

Different modes of public participation in a public trust regulatory model

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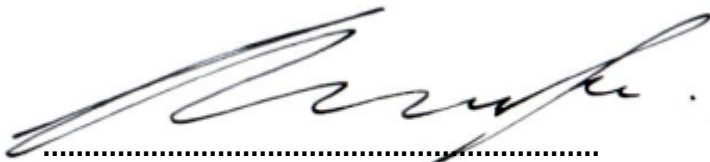
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DECLARATION

I, Maria Elisabet van Aswegen, identity number 560508 0097 083 and Student No 11938978, hereby declare that this dissertation titled 'Different modes of public participation in a public trust regulatory model' is my own original work. The dissertation is hereby humbly submitted to the North-West University, Potchefstroom fulfilment of the requirements for the degree Masters in Environmental Law. This dissertation has not been submitted anywhere before.

A handwritten signature in black ink, appearing to read 'M. van Aswegen', is written over a horizontal dotted line.

MARIA ELISABET VAN ASWEGEN

Date: 23 November 2018

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I dedicate this study to my late parents, Willem and Tienie Breedt, who through the example they set motivated me to manage and execute this academic challenge; and to my husband, Cronje, daughters, Marinelda and Corleen, as well as my son-in-law, Divan, for their invaluable support.

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Omnia ad maiorem dei gloriam.

**ME van Aswegen
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ABSTRACT

Title: Different modes of public participation in a public trust regulatory model

Section 24 of the Constitution creates the foundation of a conceptual framework for a public trust regulatory model through which access to and the use of the environment and natural resources are regulated. "Public trusteeship" and "state custodianship" are phrases that have only recently been incorporated in the South African natural resources related legislation. The concept of public trusteeship was first introduced through section 3 of the *National Water Act* and section 3 of the *Mineral and Petroleum Resources Development Act*.

The concept of public trusteeship statutorily entrenches the state and government's duty to act as a guardian of either the environment, or specific natural resources for the benefit of the public as a whole. The section 24 environmental right places a fiduciary obligation on the government as the public trustee of South Africa's environment to protect and conserve the environment in the public interest, while vesting in the trustee the necessary power to regulate access to and the use of the resource for the benefit of current and future generations. The vesting of a fiduciary responsibility pertaining to the regulation of the environment in the government ensures that the public interest in the environment is upheld and protected.

Public participation is the mechanism used to provide interested and affected parties with the opportunity to provide their perspectives when decisions are taken through which they may be affected or in which they may have an interest. Public participation consists of different processes that take place at different stages in the decision-making process. Through these processes the public interacts with government to enhance decision making to safeguard the interest of the public.

Provision is made for public participation in the environmental law and natural resources legislation. The NEMA serves as example providing for public participation through set principles and specific clauses. The *National Water Act* contains certain provisions with a limited discretionary provision for public participation. The *Mineral and Petroleum Resources Development Act* also makes provision for public participation in terms of a notification, comment and consultation process.

Key terms: Public trust, stewardship, state custodianship, fiduciary obligation, public interest and affected parties, public participation, notification, comment, consultation

OPSOMMING

Titel: Verskillende vorms van openbare deelname in 'n model van openbaretrust-regulering

Artikel 24 van die Grondwet skep die grondslag vir 'n konseptuele raamwerk vir 'n model wat openbare trusts reguleer en waardeur toegang tot en die gebruik van die omgewing en natuurlike hulpbronne gereuleer word. "Openbare trusteeskap" en "staatskuratorskap" is frases wat eers onlangs opgeneem is in Suid-Afrikaanse wetgewing wat op natuurlike hulpbronne betrekking het. Die konsep van openbare trusteeskap word vir die eerste keer genoem in artikel 3 van die *Nasionale Waterwet* en artikel 3 van die *Wet op die Ontwikkeling van Minerale en Petroleumhulpbronne*.

Die staat en die regering se plig om as beskermheer van die omgewing of van spesifieke natuurlike hulpbronne op te tree tot voordeel van die publiek as geheel, word statutêr verskans in die konsep van openbare trusteeskap. Die omgewingsreg in artikel 24 plaas 'n fidusiêre verpligting op die regering as die openbare trustee van Suid-Afrika se omgewing om die omgewing in die openbare belang te beskerm en te bewaar, terwyl dit ook aan die trustee die nodige mag gee om toegang tot en die gebruik van die hulpbron te reguleer tot die voordeel van huidige en toekomstige geslagte. Die vestiging van 'n fidusiêre verantwoordelikheid in die regering met betrekking tot die regulering van die omgewing, verseker dat die openbare belang in die omgewing gehandhaaf en beskerm word.

Openbare deelname is die meganisme wat gebruik word om belanghebbende partye die geleentheid te gee om hulle perspektiewe aan te bied wanneer daar besluite geneem word waardeur hulle geraak kan word of waarin hulle 'n belang kan hê. Openbare deelname behels verskillende prosesse wat op verskillende stadiums in die besluitnemingsproses plaasvind. Deur hierdie prosesse skakel die publiek met die regering sodat beter besluite geneem kan word om die belange van die publiek te beskerm.

Daar word voorsiening gemaak vir openbare deelname in die omgewingsreg en in wetgewing rakende natuurlike hulpbronne. Die *Wet op Nasionale Omgewingsbestuur* dien as voorbeeld hiervan, en maak voorsiening vir openbare deelname deur vasgestelde beginsels en spesifieke klousules wat voorsiening maak vir openbare deelname. Die *Nasionale Waterwet* bevat sekere bepalings met beperkte diskresionêre voorsiening vir openbare deelname. Die *Wet op die Ontwikkeling van Minerale en Petroleumhulpbronne* maak ook voorsiening vir openbare deelname deur 'n proses van kennisgewing, kommentaar en konsultasie.

Sleutelterm: Openbare vertrouwe, rentmeesterskap, staatskuratorskap, fidusiêre verpligting, openbare belang en geaffekteerde partye, openbare deelname, kennisgewing, kommentaar, konsultasie

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LIST OF ABBREVIATIONS

ANC	African National Congress
CC	Constitutional Court
CEIR	Consultation Environmental Impact Report
CEQ	Council on Environmental Quality
CLARA	Communal Land Rights Act
CLR	Common Law Review
Constitution	Constitution of the Republic of South Africa, 1996
EAP	Environmental Assessment Practitioner
ECA	Environmental Conservation Act
EIA	Environmental Impact Assessment
EMPr	Environmental Management Program
Envtl L	Environmental Law
GG	Government Gazette
GN	Governmental Notice
Hastings W-Nw JELP	Hastings West-Northwest Journal of Environmental Law and Policy
I&AP's	Interested and Affected Parties
IEM	Integrated Environmental Management
IWULA	Integrated Water Use License Authorisation
LEAD Journal	Law, Environment and Development Journal
MPRDA	Mineral and Petroleum Resources Development Act
NA	National Assembly
NCOP	National Council of Provinces
NEM:BA	National Environmental Management Biodiversity Act
NEM:ICMA	National Environmental Management Integrated Coastal Management Act
NEM:WA	National Environmental Management Waste Act
NEMA	National Environmental Management Act
NEPA	National Environmental Policy Act (America)
NWA	National Water Act

NWRS	National Water Resources Strategy
NYUELJ	New York University Environmental Law Journal
PELJ	Potchefstroom Electronic Law Journal
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal Human Rights
SALJ	South African Law Journal
SAPOA	South African Property Owners Association
SCA	Supreme Court of Appeal
SEMA	Specific Environmental Management Act
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UCDLR	University of California, Davis Law Review
UNDESA	United Nations Department of Economic and Social Affairs
US	United States
Virginia LR	Virginia Law Review
WCED	World Commission on Environment and Development
WUL	Water Use License

CHAPTER 1

Introduction

1.1 Background and research question

Section 24 of the Constitution¹ constitutes the foundation of a conceptual framework for a public trust regulatory model through which access to and the use of the environment and natural resources in South Africa are regulated.² The section grants everyone the right to have the environment protected for the benefit of present and future generations, hence creating a fiduciary responsibility towards unborn generations.³ It further creates an obligation for the state to take positive steps towards the realization of the right to ensure that the environment is protected by preventing pollution and ecological degradation while providing for the conservation and ecologically sustainable development and use of the country's natural resources.⁴

'Public trusteeship' and "state custodianship" are phrases that have only recently been incorporated in South African natural resources-related legislation. The concept of public trusteeship was first introduced through section 3 of the *National Water Act* (hereafter NWA).⁵ The concept of state

¹ *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

"Everyone has the right -

- a) to an environment that is not harmful to their health or well-being and
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
 - i) prevent pollution and ecological degradation;
 - ii) promote conservation; and
 - iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

² Badenhorst, Olivier and Williams 2012 *TSAR* 113; Feris 2012 *LEAD Journal* 1-18; Blackmore 2015 *SAJELP* 90; Kidd *Environmental Law* 11, 32; Van der Schyff 2013 *SALJ* 369.

³ It is a fundamental human right to have a safe environment. S 24 creates a constitutional environmental right. Van der Schyff 2013 *SALJ* 380.

⁴ Section 24(a) of the Constitution. In *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 6 SA 4 (CC), the court referred to the explicit recognition of the obligation to promote economic and social development.

⁵ Act 36 of 1998. S 3 "states that the national government is appointed as public trustee of the nation's water resources". This Act is discussed in more detail in para 2 below. The White Paper on a National Water Policy for South Africa, 1997 states that the government

custodianship was introduced with the promulgation of the *Mineral and Petroleum Resources Development Act* (hereafter MPRDA).⁶ Other natural resource-related statutes where either of these phrases are present are, amongst others, the *National Environmental Management Act*,⁷ (hereafter NEMA) the *National Environmental Management Biodiversity Act* (hereafter NEM:BA),⁸ and the *National Environmental Management Integrated Coastal Management Act* (hereafter NEMA:ICMA).⁹ In light of the fact that each of the statutes referred to uses different terms to introduce the notion of public trusteeship or state custodianship, it has been suggested that different “stewardship doctrines of public trust have been incorporated” in South African natural resources law.¹⁰ Despite the differences that exist between the different statutes in which the notion appears, it has been proposed that the concept of public trusteeship statutorily entrenches the state or government's duty to act as a guardian of either the environment, or of specific natural resources, for the benefit of the public as a whole.¹¹ For the purpose of this work, this argument is accepted as correct. The term 'public trusteeship' is thus used in this work as a collective term including both 'public trusteeship' and 'state custodianship'. The term 'government' is used as the collective term referring to the statutorily appointed fiduciary authority.¹²

intended to create a doctrine of public trust. The history of the concept in South African legislation is fully unpacked in Van der Schyff 2010 *PELJ* 123.

⁶ According to s 3 of Act 28 of 2002, mineral and petroleum resources are the common heritage of all the people of South Africa, the state being the appointed custodian. Van der Schyff 2013 *SALJ* 380.

⁷ Section 2 of Act 107 of 1998: The environment is held in trust for the people and the state is appointed as the custodian thereof. The founding principle of the public trust doctrine within NEMA is s 2(4)(o). Blackmore 2015 *SAJELP* 95.

⁸ Sections 11 and 12 of Act 10 of 2004.

⁹ Section 2(c) of Act 24 of 2008; Van der Schyff 2013 *SALJ* 380. The state is appointed as public trustee of coastal public property.

¹⁰ Van der Schyff 2010 *PELJ* 123; Van der Schyff 2013 *SALJ* 386. The Gauteng High Court in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) has accepted that s 24 introduced the principle of stewardship into South African law.

¹¹ Blackmore 2015 *SAJELP* 96; *Hichange Investments (Pty) Ltd v Cape Produce Company (Ltd) t/a Pelts Products* 2004 2 SA 393 (E); Van der Schyff 2010 *PELJ* 123.

¹² The MPRDA acknowledges in the preamble “that South Africa's mineral and petroleum resources belong to the nation and the state is the custodian thereof”.

The study commences from the basis that the environmental right in section 24 places a fiduciary obligation on the government as the public trustee of South Africa's environment to protect and conserve the environment in the public interest, while vesting in the trustee the power to control access to and the use of the resource for the benefit of current and future generations.¹³ In addition to emphasising the government's fiduciary responsibility, the public interest is protected through the concept of public trusteeship.¹⁴ The vesting of a fiduciary responsibility pertaining to the regulation of the environment in the government ensures that the public interest in the environment is considered and protected.¹⁵ By proclaiming that the environment or a specific natural resource must be regulated to the benefit of the people of the country, public trust legislation necessitates the involvement of the beneficiary in decision-making processes when its interests may be affected. The public, or people of South Africa, as the statutorily designated beneficiary, is granted a voice in the management of the country's environment and natural resources.

Public participation is the mechanism used to provide interested parties with the opportunity to provide their perspectives when decisions are taken through which they may be affected or in which they may have an interest.¹⁶ Public participation in its broadest sense consists of different processes that take place at different stages in the decision-making process.¹⁷ Through these processes the public interacts with government to enhance decision-making and to create public buy-in to safeguard the interest of the public.¹⁸ Public

¹³ Section 24(b) of the Constitution obligation of directive principle. Kidd *Environmental Law* 23, 34. The incorporation of the notion of intergenerational equity.

¹⁴ Van der Schyff 2010 *PELJ* 123. In *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 102 "the present generation holds the earth in trust for the next generation"; Van der Schyff 2013 *SALJ* 378.

¹⁵ Van der Schyff 2013 *SALJ* 379.

¹⁶ King and Reddell 2015 *PELJ* 944; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC); Du Plessis 2008 *PELJ* 21 23; Barton "Underlying concepts" 105.

¹⁷ Section 24 of the NEMA read with the Environmental Impact Assessment (EIA) Regulations GN R982 in GG 38282 of 4 December 2014; s 21 of the NWA.

¹⁸ Blackmore 2015 *SAJELP* 89 describes this obligation as "to act as custodian of the nation's resources, to protect the public interest, to ensure equitable access to such resources and in general to ensure that all South Africans enjoy an environment of acceptable quality".

participation may simultaneously be used as an effective tool for the establishment of environmental priorities to ensure that sustainable imperatives are recognised in decision-making processes.¹⁹ In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*²⁰ the Cape Division of the High Court confirmed “the close nexus between just administrative action and the participation of interested and affected parties during all stages of decision making”.²¹ Although the central link between public participation, environmental management and the fulfilment of environmental rights has been made by academic scholars,²² none of the existing studies explore the nuances that the concept of public trusteeship might provide to the discussion. It is against this background that this dissertation seeks to explore the content and role of the continuum of public participation in a public trust regulatory model. In order to facilitate this investigation, the research question that underpins this study is: What are the modes²³ of meaningful public participation required by a public trust regulatory model?

1.2 Methodology

This study is based on a literature study of relevant text books, law journals, legislation, case law and Internet sources. In order to answer the research question, the next section will focus on determining the origin and implications of a public trust regulatory model. The research will therefore focus on the

¹⁹ Du Plessis 2008 *PELJ* 22; Blackmore 2015 *SALJ* 89.

²⁰ 2005 3 SA 156 (C).

²¹ Field 2005 *SALJ* 748 critically examines the decision.

²² Du Plessis 2008 *PELJ* 21 provides an introductory article on the role that public participation is projected to play in government's fulfilment of environmental rights. It is universally agreed that public participation has the potential to improve the accountability for the effective management of resources to protect the environment of committees of people for the present and future generation. S 24(b) of the Constitution; Du Plessis 2008 *PELJ* 23; Piccolotti and Taillant *Linking Human Rights and Environment* 50-57. According to Kotzé 2004 *PELJ* 61, there exists a relationship between the protection of environmental rights and administrative decision-making by environmental authorities. King and Reddell 2015 *PELJ* 944 also underwrite this statement. Murombo 2008 *PELJ* 31; Field 2005 *SALJ* 748.

²³ English Oxford Living Dictionaries – “A way or manner in which something occurs or is experienced, expressed, or done” <https://en.oxforddictionaries.com/definition/mode>.

origin of the public trusteeship notion and its inception and development in South African jurisprudence. The custodial obligation acquired by government as public trustee as well as the interest acquired by the public will be critically assessed in order to determine at which stages in the life cycle of environmental decision-making the public voice needs to be heard. Thereafter a discussion will be presented on the concept of public participation. Public participation as a concept of participatory democracy in environmental decision-making will be critically analysed in order to provide a theoretical exposition of the role, content and importance thereof. In the penultimate section of this dissertation the focus will be on describing and analysing the extent of public participation that is currently provided for in South African constitutional and environmental law. In the final instance an answer to the research question will be offered in conclusion of the dissertation.

CHAPTER 2

The origin and implications of a public trust regulatory model

2.1 Defining public trusteeship

2.1.1 Introduction

The notion of public trusteeship is a relatively new legal notion that has been statutorily entrenched into the South African legal system.²⁴ Although the notion displays characteristics previously associated with the common law concepts of *res publicae* and *res omnium communes*,²⁵ there was no previous recognition of a public trust doctrine in South Africa.²⁶ In order to understand exactly what the 'public trust regulatory model' consists of, it is necessary to define public trusteeship and explain how this regulatory model became part of the South African environmental regulatory system. Thereafter the implications of the model need to be highlighted.

In order to determine the meaning of public trusteeship, the philosophy underpinning the notion first needs to be researched.

2.1.2 Philosophical foundation

The concept 'public trusteeship' has a philosophical foundation²⁷ based on John Locke's statement in the *Second Treatise on Civil Government*²⁸ and also

²⁴ See para 1.1 above.

²⁵ Viljoen *Water as public property* 68, 75; Viljoen *The public trust doctrine* 37; Viljoen 2017 *Law, Development and Democracy* 179, 183.

²⁶ *Res publica* refers to things that belong by the state, such as a river, and *res omnium communes* refers to things used by everybody, such as the air and the flowing water. *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 86 as per Wallis J remarked: "that the question whether or not the MPRDA introduced elements of the public trust doctrine into SA law...seems to me neither here nor there"; Van der Schyff 2013 *SALJ* 370.

²⁷ Sand 2004 *Global Environmental Politics* 54.

²⁸ Dunn "The concept of 'trust' in the politics of John Locke" 279-301.

Roscoe Pound's²⁹ views. According to Locke, governments merely exercise a "fiduciary trust" on behalf of their people.³⁰ For Pound, the management of the state's role in regard to common natural resources is based upon "a sort of guardianship for social purposes".³¹ These views relate closely to Karl Marx's statement pertaining to the role of state governments in regard to natural resources. Marx expressly states that a society or a nation as a whole is not the owner of the earth.³² In much stronger terms Marx states that society or the nation as occupants, users and diligent guardians must hand the earth down to the following generations.³³

According to Sand, these philosophical statements form the fundamental political dimensions of trusteeship.³⁴ Given this philosophical foundation, the concept is securely founded on the legal philosophy that it is the sovereign's duty to act as the guardian of certain interests of the public.

But the public trust notion with its stewardship characteristics is more than a philosophical notion.³⁵ The concept forms the basis and core of foreign legal constructs,³⁶ with reference to the Anglo-American public trust doctrine,³⁷ German jurisprudence,³⁸ and French jurisprudence.³⁹ The public trust doctrine displays some similarities to the German constitutional law concept of restrictions on property rights with reference to the use of certain natural

²⁹ Pound *An introduction to the Philosophy of Law*. Pound refers to the state's fiduciary rights over certain natural resources as "a sort of guardianship for social purposes".

³⁰ Dunn "The concept of 'trust' in the politics of John Locke" 279-301.

³¹ Pound *An introduction to the Philosophy of Law* 111.

³² Marx *Das Kapital* 718.

³³ Marx *Das Kapital* 718 "Even society as a whole, a nation, or all contemporary societies taken together, are not owners of the Earth. They are merely its occupants, its users; and as diligent guardians, must hand it down improved to subsequent generations".

³⁴ Sand 2004 *Global Environmental Politics* 54 makes this statement with reference to Anglo-American trust law and other legal systems. Property Law analogies may also not suffice to explain public trusteeship.

³⁵ Sand 2004 *Global Environmental Politics* 54 refers to the American trust law and their legal systems; Van der Schyff 2010 *PELJ* 123 refers to the Anglo-American system, the French jurisprudence and Germany.

³⁶ Sand 2004 *Global Environmental Politics* 54.

³⁷ Van der Schyff *The constitutionality of the MPRDA* 280.

³⁸ Viljoen *Water as public property* 243.

³⁹ Wilkinson 1989 *Environmental Law* 429-430; Van der Schyff 2010 *PELJ* 123.

resources devoted as public goods by way of servitudes or easements.⁴⁰ Along the same lines, the concept of *domaine publique* in the French jurisprudence has been recognised as being similar to the Anglo-American public trust, bestowing the state with custodianship over inalienable natural resources such as the seashore.⁴¹

The public trust doctrine in the American legal system was developed in a quest to determine the ownership of the beds of navigable waters.⁴² In essence it entails the differentiation between private ownership and public rights, with the state acting as the trustee of public rights in regard to certain natural resources.⁴³ The doctrine's differentiation between private ownership and public rights is also seen in the early English common law where the notion provided that title to tidelands had two components; first, the King's right of *jus privatum*, which could be estranged, and second, the *jus publicum* rights of navigation and fishing which were held by the King in alienable trust for the public.⁴⁴

2.1.3 American public trust doctrine

Reference is made to the American jurisprudence to assist in the process of defining the concept of public trusteeship. The focus in this section will be on the underlying principles upon which the American public trust doctrine is founded.

The expression 'public trust doctrine' as used in the American legal literature refers either to a common law doctrine (where it is also referred to as the

⁴⁰ Sand 2014 *Environmental Policy and Law* 6; Global Trust 2015 <http://www.globaltrust.tau.ac.il/publications>.acc9/11/2017 provides this example and the German concept of *öffentliche sachen*. Viljoen *Water as public property* 277.

⁴¹ Sand 2014 *Environmental Policy and Law* 6.

⁴² Stevens 1980 *UC Davis LR* 200; Frank 2012 *University of California Davis LR* 671; Blumm 2017 *Boston College Env'tl Aff LR* 7-19, 31, 32; Van der Schyff 2013 *SALJ* 375; Viljoen 2017 *Law, Development and Democracy* 189-199.

⁴³ *Illinois Central Railroad Company v Illinois* 146 US 387 1892 452; *Arnold v Mandy* 6 NJL 1 (1821); *Shively v Bowlby* 152 US 1 (1894); *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842).

⁴⁴ Takacs 2008 *NYUELJ* 713.

traditional public trust doctrine) or to a statutory doctrine incorporated in constitutional or statutory law.⁴⁵ The common law doctrine was used to protect and prohibit interference with the trust property earmarked for the purposes of commercial usage, navigation and fishing.⁴⁶ The common law doctrine entails the state's ownership and sovereignty over the "soils under tide water".⁴⁷ The fiduciary dominium entrenched is the public's right of access to the identified uses of commerce, navigation and fishing.⁴⁸ It implies the responsibility to protect the natural resource.⁴⁹

These resources are owned by the state, but ownership in this context is not the same as the ordinary private law concept of ownership.⁵⁰ The view of the American courts is that land subjected to the public trust doctrine is held by a title that is different from that in which states hold land to be sold.⁵¹ The basis of the ownership is a fiduciary dominium over the property, vested in the state

⁴⁵ Takacs 2008 *NYU* 711-765; Bento 2010 *CLR* 7-13; Van der Schyff 2013 *SALJ* 375.

⁴⁶ The landmark case in regard to the public trust doctrine is the "Iodestar" case, referred to as the legislature of the State of Illinois tried to repeal a fee simple grant to submerged lands in Lake Michigan to the Illinois Central Railroad company. The Supreme Court held that navigable waterways were to be held in trust for the benefit of the entire population. Two other important cases preceded the Illinois case, namely the *Arnold* case and the *Martin* case. The idea is without doubt due to Sax's reference to this case as the "Iodestar in American trust law" as per Sax 1970 *Mich LR* 489.

⁴⁷ As per *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842) and *Arnold v Mandy*, in which the plaintiff claimed title to the oyster fishery in Raritan Bay based upon a grant from the New Jersey legislature. Chief Justice Taney upheld the grant. In *Arnold v Mandy* 6 NJL 1 (1821) 76-78 the court rejected the claim of a private claimant's exclusive right to oyster beds, affirming that "the rivers that ebb and flow, the bays and the coasts are common to all citizens and are sources from which they can find their sustenance". Blumm 2010 *Hastings W-Nw JELP* 105-106 refers to this as the "public ownership and access doctrine" with reference to the protected uses of commerce, navigation and fishing.

⁴⁸ *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842) provides an example where the fiduciary dominium is entrenched in regard to access to specified uses of commerce, navigation and fishing. *Knight v United States Land Association* 142 US 161 1891.

⁴⁹ *State v City of Bowling Green* 313 NE 2d 409 (Ohio 1974) 411, the state is regarded as the trustee of property for the benefit of the public and to protect the trust property and also in *National Audubon Society v Superior Court of Alpine County* 658 P2d 709 724 CAL 1983.

⁵⁰ *Illinois Central Railroad Company v Illinois* 146 US 387 1892 452; *Shively v Bowlby* 152 US 1 (1894) at 56 and *National Audubon Society v Superior Court of Alpine Country* 658 P 2a 709 724 CAL 1983, where the duty of the state is affirmed to be to "protect the people's common heritage of streams, lakes, marshlands and tide lands".

⁵¹ *Illinois Central Railroad Company v Illinois* 146 US 387 1892 452; *National Audubon Society v Superior Court of Alpine Country* 658 P 2a 709 724.

as a representative of the nation.⁵² The expanded development of the traditional common law public trust doctrine implied more than the fiduciary responsibilities of states to protect public access to and the usage of natural resources.⁵³ The public trust doctrine was further developed with the intervention of Sax.⁵⁴

Joseph Sax identified the principles underlying the public trust doctrine in such a way as to ensure that the doctrine serves to protect the environment.⁵⁵ Sax found in the public trust doctrine a legal method for citizens to use in fighting the misuse of resources that should fairly be protected as common property.⁵⁶ Sax identified three concepts or principles that underlie the doctrine. The first principle is: "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs".⁵⁷ The second principle is: "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace".⁵⁸ And finally, "certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".⁵⁹ Sax's notion of the public trust doctrine focuses heavily on the public interests in the resources and how these interests should be safeguarded.⁶⁰ In essence, the three characteristics consist of an obligation that could be enforced against the

⁵² *Shively v Bowlby* 152 US 1 (1894). The Illinois case needs preference as it represents the beginning of the American jurisprudence public trust doctrine. Three elements evolved from the case that were to constitute the essence of public trust doctrine:

- "trust for the common good,
- the public has some kind of right to protection of these resources,
- democracy may seem to be subverted when a court overrules the acts of elected officials. On the contrary, such judicial acts serve democracy by the preserving of rights invested in all people."

Illinois Central Railroad Company v Illinois 146 US 387 1892 387. Also see Sax 1970 *Mich LR* 470. Defending the environment, a strategy for citizen action.

⁵³ Van der Schyff 2013 *SALJ* 378.

⁵⁴ Sax is also known to have been the father of the modern public trust doctrine, a renowned scholar at Michigan Law School, and later a professor of law.

⁵⁵ Sax was a professor of law first at Michigan Law School and then at California Berkeley.

⁵⁶ Takacs 2008 *NYUELJ* 715.

⁵⁷ Sax 1970 *Mich LR* 484; Olson 1975 *Detroit College LR* 161 at 162, referred to Sax's seminal work as the leading treatment on the public trust doctrine.

⁵⁸ Sax 1970 *Mich LR* 484; Torres 2015 *Environmental Law* 387.

⁵⁹ Sax 1970 *Mich LR* 485; Torres 2015 *Environmental Law* 387.

⁶⁰ Takacs 2008 *NYUELJ* 718.

government, the vesting of some form of legal right in the public, and the requirement of consistency with contemporary concerns for environmental quality.⁶¹ These principles form the basis of his notion of the public trust doctrine.

Subsequent to the recognition of Sax's development of the doctrine, it was applied by courts and state legislature to resources not previously affected.⁶² The outcome of the development was that different concepts of public trusteeship emerged in different states, all of them based on Sax's exposition of the notion.⁶³

A cursory overview of the American public trust doctrine provides us with the understanding that in order to establish a public trust doctrine, it needs either to be endorsed by common law or incorporated by statute. If the public trust doctrine is incorporated by means of a statute, a fiduciary responsibility is by implication placed on and vested in a state authority to safeguard that the public interest in the resource is maintained and protected. The statutory incorporation also acknowledges the intergenerational importance of the resource. This golden thread is also detected in the South African legislation.

2.1.4 Stewardship notion explained

The phrases 'public trusteeship' and 'stewardship' are foreign phrases recently incorporated into the South African natural resources law.⁶⁴ Owing to the

⁶¹ Sax 1970 *Mich LR* 474.

⁶² Walston 1982 *Santa Clara LR* 66 stated that the trust is a dynamic rather than a state concept and seems to expand with the development and recognition of new public uses.

⁶³ Van der Schyff 2013 *SALJ* 377; Viljoen *Water as public property* 186.

⁶⁴ Van der Schyff 2013 *SALJ* 370; Van der Schyff 2010 *PELJ* 123; Sand 2004 *Global Environmental Politics* 47. International commentators argue that a constitutional and statutory foundation has been laid for the doctrine to operate in the South African Law. References to the notion "stewardship" are found in the well-known case referred to as the *HTF* case. Here Gauteng High Court referred to the stewardship concept with reference to the onus placed upon the authorities when executing their functions. The court used the terms "custodian" and "trustee" as synonyms and linked them directly to the concept of stewardship. The *HTF* case 132 para 19 refers to s 24 of the Constitution as it "confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future generations". Although the court did not define the notion (stewardship), the explanation the court provided coincides with the ordinary dictionary meaning. Stewardship is the careful and

inherent link between public trusteeship and stewardship, it is necessary first to define stewardship. A general definition of the term is that it is "the job of supervising or taking care of something, such as an organization or property".⁶⁵ It is also referred to as the "careful and responsible management of something under one's care".⁶⁶ The term is also referred to as an ethical and religious norm.⁶⁷

A further literature search has revealed a description of stewardship as an "approach towards problem solving that includes a long-term perspective, a focus on the sustainability, and respect of the delicate balance of the earth's ecosystem".⁶⁸

Certain unique characteristics⁶⁹ of stewardship were highlighted by Barnes, Sax and Weiss, such as a duty towards the environment,⁷⁰ a duty to conserve resources,⁷¹ a duty to protect and preserve resources, and a duty towards other people, including future generations.⁷² Barnes states "that public trusteeship is often explained as a specific manifestation of stewardship".⁷³ Kameri-Mbote⁷⁴ links the stewardship ethic closely to the government's fiduciary duty towards the public's environmental interest in regard to natural resources. It follows that the state's authority is a fiduciary duty of stewardship

responsible management of something entrusted to one's care Meriam Webster Dictionary date unknown <http://www.meriam-webster.com/dictionary/stewardship>.

⁶⁵ Oxford Dictionary date unknown <https://www.en.oxforddictionaries.com/definition/stewardship>.

⁶⁶ Wehmeier, McIntosh and Turnbull *Oxford Advanced Learner's Dictionary* 1450.

⁶⁷ Van der Schyff 2003 *Koers* 239; Van der Schyff 2013 *SALJ* 371; Van der Schyff *Property in minerals and petroleum* 232.

⁶⁸ Bratspies 2001 *Harv Env't LR* 214, provided the description of stewardship.

⁶⁹ Barnes *Property rights and natural resources* 247 values trusteeship as a specific manifestation of stewardship.

⁷⁰ Sax 1992 *Stan LR* 1433.

⁷¹ Weiss 1992 *AUJLR* 19.

⁷² Barnes' *Property rights and natural resources* reference to future generations echoes Weiss 1992 *AUJLR* 19, as she also includes future generations in her explanation.

⁷³ Barnes *Property rights and natural resources* 247.

⁷⁴ Kameri-Mbote 2007 *Law Env't Dev J* 197.

in regard to the public's natural and environmental capital.⁷⁵ Sand⁷⁶ refers to the trusteeship notion as an "ethical equivalent of stewardship" that is "purely metaphoric/rhetoric and devoid of legal substance". Sand believes that the concepts of stewardship and trusteeship are synonymous. According to Sand, certain natural resources, regardless of whether they are earmarked for public or private uses, are defined as part of "inalienable public trust[s]".⁷⁷ Federal agencies, state governments or and tribal authorities are earmarked as "public trustees" for the protection of these resources. Every citizen as a "beneficiary" of the trust may make claims to hold the trustees liable and obtain judicial protection against actions such as violations that lead to deterioration.⁷⁸ In a fairly strong statement, Sand avers that "[t]he message is simple: the sovereign rights of nation states over certain environmental resources are not proprietary, but fiduciary."⁷⁹ With this statement Sand refers to comparative environmental law, to "stewardship economics," and to public international law in the same breath.⁸⁰ Sand refers to South Africa as a country where the environmental scope of trusteeship is extended, with reference to the NWA as an example.⁸¹ He argues that international environmental trusteeship is typically trilateral with the community as the trustor/settlor, the state as the trustee, and the people as beneficiaries.⁸²

⁷⁵ The reference is made by Kameri-Mbote, who also based her statement on Weiss's explanation: that future generations possess rights in relation to the state of the environment and the present generation must deal with the fundamental entitlement of future generations. See Weiss *In fairness to future generations* 219 where he uses the word "capital".

⁷⁶ Sand 2014 *Environmental Policy and Law* 210-218; Global Trust 2015 <http://www.globaltrust.tau.ac.il.//publications>; Barnes *Property rights and natural resources* 156.

⁷⁷ Sand 2004 *Global Environmental Politics* 49.

⁷⁸ Sand 2004 *Global Environmental Politics* 49.

⁷⁹ Sand 2004 *Global Environmental Politics* 48.

⁸⁰ Sand 2004 *Global Environmental Politics* 49. The concept of the public trusteeship of environmental resources has undergone a revival in the US with the Illinois case rediscovered by Prof Sax. It became the starting point of innovative environmental law-making. Sand emphasises that the concept of the public's being entrusted with natural resources belongs to public law rather than private property law. Sand "The concept of public trusteeship" 34-64. The terms "trustee", "trustee" and "beneficiary" indicate a relationship between trust law and public trusteeship.

⁸¹ Chapter 1 para 3; Sand 2004 *Global Environmental Politics* 50.

⁸² Sand 2004 *Global Environmental Politics* 55.

Brady⁸³ argues that the public trust doctrine might "serve as a vehicle to bring the stewardship ethic into law". Brady's argument is based on the American *National Environmental Policy Act* of 1969 (hereafter NEPA)⁸⁴ that statutorily incorporated the public trust law into federal law on 1 January 1970. According to Brady, the NEPA should also be able to serve as a mode to bring the stewardship ethic into law. Although Brady's explanation is not focused on the stewardship notion as such, it is linked to taking care of the needs of the 'future' through the stewardship ethic. According to Brady's reference to the NEPA, the stewardship ethic is used to incorporate the public trusteeship notion into American jurisprudence.

All these variations of the stewardship notion imply that through the stewardship ethic an interest in natural resources is based in both the direct holder of the resource and in the broader party or distant party, such as the public or the community.⁸⁵ They also imply that the holder of the resource has a responsibility to respect the fiduciary relationship which exists between the holder of the resource and the current and future generations.⁸⁶ This explanation corresponds with the formulation to be found in *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province*⁸⁷ that "the present generation holds the earth in trust for the next generation".⁸⁸

The essence of this exposition is that the word 'trust' and the other trust-related phrases (as above) in this connotation refer to the fiduciary responsibility of the state through the integration of the concept of public

⁸³ Brady 1990 *BC Env'tl Aff LR* 621-646.

⁸⁴ Sections 4321-4370(a). The NEPA promotes the enhancement of the environment and establishes the President's Council on Environmental Quality (CEQ).

⁸⁵ Van der Schyff 2013 *SALJ* 372.

⁸⁶ Kamari-Mbote 2007 *Law Env't Dev J* 197.

⁸⁷ 2007 6 SA 4 (CC) para 102. S 24 laid the foundation for the introduction of the ethical norm of stewardship into South African Law.

⁸⁸ *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 102.

trusteeship.⁸⁹ In the light of the focus of this study, it is important to recognise and highlight the fiduciary responsibility of the state to act either as a trustee or as a custodian of the environment or of specific natural resources. Sand's explanation leads to the acceptance that public trusteeship is based on a fundamental philosophy, featuring differently in different legal constructs.

From the remarks made by Sand and from other commentators it can be accepted that the principle of public trusteeship is to be found in the fiduciary responsibility of the state to act as a trustee or as a custodian of the environment or of specific natural resources and this is in turn intrinsically linked to stewardship.

2.2 Origin of public trusteeship in South African jurisprudence

2.2.1 Introduction

Various international writers and commentators have claimed that a constitutional and statutory foundation was laid in South Africa for the public trust doctrine to function in natural resources and environmental law.⁹⁰

2.2.2 South African constitutional and statutory law

The creation of a constitutional environmental right in section 24 of the Constitution laid the foundation for the statutory introduction of the concept

⁸⁹ Sand 2004 *Global Environmental Politics* 48; Van der Schyff 2013 *SALJ* 374.

⁹⁰ Sand 2004 *Global Environmental Politics* 50; Takacs 2008 *NYUELJ* 716; Blumm 2010 *Hastings W-Nw JELP* 106. This view is plausible, because public trusteeship is often seen as a manifestation of the ethical notion of stewardship. Barnes *Property rights and natural resources* 247. In an effort to demystify the concept of public trusteeship, traces and links with potentially similar notions have been explained and followed. It is submitted that through various forms (paras 2.1.5 and 2.1.6.) of stewardship with reference to the clauses in the NEMA, the NWA and the MPRDA (chapter 4), the public are linked to the notion of trusteeship and custodianship, based on the relation between trusteeship and the idea of having a fiduciary responsibility. The inherent link between the notions of trusteeship and custodianship is illustrated for example in SA water-related legislation, where the national government is appointed as the public trustee of the nation's water resources. The *Water Services Act* 108 of 1997 confirms the national government's role as "custodian: of the nation's water resources".

of public trusteeship.⁹¹ Section 24 is the conduit through which the ethical concept of stewardship has found its way into the South African law.⁹² Several statutes flowed from section 24 to incorporate the notion of public trusteeship in South African environmental and natural resources law.⁹³ This notion is incorporated in different pieces of environmental and natural resources-related South African legislation.⁹⁴ These statutes acknowledge the nation's shared interest in a particular natural resource, and the state is appointed its trustee or custodian. The notion made its debut in the White Paper on a National Water Policy for South Africa.⁹⁵ It was stated in the White Paper that the government intended to create a doctrine of public trust

⁹¹ Sand 2004 *Global Environmental Politics* 47-71; Takacs 2008 *NYUELJ* 711; Blumm and Guthrie 2012 *UCDLR* 788-794; Blumm 2010 *Hastings W-Nw JELP* 107. Blackmore 2015 *SAJELP* 90 holds the opinion that the application of the public trust doctrine is brought into South African jurisprudence by way of the environmental right in s 24 of the Constitution. Feris 2012 *LEAD Journal* 12 sees a direct link between the public trust doctrine and the Constitution. Ferris states that the synergy between constitutional rights and the public trust doctrine is of vital importance and refers to Takacs 2008 *NYUELJ* 711, 733: "Once we label something as a fundamental right or an inviolable right, it is much less likely to come up short in a balancing test. The more fundamental the right is considered, the more non-derogable are duties to protect those rights and the heavier the weight of international shaming falls upon the violator. Fulfilment of those rights supervenes any legislation that conflicts with such fulfilment." The Gauteng High Court stated in the *HTF* case (para 19) that s 24 of the Constitution "confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future generations".

⁹² Van der Schyff 2013 *SALJ* 370-371.

⁹³ NEMA chap 4 of the dissertation.

⁹⁴ A discussion follows hereafter in chap 4: MPRDA.

⁹⁵ Department of Water Affairs 1995 <http://www.dwa.gov.za/Documents/Policies/nwpwp.pdf>.

The White Paper that led to the *National Water Act* laid the foundation for reinstituting the Public Trust Doctrine. The Paper states: "In Roman Law (on which South African law is based) rivers were seen as being resources which belonged to the nation as a whole or were available for common use by all citizens, but which were controlled by the state in the public interest. These principles fitted in well with African customary law which saw water as a common good used in the interest of the community" (para 5.1.1). The White Paper further proclaims (para 5.1.2) of Government's role as custodian of the "public trust" in "managing, protecting and determining the proper use of South Africa's water resources...." The purpose of the public trust is that the national Government has a duty to regulate water use for the benefit of citizens taking in to consideration in such a way that takes into account the nature of water resources and the need to make sure that there is fair access to these resources. The White Paper refers to the United States court precedents that overturned private water rights "on the grounds that water remains subject to the public trust", confirming the development of the public trust as including "the state's duty to protect the people's common heritage of rivers, streams, lakes, marshlands, tidelands and the sea-shore" (para 5.1.2); Takacs 2008 *NYUELJ* 744.

... to make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust.⁹⁶ The NWA incorporates the concept first in the preamble, stating that water is a 'natural resource that belongs to all people'⁹⁷

and in section 3 of the *National Water Act* (hereafter NWA) proclaiming that the national government is appointed as public trustee of the nation's water resources.

The National Environmental Management Act (hereafter NEMA) followed thereafter as framework legislation.⁹⁸ In the NEMA it is stated that the "environment is held in trust for the people"⁹⁹ and the state is appointed as the custodian¹⁰⁰ thereof. In the *Mineral and Petroleum Resources Development Act* (hereafter MPRDA)¹⁰¹ the country's "mineral and petroleum resources are proclaimed to be the common heritage of all the people of South Africa, with the state the duly appointed custodian for the benefit of all South Africans".¹⁰² *The National Environmental Management Integrated Coastal Management Act* (hereafter NEMA:ICMA)¹⁰³ was promulgated in 2008 with the same concept in

⁹⁶ Department of Water Affairs 1995 <http://www.dwa.gov.za/documents/policies/nwppwp/pdf>.

⁹⁷ Preamble of the NWA: "Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary interdependent cycle. Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources".

⁹⁸ Act 107 of 1998. The White Paper of Environmental Management Policy GN 749 of GG 18894 of 15 May 1998, which forms the policy of the management of the environment, unpacks this environmental right into duties. These bind the government to the public trust/custodianship obligation of the nation's resources to protect the public interest and to ensure equitable access to such resources. This policy formed the foundation on which the NEMA was constructed to ensure sustainable environmental management decision-making and the achievement of the environmental right. Kidd *Environmental Law* 32. The public trust doctrine was reaffirmed in the NEMA, which declares that the "environment is held in public trust for the people". The beneficial use of the environmental must be protected as the people's common heritage Act 107 of 1998 chap 1 para 2(4)(o).

⁹⁹ Chapter 2, s 2 of the NEMA

¹⁰⁰ Van der Schyff 2013 *SALJ* 380 according to the public trust principles the state is the custodian.

¹⁰¹ Act 28 of 2002.

¹⁰² Section 3(1) of the MPRDA; Van der Schyff 2008 *TSAR* 758; preamble to the MPRDA.

¹⁰³ Act 24 of 2008. The Act came into effect in December 2009 and is intended to provide for integrated and holistic management. The state is the trustee of the whole coastal zone. Glazewski *Environmental Law* 376.

mind, with the ownership of coastal public property being vested in the citizens of the Republic¹⁰⁴ and the state declared the public trustee.¹⁰⁵

In all of these statutes certain words and phrases represent and embody the 'public trust' concept. With the exception of the NEMA, each statute functions within its own sphere. Taking into account the different statutes, it becomes clear that the most important common characteristic displayed by the various statutes is the state's fiduciary responsibility for a natural resource. The content of the fiduciary responsibility prescribed in the different statutes indicates the duty of the national government or state to protect the intergenerational interests in the respective resources.¹⁰⁶ This concept is discussed in more detail below in paragraph 2.2.6. The discussion that follows will indicate that these pieces of legislation contain the different elements associated with a public trust regulatory model by providing a custodial authority with fiduciary responsibilities towards an identified beneficiary in regulating a specific subject matter.

2.2.3 Identification of the different elements of a public trust regulatory model

2.2.3.1 Custodial authority

The purpose of this discussion is to indicate that the underlying philosophy of public trusteeship, namely that resources used by the community or citizens are intended to be protected for intergenerational access under the custodial duty of the state authority, is embedded in the NEMA, the NWA and the MPRDA.

All the statutes referred to below emphasize that the state government has the obligation to act either as a trustee or as a custodian of the environment

¹⁰⁴ Section 11 of the NEMA: ICMA.

¹⁰⁵ Section 12 of the NEMA: ICMA.

¹⁰⁶ Du Plessis 2015 *SAJHR* 278-280 refers to the role of the present generation that echoes the objective of the public trust doctrine.

or of specific natural resources.¹⁰⁷ As the custodian or trustee, its function is to exercise a fiduciary responsibility to deal with the resource in the public interest. The fiduciary responsibility that is statutorily imposed on the state is similar in both the notion of a state custodianship and the public trust doctrine.¹⁰⁸

In a public trust regulatory model, a custodial authority is created by the state government.¹⁰⁹ The custodial authority features in the NWA, where the national government is appointed as the trustee of the nation's water resources,¹¹⁰ and the NEMA, where the state is appointed as the public trustee of the nation's interest in regard to the environment.¹¹¹ In the MPRDA, the state is appointed as the custodian of the nation's mineral resources.

In all these pieces of legislation a specific minister is appointed to act as the agent or as a delegate of the public trustee or state custodian respectively.¹¹² The main responsibility lies with the public trustee or custodian to ensure that the designated natural resource or environment is regulated for the benefit of the people of South Africa.¹¹³ In the recognised statutes "the state or national government is responsible for the management, development, use and protection of the resources in the interest of the public".¹¹⁴

¹⁰⁷ Chapter 2, para 2.2.6.

¹⁰⁸ Van der Schyff *Property in minerals and petroleum* 246 asserts: "the first noteworthy similarity between the notion of state custodianship and the public trust doctrine is the fiduciary responsibility that is statutorily imposed on the state as custodian".

¹⁰⁹ The NWA s 3; the NEMA s 2(4)(o); the MPRDA s 3.

¹¹⁰ Section 3 of the NWA.

¹¹¹ Section 2(4)(o) of the NEMA.

¹¹² Section 63 of the NWA; s 8 of the MPRDA.

¹¹³ NEMA s 3, the state has the duty of public trustee in relation to the environmental. NWA s 3, the national government is appointed as the trustee of the nation's water resources.

MPRDA s 3, the state is appointed the custodian of the nation's mineral resources.

¹¹⁴ NWA "3(1) As the public trustee of the nation's water resource the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interests, while promoting environmental values. "(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic."

2.2.4 Subject matter of the fiduciary responsibility

The study now focuses on the 'issues' that are dealt with in the respective acts that form the subject of the fiduciary responsibility.

According to section 1 of the NEMA, the object of the public's claim is the whole environment. It defines the environment as the surroundings within which humans exist and that are made up of:

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the inter-relationship among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

The NWA provides that the nation's water resources belong to all people. It is subsequently the nation's water resources that form the object of the public trust created in the NWA. According to the MPRDA, mineral and petroleum resources are the common heritage of all the people of South Africa.¹¹⁵ These pieces of legislation respectively indicate the nation's claim to a specific natural resource or the entire environment.

2.2.5 Fiduciary responsibility: the essence of the notion of public trusteeship

Owing to the fact that the notion of public trusteeship is created in different statutes, the content ascribed to the public trustee's fiduciary responsibility differs in each case. In the discussion below, the extent of the fiduciary

NEMA "2(4)(o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

MPRDA "3(2)(a) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may -

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right."

¹¹⁵ Van der Schyff 2013 *SALJ* 385. Van der Schyff *Property in minerals and petroleum* 246

responsibility pertaining to the environment and specific natural resources is discussed. Thereafter certain general observations will be made.

The NEMA appoints the Minister of Environmental Affairs and Tourism as the trustee of the environment.¹¹⁶ The extent of the fiduciary responsibility created in this Act is based on a set of principles which are intended to:

... apply throughout the Republic to the actions of all organs of state that may significantly affect the environment.¹¹⁷

The principles are collectively referred to as the fiduciary duty, formulated as per clause 2(4)(o). It is noted that the environment is held in:

... public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.¹¹⁸

This implies that natural resources are held in trust, and the state must manage their use and protection on behalf of present and future citizens.¹¹⁹ In the preamble it is recorded that the state has a duty to respect, protect, promote and fulfil the social, economic and environmental rights of

¹¹⁶ The long title of the NEMA refers to the intention to provide for cooperative governance. Cooperative environmental governance is to be introduced through the NEMA. The NEMA establishes principles as per Chapter 1 clause 2(1) -(4) for decision-making on matters affecting the environment. The NEMA also makes provision for the establishment of organisations that will promote cooperative governance and the establishment of regulations for the coordination of environmental functions executed by organs of the state. The NEMA also provides for regulations of the administration and enforcement of other environmental management laws to provide for issues related therewith.

¹¹⁷ Section 2(1) of the NEMA defines "environment" as meaning "the surroundings within which humans exist and that are made up of
(i) the land, water and atmosphere of the earth;
(ii) microorganisms, plant and animal life;
(iii) any part of combination of (i) and (ii) and the interrelationship among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being (section 1)".
Also see Kidd *Environmental Law* 3 for a wide definition of "environment".

¹¹⁸ Some of these principles are referred to as distinctive and others not. Kidd *Environmental Law* 7 and 10. The public trust principle is viewed by some as a distinctive principle, but by others not, because of the significant uncertainties associated with the meaning of the doctrine Kidd *Environmental Law* 10. The notion of public trust in this regard refers to "trusteeship" Kidd *Environmental Law* 11.

¹¹⁹ Blackmore 2015 *SAJELP* 98.

everyone.¹²⁰ The state's obligation to honour and respect the social and economic rights expressed in Chapter 2 of the Constitution serves as the "general framework within which environmental management and implementation plans must be formulated".¹²¹

A further document that outlines the government's fiduciary duty as it relates to the environment is the White Paper on Environmental Management Policy for South Africa,¹²² which shaped the foundation on which the NEMA was drafted. This fiduciary obligation includes "the duty to act as custodian of the nation's resources; to respect the public interest in and to ensure equitable access to such resources and generally to ensure that all South Africans enjoy an environment of acceptable quality".¹²³

The fiduciary responsibility of the national government as the trustee of the nation's water resources and acting through the Minister of Water and Sanitation is described in section 3 of the NWA. The trustee must ensure that water is conserved for the benefit of all.¹²⁴ In exercising these functions the Minister has the duty to fulfil obligations in regard to the use, allocation, protection and access to water resources.¹²⁵

¹²⁰ The word used is "must".

¹²¹ And any other law concerned with the protection or management of the environment s 2(1)(a)-(c); Van der Schyff 2013 *SALJ* 382; *Meepo v Kotze and Others* 2008 1 SA 104 (NC); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC).

¹²² GN 749 in GG 18894 of 15 May 1998 at 18.

¹²³ GN 749 in GG 18894 of 15 May 1998 at 21.

¹²⁴ Chapter 1 of the NWA clarifies the guiding principles in the protection, use, development, conservation, management and control of water resources. Ss 3(1) and 3(2).

¹²⁵ Introductory para to Chapter 1 of the NWA. The NWA statutorily entrenches this notion by summarising the duties of the state in the National Water Recourses Strategy. Department of Water Affairs and Forestry 2004 <http://www.awaf.gov.za/documents/Politics/NWRS/Sept2014/pdf/General.pdf>. According to the White Paper, the public trust doctrine includes certain central obligations. The first obligation is to provide for the basic needs of citizens (para 5.2.1); the second one is the duty to protect the resource itself "after providing for the basic needs of citizens. (The only other water that is provided as a right is the Environmental Reserve – to protect the ecosystems that underpin our water resources, now and into the future" [para 5.2.1] [Principle a]). Feris 2012 *LEAD Journal* 14 argues that it is the duty of the National Government, as part of its public trust function, to assess the needs of the Environmental Reserve and to ensure that an amount of water is set aside.) And the third, which is in line with international law, is to ensure that the water allocation for downstream users in shared river basins is respected (para 5.2.3).

In the MPRDA the Minister of Minerals and Energy is appointed to act on behalf of the state.¹²⁶ The state carries the responsibility of custodianship¹²⁷ and the state government does not obtain any proprietary interest in the mineral or petroleum resources, but the interest is based in the fiduciary responsibility.¹²⁸ The state's responsibility is to:

... ensure the sustainable development of South African's mineral and petroleum resources within a framework of national environmental policy norms and standards.¹²⁹

The fiduciary responsibility of the state means that the following functions are exercised: the granting, issuing, refusal, control and management of a range of permissions, rights and permits; and the determination of levies, fees and considerations payable in terms of any act in regard to the exploitation of minerals and petroleum.¹³⁰

2.2.6 Identification of the beneficiaries

It is clear that the different statutes referred to identify the different beneficiaries in different phrases and terms. The NWA states that "water is a natural resource that belongs to all people".¹³¹ The beneficiaries identified in the NWA are "all [the] people". The NEMA states that the "environment must

¹²⁶ Section 3(2) of the MPRDA "As the custodian of the nation's mineral and petroleum resources, the state, acting through the minister, may...".

¹²⁷ Section 3(2) of the MPRDA "As the custodian of the nation's mineral and petroleum resources, the State acting through the minister...". In the preamble it is acknowledge that the state is the custodian of mineral and petroleum resources. The section titled: "Objects of the Act" lists nine objects, including the recognition of the "internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic and to give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources and the promotion of equitable access to the nation's mineral and petroleum resources to all the people of South Africa". S 2(a), (b) and (c).

¹²⁸ Van der Schyff *Property in minerals and petroleum* 247; *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC).

¹²⁹ This is a statutory directive based in s 3(3).

¹³⁰ Section 3(2). *Meepo v Kotze* 2008 1 SA 104 (NC) and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) provide examples of case law highlighting the state's failure to comply with its duties as custodian. Section 47 of the MPRDA grants the relevant minister the power to suspend or cancel rights, permits or permissions in certain circumstances.

¹³¹ The preamble to the NWA.

be protected as the people's common heritage",¹³² and the MPRDA states that "South Africa's mineral and petroleum resources belong to the nation".¹³³ The ordinary interpretation of the 'nation' is that it is used as a collective noun¹³⁴ to represent a community of people related with a particular territory. Therefore, the community of people in its collective capacity shares in the interest in the environment and the natural resources.¹³⁵

All these statutes precisely include future generations as stakeholders.¹³⁶ Focusing again on the statutes above, the phrase "future generations" is repeated in the NEMA, the NWA, and the MPRDA.¹³⁷ The reference to the present and future generations defines the full extent of the beneficiaries who must benefit from the public trust.¹³⁸ It follows that the shared interests of the public, the South African nation as a whole, are advanced.¹³⁹ The objective, principles and purposes of the statutes are to benefit the nation as a whole and to serve the interest of the public, or the "public interest".¹⁴⁰

'Public interest' is an abstract concept¹⁴¹ and also difficult to define and explain.¹⁴² The ordinary dictionary explanation of 'public interest' is "a common concern among citizens in the management and affairs of local, state, and

¹³² Section 2(4)(o).

¹³³ The preamble to the MPRDA.

¹³⁴ The word "nation" stems from the Latin *nation*, meaning "people, tribe, kin, genus, class, flock". Black *Black's Law Dictionary* 1175 defines a nation as:

"A people, or aggregation of men, existing in the form of an organized rural society, usually inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty".

A nation is distinct from a "people" Black *Black's Law Dictionary* 1175 "and is more abstract and overtly political than an ethnic group. It is a cultural-political community that has become conscious of its autonomy, unity, and particular interests". Smith *The Ethnic Origins of Nations* 17.

¹³⁵ Van der Schyff 2013 *SALJ* 383.

¹³⁶ NEMA s 1(xxix); NWA s 2(a); MPRDA s 1.

¹³⁷ NEMA s 1(xxix); NWA s 2(a); MPRDA s 1.

¹³⁸ Du Plessis 2015 *SAJHR* 278 refers to the role of the "present generation" as echoing the objective of the public trust doctrine with reference to Van der Schyff 2010 *PELJ* 125-49.

¹³⁹ Van der Schyff 2013 *SALJ* 383.

¹⁴⁰ The NEMA; the NWA; the MPRDA.

¹⁴¹ Van der Schyff *Property in minerals and petroleum* 248 refers to the concept public interest as a concept that is difficult to define.

¹⁴² Barnes *Property rights and natural resources* 69.

national government". The public interest that affects the rights, health or finances of the public at large is a variable concept and varies across different communities.¹⁴³ In an attempt to value the interest of the public, the constitutional values and the objectives of the resources-related legislation and environmental legislation serve to give content to the public interest which includes the intergenerational interest.¹⁴⁴ "Intergenerational interest" refers to the interest of present and future generations that is protected and preserved by the government's fiduciary responsibility.¹⁴⁵ According to Weiss, members of the present generation hold the earth in trust for future generations. We are fiduciaries who must ensure that people in future may use the earth and benefit from it.¹⁴⁶ In this regard it is also necessary to refer to international and foreign law instruments such as the Aarhus Convention,¹⁴⁷ which states that "every person has...the duty, both individually and in association with others, to maintain the environment for the benefit of present and future generations". All people, individually and collectively, are the representatives of the interest of the future, which simply means¹⁴⁸ that it is an individual and collective duty

¹⁴³ Van der Schyff 2013 *SALJ* 383; also see Barnes *Property rights and natural resources* 17, where he argues that the ambit of the public interest is defined by the structures of legal rights founded in fundamental values; Slade 2014 *PELJ* 171 and further in regard to the public interest in terms of s 25(2) of the Constitution; Van der Schyff *Property in minerals and petroleum* 522 provides extensive explanation of public interest in regard to mineral resources. S 7(2) of the Constitution places a duty on all three spheres of government to ensure that environmental resources are helpfully used in the interest of the public.

¹⁴⁴ Brady 1990 *BC Env'tl Aff LR* 629-630 "law in a democratic society would be a true reflection of society's values". Van der Schyff 2013 *SALJ* 384 referred to this public interest where the "individual interests bow before the public needs".

¹⁴⁵ Du Plessis 2015 *SAJHR* 280 and further refers to "the state responsibility to manage the collective duty of existing generations and to act as guardian of certain interests to the benefit of nations and succeeding generations as a whole".

¹⁴⁶ According to Weiss members of the present generation, hold the earth in trust for future generations and the members of the present generation are the fiduciaries to use it and benefit from it. Weiss *In fairness to future generations* 40-45, 17-18. The role of the present generation is the objective of the public trust doctrine and this is one of the first references to the idea that "at any given time, each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits" and a reference to a charitable trust - Weiss 1984 *Ecology Law Quarterly* 495-582.

¹⁴⁷ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) endorsed by the UN Economic Commission for Europe in 1996. The relevance of the document will be discussed in more detail in Chapter 3. The Aarhus Convention came into force on 30th October 2001.

¹⁴⁸ Adopting the words of Feinberg "The Right of Animals and Future Generations" 159, 183.

of everyone living in the present¹⁴⁹ to protect and improve the environment for the benefit of present and future generations.

Apart from the specific reference to the nation and community of people in the respective statutes, section 24 of the Constitution grants everyone "the right to have the environment protected for the benefit of the present and future generations",¹⁵⁰ hence also creating a fiduciary responsibility towards a more extended collection of people and even to unborn¹⁵¹ generations.¹⁵² The constitutional vision captured in section 24 of the Constitution is based on "an environment that is not harmful to health or well-being" and "the nation's commitment to reforms" in regard to equitable access to all South Africa's natural resources.¹⁵³ The distinctive elements of the constitutional vision are the reference to protecting the intergenerational interest by the promotion of "conservation, preventing pollution and ecological degradation, securing ecologically sustainable development and justifying economic and social development".¹⁵⁴ The advancement of a constitutional environmental right is connected with section 24(b):

...to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures by promoting conservation, preventing pollution and ecological degradation, securing ecologically sustainable development and the justification of economic and social development.

¹⁴⁹ Du Plessis 2015 *SAJHR* 277.

¹⁵⁰ See chap 1 para 1.1 note 3 of the dissertation.

¹⁵¹ The Earth Charter states: "We are at once citizens of different nations and of one world in which the local and global are linked. Everyone shares responsibility for the present and future well-being of the human family and the larger living world." Preamble to the Earth Charter, 2002.

¹⁵² Paragraph 2.2.6.

¹⁵³ Sections 24(a) and 25(4).

¹⁵⁴ Section 24(b) of the Constitution. The intergenerational interest as per s 24(b) was emphasised in *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 6 SA 4 (CC) paras 51-77, with reference to inter- and intra-generational equity. Du Plessis 2015 *SAJHR* 274 also avers that "intergenerational equity is understood in this context as a matter of justice and as meaning that present generations are answerable to future generations for *inter alia* their stewardship of the natural resource base".

The values of the Constitution are further refined by the context-specific objectives and aims of the various acts such as the NEMA, the NWA and the MPRDA. The objectives clauses of each of these acts set the basis upon which the public interest must be advanced and supported by every action of the state government.¹⁵⁵ This is for the benefit of each individual as part of the community, as well as for the community as a whole.¹⁵⁶ It is not only the applicant's interest that should be considered, but also the public interest.¹⁵⁷ When the application for a license is considered, the administrative organ considers the interest and right of the applicant as well as the interest of the public.¹⁵⁸

2.2.7 Conclusion and summary

The aim of this discussion has been to investigate how the concept of public trusteeship has been incorporated into the South African law of environment and natural resources. In this process reference has been made to the underlying philosophical principles in a quest to determine the nature of the concept.

The legal philosophy underlying the public trusteeship notion was founded on the duty of the sovereign to act as the guardian of certain interests.¹⁵⁹ Public trust language emanates from the fundamental stewardship principle underlying public trusteeship. Reference was made to the American law¹⁶⁰ that

¹⁵⁵ Section 2(d) of NWA: "promoting the efficient sustainable and beneficial use of water in the public interest"; s 2(4)(o) of the NWA: "resources must serve the public interest".

¹⁵⁶ Chapter 2 of the Constitution referred to see 7 (Rights) "It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom"; s 9(1) Equality "Everyone is equal before the law and has the right to equal protection and benefit of the law"; s 10 Human dignity "Everyone has inherent dignity and the right to have their dignity respected and protected".

¹⁵⁷ Also see *Goede Wellington Boerdery (Pty) Ltd v Makhanya* 2011 ZAGPPHC 141 para 5.5.

¹⁵⁸ Chapter 4 of this dissertation.

¹⁵⁹ Paragraph 2.1.2 *Philosophical foundation* above.

¹⁶⁰ Paragraph 2.1.4 *The American public trust doctrine* above.

contains the philosophical ethic of public trusteeship which found its way into the South African environmental and natural resources law.¹⁶¹

With this development the legislature intended to create a constitutional and statutory responsibility for the state and national government pertaining to the use, protection and management of South African natural resources for the benefit of South African society. The use, protection and management of the resources are focused on advancing the public interest in the environment and respective resources.¹⁶²

The applicable legislation was analysed, and it was indicated that different phrases and words are used to embody the notion of stewardship in the various statutes.¹⁶³ An analysis of the statutes that incorporate the concept of public trusteeship reveals that the concept, as incorporated in South African jurisprudence, embodies the principle that certain natural resources are destined to benefit the people of South Africa.¹⁶⁴ These resources have been removed from the sphere of private property and the government must regulate access to and protect and maintain these resources in the public interest. It was noted that although the fundamental philosophy of a stewardship ethic has been incorporated in South African environmental and natural resources legislation, various forms of statutory "stewardship doctrines of public trust"¹⁶⁵ have been created. The common denominators among these doctrines are section 24 of the Constitution and section 2(4)(o) of the NEMA. Otherwise, each doctrine functions only within the ambit of the specific statute through which it was created.¹⁶⁶

The legal principles captured in the respective statutes are aimed at ensuring the sustainable and equitable use of natural resources. Section 24 of the

¹⁶¹ Paragraph 2.1.6 *The public trusteeship notion* explained above; 2.2 *The origin of public trusteeship in South African jurisprudence* above.

¹⁶² Paragraph 2.2.2 *South African constitutional and statutory law*.

¹⁶³ The NEMA, NWA & MPRDA.

¹⁶⁴ See para 2.2.2 above.

¹⁶⁵ Van der Schyff 2013 *SALJ* 370-371.

¹⁶⁶ Paragraph 2.2.3 *Identification of the different elements of a public trust regulatory model* above.

Constitution and the respective statutes acknowledge the nation's collective interest in protecting the environment and its natural resources, and the state or national government is appointed as the trustee or custodian. The environment, water and minerals are subjected to the notion of stewardship embodied either as public trusteeship or state custodianship, highlighting the fiduciary responsibility of the state government. The legal nature and consequence of the incorporation of the concept of public trusteeship differ according to the legal statutes that are used to enunciate the stewardship ethic.¹⁶⁷

The different pieces of legislation are characterised by certain common elements such as the identification of a natural resource that is used by a specific community of citizens, that is to be protected for intergenerational access, use and benefit, and that is placed under the custodial or fiduciary control of a state authority. It is thus concluded that the philosophical notion of public trusteeship has been created by statute in relation to the environment and specific natural resources.

In the next chapter the focus will be on the concept of public participation to consider how the public participates in the decision-making process of the state government to ensure that actions taken meet the people's needs.

¹⁶⁷ Paragraph 2.2.4 *A fiduciary responsibility: the essence of the notion of public trusteeship* above; para 2.2.5 *The identification of the beneficiaries* above.

Chapter 3

Public participation as a concept of participatory democracy in environmental decision-making

3.1 Introduction

In this section of the dissertation the concept of public participation is discussed with the aim of shedding some light on public participation as a concept of participatory democracy in environmental decision-making. Webler and Renn explain that public participation is synonymous with participatory democracy in countries following the Anglo-Saxon tradition.¹⁶⁸ Barton, in turn, states that public participation:

...is a subject where comparison is difficult, because the extent to which there should be public participation, and how it should occur, go straight to the heart of a nation's political values, its concept of the state and the state's relationship with its citizens, and its concept of how public business is properly carried out.¹⁶⁹

This work is premised on the assumption that public participation is rooted in democracy.¹⁷⁰ Therefore, in order to understand public participation as a concept, it is necessary to take a step back and focus on democracy as a concept. The focus will first fall on the social contract theory in an attempt to investigate the relationship between the citizens of the country and the government in a democratic system. Thereafter the concept of democracy will

¹⁶⁸ Webler and Renn "A brief primer on participation" 17.

¹⁶⁹ Barton "Underlying concepts" 77-120.

¹⁷⁰ Deegan 2002 *Common Wealth and Comparative Politics* 43 referred to the need for "people to be involved" and for democracy to be taken to the people and at 51 "The promotion of public participation in legislative was another move towards widening the country's democratic base"; Masango 2002 *Politeia* 52 argues that democracy is a people-driven process in which public participation plays an important role. Richardson and Razzaque 2006 *Environmental Law for Sustainability* 171 refer to the "liberal democratic one", "which stresses procedural rights for individuals and NGO's to be consulted" Therefore, "most liberal states have sought to create supplementary public consultation and information processes in administrative and legislative decision-making".

be defined, and subsequently public participation will be explicated, both as a general concept and as a functional concept in South Africa jurisprudence.

3.2 Democracy and the social contract theory

3.2.1 Introduction

In a democratic process, the public participates through a representative participatory process which takes into account the interests and views of those they represent when decisions are taken and policies are made.¹⁷¹ The state government is obliged to take into consider the ideas, needs, concerns and values of the public into the decision-making process because of the obligation of the government to sustain the general good and well-being of the public.¹⁷²

In this regard reference can be made to the social contract theory which proposed that people's moral and political obligations are based upon an implicit contract or agreement to form the society in which they live.¹⁷³ The theory of the social contract was proposed in various forms by proponents such as Thomas Hobbes (1712-1788),¹⁷⁴ John Locke (1632-1704)¹⁷⁵ and Jean-Jacques Rousseau (1712-1778).¹⁷⁶ What is common among these theorists is the view that the origin and legitimacy of a state are based upon a contractual agreement between the civil society of the state and its government.¹⁷⁷ The

¹⁷¹ Breakfast, Meko and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 36; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) at 142-42; Phooko 2014 *Obiter* 41; Phooko 2017 *Obiter* 519.

¹⁷² Chapter 1. Czapanskiy and Manjoo 2008 *Duke Journal of Comparative and International Law* 19, where reference is made to the administrative rulemaking that the decision-maker is required to consider comments "filed and make some response to them before the rule is finalized". Field 2005 *SALJ* 748, 757. According to Czapanskiy and Manjoo 2008 *Duke Journal of Comparative and International Law* 20 "legislators are required to listen to their view".

¹⁷³ Gough *The Social Contract* 2-3; Madumo 2014 *Administratio Publica* 139.

¹⁷⁴ Thomas Hobbes lived during the early modern period of English history. His philosophical masterpiece, "Leviathan", was published in 1651. Adams and Dyson *Fifty major political thinkers* 52-57.

¹⁷⁵ Locke's most important and influential writings are contained in his Two Treatises on Government. Adams and Dyson *Fifty major political thinkers* 64-66.

¹⁷⁶ His two most famous works, "Emile" and the "Social Contract", outraged the authorities because of their religious content. Adams and Dyson *Fifty major political thinkers* 78-81.

¹⁷⁷ Fox and Meyer *Public Administration Dictionary* 120; Madumo 2014 *Administratio Publica* 139; Heywood *Politics* 93.

implication is that the citizens as members of that the public willingly enter into a contract with their government to sustain the general well-being of the society. The idea that there is a contract between civil society and the government may be aligned with the public participation concept.

3.2.2 Social contract theory explained

The social contract theory is based upon the understanding that in the beginning man lived in a state of nature.¹⁷⁸ Hardship and oppressions were part of the human condition, and to overcome them the people entered into contracts with members of the society to protect their lives and property.¹⁷⁹ There was no government and no law to regulate the people's behaviour. In order to protect their lives and property an agreement was formed named the *pactum unionis*¹⁸⁰ and the *pactum subjectionis*.¹⁸¹ The authority or the state government came into being because of people's desire to escape from the state of nature.¹⁸² The essence of the social contract theory is that it focuses on the voluntary consent that people provide to the formation of a government.¹⁸³ Secondly, the theory suggests that there is an implicit agreement within a state in regard to the rights and responsibilities of the state (with reference to the government and its citizens).¹⁸⁴ The agreement, whether explicit or implicit, emphasizes the rights of citizens in their relationship to the government.¹⁸⁵ The political order that provides opportunities for the public to participate in government is integral to the lives

¹⁷⁸ Under the state of nature people live without government or written laws. Adams and Dyson *Fifty major political thinkers* 50-52.

¹⁷⁹ Friend 2004 <http://www.iep.utm.edu/soc-cont>.

¹⁸⁰ People sought the protection of their lives and property. In terms of this agreement a society was formed where people undertook to respect one another.

¹⁸¹ People united and agreed to obey an authority. This authority guaranteed the protection of everyone's lives. In regard to this agreement called *pactum subjectionis* the people united and pledged to obey an authority and surrender part or whole of their freedom and rights to an authority.

¹⁸² Nyamaka 2011 *St Augustine* ULJ

¹⁸³ Burke "State formation and social contract theory" 8.

¹⁸⁴ Burke "State formation and social contract theory" 8.

¹⁸⁵ Nyamaka 2011 *St Augustine* ULJ 2

of ordinary citizens.¹⁸⁶ Thomas Hobbes and John Locke are classic exponents of the social contract theory.

3.2.3 Thomas Hobbes and the social contract theory

The social contract theory was elaborated upon by Thomas Hobbes.¹⁸⁷ Hobbes argued that people willingly come together and agree to live under the rule of a government that is strong enough to keep order. According to Hobbes, prior to the social contract, people lived in a state of nature. Man's life in the state of nature was one of fear and self-sufficiency. In order to secure self-protection, man entered into a contract.¹⁸⁸ The government obtains its authority through the social contract.¹⁸⁹ Man has a natural desire for security and therefore voluntarily surrenders his rights and freedoms to a governmental authority in return for the benefits of enjoying an orderly existence.¹⁹⁰ It is therefore the duty and responsibility of the powerful authority to protect and preserve the common man's life and property.¹⁹¹ Hobbes is infamous for using the "social contract theory" method to arrive at the conclusion that people ought to submit to the authority of an absolute undivided and unlimited sovereign power.¹⁹² This led to the emergence of the institution of the ruler "or monarch who shall be the absolute head".¹⁹³ Hobbes's theory on the expansion on the social contract was that it evolved out of logical self-interest, where people freely came together and agreed to live under the rule of government that was strong to keep stability and protection. The sovereign's¹⁹⁴ power should be unlimited because the state initiated in a

¹⁸⁶ Nyamaka 2011 *St Augustine* ULJ 3; Wambali *Democracy and Human Rights* 3.

¹⁸⁷ Thomas Hobbes' theory of social contract appeared first in the "Leviathan", published in the year 1651, during the civil war in Britain. Adams and Dyson *Fifty major political thinkers* 52-57.

¹⁸⁸ Hobbes, Locke and Rousseau date unknown www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau.

¹⁸⁹ Nyamaka 2011 *St Augustine* ULJ p5

¹⁹⁰ The natural transferring of a right called Hobbes a contract.

¹⁹¹ Nyamaka 2011 *St Augustine* ULJ p5 This lead to the institution of the "ruler" or "monarch". Hobbes was a supporter of absolutism.

¹⁹² Stanford Encyclopaedia of Philosophy date unknown <https://plato.stanford.edu/entries/hobbes-moral/>.

¹⁹³ Hobbes was the supporter of absolutism.

¹⁹⁴ Nyamaka 2011 *St Augustine* ULJ 4,5

alleged social contract whereby individuals accepted a common higher power for protection.¹⁹⁵

3.2.4 John Locke and the social contract theory

John Locke developed the theory further by focusing on the natural rights of all people and the purpose of government to protect these natural rights. Locke's point of departure, which is known as the *First Treatise*, was that no one is by nature or by divine law subjected to anyone else. Locke's formulation of this idea is that "all men are born equal; each individual is, as it were, the sovereign ruler of his own person".¹⁹⁶ All men are created equal with natural rights. The purpose of government is to protect these natural rights.¹⁹⁷ It follows that no one can become subjected to anyone else, or to any legal ruling except his own consent.¹⁹⁸ From a state of nature, men moved to a state of society in terms of a contract in which men undertook to respect one another (the *pactum unionis*) and to obey the government (the *pactum subjectionis*).¹⁹⁹

Like his predecessors, he found the source of the authority of government in the consent of the governed (the people). Locke reserved the right of revolution to the governed.²⁰⁰ Locke argued that sovereignty resides in the people for whom governments are trustees. In terms of such a sovereign relationship, a government may be legitimately overthrown if it fails to discharge its responsibility to the people.²⁰¹ Further, Locke stated that the

¹⁹⁵ Nyamaka 2011 *St Augustine* ULJ 5

¹⁹⁶ Adams and Dyson *Fifty major political thinkers* 63.

¹⁹⁷ Adams and Dyson *Fifty major political thinkers* 63 with reference to the *Second Treatise* Chapter 4. "The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what the legislative shall enact, according to the trust put in it."

¹⁹⁸ Adams and Dyson *Fifty major political thinkers* 63 with reference to the *Second Treatise* chapter 4.

¹⁹⁹ Hobbes, Locke and Rousseau date unknown www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau; Nyamaka 2011 *St Augustine* ULJ p6

²⁰⁰ Nyamaka 2011 *St Augustine* ULJ 6.

²⁰¹ Nyamaka 2011 *St Augustine* ULJ 6.

principal rights²⁰² rest with the people. Locke's social contract theory deals with sovereignty and the law, and posits that sovereignty is derived from the people's will.²⁰³ Power under the social contract was submitted to the community and not to the sovereign. Locke's ideas led to the notion of government of the people, by the people and for the people.²⁰⁴ He argued that the state of nature has been superseded by a social state in which people undertake to respect one another and live in peace.²⁰⁵ Further, people undertake to submit a government they have chosen.²⁰⁶ The source of governmental authority is the consent of the governed (the people) and the legitimacy of the government should stay in the will of the people.

3.2.5 Jean-Jacques Rousseau and the social contract theory

Jean-Jacques Rousseau reinterpreted these ideas of Hobbes and Locke in his work *The Social Contract*.²⁰⁷ According to Rousseau, a new form of social organisation, the state, was formed through the social contract to assure and guarantee the rights, liberties, freedom and equality of the people.²⁰⁸ Rousseau positioned sovereignty in the general will of the people, which he believed to be the best guarantor of the freedom and liberty of the individual.²⁰⁹ Rousseau had two separate social contract theories. Rousseau

²⁰² The *pactum unionis* and *pactum subjectionis* therefore all the rights are not taken by sovereign. Nyamaka 2011 *St Augustine* ULJ 6

²⁰³ Nyamaka 2011 *St Augustine* ULJ p5; "John Locke" Microsoft (R) student 2007 (DVD).

²⁰⁴ Nyamaka 2011 *St Augustine* ULJ p5&6 explained that community rights should prevail over individual rights because the sovereign is the people and only comes from the people.

²⁰⁵ Adams and Dyson *Fifty major political thinkers* 63. Locke uses of the idea of a state of nature as an explanation upon which to build his political theory. It is Locke's attempt to infer the proper structure of government.

²⁰⁶ Nyamaka 2011 *St Augustine* ULJ p4&5 Locke's theory of social contract is different from that of Hobbes in that Locke's view of state of nature is less vicious than that of Hobbes, and even reasonably enjoyable. Locke holds that the law of nature confers upon mankind natural rights of life, liberty and property. Adams and Dyson *Fifty major political thinkers* 63.

²⁰⁷ Adams and Dyson *Fifty major political thinkers* 78, 79. "The Social Contract" (1762) and "Emile" were Rousseau's most famous works because of the religious content. "Emile" signified Rousseau's educational ideas.

²⁰⁸ Social Contract Theory. Internet Encyclopaedia of Philosophy date unknown <https://www.iep.utm.edu/soc-cont/>.

²⁰⁹ Laskar 2013 *SSRN Electronic Journal* 6.

develops the first of his theories in his essay *Discourse on the Origin and Foundations of Inequality among Men*, which is also referred to as the *Second Discourse*. This essay describes the moral and political evolution of human beings over time from a state of nature to modern society.²¹⁰

Rousseau's second social contract theory is the normative or idealized theory of how to eradicate the problems created by modern society, as per the *Second Discourse*,²¹¹ the purpose of which is to remedy the social and moral damage produced by the development of society.²¹² Chapter 1 of the book of 1762, *The Social Contract*, opens with the words "Man is born free, and everywhere he is in chains",²¹³ thus describing the domination in society imposed upon natural man. The argument is that it is not possible for people to return to the freedom of the state of nature, but it is possible to exchange freedom for the freedom of the citizen.²¹⁴ This can happen through an act of association, creating a social entity, giving up one's rights and becoming subjects, and receiving rights as citizens and members of the sovereign state.²¹⁵ The outcome of this is that people can live in freedom if they live according to the rules they themselves make, and people must be citizens of a state where they make their own laws – in other words, in a democracy.²¹⁶ But this should not involve choosing somebody to make laws on one's behalf as in a representative democracy, which is not a democracy at all.²¹⁷ According to Rousseau, one

²¹⁰ Friend 2004 <http://www.iep.utm.edu/soc/8>; Rousseau, Dunn and May *The social contract* 167.

²¹¹ Friend 2004 [http://www.iep.utm.edu/soc/8, 9](http://www.iep.utm.edu/soc/8,9); Rousseau, Dunn and May *The social contract* 156.

²¹² Friend 2004 <http://www.iep.utm.edu/soc/9>; Rousseau, Dunn and May *The social contract* 268.

²¹³ Adams and Dyson *Fifty major political thinkers* 79.

²¹⁴ Adams and Dyson *Fifty major political thinkers* 79-80.

²¹⁵ Adams and Dyson *Fifty major political thinkers* 79-80. This is the "social contract", but the way in which the sovereign state describes itself through laws and government is left to a separate constitution-making process. Each person is both a subject and a participating citizen, freedom is available for each citizen. Accordingly, people can live in freedom according to rules they have made themselves.

²¹⁶ Adams and Dyson *Fifty major political thinkers* 80; Rousseau, Dunn and May *The social contract* 200-201.

²¹⁷ Adams and Dyson *Fifty major political thinkers* 80.

person cannot represent the will of another.²¹⁸ Rousseau's concept of a democracy is a direct democracy where the whole citizen body comes together in a public place and makes the laws.²¹⁹

From the exposition above it can be concluded that Hobbes' theory of the social contract favours absolute sovereignty rather than ascribing any particular political authority to the generality of the people, while Locke and Rousseau identify the people in the first instance as the source of the authority of the state or the government. Hobbes, regards the sovereign and the government are identical. Rousseau makes a distinction between the sovereign and the government. Hobbes favours a representative form of government rather than the direct government of the people; Locke does not make any such distinction. Rousseau's view of sovereignty is a compromise between the constitutionalism of Locke and the absolutism of Hobbes. He identifies direct democracy as the best instrument to sustain the general good and well-being.²²⁰

The social contract theory visualises political power as emanating from the people. Locke's idea therefore paved the way for a democratic government, a government of the people, by the people and for the people.²²¹ The modern version of the social contract is based upon the adherence of a democratic government to the principles, founded in the social contract theory, that give rise to the practice of holding periodic free and fair elections. Modern academic writers in the discipline of public management and administration identify the social contract theory as the source of government based upon a contractual agreement between civil society and the state.²²²

²¹⁸ Adams and Dyson *Fifty major political thinkers* 80. This represents a strong form of democracy; Friend 2004 <http://www.iep.utm.edu/soc> 10.

²¹⁹ Adams and Dyson *Fifty major political thinkers* 80; Rousseau's model would apply to the city states of Ancient Greece.

²²⁰ Adams and Dyson *Fifty major political thinkers* 75.

²²¹ See chap 3.1 Introduction.

²²² Fox and Meyer *Public Administration Dictionary* 120; Heywood *Politics* 93.

3.2.6 The constitution of a country as a social contract

A constitution of a country is an important legal document of that country.²²³ All in all, a constitution is a political document reflecting the nationally agreed consensus on the modalities of the law on which the state is going to be ruled and within what limitations.²²⁴ It is a collection of fundamental basic principles that govern a country and all other legal rules originate their authority from it.²²⁵ All the laws, by-laws, rules and regulations find their legality from the constitution.²²⁶ The principle of constitutionalism is the essence that the power of the state should be defined and limited by the law to protect the interests of society. As the constitution of a country is a document that indicates the social contract²²⁷ between the government and society,²²⁸ it must be voluntarily based upon the common good and well-being of the country's people.²²⁹ Thus the social contract theory of John Locke was a sign of the democratic theory, namely the government of the people, by the people and for the people.²³⁰

²²³ See Peter "Constitutional making process in Tanzania" 3 for a history on the constitutional order of South Africa. See also Currie and De Waal *The Bill of Rights Handbook* 1-6.

²²⁴ Nyamaka 2011 *St Augustine ULJ* 7 p6&7.

²²⁵ The basic principles which underlie the constitutional order of the South African Constitution constitutionalism, rule of rule, democracy and accountability. Currie and De Waal *The Bill of Rights Handbook* 7-13.

²²⁶ Currie and De Waal *The Bill of Rights Handbook* 7-8 "The Constitution in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislatures and interpreted by the courts and the way the courts develop the common law."

²²⁷ Peter "Constitutional making process in Tanzania" 3 refers to the "social contract. It is the contract between the rulers and the ruled". "It embodies the wishes and aspirations of the country".

²²⁸ Peter and Juma *Fundamental Rights and Freedoms* 7.

²²⁹ See the history of the long negotiation process in Currie and De Waal *The Bill of Rights Handbook* 4-7; Peter "Constitutional making process in Tanzania" 3.

²³⁰ There is no definition of democracy in the constitution. There is also no list of the requirements the principle imposes. Currie and De Waal *The Bill of Rights Handbook* 14. Democracy is not simply "the rule of the people but always the rule of the people within certain predetermined channels according to pre-arranged procedures". Preamble of the constitution, in so far as there is an agreement between the governor and the governed based upon the will of the people. The constitution recognises three forms of democracy, namely representative, participatory and direct democracy. Currie and De Waal *The Bill of Rights Handbook* 15. The democratic government as contemplated by the constitution requires provision for public participation in the law-making processes. *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 111; Maphazi *A critical analysis of the role of public participation* 65 "the new South African government regards public participation as the cornerstone of democracy of democracy...".

3.3 Defining democracy

Different definitions give meaning to the concept 'democracy'.²³¹ Democracy has been described as a system where the government grants all adult citizens an equal say in the decisions that affect their lives.²³² The ordinary dictionary meaning of democracy is "a system of government in which the citizens exercise power directly or elect representatives to form a governing body".²³³ According to scholars of the school of public administration, democracy is defined as a system of governance where the citizens participate actively in politics and civic life and have an equal say in governmental decisions.²³⁴ In a democracy the involvement of adult citizens in politics and civic life is a crucial element to constitute public participation.²³⁵ Breakfast, Mekoa and Maphazi²³⁶ hold the opinion that democracy means different things to different people and is essentially a consisted phraseology.²³⁷ Democracy as a form of government

²³¹ The term comes from the Greek word *demokratia* which means the "rule of the people". Brynard "Realities of citizen participation" 53 adopts the definition of democracy by Ranney, as it emphasises the importance of public participation in government activities. Ranney (as cited in Brynard "Realities of citizen participation" 53) defines democracy as "a form of government organised in accordance with the principles of popular sovereignty, political equality, popular consultation and majority rule".

²³² Breakfast and Mekoa *The practise of democracy* 1; Mekoa 2016 *Politeia* 1-2 defines democracy as a form of government in which adult citizens have an equal say in the decisions that affect their lives. According to African scholars, Africans have their own democracy, referred to as African consensus. The foundation is an *imbizo*-agreement which can only be reached by consensus.

²³³ Simpson and Weiner *Oxford English Dictionary*. Democracy is also referred to as "rule of the majority" by Webster 2011 <http://www.meriam-webster.com/dictionary/democracy>.

²³⁴ Tshishonga and Mlambo 2008 *Journal of Public Administration* 768 understood democracy as equal rights and majority rule. Breakfast and Mekoa *The practice of democracy* 1; Mekoa 2016 *Politeia* 1-2 defines democracy as a form of government in which adult citizens have an equal say in the decisions that affect their lives. According to African scholars, Africans have their own democracy referred to as African consensus. The foundation is an *imbizo*-agreement which can only be reached by consensus. While no universally accepted definition of "democracy" exists, equality and freedom have been identified as important characteristics. Mekoa 2016 *Politeia* 2.

²³⁵ Creighton *The Public Participation Handbook* 7. The elected officials make the important decisions and then hold the bureaucracies accountable for the implementation of the decisions.

²³⁶ 2015 *Africa's Public Service Delivery and Performance Review* 47.

²³⁷ Breakfast *An investigation into political apathy amongst students* 9.

presupposes an equal say by all the citizens in the decision-making processes that affect their lives.²³⁸

Booyesen referred to public participation when explaining theoretical and conceptual orientation of public participation.²³⁹ Booyesen concluded that public participation and democracy are intricately linked in a participatory orientation.²⁴⁰ Offer defines democracy as "a system of government in which every individual participates in the process of government maximally or minimally".²⁴¹ Closely related to this, Young cautioned that "only in a democratic political system do all members of a society in principle have the opportunity to try to influence public policy".²⁴² In all these definitions, the public participation concept is a common denominator and the voice of the citizens carries the weight and strength of their influence.²⁴³ In the process to determine the real meaning of the concept democracy and the role played by the public it is necessary to look into the theoretical framework that underpins the concept of democracy and the conceptual framework of democracy.

3.3.1 Procedural and substantive democracy as facets of a democracy

The theoretical conceptual framework that underpins the concept of democracy is rooted in the procedural and substantive parts of democracy.²⁴⁴ Procedural democracy embodies the institutional arrangements of a

²³⁸ Mekoa 2016 *Politeia* 2.

²³⁹ Booyesen 2009 *Politeia* 3.

²⁴⁰ Booyesen 2009 *Politeia* 3; Maphazi *A critical analysis of the role of public participation* 69. Public participations are "inextricably linked to democracy" and in particular participatory democracy. Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 39. In this context reference is made to the two-way exchange of information between the people/communities and the legitimate government of the day.

²⁴¹ Offer 2006 *The Journal of Social, Political, and Economic Studies* 265-277.

²⁴² Young *Inclusion and democracy* 17.

²⁴³ Four requirements are identified for a democracy effective participation in policy making process voting equality for all citizen's transparency and accountability. Dahl *Democracy and its critics* 37-38. Procedural democracy means a government by the people" Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 34.

²⁴⁴ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 32.

democracy.²⁴⁵ In a procedural democracy greater emphasis is placed on elections, the executive authority and the legislative authority.²⁴⁶ Elements of “effective citizen control over government policies, good governance, honesty, transparency and openness in politics, informed and robust debates” and maximum participation characterize the effectiveness of the procedural democracy.²⁴⁷ These characteristics emphasize the role that the public needs to play in a true democracy.²⁴⁸ Therefore it means that all citizens are eligible to choose a government of their choice.²⁴⁹ The right is exercised through legislative bodies such as the parliament which has representatives from various parties.²⁵⁰ In the case of South Africa, the constitutional democracy is both representative and participatory in nature.²⁵¹ The electorate elects their representatives to act and decide on their behalf.²⁵² In the participatory process the electorate voices their inputs regarding the proposed law or policy as opposed to or supportive of the legislation.²⁵³

The other facet of democracy is based in the substantive nature of democracy.²⁵⁴ In a substantive democracy the focus is on the socio-economic

²⁴⁵ Such as the holding of elections, public participation, the rule of law and the supremacy of the Constitution. Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 32.

²⁴⁶ Mangu 2005 *Politeia* 318-320; Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 33.

²⁴⁷ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 33; Dahl *Democracy and its critics* 45. According to the procedural school of thought means a government by the people, also with reference to The Freedom Charter's. "The people shall govern". The Freedom Charter was adopted at the Congress of the People at Kliptown 1955.

²⁴⁸ Based upon the Freedom Charter's "The people shall govern".

²⁴⁹ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 34.

²⁵⁰ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 34. SA is a good example of a representative democracy. A representative democracy is designed to represent the various constitutions at decision and policies stages.

²⁵¹ Nyati 2008 *Law Democracy and Development* 102.

²⁵² Phooko 2017 *Obiter* 519.

²⁵³ Phooko 2017 *Obiter* 519. In this participatory process the constituency submits ideas about what the proposed law should contain and how a particular issue should be regulated. Phooko 2014 *Obiter* 35.

²⁵⁴ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 35.

conditions of the people, it pertains to social-economic changes²⁵⁵ and is more socialist²⁵⁶ orientated in nature. Substantive democracy is an method to eliminate poor socio-economic conditions and promote equity.²⁵⁷ Both these facets are forms of a conceptual framework of democracy.²⁵⁸ Both procedural and substantive democracy concern the participation of the public in decision-making to influence the outcome of the decisions for the benefit of the public.²⁵⁹ The procedural form of a democracy has both a representative and participatory side.

3.3.2 The representative and participatory nature of South African democracy in the constitutional state

The representative element of democracy in South Africa is implicit in the notion that citizens will delegate law-making power to elected representatives by the participation in periodic elections.²⁶⁰ Representative democracy is exercised through those who are democratically elected by the people and through regular elections.²⁶¹ The people elect their representatives to act on their behalf.²⁶² The representative concept includes participating in the

²⁵⁵ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 35. Substantive democracy is supported by the White Paper of 1998 and according to the White Paper on local government 1998:12. The idea of development local governments to work in close relationship with the citizens to promote development.

²⁵⁶ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 35; Mango 2005: 319 referred to a substantive democracy "as a maximalist school of thought within the scholarship of Political Science and Public Administration". The White Paper on local government 1998:12 support the idea of substantive democracy.

²⁵⁷ Kotze 2004 *PELJ* 30-32.

²⁵⁸ Breakfast, Mekoa and Maphazi 2015 *Africa's Public Service Delivery and Performance Review* 33.

²⁵⁹ According to Clapper "Positioning citizen participation" 52 creates a platform for communities to participate directly in decision-making and other governmental activities.

²⁶⁰ Sections 1(a) & (d) of the Constitution; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 110-111, 115.

²⁶¹ The representative nature includes participation through elected representatives and is exercised through regular elections. Currie and De Waal *The Bill of Rights Handbook* 14; Nyati 2008 *Law Democracy and Development* 12. The people elect their representatives to act on their behalf.

²⁶² Phooko 2014 *Obiter* 40.

decision-making processes.²⁶³ This refers to individuals making submissions at public hearings on draft laws.²⁶⁴

Participatory democracy entails the making of representations in the law-making process from the onset and taking part in the law-making processes.²⁶⁵ Participatory democracy is characterised by the electorate voicing their inputs on the proposed law on policy²⁶⁶ through individuals making submissions at public hearings on draft laws.²⁶⁷ The constituency submits what the proposed law should obtain and how a particular issue should be regulated.²⁶⁸

Participatory democracy allows for maximum and active public involvement in all aspects of public decision-making.²⁶⁹ According to Roux, this model is "essentially about the question whether, and if so, how citizens should be given the right to participate in the making of decisions that affect them".²⁷⁰ We now turn to the concept of public participation.

²⁶³ Quinot 2009 *SAJHR* 397.

²⁶⁴ Phooko 2014 *Obiter* 40, 55; Hobley 2012 *The Guardian* 109.

²⁶⁵ Nyati 2008 *Law Democracy and Development* 102, Phooko 2014 *Obiter* 40; Phooko 2017 *Obiter* 519.

²⁶⁶ The electorate can partially support or apposed the proposed legislation, Phooko 2017 *Obiter* 519.

²⁶⁷ Phooko 2014 *Obiter* 40.

²⁶⁸ Phooko 2017 *Obiter* 519; Phooko 2014 *Obiter* 35. Complementary to, the participatory element is implicit in the notion that a democratic government is one "based on the will of the people", where elected representatives must exercise power in an accountable, responsive and open manner, by facilitating public involvement in their governing processes. Preamble to the Constitution and s 1(a); *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 110-111, 115.

²⁶⁹ Quinot 2009 *SAJHR* 397; Roux "Democracy" 4, describes this model of democracy as "essentially about the question whether...citizens should be given the right to participate in the decisions that affect them..., notwithstanding the fact that the basic form of political organisation in the modern notion state is and is likely to remain representative democracy"; Du Plessis 2008 *PELJ* 6 refers to representative democracy that is in itself a form of public participation. Du Plessis also refers to direct participation supplementary to representative democracy.

²⁷⁰ Roux "Democracy" 10. The Constitution provides for this type of democracy in provisions calling for public participation. Sections 57, 59, 70, 72, 74, 116, 118 and 160. The representative element is implicit in the preamble to the Constitution and s 1 of the constitution which sets out the founding provisions of the Constitution. *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 110-111; *Matatiele Municipality v President of the RSA (2)* 2007 6 SA 477 (CC) para 65.

3.4 Explicating public participation

3.4.1 Introduction

In South Africa, public participation is regarded as a relatively new phenomenon.²⁷¹ Prior to 1994, African, Coloured and Indian groups were excluded from the decision-making process through statutory instruments such as the *Group Areas Act*²⁷² and the *Population Registration Act*.²⁷³ Apartheid policies deprived South Africa of a history of public participation.²⁷⁴ In post-apartheid South Africa, public participation is not a privilege but a constitutional right.²⁷⁵ The Constitution placed an obligation on the government to create public participation structures and systems. Hence various legislative environmental and natural resources legislation followed, making provision for the participation of the public.²⁷⁶ In this process public

²⁷¹ Maphazi *A critical analysis of the role of public participation* 65. In the new democratic dispensation public participation is regarded as a cornerstone of democracy. Public participation creating a platform for communities to directly participate in decision-making and other governmental activities: Clapper "Positioning citizen participation" 52; Masango 2002 *Politeia* 52 aver that apartheid policies caused SA to be deprived of public participation in the making and implementation of policy.

²⁷² Davids *Voices from below* 18; Act 41 of 1950. According to this act, urban areas were to be divided into racially segregated zones "where members of one specific race alone could live and work" Group areas were created "for the exclusive ownership and occupation of a designated group".

²⁷³ Davids *Voices from below* 18; Act 30 of 1950.

²⁷⁴ Masango 2002 *Politeia* 52.

²⁷⁵ Chapter 1 of the Constitution.

²⁷⁶ Section "59(1)(a) The National Assembly must (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees.

Section 72(1)(a) The National Council of Provinces must:

a) facilitate public involvement in the legislative and other processes of the Council and its committees.

Section 118(1)(a) A provincial legislative must:

a) facilitate public involvement in the legislative and other processes of the legislative and its committees".

Sections 195(e) and (g) state that one of the basic values and principles governing public administration is the encouragement of the public to participate in policy making.

Sections 2(4)(f) and 2(4)(g) of NEMA and the NEMA principles. Du Plessis 2008 *PELJ* 14 argues that s 24(b) arguably implies a need for public participation in environmental decision-making of all levels.

Section 152(1)(e) one of the objectives of local government is to promote the participation of communities and community organisations in local government.

The White Paper on Integrated Pollution and Waste Management of South Africa of 2000 provides that public participation will be expanded.

The Draft National Policy framework outlines a number of public participation principles.

participation creates a direct relation between the public and the various spheres of government to view their ideas and values.²⁷⁷

3.4.2 Definition of public participation

There is no generally acceptable definition of public participation. It is a "concept that means different things to different people".²⁷⁸ Public participation as rooted in a democratic²⁷⁹ South Africa can be regarded as an essential element of all aspects of decision-making.

Different authors have different viewpoints of the concept of public participation and a single common definition is essential to create an understanding. First is it necessary to look into the ordinary meaning of public participation and thereafter a general overview of the description of the concept by academic writers in the school of public administration will be provided. The description as provided by environmental and natural resources law writers will be compared to find some common characteristics in an attempt to contextualize the role of public participation in the decision-making processes of government.

The ordinary meaning of public participation:

...is the process by which an organization consults with interested or affected individuals, organizations, and government entities before making a decision? Public participation is two-way communication and collaborative problem solving with the goal of achieving better and more acceptable decisions.²⁸⁰

Section 2(b)(ii) of the *Local Government Municipal Systems Act*: the council of a municipality has the duty to encourage the involvement of the local community. Section 72 of the *Local Government Municipal Structures Act* also makes provision for the inclusion of the public to participate.

²⁷⁷ *Escarpment of Water Affairs* 2015 ZAGPPHC 508 para 48, the court recognised the importance of public participation in environment decision-making.

²⁷⁸ Madumo 2014 *Administratio Publica* 132.

²⁷⁹ Armeni 2016 *Journal of Environmental Law* 416 referred to "participatory models, the nature of the engagement is presented as a deliberate, consensus-based public dialogue aimed at reaching better quality decisions through the transformation of individual rationalities".

²⁸⁰ Anon 2008 https://depts.washington.edu/ccph/pdf_files/2-Definitions_of_CE_and_PP.pdf.

Public participation is also recorded as a "two-way communication and collaborative problem-solving, with the goal of achieving better and more acceptable decisions".²⁸¹

Various academic writers in the school of public administration have defined the same concept in an attempt to give expression to the most accurate description of the concept. Clapper provides a distinction in an attempt to differentiate between citizen participation and public participation. Clapper contends that public participation is "the effects of all the people included in the public to influence government activities" whereas citizen participation is referred to as "purposeful activities in which people take part in relation to political units of which they are legal residents".²⁸² In addition, the definition provided by Brynard indicates "public participation as a process undertaken by one or more individuals who were previously not included in the decision-making process concurrently with other individuals who were previously the only advocates in that process".²⁸³ According to Kotze,²⁸⁴ "the concept of people's or public participation lies at the core of the people-centred development approach and may refer to the following aspects: involvement; communication; a new attitude from government." Meyer and Theron attempt to define public participation as the following:

With regard to development ... participation includes people's involvement in decision-making processes, in implementing programmes, their sharing in the benefits of development programmes and their involvement in effects to evaluate such programmes.²⁸⁵

Arnstein defined citizen participation as a categorical term for citizen power, where the spreading of power is improved to include the underdeveloped²⁸⁶ in a process to obtain their active participation. This description states that public

²⁸¹ Maphazi *A critical analysis of the role of public participation* 67.

²⁸² Clapper "Positioning citizen participation" 13-14. In "both the definitions participation is regarded as an activity, even though the definition of citizen participation acknowledges an important component of legal residency, and its obligations thereof".

²⁸³ Bekker *Citizen participation in local government* 41 "Realities of citizen participation". Realities of citizen. This view affirmed participation.

²⁸⁴ Kotze 2004 *PELJ* 37.

²⁸⁵ Meyer and Theron *Workbook* 1.

²⁸⁶ Arnstein "A ladder at citizen participation" 246.

participation exists is founded in different types and categories within which power is centred.²⁸⁷

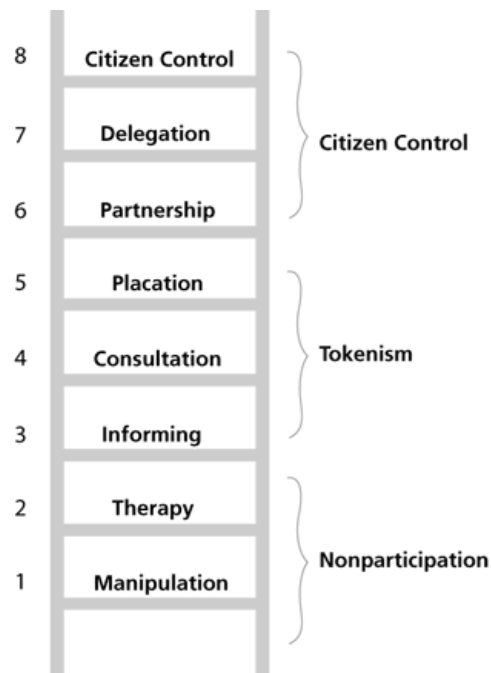


Figure 3.1: Arnstein's ladder of participation²⁸⁸

Creighton's more systematic description of public participation describes public participation as including the people's concerns, needs and values and integrating these in the governmental decision-making process.²⁸⁹ Creighton summarises the difficulty in providing the essence of public participation by noting that there are numerous definitions, but most include the following elements:²⁹⁰

- Public participation applies to administrative decisions.
- Public participation is not just providing information to the public - interaction is an important component.

²⁸⁷ Arnstein "A ladder at citizen participation" 247. The writer defines public participation with reference to the categories of participation through the usage of the eight rungs on the ladder of participation. The extent to which citizens could be empowered to total control in the participation processes are divided into non-participation, tokenism and citizen power. Arnstein 1969 *Journal of the American Planning Association* 217.

²⁸⁸ Arnstein's Ladder (1969) Degrees of Citizen Participation

²⁸⁹ Creighton *The Public Participation Handbook* 7 "Public participation is the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making."

²⁹⁰ Creighton *The Public Participation Handbook* 7.

- There is an organised process for involving the public.
- Participants have some level of impact or influence on the decision being made.

Creighton²⁹¹ notes that the word 'participation' has many different meanings and is best understood and illustrated as a continuum in an active context:

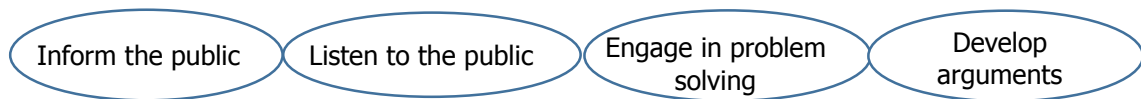


Figure 3.2: Continuum of participation²⁹²

The definition by Pearce²⁹³ refers to two types of public participation, namely "direct citizen participation" and "participation through associations". Direct citizen participation refers to an action where citizens in their individual capacity as members of the society participate in decision-making processes. Participation through associations refers to a representative participation where a citizen is elected or appointed to represent the opinions and needs of those who elected or appointed them in decision-making processes.

Turning to the environmental context, Pring and Noé define public participation as an all-encompassing label used to describe "various mechanisms that individuals or groups may use to communicate their views on a public issue".²⁹⁴ According to White, "public participation is used to build and facilitate capacity and self-reliance among the people. Public participation is an involvement of citizens in initiatives that affect their lives". In another attempt White defines public participation as "an active involvement of the local population in decision-making" in regard to implementation of developments.²⁹⁵ The definition is maintained by the *United Nations Department of Economic and Social Affairs (UNDESA)*, which further emphasises that in public participation,

²⁹¹ Creighton *The Public Participation Handbook* 9.

²⁹² Creighton *The Public Participation Handbook* 9.

²⁹³ Pearce *Participation and democracy* 232.

²⁹⁴ Pring and Noé "The emerging international law of public participation" 15.

²⁹⁵ White "Community participation in water and sanitation" 171-180.

people are offered an opportunity to advance their circumstances of living taking into consideration with as much dependence as possible on their own initiative.²⁹⁶

The word 'public' also needs some clarification. Thomas²⁹⁷ explained the word 'public' in public participation to "include individual citizens, community groups and interest groups." According to Masango,²⁹⁸ members of the public can be defined as "individuals, members of groups, or groups representatives". Creighton²⁹⁹ regarded public to be:

... different from issue to issue. Public participation programs are always involving a subset of the public. The reality is that people participate when they perceive themselves to have significant stake in the decision being made.

Public participation should therefore involve the participation of members of the public who are involved and interested in the issue at stake. As Craythorne³⁰⁰ aptly puts it:

... the secret of public participation is to ensure that the relevant 'publics' are approached on any particular issue.

For the purpose of the study, the focus will be on the continuum of activity displayed by the public in governmental decision-making processes in the legislative, administrative and policy-making spheres. For this reason, it is proposed that public participation concerns the participation by the public in governmental decision-making processes to influence government in regard to people's concerns, needs and values. Therefore, public participation is more than a matter of decision-making. Public participation establish a foundation for decision-making and the process of decision making continues beyond the phases of implementation, monitoring and evaluation.³⁰¹

²⁹⁶ Siphuma *An assessment of the role of public participation in IDP* 21.

²⁹⁷ Thomas *Public participation in public decisions* 1.

²⁹⁸ Masango 2002 *Politeia* 53.

²⁹⁹ Creighton *The Public Participation Handbook* 22-23.

³⁰⁰ Craythorne *Municipal administration* 99.

³⁰¹ Maphazi *A critical analysis of the role of public participation* 69; Bekker *Citizen participation in local government* 41; Phooko 2017 *Obiter* 538.

3.5 Explicating public participation in the South African constitutional dispensation

3.5.1 Introduction

The 1994 elections ushered a new democratic dispensation into the South African government with the victory the African National Congress (hereafter ANC) achieved at the polls. It became possible to realise the vision articulated in 1955, namely that the people shall govern.³⁰² In the preamble of the Constitution it is proclaimed that the people of South Africa:

...recognise the injustices of the past, honour those who have worked to build and develop our country, respect those who suffered for injustices and freedom in our land, believe that South Africa belongs to all who live in it, united in diversity.

3.5.2 The duty of the national and provincial legislatures to facilitate public participation

The South African Constitution is based upon a democratic society that is participatory and representative in its nature. The Constitution provides particularly for this type of democracy in the provisions providing for public participation in legislative processes³⁰³ and procedural fairness in

³⁰² In June 1955, all the leaders of movements in their struggle to end apartheid met in Kliptown. The meeting was called the Congress of the People. The meeting agreed to adopt a list of rights called the Freedom Charter. A new era of participatory democracy in which the people shall govern evolved. Mandela *The Long Walk to Freedom* 204 - "Every man and woman shall have the right to vote and stand as a candidate for all bodies which make laws".

³⁰³ Sections 57, 59, 70, 72, 74, 116, 118 and 160. These provisions place a positive obligation on the national and provincial legislative bodies to take steps to facilitate participation by members of the public in the law-making and other processes preamble to the Constitution; Ss 559(1), 572(1), 5118(1), 542(3) and (4) of the Constitution; S 59(1) requires the NA to "(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees"; S 72(1) requires the NCOP to "(a) facilitate public involvement in the legislative and other processes of the council and its committees"; S 118 (1)(a) requires a provincial legislature to "(a) facilitate public involvement in the legislative and other processes of the legislature and its committees". People elect their representative to act on their behalf and include the participating inter alia in the law-making processes. *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 48; Quinot 2009 *SAJHR* 392; Phooko 2014 *Obiter* 40.

administrative action.³⁰⁴ The Constitution makes provision for the duties on the National Assembly (hereafter NA), the National Council of Provinces (hereafter NCOP) and provincial legislatures to facilitate public participation in the law-making process.³⁰⁵

The constitutional imperative to facilitate public participation in the law-making process will be discussed with reference to selected cases to evaluate the actions of the legislature in facilitating public participation and the role of public participation. The selected cases have been chosen to indicate the court's³⁰⁶ progression from emphasising participatory democracy to its more recent emphasis on representative democracy.³⁰⁷

3.5.3 Doctors for Life International v Speaker of the National Assembly

The nature and content of the duty to facilitate public participation was first outlined in *Doctors for Life International v Speaker of the National Assembly*.³⁰⁸ In this case is based upon the applicant allegation that during the legislative process in the promulgation of four statutes,³⁰⁹ NCOP and the provincial legislatures did not comply with their constitutional obligation to facilitate public participation.³¹⁰

The court stated that the duty to facilitate public participation had to be understood based upon:

³⁰⁴ The right of fair administrative action includes the fundamental right to be heard before action is taken; also referred to as an *alteram partem*. See the principle in Hoexter *Administrative Law* 325 and further.

³⁰⁵ These duties are outlined in ss 59(1)(a), 72(1)(a) and 118(1)(a).

³⁰⁶ High Court, Supreme Court of Appeal.

³⁰⁷ The representative democracy requires the public to participate through the representative bodies. 2014 *Obiter* 41. According to Phooko this is merely a form of procedural obligation.

³⁰⁸ 2006 12 BCLR 1399 (CC) 1408-1409.

³⁰⁹ The *Choice on Termination of Pregnancy Amendment Act* 38 of 2004, the *Sterilisation Amendment Act* 3 of 2005, the *Traditional Health Practitioners Act* 35 of 2004 and *Dental Technicians Amendment Act* 24 of 2004.

³¹⁰ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1408E-F, 1409B. The applicant contented that the NCOP and the various provincial organs of state were required to invite written comments and hold public hearings on these statutes before passing them.

- (a) the constitutional role of the NCOP in the national legislative process and in particular, its relationship to the provincial legislatures;
- (b) the right to political participation under international and foreign law; and
- (c) the nature of our constitutional democracy.³¹¹

The court further specified that the Constitution anticipates both a representative and a participatory democracy which is transparent, responsive and accountable. It provides the public the opportunity to participate in the law-making process.³¹² The court also held that it was important for the legislature to provide methods to give the public a reasonable opportunity to participate efficiently in the law-making process.³¹³ The court further defined the duty to facilitate public involvement in terms of two legs.³¹⁴ The first was to provide for:

... meaningful opportunities for public participation in the law-making process and the second was the duty to take measures to ensure that people had the ability to take advantage of the opportunities provided.³¹⁵

The judgment demonstrates the intention of the Constitutional Court (hereafter CC) to apply the democratic principles in the Constitution to endorse participatory democracy.³¹⁶ The court stated that the basic dictionary

³¹¹ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1428J.

³¹² *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1443E-F, the two elements viz. the representative and participatory should be balanced. "Section 72(1)(a), like section 59(1)(a) addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and presupposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution."

³¹³ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1445B.

³¹⁴ Reference by Phooko 2014 *Obiter* 44.

³¹⁵ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1447F- 1456E-G. Meaningful participation means when the public was given time to participate before decisions by the legislature were made and not when they were about to be made. "The requirement that participation had to be facilitated where it was most meaningful had both symbolic and practical objectives: the persons concerned had to be manifestly shown the respect due to them as concerned citizens and the legislators had to have the benefit of all inputs that would enable them to produce the best possible laws".

³¹⁶ Nyati 2008 *Law Democracy and Development* 102; Phooko 2014 *Obiter* 44.

meaning of public participation means the participation of the public and also means that methods have to be taken to guarantee that the public participates in the law-making process.³¹⁷ The court further stated that the Constitution anticipates both representative and participatory democracy to give the public the opportunity to participate in the law-making process.³¹⁸ The court noted that participatory democracy in this broader format is well known in the traditional forms of *imbizo/lekgotla*. In a very crucial passage the court noted:

It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.³¹⁹ The right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bills of Right as supported by the right to freedom of expression, but also imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.³²⁰

The CC said that public participation in the legislative-making process entails giving an opportunity to those who are likely to be adversely affected by the draft law to make representations either orally or in writing.³²¹

The CC further stressed that:

[T]he requirement that participation had to be facilitated where it was most meaningful had both symbolic and practical objectives: the persons concerned had to be manifestly shown the respect due to them as concerned citizens, and the legislators had to have the benefit of all inputs that would

³¹⁷ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1443D. Sacks J, concurring with the majority judgment, emphasises the "special meaning" of public participation within our democracy and states that the effect of public participation should be: "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to procedure the best possible laws." Nyati 2008 *Law Democracy and Development* 104.

³¹⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1443E.

³¹⁹ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 98.

³²⁰ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 106.

³²¹ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 1408-1409J.

enable them to produce the best possible laws.³²² The court explained that the objective in involving public participation in the law making process is to ensure that legislatures are aware of the concerns of the public.³²³

3.5.4 *Matatiele Municipality v President of the Republic of South Africa 1*

The concept of public participation in legislative processes was further confirmed by the CC in the case *Matatiele Municipality v President of the Republic of South Africa*.³²⁴ The court aligned the provisions of the Constitution with these models³²⁵ of participatory democracy.³²⁶

3.5.5 *Matatiele Municipality v President of the Republic of South Africa 2*

In the second *Matatiele*³²⁷ case the CC confirmed the same principle that our Constitution anticipates democracy that is representative and comprises elements of participatory democracy as well. In the *Matatiele* case, Parliament adopted the Twelfth Amendment of 2005 and the *Cross-boundary Municipalities Laws Repeal and Related Matters*³²⁸ to alter boundaries of KwaZulu-Natal and the Eastern Cape. The CC emphasized that the Constitution required public participation in the law-making process to offer the public an opportunity to influence the decisions of legislative authorities.³²⁹ The CC took

³²² *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1456E-G; Phooko 2014 *Obiter* 44. The court uses the democratic principles as per the Constitution to promote participatory democracy. Both Phooko and Nyati underwrite the decision of the court as it is a departure from South Africa's unjust history. Phooko 2014 *Obiter* 44; Nyati 2008 *Law Democracy and Development* 12.

³²³ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 95.

³²⁴ 2006 5 SA 47 (CC) para 72. The court stated that "they lie at the heartland of our participatory democracy". The court stated, with reference to the constitutional provisions that "they lie at the heartland of our participatory democracy".

³²⁵ The word "models" are used by Phooko 2014 *Obiter* 44.

³²⁶ *Matatiele Municipality v President of the RSA (2)* 2006 5 SA 47 (CC) para 98.

³²⁷ *Matatiele Municipality v President of the RSA (2)* 2007 6 SA 477 (CC) paras 40 and 57. Where the court stated "our Constitution contemplates a democracy that is representative and that also contains elements of participatory democracy"; paras 40, 57 and further the court stated: "Taken to, its logical conclusion, this submission would render meaningless the public involvement provisions (in the Constitution) and reduce our democracy to a representative democracy only. The government has misconceived the nature of our democracy" para 56.

³²⁸ Act 23 of 2005

³²⁹ *Matatiele Municipality v President of the RSA (2)* 2007 6 SA 477 (CC) para 97. According to Phooko 2014 *Obiter* 45, this means that the lawmakers had to consider the

into account that the KwaZulu-Natal legislature had considered public hearings as an effective way of involving public involvement.³³⁰ The CC emphasized that the Constitution required public participation in the law-making process to offer the public an opportunity to influence the decision of lawmakers.³³¹ The *Matatiele* case was built on the *Doctors for Life* case by confirming that public participation is part and parcel of the law-making process and this duty is also applicable to the provincial legislature in terms of section 118(1) of the Constitution.³³² The court also emphasised that the duty to facilitate public participation will be meaningless if the legislator did not:

...provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values and preferences and to consider these in shaping their decisions and policies.³³³

3.5.6 Merafong Demarcation Forum v President of the Republic of South Africa

In *Merafong Demarcation Forum v President of the Republic of South Africa*,³³⁴ the court once again confirmed the principles of participatory democracy. The *Merafong* case shows that more recent cases adopt a more technical approach in which the mere holding of public hearings was deemed sufficient to comply with the duty to facilitate public involvement. The applicant's refusal to be transferred to the North-West Province was supported and a "negotiating mandate was adopted".³³⁵

The Portfolio committee on Local Government, in principle supported the phasing-out of cross boundary municipalities as per the constitution Twelfth Amendment Bill [B 33B-2005]; in light of the outcome, impact assessment

representations of the public and then to make informed decisions based upon such representations. *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC) para 97.

³³⁰ *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC) para 78.

³³¹ *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC) para 97. This meant that lawmakers had to consider the representations of the public and then make informed decisions based on such representations.

³³² *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC) para 80.

³³³ *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC) para 97.

³³⁴ 2008 5 SA 171 (CC) para 27.

³³⁵ In light of the majority's wishes - *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 34.

and analysis of the public hearing submissions, agreed with the inclusion of the geographical area of *Merafong* Municipality into the West Rand District municipality in the Gauteng Province, recommended to the House, amendment to Schedule IA of the Constitution. Twelfth Amendment Bill [B33 B-2005] to provide for the inclusion of the municipal area of *Merafong* into the municipal area of the West Rand District Municipality of the Gauteng Province.³³⁶

Despite such directive, the Gauteng Provincial Legislature, without further consultations, unilaterally maintained the Amendment Bill that incorporated the Merafong Municipality into the North-West Province.³³⁷ The court found that there was no evidence to recommend that the Gauteng legislature did not facilitate public involvement. The applicant's case was dismissed and the area was transferred to the North-West Province.³³⁸ The *Merafong* case represents a clear suggestion that the views of the public were not considered although there was a public participation process.³³⁹ The government unilaterally altered its position to support *Merafong* resistance and voted in favour of the Bill that moved Merafong to North-West Province.³⁴⁰

3.5.7 Tongoane v National Minister for Agriculture and Land Affairs

The duty to facilitate public participation in the law-making process was also emphasised in *Tongoane v National Minister for Agriculture and Land Affairs*.³⁴¹ The applicants tested the constitutionality of the *Communal Land Rights Act* (hereafter CLARA)³⁴² on the grounds that Parliament had failed to fulfil with

³³⁶ Phooko 2014 *Obiter* 47.

³³⁷ *Merafong Demarcation Forum v President of the Republic of SA* 2008 5 SA 171 (CC) para 58.

³³⁸ *Merafong Demarcation Forum v President of the Republic of SA* 2008 5 SA 171 (CC) paras 50, 55-60. The court did not condemn the actions of the legislature, but stated that participating in the law-making process did not mean that one's views should be taken into account or that such views should be taken into account or that such views bound the legislature.

³³⁹ *Merafong Demarcation Forum v President of the Republic of SA* 2008 5 SA 171 (CC) para 25 as per judge Moseneke J: "Government must be open and responsive to the wishes of communities, may not necessarily be adequately represented in national elections and could, therefore, find expression in localised resistance. But it also must act in the national interest, be loyal to those who voted it into office".

³⁴⁰ *Merafong Demarcation Forum v President of the Republic of SA* 2008 5 SA 171 (CC) paras 55-60.

³⁴¹ 2010 6 SA 214 (CC); 2010 8 BCLR 741 (CC).

³⁴² Act 11 of 2004.

its constitutional obligations to consider public involvement in the legislative process in terms of sections 59(1)(a) and 71(1)(a). The court reasoned that if the Constitution stated that the procedure of indorsing certain laws involved public participation, Parliament should have followed that procedure.³⁴³ This judgement presented the clearest and most authoritative exposition of participatory democracy. The court said:³⁴⁴

[C]onstitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection action taken at the time that it was varied out... The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.³⁴⁵

CLARA was declared as invalid as the court applied the principle set in the *Doctors for Life case*.

3.5.8 Moutse Demarcation Forum and Others v President of the Republic of South Africa

In *Moutse Demarcation Forum v President of the Republic of South Africa*,³⁴⁶ the CC ruled in favour of the provincial legislature and acknowledged that the community of *Moutse* was a discrete group³⁴⁷ and that it had to be given an opportunity to be overheard in the development of any law that affects the alteration of their boundaries.³⁴⁸ The Court stated that the compliance with section 118(1) of the Constitution had two implications, namely that the

³⁴³ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 108.

³⁴⁴ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 104.

³⁴⁵ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 104.

³⁴⁶ (CCT 40/08) [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) (23 August 2011).

³⁴⁷ Phooko 2014 *Obiter* 48. The phrase "discrete group" was first used by this court in the Poverty case. It was used to describe a group of people who were directly affected by an alteration of provincial boundaries as a cause of being located where the change was effected.

³⁴⁸ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 57.

legislature had to invite the public to participate in the hearing and give them sufficient time to prepare, otherwise there would be no meaningful participation of the public because they would not have had time to "study the Bill, consider their stance and formulate representations to be made".³⁴⁹ Secondly, the time or stage at which the hearings were made should not have been just before the final decisions were to be made by the legislature otherwise that would not have afforded the public the opportunity to participate meaningfully.³⁵⁰ The CC further indicated that the participation process should have been able to influence the decisions to be taken by the legislature and the question of sufficient notice would depend on the case-by-case³⁵¹ basis. The CC accepted that the *Moutse* community had not received sufficient notice to hold a meeting with the provincial legislature.³⁵²

3.5.9 Poverty Alleviation Network v President of the Republic of South Africa

In the *Poverty Alleviation Network v President of the Republic of South Africa*³⁵³ the CC ruled that provincial legislatures³⁵⁴ had leeway in determining how to facilitate public involvement and the fact that the views of the public were not reflected in the final legislation did not mean that the public had not been consulted.³⁵⁵ There were several consultations but the people remained opposed to the move. The elected representatives proceeded with the move and transferred them to the Eastern Cape Province. It can be deduced that where the elected representatives and the electorate have conflicting views on

³⁴⁹ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 61.

³⁵⁰ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 63.

³⁵¹ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) paras 64-65.

³⁵² *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) paras 64-65. The court stated that they should have complained about this issue and their failure to do so was a sign that the hearing was appropriately set down.

³⁵³ 2010 6 BCLR 520 (CC).

³⁵⁴ Court referred to the elected representatives that had unfettered discretion in determining how to facilitate public participation. *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) paras 35 and 56.

³⁵⁵ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 63.

certain issues, the views of the representatives prevail over the views of the electorates. The ruling of the court was that provincial legislatures (elected representatives) had unfettered discretion in determining how to facilitate public participation.³⁵⁶

3.5.10 Democratic Alliance v eThekweni Municipality

In the case referred to as *Democratic Alliance v eThekweni Municipality*³⁵⁷ the applicant challenged the eThekweni Municipality's decision on the basis that there was no proper public consultation in regard to the policy of the renaming of certain streets and buildings within its jurisdiction.³⁵⁸ The High Court held that consultation did not guarantee that the applicants' views would influence the final results. The Supreme Court of Appeal (hereafter SCA) also highlighted that consultation had taken place at council level. In the SCA the emphasis was on the constitutional obligation of the NA and the NCOP to facilitate public involvement in their legislative processes.³⁵⁹ The SCA also noted that such obligation was also imposed on the provincial legislatures and concluded that municipal councils were required to facilitate public involvement because of section 152(1)(a) of the constitution and various other provisions of the *Local Government Municipal Systems Act*³⁶⁰ that entails from municipalities "to establish appropriate mechanisms...to enable local communities to participate

³⁵⁶ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) paras 35 and 56.

³⁵⁷ 2012 2 SA 151 (SCA). The eThekweni Municipality adopted a policy in order to rename certain streets and buildings within its jurisdiction (para 1). The policy was implemented in two phases and the first phase took place on 28th February 2007 during which the names of ninety-nine streets were renamed (para 1). The second phase /occurred on 28th May 2008 with ninety-nine streets being changed. During the second phase the municipal council amended its street-naming and renaming policy. The effect of the amendment was that "the requirement of prior consultation with the addressees and affected persons during the renaming process was deleted and replaced with the requirement of consultation with ward communities." *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 12.

³⁵⁸ *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 15. No proper deliberative process took place in any of the committees of the Municipal Council itself with reference to the decisions. The Municipal Council had failed to adhere to its own policy in regard to the street-naming policy.

³⁵⁹ *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 23.

³⁶⁰ Act 32 of 2000.

in municipal affairs".³⁶¹ The SCA decided that the public should have been afforded a reasonable period to submit, amongst others, comments and objections.³⁶² The Court (SCA) also found that the public notices were not proper, as they did not, inter alia, invite any suggestions for alternative names.³⁶³ The Court applied the reasonable standard in arriving at the conclusion that the process in phase one failed the test for lawfulness and was therefore to be set aside.³⁶⁴ In regard to phase 2, the SCA found that the amendment was valid as proper procedures in enacting it had been followed as there were consultations with ward communities.³⁶⁵

3.5.11 Joseph v City Power of Johannesburg

*Joseph v City Power of Johannesburg*³⁶⁶ dealt with the disconnection of electricity supply by City Power of Johannesburg. Applicants as tenants in a building known as Emmerdale Mansions were not given prior notice. The issue that had to be determined by the CC was whether the tenants were entitled to a notice³⁶⁷ before the disconnection of the electricity supply by City Power. Apart from other rulings, the court held that receiving electricity is a public law right by virtue of a constitutional and statutory obligation³⁶⁸ and that the applicants were entitled to procedural fairness, which included adequate notice of at least 14 days before disconnection.³⁶⁹ This decision provides an example

³⁶¹ Three issues are relevant. S 152(e) of the Constitution provides for municipalities to encourage public participation in local government. Effective participation remains difficult to attain. See comments by Mubangizi and Dassah 2014 *Journal of Social Sciences* 282 in regard to grass roots participation.

³⁶² *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) paras 26-27.

³⁶³ *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 27.

³⁶⁴ *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 29.

³⁶⁵ *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA) para 30; Phooko's 2017 *Obiter* 529 comment "This decision bolsters the point that the Constitution requires elected representatives to take reasonable measures to consult with the people in the law-making process."

³⁶⁶ 2010 4 SA 55 (CC).

³⁶⁷ Phooko 2017 *Obiter* 530 referred to notice as meaningful engagement.

³⁶⁸ *Joseph v City Power of Johannesburg* 2010 4 SA 55 (CC) para 47.

³⁶⁹ The City Power by-laws are the ones that sanctioned disconnection of electricity supply to its customers. Greater Johannesburg Metropolitan Council Standardization of Electricity By-Laws (1999); City of Johannesburg Metropolitan Municipality: Credit Control by-laws 2005. The court in the Joseph case declared the by-laws as inconsistent with the Constitution.

of a matter involving a contractual dispute between the municipality and the landlord in a manner that affords those who were directly affected with an opportunity to make representations and provide them with adequate notice.³⁷⁰

The case provides an example of the constitutional obligation of the local municipality to comply with its contractual obligation to consult and give an opportunity to those who are affected by a particular law to make representations: this represents an example of participatory democracy in local affairs.³⁷¹

3.5.12 Beja v Premier of the Western Cape

In the matter referred to as *Beja v Premier of the Western Cape*,³⁷² the facts of the case relate to the upgrading of the City of Cape Town's informal settlement project known as Makhaza.³⁷³ There was an agreement between the City of Cape Town and each members of the community in respect of the provision of toilets and concerned 55 unenclosed toilets in Makhaza.³⁷⁴ The court stated that when the decision was made by the City of Cape Town to provide the toilets and when the tender for the installation was issued, the community was not consulted. Erasmus Judge referred hereto:

I pause to note that I was not referred to any meaningful community engagement before this decision was made.³⁷⁵

The court noted with concern that there was no reference to the community's having attended any of the meetings, when the decision was made to provide toilets and when the tender for installation was issued.³⁷⁶ The court highlighted

³⁷⁰ Munyai *The contribution of the Joseph case* 14.

³⁷¹ Murcott 2013 *SAJHR* 484; Phooko 2017 *Obiter* 530 regarded this statement by the Constitutional Court as an example of the pivotal role played by the public in a participatory democracy in local affairs. The City Power case also reflected an example of procedural fairness.

³⁷² 2011 3 All SA 401.

³⁷³ *Beja v Premier of the Western Cape* 2011 3 All SA 401 para 11.

³⁷⁴ *Beja v Premier of the Western Cape* 2011 3 All SA 401 para 20.

³⁷⁵ *Beja v Premier of the Western Cape* 2011 3 All SA 401 para 20.

³⁷⁶ *Beja v Premier of the Western Cape* 2011 3 ALL SA 401 para 82.

that the standard of reasonableness in terms of section 26(2) of the Constitution requires a housing programme that takes account of the “most vulnerable and desperate”.³⁷⁷ The judgement emphasised the vital input and role exercised by community participation as outlined in the Upgrading of Informal Settlement Programme as well as the concept of meaningful engagement as set in the Constitution and the National Housing Code.³⁷⁸

3.5.13 South African Property Owners Association v Johannesburg Metropolitan Municipality

In the case referred to as *South African Property Owners Association v Johannesburg Metropolitan Municipality*³⁷⁹ the appellant, the South African Property Owners Association (hereafter SAPOA),³⁸⁰ was aggrieved by the City's decision to unilaterally increase rates on business entities, commercial and industrial properties. As a result, the appellant challenged the decision of the city in the South Gauteng High Court maintaining that it was in contravention of the provisions of the law.³⁸¹ The High Court found that there was no failure on the part of the city to engage the community. The appellants then appealed this decision to the Supreme Court of Appeal. One of the issues to be determined by the SCA was whether the city had complied with its responsibility to conduct community participation in the approval of the additional budget to increase levies on business properties. The SCA found that the respondents had not given the appellant (SAPOA) and the rest of the business public appropriate notice of the new proposed rates. The short period that allowed for business entities to comment on the amended rates for

³⁷⁷ *Beja v Premier of the Western Cape* 2011 3 ALL SA 401 para 102. The court found that the City's action failed to meet the standard of reasonableness as required by the Constitution.

³⁷⁸ Most importantly the court found that there was no meaningful engagement with the community representatives to consult with their constituencies. The court further held that there was no information-sharing with the community and that there were also no minutes. *Beja v Premier of the Western Cape* 2011 3 ALL SA 401 para 98.

³⁷⁹ 2013 1 SA 420 (SCA).

³⁸⁰ *South African Property Owners Association v Johannesburg Metropolitan Municipality* 2013 1 SA 420 (SCA) para 1.

³⁸¹ With reference to the *Local Government: Municipal Finance Management Act* 56 of 2003 and the *Local Government: Municipal Systems Act* 32 of 2000.

business properties was completely insufficient.³⁸² The SCA ruled that the city had unlawfully increased the property rates. The city's decision was set aside. The decision also emphasised the need for local authorities to engage meaningfully with those who are more likely to be affected by the proposed decision.³⁸³

3.5.14 Opposition to Urban Tolling Alliance v The South African National Road Agency Ltd (SCA)

The applicants³⁸⁴ challenged the government's law for collecting revenue through the "user pays" tolling system on Gauteng freeways. A number of public hearings were held and the public indicated that they did not want the tolling system.³⁸⁵ Despite these oppositions the government went ahead to put the "user-pays" system into operation. This case represents an example where the people's views were disregarded despite the clear opposition against the tolling system. The case was dismissed on technical grounds, because the applicants brought the case before the court five years after the tolling system had been launched.³⁸⁶ Throughout the five-year period, the people had continually engaged the government through public demonstrations opposing the tolling system.³⁸⁷ The case further illustrates that where the elected

³⁸² *South African Property Owners Association v Johannesburg Metropolitan Municipality* 2013 1 SA 420 (SCA) para 40. The SCA found *inter alia* that "The respondents did not give SAPOA and the rest of the business community proper notice of the new rates proposed the short period allowed for business organisations to comment on the amended rate for business properties was completely inadequate for any person or body to properly consider the matter, do the necessary research and prepare a meaningful representation".

³⁸³ Phooko 2017 *Obiter* 533 "Any decisions that have been taken without affording those who are more likely to be affected by it an opportunity to make a representation are therefore likely to be declared unlawful by the courts".

³⁸⁴ *Opposition to Urban Tolling Alliance v The South African National Road Agency Ltd (SCA)* 2013 4 ALL SA 639 (SCA) para 13.

³⁸⁵ *Opposition to Urban Tolling Alliance v The South African National Road Agency Ltd (SCA)* 2013 4 ALL SA 639 (SCA) para 13.

³⁸⁶ *Opposition to Urban Tolling Alliance v The South African National Road Agency Ltd (SCA)* 2013 4 ALL SA 639 (SCA) para 31. The court indicated that the project was already completed and there was no plan B to replace the tolling system.

³⁸⁷ Phooko 2014 *Obiter* 51.

representatives have adhered to the law and imply public participation, the legislature may do what they wish regardless the views of the people.³⁸⁸

3.6 An assessment of the cases

The *Merafong* case presents a clear indication that the responsibility to facilitate public participation is a procedural rather than a substantive obligation, because the court stated that participating in the law-making process did not intent that participants' views should be taken into account or that such views bound the legislature.³⁸⁹ The court erred by not focusing on and considering sufficiently the views of the individuals and groups in the community.³⁹⁰

In the *Moutse* case the needs and fears of the *Moutse* people were not taken into account by the legislature. The *Moutse* people did not want to go to Limpopo Province. That was never taken into account by the legislature yet the court³⁹¹ stated:

...[t]he Constitution contemplates that the people will have a voice in the legislature organs of the state not only through elected representatives but also through participation in the law-making process.

In the *Poverty* case, the court found that:

³⁸⁸ The requirement for public participation was met and the electorate will be unable to challenge the decision. The courts are not prepared to deal with issues that do not fall within their sphere of operation unless decisions are taken irrationally *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 1 SA 765 (CC) para 29.

³⁸⁹ The court moved away from the position adopted in *Doctors for Life* where it held that all that was required was that the legislature should have been open minded to the opinions of the people and been willing to consider them but had no legally binding directive to consider them. *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 1 SA 765 (CC) para 51.

³⁹⁰ According to Phooko 2014 *Obiter* 50, "the court ought to have found that the legislature should have consulted with the people and updated them about new developments on relocation".

³⁹¹ *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 6 SA 477 (CC) para 60-61.

[al] though due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by the public opinion in its ultimate decision.³⁹²

Most importantly, the court also said that the fact that the legislation did not reflect the views of the public did not mean that they were never considered.³⁹³ The court reinforced the principle of representative democracy and found that law-making is "the function of parliament alone" and therefore could not decide where people should live.

These decisions also reflect a preference of representative democracy over participatory democracy. Despite the fact that the legislature purported to facilitate public participation in the *Merafong*, *Moutse and Poverty* cases, the disputed laws prevailed and the people were relocated. However, ultimately, all these cases indicate that during the law-making process, the legislature has to give people a reasonable opportunity to make representations, either orally or in writing.

The *Merafong* and *e-Tolling* cases³⁹⁴ reveal that where the legislature has fulfilled with its responsibility to facilitate public participation, it does not matter whether the public is satisfied or not with the outcome. The decision of the representatives prevails as long as the obligation of public participation has been conducted in line with the Constitution. Another disturbing observation is that the Court also disregarded its own initial views as indicated

³⁹² *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 62.

³⁹³ According to Phooko 2014 *Obiter* 51, this narrow procedural approach seemed to view representative and participatory elements of the SA democracy as distinct obligations rather than finding a synergy between the two. The public could only know that their views were taken into account if policies and laws reflected their wishes to some extent. Phooko 2014 *Obiter* 51 para 71: The court reinforced the principle of representative democracy and found that the law is "the function of parliament alone". An exception hereto would of course be where the public views supported a matter that was contrary to the Bill of Rights. See also Phooko's 2014 *Obiter* 51 arguments with reference to *S v Makwanyane* 1995 3 SA 391 (CC) paras 87-89. The court reinforced the principle of representative democracy and found that the law-making is "the function of parliament alone" and therefore could not decide where people should live. *S v Makwanyane* 1995 3 SA 391 (CC) para 71.

³⁹⁴ *Opposition to Urban Tolling Alliance v The South African National Road Agency Ltd* 2013 4 ALL SA 639 (SCA); *Merafong Demarcation Forum v President of Republic of SA* 2008 5 SA 171 (CC).

in the *Doctors for Life* case in that the participatory elements of the South African democracy should not be in conflict.³⁹⁵

The following cases referred to, namely *Democratic Alliance v eThekweni Municipality*, *Joseph v City of Johannesburg*, *Beja v Premier of the Western Cape*, and *SA Property Owners Association v Johannesburg Metropolitan Municipality* are evidence that participatory democracy is crucial in the law-making process. The discussion of the cases emphasises that sections 59(1)(a), 72(1)(a) and 118(1) deal with the constitutional responsibility on legislative bodies to consider public participation in the law-making process. The courts³⁹⁶ have been clear in these cases that they have no role to play where the legislature has facilitated public participation. In all these cases public participation did take place, but the views, values and opinions of the public were not reflected in the decisions taken by their representatives. In order to safeguard the opinion of the public through to the final stage of decision-making, the public must be engaged at all stages of consultation until the final decision of the consultation process.³⁹⁷

3.7 Conclusion and summary

The focus of the discussion was to investigate the concept of public participation as a conceptual part of a democracy in a representative and participatory form. The essence of a democracy is based upon and rooted in the social contract theory, whereby people voluntarily consent to the formation of a government.³⁹⁸ The development of the social contract theory by proponents Locke, Hobbes and Rousseau emphasises the will and the power

³⁹⁵ Phooko 2017 *Obiter* 536 for his comments and criticism that political decisions should be challenged in the political sphere and not before courts.

³⁹⁶ The court's role is limited in dealing with procedural issues and it will not interfere in substantial matters: Phooko 2017 *Obiter* 539. The courts only honour their constitutional obligation and are unable to interfere, even when the representatives disregard the views of the people. Reference is made to the *e-Tolling*, *Merafong* and *Matatiele* cases. Phooko 2017 *Obiter* 539 regarded the views of the courts as preferring participatory over representative democracy.

³⁹⁷ Phooko 2017 *Obiter* 538 refers in this regard to the tension between participatory and representative democracy.

³⁹⁸ Paragraph 3.2.2.

of the people in which the concept of a democracy evolves.³⁹⁹ Accordingly, it was concluded that a democracy is a system of governance where citizens participate actively in politics and civic life and have an equal say in decisions. Public participation and democracy are also often intricately linked in a participatory orientation and referred to the procedural and substantive parts of a democracy. The procedural facet of the South African government makes provision for the participation of the public in the law-making processes as per clauses 59(1)(a), 72(1)(a) and 118(1)(a). The Constitution places duties on the National Assembly (NA), the National Council of Provinces (NCOP) and the provincial legislatures to facilitate public participation as a constitutional duty.⁴⁰⁰

The constitutional democracy of South Africa is characterised as both representative and participatory. An explanation was offered to elucidate that the representative element is implicit in the notion⁴⁰¹ that citizens will delegate law-making power to elected representatives. Participatory democracy entails the making of representations in the law-making process from the onset and taking part in the law-making process. The public participates in both the representative and participatory forms of a democracy. There being both a constitutional right and an obligation on the government to establish public participation structures, a search was conducted into the real meaning of public participation.⁴⁰²

In all the cases⁴⁰³ reference was made and a clear indication was given to the fact that the legislature has an obligation to facilitate public participation. In some of the cases under discussion the concept of participatory democracy overshadowed the concept of representative democracy. The essence was emphasised by the courts to facilitate public participation. In cases where the legislature has complied with its constitutional obligation to facilitate public

³⁹⁹ Paragraphs 3.2.3, 3.2.4, 3.2.5.

⁴⁰⁰ Paragraph 3.3.1.

⁴⁰¹ Paragraph 3.3.2.

⁴⁰² Paragraph 3.4.

⁴⁰³ Paragraphs 3.5.3, 3.5.5 - 3.5.14.

participation, the courts are unable to intervene even if the representatives have disregarded the views of the public.

In the next section of the dissertation the focus and discussion will be on the different environmental and natural resources legislations which make provision for public participation.

CHAPTER 4

Different modes of public participation identified in the environmental legislation and natural resources legislation: A cursory overview

4.1 The South African law framework

4.1.1 Introduction

In the preceding chapter the concept of public participation was discussed and explained with reference to the meaning of the notion as a concept of participatory democracy. The aim of the chapter is to provide an overview of the extent to which existing natural resources legislation provides for public participation in environmental decision-making. The focus of the discussion will be on the *National Environmental Management Act* (hereafter NEMA),⁴⁰⁴ the *National Water Act* (hereafter NWA)⁴⁰⁵ and the *Mineral and Petroleum Resources Development Act* (hereafter MPRDA).⁴⁰⁶

4.2 The NEMA and the provision of the public participation concept

4.2.1 Introduction

The NEMA provides the underlying framework for integrated environmental management⁴⁰⁷ in South Africa as well as the legislative framework for the adoption and promulgation of a range of environmental sector specific laws.⁴⁰⁸ Various changes were achieved to South Africa's environmental framework with an understanding to streamlining and integrating environmental

⁴⁰⁴ Act 107 of 1998.

⁴⁰⁵ Act 36 of 1998.

⁴⁰⁶ Act 28 of 2002.

⁴⁰⁷ See Kidd 1999 *SAJELP* 23; Du Plessis and Nel 2001 *SAJELP* 19; Du Plessis 2009 *SAPL* 61-70.

⁴⁰⁸ Nel and Alberts "Environmental management and environmental law" 38.

regulatory processes primarily for the benefit of the mining section.⁴⁰⁹ The new framework legislation is known as the "One Environmental System".⁴¹⁰ The purpose of this discussion is not to analyse the existing framework but to indicate where and to what extent provision is made for public participation. The NEMA defines public participation as "...a process in which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to, specific matters".⁴¹¹

4.2.2 The NEMA principles and the provisions in the NEMA

The NEMA contains an extensive list of principles that "...apply throughout the Republic to the actions of all organs of state that may significantly affect the environment".⁴¹² The importance of the environmental management principles

⁴⁰⁹ Sections 37(1) and 38(1)(a) of the MPRDA provide that the principles as per sections of the NEMA apply to all prospecting and mining permits and rights. The guidelines serve for the interpretation, administration and implementation of the environmental requirements of the MPRDA. See s 50A(2) of the NEMA. The Minister responsible for the mining industry will implement the provisions of the principal Act and the subordinate legislation as far as it is applicable to prospecting mining operations. NEMA s 50A(2) refers to the agreement between the Ministers in terms of the NEMA. The Minister for water affairs and the Minister for mineral resources that reached an agreement titled: "One Environmental System" for the country in regard to mining. It entails that all environmental-related aspects would be regulated through one environmental system which is the principal Act and that all environmental provisions would be repealed by the MPRDA.

⁴¹⁰ The Department of Environmental Affairs published legislation for implementation such as the *National Environmental Management Amendment Act* 62 of 2008, entered into force on 1st Sept 2014 and gives effect to the "One Environmental System". The *National Environmental Laws Amendment Act* 25 of 2014 commenced on 2nd September 2014 and provides for further alignment to the "One Environmental System". The Environmental Impact Assessment Regulations and listing notices, 2014 were published on 4th December 2014 and came in effect from 8th December 2014. The National Appeal Regulations 2014, were published and came in effect from 8th December 2014. Recent changes to the environmental authorisation rule were published by the Minister of Environmental Affairs on 4th April 2017. These amendments provide effect to the implementation of the "One Environmental System".

⁴¹¹ Section 1, definitions. Public participation is also referred to as stakeholder involvement. Aucamp *Environmental impact assessment* 49 referred hereto as "... the process in which individuals, companies, authorities or groups that are affected by a proposed intervention participate in a prescribed process".

⁴¹² The NEMA principles are captured in s 2(1) of the NEMA. The principles are applicable to those situations, itemised in s 2(1)(a)-(r). The Constitutional Court in *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC), stated that the principles are not directed at "controlling the manner in which organs of state use their property" para 68 and it is not appropriate for the court to decide whether the principles can be applied in a dispute "between members of the public and the government concerning activities that are not regulated by environmental implementation plans or

as laid down in section 2 is emphasised throughout the Act.⁴¹³ The principle of public participation is entrenched in section 2(4)(f) which provides as follows:

The participation of all interested and affected parties in environmental governance must be promoted and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and participation by vulnerable and disadvantaged persons must be ensured.

Closely related hereto is section 2(4)(g)⁴¹⁴ that refers to the needs and values of interested and affected parties (hereafter I&APs) that support section 2(4)(f)⁴¹⁵ in that when decisions are taken, decision makers must take into account all forms of knowledge, including traditional and ordinary knowledge.⁴¹⁶

Chapter 5 of the Act is titled "Integrated Environmental Management" (hereafter IEM).⁴¹⁷ The purpose of chapter 5 as set out in section 23(1) is to:

...promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities.

other provisions formulated under the *Management Act*" para 69. More recently in the *Fuel Retailers* case the court having paraphrased s 2(1) and observed that it is "plain that these principles must be observed as they are of considerable importance to the protection and management of the environment" para 67. For an in-depth discussion on the environmental management principles see Glazewski *Environmental Law* Part 7.2.2. Environmental principles guide the interpretation and implementation of the NEMA and other law, Kidd *Environmental Law* 23.

⁴¹³ *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 6 SA 4 (CC) where the court observed it is "plain that these principles must be observed as they are of considerable importance to the protection and management of the environment" para 67.

⁴¹⁴ Section "2(4)(g). Decisions must take into account the interests, needs and values of all interested and affected parties, and this ordinarily includes recognising all forms of knowledge including traditional knowledge".

⁴¹⁵ "The participation of all interested and affected parties in environmental governance must be promoted and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and participation by vulnerable and disadvantaged persons must be ensured."

⁴¹⁶ This principle reflects both concern for vulnerable people in South Africa and international legal thinking. The recognition of traditional knowledge is becoming more important in the international forum, for example in the *Convention on Biological Diversity* of 1992. Glazewski *Environmental Law* 68.

⁴¹⁷ The chapter was amended by Acts 8 of 2004 and 62 of 2008.

One of the facets of the general objective of integrated environmental management is captured in section 23(2)(d), namely to:

...ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment.⁴¹⁸

It is thus evident from section 23 that a successful system of integrated environmental management is dependent on providing adequate avenues through which public participation can be facilitated. Section 24(4)(a)⁴¹⁹ of the NEMA then follows by specifically requiring the "consideration, investigation, assessment and reporting of potential consequences for or impacts on the environment of listed or specified activities". Procedures that are developed to facilitate the "investigation, assessment and communication of the potential consequences or impacts of activities on the environment" when an application for environmental authorisation is considered, must ensure the provision of:

...public information and participation procedures which provide all interested and affected parties including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures.⁴²⁰

It is evident from the sections referred to above that public participation is compulsory in regard to decisions for every application for environmental authorisations.

⁴¹⁸ Section 23(2)(d)

⁴¹⁹ "Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure with respect to every application for an environmental authorisation."

⁴²⁰ Section 24(4)(a)(v) of the NEMA.

4.2.3 Section 24 of the NEMA and environmental authorisations

During the planning phase of a development, environmental authorisation⁴²¹ needs to be obtained.⁴²² Section 24⁴²³ of the NEMA provides the statutory foundation for environmental authorisations.⁴²⁴ When applying for an environmental authorisation, the applicant must comply with the requirements of the NEMA⁴²⁵ by conducting public participation⁴²⁶ procedure in relation to the public consultation and information gathering.⁴²⁷

During the planning⁴²⁸ phase of a development, provision is made for public participation at different stages⁴²⁹ of the application⁴³⁰ procedure.⁴³¹ Firstly, during the application stage where a basic assessment⁴³² is applicable, a public

⁴²¹ Chapter 6 of the NEMA reg 39-44 in GN R982 in GG 38282 of 4 December 2014 regulates the public participation process. "Environmental authorisation" means when used in chapter 5 "the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act" NEMA s 1 definitions.

⁴²² Nel and Wessels 2010 *PELJ* 66.

⁴²³ "Environmental Authorisation".

⁴²⁴ Section 24(2)(a)-(e) empowers the Minister of Environmental Affairs or the MEC to identify activities which may not commence without environmental authorisation. S 24(2A) empowers the Minister to restrict and cancel the granting of an environmental authorisation by the competent authority for a listed or specific activity. See also the discussion on the "One Environmental System". Environmental authorisation when used in Chapter 5 of the NEMA means the authorisation by a competent authority of a listed activity or specified activity, and includes a parallel authorisation contemplated in a *Specific Environmental Management Act* (hereafter SEMA).

⁴²⁵ Section 24(1A).

⁴²⁶ Section 24(1A) "any" refers to the prescriptions in regard to the regulations.

⁴²⁷ Section 24(1A)(c) of NEMA. Any procedure relating to public consultation and information gathering. GN R326 in GG 40772 of 7 April 2017. Chapter 4 Reg 16(1), (2) and (3) contains contain general application requirements. Reg 17 refers to the compliance of formal requirements.

⁴²⁸ Nel and Alberts *Environmental management and environmental law* 30.

⁴²⁹ GN R326 in GG 40772 of 7 April 2017 Part 2: Basic Assessment.
GN R326 in GG 40772 of 7 April 2017 Part 3: Scoping report and Environmental Impact Report.

⁴³⁰ Chapter 3: GN R326 in GG 40772 of 7 April 2017 refers to general requirements. Chapter 4: Reg 16, GN R326 in GG 40772 dated 7 April 2017.

Part 1: General

Part 2: Basic assessment

Part 3: Scoping and Environmental Impact Report.

⁴³¹ Section 24(1A)(c) of NEMA "any procedure relating to public consultation and information gathering". See also Chapter 4 of Reg 16-24 in GN R326 in GG 40772 of 7 April 2017 which contains the public participation regulations; Chapter 6 Reg 39-44 contains the public participation regulations. Reference is also made to s 24J of the NEMA in regard to relevant guidelines.

⁴³² Regulation 19(1) within 90 days of receipt of the application.

participation process is required by means of inviting comments⁴³³ in regard to the basic assessment report.⁴³⁴ In the case where significant⁴³⁵ changes or significant new information have been added to the basic assessment report, another public participation process by means of comments⁴³⁶ must be instituted within 40 days of receipt of the application. A second public participation process during the scoping⁴³⁷ report stage provides for comments by the public for a period of 30 days.

In the third instance, a report reflecting the comments from the public and comments by the competent authority⁴³⁸ must be submitted to the competent authority within 106 days of the acceptance of the scoping report and during the environmental impact assessment stage and the Environmental Management Programme, (hereafter EMPr)⁴³⁹. Another comment process for public comment⁴⁴⁰ is provided within 156 days of receipt of the application as per regulation 23(1)(a) where significant new information has been added to the environmental impact report.⁴⁴¹

The public participation process provides for access to all⁴⁴² information and includes consultation with⁴⁴³ all potential registered interested and affected

⁴³³ Regulation 19(1)(a) 30 days to participation process for comments.

⁴³⁴ The basic assessment report includes specialist reports and an Environmental Management programme and, where applicable, a closure plan.

⁴³⁵ Regulation 19(1)(b).

⁴³⁶ Regulation 19(2) The public participation to comments and a 140-day period is provided.

⁴³⁷ Regulation 21(1) Within a period of 44 days to be submitted to the competent authority.

⁴³⁸ Regulation 23(1)(a) The public comments make provision for 30 days.

⁴³⁹ The Environmental Impact Assessment (EIA) regime was first provided for in the South African Law by the *Environment Conservation Act 73 of 1989* (hereafter ECA), ss 21 and 22. The NEMA was brought into operation on 15 January 1999. Chapter 5 of the act on Integrated Environmental Management (IEM) including s 24 provides for EIA. The NEMA principles as per 52 and the provisions on IEM in chapter 5 of the NEMA still applied to all EIA's commenced in terms of the ECA, EIA regulations after the NEMA. In July the first EIA regulations made under NEMA came into operation. See Warburton *Evaluating SA Environmental Impact Assessment (EIA) processes* 20-24 on a synopsis of the EIA regulations.

⁴⁴⁰ 30-day period.

⁴⁴¹ Chapter 6. Reg 42 To keep a register of I&AP's.

⁴⁴² Regulation 3 of the EIA Regulations - GN R982 in GG 38282 of 4 December 2014 and Reg 42 GN R326 in GG 40772 of 7 April 2017.

⁴⁴³ Chapter 6. Reg 40(2) of GN R982 in GG 38282 of 4 December 2014 refers to consultation with (d) "all potential or where relevant registered interested and affected parties". Reg 41(1) 2(a)(i)(ii) of GN R982 in GG 38282 of 4 December 2014 provides for the modes of

parties to record comments in the basic assessment, scoping and environmental impact assessment report.

4.2.4 The appeal procedure and public participation

Section 43 of the NEMA⁴⁴⁴ provides for an appeal procedure. Any person may appeal to the Minister against a decision made in terms of the NEMA or any Specific Environmental Management Act (hereafter SEMA). A public participation procedure takes place when an appeal is submitted to the appeal administrator by means of a notification to registered interested and affected parties in terms of a copy of the appeal to be served by the applicant.⁴⁴⁵ The notification takes place within a period of 20 days⁴⁴⁶ from the date on which the notification of the decision for an application was sent to the registered interested and affected parties by the applicant,⁴⁴⁷ or within 20 days from the date on which the notification of the decision was sent to the applicant by the competent authority that issues the authority or licence.⁴⁴⁸

Interested and affected parties submit their comments in the form of a responding statement to the appeal authority within 20 days from the date of receipt of the appeal submission.⁴⁴⁹ When the appeal authority has reached a decision on an appeal, a notification must be issued to the registered interested and affected party.⁴⁵⁰ It is evident that the appeal procedure is only about a notification and written comment by the I&AP's.

notice by a notice board 2(c), advertisement, one local newspaper, an official gazette 2(d), one provincial newspaper or national newspaper.

⁴⁴⁴ As well as Chap 2 Reg 4-8 in GN R982 in GG 38282 of 4 December 2014.

⁴⁴⁵ Regulation 4(1).

⁴⁴⁶ Regulation 4(v).

⁴⁴⁷ Regulation (4)(1)(a).

⁴⁴⁸ Regulation 4(1)(b).

⁴⁴⁹ Regulation 5.

⁴⁵⁰ Regulation 7(3) "The appeal authority must reach a decision on an appeal and notify the appellant applicant and any registered interested and affected party within 20 days of the recommendation on the appeal by the administrator".

4.3 The NWA and its reference to public participation

The preamble of the NWA⁴⁵¹ states that water is "...a scarce natural resource that belongs to all people".⁴⁵² Responsible management of the resource for the benefit of all people is non-negotiable and the public has a role to play in providing input on strategies⁴⁵³ regarding the management of water resources. In the new water legislation dispensation, the private control of water was abolished⁴⁵⁴ and the national government was appointed as the public trustee of the nation's water resources.⁴⁵⁵ The *National Water Amendment Act 27 of 2014*⁴⁵⁶ forms part of the suite of amendment legislation in acted to make provision for the integration and alignment of environmental regulatory requirements in the context of the "One Environmental System".⁴⁵⁷

⁴⁵¹ The NWA offers that all water use rights are placed under the control of the public trustee. The public trustee assigns and regulates the use of South Africa's water resources in terms of a licencing and permitting system. Pienaar and Van der Schyff 2007 *LEADJ* 186-187; Viljoen *Water as public property* 194; Viljoen 2017 *Law, Development and Democracy* 196.

⁴⁵² Section 3 of the NWA continues along the same line. The primary aim of the NWA was to provide for fundamental reform of the law relating to water resources in South Africa.

⁴⁵³ Long title of the NWA and s 2 of the NWA. "Recognizing that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle; Recognizing that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources; Acknowledging the National Government's overall responsibility for an authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use (the redistribution of water, and international water matters); Recognizing that the ultimate aim of water resource management is to achieve the sustainability of the nation's water resources in the interests of all water users; and Recognising the need for integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate".

⁴⁵⁴ See Viljoen *Water as public property* 210-215. A note on licences as property: some implications for the South African water for the regulatory regime: legal status of existing water use rights. Muller 2014 *Aquatic Procedia* 35-41 history of 20 years realisation of the rights to water.

⁴⁵⁵ Section 3 of the NWA on the basis of public trusteeship, the authority over water resources primarily vests within the national sphere of government. The national government may delegate certain functions pertaining to water resources to other spheres of government in forms of schedule 4B and 5B of the Constitution.

⁴⁵⁶ The *Amendment Act* came into force on 2 September 2014.

⁴⁵⁷ The *Amendment Act* came into force on 2 September 2014.

4.3.1 *The application of a licence and the public participation requirement*

Water use rights are subject to a governmental authorisation process in terms of a licence or permit.⁴⁵⁸ Part 7, sections 40⁴⁵⁹ and 41⁴⁶⁰ of the NWA deal with the application and procedure requirements for individual licences. The application for a water use licence (hereafter WUL) takes place during the planning phase of the project.⁴⁶¹ During the planning phase of a project, when an application⁴⁶² for a WUL is applied for, the competent authority may⁴⁶³ invite written comments from a person who has an interest in the matter.⁴⁶⁴ There is another discretionary public participation procedure during any⁴⁶⁵ stage⁴⁶⁶ of the application process whereby the competent authority "may"⁴⁶⁷ require that the application be brought to the attention of interested persons and the general public⁴⁶⁸ through a notice in a newspaper stating that written objections may be lodged. Section 41(4)(b)⁴⁶⁹ states that the competent authority may require the applicant by invitation to take steps at any stage to bring the application to the attention of interested persons and the general public. The comments or objections of interested and affected parties must be

⁴⁵⁸ Viljoen *Water as public property* 195, refers to certain instances where exemption is granted from the acquisition of an authorisation with reference to Schedule I of the NWA.

⁴⁵⁹ Section 40(1)-(4).

⁴⁶⁰ Section 41(1)(a)-(c).

⁴⁶¹ Buckley, Friedrich and Von Blottnitz 2011 *Water SA* 719, 724.

⁴⁶² Section 40(1) of NWA and s 41(1) refer to the procedure Reg 3(1)-(b), 6(1)-(4) in GG 40713 of 24 March 2017.

⁴⁶³ The use of the word may make it a discretionary requirement for public participation. King and Redell 2015 *PELJ* 953-954 refer to the limited discretionary public participation procedure.

⁴⁶⁴ Section 41(2)(c) of NWA "may invite written comments from any organ of state which or person who has an interest in the matter" Reg 17(3) refers to the notice of application that must be provided to interested and affected parties.

⁴⁶⁵ Reference to s 41(4) "at any stage of the application process".

⁴⁶⁶ Section 41(4)(b) of NWA "A responsible authority may, at any stage of the application process, require the applicant (b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public". Reg 17(1)(2)(3).

⁴⁶⁷ Section 41(4) of NWA.

⁴⁶⁸ In contrast, s 41(2)(d) provides that the competent authority "must" afford the applicant an opportunity to make representations on any aspect of the licence application.

⁴⁶⁹ King and Redell 2015 *PELJ* 945 state that s 41 does not provide an complete mechanism for public participation. S 41 provides some guidance as to the information required to be provided in the media in regard to a WUL. No details are provided regarding the nature and extent of the public participation.

compiled in a report⁴⁷⁰ and submitted to the competent authority. No details are provided regarding the nature and extent of the public participation as interested and affected parties.

4.3.2 Appeals to the Water Tribunal and public participation

A right of appeal to the Water Tribunal

... against a decision of the responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies by the applicant or by any other person who has timeously lodged a written objection against the application⁴⁷¹

⁴⁷⁰ Regulation 19(1) written comments or objection records of meeting and the register of interested and affected parties.

⁴⁷¹ Section 148(1)(f). The Water Tribunal is an administrative tribunal established under the NWA in terms of s 146. In some cases, I&AP's will be notified and submit a written objection, but in other cases not. Where a written objection is not submitted, those I&AP's will not be able to approach the Water Tribunal in the case of an appeal. S 148(1)(f) of the NWA makes provision for a right of appeal to the Water Tribunal "... against a decision of the responsible authority on an application for a licence under s 41, or by any other person who has timeously lodged a written objection against the application." "The right to an appeal in terms of s 41 of the NWA is available to "any other person" only insofar as that person has "timeously lodged a written objection against the application." The discretionary powers in regard to the provision to allow public participation in s 41 provides that I&AP's in some cases not be notified of their opportunity to submit a written objection. Those I&AP's will therefore be barred from exercising their appeal rights to the Water Tribunal. In *Gideon Anderson T/A Zonnebloem Boerderey v Department of Water and Environmental Affairs and Vuna Enterprises (Pty) Ltd* unreported case number 24/02/2010 of 21 July 2010 the Water Tribunal held the opinion that a person may object to an application for a water use license if only objections had been "invited" in terms of s 41(4)(a) of the NWA para 23.9. In that case the Water Tribunal found that as no objections had been "invited" by the applicant in terms of s 41(4), the appellant had no right of appeal in terms of s 148(1)(f) of the NWA. The *Escarpment Environmental Protection Group v Department of Water Affairs* case deals with a judicial review by the Gauteng North High Court of three decisions by the Water Tribunal regarding appeals lodged in terms of s 148(1)(f) of the NWA. The court stated that the word "may" in s 41 should be read as confirming a discretionary power to the competent authority. Para 6. The Anderson case demonstrates that no right of appeal to the Water Tribunal exists if comments from I&AP's had not been invited. The "written" objection can only refer to a formal "invited" objection. Therefore, appellants who were not invited to submit objections have no right of appeal. But in the *Escarpment* case, the High Court did not go so far as to say that there 'must' be public participation in all water use license applications.

is available to "any other person"⁴⁷² to submit written objections. The public⁴⁷³ is hereby granted an opportunity to participate in that appeal only insofar as the public has "...timeously lodged a written objection against the application".⁴⁷⁴ The limited participation by public as per section 41 when invited by the competent authority will only in some cases notify the I&AP's or provide them with an opportunity to submit written objection.⁴⁷⁵ The Amendment Act⁴⁷⁶ also introduces an alternative appeal mechanism through the integrated process for applicants aggrieved by a decision of the competent authority.

4.3.3 The implications of the One Environmental System of integrated environmental authorisation process for public participation

It is evident that section 41(2)(c)⁴⁷⁷ of the NWA places a discretion on the competent authority and does not provide an inclusive mechanism for public participation. It is further evident that section 41(4)(a)-(b) of the NWA also places a discretionary function on the competent authority to require the applicant to bring the application to the attention of the interested persons and the general public⁴⁷⁸ and therefore does not provide an inclusive mechanism for public participation (limited and discretionary). Based upon such a limited public participation process, changes to the NWA created an opportunity to address the shortcomings in the NWA. The amended section 24L⁴⁷⁹ of the NEMA purposes to promote the integration of regulatory processes under conditions in which an integrated environmental authorisation

⁴⁷² Referring to interested and affected parties. King and Reddell 2015 *PELJ* 956 argue as follows: "Given the discretionary approach to public participation provided in section 41, (alluded to above I&AP's will in some cases not be notified or provided with an opportunity to submit written objections."

⁴⁷³ "any other person" s 148(1)(f) of NWA.

⁴⁷⁴ Section 148(1)(f) of NWA.

⁴⁷⁵ As the applicant was not required by the responsible authority to invite written comments in terms of s 41(4)(a) of NWA.

⁴⁷⁶ Act 27 of 2014.

⁴⁷⁷ "may invite written comments".

⁴⁷⁸ Section 41(4)(a)(b) of NWA "may at any stage of the application process require the applicant".

⁴⁷⁹ Act 25 of 2014.

may be granted by the competent authority. Section 24L(2) of the NEMA requires that an integrated environmental authorisation "...may be issued only if the relevant provisions of this Act⁴⁸⁰ and the other law or specific⁴⁸¹ environmental management Act have been complied with". Therefore, the public participation requirements in the NEMA are applicable in an application for an integrated environmental authorisation.⁴⁸² Section 41(5) of the NWA entitles the Minister to align and integrate the water use licencing in terms of the NWA with the timeframes and procedures prescribed in terms of the NEMA and the MPRDA.

4.4 The MPRDA and public participation

4.4.1 Introduction

The preamble and the long title of the MPRDA⁴⁸³ indicate that the MPRDA evolved from a desire to transform the mineral and petroleum laws of the country. The MPRDA also indicates a commitment to regulate the sustainable development of the nation's mineral resources to the benefit of current and future generations.⁴⁸⁴

The regulations for petroleum exploration and production set additional requirements over and above the NEMA EIA requirements.⁴⁸⁵ The MPRDA⁴⁸⁶

⁴⁸⁰ With reference to the NEMA.

⁴⁸¹ With reference to the applicable SEMA's.

⁴⁸² See comments by King and Reddell 2015 *PELJ* 962.

⁴⁸³ Act 28 of 2002; Van der Schyff *Property in minerals and petroleum* 161 writes that objects as per s 2 play an important role in the function of interpretations. The sustainable objective is based in ss 2(f) and (i). The term 'sustainable development' is defined in s 1 of the MPRDA as follows: "the integration of social economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serve present and future generations".

⁴⁸⁴ Van der Schyff *Property in minerals and petroleum* 153. The concept "sustainable development" is defined in s 1 of the MPRDA and from the content it is clear that the interests of both current and future generations are at stake. "The integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serve present and future generations." See also s 37(2) that refers to the present and future generations' incorporation of the public trust doctrine through the *Mineral and Petroleum Resources Development Act* in regard to the object of the Act.

⁴⁸⁵ GN R466 in GG 38855 of 3 June 2015.

⁴⁸⁶ Section 37 with reference to Environmental Management Principles.

makes explicit provisions by stating that the NEMA principles⁴⁸⁷ apply to all prospecting and mining operations⁴⁸⁸ and serve as guidelines for the interpretation, administration and implementation of environmental requirements.⁴⁸⁹

Chapter 4 of the MPRDA contains a specific section dealing with "consultation with interested and affected parties".⁴⁹⁰ The I&AP's are called upon to submit their comments in regard to an application.

4.4.2 The provisions in the MPRDA providing for public participation

The requirement for public participation for the MPRDA is captured in sections,⁴⁹¹ 5(4)(c),⁴⁹² 10(1)(b),⁴⁹³ section 16(4)(b),⁴⁹⁴ 22(4)(b)⁴⁹⁵ section 27(5)(b) of the Act.⁴⁹⁶

⁴⁸⁷ As per s 2 of the NEMA.

⁴⁸⁸ Section 37(1)(a).

⁴⁸⁹ Section 37(2) also refers to present and future generations and reaffirms the commitment to regulate the sustainable development of the nation's mineral resources.

⁴⁹⁰ Chapter 4 s 10(1)(a)-(b) "within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner call upon interested and affected persons to (b) submit their comments regarding the application within 30 days from the date of the notice".

⁴⁹¹ That require notification and consultation.

⁴⁹² "giving the landowner or lawful occupier of the land in questions at least 21 days' written notice".

⁴⁹³ Chapter 4 of the MPRDA as per s 10 referred to as consultation with interested and affected parties. S 10(1) "Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner 10(1)(b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice."

⁴⁹⁴ Section 16(4)(b) "If the Regional Manager accepts the application, within 14 days from the date of acceptance, notify the applicant in writing (b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports."

⁴⁹⁵ Applications for a mining right as per s 22(4)(b) "If the Regional Manager must within 14 days from the date of acceptance, notify the applicant in writing (b) to consult in the prescribed manner with the landowner, lawful occupier and include the result of the consultation in the relevant environmental reports."

⁴⁹⁶ The application for issuing and duration of a mining permit as per s 27(5)(a) states as follow: "If the Regional Manager accepts the application, the Regional Manager must within 14 days of the receipt of the application, notify the applicant in writing to (a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports."

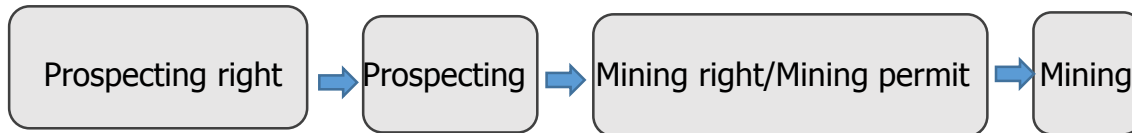


Figure 4.1: The different stages of mining⁴⁹⁷

It is evident from the sections⁴⁹⁸ that public participation should take place in the following instances: First, before an applicant for a prospecting right needs to test the earth of the mining area and before the applicant starts mining, by giving the landowner or lawful occupier at least a 21-day written notice.⁴⁹⁹ In the second instance, after an applicant lodges an application in terms of sections 16 (prospecting right),⁵⁰⁰ 22 (mining right)⁵⁰¹ and 27 (mining permit),⁵⁰² the regional manager has to call upon interested and affected persons to submit comments in regard to the application.⁵⁰³

The public's right to participate in the application process of a prospecting right,⁵⁰⁴ mining right⁵⁰⁵ or a mining permit as per section 27(a)⁵⁰⁶ is based on a comment for a section 10 application (a prospecting right)⁵⁰⁷ and consultation process for a section 16 mining right and consultation as per section 16(4)(b) process.⁵⁰⁸ In addition to the comment/consultation

⁴⁹⁷ Design by Legal Resources Centre 1979 https://cer.org.za/wp-content/uploads/2016/05/LRC-2016_Mining_affected_communities_Eng.pdf.

⁴⁹⁸ Referred to ss 5(4)(c), 10(1)(b), 22(4)(b) and 27(5)(b) of the Act.

⁴⁹⁹ Section 5(4)(c) of the MPRDA.

⁵⁰⁰ Section 16 refers to a prospecting right and s 16(1) refers explicitly to the application for an environmental authorisation that must be lodged simultaneously.

⁵⁰¹ Section 22 refers to a mining right and refers to the obligation placed upon the applicant to apply simultaneously for an environmental authorisation.

⁵⁰² Section 27 refers to a mining permit and s 27(2) refers to the environmental authorisation that must be applied for simultaneously.

⁵⁰³ Comments from the interested and affected persons should be submitted within a period of 30 days. Reg 3(2). S 10(1) which states that a notice must be placed on a notice board accessible to the public at the office of the Regional Manager. Reg 3(3) is also applicable as to the method of publication, the Provincial Gazette, the magistrate's court, or an advertisement in a local or national newspaper. Reg 3(4).

⁵⁰⁴ Section 16 of the MPRDA.

⁵⁰⁵ Section 22 of the MPRDA.

⁵⁰⁶ Section 27 of the MPRDA.

⁵⁰⁷ Via a notice published by the Regional Manager.

⁵⁰⁸ Consultation between the department and the landowner or lawful occupier has to take place within 14 days after the acceptance of a prospecting right application, notifying and

requirement during the application process, the “landowner or lawful occupier must again be notified by the person to whom a prospecting right was granted prior to the actual commencement” of the operation.⁵⁰⁹

4.4.3 Public participation and closure

Closure of a mining project or a closure plan contemplated in terms of regulation 19 of government notice (hereafter GN)⁵¹⁰ also makes provision for a public participation procedure.⁵¹¹ The details of such a procedure are as follows: notification; meetings to be held, including the keeping of minutes; opportunities for comments in regard to the project; and review of EIA documentation. These comments and responses are contained in a report as

calling upon interested and affected persons to comment within 30 days of the notice as per s 10(1) of the MPRDA. The objections have to be referred to the Regional Mining Development and Environmental Committee as per s 10(2) of the MPRDA. The Regional Manager must within 14 days after acceptance of a prospecting right application provide the applicant with a written notification to notify and consult with the landowner or lawful occupier as per s 22(4)(b) of the MPRDA. The consultation seems to be connected to the preparation of the environmental reports required in order to obtain a prospecting or mining right. The EMP must be lodged to obtain a prospecting right and must include a record of the public participation conducted and its outcomes. Reg 52(2)(g). In the case of a mining right, the environmental reports include a scoping report. Reg 48. The public participation process is required in respect of both reports. In the scoping report the process of cooperation with identified interested and affected persons must be described, including their opinions and values. Reg 49(1)(f). The EIA report must also include details of the participation process with interested and affected persons and additional thereto how the concerns raised by them have been addressed. Reg 50(f). After a prospecting or mining right is obtained and before the commencement of the prospecting or mining operations, the holder of the right must engage with the land owner or lawful occupier of the land. S 5(4)(c). S 5(4) provides that no person may prospect or mine or commence with any work incidental thereto on any area without notifying and consulting with the landowner or lawful occupier of the land in question. In *Sechaba v Kotze* 2007 4 All SA 811 (NC) para 16 the Court held that proper notice should be given to the landowner, followed by a consultative process. The procedure was overturned by the CC in the *Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC), the Constitutional Court followed a far more rigorous "good faith" standard in relation to the consultation requirement. The CC made definite requirements in regard to the consultation process (paras 63 and 67).

⁵⁰⁹ Section 16(4)(b) of the MRDA. The Department of Mineral Petroleum and Resources issued guidelines for consultation with communities and interested parties. The guidelines provide definitions on consultation, namely a two-way communication process between the applicant and the community or interested and affected party, which includes, among others, host communities and traditional authorities. See also comments from Badenhorst, Olivier and Williams 2012 *TSAR* 126-128.

⁵¹⁰ GN R982 in GG 38282 of 4th December 2014. The closure plan as per Appendix 5.

⁵¹¹ Regulation 41 of GN R982 in GG 38282 of 4 December 2014 refers and the details are contained in the EIA Report. An amendment of the closure plan takes place in terms of reg 34-37 of GN R982 in GG 38282 of 4 December 2014.

well as copies of representations and comments received from registered I&AP's. As part of the closure activities a further public participation process will also be conducted to establish the closure objectives, concerns by the I&AP's and to register and address the complaints. This process entails a consultation with I&AP's.

An illustrative diagram of the public participation process as per the NEMA, NWA and MPRDA follows (Figure 4.2):

Different processes in project life cycle	Applicant	I&AP's
Announcement Phase 	• Distribute information document to the proposed application and notification • Identify I&AP's via ➤ Post media advertisements ➤ Site notice boards • Keep a register (by the environmental assessment practitioner [EAP]) of I&AP's (Reg 42 of GNR 982) with details of involved I&AP's throughout the process.	Notification by I&AP's
Scoping Phase 	• Receive and collect objection sheets and comment sheets and comments telephonically or by email • Verify the I&AP's contributions and interpretation of comments • Use the information received during this phase to define the scope of works for the specialist studies that will be executed during the Impact Assessment phase of the EIA/EMPr. • Announce the scoping report through the media and send by mail or post to the individuals and organisational authorities on the stakeholder database (consultation) • Distribute the report (consultation scoping report) at public venues, by mail in an electronic format. This will also be distributed to the authorities • Make comments (by I&AP's) via a comment sheet, submissions in writing or by email or by attending a public meeting	• Identify issues of concern to comment on • Provide local knowledge and experience • Define scope of the technical studies for the Impact Assessment • Complete and return registration and comment sheets by telephone or email • Verify the contributors of I&AP's and oversee that they are correctly interpreted and understood • Raise further issues • Use the concerns identified by the I&AP's and the environmental technical specialists to describe the Terms of Reference for the expert studies for the Impact Assessment Phase • Comment on report by I&APs
Impact Assessment Public Participation Process 	• Announce the availability and public review of the environmental impact report/environmental management programme and the draft of the integrated water use application for public view through consultation • Send a letter of notification to registered I&APs re information of the improvement made with the study and the availability of the reports for comment by consultation • Distribute the result of the report to public places • List the following items in the environmental impact report and the environmental management programme through consultation ➤ project description ➤ motivation ➤ description of alternatives that are considered	• Hold public review of the Environmental Impact Report/Environmental Management Programme (CEIR/CEMPR) and draft IWULA to comment on I&AP's to verify issues before approval of report (a consultation action) • Attend public meeting for public review of consultation reports • Comment on final report

	➤ findings of the assessment • recommend mitigation measures • include comments and responses report • Hold a public meeting. The public review period made provision for reports containing the consultation • Distribute information of the meeting as part of the notice of the availability of the reports • Send letters to stakeholders after comments received from I&AP's all the stakeholders to report where the process is and to inform that the environmental impact reports and environmental programme have been submitted to lead authority • Create a further opportunity for the I&AP's to raise objections on the final reports • Outcome Environmental Impact Report	
Environmental Authorisation Phase and IWULA 	• Receive environmental authorisation • Send out notification letters to individuals and stakeholder database • Post media adverts	• Receive notification of environmental authorisations via media adverts
Closure phase 	• Notify I&APs • Hold meeting with minutes and comments on project • Review of EIA documentation • Compile report with representations and comments • Compile closure report with objections and register and address complaints	• Receive notification of closure • Deliver comments and responses on project and EIA • Meeting and consultation to register and address complaints

Figure 4.2: Illustration of the public participation process

4.5 Conclusion

The purpose of this discussion was to provide a cursory overview of the extent to which existing environmental legislation and natural law legislation provide for public participation. The focus was first on the NEMA to detect the provisions for public participation procedures. The NEMA example provides an extensive list of principles, one of which is the public participation of all

registered I&AP's.⁵¹² Apart from the specific participation clause, a further provision is refers to the needs and values of I&AP's that should be considered when decisions are taken.⁵¹³ The integrated environmental management procedure per chapter 5 also makes provision for public participation.⁵¹⁴ The environmental authority procedure facilitates the investigation, assessment and communication of the consequences or impacts of activities on the environment and requires a public participation procedure.⁵¹⁵ The appeal procedure takes place when the applicant (referred to as any person) submits an appeal by means of a notification to registered I&AP's.⁵¹⁶ The public participation procedure is based upon a notification, comment and consultation process during the planning phase and, if applicable in terms of Chapter 5⁵¹⁷ for the amendment, suspension, withdrawal of compliance with the environmental authorisation and EMPr.

In the NWA, a limited and discretionary provision is made for public participation.⁵¹⁸ The decision to invite I&AP's is based on the discretion of the competent authority. It is a limited process during the planning phase by means of a notification and comment process. The NWA does not regulate any procedure in terms of the nature and extent; however, guidelines by the Department of Water and Sanitation provide some guidance. The limited discretionary appeal procedure provides a notification⁵¹⁹ by the competent authority to any other person, as well as a comment process.

The implication of the 'One Environmental System' entitles the Minister to align and integrate the WUL in terms of the NWA with the timeframes and procedures in terms of the NEMA and the MPRDA.⁵²⁰ In regard to the MPRDA,

⁵¹² Paragraph 4.2.2.

⁵¹³ Paragraph 4.2.2.

⁵¹⁴ Section 23(2)(d).

⁵¹⁵ Paragraph 4.2.3 24(4)(a)(v).

⁵¹⁶ Paragraph 4.2.4.

⁵¹⁷ Regulation 27-28.

⁵¹⁸ Paragraph 4.3.1.

⁵¹⁹ Paragraph 4.3.2.

⁵²⁰ Paragraph 4.3.3.

the NEMA principles apply to all⁵²¹ prospecting and mining operations. The public participation process in regard to the MPRDA during the planning phase for the application of “a prospecting right, mining right and mining permit” is a parallel process with the environmental authorisation process in terms of the NEMA.⁵²²

The public participation provision is based upon a notification, comment and consultation process. A mining closure plan as per regulation 19⁵²³ makes provision for a public participation procedure whereby I&AP's are notified to comment and consult. The section 43(4) closure certificate of the MPRDA requires that certain information in terms of the NEMA with reference to programme plans and reports be complied with. The NEMA regulation 40(1)(b) refers to public participation for I&AP's where applicable to a closure plan. The extent of the public participation process ends at the consultation stage.

⁵²¹ Paragraph 4.4.1.

⁵²² Paragraph 4.4.2.

⁵²³ Paragraph 4.4.3.

CHAPTER 5

Conclusion and recommendation

5.1 Conclusion

5.1.1 Background

The concept of public participation entrenches the government's duty to act as guardian of specific resources for the benefit of the public as a whole.⁵²⁴ The government has the obligation to act either as a trustee or as a custodian of the environment or specific natural resources.⁵²⁵

As trustee or custodian, the government has the duty to administer, protect, manage and conserve the environment for the benefit of current and future generations.⁵²⁶ The interests of the current and future generations as beneficiaries are represented by the public interest.⁵²⁷ Therefore, the government is obliged to consider the interests represented by the public through a process of public participation.⁵²⁸

The public's interests in the environment and the country's natural resources are outlined in different statutes.⁵²⁹ The public is granted a voice in the management of the country's natural resources through the process of public participation.⁵³⁰ Public participation in its broadest sense consists of different stages in the decision-making process.⁵³¹

Through these processes the public interacts with government to enhance decision making and to create public buy-in to safeguard the obligations of the state.⁵³²

⁵²⁴ Chapter 1.1.

⁵²⁵ Chapters 1 and 2.

⁵²⁶ Chapter 1.3.

⁵²⁷ Chapter 1 para 1.1.

⁵²⁸ Chapter 1.2.

⁵²⁹ Chapter 1.2.

⁵³⁰ Chapter 1 para 1.1.

⁵³¹ Chapter 1.3.

⁵³² Chapter 1 para 1.1.

In the *Earthlife* case⁵³³ the Cape Provincial Division of the High Court confirmed the close link between administrative processes and the participation of interested and affected parties during all stages of environmental decision making.⁵³⁴ Although the central link between public participation, environmental management and the fulfilment of environmental rights has been made by academic scholars,⁵³⁵ none of the existing studies explore the nuances that the concept of public trusteeship might provide to the discussion. The dissertation sought to explore the content and role of the continuum of public participation in a public trust regulatory model. The research question that underpins this study is the following:

5.1.2 Research question

What are the modes of meaningful public participation required by a public trust regulatory mode?

5.1.3 Methodology

The methodology that was followed was based on a literature study of relevant text books, law journals, legislation, case law and Internet sources in order to answer the research question. To this end, the section focused on determining the origin and implications of a public trust regulatory model. The research was focused on the origin of the public trusteeship notion and its inception and development in South African jurisprudence. The custodial obligation acquired by government as public trustee as well as the interest acquired by the public were critically assessed in order to determine at which stages in the life cycle of environmental decision-making the public voice needed to be heard. Thereafter, a discussion was presented on the concept of public participation. Public participation as a concept of participatory democracy in environmental decision-making was critically analysed in order to provide a

⁵³³ Chapter 1 para 1.1.

⁵³⁴ Chapter 1 para 1.1.

⁵³⁵ Chapter 1 para 1.1.

theoretical exposition of the role, content and importance thereof. In the penultimate section of this dissertation the focus was on describing and analysing the extent of public participation that was provided for in South African constitutional and environmental law. In the final instance an answer to the research question was offered in conclusion of the dissertation.

5.2 The origin and implications of a public trust regulatory model

Research was conducted to trace the origin⁵³⁶ and implications of a public trust regulatory model.⁵³⁷ The aim was to investigate how the concept of public trusteeship has been incorporated into the South African environment and natural resources legislation.⁵³⁸

The purpose of the discussion was to understand exactly what the 'public trust regulatory model' consists of; therefore, it was necessary to define public trusteeship and explain how this regulatory model became part of the South African environmental regulatory system.

5.2.1 Finding

The following finding was made, namely that the legal philosophy underlying the public trusteeship notion was founded on the duty of the sovereign to act as the guardian of certain interests.⁵³⁹

The stewardship principle forms the underlying foundation of the public trustee notion.⁵⁴⁰ Research into the American law traced the philosophical ethic of public trusteeship which found its way into the South African environmental and natural resources law.⁵⁴¹ It was found that the state and the national government have a constitutional and statutory responsibility for the interests of South African society. The responsibility relates to the use, protection and

⁵³⁶ Chapter 1 para 1.1.

⁵³⁷ Chapter 1 para 1.1.

⁵³⁸ Chapter 2 paras 2.1.2, 2.1.3, 2.1.4, 2.2.

⁵³⁹ Chapter 2 para 2.1.2.

⁵⁴⁰ Chapter 2 para 2.1.2.

⁵⁴¹ Chapter 2 para 2.1.6.

management of South African natural resources.⁵⁴² A stewardship ethic is found in various natural resources and environmental legislation that incorporates the public trusteeship notion⁵⁴³ and embodies the principle that certain natural resources are destined to benefit the people of South Africa. In exercising its fiduciary responsibility, the government regulates access to and protects and maintains these resources in the public interest.⁵⁴⁴

Various statutory "stewardship doctrines of public trust" were created by the legislature.⁵⁴⁵ Section 24 of the Constitution and the respective natural resources statutes acknowledged the nation's collective interest in protecting the environment and its natural resources.⁵⁴⁶ The different pieces of legislation are characterised by certain common elements such as the identification of a natural resource that is used by a specific community of citizens, and that is to be protected for intergenerational access, use and benefit under the custodial or fiduciary control of a state authority.⁵⁴⁷ The philosophical notion of public trusteeship has been created by statute in relation to the environment and specific natural resources.

5.3 Public participation as a concept of participatory democracy in environmental decision making

The discussion of the concept of public participation was conducted with the aim of shedding some light on public participation as a concept of participatory democracy in environmental decision making. The assumption was made that public participation was rooted in the concept of democracy. The focus was therefore on the concept of democracy. The social contract theory was investigated to follow the relationship between citizens and the government of a country in a democratic system. The concept of democracy was defined and the public participation concept explicated.

⁵⁴² Chapter 2 para 2.2.3.1.

⁵⁴³ Chapter 2 para 2.2.2.

⁵⁴⁴ Chapter 2 para 2.2.6.

⁵⁴⁵ Chapter 2 para 2.2.7

⁵⁴⁶ Chapter 2 para 2.2.6.

⁵⁴⁷ Chapter 2 para 2.2.6.

Subsequent research was conducted on the public participation concept as part of a participatory democracy,⁵⁴⁸ with reference to the representative and participatory facet. A definition of public participation was provided.

5.3.1 The finding

It was concluded that the essence of a democracy was based on and rooted in the social contract theory⁵⁴⁹ whereby people voluntarily consent to the formation of a government.⁵⁵⁰ The development of the social contract theory by Locke, Hobbes and Rousseau emphasised the will and the power of the people in which the concept of a democracy evolved.⁵⁵¹

It was concluded that a democracy was a system of governance whereby citizens participated actively in politics and civic life and had an equal say in decisions.⁵⁵² Public participation and democracy are also intricately linked in a participatory orientation and refer to the substantive and procedural aspects of a democracy.⁵⁵³

The procedural facet of the South African government made provision for the public to participate in the law-making processes as per clauses 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution.⁵⁵⁴

The Constitution placed a duty on the National Assembly (hereafter NA), the National Council of Provinces (hereafter NCOP) and the provincial legislatures to facilitate public participation as a constitutional duty.⁵⁵⁵ The constitutional democracy is both representative and participatory.⁵⁵⁶ The representative element is implicit in the notion that citizens will delegate law-making power to elected representatives,⁵⁵⁷ whereas participatory democracy entails the

⁵⁴⁸ Chapter 3 para 3.3.1.

⁵⁴⁹ Chapter 3 para 3.2.1.

⁵⁵⁰ Chapter 3 para 3.2.2.

⁵⁵¹ Chapter 3 paras 3.2.3, 3.2.4, 3.2.5.

⁵⁵² Chapter 3 para 3.3.

⁵⁵³ Chapter 3 para 3.3.1.

⁵⁵⁴ Chapter 3 paras 3.4, 3.5.2.

⁵⁵⁵ Chapter 3 paras 3.3.1, 3.4.

⁵⁵⁶ Chapter 3 para 3.3.2.

⁵⁵⁷ Chapter 3 para 3.3.2.

making of representations in the law-making process. The public participated both in the representative and participatory forms of a democracy.⁵⁵⁸ For the purposes of the study, the focus was on the continuum of activity displayed by the public in the governmental decision-making processes.⁵⁵⁹ It is proposed that public participation entails the participation by the public in governmental decision-making processes to influence the government in regard to people's concerns, needs and values.⁵⁶⁰

A summary of the relevant cases demonstrated an over-emphasis of the participatory concept of democracy compared to the representative democracy.⁵⁶¹ In cases where the legislature complied with its constitutional obligation to facilitate public participation, the courts are unable to intervene, even if the representatives have disregarded the views of the public⁵⁶² which were not reflected in the decisions taken by their representatives. The provisions for public participation then follow as provided for in the environmental and natural resources legislation.

5.4 Different modes of public participation identified in the environmental legislation and natural resources legislation: A cursory overview

The aim of the chapter was to provide a cursory overview of the extent to which existing environmental law and natural resources legislation provided for public participation in environmental decision making. The focus of discussion was on the *National Environmental Management Act*, the *National Water Act* and the *Mineral and Petroleum Resources Development Act*. The principles and provisions in the NEMA were taken as an example and also chapter 5 of the Act referred to "Integrated Environmental Management".⁵⁶³

⁵⁵⁸ Chapter 3 para 3.3.2.

⁵⁵⁹ Chapter 3 para 3.4.2.

⁵⁶⁰ Chapter 3 para 3.4.2.

⁵⁶¹ Chapter 3 para 3.5.2.

⁵⁶² Chapter 3 para 3.5.3, 3.6.

⁵⁶³ Chapter 4 para 4.2.1.

5.4.1 The findings

In the findings the following were observed: The NEMA provides an example of a set of principles of public participation of interested and affected parties (hereafter the I&AP's) in environmental decision making.⁵⁶⁴ The Chapter 5 on 'integrated environmental management' provisions also provides for public participation in regard to decision making.⁵⁶⁵ It is evident from section 23 that a successful system of integrated environmental management is dependent on the provision of adequate avenues through which public participation can be facilitated.⁵⁶⁶ It is also evident that the public participation procedure provides for access to all information, comments by and consultation with I&AP's.⁵⁶⁷ The application procedure for an environmental authorisation makes provision for public participation through notification, comment and consultation procedure provision.⁵⁶⁸ The appeal process of the NEMA also provides for a notification and comment process.⁵⁶⁹

In the NWA, a limited and discretionary provision is made for public participation.⁵⁷⁰ The discretion is based in the competent authority who has the discretion to invite comments from a person who has an interest in the matter.⁵⁷¹ Another discretionary public participation process is also based in section 41(4)(b) whereby the competent authority may at any stage of the application process direct the applicant to bring the application to the attention of interested persons and the general public.⁵⁷² This limited discretionary public participation process also leads to a discretionary appeal process.⁵⁷³

The public participation process in regard to the MPRDA reveals that, during the application for a prospecting right, mining right and mining permit,

⁵⁶⁴ Chapter 4 para 4.2.2.

⁵⁶⁵ Section 23 of the NEMA.

⁵⁶⁶ Chapter 4 para 4.2.2.

⁵⁶⁷ Chapter 4 para 4.2.3.

⁵⁶⁸ Chapter 4 para 4.2.3.

⁵⁶⁹ Chapter 4 para 4.2.4.

⁵⁷⁰ Chapter 4 para 4.3.1.

⁵⁷¹ Chapter 4 para 4.3.1.

⁵⁷² Chapter 4 para 4.3.1.

⁵⁷³ Chapter 4 para 4.3.2.

provision is made for a notification, comment and consultation process.⁵⁷⁴ In regard to the closure certificate in terms of section 43 of the MPRDA, section 43(4) of the MPRDA requires compliance by means of the required information, programme plans and reports in terms of the NEMA. The closure plan referred to in regulations 40(1)(b) refers to a public participation process for I&AP's by means of a comment process.⁵⁷⁵

5.5 Conclusion

In a constitutional democracy the public are given an opportunity to choose public representatives to represent them in government.⁵⁷⁶ One of the principles of a democracy is the right by the people and a duty to participate in governmental processes and civil society.⁵⁷⁷ The public participate in various modes in different stages of the decision making process of government.⁵⁷⁸ By voting in elections, participation in party politics, organizing public demonstrations, petitioning local, provincial and national leaders, lobby decision makers, engaging with ward committees, making of written or verbal submissions to council committees, referring complaints to appropriate institutions such as South African Human Rights Commission (SAHRC) and lobby constituency representatives of statutory institutions.⁵⁷⁹

In terms of the Constitution different structures of national, provincial and local government offer opportunities in their respective executive and legislative branches.⁵⁸⁰ During the policy-making process, the public participates in the identification of the need for a new policy stage, the identification of issues, the exploration of options and the finalizing at the policy stage. The public participates through notification, comment, consultation, attendance of hearings and the making of submissions.⁵⁸¹ During the law-making process, at

⁵⁷⁴ Chapter 4 para 4.4.2.

⁵⁷⁵ Chapter 4 para 4.4.3.

⁵⁷⁶ Chapter 3 para 3.3.1.

⁵⁷⁷ Chapter 3 para 3.3.2.

⁵⁷⁸ Chapter 3 para 3.3.1.

⁵⁷⁹ Chapter 3 para 3.5.

⁵⁸⁰ Chapter 3 para 3.5.2.

⁵⁸¹ Chapter 3 para 3.5.2.

different stages when a bill is tabled in parliament and when the bill is referred to the parliamentary committee, which holds public hearings, the committee debates the bill and refers it back to the parliament. Then follow a debate and a vote on the bill, and the bill is sent to the office of the President for signature. The public participates during these stages by means of written submissions, oral representations, informal lobbying, during public hearings and letters of objections. In a public trust⁵⁸² regulatory model the public participates in different stages of the decision-making process when rights in terms of environment authorisations and permission are acquired in terms of the NEMA, the WUL and the MPRDA. The mode of participation consists of a notification, written comments, and an objection and consultation process. The level of participation in all these legislation requirements ends after the consultation process. During the operational phase of the project lifecycle and the integrated environmental management phase, there is no process of public participation. When environmental authorisation and permission terminate the closure stage, the public again has the right to participate by means of a notification, comment, and an objection and consultation process.

5.6 Recommendations

It is evident that the public trust responsibility places a duty on the government to administer, protect, manage and conserve the environment for the benefit of current and future generations. The public's voice is signified through the constitutional obligation of public participation. It is evident that different stages exist in the law-making process whereby government is obliged to take into account the public's concerns, needs and values. It is also evident that environmental decision-making consists of different stages. It is submitted that 'public participation' legislation is enacted to make provision for public participation procedures and provisions in regard to the environmental and natural resources law. Such legislation must contain provisions affording the public and interested and affected parties an opportunity at all stages of

⁵⁸² Chapter 4 para 4.2.

environmental decision-making to make their concerns, needs and values known in order to enhance the value of the government's decision-making process.

The continuum of activities should provide the public with information and an opportunity to be interviewed and to engage in the issues to be solved. The legislation should comprehensively cover all the details of the public participation's input where decision-making processes are applicable.

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