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DEMOCRACY**

The Future of Independent Human Rights Institutions in South Africa

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Introduction

A cornerstone of the constitutional democracy established in 1994 is the entrenchment of human rights. To give effect to this goal, Chapter 9 of the constitution, which establishes institutions charged with protecting and promoting democracy, also created the SA Human Rights Commission (HRC) and the Commission on Gender Equality (CGE), which have an explicit mandate to promote human rights.

The performance of these institutions has been the subject of controversy – critics have argued that they have failed adequately to discharge their mandate. In response, in 2007, parliament established an ad hoc Committee on the Review of Chapter 9 and Associated Institutions. Chaired by Professor Kader Asmal, its brief was to investigate and report on whether they had succeeded in transforming society by entrenching human rights. The committee made several suggestions for reform, but these have not been implemented.

More recently, the appointment of a new Human Rights Commission prompted concerns from some public commentators about the commission's independence from government and thus its ability to protect citizens' rights. The workshop sought to stimulate debate on the two challenges for human rights institutions which this context poses: how best to preserve their independence and to enhance their effectiveness.

Opening Address – Kader Asmal

Professor Asmal stressed that the Bill of Rights was not an inert set of rules – it required active respect, protection and promotion by the state. The task of the human rights institutions established by Chapter 9 was to give effect to this mandate of seeking to ensure that the rights promised by the constitution are realised in practice. It was therefore essential that they be robust and independent of the Executive, enjoy popular support and have sufficient resources to perform their functions effectively. Their ultimate goal was to ensure that the state became more responsive to the needs of citizens and more respectful of their rights. They had to act to promote rights rather than react only after complaints were lodged.

Institutions such as the Independent Electoral Commission (IEC) were pivotal to the democratic order, because the validity of the elective process lay at the heart of the legitimacy of our democracy.

A public opinion survey conducted by the ad hoc Committee found that while all the institutions had been rated as important by respondents, not all had been deemed

effective. With the exception of the IEC, their recommendations were advisory rather than mandatory.

There was a need for greater transparency in the appointment procedure for office bearers and the suitability and commitment of candidates had to be subjected to rigorous scrutiny.

The vitality of Chapter Nines depended on the extent to which they were open, transparent, activist and independent. Above all, they needed to be led and nurtured by people committed to the promotion of human rights.

Discussion

Questions were asked about why some institutions had wandered off course. Asmal said some had lost their 'spirit' as original office bearers moved elsewhere and were replaced by those who lacked 'institutional memory'.

There was a debate on the tension between the need for such institutions to be independent on the one hand and their dependence on government's co-operation on the other.

The ad hoc committee's proposal that human rights institutions be merged into one umbrella institution for the promotion of rights was debated. In support of the idea, it was argued that this would eliminate duplication, enhance effectiveness and command greater authority. Other views stressed the uniqueness of , for example, gender as a rights issue and therefore argued that there was a continuing need for a separate CGE. It was agreed that there was at least a need for 'joint collaboration' between institutions.

Panel 1: Protecting Independent Human Rights institutions. Is the independence of South Africa's Chapter 9 Institutions under threat and if so, what can be done about it?

Speakers:

Yvette Abrahams (Commissioner, Commission for Gender Equality)

Janet Love (Commissioner, South African Human Rights Commission)

Judith February (Head Political Information & Monitoring Service, Idasa).

Chair: Richard Calland (Director: Economic Governance Programme, Idasa)

Yvette Abrahams: The CGE has to work within a constitutional framework which recognises only individual human rights and did not recognise that groups can deprive other groups of rights. This made it more difficult to understand and respond to patriarchy. It also did not recognise the intersection of class, race and gender. Literature which reviews institutions such as the CGE did not express a black feminist or womanist perspective which could draw attention to these issues.

Perhaps one indication of the low priority placed on gender issues was that the Treasury had designated the CGE an A2 institution, which meant that its budget was about the half the size of that of the HRC.

Its responsibility to account was partly shaped by an expectation by feminist civil society that it account to them - a sense that commissioners had been appointed because they were supported by civil society and that they needed to account in return.

Advocate Kamraj Anirudhra, Parliamentary Officer for the Commission for Gender Equality said several factors contributed to human rights institutions' lack of accountability. The parliamentary portfolio committee responsible for overseeing them faced workload and time constraints, there was no clear understanding of what independence meant and appointment procedures were flawed.

Janet Love: The burning question of the moment was not the independence of the HRC – there was no sign that politicians were trying to curb its independence. Rather, the issue was whether the HRC could win the confidence of citizens and whether it could ensure that its work has real impact. This meant that the Commission needed to set itself goals which ensured that civil society and society at large could feel that its work was making a difference. Otherwise it would be undermining its own credibility.

It was important that the HRC did not rely on the media as its main voice – its first port of call had to be social movements and civil society whose co-operation could also ensure that influence was brought to bear to ensure that human rights issues were acted upon: 'marching feet are crucial to impact'. While the HRC was formally accountable to Parliament, it needed to ensure that it accounted to society at large.

The importance of independence, the need to account directly to society and the stress on working with activist citizens' organisations did not mean that human rights institutions had to confront power-holders – it was possible to be effective without 'whimpering' and without 'shouting at' politicians.

A single human rights institution would not necessarily enhance effectiveness and the question was rather how Chapter 9 institutions worked together to enhance their effectiveness.

The question of independence was less about the intrusion of politicians as it was about whether commissioners could avoid conflicts of interest. Not enough thinking had been devoted to this issues – it sometimes seemed to be assumed that office bearers simply had to declare a conflict of interest to make it go away. This clearly was not so. Conflict of interest needed to be taken far more seriously than it has been.

Judith February: The discussion suggested that each Chapter Nine institution has its own character and culture. But in general the record of human rights institutions had been 'patchy' – society was impatient with them and believed that they should be doing what they did more quickly. One reason for the inadequate progress was the quality of

leadership in these institutions – the country did not necessarily seem to want the ‘best and brightest’ to lead them. But the buck stopped ultimately with citizens who had not done enough to ensure that the institutions fulfilled their mandate and had deflected responsibility for this.

As an indication of the institutions’ lack of reach into society, a survey conducted for the Presidency’s 2006 report *A Nation in the Making* found that about half the respondents had never heard of the Public Protector, the HRC or CGE. It was therefore encouraging that the new Public Protector had said that she planned to build links with communities – a task which all the Chapter 9 institutions needed to embrace. This obviously required independence and it was therefore necessary to disagree with the HRC’s new chair, Advocate Mushwana, who had said that it was ‘as independent as the government wanted (it) to be’.

Part of the accountability problem, however, was Parliament’s failure to use the information provided by human rights institutions to hold the Executive to account. It was also an indictment of the previous Parliament that the Asmal report was still gathering dust and had not elicited a response aimed at making Chapter 9 institutions more accountable. Accountability also meant a continual conversation between the institutions and society, however uncomfortable this might be.

One issue which might be considered in the attempt to ensure more effective human rights institutions was whether the current procedure for appointment by parliament was appropriate. An appointments system which relied on a body similar to the Judicial Service Commission, comprising not only parliamentarians but others as well, could perhaps be considered. But a further problem with the current appointments process was that there was little media interest in it, which meant in turn that citizens were not informed and so did not influence appointments. It was also open to question whether civil society had been vigilant enough in ensuring an appropriate appointments process.

Chapter 9 institutions would become more effective when they were ‘overwhelmed by the voices of the public’. This required an informed citizenry with clear expectations of what they wanted from the institutions.

Discussion

The view was expressed that independence boiled down to the willingness to upset those in power. If human rights institutions were not willing to do this, then they would not be able adequately to protect citizens’ rights.

Other issues canvassed were the influence of politics on appointments, the quality of individual appointments and the unrealistic expectations placed on Chapter 9s.

Abongile Sipondo, Researcher and Advocacy Manager in the University of Cape Town’s Democratic Governance and Rights Unit, presented the findings of a monitoring team which attended the interviews for the appointment of commissioners to the HRC.

Key findings were:

- The interviewing process suffered from a ‘blatant lack of professionalism’;
- Members of the panel absented themselves during interviews or engaged in distracting conduct such as using cell phones;
- There was a lack of content knowledge and a lack of impartiality;
- Some candidates were overtly favoured from the outset;
- Some panellists hardly took notes while for others interviewing was a mere formality;
- According to a system devised by monitors, most of the candidates who were nominated scored poorly while many who scored well were not chosen;
- Finally, the selection process tended to ignore those who were independent of the governing party.

Panel 2: Protecting Rights in the Real World: Making Independent Human Rights institutions work. What should Human Rights institutions be and what should they do?

Speakers:

Pumla Gqola (School of Literature and Language Studies, University of the Witwatersrand)

Mazibuko Jara (Executive Member, Amandla)

Tseliso Thipanyane (CEO, South African Human Rights Commission)

Chair: Steven Friedman (Director: Centre for the Study of Democracy, Rhodes University, University of Johannesburg).

Pumla Gqola: There was a danger that human rights language would place the promotion and protection of rights beyond grassroots citizens: lawyers tended to pose human rights issues in language which was unfamiliar to non-lawyers. Criticism should not be the sole preserve of academics and there was a need to examine how human rights issues were phrased to ensure that all could participate in discussion about rights.

One example of the elitism of current debate on rights was that it was not considered important that the education system continued to disadvantage poor black students and others whose first language was not English. This clear impediment to the right to speak and thus to participate in choices which affect people did not even feature in current understandings or discussions of rights.

Human rights institutions had responded poorly to the legitimate expectation that they should play a visible role in strengthening the participation of Civil Society and increasing institutional transparency.

Human rights institutions also continued to be dominated by ‘gender conservatives’, ensuring that gender issues, where they were addressed, were understood in a narrow and limited way.

Mazibuko Jara: Human rights institutions needed to be much more activist and interventionist. They needed to adopt a clear agenda in which social and economic rights played a prominent role. At times these institutions had to be pressed to use the law or to support litigation aimed at expanding rights. They also ignored key threats to the rights of citizens such as the Traditional Courts Bill, which removed many people from the protection of the constitution and posed particular problems for women. Human rights institutions seemed to have no clear legal reform agenda.

One form of activism by the institutions which was urgently needed was the mobilisation of 'ordinary people' in defence of rights. This meant that the institutions had to be present where people were working for social change, a role which was complicated but necessary.

Another priority was the promotion of a new consciousness in a 'socially conservative society' which continued to reinforce backward notions of what it meant to be a black person or a woman. The institutions should seek to build a 'critical consciousness' and to spread knowledge which would make future rights abuses less likely. This implied a willingness to move beyond simple majoritarianism, not in the manner demanded by white reactionaries but in a way which pointed to a 'democracy of progressive values' which recognised the rights of the dominated even if they were in a minority

The institutions also needed to do more to challenge structural impediments to the realisation of rights. Thus in 2002 the HRC had published a report on violations of the rights of farm workers but this seemed to end its intervention. To the best of his knowledge, farmers had not been prosecuted for using violence against workers, for example. It was also not clear what analysis of society informs the work of the human rights institutions - it was not possible to challenge structural impediments without a clear analysis of what these were and so it was necessary for the institutions to develop an understanding of the way in which social conditions impede the realisation of rights.

A key element of interventionism was the willingness to challenge the state when it was party to or sanctioned the violation of human rights – when, for example, the relevant Eastern Cape MEC had hindered access to social grants. Would, for example, joining cases in which civil society uses the law to demand social and economic entitlements from the government be seen as opposing the government? The institutions needed to give people a stake in human rights and this would only happen if their work contributed to social and economic change.

A crucial structural impediment to the realisation of rights was that citizens at the grassroots lacked social power. Before 1994 most South Africans had a voice but no rights 'now most have rights but no voice'. Human rights institutions needed to address this by building new spaces for voice beyond the invited spaces made available by the government. This was also in the HRC's interests because, if it took its mandate seriously, it would be 'quite vulnerable' without the support of social movements.

Reforms which made it easier for the institutions to play this role should be considered. Thus the current funding procedures meant that the institutions were ultimately dependant on the executive for funding, the same executive which it sometimes had to challenge. There was a need to consider funding arrangements which guaranteed their independence. Also, it was worth asking whether the constitutional and legal order could recognise social power or its absence rather than restricting itself to a formal understanding of rights.

Tseliso Thipanyane: The HRC and other human rights institutions had been criticised for not achieving social change but how does one measure this change scientifically? Unless a clear measure was offered, it could not be assumed that the institutions' impact on change was being accurately assessed.

Critics had mentioned leadership as an important criterion for effectiveness but more important than the role of individual leaders was powerful, courageous and effective institutions. We need to be concerned about building institutions rather than relying on individuals. More relevant than appointment procedures was whether we were achieving the quality of participation which ensured that we were building institutions.

As other speakers had suggested, the success of chapter 9s did not depend on the institutions alone – society's attitude was also important. Whether the country got the institutions it needed depended largely on whether we 'really demand the best' from them.

Clearly, the institutions still faced an immense challenge in discharging their mandate. Pressing issues included the need to redress economic inequality, problems of language and culture, and the role of local government and the private sector. Compliance with international human rights instruments was a challenge and effectiveness was hampered by an unsatisfactory relationship with stakeholders (taxpayers).

Discussion

Again, the advisability of a single institution to strengthen enforcement was raised. Janet Love suggested that some interventions which relied on restructuring institutions to achieve desired goals had unintended consequences which worsened the problems – this had happened in education especially and it was a lesson which those who advocated restructuring needed to consider. Merging the institutions would not guarantee optimal efficacy.

It was argued that, despite advances in its work on socio-economic rights such as the right to food security, the HRC had failed to adequately engage Government on future policy. The challenge was how to gain maximum impact with minimum resources.

Also discussed were the enforcement of recommendations by the courts and the need better to inform citizens of their rights.

Question and Answer Session with Advocate Lawrence Mushwana, Chair of the Human Rights Commission

Lawrence Mushwana: The workshop was welcome because it had enabled him and other HRC commissioners and officials present to reflect on their role. He could not, however, offer a view on behalf of the HRC because it had not yet met as a commission and so it did not yet have a collective view. Engagement was welcome and the commission would continue to seek dialogue with citizens. But, until it had developed its collective view, responses to the points raised during the workshop would be preliminary only and would not necessarily express an HRC view.

In response to criticism of his statement that the commission could only be as independent as the government allowed it to be, he said he had stressed that the HRC was not part of government. But money was critical to the operation of Chapter 9 institutions and the government decided how much money they received. They could also not force Parliament or the government to implement their recommendations. The Public Protector's office could appoint its own staff but did not sit in the bargaining chamber where pay and conditions were decided. Independence meant that institutions should drive their own processes and there were limitations on this. It was only in that sense that he had meant that the government could decide how independent the commission is.

He expected the government to make the HRC more relevant by implementing its recommendations. Parliament also had a role here – as Public Protector, he had responded to the failure to implement recommendations by writing to Parliamentary committees asking them to call the relevant Minister to the committee to ask why there had been no implementation but he had no power to ensure that they did this.

He agreed that the institutions had not made themselves as relevant to citizens as they should be. For example, before citizens take to the streets to protest about service delivery, they should approach the institutions for redress and this had not happened yet. He agreed too that language was important here –the HRC needed to communicate in the official languages which people understand.

He accepted some of the criticism of the appointments process but this was Parliament's responsibility. It was meant to exercise oversight but it could be argued that it did not play this role as effectively as it could. It could be necessary to allow participation by civil society in how people are appointed and to encourage more transparency. Democracy will only be fully democratic when it reaches everyone and that can only happen when we appoint people in whom the people have confidence.

The commission wanted NGOs to assist it and one example of how they could this is that the HRC and the country needed clarity on a definition of hate speech. Political rhetoric was very heated and there was a need to define what was acceptable speech and what was not. NGOs and others had a role to play here. It might be necessary to come up with a

definition even if this meant that it was taken on judicial review: this could be healthy because it would ensure that clarity was achieved.

He agreed that Chapter 9s had failed to collaborate with each other. He had tried to encourage this when he served as Public Protector but more was clearly needed. There was also a need to clarify the public's understanding of the roles of particular institutions: thus the HRC had been asked to intervene to address alleged police misconduct when this was the role of the Independent Complaints Directorate. He also agreed with Kader Asmal that the commissions were too small – they did not have the capacity they needed to carry out their mandate. High staff turnover undermined continuity and an emergent culture of self-enrichment among office bearers lowered organisational morale

Deciding on priorities was a challenge – every day brought reports of new human rights issues and the commission obviously could not address them all. This would be one issue to be discussed at a forthcoming strategic retreat. After it, the HRC would issue a statement of intent and it looked forward to engaging with civil society on it. He hoped that the workshop would begin a process of continuing engagement between the commission and society.

Discussion

Among the issues discussed were:

- The sharing of departmental audit reports to expose service delivery failures;
- Dealing with complaints lodged by political parties;
- The growing problem of the police repression of those involved in social protest.

Adv Mushwana said the HRC would take seriously the points raised and that they would be considered when it formulated its statement of intent. He looked forward to further engagement between the commission and society.