

# SHADOW REPORT ON PARTICIPATORY DEMOCRACY TO SOUTH AFRICA'S STATE REPORT AND THEIR RESPONSES TO THE LIST OF ISSUES ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Compiled by:



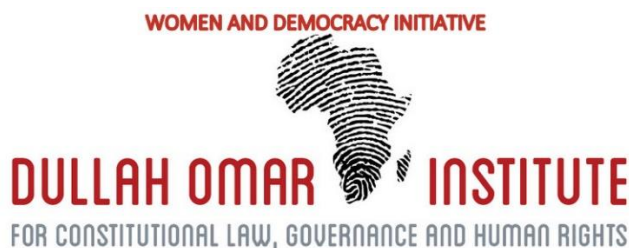
**The Centre for Constitutional Rights** is a unit within the FW de Klerk Foundation. Its mission is to uphold and promote the Constitution.

The Centre's goals are:

- To promote the values, rights and principles in the Constitution;
- To monitor developments that might affect the Constitution;
- To inform people and organisations of their constitutional rights;
- To assist people and organisations claim their rights.

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**In Partnership With:**



**The Women and Democracy Initiative** is a project of the Dullah Omar Institute based at the University of the Western Cape. The Dullah Omar Institute for Constitutional Law, Governance and Human Rights (formerly the Community Law Centre) is a research and advocacy institute under the University of the Western Cape's Law Faculty. The Women and Democracy Initiative (WDI) focusses on the realisation of women's rights, including citizenship and participation rights. The WDI takes an intersectional approach to women's rights addressing integrated issues. We do this through promoting evidence-based and collective civil society advocacy.

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## **Introduction**

1. The South African Constitution, as well as other legal provisions provide a lens through which the adherence of the State to its obligations imposed by the International Covenant on Civil and Political Rights (ICCPR) can be tested. The conduct of various State organs also acts as litmus test against which the notion of participatory democracy in South Africa can be assessed. Despite a solid legal framework to govern and encourage participatory democracy, concerns remain around the extent to which the public can meaningfully engage in the electoral process. As such, the recommendations detailed below range from country wide civic education, an amendment to electoral legislation as well the legislature providing greater clarity in the resourcing and implementation of direct public participation measures.

## **The Independent Electoral Commission (the IEC)**

2. The South African Constitution in its preamble states that one of its purposes is to lay the foundations for a democratic and open society in which government is based on the will of the people. The founding values of the Constitution include universal adult suffrage, a national common voter's roll and a multi-party system of democratic government to ensure accountability, responsiveness and openness. The political rights of all citizens are enshrined in the Bill of Rights. The Constitution requires that one of the State institutions supporting constitutional democracy must be an Electoral Commission, with responsibility for the management of elections at all three levels of government.
3. The Constitution guarantees political rights in section 19 of the Bill of Rights:
  - “(1) Every citizen is free to make political choices, which includes the right -
    - a. to form a political party;
    - b. to participate in the activities of, or recruit members for, a political party; and
    - c. to campaign for a political party or cause.*
  - (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
  - (3) Every adult citizen has the right-*

- a. *to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
  - b. *to stand for public office and, if elected, to hold office.”*
4. The task of the IEC is to deliver regular, free and fair elections at all three levels of government. To date, it has overseen five national and provincial elections and four local government elections. All of these elections were officially declared free and fair by the IEC with no substantial accusations of vote-rigging or other irregularities, bar the 250 complaints lodged in the 2014 general elections.
5. The IEC is run by five commissioners, one of whom serves as a vice-chairperson and one as chairperson. Their impartiality should be beyond reproach, but it is currently called into question. In 2015 a chairperson with very close links to the governing party was appointed, having, from 2010 to 2012 served as deputy chairperson of the President’s Review Commission on State-Owned Enterprises, and then from 2012 until 2015, as full-time adviser to the President on ‘special projects’.
6. Previously, the Public Protector’s office had found that the former IEC chairperson, Pansy Tlakula, had presided over an ‘unmanaged conflict of interest’ when the IEC entered into a R320 million lease agreement for office space. The allegation was that Tlakula had at the very least, a business relationship with African National Congress (ANC) Member of Parliament, Thaba Mufamadi, the chairperson of Parliament’s finance committee, and that Mufamadi had benefitted from the deal.
7. *In Kham and Others v Electoral Commission and Another*, in which the Constitutional Court unanimously decided to set aside the result of a number of by-elections in the Tlokwe Local Municipality, the Court remarked that the process of voter registration, particularly in provincial and local government elections, is especially vulnerable to manipulation.<sup>1</sup>

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<sup>1</sup> *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37.

8. Once there is any perceived bias in the conduct of the IEC, citizens will lose faith in the integrity of the IEC, as well as the democracy which the IEC ought to be serving.
9. **As such, the perceptions of bias coupled with the adverse findings of the Constitutional Court against the IEC, are a cause for concern. South Africa may well be falling short of the Convention's standard guaranteeing the free expression of the will of the electors.**

### **South Africa and its obligations for direct political participation under International Human Rights Law (IHRL)**

10. The provisions of Article 25 of the ICCPR similar to those of the Universal Declaration on Human Rights and the African Charter on Human and Peoples' Rights (to which South Africa is also party), articulates the right to indirect political participation in representative forms of democracy. The ICCPR, read with General Comment 25 (in particular paragraphs 5, 6 and 8),<sup>2</sup> expand on the right to direct participation in public affairs. However states are afforded discretion regarding the extent and forms of direct political participation that they adopt. It's notable that instruments such as the Convention on the Elimination and Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) – all of which South Africa is party to - deepen the concept of direct participation, articulating stronger requirements for on-going political participation. For example, CEDAW specifies that women have the right to participate in both the formulation and the implementation of policy.<sup>3</sup>
11. The 2013, report of the UN Special Rapporteur on Extreme Poverty and Human Rights (UNSREPHR) on the meaningful participation of people living in poverty strengthens the meaning of participation and stipulates that participation is considered a fundamental human right.<sup>4</sup> The report centrally engages with and attempts to address

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<sup>2</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>3</sup> CEDAW. *Ibid.* Article 29(b).

<sup>4</sup> CEDAW. *Ibid.* Article 29(b).

the ways in which power and poverty negatively affect participation, this means that it goes beyond the typical technical framing of the right to political participation as is the case with most IHR instruments.

12. 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>5</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.

### **The South African Constitutional and Legislative Framework for Direct Participation**

13. South Africa's framework for direct participatory and representative democracy is strong. In addition to the national and nine provincial legislatures' powers to pass and amend legislation; to hold the executive to account; and to exercise oversight over the executive's implementation of legislation,<sup>6</sup> the Constitution contains specific provisions which expand on the legislatures' public participation and representivity functions, requiring a high level of openness, public access and public involvement in the legislatures.<sup>7</sup> The Constitution further requires that the legislatures 'facilitate public involvement in the legislative and other processes' of the institutions and the various committees that function within these. Secondly, the provisions require the legislatures to conduct their business in an open manner and that sittings must be held in public.<sup>8</sup> It is important to note that this involvement in the processes of legislatures applies not only to law reform, but also to the 'other processes' they are mandated to fulfil – specifically their accountability and oversight functions. Similarly, the Constitutional objective that local government must encourage the involvement of communities is given direction by the *Local Government Municipal Systems Act* of 2000 which requires

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<sup>5</sup> United Nations Population Fund. <http://www.unfpa.org/rights/principles.htm> accessed 06 March 2013.

<sup>6</sup> Act 108 of 1996. *ibid* Section 55 and Section 114.

<sup>7</sup> Act 108 of 1996. *Ibid* Section 59, 72 and 118.

<sup>8</sup> Act 108 of 1996. *ibid* Sections 59(1); 72(1) and 118(1).

municipalities to develop both formal representative and participatory systems of governance.<sup>9</sup>

14. In response to the tensions arising from incorporating participatory democracy into representative systems the Constitutional Court has plainly ruled that South Africa's constitutional democracy is a 'representative and participatory democracy'.<sup>10</sup> 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>11</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>12</sup> It then elaborates on the value of ongoing direct public participation within a framework of representative democracy.
15. "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>13</sup>
16. The Legislative Sector recently developed a Public Participation Framework (PPF) which articulates its goal as 'seeking ways of achieving Public Participation' in order to deepen democracy'.<sup>14</sup> The PPF articulates a wide scope of public participation in the

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<sup>9</sup> Act 32 of 2000. Local Government Municipal Systems Act. Section 16.

<sup>10</sup> *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05 2006. (DfL) Paras 116 and 121.

<sup>11</sup> DfL. *Ibid.* Para 108.

<sup>12</sup> DfL. *Ibid.* Para 122.

<sup>13</sup> DfL. *Ibid.* Para 115.

<sup>14</sup> Public Participation Framework. 2013. P30.

work of the legislatures at national and provincial levels and begins to provide some minimum standards for this. However, as admirable as they are, these provisions are aspirational, not enforceable. In the two years since their adoption there is no evidence of improvements in the existing participation processes.

17. Taken together, it is clear that the South African framework shows a strong overall commitment to ensuring a robust democratic system that incorporates measures for direct ongoing political participation. **We are of the view that the government of South Africa should be commended on its framework which is, overall, exemplary.** However, we note that the legal framework lacks clear direction regarding the processes for participation and the Courts have chosen not to provide direction to the legislatures on how this framework should be achieved, leaving this to the discretion of those institutions.

#### **The State of Direct Participation in South Africa**

18. Section 1 of South Africa's Constitution establishes the nation as a sovereign and democratic state founded on, among other, the values of "universal adult suffrage, a common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Further, the preamble to the Constitution states that government is based on the will of the people.
19. The Constitution provides for a national Parliament and provincial legislation to represent the people in the national and provincial spheres of government.
20. The Constitution in section 42(3) determines that the National Assembly is elected to represent the people and to ensure government by the people under the constitution. Section 47 determines, apart from prescribing eligibility for membership of the National Assembly, a person loses membership of the National Assembly if that person, among other things, "ceases to be a member of the party that nominated that person as a member of the National Assembly". As such, section 47(3)(c) makes retention of party membership a prerequisite for security of tenure and a continuing parliamentary career.

21. Accordingly, the section creates an environment in which Members of Parliament are beholden to their party bosses rather than to the electorate. This results in the will and concerns of voters not necessarily being reflected or considered in the National Assembly. In addition, this creates an environment on which more focus is placed on longevity of political careers than on accountable, responsive and open government.
22. It consequently also infringes upon the principle of separation of powers as it results in the National Executive not effectively being held accountable, potentially leading to endless variety of unjust privileges, sometimes benefitting their pockets at the expense of the people.<sup>15</sup>
23. The inability of Members of the National Assembly to act in terms of a free mandate - along with an electoral system which denies the electorate the ability to hold individual representatives accountable - not only flouts the constitutional notion that government must be based on the will of the people but also the values of accountability, openness and responsiveness. This ultimately weakens Parliament as a fundamental pillar of our constitutional democracy.
24. Section 47(3)(c) results in a party mandate above personal conviction. This unintended effect results in a serious erosion of freedom of expression and negation of the practice of free mandate of representation.<sup>16</sup>
25. The same provision hampers responsiveness as Members of the National Assembly and the National Executive tend to respond to the electorate when and how they see fit, if at all.

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<sup>15</sup> United Democratic Movement v President of the Republic of South Africa & Others No 2 2002 11BCLR 1179.

<sup>16</sup> Mangu AMB "Who really governs in South Africa's Constitutional Democracy: Parties or We, the People?" 2003 Codicillus XLIV No 2 2 - 23.



26. The Constitution in terms of the now repealed item 6(3) in Schedule 6 determines that a list system of proportional representation was to be followed through during the 1999 elections. This closed party list system requires the electorate to exercise their political rights in terms of the above-mentioned section 19 by voting for particular political parties instead of individual candidates. Political parties in turn compose party lists comprising their respective individual candidates selected from among party members. The current political and electoral arrangement is a result of those provisions subsequently being adopted and enacted in the current *Electoral Act*, therefore maintain an electoral system of closed party lists resulting in proportional representation.
27. In March 2002 the Cabinet established an Electoral Task Team to be chaired by Dr. Frederick Van Zyl Slabbert and mandated to draft the new electoral legislation required by the Constitution. It was also requested to formulate the parameters of (at that time) new electoral legislation. In its final report published in 2003, the Electoral Task Team found that the current electoral system did not lend itself to participation by the electorate in the selection of candidates - an inherent weakness in closed candidate list systems.<sup>17</sup>
28. **As such, the overall impression created by section 47(3)(c), as well as the current electoral system indirectly results in an unintended transfer of power to a minority of the majority - the party leaders and thus also a minority of the electorate.** This creates an environment conducive to political careers rather than to accountability, responsiveness and openness. **Therefore article 25 (a) of the ICCPR which provides for citizens to take part in the conduct of public affairs, directly or through freely chosen representatives, is not being given its fullest expression due to the fact that the ability of citizens to fully express their political will through freely chosen representatives is somewhat limited.**

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<sup>17</sup> *Report of the Electoral Task Team* (Government Printer Cape Town 2003) <http://www0.sun.ac.za/fvzs/wp-content/uploads/2012/11/Electoral-Task-Team-Report.pdf> (accessed 5 February 2016).

29. Under the current closed list proportional representation electoral system, there is little motivation for elected representatives to be responsive and accountable to the public and, by extension, no motivation to implement effective participation which includes the potential for the public to influence the outcomes.<sup>18</sup> The system encourages the allegiance of elected representatives to their political party rather than the public. This has serious implications for the independence of legislatures and their responsiveness to public inputs. The framework and technical avenues for public participation fail to mitigate against the politics that maintain exclusion and limit the influence of the public.
30. Researchers, analysts, and civil society organisations agree that for the most part, opportunities for citizen participation in the national and provincial legislatures as well as in local government are ‘box-checking’ exercises that seldom have the potential of public influence on the outcomes, but rather are implemented in a manner that validates predetermined political positions.<sup>19</sup> We support the view of analysts who’ve argued that many of the opportunities presented are ‘inadequate, inaccessible and disempowering’.<sup>20</sup> Similar to the findings in other jurisdictions,<sup>21</sup> on-going political participation in South Africa’s legislatures and local government seems to be motivated by the legal framework and not by the values that underpin this framework.<sup>22</sup> As such, it is implemented as an afterthought to the more resilient representative system.
31. While the provincial legislatures theoretically play a crucial role in fulfilling the constitutional obligation for public participation. In practice provinces provide inconsistent and uneven opportunities for public participation. For example public hearings dealing with the same bill receive very different attention across provinces.<sup>23</sup>

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<sup>18</sup> Theron F, Ceaser N and Davis I. 2007. Participation according to IAP2 principles: Opportunity or challenges for integrated development planning in South Africa? *International Journal of Public Participation*. P8.

<sup>19</sup> Waterhouse. 2015. *Ibid.* p184. Van der Westhuizen. 2014. *Ibid.* p38; Friedman and McKeiser. 2009. *Ibid.* P28; Parliament of South Africa. 2009. *Report of the Independent Panel Assessment of Parliament*. P96 (RIPAP); Theron et al. 2007. *Ibid.* p12.

<sup>20</sup> Hicks and Buccus. 2007. *Ibid.* P106.

<sup>21</sup> Barnes *et al.* 2004. *Ibid.* P8.

<sup>22</sup> Theron *et al.* 2007. *Ibid.* Pp4-5.

<sup>23</sup> For example in the processing of the Housing Development Agency Bill during 2008, 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.

And whereas the provincial legislatures hold a greater role in oversight over the implementation of law and policy concerned with increasing equitable access to socio-economic rights in South Africa than the National legislature does, their realisation of this oversight role is weak and public participation at this level and in this regard is almost non-existent.

32. In order to create more direct links between elected representatives and the public at local level the legislatures developed constituency offices.<sup>24</sup> National and provincial legislatures allocate time in their programmes for elected representatives to conduct constituency work. The duty to establish the constituency offices and assign elected representatives to constituency offices lies with the political parties. It's important to note that the legislatures provide funding to political parties to establish and run these constituency offices.

33. Various authors have concluded that constituency offices are not functioning well.<sup>25</sup> The 2009 Report of the Independent Panel Assessment of Parliament (RIPAP) found that: *'clearly there is a disjuncture between the resources being allocated to constituency support and tangible improvements in the functioning of these offices as channels of communication between Parliament and the public.'*<sup>26</sup> One of the key problems with constituency offices is that they are seen to function as political party offices rather than extended spaces of the legislature. With no accountability mechanisms in place, monitoring performance at constituency offices does not take place. Civil society efforts to obtain information regarding the location of constituency offices and members assigned to each has proved extremely difficult, this in spite of policy requiring that parties provide Parliament with this information.<sup>27</sup>

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<sup>24</sup> RIPAP. 2009. *Ibid.* P7.

<sup>25</sup> RIPAP. 2009. *Ibid*; and Scott, R. An analysis of public participation in the South African legislative sector. Masters Degree, University of Stellenbosch March 2009; and Van der Westhuizen C. 2014. Working democracy: Perspectives on South Africa's Parliament at 20 years.

<sup>26</sup> RIPAP. 2009 *Ibid.* P85-86.

<sup>27</sup> <http://www.pa.org.za/info/constituency-offices>.

34. **We recommend that the South African legislative sector be requested to develop a clear strategy regarding the role and function of constituency offices. Further it should be asked how it is implementing the RIPAP recommendations for greater accountability regarding the utilisation of funds allocated for constituency work and that the legislatures provide the public with specific information regarding the location of constituency offices, and the name and contact details of elected representatives assigned.**
35. In spite of the significant limitations, we recognise that the legislatures' systems and practices for facilitating public involvement in law reform have been well developed over the past 20 years, and these opportunities have been well utilised by better resourced actors of civil society.<sup>28</sup> Further, we recognise that the legislatures' practice of hosting public hearings on bills, in towns and cities across the country has broadened the range of public who access these opportunities. However, the systems for public participation in implementation and oversight processes have not received much attention. The development of the Sector Oversight Model by the legislatures has not improved this, as with the PPF it is not enforceable, it has no budget allocated to its implementation and to date the annual oversight processes in the legislatures remain designed in such a way that they hinder and do not facilitate public engagement. **The Government of South Africa, specifically the duty bearers heading the legislatures, should be asked to clarify plans for resourcing the implementation of direct public participation in relation to both the Public Participation Framework and the Sector Oversight Model. Furthermore, it should be requested to explain its plans to increase the capacity of provincial legislatures to perform their range of constitutional duties independently and effectively.**
36. Across the board, public access to information remains a serious barrier for effective participation. The utilisation of community media by the South African legislatures to publicise opportunities has been erratic, with different standards applied in different provinces and in some instances it is not utilised at all or at extremely short notice,

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<sup>28</sup> Waterhouse. 2015. *Ibid.* pp175-176.

completely negating its usefulness.<sup>29</sup> Without information regarding political systems for direct participation; opportunities to participate; the substantive content of the issue under consideration policy or process on which the participation is based, effective participation cannot take place and will continue to favour political and social elites. **The Government of South Africa should be asked to explain its plans to ensure more widespread civic education regarding the South African political system and the general opportunities for direct public participation at all levels. It should also explain why it has failed to adequately utilise community radio and social media to ensure that sectors of the public and communities most affected by issues are informed of relevant participation processes in the national and provincial legislatures and at local government level.**

37. South Africa clearly meets the UNSREPHR's recommendation to adopt a legal framework for participatory mechanisms at local and national levels;<sup>30</sup> however it has not similarly adopted policies and operational guidelines as recommended, nor have minimum standards been developed or enforced to ensure the equitable participation of people living in poverty and other disadvantaged groups. The UNSREPHR's recommendations also require that states allocate sufficient resources to participation which is currently one of the factors that undermines the implementation of the framework in South Africa.<sup>31</sup> The South African system for direct political participation has also failed to take measures to address inequality and discrimination;<sup>32</sup> to ensure adequate access to information;<sup>33</sup> to put in place accountability mechanisms such as complaints system and reporting requirements;<sup>34</sup> to ensure empowerment of the people who participate;<sup>35</sup> and to support civil society<sup>36</sup> - all as recommended by the UNSREPHR. **As such we recommend that the Government of South Africa be**

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<sup>29</sup> For example, this has been well documented in the case of the processing of the Traditional Courts Bill during 2012.

<sup>30</sup> UNSREPHR. *ibid.* Para 86(a).

<sup>31</sup> UNSREPHR. *ibid.* Para 86(b).

<sup>32</sup> UNSREPHR. *ibid.* Para 86(c).

<sup>33</sup> UNSREPHR. *ibid.* Para 86(d).

<sup>34</sup> UNSREPHR. *ibid.* Para 86(e).

<sup>35</sup> UNSREPHR. *ibid.* Para 86(f).

<sup>36</sup> UNSREPHR. *ibid.* Para 86(g).

**required to report on measures that will be taken to implement the recommendations of the UNSREPHR**

- 38. We specifically recommend that the domestic framework be further developed to include the articulation of minimum requirements for public participation in the formal Rules of various legislatures. 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.**