

Not only the business of the state, but also a business of all: State reporting in South African and popular participation*

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1 INTRODUCTION

This year marks the twentieth anniversary of the Community Law Centre at UWC, and at the outset I wish both to thank the Centre for inviting me to address this seminar and to congratulate it for the invaluable work it has performed over these many years. The Community Law Centre has stood by its principles, has been a pillar of support, and has become a reliable partner and institution in the advancement of human rights.

When one turns to the subject of South Africa's state reporting in relation to international human rights law, three issues consistently come to light:

- there have been delays in the submission of reports;

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- there have been problems with their content; and
- there has been a lack of consultation in their development.

2 INTERNATIONAL TREATIES AND HOLDING STATES ACCOUNTABLE

Together, the following issues form part of the contradictory global picture identified by the United Nations Development Programme (UNDP) in an assessment of the state of the world undertaken not long ago:

“Some 60 years after the establishment of the United Nations, what has emerged is an arresting picture of unprecedented human **development** and unimaginable human misery, of humanity’s advance on several fronts coupled with humanity’s retreat on several others, of a breath-taking globalisation of prosperity side by side with the depressing globalisation of poverty.”¹

On the one hand it is remarkable that, 62 years after the Universal Declaration of Human Rights, a host of treaties, charters and conventions have been ratified worldwide; that consensus on them could have been reached is a significant achievement in itself. On the other hand, compliance with these international standards remains a matter of serious concern, and part of the ongoing debate in this regard is that of political will; the political will on the part of States to allow themselves to be held accountable, and political will in turn by international bodies to hold States accountable, both at country level and at the level of intergovernmental organisations.

Of course, related to the expression of political will is the observation that, even though the power of rights has become a potent reality in our times, it is simply no match for the rights of power. The fact that 200 children die every hour around the world from causes that could have been avoided bears compelling testimony to this tragic contradiction.

Human rights are a cardinal element of the international as well as the regional systems of governance, and standard-setting in this regard has been an impressive accomplishment. Nevertheless, a troubling gap exists between ratification and compliance, theory and practice. It is in this context that questions around State reporting – the timeliness of reports, the nature of their content, the processes by which they are formulated, and the follow-up activity they set in motion – take on critical urgency and require us to examine the role of Parliament, national human rights institutions and civil society in finding a way forward.

¹ The observation was originally contained in the UNDP *Human Development Report*, 1994.

While reporting is primarily a state obligation, what is contained in the report is not exclusively the business of state. It is the business of everybody else in the country inasmuch as they have an interest and stake in it. Similar reasoning applies in the case of entities like the United Nations (UN) and African Union (AU). Although they are inter-governmental organisations, their work is the concern of all humanity, and therefore everybody has an interest in what happens within these structures and in the reports that are submitted to them. In other words, given the existence of a gap between international standard-setting and compliance therewith, it is vital that citizens participate in the processes around state reporting, both at country and intergovernmental levels.

I will focus on two issues to examine the scope and nature of civil society engagement and involvement in the reporting process.

3 CONSTITUTIONAL CHALLENGE

In the first place, it is conceivable that civil society organisations could challenge the government's considerable delays in meeting its reporting obligations. The challenge could involve more than putting pressure on the government; it could entail examining whether or not, or to what degree, grounds exist for mounting a legal and constitutional case to expedite the fulfilment of these obligations.

For instance, it is arguable that once the State has ratified a human-rights treaty, the obligation to report then forms part of the obligations provided by section 7(2) of the Constitution, namely that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights". If this is so, one could proceed to argue for expeditious reporting in terms of section 237, which provides that "[a]ll constitutional obligations must be performed diligently and without delay."

A likely counter-argument is that there is no duty upon the State to ratify; rather, it is a matter of executive discretion. To this it could be replied that, once ratification has taken place, reporting is not an option but an obligation. Furthermore, if that obligation can be brought within section 7(2), one could argue in terms of section 237. Should this argument prove viable, the government's failure to report would then place it in breach of its constitutional obligations.

The scenario above highlights two points. The first is that reporting and the failure to do so may well be brought within the ambit of the State's legal and enforceable human rights obligations and in appropriate instances the courts could issue directives where there has been an unjustified failure to report.

4 NATIONAL HUMAN RIGHTS REPORT

The second point is more general in nature. It is this: it is important to recognise that reporting is not simply one more obligation among others to be ticked on a check-list. Instead, it is an opportunity to affirm both the efficacy and legitimacy of the international as well as regional human rights system. Conversely, failure to report has the potential to undermine the efficacy and legitimacy of those systems – a problem which is compounded when such failures do not meet with any consequences. State reporting should be understood, and addressed, by all stakeholders as an activity crucial to the interests of deepening and broadening democracy.

The second scenario which illustrates the scope available for civic participation concerns the fact that, 16 years into democracy, South Africa still does not produce an annual human rights report. Granted, various organisations in this country produce reports on children's rights, women's rights, freedom of expression and so on, but for holistic country reports we have to look to the likes of Amnesty International, Human Rights Watch and, to some extent, even the US State Department.

South Africa itself does not produce its own country report, which means we have no standardised indicators according to which we can assess from year to year whether or not we are making progress towards the realisation of human rights. The African Peer Review Mechanism (APRM), for example, has advised that South Africa should define what we mean by "poverty". This has not happened, and as a result different answers are given to the question: "are we making inroads in the fight against poverty?" Some would say yes, others no, and this divergence stems from the fact that we do not have a universally accepted definition in this country of what constitutes poverty.

What bearing does this have on state reporting? If our system for reporting to international and regional bodies were effective, it could provide the basis for a template in terms of which data may be gathered for the purposes of a national country report that is capable of providing consistent yardsticks for the evaluation of our progress in furthering democracy. Government, Parliament, NGOs and human rights institutions have, between them, the resources and data to produce such a country report. The question of who should take responsibility for doing it is another matter. While in principle nothing prevents the government from producing its country report, from the point of view of cultivating participatory processes a case can be made for institutions like the South African Human Rights Commission (SAHRC), working in conjunction with other national institutions and civil society, to develop an annual country human rights report.

To reiterate, then, reporting to regional and international bodies is a state obligation, yet it is not the business of state alone: it is the business of everybody else in the country. When Amartya Sen, the Nobel laureate in Economic Sciences, visited South Africa, he spoke of what he called "the two perspectives" of democracy. The one, he said, is the

“public ballot” perspective, and it concerns the adequacy of the public ballot; the other is the “public reasoning” perspective, which relates to the ability of government to respond to public reasoning. From such a perspective, the desired outcome is what he termed simply as “government by discussion.” South Africa fares very well in terms of the first perspective, but the second perspective requires emphasis in relation to State reporting.

5 THE CONSTITUTION AND PUBLIC PARTICIPATION

We have a constitution that is committed to public participation at virtually every level of governance: the level of policy-making, the level of law-making and the level of service delivery. The notion of public participation is the golden thread running through the Constitution; by implication, that notion applies as well to the processes by which government discharges its international human rights obligations. In other words, it could be argued that public participation in these processes is constitutionally endorsed.

Moreover, one can at very least argue that the values of openness, accountability and responsiveness that are articulated in section 1 of the Constitution advance the concept of public participation. Similarly, article 71 of the UN Charter recognises and authorises the actions of NGOs, as does resolution 18 of 2006 of the General Assembly. In the AU, particularly in the African Commission and Human Rights Council, there is likewise no dispute that the role and value of civil society and national human rights institutions is vital.

So, substantial grounds exist for supporting public participation in state reporting processes. Nevertheless, prospective public participants often debate the value of taking up these opportunities for engagement and involvement. Constitutional and other legal provisions may well entitle NGOs and human rights institutions to participate – but is participation desirable or worthwhile? After all, it is sometimes said, Banjul and Geneva are very far removed from our situation in South Africa. The question is then raised: what is the purpose of investing energy and resources in processes that are perhaps politically compromised and seemingly unlikely to yield the desired results?

6 IMPACT OF PUBLIC PARTICIPATION

My response is that while questions such as these form part of a necessary and important debate, it is often not fully appreciated how detailed, exacting and productive these reporting processes actually are or can be. In April 2008 I happened to be present in Geneva on the occasion of South Africa’s presentation on the UPR (Universal Periodic Review). The question was raised as to how the country was dealing with xenophobia, and Member States – who were positive and supportive – said they would like South Af-

rica to share its plans with them in this respect. A month later, of course, South Africa experienced an outbreak of violent xenophobic riots.

To my mind, the meeting in Geneva illustrated how timely, pertinent, rigorous and thorough these processes can tend to be. They are not axiomatically irrelevant or out of touch; indeed, they provide beneficial opportunities for deliberation, information-exchange and wide-ranging constructive dialogue – opportunities that ought to be seized by civil society and public bodies in order to address the overarching problem identified at the start of this talk, namely the dangerous gap that exists between international standards in human rights and poor compliance with them.

What, then, are the roles that civil society and national human rights institutions can play in narrowing this gap? In considering the question, it is useful to bear in mind the schematic elements of the state reporting process and regard them as forming a template within which different roles can be conceived:

- ratification, and the decision to ratify;
- consultation and compilation of the report
- the presentation of the report; and
- concluding observations and follow-up work

7 THE ROLE OF THE SAHRC

Let us begin by examining national human rights institutions, in particular the SAHRC, which is well positioned to play a critical role in advancing public participation in the state reporting process. In the first place it is able to hold the Executive accountable and have the latter report to it. In addition, the SAHRC is itself accountable to Parliament, a key institution with which it can share information; and it has a natural and organic relationship with civil society. Given these three factors, the SAHRC is structurally and institutionally well placed to act as a link and conduit between the Executive, Parliament and civil society.

A Commission that is properly resourced and functioning effectively can play a variety of roles in the template outlined above. For example, it can ask fundamental questions about the ratification process. This includes raising the question of why the International Covenant Economic Social and Cultural Rights (ICESCR) treaty has not been ratified. It can also raise questions concerning the Optional Protocol on the Convention against Torture (OPCAT). In terms of its own mandate, the SAHRC can require the Executive to report on it and then share those reports with Parliament, thereby assisting the latter in its interactions with the Executive. Furthermore, the SAHRC can (as it has indeed done) compile shadow reports and attend sessions, both at the treaty body as well

as at UPR and the African Commission. Significantly, it can share information with special rapporteurs in their visits to South Africa, thereby contributing to the reporting process and at the same complementing Parliament's role in ensuring accountability by the Executive.

A particularly important role that a human rights institution like the SAHRC can play is that of providing public information and education about processes in Geneva and Banjul, especially given that people back in our home country are likely to debate the value and efficacy of processes that happen at such geographically removed fora. For instance, when South Africa's UPR report was submitted, the SAHRC in Cape Town hosted a live screening of events in Geneva so that local stakeholders could follow the proceedings. This was a creative, interactive and dynamic way of providing public information and education, and illustrates the kind of practical measures that national human rights institutions can adopt.

8 THE ROLE OF PARLIAMENT

Turning briefly to the role of Parliament, two important observations can be made. The first is that sections 55 and 56 of the Constitution provide the basis for enhanced parliamentary oversight of the state's international human rights obligations. In particular, section 55 entitles Parliament to hold the Executive accountable by exercising oversight of its activities, while section 56 grants it the right to summon any person or institution to appear before it and answer questions. Parliament, in other words, is in a position to play a vital role in respect of the state's international obligations. The problem, however, is that engagement with these obligations seems to be regarded as task separate and distinct from Parliament's usual oversight activities.

The second observation is that when government departments present their strategic plans, Parliament ought at that point to interrogate those plans by asking how international human rights obligations fit into them in terms of their procedures, deliverables and internal reporting processes. All too often it appears to be the case that international obligations are viewed – both by the departments and by Parliament – as optional extras rather than as an integral part of government's obligations.

9 THE ROLE OF CIVIL SOCIETY

We come now to the role of civil society organisations, which is crucial, given that they have, or are supposed to have, a connection with citizens. As such they should be able to speak to and on behalf of the ordinary experience of citizens. The information that they characteristically gather and accumulate can be used both in the production of shadow reports and as contributions to State reports themselves.

It might be argued, though, that doing both is difficult or undesirable. After all, this would seem to create a problem of institutional independence: the organisation that has contributed to a report cannot then proceed to write a shadow report of the same document. But in principle there is nothing untoward about such a procedure, because what it is at issue is a country report, not a government report. In other words, the report is not confined to what government does, but extends to an account of what other groups, such as civil society and human rights institutions are doing. Thus, in principle, there is no impediment to participation, provided that the report reflects that it is not a consolidated or joint report by the various institutions but, rather, that it was produced with the input of non-governmental role players.

Nevertheless, there are several real challenges that stand in the way of civil society engagement with state reporting processes. First of these is the problem of capacity. The international system is complex and participation in it requires advanced skills and capacity. It is, however, equally the case that important international institutions such as the Office of the High Commissioner of Human Rights are endowed with both the requisite capacity as well as the willingness to share their expertise with role players in South African civil society.

A second challenge concerns the choices that are made in determining what work gets done. It is true that a draft country report can be an extensive undertaking, and it therefore cannot be expected that civil society, or indeed a human rights institution cover all of the relevant areas. In this respect it would be advisable for participating organisations to play to their respective strengths rather than spread themselves too thin in a vain and resource-intensive attempt at comprehensiveness. From the point of view of the treaty body, what is of value in a report is sharp, smart and containing pertinent information – information precisely of the type that niched groupings in civil society are able to provide.

Related to this is a third issue which concerns the coordination of efforts within civil society. Public participation is to be encouraged, and it must be commended whenever it occurs; nevertheless, it goes without saying that there is strategic value in close inter-organisational consultation in terms of which reports get compiled and on which matters they focus. It is noteworthy, for instance, that South Africa produced two shadow reports on the Convention against Racial Discrimination and six on the Convention Against Torture. On this basis, an external observer in Geneva unfamiliar with our local context would be led to conclude that torture is a more serious issue in South Africa than racism; alternatively, he or she might wonder why so few civil society groupings appear to be active in the area of racism and non-discrimination. The point being made here is that in coordinating its efforts, civil society would, inter alia, consider how resources are allocated and evaluate whether there are significant gaps in their collective reporting activities.

A further issue concerns the relationship between civil society and government. When civil society criticises the government's reporting processes, a common defence is that government is encountering capacity problems. It should be noted that there is sometimes validity to these claims. Reporting is an extensive process requiring a great deal of interdepartmental coordination: although a single department will be tasked with the production of a specific report, in so doing it will have to draw on the assistance of various other departments. At present there is no focal point for human rights reporting in the country. However, were such a thing to become a reality, the Department of Justice and Constitutional Development would appear to be the best suited for playing the role of lead department.

Whatever the case, the broader point to bear in mind is that there ought to be regular and on-going dialogue between government and civil society on these matters. In other words, the need exists for a forum to be established in the interests of greater communication among all stakeholders. This idea is not a new one, but its continuing relevance was impressed on me when I received a complaint from the gay and lesbian community in connection with the position the South African government had adopted at the Human Rights Council. Brazil had proposed a certain resolution and the government, rather than supporting it, asked that the discussion be postponed – a position, so the complainant believed, that put the government in violation of its constitutional obligations. However, the reply I received from the government painted a somewhat different picture. The government's view was that if the resolution were to have been tabled at that time, it would have been defeated; by postponing the vote, the government allowed itself and other like-minded countries the time and opportunity to lobby around the resolution.

The government's position, then, was not unreasonable and it was intriguing to discover that there might be room for much greater interaction between government and civil society even beyond the reporting process itself.

10 CONCLUSION

It is evident that no reporting process can have credibility without the participation of society's other reporting stakeholders. Conversely, where there is no consultation one runs the risk of having two distinct and separate reports that speak very differently to the same situation, but do so on the shaky ground of mutual misapprehension. The shadow report and the country report do – and should – say two different things and, notwithstanding its capacity problems, civil society should pursue this critical dialectic. Nevertheless it should be pragmatic as well as principled in what it chooses to pursue, and the establishment of a governmental-civil society forum would provide the basis both for constructive dialogue and greater coordination in how civil society engages with the international and regional human rights system.