



**Address by Public Protector Adv Thuli Madonsela during Parliament's
Consultative Seminar in Cape Town, Western Cape**

Friday, 16 March 2012

**Chairperson and Speaker of the Free State Provincial Legislature, Hon M B Sesele;
Speaker of the National Assembly, Hon Max Sisulu;
Head of the European Union Delegation to South Africa, HE Ambassador, R van de Geer
Speaker of the Northern Cape Provincial Legislature, Hon J F van Wyk;
Hon Masutha of the Standing Committee on the Auditor General;
Chairperson of the Public Service Commission; Mr B Mthembu;
Acting Chairperson of the Commission for Gender Equality, Dr T Maitse;
Prof Shadrack Gutto from UNISA's Centre for African Renaissance Studies;
Ms P Mbele from Positive Women's Network representing the civil society;
Dr T Hughes representing Institutions of Higher Learning;
Members of the media;
Ladies and gentlemen;**

Ladies and gentlemen

It is an honour and great privilege to participate in this important consultative seminar of the legislative sector of our country. I am sincerely grateful to Parliament for the opportunity.

I am particularly delighted that our legislative sector leadership had the foresight to include a session on the role of Institutions Supporting Constitutional Democracy (ISCD) in facilitating effective and proactive oversight over the executive, in this seminar on strengthening democracy through global collaboration of legislative oversight.

My role is to comment on the paper presented by Adv TM Masutha on the role of ISCD in facilitating effective and proactive oversight over the executive.

ISCD are established under Chapter 9 of the Constitution to strengthen and support constitutional democracy. Section 181 of the Constitution provides the following:

1. *The following state institutions strengthen constitutional democracy in the Republic:*
 - (a) *The Public Protector,*
 - (b) *The South African Human Rights Commission,*

- (c) *The Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities,*
 - (d) *The Commission for Gender Equality,*
 - (e) *The Auditor General,*
 - (f) *The Electoral Commission*
2. *These Institutions are independent and subject only to the Constitution and the law, and must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.*
 3. *Other Organs of State, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness of these institutions.*
 4. *No person may interfere with the functioning of these institutions.*
 5. *These institutions are accountable to the National Assembly and must report their activities and the performance of their functions to the National Assembly at least once a year.*

What immediately struck me about the paper was the fact that it accurately captures the centrality of “*the governance goals of greater transparency, accountability and participation in the legislature’s performance of its primary functions- the legislation (law making), overseeing the executive and representing citizens*”.

The paper further accurately highlights the principal role of the legislature in promoting good governance, a function seen to be performed in collaboration with institutions supporting democracy in contemporary democracies. The paper states that:

“Effective oversight requires members of the Legislature to fully understand the constitutional injunction and rationale behind the notion of accountability of government. Therefore, oversight helps to promote the constitutional values of transparent and accountable government and good governance.”

The central thesis in the paper is the question whether or not legislatures are making full use of ISCD to complement their oversight of the executive through adequate use of briefing opportunities by these institutions.

The conclusion is that there is some utilisation, particularly of the Auditor -General, but the utilisation is not optimal as there are missed opportunities. The justification for the conclusion is that Parliament mostly engages with these institutions through annual reports, an oversight mechanism regarded as reactive and sometimes ineffective. The paper argues that engaging through annual reports does not enable the Legislature to fully utilize the information and knowledge held by these institutions. A point is made that these institutions need not report once a year and may report anytime the Legislature requires them to.

It is my considered view that the paper’s analysis of the utilisation of ISCD by the legislatures to reinforce their own role as the principal oversight bodies is sound. In the context of democracy being a dialogue between citizens as the power givers and those they have entrusted with public power, it makes sense to recognize and fully utilise all levers that enhance that dialogue. It is also important to strengthen synergies between such levers.

The paper correctly points out that there are indeed far more opportunities for synergies and leveraging of the strengths of most of these institutions in favour of enhanced effectiveness in Parliamentary oversight. I will elaborate on this observation further below. I’ve decidedly used

“most” here in recognition of the fact that these institutions are diverse. For example, the Independent Electoral Commission’s work has very little to do with executive oversight.

Something particularly worth noting in the context of a discourse on the role of ISCD is the fact that this paper is one of the few narratives that firmly locates the innovation of ISCD in the modern democracy. Elsewhere I have referred to the paradigm that informs this narrative, which factors in the transformative impact of Chapter 9 of the Constitution as the “After Constitution” paradigm.

The alternative involves narratives whose democracy architecture does not transcend the traditional checks and balances represented by three arms of government that exercise diffused state power in a manner that involves checking and balancing each other.

Elsewhere I’ve referred to this paradigm as “Before Constitution” paradigm. What I seek to communicate is that such thinking continues with ‘business as usual’ as if no change was made when this country adopted a Constitution that incorporates an elaborate institutional framework that adds to and seeks to complement the traditional oversight mechanisms, which primarily include Parliament and the courts. In other words such narratives are stuck in a paradigm that does not factor in the transformational impact of the fundamental architectural adjustments made in 1993 and 1996 when a Constitution that includes Chapter 9 was adopted.

When I am confronted with conduct characteristic of the “Before Constitution” paradigm in my role as the Public Protector I’m often reminded of Alice in Wonderland. I’ve read Alice in Wonderland, you probably recall the situation where Alice is invited to a party but when she gets to the door she has to force her way in and she when looks for space around the table there’s none.

What is really meant by the Before Constitution paradigm is untransformed conduct whose impact is failure to accord legitimate space to ISCD to play a role in the accountability architecture leaving them in an invidious position where they find themselves having to elbow themselves in to create operational space for themselves.

Interestingly, the struggle to find space has not been equally experienced by all of the ISCD. Let us take for example, the Auditor -General, which incidentally is the first and most elaborately discussed in the paper.

Why has the Auditor-General fared better with regard to being embraced by Parliament as a partner complementing and strengthening Parliament’s oversight role over the Executive. One of the key reasons is the fact that the Auditor -General, which is a hundred year old institution predates constitutional democracy in this country. This office was fully entrenched in the country’s democracy architecture long before the post apartheid constitutional dispensation.

Most of the others are innovations of the new constitutional framework and to embrace them fully, requires more thinking and work. This applies even to the South African Human Rights Commission even though the institution deals with the very old issue of fundamental human rights. It is even much more difficult to fully embrace the Public Protector, which is not only 15 years old in our democracy but also a relatively new innovation in the global architecture of democracy. Established about 202 years ago, in Sweden the Public Protector or National Ombudsman as known in Sweden and in global circles is an innovation that has sought to address gaps in the classical checks and balances that seek to curb excesses and deviations in the exercise of public power by those entrusted with it by the citizens.

The Ombudsman institution, which has become mandatory feature in European democracies, operates independently while working closely with the Legislature to help citizens hold those they have entrusted with public power, particularly in the Executive branch of government, accountable for their conduct. The ultimate aim is to ensure that public power is exercised fairly, justly and lawfully. Linked to this is the goal of ensuring that public resources are utilized in accordance with the law and other enabling instruments in the interest of the people as the ultimate beneficiaries and owners. The ultimate result is good governance which yields a better life for citizens, which includes greater enjoyment of all human rights and freedoms.

This brings me to the role of human rights institutions. All of the traditional branches of government have a duty to protect and promote human rights and that the judiciary has traditionally been seen as the anchor of human rights protection, particularly in the era of constitutional democracy. Human Rights institutions are a key feature of modern institutions seeking to strengthen the protection and promotion of human rights. However, the amount of space to be accorded to this institution is still at an elementary stage of our democracy. The diminished emphasis on human rights in the post Mandela era has also not helped issues.

The Commission for Gender Equality has had a rockier journey in finding its place in our democracy, including as a valued partner to Parliament. The reasons are varied and internal dynamics, including governance challenges in this institution have also not helped the situation.

The Commission on Cultural, Religious and Linguistic Rights had a delayed birth, which has impacted negatively on its role. It has also suffered more severe resource constraints than the others.

The Independent Electoral Commission on the other hand has made an indelible independent mark in our democracy. Its role as indicated earlier has less to do with Executive oversight. A partnership with Parliament in this regard is accordingly not part of its mandate.

What opportunities have been missed by Parliament with regard to leveraging the roles of ISCD to strengthen its own oversight role?

We have already heard that through annual reports some dialogue takes place on governance gaps that need to be addressed. However, it has been pointed out that this opportunity is not fully exploited. As Public Protector I can attest to that. When my office delivers its report to Parliament the dialogue is mostly around how our own accountability for the public resources allocated to my office in the year under review.

Among the missed opportunities are opportunities to ask questions about the institution's impact on maladministration and the state of compliance by organs of state within the Executive. Opportunities for picking up areas for law reform have also been missed. Special reports have not at least in the last two years been discussed. At some stage it seemed that the Vembe Pension fund report was going to be discussed but it was withdrawn at the last minute never to be seen again. There are also inadequate joint ventures, including referrals and public outreach. However, there is positive progress in this regard. Examples include increased invitations to ISCD at national provincial and local government levels when legislatures engage communities. There are also a number of collaborative ventures. In so far as the Public Protector is concerned, an increasing number of complaints are lodged by parliamentarians while a few investigations have been initiated through a referral by Parliamentary Committees. Examples in this regard include investigations under the Executive Members' Ethics Act.

There are only two meaningful engagements that Parliament currently has with the Public Protector, namely the strategy presentation and the annual report session.

Can more be done?

It is certainly possible for Parliament to extract more value out of ISCD to strengthen its own oversight role. On the question of ensuring more opportunities for engagement, the Portfolio Committee on Justice and Constitutional Development has acknowledged this. The Committee has called for more opportunities for engagement between Parliament and the Public Protector. The need for more engagement is in line with the view taken by the Kader Asmal Commission although the channel for engagement recommended by Professor Asmal was different.

Another area that is full of possibilities is the area of mutual referrals. In UK even mutual referral with the courts has been considered as a possibility. This emerged in the Law Reform Commission's Access to Justice Report. The interdependences must without doubt be harnessed in the context of respecting the independence and impartiality of each of the institutions involved.

Collaboration in community outreach or public engagements is an important area where Parliament has a potential to leverage the strengths of ISCD to enhance its own oversight role over the Executive. As indicated earlier, there is a fair amount of collaborative work already. Where this has happened optimally, legislatures invite ISCD to public engagement events. During the field work the ISCD provide information about their services and also provide some of those services on the spot. The Public Protector provincial offices have participated regularly in such ventures. The feedback received indicates that communities appreciate these opportunities.

Where there are service protests Legislatures can collaborate with ISCD to ensure where thorough investigations are needed these institutions do so while *Parliament* addresses what needs to and can be resolved immediately. The key factors in this regard are the Petitions Committees. The Public Protector already works with some of these.

What are some of the factors behind the missed opportunities?

One of the key impediments to the realization of the potential value of ISCD to strengthen Parliament's oversight role is what I refer to as the Cinderella location of many ISCD. This is particularly the case with regard to the Public Protector, the South African Human Rights Commission; the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality. One of the reasons it is not possible to engage fully with the outputs of these institutions, particularly the Public Protector and the South African Human Rights Commission, is the location in the Portfolio on Justice and Constitutional Development, which has its own overflowing programme on Justice, State Legal Affairs and Constitutional Development matters.

Another key impediment is lack of shared understanding of the role, power and responsibilities of these institutions. For the Public Protector, one of the challenges that does not seem to get resolved is, what exactly does the Constitution expect from the Public Protector when it directs the Public Protector in section 182(1)(c) to take appropriate remedial action after investigating and reporting on an allegation or suspicion of improper or prejudicial conduct in state affairs or the public administration.

There are those, including a few members of Parliament, who insist that all the Public Protector has to do is make recommendations and walk away. Would this comply with the constitutional injunction to “take appropriate remedial action”? What about the Public Protector Act’s directive that the Public Protector is to resolve and redress allegations of maladministration, abuse of power and abuse of state resources.

In other democracies it is expected that after making a determination (finding in our legislation) the matter is not concluded until the Ombudsman has ensured implementation of remedial action. If all else fails to ensure implementation the Ombudsman requests a Parliamentary debate on his or her special report. At such debate Parliament would ask the organ of state in question what is unreasonable about the findings of the Ombudsman to justify impossibility or inappropriateness of remedying or redressing the consequences of the maladministration determined by the Ombudsman. This practice reinforces the oversight role of the Legislature.

A related impediment is the tendency to view these institutions in uniform terms whereas they are different but complementary. For example, the Auditor -General audits on the basis of sampling cases of compliance with the regulatory framework whereas the Public Protector investigates specific alleged violations, administrative injustices or incidences of maladministration. It is important to note that the Public Protector may and does conduct own initiative and systemic investigations and, in this regard, acts as a catalyst for governance transformation where a need is detected.

Lack of role clarification is important, both in terms of what really is expected by the Constitution from these institutions and in terms of the opportunities available for these institutions. Optimal collaboration with a view to strengthening Parliament’s oversight role requires that shared space be viewed as an issue of complementing each other as opposed to the tendency to view the shared space in competitive terms.

Under resourcing of both Parliamentary structures and ISCD also serves as one of the major impediments.

What are the possibilities?

My recommendation is that Parliament looks closely at the Swedish Model. The Swedish model incorporates a Parliamentary Committee on the Constitution. Institutions such as the Ombudsman are overseen and supported by this Committee. In our context, the Office for ISCD could provide support to the Committee. This office is particularly well positioned to provide support in regard to analysing the reports of ISCD. It can extract trends in terms of maladministration, particularly systemic service failure. It can also isolate systemic issues of ethics violations, governance failure and abuse of power or state resources, including corruption. The office can also extract and advise on recommendations regarding policy and legislation reform.

An ideal way forward is the systematic and managed implementation of the Asmal report with appropriate modifications detected by time and additional perspectives on the findings.

The other weaknesses identified in the discussion on missed opportunities and factors underpinning impediments need to be examined closely and measures taken to address them. This includes review of the funding model to ensure that the institutions receive direct funding as is the case in other democracies.

It also includes resolving the questions around what really is the space accorded to these institutions by the Constitution and how are they to be harnessed to support Parliament's oversight role while supporting their independence and impartiality. At the heart of the question is achieving a common understanding of what the Constitution means when it directs the ISCDs to support and strengthen constitutional democracy. A related question relates to clarifying the unique role of each of these with regard to strengthening constitutional democracy.

Lastly Parliament need not wait until there are holistic structural changes. Many valuable opportunities for leveraging the strengths of ISDs to strengthen Parliament's oversight role can be exploited immediately. This includes the analysis of annual and special reports by the office in the Office of the Speaker. It further includes protocols regarding referral of matters and collaboration in regard to community outreach and/ or community dialogues. It also involves sharing of information and ideas through informal dialogues beyond the presentation of formal reports.

The Public Protector initiated a focus week that was until 2011 referred to as the Public Protector Good Governance Week. The 2011 Good Governance conference which forms part of the standard activities of the focus week resolved that the focus week will forthwith become a collective venture of the oversight sector referred to as the National Good Governance Week. The legislative sector can join in and assume a leadership role in the Good Governance Week initiative. There is also Constitutional Week. Currently constitutional week focuses on courts to the exclusion of Chapter 9. A paradigm shift needs to take place in recognition of the role of ISDs as envisaged in the Constitution. This is in line with what I referred to earlier as an After Constitution paradigm.

Conclusion

While Parliament is indeed harnessing opportunities presented by ISDs to strengthen its own oversight role over the Executive but there are opportunities that are yet to be exploited. An effective exploitation of available opportunities will not only strengthen Parliament's oversight role but will also go a long way towards strengthening and consolidating constitutional democracy.

Guarantees for success include respecting the independence, impartiality and constitutional responsibilities of each institution. They also include appreciating and exploiting the diversity of ISDs. Empowerment through resources and endorsement of findings is also important.