



Contents

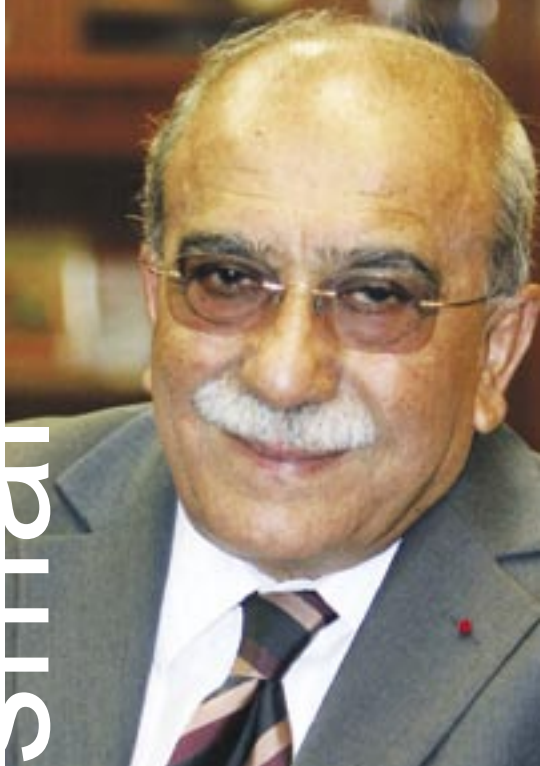
- 2 PROFILES
- 5 INTRODUCTION
- 8 KADER ASMAL
Member of Parliament
- 14 RAENETTE TALJAARD
Director of the Helen Suzman Foundation
- 16 DR MCEBISI NDLETYANA
Senior research specialist in the Democracy and Governance research programme at the Human Sciences Research Council (HSRC).
- 20 PERRAN HAHNDIEK
Researcher at the Political Information and Monitoring Service (PIMS) at the Institute for Democracy in South Africa (IDASA).
- 24 JODY KOLLAPEN
Chairperson of the South African Human Rights Commission (SAHRC).
- 36 QUESTIONS & ANSWERS
- 42 MEDIA COVERAGE
- 44 RELEVANT ARTICLES

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IRISH

Kader Asmal

Kader Asmal has been a Member of Parliament in the National Assembly since 1994.

He is a former Minister of Education (1999 – 2004), Minister of Water Affairs in the Mandela Government (1994 – 1999), Chairperson of the Cabinet's National Conventional Arms Control Committee (1995 – 2004) and chair of the Portfolio Committee on Defence in the National Assembly (2004 – 2005).

He was President of the Financial Action Task Force for 2005 – 2006 and was chairman of the Intergovernmental Committee of Experts at UNESCO, negotiating the draft for Convention on Cultural Diversity during 2004 – 2005.

He was born in Dukuza (Stanger) KwaZulu Natal, 'educated' at the Stanger 'Indian' Secondary School and the Springfield Teachers' Training College for a teacher's diploma. He has studied at UNISA (BA), London School of Economics (London University, LL.M where he was a law scholar) and King's Inns, Dublin and Lincoln's Inn, London (barrister-at-law) and is an advocate of the High Court of South Africa.

He was a school teacher from 1955 to 1959 in Natal and taught at Trinity College Dublin from 1963 to 1980 (and Dean of the Faculty of Humanities 1980 – 1986) when he returned to South Africa as visiting professor in law at the University of the Western Cape and in 1994

was appointed as Professor in the university. He has been a visiting professor at Princeton and Rutgers Universities in the US and Christ's College, Cambridge.

Professor Asmal was a founder member of the British Anti-Apartheid Movement in 1960, founder and chairperson of the Irish Anti-Apartheid Movement, 1964 to 1990, rapporteur of UN International conferences on apartheid, Havana: 1976, Lagos: 1977, and Paris: 1986. He was a founder and chairperson of the Irish Council for Civil Liberties from 1976 to 1991 and legal advisor to the South African non-racial Olympic Committee.

He was an ANC delegate to the Convention for a Democratic South Africa (Codesa) in 1992 and a member of the African National Congress' negotiating team at the Multi-Party Negotiating Forum, 1993 and a founder member of the ANC's Constitutional Committee in 1986. He has been a member of the Nation Executive Committee of the ANC since 1991.

He has participated in a number of international committees of enquiry on human rights, decolonisation and on Ireland. He was vice-president of the World Commission on the Oceans (1995 – 1998) and chairperson of the World Commissions on Dams (1997 – 2001). He has been a Patron of the Global Water Partnership since 1995.

He has been awarded seven honorary degrees by universities in Ireland and South Africa and is Honorary Fellow of the London School of Economics and the Colleges of Medicine of South Africa.

He was awarded the Prix UNESCO for human rights in 1983 and the Stockholm Water Prize in 2000 and numerous other awards, including the Gold Medal of the World Wide Fund for Nature – SA, for conservation (1996). In 2005, he was made an officer of the Order of the Légion d'honneur by President Chirac.

He has written or co-edited eight books, written nearly 40 chapters in books, 60 articles on apartheid, decolonisation, Ireland, labour law and the environment and 26 of his lectures have been published.

He is married to Louise Asmal and they have two sons and two grandchildren.



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Mcebisi Ndletyana

Dr Mcebisi Ndletyana is a senior research specialist in the Democracy and Governance Research Programme. He holds a PhD in political science from the University of the Witwatersrand.

Before joining the HSRC in 2005, he taught at universities in the US, including the City University of New York and the State University of New York. He has also worked as a researcher for the Johannesburg-based Centre for Policy Studies and the Steve Biko Foundation, focusing on the formulation and implementation of public policy by the post-apartheid state, improving the efficacy of the committee system in new provincial legislatures, the political status of youth in the post-apartheid South Africa, and on understanding the role of political leadership in political transition.

His research interest is in the evolution of modernity in South Africa, particularly in documenting the reaction of the indigenous populations towards the so-called civilizing mission, the initial debates among African intellectuals over the meaning of modernity and its implication on African identity and culture, and the role played by African intellectuals in moulding the emerging political institutions and encouraging electoral participation among African voters in the late 19th to early 20th century.

Dr Ndletyana has published numerous papers on a range of subjects. He is a regular contributor of articles to various newspapers.



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Perran Hahndiek

Perran Hahndiek is a researcher at the Political Information and Monitoring Service (PIMS) at the Institute for Democracy in South Africa (IDASA). He studied governance and political science at the University of Cape Town (UCT) and, before joining IDASA, worked at the Centre for the Study of Violence and Reconciliation (CSVR).

Perran has a particular interest in institutional development, specifically accountability systems and public sector ethics in South Africa, and has contributed to a number of projects and publications on these subjects. He has recently completed a research paper on the functioning and performance of South Africa's institutions supporting constitutional democracy, established in Chapter Nine of the Constitution, and their relationship with the National Legislature.



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Jody Kollapen

Mr Jody Kollapen is the Chairperson of the South African Human Rights Commission (SAHRC), a constitutional body set up in terms of Chapter 9 the South African Constitution to protect and promote human rights. He was appointed by President Mandela on the recommendation of Parliament and reappointed for second term by President Mbeki.

He has a B.Proc degree and LLB degree from Wits. He practiced law in Pretoria, South Africa from 1981 to 1992 focusing on public interest law, representing a number of persons prosecuted in terms of apartheid laws. His involvement included the Delmas Treason Trial, the Biko doctors case and the Sharpeville six. All these cases sought to positively impact on the enforcement of human rights. He joined Lawyers for Human Rights, a leading human rights NGO in 1992 and served, as its National Director from 1994 until 1995.

He was requested by President Mandela to be part of a panel entrusted with the task of interviewing and making recommendations on persons to be appointed to the Truth and Reconciliation Commission (TAC).

He is presently chairperson of the Equality Review Committee, and currently serves on the boards of national and international human rights bodies, including the Legal Resources Centre and the Human Rights Foundations. He has spoken and written extensively on human rights issues and constitutionalism.



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Raenette Taljaard

Raenette Taljaard is the director of The Helen Suzman Foundation. Taljaard, a former DA MP, served as Shadow Minister of Finance from 2002 and was a member of the Portfolio Committee on Finance. She also served on numerous other parliamentary committees, including the Standing Committee on Public Accounts during the arms deal investigation.

Taljaard lectures part-time at the University of the Witwatersrand's School of Public and Development Management and locally and abroad on the regulation of private military and security companies.

Taljaard is a Yale World Fellow, a Fellow of the Emerging Leaders Programme of the Centre for Leadership and Public Values (UCT's Graduate School of Business and Duke University) and a Young Global Leader of the World Economic Forum.

Taljaard holds a BA in Law, RAU (University of Johannesburg), a BA (Hons) in Political Science, cum laude, RAU (University of Johannesburg), an MA in Political Science, cum laude, RAU (University of Johannesburg) and an MSc in Public Administration and Public Policy, cum laude, London School of Economics and Political Science.

Taljaard publishes widely.



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promoting liberal constitutional
democracy and human rights

Chapter Nines – Review, Reform or Reduction?

Introduction

The Helen Suzman Foundation launched its Annual Quarterly Roundtable Series in 2006 aimed at stimulating debate on issues relevant to the future of democracy in South Africa and to explore matters related to politics and governance of South Africa.

This Roundtable on the Review of Chapter Nine Institutions, currently in progress under the auspices of a parliamentary Ad Hoc Committee on the Review of State Institutions Supporting Constitutional Democracy and the Public Service Commission chaired by Prof. Kader Asmal, MP, was convened to ensure that there would be adequate and additional public spaces to further a societal discourse about the Chapter Nine institutions, their constitutional role, performance since their respective establishment, institutional strengths and weaknesses.

With the review process firmly ensconced where it belongs – in Parliament – these material questions need to be answered to strengthen the independence of these structures, build strong bridges between these bodies and civil society, create a clear link between the recommendations these structures make and implementation by government and, finally entrusting Parliament with a renewed sense of commitment to create a strong and robust but adequately respectful accountability architecture

Parliament's review of Chapter Nine and other bodies must strengthen these institutions and enhance their accountability.

to the House for these constitutionally mandated and protected entities.

This Review process itself touches on a broad range of issues that emanate from South Africa's transition to democracy in the early 1990's. It addresses the performance of the various bodies set up in terms of the Constitutional and national law in their respective tenures to date as well as specific institutional questions that relate to their operational independence, budgetary procedures, relationships with Parliament as well as their appointment procedures and various related matters.

This review is one of the most significant Constitutional developments since the adoption of the final constitution in 1996 and the mandate of the Committee is cast relatively broadly:

- (1) Committee to review State Institutions Supporting Constitutional Democracy as listed in chapter 9 of the Constitution as well as the Public Service Commission as established in chapter 10 of the Constitution, for the purpose of –

introduction

Three of five panelists who participated in this Roundtable were (from left to right): Raenette Taljaard, Kader Asmal and Perran Handiek,

- (a) assessing whether the current and intended Constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a rationalisation of function, role organisation is desirable or will diminish the focus on important areas;
 - (b) reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;
 - (c) reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;
 - (d) improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;
 - (e) recognizing the need for a more structured oversight role by Parliament in the context of their independence;
 - (f) and reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency;
- (2) the Committee to conduct its review also with reference to other organs of state of a similar nature whose work is closely related to the work of institutions.
- (3) the Committee may exercise those powers in Rule 138 that may assist it in carrying out its task; and



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- (4) the Committee to report by not later than 30 June 2007.

There is considerable variation in the Constitution with respect to some of the founding provisions applicable to the various structures under review before the House.

As Prof. Asmal observed at the Roundtable the founding fathers and mothers of our constitutional democracy did not create these bodies in a systematic fashion:

“Except that they did not do it systematically, by the way. Why is PANSALB in section 1 of the constitution in Chapter one? Why are we now having big debates as to whether ICASA is a Chapter Nine body or not because ICASA is not one of the six bodies identified there. Interesting point, though, but we don't have legal consistency.”

The Helen Suzman Foundation has made specific submissions and recommendations to this Review.

We trust that not only the Review itself will enjoy broad public support and vigorous and robust engagement, but that the Committee's recommendations will receive the attention they deserve in the months and years ahead as a degree of reform appears inevitable.

It is the hope of the Helen Suzman Foundation that these institutions will emerge stronger and in greater service of South Africa's democracy at the end of this process.

by Raenette Taljaard

Kader Asmal

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Over the last 18 months the executive has been thinking about this matter and referred it to parliament to conduct a review.

Kader Asmal

Why are we reviewing the Chapter Nine institutions and other bodies? Well, I think it's a new and an exceptionally South African matter. We have these core six, plus other bodies that are in fact, enshrined in the Constitution. No other country that I know of has that. But this is not all. These six bodies are described as bodies in support of constitutional democracy. But in effect we're looking at 11 bodies. Parliament decided to set up this review of these 11 bodies, and it was in fact largely as a result of the fact that over the last 18 months the executive has been thinking about this matter. Since I'm not someone who supports obscurities and evasions, the executive referred the matter to parliament on the basis that parliament is an appropriate body to conduct such a review.

Not all these bodies are accountable to parliament. I'll come to that. So, there are six bodies referred to in Chapter 9 that are bodies in support of constitutional democracy I mention this because there are problems that we're going to face as we conduct this review. The six bodies that are state institutions that support the pursuit of democracy are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic

Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. As you know, they perform very different functions by definition. Added to this we have the Public Service Commission, which is a Chapter 10 institution, the Financial and Fiscal Commission, which is a Chapter 13 institution, the Pan South African Language Board, which is a Chapter 1 institution, and then, finally, our own cherry on the top, the Youth Commission.

The Youth Commission is not mentioned in the Constitution at all. It is an addendum, which came the following year. These institutions stand in contrast to the Chapter Nine institutions that have great detail in terms of how they should be appointed, how they should be dismissed and regulated etcetera.

Our Review Committee was appointed in September. We sent out a questionnaire containing 25 questions to all these bodies. We wrote to 150 non-governmental organisations or civil society bodies. We wrote to ministers who have contact, one way or another, with these bodies and we asked for responses. The responses came more in dribs than in drabs, by December and January. And we're going through the responses. Between the end of January

and now we've had bilateral encounters or meetings with nine of the 11 bodies for three hours, five hours sometimes, where we have gone through their responses with reference to our terms of reference. Our terms of reference are very important and we should not look at them in isolation.

The two outstanding bodies are the Human Rights Commission and the Auditor-General. We only had one encounter with non-governmental organisations and we have another one on Wednesday this week.

Now, Raenette, with her usual intellectual persistence, said can I draw some conclusions? Well I can't draw any conclusions. I've been trying to get the committee to say we'll start drawing the conclusions when we're finished with this and other encounters. We looked at the position of other countries, which have merged large number of bodies into one. All I can say is

We looked at the position of other countries, which have merged large numbers of bodies into one.

what has come out of the process so far, but they're not conclusions. First of all, things are never what they appear to be. That's a first conclusion and that applies to submissions by non-governmental organisations and by ministers. The position is very different from what we're told in general because you delve deeper as the review process progresses.

The surprising thing is that we wrote to all the law faculties in South Africa because everyone now is a constitutional expert. We haven't received a single response and it is two and half months later. I was prepared to accept late responses also. The silence of the academics unfortunately relates



Asma Kader



to some very important constitutional developments. It's frightening, in relation to portfolio committees, for example, how few submissions are made. Political scientists haven't done much research. What they mean by research is, can they get money from some foundation or other and then write a report? That's what they call research. But the idea of delving deep and sharply and coming to conclusions, without being paid for it by a foundation, is a matter of academic exercise for its

We must uphold the honour and dignity of these bodies.

own sake, is, in fact, in support of our democratic order. The more invigilation there is, the more investigation there is, the more oversight there is. Our review cannot interfere with the constitution's sense of the day to day running of specifically Chapter Nine bodies. We must uphold the honour and dignity of these bodies. As Chair, I have been trying to do that at our hearings and particularly from the point of view of our committee's questions posed to those bodies. Our review function, furthermore, is to ask whether these bodies are doing the work they were set up to do, given that our country has changed in 14 years. Are

they, for example, in fact cost-effective, which is very important? We spend billions on them. Most of the money is devoted to the Electoral Commission and the Auditor-General. So, the first question is are things as they ought to be? Secondly, it's extraordinary how the consensus emerges to determine the budgets of these structures. In a very important submission the National Treasury has said, "but constitutionally it's necessary for parliament to determine the budgets".

There's enormous variation across these structures. Again I say things are never as they appear to be because we asked each one of the bodies, "tell us how your budget is determined and the role of the department or parliament in the process". The problem is how is parliament going to determine the budget? One of the bodies, for example, says the budget we submit should be the budget that we receive. So the first thing is, parliament should determine the budget, which is wonderful. But parliament doesn't seem to determine its own budget at moment. How's it going to determine the budgets of these 11 bodies? I should mention, by the way, altogether there are 29 bodies that parliament establishes. We established in our own research that there are 29 bodies which the NCOP or National Assembly appoints, a very little known fact.

And so, secondly, it's quite clear that there's an enormous unmet need in South Africa for assistance – a need we hoped to fill through these structures.

I'd like to share a personal experience. This morning I received a letter from an 85-year-old white woman who can't access her social old-age pension. I must have received about 200 letters in the last six months. A one-page letter, a 25-page letter, against attorneys, building societies, complaints against estate agents – well that's predictable – but seriously, consumer protection matters and various others. It's remarkable. One of the things we will discuss is the need for a one-stop body, a one-stop place in every major town as nearly every one of these bodies, has provincial and some of them have regional offices. And of course, as you know, the very important document, which you haven't read, is a social survey published by the government last year.

Fifty percent of the people canvassed had never heard of the ... Human Rights Commission and the Public Protector.

The figures in this survey are very honest figures too because I believe they have relied on non-governmental organisations in compiling their research. Fifty per cent of the people canvassed had never heard of two of the most important – I should say two significant bodies – the Human Rights Commission and the Public Protector. If they have never heard about the Human Rights Commission and the Public Protector, what about the other bodies then? Now of course the fact that you haven't heard of them doesn't matter because, in a contrasting example, only 12% of British sixth-form students know the name of the British Prime Minister. Well, I mean that would be with good reason why you should know the name of the Prime Minister, but the



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Kader Asmai

lack of knowledge about our institutions is concerning though. I think 50% is a very good figure, actually, in any country. So let me just finish quickly. The question of access to these bodies is very important. How do you get access to them? Secondly, equally important, is the time taken to investigate complaints and what kind

Supervision by parliament is either perfunctory or non-existent, or, in fact slightly frivolous.

of remedies they provide? What kind of satisfaction is there in remedies and how effective are they? The thing that has come out very clearly in the letters I received is that there is no satisfactory conclusion in many processes instituted by these bodies. For example, when people want to know how their children were killed, they don't want to try the aggressor, they just want to know what happened. By the same token people ask what happened to my complaint, is it lost? I know from personal experience because I complained in 1998 against the Department of Water

Affairs. Their replies to me and to the public were very slow. Well, four years later, parliament discussed my report, the report to the Public Protector, when I was no longer the minister of Water Affairs & Forestry. But it took two years for the Public Protector to go through the report. I tried to report my own department for public welfare policies and the experience is an interesting example.

Can I end by saying that, of course, the other aspect that comes out is that supervision by parliament is either perfunctory or non-existent, or, in fact, slightly frivolous? And oddly enough – perhaps not oddly enough – we are pleased to learn that these bodies do want supervision; and would like oversight to be performed by Parliament. Presumably these bodies partly desire this to sell themselves, I think, but mostly to get assistance in various areas. The other thing is that I think their approach to their mandate and tasks and most things are very legalistic. Some of them appoint lawyers in everyone of their provincial offices when they should be employing people who are sensitive about enquiries.

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By and large the submissions have not been of a high quality.

I conclude my comments by saying that the submissions from outside the government department and from the 11 bodies have not been of a particularly high quality. I regret that, despite the fact that this issue has been around for a long time. By and large the submissions have not been of high quality, whether in focusing on the terms of reference of the committee or in being backed by solid research. In fact, assertions are made without reference to the context of South Africa and the history of these bodies. So we are told “this is what happens in the United States, this is what happens in Brazil, this is what happens in Sweden”, but the contexts are very different in those places. So I look forward to these discussions here because I think that you assist the committee in its deliberations as to how we should handle the particular question of oversight by parliament. It’s a real problem because the suggestion that was made is to have one super committee. Well you see the background – the possible drawbacks of one super committee. However, there we are, my introduction. I hope I met some of your needs. I’m committed to meeting your needs.



Raenette Taljaard

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Raenette Taljaard

Sorry, yes, those of you who know me would know that I've been rather uncharacteristically quiet. But I've taken heed of Professor Asmal's desire to meet all my needs, including chairing, which I've thoroughly appreciated.

I wanted just to make one short intervention on the role of the Helen Suzman Foundation in convening this forum, because Professor Asmal jumped in right at the beginning. The Helen Suzman Foundation believed that it was critical to ensure that there would be adequate public spaces, to have a discourse about Chapter Nine institutions. I think that it is key that all agents in civil society start taking a very active interest in this process, Prof Asmal, not only procedurally in terms of making submissions to the House, but also in talking about the issues that Jody has raised so eloquently in relation to the broader issues in society inherent in the questions being asked of this review. It's quite clear that it goes beyond simply asking questions of operational independence, of budgetary principles, or of the relationship with parliament.

It also goes to the ethos of the role envisaged for these institutions by the founding fathers, and I include you here,

The Review goes to the ethos of the role envisaged for the institutions.

of the constitutional process as their core responsibility and their core duties.



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Taljaard



Mcebisi Ndletyana

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Mcebisi Ndletyana

Our study looked specifically at the relationship between Chapter Nines and civil society. The assumption, of course, is that for Chapter Nines to be effective they need to have a very strong relationship with civil society organisations and one of the institutions we looked at was the Human Rights Commission, headed of course by Jody here. It looked at the relationship between Chapter Nines and civil society. Why is that relationship important? It's important for a range of reasons actually, one being that civil society organisations are involved, in most cases, in the same kind of issues as Chapter Nine institutions – abuse of women, exactly the kind of issues that these Chapter Nines are concerned about. So there's common interest in terms of subject matter. Secondly, their proximity to the local communities that they work with; easily accessible to residents, so if any person has a complaint about a particular matter that concerns the Gender Commission for something about the abuse of kids or women, that person is most likely to go to an NGO that she or he knows that works in the same area and most probably the NGO will refer that person to the Gender Commission.

So civil society allows these Chapter Nines a far wider access to the community than

The assumption, of course, is that for Chapter Nines to be effective they need to have a strong relationship with civil society.

they would otherwise have because they don't have resources to start with. They only have one office in one province. So it's better to have this ongoing relationship. What do we mean by a relationship? We mean a kind of a structured relationship where there is regular interaction; where they have joint campaigns on particular subjects. They meet regularly to review what are the important issues perhaps that we haven't been looking at. We may have been concentrating on this, not realising that something more important has emerged on the margins. So if you keep in contact with CBOs, with NGOs, they're likely to keep you informed about the kinds of issues that are happening out there. So the relationship is important in that way. But then there are a whole range of issues that impact on the quality of this relationship and some of these issues were touched upon by my IDASA colleague.

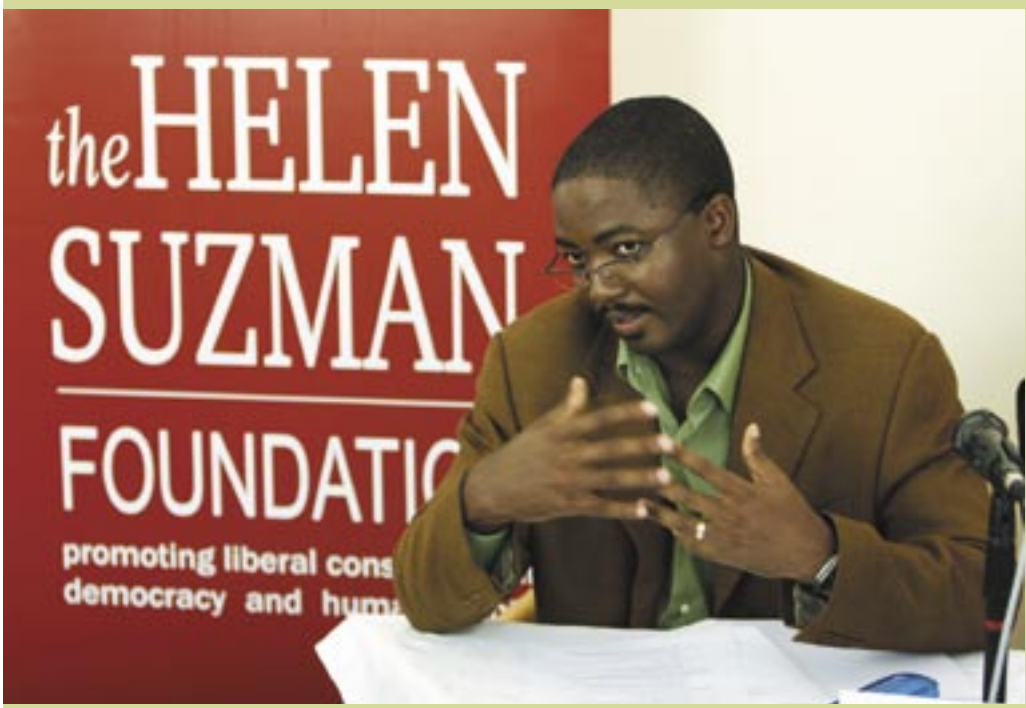
I think that even though the focus was on the Chapter Nines, nonetheless their effectiveness is determined not only by institutional factors that are inherent to them, but by the way they relate as well to parliament and the presidency. And the relationship also reflects the kind of unresolved issues about the role of civil society, the relationships of civil society towards the state and certainly there

doesn't seem to have been some kind of a common understanding about how exactly these institutions should relate to government, particularly within civil society. There's disagreement over how they should relate to government, what approach they should take, how they should, for instance, enforce compliance with their findings and recommendations.

What do I mean by inherent institutional weaknesses? I'm going to go into a few key issues here that I think are somewhat important. Firstly, there are institutional limitations to the Chapter Nines, the main one being the fact that their recommendations are not binding. They can undertake an investigation, make all kinds of recommendations, intended for the use of a particular department, but it doesn't come with a proviso that those recommendations have to be implemented. So in the face of them not being able to enforce compliance from departments, for instance, to some people they may appear ineffective, which then brings into question the options that are available for them

to pursue compliance and this is an issue that elicited a lot of disagreement; heated disagreement from some quarters.

The issue of litigation to enforce compliance has come up. Is it necessary? Are they capable of litigating in order to enforce compliance with their recommendations? They have a whole range of options – they can mediate. The Human Rights Commission particularly doesn't litigate much – it prefers to mediate as opposed to litigate because litigation costs a lot of money. It's a drawn out process, which ultimately might not even lead to any fruition. But then if you say they should litigate, do they have the resources to pursue that route? They don't have the resources to do that. So then how do they proceed if they embark on an investigation. A reasonable assumption will be that that investigation should lead to something concrete? So if their recommendations are not binding it is an exercise in futility to some degree. Assuming that we all agree that these bodies don't have resources to pursue litigation, and really they don't have resources, this is a complex matter.



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Mcebisi Ndletyana

Mcebisi Ndletyana



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Professor Asmal has just said parliament might review the budgets. A lack of resources is a serious problem so could this include increases in budgets? How do you offset that lack of resources, which is where parliament comes in? The oversight of Parliament is crucial. That's what they do to make sure that the departments, whatever department is concerned, implement those recommendations. So it's an institutional problem nonetheless.

A lack of resources is a serious problem, so could this include increases in budget?

It's not of its own making, but it's institutional, it's inbuilt and it can be easily addressed by, perhaps, one, making their recommendations binding or secondly simply ensuring that parliamentary committees do their job, which apparently they seem to be doing quite a lot lately.

The second point then, or the second institution that bears some responsibility, in conjunction, of course, with parliament, is the President in terms of the whole appointment issue. It's totally unacceptable that we'd have a commission that doesn't have commissioners. The situation at the Commission Gender Equality is absurd isn't it? And of course

that's the responsibility of parliament to do that. It may well be true that CGE has its own institutional problems, but then if they don't have commissioners to do the job, obviously they will not do any job, and they cannot themselves appoint commissioners; that process is started with parliament. And these appointments are to be made on time, and that's the responsibility of parliament in conjunction with the presidency.

All institutions must bear their responsibilities. Then we have the issue of their mandates. What are their mandates?

There are various ways in which different organisations interpret this mandate. Should they monitor? Should they advocate? This issue came up quite sharply in relation to the Gender Commission. The NGOs involved in this sector will say the Gender Commission is not visible, they don't take leadership in any gender issue and we suspect that part of the reason for the lack of leadership on gender issues is that they haven't themselves resolved how to approach gender issues. Some are saying we should adopt a feminist orientation, others say no, have a human rights approach to gender issues. There are those who are saying well human rights, but nonetheless you need to be sensitive to your Afro-centric

perspective. So it's divided. Hence they don't give leadership on any gender issue that comes up, and they're also divided about how to enforce gender equality. Do they monitor or do they advocate? Most civil society organisations are saying, you need to advocate for your particular gender perspective and they say no, our responsibility is not to advocate, it's to monitor and we only monitor state departments, we monitor their compliance with gender equality, so it's not up to us to concentrate in a much more visible way on society-wide advocacy campaigns, so there's disagreement. Here the mandates haven't been agreed upon.

The institution has been running for a while, more than ten years, still there's disagreement over what exactly we mean by gender equality. Then there's the issue of how these institutions relate to the state? Are they state institutions to start with, or are they part of civil society? Some people in civil society were saying you should work with us to monitor government compliance on all sorts of

How do you become a watchdog and be hostile to the state institutions from whom you expect compliance?

things and this is the position of an alliance between Chapter Nines and civil society, presupposing that the Chapter Nines should be confrontational towards government in the same way that civil society is. They should be a watchdog, that's the term involved, isn't it? How do you become a watchdog and be hostile to the state institutions from whom you expect compliance? Because they monitor these state institutions and ultimately they need them to comply.

If you're hostile to them, you squander any goodwill there may be. So, even though you may be independent, you need to retain some kind of collegiality, hence, one of the political scientists, speaks of the term "embedded autonomy". They may be embedded within these institutions, nonetheless they're autonomous.



Perran Hahndiek

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There's generally consensus that the current budget model is inappropriate.

Perran Hahndiek

IDASA is currently involved in research. It's ongoing at the request of the committee, Professor Asmal and others, on the functioning of the ISDs (Institutions Supporting Democracy (ISDs)). I will be presenting very briefly some of the main findings and the questions that have arisen. We looked at three areas in particular, which we thought were obviously important for the independence and effectiveness of the institutions and that is their relationship with parliament, their budget arrangements, which the professor has alluded to, and aspects of the appointment procedures for the commissioners.

As has been mentioned, there's generally consensus that the current budget model is inappropriate. In terms of budgets there are two questions that arise. One is, are they sufficiently funded and the other whether they use those funds appropriately? And that's obviously something which the parliamentary committee will need to assess in detail. But in terms of the model it's primarily the (National Treasury) through the various departments that are responsible or allocate the budget. The ISDs have varying degrees of influence and, of course, parliament can oversee that process through mechanisms such as the Medium-Term Expenditure Framework (MTEF) process as well as the budget vote.

Certainly these issues can be improved on. Specifically parliament's oversight of the budget can definitely be improved. I think it is being looked at currently. But that doesn't really answer the question of whether that process is the most appropriate one.

There is consensus that parliament should play a greater role and how that is going to happen obviously needs to be discussed in detail. But I think IDASA's view, at least, is that the ISDs should present their budgets to parliament as well as their medium-term expenditure allocations and then parliament should – that is either of the two accounting mechanisms, (the portfolio committees or the proposed standing committee on the ISDs) – engage with treasury and make the recommendation and essentially forward that to government. But I think what's important – in that these are issues under discussion is that to protect the independence of the Chapter Nines parliament must be allowed to have the power to amend the budget. That's where we stand. It's the only way parliament can ensure that the ISDs are independent and protected.

In terms of the appointment of commissioners, again there are two questions that we looked at: whether the legislature has met its obligations

and involved the public sufficiently, and secondly, and this is a fairly contentious area, whether this process is in fact appropriate, given that what you have is politicians ultimately recommending commissioners? Can that possibly, and under different circumstances, compromise their independence? Concerning the first question – the parliamentary process – currently ad hoc committees appoint commissioners and I think we looked at various case studies and there have certainly been varying degrees of cohesion and consensus amongst committees. And that’s not always ideal. I think what you want is a more standardised process. And then you know proposals include using a standing committee for this appointment purpose. Another proposal, and I think a fairly

There is a proposal to establish an independent, multi-sector body to review nominations and make appointments.

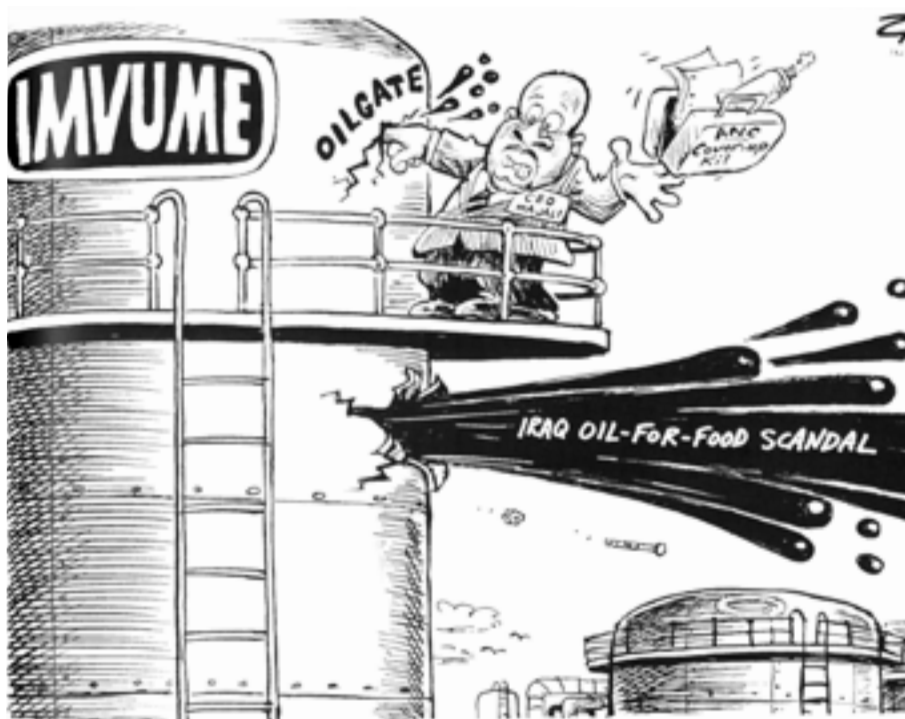
useful one that was raised, is to use special quorums for these committees to ensure that the members attend the whole process and so on and to ensure that there’s a degree of integrity. There is a proposal to establish an independent, multi-sector body, such as the Judicial Service Commission, to review nominations and possibly make appointments to the institutions. This is an option despite being conceptually difficult. The difficult questions being how would such a body be composed and what exactly would its functions be?

In terms of the second component of our



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work we looked at the relationship between parliament and the ISDs. This is obviously a very important area. Parliament really needs the reports of the ISDs to fulfil its oversight function whereas the ISDs need the support of parliament in terms of urging government to comply with their recommendations and, in some cases, just to get information from government. There have been a number of concerns

Parliament really needs the reports of the ISDs to fulfil its oversight function.

about this. Firstly that parliament has not always used reports very usefully, if at all. The professor alluded to one case where parliament only got a report two years down the line, where everything had changed in that time, so it was of very limited use. And the second is what role parliament has in terms of monitoring recommendations of the Chapter Nines? The important point I think is that the Chapter Nines are very

different, so it's very difficult to make a generalised comment about this. In the case of the Auditor General for example, he performs a very technical function, you're simply reporting to parliament, parliament takes it up politically. But in the case of the South African Human Rights Commission for example, and this applies to the CGE and other bodies, they have a measure of political oversight. That is, they can take up an issue, they can lobby, they can advocate and they can seek remedial action, and one of the problems that we have identified – we've commented on, is the fact that there doesn't seem to be enough of that. The question is whether there's an agreement between the executive and these bodies that these are avenues that the ISDs can pursue and legitimately pursue and that those shouldn't create tensions.

The second issue is about parliament and of course the question of accountability over the ISDs. The major point is simply that the Constitution says that these bodies are independent, which impacts on their degree of accountability. The Constitution also

says that these bodies are only accountable or should report at least once a year, so that immediately sets up a very different relationship. In the case of the Executive, for example, it's an ongoing reporting function on a weekly basis. But the Chapter Nines only report at least once a year, so that implies a fairly loose relationship, if you like. But then of course, parliament can, I think, improve its oversight over the Chapter Nines and I think that some of the issues that have been raised in the committee point to the weaknesses in parliamentary oversight up to now. I think the professor might have some views on

that. But how to go about that is difficult. I think that on one level parliament's oversight generally is evolving and I think that one could expect in the case of the portfolio committees that are currently involved in overseeing the Chapter Nines that they will improve and, as they understand their role, that relationship will improve. But the question is, of course, whether it requires a dedicated committee. So those are some of our findings. Our research is available online at the IDASA website. As I said it's ongoing, so aspects of it might change in light of the discussions here and other places.



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We proudly proclaim the standards in this constitution. The question is whether the compliance comes anywhere near that.

Jody Kollapen

Thank you Prof. Asmal, By agreement with the organisers, because we appear before the parliamentary committee on Friday, I thought it wasn't appropriate for me to speak about the work of the commission and its perspectives as an institution today. We are going to have a full session on Friday, but rather to touch on some of the broad principles underpinning the review, underpinning in the sense the location of the Chapter Nine institutions and how it fits into the architecture, broadly speaking, of the democratic state. How it relates to issues of accountability, of responsiveness, of advancing both an agenda of transformation and of checking and holding accountable. Since the committee was put in place in September last year there's been a fair amount of public debate on the matter. Some of it has been quite analytical, quite forward-looking, quite informed, and frankly others have been quite superficial, really, not constructive and not very helpful.

Certainly from the Human Rights Commission's perspective we welcome this process and we welcome it for four main reasons. I think given that the Constitution is transformative in nature it's important for us as a young democracy undergoing massive changes

almost on a daily basis, to assess from time to time whether the architecture of the Constitution still remains valid and relevant to the aspirations of our people. Professor Asmal has spoken about an unmet demand and unmet needs for assistance out there and I think that is quite appropriate in terms of reviewing these institutions. I think, secondly, the standard setting, which is the Constitution, is about the highest in the world. We proudly proclaim the standards in this Constitution. The question is whether the compliance comes anywhere near that. I think that while we must look at, broadly speaking, how as a nation we comply with this, I think the role of Chapter Nines in advancing the standard set in the agenda here is also quite critical.

I think, thirdly, and we're mindful of that, that we use public money. I'm sitting here being paid by the taxpayer, that's you and the millions of the people out there. The other question is whether you get value for your money in the work I do and in the work that the various institutions do. And I think, fourthly, any process of review and assessment you have undertaken in a way in which I think this one is being undertaken, with integrity, with a sense of purpose, can only assist in building up these institutions and, more importantly,

can assist in protecting the space, the democratic space that you require for such institutions to function.

Now clearly these institutions are widely differing in mandates, while the Chapter Nines all have their independence guaranteed. Their mandates differ – some are narrow and quite focused, and others have quite a wide mandate. The resources differ quite considerably and Professor Asmal has spoken about that. Just in terms of the six institutions set out in Chapter Nine, they used, in the year 2005/2006, R1,7-bn. The IEC used R964-m of that, which is 56%. The A-G used R613-m, which is 36%; the Human Rights Commission used 21.2 %. I'm not drawing any conclusions from that, I'm just saying let's have the bigger picture.

I think the question of review and assessment is quite difficult when we ask against what do we review and against what do we assess? And there are differing expectations of these institutions and I think other speakers have touched on that.

I think the question of review and assessment is quite difficult when we ask against what do we review and against what do we assess?

There are some who would prefer to see these institutions as essentially watchdog institutions, exercising an accountability-answerability function. Others say, well, the Constitution says these are state institutions supporting democracy so we see a supportive relationship with that. I think many in the state would see that and I don't think those two cannot co-exist, I don't mean you have the luxury or the liberty of choosing which kind of relationship you have. You may have to work with the Department of Justice in advancing knowledge about the quality of the courts and ensuring people use them and that may mean that you have a co-operative relationship with them, which we do, but we also took the Department of Justice to the equality courts for not ensuring that courts are accessible, so you can have both those relationships.



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Jody Kollapen



I think the circumstances from time to time will determine which aspect of the relationship is the dominant one and currently I think the accountability, the answerability aspect is the dominant part of that relationship, and I say that just from personal experience in the work we've done. Clearly in our society our view is that there's a need for these institutions. We're a young democracy. We're going through a transitional phase, we have great expectations, we have high standards, we have questions of capacity to deliver on

If you understand the landscape properly, these institutions have to work in a complementary fashion with others to advance accountability.

those standards. We don't have a culture of respecting human rights. We don't have a culture of doing things in a way which complies with the spirit and the tenure of this Constitution, and I think these institutions play a vital role in enhancing that culture.

I shared a platform with Christina Murray at the University of North West last year, and she spoke about the two dominant functions.

The one is the checking function, the function of getting an answer, holding actors to account; and the other is the transformative function, the function of articulating norms and standards and building up a commitment and a fidelity to those norms and standards. Those are the two functions that I think sometimes come into conflict with each other and it's important to note that, as other speakers have pointed out, these institutions only have the power to make recommendations. Some have called them – what's it, bulldogs without teeth, and some have suggested, well, what's the point of them and I think that's a very superficial understanding, with respect. I'm not an academic, so I don't read too much of this stuff, but a wonderful article by Linda Reeve unpacks what accountability means in two components. The one is answerability, the process by which you call actors to account, to give answers and to account for their conduct, and these institutions could actually do that quite effectively because they have the power to call those actors to account. And the other is what she calls enforceability – when you have a unilateral decision delivered by the courts of law as a sanction for non-compliance. She says these are both components of accountability, answerability and enforceability.

If you understand the landscape properly, these institutions have to work in a

It's important when we review and assess these institutions that we do so with an understanding of what it is they can do and what it is they can't do.

complementary fashion with others to advance accountability. It can't be that the Human Rights Commission or the Gender Commission can advance accountability in all senses of the word and, interestingly, the argument is then developed that institutions like these exercise a form of control, but the control they exercise is known as co-operative control as opposed to the control that courts exercise, which is coercive control. So I found it quite an interesting distinction, but I think what it leads to is that to understand these institutions properly you need to see them as part of the broader architecture of the democracy and the landscape and how other institutions complement these institutions and do the tasks these institutions can't do, and I've found that distinction quite useful.

Therefore, in my view it's important when we review and assess these institutions that we do so with an understanding of what it is they can do and what it is they can't do and that brings me to the next point really, and that's the question of the relationship of these institutions to other sectors in society, and I speak of the big ones, that is, the executive, the judiciary and the legislature, and civil society. I agree that there needs to be a strong relationship but I also think that Chapter Nines need to be independent from civil

society and I think we mustn't assume that civil society is everywhere. In the last month I've been to deeply lying rural communities and I found people living in poverty and no one else there. Elected representatives from the three levels of government, that is national, provincial and local, would have had responsibility for that particular constituency, as well as community development workers, and there was no one there. It was just people and their poverty. So I think we need to understand also, when we use the term "civil society", it's not some magical romantic term.

I also think that how civil society chooses its priorities is important. Last year, Prof, you'll know that South Africa submitted two reports in terms of its international obligations to the CAT Committee, which is the Convention Against Torture, and to the Committee on the Elimination of Racial Discrimination (CERD). Now, when these reports were submitted in Geneva there were four civil society representatives there to present reports on the CAT Report. There wasn't a single South African NGO there to present anything on the CERD Committee and the CERD Committee looks at inequalities and racial discrimination. So, the impression you would get is that torture is a major problem in our society, but inequality is

Jody Kollapen



not so important. I'm a great fan of civil society, I come from there, but we have to be quite realistic.

I think the issue of relationships with the executive is an important one. It's at two levels. The one is where these institutions can hold the executive to account, but the other is where they can provide advice to the executive. Recently we've had requests from cabinet ministers to provide advice to them on whether something they said may have constituted hate speech or something like that and that's what we do and I think that's valuable. Ultimately I think it's important that both government and the citizens are able to trust these institutions and that doesn't go to the mechanisms of appointment. It may be related to that but, at the end of the day, it's the perception of ordinary people. Can I walk into that institution in the knowledge and belief that they'll take my complaints seriously? And even if they can't help me they'll do it with integrity. So I think that's important.

I think the relationship with parliament is critical. As Professor Asmal has said, we want to be held accountable. We don't think we can be held accountable for one hour a year. It's a disservice to the broader public to see that as accountability

and I'm mindful of the constraints under which parliament functions, but I think that's quite critical. But the flip side of it is that how these institutions – how parliament uses the work generated by these institutions to assist them in their oversight function. I think there's a lot that can happen in terms of the relationship between Chapter Nines and the courts. Currently if they participate in the judicial process they participate simply as an ordinary litigant. I think there's certainly room for courts to refer matters to Chapter Nine institutions as part of structured interdicts and require them to report back to courts. I think that could be a much more dynamic relationship and that will advance this notion of complementarity that I spoke about.

A human rights activist was in South Africa not so long ago. He spoke about the true perspectives of democracy. He said the one is the public ballot perspective, that is, the adequacy of the public ballot, and the other is the public reasoning perspective, and that is the ability of government to respond to public reason, what he called "government by discussion". I think the one aspect is certainly evident. It is questionable whether the other exists and I think if you look around at what's



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happening in our country it's an open question whether government is able to respond to public reasoning, and so institutions like the Chapter Nines and like the Human Rights Commission, have a vital role to play in giving effect to both these vital components of democracy.

So, in conclusion, we welcome review. We think that it could be quite simple for the broader public to focus on issues of efficacy and if you focus on issues of efficacy

you could end up closing the space. Let's examine whether the space is being properly used. That's a different question from reducing the space. They are two different inquiries. It is quite simple to say you are not being effective, so let's close this space. My own view is that that would be quite fatal to our democracy. Let us leave the space open, with the caveat that we will examine whether the space is being used effectively and if not, ensure that it will be used effectively.



Jody Kollapen

Questions & Answers

Question one:

MR HOFFMAN: Thank you Professor. I'm Paul Hoffman from the Centre for Constitutional Rights. I'm told by my staff that your show is the best show in town, and picking up on what you've just challenged us with, I want to take up directly with Jody, if I may, the fate of the most excellent report that was prepared by the HRC in relation to Section 29 (1) rights. For those of you who are not lawyers, that is the right to basic education for everybody in South Africa. There was an investigation back in October 2005. At that time 75% of the schools in the country did not have a library. The report on that investigation was made public in July last year. At that time 81% of the schools in the country did not have libraries. To revert to our chairperson's first language, "ons boer agteruit". We're going backwards. The Department of Education has responded to the HRC report on basic education by only addressing the recommendations and not taking issue with any of the findings, in other words the facts of common cause between the department and the HRC. We continue to go backwards and, as Jody knows, his commission has the obligation in terms of the Constitution to take steps to secure appropriate redress where human rights have been violated. The human rights of the youth of South Africa to basic education are, in his own finding, being violated. What is the HRC doing?

Answer:

MR KOLLAPEN: Thank you. I think the issue of recommendations of the commission, if I could just say as a preliminary point, it was raised whether we should have – whether it should become binding there. We'd like to think that there could be some scope to discuss the possibility of making it binding for people to respond to the recommendations. You see, currently government can sit with the report and just ignore it, but if it was an obligation to respond within, let's say, 30 days, at least they'd be obliged to say "we agree", "we disagree", or whatever, and you at least begin an engagement. I think, to the credit of the Department of Education, we were able to reach an agreement with them at the time of the launch of the report, that they would respond to the recommendations within 90 days, and they did, and it was quite an extensive response. They had it under three columns, you know, "agree and are working on it", "will work on it" and "disagree". So you could interrogate that

process. And they took issue with us in terms of some of the methodology we used in coming to our conclusions as well, and they said they'd like to engage with us over that. So, as we sit now, we at least have a basis to talk to them.

The difficulty, Paul, is that some of the issues can lend themselves to litigation, but not every issue can lend itself to a justiciable issue, which you can take to court, and that's why we need to separate those that we can maybe take in that direction. But an interesting development was that parliament asked us to come and report to them last week on that report, and so you could get parliament then using the report as well. And so it could be a soft way of enforcement, but I think in the current circumstances one must beg to distinguish where you use parliament effectively and where you use the courts effectively.

CHAIRPERSON: Thank you very much.

answers

One must distinguish where you use parliament or the courts.



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Question two:

MR HIRSCH: Thank you. The name is Herbert Hirsch. I can't respond to or make a point directly in relation to the review committee, but I think something that ought to be put on the table, at least as part of the discussion, and you'll see in a moment it's not an original thought of mine, but I think it's important to recognise the fact that in my view part of the problem, the whole problem that we're discussing, is our electoral system, proportional representation. If we had constituency-based elections or at least a mixture of constituency based and proportional representation, there would be representatives who would be accountable, at least to some extent, in realistic terms, to the electorate. As it is now, the representatives are primarily and almost solely accountable to their party. I think a way, a different way, needs to be found to make parliament a bit more accountable so that the individuals within the party have fairer opportunity of – any party I'm talking about – a better opportunity of actually influencing events.

Answer:

PROF. ASMAL: We heard three, but Mr Hirsch, we'll talk about this privately because I've lived in the single transferable vote in Ireland, first past the post in England and now in this system. We'll talk about it privately when we have an occasion sir.

I think the Chapter Nines
should also litigate when it's
appropriate to do so.
JODY KOLLAPEN

Question three:

DR LANDMAN: Chris Landman. My question relates to the litigation powers of some of the Chapter Nine institutions. Now, if one considers the fact that the Constitution of South Africa in 1993, as well as the 1996 Constitution, are really the products of an ongoing negotiation process my feeling is that at least some of the Chapter Nine institutions can never be an alternative to government or to the courts and that the role, specifically of some of the vital institutions, it's a form of democracy, is there as their advisory opinion, as institutions to normalise relations, conflict to being government and institutions of civil society, also to serve as intermediaries between situations so as to enhance the culture of democracy and the ongoing democracy. So, in conclusion, I think that Chapter Nines are not there as an alternative either to government or to the courts, but they should really stick to conflict resolution and advisory opinions and now my question is, to what extent are these advisory opinions taken seriously by the courts, or, on the other hand, by government or an organ of state?

Answers:

MR KOLLAPEN: I think the distinction is an important one, but I think the Chapter Nines should also litigate when it's appropriate to do so, and we've litigated in the equality courts quite extensively, dealing with these issues.

It's part of the court system but litigating against government, against private actors, etc, and I think the advisory role is a critical one, but I think at the end of the day that advisory role is dependent upon the standing of the institution. If the institution is respected it will be asked to play that kind of role and I think, certainly in our view, when governments asks for opinions and views, it takes them seriously.

I mean various government departments have asked us for legal opinion and they take it seriously because issues of human rights are contested and while there isn't hostility to it, very often people grapple with "what should I do in this case? Should I cut subsidies to former white old-aged homes and move the money to black areas that were historically disadvantaged? Is this constitutional?" And the advice you give them assists them in complying with their constitutional obligations, so it's transformative in that sense. But then you can always go back and use the checking system and see whether you've acted upon it and whether you've put in place systems to deal with it.



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Question four:

MS WALKER: My name is Belinda Walker. I'd like to ask a question about what happens in the case of a failure of one of these institutions, and I do have some primary research here, even if it's anecdotal and relative to, I think, five cases? I'm speaking about the Public Protector, where I referred a number of items to the Public Protector. They were a matter of public interest. They had extremely professional response from the local Public Protector. They were then taken up to the national level, where the response was inadequate, to say the very least. It was quite startlingly inadequate and I have the details, but I don't think you want the detail here. That certainly undermined my confidence in that institution and it had almost a ripple effect in the sense that I think one thinks of it as one of the Chapter Nine institutions, and a bad decision by one institution can have a knock-on effect on all the others. What kind of review process would you see as being appropriate, given that, in this instance, I think there may well have been political interference? I don't know that. And if one cannot go the political route by referring it to parliament, or a parliamentary committee where there is a political majority, what other options are available apart from publicity, which, in this case, was the one that was used?

Answers:

MR NDLETYANA: On the responsiveness on the Office of the Public Prosecutor, it's something that we've also come across in the course of this research, but I think it's – at times the personality's more of a problem than an institution because the problematic nature of the personality has been such that people have wanted to revise the nature of the institution and I think the institution is, to some degree, it's fine as is. Perhaps I should say something on the political nature of the personality because most people who want to speak

about these things, they say, "well, he's a political hack, he's a political appointee, therefore we can't expect him to behave any differently". And to underscore a point that was made by Professor Asmal that it's a political institution, it's highly unlikely that one will get someone of that calibre who's not political. I mean these are political issues and most often you have someone who's a political activist. But then it's a different thing, I suppose, if you appoint a political hack, and there may be perceptions, even though they're



not real, but there's a perception that they are conceding or responding to particular political pressure. Hence, then, the appointment of the personality that is appointed becomes very important, but in appointing that personality we need not say that that person should be completely apolitical. I don't think you can get that. You can get a political activist who's not necessarily embedded in a particular party but nonetheless has a political biography. Because it's also very important to get someone who has political credibility, who can call up a minister and say, look, Kader, you know I need this thing fixed up. You can't get a nobody who has no standing amongst politicians because that person won't really carry any influence.

MS TALJAARD: There certainly is an issue in relation to completely fleshing out the relationship between the Chapter Nines and parliament as to what new rules can be developed to support Rule 66 in the Rules of the National Assembly, which really calls for the procedures for removal of office requiring specific majorities and specific provisions to be made for passing a substantive motion in the National Assembly. I mean, as part of this whole process of looking at that relationship, the rules would also, as a consequence after Professor Asmal's committee reports in June, presumably be looked at, and you will recall that in the process of the strategic defence procurement investigations there were issues around this and there were also issues around the fact that the House had not yet fully developed processes and procedures for substantive motions under Rule 66. It is but one aspect, there would be others that could be looked at, but that is certainly one of them.

PROF. ASMAL: That's a good reminder. I'm sorry about those three cases. If you would pass them on to me, about the cases, I think you have written to me already have you? Well pass it on to me. I think, because this goes to the heart of what is democracy, which is still very young, and we haven't worked out the ground rules.

You see in the United Kingdom there's an "establishment". They choose a safe pair of hands, they call them. When that man Kelly killed himself over the Iraq war issue they chose a very safe pair of hands who blamed the BBC for Kelly's death, not the Minister of Defence or the Prime Minister, who were arguably the culprits, right? You find a safe pair of hands where you have an "establishment".

You have to act fairly, openly, that's the only two guiding criteria— fairly and openly. That's what you have to do. And the confidence you generate, it depends on your fairness and efficiency I should say. This is very important. So, be careful, we can't pick and choose. And I've got a cutting from that lovely man (Rob Amato) who died – it was a motorcar accident in Observatory – he praises the Public Protector on the judgement he made on the Zuma affair, for example; it changed his mind. Now, you see, we've got to be careful, but we only praise an office because they arrive at judgements congenial to us and I said this on radio, and I know Mr de Klerk, I tease him about that. He was very suspicious of the Constitutional Court and he went to the Foreign Affairs Committee and said so. Actually, he said, "they made this long series of judgements against the government of the day. They're no longer ANC hacks." We've got to be careful

about that because you see the same thing happened to Van Zyl Slabbert over the floor-crossing thing. A lot of the commentators said it was a logical conclusion from the law they found themselves in. So, I'm one of those people who believes you take the rough and tumble of decision-making. There are lots of cases where I don't approve of decisions, but of course the Human Rights Commission played a leading role in the eviction case in the Western Cape, didn't you? The Grootboom case was very important. Now, the supervision of that case is a different matter. That's the important thing.



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Question five (a):

DR CARDO: My name is Michael Cardo. I want to ask both Professor Asmal and Mr Kollopen a question. My first question, to Professor Asmal, is, how would the parent portfolio committees, through which the Chapter Nines report, be chosen. If I'm not mistaken, for example, I think the Cultural and Linguistic Commission reports through the Portfolio Committee on Provincial and Local Government. Why should that be the case? I also want to know, in your work so far, how much thought has been given to establishing a standing committee on constitutional institutions, which would exercise oversight over all Chapter Nines?

Answers:

MS TALJAARD: Looking at how the committee structure could perhaps function if there is to be support for an overarching committee. There are risks in that and I understand those risks. However, such a committee could be in a fairly dynamic relationship with the Budget Committee, for example, that is already established. There will be a host of internal

relationships among the committees to be worked out after this process reaches its conclusion and after parliament actually finally adopts the legislation, which is currently still in the Finance Committee, to give it those powers to amend Budgets.



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Question five (b):

Then, secondly, to Mr Kollapen, I know there's been some talk in the past about possibly merging the Human Rights Commission with the Commission for Gender Equality and the Culture and Linguistic Commission. What are your views?

Answers:

PROF. ASMAL: He can't answer that. Sorry, he can't answer that because I think he needs to discuss that with the committee first, really. Sorry, I'm not protecting you. I think he needs to go to the Portfolio Committee first. On the merging question, because I'm not Jody and I can perhaps venture a very cautious opinion, I think there is a very serious issue that is going to require addressing because you know, and you raised it in your opening remarks to the committee when you kicked off this process.

MS. TALJAARD: Some of the issues that we're dealing with here come from a very complex transition. For example, the establishment of the Cultural Commission was clearly part of the negotiated

settlement, part of the difficult trade-offs that were made as part of that negotiating process. And some of the ghosts are still in the cupboard on some of these issues and may even come back to haunt us as the process proceeds, and it will be very interesting to see how you will have the wisdom of Solomon by June to put through recommendations on some of these matters, because I see the complexity involved in you having to adjudicate some of these tensions that emanate from the transition essentially.

MR KOLLAPEN: But I will say thanks Prof.

PROF. ASMAL: Thanks for transferring that. That's your answer.

Question six:

MR PEETZ: Name's Craig Peetz. I'm from African Mirror. All democracies just simply because they're democracies doesn't suggest that's a good thing. The quality of the democracy is based on the quality of the individuals that make it work and function. Who decides on how these people are appointed to these various commissions and committees,

Answer:

CHAIRPERSON: I'm not sure if they're democratic. The point is that they are – we have a representative democracy. We don't have Rome and Greece, which are built on slavery, so you hardly can call it democratic in Rome and Greece either. There's not one rule but, in broad terms, they're appointed by the President in most cases on the nomination of parliament. Usually there's a vote, in some cases 50% vote, 60% vote. The vote takes place on the basis of a selection done by parliament – an ad hoc parliamentary committee. An ad hoc parliamentary committee, unlike the committee I chair, has obviously a political majority, which happens in nearly all democracies. The ad hoc committee makes recommendations to parliament and then parliament votes.

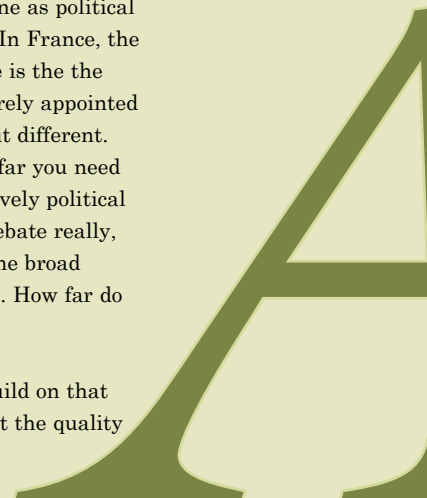
Now, in the Electoral Commission, their processes are much more complicated and that is that the Chief Justice chairs the committee that calls for nominations from the public and then, very anomalously, the Human Rights Commission, Public Protector and the Gender Commission sit on the committee, which I think is crazy – how can you have three people from a Chapter Nine body sitting in judgement?

So that in itself again shows that the fathers and the mothers, as a postscript, didn't have a grand design about it. They were political compromises and, since the Independent Electoral Commission is the heart of the democratic order, I mean the conduct of

elections is central, more important than anything else, legitimacy is established by the committee. That is why they put the Chief Justice there and that's something you need to understand – that the Chief Justice does not want to be there – because they don't have the time to sit on that, so we've got to find a more rational system. The process we follow is much more complex.

In the United Kingdom, for example, they're merging the four bodies; they're merging them into one. I didn't want to say that, but they're merging the four bodies into one. It takes effect in September. And the minister appoints there. No nonsense of parliament appointing; nominations being held. The Minister appoints, directly, in that sense, in the broad sense these are all political appointments. I should say, as I said to the committee the other day, in the United States all the commissions, they retire when the change of presidency takes place and the new president appoints everyone as political appointments in a democracy. In France, the most important body in France is the constitutional council. It's entirely appointed on political grounds. We're a bit different. We try to de-politicise it. How far you need to de-politicise what are effectively political bodies really, is a matter for debate really, because, as Jody has said, in the broad sense these are political bodies. How far do you de-politicise them?

MR KOLLAPEN: Can I just build on that as well because you pointed out the quality



Answer:

of a democracy is in a sense judged by who sits on those bodies. The quality is also judged by the level of public participation in these processes. Now clearly when there are vacancies there's a public process by which people can be nominated, where civil society can participate and prospective members of these commissions are interviewed. It's done in public. But certainly my sense was that the level of public participation there was

quite low. Because that's an opportunity for the public to say, "well, you know, we have a problem with that person's track record. Give that information to the members of the committee." Through media you highlight those things so you ensure that only fit and proper individuals are appointed - whatever that may mean. So I think the public also sometimes missed the opportunity to participate in those processes.



Concluding Remarks

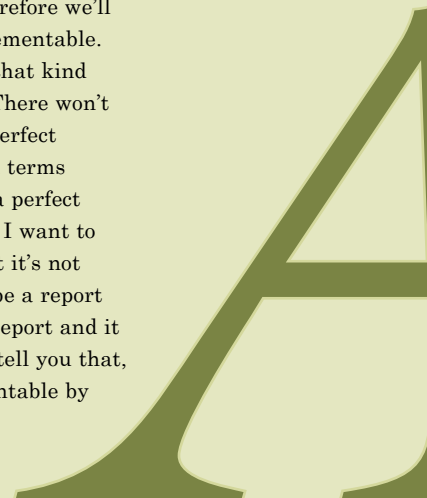
Can I conclude by saying one of the findings, because I must tell my legal superiors you know, one of the findings is, under the law relating to the Human Rights Commission and the Gender Commission and the Youth Commission, there's a duty to cooperate and collaborate. There's very little collaboration that exists despite the statute I can say is a conclusion by the way - very little, either informal or structural collaboration takes place. That's why it's very important ten years later to conduct a review.

You see Jody, no one wants to cut down space. If the space is not used effectively, it doesn't mean you've got to cut down space all together. You may use another method of using the space. But the fact is, you may complain about the budgets now. However, performance is key for those judging increasing the budget. I said so publicly. If you are seen to be active the budget will come. I think that this three-year round that's coming, budgets have gone up 50, 60, 70%. I don't know about yours, but they've gone up enormously, in the budget announcements made for the next three years, because the executive recognises the important value of these institutions. And I'll tell you one thing in an indiscreet way. I've never been able to find out the real function of the Financial and Fiscal Commission. Now I can, actually. Now I can because of a good, decent, openhearted, necessarily generous Minister of Finance.

It doesn't mean that you're going to have the same kind of minister five years from now. So therefore if we don't want discrimination against provinces, allocations being skewed, you'd need the Financial and Fiscal Commission. And you need them like you did the other day, where they disagreed openly, publicly, with the Minister

of Finance. So I had been suspicious about them until I heard them and until I heard of the relationship between the present minister and the Financial and Fiscal Commission who values the existence of that body. Now that's an important thing. Then I'm convinced now. I'm only one out of ten, by the way, on the committee. It's vital to keep the Financial and Fiscal Commission because they will be the countervailing force. Democracy needs countervailing voices, so the lack of cooperation and collaboration is a serious indictment of Chapter Nine bodies really. It's a betrayal of the trust that parliament has given to them, that they must work closely particularly when the terms of reference and legislative powers allow. They do not necessarily conflict, they co-mingle with each other.

Thank you very much to HSF for this opportunity. It's been good being in Cape Town to discuss this. Maybe what we'll do is we'll discuss preliminary findings here under your auspices, just to explain the findings of the review. Because I'll end on this note, I don't want this 300-page report to gather dust. I'm only doing this, and I should be doing something more profitable, at least, because I believe in the process. I believe in it and therefore we'll make proposals that are implementable. The enemy of an approach of that kind is to make perfect proposals. There won't be perfect proposals because perfect proposals are unimaginable in terms of implementation. So I have a perfect scenario for this. I know what I want to do, but I can't say. Well in fact it's not implementable. So there will be a report by June. It will be a massive report and it will be very controversial, I'll tell you that, but we hope that it's implementable by December this year.



Media coverage

CAPE TIMES TUESDAY, MARCH 6 2007



HELD ACCOUNTABLE: Head of the SA Human Rights Commission, Jody Kollapen, director of the Helen Suzman Foundation, Raenette Taljaard, and Chairman of the Ad Hoc Committee on the Review of Chapter 9 and associated institutions, Kader Asmal, discuss the review process in Cape Town yesterday. Picture: BRENTON GEACH

Asmal recommends 'one-stop' assistance for consumers

DOMINIQUE HERMAN

DENSELY populated areas in South Africa need a "one-stop shop" to direct the public to the appropriate organisations, according to Kader Asmal, chair of the Ad Hoc Committee on the Review of Chapter 9 and associated institutions, which was set up in September to investigate the effectiveness of these organisations.

"There is an enormous unmet need in South Africa for assistance," Asmal said yesterday at the Helen Suzman Foundation's first Quarterly Roundtable for 2007, which met for the first time in Cape Town to discuss the review of Chapter 9 institutions – those bodies set up by parliament and funded by the taxpayer to uphold the

tenets of the constitution.

He said that, during the six months since the committee had been reviewing these organisations, he had received 300 letters from members of the public complaining about attorneys, building societies, estate agents ("Well, that's predictable", he joked) and dry cleaners – matters that had nothing to do with Chapter 9s.

A "one-stop" body could assess whether a person's complaint needed to go to the Human Rights Commission (HRC) or a consumer protection body for example.

"Access to bodies is very important (as is) the time taken to investigate complaints and provide satisfaction," Asmal said.

He said the committee's first

finding was that "things are never what they appear to be".

"The lack of co-operation and collaboration is a serious indictment of Chapters 9s," he added. A "massive, very controversial" report on the committee's findings could be expected by June.

Head of the HRC, Jody Kollapen, said Chapter 9 institutions wanted to be held accountable and to be trusted by the public.

"We don't have a culture of respecting human rights," he said, and these institutions played a "vital role" in upholding the constitution.

Mayoral committee member for corporate services and human resources, Belinda Walker, said from the audience that matters of public interest

she had referred to the Public Protector were met with an "extremely professional response" from the local office, but the response at the national level was "startlingly inadequate", which led her to believe there may have been political interference.

"That certainly undermined my confidence in the institution," she added.

"Is the review process appropriate? What other options are available apart from publicity?" she asked.

Asmal encouraged her to pass the matters on to him. He added that each institution's budget increase request needed to be dependent on its performance. There are six Chapter 9 institutions plus another five constitutional institutions.

State distributing R6bn to institutions backing democracy

BY EDWIN NAIDU

In spite of a current parliamentary review over their effectiveness and future, the government is committed to spending more than R6 billion of taxpayers' money over the next three years on organisations supporting democracy.

Kader Asmal, the former education minister, heads the committee tasked with looking at the work, salary structures, the role and responsibilities of state bodies supporting democracy.

This year alone, Trevor Manuel, the finance minister, has budgeted more than R2 billion for state organs described in the constitution as chapter 9 organisations and bodies promoting the constitution. The budget makes provision for increased allocations to chapter 9 and constitutional bodies until 2010.

These include the Human Rights Commission, which will get R55 million; the Commission on Gender Equality (CGE), which received R49 million; the Public Protector (R78 million); the Independent Electoral Commission, which stands to get R254 million; the body responsible for the promotion and protection of the rights of cultural, religious and linguistic communities (CRLC) received R154 million; while the auditor-general, also a chapter 9 body, determines its own budget for which it accounts to parliament in accordance with rules governing its independence.

Also forming part of the review is the Public Service Commission which has been given R166 million for raising awareness of constitutional values in the public service.

South Africa has another five constitutional bodies, including the Independent Communications Authority of South Africa, which got R222 million this year; the Financial and Fiscal Commission, which received R29 million; the Pan South African Language Board, which was given R43 million; and the National Youth Commission, which received R77 million.

Additional allocations in the 2007 budget include R145.5 million, R163.3 million and R266.5 million for increasing human resources capacity in the Legal Aid Board, the Special Investigating Unit, the gender and human rights body, and for funding of information technol-

ogy and administration systems at the Office of the Public Protector.

Asmal's committee will have to assess whether the current and intended constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a rationalisation of function, role or organisation is desirable or will diminish the focus on important areas.

The committee will also review the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability; review institutional governance arrangements in order to develop a model of internal

'Limited resources of Chapter 9 organisations is a problem'

accountability and efficiency; and improve the co-ordination of work between the institutions covered in the review, as well as improving co-ordination and cooperation with government and civil society.

Jody Kollapen, the chairperson of the human rights body, said circumstances at the drafting of the interim constitution which made provision for constitutional bodies had changed. "Thirteen years later we ought to consider whether the realities have changed. We should be frank about it. All of us at chapter 9 organisations appear to be under-resourced, we all speak about a wide mandate and less money, yet there is duplication across the board, but the limited resources we operate under is a problem," he said.

"The human rights commission is indivisible... if the commission went out to the nation and did a roadshow, it cannot, for example pick the first 12 on the list and leave the remainder to other bodies. It encompasses all rights," he said.

Kollapen said chapter 9 institutions wanted to be held accountable



South African and British pupils spent human rights week sharing stories about their experiences, making a rainbow nation song and painting a mural on fair play at Highveld College in Soweto as part of a British Council outreach initiative with the sport and education departments. From left to right are Stephen Claydon, Babawo Moko, Lusanda Mfawwe and Amy Shefford

and to be trusted by the public but this was made difficult by the absence of a culture respecting human rights. "Chapter 9 bodies, therefore, have a vital role in upholding the constitution," he said.

The commission received 11 710 complaints in 2005/06, compared with 12 194 in 2004/05. More than 2 700 complaints were resolved by head office, and provincial offices processed 8 943.

In addition, the commission was involved in 564 educational interventions (workshops, training programmes, seminars, presentations) that reached 25 840 people, mostly in rural communities. This amounted

to an average of 79 interventions a month and exceeded the commission's targets.

Yvonne Mogadime, the spokesperson for the gender body, said the commission has been, and would continue to be, the (dead) vehicle in addressing South Africa's gender imbalance.

"The level of gender awareness has since improved through efforts made by the CGE and related partners to promote gender awareness and gender transformation in South Africa. Today some of the gender advocacy groups in South Africa are run by men," she said.

Mogadime said the commission

has made legislative inputs to the law-reform process, been involved in research, knowledge and information generation, produced a number of publications, handled complaints and acted in gender cases as a friend of the court.

The process of appointing new commissioners, undertaken within the national assembly, is at an advanced stage. The announcement of the new commissioners is expected shortly in the meantime, while the terms of the previous commissioners ended last April, outgoing Joyce Filiso-Senoke has stayed on.

In 2005/06, the commission established provincial resource centres

in Durban and Cape Town while 8 966 people participated in workshops and 39 698 people participated in campaigns.

Cornelius Smuts, the chief financial officer of the commission for protection and promotion of cultural, religious and linguistic communities, said it was a challenge fulfilling its mandate on the funding it received.

"Last year, after taking care of staffing and administrative needs, we were left with R2 million for one advocacy programme. Generally, we can host one or two big events a year," he said.

"As a new body we are busy

getting our systems in place. It is a challenge and staff here have to do more than they can handle because of the heavy demands," he said.

Speaking earlier this month at a roundtable discussion on chapter 9 bodies, Asmal said densely populated areas in South Africa needed a "one-stop shop" to direct the public to the appropriate organisations.

"There is an enormous unmet need in South Africa for assistance," he said. "Access to bodies is very important, [as is] the time taken to investigate complaints and provide satisfaction." The committee is expected to hand over its report to parliament in June.

Relevant articles

THE SUNDAY INDEPENDENT 11 NOVEMBER, 2006



Asmal: tell us what you think of state bodies

Another chance for all to participate in democracy

The national assembly's recent decision to set up a committee to review state institutions supporting constitutional democracy and related bodies has opened up a window of opportunity for all South Africans to take part in the investigation of the effectiveness, efficiency and appropriateness of these institutions.

Your readers are invited to let parliament know whether these institutions meet their expectations arising from the constitutional and legal mandates.

The Chapter 9 and related institutions under review are the Public Protector, the Human Rights Commission, the auditor-general, the Independent Electoral Commission, the Gender Commission, the Youth Commission, the Public Service Commission, the Pan South African Language Board, the Financial and Fiscal Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

South Africans should grasp this opportunity to participate in the debate about these institutions.

It is in the same spirit of national engagement that our people should respond to this survey aimed at ascertaining public awareness and perceptions of and personal experiences with these institutions.

Details about these 11 bodies and the terms of reference of the national assembly's committee are available from the committee's secretary, Marc Philander, at

Chapter nine organisations present in body but toothless in bite

Human Rights Day in South Africa celebrated under a cloud on Wednesday. The heads of the chapter nine organisations established to promote and protect democracy under the bill of rights in the constitution must have been looking nervously over their shoulders.

The fate of their institutions rests in the hands of the diminutive Kader Asmal, the feisty former education minister, who has been conducting an audit of their role and responsibilities. He would not have ventured too far before realising that most of the chapter 9 institutions and five constitutional bodies leave much to be desired in terms of how effectively they are serving South Africa.

Not all of these bodies – the public protector, Human Rights Commission (HRC), Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for

Gender Equality, the auditor-general and the Independent Electoral Commission (IEC) – have fared badly. But, on the whole, they have been a disappointment.

The bill of rights makes provision for them to be accountable only to the constitution and calls for them to be impartial and be able to exercise their powers without fear, favour or prejudice. One might argue that President Thabo Mbeki's iron-like grip on power has left leadership at chapter 9 organisations paralysed by fear. But the constitution should be their defence against any presidential interference, perceived or otherwise.

The biggest obstacle to the chapter 9 bodies exercising their duties is the fact that they depend on the government for their survival. Can you bite the hand that feeds you? Constitutional bodies, such as the National Youth Commission, cost a lot but manage to do and say very little.

The auditor-general has been

Second Take



EDWIN NAIDOO

known to chide government departments for underspending, but it has not been outspoken on defence spending and the arms deal row that have come to characterise South African politics over the past few years.

The IEC has done well in ensuring the integrity of post-democratic elections. The HRC, under Barney Pitso, was seen to have locked horns with the government and went to the point of threatening to take ministers to court. Jody Kollapan, the current chairperson of the commission, focuses on issues rather than the people who create them. But at least he's visible and doing the job he's paid for. One can always count on Kollapan, when asked, to express a view on any human rights matter.

With an ANC man at the helm in Lawrence Mushwana, the public protector's office has lived up to expectations that party officials under the microscope would get an easy ride. Mushwana's actions seem to indicate he's comfortable looking after his comrades. It's hard to explain how a government official cannot be censured for accepting money to have his house painted by someone his ministry is doing business with.

Joe Soap would not be able to speak with any confidence about the gender commission. It would appear to be the most ineffective of chapter nine organisations. Women should feel let down by the commission, which has dawdled while key gender issues have been hijacked by other groups. One can moan about the lack of staff at the gender commission, but remember the PAC in its heyday was run by one person, a telephone and a fax machine.

The body established to promote languages rears its head occasionally. Make a date on Heritage Day when it will awaken from a long slumber to inform us why what it is doing is important and in the national interest.

Hopefully, by then, Asmal will convince parliament to collapse chapter 9 and constitutional bodies under one body with a strong leader. Then South Africans might be able to right the wrongs.

Shake-up due for chapter 9 bodies

Constitutionally enshrined watchdogs face restructuring to avoid duplication, save costs

Linda Esser

Political Correspondent

CAPE TOWN — Proposals for a fundamental shake-up in the way constitutionally enshrined institutions secure their funds and are held accountable to Parliament are on the cards.

A consensus on the need for change has emerged from submissions to the multiparty ad hoc committee set up by Parliament to review institutions supporting the country's constitutional democracy.

These include bodies such as the South African Human Rights Commission (SAHRC), the Commission on Gender Equality (CGE), the public protector, the auditor-general and the Independent Electoral Commission, among others.

The ad hoc committee is to draw up a report on its findings and recommendations, which will be submitted to the National Assembly by the end of June.

In a presentation to the committee yesterday, Deputy Justice Minister Johnny de Lange endorsed the need for institutional restructuring to overcome duplication.

The human rights, gender and cultural, religious and linguistic rights commissions could, for example, be amalgamated into one strong human rights body.

De Lange also recommended a reduction in the number of commissioners as each body had a commissioner and deputy instead of the many commissioners, as is the case now. This would reduce costs.

At one stage the SAHRC had as many as 17 commissioners.

"The SAHRC and the CGE have been plagued with infighting and tension between the respective commissioners and between the commissioners and the respective secretaries," De Lange said.



There are too many portfolio committees in Parliament, resulting in a dissipation of talent and capacity, says Kader Asmal, who is chairing an ad hoc parliamentary committee. This body will review institutions supporting the country's constitutional democracy.

"This infighting has led to tension regarding the respective roles relating to management and strategy development" and would affect their work.

Committee chairman Kader Asmal signalled that the system of accountability of the institutions to parliamentary portfolio committees was not satisfactory. The overworked portfolio committees were not able to give them the attention they required.

"We have met 11 bodies and it is quite clear that the current system of accountability to

portfolio committees is not working," he said. "They would like greater oversight."

"For myself, I think there are too many portfolio committees in Parliament — 25 altogether — and therefore there is a dissipation of talent and capacity. Other countries have only eight or nine. If there were fewer committees, this could release people to do major work on these chapter nine bodies," he said.

Asmal, De Lange and justice committee chairwoman Felisa Cheftan were all opposed to the

idea of a special parliamentary committee dedicated to these institutions.

With regard to funding, Asmal noted that the treasury had objected to national departments acting as a conduit for the institutions, as this undermined their independence.

They needed a more direct interface with the treasury.

Altogether, these bodies receive funds of between R2bn and R3bn annually.

Cheftan stressed the overriding importance of the indepen-

dent-mindedness of commissioners. Accountability standards needed to be laid down for these institutions in legislation, she said. This view is shared by De Lange who also said the remuneration and employment conditions of commissioners needed to be harmonised.

Another issue that had to be tackled, De Lange said, was that commissioners sometimes set up civil society structures when they were supposed to be neutral with respect to both government and civil society.

Relevant articles

BUSINESS DAY, 16 MAY, 2007



Human Rights Commission chairman Jody Kollapen

Departments under fire for ignoring HRC

'Level of responsiveness inadequate'

Wynathan Hanley

Parliamentary Editor

CAPE TOWN — Government departments are being dragged before the Human Rights Commission through the use of subpoenas because 80% of them ignore correspondence about human rights complaints against them, chairman Jody Kollapen said yesterday.

The commission is one of SA's critical institutions, established in terms of chapter nine of the constitution. It is intended to investigate complaints against those in SA who contravene the provisions of human rights. The commission also compels all organs of state to support the chapter nine institutions.

It also envisaged yesterday that Parliament's justice committee could throw its weight behind the commission and use its powers to summon uncooperative government departments, to explain why they were not responding to correspondence from the commission.

Kollapen told the commission there was a lack of responsiveness on the part of the government, regarding complaints about its behaviour.

He reminded the commission that the rights body did not have powers of enforcement — "no power law, in part, in its duty to hold accountable and to seek answers to conduct that impairs on human rights".

For this reason a chapter nine institution was effective only if there was responsiveness from all entities, including the government.

"We remain concerned that the level of responsiveness is inadequate and having to resort to multiple correspondence and ultimately the power of the subpoena is not only a poor use of lim-

ited resources, but also contributes to an adversarial environment," Kollapen said.

He appealed to the commission to help in the issue.

His colleague on the commission, Leven Mwaeni, said subpoenas were used only after three letters and then the respective departments arrived with a glut of letters to address the complaint.

Inkatha Freedom Party (IFP) chief whip Kosi van der Merwe asked the commissioners whether or not they were in a dead end as a result of the government's attitude.

In a clear reference to a complaint lodged by the IFP against Justice Minister Kgama Mabuza, for failing to deal with applications for pardons by IFP members in prison, he said Mabuza's response — that the commission did not have the power to investigate but — showed the commission was at a dead end.

In January, the commission ruled that the lengthy delays in processing the applications of more than 200 IFP prisoners was an abuse of their human rights and recommended Mabuza process them within three months. This caused the African National Congress to launch a harsh attack on the commission, calling it ill-informed.

Committee chairwoman Fatima Chohan said there was a dispute between Mabuza and the commission over the facts of the case and a meeting was being arranged to resolve the issue. She advised Kollapen not to get drawn into the details of the matter.

Chohan did say, however, that she had no problem with using the subpoena powers of the commission to support the commission in its interaction with departments.