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Seizing the opportunities: Strengthening Parliament's hand in oversight of the realisation of human rights in South Africa

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This special issue of *Law, Democracy & Development* focuses on strengthening parliamentary oversight and civil society participation with Parliament to improve the implementation of human rights in South Africa. It has grown out of the work of the Parliamentary Programme at the Community Law Centre, University of the Western Cape which is funded by the European Union (www.peopletoparliament.org.za).

The South African Constitution entrenches democracy and human rights and provides the promise of social justice for all. This is strengthened by international human rights law (IHRL) obligations that South Africa has committed to. The spirit and values of the Constitution generate great hope for people living in conditions of poverty and deprivation. In spite of this, however, there is overwhelming evidence that structural vulnerability to serious human rights violations persists for poor and marginalised people in South Africa. Poor realisation of human rights is partly a consequence of a superficial understanding – and at times disregard – of South Africa's

obligations under domestic and international law. Poor parliamentary oversight is an additional systemic weakness that perpetuates these violations.

1 THE VALUE OF IHRL

South Africa has signed and ratified a number of international and regional human rights treaties at the United Nations (UN) and African Union (AU), respectively. These include the International Covenant on Civil and Political Rights (ICCPR); the UN Convention Against Torture (CAT); the African Charter on the Rights and Welfare of the Child (ACRWC); the UN Convention on the Rights of the Child (CRC); the UN Convention Against all forms of Racial Discrimination (CERD); and the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) amongst many others. By signing and ratifying these treaties the Government makes a commitment, and in fact becomes obliged, to realise the rights contained within these treaties.

It is concerning that, at present, South Africa is one of only a handful of countries around the world that has failed to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). Ratification of this treaty will strengthen the Government's commitment and leverage to ensure the delivery of services to the poorest and most marginalised members of society.

Along with the obligation to implement IHRL, ratification creates an obligation on the State to report to the relevant treaty monitoring bodies at regular intervals on its progress with implementing the treaty concerned. This reporting obligation is a mechanism to strengthen accountability in the international community through monitoring the status of human rights in Members States and monitoring the State's progress in realising rights.

Alarming, South Africa has an appalling track record in this regard. South Africa has been late in meeting its reporting obligations to most treaty bodies, with some reports, such as the report to the ICCPR, more than ten years late.¹ For example, after submitting its initial report to the CRC in 1997, no further reports have been submitted to this body; South Africa is now behind on two reports with the fourth one due in 2012. Furthermore, since ratifying the ACRWC in 2000, South Africa has yet to submit its initial report to the African Committee of Experts on the Rights and Welfare of the Child, in spite of this being due during 2002. All other reports due, except the report to the CEDAW committee, have also been delayed by a number of years. Where reports have been submitted, the quality and accuracy of the information has been problematic and questionable.²

¹ Chenwi L *South Africa: State of State reporting under international human rights law* (2010) p30 & p72

² Chenwi (2010) p72

The leverage of IHRL treaties can be used as a further tool to mobilise civil society and Parliament to ensure that South Africa delivers to the most vulnerable and marginalised people in the country.

2 PARLIAMENTARY OVERSIGHT

Whereas it is the role of the Executive to deliver on these rights and obligations, the role of the national and provincial legislatures are to exercise oversight over such delivery. The value of oversight is in monitoring implementation and in creating an accountability mechanism. This role is central to the importance of Parliament to ordinary citizens, as it is through this that government departments can be compelled to deliver services and social justice.

While much attention is paid to the legislative function of parliaments, however, far less is given to this critical oversight function. The Report of the Independent Panel on the Assessment of Parliament that was conducted in 2008 expressed its concern, based on interviews conducted with committee chairpersons, about the quality of parliamentary oversight. In particular it noted the concerns raised by a number of committee chairpersons regarding the power relationships that exist between ministers and members of Parliament. Due to the party list electoral system, members of Parliament – who are required to exercise oversight over senior members of their party – are subject to the power of their parties to remove them from Parliament; and this, as observed by a former Speaker of the National Assembly, may result in members feeling “obliged to toe the party line”.³ The report notes that, as a result of these and other factors, the will of the Executive prevails over that of Parliament in many instances.⁴

An important site of intervention is the promotion of greater civil society participation in the oversight function of parliaments.

3 CIVIL SOCIETY PARTICIPATION IN PARLIAMENTARY OVERSIGHT

Civil society has an important role to play in influencing law and policy and in ensuring that Parliament fulfils its oversight function effectively. Parliament has made progress in strengthening civil society participation over the past years; however, the extent and quality of this participation is weak and opportunities for meaningful engagement are limited. Where participation takes place, it tends to be confined to a handful of better-resourced national NGOs and academic institutions, national human rights institutions and other organisations and individuals with resources. In addition, although there are examples of coordinated civil society efforts, interactions with Parliament are generally uncoordinated and piecemeal.

³ Frene Ginwala in a speech delivered at a 2002 Freedom of Information Conference, cited in Parliament of the Republic of South Africa *Report of the Independent Panel Assessment of Parliament (2009)* 36.

⁴ Parliament of the Republic of South Africa (2009) 40.

Furthermore, civil society participation in Parliament has focused predominantly on legislative reform and not on monitoring service delivery. A valuable entry point for civil society to engage with oversight is through Departmental annual reports to Parliament. In 2005 the *Guideline for Legislative Oversight through Annual Reports*, a research paper commissioned by the National Treasury, recommended that committees hold public hearings on annual reports. This Guideline provides some ideas on how such hearings could be optimally used.⁵ Despite this only a handful of committees, such as the Portfolio Committee on Correctional Services, have instituted this as a regular practice. Space on committee agendas for civil society to engage in this way remains generally elusive.

Our experience has shown that where civil society organisations are organised and where these interact closely with parliaments, there are positive results in strengthening oversight and accountability of the Executive.⁶

4 WHAT CAN CIVIL SOCIETY ORGANISATIONS OFFER PARLIAMENT?

Access to quality information is essential to ensure effective oversight and the accountability of the Executive. Since legislatures are largely dependent on information that they receive from the very departments over which they are exercising oversight, this limits their ability to challenge the information presented. Although legislatures are able to augment this information by undertaking site visits and with research undertaken by the parliamentary research unit, the quality and extent of both of these sources of information are limited by the available capacity.

The information provided to Parliament by the Executive and through its in-house research team can be supplemented by information from civil society organisations which have technical expertise and can provide a “view from below”. This information can take various forms, including the provision of information on what the legal and policy framework requires, empirical research on the situation and implementation of law and policy and case studies which can provide Parliament with a tangible sense of the issues that ordinary citizens and service providers experience on a day-to-day basis. Supplementary information of this nature can enhance the quality of parliamentary oversight and the accountability of the Executive by assisting members of Parliament to understand issues more completely and by providing direction regarding possible lines of enquiry.

The added value and impact of public participation is its potential to empower people in communities by enabling the development of skills, knowledge and capacity. It

⁵ National Treasury *Guidelines for Legislative Oversight through Annual Reports* (2005) 25.

⁶ Examples include the work of the Child Justice Alliance during the development of the Child Justice Act 75 of 2008, the Children’s Bill Working Group during the development of the Children’s Act 38 of 2005 and the Sexual Offences Bill Working group that worked together on the development of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007.

may also result in powerful social movements that can add compelling political weight to issues of social justice.⁷

5 ABOUT THE ARTICLES IN THIS EDITION

The articles contained in this special collection of *LDD* address different aspects of these issues.⁸ The articles were prepared to establish the basis for and direction of the Parliamentary Programme at the Community Law Centre, and were presented at the inaugural seminar of the Programme in Cape Town on 20 October 2011. They will be published as they become available following peer review.

The first article addresses the role of Parliament in promoting compliance with IHRL. **Lilian Chenwi** explores this question by outlining the importance of IHRL in relation to promoting the rights contained in the South African Constitution. She notes that the Constitutional Court has considered IHRL an important framework within which to evaluate and understand the Constitution. The article explores current practice in relation to the process of ratification of international treaties, noting that this lies primarily with the Executive. While no role was assigned to Parliament regarding the negotiation of treaties, however, she highlights that the approval of the National Assembly and National Council of Provinces is required for international treaties to be binding on South Africa. She then argues that there is a potential role for Parliament to engage with the negotiation process, pointing out that the Report on the Independent Panel Assessment of Parliament recommends that Parliament adopt mechanisms to improve its capacity to engage with negotiation of international treaties, given the value of Parliament as a forum for debate on issues of national concern. Chenwi notes that IHRL commitments can also be used to frame questions for oversight over government departments. Finally, she argues that Parliament has an important role to ensure compliance with IHRL obligations, including on reporting obligations.

Lukas Muntingh addresses the nature of civil society participation in the National Parliament by exploring the extent of public participation in the legislative, oversight and accountability mandates of Parliament. He does this through presenting data on public participation in Parliament from January 2007 to July 2010. This data clearly shows strong emphasis on engagement that focuses on Parliament's legislative mandate and extremely limited public participation regarding oversight and accountability. He then reviews the legal and regulatory framework of public participation in Parliament, paying particular attention to recent case law which, he notes, provides considerable guidance to Parliament regarding public participation in the legislative process. The paper then discusses the relevance of this guidance in respect of the oversight and

⁷ De Villiers S, Calland R & Fakir E *A People's Government, The People's Voice: A Review of Public Participation in the Law and Policy-Making Process in South Africa* (2001) 66.

⁸ The European Union has funded the writing of the articles contained in this edition. However, the views expressed do not necessarily reflect the position of the European Union.

accountability mandates of Parliament; to this end he makes a strong argument for greater public participation in the budget vote and Departmental annual report discussions. Finally he emphasises the particular value of public participation in budget processes, arguing that the allocation of public funds and monitoring of the utilisation of these funds is of great public importance.

Similarly, **Lorenzo Wakefield** explores the mechanisms for civil society participation in key human rights structures within the African Human Rights System. He notes that a large number of civil society organisations (CSOs) have been granted observer status with the African Commission on Human and Peoples Rights (ACHPR). This enables CSOs to engage with the ACHPR through influencing the agenda and participating in sessions of the Committee. He discusses the mechanisms by which CSOs can engage with the Special Rapporteur on Prisons and Conditions of Detention, the Follow-up Committee on Torture, Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on the Rights of Women in Africa and the Working Group on Economic, Social and Cultural Rights in Africa. Similarly, he investigates the engagement of CSOs with the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). He concludes by noting that, while a high standard is set in policy documents for CSO participation in these structures, meaningful CSO participation is still lacking to a large extent. He puts forward a number of reasons for this, including lack of knowledge of the rules and procedures amongst CSOs, funding constraints in attending meetings and resistance from the ACHPR to appointing special rapporteurs who are not already members of the ACHPR.

Conrad Bosire and **Nico Steytler** address the question of the role of sub-national parliaments in IHRL. Their article recognises that provincial legislatures have no direct role to play in the negotiation and ratification of IHRL from a constitutional perspective. However, they argue for the involvement of provincial legislatures in IHRL on three grounds. First, the mandated role of the NCOP (along with the National Assembly) to approve international agreements creates a link to the provincial legislatures in that the NCOP is comprised of nine provincial delegations, each under the direction of its provincial legislature. Secondly, they note that some provisions in international agreements must be implemented at a provincial level. Finally, they point out that the growing recognition of the role that provinces play in realising IHRL requires an understanding of the broad principals of the agreements in order to guide implementation at this level. For these reasons they argue that provincial legislatures have a role to play in negotiation and ratification of IHRL, in the domestication and implementation of IHRL, and in using IHRL instruments to carry out oversight at a provincial level.

This collection also includes two speeches relating to this topic.

The first, entitled “The role of Parliament, Civil Society and National Human Rights Institutions in State Reporting”, was delivered by **Judge Jody Kollapen**, former Chairperson of the South African Human Rights Commission at the seminar *Promoting*

*Constitutional Rights Through International Human Rights Law: The State of South Africa's State Reporting.*⁹ In this speech he highlights key issues relating to South Africa's reporting on international obligations, these being the significant delays in submission of reports, problems with their content and lack of consultation in their development. He stresses that reporting, while being a state obligation, is the business of all citizens and notes that substantial grounds exist for supporting public participation in state reporting processes, including the Constitution, UN Human Rights Charter and resolutions taken by the UN General Assembly. The speech also recognises challenges faced by civil society in engaging in these processes. He then discusses the possible basis for a constitutional case to challenge state reporting processes on legal grounds and calls for an annual National Human Rights Report as a means of regularly monitoring human rights in South Africa. Considering the role of national human rights institutions, he argues for greater integration of international obligations in Parliamentary processes. Finally, he calls for regular and ongoing dialogue between government and civil society on these matters.

The second speech was delivered by **Deputy Minister of Cooperative Governance and Traditional Affairs Yunus Carrim**, who has 15 years' experience as a member of Parliament and chairperson of committees. His speech, "Towards a more activist parliament more engaged with civil society", was delivered at the launch of the Community Law Centre Parliamentary Programme on 20 October 2010. In this he highlights that an activist Parliament cannot be sustained without an activist society and calls on Parliament, civil society and ordinary people to share the responsibility of building an activist Parliament. The speech recognises that more effective cooperation is needed between Parliament and civil society at the same time as recognising that each have specific roles. He calls for further dialogue on how civil society organisations and Parliament can engage more effectively and creatively to increase pressure on the Executive to deliver more effectively. He discusses the ways in which some committees have innovated to strengthen the quality of engagement between committees and members of the public and move away from the "ten-minute per input conveyer-belt system of public submissions". These include working with representative groups of civil society organisations in a sustained way, as well as creating mechanisms to enable greater interaction between members of Parliament and the public. While he recognises that Parliament must strengthen its efforts to improve engagement, he also discusses a number of issues that must be addressed by civil society organisations to improve engagement. The speech puts forward ideas for further engagement between civil society and Members of Parliament in order to facilitate more creative engagement in the "complex political terrain in which there are many competing interests".

⁹ Organised by the Community Law Centre in Cape Town on 22 September 2010. Judge Kollapen was Acting Judge at the time that this speech was delivered.

7 CONCLUSION

The articles included in this edition argue for Parliament and provincial legislatures to play a much stronger role in the negotiation, ratification and implementation of international law as a means of advancing Constitutional rights. They explore a range of possibilities for strengthening public participation and civil society engagement in the work of parliament and international treaty monitoring bodies. These opportunities exist; the challenge is for civil society organisations to seize them and use them constructively. Improving knowledge of these opportunities, seeking and creating further opportunities for interaction with these structures, and improving the coordination of civil society efforts, will go a long way to achieving this.

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