local community. The relationship is often referred to as a complex interface.[1326]

The complex interface in a municipality with regards to political and administrative structures and officials deals with issues or aspects which may, and in all likelihood will, directly impact on the daily lives of communities and have the potential to result in a lack of service delivery.[1327] In order to be effective and accountable to the needs of communities and ensure service delivery, a close liaison and working relationship between the political and administrative structures is necessary.[1328] As per the role of the administration to give effect to the decisions taken by the politicians, a proper understanding and coordination of public policy as well as policy directives are required from the administration.[1329]

1324 Van der Waldt "Municipal Structures" 88-89.

1325 The purpose of the discussion is not proceed from the premise that the EM and MM are equal. The relationship between the EM and MM is important as it may result in a complex interface regardless of their respective reporting lines. The complex nature of the relationship have a detrimental impact on the development of the local community.

1326 Thornhill 2005 *Journal of Public Administration* 183. Also see Maqoko and Asmah-Andoh 2019 *Administratio Publica* 70-72 and 74-78.

1327 Thornhill 2005 *Journal of Public Administration* 183. Also see Maqoko and Asmah-Andoh 2019 *Administratio Publica* 70-72 and 74-78.

1328 Thornhill 2005 *Journal of Public Administration* 181. Also see Maqoko and Asmah-Andoh 2019 *Administratio Publica* 70-72 and 74-78.

1329 Surty *The political/administrative interface: the relationship between the executive mayor and municipal manager* 14.

The EM, as the leading political figure, is responsible for monitoring the municipal administration and may assign responsibilities to the MM as the head of the administration. Responsibilities relating to, for example the *IDP*, budget, Performance Management System, and communication with communities, may also be assigned to the MM. In the context of the development of the municipality, a professional and balanced relationship is required between the EM and MM.[1330] It is submitted that the fact that the municipal council as part of the political structure makes decisions which have to be implemented by the administration under the leadership of the MM and part of the executive arm, may be a contributing factor to the nature of the conflicting relationship between the EM and the MM.[1331]

Thornhill[1332] argues that the relationship between the political and administrative structures is multi-faceted and complex. The complexity finds its origin in the fact that as part of the primary functions of the administration of a municipality, it needs to give effect to political decisions and policies.[1333] Although the administration structure is not *per se* a political structure, the political agenda and affiliation of these individuals may impact their objectivity with regards to giving effect to the political decisions and policies of the municipal council, which may be contrary to the view(s) held by the political party who the individual associates with. Thus, the operation or functioning of the administration is influenced by the political component of the municipality.[1334] There seems to be no clear line dividing the political and administrative structures in a municipality[1335] as the complexity often leads to a power struggle as well as conflict and tension. For example, municipalities

1330 Van der Waldt "Municipal Structures" 83.
1331 See Surty *The political/administrative interface: the relationship between the executive mayor and municipal manager* 14.
1332 Thornhill 2005 *Journal of Public Administration* 180. Also see Surty *The political/administrative interface: the relationship between the executive mayor and municipal manager* 15; Cameron 2003 *International Review of Administrative Sciences* 55.
1333 Thornhill 2005 *Journal of Public Administration* 180. Also see section 55 (1)(k) of the *Systems Act* on the complex political-administration interface: "carrying out the decisions of the political structures and political office bearers of the municipality".
1334 Thornhill 2005 *Journal of Public Administration* 183.
1335 Surty *The political/administrative interface: the relationship between the executive mayor and municipal manager* 6.

may experience tension between the EM as a political role-player and the MM as the head of the municipal administration.[1336]

The complexity of the relationship between the political and administrative structures in a municipality may have a detrimental impact on the responsiveness of the municipality to the needs of the community. This complex relationship and its impact on the development of communities may be perceived as a contributing factor to the level of protest (violent) in local government.[1337]

3.5 Responsibilities of municipal councils to facilitate public participation

The *Constitution* sets out the constitutional mandate of municipalities.[1338] In giving effect to the constitutional developmental local government mandate, section 4 of the *Systems Act* sets out the powers and duties of municipal councils.[1339] Section 4 makes provision for the duties of municipal councils concerning public participation and responsive developmental local government.[1340] The duties listed in section 4 of the *Systems Act* must be considered within the financial and administrative capacity of each municipality and the practicality thereof.[1341] The financial restraints may impact the administrative capacity of a municipality. This may further contribute to the argument that municipalities have limited resources and therefore may fail to fulfil their constitutional mandate which embodies their duties.[1342] Although the financial and administrative capacity proviso is practical and understood considering the historical background of South Africa, it automatically

1336 See for example the case of Oudtshoorn: Cloete 2020 https://www.iol.co.za/weekend-argus/news/da-mayor-city-manager-involved-in-spat-over-r33m-tenders-31573735. Also see Maqoko and Asmah-Andoh 2019 *Administratio Publica* 70-72 and 74-78.

1337 The absence of the separation of powers in local government is noted. However, a discussion of the separation of powers is beyond the scope of the study.

1338 Section 152 of the *Constitution*.

1339 See *Joseph case* para37.

1340 See section 4 of the *Systems Act*; Joseph case para 37; SALGA 2011 *Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials* 13.

1341 Section 4(2) of the *Systems Act*. Also see SALGA 2011 *Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials* 13.

1342 See sections 25(5), 26(2) and 27(2) of the *Constitution* on the fulfilment of the relevant rights within available resources.

provides a possible justification for the failure to meet what the municipal council is entrusted with.[1343]

The municipal council's duties[1344] include allocation and distribution of the available municipal resources in the best interests of the community.[1345] This is inclusive of the duty to provide municipal services[1346] to the community.[1347] Furthermore, the municipal council must involve and consult the community regarding the level, quality, range, and impact of the municipal service to be provided to them. Different mechanisms, processes, and procedures exist and may be employed to involve and consult the community in the affairs of the municipality.[1348]

This duty further entails the development of the economic and social circumstances of the community in their best interests and to improve their livelihoods.[1349] This will be an impossible task without the involvement of the community itself in the determination of its economic and social needs. The court in *Joseph* made it clear that a public-law relationship exists between municipalities and their citizens,[1350] and that this is significant in informing local governments' engagements with citizens. Furthermore, the court indicated that the cardinal function as well as the central mandate of local government means that in order to meet the basic needs of communities, the service delivery capacity needs to be developed.[1351]

Besides the duties provided for in section 4, the municipal council should oversee the annual tabling of budgets, the Service Delivery and Budget Implementation Plan

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1343 See Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-2022* 28-29.

1344 Section 4(2) (a) – (j) of the *Systems Act*. Also see SALGA 2011 *Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials* 13.

1345 Section 4(2) (a) of the *Systems Act*.

1346 In *South African Municipal Workers Union v City of Cape Town and Others* 2004 (1) (SA) 548 (SCA) the court found that the reference to and meaning of municipal service in sections 16 to 21 of the *Systems Act* are not confined to charged or notionally charged services to identifiable users or individuals. Hereafter referred to as the *SAMWU* case. *SAMWU* case para 8 read with Chapter 6. Also see sections 16 to 21 of the *Systems Act*.

1347 Section 4(2) (b) of the *Systems Act*.

1348 See Chapter 4 below.

1349 See Munzhedzi 2020 *African Journal of Governance and Development* 91.

1350 *Joseph* case para 25.

1351 *Joseph* case para 34. Also see Munzhedzi 2020 *African Journal of Governance and Development* 91.

(*SDBIP*),[1352] and performance management agreements,[1353] and the adoption and annual review of the supply chain management policy.[1354] The duty to involve and engage with the public also applies when considering or voting concerning the following aspects: by-laws,[1355] budgets;[1356] the *IDP*,[1357] performance management systems;[1358] service delivery agreements;[1359] or any other matter provided for by regulation.[1360] The municipal council must also annually review the needs of the community and also prioritise those needs accordingly.[1361] Entrusted with overseeing, adopting, and reviewing the abovementioned, the municipal council must ensure the involvement of the community in these aspects.

The core duty of the municipal council involves the exercise of the municipality's authority and the use of resources to develop the community with the public participation of the relevant community. This duty creates certain responsibilities which the municipal council should adhere to in order to encourage and facilitate public participation, as this is important for the developmental mandate of the municipality. The next section deals with the responsibilities of municipal councils in relation to public participation in local governance and responsive developmental local government.

3.5.1 Key annual processes

In the exercise and performance of their duties, municipal councils must develop mechanisms to encourage and enhance consultation with communities. This requires that municipalities create conditions that are conducive to public participation.[1362] These conditions include but are not limited to, public participation

1352 Hereafter referred to as the *SDBIP*.
1353 Section 53(2) of the *MFMA*.
1354 See Chapter 11 of the *MFMA* in this regard.
1355 Section 20(2) (a) of the *Systems Act*.
1356 Section 20(2) (b) of the *Systems Act*.
1357 Section 20(2) (c) of the *Systems Act*.
1358 Section 20(2) (d) of the *Systems Act*.
1359 Section 20(2) (e) of the *Systems Act*.
1360 Section 20(2) (f) of the *Systems Act*.
1361 Section 19 of the *Structures Act*.
1362 Section 16 (1) of the *Systems Act*.

in the *IDP* planning process,[1363] performance review processes of the municipality,[1364] budget preparation processes[1365] and strategic decision-making on municipal services.[1366] Public participation by the community is formally institutionalised but despite this, municipalities still struggle to meaningfully engage with communities.[1367] This difficulty is evident with the substantial increase in the total number of protests due to growing community frustrations with the poor state of governance and service delivery.[1368]

The community must be able to and have the capacity to participate in the above-mentioned affairs. The extent to which the local community can participate in the above annual processes will be discussed in chapter 4. The capacity to participate extends beyond what is legislatively provided and requires more discrete initiatives.[1369] The relevant local community must be considered in determining these initiatives. The above-mentioned processes will be compromised and illegitimately implemented without the consultation and involvement of the community.

Every municipality should build the capacity of the community by developing mechanisms, processes, and procedures for active participation in these

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1363 Section 16 (1)(i) of the *Systems Act*. This includes public participation during the preparation, implementation as well as the review of the *IDP*. The court in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mount Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae)* 2008 (4) SA 572 (W) emphasised that a municipality's *IDP* which incorporates the Spatial Development Framework (*SDF*) informs all planning related decisions. This also applies to the planning authorities including tribunals. Although the *SDF* sets the urban development boundary, it does not preclude development beyond its delineation. Hereafter referred to as the *Gauteng Development Tribunal* case. *Gauteng Development Tribunal* case para 121. Also see sections 25(1) and 26 of the *Systems Act*.

1364 Section 16(1) (ii) and (iii) of the *Systems Act*. This includes public participation during the establishment, implementation, and review process of the performance of the municipality.

1365 Section 16(1) (iv) of the *Systems Act*.

1366 Section 16(1) (v) of the *Systems Act*. In the *SAMWU* case, the court found that the reference to and meaning of municipal service in sections 16 to 21 of the *Systems Act* are not confined to charged or notionally charged services to identifiable users or individuals. *SAMWU* case para 6 and 8. Also see sections 16 to 21 of the *Systems Act*.

1367 South African Government https://www.gov.za/news/speeches/strengthening-community-participation-local-government-challenges-and-prospects. Also see Shongwe and Meyer 2023 *Administratio Publica* 136-159.

1368 Vivier and Sanchez-Betancourt 2023 *Public Administration and Development* 220.

1369 Vivier and Sanchez-Betancourt 2023 *Public Administration and Development* 220.

processes.[1370] These must make provision "for the receipt, processing, and consideration of petitions and complaints by" community members;[1371] notification and public comment procedures;[1372] public meetings, hearings[1373], and consultative sessions;[1374] as well as report-backs to the community.[1375] It is important to note that the municipal council must annually review its mechanisms, processes, and procedures.[1376] The annual review process must therefore consider the relevance and effectiveness of the mechanisms, processes, and procedures followed in the preceding year in order to determine whether alternatives need to be explored, for example. This review should also give an indication of the sentiment or ignorance of the local communities concerning the mechanisms, processes, and procedures used.

3.5.1.1 Facilitation of public participation during the drafting and approval of the municipal budget

The municipal council needs to approve the annual budget of the municipality before the start of the new financial year.[1377] The budget sets out the anticipated revenue,[1378] appropriating expenditure,[1379] as well as the indicative revenue and projected expenditure for the following two years after the completion of the financial year which was budgeted for.[1380] When the annual budget is tabled for approval, specific supporting documents as listed in section 17(3) of the *MFMA* need to be submitted.

The budget process forms part of the decision-making in municipalities. This decision-making process requires public participation to allow the local community the opportunity to deliberate and negotiate their interests as well as the distribution

1370 Section 16(1) of the *Systems Act*. Also see section 17(1)(a) to (e) of the *Systems Act*.
1371 Section 17(2)(a) of the *Systems Act*.
1372 Section 17(2)(b) of the *Systems Act*.
1373 Section 17(2)(c) of the *Systems Act*.
1374 Section 17(2)(d) of the *Systems Act*.
1375 Section 17(2)(e) of the *Systems Act*.
1376 Section 19 of the *Structures Act*.
1377 Section 16(1) of the *MFMA*.
1378 Section 17(1)(a) of the *MFMA*.
1379 Section 17(1)(b) of the *MFMA*.
1380 Section 17(1)(c) of the *MFMA*.

of the available public resources.[1381] Public participation during the budgeting process necessitates citizens' involvement in order to identify their needs and priorities but also during the implementation, monitoring, and evaluation of the strategic plans to deliver accordingly.[1382] The budgeting process is supposed to be interactive[1383] between the municipality and the local community in order to prioritise the distribution of resources, as the budget uses a projection of income and expenditure.[1384] However, it seems that public participation by local community during the budgeting process has seen a decline[1385] and in response, municipalities need to create platforms to enable and ensure that every citizen participates to highlight their priorities and needs.[1386] If the community does not react, the municipality as custodians of the budgeting process should explore alternative initiatives if need be, in order to ensure that the local community have their needs and interests met but also have their voices heard, with regards to the financial plans for the municipality. If the community feels that their inputs are ignored, they may no longer participate in the budget process, feel left out and then resort to other forms of protest.[1387]

A municipal budget has various stages during which citizens can participate.[1388] The *MFMA*[1389] stresses the importance and need for public participation and regulates the tabling and the council's approval of the municipality's budget.[1390] This is also

1381 See section 151, 152 and 195 of the *Constitution* which necessitate and demand the involvement of the community in the affairs of the municipality. Also see Masiya *et al* 2021 *International Journal of Management Practice* 326; Munzhedzi 2020 *African Journal of Governance and Development* 97.

1382 Masiya *et al* 2021 *International Journal of Management Practice* 328,329. Also see Munzhedzi 2020 *African Journal of Governance and Development* 97.

1383 See Masiya *et al* 2021 *International Journal of Management Practice* 330. Public participation which is aimed at increasing the role of the citizen in the budgeting process will generate trust in the relationship between them and municipalities. Also see *Joseph case* para 25 on the special relationship that exist between municipalities and citizens.

1384 Masiya *et al* 2021 *International Journal of Management Practice* 326, 328, 329. Also see Munzhedzi 2020 *African Journal of Governance and Development* 97.

1385 Masiya *et al* 2021 *International Journal of Management Practice* 326.

1386 Masiya *et al* 2021 *International Journal of Management Practice* 326, 327, 328, 330.

1387 See section 2.4 and 2.11 above. Also see Corruption Watch 2022 https://www.corruptionwatch.org.za/municipal-governance-how-do-south-africas-metros-rank/.

1388 See Masiya *et al* 2021 *International Journal of Management Practice* 332.

1389 See section 23 of the *Local Government: Municipal Finance Management Act* 56 of 2003. Hereafter referred to as the *MFMA*.

1390 Also see Masiya *et al* 2021 *International Journal of Management Practice* 331.

supported and advanced by the *White Paper,*[1391] *Structures Act,*[1392] and *Systems Act*.[1393] A key factor to consider and keep in mind when dealing with the municipal budget is the *IDP* and the budget has to comply with its planning.[1394]

Generally, the *MFMA*, following the *Systems Act*,[1395] necessitates and compels a municipal council to make the budget public[1396] in order to provide the local community with an opportunity to submit comments or remarks on the draft budget.[1397] All submitted comments or remarks must be considered[1398] and the Mayor must provide relevant feedback on the comments.[1399] If any amendments based on the comments of amongst others the community are made to the budget, the revised budget must be tabled and approved by the municipal council.[1400] Due to political strife, some budgets take time to get approved.[1401]

Planning and budgeting by a municipality should be done in a manner that is transparent[1402] in order to best address the needs and interests of the local community.[1403] Once the needs and interests of the local community are considered during the planning and budgeting processes, this process is supposed to put the municipality in an informed position and is supposed to assist and guarantee service delivery, to showcase their responsibility towards the local community, social and financial improvement as well as effective public participation by the local community.[1404] The importance of the adoption of a budget after the local

1391 *White Paper* 29-35.
1392 See section 72 of the *Structures Act*.
1393 See sections 4(2)(a) and (e); 5(a), (b), (c) and (d); and 42 of the Systems *Act*.
1394 Also see Masiya *et al* 2021 *International Journal of Management Practice* 332.
1395 See sections 16(1)(iv),20(2)(b) and 26(h) of the *Systems Act*.
1396 Section 22(a) (i) of the *MFMA*. Also see Masiya *et al* 2021 *International Journal of Management Practice* 331.
1397 Section 22(a) (ii) of the *MFMA*. Also see Masiya *et al* 2021 *International Journal of Management Practice* 331.
1398 Section 23(1) (a) of the *MFMA*. Also see Masiya *et al* 2021 *International Journal of Management Practice* 331.
1399 Section 23(2) (a) of the *MFMA*. Also see Masiya *et al* 2021 *International Journal of Management Practice* 331.
1400 Section 23(2) (b) of the *MFMA*. Also see Masiya *et al* 2021 *International Journal of Management Practice* 332.
1401 See e.g. Karim 2023 https://www.news24.com/news24/southafrica/news/this-place-is-completely-broken-inside-ditsobotlas-downfall-and-the-collapse-of-government-20230322.
1402 Masiya *et al* 2021 *International Journal of Management Practice* 330.
1403 Masiya *et al* 2021 *International Journal of Management Practice* 331.
1404 Masiya *et al* 2021 *International Journal of Management Practice* 331.

community were engaged as part of public participation is evident since the budget is of fundamental importance for the successful implementation of the *IDP* in a municipality. The budget as a core component of the *IDP* sets out the financial plans for a municipality in order to meet its developmental goals.[1405]

The following section discusses the development and review of the *IDP* to show the importance thereof for development purposes of the local community and why the participation of communities is so important.

3.5.1.2 Facilitation of public participation during development and review of the *IDP*

In order to meet its constitutional and statutory obligation to ensure the development of a municipality, the municipal council must adopt an inclusive and strategic development plan for the municipality to assist municipal councils in exercising these obligations.[1406] The *IDP* then becomes the strategic primary planning instrument within which a municipality operates.[1407] An *IDP* is important due to the different roles it fulfils within a municipality as it facilitates the development in the municipality;[1408] 'aligns the resources and capacity of the municipality with the implementation of the plan';[1409] and forms the foundation for the drafting and adoption of budgets.[1410] The adoption of and prior procedures for an *IDP* fall within the decision-making of the municipal council. However, meaningful public participation must be facilitated as it would create an opportunity for deliberation and interaction at a local level on issues that impact the social and economic conditions of a community as set out in Chapter 4.[1411]

1405 See *Gauteng Development Tribunal* case para 8 read with para 6. Also see reg 6(a) in GN R796 in GG 22605 of 24 August 2001.

1406 Section 25(1) of the *Systems Act*. Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 87.

1407 Tshabalala and Lombard 2009 *Journal of Public Administration* 397. Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 87, 94.

1408 Section 25(1) (a) of the *Systems Act*.

1409 Section 25(1) (b) of the *Systems Act*. Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 87.

1410 Section 25(1) (c) of the *Systems Act*.

1411 Tshabalala and Lombard 2009 *Journal of Public Administration* 397.

An *IDP* is the 'principal strategic planning instrument' in the municipality[1412] and the vehicle by which the development of a municipality is to be steered.[1413] The *IDP* forms the foundation or guiding instrument of all the planning, development, and decision-making in the municipality.[1414] The *IDP* is also a binding instrument to which the municipal council has the responsibility to give effect and act accordingly.[1415] The binding nature of the *IDP* extends to all persons affected by the *IDP*, whether it is by imposing a duty or affecting certain rights.[1416]

An *IDP* adopted by the municipal council deals with a wide range of aspects relevant to the specific municipality. The *IDP* adopted by a municipality must reflect the following: the developmental vision of the municipal council especially with regards to the critical needs of the municipality;[1417] an assessment of the development status of the municipality as well as the access to basic municipal services;[1418] the developmental priorities, objectives[1419] and strategies[1420] for the elected term; a spatial development plan, making provision for land-use management guidelines in the municipality;[1421] a disaster management plan;[1422] a financial plan which should

1412 Section 35 (1) (b) of the *Systems Act*. Also see Tshabalala and Lombard 2009 J*ournal of Public Administration* 397. Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 87,94. Also see Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 11.

1413 Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 92. Also see Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 16.

1414 Section 35 (1) (a) of the *Systems Act*. Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 92.

1415 Section 35 (1) (b) of the *Systems Act*.

1416 Section 35 (1) (c) of the *Systems Act*.

1417 Section 26 (a) of the *Systems Act*.

1418 Section 26 (b) of the *Systems Act*.

1419 Section 26 (c) of the *Systems Act*.

1420 Section 26 (d) and (f) of the *Systems Act*.

1421 Section 26 (e) of the *Systems Act*.

1422 Section 26 (g) of the *Systems Act*. See for example Pijoos 2022 https://www.news24.com/news24/southafrica/news/kzn-flood-victims-protest-outside-govt-offices-demand-answers-on-disaster-response-2022062. It is submitted that the disaster management plans could not foresee and anticipate the floods. Although government made alternative accommodation available, the local communities wanted answers in respect of the floods and the disaster response thereto. The affected communities responded in protest to their demand for feedback.

include a budget plan for at least three years;[1423] and importantly, performance indicators and targets for the municipality.[1424] In order for an *IDP* to be successfully implemented, it should be linked to the municipal budget which provides and allocates the available resources for the municipality.[1425] A Performance Management System is required to ensure the implementation, monitoring, evaluation, and review of the *IDP*.[1426] It is submitted that the required monitoring and evaluation of the implementation of the *IDP* is key to the identification and detection of any deviations from the content of the *IDP*. This also enables municipalities to identify and recommend possible measures to rectify and correct the detected deviations.[1427]

It is imperative that public participation should be fostered during the *IDP* process.[1428] The effect of the failure to do so may result in the *IDP* being invalid and not representative of the lived reality of communities.[1429] The purpose of engaging with communities is to 'find sustainable ways of meeting the social, economic and material needs and improving the quality of life' of the relevant community.[1430] The involvement of communities is fundamental for the developmental local government

1423 Section 26 (h) of the *Systems Act*. Also see Also see Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 89.

1424 Section 26 (i) of the *Systems Act*.

1425 Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 93. Also see Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 17. Also see Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 113.

1426 See Chapter 6 of the *Systems Act*. Also see Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 17; Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 113; Munzhedzi 2020 *African Journal of Governance and Development* 101.

1427 Munzhedzi 2020 *African Journal of Governance and Development* 101.

1428 See Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 91. Also see Munzhedzi 2020 *African Journal of Governance and Development* 92, 94.

1429 Munzhedzi 2020 *African Journal of Governance and Development* 92, 94.

1430 Tshabalala and Lombard 2009 *Journal of Public Administration* 397. Also see Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 11.

mandate in order to meet the needs of an often embattled community.[1431] Save for the provisions of the *Systems Act* which necessitates public participation in the general affairs of the municipality,[1432] this is inclusively captured by the provisions of section 44(3)(g) of the *Structures Act* which requires the municipal council to annually report on this matter.[1433] This may then be extended to for example the *IDP* process.

Section 34 of the *Systems Act* specifies that municipal councils must annually review the *IDP* in order to amend it in accordance with 'the extent that changing circumstances so demand'.[1434] It is crucial that the *IDP* should reflect and provide for the current state of affairs or realities within a municipality in order to assess the needs and shortcomings of communities. During the review and amendment period of the *IDP*, the municipal council needs to be satisfied that the community were provided a 21-day period for comments before they adopt the proposed amendments.[1435]

3.5.1.3 Monitoring and review of the municipality's performance

From the outset, it is important to state the reality of poor local government performance in South African municipalities[1436] and that it has a detrimental effect on development.[1437] The poor performance of municipalities often leads to growing frustration and uproar from the local communities, resulting in protests.[1438] Performance by a municipality is crucial for good governance.[1439] This requires and entails that a municipality has the ability and means to take the necessary steps or

1431 Njenga *A critical analysis of public participation in the integrated development plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa* 11.
1432 See sections 4(2)(c), 4(2)(e), 16, 17 and 18 of the *Systems Act*.
1433 Section 44(3)(g) of the *Structures Act*.
1434 Section 34 (a) of the *Systems Act*.
1435 Reg 3(4)(b) in GN R796 in GG 22605 of 24 August 2001.
1436 See section 2.11 above.
1437 Khunoethe *et al* 2021 *NISPacee Journal of Public Administration and Policy* 161.
1438 See Vivier and Sanchez-Betancourt 2023 *Public Administration and Development* 220.
1439 See Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 60. The following are regarded as principles of good governance: democracy, moral and ethical conduct, accountability, transparency, and capacity.

action but also the capacity to review the progress made in relation to their developmental mandate. Consequently, a municipality should also be in a position to respond to the review findings, especially where they are found wanting.[1440] In order for a municipality to monitor and evaluate its own performance in relation to planning as per the *IDP*, a *Performance Management System* fulfils a fundamental role[1441] as it is purposed to ensure that the municipality is responsive to the needs of the community.[1442] The *Performance Management System* should guide the implementation of the *IDP* and be a driver to foster change in the community, but in reality it is rarely used to drive development in communities.[1443]

A municipality is required to establish a *Performance Management System* which should correspond with the available municipal resources[1444] as well as the realities[1445] of the said municipality. A *Performance Management System* must be designed to cater for the specific municipality and aligned with the *IDP* which sets out the priorities and targets for the municipality in order to ensure the development of the community.[1446] To monitor, measure and review a municipality's performance, certain mechanisms, systems and processes need to be developed in order to assist with the performance management as per the indicators and targets. Before doing so, the local community must be consulted.[1447] The local community must also be consulted when these are reviewed.[1448] The *Performance Management System* may be regarded as a measurement tool which provides a framework for the way in which performance should be evaluated.[1449]

1440 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 113.
1441 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111. Also see *Motale Public participation strategy for budgeting in local government: the case of Tlokwe Local Municipality* 94. Also see Khunoethe, *et al* 2021 *NISPacee Journal of Public Administration and Policy* 161, 166.
1442 Khunoethe *et al* 2021 *NISPacee Journal of Public Administration and Policy* 166.
1443 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111. Also see Motale *Public participation strategy for budgeting in local government: the case of Tlokwe Local Municipality* 94.
1444 Section 38(a)(i) of the *System Act*.
1445 Section 38(a)(ii) of the *System Act*.
1446 Section 38(a)(iii) of the *System Act*. Also see Reg 7(1) in GN R796 in GG 22605 of 24 August 2001. See Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111.
1447 Reg 13(1) in GN R796 in GG 22605 of 24 August 2001.
1448 Reg 13(4)(c) in GN R796 in GG 22605 of 24 August 2001.
1449 Reg 7(1) in GN R796 in GG 22605 of 24 August 2001.

The previously set *IDP* priorities and targets must be measured[1450] and accompanied with an annual review of the municipality's performance.[1451] The mechanisms, systems and processes established needs to provide for a bi-annual reporting of the municipality's performance to the municipal council.[1452] It is submitted that this provides for accountability and creates opportunities to evaluate the progress made but also to reconsider certain performance indicators and targets in line with the community's needs.[1453] When the municipality develops or reviews the targets and indicators, these must be informed by the community.[1454] It is submitted that local communities should participate in setting performance indicators and targets although the argument may be made that it is not a realistic and practical means to an end.

In order for a municipality to ensure performance as per the *Performance Management System*, a commitment to the needs of the community and performance orientated councillors is key.[1455] Although the community was already involved during the *IDP* and budgeting processes, it is important that they also be included here.[1456] As per section 42 of the *Systems Act*, the community needs to be involved in the development and review of the *Performance Management System*. This will allow and provide opportunity for the community to be part of setting what they deem sufficient as performance indicators and targets.[1457] Once these indicators and targets are set as part of the *Performance Management System*, the municipality needs to communicate same to the community by the means determined by the municipal council.[1458] Where no appropriate structure exists to enable the community to participate during the drafting of the *IDP*, an *IDP* forum

1450 Section 41(1)(c)(i) of the *System Act*. Also see Reg 8 in GN R796 in GG 22605 of 24 August 2001. Also see Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111.
1451 Section 41(1)(c)(ii) of the *System Act*. Also see Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 11.
1452 Reg 13(2)(a) in GN R796 in GG 22605 of 24 August 2001.
1453 See Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 110-111.
1454 Khunoethe *et al* 2021 *NISPacee Journal of Public Administration and Policy* 170.
1455 Section 38(b) of the *System Act*.
1456 Also see Reg 7(2)(c) in GN R796 in GG 22605 of 24 August 2001.
1457 Section 42 of the *System Act*. Also see Reg 9(2)(a) in GN R796 in GG 22605 of 24 August 2001. Also see Reg 10 in GN R796 in GG 22605 of 24 August 2001 on the general key performance indicators.
1458 Section 44 of the *System Act*.

may be established to monitor, measure, and review the performance with regards to the performance indicators and targets. It is important to note that this is an alternative for where an appropriate or functioning participatory structure is lacking to ensure the involvement of the community.[1459]

Generally, the view is held that better strategic planning will result in and lead to better performance.[1460] The *IDP* as the municipality's strategic plan portrays the developmental goals to be pursued. However, the achievement and implementation thereof in many municipalities remains questionable.[1461] Yet, municipalities adopt a *Performance Management System* which is purposed to ensure the implementation of the IDP.[1462] As an extension of the IDP, the *Performance Management System* is supposed to monitor the implementation of the IDP.[1463] Valuable information can in principle be elicited by means of the *Performance Management System* which may contribute to better municipal planning and budgeting.[1464]

3.5.2 Preliminary observations

Municipal councils have the right to govern the affairs of the relevant municipality within the bounds of the law in the best interests of the local communities. Obviously, this must be in accordance with the *Constitution* and any applicable legislation. It is important to mention that regardless of the right of the municipal council to govern on its own initiative, public participation by the local community is of fundamental importance as this forms part of not only the municipality's responsibilities but also participatory democracy.[1465] However, the special relationship between the municipality and the local community must be taken into account.

1459 Reg 15(1)(ii) in GN R796 in GG 22605 of 24 August 2001.
1460 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 113.
1461 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111, 120.
1462 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 111.
1463 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 113. Also see *Motale Public participation strategy for budgeting in local government: the case of Tlokwe Local Municipality* 94.
1464 Nzimakwe and Ntshakala 2016 *African Journal of Public Affairs* 117.
1465 See section 1.1 and 2.5 above.

This special relationship between the municipality and local community are premised on the close nature of their engagements as well as the fact that the local authorities are tasked with an important mandate to provide services.[1466] The rendering of these services represents some encounters the local community may have with municipalities which will influence their perception of local government. The quality and quantity of the services so rendered will also impact this perception when the performance of government is considered.[1467] The *Joseph*[1468] case endorsed the extend of this relationship where local government is mandated to provided services in post-Apartheid South Africa.[1469]

The court in the *Joseph* case furthermore confirmed that a special relationship exists between a municipality and the local community which is based on public responsibilities of municipalities.[1470] This relationship requires for example local government to act in a manner which is responsive when it fulfil their obligations and while doing so, they will be promoting trust in public administration and local democracy.[1471] Failure on the side of local government to meet the responsibilities bestowed on them and falling short of the constitutional mandate permits the local communities to hold the local authorities accountable[1472] for such shortcomings.[1473]

The existence of this special relationship is founded on the *Constitution* and other legislation which brings about certain responsibilities for not only the municipal council and community but also the municipal administration.[1474] The following

1466 Van der Waldt and Fuo "Municipal service delivery and the environment" 10-1,2. See also *Joseph* case para 34-40.
1467 Van der Waldt and Fuo "Municipal service delivery and the environment" 10-1.
1468 Also see Van der Waldt and Fuo "Municipal service delivery and the environment" 10-4,6 for a discussion of the *Joseph* case.
1469 De Vos and Freedman (eds) *South African Constitutional Law in Context* 291. Also see Van der Waldt and Fuo "Municipal service delivery and the environment" 10-4,6. Van der Walt and Fuo continue that the "relationship between government and citizens in the post-Apartheid era are to be understood considering the value of ubuntu." Also see Geduld *uBuntu as a constitutional value: A social justice perspective* 89-153 for different perspectives on ubuntu.
1470 *Joseph* case para 25. Also see Van der Waldt and Fuo "Municipal service delivery and the environment" 10-5.
1471 *Joseph* case para 46. Also see Van der Waldt and Fuo "Municipal service delivery and the environment" 10-5,6.
1472 See section 2.9 below.
1473 Van der Waldt and Fuo "Municipal service delivery and the environment" 10-6.
1474 See Van der Waldt and Fuo "Municipal service delivery and the environment" 10-5.

section highlights the responsibilities of the municipal administration with the aim to show the importance of the role fulfilled by the municipal administration.

3.6 Responsibility of the municipal administration

3.6.1 Background

The *Constitution* sets out the basic values and principles which ought to govern public administration in South Africa,[1475] including the principle that resources must be utilised in an efficient, economic and effective manner;[1476] that development is the ultimate goal of the administration;[1477] that services must be provided in an impartial, fair, equitable and unbiased manner;[1478] responsiveness to the needs of the people;[1479] encouragement of public participation in policy-making;[1480] and that "public administration must be accountable".[1481] These values set the tone and underscore the important role of a municipality, in which the administration is a key structure.

3.6.2 Responsibilities of the municipal administration

Local government, closest to the people, recognises that the members of a community and their relationship with for example the administration, form an integral part of municipal governance.[1482] Sufficient community engagement contributes to the quality of municipal government and administration. This engagement is a prerequisite for sustainable and accountable local government and administration.[1483] The municipal administration plays an important role in determining and being responsive to the needs and interests of the community.

1475 See section 195 of the *Constitution*.
1476 Section 195(1)(a) of the *Constitution*.
1477 Section 195(1)(c) of the *Constitution*.
1478 Section 195(1)(d) of the *Constitution*.
1479 Section 195(1)(e) of the *Constitution*.
1480 Section 195(1)(e) of the *Constitution*.
1481 Section 195(1)(f) of the *Constitution*.
1482 See sections 2(b)(ii) and 2(c) of the *Systems Act*. Also see Thornhill 2004 *Journal of Public Administration* 470; Steytler "The Dynamic Relationship between Devolution and Constitutionalism in South Africa" 176-177; Fuo "Municipal service delivery and the environment" 10-1.
1483 Thornhill 2004 *Journal of Public Administration* 474.

Thus, once these needs and interests are identified, the municipal administration must make available and employ the necessary resources to meet these needs and interests of the community and this should not merely be a box-ticking exercise.

The *Systems Act* sets out what a municipality's administration is tasked to do.[1484] These are underlined and embodied by the democratic values and principles which are found in section 195(1) of the *Constitution*.[1485] One of the most important responsibilities bestowed on the municipal administration is the obligation to be responsive to the needs of the local community,[1486] by implementing the *IDP.*

The municipal administration must further provide information to the community on how the municipality is managed[1487] as well as the level and standard of municipal services to which they are entitled[1488], but perhaps a predetermination of the needs of the community should already have been done. This will assist the municipal administration in establishing a clear relationship between itself and the community[1489] in order to find creative and workable ideas to ensure needs-based services are delivered. Proper communication and co-operation between the municipal administration and the local community can foster trust between the parties, which may contribute and lead to the development of the community.

In terms of section 51 of the *Systems Act*, the "municipality within its administrative and financial capacity", must organise its administration in an efficient and effective manner, which should "enable the municipality to be responsive to the needs of the community".[1490] Similarly, the municipality must be performance-driven in order to meet the developmental objectives as set out in the *Constitution*.[1491] As a performance-driven municipality administration, the administration needs to be flexible to the changing priorities and circumstances of the local community.[1492] This

1484 See section 6 of the *Systems Act*.
1485 See section 195(1) of the *Constitution*.
1486 Section 6(2)(a) of the *Systems Act*.
1487 Section 6(2)(f) of the *Systems Act*.
1488 Section 6(2)(e) of the *Systems Act*.
1489 Section 6(2)(d) of the *Systems Act*.
1490 Section 51(a) of the *Systems Act*.
1491 See sections 152 and 153 of the *Constitution*. Also see section 51(c) of the *Systems Act*.
1492 Section 51(f) of the *Systems Act*.

flexibility will also influence their ability to be responsive to the needs of the community, as the needs of any community will not remain the same over a period of time.

3.6.2.1 MM as the head of the administration

The MM as the head of the administration must ensure that his or her staff members implement the values and principles as echoed in section 195(1) of the *Constitution*. The Constitutional Court in *Executive Council Western Cape v Minister of Provincial Affairs and Constitutional Development and Another* confirmed that the MM is a key functionary and structure in a municipality. Such a role should not be assigned to merely a personnel appointment.[1493] This is indicative and signifies the importance of the office of the MM.

As the head of the municipal administration, the MM has certain responsibilities. It is important to note that some responsibilities are "subject to the policy directions of the municipal council".[1494] The MM should formulate and develop "an administration which is economical, effective, efficient, and accountable".[1495] This must implement the *IDP* of the municipality,[1496] operate in line with the performance management system[1497] and ultimately be responsive to the needs of the community by involving same in the affairs of the municipality.[1498] Although the drafting of the *IDP* is led by the mayor and approved by the municipal council, the MM is obligated and bears the onus to ensure the implementation of the *IDP* as well

1493 *Executive Council Western Cape v Minister of Provincial Affairs and Constitutional Development and Another* 1999 (12) BCLR 1360 (CC) para 109. Hereafter referred to as the *Executive Council Western Cape* case.

1494 Section 55(1) of the *Systems Act* . Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.

1495 Section 55(1)(a) of the *Systems Act*. See Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.

1496 Section 55(1)(a)(i) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.

1497 Section 55(1)(a)(ii) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.

1498 Section 55(1)(a)(iii) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15..

as the subsequent monitoring of such implementation.[1499] Central and integral to the implementation of the *IDP*, the MM should manage the provision of services sustainably and equitably to the relevant community.[1500]

The MM is also responsible and accountable for the facilitation of public participation in the affairs of the municipality.[1501] The office of the MM must also determine the level of satisfaction with service delivery.[1502]

From a financial management viewpoint, the MM is the responsible accounting officer as the responsible person for the financial affairs of the municipality.[1503] In general, the MM should account for the following: the income and expenditure of the municipality,[1504] and the assets and liabilities of the municipality,[1505] so as to ensure that the municipality complies with applicable finance management legislation.[1506] The MM is furthermore required to submit monthly statements of the municipal budget to the Mayor as part of his financial accountability.[1507] The MM should conduct and report on mid-year budget and performance assessments of the municipality.[1508] It is argued that the failure to fulfil or a lack of action on the side of the MM with regards to these responsibilities will undoubtedly have an impact on the rendering of services to incumbent communities. The municipal management must strive "progressively towards the social and economic upliftment of all communities."[1509] One needs to be mindful and cognisant of the fact that the available financial resources in a municipality will have a definite impact on the

1499 Section 55(1)(c) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.
1500 Section 55(1)(d) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.
1501 Section 55(1)(n) of the *Systems Act*. Also see De Visser, Steytler and May "The quality of local democracies: A study into the functionality of municipal governance arrangements " 15.
1502 Section 55(1)(o) of the *Systems Act*.
1503 Section 55(2) of the *Systems Act*.
1504 Section 55(2)(a) of the *Systems Act*.
1505 Section 55(2)(b) of the *Systems Act*.
1506 Section 55(2)(c) of the *Systems Act*.
1507 Section 71(1) of the *MFMA*.
1508 Section 72(1) of the *MFMA*.
1509 Bekink *Principles of South African local government law*.

ability of the administration to realise the social and economic development of communities.

3.7 Responsibilities of municipality in relation to public participation

A municipality consists of various stakeholders or role-players, which include the local community in the territorial area covered by the municipality. The members of the local community should be involved in the design and delivery of programmes and projects by the municipality with the same community as its intended recipients. Municipalities are constitutionally mandated to be developmental,[1510] thus targeted programmes and projects must be created and implemented by the municipality. As members of a municipality, the local community must be involved in the affairs of the municipality inclusive of meeting their developmental mandate.[1511] Thus, public participation by the community is fundamental for the developmental local government mandate.

As per the objectives of local government,[1512] municipalities must *inter alia* provide for an accountable and democratic local authority which should at all times encourage and enable the involvement of the local communities in the functioning of the sphere.[1513] At the centre of a democratic (local) government, public participation by citizens or communities may be regarded as integral to that. However, it may also take the form of voting, involvement in political campaigns, writing letters, involvement in community action as well as protest. These refer to some forms or methods for communities to actively participate in a democratic government.[1514]

This entails and implies that public participation is necessary, which in its elementary form includes communication and engagement with communities.[1515] Public

1510 See section 153 of the *Constitution.* Also see *Blue Moonlight Properties* case para 22.
1511 Draai and Taylor 2009 *Journal of Public Administration* 115.
1512 See section 152 of the *Constitution of the Republic of South Africa*.
1513 See section 152 of the *Constitution of the Republic of South Africa*. Also see Tshoose 2015 *African Journal of Public Affairs* 13, 15.
1514 Tshoose 2015 *African Journal of Public Affairs* 15.
1515 Section 152(1)(a)-(e) of *Constitution* . Also see Draai and Taylor 2009 *Journal of Public Administration* 113.

participation also enables communities to express their views or opinions on the governance matters which either directly or indirectly affect their livelihood. The extent of the involvement or engagement of communities include public participation in the making of decisions although they are not the decision-makers, the timing when development programmes are implemented, the way in which these programmes are monitored and evaluated, as well as being a beneficiary of the community development.[1516] This is important as it would ensure that the interests of the community are carefully considered and taken into account during these programmes.[1517] This ought to be done in pursuance of developmental local government. It is submitted that the municipality will fail to successfully pursue this mandate if and when the community is not consulted in order to determine its needs. Thus, for a municipality to strive towards development in communities, the needs and interests of the relevant community need to be assessed and provided for.

Local authorities should foster inclusive and active citizenship by enabling or enhancing opportunities for public participation, thus obligating same to develop and create mechanisms, processes and procedures which ought to encourage the involvement and/or public participation of the community.[1518] Section 16 of the *Systems Act* refers to the "development of culture of community participation."[1519] Local government is hereby committed to encouraging and creating conditions for local communities to participate in the IDP process,[1520] performance management system of the municipality,[1521] preparation of the municipal budget,[1522] and strategic service delivery decisions.[1523] The municipality must build the capacity of the local community to foster community participation.[1524] Thus, the mere fact that the community is permitted to participate in the abovementioned will not suffice; the

1516 Draai and Taylor 2009 *Journal of Public Administration* 114.
1517 Tshoose 2015 *African Journal of Public Affairs* 14.
1518 Tshoose 2015 *African Journal of Public Affairs* 16.
1519 See section 16 of the *Systems Act*.
1520 Section 16(1(a)(i) of the *Systems Act*.
1521 Section 16(1(a)(ii) of the *Systems Act*.
1522 Section 16(1(a)(iii) of the *Systems Act*.
1523 Section 16(1(a)(iv) of the *Systems Act*.
1524 Section 16(1(a)(v) of the *Systems Act*.

members of the community should be enabled to participate by means of the mechanisms, processes and procedures created and implemented by the municipality.

Section 17 of the *Systems Act* then specifically alludes to the mechanisms, processes, and procedures for community participation. The essence of these sections pertains to the means by which public participation should take place.[1525] Also, the special needs of the community must be taken into account and the mechanisms, processes and procedures created and implemented must adhere to those needs.[1526] The existence of these mechanisms, processes and procedures will be futile and redundant without the community having knowledge of these. It is imperative that the members of a community be informed of the available mechanisms, processes, and procedures in order for them to participate.[1527] Therefore, it is submitted that it will serve no purpose for a municipality to employ various means to involve or engage the members of a community with same not aware and informed of these means.

As indicated above, a municipality must enable the local community to participate in the affairs of the municipality by ensuring access to the relevant mechanisms, processes, and procedures by which they can do so. Also, they must be informed of the available means by which to participate. This public participation is of fundamental importance as the municipality must satisfy the needs of the community as part of their developmental mandate.

In furtherance of the constitutional mandate to involve and engage the members of the community, section 5 of the *Systems Act* makes provision for certain rights of the local communities.[1528] These rights are in line with what is to be expected from a municipality in terms of public participation. The rights as per section 5 of the *Systems Act* refer to, but are not limited to, the following: contribute to the decisions

1525 See section 17(1)-(2) of the *Systems Act*. Also see Draai and Taylor 2009 *Journal of Public Administration* 115.
1526 See section 17(3) of the *Systems Act*. Also see Draai and Taylor 2009 *Journal of Public Administration* 115.
1527 See sections 18, 19, 20 of the *Systems Act*.
1528 See section 5 of the *Systems Act*.

taken by the municipality;[1529] be accordingly informed of decisions taken by the municipal council which may directly or indirectly impact them;[1530] insight into the affairs including finances of the municipality;[1531] as well as access to the proceedings of the municipal council and its committees.[1532]

It is submitted that a local authority should create the relevant platform for communities to participate in affairs of the municipality which may impact their lives. These platforms or engagements should be cognisant of for example the special (specific) needs of the community by enabling them to participate.[1533] However, the local community must observe and understand the available mechanisms, processes, and procedures in order for them to participate in the development of the municipality. This includes for example public participation in the *IDP* or the municipal budget. The inference may then be drawn that the municipality must create the platform for the local community to participate in the affairs of the municipality, but the onus is bestowed on the members of the community to engage with the local government through the available means. There seems to be apathy amongst community members to participate.[1534]

3.8 Concluding remarks

The purpose of this chapter was to outline the responsibilities of municipalities in local governance and responsive developmental local government as a reflection on legitimate community expectations. A municipality consists of the municipal council, administration as well as the local community. The relationship between the municipal council and the administration is of fundamental importance for the development of the community.

A need for mechanisms, processes, and procedures in order for the local community to participate is imperative. These means must however be properly and timeously

1529 Section 5(1)(a)(i) of the *Systems Act*.
1530 Section 5(1)(c) of the *Systems Act*.
1531 Section 5(1)(d) of the *Systems Act*. Also see section 23(1) of the *MFMA*.
1532 Section 5(1)(e) of the *Systems Act*.
1533 Tshoose 2015 *African Journal of Public Affairs* 16.
1534 See in this regard Maphazi *et al* 2013 *African Journal of Public Affairs* 56-67.

communicated to the relevant community. Thus, it is important that the municipal council and its administration involve and engage the local community in the affairs of the municipality through the means put in place. This does not imply that the local community may merely disregard these means. The members of the local community need to understand the available means and do have a duty to participate and engage with the municipality on local governance matters in order to ensure their views are considered as well as their needs satisfied.

The next chapter delves in more detail into the available mechanisms that exist in law for local communities to participate in local governance and institutions where concerns or grievances can be officially lodged.

CHAPTER 4 MECHANISMS FOR PUBLIC PARTICIPATION IN LOCAL GOVERNANCE

4.1 Introduction

As was shown in Chapter 2 of this thesis, one of the reasons that people protest against public authorities is the lack of a sense of participatory and inclusive governance. In Chapter 3 the powers, role and responsibilities of local government were set out, one of which is to ensure that the public is involved in various processes of decision-making. In this chapter, the attention shifts to the mechanisms and ways in law that enable local communities to participate in local governance and institutions that can be used to raise complaints with local government.

The objective of the chapter is to a) determine whether the law adequately provides for public participation; and b) critically assess whether under the circumstances, protest action is justified; or c) whether these mechanisms should be seen as a mere extension of the means to participate in local governance. Prior to the analysis of the law, the chapter first sets out some of the general understandings of the key ingredients of meaningful public participation. This serves as a benchmark against which to assess the public participation mechanisms currently provided for in South African local government and constitutional law. The chapter concludes with a review of institutions that communities may complain to / turn to for remedies when local government fails.

4.2 (Absent) public participation in local government as a cause of protest action

Regular democratic and accessible mechanisms inclusive of elections exist for citizens to express their discontent and disapproval with the government.[1535] The citizenry might be unconvinced to express their discontent and disapproval by means of the existing mechanisms due to the view that these are not readily at their

1535 Spitz 1954 *American Political Science Review* 401-402.

disposal as envisaged by the ideal of democracy.[1536] Thus, people can use participatory mechanisms to communicate their needs and interests or discontent and disapproval, but due to public opinion and lived experiences, these are not considered to be accessible or outcome-orientated in the context of what is envisaged by democracy. Furthermore, the obstruction or stifling of public opinion through the available mechanisms will not resonate with democracy if it is intended to institutionalise some sort of control over the citizens. This will also illegitimise the process.[1537]

Mechanisms are available for people to express their discontent or dissatisfaction with a particular law, policy, or government decision-making as outcomes of democratic procedures. Numerous participatory mechanisms are available to citizens in order to communicate their discontent or dissatisfaction.[1538] These mechanisms may be constitutionally provided for or available in terms of local government law.

4.3 Protest action as a means to participate in local government

Protests have the inherent ability to complement the available local government participatory mechanisms.[1539] This is indicative by the fact that protests provide a measure of direct public participation to those who might perceive the available participatory mechanisms as ineffective due to the failures and unresponsiveness of the democratic government. In this context, protests have the potential to foster democratic responsiveness. Decision-making will inadvertently be affected.[1540] More often than not, those citizens actively involved in political life are more likely to resort to protest action[1541] due to their voices not being heard and marginalised.

1536 Spitz 1954 *American Political Science Review* 396.
1537 Spitz 1954 *American Political Science Review* 397.
1538 Pscorn "Civil disobedience as a democratic practice" 25. Also see McGuigan 1971 *The Canadian Bar Review* 222, 224; Spitz 1954 *American Political Science Review* 396.
1539 See section 4.5 below.
1540 Arce and Rice "The political consequences of protest" 7, 9.
1541 Arce and Rice "The political consequences of protest" 9.

Municipalities have the obligation to the "development of culture of community participation" as per section 16 of the *Systems Act*.[1542] This obligation entails the fostering of inclusive and active opportunities for public participation by the local communities. These mechanisms, processes and procedures must be created for public participation as well as to encourage the involvement of the local community.[1543]

It is submitted that section 16(1) of the *Systems Act*[1544] is strengthened in that the local community should be enabled by the municipality as part of capacity-building to participate in order for them to influence decision-making which ought to be progressive and focussed on the development of the community. This should be achieved by means of a two-way communicative and collaborative approach in the best interests of the community. The various characteristics for meaningful public participation are key in achieving progressive development by means of the communicative and collaborative approach.

4.4 Characteristics of meaningful public participation

In order to enable communities to participate in local governance as well as build the required capacity to participate effectively, the following characteristics for meaningful public participation as a communicative and collaborative approach are identified: access to relevant information, input, engagement in dialogues and interaction, as well as provision of feedback.

4.4.1 Access to information: opportunity to provide and obtain information

The local community should have the information relevant for the intended purpose of a public participation exercise.[1545] Section 21A of the *Systems Act* specifically states that all documents as required by the *Systems Act* and *MFMA* should be made

1542 See section 3.7 above. Also see section 4.5.3 below.
1543 Tshoose 2015 *African Journal of Public Affairs* 16.
1544 See section 16(1) of the System Act: "A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance." Also see Munzhedzi 2020 *African Journal of Governance and Development* 3.
1545 See for example Provincial Government of Western Cape "Policy on Public Participation" 10.

public. It also describes how and where the information is available. Access to information contained in this document is a prerequisite when considering the purpose of public participation[1546], which is to allow the community to participate in the affairs of the municipality.[1547] In order to pursue effective public participation, the relevant information needs to be shared and when deemed necessary, communities need to be educated on the matter to enable them to participate meaningfully.[1548]

This characteristic is confirmed in for example sections 17(2)(b) and 17(2)(c) of the *Systems Act* and proceeds from the same premise with regards to what it suggests.[1549] Section 17(2)(b) provides that the municipality must establish mechanisms to enable public participation; provide for notification and public comment procedures; and provide for access to public meetings or hearings held by the municipality.[1550] The community should receive timeous information on the issues which will be the subject of the consultation as well as the mechanisms to be used. The community should be able to participate meaningfully. In unrelated cases, the courts describe what meaningful participation would entail.[1551] It is definitely not mere consultation but active participation.[1552] For example, in relation to mining authorisations where communities have informal rights on land, the *amicus curiae* in *Maledu* argued that prior and informed consent should ensure that:

> (a) local communities are not coerced or intimidated; (b) consent is properly sought and freely given; (c) the person whose consent is required is provided with full and reliable information relating to the scope and impact of the subject matter regarding the consultation; and (d) they have the choice to give or withhold their consent. [1553]

1546 National Council of Provinces 2019 *Public Participation Model* Chapter 5-3, 10-12.
1547 See section 16(1)(a) of the *Systems Act*. Also see section 16(1)(b) of the *Systems Act*; Brand 2011 *Stellenbosch Law Review* 622; Stuurman 2019 *Journal of Public Administration* 325.
1548 National Council of Provinces 2019 *Public participation Model* Chapter 5-3, 10-12.
1549 Article 32(1) of the *Constitution* make provision for the right to in information in a broad sense.
1550 Section 17(2)(b) of the *Systems Act*.
1551 See *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP). Hereafter referred to as the *Baleni* case. Also see *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC). Hereafter referred to as the *Maledu* case.
1552 *Baleni* case paras 46 and 78.
1553 *Maledu* case para 73.

Although the local communities do not consent to local government planning, this case holds important lessons when communities are consulted. It will be important that communities should not be coerced or intimidated when they raise their concerns or express their needs and interests. The community should receive the information that is needed for them to make an informed decision and they should have the choice to participate. It will also be necessary to provide the information in such a manner that it is understandable to the community and if the documents deal with technical or scientific issues, the information should be made available in such a manner that it is understandable to the community, preferably in their own language. Provision should also be made to assist people with disabilities, those who are illiterate or who are not able to attend the meetings which have been set up for these activities. The local government should also consider holding meetings at times when people are available or do not have to attend to their family responsibilities. The time slots should also take into account whether transport is available and whether it would, for example, be safe to travel.[1554]

4.4.2 Consult: Opportunity for submissions

The second characteristic for effective public participation requires the local community to provide input and make submissions to influence for example the decision-making process.[1555] A logical and systematic order would necessitate that the local community first be informed of the issues they are to be consulted on before the intended consultative mechanism is introduced,[1556] as the failure to do so will make the consultation redundant. Ideally, a consultative session with the local community in anticipation or preparation for when the planned mechanism for

1554 This argument is based on several sources, namely *Doctors for Life International* para 235; Nyathi 2008 *Law, Democracy and Development* 102-110; Pypers E "Public Participation in Local Government"; Franco and Du Plessis 2024 *Litnet Akademies (Regte)* 668-669; GN R982 in GG 38282 of 4 December 2014 (Hereafter referred to as the Chapter 6 of the Environmental Impact Regulations); GN 807 in GG 35769 of 10 October 2012 (Hereafter referred to as the Public Participation Guideline for the Environmental Impact Assessment Process (Guideline 7).

1555 See for example Provincial Government of Western Cape "Policy on Public Participation" 11.

1556 National Council of Provinces 2019 *Public participation Model* Chapter 5, 10-12.

example such as the *IDP Representative Forum*[1557] is open and available, might have the added benefit of a better-contextualised and needs-focused process.[1558]

In terms of section 17(2)(d) of the *Systems Act*, the municipality must establish mechanisms to enable public participation and provide for consultative sessions.[1559] As submitted by Creighton,[1560] a two-way consultative approach should be followed and this will optimise and enhance the intended purpose of said engagement between the local government and communities. The consultative approach will enable the local community to effectively participate and contextualise their needs and interests for purposes of the public participation process.

It is submitted that to consult encompasses more than merely having the local community, for example, make submissions as requested. The situation must be avoided where the local community members are just informed of the communicated subject matters and when afforded the opportunity to share their views, same ought to be considered in order to manifest meaningful consultation. Case law indicates that municipalities should show that they applied their minds to the inputs of communities. They do not need to accept their views but must have thought about the matters raised in a rational way – the rationality standard becomes a useful defence when government decisions are impugned.

4.4.3 Involve: Opportunity for dialogue

After the relevant information has been shared and submissions by the local community received, the community need to be provided with an opportunity for public dialogue and interaction in order for communities to discuss the relevant matters with municipalities.[1561] It is fundamental that a two-way communication and

1557 See chapter 4.5.5 below.
1558 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56. Also see National Council of Provinces 2019 *Public participation Model* Chapter 5-3, 12.
1559 Section 17(2)(d) of the *Systems Act*.
1560 Creighton "The public participation handbook: Making better decisions through citizen involvement" 7.
1561 National Council of Provinces 2019 *Public Public participation Model* Chapter 5-13. Also see for example Provincial Government of Western Cape "Policy on Public Participation" 10.

collaborative approach be utilised as suggested by Creighton.[1562] Fundamental to this two-way process is the centralisation of the needs and interests of communities in order to achieve effective public participation.[1563] This researcher maintains that after the opportunities have been provided for communities to make submissions on the subject matters that were communicated as part of information distributed, these opportunities should be followed up by interactions and dialogues between the local community and the local government.

4.4.4 Feedback: Opportunity to provide feedback

The last element requires that feedback be provided to the local community.[1564] This will require a holistic and consolidated approach considering that information was shared with the relevant parties, these parties were provided the opportunity to make submissions, and they were provided the means to engage in dialogue with the local government on the subject matters. During this stage, it is opportune for the relevant stakeholders to be provided feedback on the contextualised issues and the envisaged interventions to address these issues or concerns.[1565]

This manner of feedback is also provided and advocated for by section 17(2)(e) of the *Systems Act*. This section provides that the municipality must establish mechanisms to provide for report-back to the community on the subject matters.[1566]

Local governments therefore need to ensure that their local communities are enabled and provided with the opportunities to participate in meaningful ways in local governance by enhancing their capacity to do so. This would entail the recommendation that the local communities should be allowed the opportunity to influence the decision-making processes which will have an impact on their needs and interests. What is important is the fact that the participatory process must be

1562 Creighton "The public participation handbook: Making better decisions through citizen involvement" 7. Also see National Council of Provinces 2019 *Public Public participation Model* Chapter 5-13.
1563 Creighton "The public participation handbook: Making better decisions through citizen involvement" 7. Also see National Council of Provinces 2019 *Public participation Model* Chapter 5-13.
1564 See for example Provincial Government of Western Cape "Policy on Public Participation" 11.
1565 National Council of Provinces 2019 *Public participation Model* Chapter 5-10, 13.
1566 See section 17(2)(e) of the *Systems Act*.

approached as a two-way communicative and collaborative process where the local communities and all the various parties, including marginalised people, are involved.

The following sections discuss in greater detail, some of the available mechanisms in law that are supposed to facilitate participation in local governance.

4.5 Mechanisms in law for public participation in local governance

4.5.1 Introduction

As stated above, public participation constitutes a fundamental component of local democracy.[1567] The *Systems Act* necessitates that municipalities be mindful of and consider the challenges faced by vulnerable members of the community when they establish mechanisms for participation in the affairs of the municipality.[1568] As per the *Systems Act*, the identified and listed challenges faced may include, but are not limited to, the following: the inability to read or write,[1569] impediments as a result of a disability,[1570] special needs of women,[1571] and other disadvantaged groups.[1572] It is imperative that the municipality mitigates the above-mentioned challenges which may hinder or impede meaningful public participation. Mitigating these challenges will assist and contribute to building the envisioned capacity to enable the local community to meaningful participate in the affairs of the municipality.

Various provisions in, for example, the *Systems Act*[1573] and *MFMA*[1574] provide for the involvement of the community in the affairs of the municipality, inclusive of the decision-making processes.[1575] Several provisions in legislation place an obligation

1567 South African Local Government Association 2013 *Effective public participation* 6.
1568 Section 17(1)(3) of the System Act.
1569 See section 17(1)(3)(a) of the *System Act*.
1570 See section 17(1)(3)(b) of the *System Act*.
1571 See section 17(1)(3)(c) of the *System Act*.
1572 See section 17(1)(3)(d) of the *System Act*.
1573 Also see for example section 29 on the *IDP*; section 42 on the *Performance Management System*; section 55 on the role of the MM; section 79 on municipal services; section 80 on service delivery agreements of the *Systems Act*.
1574 See for example section 23 on the budget, section 33 on agreements beyond 3 years covered in budget, section 46 on long term debts, section 120 on public-private partnerships and section 130 on annual reporting of the *MFMA*.
1575 See section 5 of the *Systems Act*. Also see De Villiers *et al Stellenbosch Law Journal* 337-338.

on municipalities to enable and encourage public participation.[1576] It is important that mechanisms for public participation are identified and that public participation takes place by means of these mechanisms.[1577] Furthermore, these mechanisms must be communicated to the local community as well as the matters on which they may be consulted or utilised to be involved in the affairs of the municipality.[1578] The mechanisms discussed below, link directly with municipal service delivery specifically.

4.5.2 Regular elections

Every citizen has the right to vote in free, fair, and regular elections.[1579] The *Independent Electoral Commission* (*IEC*)[1580] has the responsibility to manage the holding of elections at the different government levels.[1581] The *IEC* needs to ensure that these elections are free and fair as elections are a cornerstone of democracy.[1582] The *IEC* facilitates the electoral system and ensures that it is inclusive, representative, and responsive.[1583] Considering the electoral system where proportionality as well as direct representation are evident, the elected will be accountable and responsible to the electorate. This is one of the primary mechanisms for the elected to account to the electorate in order to identify and evaluate whether their needs and interests were represented.[1584] In fact, elections may be considered as a participatory mechanism at the disposal of the local communities to hold local government accountable and to influence decision-

1576 See sections 2.10, 3.5 and 3.6 above. Also see section 4 of the *Systems Act*; De Villiers *et al Stellenbosch Law Journal* 337-338.
1577 See section 17 of the *Systems Act*. Also see De Villiers *et al Stellenbosch Law Journal* 337-338.
1578 See section 18 of the *Systems Act*.
1579 See section 1(c), 19(2) and 19(3) of the *Constitution*. See also South African Human Rights Commission 2015 *The right to participate in public affairs* 3,5-6.
1580 Hereafter referred to as the *IEC*.
1581 Section 190(1)(a) of the *Constitution*. South African Human Rights Commission 2015 *The right to participate in public affairs* 6
1582 Section 190(1)(b) of the *Constitution*. See also Karsten *Local government accountability in South Africa: An environmental law reading* 248.
1583 Karsten *Local government accountability in South Africa: An environmental law reading* 248.
1584 Karsten *Local government accountability in South Africa: An environmental law reading* 248-249.

making, as the exercise of this power might result in a different governing party being elected.[1585]

In *Doctors for Life International*, the cooperative and interrelated nature of representative and participatory democracy were emphasised.[1586] The court confirmed that general elections which form the foundation of representative democracy would be redundant without public participation by the local communities.[1587] This envisaged public participation is important to the functioning of representative democracy, as it encourages active public participation in the affairs of government. Seemingly, this enables and creates the opportunity for local communities to make their voices heard and to have their opinions considered.[1588]

Active participation also includes, but is not limited or restricted to, the right to vote.[1589] The responsibility of the electorate may emanate from active participation, but that extends more broadly than mere voting. It encompasses the emphasis that action and control must be exerted by the community on important matters which receive political attention. This then clarifies the position and refers to the extent to which the communities should be involved in the decision-making and implementation phases of those decisions.[1590]

4.5.3 Adoption of a municipal public participation policy

Municipalities should adopt a public participation policy to institutionalise the practice of public participation.[1591] An example is the Western Cape's Policy on Public Participation.[1592] This policy identifies the challenges[1593] faced in relation to public

1585 See section 1.1 and 2.9 to 2.10 above.
1586 *Doctors for Life International* para 115. See also section 16(1) of the *Systems Act*.
1587 *Doctors for Life International* para 115.
1588 *Doctors for Life International* para 115.
1589 See section 1.1 and 2.9-2.10 above. Also see section 1(c) of the *Constitution*; South African Human Rights Commission *The right to participate in public affairs* 2015 5.
1590 Stuurman 2019 *Journal of Public Administration* 328. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198.
1591 South African Local Government Association 2013 *Effective public participation* 6. Also see de Villiers *et al Stellenbosch Law Journal* 337-338.
1592 Provincial Government of Western Cape "Policy on Public Participation".
1593 Provincial Government of Western Cape "Policy on Public Participation" 5-6.

participation, sets the purpose[1594] to be achieved with the policy as well as some principles or values[1595] to be followed. The policy then sets three specific standards depending on the matter on which the public is to be engaged. These standards have been labelled gold,[1596] silver[1597] and bronze.[1598] Policy interventions to be employed in order to facilitate meaningful public participation are also identified.[1599]

Although it may be argued that the adoption of a policy may not be regarded as a mechanism, the adoption of a public participation policy is deemed fundamental, therefore it is discussed under this heading purporting to deal with the relevant mechanism. This public participation policy must commit the municipality to establish and set out participatory mechanisms which ought to be employed in the municipality. Considering section 16 of the *Systems Act*, a culture of public participation is envisaged which encourages and creates conditions to enable the local community to participate in for example, the drafting and adoption of a municipal *IDP* and budget.[1600]

Constitutional[1601] and legislative provision is made for the principle of public participation.[1602] The adoption of a public participation policy is aimed at institutionalising participation as a practice and improving the efficiency thereof with the relevant municipality. The adoption of the public participation policy legitimises the participation processes and is utilised for all planning and budgeting purposes in the municipality. The formal institutionalisation thereof could ensure a greater

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1594 "The main purpose of the policy is to provide for opportunities for meaningful public participation and engagement to improve provincial laws, policies and service delivery in the province." See Provincial Government of Western Cape "Policy on Public Participation" 6-7

1595 Provincial Government of Western Cape "Policy on Public Participation" 7-8.

1596 This standard is relevant where the public is engaged on the provincial government's strategic objectives. See Provincial Government of Western Cape "Policy on Public Participation" 8-9.

1597 This standard is relevant where the public is engaged on proposed legislation and processes created by statute. See Provincial Government of Western Cape "Policy on Public Participation" 9.

1598 This standard is relevant where the public is engaged on any other matter. See Government of Western Cape "Policy on Public Participation" 10.

1599 Government of Western Cape "Policy on Public Participation" 10-13. See section 4.4 above.

1600 See section 16 of the *Systems Act*.

1601 See section 59(1)(a), 72(1)(a) and 118(1)(a) of the *Constitution*. Also see *Doctors for Life International* para 128, 129, 226 and 235.

1602 See sections 2.10, 3.5 and 3.6 above.

commitment and compliance with the practice and characteristics for public participation. Should a municipality embark on the development of a public participation policy, the local community must partake in this process. Access to the adopted public participation policy[1603] would be of fundamental importance, as it would clearly indicate and stipulate the available participatory mechanisms as well as the rights and responsibility of both the municipality and local community in this regard.[1604]

4.5.4 Public participation in by-law making

A municipal council has the right to regulate the local government affairs of its local community considering the limitations set in place by national and provincial legislation.[1605] As part of the right and mandate to regulate matters in its locality, a municipal council may adopt and pass by-laws.[1606] When the municipal council exercises its right and mandate to embark on the by-law process, the local community must be able to participate in that process. The adoption and passing of by-laws are not themselves a mechanism for public participation but when that process is undertaken, public participation by the local community must be realised.

In short, the following are regarded as the steps to be followed when a by-law is drafted and tabled for approval: the relevant councillor or committee prepares a draft by-law; the by-law is published for comment by the municipal council; the by-law is introduced and debated in council; the municipal council votes on the passing of the by-law; and when passed by a majority vote, the by-law is published and becomes law.[1607]

A majority of councillors needs to be present when a by-law is tabled for discussion and voting[1608]; a majority vote by the councillors present, in favour of the adoption

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1603 This public participation policy must be compliant with the requirements of the *Systems Act*.
1604 South African Local Government Association 2013 *Effective public participation* 6.
1605 See section 151(3) of the *Constitution*. Also see De Villiers *et al Stellenbosch Law Journal* 323.
1606 See section 160(2)(a) of the *Constitution* on the passing of by-laws as one of the functions which may not be delegated by a municipal council.
1607 Steytler *et al Making Law: A guide to municipal councils* 41. Also see Nel, Du Plessis A and Du Plessis W "Instruments for local environmental governance" 3-34-37.
1608 Section 160(30(a) of the *Constitution*.

thereof would suffice to have the by-law passed[1609] and effectively becomes law. Section 160(4) of the *Constitution* provides that a by-law may not be passed unless the councillors have been provided with reasonable notice thereof[1610] and the draft by-law published for public comment.[1611] This provision is reiterated in section 14 of the *Systems Act*.

It is compulsory for a draft by-law to be published by the municipal council to allow representations and comments from the local community.[1612] All members of the local community are allowed to make representations or comment on the draft by-law. If challenges are experienced by those who cannot write in order to make their submissions, the municipality must make arrangements to accommodate those individuals and same needs to be communicated to the local community.[1613] In practice, a place during working hours is indicated in the invitation for comments where those affected members of the local community can make their representations or submit comments with the assistance being provided for same to be reduced to writing.[1614]

A municipality may further establish its own mechanisms, processes, and procedures to ensure effective consultation on the matters which may affect the local community.[1615] Generally, local communities have the right to access and attend council meetings as council activities are deemed open to the public. This extends to the council meeting where the councillors will discuss and vote on the proposed draft by-law.[1616] Details of the council meeting at which the by-law will be

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1609 Section 160(3)(b) of the *Constitution*.
1610 Section 160(4)(a) of the Constitution. Also see Steytler *et al* 2000 *Making Law A guide to municipal councils* 41.
1611 Section 160(4)(b) of the *Constitution*. Also see section 12 of the *Systems Act*; Steytler *et al* 2000 *Making Law A guide to municipal councils* 41.
1612 Section 14(1)(b) of the *Systems Act.*
1613 Section 17(3) of the *Systems Act.*
1614 Steytler *et al* 2000 *Making Law A guide to municipal councils* 42.
1615 See section 18 of the *Systems Act*. Also see Steytler *et al* 2000 *Making Law A guide to municipal councils* 45.
1616 See section 20 of the *Systems Act*. Meetings of a municipal council are open to the local community and access thereto may not be prevented or limited when the following matters are on the agenda: draft by-law; annual budget; draft and amendments to *IDP* and decision on service delivery agreements.

discussed and voted on, must be provided to the local community.[1617] The municipal council may take or put reasonable steps in place to regulate the access of the local community to the meeting as well as their conduct during same. Access to these council meetings will contribute and ensure accountability, responsiveness, and openness with regards to the discussions and passing of the by-law.[1618]

4.5.5 IDP consultative process and the IDP Representative Forum

As stated before, a municipality must be developmentally orientated.[1619] All the available resources of the municipality must be aligned to and with the implementation of the *IDP,*[1620] which is the blueprint and central to the development of the municipality.[1621] The following are regarded as some but not all of the core components which must be present in the *IDP*: the existing or current levels of development in the municipality need to be assessed;[1622] the priorities and objectives set for development;[1623] and the alignment of development strategies with provincial and national planning.[1624] Municipalities are obliged to promote and facilitate public participation in the *IDP* process and allocate resources to enable the local community to participate.[1625]

The process through which an *IDP* is formulated must be transparent and inclusive of the relevant stakeholders in the community. It is also important that the needs and interests of these stakeholders are represented in the *IDP*.[1626] The *IDP Representative Forum* is one of the prominent[1627] and available mechanisms

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1617 See section 19 and 20 of the *Systems Act*. Also see Steytler *et al* 2000 *Making Law A guide to municipal councils* 45.
1618 Steytler *et al* 2000 *Making Law A guide to municipal councils* 45.
1619 Section 23(1) of the *Systems Act*.
1620 Section 25(1)(a) of the *Systems Act*.
1621 South African Local Government Association 2013 *Effective public participation* 8. Also see Reg 15(1)(a)(e), 15(2)(b) and 15(3) in GN R796 in GG 22605 of 24 August 2001.
1622 Section 26(b) of the *Systems Act*.
1623 Section 26(c) of the *Systems Act*.
1624 Section 26(d) of the *Systems Act*.
1625 Dywili and Draai 2019 *Administratio Publica* 261.
1626 See section 29 of the *Systems Act* on the involvement of the local community on the identification their development needs and priorities.
1627 See for example Viljoen *Polokwane Observer* 7 on the Capricorn District Municipality who tabled their *IDP* and annual budget for discussion at the *IDP Representative Forum*. Also see Munzhedzi 2020 *African Renaissance* 49.

through which transparency and inclusivity can be achieved during the drafting and approval of the *IDP*.[1628] An *IDP Representative Forum* is purposed to create the opportunity for the local community to be part of the discussions, negotiations and decision-making which ought to result in informed planning by the municipality.[1629]

As a consultative body, the *IDP Representative Forum* may be established in the absence of public participation structures to ensure public participation during the *IDP* process.[1630] This forum includes amongst others, councillors (members of the municipal council) and community members as representatives. These representatives are afforded a minimum of 14 days to consult with their constituencies on agenda items as per the scheduled regular meetings.[1631] This forum, which includes councillors and community representatives, must ensure that their constituencies are engaged and included in the process. Once a final draft of the *IDP* is available and before it is submitted to the municipal council for adoption, a 21-day period has to be allowed for the community to provide comments or remarks which ought to be considered.[1632]

It is important that the vulnerable and marginalised members of the community form part of the *IDP Representative Forum* or at least have their interests noted and considered during the discussion of the *IDP*. The discussion below on ward-based planning also assists the municipality with the *IDP* process to note the needs and interests of the local community and other relevant stakeholders.[1633]

Besides the *IDP Representative Forum* to ensure participation during the *IDP* process, before commencement of the process to adopt an *IDP* the local community should be consulted by means of the available public participation structures.[1634] The local community must be provided with information regarding the planning,

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1628 South African Local Government Association 2013 *Effective public participation* 8. Also see Reg 15(1)(a)(e), 15(2)(b) in GN R796 in GG 22605 of 24 August 2001; Reg 15(3) in GN R796 in GG 22605 of 24 August 2001; Munzhedzi 2020 *African Renaissance* 49.

1629 Dywili and Draai 2019 *Administratio Publica* 260.

1630 Reg 15(1)(a)(e) in GN R796 in GG 22605 of 24 August 2001. Also see Munzhedzi 2020 *African Journal of Governance and Development* 101.

1631 Reg 15(2)(b) in GN R796 in GG 22605 of 24 August 2001.

1632 Reg 15(3) in GN R796 in GG 22605 of 24 August 2001.

1633 See section 4.5.9 below.

1634 Section 28 (2) of the *Systems Act*.

drafting, adoption and review of the *IDP*.[1635] During the different stadia of the *IDP*, it is important that the local community should be consulted on its needs and priorities.[1636] The municipal council must give adequate notice to the role-players within the municipality by no later than 14 days after the *IDP* was adopted.[1637] The notice must inform the public regarding the adoption of the *IDP*[1638] as well as the specified places where copies of the *IDP* are available to the public.[1639] The municipal council must also publish a summary of the *IDP* in order to reach the wider community.[1640]

The idea of participation by members of a community or citizens is that they will contribute to deepening local democracy as well as transparent decision-making[1641] by which standard the involvement of the community is demanded. It is however submitted that the idea of participation does not always materialise as the local community elects not to participate in the opportunities available. The development of communities is driven by an *IDP* which after public participation, may align with the needs and interests of said communities. But also, the municipal budget must consider the *IDP*[1642] as the developmental blueprint when the municipal resources are allocated and distributed. The ultimate gain and benefit of participation by the community during the *IDP* process is that a municipality will have an adopted strategic planning document which focusses the local development on par with the needs of the relevant community.[1643] The community will also feel that their needs and interests are considered.

1635 Section 28 (3) of the *Systems Act*. Also see section 28 (1) of the *Systems Act*.
1636 Section 28 (1) (b) (i) of the *Systems Act*.
1637 Section 25(4) (a) of the *Systems Act*.
1638 Section 25(4) (a) (i) of the *Systems Act*.
1639 Section 25(4) (a) (ii) of the *Systems Act*.
1640 Section 25(4) (b) of the *Systems Act*.
1641 Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 87.
1642 Siphuma *An assessment of the role of public participation in IDP - The Thulamela Municipality* 89.
1643 See Tshabalala and Lombard 2009 *Journal of Public Administration* 397.

In the context of participatory governance, public participation necessitates the involvement of the local community in various decision-making processes.[1644] These decision-making processes include but are not limited to, the municipal budget,[1645] *IDP* drafting, its review process[1646] and service delivery agreements.[1647] This researcher proposes that these are some of the processes often reported to be the subject matter of protests as they relate to the ineffectiveness thereof for the intended purpose. The importance of these processes to the development of the local community is not disputed, hence the proposal that protest may be directly or indirectly aimed at these processes or lack thereof. Issues included in the *IDP* after the completion of the consultation process relate to, for example, the lack of adequate housing, the poor condition of roads and the functionality of the sewage system. Due to these being included in the IDP, one can furthermore infer that the local authority should prioritise those issues, and no need or expectation should logically arise for the community to resort to alternative mechanisms.[1648]

4.5.6 The annual budget and public participation

Municipalities have a legal duty to facilitate public participation during the development and adoption of annual budgets.[1649] The annual budget and *IDP* are key components which must be mutually consistent and credible[1650] as they are central to development in a municipality. A municipal council is required to approve the annual budget before the financial year commences.[1651] When the budget is tabled in the municipal council, measurable performance objectives considering the *IDP* must be identified[1652] in order to promote and foster greater accountability.

1644 See Duncan *Protest Nation* 43. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
1645 See Duncan *Protest Nation* 43. See also Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
1646 See Duncan *Protest Nation* 44. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
1647 See Duncan *Protest Nation* 43. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
1648 Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 9.
1649 Reutener and Fourie *Public and Municipal Finance* 12.
1650 Section 21(1)(a) of the *MFMA*.
1651 Section 16 of the *MFMA*.
1652 Section 17(3)(b) of the *MFMA*.

Once the annual budget is tabled in the municipal council, it has to be published and made public to allow the local community to make representations or provide comments on the budget.[1653] The views of the local community must be considered when the annual budget is tabled[1654] and feedback on these must be provided by the mayor.[1655]

The legislative framework on public participation as well as the annual budgeting process highlights the importance thereof in the context of what is considered as good governance. The involvement of the local community in the budgeting process amongst others is a prerequisite in that any decision taken by the local authorities in this regard will affect the relevant stakeholders. The interests and concerns of the community must be considered when the budgeting process is undertaken and clear communication in this regard ought to be provided to them.[1656] It is suggested that the notion of public participation has been implemented and practiced in municipalities to some degree of success.[1657] However, Reutener and Fourie[1658] are of the opinion that "active public participation in the budgeting environment remains in its infancy". Reutener and Fourie[1659] support their submission by stating that the budgetary process is reserved and clouded by bureaucratic secrecy. This process is spearheaded by the executive authority in the municipality, which may result in it being perceived as only their prerogative to the exclusion of the local community by means of a lack of public participation.

1653 Section 22 of the *MFMA*.
1654 Section 23(1)(a) of the *MFMA*. Also see Reutener and Fourie *Public and Municipal Finance* 7.
1655 Section 23(2)(d) of the *MFMA*. Also see Reutener and Fourie *Public and Municipal Finance* 7.
1656 Reutener and Fourie *Public and Municipal Finance* 10.
1657 See Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 7. Also see Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 65-70 on case studies that showcase public participation in South Africa's Metropoles. Also see Reutener and Fourie *Public and Municipal Finance* 8.
1658 Reutener and Fourie *Public and Municipal Finance* 8.
1659 Reutener and Fourie *Public and Municipal Finance* 8.

The importance of budgeting and a budgeting process that adheres to the principles for public participation[1660] in a municipality are key for financial planning, and the subsequent decision-making as well as the provision of services will be influenced by it. It aligns the needs and priorities of the local community with the priorities and objectives of the municipality to achieve the same with the constraints and limited resources which might be experienced locally. The alignment of the needs and priorities of the local community and municipality will be favourable to the implementation of the budget, which will have a positive impact on the efficiency, effectiveness, and accountability within the local authority.[1661] The community participation during the budgeting process may assist the process that the communities do not have raised expectations in terms of service delivery, for example.

4.5.7 Oversight committees with community representatives

The *Structures Act* provides that "a municipal council may establish one or more committees necessary for the effective and efficient performance of its functions or the exercise of any of its powers."[1662] The implication of this provision is that the municipality may establish an oversight committee to oversee the reporting on for example water, safety or finances of the municipality.[1663] This may, for example, be an audit or *Municipal Public Accounts Committee* (*MPAC*)[1664] with the function to prepare an oversight report as determined by the municipal council. The public is encouraged to attend these meetings to participate by providing their input to "ensure a balanced and well-informed oversight report."[1665] By participating in the drafting of the oversight report, the involved community members would be able to

1660 See for example the following listed as principles for public participation: inclusiveness, empowerment, engagement, knowledge management, quality dialogue and continuous engagement.
1661 Reutener and Fourie *Public and Municipal Finance* 8.
1662 See section 79 of the *Structures Act*.
1663 See for example National Treasury Guideline for Legislative Oversight through Annual Reports 25.
1664 Hereafter referred to as *MPAC*. See Munzhedzi 2020 *African Journal of Governance and Development* 95.
1665 South African Local Government Association 2013 *Effective public participation* 8.

note their needs and interests as well as the frustrations or lack of development in that regard.

4.5.8 Ward committees

As a result of the close and direct relationship[1666] between local government and communities, ward committees[1667] are one of the mechanisms to guarantee public involvement.[1668] Ward committees were established in 2000 to bridge the gap between the local communities and the municipal governance structures due to a lack of engagement with the citizenry.[1669] Along with bridging the gap, the purpose was to improve service delivery by a collective approach being followed between the local community and the municipality.[1670]

Ward committees are legislatively[1671] constituted and most municipalities have them. The broad establishment of ward committees may be an indication of the willingness and commitment by municipalities to enable the local communities to participate in the local affairs.[1672] Based on the broad establishment of ward committees, the focus should not be on obligating the establishment thereof but should be on improving the effectiveness thereof by enhancing accountability and providing the necessary resources,[1673] as the view is currently held that these committees are largely ineffective.[1674]

All relevant individuals or groups with an interest in the affairs of the municipality must be identified and represented in the ward committee. It is more likely than not that all individuals or groups will be represented but it is important that the ward committee still liaises with excluded individuals or groups to keep them abreast of

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1666 Nyalunga *International NGO Journal* 44 refers to ward committees being the closest to the people.
1667 Section 73 of the *Structures Act* provided for the establishment of ward committees.
1668 See section 3.4.2.6 above. Also see South African Local Government Association 2013 *Effective public participation* 6.
1669 Thornhill and Madumo 2011 *Administratio Publica* 130-131.
1670 Thornhill and Madumo 2011 *Administratio Publica* 130-131.
1671 See section 73 of the *Structures Act*.
1672 Recommendations may be made on any matter that affect the ward in terms of section 74(a)(i) and 74(a)(ii) of the *Structures Act*.
1673 South African Local Government Association 2013 *Effective public participation* 6.
1674 Nyalunga *International NGO Journal* 45.

the matters which might affect them. Obviously, the needs and interests of the marginalised and vulnerable groups in the community must be borne in mind when the ward committee proceeds with its stipulated business.[1675]

It is submitted that ward committees in principle are able to create opportunities for the ward councillor and local community to establish a platform for the purpose of public participation in local government affairs. It seems that some of the ward committees remain ineffective in providing a platform for citizens to communicate their concerns. Ward committees sometimes lack credibility and are subject to a top-down approach, during which the power and functions of the elected councillor are not to be challenged or undermined.[1676] The implication may be that the ward councillor rules literally and figuratively, and it may have an effect on a power balance which may defeat the purpose of ward committees as a participatory mechanism.

4.5.9 Ward-based planning or community-based planning

Ward-based planning and community-based planning will be used interchangeably for purposes of this section. Ward-based planning or community-based planning is a separate and different structure to that of a ward committee. Planning of this nature is aimed at the development founded at the ward level where the municipality may introduce the process of planning, but the facilitation thereof is, for example, handled by non-governmental organisations or civil society groups with the required capacity to do so.[1677] This is different to a ward committee, as the ward committee is under the leadership of the relevant ward councillor.[1678]

This process may contribute to the developmental mandate of the municipality in that it may identify developmental needs and challenges, but it may also discover solutions directed by and to the satisfaction of the local community. The value of

1675 South African Local Government Association 2013 *Effective public participation* 7.
1676 Duncan *Protest Nation* 44. Also see Mamokhere *African Journal of Developmental Studies* 83.
1677 South African Local Government Association 2013 *Effective public participation* 8.
1678 See section 3.4.2.6 and 4.5.8 above. Also see Section 73(2)(a) of the *Structures Act*; Thornhill and Madumo 2011 *Administratio Publica* 132.

this mechanism is that the various stakeholders could bring vast knowledge on identifying, analysing, and finding sustainable solutions for the above needs and challenges. In order for ward-based planning to be successful, the municipality still has a role to play although it is limited. It must be mindful of the *IDP* and budgeting to ensure that the priorities stipulated in those documents are aligned with those identified by means of the ward-based planning.[1679]

In Buffalo City, the NETSAFRICA Support Programme[1680] initiated ward-based planning after identifying shortcomings in the participatory governance system within the municipality. The purpose of the initiative was to promote and improve the level of public participation by the community in the *IDP* process. Workshops were held to enable and assist the members of the community to analyse the challenges as well as the resources which can address these challenges. Local communities then had to identify, amongst others, their needs and priorities as well as envisage projects to form part of their ward plans. The objective was to link the ward plans and the *IDP*, in order to improve the level of public participation in the *IDP* process. The idea was that these needs and priorities of the community could be considered and met within the framework of the annual budget.[1681] This process undertaken by Buffalo City also created a sense of co-ownership which urged the local community to claim their rights and responsibilities as citizens.[1682]

The City of Johannesburg set out an intensive consultation programme with the main objective to bridge the gap between the "technocratic planning processes" employed by the municipality and the needs and priorities of the communities at ward level. In order to achieve the set objective, a four-phase community-based approach was followed.[1683] The first phase was the internal phase which was focussed on the commitments of political leaders and senior officials to this process. The second phase entailed an outreach to the respective communities which

1679 South African Local Government Association 2013 *Effective public participation* 8.
1680 Government Communications 2012 https://www.gov.za/news/media-statements/department-cooperative-governance-reflects-its-partnership-italian-local.
1681 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 25.
1682 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 26.
1683 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 26.

included consultation on the developmental priorities in their locality to enable said communities to produce meaningful ward plans.[1684] The third phase was the iteration phase where the ward plans which had been submitted, were escalated to the relevant departmental officials for consideration. The result thereof was that some ward plans were accepted while others were referred back with feedback or additional planning being requested. The last phase entailed delicate financial negotiations to provide for and accommodate the ward plans. Although the City of Johannesburg experienced financial challenges and restraints, all the ward plans could be accommodated in the annual budget. Although the community-based planning might have a complex or challenging nature, it is possible to have the community participate in the planning and in the process provide for its own needs and priorities to be considered.[1685]

It is submitted that this mechanism is not widely employed, but from the brief discussion above it is evident that it may contribute and add significant value for a municipality. A non-governmental organisation or civil society group with capacity to deal with certain local matters could approach municipalities to embark on such a process. Obviously, this mechanism does not replace the other mechanisms and can only strengthen public participation in municipalities.

In order for ward-based planning to function optimally and serve the intended purpose, the capacity of the local community should be developed, and the members of the community need to be empowered to engage equally on their own terms. Additionally, not only does the local community need direction and support but so do the municipal officials. Both the local community and municipal officials as stakeholders need direction and support to contribute to the ward-based planning and develop a trust relationship in order to make public participation of this nature purposeful.[1686]

1684 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 26.
1685 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 27.
1686 Zack *et al* 2013 *Promoting Caring Cities – The Case of South African Metropoles* 27.

4.5.10 Feedback regarding complaints and suggestions made by the community

Section 17(2)(b) of the *Systems Act* provides that the municipality must establish mechanisms to enable public participation by providing for notification and public comment procedures.[1687] The municipality should stipulate internal and external processes to afford the local community the opportunity to provide feedback, either in the form of complaints or suggestions. This process or the manner by which this feedback ought to be provided, must be publicised. In addition to the manner in which the feedback should be provided, the process to be followed upon receipt of the feedback should be made known. This clarity on the process to be followed might reduce the frustration of the local community with reference to complaints if that process is clearly communicated and consistently adhered to. In addition to this communication, a specific office needs to be earmarked within the municipality with the capacity and resources to receive, investigate and address the complaints.[1688] Some municipalities, for example, introduced an ombudsman.[1689]

4.6 Remedial action in the event of a failure to facilitate public participation

4.6.1 Introduction

Local government has legal duties but despite that, meaningful public participation does not always take place. This brings to mind the question of what the available remedies are for those marginalised community members. Considering the developmental local government mandate derived from the *Constitution*, accountability is seemingly a key principle.[1690] Accountability is furthermore relevant considering that the primary responsibility lies with the municipality to foster and

1687 Section 17(2)(b) of the *Systems Act*.
1688 South African Local Government Association 2013 *Effective public participation* 9.
1689 See e.g. City of Johannesburg Ombudsman date unknown https://www.joburgombudsman.org.za/our-role/.
1690 Karsten *Local government accountability in South Africa: An environmental law reading* 6. See also De Visser 2009 *Commonwealth Journal of Local Governance.* Also see section B of the White Paper.

oversee the development of the community.[1691] However, this responsibility is shared with the local community as they have the duty to participate in the affairs of the local government to afford them the opportunity to influence the decision-making relevant to their needs and interests.[1692] It is submitted that the participation of community members assists in holding the local government accountable, while one is mindful of the weaknesses of the South African democracy as highlighted elsewhere in this chapter.[1693] In order to achieve accountability and responsiveness, the local communities should participate by expressing their needs and interests, as these will be fundamental to determining the parameters of the developmental local government mandate.

In this context, the *Constitution* institutionalised certain mechanisms to mitigate these apparent weaknesses of the South African democracy and strengthen the constitutional democracy.[1694] These measures will be the focus of the next sections and for this purpose, only access to courts, the *Public Protector*, the *South African Human Rights Commission* and the *Auditor-General South Africa* will be discussed, as they are deemed to be the relevant constitutional measures in place to remedy the failure of local government to ensure that the local community is participating in matters of local governance.

1691 Karsten *Local government accountability in South Africa: An environmental law reading* 6. See also De Visser 2009 *Commonwealth Journal of Local Governance*. Also see section B of the *White Paper*.

1692 Karsten *Local government accountability in South Africa: An environmental law reading* 6. See also De Visser 2009 *Commonwealth Journal of Local Governance*. Also see section B of the *White Paper*.

1693 See 4.1 of this chapter. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198,207. Also see Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56.

1694 See section 181(1) of the *Constitution*. The following Chapter 9 Institutions are established as per the *Constitution*: Public Protector, South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General and Electoral Commission.

4.6.2 Access to courts, legal standing and taking judicial action

Section 34 of the *Constitution* on access to courts[1695] provides as follows:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[1696]

The right of access to courts as guaranteed by the *Constitution* is fundamental and regarded as a prerequisite to allow the enjoyment of other constitutional rights. This would entail the enjoyment of the rights as per the Bill of Rights.[1697] It is argued by Brickhill and Friedman[1698] that without the right of access to courts, the protection and guarantees as per the Bill of Rights would be redundant if not fulfilled by government. Thus, it appears that section 34 of the *Constitution* has an enabling character as it provides an avenue or recourse to challenge government due to its failure to fulfil the rights in the *Constitution*. This may also extend to circumstances where local government fails to facilitate public participation, whereas it is clearly stipulated and required in the *Constitution* or local government laws. The *Borbet* case referred to above is one good example.[1699]

Brickhill and Friedman[1700] regard the right of access to courts in addition to the right of access to information[1701] and just administration[1702] as part of procedural rights to protect against the infringement of for example their socio-economic rights.[1703] These rights are referred to as leverage rights. The right of access to courts enables aggrieved parties to vindicate the infringement of their substantive rights. Access to

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1695 Section 34 of the *Constitution* guarantee the right of access to courts and subsequently prevent government from adopting or utilising an ouster clause in a democratic South Africa. See Brickhill and Friedman "Access to courts" 59-1,2, 27. During Apartheid, ouster clauses was a common legal tool restricting the court's jurisdiction in instances where the executive arm of governments conduct was reviewed or challenged.

1696 Section 3 of the *Constitution.*

1697 See Chapter 2 of the *Constitution*.

1698 Brickhill and Friedman "Access to courts" 59-1.

1699 See section 1.2 above.

1700 Brickhill and Friedman "Access to courts" 59-3.

1701 See section 32 of the *Constitution*, read with the *Promotion of Access to Information Act* 2 of 2000.

1702 See section 33 of the *Constitution* read with the *Promotion of Administrative Justice Act* 3 of 2000.

1703 Brickhill and Friedman refers to these rights as a three-piece cluster of rights. See Brickhill and Friedman "Access to courts" 59-3.

information also relates to the substantive rights and the determination whether same needs to be vindicated. Just administration relates to fair procedures which ought to be followed when any administrative decisions are taken which may affect substantive rights.[1704]

The content of the right of access to courts gives rise to four related aspects. Firstly, disputes must be decided before a court as the right guarantees parties the platform to bring cases before a court. Secondly, the adjudication of disputes in a court must be conducted in a public manner that is respectful of fairness. Thirdly, if fair public hearings in a court are not possible, the proceedings may be put forward an alternative tribunal or forum. Importantly, it must remain and take place independently and impartially. Lastly, as per the court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[1705] "the right to enforce the right to appropriate relief" is part of the right of access to courts.[1706] The right of access to courts entails that such access should be meaningful.[1707] In the *Modderklip* case, the Constitutional Court found that section 34 of the *Constitution* placed an obligation on government to provide effective relief to Modderklip by taking reasonable steps to ensure that they were relieved of the burden to continue providing accommodation to the occupiers of the farm.[1708]

In *Fose v Minister of Safety and Security*[1709] the following comments were made by the Constitutional Court on the reference to appropriate relief: The relief envisaged or sought is deemed necessary to protect and enforce the *Constitution*. The circumstances of each case may differ and will be indicative of whether a declaration of rights, an interdict, a *mandamus* or any other relief is granted by the court as it

1704 Brickhill and Friedman "Access to courts" 59-3.
1705 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). Hereafter referred to as the *Modderklip* case.
1706 *Modderklip* case par 50. Also see Brickhill and Friedman "Access to courts" 59-26.
1707 Brickhill and Friedman "Access to courts" 59-9.
1708 *Modderklip* case par 50.
1709 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC). Hereafter referred to as the *Fose* case.

deems appropriate in order to ensure the protection and enforcement of substantive rights.[1710]

The *Constitutional Court* judgment in the *Modderklip* case authorised the proposition stemming from section 34 of the *Constitution* which entitles a litigant to resort to judicial and enforcement mechanisms during the process of vindicating substantive rights. Thus, considering the *Modderklip* judgement as well as the relevant constitutional provisions[1711] the relevant litigants may approach the court in an attempt to vindicate or enforce their substantive constitutional rights if an infringement of their rights occurred. In these instances, the courts should seek to provide appropriate relief which must be just and equitable.[1712] The affected communities are not without remedies, as they may approach the courts to set challenges to local government's decision-making where they failed to ensure that public participation was undertaken where it was required. However, there are various barriers to approaching the courts. These include the costs associated with any court application, whether the community has the knowledge that they could do so and the willingness to take the risk in these types of applications.[1713] At times there are delays in instituting court action like in the *Borbet* case, which negatively affects the outcome. The court may find non-compliance with legal obligations and declare it as such but with no practical effect on a decision which was taken long prior and implemented by a municipality. In *Borbet*, the public participation processes for valuation of properties and incorporation of relevant instruments in the budget were not followed.

4.6.3 Chapter 9 Institutions

Institutions in Chapter 9 of the *Constitution* are created and mandated to support and strengthen democracy.[1714] This includes holding local government accountable

1710 *Fose* case para 19. Also see Brickhill and Friedman "Access to courts" 59-98.
1711 See sections 34, 38 and 172(1)(b) of the *Constitution*.
1712 Brickhill and Friedman "Access to courts" 59-99.
1713 Greenbaum 2020 *De Jure* 248-266.
1714 Section 181(1) of the *Constitution*. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 243.

where they fail to uphold and meet their constitutional mandate.[1715] Local communities have a duty to participate in the affairs of local government which will afford them the opportunity to influence the decision-making relevant to their needs and priorities. However, the mechanisms to influence decision-making are not always provided to the local communities. Affected local communities have at their disposal the Chapter 9 institutions which are committed to the protection of democracy, and the upholding of public participation is a central principle thereof.

This section will discuss the offices of the Public Protector, *SAHRC* and the *AGSA* as the relevant Chapter 9 Institutions in the context of challenging failures in local government.

4.6.3.1 Public Protector

The Public Protector is an autonomous institution with the mandate to support and strengthen democracy. Put differently, the Public Protector is mandated to protect the South African constitutional democracy.[1716] In terms of the *Constitution*, the Public Protector has the authority to investigate any alleged government conduct which may be reported as improper in having a prejudicial effect on for example the local community.[1717] The Public Protector must report investigated conduct[1718] and where necessary, take appropriate remedial action.[1719] In order for the Public Protector to fulfil the constitutional mandate, all relevant stakeholders must have access to these offices.[1720]

1715 See section 181(1)(a),(b)(e) and (f) of the *Constitution*. Karsten *Local government accountability in South Africa: An environmental law reading* 243.

1716 Karsten *Local government accountability in South Africa: An environmental law reading* 243.

1717 Section 182 (1)(a) of the *Constitution*. Also see section 7 of the *Public Protector Act* 23 of 1994; Tchawouo 2017 *PELJ* 14; Public Protector *South Africa Annual Report 2022/2023* 50; Karsten *Local government accountability in South Africa: An environmental law reading* 243.

1718 Section 182 (1)(b) of the *Constitution*. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 243.

1719 Section 182 (1)(c) of the *Constitution*. Also see *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others* 2016 ZACC 11; *SABC v DA* 2025 ZASCA 156; Wolf 2017 *PELJ* 5-17 on the remedial action the Public Protector must take in accordance with section 182(1)(c) of the *Constitution.*

1720 Section 182 (4) of the *Constitution*.

The *Public Protector Act*[1721] further regulates the powers to be exercised by the Public Protector.[1722] The Public Protector may investigate any maladministration or unreasonable delays in government matters. This may be conducted on its own initiative or when a complaint is lodged.[1723] The Public Protector has a wide range of powers which include for example subpoena, seizure of certain items as well as the entering of premises.[1724] The nature of the matters[1725] which can be investigated by the Public Protector include, but are not limited to, improper conduct by a person who must exercise a public function or as part of public administration. This improper conduct then results in unfair prejudice to any person so affected.[1726] The inference to be drawn then is that the Public Protector may, when a complaint is received or of its own accord, investigate any matter involving, for example, the failure to act in accordance with the responsibilities of a public official or a person holding a office in the public administration.[1727] The Public Protector has an important role to play in holding government accountable.[1728]

Its constitutional mandate set out in section 182 of the *Constitution* obliges the Public Protector to hold local government accountable in accordance with section 152 of the *Constitution*.[1729] Therefore, the Public Protector may be approached where local government fails to adhere to their section 152 objectives, for example that the local community were not afforded the opportunity to participate in the decision-making process which may have a negative impact on their development.[1730]

1721 *Public Protector Act* 23 of 1994. Hereafter referred to as the *Public Protector Act*.
1722 Tchawouo 2017 *PELJ* 14.
1723 Section 7 of the *Public Protector Act* 23 of 1994. Also see Tchawouo 2017 *PELJ* 14.
1724 See sections 6,7 and 7A of the *Public Protector Act*. Also see Tchawouo 2017 *PELJ* 14.
1725 See 6(4)(a)(i)-(v) of the *Public Protector Act*. Also see Tchawouo 2017 *PELJ* 14.
1726 See section 182 (1)(a) of the *Constitution*. Also see section 6(4)(a)(i)-(v) of the *Public Protector Act*. Also see Tchawouo 2017 *PELJ* 15.
1727 See Tchawouo 2017 *PELJ* 15.
1728 See section 181 of the Constitution. See section 2.9 above.
1729 Section 152 (1)(b) of the *Constitution*. See section 2.9 above. Also see Public Protector *South Africa Annual Report 2022/2023* 50.
1730 See Karsten *Local government accountability in South Africa: An environmental law reading* 245-246 on the Public Protector and accountability of local government on environmental related issues.

4.6.3.2 South African Human Rights Commission

The *SAHRC* has a constitutional mandate to ensure that the human rights of communities are realised. This also includes the protection and development of human rights.[1731] Furthermore, the *SAHRC* must ensure that it monitors and assesses the fulfilment of human rights in the local communities.[1732] The *SAHRC* may of its own accord request the local government to provide the Commission with relevant information on the measures that were employed to ensure the realisation of the rights as per the Bill of Rights.[1733] This will afford the Commission an opportunity to monitor and assess the extent of the measures and their appropriateness to achieving the envisaged outcome.

The *SAHRC* has the constitutional mandate to ensure that (local) government meets their responsibility to respect, protect, promote, and fulfil the rights in the Bill of Rights. It is argued that the local government is "*de facto* custodians of basic rights as contained in the *Constitution*" due to the close proximity and directness of the relationship between them and the local communities.[1734] Thus, local government must be held accountable with specific reference to human rights by the *SAHRC* as it serves as an accountability mechanism.[1735] The developmental mandate of local government necessitates and highlights the importance of this role by the *SAHRC*. Accountability is key in considering the historical and current state of affairs in South Africa with reference to challenges associated with local government, development, and poor service delivery.[1736]

The local community must participate in the affairs of the local government to voice their needs and priorities. The *SAHRC* can be approached by the affected local communities to investigate, report, and take the necessary steps to redress any

1731 Section 184(1)(b) of the *Constitution*. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 246. Also see South African Human Rights Commission *The right to participate in public affairs* 2015 1.
1732 Section 184(1)(c) of the *Constitution*. Also see South African Human Rights Commission *The right to participate in public affairs* 2015 1.
1733 Section 184(3) of the *Constitution*.
1734 Karsten *Local government accountability in South Africa: An environmental law reading* 246.
1735 Karsten *Local government accountability in South Africa: An environmental law reading* 246.
1736 See Karsten *Local government accountability in South Africa: An environmental law reading* 247-248 on the South African context.

violation of human rights[1737] where they were not involved in the decision-making which affected the development of the community and ultimately their human rights.

The *SAHRC* has noted that a lack of public participation by the relevant community does obstruct the realisation of human rights,[1738] for example, their right to access to water and sanitation.[1739] The SAHRC can therefore assist communities in bringing their needs to the attention not only of the specific local government, but also to the relevant provincial and national government department. The *SAHRC* can also help communities to access courts to force legal compliance by municipalities.

4.6.3.3 Auditor-General of South Africa

The *AGSA*[1740] was established in terms of Chapter 9 of the *Constitution* to support the constitutional democracy.[1741] The *AGSA* is independent[1742] in the sense of its "political autonomy and financial viability".[1743] The Auditor-General has the responsibility to ensure that the South African government conducts its affairs in an accountable manner.[1744] As the highest audit institution in South Africa[1745], the *AGSA* is tasked with financial audits, compliance audits as well as forensic audits of, for example, municipalities, to ensure that the allocated public funds are properly spent and the municipal budgets properly managed.[1746] These audits often expose

1737 Section 184(2) of the *Constitution*.
1738 South African Human Rights Commission *The right to participate in public affairs* 2015 5.
1739 See for example in the South African Human Rights *Report on the Right to Access Water and Sanitation* recommendations made to improve the local government's engagement with communities.
1740 See section 1.3 above.
1741 Section 181(1)(e) of the *Constitution*. Also see Preamble of the *Public Audit Act* 24 of 2004. Hereafter referred to as the *Public Audit Act*. Also see Woolman and Schutte "Auditor-General" 24B-2, 6.
1742 Section 181(2) of the *Constitution*. Also see section 3(a) of the *Public Audit Act*; See Woolman and Schutte "Auditor-General" 24B-2, 5.
1743 See Woolman and Schutte "Auditor-General" 24B-2, 5.
1744 Woolman and Schutte "Auditor-General" 24B-3.
1745 See section 3(a) of the *Public Audit Act*.
1746 See section 188(1)(b) of the *Constitution*. Also see section 4(1)(d) of the *Public Audit Act*; Woolman and Schutte "Auditor-General" 24B-3, 8.

corruption, fraud and incompetence in some of the public offices.[1747] Corruption, fraud and incompetence have a detrimental effect on communities.[1748]

While auditing municipalities the *AGSA* may not question the viability or need for government programmes.[1749] What the *AGSA* may do as part of the auditing process, is to investigate the implementation of the programme, the applied controls, the cost of the programme as well as the result of the programme. This enables the *AGSA* to keep an eye on the measures employed by municipalities to realise and meet their objectives and mandate.[1750]

4.7 Considering the failures and unresponsiveness of local governance

The inadequacies and imperfections of democracy as well as the response thereto by the government need to be assessed in order to determine the progress made in pursuance of the ideal of democracy. When these inadequacies and imperfections of the democratic government are considered, it should be done in relation to the determination of whether the protests or disobedience that followed the democratic failures were justified or not. To determine whether or not an act of disobedience or a protest is justified, it is required that a proportional relationship exists between the shortcomings of democracy and the actual resort to protest action and acts of disobedience.[1751] Thus, proportionality needs to be determined between the unresponsive government, which may be one of the manifestations of the shortcomings of democracy or failing democratic rule, and the subsequent response by the citizenry.

In a participatory democracy which is functional and responsive to the needs and interests of the citizenry, protest as a mechanism to express dissatisfaction and discontent should arguably not be as prevalent as it is. The reason for this submission is based on the existence of other participatory mechanisms at a local

1747 Woolman and Schutte "Auditor-General" 24B-4. See for example Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2, 14. Also see section 4.7 below.
1748 See section 4.7 below.
1749 Woolman and Schutte "Auditor-General" 24B-9.
1750 Woolman and Schutte "Auditor-General" 24B-9.
1751 Pscorn "Civil disobedience as a democratic practice" 26.

government level to enable such expression.[1752] These typically include, for example, ward committees, complaints offices, etc. Regardless of the availability of these mechanisms, the citizenry regard these as failed mechanisms and elect to be dependent on protest as an effective form of political activity.[1753] This bring to the fore the current discourse on invited and invented participation spaces in municipalities.[1754]

The perception of a failed and unresponsive local government system is not solely based on the identified problem areas as indicated above. Sufficient and objective evidence exists to support this and furthermore indicates that municipalities have recently delivered questionable and unsatisfactory performances.[1755] As one of the institutions mandated to protect constitutional democracy, the *AGSA* is constitutionally instructed to investigate and report on the performance of municipalities.[1756] A review of the most recent annual report of the *AGSA* provides objective evidence to support the argument and narrative of a failed and unresponsive local government.[1757]

The *AGSA* released a consolidated report on the outcomes of the local government audit for 2021-2022 in May 2023. The following were reported on the municipalities in South Africa: 38 (15%) received clean audits;[1758] 104 (40%) had unqualified findings; 78 (30%) had qualified findings; 6 (2%) adverse findings; 15 (6%) disclaimed findings and 16 (7%) had outstanding findings.[1759] According this report,

1752 Duncan *Protest Nation* 1.
1753 Duncan *Protest Nation* 2,3.
1754 See Motloutsi and Motloutsi "Invited and Invented Spaces of Public Participation in South African Local Government: The Study of Community Engagement Practices and Service Delivery Protests" 161–182. Also see Nomdo *et al* 2019 *J Hum Ecol* 41-51.
1755 See Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 12.
1756 See section 188 of the *Constitution*.
1757 See Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22*. Also see Matebesi *Civil strife against local governance: Dynamics of community protests in contemporary South Africa* 11.
1758 See Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 15. Clean audits require a municipality to provide evidence in the form of financial statements and performance reports to indicate the reliability of a municipality's performance.
1759 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 14.

the root causes are the following: "inadequate skill and capacity"; "governance failures" and "lack of accountability and consequences". These causes have a detrimental impact on the development of local communities.[1760] The *AGSA* launched a call to action which focussed on accountability in local government. It is submitted that although it may seem to be a daunting task to improve the *status quo*, the root causes need to be identified and accordingly addressed. It is further submitted that these statistics are evidence of the poor state of local government and perhaps indicative of the general view as to why so many protests occur.

The *AGSA* reiterated the fact that the citizenry is represented by local government and that local government has an obligation to improve the lives and living conditions of the local communities. The problem areas have a negative impact on the trust relationship between the citizenry and local government, as well as the ability to provide essential services.[1761] The citizenry's discontent and dissatisfaction with the *status quo* may necessitate them to resort to various means to express their sentiments in an attempt to have urgent attention drawn to their plight.[1762]

4.8 Conclusion

This chapter explored the mechanisms available in law to enable participation in local governance. The chapter commenced with an exploration of the notion of public participation and what it entails in the South African context. The chapter also provided and discussed the different identified elements or characteristics for effective public participation. This provided the necessary context and foundational perspectives against which the available mechanisms for public participation in local governance were explored, as well as those mechanisms provided for elsewhere in other relevant legislation or by means of customary practices.

1760 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 87. Also see Munzhedzi 2020 *African Journal of Governance and Development* 94, 96-97, 101.

1761 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2.

1762 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* 2.

Failure by the local government to ensure that the local community is indeed provided with the means and opportunity to participate in the affairs of the local government, does not leave the affected communities without recourse. These communities have access to courts, the Public Protector, the South African Human Rights Commission and AGSA as their mandate is to protect and strengthen democracy. This also extends to local government matters, which will inadvertently have an impact on the human rights of the local communities.

Public participation is central to democracy. Considering representative and participatory democracy, it is clear that with both types of democracies the involvement and public participation by stakeholders is fundamental. The electorate vote for the elected and the elected represent their voice in the relevant organisational level. But the electorate should also be provided with the necessary mechanisms to be able to participate and communicate their needs and interests. Local government is constitutionally mandated to be developmental, and the community must be part of that pursuit. The extent to which this developmental mandate is pursued by the local government definitely has an impact on the human rights in the Bill of Rights.

When one considers the state of democracy, it is often noted that South Africa is regarded as a free democracy where all the formal requirements[1763] of what a democracy should be, are present and met.[1764] One of these formal requirements is public participation.[1765] In this context, public participation must take place through the mechanisms provided for in legislation and those that were established as customary practices.[1766] In the local government context these are the holding of regular elections,[1767] adoption of a public participation policy,[1768] participation when

1763 See Teichmann 2022 *The state of democracy in South Africa is cause for concern*. These formal requirements include amongst others separation of powers, free and fair elections and public participation.
1764 See Teichmann 2022 *The state of democracy in South Africa is cause for concern*. Teichmann also alludes to the notion of a failed democracy.
1765 Stuurman 2019 *Journal of Public Administration* 325.
1766 See in this regard section 17(1)(c) of the *Systems Act* which provide that public participation may take place through the mechanisms as established by the relevant municipality.
1767 See section 4.5.2 above.
1768 See section 4.5.3 above.

by-laws are drafted,[1769] consultative processes for the IDP,[1770] public participation for the budget,[1771] oversight committees,[1772] ward committees,[1773] ward-based planning committees[1774] as well as the traditional complaints and suggestion process. [1775] It seems that despite these mechanisms, communities do not participate in these structures or participate in the meetings available to them. Participation may take place but may not be regarded as meaningful.

Regardless of the commitment to democracy by South Africa, arguments exist that it has a weak democratic culture.[1776] This is akin to or associated with the notion of what is perceived to be a failed democracy.[1777] Generally, the support for democracy has been weak and the democratic rule has been decreasing.[1778] A lack of trust and a tenuous relationship between the citizens and government is evident by, for example, the declining levels of participation in (local) governance. Another indicator of the state of the South African democracy is the political nature of participation[1779] where for example, political infighting will have the eventual outcome of stakeholders being excluded who had every intention of participating, but due to the latter reason are not allowed to do so.[1780]

1769 See section 4.5.4 above.
1770 See section 4.5.5 above.
1771 See section 4.5.6 above.
1772 See section 4.5.7 above.
1773 See section 4.5.8 above.
1774 See section 4.5.9 above.
1775 See section 4.5.10 above.
1776 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198,207.
1777 See Teichmann 2022 *The state of democracy in South Africa is cause for concern*. Teichmann also alludes to the notion of a failed democracy.
1778 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 57. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198,207.
1779 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 57.
1780 Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56, 60 and 61.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Research questions, objectives and background

This thesis questioned to what extent civil protest is justified from the South African local government perspective. The study was premised on the assumption that there is a growing tendency in the country to resort to protest action on the local level. The statistics provided in this regard prove the tendency[1781] despite various participatory mechanisms that exist (at least in law/on paper) for residents to inform local authorities of their needs and interests as well as to communicate their discontent and dissatisfaction.[1782] Municipal councils,[1783] municipal officials[1784] and local communities[1785] all have responsibilities with regards to public participation[1786] in local governance and responsive developmental local government but they seem to be disregarded.[1787]

In support of the research question, the following sub-aims were set for the study:

(i) to determine the content of the theoretical and normative foundations underpinning civil protests and developmental local government, including the link between them; as well as to critically reflect on the features, scope, and impact of justified civil protest in the event of failing and unresponsive local government;[1788]

(ii) to determine the functions of local government as background to public participation and developmental local government;[1789]

1781 See section 1.3 above.
1782 See section 1.5 and 2.4.6 above.
1783 See section 3.4.2 and 3.5 above.
1784 See section 3.4.3 and 3.6 above.
1785 See section 3.7 above.
1786 See section 2.11 and Chapter 4 above.
1787 See section 2.8, 2.9 and 3.2 above.
1788 See section 1.6.2 above.
1789 See section 1.6.2 above.

(iii) to determine and critically analyse the responsibilities of municipal councils, municipal officials and local communities in relation to local governance and responsive developmental local government;[1790]

(iv) to analyse the mechanisms created in law to improve participative local governance including via the formal justice system and the processes of the constitutional Chapter 9 institutions;[1791] and

(v) to propose when civil protest could be justified from the South African local government perspective.[1792]

Civil protest in local government context, for purposes of this study, was defined as[1793]

> Civil protest is a universally recognised civil and political right and may be exercised within bounds of reasonable limitations as an indispensable tool in a participatory local democracy which enables the voiceless and marginalised effective public participation mechanisms to hold local government accountable and to express their legitimate concerns and interests to government in a peaceful and unarmed manner.

Civil protest manifests as civil disobedience,[1794] peaceful protest,[1795] strikes,[1796] self-help,[1797] defence of a collateral challenge[1798] as well as violent protest.[1799] This study includes civil disobedience, peaceful protest, and violent protest as inclusive of civil protest.[1800]

1790 See section 1.6.2 above.
1791 See section 1.6.2 above.
1792 See section 1.6.2 above.
1793 See section 2.3.7 and 2.12 above.
1794 See section 2.3.1 above.
1795 See section 2.3.2 above.
1796 See section 2.3.3 above.
1797 See section 2.3.4 above.
1798 See section 2.3.5 above.
1799 See section 2.3.6 above.
1800 See section 2.3.7 and 2.12 above.

One of the categorical reasons for protest action is the inadequate provision for participatory governance at the local level and Chapter 4 focused on this specific aspect. The objective was specifically to determine the available mechanisms, processes, and procedures available to local communities to participate in the affairs of local government. The chapter also ventured into an outline of the remedies (as opposed to protest action) that are available when there is non-compliance with public participation provision in law to hold local government accountable.

5.2 Theoretical and normative foundations: civil protests, developmental local government and failing/unresponsive local government

The first aim of the study[1801] was to determine the content of the theoretical and normative foundations underpinning civil protests and developmental local government, including the link between them. The study reflected on the features, scope, and impact of justified civil protest in the event of failing and unresponsive local government. The functions of local government as background to public participation and developmental local government in general were also discussed. The foundations that underlie the phenomenon of civil protest and the need for responsive developmental local government formed the basis for the discussion of the rest of the study.[1802]

The right to protest is internationally[1803] and regionally[1804] recognised by various instruments, with many countries providing for similar recognition and respect of their constitutions.[1805] The right to protest is internationally recognised and protected as an individual right exercised by a collective. The right must be exercised peacefully and unarmed. From the reading of the international instruments, it is clear that the right to assemble manifests as an important political and civil right in a democracy and a key participatory measure.[1806] This right may only be restricted

1801 See section 1.6.2 above.
1802 See section 2.1 above.
1803 See section 2.2.4.1 above.
1804 See section 2.2.4.2 above.
1805 See section 2.3.2 above.
1806 See section 2.2.4.1 above.

if public order, national safety and security necessitate it.[1807] From the discussion of some foreign national constitutions, several other limitations came to the fore, such as a notice requirement of the intention to protest.[1808] The blockading of roads, and disruption of vehicular and pedestrian traffic, are not to be seen as destructive or violent measures and are regarded as part of a peaceful demonstration although these actions may be regarded as disruptive in nature.[1809] Violence directed at the person is prohibited and damage to property ought to be excluded from the definition of protest and be classified as vandalistic protest as argued by Chiwarawara.[1810]

Some countries require that protests be noticed, but such notification does not constitute permission for the proposed action. This differs from the South African position where the notification process is sometimes seen as permission to exercise the right to assemble. The court in the *Mlungwana* case found that criminalising the failure to provide a notice was not linked to the reasons submitted by the municipality and subsequently not a justified limitation of the right to protest.[1811] The limitations on the right to assemble in the South African context include instances where the protesters are armed with or carry weapons and / or are engaging in violence by for example causing injuries to a person.[1812]

Historically, civil protests played an important role for example in the fight against segregation and racism.[1813] Civil protest is still prominent and fulfils an important role in a democratic society. The right to protest represents a mouthpiece for the voiceless and marginalised members of communities and also due to its enabling character, the resort thereto may be relied upon to enforce certain rights in line with the developmental mandate of local government.[1814]

1807 See section 2.2.4 and 2.3.2 above.
1808 See section 2.3.2 above.
1809 See section 2.3.6 above.
1810 See section 2.3.6 above.
1811 See section 2.4 above.
1812 See section 2.3.2.4 and 2.4 above.
1813 See section 2.2.1 and 2.2.2 above.
1814 See section 2.8 above.

One of the ideals of the *Constitution* is to ensure developmental local government.[1815] Developmental local government is aimed at the development in local communities which extends broader than the provision of services in considering the needs and interests of the people. This requires the municipality to align its budget and planning structures to ensure that their available resources are distributed to meet the needs and interests of their constituencies in pursuit of social and economic development. Municipalities must be able to deal with challenges as they appear, without necessarily seeking assistance from national or provincial government.[1816]

The increased rate of violent and destructive protest in South Africa has a detrimental impact on the social and economic development of local communities.[1817] The extent of this development is fundamental considering the pursuance of social order and social justice. Developmental local government is aimed at improving the lived experiences of the local government communities by introducing socio-economic development programmes, which cannot be achieved by way of violence.[1818]

The participatory character of democracy highlights the importance of public participation and the significant role it fulfils in the context of accountability.[1819] Protest action is also employed as a mechanism to ensure accountability in local government.[1820] For example, one may resort to civil protest in order to resist or oppose government's law, policies and actions.[1821] Protests are in principle in line with the participatory character of democracy. There is no obligation to first exhaust all the available local government participatory mechanisms[1822] before a person may

1815 See section 2.8 above.
1816 See section 2.8 and 3.3 above.
1817 See Mamokhere *African Journal of Developmental Studies* 80-81.
1818 See Mamokhere *African Journal of Developmental Studies* 80-81.
1819 See sections 2.3.8 and 2.5 above.
1820 See sections 4.2 and 4.3 above.
1821 See section 2.3 above.
1822 See section 4 above.

embark on protest action.[1823] Section 17 of the *Constitution* is clear in that regard.[1824]

Local government is more often than not, held accountable for their failures and unresponsiveness to the needs and interests of local communities. Accountability entails that the municipality take responsibility and fulfil its developmental local government mandate. Municipalities are both downwardly accountable to their constituencies as well as upwards to the national and provincial government.[1825]

Some of these issues might be the responsibility of the national or provincial government but are assigned to local government. This is the outcome of decentralisation[1826] of government, whereby powers and functions from the central government are assigned to local government. An important reason for this is the closeness of local government to the people to deliver services in a sustainable manner.[1827] Civil protest is often directed at local government for said failures and unresponsiveness even if the failure is not that of local government itself.[1828]

5.3 Responsibilities of role-players in municipalities and public participation

The second aim[1829] of the study was to determine and critically analyse the responsibilities of municipal councils, municipal officials and local communities in local governance and responsive developmental local government. The legal framework of local government establishes the powers, functions and developmental mandate of local government as well as the role the law foresees for municipalities concerning service delivery, accountability and inclusive governance.[1830]

1823 See sections 2.3, 2.11 and 3.3.3 above.
1824 See sections 1.3 and 2.3.2.4 above.
1825 See section 2.9 above.
1826 See section 2.6 above.
1827 See section 2.7 above.
1828 See section 4.7 above.
1829 See section 1.6.2 above.
1830 See section 3.1 above.

Local government is democratic and accountable to the local community.[1831] Local government, established based on the principle of decentralisation, underwent a transition from being a service provider to being envisaged as a developmental agent.[1832] This transition, brought about by the developmental local government mandate, places an obligation on local government to ensure the sustainable delivery of services.[1833] These services are closely linked to the needs and interests of the local community to which the local government must respond.

Municipalities consist of various structures (political[1834] and administrative[1835]) as well as role-players, all with clearly defined responsibilities.[1836] The role-players include the executive mayor, municipal council and councillors, the municipal manager, heads of departments and officials of local government.[1837] The mayor, councillors and the municipal council make political decisions, while the municipal manager and the rest of the municipal administration have to implement the decisions of the municipal council and act in terms of their respective legal mandates. In addition to the municipal council, ward committees are established. A ward committee consists of members of the community and a ward councillor, with the last mentioned being the chairperson of the committee.[1838] These committees are used to establish and provide a communication channel between the local community and the ward councillor, who is also a member of the municipal council.[1839] In order to determine the needs and interests of communities, *IDP* forums are purposed to provide an opportunity for the local community to have insight into the developmental aspects to be included in the *IDP*.[1840] These two

1831 See sections 2.9 and 3.2.2 above.
1832 See sections 3.2 and 3.3.3 above.
1833 See section 3.2.3 above.
1834 See section 3.4.2 above.
1835 See section 3.4.3 above.
1836 See section 3.4 above.
1837 See section 3.4.2 and 3.4.3 above.
1838 See section 3.4.2.6 and 4.5.8 above.
1839 See section 3.4.2.6 and 4.5.8 above.
1840 See section 4.5.5 above.

structures are specifically geared to ensuring community involvement in local governance.[1841] There is evidence that they are not always effective.[1842]

The functions of the municipal council include the overseeing of public participation during the drafting and approval of the annual budget,[1843] the development and review of the *IDP*,[1844] and the development of the municipality's performance plan.[1845] These functions are important for municipalities to pursue their developmental mandate. Municipal meetings are open to the public and all documents must be made available to the public for their perusal.[1846] The public must also participate in the budget and *IDP* processes via the structures available to them.[1847] These structures are important as they assist municipal councils to determine communities' needs and interests, prioritise the needs and interests, plan and budget accordingly to meet the financial implications thereof, and to monitor their performance in pursuing same. In some instances, municipalities and non-governmental authorisations could align their objectives and work together in order to address the needs and interests of the local communities.

5.4 Mechanisms for public participation and available remedies

The last aim[1848] was to analyse the mechanisms created in law to improve participative local governance, including via the formal justice system and the processes of the constitutional Chapter 9 institutions; and to propose when civil protest will be justified from the South African local government perspective.

Various mechanisms, processes and procedures exist to involve the local communities by means of public participation in the affairs of the municipality.[1849] They include the holding of regular elections,[1850] adoption of a public participation

1841 See section 3.4.2.6, 4.5.5 and 4.5.8 above.
1842 See section 3.4.2.6 and 4.5.8 above.
1843 See section 3.5.1.1 above.
1844 See section 3.5.1.2 above.
1845 See section 3.5.1.3 above.
1846 See sections 3.5.1.1, 3.5.1.2, 3.7 and 4.4.1 above.
1847 See sections 3.5.1.1, 3.5.1.2, 4.5.5 and 4.5.6 above.
1848 See section 4.1 above.
1849 See section 4.5.1-4.5.10 and 4.8 above.
1850 See section 4.5.2 above.

policy,[1851] participation when by-laws are drafted,[1852] consultative processes for the IDP,[1853] public participation for the budget,[1854] oversight committees,[1855] ward committees,[1856] ward-based planning committees[1857] as well as the traditional complaints-and-suggestion process.[1858] Despite these available mechanisms, communities do not participate in these structures or participate in the meetings available to them. Participation may take place but may not be regarded as meaningful.[1859] The perception is that these mechanisms are regarded as failed mechanisms with people choosing protest as a recourse to engage with the local government effectively and meaningfully.[1860]

Regardless of the commitment to democracy by South Africa, it is argued that it has a weak democratic culture.[1861] This is perhaps akin to or associated with the notion of what is perceived to be a failed democracy.[1862] Generally, the support for democracy has been weak and the democratic rule has been decreasing.[1863] A lack of trust and a tenuous relationship between the citizens and government is evident by for example, the declining levels of public participation in (local) governance.[1864] Another indicator of the state of the South African democracy is the political nature of public participation[1865] where for example, political infighting will have the

1851 See section 4.5.3 above.
1852 See section 4.5.4 above.
1853 See section 4.5.5 above.
1854 See section 4.5.6 above.
1855 See section 4.5.7 above.
1856 See section 4.5.8 above.
1857 See section 4.5.9 above.
1858 See section 4.5.10 above.
1859 See section 4.8 above.
1860 See section 4.7 and 4.9 above.
1861 See Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198, 207.
1862 See Teichmann 2022 *The state of democracy in South Africa is cause for concern*. Teichmann also alludes to the notion of a failed democracy. South Africa is not classified as a failed state. The argument is submitted that South Africa has a weak democratic culture and the notion of what is deemed a failed democracy is introduced and may become relevant in the future.
1863 See Skejana and Kimemia *Existing mechanisms for public participation at local government level* 57. Also see Karsten *Local government accountability in South Africa: An environmental law reading* 198, 207.
1864 See section 2.9, 4.5.9, 4.7, 4.8 and 5.4 above.
1865 See Skejana and Kimemia *Existing mechanisms for public participation at local government level* 57.

eventual outcome of stakeholders being excluded who had every intention of participating but due to the latter reason are not allowed to do so.[1866]

These participatory mechanisms must be available to all members of the local municipality with no exception made as to who may and may not participate. When public participation is undertaken by the municipalities, they need to ensure that it is meaningful in order to truly reap the rewards of the mechanisms. Meaningful public participation[1867] entails that certain characteristics need to be met, namely that information is shared with the community,[1868] consultation opportunities are available to make submissions,[1869] involvement through dialogue exists,[1870] and that an opportunity to provide relevant feedback is provided.[1871] To ensure meaningful participation[1872] it would be necessary to create opportunities for the local community to provide and obtain relevant information;[1873] allow opportunities for the local community to provide input and submissions;[1874] involve the local community in dialogue;[1875] and provide feedback to the local community on the matters that were the subject of the public participation.[1876]

Municipalities are mandated to ensure that the local community is involved by means of public participation when it concerns matters of local significance. This mandate stems from the *Constitution* and local government legislation. Municipalities may subsequently be held accountable for not pursuing the developmental mandate or facilitating public participation. The failure by the municipality to meet, for example, their responsibilities as they relate to public participation will result in them being in conflict with the principle of accountability. In such cases, remedial action is available by for example approaching the courts

1866 See Skejana and Kimemia *Existing mechanisms for public participation at local government level* 56, 60 and 61.
1867 See section 4.4 above.
1868 See section 4.4.1 above.
1869 See section 4.4.2 above.
1870 See section 4.4.3 above.
1871 See section 4.4.4 above.
1872 See section 2.10 and 4.4 above.
1873 See section 4.4.1 and 4.5.3 above.
1874 See section 4.4.1 and 4.5.3 above.
1875 See section 4.4.1 and 4.5.3 above.
1876 See section 4.4.1 and 4.5.3 above.

or a Chapter 9 institution as responses to the municipalities' failure to act in accordance with their responsibilities.[1877] However, approaching the court is costly and poorer communities would not be able to approach the courts if not assisted by law clinics or other non-governmental organisations.[1878] The Chapter 9 institutions can inform government of their challenges within local communities, but the government still has to adhere to their reports.[1879] The *AGSA* recently produced a powerful report indicating the failure of several local governments to meet their mandates.[1880] Steytler[1881] suggested that "developmental efforts will founder on the rocks of central planning and bureaucracy" unless communities are engaged and fully participate.

Mechanisms for public participation must be relied on for the purpose intended. Protest action follows the absence or lack of public participation by community members in the affairs of the local government.[1882] Protest action as a means to participate in local government seems to be the default position of local communities as a result of the poor state of local governance.[1883] They do not necessarily make use of or wait for the outcome of their public participation.[1884]

5.5 Key findings

A right to civil protest exists and may only be limited under special circumstances. Any person may resort to this right if he or she feels aggrieved by decisions or activities of local government.

The fact that a democratic government exists, does not ensure the achievement of democracy or the full realisation of the pursuit of developmental local government. Democracy is an ideal to be pursued but is by no means perfect. A democracy may be perceived as being superficial due to the discontent and dissatisfaction

1877 See section 4.6 above.
1878 See section 4.6.2 above.
1879 See section 4.6.3 above.
1880 See section 4.7 above.
1881 See Steytler "Local Government in South Africa: Entrenching decentralized government" 186.
1882 See section 4.2 above.
1883 See section 4.3 above.
1884 See section 2.5, 2.10, 2.11, 3.7, 4.2, 4.3 and 4.8 above.

experienced by the citizenry, especially the marginalised and minority groups in local communities. These groups may be of the opinion that their needs and interests are not recognised and heeded by the democratic government. Furthermore, the majority group may also experience dissatisfaction and discontent with the democratic government due to its failures and unresponsiveness.

The political landscape in a democracy must be open, accountable and responsive, which may be achieved by means of the available participatory mechanisms or civil protests. The extent of the openness and responsiveness promotes access to the government by means of encouraging the citizenry to pursue change. A strong political party system is an effective conveyor belt to assist with directing the social struggles and lived experiences of the citizenry to the government. The political landscape contributes to the discontent and dissatisfaction, leading to protest action.

In order to develop the local communities to ensure that society is integrated, and all people have resources at their disposal, government recognised that a centralised approach will not suffice for this purpose, hence the need arose for decentralised local government to facilitate the equitable redistribution of resources. Furthermore, a centralised approach complicates government's ability to effect social and economic development. It is evident from the onset of the transition phase that local government is key to capturing and institutionalising public participation to determine the developmental needs of communities. Local governments are mandated to develop communities and their constitutional status as a sphere of government empowers them to deal with development and related matters.

The idea of development and participation in local government is intertwined. The rationale behind this is that development will not take place if and when the community is not involved in the processes of local government.

Several mechanisms exist to ensure participation in local government. It seems that not everyone knows about or uses these mechanisms. If people are dissatisfied with local government, they often will resort to protest action, which will involve violence.

5.6 Recommendations

Local governments need to ensure that their local communities are enabled and provided with the opportunities to participate in the local governance by enhancing their capacity to do. This means that the local communities should be allowed the opportunity to influence the decision-making processes which will have an impact on their needs and interests. What is important is the fact that the participatory process must be approached as a two-way communicative and collaborative process where the local communities and all the various parties including the marginalised people, are involved.

The apparent disregard for the needs and interests of the powerless and voiceless may result in social strife. The affected citizens may use their right to protest as allowed in terms of the *Constitution* – there is no need to exhaust the various mechanisms that are available to ensure public participation in the affairs of the local government. However, the manner in which these groups decide to respond will depend on their intended purpose and what they would deem as meaningful. Protest, regardless of the availability of other participatory measures, remains a mechanism at the disposal of the citizenry as it has the inherent character to foster and advance developmental local government as well as the broader sense of democracy. These protests must however, be peaceful and unarmed, and should not be vandalistic by causing damage to private or public property.

Government is faced with difficulties relating to corruption, mismanagement, maladministration, and nepotism, amongst others. This contributes to the inability of local government to facilitate and enhance development within communities as mandated by the *Constitution*. These challenges amount to the imperfect nature of local government to fulfil their developmental mandate. This failure by local government is met with an increasing rate of protests. Regardless of the many participatory mechanisms created by local government for public participation by the community, it seems that community's resort to or prefer protests (in many instances violent protests) to indicate their dissent.

Civil protests seek to create social change by establishing a platform on which individuals and groups can communicate their grievances but also challenge government's decision-making or lack of development in communities. In a democratic society, the citizenry has at their disposal, mechanisms to communicate their needs and interests, and these should be made available and accessible to the voiceless and marginalised.

Protests have the inherent ability to complement the available participatory mechanisms. This is indicated by the fact that protests provide a measure of direct public participation to those who might perceive the available participatory mechanisms as ineffective due to the failures and unresponsiveness of the democratic government. In this context, protests have the potential to foster democratic responsiveness. Decision-making will inadvertently be affected. More often than not, those citizens actively involved in political life are more likely to resort to protest action.

The following specific recommendations are made:

(i) Civil protest in the local government context should be defined as set out above.

(ii) The limitations of civil protest should be made clearer; these include, over and above the constitutional limitations, also damage to private and public property as well as civil protest which incites fear or intimidation.

(iii) The notification of an intended protest should not be seen as permission but as a process to inform the local authorities of the intended protest in order for them to ensure public order and safety.

(iv) Municipalities must eradicate corruption, mismanagement, maladministration, and nepotism, as these contribute to the inability of local governments to facilitate and enhance development within communities, as mandated by means of developmental local government as per the *Constitution*.

(v) The available local government participatory measures need to be strengthened as a two-way communicative and collaborative process between municipalities and local communities in order to pursue meaningful public participation.

(vi) It may not be required that all other available participatory mechanisms to express discontent and dissatisfaction must first be exhausted, as such a requirement will hamper and limit the constitutional protection afforded to peaceful protest. Peaceful protest should remain a way to express discontent, especially in light of the failure of local government to respond.

(vii) Protest action must be considered in relation to the proportionality thereof to the matter underlying the unresponsiveness of the local government, as failing democratic governance will result in the subsequent response with protest by the local community.

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