

# **THE RIGHT OF PUBLIC PARTICIPATION IN THE LAW-MAKING PROCESS AND THE ROLE OF LEGISLATURE IN THE PROMOTION OF THIS RIGHT**

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## INTRODUCTION

By definition, a democratic nation has some mechanism through which leaders hear from the people. Ordinarily, the mechanism is a periodic election during which the people have an opportunity to hold leaders accountable. Between these traditional opportunities for democratic involvement, however, should a democratic nation have mandatory mechanisms for give and take between legislative leaders and the public? The South African Constitutional Court held that the South African Constitution answered that question affirmatively in *Doctors for Life v. Speaker of the National Assembly*.<sup>1</sup> By way of contrast, no such requirement has been found in the United States

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1. *Doctors for Life Int'l v the Speaker of the Nat'l Assembly & Others* 2006 (12) BCLR 1399 (CC) (S. Afr.).

Constitution.<sup>2</sup> In the international human rights arena, the International Covenant on Civil and Political Rights provides authority for a mandatory mechanism in General Comment 25, but it has attracted little attention.<sup>3</sup> As advocates in our respective countries, we found the South African decision provocative. This article attempts to examine the impact of the requirement in our respective contexts, as well as further the discussion in the context of international human rights norms.

As the most recent South African Constitutional Court judgment relating to the involvement of citizens in the law-making process, *Doctors for Life*<sup>4</sup> gave rise to three crucial issues: first, the nature and the scope of the constitutional obligation of a state's legislative organ to facilitate public involvement in its legislative processes and its committees, and the consequences of the failure to comply with that obligation;<sup>5</sup> second, the issue of timing and scope,<sup>6</sup> *i.e.*, at what stage in the legislative process and the extent to which the Constitutional Court may interfere in the processes of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes;<sup>7</sup> and finally, whether the Constitutional Court is the only court that may consider the questions raised.<sup>8</sup> This paper will limit itself to dealing broadly with the first question, the nature of a

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2. While the right to petition the Congress is well-established, as is the Congressional duty to maintain a public journal of its activities and its custom of open hearings, no authority exists for a requirement that a member, committee or a house of Congress must solicit input, much less facilitate its delivery. *See generally* U.S. CONST. art. I.

3. International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171 ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: 1. To take part in the conduct of public affairs, directly or through freely chosen representatives; 2. To vote and to be elected . . . ; 3. To have access, on general terms of equality, to public service in his [sic] country.").

4. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.); *see also King & Others v Attorneys Fund Bd. of Control & Another* 2006 (4) BCLR 462 (SCA) (S. Afr.); *Minister of Health & Another v New Clicks S. Afr. (Pty) Ltd & Others* 2006 (1) BCLR 1 (CC) (S. Afr.); *Matatiele Municipality & Others v President of the Republic of S. Afr. & Others* 2006 (5) BCLR 622 (CC) (S. Afr.).

5. *Doctors for Life*, (12) BCLR 1399 (CC) at 36-37 (S. Afr.); *see also King & Others*, 2006 (4) BCLR 462 (SCA) (S. Afr.); *Minister of Health & Another*, 2006 (1) BCLR 1 (CC) (S. Afr.); *Matatiele Municipality & Others v President of the Republic of S. Afr. & Others* 2006 (5) BCLR 622 (CC) (S. Afr.).

6. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.).

7. *Id.* The separation of powers question is addressed in Dennis M. Davis, *Transformation and the Democratic Case for Judicial Review: The South African Experience*, 5 LOY. INT'L L. REV. 45 (2007).

8. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.).

legislative body's duty to facilitate input, using debates relating to the notions of human rights and participatory democracy.

Legal scholars Carolyn Evans and Simon Evans argue that:

[I]n established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberative law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.<sup>9</sup>

The role of the South African Parliament as a 'deliberative law-making body' came under scrutiny in the *Doctors for Life* case, due to the applicant's allegation of an omission in the legislative process. The seminal value of this case lies in the three bases of the court's approach to the role of legislatures in promoting human rights and democracy through their public participation processes: international human rights law, a unique and specific mandatory constitutional duty, and a contextual and historical approach to public participation.<sup>10</sup> The case does not focus on the substance of the statutes that were the source of the challenge. Instead, the court, as the enforcer of human rights, examined whether the Legislature denied the enjoyment of one component of the fundamental human right to political participation, the general right to take part in the conduct of public affairs.

This article is underpinned by the knowledge that human rights are contestable; that debates about rights are an inescapable part of politics; and that, although judicial rulings on rights may derive from human rights instruments, such rulings cannot necessarily resolve the multi-faceted disagreements at the heart of many rights issues.<sup>11</sup> Henry Steiner's description of the right to political participation as an 'open-textured programmatic right' which will change in different contexts and with experiences finds resonance with the majority judgment's views of the 'idea of an evolving human right to political participation.'<sup>12</sup> We support this notion and are of the view that, in the

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9. Carolyn Evans & Simon Evans, *Evaluating the Human Rights Performance of Legislatures*, 6 HUMAN RIGHTS LAW REVIEW 545, 548 (2006).

10. *See generally, Doctors for Life*, 2006 (12) BCLR 1399 (CC) (S. Afr.).

11. Evans & Evans, *supra* note 9, at 550-51.

12. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 103-04 (S. Afr.).

interest of promoting human rights and democracy, the legislative duty to facilitate public participation is an important one. Hence, *Doctors for Life* may provide valuable lessons with respect to citizen participation in the law-making process, thereby further promoting human rights values of, amongst others, dignity and respect.

As its thesis, this article draws out and examines two such lessons: first, legislation is better when legislators are required to invite and attend to public input, and, second, citizenship is better when legislators are required to invite and attend to public input. *Doctors for Life*, by requiring legislators to facilitate public participation in the legislative process, puts South Africa on the road to improving both legislation and citizenship. In the United States, without a similar mandate, the road is largely untraveled, to the detriment of democracy in the US. While rejecting traditional representative democracy as an adequate expression of political participation, *Doctors for Life* does not go as far as it could in terms of entrenching public participation in the South African legislative process. Nonetheless, it offers a model of an interim solution that the United States can consider, even in light of significant historical and contextual differences. The case also offers a model for international human rights exploration in an area of underdeveloped theory, especially with regard to enhancing respect and dignity as aspects of citizenship in a democratic state.

In Part I, this article sets the stage for examining *Doctors for Life* with a discussion of the South African and international legal provisions applicable to the issue of political participation. Part II sets forth a detailed description of the decision in *Doctors for Life*. Part III situates the decision within theories of participatory democracy. Drawing on the co-authors' experiences as advocates in our respective countries in Part IV, we each explore an example of legislative change and how that process is, or would have been, different under the requirements of *Doctors for Life*. In addition, we each comment on the example provided by the other in light of the context and history of our home countries. The article concludes by examining what contributions the *Doctors for Life* decision could make to the understanding of respect and dignity as components of political citizenship in the international human rights context.

## I. APPLICABLE CONSTITUTIONAL AND INTERNATIONAL LAW PROVISIONS

### A. Legislative Structures and Relevant Provisions

In South Africa, the national legislative authority is vested in Parliament which consists of two houses: the National Assembly (NA) and the National Council of Provinces (NCOP).<sup>13</sup> The Constitution also provides for provincial legislatures and local government structures, which have varying degrees of legislative power. The NA and the NCOP represent different interests in the legislative process, with the NA representing “the people . . . to ensure government by the people” and the NCOP representing “the provinces to ensure that provincial interests are taken into account” in the legislative process.<sup>14</sup> The participation of both houses of Parliament is required in the legislative process. In the view of the court, if either of these democratic institutions fails to fulfill its constitutional duty in relation to a bill, which includes the duty to facilitate public participation, Parliament has failed to fulfill its duty.<sup>15</sup>

The constitutional duty to facilitate public involvement in the legislative and other processes is found in section 59(1)(a) for the NA; section 72(1)(a) for the NCOP; and section 118(1)(a) for provincial legislatures. Section 1(d) sets out the founding values of a multi-party system of democratic government, which, according to the court, include ensuring accountability, responsiveness and openness.<sup>16</sup> The Preamble of the Constitution expresses the values that underpin the goals agreed upon for the establishment of a society based on democratic values: social justice and fundamental human rights.<sup>17</sup> The Court interpreted the provision in the Preamble which states that “[T]he foundations for a democratic and open society in which government is based on the will of the people” as indicating that “the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the

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13. S. AFR. CONST. 1996 ch. 4, §§ 42 (1), 43(a), 44(1).

14. *Id.* § 42 (3)-(4).

15. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 55-56 (S. Afr.).

16. *Id.* at 118.

17. S. AFR. CONST. 1996 pmb. (“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . .”).

representative bodies they created.”<sup>18</sup> The right to political participation is further strengthened by the political rights clause found in Section 19 of the Constitution and the clause protecting freedom of expression found in Section 16 of the Constitution.<sup>19</sup> Altogether, according to the Court, this language indicates a broader notion of political participation than simply the right to vote.<sup>20</sup>

Furthermore, both the 1993 and the 1996 Constitutions provide for the establishment of, amongst others, two independent commissions to strengthen democratic practices. The Commission for Gender Equality (CGE) has as one of its functions, “to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.”<sup>21</sup> The South African Human Rights Commission (SAHRC) similarly has the power to promote the observance of, respect for, and protection of fundamental rights through education, monitoring and evaluation.<sup>22</sup> Both commissions, known as Chapter 9 institutions, have parliamentary offices that are involved in public consultation and submission of reports on proposed legislation to Parliament. This is another unique constitutional provision that allows for the achievement of public participation in the legislative process. According to the Court, South Africa “[O]pted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process.”<sup>23</sup>

## B. International and Regional Obligations

The Court also asserted that the right to political participation is a fundamental human right based on provisions in both international and regional human rights instruments. Articles 19 and 25 of the International Covenant on Civil and Political Rights (ICCPR), concerning the freedom of expression right and the political right, consist of at least two elements: a general right to take part in the conduct of public affairs and a more specific right to vote and/or to be

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18. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 117 (S. Afr.).

19. *See* S. AFR. CONST. 1996 ch. 2, §§ 16, 19.

20. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 105 (S. Afr.).

21. Comm’n on Gender Equality Act 39 of 1996 pmbl.

22. Hum. Rts. Comm’n Act 54 of 1995 pmbl.

23. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 115 (S.Afr.).

elected.<sup>24</sup> Furthermore, the ICCPR guarantees not only the ‘right’ but also the ‘opportunity’ to take part in the conduct of public affairs. The Court viewed the ICCPR as imposing an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.<sup>25</sup> In addition to specific articles in the ICCPR, the United Nations Human Rights Committee’s General Comment No. 25 encourages States to “adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.”<sup>26</sup>

The African [Banjul] Charter on Human and Peoples’ Rights (African Charter) is the applicable regional human rights instrument. The relevant sections include Article 9 on freedom of expression and information, Article 13 on freedom to participate in government of country either directly or through freely chosen representatives, and Article 25 on the obligation of the state to promote and ensure, through teaching, education and publication, respect of the rights and freedoms contained in the Charter. The Court affirmed that this last provision in the African Charter is more specific than the ICCPR in spelling out the obligation of state parties to ensure that people are well informed of their political rights.<sup>27</sup>

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24. See International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171.

25. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 115 (S. Afr.). Also, in the environmental rights sector, the United Nations Economic Commission for Europe’s (UNECE) “Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”, recognizes the right of people to live in a healthy environment, and calls for officials and agencies to provide information and to facilitate participation in decision-making. The Declaration links environmental rights and human rights and affirms that the involvement of all stakeholders is crucial for sustainable development. The principles underlying the adoption of this Convention include government accountability, transparency and responsiveness; the granting of rights to the public and the imposition on signatories and public authorities obligations regarding access to information and public participation and access to justice; and the forging of new processes for public participation in the negotiation and implementation of international agreements. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517.

26. Office of the U.N. High Comm’r for Human Rights [OHCHR], *International Covenant on Civil and Political Rights, General Comment No. 25*, adopted July 12, 1996, para. 1, <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument>.

27. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 100-01 (S. Afr.).

## II. OVERVIEW OF *DOCTORS FOR LIFE*

### A. Facts of the Case

The applicant in this case, an advocacy organization called Doctors for Life,<sup>28</sup> complained that, during the legislative process leading to the enactment of four statutes, the NCOP and some of the Provincial Legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes. They argued that there had been a failure to invite written submissions and conduct public hearings on these statutes. The court referred to the four statutes collectively as ‘health statutes.’<sup>29</sup>

The respondents denied the allegations and argued that both the NCOP and the various provincial legislatures had complied with the duty to facilitate public involvement in their legislative processes. The respondents also challenged the applicant’s assertion as to the scope of the duty to facilitate public involvement. Their contention was that, although the duty to facilitate public involvement requires public participation in the law-making process, essentially all that is required of the legislature is to provide the opportunity to make either written or oral submissions at some point in the national legislative process.

### B. Holding of the case

The majority of the Court found that, regarding section 72 (1)(a) of the Constitution, Parliament had failed to comply with its

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28. According to the website of Doctors for Life International, “Doctors for Life stands for the following 3 principles: For sound science in the medical profession, the sanctity of life from conception till death, and for a basic Christian ethic.” Doctors for Life International, Mission Statement, <http://www.doctorsforlifeinternational.com/about/mission.cfm> (last visited July 29, 2008).

29. See *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.). The health statutes mentioned included the: Traditional Health Practitioners Act 35 of 2004 (intending to bring about a new dispensation of recognizing and regulating traditional health healers); Choice on Termination of Pregnancy Amendment Act 38 of 2004 (making provision for registered nurses, other than midwives, to perform termination of pregnancies at certain public and private facilities); Dental Technicians Amendment Act 24 of 2004 (making provision for persons who have been employed as dental laboratory assistants for a period of not less than five years under the supervision of a dentist or dental technician, and who have been trained by these professionals, to perform the work of a dental technician); and the Sterilisation Amendment Act 3 of 2005. There was no dispute as to whether the National Assembly had fulfilled its constitutional obligation to facilitate public involvement in connection with the ‘health statutes.’ This had taken place through the acceptance of written submissions made to the National Portfolio Committee on Health, and also by the holding of public hearings.

constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act and the Traditional Health Practitioners Act. Adopting a social and historical context approach, the Court held that certain statutes require mandatory public consultations. Which statutes require such consultations can depend on such things as the nature and importance of the bill, requests received for consultations, and whether or not promises had been made in response to such requests.<sup>30</sup> Public consultations in such circumstances would be an indicator of respect for the views of affected people. Adequate consultation is even more crucial in contexts where the affected groups have been previously discriminated against, marginalized, silenced, received no recognition, and have an interest in laws that will directly impact them.<sup>31</sup> Furthermore, in terms of the Traditional Health Practitioners Act, the Court recognized the critical role played by traditional health care providers in the communities that they served, the standing and status that they held in such communities, and also the historically demeaning treatment of this sector in South Africa.

In relation to the Choice on Termination of Pregnancy Amendment Act, the Court held that this was not an uncontroversial matter, that great interest had been demonstrated by interested groups asking the NCOP to hold public hearings, and that undertakings were made by the NCOP to get the provincial legislatures to hold public hearings. Independent of such requests, the NCOP was also of the view that public hearings were necessary on this particular Bill. The NCOP was notified about the failure of some of the provincial legislatures to hold hearings, despite its undertaking to interest groups. Unfortunately, the NCOP did not take any action to remedy the situation, including the mandatory obligation to hold public hearings at a national level.<sup>32</sup> The Court held that “[T]he NCOP is not a rubber stamp of the provinces when it comes to the duty to facilitate public involvement. It is required by the Constitution to provide a ‘national forum for public consideration of issues affecting the provinces.’”<sup>33</sup>

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30. See generally *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 146-47, 177 (S. Afr.) (outlining and giving examples of reasonableness and unreasonableness in regard to legislative consultations with the public).

31. See *Id.* at 163-64.

32. S. AFR. CONST. 1996 § 59, pt. 1 (regarding hearings at the national level).

33. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 173 (S. Afr.).

The Court concluded that both the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were adopted in a manner inconsistent with the Constitution and both were declared invalid.<sup>34</sup> Taking into account the fact that the statutes had come into effect, and recognizing the adverse consequences of an immediate order of invalidity, the order of invalidity was suspended for a period of 18 months to enable Parliament to re-enact these statutes in a manner consistent with the Constitution.<sup>35</sup>

### C. The Court's Rationale

The Court's interpretation of the Constitutional mandate to 'facilitate public participation' was premised on many factors,

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34. The constitutional challenges relating to two other bills, the Dental Technicians Amendment Act and the Sterilisation Amendment Act, were dismissed. This last statute had not been passed by Parliament at the time of the application, and, although the statute was already passed at the time of writing of the judgment, the Court reached a decision that it did not have jurisdiction to hear this, as the legislative process was not complete at the time of application. The challenge to the Dental Technicians Amendment Act was dismissed as, after having considered the nature of the Bill and the views of the provinces and the NCOP, the court concluded that it could not find that the respondents had acted unreasonably in not inviting written representations or holding public hearings on this Bill. Furthermore, the Bill had not elicited public interest, as evidenced by the fact that no submissions were received when the bill was first published for public comment. Hence, there was no breach of the duty to facilitate public involvement and the applicant's challenge to this Bill failed. *Id.* at 70-76, 174-75, 177-78.

35. *Id.* at 188-89. Three dissenting judges each issued an opinion. Judge Westhuizen agreed with the majority position on the importance of public involvement for democracy, and was convinced that there is a constitutional obligation, which must be fulfilled. Nevertheless, he argued that section 72(1)(a) does not mandate that the legislature *has* to hold public hearings, nor is it a specific requirement for the passing of every Bill. Also, the provision is not constitutionally intended to result in specific legislation being declared invalid by the Court. *Id.* at 212-21 (Westhuizen, J., dissenting). Judge Yacoob's detailed dissenting judgment had the support of both Judge Westhuizen and Judge Skweyiya. His focus was on determining what the Constitution required both textually and historically, as opposed to using international law provisions above constitutional principles, or what the merits of public participation were. *Id.* at 221-307 (Yacoob, J. dissenting). He agrees that the Constitution envisions a relationship between representative and participatory elements in South Africa's democracy. He identifies three elements which emphasize the participatory aspects of democracy: universal adult suffrage, a national common voters' roll, and regular elections. The multi-party democracy aspect, he argues, points to the representative nature of the democracy contemplated in the Constitution. He argues that "[T]he object of all these elements of democracy is to ensure accountability, responsiveness and openness. . . . It implies that our democracy requires citizens to vote for members of a political party who would represent them. Public involvement in the legislative process is not mentioned at all as an essential principle of the Constitution. . . . In our constitutional scheme, laws passed by representatives of the people must be regarded as government by the people and as laws passed by the people. This is a vital contextual factor in determining what 'public involvement' in the Constitution means." *Id.* at 250, 256-57 (Yacoob, J., dissenting).

including amongst others: provisions in human rights instruments, the use of both an historical and a social context approach, an acknowledgement of the values of dignity and respect that are engendered by public participation in law-making processes, and inspiration from a particular vision of a non-racial and democratic society based on democratic values, social justice and fundamental human rights, in which government is based on the will of the people.

As discussed in earlier sections,<sup>36</sup> the Court's reference to human rights instruments, both international and regional, indicates an awareness of the evolving nature of rights and notions of justice. The Court re-stated a principle enunciated in a previous decision: "[r]ights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on a new texture and meaning."<sup>37</sup>

Historically, the struggles fought against an unjust and undemocratic state included the formation of community structures based on the concept of 'people's power.' In South African communities, the traditional forums for public participation included 'imbizos, lekgotlas and bosberaads'. These methods of public consultation and participation are used today by the democratic government and include the convening of an annual People's Parliament. The Court, in recognizing the significance of public participation structures and methods of the past, asserted:

[Traditional forums] were also seen as crucial in laying the foundation for the future participatory democracy that [the people] were fighting for and that we are operating under. This emphasis on democratic participation that was born in the struggle against injustices is strongly reflected in our new democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.<sup>38</sup>

On a global level, the Court recognized that the right to political participation dates back to the Middle Ages, and many modern constitutions provide forums for public participation in different forms and through different processes, including the right to petition, present written requests and complaints, and the holding of referenda.

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36. *See supra* Part I.B.

37. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 104-05 (S. Afr.).

38. *Id.* at 119.

The Court's focus on the 'nature' of South Africa's democracy involved both an historical examination as well as a contextual interpretation of the Constitution. The merits and values of a participatory democracy in furthering a system of accountability, responsiveness and openness in government were widely discussed in the judgment. In an earlier case, *New Clicks*, the Court had held that "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies."<sup>39</sup>

The interpretation of the mandatory obligation on the Legislature to facilitate public involvement was also grounded in the context of the historical exclusion of the majority of people from political processes and the goals in the Constitution to support transformation. The *Doctors for Life* Court recognized two aspects of the duty to facilitate public involvement: the duty to provide meaningful opportunities for participation in the law-making process and the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.<sup>40</sup> Hence, "our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy."<sup>41</sup> Furthermore, the Court pointed to the transformative need for government to respect the dignity of citizens as a way of strengthening its conclusion that a special duty existed as regards to public participation. The legislature can satisfy its duty in any of a number of ways, according to the Court, depending on the particular legislative context. Examples include providing access to Parliament, providing an opportunity to submit representations and submissions, providing a forum for public hearings for oral submissions, and summoning people to Parliament.

#### D. Court's Self-imposed Limits

At first glance, one can view *Doctors for Life* as a prime example of judicial activism gone too far. However, a more nuanced reading reveals a fairly balanced majority judgment which illustrates a deep awareness of the doctrine of separation of powers, the careful use of judicial discretion, and acknowledgement of the limitations faced by

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39. *Minister of Health & Another v New Clicks S. Af. (Pty) Ltd & Others* 2006 (1) BCLR 1 (CC) at 344-47 (S. Afr.).

40. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 24 (S. Afr.).

41. *Id.* at 127.

courts. For example, the Court cited the *King* case, where the Supreme Court of Appeal, in dealing with the concept of public involvement, made the following observation:

Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.<sup>42</sup>

The Court acknowledged that the legislature will have considerable discretion in determining how best to achieve the facilitation of public participation. Hence, Parliament must be free to carry out its functions without interference and, in terms of section 57 (1) (a) of the Constitution it has the power to "determine and control its internal arrangements, proceedings and procedures. The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralyzed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers."<sup>43</sup>

The determination by the Court is based on a reasonableness test that takes into account the factual basis. The Court took into account

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42. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 141-42 (S. Afr.) citing *King & Others v Attorneys Fidelity Fund Bd. of Control & Another* 2006 (4) BCLR 462 (SCA) at 23-24 (S. Afr.).

43. *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 59-60 (S. Afr.). The Court was clear that the separation of powers principle is not simply an abstract notion. It "... has important consequences for the way in which and the institutions by which power can be exercised. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government." In a context where the Constitution is the supreme law, and where it imposes binding obligations on all branches of government, Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfill their constitutional obligations. In terms of section 2 of the Constitution, the Constitutional Court "has...the responsibility of being the ultimate guardian of the Constitution and its values." "[Y]et, however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution." Thus the Court has a role in deciding whether Parliament has fulfilled its obligations, including in providing citizens with a meaningful opportunity to be heard. *Id.* at 60-63, 128 (citations omitted).

questions such as, amongst others, the following: what action has Parliament taken? Is it reasonable in all the circumstances? Are the rules of Parliament relating to public participation reasonable? How controversial is the Bill, and is there a reasonable degree of public interest in it? Did the legislation need to be passed urgently?<sup>44</sup>

### III. THEORIES RELATING TO THE NOTION OF PARTICIPATORY DEMOCRACY

The judgment in *Doctors for Life* grounded the right to participation in, among other sources, international human rights norms. Henry Steiner, in the article cited by the court, describes the international human right to take part in governance as having two aspects: the right to vote and the right to participate between elections.<sup>45</sup> The first is well-developed, while the second, according to Steiner, remains rather vague. *Doctors for Life* concerns the second, less well-developed aspect of the international human rights norm concerning public participation in the process of governance between elections.<sup>46</sup>

In recent years, theoreticians on the subject of participatory democracy have identified two models for citizen engagement in governance between elections: strong democracy and discourse, or

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44. *Id.* at 146-47.

45. Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 78 (1988).

46. Both elections and participation between elections are necessary, of course, only if they contribute to the legitimacy of the laws adopted through the process. As Peter Shane has put it, Both elections and public deliberations are mechanisms, not ends in themselves. The overarching issue is what these mechanisms are intended to achieve. If we start from the premise that legitimacy is that quality of government that gives those in power the moral authority to impose their will on members of the polity, then, as I have argued elsewhere, democracy's claim to legitimacy rests on two premises. One is that, as opposed to other systems, it is more likely to facilitate government decision making that at least takes seriously the interests of all persons subject to the decision at issue. Equal respect for all persons is thus one of the moral building blocks of democratic legitimacy. The second is that, as opposed to other systems, democracy empowers individuals with meaningful agency. That is, a democratic regime, properly constituted, allows citizens to experience themselves as autonomous actors free to participate in the determination of their political fate. These are the qualities of government that both elections and public deliberation aim to achieve, the ends to which they function as our most powerful means.

Peter M. Shane, *Deliberative America*, 1 J. PUB. DELIBERATION 10, 10 (2005) (reviewing BRUCE ACKERMAN AND JAMES S. FISHKIN, *DELIBERATION DAY* (2004) and ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004)).

dialogic participation. Both stand in contrast to “thin” or purely representative democracy, in which the citizen’s role is to elect representatives periodically. Political accountability in a purely representative democracy is achieved at the ballot box: those who fail to satisfy the electorate are not returned to office in the next election. Citizen input between elections is not forbidden, but it is not mandated.

The concept of strong democracy described by Benjamin Barber in his book of the same name is characterized by a continuous process of citizen deliberation.<sup>47</sup> No principle is sacred or beyond change through the political process. Deliberation, or strong democratic talk, is at the heart of strong democracy. It is characterized, according to Barber, by “listening no less than speaking; second, it is affective as well as cognitive; and third, its intentionalism draws it out of the domain of pure reflection into the world of action.”<sup>48</sup>

Dialogic participation shares with strong democracy a commitment to engagement by citizens with one another to develop points of view and positions. As described by Jürgen Habermas, dialogic participation is process-oriented, rather than protective of particular principles.<sup>49</sup> Like strong democracy, dialogic participation relies on building connections among people and groups; it cannot occur if people are isolated from one another. As described by Shannon, democratic process requires active, animated citizens, who engage with each other to identify and understand their political interests, to discover their social values and to decide public issues through public debate. When the process works, public decisions are the product of social learning, rather than simply a bureaucratic process of proposal and response.<sup>50</sup>

According to classic and modern advocates for participatory democracy, the more that citizens are engaged in self-governance, the more they gain in self-respect, autonomy and empathy for others.<sup>51</sup> As they work together, they learn the art of give and take and become more willing to accept decisions that advance the common

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47. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* at 117-19 (3d ed. 2003).

48. *Id.* at 174.

49. Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1, 1-10 (1994), reprinted in *CONSTITUTIONALISM & DEMOCRACY* 277 (R. Bellamy ed. 2006).

50. Margaret A. Shannon, *Participation as Social Inquiry and Social Learning*, 157 *SCHWEIZ Z. FORSTWES* 430 (2006).

51. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 22-44 (1970).

good even when their individual good may be disserved.<sup>52</sup> It can serve as an antidote to apathy and a tonic for empathy.<sup>53</sup>

The judgment in *Doctors for Life* does not reject representative democracy as fundamental to the structure of the South African government under the post-apartheid constitution. Instead, it insists that representative democracy is not the only aspect of democracy contemplated by that constitution. In addition, the Court concludes that the constitution requires some participation between elections. The question, then, is what kind of participation is consistent with what is fundamentally a representative democratic structure.

While the boundary between strong democracy and dialogic democracy may not be entirely plain, the path taken by the Court in *Doctors for Life* is more within the territory mapped by dialogic democracy than strong democracy. For example, while Barber posits that agenda-setting must be done through strong democratic talk, *Doctors for Life* puts the question of agenda-setting mainly in the hands of the legislature. Legislators must facilitate input, according to the court, only as to controversial questions and only using the means chosen by the legislators. The decision does not demand, as may be true in a strong democracy,<sup>54</sup> the reconsideration of basic substantive premises concerning, for example, the structure of government and the nature of fundamental rights. Under the decision, the process may be as limited as the legislature inviting input from the public, but the Court encourages legislators to go further. Among the means identified by the Court are educating the public about controversial topics, soliciting views from affected groups, seeking both oral and written submissions, and holding hearings around the country. A reader of Habermas would find these techniques for democratic participation quite familiar, although Habermas would surely encourage the legislature to go further along the road to greater social learning, with its concomitant political activity.<sup>55</sup>

The process of social inquiry which creates social learning includes four aspects: discourse among the actors must create inter-subjective meaning and express shared understanding, “discussion must create and authenticate ‘true’ statements of conditions,” a “deliberative process must establish the moral and ethical basis for

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52. See generally *id.* at 26-31.

53. *Id.* at 104-05.

54. See Frank Michelman, *Democracy & Positive Liberty*, BOSTON REV., Oct./Nov. 1996, at 3, reprinted in CONSTITUTIONALISM & DEMOCRACY 287 (R. Bellamy, ed. 2006).

55. See Shannon, *supra* note 50, at 432.

normative claims of value, priority, and significance,” and the “process of participation must ensure the authenticity of the participants.”<sup>56</sup> When the process of social inquiry is successful, “when multiple stakeholders bring together their knowledge, experiences, perspectives, values and capacities in a communicative process of critical reflection and civic science as a means of jointly understanding and addressing shared challenges and potential options,” it leads to social learning.<sup>57</sup>

As opposed to a purely representative democracy, either a strong or a dialogic democratic process could produce some important social and political forces in South Africa as well as in the United States. As the Court in *Doctors for Life* posits, the relationship between legislators and citizens changes when legislators have a duty to facilitate input into the legislative process. Legislators are demonstrating respect for citizens when they ask their opinion, and citizens then learn that their opinions are valued. Their input may also change legislation for the better, but that is not the whole point. As participatory democratic theoreticians argue, what is “better” cannot be objectively determined. What one seeks through the participatory process is social learning, in which the realities that each participant brings to the table are revealed and discussed and the outcomes are negotiated. There is no one best outcome; instead, there is a respectful communicative process that leads to the identification of outcomes that participants design and can live with.<sup>58</sup>

Communication is a two-way street. In a participatory democracy, as opposed to a representative democracy, legislators must come face-to-face with those who are affected by their decisions, and they must ask them for their opinion. Legislators may reject those opinions, but they cannot do so without having exposed themselves to the arguments, the feelings, and the insights of those who are affected by the decision. For this reason, Barber claims that strong democracy

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56. *Id.*

57. *Id.*

58. See YASH GHAI & GUIDO GALLI, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION 14-15 (2006) (arguing that public participation can help create a more tolerant and democratic society); see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 196-206 (1997) (stating that to be legitimate, decisionmaking must allow some degree of nonexpert participation, and arguing that civic virtue is necessary for a deliberative democracy).

“can assure sufficient equality and justice to coexist with a variety of economic systems.”<sup>59</sup>

Another feature of participatory democracy is that it works best when the scale is small enough for people to hear and be heard by others. *Doctors for Life* advances this aspect of participatory democracy by stressing that legislators should seek input at the provincial level, not just at the national level. Provinces are still rather populous for direct democracy, however. The possible antidote suggested by *Doctors for Life* is to focus on groups of interested people, rather than solely on individuals. Gathering people together to form groups that formulate authentic positions through dialogue is at the heart of dialogic democracy as described by Habermas. These groups can then engage with one another to negotiate for solutions that represent the collaboration of the individuals and the groups.

Since the *Doctors for Life* judgment requires legislators to consider consulting with groups, it provides an incentive for civil society to develop and sustain itself in the hope that groups will have influence, especially between elections. The judgment in *Doctors for Life*, possibly provides an incentive for government to assist groups to develop, that is, to help people who will be affected by controversial legislation to find each other and engage in the kinds of democratic talk that allows them to identify solutions they can live with and advocate for. According to participatory democracy theoreticians, authentic participation does not occur when a government agency suggests a solution to a problem and then invites input from affected people.<sup>60</sup> This is the process most familiar from administrative rule-making in the United States. What is missing from this process is the opportunity for people to talk through the problem, rather than just respond to a possible solution or group of solutions.<sup>61</sup> Interestingly, in the environmental arena, some agencies in the U.S. and elsewhere have experimented with a more open and interactive process, including aiding groups to come together and providing them with access to experts.<sup>62</sup> *Doctors for Life* does not require that legislators

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59. BARBER, *supra* note 47, at xii.

60. Shannon, *supra* note 50, at 432.

61. Cf. Peter Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, 1 ISJLP 147 (2005) (reviewing DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Eric Olin Wright eds., 2003)).

62. See generally Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998) (discussing experiments in pollution controls).

undertake such an extensive and expensive process, but it suggests that the process is worthwhile for the legislature to consider.

Another aspect of administrative rulemaking in the U.S. and South Africa is that the decisionmaker is required to consider comments that are filed and make some response to them before the rule is finalized.<sup>63</sup> *Doctors for Life* does not require legislators to respond to input. It may be difficult, however, for legislators to listen to people as the decision requires and not take their views into account, at least to some degree. By listening, legislators may learn about the lives of people different from themselves. They may open the door to understanding and empathy. Also, those who share their views may, quite reasonably, expect their views to make a difference, and they may hold accountable a legislator who ignores them.

Bohman argues that for the adoption of laws, democratic values in a pluralist society are satisfied if three criteria are met. First, the laws must “result from a fair and open participatory process in which all publicly available reasons have been respected.”<sup>64</sup> Second, “the outcome is such that citizens may continue to cooperate in deliberation rather than merely comply.”<sup>65</sup> And, third, “the source of sovereign power” is “the public deliberation of the majority.”<sup>66</sup> In other words, in a pluralist society, not everyone will be happy with the outcome of a deliberative process, but everyone should be happy enough with the process to have an incentive to continue to try. By requiring legislators to openly solicit input, the Court in *Doctors for Life* in effect challenges legislators to take into account Bohman’s criteria, particularly the second one. Once they have invited input, legislators cannot avoid the task of being accountable to those who go to the trouble of giving input. Bohman suggests that accountability is achievable without agreement so long as those who give input can be persuaded that they should continue to do so regardless of whether the outcome tracks their opinion.<sup>67</sup> This requires that legislators act respectfully during hearings, make themselves open to changing their

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63. See 5 U.S.C. § 553 (2000); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985); see also 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.1 (4th ed. 2002); Tracy-Lynn Field, *Public Participation in Environmental Decision-Making: Earthlife Africa (Cape Town) v. Director-General: Department of Environmental Affairs and Tourism*, 122 S. AFR. L.J. 4, 748, 757 (2005).

64. JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 187 (1996).

65. *Id.*

66. *Id.*

67. See *id.* at 55 (stating that public deliberation requires a plural accountability).

minds, and be prepared to justify their decisions in the same fair and open participatory process.

A criticism of participatory democracy is that it allows the majority to overwhelm minorities while, at the same time, does not affirm the unchangeable character of certain core values.<sup>68</sup> *Doctors for Life* does not go that far down the route toward participatory democracy because of its insistence that, whatever participation the legislature must facilitate, the process is part and parcel of the representative democracy and the unwavering values embodied in the South African Constitution. Indeed, *Doctors for Life* probably serves to enhance the power of minorities, rather than the majority, because it provides for specific spaces in which the voices of those affected by the legislature must be heard. The plaintiffs in *Doctors for Life* itself are a good example – a group of advocates opposed to broad access to abortion is not, in South Africa, a widely popular organization, but, under the decision, legislators are required to listen to their views.

A second criticism of participatory democracy is that it does nothing to counteract the silencing of groups historically silenced in society.<sup>69</sup> In part for that reason, Iris Marion Young recommends renaming deliberative democracy “communicative democracy.”<sup>70</sup> She posits that the argumentative norms of discourse sometimes advanced by advocates of deliberative democracy privilege speakers who enjoy political and economic advantage and devalue the speech of others. Communicative democracy, on the other hand, “attends to social difference, to the way that power sometimes enters speech itself, recognizes the cultural specificity of deliberative practices and proposes a more inclusive model of communication.”<sup>71</sup> Her more inclusive model aims, like deliberative democracy, to make room for people to change their ideas because of their interactions with others, including others whose experiences and discursive methods are different from their own. To achieve the goal, she recommends adopting a discourse that includes narrative, preservation of differences in respectful exchanges that enhance social knowledge of

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68. See Michelman, *supra* note 54.

69. See IRIS MARION YOUNG, INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY 60-74 (1997).

70. *Id.* at 60.

71. *Id.* at 63.

all participants, caring for the participants in the exchange, and strong rhetoric.<sup>72</sup>

In addition to changing the norms of discourse, feminists have pointed to the experiences of women within families as a source of their silence in public life. For example, family life historically has been viewed as a private realm, whereas politics is a public realm. Feminists have critiqued this division of the public and the private as a way of validating the absence of women from public life, since women who can be subject to violence and sexual domination at home can be viewed as lacking the agency necessary for participation in the public sphere. Further, women have been tasked with the responsibility for home while also participating in the paid economy, leaving them little time for participation in political activity.<sup>73</sup>

The judgment in *Doctors for Life* specifically identifies the historical silencing of the majority of the country's residents as one of the reasons underlying the need to incorporate aspects of participatory democracy into its representative democracy. People of color were the principal targets of the system of political and economic exclusion called apartheid, but white women, and gay men and lesbians of all colors, suffered some of its impact as well. Many of the same groups have been the targets of political and economic exclusion in other countries, including the United States.<sup>74</sup> Making room at the political table for historically silenced groups may be essential to the functioning of a good government, as the court in *Doctors for Life* argues. At the same time, making room is important

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72. *Id.* See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1991-92).

73. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110-33 (1989); CAROLE PATEMAN, THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 118-40 (1989).

74. See, e.g., PATEMAN, *supra* note 73; Mary G. Dietz, *Hannah Arendt and Feminist Politics*, in FEMINIST INTERPRETATIONS AND POLITICAL THEORY 232-52 (Mary Lyndon Shanley & Carole Pateman eds., 1991); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (overturning referendum adopted by state's voters that prohibited legislature from adopting measures to protect people from discrimination on the basis of sexual orientation as a denial of the fundamental right to participate equally in the political process), *upheld on different grounds*, 517 U.S. 620 (1996). Compare Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991) (rejecting the claim that laws created by referenda are more likely to produce discrimination than laws created by elected officials) with Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978-79) (suggesting the trend towards using referenda to create laws promotes racial inequality).

for the members of these historically silenced groups as well, another point raised by the court in *Doctors for Life*. Many feminists have focused on the liberating value for women of coming together in groups and argued that feminist method must include collectively respectful encounters.<sup>75</sup>

Whether historically silenced groups will find room for political participation and influence because of *Doctors for Life* is uncertain. Making that happen will require legislators to take the mandate seriously and reach out to groups affected by proposed controversial legislation. It will also require members of those groups to find reason to trust the process and agree to participate. If legislators reach out, and if they attend respectfully to the input they receive, the decision could increase the incentives and opportunities for historically silenced people to come together, collaboratively determine their views and position and share them with legislators. If, on the other hand, legislators do not take the mandate seriously, will women and other members of disadvantaged groups be worse off? The answer to that question depends, of course, on the nature of the controversies in which *Doctors for Life* should have an impact and on the differences between the limited deliberative democratic participation envisioned by the *Doctors for Life* court and the more limited practice of representative democracy.

An additional criticism of deliberative democracy is that it contributes little to the achievement of economic justice.<sup>76</sup> Cass Sunstein has argued that assuming the absence of a relationship between civil rights and economic rights is a “large error.”<sup>77</sup> He points to the Amartya Sen’s finding that famine does not occur in a society with political safeguards against tyranny, because a government with an incentive to listen to its citizens is more likely to adopt pro-social welfare policies. At the same time, Sunstein cautions, a democratic system may insulate great wealth by allowing wealthy citizens to, in

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75. Dietz, *supra* note 74; OKIN, *supra* note 73, at 124-33; Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1989-90). Cf. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263 (2003).

76. The notion that deliberative democracy can contribute to the achievement of social rights is not self-evident, but some commentators point to a connection, particularly in the need to “integrate groups that were improperly marginalized by the political system.” See Roberto Gargarella, *Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 244-51 (Samantha Besson & José Luis Martí eds., 2006).

77. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 184 (2004).

effect, buy greater access to decisionmakers. Avoiding that result requires, at least, capacity building so that citizens are adequately educated and enjoy some modest degree of economic security.<sup>78</sup>

A more extended consideration of the relationship between public participation and economic justice is offered by James Bohman,<sup>79</sup> who argues that, since democratic deliberation is incompatible with persistent inequality, “the norm of political equality in deliberation serves as a critical standard of democratic legitimacy.”<sup>80</sup> In his view, “persistent inequalities of race, class, and gender are not merely the results of the unequal distribution of resources; they are also due to the lack of social agency by these groups in relation to the goals and interests of others.”<sup>81</sup> Ignored as agents in the public debate, the interests and needs of these groups are also ignored. The solution is not solely economic, therefore; it also requires that government ensure that a threshold of resources and capacities are provided to each citizen so that he or she is not ignored and can make his or her public reasons convincing to others.<sup>82</sup>

Guaranteeing the capacity of individual citizens to participate does not guarantee positive results in terms of economic justice, but it opens the door for individuals to make the connections with others that are necessary to achieve common goals. Acknowledging the necessity of collective action, Bohman asserts that government may have a role in developing opportunities for collectivities to organize and make their views a part of the public debate.<sup>83</sup> Interestingly, the judgment in *Doctors for Life* asks the government to consider, at least, whether it must provide funding and other resources to groups to assist them in providing input on relevant legislation. Assuming the answer is positive, these groups will have much more potential for advancing their claims to economic, social and cultural rights. While *Doctors for Life* does not demand this, it seems obvious that, if the process of facilitating input is to be meaningful over time, government must assist people with similar issues and problems to come together to advocate for their views and to make their needs known to legislators. This must occur not just when an election occurs but frequently over the course of the life of the parliament. The

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78. *Id.* at 184-85.

79. BOHMAN, *supra* note 66.

80. *Id.* at 125.

81. *Id.* at 130.

82. *See id.* at 131.

83. *See id.* at 141.

process may increase the capacity of groups in civil society who face some of the greatest economic, social and cultural disadvantage.<sup>84</sup> It may give members of this group reasons to see themselves as citizens and to develop the skills and self-respect necessary for fuller participation in society. Developing civil society in this way can be seen as a type of capacity building that is as important in the long run as other forms of capacity building advocated by Sunstein.

Another reason to think that the judgment in *Doctors for Life* is not unrelated to the achievement of social and economic rights is that the South African Constitution, unlike the constitutions of most countries, protects social and economic rights and makes them judicially enforceable.<sup>85</sup> When social and economic rights are not justiciable, courts have little incentive to be concerned with whether the legislative process is open to hearing claims from disadvantaged groups about their needs for economic and social justice. Where the court is an alternative forum for the achievement of economic and social justice, however, it is in the best interests of judges for the legislature to be seen as an appropriate and responsive institution for such claims. With its judgment in *Doctors for Life*, the South African Constitutional Court could be seen as encouraging Parliament to become more open and responsive to claims for economic and social justice and to relieve the Court of having to take on the primary role. As the South African Constitutional Court has seen, tasking courts with enforcing social and economic rights is tricky; for example, the South African Constitutional Court lacks the power to appropriate funds and create organizations to implement its judgments.<sup>86</sup> The

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84. An important example of the government assisting the development of civil society occurred during the War on Poverty in the United States in the latter part of the 1960s, when the Office of Economic Opportunity devoted resources to help communities create and sustain local advocacy and service organizations. These organizations included welfare rights groups, which were successful, for a time, in expanding access by low-income women to public benefits. See FELICIA KORNBLOH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 33-36 (2006).

85. See generally Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 8 HUM. RTS. REV. 157 (2007) (discussing judicial practice in India and comparing it to other countries); Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006) (discussing Constitutional jurisprudence in the United States).

86. Taunya Lovell Banks, *Balancing Competing Individual Constitutional Rights: Raising Some Questions*, in LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE 27, 37 (Penelope E. Andrews & Susan Brazilli eds., 2008) (“[T]he Constitutional Court’s approach to the enforcement of socio-economic rights is cautious and largely declarative rather than transformative.”); Dennis Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Toward “Deference Lite?”*, 22 S. AFR. J. HUM. RTS. 301 (2006).

same lack of institutional capacity is viewed by many countries as exactly the reason not to make social and economic rights judicially enforceable.<sup>87</sup> With *Doctors for Life*, the Constitutional Court may have begun to explore a middle ground: remaining open to adjudicating social and economic rights claims while simultaneously articulating how the legislature can do a better job of addressing the same rights.<sup>88</sup>

#### IV. CASE STUDIES FROM THE UNITED STATES OF AMERICA AND SOUTH AFRICA

##### A. Case Study – South Africa

In *Doctors for Life*, the Court acknowledged the existence of, and affirmed the benefits of, the notion of public participation through many forums and at different times. However, the Court recognized that there is a problem in the legislative process, and that this was not the first case that raised the issue of an omission to facilitate public participation by the legislature.<sup>89</sup> But this was the first case that led to the striking down of legislation due to the failure to facilitate public participation.

Since its inception, the post-apartheid Parliament has faced criticisms about its public participation processes. Some of the criticisms include the inaccessibility of Parliament for people who do not live in the city where it is situated, the lack of adequate public information, the short time-frames for public inputs in many instances, the lack of responsiveness of the legislature to inputs, and the lack of consultation at the provincial and local levels. Peter Kimemia, in a recent critique of public participation in South Africa,

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87. See generally Rajagopal, *supra* note 85 (discussing judicial practice in India and comparing it to other countries).

88. An important critique of deliberative democracy is that, as deliberative processes increase, the speed of legislative process and the power of experts to decide policy both decline. The question is whether the tradeoff is worthwhile. One part of the response is that the answer to the question is political, not empirical. What the *Doctors for Life* Court assumes, it appears, is that the political claim was decided in favor of deliberation when the constitution was adopted. It is hard to make same claim, of course, based on the language of the US Constitution. At the same time, given how slowly important legislation has moved through Congress in recent years despite the absence of a mandatory process for public input, the efficiency claims may not be empirically accurate even if the writers of the US Constitution were satisfied as a political matter with representative democracy.

89. *Doctors for Life Int'l v the Speaker of the Nat'l Assembly & Others* 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.).

argues that what passes as a participatory process can be described as manipulation, tokenism and a “crafty means by which to dispense with this rather irritating and tedious process of facilitating public participation in governance practice.”<sup>90</sup> Themba Fosi, an employee of the Department of Provincial and Local Government, has acknowledged that, despite efforts at facilitating participation, the actual process has led to minimal participation by the public. Included amongst the challenges he identifies is the fact that “the spaces and in some cases the means provided to facilitate public participation are fraught with flaws that effectively swell the potential for failure.”<sup>91</sup>

The comments above indicate that the constitutional inclusion of a mandatory duty to facilitate public participation has led to implementation challenges within all spheres of government. Fortunately for South Africa, the Chapter 9 institutions also have a role to play in strengthening democracy, through, amongst other means, the facilitation of public participation in the legislative process. As discussed above, the CGE and the SAHRC both have Parliamentary Offices which undertake this task. Both institutions have faced internal and external challenges and criticisms in interpreting and implementing their mandates in this regard. Nevertheless, these institutions have a crucial role to play, for several reasons: they have the means to provide a forum for public education, they are able to facilitate public participation, and they can mediate easier access to the relevant legislative structures and individuals for civil society actors. These institutions also have offices in all provinces and are generally more accessible to the public. The case study below seeks to illustrate one successful attempt at facilitating public participation by a Chapter 9 institution. Despite the intervention taking place prior to the judgement in *Doctors for Life*, the methodology employed resonates with the views of the Court on what the Legislature ought to have done in fulfilling its mandate.

This case study reflects the legislative intervention process undertaken by the South African Human Rights Commission (SAHRC) on legislation relating to older persons known as the Older Persons Bill.<sup>92</sup> The SAHRC has acknowledged that this is the first

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90. Peter Kimenia, *South Africa: Public Participation – Need for a Re-definition*, LOC. GOV'T TRANSFORMER, Oct./Nov. 2007, available at <http://www.africafiles.org/article.asp?ID=16327>. See generally Parliamentary statements and Annual Reports of the Commission for Gender Equality, [www.cge.org.za](http://www.cge.org.za).

91. Kimenia, *supra* note 90.

92. Older Persons Bill, 2003, Bill B68B-2003 (GA).

time that they have consulted so extensively on a piece of legislation.<sup>93</sup> In fulfilling its constitutional mandate, the SAHRC in this instance recognised that the older persons sector is organisationally weak, that older persons lacked resources such as access to information, forums and funding, that there was no national structure or advocacy group to take up the broader systemic concerns of older persons, and that older persons are autonomous individuals and that their participation is crucial in all matters concerning their group. This latter provision is prescribed in terms of the United Nations Principles for Older Persons and also the Madrid Program of Action on Aging. Hence, in line with both their constitutional mandate and also international instruments, the SAHRC embarked on an in-depth process in relation to the Older Persons Bill. The other reason for embarking on such an in-depth process was based on institutional concerns relating to the limitations in the Bill, including the lack of a developmental approach. The focus of the Bill was on facilities for older persons as opposed to a holistic focus on the numerous concerns facing older people living in communities and families.

The SAHRC intervention started in 2001 when general consultations began taking place with various NGOs. A pilot workshop was held in 2003, followed thereafter by workshops throughout the country between 2003 and 2005. A special focus in this respect was to include rural communities in the consultation process. The number of participants in workshops ranged from 18 to 80 and included representatives from organisations, municipalities, traditional leaders, NGOs, activists, academics, policymakers, church groups, and homes for older persons. The workshops had two purposes: to empower older persons with knowledge about Parliamentary processes both at the national and the provincial levels and to share information on the draft law and elicit participants' views on that law. Because this latter process would serve to inform the SAHRC's submission to Parliament, the workshop programmes included information on how laws are made, how to write and present submissions to the legislature, background information on and provisions contained in the draft Bill, the applicable human rights and international law aspects on the rights of older persons, and the sharing of information on positive changes in South Africa since 1994. The workshops also elicited information from participants on the

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93. See Older Persons Bill: *Hearing on B68B-2003 Before the Portfolio Comm. On Social Development*, 1 (2005) (Oral Submission of S. Afr. Human Rights Comm'n).

current challenges facing older persons. These challenges included pension issues, health issues, HIV/AIDS, accommodation and care issues, and abuse and neglect issues. During these workshops, the SAHRC received repeated requests from participants for assistance in setting up a national older persons' forum.<sup>94</sup>

In addition to the workshops, the Parliamentary Office of the SAHRC also held a series of brainstorming sessions with a smaller group of people. The objective of these sessions was to have more in-depth discussions on specific aspects of the Bill. These sessions consisted of between 8 and 15 people and dealt with both the substance of the draft Bill and law-making processes. Experts were also invited to present short inputs on both the Bill and share successful advocacy strategies. A workshop was held on public participation in the legislative process, and sessions included input on developing advocacy and submission writing skills. All discussions were recorded and the notes were widely distributed to relevant role-players. The Parliamentary Office also established the Rights of Older Persons Working Group, which was an email information service for relevant role-players and served as an information clearing-house on the progress of the Bill. Individuals and communities were encouraged, through all these processes, to participate in the parliamentary process.<sup>95</sup>

At a national conference on older persons which was held in 2005, a discussion was held on the need for a national structure that would represent the diverse needs and interests of older persons. The SAHRC agreed to set up (internally) an Older Persons Unit to assist the older persons sector in creating a national forum within a year. It provided assistance with fund-raising, as well as administrative support. The objective of the Older Persons National Forum is to act as a civil society advocacy and advisory group that works to promote the rights of older persons.

In August 2005, Parliament held extensive public hearings on the Older Persons Bill. As a result of the submissions received, the Parliamentary Committee sent the Bill back to the drafters, with an instruction to re-draft the Bill, taking into account the concerns raised. After the re-drafted Bill was submitted to Parliament, the SAHRC was asked to bring any further concerns to the attention of

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94. South African Human Rights Commission [SAHRC], *Case Study - The Older Persons Bill 10* (undated & unpublished document, on file with authors).

95. *Id.*

the Parliamentary Committee. A one-day workshop was convened in January 2006 by the Parliamentary Office to gather any outstanding concerns, and the report from this workshop was submitted to Parliament. The Parliamentary Office also attended and monitored all the Parliamentary Committee meetings and sent out reports to relevant role-players. This was a valuable initiative, as it greatly assisted civil society to stay informed and to actively participate both directly and indirectly, on issues that concerned them.<sup>96</sup>

Included in the successes achieved by this new mode of Parliamentary intervention by the SAHRC were the following:

- a) The SAHRC received over 300 written and oral submissions in all these interventions, from both individuals and groups/organisations. These submissions were used to inform the SAHRC's official submission to Parliament.
- b) The process also led to a working relationship with the relevant government department dealing with the draft Bill and the provision of direct inputs to the drafters.
- c) The SAHRC estimates that 90% of all oral submissions presented in Parliament were by persons and organisations that had participated in their various activities listed above.<sup>97</sup>
- d) In terms of substance, the structure of the Bill was changed to shift the focus from institutional care to a more developmental focus, including new provisions addressing the issue of elder abuse. The law was passed in December of 2006.
- e) The intervention had an invaluable impact in terms of building coalitions and community solidarity in the mission to protect the rights of a vulnerable constituency.<sup>98</sup>

The above case study illustrates both an effective methodology in facilitating public participation as well as a powerful vehicle that can work in tandem with the legislature to fulfil this constitutional obligation. In a country with competing demands and limited resources, the Chapter 9 institutions are ideally situated to supplement and compliment the role of the legislature in facilitating public participation, thereby fulfilling a constitutional imperative.

#### B. Case Study—United States of America

An example from the United States may shed some light on the differences between the ordinary legislative process in the US and

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96. *Id.*

97. *Id.*

98. *Id.*

what might occur if the legislative practices mandated in *Doctors for Life* were adopted. In the example, one of the authors of this article unsuccessfully attempted to persuade a local legislator to change a social welfare policy affecting low-income individuals and families.

In Montgomery County, Maryland, some low-income parents can qualify for a child care subsidy to assist them in purchasing child care while they are at work. Only single-parent households are eligible. In addition to financial eligibility, each applicant parent is required either to have a judicial child support order or to undertake the process of suing the nonresidential parent for child support.<sup>99</sup>

In 2003, when the county was considering an ordinance to renew the program, I contacted one of the county's council members to advocate for eliminating the child support requirement. According to the council member and members of the council staff, the requirement is imposed in the interest of serving more families. The amount of the subsidy that each family receives varies according to the family's income. If one family has more income, the family's subsidy can be less and the excess money can be used for a second family. Child support can be included as a source of income for the recipient family. In terms of horizontal equity, enhancing the income of some families helps more families receive subsidies.<sup>100</sup>

Nonetheless, whether more families would actually be served because of the child support requirement is unclear because the nonresident fathers of children in the care of low-income custodial mothers tend to not have substantial resources from which child support can be paid. As a result, child support actually collected under court orders may not raise the household incomes of a sufficient number of households to make a difference in terms of subsidy money for other households.<sup>101</sup>

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99. MONTGOMERY, MD. CODE § 02.42A.06 (2008).

100. The horizontal equity argument has some appeal since more families apply for the program than the funding can serve. In 2007, more than \$11,000,000 was budgeted for the program to serve approximately 1800 children. MONTGOMERY COUNTY, MD., OFFICE OF MANAGEMENT AND BUDGET, COUNTY EXECUTIVE'S RECOMMENDED FY09 OPERATING BUDGET AND PUBLIC SERVICES PROGRAM 53-3 (2008). Only three years earlier, the program had 179 families with 268 families on a waiting list. DEP'T OF HEALTH AND HUM. SERVS., MONTGOMERY COUNTY, MD., CHILD CARE SUBSIDY PROGRAMS COMMUNITY REVIEW (2004), available at <http://www.montgomerycountymd.gov/content/hhs/ACS/Documents/childcaresubsfinalreport.doc>.

101. See, e.g., Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson In Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 265-66 (2001); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1073-74 (2007) (arguing that

Many, perhaps most, custodial parents have no problem with the child support cooperation requirement, at least on a theoretical level. Along with some commentators, many parents believe that establishing the paternity of a child's nonmarital father and requiring a formal child support order is good for the child as well as the parent.<sup>102</sup> Some custodial parents, however, have concluded that obtaining child support from the nonresident parent is a bad idea, even though any child support actually paid would relieve some of the custodial parent's financial burden. Some custodial parents are afraid that the nonresidential parent will threaten the child or the parent, either physically or emotionally, or counterclaim for custody.<sup>103</sup> Other parents are receiving some informal support, at least on an occasional basis, either from the nonresidential parent or that parent's family, which may stop when judicial proceedings begin.<sup>104</sup> Furthermore, the judicial process is time-consuming and conflicts, in many cases, with employment. Finally, many nonresidential parents are as poor as the custodial parent. Getting a judicial order, therefore, offers no promise of money reaching the custodial parent.<sup>105</sup>

The county council member seemed unaware of how the requirement impinged on the life and the autonomy of custodial parents, a life he had never shared. Persuaded by the horizontal equity argument, he was willing to consider changing the requirement only if affected parents could persuade him that it was burdensome to them. He suggested I find affected parents and bring them in to speak with him or to testify at a hearing.

The council member's suggestion is not unreasonable in theory, but it makes little sense in the context of a child care subsidy program

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administrative costs substantially reduce any benefit from child support); Chien-Chung Huang, Ronald Mincy, Ronald & Irwin Garfinkel, *Child Support Obligation of Low Income Fathers*, 67 J. MARR. & FAM. 1213 (2005).

102. See Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006); Memorandum from Paula Roberts, Ctr. For Law & Soc. Policy, to Interested People, Preliminary Analysis of Child Care Support Cooperation as a Condition of Eligibility for Subsidized Child Care (Nov. 19, 2004), available at [http://www.clasp.org/publications/cs\\_cc\\_subsidy.pdf](http://www.clasp.org/publications/cs_cc_subsidy.pdf) (reviewing pros and cons of imposing requirement).

103. Having been involved in representing women who had been battered by partners, I knew this was not a purely theoretical concern. It finds support in the scholarly literature. See SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 82-83 (2003); Karen Syma Czapanskiy, *Domestic Violence and the Maryland Family Violence Option*, 11 AM. U. J. GENDER SOC. POL'Y & L. 447 (2003); Susan Notar & Sharon Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y. & L. 657 (2000).

104. HAYS, *supra* note 103, at 80-81.

105. See Czapanskiy, *supra* note 101.

or many other public benefits programs.<sup>106</sup> Because public benefits records are kept private to protect applicants and recipients from stigma, I had no access to the names of or contact information for applicants who were refused benefits. A student helped find several parents in the waiting room of the office, and we provided their statements to the council member. Given that each was a busy low-income woman supporting a family, none was able to take time from work and family to speak personally with a county council member who had never listened to her before. Of course, an organization of low-income women could have advocated on their behalf, but, probably for all the same reasons that low-income women historically have had little voice in public debates, such organizations do not seem to exist in this locale.

Under the mandate of *Doctors for Life*, the county council might have been required to solicit the opinions of people who are financially eligible for the child care subsidy. Alternatively, an intermediating institution, such as a women's commission, might have been asked to investigate the issue from the perspective of financially eligible parents. The government agency that administers the program could have been directed to identify applicants for and participants in the program, so that legislators or the intermediating institution could seek their input. If stigma were an important issue, the intermediating institution might have sought input without identifying low-income parents in public, while still allowing their opinions to be heard. The agency might have also been required to advise participants about the interest of the legislature because of the requirement. When we asked the agency to make our interest as advocates known to participants, the director turned us down, which

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106. Another advocacy project I was involved with around the same time involved extending unemployment insurance benefits (UIB) to part-time workers on the same basis as provided for fulltime workers. Finding people denied UIB was even more difficult than finding disappointed applicants for the child care subsidy program. Applications were taken only over the phone, and applicants were required to work through a telephone decision tree before speaking with a claims representative. The decision tree was unambiguous when it comes to benefits for part-time workers. Applicants were told that they are ineligible for benefits, and they were provided with no opportunity to contest the decision. They are not connected with a claims representative to talk over the issue, and they are not provided with a denial letter. Because they were never informed that the question might be decided differently if the law were changed (or, in a few cases, if they come within one of the exceptions to the exclusion), they had no incentive to create or even contact a legal or advocacy group. From the perspective of the unemployed worker, it must have appeared that their exclusion was inevitable and unquestionable.

was a sensible response given that no council member was demanding a different outcome.

It is not impossible to imagine the *Doctors for Life* requirements being handled, at a preliminary level at least, by an administrative agency. Unexpectedly, that turned out to be one of the lessons that can be drawn from the child care subsidy example. A year after my failed advocacy effort, the agency conducted an internal audit of the child care subsidy program.<sup>107</sup> The audit included interviews with a number of program participants. They were asked questions about the operation of the program, but they were not asked to give their opinion on whether the program's requirements made sense to them. Program participants were interviewed individually, giving them no opportunity to gain an understanding of how others experienced the program.<sup>108</sup>

What is interesting is that, despite these limitations, the largely positive audit made reference to problems with the child support requirement. Because of the requirement and the lack of close connections with the people administering the child support program, applications for the child care subsidy were sometimes delayed or made more complex. Talking with participants, then, even in the limited manner done here, uncovered problems. Unfortunately, the audit did not lead to a reconsideration of the requirement.

One thing seems clear from this example: without some mandate to take into account the views of people who experience some form of disadvantage in the political system, legislators are likely to accept as valid the views of those who share their perspectives. The county council member, while not an unreasonable or unsympathetic person, was willing, without much curiosity or even imagination, to discount arguments about the unsuitability of the requirement for purported beneficiaries of the benefit. The people whose views did not count in the conversation were members of disadvantaged groups: most are female and all are low-income.

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107. DEP'T OF HEALTH AND HUM. SERVS., *supra* note 100.

108. *Id.* at 3. Cf. YOUNG, *supra* note 69, at 60-74 (discussing deliberative democracy as an example of social learning happening in conversation with others who share the experience); Shannon, *supra* note 50 (discussing political participation as a method of social learning happening in conversation with others who share the experience).

### C. Reflections on the case studies from South Africa and the United States of America

The process leading to the adoption of the Older Persons Bill contrasts rather sharply with the US experience. In both countries, the proposed legislation primarily affected people with few economic resources. The South African legislation addressed a large number of issues affecting an important group of people in the population, which helps to explain the significant amount of consideration it was given by the executive department, the SAHRC and advocacy groups. The US example involved modest changes to an existing program, which helps to explain why the attention paid to the proposal was not substantial. In both countries, however, the judgment in *Doctors for Life* would have made a difference in the process and in the outcome.

In South Africa, the adoption of a more expansive and consultative process by the SAHRC reflected a shift in the methodology regarding public participation. As noted above, this was not due to the judgment in *Doctors for Life*, but rather to the identification of problems in the draft law and also the recognition that the older persons sector was not sufficiently well-organized to make an impact on its own. The judgment in *Doctors for Life* confirmed that the nature of South Africa's democracy was participatory, inclusive and responsive, and that the values of dignity and respect are engendered by public participation in the law-making process. Both the imposition of a constitutional mandate to facilitate public participation, and the creation of constitutional bodies to strengthen democracy, allow for the realization of deliberative democracy goals. The existence of a court with the power to oversee the implementation of the Constitution also assists enormously in this mission.

In the absence of a judgment such as *Doctors for Life*, the Constitutional Court would likely face similar complaints in the future. The striking down of laws in this case serves to send a stronger message to the Legislature regarding a violation of its constitutional mandate. This will hopefully lead to greater awareness and changes in the Legislature in its future facilitation of public participation. The judgment also clarified that there is a mandatory duty to facilitate public participation and that there are two aspects to this duty. Contextualizing the duty in terms of human rights obligations as well as historical and contextual approaches is another innovative aspect of the judgment. The recognition of political citizenship as being more than just the right to vote shows respect for citizens and allows

for the development of a culture of ongoing deliberation amongst people. It also reflects the principle of government based on the will of the people. In the absence of the judgment and the SAHRC's new approach, the outcome in the 'Older Persons Bill' process would have been different on many levels. The networking and coalition-building aspects would not have occurred to the same extent in the sector. The participation of such a diverse group of people who exercised both agency and their voices (in the SAHRC forums and also in Parliament) would have been absent. The raising of awareness in Parliament about the limitations of the draft law also led to changes to the draft law, to the benefit of a marginalized and vulnerable sector.

In the United States, there is no constitutionally-based civil right requiring legislatures to facilitate input from affected members of the public. Citizens enjoy the freedom to petition the government, and that freedom has been held to be the basis for protection of certain kinds of political organizing.<sup>109</sup> Congress has the duty to publish its journal, and, as a matter of accepted historical practice, Congressional sessions and most committee hearings are held in public.<sup>110</sup> Nothing, however, requires Congress to do more than receive input; it is not required to seek or to facilitate input.

Another important difference between the normal legislative process in South Africa and the United States is that Chapter 9 institutions, such as the SAHRC, in South Africa sometimes use their constitutional mandate to bring advocates, affected groups of people and government officials together to discuss legislation. Sometimes these institutions have ongoing relationships with the various players, and they can use those relationships to engage more fully with them over a long period of time. Staff members employed by some congressional committees develop similar relationships over time with advocates, affected groups and government officials, which helps the legislators to include a broader set of views in the legislative process.

Staff members of congressional committees, unlike the members of the Chapter 9 institutions,<sup>111</sup> are chosen and supervised by the

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109. See U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

110. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 82-83 (2005).

111. In terms of section 193 of the RSA Constitution, members of Ch. 9 institutions are appointed through a public participation process when calls for nominations are made. This is followed by a Parliamentary process of short-listing, interviews and a voting exercise by both

leadership of the committee they serve. They are subject to no mandate requiring them to pay attention to the views of people or organizations that are different from the views of the committee's legislators. Of course, if a legislator ignores input from people who disagree with him or her, the legislator may pay the price at election time. But the process of deliberation between elections, which is the subject of *Doctors for Life*, can be ignored.

As discussed earlier, practices that fall within the broad ambit of deliberative or communicative democracy can have a substantial positive impact on a society in which they are practiced. They can bring people together to articulate, discuss and compare their experiences and views. They can help people develop self-respect for themselves as citizens and respect and empathy for others in the society. They can encourage the development of civil society which then serves to limit government intrusiveness. They can add to the incentives for government to find solutions to economic and social inequalities and injustices.

One of the goals of deliberative democracy, in a political sense, is "illuminating conflicts, including conflicts in material self-interest that might previously have been obscured."<sup>112</sup> Unless the door is pried open for people, the illumination cannot occur. *Doctors for Life* offers that possibility by requiring legislators to seek input. Although it does not guarantee that any conflict will be resolved differently, the decision makes it harder for legislators to argue that opposing viewpoints do not exist and do not merit some reply.

*Doctors for Life* offers another potential benefit: the chance for people to organize around an issue of importance in their lives. Under the mandate, legislators are instructed to reach out to groups of affected people. What if no groups exist? It may be necessary for legislators to provide educational opportunities for people to learn about the policies under consideration and to give people the opportunity to debate among themselves which policies they prefer. This process can produce a chance for organization around common interests and connections among people with existing organizations. Once organizations develop in civil society that include people who have been marginalized in the political system, it is harder for the

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Houses of Parliament. The names of nominees are then submitted to the State President for assent and appointment.

112. Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in *DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS* 107, 128 (Samantha Besson & José Luis Martí eds., 2006).

disadvantage to continue; political actors begin to pay a price for ignoring the interests of those people in the future.

These benefits are well demonstrated in the process leading to the adoption of the Older Persons Bill. Even though the bill was developed prior to the judgment in *Doctors for Life*, the process was similar. The SAHRC reached out to affected people who, at the time, were poorly organized in terms of capacity for political input. The SAHRC assisted, through outreach, education and workshops, in learning about the views and perspectives of affected groups. It organized conversations with and without agendas. It received input orally and in writing from affected groups, advocates and experts. Even with all of that outreach, its submission to Parliament was not fully accepted. Continuing the process of seeking and incorporating input, the SAHRC and parliamentary committees finally arrived at an acceptable bill. Acceptable, in this context, has both a substantive and procedural meaning. Given the nature of the deliberative democratic process that underlies the bill, it seems highly likely that all stakeholders must have felt respected as citizens throughout the process. Most probably saw their views adopted on at least a few points, and everyone likely had a chance to learn about the views of people quite different from themselves. It seems unlikely that anyone who participated or who will be affected by the bill will come to the conclusion that the bill was adopted in a vacuum far from the perspectives and experiences of those it attempts to assist. It also seems unlikely that anyone who participated will conclude that they cannot seek to influence legislation in the future. Furthermore, the process resulted in the creation of an institution in civil society that is concerned with issues affecting older persons and could have an ongoing relationship with older persons and the legislative process.

On the flip side, *Doctors for Life* demonstrates the potential losses to a society that has not adopted deliberative democratic processes as part of the legislative process. In the US example, the only deliberation was one-sided. Legislators were willing to hear the input of advocates, but they did nothing to facilitate input by the affected groups. The affected group was, like the older persons in South Africa, politically impoverished. That is, they had no organization in civil society that either represented them or sought their views as advocates.<sup>113</sup> Nor could they find each other, given the

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113. Underrepresentation of economically disadvantaged people in pressure politics is a common phenomenon. See Kay Lehman Schlozman, Benjamin I. Page, Sidney Verba & Morris

privacy rules that surround public benefits programs. In both cases, legislators could have facilitated input by requiring government to identify affected persons and seek their views.

By not reaching out to members of the affected groups and facilitating their input, the legislator in the US example reached a conclusion that failed to improve the economic situation of low-income mothers without ever hearing from those women. He lost an opportunity to bring low-income women into the political process and give them a sense that they could make a difference in that process. He reinforced their silence and denied them an opportunity to develop politically, either as individuals or as members of a group. It seems questionable that these women will find a reason to connect to the political process during their lifetimes, given their not unreasonable conclusion that their views matter little to anyone with power.<sup>114</sup> At the same time, the political process is impoverished by their absence. Legislators and others in the political process cannot learn the views of people who do not participate, and they are not required to develop empathy or to rethink their positions. Finally, the legitimacy of programs that are created to serve low-income women cannot be assured, as the next few paragraphs will discuss.

While the judgment in *Doctors for Life* could lead to greater participation in the legislative process in the US, it should be noted that the historical and social contexts in the US differ from those in South Africa. In the eighteenth century, when representative democracy was adopted as the basic process for democratic participation in the US, it was a bold innovation. When South Africa, in its late twentieth century constitution, increased democratic participation by adding participatory processes to a representative democracy, it too was making a bold innovation. If the US follows suit, it should be for reasons that acknowledge the changed US political and social landscape and the need for changes in democratic practices.

The South African context includes, as the court in *Doctors for Life* said, the history of apartheid, during which the voices of most of the country's residents were suppressed, both by law and by violence.

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P. Fiorina, *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 19, 54 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

114. Recipients of public benefits are underrepresented among politically active people in the United States, including electoral and non-electoral actions, such as getting in touch with elected officials. *See id.* at 43.

Without an authentic invitation to participate, many in the country could continue to believe that their voices are unwelcome. In the United States, a minority of residents have effectively been excluded from the public sphere, even after *de jure* exclusion from voting came to an end. That minority includes many people of color and people of limited means, many of whom still fail to engage with the electoral process. Their disengagement from the political process may reveal a level of distrust of government similar to what the majority of South Africa's citizens experienced prior to 1994. Alienation at that level cannot be combated by elected officials announcing a willingness to receive input. More must be done. Reaching out directly to low-turnout communities to engage with them in social inquiry, to ask people to come together, to discuss their views and communicate a position – all techniques suggested by the Court in *Doctors for Life* – may be a necessary first step. Doing this regularly and supporting the necessary institutions of civil society may produce even better results over a longer term. Obviously, this approach requires resources and commitment by government. Given the history and context in the US, where relatively smaller groups than in South Africa have experienced deep political alienation, the effort should be both affordable and worthwhile. There is no need for government to support the political development of the many groups in the US that already enjoy extensive access to legislators through means such as lobbying, think tanks, advocacy groups and campaign contributions. Unlike in South Africa, where the majority was excluded, efforts in the US can be focused on historically excluded groups.

### CONCLUSION

The Court in *Doctors for Life* looked to international and regional human rights instruments for guidance on the parameters and importance of citizen participation in the legislative process. Through its decision, the Court has also advanced our understanding of respect and dignity as components of political citizenship in the international human rights context, with lessons of importance to both old and new democracies.

The court stressed that legislatures must facilitate input, and not simply wait for people to provide it between elections. By inviting participation, legislators not only garner information on which to base better legislation, they also express their respect for the citizens whom they consult. In turn, those citizens may become more engaged and less apathetic about public life. The two-way street contemplated

by the Court in *Doctors for Life* envisions a robust two-way ongoing connection between legislators and citizens, something quite different from the representative democracy commonly associated with civil and political rights in both the domestic and international human rights arena.

It is not difficult to imagine, as we have done in this article, how the mandate of Doctors for Life could change political practices by legislators. What seems somewhat more difficult to imagine is whether the political practices by ordinary citizens would also change. Will citizens experience themselves as having more opportunities to influence legislators if invited to participate? If a change in perception occurs, will more citizens participate? Will more advocacy organizations develop in civil society? Will more citizens participate as voters and as candidates in elections, or otherwise express more political interest? Will historically disadvantaged and silenced groups be heard more frequently in public life, and will their interests be better advanced in public policy?

While we have become convinced, through our examination of *Doctors for Life*, that participatory democracy is a beneficial addition to a representative democracy, we are not yet convinced that human rights norms must always encompass a duty by legislators to facilitate public input into legislation. Before coming to that conclusion, we would like to see some empirical research on our questions about citizen political practices. Participatory democracy, even in the limited form encompassed by the mandate of *Doctors for Life*, is an expensive and time-consuming enterprise. It may result in some unexpected policy outcomes. Some presently disadvantaged or silenced groups may become even more alienated from political activity and political power. A transformation of human rights norms to include participatory democracy, therefore, should be based in greater knowledge about what it means on the ground in countries with different histories and varied social and economic contexts. What Doctors for Life has contributed is a challenge that the investigation be undertaken. The experience of South Africa following this ground-breaking decision should be studied extensively in the years to come.