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Amend laws to help civil society challenge poor governance in SOEs



PhD graduand Julieth Gudo.

Photo: Lerato Maduna

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Refinements and amendments to specific laws will place civil society organisations (CSOs) in a much stronger position to challenge poor corporate governance in state-owned enterprises (SOEs), said PhD graduand Julieth Gudo. Julieth will graduate from the University of Cape Town's (UCT) Faculty of Law this month.

CSOs have been key in confronting the dismal governance record of SOEs – most have failed or are teetering on the brink of disaster, with severe implications for public services, said Julieth.

Their abuses of power, coupled with the evidence of massive corruption within these behemoths, have led to a public outcry. However, in her doctoral thesis Julieth shows how an enabled legal environment could be a game changer for demanding accountability and transparency.

Roles undefined in law and literature

The problem lies with the fact that the role of CSOs in challenging SOEs is undefined in law and literature. This must change, she said. A stronger legal framework is essential.

“Uncertainty has created an unsatisfying legal environment for CSOs, and a strained relationship between themselves and government.”

Speedy and effective amendment of existing law and the introduction of new legal provisions can close legal loopholes and give CSOs “express authority” to confront SOEs that are badly governed.

“It’s also critical to enforce these laws so that those responsible are held accountable,” said Julieth. Her thesis details existing provisions CSOs use, identifies the loopholes in these provisions, and lists measures that CSOs use currently to demand accountability.

CSOs use several legal provisions to seek accountability, the choice depending on the entity under scrutiny. The most common provisions include sections of the Constitution (Section 38 and 8(2)); the Companies Act (Section 26); the Promotion of Access to Information Act; the Promotion of Administrative Justice Act; the Prevention and Combating of Corrupt Activities Act of 2004; the Protected Disclosures Act of 2000; and Judicial Reviews.

Although well written, most have loopholes and need to be amended urgently, she said.

“Closing these gaps would contribute significantly to creating an enabling environment for CSOs.”

Julieth’s thesis lists examples of some of the provisions used and the problems attached. These include:

Provision: Section 37 – Promotion of Access to Information Act 2 of 2000. Protection of confidential information of third parties. **Problem:** State officials have room to refuse to provide information about a third party required by CSOs for their work, where a third party was involved with government.

Provision: Section 10 – National Key Points Act 1980. Limits, prohibits and criminalises access to certain National Key Point Infrastructure. **Problem:** This presents obstacles to journalists wanting to do work on National Key Points, which may be part of a corruption case.

Provision: Public Audit Amendment Bill. This is to allow the Auditor-General to take remedial action and investigate state corruption. **Problem:** The Bill is taking too long to become law.

Provision: Chapter 3 – Non-Profit Organisations Act of 1998. Registration of Non-Profit Organisations. **Problem:** The NPO Act virtually forces CSOs to register as NPOs, resulting in CSOs not carrying out their mandate freely or independently.

Provision: Sections 84–94 – Companies Act of 2008. Enhanced accountability and transparency. **Problem:** The corporate governance provisions in the Act are geared more towards the regulation of private companies and less towards SOEs, which are unique in nature. The Act does not define corporate governance.

Julieth hopes her research will serve as a guide to lawmakers. Poor governance and corruption at SOEs are not only South African problems, she added. The malaise affects state entities across the world, because of the problems associated with state ownership.

However, the situation in developing countries is dire. But with the right legal framework, South Africa could be a leader in the fight.

“When it comes to Africa, South Africa has a flexible media, and citizen representative agents such as CSOs which operate in a less hostile environment than in other African states. They can expose corruption and poor governance.”

Story by Helen Swingler

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