



**Remarks by Professor Kader Asmal, M.P., Chairperson of the *ad hoc* Committee at the launch of the Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated institutions at the Good Hope Building, Parliament, on Tuesday, 21 August 2007**

I am honoured and delighted today to present to you the “Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions”. The report is the culmination of an intensive, illuminating and exhilarating process carried out over the past eleven months.

I believe that the Committee has produced a report that is as honest, fair-minded and sincere as our combined talents and wisdom and the information at our disposal, would permit. This review process indeed signals the self-confidence and vibrancy of our democracy. We did not set out to identify some decay or mischief that needed fixing, although the latter may appear to be a far more attractive conclusion – particularly for media headlines.

The fact our Parliament would embark on such a review, initiated by none other than the Executive, itself demonstrates that we collectively care about our constitutional democracy and the rights of especially marginalised and vulnerable people in South Africa. Ten years after the adoption of the final Constitution the Executive had the foresight and confidence to initiate the process for this review to establish whether the institutions were fulfilling their function as envisaged in the Constitution adequately.

In order not to create the perception that the independence of the institutions was being compromised and since the Constitution makes most of the institutions reviewed accountable to the National Assembly, the Assembly rightly took over the review. It established a 10 member multi-party Committee (with 5 members of the ruling party and 5 members drawn of opposition parties). We were required to review the institutions based on terms of reference adopted by the Assembly and to report to the Assembly on our findings and recommendations. Based on the terms of reference, foremost in our minds were questions about:

- (1) the effectiveness and efficiency of the institutions;

(2) whether the National Assembly played a sufficiently robust oversight role over the institutions; and

(3) whether the institutions were fulfilling their Constitutional and legal mandates.

It is a curious fact that a number of the institutions under review found their way into the 1993 and/or 1996 Constitutions not through some over-arching design or consistent plan, but because of the peculiarities of the negotiating process and the influence of various lobby groups. But this does not mean that there were not very good reasons – endorsed by the drafters of the Constitution – for including provisions for the establishment of institutions to safeguard and deepen democracy and promote human rights.

The apartheid state had displayed a profound disrespect for the human rights of its citizens and had failed to honour even the most basic tenets of the rule of law, and it was necessary to create a set of credibly independent institutions whose task it would become to strengthen constitutional democracy by assisting to: (1) restore the credibility of the state and its institutions in the eyes of the majority of its citizens; (2) ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation; (3) ensure the successful establishment of and continued respect for the rule of law; and (4) guarantee that the state became more open and responsive to the needs of its citizens and more respectful of their rights.

Our research has shown that apart from the Chapter 9 and associated institutions identified in this review, there are at least 18 other bodies that Parliament in some way or another appoints. This is an extraordinary fact for Parliament, which sits for approximately 131 days a year, has to be involved in one form or another, over such a large group.

From the outset the Committee agreed that the institutions under review played a vital role in our constitutional democracy. We also noted with pride that South Africa was a world leader when it provided for the establishment of some of these institutions in its Constitution back in 1994.

Our leaders in Africa have echoed the importance of such countervailing bodies in strengthening democracy. Recently the Heads of States of the African Union adopted the African Charter on Democracy, Elections and Governance at its Eighth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 30 January 2007. Article 15 of the Charter places an obligation on African States (1) to establish public institutions that promote and support democracy and constitutional order; (2) to ensure that the independence or autonomy of the said institutions is guaranteed by the constitution; (3) to ensure that these institutions are accountable to competent national organs; and (4) to provide the above-mentioned institutions with resources

to perform their assigned missions efficiently and effectively. These provisions are very similar to those contained in our Constitution.

Already three of our institutions under review are in great demand internationally because there is recognition and appreciation of their independence and effectiveness. The Electoral Commission, for example, is highly respected for its electoral work and professionalism. It plays a vital role in other parts of Africa to help enhance democracy. Similarly, the South African Human Rights Commission is clearly respected far beyond the borders of South Africa and is often asked to advise and assist other countries with their processes of deepening respect for human rights. The Auditor-General has been contracted to major multilateral bodies such as the United Nations to provide audit services.

The Committee approached its work with the deep acknowledgement of the important role of such countervailing bodies – not so much for the immediate future – but for generations to come. Not everybody likes totally independent bodies – even in very established democracies there is a tendency to trim the independence of such bodies or to control them in one form or another. In the USA for example, all such federal bodies are appointed by the President. So, these bodies may not always be very popular, but we believe that they are essential.

The Committee felt strongly that the aim of the review would be to try and assist and enhance the work done by the institutions in order to improve their effectiveness, which would assist the institutions to better serve the public. This was done within the context of the independence of the institutions.

But, of course, this does not mean that the Committee shirked from its task to ask the thorny questions and to confront the difficulties and problems experienced by some of these institutions head-on. Displaying an ostrich-like mentality would have done a disservice to these institutions and to the South African public at large and would have reflected badly on the confidence of Parliament to conduct this review.

Not everyone will, of course, agree with all the findings and the recommendations contained in the Report, and some might even be upset by aspects of the Report they might view as unfair or unwise. In this regard I can only emphasise that this Report was adopted unanimously by the Committee and that it represents a sincere effort made in good faith to contribute to deepening democracy and the further enhancement of a human rights culture in South Africa. A fair reading of the Report will, I believe, confirm that the Committee had no particular axe to grind.

Arguably the most far-reaching and dramatic findings and recommendations of the Committee centre around the Committee's realisation that the proliferation of bodies promoting and protecting human rights diminishes, rather than enhances, the effectiveness of these bodies.

As South Africa's Constitutional Court has pointed out on several occasions, human rights are interdependent and indivisible. The creation of separate bodies to deal with the promotion and protection of human rights, the rights of women and the rights of linguistic or religious or cultural communities, inadvertently has led to inefficiency and confusion and failed to serve optimally the needs of the public and of our democracy as a whole.

A danger exists that individual complainants would not know to which body to turn for assistance and that such an individual could easily be disheartened if referred on from one body to another. We therefore came to the difficult but ultimately correct conclusion that in the long term the establishment of a single body will better protect and promote not only human rights in general, but also the rights of women of linguistic & cultural communities and all other marginalised groups in our society such as people with disabilities and children.

A single human rights body would also be better placed to deal specifically with issues related to the promotion of access to information and rights in terms of the equality legislation.

Moreover this arrangement would be more cost effective, while allowing for such a body to address the human rights needs of all in a more comprehensive, cohesive and holistic manner. A single body will also be more accessible to especially the poor and the marginalised members. We strongly believe such a new body should focus a significant amount of its energy and resources on assisting especially poor and marginalised individuals with accessing and enforcing their rights.

The Committee is further of the opinion that some of the institutions under review have played a unique and vital role and that it is essential that their position continues to be constitutionally entrenched, and their independence be respected. Ours is not a quest for uniformity and homogeneity – rather we accepted the fact that several institutions had to retain their character and function, but with some improvements of institutional governance arrangements and so on, to serve South Africa and its people better. These included the Electoral Commission, the Public Protector, the Auditor-General, the Financial and Fiscal Commission and the Public Service Commission.

However, we noted that there were serious discrepancies in the nature of appointment of the leadership of these institutions and in the number of members serving in each of these institutions. We therefore recommended processes to streamline the appointments procedures to re-establish the central role of the National Assembly and agreed that these differences could not always be justified. We have therefore recommended that the number of Commissioners for some of these bodies be reduced, while we have also recommended that more

Commissioners should be appointed to the South African Human Rights Commission, which functions with only five full time commissioners at present.

It is important to note that the Committee endorsed the views expressed by the Constitutional Court regarding the nature of the independence of the Chapter 9 institutions. This view of their independence is not rigid and does not apply uniformly to all bodies, but it does establish principles that would safeguard institutions to allow them to do their work without fear favour or prejudice. In this regard we reiterated that these institutions are *not* part of the government and do not have a duty in terms of section 41 of the Constitution to be part of the mechanisms of co-operative government.

We also note that the Constitution allocates an important role for the National Assembly to hold these institutions to account. In a surprising but delightful development, almost all the institutions under review expressed the view that the National Assembly should play a more active role in this regard and that there should be more engagement between institutions and the National Assembly.

Many of the recommendations made in the Report attempt to give effect to this wish. The Committee's recommendations in this regard can be seen as an attempt to enhance the oversight role of the National Assembly in recognition of its important Constitutional role in relation to these institutions.

In particular, we draw attention for the urgent need to establish a special Unit in the Office of the Speaker to assist in effective liaison between Parliament and these bodies. In the Committee's view, there is no such orderly liaison; on the contrary, contact is haphazard, erratic and often not very productive.

During the many hours of work and deliberation, the Committee came across some innovative and important programmes and initiatives of the various bodies under review. We were often surprised by the excellent work done by some of the institutions but were also puzzled that these initiatives were not generally known.

Doing good in secret is little use, because the very people who might benefit from such programmes may not know about them. We therefore feel strongly that institutions can and should do more to inform the public of their services and activities. This should happen not only through the press (which in this case should be the ally of the institutions) but also through the creative distribution of materials and information including through the use of infrastructure already established through government initiatives. Two examples of these, mentioned in our report are the Thusong community centres and the Community Development Workers.

The Committee was surprised to discover that there seems to be some confusion – among Commissioners and members of civil society – about the appropriate

constitutional and legal powers and mandates of the Chapter 9 and related bodies. For example, some suggested that bodies like the South African Human Rights Commission and the Commission for Gender Equality should take on a more active adjudicative role. But these bodies are not courts of law and they cannot usurp judicial functions vested in the judiciary from which these bodies are kept distinctly separate in the Constitution.

In any event, such enhanced powers are unnecessary because many of these bodies already have more than adequate legal powers to investigate and ultimately to take cases to court in their own name or on behalf of others. Unfortunately some institutions like the Commission for Gender Equality have failed to use these powers fully in a way that would assist the most vulnerable and marginalised in our society. The Report also notes that the National Youth Commission consistently failed to correctly interpret its legal mandate and chose to focus their efforts very narrowly, thus severely curtailing its efficiency and effectiveness.

The Committee was therefore concerned not with increasing the powers of these bodies, but rather that the bodies do not use the existing mechanisms to ensure that they exercise their powers fully.

Many of the institutions under review do not at present perform to the best of their ability or capacity. We report on this more in sorrow rather in anger but also make a long list of recommendations to try and assist these institutions to fulfill their Constitutional and legal mandates.

The Committee received a number of submissions from non-governmental organisations. An outstanding example was one which dealt with the operation of the Promotion of Access to Information Act. The Committee was able to establish that the Act was not really operating as the legislature had intended. Also, appeals to the courts to challenge decisions denying access to information undermine the effectiveness of the legislation. The Committee has therefore made an important recommendation to ensure more effective implementation of this valuable legislation.

Because the central recommendation on the establishment of a single human rights body would entail complicated negotiations and would thus not be implemented immediately, we also provide specific recommendations that would enhance the effectiveness and relevance of institutions in their current formulation. This included updating legislation in at least two cases. The legislation of the Human Rights Commission and the Commission for Gender Equality is out of date and we therefore recommend immediate changes to the legislation – the National Assembly should pay particular attention to such recommendations.

We note that not a great deal of active co-operation occurs between these bodies. We therefore also make strong recommendations about re-establishment of formal co-operation between the bodies under review.

Independent institutions established across the world to deepen democracy and to promote and protect human rights are not always, to put it mildly, universally celebrated and enthusiastically supported by those in positions of power. They are, however, an essential countervailing force in any democracy – as recognised by the African Charter on Democracy, Elections and Governance.

Endorsing and promoting the need for such institutions does not imply distrust of the other branches of government – just like the adoption of a justifiable Bill of Rights does not imply distrust in the Legislature or the Executive. These institutions should be part of the democratic firmament of any vibrant and self-confident society and when they act with wisdom and passion, within the confines of their mandates, but always aware of the need to deepen democracy and promote and protect human rights, they are in effect supporting the other branches of government in upholding the Constitution and fulfilling their other tasks.

The members of the Committee therefore call on all political parties to engage with this report in a serious and considered manner, to debate vigorously the findings and recommendations of the Report and ultimately to deal with the recommendations in a manner that would help to deepen democracy and protect and promote human rights, not only for the immediate future but also for a future to be lived by our children and our children's children.

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