MEANINGFUL PUBLIC PARTICIPATION IN DECISION-MAKING MATTERS: DOES SOUTH AFRICA COMPLY WITH THIS DIRECTIVE OF THE AFRICAN CHARTER?

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Abstract: Public participation in decision-making matters is a relatively new development in sub-Saharan Africa. The African Charter entered into force during 1986, and South Africa acceded to it during 2006. One of the duties of the monitoring body of the African Charter – the African Commission – is to protect the fundamental rights guaranteed by the African Charter. To this end, the African Commission has interpreted the African Charter so as to determine whether violations of the rights guaranteed by it have occurred. When the African Commission was seized to interpret articles 16 (right to heath care) and 24 (right to development) of the African Charter, it explained that these rights place an obligation on member states to facilitate public participation in the decision-making process. However, it is submitted that article 13 of the African Charter pertinently deals with the issue of public participation. This provision states in plain terms that member states must allow the public to directly and effectively participate in the public affairs of government. Article 13 of the African Charter finds expression in several provisions of the Constitution of South Africa. The Constitutional Court of South Africa has had the opportunity to interpret those provisions. These decisions are explored in order to determine the meaning of the concept "meaningful public participation". The author concludes that public participation cannot be meaningfully undertaken without access to information. It is further concluded that South Africa has observed the directives of the African Charter relating to public participation, but the author raises concern about recent developments in Parliament. Parliament allegedly introduced a policy of indirect "censure", ostensibly designed to "discipline" journalists that refuse to disclose the sources of their information. Such a policy may thwart access to information, thus obstructing the purposes sought to be advanced by effective public participation in decision-making matters.

Keywords: accountability, decision-making, democratic, participation, public

INTRODUCTION

States parties that ratify the African Charter on Human and Peoples' Rights ("the African Charter") must respect its terms. To this end, article 18 of the Vienna Convention on the Law of Treaties dictates that nation states that ratify treaties has an obligation to observe the terms of the treaties in good faith. The African Charter entered into force during 1986. With the exception of Morocco, all 53 (fifty three) African nation states have ratified the African Charter. The supervisory body of the African Charter is the African Commission on Human and Peoples' Rights ("African Commission"). The members of the African Commission must promote, protect and interpret the rights guaranteed by the African Charter (Dugard, 2005).

This paper is focussed on the interpretative mandate of the African Commission, more particularly in regard to public participation in decision-making

matters. The author explores the approach followed by the African Commission in regard to public participation in the public affairs of government and considers whether the approach adopted by the Constitutional Court of South Africa ("Constitutional Court") is in conformity therewith. The African Commission has yet to interpret article 13 of the African Charter. It is submitted that such an occasion arose in the *SERAC* decision (discussed in part three below), but the African Commission chose to resolve the issue by relying on different provisions of the African Charter. It is furthermore submitted that article 13 of the African Charter clearly seeks to enhance public participation in the public affairs of member states. The author considers whether South Africa has incorporated provisions in the Constitution that gives effect to article 13 of the African Charter. To facilitate this purpose, the author analyses the provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution") that were designed to support public participation in decision-making matters. Insincere "compliance" with the requirement of public participation should not be condoned by the courts, for this would be conceived by the public as judicial condonation of unjustifiable governmental conduct. In a democracy based on accountability, openness, and the advancement of democratic principles, judges must not be perceived by the public at large as associating themselves with unwarranted government conduct. In the light hereof, this paper considers what meaning the Constitutional Court has attached to the phrase "meaningful or effective public participation" in decision-making matters.

This contribution is divided into five parts. Part one consists of this introduction. The research design and its importance are discussed in part two, followed by a discussion of public participation under the African Charter in part three. The position under the Constitution of the Republic of South Africa, 1996 ("the Constitution") is explored in part four, followed by the conclusion.

RESEARCH DESIGN AND ITS SIGNIFICANCE

This paper consists of a comparative law analysis between the provisions of the African Charter and the Constitution, which were designed to advance public participation in decision-making matters. In order to understand the meaning of this governmental obligation, the author analyses relevant decisions of the two jurisdictions. Since the governmental obligation to facilitate public participation is relatively new in sub-Saharan Africa, and in the absence of relevant case law that gives particular meaning to article 13 of the African Charter, it is apposite to consider how the Constitutional Court has given meaning to this obligation. Despite the fact that the African Commission (or the newly established African Court of Justice) will not be bound thereby, it cannot be disputed that the decisions of the Constitutional Court would have considerable persuasive value in resolving analogous issues at the regional level of human rights protection in Africa (see article 61 of the African Charter). Having disclosed the research design and the significance of this analysis, this paper asks the following main questions: Does the South African government conform to the dictates of the African Charter relating to public participation in the public affairs of government? Would the decision of the African Commission in the *SERAC* decision – regarding public participation – not have been decided on a sound legal basis if article 13 of the African Charter was applied to the facts of the complaint? Can public participation in decision-making matters be effectively exercised if the public does not have access to information? Lastly, is the remedy (declaring legislation unconstitutional) for failure to facilitate public participation, appropriate relief? Differently put, what purpose does such relief seek to achieve?

POSITION UNDER THE AFRICAN CHARTER

The African Commission held in the seminal decision of *Social and Economic Rights Action Centre* (*SERAC) v Nigeria* (2001) ("*SERAC*") that fundamental human rights impose both positive and negative obligations on nation states (see also Liebenberg (2009) pp. 82-87). Negative obligations relate to the duty imposed on member states to *respect* particular fundamental rights. In other words, government must desist or refrain from interfering with the enjoyment of guaranteed rights. Member states may not for instance, enact legislation that allows discrimination on the ground of sex or gender, for in such circumstances they will not have refrained from interfering with the citizens' right to equality (De Wet & Du Plessis, 2010). This obligation does not require governmental expenditure.

Positive obligations, by contrast, consist of the governmental duty to *protect*, to *promote*, and to *fulfil* fundamental rights. The duty to *protect* is fulfilled when government, for example, enacts legislation (and implements policies) to protect its female citizens against unfair discrimination. Member states can comply with their obligation to *fulfil* by, for instance, ensuring that its citizens who need access to housing are provided with adequate housing within a reasonable time, depending on the availability of resources. The duty to *promote* can be implemented by means of awareness campaigns. This implies that, in order to protect, promote, and to fulfil the effective reliance on particular fundamental rights, member states may have to use their financial resources in

order to achieve this purpose (Viljoen ,2007, pp. 239-240). It is submitted that the significance of the *SERAC* decision is that it established a standard of governmental accountability that will ensure that the duties imposed by the African Charter on member states are realised. In the light of the importance of the *SERAC* decision, a brief summary of the facts of the case would be apposite.

The complaint lodged against the military government of Nigeria alleged that the government was a majority shareholder in a consortium formed with Shell Petroleum Development Corporation which was involved in oil exploitation in Ogoniland. These activities were allegedly undertaken without due regard for the health of the local community. Toxic waste was, for example, disposed of into the environment and rivers, which poisoned the soil and water. This reckless behaviour had a crippling effect on the fishing and farming activities of the Ogoni people – thus eliminating an important means for their survival. Moreover, the government withheld information from the Ogoni people about the negative effect these oil exploitation activities had on the environment. More to the point, the Ogoni community was not consulted in regard to decisions taken by the consortium, which decisions had an adverse effect on their environment and social life (*SERAC* decision para 1-4).

Furthermore, the government failed to call upon the oil companies to provide the results of the health and environmental impact studies relating to their harmful operations, despite the evident health and environmental crisis in Ogoniland (*SERAC* decision para 5). In response to the claim lodged by the applicant, the African Commission considered whether the conduct of or failure to act by the Nigerian military government constituted violations of various provisions of the African Charter. However, the applicants in the *SERAC* decision did not deem it necessary to ask the African Commission to determine whether the military government's failure to consult with the affected communities constituted a violation of article 13 of the African Charter. Heyns & Killander (2007) conveniently quote this provision as follows: "(1) Every citizen shall have the right to *participate freely in the government of his country*, either *directly* or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of his country." (p. 32. Emphasis added. Compare the provisions of article 25 of the International Covenant on Civil and Political Rights and note the striking similarities between these provisions).

It is submitted that the emphasised phrases suggest that member states of the African Charter must, in addition to permitting indirect public participation in the democratic process through their elected representatives, also facilitate public participation *directly*, by allowing the public to take part in the decision-making process of government when such decisions could have an adverse impact on society. In the light hereof, it is submitted that this provision was rightfully relevant to the issues faced by the African Commission in the *SERAC* decision. Even so, the African Commission decided instead to resolve these issues while having regard to articles 16 and 24 of the African Charter. Article 16 provides as follows: "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Article 24 of the African Charter reads as follows: "All peoples shall have the right to a general satisfactory environment favourable to their development" (Heyns & Killander, 2007, pp. 32-33).

Referring to article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") which guarantees the right to a healthy environment (which was ratified by Nigeria), the African Commission concluded that the right to development (guaranteed by article 24) and the right to physical and mental health (guaranteed by article 16) "obligate governments to desist from directly threatening the health and environment of their citizens" (*SERAC* decision para 52). Differently put, member states have a duty to *protect* the health and environment of their citizens. The African Commission then proceeded to adopt the following procedural standard, which guarantees public participation in governmental decision-making matters, when it held that governments have a duty of "providing information to those communities exposed to hazardous materials and activities and providing *meaningful opportunities* for individuals *to be heard* and to *participate in the development decisions* affecting their communities" (*SERAC* decision para 53. Emphasis added).

This requirement is pertinent to the discussion in this paper. It cannot be gainsaid that the African Commission interpreted articles 16 and 24 generously and purposively in order to establish the governmental obligation to facilitate public participation in decision-making matters (see also *New Patriotic Party v Inspector-General of Police* where the African Commission also followed a generous and purposive interpretation of fundamental human rights). The veracity of this statement is furthermore borne out by the fact that neither of these provisions explicitly refer to public participation in governmental decision-making. Even so, the African

Commission has not explained what is meant by the phrases highlighted in the quotation above. In other words, what does "meaningful or adequate opportunities for public participation" mean? This issue is considered further when the South African position is discussed below. The Constitutional Court has, on several occasions, had the opportunity to consider the meaning of this phrase. It therefore seems appropriate to consider how the Constitutional Court grappled with a similar obligation placed on the South African government.

POSITION UNDER THE SOUTH AFRICAN CONSTITUTION

The Republic of South Africa acceded to the African Charter on 9 July 1996 (Dugard, 2005). One of the legal consequences of the accession to the African Charter was pointed out by the African Commission in the decision of *Legal Resources Foundation v Zambia* (2001) ("*Legal Resources Foundation*"), when it reasoned that member states have a duty to give effect to the rights guaranteed under the African Charter in national law (para 62). To this end, the Constitution embraces the notion that fundamental rights impose both negative and positive obligations on member states (section 7 of the Constitution provides that government shall "respect, protect, promote, and fulfil" the rights guaranteed in the Constitution).

The provisions in the Constitution that gives effect to the dictates of the *SERAC* decision – more particularly relating to public participation in governmental decision-making matters – are contained in sections 59(1)(a), 72(1)(a), and 118(1)(a). For the sake of convenience, the terms of these provisions are quoted. Section 59(1) relates to the duties imposed on the National Assembly (or Parliament), requiring it to – "(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees". Section 72(1) obligates the National Council of Provinces to – "(a) facilitate public involvement in the legislative and other processes of the Council and its committees". Section 118(1) places the constitutional responsibility on provincial legislatures to – "(a) facilitate public involvement in the legislative and other processes of the legislature and its committees".

The author submits that these provisions comply with the provisions of articles 13 and 24 of the African Charter, as interpreted by the African Commission, and discussed above. Sections 59, 72, and 181 have been designed to ensure that the South African government allows the public access to participate in the decision-making process at all levels of government. In a word, it places a positive duty on the government to ensure that the public has access to the decision-making process at all spheres of government. It follows that the government should desist from creating unnecessary hurdles that would make it unreasonably difficult to enjoy this right. In this manner, these provisions also give effect to the legal principle adopted by the African Commission in the *SERAC* decision. The Constitutional Court was called upon to interpret these provisions in the decisions of *Doctors for Life International v Speaker of the National Assembly* (2006) ("*Doctors for Life*"), *Matatiele Municipality v President of the Republic of South Africa* (2006) ("*Matatiele*"), and *Poverty Alleviation Network v President of the Republic of South Africa* (2010) ("*Poverty Alleviation*").

The Constitutional Court asserted in *Doctors for Life* that political participation through elected representatives is a cornerstone of our democracy, but intimated that that is not where the democratic process comes to an end (para 92). Government must also, thus the Court reasoned, create an enabling environment that allows citizens to participate directly in public affairs "through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisation" (*Doctors for Life* para 99). The Court proceeded to determine whether the government had allowed the public an adequate or a meaningful opportunity to participate in the decision-making process, and held that this issue hinges on the reasonableness of the governmental conduct in each particular case (*Doctors for Life* para 146). In other words, the reasonableness of the governmental conduct depends on the facts of each case: Reasonableness is determined on a case-by-case basis. The Court reasoned that the factors that must be taken into account when determining whether government's conduct is reasonable are, among others, the following: The nature and importance of the legislation and the intensity of its impact on society (para 128). These factors are especially important in determining the reasonableness of the governmental conduct (para 128). Furthermore, the practical issues such as the time and expense incurred, which reflects on the efficiency of the law-making-process, must be considered. However, the Court was quick to point to the fact that the latter two issues do not justify inadequate opportunities for public involvement (*Doctors for Life* para 128). Lastly, the Court reasoned that it must also take into account what Parliament considered to be appropriate public involvement, having regard to the content, significance and urgency of the legislation (*Doctors for Life* para 128). In this case, where the National Council of Provinces admitted that it did not hold public hearings in six out the nine provinces, and that it furthermore failed to invite written representations from the public in several provinces, the court held that the government failed to facilitate public

participation in the decision-making process (*Doctors for Life* decision para 181). The Court consequently declared the legislation unconstitutional (para 195). This reasoning was followed in both the *Matatiele* and *Poverty Alleviation* decisions.

In the *Poverty Alleviation* decision, for instance, public hearings were held at different places, both at national and provincial level to discuss government's proposed constitutional amendment. The challenged legislation had practical and budgetary consequences for a vast area in South Africa. As such, it impacted on the daily lives of citizens in the relevant areas (*Poverty Alleviation* para 27). The importance of having the legislation enacted was therefore obvious. The Minister for Local Government furthermore announced on a government website the intention of government to proceed with the relevant constitutional amendment. A notice was published in the Government Gazette, which prompted the Mass Action Committee to submit written submissions on the proposed Bills. The Chairperson of the Portfolio Committee on Justice thereafter issued a press statement in which she invited the public to make submissions on the proposed Bill. A large number of submissions were received. After deliberating on all the submissions received, the Portfolio Committee did not deem it necessary to hear oral submissions, having formed the point of view that no clarity was required on the submissions. The legal representatives of the applicants were furthermore allowed to address the Portfolio Committee on their behalf. Several public meetings were also held at provincial level. Members of the public were allegedly assaulted at one such meeting. All these factors considered, the Court held that "it is manifest that participation was facilitated ... nor was it contended that the applicants were unable to present their views" (*Poverty Alleviation* para 50).

A final example of meaningful public participation in decision-making matters in the South African context arose with regard to the highly controversial *Protection of State Information Bill*. This Bill was originally tabled in Parliament – but soon withdrawn – during 2008. At that stage, one of the main objections raised against the adoption of this Bill was the absence of a public interest defence, which would protect journalists if they disclosed information with the aim of advancing this legitimate societal interest (see http://www.sabinetlaw.co.za for the historic developments relating to this Bill). Extensive public hearings as to whether the Bill should be adopted were facilitated during 2010. The public expressed their opposition to this Bill by marching to Parliament prior to, and when the African National Congress ("ANC") was about to adopt the Bill on 20 September 2011. Seemingly in response to these public protests and the constantly televised public picketing campaigns against the adoption of this Bill, the ANC Parliamentary Caucus withdrew the Bill, pending further discussions with interest groups, civil society organisations, and individual members of the public (see the website of the office of the ANC Chief Whip at http://www.anc.org.za). The ANC represents the majority in Parliament. Some might argue that, in the light of these developments, the South African public has conveyed a strong message that the right to freedom of expression should be cherished, instead of disproportionately restricted.

To be sure, the government must, on the one hand, protect the public interest in ensuring that national security is not compromised; on the other hand, the right to be informed about the public affairs in one's country is an equally important societal interest that needs to be protected in an open and democratic society, based on the enhancement of human dignity, equality, and freedom (see section 1 of the Constitution, indicating that these values should be accorded much weight when the Constitution is interpreted). This Bill does not strike a delicate balance between the public interest in protecting national security, and the equally important public interest in enhancing freedom of expression. The dominoes-effect that an adoption of this Bill will create in respect of the issue addressed in this contribution is evident: If the public is not informed about the public affairs of government, how will they be able to meaningfully participate in public decision-making matters? The Constitutional Court expressed a similar point of view in the *Doctors for Life* decision (para 92).

CONCLUSION

Is a declaration that legislation – for want of compliance with the public participation threshold – is unconstitutional, an "appropriate" remedy? (See article 27(1) of the African Charter and section 38 of the Constitution). Put in another way, what purpose does such relief seek to achieve? The Constitutional Court was divided on this important issue. The majority of the judges were in favour of declaring the legislation unconstitutional, but a dissenting minority had reservations about the appropriateness of such remedy. The majority opinion seemingly adopted a regulatory approach to remedies, because the declaratory order was clearly aimed at changing the behaviour of government officials in order to ensure future compliance with the provisions of the Constitution (Roach, 1994). On the contrary, some might acceptably argue that the majority opinion adopted a deterrence rationale, since the declaration of unconstitutionality was designed to discipline the government for their failure to facilitate public participation (Roach, 1994).

Despite the fact that South Africa has complied with the directives of the African Charter relating to public participation in decision-making matters by entrenching the relevant provisions into the Constitution, and the apparent purposes which the decision of the Constitutional Court in *Doctors for Life* seek to achieve; recent developments raise a measure of doubt as to whether the objectives sought to be achieved by the majority judgment in the *Doctors for Life* decision have indeed been realized. It recently emerged that Parliament unilaterally adopted a policy document which authorises it to prevent journalists from attending Parliament if they do not adhere to the rules of the policy document. This policy emerged when a journalist refused to disclose the source of his information after he reported on "confidential" matters of the ruling party (see the newspaper article by Kgosana (2011) p. 4). It is suggested that Parliament should, perhaps, be reminded about the following statement made by Chief Justice Ngcobo of the Constitutional Court: "Public access to Parliament is a fundamental part of public involvement in the law-making process" (*Doctors for Life* decision para 137). Put in another way, forbidding journalists (whose primary function in a democratic society is to inform the public about the public affairs of government which information politicians, every so often, wish to withhold) access to Parliament, is practically the same as denying public participation in the decision-making process. Moreover, it is highly unlikely that this policy would survive constitutional muster (see Currie & de Waal (2005) 163-188; also *S v Makwanyane*).

The author concludes that the *SERAC* decision – regarding public participation in the public affairs of government – would have been decided on a sound legal basis if article 13 of the African Charter were applied to the facts of the complaint. As pointed out before, this provision allows indirect public participation in the democratic process by obligating member states to facilitate free and fair elections; however, it also establishes the governmental obligation to facilitate public participation *directly*, by making it possible for the public to take part in the public decision-making process of government, particularly when such decisions could have an adverse impact on society.

As a final point, this paper also highlights the fact that the right to freedom of expression and public participation in decision-making matters are intrinsically connected. The public can only meaningfully participate in the public affairs of government if they have access to the necessary information. Public participation in decision-making matters has the inherent virtue of eliminating any possible justification to oppose government decisions through undemocratic means. During November 1962 Dr Nelson Mandela eloquently expressed this point of view as follows before he was sentenced for inciting workers to strike, and leaving South Africa illegally: "That the will of the people is the basis of the authority of government is a principle universally acknowledged as sacred throughout the civilised world, and constitutes the basic foundations of freedom and justice. It is understandable why citizens, who have the vote as well as the right to direct representation in the country's governing bodies, should be morally and legally bound by the laws governing the country" (Mandela (2011) p. 77).

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