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People's Parliament? An assessment of public participation in South Africa's legislatures

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## Chapter 1

### Introduction

*“The people of South Africa are the Parliament, which is why it is called the “People’s Parliament”. ... The people you voted for are accountable to you, as it is you who elected them. It is their duty to listen to your opinions and needs. They must make sure the views of the voters are taken into account when they vote for laws. And they must report the decisions of Parliament back to you, the people. Everything they do and say must be open so that you, the voter can know what decisions are being made. So the people actively working for Parliament are there because the people of South Africa have put them there. And it is their duty to work for and represent every citizens [sic] of South Africa.”<sup>1</sup>*

This paper assesses the political impact of the constitutional framework and policy for public participation in South Africa. I consider the question of how legislatures are fulfilling their obligations to facilitate public participation, if they meet international human rights law (IHRL) norms and the extent to which the public involvement facilitated by legislatures measures up to standards identified by theories of political participation. Central to this is a discussion of whether government-led citizen participation processes influence, or have the potential to influence, state decision-making. I examine the political tensions that arise between public participation and party politics within the context of South Africa’s political system and discuss the role of civil society-led participation, and the interactions and conflicts between this and the government facilitated processes.

#### **The role and value of the legislatures**

Parliament is entrenched as the centre of South Africa’s democracy in Chapter 4 of the Constitution of the Republic of South Africa, 1996 (the Constitution). It provides the framework for a National Assembly (NA) to *“ensure government by the people under the Constitution”* and it goes further to note that *“It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”*<sup>2</sup> The National Council of Provinces (NCOP) is also required to provide *‘a national forum for public consideration of issues affecting the provinces.’*<sup>3</sup> The National Development Plan 2030 echoes the constitutional mandate, stating that their role is *‘to champion the concerns of citizens’*.<sup>4</sup> The NDP recognises the legislatures’ role in our democracy, towards *‘building an*

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<sup>1</sup> Quoted from the Website of the Parliament of South Africa. Accessed at [http://www.parliament.gov.za/live/content.php?Category\\_ID=14](http://www.parliament.gov.za/live/content.php?Category_ID=14) on 24 February 2014

<sup>2</sup> The Constitution of the Republic of South Africa. Act 108 of 1996. s42(3)

<sup>3</sup> The Constitution of the Republic of South Africa. Act 108 of 1996. s42(4)

<sup>4</sup> National Development Plan 2030: Our future – make it work. 2012. National Planning Commission. P428.

*accountable and responsive state*'. It notes that strong legislatures are essential for oversight and accountability of the executive by ensuring *'that questions get asked when things go wrong'*, and it describes their role to ensure that there is rigorous debate on policies.<sup>5</sup> In addition, it recognises that there is a *'crucial role for Parliament.... in enabling public participation'* within our democratic order.<sup>6</sup>

## Performance

Key to the discussion on the state of public participation in South Africa's legislatures is the issue of our democratic system. South Africa's democracy is based on a closed-list proportional representation system, which means that, at a national and provincial level, citizens vote for the party and the party decides who will be appointed as members of Parliament (MPs) or members of the provincial legislatures (MPLs).<sup>7</sup> While this system safeguards the election of a diversity of representatives, its downside is that citizens do not vote directly for their representatives, and thus the representatives do not account directly to voters, but rather to the party that has given them a place on the party list.<sup>8</sup> This acts as a disincentive for elected representatives to act independently; either in responding to the will of citizens where this conflicts with the positions of their party,<sup>9</sup> or in terms of their mandate to exercise oversight and hold the executive to account, which practically speaking means critiquing senior members of their party.<sup>10</sup> The problems that arise from this system are exacerbated by the dominance of a single political party at the polls.<sup>11</sup>

Friedman argues that in spite of this context, parliament has seen some strongly independent committees and committee chairpersons at times, but that this independence has frequently also resulted in their removal from parliament. He explains that the African National Congress' (ANC) reasoning for removing a number of committee chairpersons in 2010 was that these chairpersons *'were not showing enough respect for ministers'*.<sup>12</sup> The emergence of strong factions within the ANC since 2007 increased the independence of ANC members during a period of a few years, but Friedman stresses that indications of independence were not entirely the result of these rifts in the ruling party.<sup>13</sup> Van der Westhuizen also highlights instances in which committees and MPs have flexed their constitutional muscle over the executive with positive effects, but comes to the

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<sup>5</sup> National Development Plan 2030: Our future – make it work. 2012. National Planning Commission. (NDP) P428.

<sup>6</sup> NDP. 2012. *ibid.* P408.

<sup>7</sup> Report of the Electoral Task Team. 2003. P1

<sup>8</sup> Report of the Electoral Task Team. 2003. P29 ; and Report of the Independent Panel Assessment of Parliament. 2009. (RIPAP) Parliament of the Republic of South Africa. P8

<sup>9</sup> RIPAP. 2009. *ibid.* P8

<sup>10</sup> Van der Westhuizen C. 2014. *Working democracy: Perspectives on South Africa's Parliament at 20 years.* P38; and RIPAP. 2009 *ibid.* P37

<sup>11</sup> Friedman S. 2012. 'Fiercely (In-)dependent: South Africa's Parliament. *Perspectives* 2:12, 13-15. P 13; and RIPAP. 2009. *ibid.* P37

<sup>12</sup> Friedman. 2012. *ibid.* P14

<sup>13</sup> Friedman. 2012. *ibid.* P15

same conclusion that while this has had positive impact in isolated cases and in the short term, in the long run it results in the removal of these MPs from their parliamentary positions.<sup>14</sup>

As a consequence, significant questions persist regarding the will and capacity of the elected representatives to perform their functions of law making, representivity and oversight independently of political parties,<sup>15</sup> and regarding their lack of accountability to the voting public.<sup>16</sup> This context raises critical questions around parliament's mandate in terms of the Constitution – are decisions that should be taken in parliament, in reality, being taken by political parties and sent to parliament to be '*rubber stamped*'?<sup>17</sup> The impact of this weakness of the legislatures, is that they are failing to meet citizen expectations, thus citizens question the legislatures' credibility and have expressed significant mistrust in elected representatives.<sup>18</sup> "*Come to parliament and become a professional puppet*" read one protestor's placard outside parliament on 25 February 2014.<sup>19</sup> "*Its not a people's parliament, it's a parties' parliament*" opined a conference participant at the *People's Power, People's Parliament Conference*.<sup>20</sup>

To achieve accountability of the executive it is essential that MPs play a stronger leadership role to challenge and hold the executive to account. This scrutiny is essential to ensure accountability on the redistribution of resources and the provision of public services and to address mismanagement and corruption. A quote by a previous senior MP illustrates the frustrations MPs face in relation to this:

*"I think when we look at the issue of the relationship between committees and the Executive, it's essentially a matter of power. ... it's about power and whose views prevail. According to my experience...it tends to be the view of the executive that prevails. ... when I came to Parliament I served in one committee for six years. I left it because I was sick and tired of wasting my time because the minister won't listen".<sup>21</sup>*

In her assessment of the performance of Parliament over a 20-year period, van der Westhuizen provides numerous examples of executive dominance over the legislatures' territory, relating to both Parliament's oversight and law-making functions.<sup>22</sup> Examples include the handling of the

<sup>14</sup> Van der Westhuizen. 2014. *Ibid.* Pp33-35, p75 and p78

<sup>15</sup> Friedman. 2012. *Ibid.* P14; and RIPAP. 2009. *Ibid.* P 33

<sup>16</sup> RIPAP. 2009. *Ibid.* P8; and NDP. 2012. *Ibid.* P428.

<sup>17</sup> Pierre de Vos, Quoted in Ben-Zeev K. 2014. Report on *People's Power, People's Parliament: A civil society conference on South Africa's Legislatures. 13 – 15 August 2012.* P11

<sup>18</sup> Ben-Zeev, K. 2014. Report on *People's Power, People's Parliament: A civil society conference on South Africa's Legislatures. 13 – 15 August 2012.* Pp 6-11

<sup>19</sup> Observed by the author, for a number of hours after a Treatment Action Campaign march regarding patent laws on medicines, this protestor stood at the staff entrance to parliament with a placard repeating this phrase.

<sup>20</sup> Vuyiseka Dubula, Quoted in Ben-Zeev, K. 2014. Report on *People's Power, People's Parliament: A civil society conference on South Africa's Legislatures. 13 – 15 August 2012.* P7

<sup>21</sup> Quoted in RIPAP. 2009. *Ibid.* p40

<sup>22</sup> Van der Westhuizen. 2014. *Ibid.*

investigation into corruption in the arms deal; the ‘travelgate scandal’<sup>23</sup>; decisions relating to incumbent National Prosecuting Authority bosses over time; the closure of the Scorpions unit; and the processing of the Protection of State Information Bill, amongst others.<sup>24</sup> She demonstrates how the quality of ruling party MPs regarding their allegiance to constitutional values has weakened over time from the first heady years post 1994 and how this is linked to the increasing strength of the executive in the Parliament.<sup>25</sup> However, she argues that executive interference does not always result in negative outcomes when assessed against the issue of constitutionality of decisions, she refers to interventions by senior party leaders in the executive to address MPs resistance to the passage of the Civil Unions Bill<sup>26</sup> in order to remind them of their duty to uphold the Constitution irrespective of their personal feelings regarding the issue.<sup>27</sup>

This bloating of executive power at the expense of the influence of legislatures and consequently at the expense of state responsiveness to citizen input, lies at the heart of calls for Parliament to review the electoral system and consider incorporating more direct constituency-based selection of representatives in the national system, while maintaining some aspects of the party list system.<sup>28</sup>

There is some tension regarding the interpretation of the way in which elected representatives should engage with citizens, does public participation end with the direction given by citizens through voting in elections, or do representatives have a duty to engage with the views of citizens on a regular basis? Government claims ‘that because it was elected, it represents society and therefore need not consider civil society’s’<sup>29</sup> ongoing inputs, is problematic since elections do not translate into politicians knowing what citizens’ views are on different policy issues.<sup>30</sup> In response to the tensions that arise from incorporating participatory democracy into representative systems the Constitutional Court has plainly ruled that South Africa’s constitutional democracy requires the incorporation of ongoing political participation of citizens.<sup>31</sup>

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<sup>23</sup> A scandal in which 40 MPs were accused of fraudulent use of parliamentary travel vouchers

<sup>24</sup> Van der Westhuizen. 2014. *Ibid.* Pages: 32; 43; 96 and 99

<sup>25</sup> Van der Westhuizen. 2014. *Ibid.* P43

<sup>26</sup> Now the Civil Union Act No. 17 of 2006

<sup>27</sup> Van der Westhuizen. 2014. *Ibid.* Pp41 and 42

<sup>28</sup> Van der Westhuizen. 2014. *Ibid.* Pp41 and 42; and Report of the Electoral Task Team. 2003. Pp17-18

<sup>29</sup> The term civil society encompasses a broad range of non-state actors including the private sector, organized labour, religious sectors, academic institutions, non-governmental organisations, social movements, and community-based organisations and structures. In this paper I will use it specifically to refer to organized groups including most of these, however I will refer specifically to organized labour and the private sector at times in the discussion. I use the term ‘the public’ or ‘citizens’ interchangeably to refer to those members of the public who are not members of any organizing structure, however I do not intend, when using the word ‘citizens’ to exclude those members of the South African public who are not citizens of South Africa.

<sup>30</sup> Friedman S and McKeiser E. 2009. *Civil society and the post-Polokwane South African State: assessing civil society’s prospects of improved policy engagement.* Centre for the Study of Democracy; Rhodes University/University of Johannesburg; Commissioned by the Heinrich Boell Foundation. P40

<sup>31</sup> Doctors for Life International v The Speaker of the National Assembly and Others CCT 12/05 2006. (DfL) Para 116

Ensuring public participation in the legislatures not only promotes a people-centred democracy, it is also important because it can strengthen the functioning of the legislatures. Effective public participation can improve the capacity of legislatures to hold the executive to account. Information from civil society and the public more broadly, serves to verify the information that is provided by the executive which is vital for effective oversight.<sup>32</sup> Further, many civil society organisations (CSOs) have technical expertise and experience on specific issues which elected representatives do not. Finally, due to the statutory provisions regarding their openness, engaging with the legislatures affords the public access to information that may be difficult to obtain through government departments, this enhances efforts to monitor government performance and engage with government priorities and spending. The provincial legislatures (PLs) play an important role due to their mandate for oversight over the performance of provincial departments. It is at this level that many of the decisions relating to delivery on socio-economic rights such as health, education, housing and social services are taken.

### **Participation is political**

Public participation is not simply a technical exercise, it's highly politicised. Who speaks and who has influence on outcomes is strongly linked to systems of political and social power.<sup>33</sup> This plays out, not only in the extent to which the state engages in public participation, but also the extent to which participation impacts on decisions. A framework for participation, which must address technical avenues for access and participation, must also be alive to its inherent politics.<sup>34</sup> Without this, the vision for widespread meaningful public engagement will not be realised.

Public participation at its best is considered within a rights-based perspective.<sup>35</sup> The UN Special Rapporteur on Extreme Poverty and Human Rights' (UNSREPHR's) recent report on participation of people living in poverty strongly argues this point, stating that participation is a "*precondition or catalyst for the realisation and enjoyment of other human rights and of fundamental importance in empowering people living in poverty to tackle inequalities and asymmetries of power in society.*"<sup>36</sup> The report firmly establishes participation as a fundamental human right and recognises it as being central to promoting social justice.<sup>37</sup> The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others* (2006) also refers to the value of

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<sup>32</sup> Ajam T at the People's Power People's Parliament Civil Society Conference on South Africa's Legislatures 2012. Quoted in Ben-Zeev 2014. *Ibid.* P48

<sup>33</sup> Mander H. 2005. 'Rights as struggle – towards a more just and humane world'. In Gready P & Ensor J (Eds) *Reinventing Development?: Translating Rights-Based Approaches from Theory into Practice*. Pp240-241

<sup>34</sup> Hickey, S and Mohan, G. 2005. Relocating participation within a radical politics of development. *Development and Change*, 36(2), pp. 237–262. Accessed at [http://oro.open.ac.uk/4103/1/Hickey\\_and\\_Mohan\\_revised\\_70704.pdf](http://oro.open.ac.uk/4103/1/Hickey_and_Mohan_revised_70704.pdf) on 17 August 2014. P19 (page number refers to the open source version)

<sup>35</sup> Gaventa, J. 2009. 'Exploring Citizenship, participation and accountability' *IDS bulletin vol 33, issue 2*. P2

<sup>36</sup> UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona. *Recommendations to States: an operational framework to ensure meaningful participation of people living in poverty*. Human Rights Council A/HR/C/23/36 11 March 2013. (UNSREPHR)

<sup>37</sup> Lister 1998 p228 in Gaventa 2009. *Ibid.* p5.

participation to achieve redistribution, indicating that “*Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*”<sup>38</sup>

Strong legislatures, capacitated to fulfil their representative, oversight and legislative functions are critical to ensure a democratic system capable of achieving social justice and promoting human rights. To play this role, legislatures must be empowered through legislation, be independent, open and accessible to citizens and be sufficiently resourced. Equally, strong democracies require strong, diverse and independent civil society that promotes a plurality of voices.<sup>39</sup>

In the following chapters, I start in Chapter two with a discussion of the normative legal framework for political participation. I discuss the IHRL framework for political participation, describing developments in this and focussing on the recent report of the UNSREPHRs recommendations to states in this regard. I follow this with a description of the South African legal and policy framework for participation, considering the constitutional provisions for public involvement in the legislatures, along with reflecting on the Constitutional Court’s elaboration on these and the role of participation in South Africa’s representative democracy. In addition to a brief look at legislation relating to citizen participation, I explore the Rules of the legislatures in some detail before finally considering relevant frameworks recently developed by the legislatures.

Chapter three is dedicated to exploring the theoretical frameworks related to public participation. I discuss the developing theoretical understanding of and the empirical evidence supporting the incorporation of deliberative approaches and rights-based participation in representative systems. I then turn to the question of the spaces in which participation takes place, those who ‘own’ those spaces, define the terms of engagement and this impacts on their relative potential for political influence.<sup>40</sup> Understanding how power shapes and plays out in public participation is also critical to understand the potential for and limits of influence of participation, this question applies as much to power within civil society as to power between the state and the public and offers an explanation of why strong normative frameworks generally fail to deliver on their promises of citizen influence.

In chapter four, I turn to the question of the range of mechanisms provided by South Africa’s legislatures for participation and their performance regarding both their legislative and oversight functions. I draw on a range of examples and studies to examine in some detail if the public have

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<sup>38</sup> DfL. *Ibid.* Para 115

<sup>39</sup> Friedman and McKeiser. 2009. *ibid.* Pp12-14

<sup>40</sup> Gaventa J. 2006. Finding the spaces for change: a power analysis. IDS Bulletin Volume 37 Number 6 November 2006  
© Institute of Development Studies P112



influenced the outcomes of various processes and what the political and systemic factors were that prevented or facilitated influence. In this discussion I also engage with questions of the performance of civil society in making claims on the legislatures and in creating other opportunities to enhance political influence. I then consider examples of how elected representatives have used their power to define the spaces and terms of engagement to serve broader political agendas.

I conclude with an assessment of the performance of South Africa's legislatures against the standards set out in the IHRL framework and those defined through theory, before addressing myself to the question of whether there is any point to the public and civil society continuing to engage with the legislatures in South Africa's current political climate.

## Chapter 2

### Framework

#### 1. Introduction

Over the past 50 years, international standards for citizen participation have improved, and it has been articulated as a fundamental human right.<sup>41</sup> In addition, requirements for greater direct citizen participation within representative democracies have gained more traction.<sup>42</sup> The South African Constitution is explicit in its requirements for participation in legislative processes and these requirements have been interrogated by our courts, which have also ruled that South Africa's representative democracy must incorporate systems of direct participation as well as providing further direction regarding how participation should be implemented.<sup>43</sup> There is no single piece of legislation or policy in South Africa to govern public participation. In terms of the legislatures guidance is mostly contained in the Rules of the legislatures, along with a number of other documents with variable levels of enforceability, standards and frameworks for participation.

In this chapter I look at the evolving provisions in the international human rights law framework for citizen participation, and how these are linked to the right to information. I provide a summary of the recent recommendations to states of the UN Special Rapporteur on Poverty and Human Rights regarding participation. I then turn to the South African framework, starting with the provisions of the Constitution, their limits, and the decisions of the Courts in respect of the role of direct participation within our representative democracy. I briefly look at legislation that deals with oversight and public participation before taking a more comprehensive look at the Rules of the legislatures which relate to openness, access and public participation. Finally, I discuss the Public Participation Framework and Oversight Model for the South African Legislative Sector. Both provide further direction to support the aspiration for effective public participation in the work of the legislatures.

#### 2. International Human Rights Law Framework

The international human rights law (IHRL) framework addresses the issue of citizens' political participation extensively. A range of international treaties and conventions express the right to

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<sup>41</sup> UNSREPHR. *Ibid.* Para 20

<sup>42</sup> *UN Convention on the Elimination of all forms of Discrimination Against Women*. 1979. Article 7(b); *UN Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106. Article 3(c); and *The Declaration on the Right to Development*. A/RES/41/128. 4 December 1986. Article 8(2) in reference to Article 8(1)

<sup>43</sup> DfL. *Ibid.*

participate and emphasise participation's role in promoting access to all human rights and freedoms.

The Universal Declaration on Human Rights states that *'everyone has the right to take part in the government of his country, directly or through freely chosen representatives'*.<sup>44</sup> Similarly the International Covenant on Civil and Political Rights (ICCPR) states that *'every citizen has the right and opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives'*.<sup>45</sup> The African Charter on Human and Peoples' Rights (Banjul Charter) also expresses the right, stating that *"every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law"*.<sup>46</sup> These provisions foreground indirect participation in representative forms of democracy, but also make clear the right to direct participation in public affairs. They afford states wide discretion to define in legislation and constitutions, the forms and means of participation in public affairs that they adopt.<sup>47</sup>

Since the late 1970s, the extent to which participation in political and public life is addressed by the IHRL framework has deepened by elaborating on the nature of issues to which the right to participate in public life applies. The Convention on the Elimination of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of Persons with Disabilities (CRPD) in particular, provide stronger indications of the importance of direct participation of citizens and people in decisions on issues that affect their lives. They articulate strong requirements for on-going political participation in the implementation of policy of the groups addressed in those treaties.<sup>48</sup>

The CEDAW, while asserting women's right to participate on an equal basis with men, elaborates that participation goes beyond voting for representation, to participation in the development of policy and, importantly, participation in the implementation of that policy.<sup>49</sup> The Declaration on the Right to Development sets participation as the basis for development, stating in its first article that *'every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental*

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<sup>44</sup> Universal Declaration of Human Rights. 10 December 1948 General Assembly Resolution 207A (III). Article 21(1). Article 21(3) goes further to state: *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

<sup>45</sup> *International Covenant on Civil and Political Rights*. 1966. (ICCPR) Article 25

<sup>46</sup> *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Article 13(1)

<sup>47</sup> General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. Para 5

<sup>48</sup> *UN Convention on the Elimination of all forms of Discrimination Against Women*. 1979. Article 7(b). It states that *'women, on equal terms with men' have the right 'to participation in the formulation of government policy and the implementation thereof...'* (CEDAW)

<sup>49</sup> CEDAW. *Ibid.* Article 29(b)

*freedoms can be fully realised*'.<sup>50</sup> The Declaration further recognises that the right to development includes the *'full realisation of the right of peoples to self-determination*'.<sup>51</sup> Finally, the Declaration requires states, at national level, to *'encourage popular participation in all spheres*' to enable development and fully realise human rights.<sup>52</sup> The CRPD stresses the participation of persons with disabilities in a range of articles, requiring under its general principles the *'full and effective participation and inclusion in society*' of persons with disabilities.<sup>53</sup> It augments this commitment by placing an obligation on states to *'closely consult with and actively involve persons with disabilities*' in the development and implementation of legislation and policy.<sup>54</sup> Article 29 of the CRPD is dedicated to the requirement for the participation of persons with disabilities in political and public life.<sup>55</sup> It is arguable that the same standards for participation in the development and implementation of law and policy provided in CEDAW and the CRPD must apply to all citizens.

In 2013, the UN Special Rapporteur on Extreme Poverty and Human Rights (UNSREPHR), Magdalena Sepulveda Carmona, issued a report which provides recommendations to states to ensure meaningful participation of people living in poverty.<sup>56</sup> Her report stipulates that participation is considered a fundamental human right. *"This report focuses on the intrinsic value of participation as a fundamental right to which individuals are inherently entitled by virtue of their humanity"*.<sup>57</sup> The report starts with an analysis of the ways in which manifestations of power and poverty intersect with the right to participate. She then describes a human rights based approach to participation, stressing that meaningful participation requires respect for people's rights to dignity, autonomy and agency; non-discrimination and equality; transparency and access to information; accountability; and empowerment.<sup>58</sup> While the recommendations provide minimum standards, the UNSREPHR indicates that universal guidelines for participation are not desirable as different socio-cultural contexts and power dynamics require different approaches. Instead, she stresses that the forms that participation take must be developed in consultation with communities.<sup>59</sup>

Carmona's recommendations to states include that states adopt legal frameworks which explicitly include the right to participate.<sup>60</sup> These frameworks must include participatory mechanisms at local and national levels; policies and operational guidelines; an explicit duty on public officials

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<sup>50</sup> The Declaration on the Right to Development. A/RES/41/128. 4 December 1986. (DRD) Article 1(1)

<sup>51</sup> DRD. *Ibid.* Article 1(2)

<sup>52</sup> DRD. *Ibid.* Article 8(2) in reference to Article 8(1) which elaborates on the rights to equal opportunity to access basic resources, education, health, food, housing, employment and the fair distribution of income.

<sup>53</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly*, 24 January 2007, A/RES/61/106. (CRPD) Article 3(c)

<sup>54</sup> CRPD. *Ibid.* Article 4(3)

<sup>55</sup> CRPD. *Ibid.* Article 29. This article deals with the right to participate in elections in representative democracy and in the conduct of public affairs.

<sup>56</sup> UNSREPHR. *Ibid.*

<sup>57</sup> UNSREPHR. *ibid.* Para 20

<sup>58</sup> UNSREPHR. *ibid.* Paras 35 - 79

<sup>59</sup> UNSREPHR. *ibid.* Para 81

<sup>60</sup> UNSREPHR. *ibid.* Para 86(a)

and policy makers to ensure the participation of people living in poverty; and developing and enforcing minimum standards for the participation of people living in poverty and other disadvantaged groups.<sup>61</sup> She also makes recommendations regarding legislative measures that must be in place in order to ensure a national environment conducive to meaningful participation. These include decentralisation of decision making structures; legislation prohibiting discrimination; and laws that support freedom of association, media freedom, and access to information and whistle-blower protection.<sup>62</sup> The report specifies that public participation in budget formulation and monitoring should be included in national frameworks.<sup>63</sup> These recommendations go further than establishing a legislative and policy framework to require states to allocate sufficient resources;<sup>64</sup> take measures to address inequality and discrimination;<sup>65</sup> ensure access to information;<sup>66</sup> put in place accountability mechanisms such as complaints system and reporting requirements;<sup>67</sup> ensure empowerment of the people who participate;<sup>68</sup> and support civil society.<sup>69</sup> Finally in recognition of the important role played by national human rights institutions, Carmona includes recommendations requiring these to promote and monitor the implementation of the right to participate.<sup>70</sup>

The fact that the report centrally engages with and attempts to address the ways in which power and poverty negatively affect participation, means that it goes beyond the typical technical framing of the right to participate as is the case with most IHR instruments.

Participation is intrinsically linked to access to information. The ICCPR provides the right to seek, receive and impart information.<sup>71</sup> In the same vein, but more clearly stated, the Banjul Charter provides that *'every individual shall have the right to receive information'*.<sup>72</sup> Although the IHRL provisions, including the UDHR and the ICCPR, are not particularly strong and do not provide much detail, Mendel argues that the right to information as a fundamental right is *'beyond question'*.<sup>73</sup> He refers to Resolution 59(I) of the UN General Assembly, made as early as 1946, which states that *"Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated"*.<sup>74</sup> Mendel argues further that although at the time of writing the treaties mentioned above, the right was not understood to

<sup>61</sup> UNSREPHR. *ibid.* Para 86(a)(i)

<sup>62</sup> UNSREPHR. *ibid.* Para 86(a)(ii), (iii), and (vii)

<sup>63</sup> UNSREPHR. *ibid.* Para 86(a)(iv)

<sup>64</sup> UNSREPHR. *ibid.* Para 86(b)

<sup>65</sup> UNSREPHR. *ibid.* Para 86(c)

<sup>66</sup> UNSREPHR. *ibid.* Para 86(d)

<sup>67</sup> UNSREPHR. *ibid.* Para 86(e)

<sup>68</sup> UNSREPHR. *ibid.* Para 86(f)

<sup>69</sup> UNSREPHR. *ibid.* Para 86(g)

<sup>70</sup> UNSREPHR. *ibid.* Para 86(h)

<sup>71</sup> ICCPR. *ibid.* Article 19(2)

<sup>72</sup> Banjul Charter. *ibid.* Article 9(1)

<sup>73</sup> Mendel T. undated. Freedom of information as an internationally protected right. ARTICLE 19. Accessed at <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> on 15 01 2015

<sup>74</sup> UN Resolution 59(I) *Calling of an international conference on freedom of information* accessed at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement> on 15 01 2015

include information held by public bodies, this understanding has shifted and *'the content of rights are not static'*.<sup>75</sup>

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression is emphatic that access to information is a right.<sup>76</sup> In his report to the UN Economic and Social Council in 2000 he stated: *"The right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself"*.<sup>77</sup> Importantly, he asserts that the right to participate is dependent on access to information, arguing that information: *"is one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate"*.<sup>78</sup>

The IHRL framework thus requires a significant level of citizen participation, and particularly participation of marginalised groups, for the realisation of political rights and development more broadly.<sup>79</sup> It encompasses indirect participation through the right to vote and the right to citizens' direct participation on an ongoing basis in public affairs. In addition it establishes the right to information as fundamental to participation rights.

### 3. Constitutional mandate

The Constitution articulates the vision of South Africa as a democracy driven by its people, stating in the preamble that the purpose of the Constitution is to *"Lay the foundations for a democratic and open society in which government is based on the will of the people ..."*.<sup>80</sup> Further, the Constitution entrenches Parliament as the centre of South Africa's democracy, requiring that the National Assembly (NA) *"represent the people"* and *"ensure government by the people under the Constitution"*.<sup>81</sup>

The broad powers of national and provincial legislatures include their mandates to pass and amend legislation;<sup>82</sup> to ensure that the executive are accountable to it;<sup>83</sup> and to exercise oversight over the executive's implementation of legislation.<sup>84</sup> The National Council of Provinces (NCOP) has a slightly different role to the NA and PLs; it is envisaged as a council to represent the interests of

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<sup>75</sup> Mendel T. 2008. *Ibid.*. P8

<sup>76</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Abid Hussain. Report to the UN Economic and Social Council. E/CN.4/2000/63 18 January 2000.

<sup>77</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. *Ibid.* Para 42

<sup>78</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. *Ibid.* Para 42

<sup>79</sup> United Nations Population Fund. <http://www.unfpa.org/rights/principles.htm> accessed 06 March 2013

<sup>80</sup> Act 108 of 1996. Preamble

<sup>81</sup> Act 108 of 1996. *ibid* Section 42(3)

<sup>82</sup> Act 108 of 1996. *ibid* Section 55(1) for the NA and Section 114(1) for PLs

<sup>83</sup> Act 108 of 1996. *ibid* Section 55(2)(a) for the NA and Section 114(2)(a) for PLs

<sup>84</sup> Act 108 of 1996. *ibid* Section 55(2)(b) for the NA and Section 114(2)(b) for PLs

the provinces and not ‘the people’ specifically.<sup>85</sup> In addition to these broad functions of the legislatures, the Constitution contains specific provisions which expand on its public participation and representivity functions, requiring a high level of openness, public access and public involvement in the legislatures. Three sections are dedicated to these issue, section 59 in relation to the NA, section 72 in relation to the NCOP and section 118 dealing with the PLs. The text of these sections is largely similar, conveying the same principles.

Firstly, they require the legislatures to ‘*facilitate public involvement in the legislative and other processes*’ of the institutions and the various committees that function within these.<sup>86</sup> Secondly, the provisions require the legislatures to conduct their business in an open manner and that sittings must be held in public.<sup>87</sup> This second requirement is limited in that public access and access of the media can be regulated and that people can be refused entry or removed.<sup>88</sup> The potential for exclusion is qualified in that exclusion may only take place if “*it is reasonable and justifiable to do so in an open and democratic society*’.<sup>89</sup> Two issues must be noted regarding these provisions. Firstly, the Constitution does not refer specifically to participation but rather ‘*involvement*’, and its exact meaning is not defined. The Constitution then indicates that the legislatures could elaborate on how public involvement is achieved through the development of rules and orders for the institution.<sup>90</sup> Secondly this involvement in the processes of legislatures applies not only to law reform, but also to the ‘*other processes*’ they are mandated to fulfil; thus public involvement is required in the execution of their accountability and oversight functions as well.

South African courts have dealt with the question of the role of the legislatures to promote participatory democracy and provided further guidance on public participation in legislative processes.<sup>91</sup> In 2006, in *Doctors for Life International vs The Speaker of the National Assembly* (DfL)<sup>92</sup>, the Constitutional Court dealt specifically with the legislative mandate of the legislatures. The Court first explores the meanings of the words ‘involvement’ and ‘participation’ and concludes that, plainly put, “*Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process*’.<sup>93</sup> The Court then stresses that the form that the participation takes is at the discretion of the legislatures and will vary in different cases.<sup>94</sup>

<sup>85</sup> Act 108 of 1996. *ibid* Section 42(4)

<sup>86</sup> Act 108 of 1996. *ibid* Sections 59(1)(a); 72(1)(a) and 118(1)(a).

<sup>87</sup> Act 108 of 1996. *ibid* Sections 59(1)(b); 72(1)(b) and 118(1)(b).

<sup>88</sup> Act 108 of 1996. *ibid* Sections 59(1)(b)(i) and (ii); 72(1)(b)(i) and(ii) and 118(1)(b)(i) and (ii)

<sup>89</sup> Act 108 of 1996. *ibid* Section s 59(2); 72(2) and 118(2)

<sup>90</sup> Act 108 of 1996. *ibid*. Section 57(1)(b)

<sup>91</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Minister of Justice* SCA 561/04; DfL. *ibid*; *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC)

<sup>92</sup> DfL. *ibid*.

<sup>93</sup> DfL. *ibid*. Para 120

<sup>94</sup> DfL. *ibid*. Paras 124 and 125

The Constitutional Court sets out a reasonableness test to establish the appropriate extent and nature of public participation.<sup>95</sup> This test requires the consideration of a number of factors, primary among these are *'the nature and importance of the legislation'* linked to the *'intensity of its impact on the public'*.<sup>96</sup> The Court also indicates that the practicalities and efficiency of the law-making process should be considered, at the same time cautioning that inadequate public involvement cannot be justified based on these practical considerations alone.<sup>97</sup> The Court clearly expresses that in considering reasonableness, it will take Parliament's own views on what is appropriate into account.<sup>98</sup> In addition, it defines that the constitutional obligation includes providing meaningful opportunities for public participation in the law making processes and taking measures to ensure that people have the ability to take advantage of the opportunities that are provided.<sup>99</sup>

The Supreme Court of Appeal acknowledges that public participation extends from making information available to the public through to providing platforms for participation in decision making.<sup>100</sup> Similarly, the Constitutional Court, drawing on US administrative policy, indicates that *"public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making.'"*<sup>101</sup> The Constitutional Court is clear that Parliament must *"provide notice of and information about the legislation under consideration"* and regarding the available opportunities for participation.<sup>102</sup> However, it does not provide any guidance regarding format or timeframes. It also offers some ideas that can be incorporated into the participation strategies of the legislatures, suggesting that public education may be a useful approach to provide information and facilitate learning and understanding, which in turn would improve the possibility that the public involvement is *'meaningful'*; and considering other mechanisms such as *'road shows, regional workshops, radio programmes and publications'*.<sup>103</sup>

All in all, the courts have firmly upheld that the legislatures have a duty to facilitate public involvement in law reform, but have chosen not to provide direction on how this should be implemented, leaving this to the discretion of the legislatures. The reasonableness test would thus need to be applied in the context of specific pieces of legislation. To date, the courts have

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<sup>95</sup> DfL. *Ibid.* Para 127

<sup>96</sup> DfL. *Ibid.* Para 128

<sup>97</sup> DfL. *Ibid.* Para 128

<sup>98</sup> DfL. *Ibid.* Para 128

<sup>99</sup> DfL. *Ibid.* Para 129

<sup>100</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA)

<sup>101</sup> DfL. *Ibid.* Para 129. Quoting States National Park Service, Director's Order No 75A: *Civic Engagement and Public Involvement*, 17 November 2003, available at <http://www.nps.gov/policy/DOrders/75A.htm> [accessed 24 July 2006] at section V. See also United States Code of Regulations, Title 40 (Protection of Environment), 40 CFR 25(1)(a), (b) and (d), *National Wildlife Federation v Burford* 835 F.2d 305, 322 (D.C. Cir. 1987). Section V

<sup>102</sup> DfL. *Ibid.* Para 131

<sup>103</sup> DfL. *Ibid.* Para 132



not provided any further direction regarding public involvement in the 'other' functions of the legislatures.

There is some tension regarding the interpretation of the way in which representatives, elected by the public, should engage with citizens. Does public participation end with the direction given by citizens through voting in elections, or do representatives have a duty to engage with the views of citizens on a regular basis? The Constitutional Court is emphatic that South Africa's democracy, given the apartheid history, is both representative and participatory.<sup>104</sup>

*"The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent..."*

It indicates that in the development of the Constitution, value was placed on people's ongoing participation in decisions which affect their lives beyond voting in elections.<sup>105</sup> The Court states that these should not be seen in tension with each other, as they are mutually supportive concepts which have a vital relationship to each other.<sup>106</sup>

It then elaborates on the value of ongoing direct public participation within a framework of representative democracy.

*"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. ... Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling."*<sup>107</sup>

#### 4. Legislation

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<sup>104</sup> DfL. *Ibid.* Para 121

<sup>105</sup> DfL. *Ibid.* Para 108

<sup>106</sup> DfL. *Ibid.* Para 122

<sup>107</sup> DfL. *Ibid.* Para 115

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act<sup>108</sup> provides a statutory framework in which legislatures must function. It includes broad provisions dealing with issues such as the independence and immunities of members,<sup>109</sup> disciplinary action against members,<sup>110</sup> the management of the precinct of parliament<sup>111</sup> and broadcasting of the proceedings of parliament.<sup>112</sup> It does not provide significant direction in terms of the functioning of parliament, nor regarding public access and participation (save for the sections which give the Speaker control over broadcasting from Parliament); most of this direction is provided through the Rules of the legislatures, which I discuss in more detail below.

The Money Bills Amendment Procedure and Related Matters Act (Money Bills Act)<sup>113</sup> is significant because it provides for stronger direction to legislatures in terms of their constitutional role to perform oversight over the executive. It focusses on the role of the legislatures in decisions regarding the utilisation of public money and seeks to enhance the systems of parliamentary oversight over executive decisions relating to financial planning, budgeting and spending. Analysis of the Act, however, raises questions about the impact of the legislation. Pauw argues that it will not be effective for two primary reasons: the systems and procedures contained in the Act are too onerous for legislatures to effectively implement them and, most importantly, the role given to Treasury in the Act dominates the Parliamentary process and decisions.<sup>114</sup>

Section 5 of the Money Bills Act requires parliamentary committees to assess departmental performance on an annual basis. It sets out the basis on which this assessment must be made, including consideration of the medium term estimates of expenditure, the strategic plans, expenditure report, financial statements and annual reports of each department.<sup>115</sup> Committees are then required to submit budgetary review and recommendation reports (BRRRs), which must assess the performance of departments in delivering services in the context of the resources available. It must assess the effectiveness of the use and allocation of resources; and it may include recommendations regarding the future allocation of resources.<sup>116</sup> The Act does not mandate public participation in this part of the process, thus the general provisions of the Constitution regarding public participation apply. Section 8, however, mandates the committees on Appropriation and Finance to hold annual public hearings regarding the annual fiscal framework and revenue proposals.<sup>117</sup> This legislated duty to involve the public on a particular

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<sup>108</sup> Powers, privileges and immunities of Parliament and Provincial Legislatures Act 4 of 2004.

<sup>109</sup> Act 4 of 2004. *ibid* Chapter 3

<sup>110</sup> Act 4 of 2004. *ibid* Chapter 4

<sup>111</sup> Act 4 of 2004. *ibid* Chapter 2

<sup>112</sup> Act 4 of 2004. *ibid* Chapter 6

<sup>113</sup> Money Bills Amendment Procedure and Related Matters Act. No. 9 of 2009

<sup>114</sup> Pauw JC. 2011. 'Will the Money Bills Amendment Act enhance the power of the purse in South Africa?' *Politeia*. Vol 30: Issue 3: 54-73

<sup>115</sup> Act. No. 9 of 2009. *Ibid*. Section 5(1)

<sup>116</sup> Act. No. 9 of 2009. *Ibid*. Section 5(2)

<sup>117</sup> Act. No. 9 of 2009. *Ibid*. Section 8(2)

issue signals the intention of the legislature to ensure that public opinion is embedded in processes relating to public money.

## 5. Rules of the National Assembly

The Constitution empowers the NA, NCOP and PLs to make rules regarding their procedures.<sup>118</sup> It enjoins that these rules should be made with '*due regard to the representative and participatory democracy, accountability, transparency and public involvement*'.<sup>119</sup> The NA and NCOP have developed rules, so too have the PLs. These are regularly updated; by May 2014, the Rules of the NA were in their 8<sup>th</sup> edition and further amendments had been made to that edition in May of that year already.<sup>120</sup> The last time that the NCOP rules were updated was in their 9<sup>th</sup> edition published in 2008.<sup>121</sup> In this discussion, I focus on the provisions of the most recent Rules for the NA dealing with openness, public access, and public involvement.

Chapter four deals with the sittings of the Assembly. Rule 22 states the general rule that the proceedings of the Assembly are to be conducted in public. Part 5 of this chapter deals in more detail with *Public Access* to proceedings in the House and certain committees; interestingly the public are referred to as 'strangers' in this Part. Rule 40 provides that the Speaker may admit strangers to the house; rule 41 provides that strangers may be ordered to withdraw and 42 provides for the removal of strangers under certain circumstances.

Chapter 12 of the Rules provides a large number of rules relating to the committee system. Rule 152 reiterates the provisions of the Constitution in that the meetings of committees must be open to the public and the media.<sup>122</sup> It then provides a number of grounds on which exception can be made and the public or the media excluded.<sup>123</sup> Rule 154 allows for the presiding officer of a committee to exclude members of the public and rule 156 provides for the removal of members of the public under certain circumstances.

Public participation in the work of committees is covered in rule 138, which covers '*general powers of the committees*'. This rule gives committees the powers to summon people to appear

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<sup>118</sup> Act 108 of 1996. *Ibid.* Sub sections 57(1)(b) and 57(2) in respect of the NA; sub sections 70(1)(b) and 70(2) in respect of the NCOP; and sub sections 116(1)(b) and 116(2) for the PLs.

<sup>119</sup> Act 108 of 1996. *Ibid.* Sections 57(1)(b), NA; 70(1)(b), NCOP; and 116(1)(b) PLs.

<sup>120</sup> *Rules of the National Assembly* 8<sup>th</sup> Edition February 2014 as amended May 2014. Parliament of the Republic of South Africa (NA Rules)

<sup>121</sup> *Rules of the National Council of Provinces* 9<sup>th</sup> Edition: March 2008. Parliament of the Republic of South Africa

<sup>122</sup> NA Rules. 2014. *Ibid.* Rule 152(1)

<sup>123</sup> These are when this is allowed by legislation, Rules, or resolutions of the Assembly (sub-rule 152(1)(a)). Or where the matter under consideration is of a private nature or prejudicial to a person, is protected under parliamentary privilege, is confidential in terms of legislation, or where confidential treatment is reasonable and justifiable in an open and democratic society. Sub-rule 152(1)(b).

before them to give evidence or produce documents;<sup>124</sup> to receive submissions from interested persons or institutions;<sup>125</sup> to conduct public hearings;<sup>126</sup> and to permit oral submissions.<sup>127</sup> Although participation is enabled by rule 138, committees retain the discretion as to if and when the public should be involved, and no further direction is given. In contrast, rules inserted in 2011 dealing with '*Public Involvement*' in the Standing Committees on Finance and Appropriations are stronger, clearly stating that public involvement is imperative.<sup>128</sup> These rules require, in relation to each of those two committees, that: '*The committee must ensure public involvement in accordance with the provisions of the Constitution and the Money Bills Amendment Procedure and Related Matters Act, 2009.*' Giving effect to sections in that Act which require Parliament's rules to include public hearings on the development of annual fiscal framework and revenue proposals.<sup>129</sup>

Participation in relation to law reform processes is dealt with under chapter 13 of the rules, which deals with the legislative process. These include rules requiring notice of the introduction of draft legislation and summaries thereof to be published in the Government Gazette.<sup>130</sup> Only a small proportion of the public monitor the Gazette, but no other measures are specified to ensure that sectors of the public that may be affected by a particular bill are notified regarding its introduction. Where the full bill is published, it must be accompanied by an invitation to the public for written submissions and the timeframes for these submissions specified (although the actual timeframes are not specified in the rule).<sup>131</sup> Finally, if a bill has been published for public comment, the Rules require that the relevant committee must '*arrange its business in such a manner that interested persons and institutions have an opportunity to comment on the bill*'.<sup>132</sup>

The rules fail to provide significant direction, guidance or standards for how participation should be implemented. In addition, except for the 2011 rules which deal with public participation in the fiscal framework and revenue proposals process, they do not expressly address the current blind-spot that exists regarding the issue of public participation in the 'other' functions of Parliament.

## 6. Other Initiatives to enhance public participation in the legislatures

<sup>124</sup> NA Rules. 2014. *Ibid.* Rule 138(a)

<sup>125</sup> NA Rules. 2014. *Ibid.* Rule 138(b)

<sup>126</sup> NA Rules. 2014. *Ibid.* Rule 138 (c)

<sup>127</sup> NA Rules. 2014. *Ibid.* Rule 138(d)

<sup>128</sup> NA Rules. 2014. *Ibid.* Rules 203F and 203M

<sup>129</sup> Act. No. 9 of 2009. *Ibid.* Sub-section 8(2) "*the committees must conduct joint public hearings on the fiscal framework and revenue proposals*" and sub-section 9(5) "*The standing rules must provide for ... (b) public hearings by committees on appropriations*".

<sup>130</sup> NA Rules. 2014. *Ibid.* Sub-rule 241(1)(b) and (c)

<sup>131</sup> NA Rules. 2014. *Ibid.* Sub-rule 241(2)

<sup>132</sup> NA Rules. 2014. *Ibid.* Rule 249(1)

Parliament has undertaken a number of initiatives to improve public engagement in its processes. Systems for participation in legislative reform are well developed, including, over the last five years, systems to ensure participation of rural communities on legislative reform. A Public Participation Framework (PPF) for the legislatures was finalised in 2013,<sup>133</sup> the Oversight and Accountability Model in 2009<sup>134</sup> and an Oversight Model for the South African Legislative Sector (SOM) in 2012.<sup>135</sup> Other initiatives include sectoral parliaments which take place at national or provincial level in which specific sectors are engaged<sup>136</sup> and the 'Taking Legislatures to the People' initiative in which legislatures go out to communities to host meetings.<sup>137</sup>

### **Public Participation Framework**

To give more direction to the legislatures regarding the standards and nature of public participation, the legislative sector<sup>138</sup> developed the PPF to guide the public involvement in the legislatures. It articulates its goal as '*seeking ways of achieving Public Participation*' in order to deepen democracy'.<sup>139</sup> It sets its objectives to obtain the public's views on policy, legislation and other processes; to share knowledge with communities regarding governance issues in order to improve the '*pace and relevance of service delivery*'; and to obtain information from people regarding their experiences of service delivery in order that government institutions may take action to bring about change.<sup>140</sup>

The core values and principles of the PPF are encouraging, they articulate the expected values that the people affected by an issue are involved in the decision making process and that people receive the information necessary for participation.<sup>141</sup> They go further to articulate some of the important values and principles which are central to '*meaningful participation*', a concept that will be discussed in more detail in the following chapters. In particular, the core values which emphasise people's input in the design of participation opportunities; and communication to people on how their input affected decisions, which includes the various perspectives that were raised on an issue. Most encouraging is the value that participation processes hold "*the promise that public's contribution will influence decision making*".<sup>142</sup> Overall the PPF requires planning, co-ordination, quarterly reporting, feedback to stakeholders and human and financial resources to

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<sup>133</sup> Public Participation Framework for the South African Legislative Sector. 2013. (PPF)

<sup>134</sup> Parliament of South Africa Oversight and Accountability Model: asserting parliament's oversight role in enhancing democracy. 2009.

<sup>135</sup> Oversight model of the South African Legislative Sector. 2012. Legislative Sector of South Africa (SOM)

<sup>136</sup> PPF. 2013. *Ibid.* P54

<sup>137</sup> PPF. 2013. *Ibid.* P48

<sup>138</sup> The South African Legislative Sector is a forum of stakeholders from Parliament and Provincial Legislatures. The SALS seeks to strengthen the capacity of legislatures to implement their constitutional mandate. <http://www.sals.gov.za/show.php?show=2>

<sup>139</sup> PPF. 2013. *Ibid.* P30

<sup>140</sup> PPF. 2013. *Ibid.* P30

<sup>141</sup> PPF. 2013. *Ibid.* P31

<sup>142</sup> PPF. 2013. *Ibid.* P31

enable effective public participation.<sup>143</sup> It covers a range of mechanisms for public participation including Taking Parliament to the People; Taking Legislatures to the People; public hearings; petitions; Sectoral Parliaments; general participation in committees; and participation in oversight and law making.<sup>144</sup>

Notably, the PPF requires that in most cases people have input into the agenda of the participation process, that committees produce reports on the processes within three weeks and provide feedback to stakeholders on the processes.<sup>145</sup> For the first time, we see a timeframe specified for notification of the public: in the section dealing with public hearings the PPF requires a five week notice period.<sup>146</sup> It also considers to whom notice should be given, indicating in relation to participation on oversight that committees should maintain lists of stakeholders and that these lists should include experts and academics as well as community based structures.<sup>147</sup> Finally, throughout the PPF some direction is provided as to the means of notification, whereby it recommends the use of social media for notification.<sup>148</sup>

As with most well articulated state documents, the PPF is not binding, it states that it provides a guideline while also claiming to set minimum requirements.<sup>149</sup> The extent to which those minimum requirements can be met by the legislatures and their committees, particularly considering the fast pace at which some processes are undertaken, is questionable.

### **Oversight Model of the South African Legislative Sector**

The SOM was developed subsequent to the Oversight and Accountability Model of 2009 and is effectively a more detailed version of that document and applies not only to Parliament but all of the legislatures. It also provides a more detailed version of what is required in the Money Bills Act, in that it attempts to clarify what is meant by oversight and accountability and aims through this to provide information to assist committees in their analysis and debates related to oversight.<sup>150</sup>

It sets out detailed guidelines for committees regarding the processes relating to their engagement with Appropriation Bills and Departmental Votes, quarterly and annual reports, strategic budget reviews, and oversight visits and intervention studies.<sup>151</sup> The SOM strongly emphasises public participation at each stage of the process requiring '*constant enlistment of*

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<sup>143</sup> PPF. 2013. *Ibid.* P41

<sup>144</sup> PPF. 2013. *Ibid.*

<sup>145</sup> PPF. 2013. *Ibid.* P49

<sup>146</sup> PPF. 2013. *Ibid.* P52

<sup>147</sup> PPF. 2013. *Ibid.* PP59

<sup>148</sup> PPF. 2013. *Ibid.* Pp43, 48, 50 and 57

<sup>149</sup> PPF. 2013. *Ibid.* P38

<sup>150</sup> SOM. 2012. *Ibid.* Pp 16 – 18

<sup>151</sup> SOM. 2012. *Ibid.*

*external information input for independent verification*'.<sup>152</sup> Overall the SOM is extremely detailed. The requirements for public participation in the oversight over quarterly and annual reports, strategic plans and budgets are unrealistic given the timeframes within which these must be finalised.

## **7. Conclusion**

Citizen participation is well established as a human right. Over time, the articulation this right has expanded beyond voting to include participation in processes relating to the development and implementation of law and policy. The Constitution places legislatures at the heart of our democracy, in terms of their duty to represent citizens, consult with the public in the development of law and in fulfilling their oversight and accountability functions. Importantly the South African constitutional promise of citizen participation extends beyond indirect participation through elections to direct citizen participation on an on-going basis.

In spite of the Constitutional Court's interrogation of the legislatures' duty to facilitate public participation in law making processes, these judgements fail to provide direction to the legislatures on how this should be achieved, recognising that different issues require different processes. However, the courts do emphasise the importance of the public's access to information to enable effective participation.

The Rules of the legislatures, which should provide some standards for participation, do not go substantially further than reiterating in greater detail the Constitutional provisions for openness, access and participation. Whereas they appear to mandate participation in law reform processes, they are weak on providing similarly for participation in the oversight functions of the legislatures. It is only in giving effect to the provisions of the Money Bills Act that there is oversight. However the capacity to engage with matters relating to the fiscal framework and national revenue will in all probability only lie with a minute proportion of the public. Since the Money Bills Act failed to mandate public participation in the annual departmental oversight cycles, the rules do not require this either, indicating a lack of initiative on the part of the legislatures to embed participation in these processes which are so critical to service delivery.

It is some consolation that the recently developed SOM and PPF do articulate the full scope of public participation required in the work of the legislatures, and that the PPF begins to provide some minimum standards for how this should be done. However, as admirable as the provisions of these documents are, they are not enforceable and their full implementation seems unrealistic

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<sup>152</sup> SOM. 2012. *Ibid.*P23

in light of their extensive requirements for participation. The SOM in particular is extremely ambitious in its requirements.

The domestic framework would be improved by an articulation within the rules of legislatures of the minimum requirements for public participation. These should include notification periods and the means of notification to ensure that people most affected are notified. It should also include standards for pre and post participation processes to ensure that the public are educated on the issue in question and receive feedback regarding the process outcomes, including the reasons for decisions being taken. Ideally, the framework should go beyond technical detail to allow for processes that address the issues discussed by the UNSREPHR regarding the interaction of power dynamics from local to national levels with participation processes.



## Chapter 3

# Theories of public participation, participatory democracy and deliberative democracy

### 1. Introduction

The term ‘participation’ is often incorrectly used to describe concepts such as information sharing, consultation, involvement and engagement.<sup>153</sup> The constitutional framework and the direction provided to the legislatures by the courts and Parliament’s rules do not address this issue adequately. Most public participation exercises of the legislatures and government generally fail to meet internationally recognised good practice standards of participation.<sup>154</sup> These different concepts must be distinguished from each other and guidance must be given to officials on when different processes are appropriate. Without greater clarity on what is meant by ‘participation’ and what the standards are, many initiatives amount to little more than information sharing exercises.<sup>155</sup> This creates the impression that they are rubber stamping exercises used to legitimise pre-determined agendas.<sup>156</sup>

Studies into the motivation of government efforts for public participation and deliberation indicate that the primary motivation for the development of mechanisms and structures to engage with the public is the presence of a policy context that requires this.<sup>157</sup> These frameworks are underpinned by goals to promote greater connections between government and the people; active citizens and stronger communities; and to improve the performance of the public sector.<sup>158</sup>

In this chapter I consider what the concept of ‘meaningful participation’ entails, and how this intersects with the rights-based approaches to public participation that have developed over the past 50 years. Theories of deliberative democracy add to our understanding of the most effective methods of incorporating ongoing deliberation with the public into representative democratic systems. I discuss these theoretical developments and some of the proven benefits of effective deliberative process before turning to a discussion on the range of spaces for citizen-state engagement, their various limitations and the necessity for civil society to utilise this range of spaces to increase political influence.

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<sup>153</sup> Theron F, Ceaser N and Davids I. 2007. ‘Participation according to IAP2 principles: Opportunity or challenge for integrated development planning in South Africa?’ *International Journal of Public Participation Vol1. Issue1. 2007.* P11

<sup>154</sup> Theron *et al.* 2007. *Ibid.* P9

<sup>155</sup> Theron *et al.* 2007. *Ibid.* P12

<sup>156</sup> Hicks J & Buccus I. 2007. ‘Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa’. *Transformation* 65. P99

<sup>157</sup> Barnes M, Newman J and Sullivan H. 2004 Power, participation and political renewal: Theoretical and empirical perspectives on public participation under New Labour. *Social Politics*, 11(2), pp.267–279. P6 (page number refers to the open source version, available at Open Research Online: <http://oro.open.ac.uk/17469/2/B68D8B11.pdf>)

<sup>158</sup> Barnes *et al.* 2004. *Ibid.* Pp4-5 (page number refers to the open source version)

A discussion on political participation is impossible without building an understanding of social and political power and how these affect processes, and the potential for public influence. This power affects not only state-citizen interactions, but also interactions between citizens and citizen groups. It plays out in participation and deliberative processes from the time of defining the issues for debate, also affecting who is invited to participate and who has access to the process. Importantly, it affects the ways in which the processes are implemented, influencing the rules of engagement and the norms of who may speak and whose opinions matter. Manifestations of power are closely linked to social exclusion and inequality, in that exclusions broadly present in society may be reproduced in or mitigated by participation processes. Exclusion and inequality are also linked to problematic claims of representivity and legitimacy, both in terms of co-optation by government and elite capture within civil society. I then consider why strong normative frameworks do not automatically translate into effective, meaningful participation or deliberation within embedded representative democratic systems. Finally, I briefly identify some of the negative consequences that are linked to poorly implemented participation exercises.

## **2. Meaningful participation and rights-based citizen participation**

The phrase ‘meaningful participation’ is frequently used to describe an ideal form of participation.<sup>159</sup> The International Association for Public Participation (IAP2) describes these as processes that are viewed as a right of those participating, and importantly, which hold the promise of influencing decisions.<sup>160</sup> Various sources describe the standards required in order for a public participation process to be considered ‘meaningful’.<sup>161</sup> These are framed by the principle that participation must be implemented as processes and not as once-off events. Participants should be engaged prior to the actual participation, in order to influence the agenda for the process and, importantly, to contribute to defining the terms of the debate and the form that the process will take.<sup>162</sup> As reflected in the previous chapter, participation processes must ensure that those people most affected by the issues are involved; they should enable engagement with the views of all participants; ensure that participants are provided with all necessary information prior to the process; and incorporate feedback processes to describe the ways in which inputs have affected decisions that were taken.<sup>163</sup> Finally, participation processes must incorporate mechanisms for complaints to facilitate accountability for poorly implemented processes.<sup>164</sup> Public participation is best considered within a rights-based perspective. Mander reflects that, in spite of incorporating common themes, rights-based participation approaches are diverse, that

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<sup>159</sup> UNSREPHR. *Ibid.* P11

<sup>160</sup> UNSREPHR. 2013. *Ibid.* P11

<sup>161</sup> I will rely on the IAP2 and the Special Rapporteur on Extreme Poverty and Human Rights

<sup>162</sup> UNSREPHR. 2013. *Ibid.* Pp14,17; and RIPAP. 2009. *Ibid.* P54

<sup>163</sup> Theron *et al.* 2007. *Ibid.* P8.

<sup>164</sup> UNSREPHR. 2013. *Ibid.* P15

these evolve, and that they are frequently contested; as such, she argues that there is no *'settled theory of uniform practice'* for a rights-based approach to participation.<sup>165</sup>

Building citizen participation is strongly linked to empowerment, however, participation approaches have been widely criticised for utilising the language of 'empowerment' but failing to actually engage with inherent politics or the manifestations of power.<sup>166</sup> They are more frequently framed and implemented as engagements with local government and less so regarding macro political questions or policy formulation.<sup>167</sup> This focus on issues of local delivery, but not the broad structural systems of exclusion, the weak analysis of the operation of power, and when scaled up, the implementation of processes that are technical and not political in their approach contribute to their ineffectiveness as empowerment processes.<sup>168</sup>

Participation practice and theory have evolved significantly since the 1960s within the development context. Since the 1990s the theoretical framing has shifted from participation being considered a development tool to an understanding that it is an essential aspect of citizenship rights.<sup>169</sup> Thus there has been a shift towards developing theory of citizen participation that addresses the transformation of power relations and the empowerment of people who participate, this calls for participation to be undertaken as a political methodology of empowerment and not as a technical exercise.<sup>170</sup>

Political participation underpins the realisation of a range of other rights. The UNSREPHR states that participation is a *"precondition or catalyst for the realisation and enjoyment of other human rights and of fundamental importance in empowering people living in poverty to tackle inequalities and asymmetries of power in society."*<sup>171</sup> South African political analysts have similarly argued that the most important rights to defend and claim are those relating to people's full participation in national debates, more so than those that address specific issues or protect specific groups.<sup>172</sup> This recognises that participation as central to promoting social justice. The Constitutional Court supports this, indicating that: *"Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."*<sup>173</sup>

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<sup>165</sup> Mander. 2005. *Ibid.* P239

<sup>166</sup> Hickey et al. 2005. *ibid.* P8

<sup>167</sup> Barnes *et al.* 2004. *Ibid.* P5

<sup>168</sup> Hickey et al. 2005. *ibid.* P8

<sup>169</sup> Hickey et al. 2005. *Ibid.* P19

<sup>170</sup> Hickey et al. 2005. *Ibid.* P8

<sup>171</sup> UNSREPHR. *Ibid.* 11 March 2013 presented at the 23<sup>rd</sup> session of the Human Rights Council

<sup>172</sup> Friedman and McKeiser. 2009. *Ibid.* P44

<sup>173</sup> DfL. *Ibid.* Para 115

Mander explains that without engaging in questions of how inequality and social exclusion are constructed through the agency and exercise of power by state or private actors, and without considering the political process in which people can lay claim to these rights, participation simply attaches a new label to development.<sup>174</sup> She explains that while this adds to the normative framework, it does not engage with how people can change, access and use the framework.<sup>175</sup> To be effective therefore, rights-based approaches must incorporate certain non-negotiables; they must prioritise the people who experience the greatest levels of social exclusion and rights violations; and they require at their heart, the potential to build the agency of the people affected.<sup>176</sup> The people affected must generate the analysis and definition of the issues as well as the solutions to these; and as such, processes must be 'profoundly democratic'.<sup>177</sup> Empowerment is central, in that people must be enabled to develop their '*power within*' to build social movements, participate in governance and take action to hold the state to account. It is only through such processes, Mander argues, that the state will be more likely to act in the interests of people affected and the participation can be realised as a right.<sup>178</sup>

The primary aims of human rights theory and practice are to prevent power abuses; transform power relations; challenge oppression, subordination and marginalisation; and promote people's agency.<sup>179</sup> As such, participation strategies which co-opt, fail to ensure the possibility of influencing outcomes, do not allow for people to define the spaces of participation or reinforce discrimination and social inequalities cannot be considered rights-based.<sup>180</sup> It is not surprising therefore that a human rights approach to participation is more closely aligned with the practice of deliberative than representative forms of democracy,<sup>181</sup> Chambers explains that deliberative democracy provides a '*rights-friendly theory of robust democracy*'.<sup>182</sup>

### **3. Theoretical evolution from representative to deliberative democracy**

The right of citizens to vote in representative democratic systems is well established, and while it is recognised as being critical to democracy, taken on its own, voter-centric democracy provides a limited version of democracy with narrow scope for the public to exercise their citizenship rights.<sup>183</sup> Theorists argue that the quality of democracy is undermined in these systems, particularly due to unresponsiveness of governments to citizens and a lack of accountability of the

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<sup>174</sup> Mander H. 2005. *Ibid.* Pp240-241

<sup>175</sup> Mander H. 2005. *Ibid.* P241

<sup>176</sup> Mander H. 2005. *Ibid.* P238

<sup>177</sup> Mander H. 2005. *Ibid.* Pp 242-243

<sup>178</sup> Mander H. 2005. *Ibid.* Pp 251

<sup>179</sup> UNSREPHR. 2013. *Ibid.* p5

<sup>180</sup> Gaventa J. 2006. *Ibid.* P26; and UNSR Report 11 March 2013 presented at the 23<sup>rd</sup> session of the Human Rights Council p11

<sup>181</sup> Gaventa. 2009. *Ibid.* P2 and Chambers S. 2003. Deliberative Democratic Theory. *Annual Reviews Political Science.* 6: 307-26. Pp309-310

<sup>182</sup> Chambers. 2003. *Ibid.* P310

<sup>183</sup> Friedman and McKeiser. 2009. *Ibid.* P45

state. They elaborate that representative systems create very weak links between the state and citizens.<sup>184</sup> The concept of '*participatory citizenship*' within more direct democratic systems has been developed to respond to the weaknesses in the capacity of representative systems to enable elected representatives to know what their constituents think about specific issues.<sup>185</sup> Thus, in participatory systems, further opportunities are afforded to the public for their input into state decisions and participation does not end with the vote.<sup>186</sup>

These have led to the further development of theories of deliberative democracy that are concerned with the development of versions of democracy where decisions are taken '*based on public justification through deliberation*'.<sup>187</sup> These result in the development of mechanisms whereby the public engage directly with the state on issues through discussion and deliberation. In this way deliberative democratic processes deepen the notion of participatory democracy, as people are required in deliberative process not only to make their opinions known on an issue, but also to provide rationale for their opinions, enter into exchange on, and develop these opinions further.<sup>188</sup>

Habermas explains that, based on the assumptions that deliberation emphasises relevant issues and the arguments surrounding them, it will encourage '*critical evaluation*' of this discourse, and ultimately result in reactions to the topic that are rationally motivated and should result in '*reasonable outcomes*'.<sup>189</sup> Theorists therefore argue that public deliberation enriches representative democratic systems as they become less reliant on simple aggregation of opinions that are uninformed by a process of discussion, and they help to assess the range of positions held by different people in society to develop positions for '*the common good*'.<sup>190</sup> In these ways the quality and legitimacy of the process and democracy more broadly is improved.<sup>191</sup> To have this impact, Habermas argues that deliberative democratic processes should be transparent, inclusive and allow for equality in the opportunity to participate.<sup>192</sup>

Empirical studies demonstrate a number of positive impacts of deliberative processes where they are conducted under conditions in which participants can engage as '*reasonable equals*'.<sup>193</sup> Neblo

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<sup>184</sup> Hicks & Buccus. 2007. *Ibid.* P97; Gaventa J. 2002. 'Exploring citizenship, participation and accountability' *IDS Bulletin volume 33 Issue 2*. P1 accessed May 2014 at <http://onlinelibrary.wiley.com.ezproxy.uct.ac.za/doi/10.1111/j.1759-5436.2002.tb00020.x/pdf>

<sup>185</sup> Friedman and McKeiser. 2009. *Ibid.* P45 P1 and p3

<sup>186</sup> Chambers. 2003. *Ibid.* Pp316-317

<sup>187</sup> Baiocchi G. 1999. *Participation, activism and politics: The Porto Alegre experiment and deliberative democratic theory*. Department of Sociology University of Wisconsin-Madison. P2

<sup>188</sup> Habermas. J. 2006. 'Political Communication in Media Society: Does democracy still enjoy an epistemic dimension? The impact of normative theory on empirical research. *Communication Theory 16 (2006) 411-426* International Communication Association. P413

<sup>189</sup> Habermas. 2006. *Ibid.* P413

<sup>190</sup> Habermas. 2006. *Ibid.* P413

<sup>191</sup> Baiocchi. 1999. *Ibid.* P2; and Habermas. 2006. *Ibid.* P413; and Gaventa. 2002. *Ibid.* P1 and Chambers. 2003. *Ibid.* P308

<sup>192</sup> Habermas. 2006. *Ibid.* P413

<sup>193</sup> Baiocchi. 1999. *Ibid.* P2

found that deliberation on issues (such as affirmative action and gay people being employed in the military) did not result in greater polarisation as had been suggested by critics, but rather in greater agreement within the groups.<sup>194</sup> Studies also indicate that the final decisions taken by participants differed from their original positions on the issues, and these positions demonstrated that participants were more informed, and had a wider range of perspectives on the issue.<sup>195</sup> Overall these processes are linked to improved cooperation and collective problem solving, strengthening citizen empowerment and improvements in implementing policy.<sup>196</sup> In addition, the evidence shows that effective deliberative processes enhance parity in participation spaces.<sup>197</sup> And as a result of negotiation between officials and the public, as well as interactions between civil society groupings through the process, the participants expand beyond the original target group that was identified.<sup>198</sup>

However, deliberative democratic processes are generally limited to interactions with smaller groups within the broader public and the valuable exchange of ideas and reasoning is not available to most people. Thus public opinion more broadly, is often informed or shaped by the debates as they take place in the mass media, which has limited potential, in that it is a mediated mechanism of communication which is subject to influence by those with the power to engage in that space.<sup>199</sup>

Research suggests that deliberative processes, even when instituted by the state, fulfil a function of constructing civil society. Studies also show that deliberative engagements have the potential to facilitate the emergence of new activists who continue to engage on a range of social issues over time, thus having the unplanned consequence of being 'schools' for political learning.<sup>200</sup> Baiocchi explains that they serve as forums in which activists from a range of areas, dealing with different issues may meet, interact, and learn from each other; in this way they facilitate greater solidarity and mobilisation in civil society.<sup>201</sup> This is linked to the fact that connections made between activists in one space, are built upon in the range of other spaces in which these activists are active.<sup>202</sup> In light of these benefits to civil society, Baiocchi argues that the theoretical question of the purpose of deliberation should be expanded to include the issues of empowerment, social justice, activism, and oppositional politics.<sup>203</sup>

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<sup>194</sup> Neblo. 2005. Change for the better? Linking the mechanisms of deliberative opinion change to normative theory. *In Common Voices: The problems and promise of a deliberative democracy* in Habermas. J. 2006. *Ibid.* P414

<sup>195</sup> Habermas. 2006. *Ibid.* P414

<sup>196</sup> Theron *et al.* 2007. *Ibid.* P3; and Habermas. 2006. *Ibid.* P414

<sup>197</sup> Baiocchi. 1999. *Ibid.* P3

<sup>198</sup> Barnes *et al.* 2004. *Ibid.* P9

<sup>199</sup> Habermas. 2006. P416

<sup>200</sup> Baiocchi. 1999. *Ibid.* P27

<sup>201</sup> Baiocchi. 1999. *Ibid.* P27

<sup>202</sup> Baiocchi. 1999. *Ibid.* P17

<sup>203</sup> Baiocchi. 1999. *Ibid.* P33

#### 4. Spaces for participation

The spaces in which participation takes place are not neutral, those who create the space tend to define the processes and rules of the space and to hold more power to influence outcomes.<sup>204</sup>

Gaventa refers to three types of spaces in which participation takes place: closed spaces to which only a few people have access, usually those already with power; invited spaces, which are those to which citizens are invited to participate, and which is typical of government-led participation processes; and invented (also called created or claimed) spaces – those spaces defined by citizens for engagement with the state.<sup>205</sup> These invented spaces can include meetings called by citizens or citizen groups, public protest, engaging the media and building social consciousness on issues.<sup>206</sup>

The opportunities for participation created by government tend to be top down; the public do not control the processes and instead of being considered a right of citizens they are bestowed as a benefit.<sup>207</sup> By their very nature, participation processes of the legislatures are invited spaces. The issue, timing, format, agenda, venue and processes are defined by the legislatures, not by the people participating. Gaventa argues that it is important to question these, he argues for '*resistance from below*' to invited spaces, indicating that invented spaces are often created in rejection of closed and invited spaces,<sup>208</sup> similarly, Cornwall describes them as '*organic spaces which emerge out of sets of common concerns.*'<sup>209</sup> Friedman and McKeiser argue for the importance of civil society building strategic alignments and power outside of the state in order to increase influence, not relying on proximity to and engagement with the state – which is out of the reach of many – but through civil society mobilisation.<sup>210</sup> Certainly, investing in building the power and legitimacy of citizen-led invented spaces outside the spaces in which decisions are taken, can result in those groups having greater influence inside.<sup>211</sup>

The Constitutional Court, referring to the UN Human Rights Committee General Comment on participation, refers to the importance of organisation among citizens to promote participation and explains that this is enabled by other fundamental civil and political rights.

*“Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring*

<sup>204</sup> Gaventa. 2006. *Ibid.* pp26-27; and Hicks J and Buccus I. 2007. *Ibid.* p112

<sup>205</sup> Gaventa. 2006. *Ibid.* pp26-27

<sup>206</sup> Theron *et al.* 2007. *Ibid.* P14; and Friedman and McKeiser. 2009. *Ibid.* Pp37-38

<sup>207</sup> Theron *et al.* 2007. *Ibid.* P6 and p10

<sup>208</sup> Gaventa. 2002. Exploring Citizenship, participation and accountability. *IDS Bulletin* Volume 33 issue 2. P10

<sup>209</sup> Cornwall P. 2002. In Gaventa J. 2006. *Ibid.* P27

<sup>210</sup> Friedman and McKeiser. 2009. *Ibid.* Pp39-40

<sup>211</sup> Friedman and McKeiser. 2009. *Ibid.* P7 and Pp37-38

*freedom of expression, assembly and association.”*<sup>212</sup>

Barnes *et al* argue that not only does mobilisation of social networks increase influence, the existence of strong networks also increases the extent to which citizens engage with the state. They explain that members of the public do not choose to become involved based only on their individual decisions, but that social networks play a significant role in this regard, with people more likely to participate when they have pre-existing social and political connections.<sup>213</sup>

## 5. Participation and power

At the heart of discussions on public participation and influence is the question of power. Often technical approaches to processes obscure the ‘*political and power-laden controversial issues, such as those of resource access, control and equity*’.<sup>214</sup> Frequently, there are deep interests and significant resources or power at stake for some parties and the manifestations of these power relations are an obstacle to people realising their citizenship rights.<sup>215</sup> It is essential that participation processes are alive to these currents, that they are recognised in the planning phase and facilitation of the process, and that measures are put in place to ensure the protection of people who participate.<sup>216</sup> More importantly, consciousness-raising and building the capacity of people, through invented spaces, to push back against and equalise power, is essential.<sup>217</sup>

The manifestations of power in political arenas cannot be simply expressed as one party having power over another and using that power in a negative way. Typically it is expressed as government with power and citizens without. It is more complex than that: power plays out between different individuals, groups of individuals and institutions, both in government and in civil society.<sup>218</sup> Often the analysis fails to consider the different permutations of power and layers of contestation that are involved in decision-making processes.<sup>219</sup>

Positive responses of decision-makers to public input within a process, are not always indicative of their actual position or willingness to promote the views of the public in the final decisions. Participants in Barnes *et al*'s study identified that even when public officials appeared to accept or

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<sup>212</sup> DfL. 2006. *Ibid.* Para 99. Referring to Human Rights Committee. Human Rights Committee *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96*, CCPR/C/21/Rev.1/Add.7 at para 5

<sup>213</sup> Barnes *et al.* 2004. *Ibid.* P16

<sup>214</sup> Wolmer W, Keeley J, Leach M, Mehta L, Scoones I and Waldman L. 2006. *Understanding policy processes: a review of IDS research on the environment*. Knowledge, Technology and Society Team, Institute of Development Studies, University of Sussex. P13

<sup>215</sup> Friedman and McKeiser. 2009. *Ibid.* P45

<sup>216</sup> Hicks and Buccus. 2007. *Ibid.* P105

<sup>217</sup> Gaventa. 2006. *Ibid.* p30; and Hicks and Buccus. 2007. *Ibid.* P109

<sup>218</sup> Gaventa J and Cornwall A. 2001. Power and Knowledge. *Handbook of action research: participative inquiry and practice*. P Reason, H Bradbury (Eds). London Sage p70; and Hicks and Buccus. 2007. *Ibid.* P105

<sup>219</sup> Hicks and Buccus. 2007. *Ibid.* P105



respond to citizen views in the forum, the lack of tangible outcomes belied that they were not taken seriously.<sup>220</sup> This is exacerbated by a general failure to provide feedback on how the contributions were considered and if they affected the final decision.<sup>221</sup> By predetermining the issues for discussion, which often didn't include those issues that members of the public wanted to discuss, the respondents indicated that their ability to participate was further frustrated. In some instances respondents reflected on how deliberation on an issue, resulted in cooptation and '*incorporation*' into the state's decisions, discourses and practices.<sup>222</sup>

Another aspect of the complexity of power within the state, as Friedman and McKeiser stress, is that the state is not 'monolithic'.<sup>223</sup> Different individuals and agencies within the state hold different positions on issues and have varying levels of power. They argue that it is important that these differences '*must be understood and utilised*' by civil society advocates as they 'invent' spaces for engagement in order not to miss avenues for action that can potentially influence the outcomes.<sup>224</sup>

### Civil Society

It is as important to think critically about the power manifest among civil society groups. There is a problematic assumption of equality within civil society, whereas different stakeholders in civil society have different levels of influence, frequently larger non-governmental organisations (NGOs) and academic institutions have greater resources and access to policy engagement opportunities. Within the process they are also more likely to meet the requirements of the engagement.<sup>225</sup> It is notable that citizen structures and groups that exist prior to the opportunity for participation tend to be stronger in these spaces as well as taking a more proactive approach to engaging with them and influencing the outcomes.<sup>226</sup> NGOs, which are often representative of more elite civil society, have an important role to provide information, support and mobilisation among local citizen groups and organisations that have fewer resources or less experience,<sup>227</sup> but Friedman and McKeiser caution NGOs against seeking to '*be the agency of the poor*', instead of providing support to help '*unlock*' that agency.<sup>228</sup> The UNSREPHR refers to the concept of '*elite capture*' in which those who hold power within a community or civil society, use the platforms for engagement to reinforce inequality and exclusion.<sup>229</sup>

### Social Exclusion

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<sup>220</sup> Barnes *et al.* 2004. *Ibid.* P14

<sup>221</sup> Barnes *et al.* 2004. *Ibid.* Pp14-15

<sup>222</sup> Barnes *et al.* 2004. *Ibid.* Pp14 - 15

<sup>223</sup> Friedman and McKeiser. 2009. *Ibid.* P22

<sup>224</sup> Friedman and McKeiser. 2009. *Ibid.* P22

<sup>225</sup> Hicks and Buccus. 2007. *Ibid.* p P98; and Friedman and McKeiser. 2009. *Ibid* P17

<sup>226</sup> Barnes *et al.* 2004. *Ibid.* P7

<sup>227</sup> Friedman and McKeiser. 2009. *Ibid.* P22

<sup>228</sup> Friedman and McKeiser. 2009. *Ibid.* P22

<sup>229</sup> UNSREPHR. 2013. *Ibid.* P17

Existing power relationships influence opportunities for participation, and these processes, depending on how they are implemented, may either reinforce or mitigate existing social exclusion, both within the participation process and in the broader social context.<sup>230</sup> Deliberation and other participation processes which are presented as opportunities for people to engage on an equal basis, but which do not explicitly address power, are frequently dominated by those with more social power.<sup>231</sup> In this context, these processes ‘*create the fiction of rational deliberation*’ while in reality serving dominant social groups and elites; through this they can legitimate inequality or the power of those who control the process.<sup>232</sup>

Many participation processes fail to consider how invitation, venue, time of day, social norms and local power hierarchies may exclude affected stakeholders from the engagement. Without this consideration, broader exclusion and inequalities within society may be exacerbated and the privilege of elites promoted.<sup>233</sup> The Centre for Public Participation illustrates the extent to which local civil society groups experience this exclusion:

*“Groups ... [from] civil society ... spoke of mixed experiences of the policy process. Feelings of being sidelined and marginalised, excluded and disempowered overwhelmingly dominated. These were occasioned by... not being recognised as worthy of participating”.*<sup>234</sup>

Addressing inequality, requires that the particular vulnerabilities of different people and groups of people are taken into account when designing participation processes. It requires an active approach to ensure that groups such as children, youth, persons with disabilities, women, elderly people, people living in rural or poor contexts are able to prepare for, attend and, once in attendance, participate on equal terms in the deliberations. Recognising that participation processes often don’t change power hierarchies within people’s context outside of the participation, provisions must be made for people to participate without disclosing their identities.

Not only does inequality and power affect who has access to deliberative forums, it can significantly affect what takes place within the forum.<sup>235</sup> The ‘rules of engagement’ are seldom neutral, technically defined rules may be employed, adapted or rejected in order to afford some people greater opportunity to influence the process and thus serve a particular agenda. This is

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<sup>230</sup> Barnes *et al.* 2004. *Ibid.* P8

<sup>231</sup> Baiocchi. 1999. *Ibid.* P5

<sup>232</sup> Baiocchi. 1999. *Ibid.* P5

<sup>233</sup> UNSREPHR. 2013. *Ibid.* P5

<sup>234</sup> Centre for Public Participation (CPP), *On developing a Public Participation Strategy for South Africa’s Legislatures*. A background paper included as part of the South African Legislative Sector *Public Participation Strategic Framework*, adopted by the Speaker’s Forum in 2009. P36.

<sup>235</sup> Barnes *et al.* 2004. *Ibid.* P12

most pronounced in respect of the management of partiality, differences of opinion and dissent in the deliberative exchange.<sup>236</sup> The issue of whose voice ‘counts’ is significant, the contributions of some people may be valued or considered more legitimate than others based on what they say, how they say it and who they are. In this way, the style of discourse that is legitimised in the exchange can encourage or discourage participation.<sup>237</sup> State officials tend to emphasise more ‘rational’, technical, and procedural discourse whereas members of the public more often utilise a lay or experiential approach that may be considered emotional. This favours civil society elites and the approach may alienate community oriented activists and members of the public more broadly.<sup>238</sup> Baiocchi discusses the ways in which language manifests as a form of power, stating that the interactions between speakers are expressions of the power relations that exist between them.<sup>239</sup> He argues that this manifests in the ability of different speakers to meet the technical requirements of the exchange and also disallows certain people from engaging in some forms of speech so, in addition to technical ‘competence’, speakers must also have the standing to participate in the debate.<sup>240</sup>

Baiocchi argues that expecting isolated deliberative processes to eliminate existing social inequalities is unreasonable.<sup>241</sup> However, in a study which took place over a five year period, he found that the longer that people engaged in these processes, the greater the levels of equality between participants.<sup>242</sup> This is noted in the study with particular reference to the participation of women and people who have lower levels of education, who indicated a greater degree of engagement in the processes after five years.<sup>243</sup> In other words, when conceptualised over longer periods of time, deliberative processes have the potential to foster parity within those spaces.

### Representation and legitimacy

The concept of representation has different meanings in the context of participation. There is the formal political understanding of representation derived from elections which gives political actors the authority to act on behalf of citizens. However, within citizen groups this can be understood to mean representation by means of a mandate from a wider interest group (be they formal or informal networks) or representation resulting from personal or social characteristics, such as experience of a particular situation, gender, race, economic status, or disability.<sup>244</sup>

Questions of representation, inform decisions about who should be engaged, as well as claims by citizens to speak on behalf of others. Both government officials and members of the public lay

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<sup>236</sup> Barnes *et al.* 2004. *Ibid.* P12

<sup>237</sup> Barnes *et al.* 2004. *Ibid.* P12

<sup>238</sup> Barnes *et al.* 2004. *Ibid.* P13

<sup>239</sup> Baiocchi. 1999. *Ibid.* Pp4-5

<sup>240</sup> Baiocchi. 1999. *Ibid.* Pp4-5

<sup>241</sup> Baiocchi. 1999. *Ibid.* P10

<sup>242</sup> Baiocchi. 1999. *Ibid.* P11

<sup>243</sup> Baiocchi. 1999. *Ibid.* P11

<sup>244</sup> Barnes *et al.* 2004. *Ibid.* P10

claim to authority derived from the discourse of representation in order to legitimise and strengthen the impact of their positions. To do this they '*mobilise particular identities as legitimate and others as marginal to the topic under discussion*' through the discourses they employ.<sup>245</sup> Legitimacy is negotiated and the notion of 'the public' is frequently constructed in ways that serve those with power, either within government or within civil society.<sup>246</sup> Defining who should participate and what the value of their participation is, is affected both by subtle negotiation and 'overt conflict that manifest in decisions of who should participate and how seriously they should be taken.'<sup>247</sup>

The UN Special Rapporteur on Extreme Poverty and Human Rights cautions that NGOs do not automatically represent excluded groups just because they have taken up their cause.<sup>248</sup> Elitism in civil society must be challenged, in particular when people claim to represent or speak on behalf of others, yet do so without mandate and in the absence of feedback and accountability processes.<sup>249</sup>

## **6. Resistance to embedding participatory and deliberative practice into established political systems**

Effective participation processes which go beyond token technical exercises and promote the empowerment of citizens in the process, by their nature, create a scenario where the public oversee and critique public officials, which creates tensions that must be managed.<sup>250</sup> As a consequence these exercises should challenge prevailing power. Baiocchi explains that it is therefore reasonable to expect resistance from those who hold power, arguing that the more aligned a participatory process is to meaningful participation, or '*true deliberative democracy*', the more it is likely to have a redistributive outcome.<sup>251</sup> He goes further to state:

*"A sociologically realistic expectation about any kind of empowered deliberative setting that redistributes a good toward the less powerful is that it will meet opposition from more powerful organized groups invested in the previous distributive scheme."*<sup>252</sup>

For these reasons it follows, that deepening spaces for effective and meaningful participation does not necessarily serve the interests of those with power, which goes some way to explaining the generally weak implementation of these processes.

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<sup>245</sup> Barnes *et al.* 2004. *Ibid.* P11

<sup>246</sup> Barnes *et al.* 2004. *Ibid.* P15

<sup>247</sup> Barnes *et al.* 2004. *Ibid.* P9

<sup>248</sup> UNSREPHR. 2013. *Ibid.* P17

<sup>249</sup> Hicks and Buccus. 2007. *Ibid.* P108

<sup>250</sup> Barnes *et al.* 2004. *Ibid.* P5

<sup>251</sup> Baiocchi. 1999. *Ibid.* P30

<sup>252</sup> Baiocchi. 1999. *Ibid.* P30

The existence of a policy imperative to implement participation or deliberative processes alone does not result in them automatically achieving the goals of that policy. Depending on how the formal and informal rules and norms for participation are constructed, understood or implemented they affect the possibility of the public participation processes influencing the outcomes.<sup>253</sup> Linked to this issue of potential influence, Baiocchi raises two key considerations in theorising deliberative democratic theory. Firstly, the need to understand the ‘institutional capacity and autonomy’ of government agencies and structures to implement such processes and, secondly, consideration of the ‘driving politics’ that infuse deliberative processes.<sup>254</sup> A study of participation processes in the British context found that, in spite of being motivated by policy requirements, they remained subject to established power within the structures facilitating the participation. As such, the concepts of participation and deliberation ‘*were overlaid on, rather than displaced, ‘old’ professional, organisational and political frameworks of action.*’<sup>255</sup> This was evident in the prevalence of norms of professionalism which value expertise above opinion and lived experience; the pre-eminence of the belief in and practices of representative rather than participatory democracy; and norms in which decision making power is concentrated centrally in structures and institutions. Barnes et al found that these established norms are ‘resilient’ and limit the extent to which deliberative spaces can influence outcomes.<sup>256</sup>

Achieving participation as envisaged within a human rights framework, requires a shift not only in the activities of institutions, which is often driven by policy requirements, but also a shift in the culture of institutions. A shift in the culture and values of the institution will not occur simply through the iteration of the principles in a framework; it requires measures to build the capacity of and shift the values held by public representatives who implement these processes. Without leadership and investment into making these shifts, participation and deliberation will remain a box checking exercise in which people are co-opted into supporting predetermined outcomes without any possibility of real influence.<sup>257</sup>

## 7. Conclusion

The trajectory away from the developmental concept of participation to formulations that incorporate rights and embed not only participation but specifically deliberative participation, in political theory is important as it gives greater meaning to our understanding of citizenship rights within participatory democracies. The concept of deliberative democracy is particularly critical to

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<sup>253</sup> Barnes *et al.* 2004. *Ibid.* P8

<sup>254</sup> Baiocchi G. 1999. *Ibid.* P3

<sup>255</sup> Barnes *et al.* 2004. *Ibid.* P6

<sup>256</sup> Barnes *et al.* 2004. *Ibid.* P14

<sup>257</sup> Hicks and Buccus. 2007. *Ibid.* P110; and UNSREPHR. 2013. *Ibid.* Pp12-13

develop systems of democracy in which citizens can meaningfully engage the state under circumstances that allow for a range of positions and ideas to be debated.

By and large, state institutions are failing to incorporate the full intent of the legal and policy frameworks into their practices. This is partly due to a lack of institutional capacity and mechanisms, however the primary reason is the failure to address the manifestations of power through the structuring of participatory processes. Technical approaches to participation are utilised to fulfil the policy requirements without the risk of them upsetting established political or social power. However, the manner in which power is understood, recognised and addressed is central to the effectiveness of these processes as sites of citizen engagement. Without this they will continue to fail in achieving their goals of greater connectivity between the state and citizens, empowerment of citizens or improved government performance which is responsive to the will of citizens.

While there is strong evidence that poorly conceived and implemented participation exercises can entrench inequality, when implemented in line with the principles of rights-based approaches they are associated with a number of positive effects that go beyond the outcomes specific to the issue under discussion, particularly in generating deliberative processes which increase understanding and result in more rational decision making. They have the potential to improve tolerance and strengthen relationships between different groups of people, and in that way build civil society.<sup>258</sup> They can also empower citizens and, when implemented over a period of time, push back against embedded social inequalities that bedevil these spaces.

The responsibility for creating spaces for engagement does not lie only with the state; citizens and, in particular, well-resourced organisations, must also claim that role within the democratic state. In addition to creating spaces for engagement, citizens must consider how they can lay better claim to invited spaces; and how the opportunities provided by the state can be better used through proactive mobilisation on issues that concern different groups. However, bearing in mind that the power to define the process and rules of engagement still lies with the state institution, it is important not to be naïve about the extent that invited spaces can be claimed.

For the legislatures, specifically, there are limitations on the extent to which they can implement real deliberative processes on macro political and policy issues. This is further heightened when considering the levels of political contestation manifest in this sphere of government, in terms of the interactions of different political parties, which means it is questionable to what extent is in their interests to promote stronger forms of deliberation and participation with the public.

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<sup>258</sup> Chambers. 2003. *Ibid.* p318

## Chapter 4

### The performance of South Africa's legislatures

#### 1. Introduction

There is a wealth of literature focused on South Africa's legislatures, particularly relating to their independence, performance in terms of holding the executive to account, and the quality of law-making. However, and in spite of significant literature on South African public participation with local government, there's far less written on public participation with the legislatures.

In this chapter I consider the range of avenues to for public participation in the legislatures, exploring developments in participation in law-reform before focusing on the emerging systems for oversight and public participation in relation to this, as well as the extent to which civil society are utilizing these opportunities. Finally in this section I provide an overview of a range of other mechanisms for public engagement with the legislatures and discuss their strengths and weaknesses. Throughout, I draw on examples to demonstrate how public opinion fares when pitted against firm positions of the dominant political party on specific issues. In the following section I elaborate on the systemic barriers to public participation in the legislatures.

I then turn to questions of the performance of civil society, exploring the extent to which organisations strategically utilise methods aimed at creating spaces for political engagement and if these are effectively staking greater claim on the potential for participation presented by the constitutional framework. To conclude this section I consider the issues of power and inequality within civil society and possible strategies to address this.

It's important to understand where political decisions, relating to the work of the legislatures, are taken and the limits that this places on the potential for influence through public interaction with committees alone. This provides some context to an elaboration on some examples drawn from the past ten years in which committees utilise their authority to define the rules of engagement in participation processes, which may in turn serve broader political agendas.

#### 2. The scope for public participation and engagement with the legislatures

There are a range of formal mechanisms through which members of the public can interact with members of parliament and of the provincial legislatures.

## 2.1. Participation in law reform

The primary focus of parliament during the first 15 years of democracy was on law reform aimed at transforming South African society.<sup>259</sup> This included the development of complex legislation that was linked to significant social transformation through policies aimed at redressing the injustices of apartheid law and policy.<sup>260</sup> The Report of the Independent Panel Assessment of Parliament (RIPAP) points out that the fast pace of law reform during the first phases of our democracy meant that at times, these laws were not sufficiently scrutinised.<sup>261</sup> While the public participation in developing the Constitution was significant,<sup>262</sup> the full picture of the extent and nature of public participation in the development of the other pieces of legislation during the 1990s is unclear.<sup>263</sup> It's therefore not surprising that systems and standards for public participation in law reform are, with interventions by the courts, relatively well developed and that civil society engagement with these is relatively strong, Muntingh undertook a study of public participation in the National Assembly (NA) committees between 2007 and 2010 which showed that over 79 per cent of submissions made related to law reform.<sup>264</sup> Based on this study, Muntingh argues that the motivations for civil society involvement in the legislatures includes the level of politicisation and controversy related to the bill, or the pre-existence of organised civil society groups focussed on the particular issue.<sup>265</sup>

It is clear on reading the provisions of the Constitution, the DfL judgement and the rules of Parliament that the requirement for '*public involvement in the legislative and other functions*'<sup>266</sup> of the legislatures does not necessarily mean that they must host public hearings. When a bill is published it must allow people the opportunity to comment,<sup>267</sup> but this may be achieved through accepting written comment on a bill. The discretion of the legislatures to define the extent and nature of the processes they follow is cemented by the Constitutional Court decision in DfL.<sup>268</sup> Public participation in the law-making functions typically follows a process through which the public provide the relevant NA and National Council of Provinces (NCOP) committees with written

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<sup>259</sup> RIPAP. 2009. *Ibid.* P28

<sup>260</sup> Murray C. and Nijzink L. 2002. *Building Representative Democracy - South Africa's Legislatures and the Constitution.* p74. In RIPAP. 2009. *Ibid.* P24. The RIPAP indicates that In 1998 the number of bills and acts on which Parliament worked peaked at over 250, thereafter the number declined significantly and by 2006 that number was less than 30. P28

<sup>261</sup> RIPAP. 2009. *Ibid.* P24

<sup>262</sup> Van der Westhuizen. 2014. *Ibid.* P15

<sup>263</sup> February J. 2006. 'More than a law-making production line? Parliament and its oversight role'. *State of the Nation: South Africa 2005 – 2006.* S.Buhlungu S. Daniel J. Southhall R. and Lutchman J. (Eds). HSRC Press. P136.

<sup>264</sup> Muntingh L. 2012. 'The state of civil society participation in Parliament'. *Law, Development and Democracy.* 29:48. P 34

<sup>265</sup> Muntingh. 2012. *Ibid.* P33. The issues that stimulated the greatest level of public input during that period were bills dealing with the closure of the Scorpions, the National Youth Development Agency, the 11-year review of the implementation of the Domestic Violence Act, the Protection of Personal Information Bill and the Choice of Termination of Pregnancy bill.

<sup>266</sup> Act 108 of 1996. Sections 59(1)(a); 72(1)(a) and 118(1)(a).

<sup>267</sup> NA Rules. *Ibid.* Rule 249(1)

<sup>268</sup> DfL. *Ibid.* Para 128



submissions after which some are invited to make oral submissions. It is however notable that NCOP committees are significantly less likely to call for public comment or host hearings than NA committees are.<sup>269</sup> February's analysis in 2006 also highlights the weaker role of the NCOP, she states that the NCOP '*has been hidden by the long shadow of the NA*'.<sup>270</sup>

There is evidence of provincial legislatures (PLs) paying significant attention to facilitating public hearings on some bills over the past 10 years. When a 'bill affecting the provinces'<sup>271</sup> is processed through the PLs, most facilitate public hearings in towns across the provinces.<sup>272</sup> However the PLs, as with Parliament, have discretion as to if they hold public hearings or not and regarding the extent of those hearings. It is difficult to establish from any record on what basis the decision is taken to invest in public participation at this level, however it appears, as is the case with Parliament, that this is related to the level of political and public interest in the issue.<sup>273</sup> The discretion to decide on if and how to implement public participation leads to extremely uneven implementation across provinces at times.<sup>274</sup>

The processing of some bills has resulted in significant public consultation processes which are implemented in rural towns and villages, led by the PLs, I'll provide two examples. Regarding the Traditional Courts Bill [B1 of 2012] (TCB) the PLs hosted a total of 30 hearings across the nine provinces in the first half of 2012.<sup>275</sup> 26 of these 30 hearings were attended by approximately 6 688 people and 510 oral submissions were recorded at 25 by civil society monitors from the Alliance for Rural Democracy (ARD).<sup>276</sup> These provincial public hearings were additional to hearings hosted

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<sup>269</sup> Muntingh. 2012. *Ibid.* P35. Muntingh's study illustrates that NCOP committees received a total of 7 submissions compared to the 281 submissions received by NA committees during the four year period.

<sup>270</sup> February. 2006. *Ibid.* P127

<sup>271</sup> Act 108 of 1996. Section 76

<sup>272</sup> Reading the provincial mandates prepared by Provincial Legislatures on the Housing Development Agency bill [B1 of 2008]; the Restitution and Land Rights Amendment bill [B35 of 2013]; the National Credit Amendment Bill [B47 of 2013]; the Children's Act Amendment Bill [B19F of 2006]; and the Traditional Courts Bill [B1 of 2012]; most provinces indicate that they hosted public hearings and provide an indication of in which towns these were held. These documents can be found on numerous websites including the Parliamentary Monitoring Group website, the Children's Institute and the Centre for Law and Society.

<sup>273</sup> By searching the term 'public hearings' and the name of a PL, one is able to ascertain from the online presence, which bills PLs advertised for or reported on as having hosted public hearings. However the PLs online footprint is weak and it is thus difficult to establish the full picture of public hearings hosted by a legislature unless a civil society organisation has tracked the processing of the bill. These searches identify the Traditional Courts Bill (during 2012), the Restitution and Land Rights Amendment Bill (in 2013 and 2014); the Housing Development Agency Bill (during 2008); and the Children's Act Amendment Bill (in 2006 and 2007) as bills on which there were significant public participation processes at provincial level.

<sup>274</sup> For example in the processing of the Housing Development Agency Bill [B1 of 2008] during 2008, while the Eastern Cape Legislature reported hosting 32 public hearings, the Gauteng and Limpopo Legislatures only hosted one each, and the Western Cape and Kwazulu-Natal Legislatures' negotiating mandates make no mention of public hearings. A record of the negotiating mandates from all provinces can be accessed on the Parliamentary Monitoring Group website at <https://pmg.org.za/committee-meeting/9263/> accessed on 14 February 2015. The record for the North West Legislature's negotiating mandate is accessible at [http://www.parliament.gov.za/live/commonrepository/Processed/20110729/83954\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20110729/83954_1.pdf) accessed on 14 February 2015.

<sup>275</sup> Information obtained from Center for Law and Society and the Alliance for Rural Democracy (ARD) monitoring reports on the hearings.

<sup>276</sup> ARD. The information on attendance is not available for four hearings, and information on the number of submissions made is not available for five hearings.

by the NA in 2008 at which 21 written and 16 oral submissions were recorded;<sup>277</sup> and later in 2012 hearings hosted by the NCOP at which 67 written and 31 oral submissions were recorded.<sup>278</sup> Similarly PLs invested in broad consultations on the Children's Act Amendment Bill [B19B of 2006] during 2006 and 2007. The negotiating mandates indicate that 25 hearings were held in the six provinces that recorded this information.<sup>279</sup> While the Eastern Cape Legislature does not provide detail regarding how many hearings they hosted, the negotiating mandate indicates that they hosted hearings between the 23<sup>rd</sup> and 26<sup>th</sup> of October 2006.<sup>280</sup> Once again this was in addition to public hearings hosted by the NA in September 2007.<sup>281</sup> Interestingly in addition to these processes the NA undertook 'community consultations' in eight towns in four provinces.<sup>282</sup>

These examples demonstrate a growing sophistication in the mechanisms for public involvement in the law making functions of the legislatures and greater attention being paid to ensuring that these opportunities are accessible to people across the country.

## 2.2. Participation in oversight and the impact of legislation

The oversight and accountability functions of legislatures are at the heart of the delivery of human rights, addressing inequality, building infrastructure, delivering services and tackling poverty in the country. Failures in service delivery such as textbooks not being delivered to schools or clinics not having essential medicine stocks are as much a failure of the legislatures oversight as it is a failure of the executive to perform.<sup>283</sup> Yet in spite of the constitutional mandate that public participation must take place in the legislative *and other functions of the legislatures* most public participation relates to law reform and not these processes of the legislatures.<sup>284</sup> Much of the policy, law and academic focus of public participation has been on law making and

<sup>277</sup> <http://www.pmg.org.za/report/20080513-traditional-courts-bill-b15-2008-department-justice-briefing-and-publ> accessed on 17 August 2013; <http://www.pmg.org.za/report/20080514-traditional-courts-bill-b15-2008-public-hearings> accessed on 17 August 2013; and <http://www.pmg.org.za/report/20080520-renaming-high-courts-bill-b5-2008-public-hearings-traditional-courts> accessed on 17 August 2013. This 21 includes submissions from the NTHL, the CGE and the SAHRC.

<sup>278</sup> Accessed from the Parliamentary Monitoring Group website records of the four days of hearings. <http://www.pmg.org.za/committees/NCOP%20Security%20and%20Justice> on 30 December 2014. It's notable that the deliberation meeting of 24 October 2012 repeatedly refers to 20 to 22 oral submissions having been made, this is likely to be the result of last minute decisions to include some oral submissions not being reflected on the official list.

<sup>279</sup> Jamieson L. 2007a. *Children's Amendment Bill Progress Update: 20 March 2007*. Children's Institute, University of Cape Town. Accessed at <http://www.ci.org.za/depts/ci/plr/pdf/progress/Update20March2007.pdf> on 14 February 2015. Links to each negotiating mandate, from which I have counted the public hearings recorded can also be accessed via this link.

<sup>280</sup> Eastern Cape Negotiating Mandate on the Children's Act Amendment Bill. Accessed at <http://ci.org.za/depts/ci/plr/pdf/subs/Eastern%20Cape.pdf> on 14 February 2015

<sup>281</sup> See the Parliamentary Monitoring Group Website for records of these hearings. Accessed at <https://pmg.org.za/committee-meeting/8360/> and <https://pmg.org.za/committee-meeting/8358/> on 14 September 2015.

<sup>282</sup> Jamieson L. 2007b. *Children's Amendment Bill Progress Update: 17 July 2007*. Children's Institute, University of Cape town. Accessed at <http://www.ci.org.za/depts/ci/plr/pdf/progress/ProgressUpdate17July2007.pdf> on 14 February 2014. The community consultations were held in Mpumalanga, Limpopo, Eastern Cape and North West provinces.

<sup>283</sup> Ben-Zeev. 2014. *Ibid*. P40

<sup>284</sup> Muntingh. 2012. *Ibid*. P34. The study indicates that only nine per cent of public engagement related to oversight or accountability.

not oversight, and similarly the focus on the oversight roles of parliament has been weak in addressing public participation in this regard.<sup>285</sup>

The terms oversight and accountability are frequently used interchangeably, however in their *Report on Parliamentary oversight and accountability* (Corder Report) Corder *et al*, define the differences between these concepts, explaining that accountability in the context of the legislatures relates to state entities or individuals within the executive arm of government being required to 'explain and justify ... their decisions or actions', they indicate that accountability is strongly linked to requirements that where there is evidence of wrongdoing or errors, that the parties responsible make reparations for this and take action to prevent this from taking place in the future.<sup>286</sup> They explain that oversight includes a broader range of activities through which the legislatures monitor and review the actions of the Executive.<sup>287</sup> The Corder Report argues that both concepts are central to democracy, explaining that they give powers to the legislatures to '*ensure that the executive is carrying out its mandate, monitor the implementation of its legislative policy and draw on these experiences for future law-making*'.<sup>288</sup> The report further argues that accountability encourages openness of government and strengthens the confidence of the public in government.<sup>289</sup>

Parliament's approach to accountability and oversight has generally been poor,<sup>290</sup> and strong oversight has evidently been dependent on the nature of the issue at hand, the approach of senior MPs, and the strength of the ANC party position on the issue.<sup>291</sup> In addition, February suggests that parliament have approached its duty to assert itself over the executive in this regard 'hesitantly',<sup>292</sup> with the consequence of decreasing the trust of the public in the institution.<sup>293</sup> She argues that during the first ten years of democracy, Parliament '*struggled to define and interpret its oversight role*'.<sup>294</sup> Both February and van der Westhuizen argue that the investigations into the Arms Deal were a significant test of parliament's role to hold the state accountable and ultimately demonstrated the lack of political capacity of the institution to do this.<sup>295</sup> Van der Westhuizen further argues that this '*set the tone*' for parliamentary oversight going forward.<sup>296</sup>

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<sup>285</sup> This is evident on reading the work of parliamentary analysts, the focus of Constitutional Court challenges and the various documentation of the legislatures. Generally articles dealing with oversight and accountability fail to incorporate commentary on the state of public participation in this and articles on public participation focus on this in respect of law reform.

<sup>286</sup> Corder H, Jagwanth S, & Soltau F. 1999. *Report on Parliamentary oversight and accountability*. Faculty of Law, University of Cape Town. Accessed at <https://pmg.org.za/files/docs/oversight&account.htm> on 15 February 2015

<sup>287</sup> Corder *et al*. 1999. *Ibid*.

<sup>288</sup> Corder *et al*. 1999. *Ibid*.

<sup>289</sup> Corder *et al*. 1999. *Ibid*.

<sup>290</sup> February. 2006. *Ibid*. P123. And Van der Westhuizen. 2014. *Ibid*. P52

<sup>291</sup> Van der Westhuizen. 2014. *Ibid*. P100

<sup>292</sup> February. 2006. *Ibid*. P129.

<sup>293</sup> February. 2006. *Ibid*. P126.

<sup>294</sup> February. 2006. *Ibid*. P123.

<sup>295</sup> Van der Westhuizen. 2014. *Ibid*. P32; and February. 2006. *Ibid*. P124

<sup>296</sup> Van der Westhuizen. 2014. *Ibid*. P32

Parliament has dragged its feet in addressing its poor oversight performance, February supports this in her paper written in 2006, in which she argues that Parliament's insipid response to the Corder report of 1999 at that stage demonstrated the institution's reluctance to strengthen this aspect of its work.<sup>297</sup> Subsequently there has been a growing recognition by Parliament of the need for it to strengthen its oversight capacity.<sup>298</sup> Van der Westhuizen argues that at the beginning of its term in 2009, the 4<sup>th</sup> Parliament seemed imbued with a new enthusiasm for effective oversight and she provides a range of examples from different committees at the time to support this.<sup>299</sup>

In addition to the Constitutional framework, more structured architecture to enable these functions is lacking. The then Speaker of the NA, Max Sisulu addresses this in his speech on the budget of Parliament in 2011, indicating that these functions of Parliament will be improved through the implementation of the Oversight and Accountability Model.<sup>300</sup> This model was finalised in 2009, and broadly addresses the mechanisms for oversight and accountability, including making recommendations for changes to the current rules of the NA to improve this.<sup>301</sup> Reference to public participation is weak in this document; it simply articulates that public participation in the oversight functions of Parliament must be addressed, stating that this should be achieved in a separate model.<sup>302</sup> Further, there are some aspects of parliamentary oversight, which by their very nature involve the public that are addressed.<sup>303</sup> In 2012, the *Oversight model of the South African Legislative Sector (SOM)* was launched. It draws significantly from the Oversight and Accountability Model and applies not only to Parliament but also to the PLs. A notable difference is the clear and detailed articulation of the oversight cycles of the legislatures and importantly, the integration of public and stakeholder engagement in this.<sup>304</sup> However, the sheer volume of oversight-related meetings raises the question of the extent to which it will be possible for the extensive standards articulated to be fully realised.<sup>305</sup>

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<sup>297</sup> February. 2006. *Ibid.* P139.

<sup>298</sup> Address by Speaker Max Sisulu, MP on the occasion of Parliament's Budget Vote, National Assembly, 11 June 2013. Accessed at [http://www.parliament.gov.za/live/content.php?Item\\_ID=3587](http://www.parliament.gov.za/live/content.php?Item_ID=3587) on 15 February 2015; RIPAP. 2009. *Ibid.* P28; and Parliament of South Africa Oversight and Accountability Model: asserting parliament's oversight role in enhancing democracy. 2009. Section 3.1.3.

<sup>299</sup> Van der Westhuizen. 2014. *Ibid.* P55

<sup>300</sup> See footnote 298 above

<sup>301</sup> Parliament of South Africa Oversight and Accountability Model. 2009. *Ibid.*

<sup>302</sup> Parliament of South Africa Oversight and Accountability Model. 2009. *Ibid.* Section 4.1.8.

<sup>303</sup> These include recommendations that the Rules of Parliament should include mechanisms by which the recommendations made in sectoral parliaments can be forwarded to relevant committees for consideration; that the mechanisms for petitions should be strengthened; and that mechanisms to ensure that issues that are raised with MPs through their constituency work can be addressed in parliamentary processes that seek executive responses. Sections 4.1.1 and 4.1.6

<sup>304</sup> SOM. 2012. *Ibid.* Pages: 23, 30, 37, 40, 43, 47 and 50

<sup>305</sup> The model requires stakeholder engagement in deliberations on the appropriation bills and departmental budget votes, quarterly reports, annual reports, the public accounts committee, oversight visits, and departmental budgeting for the medium term.

Public participation in annual monitoring cycles of departmental budgeting, planning and reporting can provide legislatures with an indication of citizen priorities and is critical to ensure that legislatures have access to external information to verify information obtained from the executive; to rely solely on departments for information on their own performance is counterintuitive to oversight.<sup>306</sup> However while they sound the right note, these models are aspirational, unlike the rules of the legislatures they are not enforceable. February, in 2006 argues that elected representatives generally lack political will to fully exercise their oversight and accountability functions,<sup>307</sup> this sentiment, linked to the implications of the closed-list system, was repeated by a range of delegates at a civil society conference on South Africa's Legislatures in 2012.<sup>308</sup> Without political will, its questionable if these models or any other aspect of the framework for accountability and oversight will be effectively enforced.

It's notable that some members of the legislatures have argued that the issue is not political will, rather the lack of capacity and resources within the legislatures to access independent information and undertake effective oversight.<sup>309</sup> While it's unlikely that MPs and MPLs themselves will acknowledge that they lack the political mettle to assert themselves over the executive, van der Westhuizen undertook interviews with past MPs who clearly articulate that the issue is one of politics, not logistics or capacity. She quotes former MP Sisa Njikelana saying: "*... from time to time we monitor and give direction to things. The style of leadership will be informed by the precepts of the ANC.*"<sup>310</sup>; and another former ANC MP who states: "*... and you must not go and counter the Minister, publically or even in the committee, or even in caucus, because they will pull rank*".<sup>311</sup> I'm not suggesting that the capacity and resource concerns are not relevant, rather that addressing them alone without dealing with the bigger political motivations that weaken oversight, will not resolve the problem.

Although less pronounced than their interactions on legislation, civil society has not been completely absent in engaging directly with parliament on oversight or accountability. While the public have been vocal over the years, particularly through the mechanism of mass media, regarding significant political questions of accountability, this has less frequently resulted in direct engagements between the public and the legislatures. Since 2010, a growing number of civil society organisations or networks have put engaging with parliament's oversight role over departments in a systemic and sustained manner at the core of their work.<sup>312</sup> However, these

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<sup>306</sup> Ajam T at the People's Power People's Parliament Civil Society Conference on South Africa's Legislatures 2012. Quoted in Ben-Zeev 2014. *Ibid.* P48

<sup>307</sup> February. 2006. *Ibid.* P139.

<sup>308</sup> Ben-Zeev 2014. *Ibid.* P43 and p45

<sup>309</sup> Ben-Zeev 2014. *Ibid.* Pp 43-44

<sup>310</sup> Quoted in Van der Westhuizen. 2014. *Ibid.* P37

<sup>311</sup> Quoted in Van der Westhuizen 2014. *Ibid.* P38

<sup>312</sup> Equal Education, the Community Law Centre Parliamentary Programme at UWC, the Budget Expenditure Monitoring Forum, and the *Shukumisa* Campaign. The Civil Society Prison Reform Initiative and Institute for Security Studies have

contributions are frequently initiated by civil society and seldom at the invitation of committees.<sup>313</sup>

### Monitoring the implementation of legislation

The legislatures should not only perform oversight over the general performance of departments, it's also essential that they consider the implementation of the legislation that has been passed since 1994.<sup>314</sup> Importantly the RIPAP suggests that Parliament must consider how the content of legislation can facilitate legislative monitoring and oversight over the implementation of that legislation.<sup>315</sup> Requiring departments to report regularly on implementation can enable Parliament to identify any flaws or gaps in the legislation itself as well as problems with departmental programmes and plans.<sup>316</sup> Further it is of particular importance when the implementation of the legislation requires coordination between departments as it can provide a forum for coordinated oversight between different committees.<sup>317</sup>

But strong oversight provisions in legislation are not in the interests of the executive, particularly in respect of highly politically charged issues, February describes the battle between the Parliamentary committees and the executive in this regard during the development of the National Conventional Arms Control bill (B50B of 2001) in 2002.<sup>318</sup> She illustrates how in spite of support from the parliamentary committee and civil society for a provision in that act which would require parliamentary oversight over executive decisions, the Act was passed without this provision.<sup>319</sup>

Three acts stand out for their express provisions for parliamentary oversight. The Domestic Violence Act (DVA), the Criminal Law [Sexual Offences and Related Matters] Amendment Act (SOA) and the Child Justice Act (CJA) include express provisions for regular parliamentary oversight of the implementation of those laws.<sup>320</sup> Parliament's implementation of these

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for an even longer period undertaken regular engagements with the correctional services and police portfolios on oversight. This is not an exclusive list but reflects organisations with whom the author works on a regular basis.

<sup>313</sup> Community Law Centre, UWC indicated that they are only aware of the committees on Correctional Services and Justice and Constitutional Development (during 4<sup>th</sup> Parliament) now the committee on Justice and Correctional services extending invitations to a stakeholder group to provide comment on departmental annual reports. In addition to these committees the Centre monitors and engages with the Police, Health, Social Development, Women's and Education committees on a regular basis. None of these committees have in the past five years extended any invitation to contribute to meetings related to the annual oversight cycles. Authors experience.

<sup>314</sup> RIPAP. *Ibid.* p28

<sup>315</sup> RIPAP. *Ibid.* p30 and p33

<sup>316</sup> Wakefield L and Waterhouse S. 2014. 'Monitoring the Child Justice Act: oversight of national parliament' *Article 40* Vol16: 1. 8:14 p8

<sup>317</sup> Wakefield and Waterhouse. 2014. *Ibid.* p8

<sup>318</sup> February. 2006. *Ibid.* P131. She also points out that this is another example of a strong MP being moved out of the way by the ANC when they pit themselves against executive authority; the chairperson of the Defence Portfolio Committee was subsequently moved to a albeit senior position in the North West legislature.

<sup>319</sup> February. 2006. *Ibid.* P131.

<sup>320</sup> Domestic Violence Act No. 116 of 1998 Section 16(5); Criminal Law [Sexual Offences and Related Matters] Amendment Act No.32 of 2007 sections 65 and 66 and Child Justice Act No. 75 of 2008 section 96. The DVA places reporting requirements in the Independent Complaints Directorate (now the Independent Police Investigation

provisions in respect of the SOA and CJA has been weak, there is only a record of two meetings hosted by the Justice committee and one meeting hosted by the Committee on Women, Children and Persons with Disabilities (WCPD) over the past seven years regarding the SOA and no evidence of calls for public comment in these.<sup>321</sup> The legislatures have fared only slightly better regarding the CJA. In the time from its promulgation in 2008 to date there have been five meetings hosted by three different committees.<sup>322</sup> Only one of these meetings included civil society submissions.<sup>323</sup> It's notable that the BRRRs for the justice committee over four years all refer to the issue of oversight over this act, in these, the Committee repeatedly raises that it intends to meet with all government and civil society stakeholders, eventually in 2013, the committee's BRRR indicates that time constraints have prevented such meetings.<sup>324</sup>

Parliament's performance regarding oversight over the implementation of the DVA has been more significant, particularly since 2007. Two committees, the Police and WCPD Committees, have met a total of 20 times to assess the implementation of the Act and develop responses to strengthen this,<sup>325</sup> and while inviting public submissions on this issues has not been common for the police committee, the WCPD Committee was relatively strong on including calls for public submissions on the issue.<sup>326</sup>

Overall, Parliament are extremely inconsistent in the manner in which they conduct oversight into the implementation of these pieces of legislation, this relates not only to the irregularity of meetings for this purpose, but also the fact that it only relates to certain government departments at times and the lack of standards regarding requirements for public input into

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Directorate) and the South African Police Service every six months. Section 16(5)(c) and (d). The SOA and CJA require the establishment of Ministerial level intersectoral committees and that these provide annual reports, reflecting the performance of a range of relevant departments to Parliament on the progress of implementation of the acts. SOA sections 63, 65 and 66 and CJA sections 94 and 96

<sup>321</sup> Justice committee on 16 August 2010 and 16 September 2014 (accessed at <https://pmg.org.za/committee/38/> on 16 February 2015) and the Committee on Women, Children and Persons with Disabilities on 25 August 2009 – this meeting included the implementation of the child justice and domestic violence legislation (accessed at <https://pmg.org.za/committee/51/> on 16 February 2015). Although civil society presented to the committee on recent Constitutional Court judgements relating to the sexual offences legislation in their meeting on 16 September 2014, this presentation did not relate to the overall implementation of the act, nor was it made as a result of any invitation from the committee to do so.

<sup>322</sup> Portfolio Committee on Justice and Constitutional Development on 22 February 2010 and 21 June 2011 (Jointly with the Portfolio Committee on Correctional Services and including stakeholders from a wide range of government departments) (accessed at <https://pmg.org.za/committee/38/> on 16 February 2015); Portfolio Committee on Police on 22 August 2011 and 12 September 2012 – both meetings only focused on the policing aspects of the bill (accessed at <https://pmg.org.za/committee/86/> on 16 February 2015) and the Select Committee on Security and Constitutional Development in October 2013 (accessed at <https://pmg.org.za/committee/67/> on 16 February 2015).

<sup>323</sup> Wakefield and Waterhouse. 2014. *Ibid.* p10

<sup>324</sup> Wakefield and Waterhouse. 2014. *Ibid.* p10 Referring to the BRRRs dated 26 October 2011, 30 October 2012 and 5 November 2013 and the committee meeting held on 28 May 2013.

<sup>325</sup> The Portfolio Committee on Police held seven meetings to engage with the DVA implementation between 2007 and 2014 these were: 26 and 31 October 2007; 12 September 2007; 18 June 2008; 07 August 2012; 13 May 2013 and 05 November 2014, accessed at <https://pmg.org.za/committee/86/> on 16 February 2016. The Portfolio Committee on Women Children and Persons with Disabilities hosted 13 meetings between 2009 and 2013 these were: 25 August 2009; 08 and 15 September 2009; 27 and 28 October 2009; 03, 10 and 17 November 2009; 08 November 2011; 25 June 2012; and 06 November 2013, accessed at <https://pmg.org.za/committee/51/> on 16 February 2015.

<sup>326</sup> The processes hosted by the committee between August and November 2009 included public hearings on the implementation of the Act. accessed at <https://pmg.org.za/committee/51/> on 16 February 2015.

these.<sup>327</sup> Reading the BRRRs clearly demonstrates the failure of the legislatures to follow up on their own recommendations to themselves or to enforce their recommendations to the departments concerned over time.<sup>328</sup>

#### Impact of the Money Bills Amendment Procedure and Related Matters Act

The Money Bills Act for the first time, gave Parliament the power to amend the medium term budget policy statement (MTBPS) and ensures that this process is open to public scrutiny.<sup>329</sup> Van der Westhuizen compares the reports of the Finance Committee and indicates that there is little significant difference in the recommendations made in the period before and after the promulgation of the Act, she argues that this is due to the lack of increased capacity of MPs to effectively engage with the technical and complex budgeting terrain.<sup>330</sup> In addition the provisions mandating public participation in the Finance and Appropriation committees has not significantly affected public contributions in these. An analysis of the committee records available on the PMG website between 2006 and 2014 shows that there has been an increase in the number of stakeholders that make submissions,<sup>331</sup> however this is minimal. In October 2006 four stakeholders interacted with the committees, between 2010 and 2014 that increased to between eight and ten bodies commenting on the Fiscal Framework and Revenue proposals which take place in February or March every year.<sup>332</sup> These submissions are dominated by private sector stakeholders which usually accounts for five or six of the submissions received by the Committees.<sup>333</sup> Organised labour has maintained a steady presence over the years, typically two structures representing unions participate each year.<sup>334</sup> NGOs and civil society coalitions have engaged almost every year since 2008, however this is usually only one organisation or coalition, however in 2011 three different coalitions or organisations made submissions, subsequently this has dwindled back to one, and in March 2013, there were no submissions from NGOs or coalitions.<sup>335</sup>

Overall the legislatures are demonstrating greater consciousness of their oversight role, however there is very little integration of public participation into this and the development of the framework for this does not (and probably cannot) address the question of political motivation for improved oversight. As such the commitment of legislatures to oversight appears to remain low and is only marginally mitigated by the development of its oversight models. Tellingly, the Judicial

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<sup>327</sup> Wakefield and Waterhouse. 2014. *Ibid.* p 9 and p14

<sup>328</sup> Van der Westhuizen. 2014. *Ibid.* P101 and p103; and Wakefield and Waterhouse. 2014. *Ibid.* p10

<sup>329</sup> Van der Westhuizen. 2014. *Ibid.* Pp47-48

<sup>330</sup> Van der Westhuizen. 2014. *Ibid.* P97

<sup>331</sup> Records of meetings dated: 31 October 2006; 29 February 2008; 24 25 February 2010; 28 February and 01 March 2011; 28 February 2012; 05 and 06 March 2013; and 04 March 2014. accessed at <https://pmg.org.za/committee/24/> on 12 February 2015

<sup>332</sup> See footnote 331 above

<sup>333</sup> See footnote 331 above.

<sup>334</sup> See footnote 331 above. Federation of Unions of South Africa, Congress of South African Trade Unions, National Union of Metalworkers of South Africa; and National Education, Health and Allied Workers Union.

<sup>335</sup> See footnote 331 above.



Matters Amendment Bill [B2 of 2015] on which the Justice committee has yet to deliberate includes provisions to water down the comprehensive requirements for annual reporting on the implementation of the SOA and CJA.<sup>336</sup>

### 2.3. Sectoral parliaments; Taking Parliament and the Legislatures to the People and Petitions

Parliament hosts 'sectoral parliaments' to highlight the issues of specific groups, such as youth, women, labour and people with disabilities. In spite of there having been no evaluation of these, Parliament claims that the sectoral parliaments are 'successful'.<sup>337</sup> In contrast, both the RIPAP and civil society organisations have questioned their effectiveness, raising concern regarding their failure to engage with marginalised groups, as they favour attendance by elite stakeholders from government, political parties and better-resourced NGOs; there is weak or non-existent follow up on processes;<sup>338</sup> and the excessive spending associated with hosting these large once-off events.<sup>339</sup>

The legislatures have also emphasised the programmes of Taking Parliament to the People (TPTTP) and Taking Legislatures to the People (TLTP). Through these it seeks to improve engagements between MPs and MPLs and people living in rural areas.<sup>340</sup> These have some measure of success in bringing different spheres of government together into one room with citizens to address service delivery issues for greater coordination across the spheres of government.<sup>341</sup> The primary critique of these processes is once again that they mostly don't have significant influence and are little more than 'talk shops' in which follow up processes are extremely poor.<sup>342</sup>

The petitions process is intended as a mechanism through which citizens can engage directly with the legislatures, via contacting the constituency MP or the Speaker's office.<sup>343</sup> Although a Petitions Framework was recently developed,<sup>344</sup> the entry points are opaque to most people.<sup>345</sup> This coupled with the requirement that petitions must be made in writing makes this system inaccessible to the citizens, it favours better-resourced and literate people and is most unavailable

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<sup>336</sup> Judicial Matters Amendment Bill [B2 of 2015] clauses 15, 16 and 19

<sup>337</sup> PPF. 2013. *Ibid.* Pp26-27

<sup>338</sup> Ben-Zeev. 2014. *Ibid.* P25 and RIPAP P54

<sup>339</sup> RIPAP. *Ibid.* P64

<sup>340</sup> PPF. 2013. *Ibid.*

<sup>341</sup> Ben-Zeev. 2014. *Ibid.* P24 An example of this relates to a rural area in KwaZulu-Natal, in which the TLTP process resulted directly in the investment of resources for water provision in that area. Neliswa Nkonyeni. Speaker of the KZN legislature. 14 August 2012. At the People's Power, People's Parliament conference.

<sup>342</sup> Ben-Zeev. 2014. *Ibid.* P24

<sup>343</sup> PPF. 2013. *Ibid.* Pp52-54

<sup>344</sup> Petitions Framework for the South African Legislative Sector, annexure to the Public Participation Framework for the South African Legislative Sector. 2013.

<sup>345</sup> RIPAP. 2009. *Ibid.* p63

to those who have the most at stake.<sup>346</sup> Although this avenue for participation is seldom invoked,<sup>347</sup> when it is, it has had little success.<sup>348</sup>

These initiatives have the potential to improve citizens' access to the legislatures, however significant challenges currently impact on their effectiveness. Most notably that they tend to be framed as once-off events and fail to incorporate effective follow up on the issues raised between the legislatures and the executive and with the citizens who participate through these, the recent PPF seeks to address this through incorporating requirements for feedback throughout.<sup>349</sup> The poor follow through on many of these initiatives poses a danger because poorly implemented participation processes, where there is no evidence of them affecting decisions, tend to deepen frustration, helplessness and mistrust in elected representatives.<sup>350</sup>

#### 2.4. Constituency offices

Constituency offices have been established in an attempt to enhance the contact between elected representatives and citizens at local level.<sup>351</sup> Legislatures allocate time in their programmes for MPs and MPLs to conduct their constituency work.<sup>352</sup>

However, South Africa's is not a constituency based electoral system; as such constituency work is not embedded in, but rather layered over the proportional representation system.<sup>353</sup> The RIPAP found that constituency offices were not functioning well; attributing this to the fact that they are unstructured and that constituency work is not prescribed.<sup>354</sup> The report also found that neither elected representatives nor members of the public understood the roles and functions of these offices.<sup>355</sup> Delegates at a civil society conference on South Africa's Legislatures, and at a community workshop preceding this conference also indicated that members of the public are seldom aware of the existence of these offices, where they are located or what their role is.<sup>356</sup> Parliament has also acknowledged that the constituency offices are poorly resourced and that

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<sup>346</sup> PPF. 2013. *Ibid.* Pp5

<sup>347</sup> RIPAP. 2009. *Ibid.* p63

<sup>348</sup> Ben-Zeev K and Waterhouse S. 2012. *Not Waiting for an Invitation: lessons from South African civil society engagement with National Parliament in 2011.* Pp27-28. This describes a case in which the Tshwaranang Legal Advocacy Centre lodged a petition in response to ANC MP Mandla Mandela's comments that the practice of abducting young girls and women for marriage (*Ukuthwala*) is 'legitimate, and opposition to it is Western'. In spite of submitting this petition to the then ANC Chief Whip in August 2010, there was no response until September 2011 after the Commission on Gender Equality were approached to intervene. Eventually a small meeting was convened in Parliament in November 2011 at which it was agreed that MP Mandela would 'clarify' his statements at a Parliamentary debate during the upcoming 16 days of activism, this never took place.

<sup>349</sup> PPF. 2013. *Ibid.*

<sup>350</sup> Manor J. 2004 p9 in Hicks & Buccus. 2007. *Ibid.* P99

<sup>351</sup> RIPAP. 2009. *Ibid.* P7

<sup>352</sup> PPF. 2013. *Ibid.* P35

<sup>353</sup> February. 2006. *Ibid.* P135.

<sup>354</sup> RIPAP. 2009. *Ibid.* Pp 58-59

<sup>355</sup> RIPAP. 2009. *Ibid.* p60

<sup>356</sup> Ben-Zeev. 2014. *Ibid.* P26

constituency time for MPs and MPLs is limited.<sup>357</sup> Currently this time is unmonitored leading to a lack of accountability.<sup>358</sup>

The implementation of constituency work is dependent primarily on the approach of the specific MP as to if it is effective or not.<sup>359</sup> The overall performance of MPs regarding their constituency work is dismal, in an exercise where she telephoned a number of constituency offices during allocated constituency time, van der Westhuizen found very few MPs accessible through their constituency offices.<sup>360</sup> However, supporting February's assertion that the effectiveness is dependent on the MP, a small proportion of those telephone calls yielded conversations with MPs who were clearly very committed to their constituency work.<sup>361</sup>

### 3. Limitations on access

There are a number of issues which are procedural or technical in nature that significantly impact on the possibility of sectors of the public participating and on the quality of that engagement. These relate to the places where these exercises are hosted, the times at which they take place, notification of opportunities, and access to different forms of information to enable meaningful engagement.

#### 3.1. Geography and timing

The site of the national legislature coupled with vast rural areas across the country, and the associated costs and time required to travel to Parliament means that it is seldom possible for people to come to Parliament.<sup>362</sup> While one would expect the provincial legislatures to be more accessible, this is not the case, there is more evidence of citizen engagement at Parliament than at the Provincial Legislatures.

Measures such as TLTP and public hearings hosted in towns across the country are designed to address this problem of geography,<sup>363</sup> however they can only go so far. The notion of 'public access' and 'engagement' could be interpreted beyond physical presence to include other more creative means of people engaging directly with MPs and MPLs on issues. Using social media and

<sup>357</sup> Draft Public Participation and Petitions Framework for the South African Legislative sector. 2012. Page 29

<sup>358</sup> Van Der Westhuizen. C. 2014b. *Parliament @20: Shrinking the Accountability deficit*.

<http://www.thoughtleader.co.za/christivanderwesthuizen/2014/02/19/parliament-20-shrinking-the-accountability-deficit/> accessed 25 February 2014

<sup>359</sup> February. 2006. *Ibid*. P135.

<sup>360</sup> Van der Westhuizen. 2014. *Ibid*. Pp87-88

<sup>361</sup> Van der Westhuizen. 2014. *Ibid*. P89

<sup>362</sup> RIPAP. 2009. *Ibid*. p56

<sup>363</sup> RIPAP. 2009. *Ibid*. p56

other forms of electronic communication, as well as improved implementation of provisions for constituency work are but two measures that can help to narrow the geographical gap between the legislatures and citizens.<sup>364</sup>

### 3.2. Information

Access to information is fundamental to public participation,<sup>365</sup> addressing weaknesses in access to information on processes and opportunities for participation is arguably more critical than addressing physical geographic concerns. Lack of information about the legislatures, their processes and opportunities for engagement lies more solidly behind lack of access than distance does. Inadequate and short notification of invited opportunities, is the most frequently cited information-related barrier to public participation,<sup>366</sup> however there are three other aspects of the information barrier that are relevant.

Firstly, the majority of the public express a lack of knowledge and understanding regarding the overall role and purpose of the legislatures, their structures and processes, as well as the framework for public participation.<sup>367</sup> At a community workshop hosted in Khayelitsha in 2012, participants indicated that they perceived public participation in the legislatures to be related to demonstrations and marches.<sup>368</sup> Secondly, access to the schedule of meetings and activities of legislatures enables the public to identify issues on the agenda ahead of schedule and prepare for interactions relating to these. Parliament provides the schedules of committee meetings for the NA and NCOP on its website, and generally updates these weekly.<sup>369</sup> The notice provided by these schedules favours organisations that are poised to interact with the legislatures and is seldom sufficient time for citizens outside of the Western Cape to attend those meetings.<sup>370</sup> It's also notable that there are large swathes of the population who don't have access to the internet.<sup>371</sup> A search of the websites of PLs shows that this information is almost non-existent at this level, since there's no information on what is being considered, participation is rendered almost impossible. Given that it is provincial departments that are responsible for service delivery on most socio-economic rights issues and that the provincial legislatures are tasked with oversight over this, this is extremely problematic. The third issue is access to documents on the substantive issues under discussion, this is crucial to ensure that people are prepared to engage with the issues on the

<sup>364</sup> Ben-Zeev. 2014. *Ibid.* P29

<sup>365</sup> Abid Hussain. UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Abid Hussain. *Ibid.* Paragraph 42

<sup>366</sup> Hicks and Buccus. 2007. *Ibid.* P105; RIPAP. 2009. *Ibid.* p54; February. 2006. *Ibid.* P136.

<sup>367</sup> RIPAP. 2009. *Ibid.* p64 and Stakeholder meeting 8 February 2012. Community Law Centre, UWC, Heinrich Boell Foundation, UNICEF South Africa. Community workshop in preparation for the People's Power People's Parliament Conference 7 August 2011 Khayelitsha; and RIPAP. 2009. *Ibid.* p7.

<sup>368</sup> Community workshop in preparation for the People's Power People's Parliament Conference 7 August 2012 Khayelitsha. Author's notes from the meeting.

<sup>369</sup> The 'meetings of committees list' can be accessed at [www.parliament.gov.za](http://www.parliament.gov.za)

<sup>370</sup> Hicks and Buccus. 2007. *Ibid.* P102

<sup>371</sup> RIPAP. 2009. *Ibid.* p54

table. Documents on which many participation processes are based, such as bills, departmental reports or draft policies are generally made available in English, and as a norm, they are seldom available in local languages, nor are ‘plain language’ explanations of the often technical and legal content made available.<sup>372</sup>

### 3.3. Notification

As previously stated, the issue of the timeframes in which notification is given for public submissions, written or oral, is frequently cited as a significant reason for poor uptake on opportunities to participate.<sup>373</sup> The Congress of South African Trade Unions (COSATU) explain that the public cannot make meaningful inputs into processes, under circumstances in which, at times, less than a week’s notice is given, and Hicks and Buccus argue that this results in the exclusion of community based organisations and structures.<sup>374</sup> Short notice also precludes effective mobilisation, consultation and deliberation among networks and in communities, limiting the quality of public responses.<sup>375</sup> Even two weeks’ notice may not always be sufficient to mobilise resources or people around the country who are not already organised to respond.<sup>376</sup> In addition to late notice, last minute schedule changes, cancellation and postponement of committee meetings and public hearings is not uncommon and confounds participation.<sup>377</sup> At times this also results in organisations wasting resources.<sup>378</sup> During the process of provincial hearings on the TCB in addition to extremely late notice for some hearings,<sup>379</sup> there were instances where the venue for the hearing was changed and members of the public were not notified of the change, this resulted in people arriving at the original venue on the morning of the hearings only to discover there was no hearing at that venue, and as a consequence people had the option of paying for public transport to the new venue or not attending at all.<sup>380</sup>

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<sup>372</sup> Hicks and Buccus. 2007. *Ibid.* P102. Bills are usually also translated into at least one other official South African language, but this fails to address the linguistic needs of the rest of the population. There are some examples, such as with the Traditional Courts Bill, of the legislatures translating bills into more than just one other official language besides English, however this is extremely rare.

<sup>373</sup> Hicks and Buccus. 2007. *Ibid.* P105; RIPAP. 2009. *Ibid.* p54; February. 2006. *Ibid.* P136

<sup>374</sup> COSATU submission, quoted in RIPAP. 2009. *Ibid.* p54; and Hicks and Buccus. 2007. *Ibid.* P105

<sup>375</sup> COSATU submission, quoted in RIPAP. 2009. *Ibid.* p54

<sup>376</sup> The Community Law Centre Parliamentary Programme, seeks to support organised and deliberated citizen input, with particular emphasis on extending the range of the public involved with the legislatures beyond better resourced NGOs, while the organisation has had some success in expanding this range of stakeholders, when short notice is provided, it is commonly NGOs and those community oriented stakeholders with whom the organisation has pre-existing relationships who can be reached and engaged in the process. This is based on the authors experiences working on the Traditional Courts Bill in 2012, the Women’s Empowerment and Gender Equality Bill in 2012 and the various amendments to the sexual offences legislation between 2010 and 2014.

<sup>377</sup> RIPAP. 2009. *Ibid.* p58

<sup>378</sup> The Community Law Centre, UWC had on another occasion supported the travel of a person from another province to Parliament to present at a meeting of the Committee on Justice only to be informed the afternoon prior to the meeting that the meeting would no longer be taking place. Author’s experience

<sup>379</sup> Ben-Zeev. 2014. *Ibid.* P35

<sup>380</sup> D Smythe. Who was a member of the ARD steering committee. Personal Communication with the author 23 February 2015

Not only the RIPAP, but more importantly the Constitutional Court has stressed the importance of giving the public enough time to prepare submissions.<sup>381</sup> However the absence of any clear standards as to what reasonable timeframes are, provides the gap in which the practice of providing last-minute notice can continue. Although Parliament in the last five years has aimed to provide two-weeks' notice<sup>382</sup> this standard is not articulated in the Rules, and certainly it is not the standard with regard to PLs and their processes at local level.<sup>383</sup>

### 3.4. Methods of communication and notification

In addition to notice periods and the nature of the information available to people, the mechanisms for public notification are generally problematic and favour organised groups in civil society who have access to resources.<sup>384</sup> Currently bills are published in the Government Gazette and on Parliament's website, and the legislatures rely on national print media and websites to communicate upcoming participation opportunities.<sup>385</sup> COSATU argue that these mechanisms tick the box of legal obligations to provide information but fail to consider the '*spirit of ensuring public access*'.<sup>386</sup>

To participate effectively in the annual oversight processes of the legislatures it's essential to have access to the draft departmental annual reports and strategic plans on which deliberations are based. However these drafts are not made broadly available prior to being assessed by parliament. To access them one must physically go to the document stores at Parliament. Until recently these have only been available in hard copy, two weeks prior to the deliberations.<sup>387</sup> This once again demonstrates the lack of attention to public participation in the oversight functions of the legislatures.

The Centre for Public Participation states that notification must extend '*beyond mainstream media and make use of community print and electronic productions.*'<sup>388</sup> A civil society conference in 2012, which examined the functioning of the legislatures took this further, calling for greater use of new social media, including cell-phone platforms such as mass SMS messaging and MIXit. The conference noted that these platforms not only tick the boxes for notifications, but allow for

<sup>381</sup> RIPAP. 2009. *Ibid.* p54; and DfL. *Ibid.* Paras 129 and 131

<sup>382</sup> Personal communication with Joy Watson a senior researcher at Parliament, December 2013.

<sup>383</sup> Ben-Zeev. 2014. *Ibid.* P35. During the provincial hearings on the Traditional Courts Bill there were a number of hearings which were only advertised within a week or days before the actual hearing, in the Northern Cape, public notice was provided the day before the hearing through the distribution of posters.

<sup>384</sup> Hicks and Buccus. 2007. *Ibid.* P104 and 107; and COSATU submission quoted in RIPAP. 2009. *Ibid.* p54

<sup>385</sup> Hicks and Buccus. 2007. *Ibid.* P105

<sup>386</sup> COSATU submission quoted in RIPAP. 2009. *Ibid.* p54

<sup>387</sup> In 2014 the Community Law Centre was able to access electronic versions of the documents, however this still required going to the document stores physically to obtain these. In previous years (2010 to 2013) the Community Law Centre has scanned these lengthy hard copies page by page for circulation to relevant CSOs outside of Cape Town and arranged the physical delivery of hard copies to stakeholders working around the city. Author's own experience.

<sup>388</sup> Centre for Public Participation. 2009. *Ibid.* Page 42.

more sustained engagement with people for input and communicating outcomes on processes.<sup>389</sup> In addition, there are a range of avenues for communication that target particular constituents, through existing local networks and structures such as school governing bodies and newsletters, local religious forums, community meetings, iindaba, lekgotla, and community policing forums.<sup>390</sup>

### 3.5. Implications for who has access

Research indicates that the same individuals and organisations tend to access parliament to participate over time.<sup>391</sup> This pool of ‘usual suspects’ has not changed significantly and tends to be made up of actors from the private sector and civil society elites that are organised and have greater access to resources.<sup>392</sup> Linked to this, February refers to a survey undertaken with 100 000 NPOs in South Africa, of which the ‘*extreme minority*’ ever engage in parliamentary processes.<sup>393</sup>

The issue, does not, however solely revolve around the preparedness of citizen groups to respond, the issue of who is informed of opportunities and how is also pertinent. Citizens have raised concerns that people who are known to be sympathetic to government’s position on an issue are targeted with information and at times provided with financial or practical support to participate.<sup>394</sup> The lack of transparency regarding who is invited and supported by the legislatures to participate exacerbates this.

## 4. Civil Society

Thus far I’ve primarily discussed the performance of the legislatures in relation to public participation, however, some attention must be turned to the issue of the performance of the public and civil society in this regard. Theron *et al* indicate that citizens have a responsibility to further participation within democratic contexts and argue that the question of who ‘owns’ participation in South Africa has not been sufficiently engaged or answered.<sup>395</sup>

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<sup>389</sup> Ben-Zeev. 2014. *Ibid.* P27

<sup>390</sup> Centre for Public Participation. *Ibid.* Page 42.

<sup>391</sup> Van der Westhuizen. 2014. *Ibid.* P98; Muntingh. 2012. *Ibid.* P39; and Hicks and Buccus. 2007. *Ibid.* P97 and p105

<sup>392</sup> Muntingh. 2012. *Ibid.* P39; and Hicks and Buccus. 2007. *Ibid.* P97 and p105

<sup>393</sup> February. 2006. *Ibid.* P136.

<sup>394</sup> Ben-Zeev. 2014. *Ibid.* P38. And during the processing of the WEGEB early in 2014 a ‘consultation’ was hosted in the Western Cape on 27 January 2014 at which the majority of delegates present were government employees who had been transported to the meeting from the Northern Cape. Of the more than 50 people present at the meeting only 10 were from NGOs and CBOs, the rest identified themselves as ANC Women’s League members or staff across various government departments in the Northern or Western Cape. It’s notable that of the 10 CSOs present, some received the information of the meeting from the Community Law Centre and attended as a result of this. Information obtained by author’s own record of the meeting and author’s email records.

<sup>395</sup> Theron *et al.* 2007. *Ibid.* P4

A central question is: how well is civil society managing to 'invent' spaces for interactions with government and the legislatures, and to what extent are the invited opportunities being claimed and re-framed by civil society?

#### 4.1. Creating and inventing spaces

Due to the limitations to access of legislature-led opportunities, it's essential for civil society to invest in building spaces and capacity to ensure a wider range of public contributions can be heard and taken note of by those with political power. This is supported by an activist's views in relation to the Traditional Courts Bill participation process:

*"So the lesson is that civil society engagement can change the content of laws if people take opportunities, but also, the official processes are deeply one-sided. They're inaccessible, and without a broader alliance that's mustering resources to enable people to be able to use them effectively, the power imbalances are really almost insurmountable."<sup>396</sup>*

Building strategic alliances and mobilisation within civil society is considered central to the notion of creating such spaces and is linked to increased political influence of civil society groups.<sup>397</sup> The Treatment Action Campaign (TAC) stands out as one of the most significant alliances.<sup>398</sup> TAC's approaches of building alliance and 'moral consensus' among civil society to strengthen its work involving direct engagement with policy makers has been argued by analysts to be central to the successes of the campaign.<sup>399</sup> More recently the Right to Know Campaign (R2K), originally established in 2010 to build civil society's response to the Protection of State Information Bill (PoSIB)<sup>400</sup> has subsequently broadened its support base to include a range of civil society structures ranging from well resourced NGOs to locally based organisations and social movements.<sup>401</sup> There are numerous other examples of alliances formed for this purpose including the Alliance for Rural Democracy (ARD) established in 2012 to respond to the TCB; the civil society coalition responding to the Women's Empowerment and Gender Equality bill (WEGEB); and the *Shukumisa* campaign which focuses on the implementation of sexual offences legislation and policy. A key feature of these alliances is their attempts to broaden their membership beyond

<sup>396</sup> D Smythe, quoted in Ben-Zeev. 2014. *Ibid.* P38

<sup>397</sup> Friedman and McKeiser. 2009. *Ibid.* Pp39-40; and Gaventa. 2002. *Ibid.* P10

<sup>398</sup> Established in 1998 it continues to maintain a visible political presence to date, it currently represents over 8000 activists organised within 182 branches across the country. Treatment Action Campaign Website. Accessed at [http://www.tac.org.za/about\\_us](http://www.tac.org.za/about_us) on 17 February 2015.

<sup>399</sup> Friedman and McKeiser. 2009. *Ibid.* Pp37-38

<sup>400</sup> Protection of State Information Bill [B6B of 2010]

<sup>401</sup> Subsequently the R2K have broadened the range of issues relating to access to information, whistle blowing and media freedom. Accessed at <http://www.r2k.org.za/about/> on 17 February 2015.



individuals and organisations who typically engage in policy formulation and who are resourced, to include individuals and citizen groups operating in local contexts.

These alliances tend to invest in range of actions besides building their support bases. These include providing the public and their members with information regarding the policy issues under debate; providing information on the opportunities for participation;<sup>402</sup> providing regular updates on developments in the process;<sup>403</sup> providing deliberative spaces for civil society to build understanding of and responses to the issues; creating participation spaces, particularly through organising marches or other public actions; engaging directly with political leaders in formal interactions such as meetings or hearings – often focussing on ensuring that those people who are less frequently present in those spaces can participate in these too; attending parliamentary committee meetings to monitor the proceedings;<sup>404</sup> and sustained media engagement in order to influence public discourse on the issues.

Public protest is also considered a significant form of created citizen engagement with the state, often linked to citizens' frustrations regarding their lack of influence over state decisions.<sup>405</sup> Theron *et al* argue that protest is the dominant form of public participation in South Africa.<sup>406</sup> Karamoko and Jain have analysed the extent of community level protests in South Africa since 2007 indicating that these were at their height in the first quarter of 2010, at 18 protests per month and have subsequently dropped down to levels similar to those seen in 2007 at just under nine protests per month.<sup>407</sup>

Another avenue some organisations employ is to invite MPs and MPLs to forums for discussion on key issues. The response of elected representatives to these varies, but is generally not overwhelmingly positive.<sup>408</sup> That said, there are a handful of members of legislatures who do respond positively to these and engage with citizens in spaces, on issues and on the terms set by citizens.<sup>409</sup> The extent to which this influences decisions taken in government spaces is difficult to

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<sup>402</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P12; and throughout the 2011-2013 period, the Alliance for Rural Democracy worked with media experts to ensure a robust media campaign in the national and local media.

<sup>403</sup> Searching for information on participation processes with the legislatures reveals that it is generally civil society based information sites such as the Parliamentary Monitoring Group, the Centre for Law and Society, UCT and the Community Law Centre, UWC that provide this information; it is not provided by the legislatures. February (2006, p136) reflects that part of the problem is that the legislatures do not maintain any database of submissions for example.

<sup>404</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P11

<sup>405</sup> Theron *et al.* 2007. *Ibid.* P12

<sup>406</sup> Theron *et al.* 2007. *Ibid.* P17

<sup>407</sup> Karamoko J. 2011. And Jain H. 2010. In *Community Protests in South Africa: Trends, Analysis and Explanations 2011*. Multi Level Government Initiative, Community Law Centre, UWC 2011. Pp4-5. Accessed at [http://mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Community\\_Protests\\_SA.pdf](http://mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Community_Protests_SA.pdf) on 17 February 2015.

<sup>408</sup> The Parliamentary Programme of the Community Law Centre, UWC, regularly hosts meetings with alliance partners to which members of parliament or the legislatures are invited. These include events related to maternal health, sexual offences, domestic violence and prisoners rights amongst others between 2010 and 2014. Author's own records.

<sup>409</sup> The response is not overwhelming, however in the majority of these meetings a small handful of MPs or MPLs do attend and participate. Author's own records.

assess. However by engaging in these, elected representatives are exposed directly to various stakeholders representing different parts of 'civil society' and citizens experiences, they are exposed to new information and research, and relationships and good faith can be built between parties.

#### 4.2. Laying claim to the legislatures

The methods by which existing invited spaces are claimed is perhaps less politically exiting than the concept of inventing spaces, at the same time, it presents a range of useful means by which people can increase access to and influence in the legislatures. Civil society can utilise existing structures, processes and entry points into the legislatures for this purpose. Due to the provisions for access and openness of the legislatures, there is nothing to preclude citizens from attending meetings and monitoring discussions. It is frequently possible to engage with MPs and MPLs informally in these meetings during breaks or through providing members with written information relating to the issues during deliberations.<sup>410</sup> In addition, many organisations have invested in building their relationships with committee support people such as committee secretaries and researchers in order to obtain up to date information regarding processes and timeframes, and in order to provide unsolicited information to committees indirectly through these people.<sup>411</sup>

The failure of the legislatures to invite civil society to provide inputs on their oversight of departments has not prevented civil society from inviting itself to the table.<sup>412</sup> Some organisations have been organised and robust in engaging with these processes, reminding committees of their duty to undertake oversight at times and providing the committees with submissions on the issue, in spite of not being invited to do so.<sup>413</sup> Responses of committees to this input has been mixed, van der Westhuizen refers to an instance in which the chairperson of the Justice committee recognised the valuable contribution of organisations in the *Shukumisa* Campaign in compiling a report on the implementation of the Sexual Offences Act, as a result of this report the committee

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<sup>410</sup> This methodology is a common component of engagement strategies and frequently associated with Lobbying. The Author has participated in this or witnessed other members of civil society undertake these actions during the deliberations on the sexual offences legislation during 2004 and 2006; deliberations on the Children's Act and Amendment Bill during 2005 and 2007; Deliberations on the Child Justice Bill during 2008; A meeting of the Police Committee in 2012 relating to training police officials; and in the Justice committee during deliberations on a bill relating to sexual offences courts in 2013.

<sup>411</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P19

<sup>412</sup> The Community Law Centre Parliamentary Programme, UWC, has since 2010 sought not only to support civil society alliances to strengthen engagement from the outside, but also to increase the extent to which citizens and citizen groups can engage with MPs and MPLs using the existing structures, processes, and entry points in the legislatures. This has included a focus on increasing civil society participation in the oversight functions of the legislatures. Author's experience.

<sup>413</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P19. The *Shukumisa* Campaign has also been successful in requesting opportunities from the Justice and Social Development Committees on numerous occasions between 2010 and 2015 to provide research and information to these committees regarding the implementation of policy and law. Author's records.

took a very critical position regarding the department's weak performance in that regard.<sup>414</sup>

Furthermore, the BRRRs and meeting reports of the Justice committee between 2009 and 2014 demonstrate a growing awareness in that committee of the issues affecting the implementation of sexual offences legislation.<sup>415</sup>

On the other hand, attempts to lay claim to the legislatures' spaces is not always well received. In the October 2014 round of oversight over departmental annual performance, civil society organisations indicate that out of four committees approached with the request to provide input, only the Justice committee immediately agreed, obtaining the go-ahead from the Health and Social Development portfolio committees required much more of a two and fro between the organisations concerned and the committees, before those committees relented.<sup>416</sup> One organisation indicated that based on the resistance from the committee to their request that they decided it was not worth the investment as they had other issues on which to spend their time.<sup>417</sup> The reluctance of these committees to allow these submissions was viewed by the organisations involved, as an indication of a renewed resistance to critical input relating to government performance by the relatively new 5<sup>th</sup> Parliament, subsequent to the 2014 general elections.<sup>418</sup> Those organisations that participated reflected after making submissions, that this had not had significant impact, while organisations perceived the response of the Justice and Social Development committees to the submissions to be polite yet patronising, those who presented in the Health committee reported that the ANC committee members were downright hostile.<sup>419</sup> Backlash by the legislatures to citizens attempting to claim the Parliamentary space are evident during the deliberations on the Protection of State Information Bill, where parliament threatened to apply '*the full might of the law*' to members of the Right to Know Campaign who silently protested for one minute during the meeting.<sup>420</sup> In another example, in January 2014, members of the Sex Workers Education and Advocacy Taskforce were told to leave a public hearing on the Women's Empowerment and Gender Equality bill for staging a silent protest against the bill.<sup>421</sup>

While initiatives of the legislatures are criticised for being conceptualised as once-off engagements, civil society also often fails to take advantage of opportunities to sustain their engagement. A study on public participation in the legislatures found that organised participation

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<sup>414</sup> Van der Westhuizen. 2014. *Ibid.* P104

<sup>415</sup> Wakefield and Waterhouse. 2014. *Ibid.* p14

<sup>416</sup> The author corresponded formally with the Justice, Health and Social Development committees in this regard.

<sup>417</sup> This relates to Ndifuna Ukwazi's attempt to approach the Police committee, a committee that usually incorporates public input. Personal communication with staff member from NU.

<sup>418</sup> Madonko T and Waterhouse S. 2014. House of the Rising Sums. Opinion Editorial in the Mail and Guardian. Published 05 December 2014. Accessed at <http://mg.co.za/article/2014-12-05-house-of-the-rising-sums> on 17 February 2015.

<sup>419</sup> Madonko and Waterhouse. 2014. *Ibid.*

<sup>420</sup> *Parliament should be investigating the anti-democratic provisions of the Secrecy Bill - not five people in masks.* R2K Press release 17 February 2011. Accessed at

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=222033&sn=Detail&pid=71619>

<sup>421</sup> *SWEAT stages protest during WEGE parliamentary meeting.* Accessed at <http://www.pa.org.za/blog/sweat-stages-protest-during-wege-parliamentary-mee>

was seldom sustained beyond attending public hearings.<sup>422</sup> While the formal opportunity to present to a committee is limited to hearings, in the time thereafter, the meetings are open to the public and deliberations can be monitored, further, many committees are open to receiving follow up written submissions on the issues under discussion, and as mentioned previously organisations can utilise the breaks during the meeting to engage MPs individually and informally.

In spite of these examples of civil society seeking to lay greater claim to the legislatures, they represent the actions of a very limited section of civil society. On the whole civil society has not significantly implemented mechanisms to increase their participation in the legislatures beyond those opportunities where they are called on to make submissions.<sup>423</sup>

### **4.3. Power, inequality and exclusion within civil society.**

There is evidence of some organisations in South African civil society '*speaking on behalf of marginalised groups*', doing so in the absence of consultation or a mandate and doing so without providing feedback or being accountable to those groups.<sup>424</sup> The growing presence of alliances and networks such as the R2K and the ARD, and the fact that many of these make a concerted effort to ensure a wide range of organisations participate, is positive in this regard, however it heightens the importance of examining how power plays out within civil society. Friedman and McKeiser state that '*civil society remains highly uneven terrain, in which who has resources and connections largely determines influence.*'<sup>425</sup> As a consequence, community based groups and members of the public in more marginalised positions in society do not trust these larger networks and NGOs.<sup>426</sup> This imbalance within CSOs can only be addressed through greater investment into building strong community-based structures.<sup>427</sup> The ARD sought through its processes and structures to mitigate against this tendency for elite, resourced or academic organisations to control the voice and identity of the alliance.<sup>428</sup> Similarly the Right to Know Campaign has demonstrated a commitment to the principle of accountability and openness, not only in respect of the state but regarding practices within the campaign itself.<sup>429</sup> That said, it will be impossible to get away from the fact that founding, or stronger organisations in any alliance are likely to have more power than others.

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<sup>422</sup> Muntingh. 2012. *Ibid.* P38

<sup>423</sup> Van der Westhuizen. 2014. *Ibid.* P98 specifically relating to the poor civil society engagement on the opportunities for engagement presented by the Money Bills Amendment Act.

<sup>424</sup> Hicks and Buccus. 2007. *Ibid.* P106 and p108

<sup>425</sup> Friedman and McKeiser. 2009. *Ibid.* P17

<sup>426</sup> Friedman and McKeiser. 2009. *Ibid.* P21; and Hicks and Buccus. 2007. *Ibid.* P108

<sup>427</sup> Friedman and McKeiser. 2009. *Ibid.* P22

<sup>428</sup> Smythe D. Who was a member of the ARD steering committee. Personal communication with the author 23 February 2015

<sup>429</sup> The principles are articulated in the campaign's mission statement accessed at <http://www.r2k.org.za/about/mission-vision-and-principles/> on 17 February 2015. In addition the author has attended a number of R2K events and meetings over the past four years in which, members of the campaign have challenged the manifestations of power within civil society.

By their nature, alliances are formed around a common position, and reasonably exclude those who don't subscribe to that position.<sup>430</sup> However it's critical that the methods by which members of an alliance participate in developing the central positions of that alliance and the extent to which members can influence the strategy of the alliance, ensure that elite organisations do not co-opt and assimilate the other organisations involved in the alliance. The insidious ways in which power within civil society can manifest, requires the same level of scrutiny within as is levelled by many of these alliances at the state.

### 5. The power games within invited participation processes

Researchers and analysts strongly argue that the legislatures' public engagement initiatives are formal box-checking exercises designed to meet constitutional requirements, but that they are implemented in ways that seek to validate predetermined political positions and agendas, with little possibility of them influencing the outcomes.<sup>431</sup>

Although the formal discussion on issues takes place in committees, many decisions, particularly those relating to more politically charged issues, are actually taken in political party caucuses and are significantly influenced by part positions and senior party members who are not members of the committees.<sup>432</sup> Hicks and Buccus explain that the fundamental problem with participation exercises is their failure to enable engagement of the public in the sites of power where decisions are actually taken.<sup>433</sup> Civil society's efforts to influence the decisions of the legislatures are currently dominated by academic and technical approaches, aimed at providing committees with sound information on which to base their decisions, as such they fail to reach all of the people, particularly more senior party members, who are involved in making the decision.<sup>434</sup> While this may not be problematic when commenting on issues that are not significantly contested, it is a significant barrier to influence in highly politically charged processes. To increase the potential for influence, civil society must also develop strategies to reach a wider political and public audience, such as accessing and interacting with members of party caucuses, utilising contestation within political parties, building strategic alliances, and engaging in public discourse to add political weight to their positions.<sup>435</sup>

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<sup>430</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P10

<sup>431</sup> Van der Westhuizen. 2014. *Ibid.* P38 and p191; and RIPAP. 2009. *Ibid.* P96, p99 and p191; Theron *et al.* 2007. *Ibid.* P 12; and Hicks and Buccus. 2007. *Ibid.* P104.

<sup>432</sup> Tilly A. 2012. Speaking at a roundtable of civil society organisations working with Parliament. Held on 8 February 2012 in Cape Town, hosted by the Community Law Centre, UWC, Heinrich Boell Foundation and UNICEF South Africa. Authors record of the meeting.

<sup>433</sup> Hicks and Buccus. 2007. *Ibid.* P104

<sup>434</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P6

<sup>435</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P6

The value of taking this more politically contextualised approach, is evident in the outcomes or status of a number of laws, policies and bills in which there has been significant contestation between civil society alliances and the ANC party position, the successes of the TAC is perhaps chief amongst these. Other examples include the Equal Education Campaign, which undertook activities both within the committees of Parliament as well as through picketing and demonstrations outside Parliament regarding the dismal conditions of schools in the Eastern Cape. Their actions directed at Parliament, are attributed to the resultant action taken by the Basic Education committee to influence the Minister of Basic Education to invoke section 100(1)(b) of the Constitution, which enables a national department to assume responsibility for a provincial obligation.<sup>436</sup> Although as yet not finalised, and in spite of tremendous resistance from ANC MPs and leaders, the PoSIB provides another example of civil society action affecting highly charged political issues.<sup>437</sup> Although Friedman disagrees with the approach of R2K, and stresses that the current formulation of the bill still poses a threat to democracy, he points out that many of the demands made by the campaign were addressed in amendments by the committee, arguing that this demonstrates that Parliament does sometimes heed such campaigns.<sup>438</sup> The fact that the PoSIB has not yet been passed demonstrates that the contestation over its provisions is having some impact. This is also true of the TCB and WEGEB, both of which senior government leaders indicated an intention to pass into law prior to the 2014 general election.<sup>439</sup> Although in both of these cases there is as yet no formal indication on if any amendments will be made and if so what these will be, and in fact if and when they will be reintroduced into Parliament; the fact that their processes were stalled belies the influence of alliances, which in both cases demonstrated almost unanimous rejection of the bills in the form that they were tabled. A common feature of the PoSIB and the TCB is not only the extent of civil society mobilisation, but also indications of divisions within the ANC regarding their content, which is also likely to lie behind the delays in finalising these bills in the form originally tabled.<sup>440</sup>

However these gains are not achieved without conflict that plays out between MPs or MPLs and members of the public in the parliamentary committees and public hearings.<sup>441</sup> The formal rules

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<sup>436</sup> Ben-Zeev and Waterhouse. 2012. *Ibid.* P13

<sup>437</sup> B6 of 2010. *Ibid.*

<sup>438</sup> Friedman. 2012. *Ibid.* pp14-15

<sup>439</sup> Joubert J. 2014. Women force rethink on traditional courts law. Published in the Sunday Times 02 February 2014. Accessed at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2014/SundayTimes\\_02022014.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2014/SundayTimes_02022014.pdf) on 18 February 2015. This article quotes the ANC chief whip Stone Sizani, indicating that the TCB was no longer on the list of priority bills to be passed before the 2014 general election, but that at that stage the WEGE bill was. The WEGE bill was passed by the National Assembly, however the NCOP recommended changes to the bill which required further processing in the NA, for which there was no time prior to the election.

<sup>440</sup> Friedman refers to this in respect of the PoSIB in Friedman. 2012. *Ibid.* p14. Regarding the TCB the then Minister of Women, Children and Persons with Disabilities Lulu Xinhana clearly took a different approach to the bill than that of other senior ANC members in her submission to the Justice committee; and Joubert J. 2014. *Ibid.* Refers to the ANC women's league's position influencing the process.

<sup>441</sup> It's notable that where conflict plays out between opposition and minority party MPs and members of the public it is likely to be considered as less serious due to the lower level of political power of these parties.

may be manipulated explicitly or in more subtle ways to favour some speakers and some positions. Defining the rules of engagement lies firmly with MPs and MPLs, the public has no input into how processes will be conducted. The Chairperson has the power to decide who can speak, for how long they can speak, on what issues they may speak, if interruptions will be allowed or not, and whether the committee can engage in questions with that person. This is illustrated by the comments of an activist who was involved in mobilisation regarding the controversial TCB since 2008:

*“There was no discussion of the controversial aspects of the bill... People were told that they had to comment on specific provisions of the bill. ... those conducting the hearings tried to shut people down when they spoke about their general experiences and how the bill would exacerbate these situations... . . . when one of our researchers tried to highlight problems with the appeals section, she was overruled - the chair just picked up the microphone and started speaking over her... At the hearings the chiefs were introduced individually... There was a great show of deference towards them... they were allowed to speak for as long as they liked, they weren't subject to the same time limits as others; at other hearings they were invited to make the closing comments.”<sup>442</sup>*

In another example, in October 2014, both the Justice and the Social Development portfolio committees indicated that the committees would not engage civil society presenters in questions or discussion, citing time constraints as the reason for this decision.<sup>443</sup> These decisions effectively rendered the already limited deliberative potential of those meetings to nil. Leaving CSOs present, with the impression that their analysis and suggestions regarding departmental performance and spending were of no interest to the committee's decision-making.<sup>444</sup>

As illustrated in the quote regarding the TCB process above, chairpersons may also favour people in the meeting who are uncritical of the ruling party or departmental positions, at times this means allowing people, such as traditional leaders in the case of the TCB, and Ministers and Directors General of departments, who hold significant social or political power to go beyond asking questions of clarity to interrupt and antagonistically challenge civil society presenters in hearings.<sup>445</sup> Displays of hostility and antagonism by committee members towards civil society have not been uncommon over the years and various examples are cited. This includes hostile treatment of civil society activists during struggles to increase access to anti-retroviral medicines by from the Health committee,<sup>446</sup> the Civil Society Prison Reform Initiative reports that committee

<sup>442</sup> Smythe D, People's Power People's Parliament conference, 14 August 2012, Cape Town. Quote taken from conference transcript.

<sup>443</sup> Madonko and Waterhouse. 2014. *Ibid.*

<sup>444</sup> Madonko and Waterhouse. 2014. *Ibid.*

<sup>445</sup> Civil Society Prison Reform Initiative quoted in RIPAP. 2009. *Ibid.* p58 and see Smythe D quote above.

<sup>446</sup> Van der Westhuizen. 2014. *Ibid.* P38; and RIPAP. 2009. *Ibid.* P39

members have at times made verbal attacks on presenters from civil society at different committee meetings;<sup>447</sup> and a number of civil society activists from NGOs and community-based structures who participated in national and provincial hearings on the TCB, who report being intimidated by committee members while attempting to make their submissions.<sup>448</sup> As a final example, towards the end of 2014 four organisations were informed by the chairperson of the Health committee that they were 'lucky' that she did not have them thrown out of the meeting.<sup>449</sup> This was in response to a range of inputs from these organisations regarding the department's performance,<sup>450</sup> her claims that they did not understand the nature of the process of reviewing the annual reports and developing budget recommendations also belies her own lack of understanding of the process as defined by the SOM.<sup>451</sup> Hicks and Buccus argue that in addition to manipulating the rules of engagement and taking a threatening stance to critical input, there are '*tendencies of the leading party...to close ranks*' against opposition or critique, '*labelling dissenters ... as ultra left, politically ambitious or even in some cases racist.*'<sup>452</sup>

A prime example of a committee seeking to skew deliberations (and the record of the process) away from critical public input, is the incident in which the chairperson of the Select Committee on Security and Justice instructed the department to only summarise two of the 31 oral submissions that were made (not to mention the further 36 written submissions received) for further discussion by the committee.<sup>453</sup> Although less politically charged than the example of the TCB, another illustration of Parliament's lack of regard for public input, in spite of rhetoric to the contrary, relates to recent amendments to the Rules of the National Assembly. There is no obligation for the legislatures to consult with the public on the development of their rules. However, late in 2012, the National Assembly called for public input into the 7<sup>th</sup> edition of the Rules.<sup>454</sup> Six submissions are recorded by the PMG.<sup>455</sup> Subsequent to making submissions these organisations were not provided with feedback regarding the process, nor were they informed of the dates on which the Committee deliberated on the Rules, and nor was there any feedback on the extent to which submissions were taken into account.<sup>456</sup> Upon searching Parliament's website

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<sup>447</sup> Civil Society Prison Reform Initiative quoted in RIPAP. 2009. *Ibid.* p58

<sup>448</sup> Ben-Zeev. 2014. *Ibid.* P38

<sup>449</sup> Treatment Action Campaign, Budget Expenditure and Monitoring Forum, Socio-Economic Rights Project, Community Law Centre and Amnesty International.

<sup>450</sup> Reading the submissions of these organisations, they provide evidence-based analysis of the department's performance on a range of issues and suggest recommendations to address persistent challenges and areas of weak performance, however they also expressly recognise where the department's performance has been effective. This is precisely the nature of discussion required by the SOM.

<sup>451</sup> The record of the meeting can be accessed at <https://pmg.org.za/committee-meeting/17632/> and the audio record provides a more detailed account of the discussion. It is also discussed in Madonko and Waterhouse. 2014. *Ibid.*

<sup>452</sup> Hicks and Buccus. 2007. *Ibid.* P101

<sup>453</sup> Audio record of the committee meeting held on 24 October 2012 available at <https://pmg.org.za/committee-meeting/15098/> accessed on 18 February 2015.

<sup>454</sup> Submissions were required by 2 November 2012. accessed at <http://legacy.pmg.org.za/calls-for-comment/deadline-for-comment-extended-rules-national-assembly-parliament> on 18 February 2015.

<sup>455</sup> One of which was submitted by two organisations and endorsed by a further 11 organisations. Community Law Centre, University of the Western Cape and Heinrich Boell Foundation. 2012. Submission on the Rules of the National Assembly 7<sup>th</sup> Edition November 2012.

<sup>456</sup> Author's own experience.



mid 2014, it became clear that the rules had been amended. A review of the record of the meetings relating to this shows that in their first meeting to discuss the public input the Committee are deeply concerned at the minimal response from the public to the call for comment. They state that this demonstrates a *'lack of interest'* from the public in the process, the Committee then discussed at length the particular importance and failure of political parties to prepare submissions to inform the process; they make no reference in this meeting to the actual content of the submissions received.<sup>457</sup> Reading through the records of the clause-by-clause deliberations on the rules in the latter part of 2013, there is no evidence of members of the Committee referring to any of the submissions that they received throughout their lengthy deliberations on the amendments.<sup>458</sup> Similarly a reading of the most recent version of the rules in conjunction with the submissions indicates that none of the recommendations made in submissions were incorporated into the rules.

The absence of any rules or standards regarding how submissions should be considered facilitates the scenarios described in the above examples.<sup>459</sup> In 2006, February argued that committees required rules to assist in defining how to weight different submissions and to ensure systematic processes of review of submissions so that 'valid or reasonable' recommendations would be considered in the committee deliberations.<sup>460</sup> That said, it is questionable if rules of this nature will fully resolve the problems, when often, the reason behind not taking submissions into account is politically motivated. The events in the NA in the latter part of 2014 and early in 2015 demonstrate that on politically charged issues, it is not the purely the absence of the rules, but also the decisions of the ruling party about how and when to enforce existing rules that comes into play.<sup>461</sup>

The failures of the legislatures to provide feedback on the processes and their outcomes to members of the public, have been widely noted as a significant problem and gap in the formal systems and procedures of the institutions.<sup>462</sup> The consequence of this is increased public disillusionment and mistrust in these processes.<sup>463</sup> It's not simply a matter of good manners, but rather one of the accountability of legislatures to the public regarding their decision-making processes. Thus standards do need to be developed for feedback, and this feedback should not

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<sup>457</sup> Meeting dated 15 November 2012, accessed at <http://www.pmg.org.za/report/20121115-consideration-draft-agenda> on 18 February 2015.

<sup>458</sup> Accessed at <https://pmg.org.za/committee/67/> on 17 December 2014 referring to meetings held on 8 and 15 November 2012; 20 and 26 September 2013; 25 October 2013; and 1 November 2013.

<sup>459</sup> Ben-Zeev. 2014. *Ibid.* P22

<sup>460</sup> February. 2006. *Ibid.* P136.

<sup>461</sup> De Vos P. 2014. *EFF vs the National Assembly: where to now?* Published in the Daily Maverick on 02 September 2014. Accessed at <http://www.dailymaverick.co.za/opinionista/2014-09-02-eff-vs.-the-national-assembly-where-to-now/#.VOSLiyI9vdk> on 18 February 2015.

<sup>462</sup> Hicks and Buccus. 2007. *Ibid.* P104; Theron *et al.* 2007. *Ibid.* P 8; and RIPAP. 2009. *Ibid.* p56; and Ben-Zeev. 2014. *Ibid.* P22

<sup>463</sup> Hicks and Buccus. 2007. *Ibid.* P104; Theron *et al.* 2007. *Ibid.* P8; and RIPAP. 2009. *Ibid.* p56

only include what was decided, but also provide the reasons for the decisions as well as the reasons for rejecting certain recommendations.<sup>464</sup>

Formal mechanisms and systems, even if they are implemented at a high standard, are not going to automatically result in citizen influence. Thus a greater awareness in civil society of the reality that many decisions are taken outside of committee-level deliberations, and are not only influenced by sound research or solid legal arguments but more significantly by the prevailing political will on the issue, could lead to the conceptualisation of broader civil society strategies for political influence. It must be bourn in mind, however, that the power to define the rules of engagement, to silence, or amplify certain positions on invited opportunities lies with the legislatures and as such, it will always be necessary to monitor these processes and challenge these abuses of power.

## 6. Conclusion

Given the South Africa's political system and context, the allegiance of most MPs and MPLs tends to lie first with their political party and not the public, this has serious implications for the independence of legislatures as well as their responsiveness to public inputs, particularly where these are at odds with the prevailing political position on an issue. The framework and technical avenues for public participation fail to mitigate against the politics of power that maintain exclusion and limit the influence of the public. This is particularly pronounced where the public view, even when it is a widely held view, is at odds predetermined political agendas.

In South Africa's representative democracy, public participation is imposed on elected representatives due to the constitutional framework and is undertaken more to meet these obligations than as a result of a firm commitment to the value of on-going public interaction with elected representatives. Theron *et al* have argued that government officials have failed to properly grasp the concept of on-going political participation and thus persist in implementing ineffective methods, they go on to suggest that the absence of programmes to orient officials to the principles and values that enable 'planning with' the people means that many are oblivious to their dismal performance in this regard.<sup>465</sup> This critique applies equally to elected representatives; however, orientation to the principles alone is unlikely to be sufficient, institutional commitment from the senior level would be essential to ensure these shifts in practice.

There is wide scope for public engagement with legislatures, and these are most developed in respect of law reform processes. In addition, in the past five years, the legislatures have

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<sup>464</sup> Ben-Zeev. 2014. *Ibid.* P22

<sup>465</sup> Theron *et al.* 2007. *Ibid.* Pp4-5

demonstrated greater awareness of, and attempts to fulfil their oversight functions, which is evident in the development of laws and models to provide scaffolding to these functions, and notwithstanding that attempts at calling members of the executive to account, have been fraught with backlash from senior party structures and an apparent lack of mettle of many MPs to assert themselves over the executive. Yet public participation on oversight is relatively underdeveloped, both in terms of implementation of measures for this by the legislatures and in terms of civil society's tendency to await invitation to participate in these opportunities, linked to a lack of proactive engagement with the legislatures on state performance. The increasing attention of the legislatures to implement mechanisms that take participation opportunities to local communities is promising, however they too remain fraught with challenges, and across the board, public access to information remains a serious barrier for effective participation, which is at its worst in the provincial legislatures and with regard to the oversight activities of the legislatures.

The primary responsibility to facilitate public participation lies with the state, however this does not absolve civil society of responsibility in this regard. The predominance of better-resourced CSOs in engagements with the legislatures must not only be addressed by the legislatures, but also with civil society. Increasing the potential for influence means strengthening the legitimacy of civil society structures through broadening support bases and alliances between NGOs and community-based structures and addressing some of the factors that cement the exclusion of certain groups. At the same time civil society organisations and alliances must be critical of the potential for abuse of power within their own structures, and implement measures to recognise and mitigate against this. Critically, advocacy strategies must include analysis of the site of political decision-making and how best to gain direct or indirect access to those spaces through mobilisation, leveraging points of contention within political parties, and influencing the public discourse through the mass media. Finally organisations can take a more robust approach to laying claim to avenues offered by the legislatures for engagement on an on-going basis.

Addressing gaps in the rules and systems for participation can go some way to improving the performance of legislatures in this regard, however the legislatures are primarily political spaces, battles over contested issues will not be won by stronger frameworks alone. It's naïve not to recognise that whoever holds power in any space can use that power, and generally will, to subvert opposition; either through more subtle manipulation of processes and rules in service of that agenda or through more obvious bullying tactics. However civil society must continue to challenge these abuses of the system and to defend the constitutionally intended purpose of the legislatures within South Africa's democracy.

## Chapter 5

### Conclusion

#### Introduction

There is a general consensus that South Africa's legislatures have delivered poorly in asserting their independence over the executive, performing oversight and facilitating public involvement. However, it is an oversimplification to suggest that the performance of the legislatures over the past 20 years has only been dismal. Reading van der Westhuizen's assessment of the legislatures since 1994, it is clear that the quality of their performance has differed at different times.<sup>466</sup> The nature of the relationships between elected representatives and members of the executive has not been static. There is evidence of numerous incidences in which MPs have put pressure on government duty bearers. That said, there is also evidence that they have ultimately paid the price for this, which has led to suggestions that South Africa's fifth parliament is even less likely to exercise its muscle than those in previous terms. The veracity of these claims remains to be seen.<sup>467</sup> Nor have the legislatures been completely impervious to public input. Delegates at the civil society conference on South Africa's Legislatures in 2012 indicated that '*citizens could still have an influence in decision-making. In spite of the frustrations, participation is not always without impact*'.<sup>468</sup> Again this must be qualified, as this impact may at times be reliant on broader mobilisation strategies rather than direct engagement with the legislatures alone.

For the most part, opportunities for citizen participation in the legislatures are '*inadequate, inaccessible and disempowering*'.<sup>469</sup> In spite of the legal framework, the purpose, methods and processes used means that participation seldom allow for the potential of public influence.<sup>470</sup> Similar to the findings in other jurisdictions,<sup>471</sup> on-going political participation in South Africa's legislatures seems to be motivated by the legal framework and not by the values that underpin this framework.<sup>472</sup> As such, it is implemented as an afterthought to the more resilient representative system.

#### Measuring South Africa against its IHRL and Constitutional obligations

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<sup>466</sup> Van der Westhuizen. 2014. *Ibid.*

<sup>467</sup> Madonko and Waterhouse. 2014. *Ibid.*

<sup>468</sup> Ben-Zeev . 2014. *Ibid.* P23

<sup>469</sup> Hicks and Buccus. 2007. *Ibid.* P106

<sup>470</sup> Friedman and McKeiser. 2009. *Ibid.* P28

<sup>471</sup> Barnes *et al.*. 2004. *Ibid.* P8

<sup>472</sup> Theron *et al.*. 2007. *Ibid.* Pp4-5

Generally speaking the South African framework for political participation meets the IHRL standards in terms of requirements for participation through elections and in terms of provisions for on-going participation in the development and implementation of policy.<sup>473</sup> However, the performance of the state relative to the elaboration of those standards by the UNSREPHR, in her report on the participation of people living in poverty, is weaker. Carmona's report sets out a number of recommendations to states.<sup>474</sup> I have dealt with these extensively in Chapter 3, but it is worth recapping here. States are required to develop a legal framework for participation at local and national levels. South Africa has this in place and has met the requirement to develop policies and operational guidelines, primarily through the Rules of the legislatures, the SOM and the PPF; however, the Rules are limited and the more comprehensive SOM and PPF are not enforceable. Thus the extent to which they are implemented remains to be seen. The report's recommendations also recognise the strong links between the right to participate and the rights to freedom of association, freedom of the media, access to information and protection for whistle blowers. While these are largely in place, the PoSIB<sup>475</sup> poses a significant threat.<sup>476</sup> And, although the South African framework meets the basic requirements of the right to receive information, the lack of articulation of *what* information and *how* to make that available, contributes to the dismal performance of the legislatures in this regard. The Money Bills Act<sup>477</sup> provides some legal framework for the participation of the public in budget formulation, but its implementation thus far is not promising, both in terms of the capacity of elected representatives to fulfil their role and in terms of public participation.

The constitutional requirements for the openness and accessibility of South Africa's legislatures are progressive in the global context and there can be no question that, under a basic analysis, the legislatures are meeting those requirements. Members of the public who can physically get to the legislatures are able to attend committee meetings and follow the discussions in these fora. The value of the Parliamentary Monitoring Group (a non-partisan CSO)<sup>478</sup> to the public, is based on the fact that the organisation's monitors have access to the committee meetings in Parliament, and are able to record proceedings. Thus, although Parliament's website is limited, members of the public who cannot physically attend Parliament, but have access to the Internet, are able to reasonably follow the agenda as well as the content of discussions in committees. Although technically accessible, in that people who can get there may enter, the legislatures are generally inaccessible to most, due not only to geographic limitations, but also to failures of the legislatures to widely disseminate information regarding their purpose, their programmes and the

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<sup>473</sup> CEDAW. *Ibid.* Article 3(c)

<sup>474</sup> UNSREPHR. *Ibid.* Para 86

<sup>475</sup> B6B of 2010. *Ibid.*

<sup>476</sup> Gordimer N. 2012. South Africa: the new threat to freedom. *New York Review of Books*. 24 April 2012. Accessed at <http://www.nybooks.com/articles/archives/2012/may/24/south-africa-new-threat-freedom/> on 25 February 2015.

<sup>477</sup> Act No.9 of 2009

<sup>478</sup> See [www.pmg.org.za](http://www.pmg.org.za).

issues under discussion, to the public. For this reason the PLs, although closer to most, are less accessible than Parliament is. Finally the reality that most political decisions are taken by political parties in closed spaces means that the openness of and access to legislatures does not translate into openness and access to the sites of decision-making.

Clearly, in spite of the limitations, the systems and practice for meeting the constitutional obligation to facilitate public involvement in the legislative functions of their work have been well developed over the past 20 years, and well utilised by some sectors of civil society. Further, the legislatures' practice of hosting public hearings on bills, in towns and cities across the country has been strengthened. However this is not the case in respect of the 'other' functions of the legislatures: in spite of the more recently developed Money Bills Act and the SOM, the extent and quality of opportunities as well as civil society's utilisation of these are pitiful.

As discussed in Chapter two, researchers have argued that the use of the term 'involvement' in the Constitution is ambiguous and results in a lack of clarity of the legislatures on what is required, providing an avenue to implement weaker forms of engagement that are tokenistic.<sup>479</sup> However, the Constitutional Court has provided clarity regarding the interpretation of the term public involvement, stating that it must be understood as 'participation'.<sup>480</sup> This clarity from the court has not demonstrably resulted in a shift in the nature of participation undertaken by the legislatures.

The reasonableness test established by the Constitutional Court requires the legislatures to consider the nature and importance of the legislation, linked to the intensity of its impact on the public, and allows that the practical considerations of law making processes must also be taken into account.<sup>481</sup> Establishing the extent to which the legislatures measure up to this test can only be assessed in relation to the development of particular pieces of legislation and the accompanying participation processes. It is notable that in the processes relating to both the TCB and the WEGEB, public inputs were overwhelmingly consistent in arguments that these pieces of legislation would impact significantly on the lives of the majority of South Africans and that the state had failed to adequately consult with the people most affected, namely rural South Africans and women respectively.<sup>482</sup> Thus, regarding these two pieces of legislation, civil society has indicated that the participation processes implemented by the executive and the legislatures have not matched the level of intensity and impact of the issues on the public. Although not required by the judgement, it would be interesting to analyse the performance of the legislatures in

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<sup>479</sup> Theron *et al.*. 2007. *Ibid.* P2 and pp4-5 and Hicks and Buccus. 2007. *Ibid.* p104

<sup>480</sup> DfL. *Ibid.* Para 120

<sup>481</sup> DfL. *Ibid.* Para 127

<sup>482</sup> The submissions made on the TCB can be accessed at <http://www.lrg.uct.ac.za/research/focus/tcb/> and those made regarding the WEGE bill can be accessed at <https://pmg.org.za/committee-meeting/16819/> and <https://pmg.org.za/committee-meeting/16834/>

respect of facilitating public involvement in their oversight functions against this reasonableness test. In spite of the dismal performance in this regard, delivery on socio-economic as well as civil and political rights has tremendous impact on the public.

### **Meeting the standards of deliberative democracy, and ‘meaningful’ or rights-based participation**

The developing theory and practice for deliberative democratic processes give greater direction to rights-based participation. As reflected in Chapter three, the evidence suggests that not only does this improve the rational outcomes of such processes but it also increases the possibility of building equity between and empowering participants. The participation implemented by the legislatures provides the opportunity for people to offer their opinions and to some extent, within time constraints,<sup>483</sup> to provide the reasoning behind these.<sup>484</sup> However, these meetings don’t provide an opportunity for any discussion, let alone robust discussion between members of the public and committee members. In many hearings, but not all of them,<sup>485</sup> a short amount of time is allocated for questions and answers between committee members and the presenter. Nor does the format of question and answer interactions meet the standards of deliberative process.<sup>486</sup> Entrenched practices and values regarding public engagement with the legislatures is in all likelihood a greater barrier to effective deliberation and debate between elected representatives and the public than the limited time available.

There is evidence of civil society organisations implementing deliberative processes in their preparations for engagements on law reform, this is done through hosting workshops with a range of stakeholders prior to hearings on an issue, in order to debate the bill, identify and develop understanding on points of contention, and build consensus where possible.<sup>487</sup> However, these civil society-led deliberative fora, while allowing for deliberation within civil society, do not create deliberation between the public and elected representatives.

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<sup>483</sup> February, 2006. *Ibid.* P136.

<sup>484</sup> In Parliament presenters usually have between 10 and 20 minutes to make their oral submissions to committees. However in the case of the TCB there were examples where the public in some of the provincial hearings were limited to two to three minutes. While written submissions provide space for reasoning the extent to which committee members read these in detail is unclear. The examples of the processes of the amendments to parliament’s rules, where the written submissions were not discussed as well as the TCB where only oral submissions were referred to in the debate regarding the summarising of submissions is an indication that written submissions do not have broad impact on committees.

<sup>485</sup> In October 2014, both the Justice and the Social Development committees indicated that they did not have sufficient time to engage in questions (let alone discussion) with civil society presenters. Author’s experience.

<sup>486</sup> It’s notable that in the NA deliberations on the TCB in 2008 and in the NA deliberations on the Child Justice Bill in 2008 the committee chair invited representative organisations from civil society to participate in the discussions of the committee on those bills. In both cases this was representation was undertaken by academic experts –‘elites’ – who were able to engage in the discussions with the committee members on the bill in the meetings following the hearings.

<sup>487</sup> The ARD hosted public education workshops across the country during 2012, these were designed to encourage debate among participants; in December 2013, four organisations hosted a civil society workshop to debate the implications of the WEGE bill and in January 2015, two organisations hosted a similar workshop on the Criminal Law [Sexual Offences and Related Matters] Amendment Act Amendment Bill [B18 of 2014]

I have argued that to be rights-based, the processes must be recognised as a right. They must have the potential to influence the outcomes, and they must explicitly recognise power and offer the possibility of transforming power relationships and inequality. Further than the requirements for public participation in the legal frameworks, participation in South Africa's legislatures fails to reach the standards described in the theoretical framework for a rights-based approach to or 'meaningful' participation. Theories of participation provide a number of indicators for what these concepts mean. The discussion in Chapter four indicates the extent to which these standards are being met. Firstly, as a norm, participation in the legislatures is implemented as once off events,<sup>488</sup> and while the legislatures fail to conceptualise them as processes of engagement with the public, too frequently, civil society organisations do likewise, failing to make effective use of the obligation on legislatures to conduct their business openly and to ensure on-going interaction with committees on issues as they are debated. Secondly, people affected by the issue should have the opportunity to influence the agenda for discussion, as well as the terms on which discussion takes place, but there is no evidence of this being incorporated into the approaches of the legislatures. Not only are people not involved in the planning phases, the TCB process provides an example of the legislatures holding firm to their terms of engagement, in which people were repeatedly required to confine their inputs to specific sections of the bill. Attempts to describe how they are affected by traditional leaders and how the bill exacerbated vulnerabilities, were silenced in many of the provincial and national hearings.<sup>489</sup> I've touched on the failure to implement the principle that those most affected must be actively involved in the process in terms of the performance regarding the TCB and WEGE bills above. In addition, the fact that research continues to show that the people who access these processes are those with greater resources<sup>490</sup> is a further indicator of the failure of the legislatures to meet this requirement. Linked to the concept that participation must be implemented as a process are requirements for feedback to the public, however the legislatures' own record of their meetings and decisions is poor, and feedback on processes to the public is non-existent.<sup>491</sup>

The legislatures have failed to demonstrate the political will to implement citizen participation within an ideological framework that can result in citizens having influence on the outcomes.<sup>492</sup> Shifting the current culture would require leadership from senior members in the legislatures and in political parties. In addition, it requires the implementation of programmes for elected

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<sup>488</sup> RIPAP. 2009. *Ibid.* P64

<sup>489</sup> Ben-Zeev. 2014. *Ibid.* P28

<sup>490</sup> Muntingh. 2012. *Ibid.* P39; and Hicks and Buccus. 2007. *Ibid.* P102

<sup>491</sup> There is some recognition of this requirement regarding the TLTP and TPTTP processes in the PPF, however this does not address the more substantial participation processes regarding law reform or oversight.

<sup>492</sup> Hicks and Buccus. 2007. *Ibid.* P101 and p110



members and staff of the legislatures that go beyond describing the basic requirements and systems for participation, to embed the values and principles of rights-based participation.<sup>493</sup>

As discussed in chapter three, within a rights-based approach, participation should challenge oppression, enable the transformation of power relations, and facilitate redistribution of resources.<sup>494</sup> However, the framework and technical avenues for public participation that are in place, generally fail to even recognise the existence of power, be it the power of the state to control the sites and terms of engagement or the hierarchies of power that exist in society, and may play out in or be exacerbated by participation processes. Rather, in chapter four I discuss numerous examples in which MPs abuse their power in attempts to silence dissenting voices and control the outcomes. In addition, there's no evidence that the relative power between different groups of the public – such as between men and women, professionals and non-professionals, or adults and children – is considered in the design of processes. To address this requires incorporating mechanisms that allow for people with relatively lower social power to speak freely without fear of reprisal subsequent to the event. It may mean creating spaces from which some groups are excluded in order to facilitate a frank exchange among those who experience higher levels of marginalisation. It is a serious indictment on the legislatures that through the processing of the TCB not only were these measures not in place, but MPs and MPLs used the processes to entrench the deep inequalities of power that exist in rural communities by underscoring the greater value they placed on traditional leaders than on the citizens living in those areas.

### **Spaces for participation**

By definition, the opportunities for participation led by the legislatures are invited and clearly there is significant scope to improve their quality, however as shown in chapter three, it is the nature of these spaces to largely serve the interests of those who control them and thus the extent to which they will shift is limited. I have argued that other methods by which elected representatives can increase their engagements with and responsiveness to citizens are through interacting with the public in spaces defined by the public. This includes attending events hosted by NGOs, but more importantly extends to attending and participating in forums and structures that are embedded at local level and that are not 'owned' by organs of the state, including local saving societies ('stokvels'), youth associations and religious groups.<sup>495</sup> Efforts at this level, would not only signal the intent of MPs and MPLs to take seriously their role to interact with and be responsive to citizens, it would also enable the public to interact with elected representatives on terms and in circumstances over which they have more control.

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<sup>493</sup> Theron *et al.* 2007. *Ibid.* P5

<sup>494</sup> Hickey and Mohan. 2005. *Ibid.* P19

<sup>495</sup> Ben-Zeev. 2014. *Ibid.* P31

The range of examples of strong alliances established to influence the legislatures, some of which are described in chapter four, indicates that civil society are alive to the necessity of ‘inventing’ processes with which to increase the potential for influence over decisions taken through the legislatures. However the extent to which inequality within civil society is addressed through these is not consistent.

## Conclusion

Under the current closed list proportional representation electoral system, there is no motivation for elected representatives to be responsive and accountable to the public and, by extension, no motivation to implement participation over which the public may have some control.<sup>496</sup> As early as 2003, the Report of the Electoral Task Team recognised this gap in motivation for political accountability, and the majority recommendations called for electoral reform. They proposed a mixed system which maintains the benefits of the proportional representation system, but allows for greater direct representation through the public voting for specific candidates and not only political parties.<sup>497</sup> That report also suggested that in the long term, transition from ‘closed list’ systems where parties select candidates to an open list system in which voters influence who the candidates are, would benefit participation, responsiveness and accountability. This was echoed in the Report of the Independent Panel Assessment of Parliament in 2009.<sup>498</sup> To date, the proposed debate on South Africa’s electoral system has not taken place, although prioritising it has been the subject of civil society pressure in recent years.<sup>499</sup> As is noted in the reports, changing the system alone will not be sufficient to ensure accountability to the public. However it can go some way to improving on the current situation, in which there is almost no relationship between the public and elected representatives, and representatives continue to display a callous disregard of public interests on certain critical issues.

No political system will escape the reality that power is deeply embedded in politics, and that those who hold political power will use it to further their agendas,<sup>500</sup> and it is impossible to imagine that any changes in state practice alone will be sufficient to address the manifestations of state power in decision making. It is not the absence of contestation or power struggles, but rather its presence and the quality of that contestation between political parties and between civil society and the state that matters. It will therefore always be necessary to invest in building civil society, and that investment must be made by civil society on its own terms. Strong civil society is essential to a strong democracy, so, to strengthen public influence; the role of civil

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<sup>496</sup> Theron *et al.* 2007. *Ibid.* P8

<sup>497</sup> Report of the Electoral Task Team. 2003. P22

<sup>498</sup> RIPAP. 2009. *Ibid.* P45

<sup>499</sup> Ben-Zeev. 2014. *Ibid.* P17

<sup>500</sup> This is not to suggest that those agenda’s are not legitimately derived or that they do not always serve the interests of the majority of citizens.

society to conscientise, organise and promote plurality of voices in its efforts cannot be underestimated.<sup>501</sup> Strategies must be alive to addressing power that promotes exclusion within civil society. Fragmentation in civil society, often driven by mistrust between NGO ‘elites’ and social-movement based initiatives, undermines the political weight that is needed to counterbalance the will of the state and private interests.<sup>502</sup> Models of mobilisation along the lines used by the TAC, the Right to Know Campaign, the Alliance for Rural Democracy and Equal Education, which seek to build bridges between different groups of citizens, to build a broad support base for specific issues and to bring different strategies to campaigns require a particular value system, approach and investment.

At this stage, all technical or political measures to strengthen the legislatures are crucial. Key, are initiatives for systematic and on-going scrutiny of their performance, and bringing this to the public’s attention. However, there seems to be a lack of significant interest by citizen groups in holding the legislatures to account.<sup>503</sup> The primary space in which analysis of their performance takes place is through media channels,<sup>504</sup> this critical analysis is undertaken by only a small handful of people. The gradual strengthening of opposition parties, particularly since the 2014 general election, both in numbers and in the approach of opposition, has seen greater contestation among parties within the legislatures. This has in turn increased public attention on them and hopefully bodes well for on-going scrutiny of the legislatures by civil society in the years to come.

In this paper I have been sought to assess the performance of the legislatures regarding the IHRL and Constitutional requirements on them to facilitate public participation, and the extent to which these meet the standards for rights-based participation. I approached this through using the legal and policy frameworks as well as the standards set in theory and practice to evaluate the legislatures’ performance. I have based this on expert analysis, empirical research and a range of examples of public participation in the legislatures drawn from over the past ten years or so. The initiatives meet the standards articulated in IHRL treaties, but fail to stand up to the recommendations of the UNSREPHR, and while meeting the basic constitutional requirements for public involvement in law reform, they don’t in my opinion do so with regard to the legislatures’ other functions.

Overall the participation initiatives of the legislatures fail to promote the ‘*spirit of democratic and pluralistic accommodation*’<sup>505</sup> as articulated by the Constitutional Court, nor are participation initiatives implemented ‘*in accordance with the principles of accountability, responsiveness and*

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<sup>501</sup> Friedman and McKeiser. 2009. *ibid.* Pp12-14

<sup>502</sup> Friedman and McKeiser. 2009. *ibid.* P21

<sup>503</sup> Friedman and McKeiser. 2009. *ibid.* P47

<sup>504</sup> Media is an effective means of building public consciousness regarding the issues

<sup>505</sup> DfL. *ibid.* Para 115

*openness*,<sup>506</sup> thus the claim that Parliament is a 'people's parliament' is no more than fiction. The legislatures' rhetoric of participatory democracy, linked to poorly implemented, and tokenistic participation processes that have very little, if any influence, and that seek to obscure a '*system-maintaining business-as-usual*'<sup>507</sup> agenda, do not come close to the standards of rights-based or deliberative participation, and they do not fool the public. Instead they increase the public's distrust, loss of faith and frustration in politicians and in the system.<sup>508</sup>

Although there is clearly truth to the question of if the legislatures are a white elephant that serves the executive and not the public; whatever their performance, they are intended to fulfil a fundamental role for state accountability and representing public interests in South Africa's democracy. As with any human right, the right to participate will not materialise solely due to being articulated in the normative framework – rather it must be defended and claimed through ongoing political strategies of civil society.

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<sup>506</sup> King and Others v Attorneys Fidelity Fund Board of Control and Minister of Justice SCA 561/04

<sup>507</sup> Theron et al. 2007. *Ibid.* P14

<sup>508</sup> Friedman and McKeiser. 2009. *ibid.* P26; and Theron et al. 2007. *Ibid.* P9

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