

4th Annual Kader Asmal Lecture

The role of Independent Institutions in deepening democracy

By Nhlanhla Nene

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Thank you programme director, Executive Secretary, CASAC, Mr Lawson Naidoo
Council members present
Louise and members of the Asmal family
Auditor General, Mr Kimi Makwetu
Prof Pamela Dube, Deputy VC, UWC
Honoured guests
Ladies and gentlemen

It is my singular honor and privilege to be invited to deliver the Kader Asmal memorial lecture and to walk on the footsteps of the esteemed former keynote speakers, all of them with rich accolades behind their names, having served in their callings with Distinction; former Constitutional Judges and former minister of finance.

My brief this evening is to talk about the role of the institutions of governance in strengthening constitutional democracy as well as the links between financial regulation and the progressive realization of socio-economic rights.

In terms of Africa's own vision, as explained by the African Union, this continent "shall be a continent where democratic values, culture, practices, universal principles of human rights, justice and the rule of law are entrenched".¹

To realise this vision we need functional institutions, visionary leadership, and participatory governance mechanisms. It is such an institutional milieu that underpins economic and social development. Such an institutional mix does so by favouring long term investment, unlocking the potential for domestic resource mobilization, unleashing entrepreneurial capacity and inducing broad-based participation and property rights.²

So, as far as our leaders across the length and breadth of our continent are concerned, good economic governance, including the transparent management of a country's finances, is a pre-requisite for the promotion of economic growth and development³.

Good governance embraces the following dimensions: political representativeness, institutional effectiveness and robust economic management. The first dimension relates to qualitative and

¹ Agenda 2063, <http://agenda2063.au.int/en/documents/agenda-2063-framework-document-ar-en-fr-po>

² United Nations Economic Commission for Africa, <http://www.uneca.org/pages/about-governance>

³ African Peer Review Mechanism, <http://www.aprm-au.org/economic-management-and-governance>

quantitative aspects of representation; the second one implies institutional capacity and efficacy, and the last one relates to the efficiency and credibility of economic systems.⁴

Good governance emphasises transparency, accountability and participation. Good governance also implies creating political and economic processes that are conducive to sustainable economic development. Therefore a country with good governance does not only manage its democratic affairs in a transparent and accountable manner but also safeguards the rule of law. It does all of this whilst ensuring that in its decision-making processes the concerns of the most disadvantaged are prioritized. But governments, or rather those who constitute and run them, often fail to live to this promise.

That is why our founding fathers (and mothers) deemed it necessary that South Africa shall be a constitutional democracy. In a constitutional democracy constitutional provisions can be segmented into two broad categories. There are those provisions that constrain or limit those in power from causing certain acts, such as torture or the use of the death penalty. The other group of constitutional provisions are those that facilitate or enable the state to do certain things.

Our constitution went further than most, by creating a number of independent institutions to strengthen democracy and promote respect for human rights. I am referring to chapter 9 institutions such as the Auditor General, the Independent Electoral Commission, Office of the Public Protector, the South African Human Rights Commission, and the Commission for Gender Equality.

But there are a number of other institutions that perform a myriad of functions, functions that affect the efficiency and equity objectives in a market economy.⁵

Firstly, by protecting property rights, guaranteeing the sanctity of contracts and by providing law and order more generally, institutions create markets and an environment in which business and private investment can flourish. Thus, having a well-functioning judiciary, an efficient bureaucracy and police is key to the development of markets.

Secondly, markets need to be regulated. Institutions fulfill this role, which arises, either from market failure or social objectives such as transformation of our society to make up for the denial of opportunity to millions of South Africans under apartheid. Or as economist Arvind Subramanian points out, 'the private sector may not deliver education and water to the most needy because the needy cannot afford to pay for these services.'

Thirdly, institutions, such as the Reserve Bank and the Treasury, stabilize markets by ensuring low inflation and macroeconomic stability and helping to avoid financial crises.

Finally, institutions legitimize markets through mechanisms of social protection and insurance. Our social grants system, for example, has provided a safety net for the most vulnerable segments of our society, including children, especially orphans, as well as the aged. A well-functioning democracy is after all the institution par excellence for legitimizing markets.

Now, let me deal with the role of the financial sector in economic development as well as the links between financial regulation and the progressive realization of socio-economic rights.

⁴ Africa Governance Report IV: Measuring corruption in Africa: The international dimension matters <http://www.uneca.org/publications/african-governance-report-iv#>

⁵ The Evolution of Institutions in India and its Relationship with Economic Growth by Arvind Subramanian, Senior Fellow, Peterson Institute for International Economics and Center for Global Development, and Senior Research Professor, Johns Hopkins University, April 2007

The financial services sector is at the heart of the South African economy and touches the life of each and every citizen.⁶ It enables citizens to make daily economic transactions, save and preserve wealth to meet future aspirations and retirement needs, and insure against personal disaster. The financial sector also enables economic growth, job creation, the building of vital infrastructure and sustainable development for South Africa and her people.

The financial sector therefore plays a crucial role in any well-functioning economy. It facilitates all economic transactions. The financial sector has four broad functions. These are:

- Value exchange: which refers to a way of making payments.
- Intermediation: which is a way of mobilizing savings and making these available to those who want to borrow money to start businesses or buy property.
- Risk transfer: a means for pricing and allocating certain risks.
- Liquidity: a means of converting assets into cash without undue loss of value.

Each of these core functions is, in its own right, vital to economic growth and development.⁷ Also, these functions are not generally ends in themselves but play an intermediary role. Since every economic activity has a financial element, the functioning of the financial sector becomes vital for the effective and efficient workings of any economy. When the financial sector fails, for whatever reason, to play any of its four core functions mentioned above the impact on the broader economy can be severe. We saw this during the global financial crisis when banks and other lenders seized lending to the economy.

The key difference between the financial sector, and more specifically banking, and other sectors of the economy, is how it is funded. Banks borrow short-term and lend long-term, a mismatch between the maturity of a bank's assets and liabilities which you don't find in companies operating in other sectors of the economy. This mismatch makes it vital for banks to be able to continually have access to funding which they can use to replace one set of liabilities as one set is repaid. Without this access to flow of funds, the financial sector freezes, choking the flow of finance to the rest of the economy. Such an impact is magnified also by the fact that there are very interlinked ages between firms in the financial sector. Banks and insurance companies, for example, lend to each other. This means that when one bank runs into difficulties it can affect the entire financial sector.

That, in a nutshell, is why the financial sector is more closely regulated than any other sector of the economy. But the special nature of the financial sector and the need therefore to regulate it closely does sometimes confuse some about the role of the regulation and regulators of the financial sector, a function which, in the case of banks, is currently fulfilled by the Banking Supervision Department of the South African Reserve Bank. The Financial Services Board on the other hand regulates non-banking financial institutions like insurance companies, collective investment companies and fund managers. This arrangement will change soon, resulting in the creation of two institutions (the Twin peaks): one focused on the prudential regulation of the entire financial sector and another to regulate market conduct, basically how financial institutions behave, including how they treat their customers.

⁶ A safer financial sector to serve South Africa better, National Treasury, 2011
<http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>

⁷ Submission to the Financial System Inquiry, March 2014, Reserve Bank of Australia
<http://www.rba.gov.au/publications/submissions/financial-sector/financial-system-inquiry-2014-03/pdf/financial-system-inquiry-2014-03.pdf>

A stable financial system is therefore vital to the effective functioning of an economy. Stability in this instance refers both to the main institutions and the markets in which they operate. We used to say during the struggle against apartheid that there can be no normal sport in an abnormal society. Equally you cannot have stable institutions in an unstable financial system.

Given all of this, that is why the regulation of the financial sector must be left to regulators who play their role without fear or favour. Professor Kader Asmal and all those who marshaled our constitution from infancy to the point where it was adopted by the Constitutional Assembly were most keenly aware of this. So they ensured that the independence of the South African Reserve Bank is enshrined in the most supreme of our laws, the constitution.

It is vitally important therefore that we not only protect the independence of our institutions such as the Reserve Bank and many others from undue influence and capture by unruly elements but that in our conduct and in our demands for socio-economic transformation we strike a balance between goals and means. Indeed government's framework for the regulation of the financial sector flags the fact that there are various priorities which interact with one another and in doing so often generating difficult decisions for policymakers.⁸

In particular, policymakers and regulators must balance the multiple trade-offs and competing objectives. There's financial stability, for example, versus access to credit. As National Treasury points out, unrestrained credit growth might appear desirable (for example, to allow broader access to housing), the global financial crisis demonstrated that excessive lending to households creates financial stability risks, with disastrous economic consequences.⁹

A careful balance needs to be struck between these competing objectives. This balance is referred to elsewhere in the literature as the progressive realization of socio-economic rights, rights that are enshrined in our Bill of Rights.

We have had a number of pronouncements by the Constitutional Court on this matter, including in the famous Grootboom case. In the Grootboom case, the court ruled that whatever measures the state came up with to give effect to the Bill of Rights must be calculated "to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable".¹⁰

In conclusion, ladies and gentlemen, allow me to reflect a bit on the man in whose honour we have gathered here this evening. What kind of a person was he?

Professor Asmal has been described in various tributes as a man of boundless energy, impatience and brilliance coupled with a moral compass as to what is right and what is wrong left no one untouched who came into contact with him. He has also been referred to as a person who was intensely human in his emotions and relationships. "At times overbearing and intimidating by virtue

⁸ A safer financial sector to serve South Africa better, National Treasury, 2011
<http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>

⁹ A safer financial sector to serve South Africa better, National Treasury, 2011

¹⁰ The Government of the Republic of South Africa versus Irene Grootboom and others.
<http://www.saflii.org/za/cases/ZACC/2000/19.pdf>

of his intellectual genius and political passion, he never abandoned his compassion and respect for people."¹¹

My recollection of Professor Asmal can perhaps be best captured by American poet and essayist Edward Estlin Cummings who once wrote of the love of his life:

"I carry your heart with me (I carry it in my heart) I am never without it...."

Professor Asmal carried our country's constitution in his heart. He was never without it. I recall one instance when he came to address the ANC caucus in parliament. He explained the clauses of the constitution that were relevant for that day's discussion without reading to the document itself. But it was his voice that said it all, capturing not only his deep knowledge of the various clauses of the constitution but his intimacy with the text.

Professor Asmal's intimacy with the constitution was based on the understanding that the constitution entrenches democratic values, culture, practices, and universal principles of human rights, justice and the rule of law. Indeed, his understanding has been confirmed by various Constitutional Court rulings and the actions of various institutions of governance, including Chapter nine institutions.

We may not match Professor Asmal's brilliance, but at least we can try and come close to matching his boundless energy, impatience and his intense humanness in emotions and relationships. And God knows, we need boundless energy and impatience if we are to defend our democratic values and the rule of law. Those who undermine the rule of law and our democratic values have displayed no less. Let's redouble our efforts.

I thank you

Townhouse Hotel, Cape Town

¹¹ UNEP Executive Director Achim Steiner pays tribute to South African politician and activist Professor Kader Asmal.
<http://www.unep.org/newscentre/Default.aspx?l=en&DocumentID=2645&ArticleID=8787>