



## The Chapter 9 Institutions in South Africa

*"With the advancement of democracy in South Africa in 1994, a human rights culture was made the cornerstone of a new constitutional dispensation and a wide-ranging set of human rights, including socio-economic rights, was inscribed in a Bill of Rights... In order to achieve this goal, a range of institutions were established in the Constitution itself and in national legislation, the purpose of which was to strengthen constitutional democracy in South Africa..."<sup>1</sup>.*

### 1. Introduction

The 'State Institutions Supporting Constitutional Democracy' – known as the Chapter 9 Institutions, after their place in the Constitution – consist of the Public Protector (PP), the Auditor-General (AG), the Electoral Commission (IEC), the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE), and lastly, the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities. These institutions are independent of government, subject only to the Constitution and the law, and report annually to Parliament. In 2006, an *ad hoc* Committee on the Review of the Chapter 9 Institutions and Associated Institutions was established to investigate the effectiveness and efficiency of these institutions, and to establish whether they were fulfilling their constitutional mandate. Based on the findings of this report, and on the inputs at a roundtable discussion held by the CPLO in collaboration with the Hanns Seidel Foundation<sup>2</sup>, this briefing paper will consider where these institutions have come from and how they are performing presently.

### 2. Background

The Chapter 9 Institutions ('Ch9s') have been based on models drawn from around the world; the first Ombudsman (known here as the Public Protector) was established in Sweden in 1713,

and the office of Auditor-General has existed in England since as early as 1314<sup>3</sup>. South Africa established both its Auditor-General and Public Protector before 1994, and these institutions became part of the Constitution during the negotiations for democracy. The Commission for Gender Equality and the SA Human Rights Commission were modelled according to the 1993 'Paris Plan', a United Nations document which provided international guidelines for the composition, responsibilities and methods of operation of human rights institutions<sup>4</sup>. Together, these institutions are responsible for reversing the profound disrespect for human rights, the rule of law and constitutional governance shown by the apartheid state<sup>5</sup>. They are designed to guarantee that the state remains open and responsive to the needs and rights of all citizens.

### 3. The Role of the Ch9s in Present-day South Africa

The Ch9s have been described as 'watchdogs' which keep government in check and transform society. However, because these institutions are not directly a branch of government, they do not have the power to take disciplinary action against government officials. Their role is purely investigatory and administrative, providing a link between government and citizens<sup>6</sup>. Additionally, the Ch9s are outside partisan politics; this ensures that they are independent and impartial in their investigation of government affairs on

behalf of citizens<sup>7</sup>. It is the responsibility of all organs of the state to facilitate the work of these institutions in order to ensure their effectiveness. The Ch9s are also constitutionally required to be impartial when exercising their power; free from favour, fear and prejudice. To ensure that they are doing their intended work, they must submit annual reports to the National Assembly, stating what progress or setbacks they have experienced. These institutions are especially needed in a young democracy such as South Africa, where many citizens still live in poverty, have limited access to services and the political leaders they have voted for, and where corruption amongst government officials is rife<sup>8</sup>.

#### 4. Challenges

The Ch9s are constantly criticized for their lack of accessibility to ordinary citizens, especially because they are constitutionally mandated to protect and promote the rights of these very citizens<sup>9</sup>. Although most Ch9s have well-established provincial offices, the effectiveness of these offices is uncertain. It is also unclear whether they have established rural offices in line with the Asmal report's recommendation. The Human Sciences Research Council (HSRC) has reported that citizens remain generally unaware of the existence of the Ch9s, and are poorly educated on their purpose, powers and functions<sup>10</sup>. They do not know where these institutions are situated or how to access them. This report suggests that this disconnection between Ch9s and citizens may be bridged by means of a more structured, continuous relationship with civil society organizations (CSOs), which are spread out all over South Africa, and which possess a wealth of knowledge that the Ch9s can tap into. Commissioner Janine Hicks, speaking at the roundtable, acknowledged the importance of this relationship. She said that the CGE was always striving to involve CSOs in its work by initiating substantive partnerships and collaboration. This process is, however, hampered by citizens who choose not to engage the Ch9s. This lack of engagement may be attributed to the abject poverty faced by the communities the Ch9s seek to serve; when people are faced with bread and butter issues, they are less likely to be interested in engaging in community projects. But the reverse may also be true: when people face such grim living conditions, they may very well choose to engage the Ch9s out of sheer desperation, as a means to

empower themselves and access their basic rights.

Civil society often accuses the Ch9s of being too cautious in their relationship with government<sup>11</sup>. This they attribute to commissioners not wanting to ruffle feathers as "the leadership of the Ch9s is appointed by the president and also funded by state departments"; this is particularly the case when commissioners belong to the ruling party<sup>12</sup>. Former Public Protector Lawrence Mushwana's poor investigation into the Oilgate party funding scandal may be seen to support such accusations<sup>13</sup>. In 2005 the Mail&Guardian revealed that R11 million of tax payers' money had been channelled into ANC coffers via oil trader Imvume. The ANC and Imvume were not called to account because Mushwana argued that "he could not follow the money as his mandate did not extend to oversight of non-state entities such as Imvume and the ANC". He was sharply criticized for deliberately shielding the ANC instead of protecting the public interest.

Against this background, the Asmal report recommended that those appointed as commissioners should resign any high-level posts in political parties<sup>14</sup>. Adding to this debate, the HSRC has posed two valuable questions, which are imperative to any discussion on the Ch9s: should they factor in a consideration of how their work may affect the public's perception of the state and its officials when deciding to pursue a certain course of action? Or should they pursue the promotion of human rights, irrespective of the consequences for the state? And then, as if to add to the pressure, in his recent address at the gala dinner celebrating the centenary of the office of the Auditor-General of South Africa, President Zuma stated that the Ch9s do not exist to attack government, but to diligently monitor and evaluate the work of government departments and officials<sup>15</sup>. Statements such as these, together with Ch9s' non-binding recommendations, contribute to the perception that they are weak and ineffective.

There is also an issue regarding staff retention and the appointment of commissioners. The SAHRC and CGE have both experienced commissioners' terms lapsing, often the result of delays on the part of Parliament in filling vacancies. A recommendation was made in the Asmal report that procedures for appointments should be completed one month prior to the expiry of a commissioner's term of employment,

and that commissioners' terms should be staggered to enhance continuity. However, Parliament's tardiness in this regard persists; the fact that the CGE will soon be without any commissioners attests to this<sup>16</sup>.

Another problem is that certain Ch9s receive more funding than others, which greatly limits their ability to serve citizens. While AG, for instance, is able to raise its own income through audit fees, other Ch9s are dependent on state funding to run their programmes. "Although differences in budget allocation might be justified, there seems to be a recognition that the general level of funding for the Chapter 9s is too low to enable them to fully deliver on all aspects of their mandates"<sup>17</sup>. Adv Masutha recommended that the allocation of funds to the Ch9s should be revised and standardised; the variation in budget allocations negatively impacts the perceived independence of these institutions and creates the impression that they are accountable to the specific government department by which they are funded<sup>18</sup>.

Prof Asmal's committee expressed concern that Parliament was not "making full use of the institutions to complement its oversight of the Executive and to brief members of Parliament on various matters of public interest on which the institutions may have reported"<sup>19</sup>. The Committee found that, with the exception of the AG, all Ch9s expressed dissatisfaction with their engagement with Parliament and the opportunities afforded them. The Committee thus recommended that a special unit be established to deal with the grievances of, and challenges faced by, Ch9s. Accordingly, in 2008 the National Assembly adopted a resolution to establish an 'Office on Institutions Supporting Democracy' (OISD). This office was to assist Parliament in meeting its constitutional obligation towards the Ch9s and to ensure effective liaison between them and Parliament. This process is currently driven by the Deputy Speaker and the OISD is conducting an audit on special reports (on issues which need urgent attention) submitted by the Ch9s to Parliament<sup>20</sup>. Despite the work of this Unit, though, certain institutions such as the SAHRC still claim to experience a lack of responsiveness to reports and inadequate interaction with Parliament. Adv Steve Swart MP, who attended the roundtable, suggested that this may be due to parliamentarians not being adequately educated about the purpose and function of the CH9s. Thus, Parliament often lets the CH9s down by responding poorly to their

recommendations and reports, especially with regard to their implementation.<sup>21</sup>

## **5. Analysis**

### **5.1. Positive achievements**

Media coverage of the Ch9s is often negative, suggesting that they are lurching from one crisis to another<sup>22</sup>. However, the current condition of these institutions is not all doom and gloom. Some of the Ch9s are performing very well, despite the challenges which have been discussed above. "The Electoral Commission, for example, is highly respected for its electoral work and professionalism. It plays a vital role in other parts of Africa to help enhance democracy. Similarly, the South African Human Rights Commission is clearly respected far beyond the borders of South Africa and is often asked to advise and assist other countries with their processes of deepening respect for human rights. The Auditor-General has been contracted to major multilateral bodies such as the United Nations to provide audit services"<sup>23</sup>. Furthermore, the PP plays an active role in exposing corrupt government officials and improving service delivery. The present PP has on numerous occasions challenged government to acknowledge its responsibility, to take institutions supporting democracy seriously, and to act on the recommendations made by these bodies, as opposed to merely acknowledging reports and recommendations and then doing nothing to implement them<sup>24</sup>. These achievements are laudable, especially considering that these institutions (respectively comprising of no more than a few Commissioners and a limited number of staff) serve millions of South Africans on a daily basis.

### **5.2. Citizen involvement**

Of course, the Ch9s are not solely responsible for the protection and promotion of democracy; everybody has a part to play. Dr Yvette Abrahams warned that if we did not want a democracy that existed only on paper, citizens must begin to play an active role in practicing democracy. South Africans were weak in demanding democracy, especially the middle-class, and the Ch9s could not do their work if citizens were not aware of their existence and did not care about what was happening in their democracy. At the same time, the Ch9s were to a great extent responsible for improving public awareness and education. They should consider using television, radio and social

media to get the attention of citizens; a striking television advert might be more useful than a pamphlet or a meeting in a community hall, for creating public awareness.

Government officials and Members of Parliament also need to be educated on the purpose and function of the Ch9s. Commissioner Hicks and Adv Swart both related incidents where they had engaged with parliamentarians who either did not know about, or fully understand, the work done by the Ch9s. Thomas Keil suggests that this could be the reason for Ch9s often experiencing a lack of compliance and engagement from government departments and officials. Awareness about these institutions does not necessarily translate into knowledge of what they do<sup>25</sup>.

### **5.3. Ch9s' constitutional mandate**

Dr Abrahams described the CGE as a 'toothless watchdog' because it was able to do very little when government or Parliament failed in their duties. This is a common sentiment, but it risks misconstruing the constitutional mandate of the Ch9s. These institutions are certainly 'toothless' to the extent that they are unable to compel government to implement their recommendations, or to impose punishments on people. However, this is not their purpose; in this sense the Constitution does not give the Ch9s 'teeth'. They do not exercise power in the same way as the executive, legislature or judiciary; they do not "govern"<sup>26</sup>, and they do not have the same kind of powers as the police or the prosecuting authorities. The Constitution does however afford these institutions strong investigative powers and administrative capacities. It is also well within their legal mandate to take cases to court on behalf of others. Some Ch9s have powers to subpoena witnesses and can apply for search and seizure warrants. They can also make recommendations that people be prosecuted.

The real problem is not so much that they lack powers, but rather, as the Asmal Report found, that they do not make full use of these powers, thus curtailing their efficiency and effectiveness. Their ability to do their job can also be derived from their moral authority. The power of public exposure goes a long way in convincing government, and others in positions of power, of what is fit and proper behaviour, as shown by the current PP. As a result of her investigation and recommendation, for example, the President

relieved Sicelo Shiceka and Gwen Mahlangu-Nkibinde of their ministerial duties, and suspended Police Commissioner Bheki Cele last year<sup>27</sup>. The AG, SAHRC and IEC are further examples of Ch9s which wield considerable power through their strong public reputations.

### **5.4. Unwarranted interference**

These institutions are meant to be independent, impartial and subject to only the Constitution and the law. Organs of the state must assist and protect them, so that they may function without fear, favour or prejudice. However, despite the fact that their work is not supposed to be influenced by partisan politics, it is continually beleaguered by political interference. The appointment of leadership and senior staff is often politically driven. "Since the ANC has a dominant position in Parliament, there is the inherent danger that candidates are selected according to how convenient they are for the ruling party"<sup>28</sup>. This results in appointees sometimes being ill-equipped to perform their duties, which severely impacts the efficiency and effectiveness of these institutions. Despite the danger this poses to the independence of the Ch9s, it does not mean that they completely lack independence in practice. The PP, for example, continues to show a lack of fear or political bias, making full use of her office's independence. It is for this reason that the South African Council of Churches (SACC) recently commended her for her diligent efforts to give meaning to the Constitution and for promoting ethical governance<sup>29</sup>.

### **5.5. The effects of secrecy**

Finally, a development that may have a significant impact on the independence of the Ch9s is the Protection of State Information Bill; it may significantly curtail the functioning of the Ch9s by restricting the flow of important, and sometimes sensitive, information needed during their investigations. At a recent *ad hoc* committee meeting on this Bill, the PP said that the vital function of her office to hold the government to account would be "severely affected" if the 'Secrecy Bill' was enacted in its present form<sup>30</sup>. She stated that her office often received leaked information from whistle-blowers, which assisted in her investigations of governmental abuses. Under the Bill, she might be required to hand this information over to the police to be declassified before her office could use it in an investigation. The police would be placed above her office, and

restrict her ability to fulfil her constitutional mandate.

Alarming, some of the members of the committee asked why she thought her office should be treated any differently to ordinary citizens. She replied that comments of this nature scared her, because they showed once again that parliamentarians lacked an understanding of the Ch9s and their constitutional role.

## 6. Conclusion

There is no doubt that these institutions are necessary to guarantee that the state stays open and responsive to the needs and rights of South Africans. However, there is no simple yes or no answer to the question whether the Ch9s are efficient and effective. Their extensive mandate must be taken into consideration when contemplating this question. It is not an easy task to ensure accountable and ethical governance when corruption seems to be the *status quo*. Furthermore, these institutions continue to be dogged by challenges such as inadequate funding, not being taken seriously by government officials,

and poor public awareness. Yet, they boast some substantial achievements, and they continue to deepen democracy and promote and protect human rights on a daily basis.

The responsibility for making our democracy function does not lie solely on the shoulders of the Ch9s. Citizens must accept and play their part in making democracy work for them, by participating in political processes. They ought to take an active part in ensuring that these institutions remain part of the democratic ferment of our society. Finally, government departments and officials should do their part to help the Ch9s achieve the full attainment of their constitutional mandate, by educating themselves about these institutions and engaging with them openly and constructively.

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<sup>1</sup> Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa. (2007). Referred to as the "Asmal Report".

<sup>2</sup> The roundtable discussion took place on 3<sup>rd</sup> April 2012. The speakers were Adv Tshililo Masutha MP, Gender Commissioner Janine Hicks and Dr Yvette Abrahams, a former Gender Commissioner.

<sup>3</sup> Murray, C. (2006). "The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?"

<sup>4</sup> *Ibid.*

<sup>5</sup> Remarks by Professor Kader Asmal, MP, Chairperson of the ad hoc Committee at the launch of the Report of the ad hoc Committee on the Review of Chapter 9 Institutions and Associated institutions at the Good Hope Building, on Tuesday, 21 August 2007.

<sup>6</sup> Murray, 2006.

<sup>7</sup> Constitution of the Republic of South Africa. (1996). Chapter 9.

<sup>8</sup> Murray, 2006.

<sup>9</sup> Human Science Research Council. (2007). "Final Report: Assessment of the relationship between the Chapter 9 Institutions and civil society".

<sup>10</sup> *Ibid.*

<sup>11</sup> HSRC, 2007.

<sup>12</sup> *Ibid.*

<sup>13</sup> Lionel Faull. (10 June 2011). "Mushwana unmoved by Oilgate ruling". Retrieved from <http://mg.co.za/article/2011-06-10-mushwana-unmoved-by-oilgate-ruling>

<sup>14</sup> This report also recommends that Commissioners should decline being electoral candidates.

<sup>15</sup> President Jacob Zuma. (2011). "Chapter 9 Institutions don't exist to attack government". Address by President Jacob Zuma to the Gala Dinner celebrating the Centenary of the Office of the Auditor General of South Africa, Gallagher Estate, Midrand, November 24 2011. Retrieved from <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=268955&sn=Detail&pid=71654>.

<sup>16</sup> Commissioner Janine Hicks said at the roundtable discussion that the CGE would once again be without Commissioners by June 2012. At one stage, the CGE was without commissioners for a period of 14 months.

<sup>17</sup> Loots, C. (2007). "The Effectiveness and Impact of Three Constitution Building Institutions in South Africa". Braamfontein: The Human Rights Institute of South Africa.

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<sup>18</sup> Adv Masutha presented a research paper at the roundtable, entitled *“Impact and relevance of the Institutions Supporting Democracy in relation to their respective constitutional mandates in facilitating oversight”*. This research paper states that most of the recommendations made by the ad hoc Committee have not been implemented by Parliament yet, with the exception of the establishment of this Unit in the Office of the Speaker.

<sup>19</sup> Asmal Report, 2007.

<sup>20</sup> Masutha, 2012.

<sup>21</sup> Mr Steve Swart is a Member of Parliament for the Africa Christian Democratic Party (ACDP). He serves on the Portfolio Committee on Justice and Constitutional Development.

<sup>22</sup> Murray, 2006.

<sup>23</sup> Asmal, 2007.

<sup>24</sup> *“The Public Protector asks government to act more than speak”*. (29 August 2011). Retrieved from [http://www.pprotect.org/media\\_gallery/2011/29082011.asp](http://www.pprotect.org/media_gallery/2011/29082011.asp)

<sup>25</sup> Thoman Keil. (2010). *Supporting constitutional development in South Africa: a study of the effectiveness of the three Chapter 9 Institutions*.

<sup>26</sup> Murray, 2006.

<sup>27</sup> Nickolaus Bauer. (24 October 2011). *“Zuma wields axe ‘for the good of SA’*”. Retrieved from <http://mg.co.za/article/2011-10-24-zuma-wields-the-axe-for-good-of-sa>

<sup>28</sup> Keil, 2010.

<sup>29</sup> *“SACC pledges its support for Public Protector and other Chapter 9 institutions”*. (21 November 2011). Retrieved from [http://www.pprotect.org/media\\_gallery/2011/21112011.asp](http://www.pprotect.org/media_gallery/2011/21112011.asp)

<sup>30</sup> Wyndham Hatrley. (29 March 2012). *“Secrecy bill ‘will limit public protector’*”. Retrieved from <http://www.businessday.co.za/articles/Content.aspx?id=168490>

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