



Assessing the Performance of South Africa's Constitution

Chapter 6. The Performance of Chapter 9 Institutions

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6.1. Introduction

The purpose of this Chapter is to consider the performance of a unique set of institutions that were set up in terms of Chapter 9 of the South African Constitution in order to support and enhance democracy and fundamental rights. The place of these institutions within the structure of government is discussed as well as their role and key goals. The focus of the chapter will be on the Public Protector, an institution set up to engage with improper conduct of organs of state; the South African Human Rights Commission, whose task is to advance the protection of fundamental rights in South African society and the Independent Electoral Commission whose task is to manage elections and ensure they are free and fair. The design and functioning of these institutions will be evaluated against a set of overarching goals they are meant to realise as well as their own specific functions. Our analysis shows that these institutions have played a vital role in advancing the goals of the South African constitution though features of their design and performance could be enhanced in ways that are detailed in the chapter.

As we have seen, with the advent of a democratic South Africa, the Constitution enshrined certain values that form the foundation of the new constitutional dispensation. Fundamental values have been encapsulated in section 1 of the Constitution and include human dignity, equality and the advancement of human rights and freedoms. In addition to these, the Constitution promises various tools for the establishment of democratic accountability, such as a multi-party democracy, rights to administrative justice and access to courts. Relevant for this chapter is the Constitution's creation of a range of independent institutions each tasked with the goal of furthering democratic accountability and, more generally, advancing the protection of the fundamental values of the Constitution.¹

The Constitution describes these institutions as state institutions supporting constitutional democracy.² These institutions are diverse and include the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (CRL Commission); the Gender Commission; the Auditor-General; and the Independent Electoral Commission (IEC). The mission and tasks of these institutions differs, each possessing a constitutional mandate that relates to a specific substantive field or section of society. Therefore, each is meant to have distinct functions and further different interests. For instance, the human rights bodies are tasked directly with the protection and fulfilment of human rights. The oversight bodies on the other hand are tasked with the monitoring of important activities in public life such as elections or public spending. Largely, these institutions function outside the traditional three branches of government – the legislature, the executive and the judiciary – and they are involved in monitoring and assessing the performance of these other branches in particular areas.

Democracy-enhancing institutions are a relatively new phenomenon in constitutional design. They have typically come in the form of national human rights institutions or other similar independence oversight bodies such as ombudsmen. However, as legal entities outside the traditional structures, these institutions have increasingly been called on to demonstrate their legitimacy or overall success. The complication that arises in determining their performance is that it must be accepted that they were never designed to provide a magic-bullet solution for all governmental shortcomings or the realisation of all constitutional objectives. Ultimately, before one can determine the success or failure of these institutions, one must establish what their purpose is, how they are equipped to meet that purpose and then consider how they have fared in that regard.

Another issue that one must be cognisant of within the context of this study is that criticism of the functioning of the chapter 9 institutions in South Africa is not hard to come by. However, it is important to differentiate between the failings of these institutions that are the product of poor management, shortcomings in the enabling legislation, or lack of public awareness, and those that are the product of inadequate constitutional design.

¹ These institutions have been established in terms of chapter 9 of the Constitution. As such, they are commonly referred to as 'chapter 9' institutions.

² Chapter 9 of the Constitution.

Role in constitutional democracy

Due to their fundamental requirement of independence, chapter 9 institutions are commonly referred to as the ‘fourth branch’ of government. The implicit reference in this characterisation is to the traditional political and legal doctrine of the separation of powers. While the separation of powers is not explicitly referred to in the Constitution, it is nevertheless considered a core element of its design.³ The traditional understanding of this doctrine is that it involves checks and balances between the legislature, judiciary and executive branches of government. Increasingly, constitutions have included institutions and mechanisms that exist outside of this formal structure in an effort to ensure the desired goals of accountability, responsiveness and openness.⁴

This provides only a partial understanding of what these institutions are. While independent, and not necessarily falling within the traditional notion of the three branches of government, they are indeed part of the state and a crucial aspect of the constitutional design.⁵ At the same time, whilst some of their powers may appear similar to those of the other three branches of government, the fact remains that chapter 9 institutions do not govern in the same way the other branches do and lack certain powers that the other branches possess. As such, these institutions are commonly understood to fall outside the strict definitions of any of the stated branches of government.⁶ As stated by Justice Goldstone, there are only three branches of Government.⁷ This removal from the definition of government can be seen as an effort to recognise the unique position of these institutions, which often function as a check on the other branches.

Despite the argument that chapter 9 institutions may not form part of the traditional tri-partite government structure in the strict sense, the Constitutional Court in *Langeberg Municipality* states that these institutions undoubtedly perform a ‘governmental function’.⁸ The judgment later states that ‘[t]he very reason the Constitution created the [Electoral] Commission – and other chapter 9 bodies, was so that they should be and manifestly be seen to be outside government’. This position has led some to argue that the nature of chapter 9 institutions is that they are bodies involved in governance but do not, however, form part of the government.⁹

As discussed above, instead of attempting to fit them within the traditional notion of government, others have opted to argue that these institutions instead take the form of an intermediary between the people of South Africa and the other branches which is an important feature of their institutional independence and a tool used in their functioning. These institutions illuminate the practices of government through the compilation and public distribution of findings in relation to unlawful or corrupt practices or failures of the executive, the legislature or government officials. As such, they allow the ordinary citizen, who relies on the information provided by chapter 9 institutions, to play their role in holding the executive to account.¹⁰

6.2. Goals

Chapter 9 institutions attempt to achieve their internal goals as a class of institutions, as well as possessing individualised goals with respect to each of their particular functions. This section attempts to elaborate the internal goals that the Constitution sets for all chapter 9 institutions. Sections below dealing with individual institutions will discuss the specific goals of particular institutions. We will also seek to show the relationship between the internal goals and the external goals.

The fundamental purpose of the chapter 9 institutions is rooted in the Apartheid history that forms the backdrop to the Constitution. Under Apartheid, state institutions were thought of as overly bureaucratic, secretive and unresponsive to the needs of the majority of its citizens. These features sapped the institutions of credibility and the trust of the people.

³ *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) (*First Certification judgment*).

⁴ Klug, 2010: 22-38.

⁵ The title of chapter 9 in the Constitution is ‘State Institutions Supporting Constitutional Democracy’.

⁶ Seedorf and Sibanda, 2005.

⁷ *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 para 11.

⁸ *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*) para 24.

⁹ Seedorf and Sibanda (2005).

¹⁰ Murray, 2006.

Therefore, as part of the transformative project, the negotiators of the Constitution thought it important that a concerted effort be made to restore trust in the state institutions. In order to accomplish this, a set of credible and visibly independent institutions were established to play an active role in giving effect to the principles on which the Constitution is built and the principles that the Constitution establishes to guide the operation of state institutions. Simply, the two broad roles of these institutions can be identified as being: (i) to contribute to creating an accountable government through monitoring and investigation of government action; and (ii) to contribute to the transformation of South Africa into a country in which freedom, dignity and equality prevail. These goals cannot be neatly separated from the external goals identified by Ginsburg and their relationship will be examined below.

A further aspect of the goals which the Constitution attempts to achieve with the creation of chapter 9 institutions can be located in the run-up to the democratisation of the country. Early in the negotiations that would lead to the democratic transition, the notion of establishing an 'ombudsman' that would channel and investigate the public's complaints with respect to malfeasance and maladministration in the state and its bureaucracy and protection of fundamental rights was accepted by all parties.¹¹ Furthermore, the notion of independent governance institutions rooted in the Constitution assisted in allaying the fear and distrust between the negotiating parties which allowed for the progression of the negotiations.

These two goals highlight the broad objectives regarding chapter 9 institutions. On the one hand, the institutions are intended to fulfill the functional role of channeling public discontent regarding the administration of the state and investigating instances of failure in good governance. On the other hand, the chapter 9 institutions assisted in bringing divided parties together in the negotiations, a vital role in establishing the peace-treaty function of the Constitution. In order for the African National Congress (ANC) to establish trust that the ruling National Party would play its part in the democratic transition, the liberation party decided that there needed to be established transitional mechanisms, housed within institutions, that would help ensure the democratic transition took place.¹²

Specifically, the ANC and others, expressed concern that if the ruling apartheid regime were to conduct the first democratic elections, they would lack legitimacy. Therefore, the incipient constitutional project would lack legitimacy and may in fact fail in its aim to unify the country under one supreme law. This situation would be more likely to arise if the results of the election were to be contested. In order to resolve these concerns, it was decided that a series of independent bodies would oversee the democratic transition. One such institution was the IEC that would manage the election itself. The other bodies established during this period were the Independent Media Commission and the Independent Broadcasting Authority. As such, these institutions operated as an important component of the settlement that would eventually lead to the adoption of the Final Constitution.

Accountability

As discussed in previous chapters, parliament, apart from its functions as a law-making institution, operates as the body that holds the executive accountable. In other words, this function, coupled with the judicial review of courts and the right to fair and reasonable administrative action, are the measures put in place to fulfil the constitutional promise of representivity and accountability. Chapter 9 institutions have been established to assist in achieving these goals. It is important to note that in fulfilling this role, chapter 9 institutions are limited in the remedies they are able to provide. They do not have the hard powers of any of the other arms of the government. They cannot declare government action unconstitutional, nor can they dissolve the executive or conduct votes of no confidence. Therefore, the 'softer' means by which they are able to fulfill their mandate are unique amongst other institutions who share the same objectives.

In helping to ensure that the constitutional goal of representivity and accountability are met, chapter 9 institutions can perform several important functions. Several of these institutions are empowered to investigate, report and advise on issues such as the abuse of public power, human rights violations, inefficient or ineffective laws

¹¹ South African Law Commission, Report on Constitutional Models, Ch 23, October 1991. Note, however, that while agreement in principle was achieved with regard to the establishment of such bodies, their scope and nature remained a topic of debate.

¹² Klug, 2010: 23-38.

pertaining to their jurisdiction, or fundamental democratic processes such as elections. In these respects, these institutions are well-suited to perform their functions for several reasons.¹³

First, chapter 9 institutions are best positioned to give advice at a macro-level with respect to any needed legal reform. In other words, these institutions are able to provide a complete review of whole areas of regulation; for instance, the SAHRC is able to assess and recommend amendments to the Promotion of Access to Information Act,¹⁴ a piece of legislation that forms part of its substantive mandate. A further example would be the IEC's ability to recommend changes with respect to the manner in which elections are conducted. In this way, chapter 9 institutions are able to identify and bridge the gaps between the public interests, with respect to important aspects of a representative democracy, and the systems currently in place to provide those services.

Second, with the ability to issue reports to the public regarding the extent to which the state has fulfilled its constitutional obligations, chapter 9 institutions play a role in providing the necessary information to citizens that assist in forming policy and political preferences. In other words, what chapter 9 institutions are equipped to do is to bring information on government action to light and to publicise it. In this way, the hope is that with greater transparency will come greater compliance with the requirements of the Constitution. This conforms to the importance of access to information in the bill of rights. The information acquired can provide another branch of government with the ammunition to hold the institution under scrutiny accountable, or this information will provide citizens with reason to apply pressure through the electoral process or other means of political channeling.

Institutions like the chapter 9s are intended to supplement the traditional methods of securing accountable government. This function gains importance given the context in which the South African government finds itself currently and, which may have been envisaged when the Constitution was being drafted. Traditionally, liberal democratic institutions come equipped with mechanisms that operate as checks and balances. The entire separation of powers structure is founded on this idea. These mechanisms ensure that no arm of government is too powerful or can abuse the powers conferred on them by the Constitution. As described in the chapter relating to the democratic institutions, these checks – for instance, the mechanisms intended to limit the power of the executive – do not operate effectively when one party dominates across all democratic institutions. In such an environment, accountability to the citizens becomes secondary to accountability to the party structures.

This situation only serves to enhance the importance of the checks and balances that the chapter 9 institutions can offer to ensure that the arms of government remain accountable to the people. In 1997, the Constitutional Court described the chapter 9 institutions, together with the Bill of Rights, as 'enhanc[ing] the 'protective framework for civil society' which is provided by multi-party democratic government and multi-sphere government.¹⁵

The accountability function of these institutions also helps to increase the legitimacy of the democratic order through ensuring that the state organs function in the interests of the people. Accountability also helps reduce agency costs through highlighting instances where representatives and officials fail to act in the public interest. As such, this function is strongly connected with two of Ginsburg's external goals.

Transformation

The transformational mandate of the chapter 9 institutions is evident in the provisions which identify the goals of some of the institutions. For instance, the SAHRC is tasked with the obligation to 'promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights'. These are proactive goals that require the SAHRC to transform the nature of society from one characterised by division and exclusion, to one that respects, protects and fulfils the rights of people in South Africa. The Commission for Gender Equality (Gender Commission) has a similar role articulated in section 187 of the Constitution. The Commission must 'promote respect for gender equality and the protection, development and attainment of gender equality'. Similarly, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) must, in terms of section 185 of the Constitution, 'promote respect for the rights of cultural, religious and linguistic communities'.

¹³ Elmendorf, C., 2007: 979.

¹⁴ Act 2 of 2000.

¹⁵ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97.*

Other chapter 9 institutions may also be said to contribute to the transformation of South African society, though somewhat more indirectly. The Auditor-General, for instance, may alert the government to underspending. Such financial parsimony may be an indication of social needs being neglected and the state not doing as much as its resources allow it to do. It may also highlight areas of financial mismanagement in government which helps with reducing the agency costs of the state. Furthermore, the performance rating issued by the Auditor-General may assist in pointing out the underperforming areas of the government which, once remedied, may better serve the transformational role with which they are burdened. The Public Protector in a similar vein is an institution that helps highlight areas of improper activity by various branches of government. These institutions, as can be seen, often play a role in ensuring the government meets its obligations in relation to public goods which are centrally connected to transformation.

Political channelling and dispute resolution

Another important role played by the chapter 9 institutions is that of an intermediary between citizens, as well as between citizens and the state. In other words, these institutions can act as a channel for conflict and a forum in which it can be resolved, thus helping to achieve one of the key external goals identified in this report. They may also provide citizens with a space outside of elections in which to communicate preferences to the relevant state bodies.¹⁶ The SAHRC, Gender Commission and CRL Commission clearly fulfil this function. Individuals may lodge grievances in relation to the violation of their rights and such complaints will be investigated and some form of remedial action taken. The Public Protector too plays an important remedial role when acting as a form of communication between citizens and government. The institution's task is to investigate matters that involve public malfeasance and publish reports that contain findings in this regard. These publically available reports then constitute a medium through which the Public Protector can better inform citizens regarding corruption.

These goals of the Constitution have two effects. First, they allow citizens better to craft their political preferences on the basis of informed opinion. This increases the quality of the democratic process by channeling the fully formed preferences of citizens through the constitutionally mandated mechanisms. In other words, the preferences that can be expressed through, for instance, voting, will reflect the interests of better informed citizens. Second, if these preferences act as a punishment for the committing of acts found to have limited rights or involve corrupt public officials, they may urge the state to improve the provision of public goods and lower agency costs.

The importance of the role played by intermediary institutions is highlighted in a country which has recently emerged from an oppressive history and suffers with a large population of under-resourced people. These communities find it difficult to gain access to the primary institutions established to resolve disputes, namely, the courts (as the survey we conducted indicated). Intermediary institutions such as chapter 9 institutions may, however, play a role in providing a forum for the interests of the individuals concerned to be addressed and provide some hope of relief in a more accessible manner.

Independence

One of the key features of these institutions is their independence which is necessary for them to perform their constitutionally-mandated functions.¹⁷ The independence of the chapter 9 institutions is entrenched in language that resembles that used in relation to the judiciary. This independence finds its roots in the Constitutional Principles established to guide the drafting of the Final Constitution. CP XXIX states that 'the independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics.' In elaborating on a test for independence, the Constitutional Court states that the determining factor is whether from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence.¹⁸

Section 185(2) of the Constitution states that 'these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. To underscore the need for independence, section 181(3) requires all other

¹⁶ Murray, 2006.

¹⁷ See Reif, 2000: 7.

¹⁸ *Van Rooyen NO v S and Others* 2002 (8) BCLR 810 (CC).

organs to assist and protect these institutions and to ensure their independence, impartiality, dignity and effectiveness. Furthermore, section 181(4) prohibits any person or organ of state from interfering with the functioning of these institutions.

However, unlike the judiciary, in terms of section 181(5) of the Constitution, chapter 9 institutions remain accountable to the national assembly and report on their activities and the performance of their functions once a year. This is a feature of the constitutional design which may be seen to be problematic. Other institutions that are accountable to the legislative branches in terms of the Constitution are the members of the executive such as the president, deputy president and the ministers. These offices are, however, political ones. The question is: how does an institution remain accountable to a political institution and remain independent of political influence?¹⁹ It is clear, therefore, that the oversight the national assembly exercises over these institutions should never compromise their independence and may be different in nature to that exercised over the executive.²⁰ Moreover, the Constitution makes it clear that the operation of these institutions is not to be interfered with by any organ of state or state institution. Therefore, even though these institutions are accountable to parliament, they are not democratically accountable to it nor to any population group or constituency which parliament represents. Their singular reference point is the Constitution. We now focus on the various forms of independence that are of importance to these institutions.

Financial independence

An important aspect of independence of the chapter 9 institutions is that they must be endowed with the necessary financial resources to enable them to fulfil their mandates effectively. As Hugh Corder mentions, '[f]inancial independence implies the ability to have access to funds reasonably required to perform constitutional obligations'.²¹ Necessarily included in this requirement is that funds must not be used as a lever through which to control these institutions.

This was recognised in *New National Party 1999* where Justice Langa DP states in relation to the IEC, though these statements are relevant for all chapter 9 institutions:

In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament and not for the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budget requirements before Parliament or its relevant committees.²²

In *Langeberg Municipality*, the Constitutional Court affirmed the basic principle that chapter 9 institutions must have some degree of independence. In this respect, the Court states that parliament has the obligation to provide 'reasonably sufficient' funding to enable the chapter 9 institutions to carry out their constitutional mandates.²³ The Court did, however, concede that it would be difficult to determine what would constitute reasonably sufficient funding. As such, the Court held that all parties should reach an agreement regarding the level of funding by negotiation in good faith.

Administrative/political independence

As mentioned above, the chapter 9 institutions are guided exclusively by the Constitution. Therefore, interference from political institutions or individuals would severely limit the independence that these institutions possess. In *New National Party*, the Constitutional Court stated that chapter 9 institutions require that they be able to carry

¹⁹ De Vos, 2012. For a general exposition of this problem in relation to human rights commissions, see Smith, 2006: 906.

²⁰ Murray, 2006.

²¹ Corder, H et al, 1999: 55.

²² *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (New National Party) paras 98-99.

²³ *New National Party* para 29.

out their activities without fear, favour or prejudice.²⁴ The result of such freedom is the control over matters that directly relate to functions that are specified in the Constitution. The Court went on to state that any engagement by the executive or parliament with the chapter 9 institutions must be done in such a manner as not to interfere with the operation of the institutions or the fulfillment of their constitutional obligations.

However, as the institution to which chapter 9 institutions are accountable, parliament is under the duty to ensure that these institutions are operating efficiently and effectively. This is the form of accountability created by the Constitution. This situation does create some tension and care must be taken whenever intervention is undertaken or assistance is granted. Ultimately, one can only conclude that such assistance is appropriate only if it does not involve the assumption of control over the functioning of the chapter 9 institutions.²⁵

Appointments and removals

The process of appointment and removal is crucial in structuring the relationship between the members of chapter 9 institutions and executive/parliament. The appointments and removals to such bodies may undermine their independence and operations. This process thus needs to give the members of these institutions 'independence from influence or control of the arm of government the office is designed to investigate – the executive/administrative branch – and other government and nongovernmental bodies that could influence its activities.'²⁶ Other features of an adequate appointment process include that there is wide advertisement of the posts, the criteria on which staff and commissioners are appointed is made public, equal opportunities provisions apply, that those who may be opposed to, or suspicious of the body should be encouraged to apply, that there is a transparent nomination process, that interviews are held in public, that vacant positions are filled quickly and that the members are appointed for a sufficient period of time.²⁷ A further requirement necessary to ensure independence is that the heads of these institutions enjoy security of tenure.²⁸

6.3. Performance

One must remember that the purpose of the chapter 9 institutions is not to achieve greater independence as a goal in itself, but rather to ensure that the constitutional vision of rights-based democracy is established along with an efficient and accountable government. Independence is thus not dealt with as a goal of these institutions against which their performance is measured. Rather it is a necessary pre-condition for the achievement of the institutions' true purpose: the support of democracy, enhancing the accountability of the executive branch of government, and the protection and advancement of rights in South Africa.

This chapter will focus on three of these institutions and aim to shed some light on their performance or reveal their weaknesses: these institutions will be the Public Protector, the SAHRC, and the IEC. In the sections below, this report will assess the performance of each of these institutions under separate headings. Under each heading, many of the concerns that have emerged regarding the chapter 9 institutions can be seen to apply to all of the institutions.

Several efforts have been made to assess the performance of chapter 9 institutions and this report will draw on these. The most prominent of these occurred in 2006. The National Assembly appointed an ad hoc committee to review the chapter 9 institutions. The Committee produced a report which contains comprehensive recommendations to improve the effectiveness of the institutions. However, many of these recommendations have not been adequately engaged with or implemented.

The public protector

Section 182 of the Constitution delineates the purpose of the Public Protector to be the investigation of 'any conduct in state affairs, or in the conduct of public administration in any sphere of government' that is alleged to have been 'improper, or to result in any impropriety or prejudice'. Following such investigations, the Constitution mandates that the Public Protector report its findings which must be available to the public, unless

²⁴ *New National Party* paras 74 and 162.

²⁵ De Vos, 2012.

²⁶ Reif, 2000: 25.

²⁷ United Nations National Human Rights Institutions, *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995).

²⁸ Reif, 2000: 25.

legislation recognises exceptional circumstances to the contrary (section 182(5)). It is also empowered to take appropriate remedial action.

The Public Protector is modelled on the ombudsman, with its roots in what was the *justitieombudsmann* (ombudsman for justice) in Sweden in 1809.²⁹ Thereafter, the institution spread and appears in a variety of forms in a number of countries.³⁰ The classical ombudsman is a mechanism that monitors the conduct of public administration to ensure that it is conducted legally and fairly.³¹ It should be pointed out that this role is performed by several, if not all, chapter 9 institutions in some capacity. However, the Public Protector fulfils this function most directly.

In South Africa, the role of the Public Protector was given clear articulation by the Supreme Court of Appeal (SCA) in *Public Protector v Mail & Guardian* where the court stated that '[t]he Constitution upon which the nation is founded is a grave and solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those institutions is the office of the Public Protector.'³²

In performing these tasks, the Public Protector acts as a supporting institution for the judiciary, legislature, as well as an oversight mechanism for the executive. With respect to the courts, the Public Protector is able to investigate matters that would not fall within their jurisdiction. In other words, conduct that is not unlawful, yet could be deemed improper or unfair, can be dealt with by the Public Protector. Furthermore, the Public Protector can initiate investigations of its own accord, as opposed to courts which require a litigant to bring a matter before it in a trial. Courts are dependent on the evidence brought before it by the attorneys involved and are typically confined by the arguments presented by the parties. On the other hand, the Public Protector may gather the evidence necessary to make a complete finding on any issue. Its role is thus more pro-active than courts.

In order for the Public Protector properly to carry out its constitutional mandate, it must maintain a certain degree of independence from the executive. As discussed above, this independence comes in the form of political autonomy and financial independence. With respect to political autonomy, the fundamental point of focus must be the appointment and removal process of the Public Protector. Here the Constitution mandates that the appointment of the Public Protector is made by the president on recommendation of the national assembly in parliament. The recommendation by parliament must be made with a 60% majority. The Public Protector may only be removed with a two-thirds vote of the national assembly.

The need for financial independence entails that the Public Protector is assured of the funding necessary for it to fulfil its constitutional mandate. As a corollary of this requirement, it is generally understood that the funding should not be controlled by the executive. In this respect, the Constitution is silent on the source of the Public Protector's funding. As a result, in *New National Party v Government of the Republic of South Africa NO*, the Constitutional Court decided that the funds for the Public Protector must come from parliament and not from the executive.

Thin compliance

The South African parliament has enacted legislation governing the operation of the Public Protector in the form of the Public Protector Act.³³ The legislation gives effect to section 182 of the Constitution and sets out in greater detail the powers and functions of the institution. The Public Protector Act's major contribution is to narrow or limit the jurisdiction of the institution. Firstly, in terms of section 6(4) of the Act, the Public Protector is only permitted to investigate the following bodies: (i) government at any level; (ii) any institution in which the state is the majority or controlling shareholder; (iii) any public entity; and (iv) persons performing a public function.

With respect to the substantive areas of investigation, the Public Protector is limited to the following in terms of sections 6(4) and 6(5): (i) maladministration; (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct; (iii) improper or unlawful enrichment, or receipt of any improper

²⁹ Lundvik, 1983: 179.

³⁰ See Reif, 2000: 8.

³¹ Reif, 1999.

³² *The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA); [2011] ZASCA 108 (Public Protector v Mail & Guardian) para 5, footnote omitted.*

³³ Act 23 of 1994.

advantage, or promise of such enrichment or advantage by a person; (iv) any act or omission that results in unlawful or improper prejudice to any other person.

The Public Protector has been operational since its establishment. It has conducted investigations and released reports on its findings.³⁴ The chapter 9 institution has also provided annual reports to parliament fulfilling its constitutional obligation in this respect.³⁵ As such, the institution has arguably met the thin compliance standards set out in the Constitution.

Thick compliance

In terms of the goal of fulfilling its constitutional mandate, the evidence suggests that the Public Protector has limited resources available to fulfil its constitutional mandate. First, according to the latest Annual Report, the Public Protector is effectively insolvent. In other words, the institution's current liabilities exceed its current assets by a significant amount.³⁶ Furthermore, for the 2013/2014 year, the institution ran at deficit of approximately R20 million (\$1.33 million). According to the Report, the financial circumstances of the Public Protector severely limit its ability to investigate all complaints in an expeditious and thorough manner. As evidence of this, the Annual Report concedes that a significant portion of the complaints lodged with the Public Protector were not resolved within 3-6 months. The lack of resolution flows from the lack of human resources available to the Public Protector to adequately cope with the number of complaints lodged.³⁷

In terms of political autonomy, it has become clear that the political independence of the Public Protector is, to some extent, contingent on the nature of the individual appointed by the president to lead the institution. This is made evident by the stark contrast in the intensity of the activity between the current and previous Public Protector. Lawrence Mushwana's tenure as Public Protector ran from 2002-2009 after which he was succeeded by Thuli Madonsela, the current Public Protector. Under Mushwana's reign he was asked by parliament to investigate allegations that the state-owned petroleum company had made illicit payments to the ruling ANC to assist the party in campaigning for the 2004 national elections. The scandal evolved to include allegations of the rigging of a major petroleum-procurement process that awarded contracts to firms with close ties to the ANC. The Public Protector duly conducted its investigation and released a report. A newspaper then challenged the report and the investigation in court arguing that neither adequately addressed the allegations raised. The matter reached the SCA where the Court found that 'no proper investigation' was conducted and that the report should be set aside.³⁸ This was taken to be a sign that the Public Protector was overly swayed by the political consequences of potential investigations.³⁹

This must be contrasted with the investigation conducted by Thuli Madonsela in response to the 2009 complaints regarding the public funds that had been spent on the upgrade of the president's personal residence, Nkandla. After an extensive and exhaustive investigation, Madonsela's final report released in 2014 (the Nkandla Report) found that the president and his family had unduly benefitted from the state funds spent on the upgrade of his residence. It further found that many of the upgrades made to the compound were not security related and were therefore unlawful and constituted improper conduct and maladministration.⁴⁰ The Report characterised the exorbitant cost of the upgrades as unconscionable, excessive and caused a misappropriation of public funds.⁴¹ Finally, the Report found that funds were diverted from the Inner City Regeneration and the Dolomite Risk Management Programmes of the Department of Public Works to pay for the upgrades.⁴² The Report went on to suggest that the president should bear responsibility for a reasonable part of the expenses of the upgrades that did not constitute security measures.

As a result of this finding, the Public Protector has come under sustained criticism from high-ranking individuals in the ANC. Members of the executive branch have questioned the remit of the Public Protector's jurisdiction

³⁴ http://www.publicprotector.org/library/investigation_report/investigation_report.asp.

³⁵ http://www.publicprotector.org/library/annual_report/annual_report.asp.

³⁶ The amount is R38 912 530.

³⁷ Annual Report of the Public Protector 2013/2014.

³⁸ *The Public Protector v Mail & Guardian* para 145.

³⁹ Musuva, 2009: 20.

⁴⁰ The Nkandla Report para 10.3.1

⁴¹ The Nkandla Report para 10.4.1

⁴² The Nkandla Report para 10.8.1.1.

claiming that it does not include investigations such as the upgrades at Nkandla.⁴³ Others have questioned whether the Public Protector had ulterior motives in her investigation of the President, even going to the lengths of accusing her of being a 'CIA agent'.⁴⁴

The contrast mentioned above can be better illustrated by taking into account of the exponential growth in the number cases received by the Public Protector during the period of Adv. Mushwana's leadership and that of Adv. Madonsela. In 2008/9, the last year of Adv. Mushwana's reign, the Public Protector received 12 435 complaints. In the 2013/14 period under Adv. Madonsela, the number of complaints grew to 39 817 complaints. A compelling explanation for this vast difference is that the perception of the effectiveness of the institution impacts upon the public trust in the institution and thus leads to its greater utilisation.

Of course much more must be done to raise awareness of the process involved in utilising this institution. The results of the survey conducted for this report indicate that 58 percent of respondents surveyed believed the process of lodging a complaint with the Public Protector was difficult. This may indicate that a greater awareness of the process involved in lodging a complaint may further increase the use of this institution.⁴⁵

These anecdotal experiences point to a deeper concern regarding the appointment process for the Public Protector. There exists no constitutional or legislative requirements regarding the nature of the individual who should lead the Public Protector that would ensure that the next Public Protector appointed will remain faithful to the constitutional mandate set for the institution.

This indicates perhaps a failure of the appointment process to ensure that an excellent individual is chosen to head this important institution. As mentioned above, the Public Protector is subject to a more stringent constitutional-appointment process than other chapter 9 institutions, barring the Auditor-General. In terms of section 193(5)(b) of the Constitution, the President makes his appointment from a list of candidates recommended by the National Assembly. This recommendation, in the form of a resolution, must have secured 60% of the vote. Furthermore, as with all appointments to chapter 9 institutions, the candidate must be considered a fit and proper person.⁴⁶ It is arguable that, with the electoral dominance of the ANC, these constitutional provisions are not enough to secure cross-party support for the appointment of a Public Protector which would help guarantee that a suitable person is appointed.⁴⁷

One potential solution presented in the Asmal Report is the greater involvement of civil society in the appointment process for chapter 9 institutions.⁴⁸ This suggestion would assist in depoliticising the process and allow for adequate vetting of potential candidates. Taking the premise of this notion further, an institution, much like the Judicial Services Commission in terms of section 178 of the Constitution, could be established to involve relevant sections of civil society and other interested groups in a more formal manner.

Perhaps a further concern regarding the powers of the Public Protector is the question of whether the remedial actions specified in its reports constitute binding orders. Neither the Constitution, nor legislation make clear the obligations the state or any other party has in relation to these remedial actions. Until recently, it was commonly argued that the findings of the Public Protector are not binding on the state.⁴⁹ In fact, it was thought that the purpose of the institution is not to effect change in conduct through coercion but rather through reason and publicity.⁵⁰ In this respect, the persuasive mechanism at the disposal of the Public Protector is the influencing of political will through well-reasoned arguments and the creation of public awareness with respect to improper or unfair conduct.

⁴³ SAPA 'Justice Minister criticises Public Protector', July 15, 2014 available at <http://polity.org.za/article/justice-minister-criticises-public-protector-2014-07-15> [accessed on 21 March 2016].

⁴⁴ The Deputy Minister of Defence called the Public Protector a CIA agent' in September 2014 See <http://www.iol.co.za/news/politics/thuli-a-cia-spy-says-deputy-minister-1.1747300#.VFBWBRb55-q> [accessed on 21 March 2016]. See also, <http://mg.co.za/article/2014-03-24-party-chastises-ancyl-over-madonsela-must-go-comments> [accessed on 21 March 2016].

⁴⁵ The result of the survey show that 29% of those sampled find the process of lodging a complaint with the Public Protector to be very difficult and 29% of the sample group find it to be difficult.

⁴⁶ Section 193(b) of the Constitution.

⁴⁷ De Vos, 2012: 169.

⁴⁸ Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions of 31 July 2007 (Asmal Report) available at: http://www.parliament.gov.za/content/chapter_9_report.pdf (accessed on 21 March 2016) 13.

⁴⁹ See Woolman, and Bishop, 2008: 24A-3.

⁵⁰ Woolman & Bishop (2005) Ch24A-3.

Recently, however, the question has risen in the context of a public protector report into the appointment of an acting Chief Operations Officer (COO) of the South African Broadcasting Corporation (SABC), Mr Hlaudi Motsoeneng, and other maladministration in that institution. The Public Protector, amongst other matters, found that Mr Motsoeneng misrepresented his qualifications for the position and that his appointment was irregular. She made a number of recommendations as to remedial actions to be taken which included disciplinary action by the SABC board against Mr Motsoeneng and recovery of irregular salary increases for the COO. She also found that the Minister should act to find an appropriate person to fill the COO position. Instead of abiding by her report, the SABC Board brazenly decided to appoint Mr Motsoeneng as the permanent COO which was accepted by the Minister of communications.

The Democratic Alliance, an opposition party, sought to review this decision in court and this reached the SCA in 2015. The argument was that the remedial actions specified in the Public Protector's report cannot simply be ignored by the SABC or the Minister.⁵¹ The judgment of the SCA was an important one which upheld the importance of chapter 9 institutions in general and the Public Protector in particular in the South African polity. The court found that the Public Protector could not play its important role as a watch dog over the use of public power if its reports could be ignored.⁵² The recommendations and remedial actions had to be carried out unless they were subject to judicial review.⁵³

The finding of the SCA was clearly highly significant in recognising that the powers of the Public Protector went beyond mere non-binding recommendations. At the same time, it is not entirely clear what is required of parties as the obligation is simply not to ignore the reports: does this require full compliance with the recommendations or simply partial compliance with an explanation for departures? The requirement that they may not be ignored is still too vague to give concrete guidance as to exactly what actions must follow the issuance of report. As a result of this uncertainty, a case has been brought before the Constitutional Court regarding president Zuma's failure to abide by the remedial action stipulated in the Nkandla Report.⁵⁴ The judgment is eagerly awaited as, hopefully, it will clarify the exact force of the recommendations of the Public Protector. In fact, this recent case highlights the major potential of the chapter 9 institutions together with independent courts in South Africa's constitutional democracy. Faced with the adverse finding of the Public Protector and the potential to have the remedial actions she suggested confirmed by the Constitutional Court, the President made a number of remarkable concessions through his legal representative. He accepted that the reports of the Public Protector could not be ignored and offered himself to pay back reasonable amounts for the upgrade to his private residence that were unrelated to security as the Nkandla Report recommended. The Court hearing became the focus of attention throughout South African society with numerous peaceful protests taking place outside. These events could be said to have strengthened the trust and legitimacy of both the Public Protector and the Constitutional Court which became the focus of national attention.

This series of cases, however, serves to highlight a possible deficiency in the Constitution's articulation of the Public Protector's investigative and remedial powers by lacking clarity as to the binding effect of her findings. It also perhaps grants parliament too much discretion in regulating the exercise of her power by rendering much of what the Public Protector can do subject to national legislation which could limit the scope of what the institution may do.

Financial independence

The financial independence of the Public Protector is also cause for concern. One way to clip the wings of such an institution is to fail to provide it with the financial resources it needs. In the latest financial year, the overwhelming majority of the funding provided to the Public Protector was provided by the Department of Justice and Constitutional Development within the executive. While this is not a clear indication of the lack of independence, it leaves open the opportunity for the executive to attempt to influence its operation through its control of the funding. The effects of such lack of funding have been pointed out by the Public Protector who states that the 'organisational structure is not fully funded', and that such 'constraints result in cases taking too long to complete and has the potential to erode public trust in the institution.'⁵⁵

⁵¹ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA) (*SABC case*)

⁵² *SABC case* para 53.

⁵³ *SABC case* para 54.

⁵⁴ *Economic Freedom Fighters v Speaker of the National Assembly Case CCT 143/15* (arguments heard on 09 February 2016).

⁵⁵ Annual Report 2013/14 p.12.

Indications of this can be seen with the recent criticism from ANC parliamentarians regarding requests for additional funding by the Public Protector in order to avoid severe cutbacks as a result of the funding shortfall. ANC parliamentarians criticised the Public Protector's annual requests for additional funding stating that the institution had not answered questions regarding its operations. The criticisms were overlaid by partisanship as ANC members made reference to the opposition party's protection of the Public Protector. The request for additional funding was only partially fulfilled and the institution was forced to make cutbacks.⁵⁶

The South African Human Rights Commission

The SAHRC is one of the chapter 9 institutions provided for in the Constitution. It is modelled on the now commonly known nation human rights institutions (NHRIs) that were popularised by the United Nations in 1993.⁵⁷ The aim of this form of institution has typically been thought of as the protection and promotion of human rights within a state.⁵⁸ A primary protagonist with respect to rights, either in the form of violation or fulfillment, is the state. As such, ordinarily, the central preoccupation of such institutions will be the state.⁵⁹ Two possible strategies exist for NHRIs to elicit compliance with human rights. First, through enforcement or inducement, these institutions can, encourage greater compliance. Second, these institutions can, through socialisation and dispersion of knowledge, inculcate a culture which is likely to lead to compliance.⁶⁰ Ultimately, the expectation of these institutions is that they will highlight, monitor and increase awareness of human rights norms. In this way, the democratic order will be strengthened through the fortification of constitutional norms within society.

The SAHRC was established in terms of section 184 of the Constitution. The powers of the commission are determined from the Constitution, its enabling legislation and other statutes. Section 184 of the Constitution deals extensively with the functions of the SAHRC. In terms of section 184 (1), the commission must '(a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. In order to accomplish these aims, the commission is equipped with the following powers in terms of section 184(2): '(a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate'. The investigative powers of the commission include the power to subpoena witnesses, to enter and search premises, and to attach articles of relevance to its investigation.

Despite the fact that the commission's mandate is broad, it is specifically tasked with the role of monitoring the realisation of socio-economic rights by other government organs. In order to carry out this function, the commission must require information to be provided from relevant state departments about the realisation of rights concerning housing, healthcare, food, water, social security, education and the environment. The task of realising socio-economic rights is a difficult one and there has been much debate about the role and capacity of courts to function effectively in this regard as reactive institutions. The SAHRC is specifically a more pro-active body which can launch investigations and actively monitor and is thus well-suited to performing this task. Its role in this regard must constitute more than existing as an alternative adjudicative forum but 'is to actively protect and promote rights and not to exist as an investigative mechanism which reacts to human rights violations'.⁶¹

Thin compliance

With respect to minimal compliance, the SAHRC was established in terms of the Interim Constitution of 1993 and has remained operational since then. The institution was initially governed by Human Rights Commission Act (HRC Act) passed by parliament in 1994. This legislation was replaced by the South African Human Rights Commission Act 2013. The SAHRC has annually submitted a report to the national assembly fulfilling its constitutional obligation.⁶² The commission has routinely conducted investigations and released reports

⁵⁶ See <http://www.timeslive.co.za/politics/2015/02/26/public-protector-saved-from-insolvency-with-a-r60-million-budget-lifeline>.

⁵⁷ UN Resolution 'National institutions for the promotion and protection of human rights' A/RES/48/134, December 1993.

⁵⁸ Reif, 1999: 10.

⁵⁹ Cardenas, 2012: 29.

⁶⁰ Cardenas, 2012: 33.

⁶¹ Govender, 2001.

⁶² The report can be accessed at: <http://www.sahrc.org.za/home/index.php?ipkContentID=13&ipkMenuID=14>.

containing its findings and recommendations.⁶³ Therefore, the argument can easily be made that the facial goals set by the Constitution have been fulfilled.

Thick compliance

In order to assess the thick compliance of the SAHRC with the goals set out in the Constitution, it is important to assess the institution in light of the powers and functions given to it by its enabling statute.

In terms of the HRC Act, the SAHRC has been granted several powers with respect to the protection of human rights. These include the power to conduct mediations in order to resolve human rights disputes, adjudicate any such disputes, and litigate on behalf of victims of human rights violations. These powers are elucidated upon briefly below.

Section 14 of the HRC Act gives the Commission the power to endeavor to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. The recommendations or findings made by the Commission are, however, not binding on public or private bodies. However, with the constitutional obligation that public bodies do all that they can to ensure that the Commission is effective, these bodies, in theory, are required to respond to the recommendations of the Commission.⁶⁴ The judgment of the Constitutional Court which is eagerly being awaited in respect of the powers of the Public Protector could also have important implications for the legal status of recommendations of the Commission as well.

In addition to mediation, the Commission has the power to adjudicate disputes in relation to fundamental rights. This power has rarely been used by the Commission. However, much like the Commission's powers of mediation, public bodies have, at times, been responsive to the findings of the Commission. An example of such a dispute was the complaint in relation to slogan used in a political rally, namely, 'kill the farmer, kill the boer'. The Commission initially held this did not constitute hate speech; however, that decision was overturned on appeal by a three-member panel chaired by a commissioner of the Commission.⁶⁵

In terms of section 13(3)(a) of the HRC Act, the commission is equipped with the powers to litigate in the protection of fundamental rights. In this respect the commission has appeared as *amicus curiae* or litigant in a number of cases.⁶⁶

The method of carrying out its mandate is, however, not specified in the Constitution and therefore has been the subject of some debate.⁶⁷ On the one hand, the possibility is that the commission could adopt what has come to be known as the 'progressive realisation' method of protecting rights, especially socio-economic rights.⁶⁸ This entails the measurement of the success of the state in meeting its obligations in terms of the bill of rights with reference to statistical data that indicates the progress of communities more generally.⁶⁹ For example, the second report on social and economic rights focused on objective statistical indicators that reflected the extent of the realisation of these rights. Commentators have argued that this method is ineffective at adequately monitoring the fulfillment by the state of its obligation with respect to rights and have been critical of the commission when it has adopted such a perspective.⁷⁰ It has been argued that such an approach lacks the analytical rigor necessary to uncover the reality of socio-economic rights realisation.⁷¹ On the other hand, the commission could adopt the 'violations method' which focuses on the instances where rights have been violated and use whatever tools it possesses to aid the provision of a remedy for such a violation. Difficulties arise here too in deciding what constitutes a violation, particularly in light of rights that are subject to progressive realisation. The commission

⁶³ Klaaren, 2005b.

⁶⁴ Klaaren, 2005b.

⁶⁵ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC).

⁶⁶ Several of the most recent such cases are *Welkom High School and Another v Head, Department of Education, Free State Province* 2011 (4) SA 531 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Another* 2009 (4) SA 222 (CC); *Brummer v Minister for Social Development and Another* 2009 (6) SA 323 (CC); *Bhe and Others v Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

⁶⁷ See Klaaren, 2005a.

⁶⁸ The progressive realisation approach was adopted by the commission from the judgment of the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

⁶⁹ See Brand and Liebenberg, 2000.

⁷⁰ Brand and Liebenberg (2000).

⁷¹ Newman, 2003: 198.

too has not explicitly expressed its preferred method and this may yield uneven and inconsistent processes with respect to the fulfillment of rights.⁷²

An alternative approach to the manner in which the commission carries out its role could be the propagation of information regarding the fulfillment of rights in South Africa. The Constitution places a specific obligation on the commission to gather information from relevant organs of state regarding the fulfilment of a number of socio-economic rights.⁷³ A strange feature of this provision is that it does not expressly require the publication of reports based on that information. This seems to be a possible flaw in the Constitution's drafting: whilst information gathering would place some duty of accountability on organs of state, it is unlikely to place much pressure on them unless a report is compiled on their performance and made public. The commission can in this way monitor the manner in which the state is carrying out its obligations and promulgates the results of the state's efforts to the public. This approach would entail the commission relying on the democratic process as the mechanism to exert pressure on the state in fulfilling its obligations with respect to socio-economic rights. In this spirit, the HRC Act provides that the commission submit a report on findings of a serious nature with respect to rights, as well as on any issue that the commission deems necessary.⁷⁴ This could potentially be read with section 184(3) of the Constitution both to create an obligation for the commission actively to collect information regarding the status of human rights protection and publish regular reports.⁷⁵ The commission has, in fulfillment of this obligation, released *Economic and Social Rights Reports* in which legislation and policies are assessed in terms of their role in the realisation of socio-economic rights.

The reporting procedure involves the commission sending information requests to various government departments. The information collected then provides the commission with insights into the states policies, legislative measures and budgetary commitments with respect to the realisation of rights. This information is then assessed against the state's constitutional obligations and the findings are compiled in a draft report which is then distributed to the public for comment. After comments are received the report is finalised and presented to parliament. To date, there have been seven such reports drafted by the commission.

While these reports themselves have been recognised as a positive step in the commission's compliance with its constitutional mandate, the procedure by which the information is gathered has come under some criticism.⁷⁶ Some have argued that greater involvement of civil society prior to the initial draft of the Report could facilitate the inclusion of more realistic depictions of the realisation of socio-economic rights in South Africa.⁷⁷ This suggestion has not, however, been adopted by the commission. Moreover, the commission often gathers information but its release of reports thereon is erratic: in areas such as equality, reports have not been released for several years. In relation to socio-economic rights, the commission has released reports but there is no clear timetable that the public can rely for the regularity of this practice.

Substantive area of jurisdiction

There are substantial overlaps between the jurisdiction of the SAHRC and many of the other chapter 9 institutions. In addition to the creation of a human rights commission, the Constitution creates a number of specialised human rights bodies to protect and promote the rights of specific constituencies. These institutions include the Gender Commission, and the CRL Commission. Concerns have arisen about the proliferation of institutions serving within the same broad substantive jurisdiction and that this may diminish the effectiveness of these bodies. The Asmal Report found that this may occur in several ways. First, by operating as separate bodies, these institutions are under-resourced as they split the available funding between them and therefore do not have enough to fulfill their core mandates.⁷⁸

Second, the interdependency and indivisibility of human rights entails that any particular case where there is a rights violation may implicate the jurisdictions of differing institutions. For instance, an instance of discrimination could at the same time deal the provision of a socio-economic rights, involve gender concerns as well as religious

⁷² Klaaren, 2005a.

⁷³ Section 184(3) of the Constitution.

⁷⁴ Section 18(2)

⁷⁵ Newman, 2003.

⁷⁶ Horsten, 2006.

⁷⁷ Horsten, 2006.

⁷⁸ Asmal Report, 2007.

or cultural rights. In order adequately and holistically to assess the matter, all of these rights must be dealt with simultaneously. Currently, each of these rights falls within the mandate of separate institutions.⁷⁹

This situation leads to a third concern, in that the victim of a rights violation may not be aware which of his/her rights has been violated. They may therefore approach the wrong institution in search of a remedy. This in turn may cause delay and inefficiency that could be avoided.⁸⁰

The substantive overlaps have also had a detrimental effect on the functioning of other chapter 9 institutions. Two chapter 9 institutions which have generally been regarded as having failed to fulfil their obligations adequately are the Gender Commission and the CRL Commission.⁸¹ The Asmal Report describes the reason for this failure as being the overlapping jurisdiction of these institutions. This, along with unclear delineation of functions, has led to an inadequate understanding and appreciation of their constitutional mandates.

As a result of these concerns, the Asmal Report proposed to merge all human rights bodies into one strengthened, well organised, human rights commission. The proposed title of this commission is the 'South African Commission on Human Rights and Equality'. Such a body, being adequately funded, would be better equipped to deal with the many complex challenges that arise in relation to the protection and promotion of human rights. It was envisaged that the new commission would become a centre of high quality research across the full breadth of the human rights and equality field. As such, it would be able to monitor, protect and enforce all human rights and promote cross-sectoral learning and information sharing in a coherent and integrated way.⁸² It has been argued that by doing so, not only will the above concerns be resolved, but that the public will be afforded greater access to redress by having only one institution with which to interact.

Appointment and removal

The appointment and removal of commissioners of the SAHRC is governed by two broad provisions of the Constitution. They mandate that the appointments are made by the President on the recommendation of the national assembly in parliament. In terms of section 193 of the Constitution, the recommendation is the product of a nomination by a committee proportionally composed of members of all political parties represented in the assembly. In terms of the Constitution, the appointment requirements of each chapter 9 institution differ. Importantly, in terms of section 193(4)(b), while the recommendations for the appointment of the Auditor-General and the Public Protector require special majorities, the SAHRC does not.⁸³

With respect to the removal of office-bearers of chapter 9 institutions, including the SAHRC, such removal may only take place on the grounds of misconduct, incapacity, or incompetence.⁸⁴ A National Assembly Committee must make a finding concerning the existence of such a ground and a simple majority of the National Assembly must approve the removal. In terms of section 194(2), removal of the Auditor-General and the Public Protector require a two thirds majority. This heightened requirement is as a result of an amendment to the Final Constitution in response to the failure of the initial draft to secure approval by the Constitutional Court in the *First Certification judgment*. The Court's reasoning with respect to the Public Protector was that '[t]he office inherently entails investigation of sensitive and politically embarrassing affairs of government.'⁸⁵

The difficulty with this reasoning is that there does not appear to be any reason why it should not apply equally to the SAHRC or any other chapter 9 institution equipped with investigative powers. The SAHRC and the Gender Commission are obliged to investigate failures of the state in fulfilling its obligations with respect to fundamental rights. In many instances, the findings of such bodies would lead to the embarrassment of state institutions as well. The Constitution in effect creates a hierarchy of independence within the set of chapter 9 institutions. The hierarchy is, however, based on the assumption that some institutions are more worthy of independence due to the potential for their findings to cause the state embarrassment. This assumption should

⁷⁹ Asmal Report, 2007.

⁸⁰ Asmal Report, 2007.

⁸¹ Asmal Report, 2007: 150

⁸² Asmal Report, 2007.

⁸³ Section 193(4)(b) of the Constitution requires that at least 60% of the national assembly vote to approve the recommendation for candidates of these two institutions.

⁸⁴ Section 194 of the Constitution.

⁸⁵ *First Certification* judgment paras 162-163.

apply to all chapter 9 institution which, through their investigations and findings in relation to human rights violations or unlawful, corrupt practices or maladministration, could cause the state embarrassment.

With respect to the removal of commissioners of the SAHRC, the Human Rights Commission Act of 1994 in section 3(b) went beyond the removal requirements in the Constitution by requiring a 75% majority of parliament to approve a removal resolution for a member of the SAHRC as opposed to the simple majority requirement that applies to many of the other chapter 9 institutions. This was an unusual, though welcome, action taken by parliament and can perhaps be explained by the strong urge to safeguard rights at the beginning of the democratic era. However, the HRC Act of 2013 in section 5(6) reverted to the requirements applicable to other chapter 9 institutions. This raises the concern that leaving to parliament the prerogative to enact laws which limit its own ability to remove office holders is not a suitable measure to safeguard independence. The Constitution would have been far better placed to contain a super-majority provision with respect to removals.

Independent Electoral Commission

One of the fundamental features of the Constitution is the commitment to multi-party democracy. In order to achieve this, the Constitution provides that South Africa is founded on the principle of '[u]niversal adult suffrage' and 'a national common voters role'.⁸⁶ The Constitution goes on to state in section 19(3)(a) that '[e]very adult citizen has the right...to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret'. The Constitution establishes the IEC in order to safeguard the legitimacy of the new democratic order and insure that the right to vote of every citizen is fulfilled. In order to play this role, constitutional drafters felt it necessary to have the commission institutionally independent from any arm of the government as opposed to located within a government ministry or parliament.

In elaborating on the role of the IEC, Langa DP in *New National Party*, states that the role of the commission is not simply a supervisory one.⁸⁷ Reading section 5(1)(b) of the Electoral Act⁸⁸ which makes clear that the role of the commission is to 'ensure that elections are free and fair' with the constitutional provisions, he suggests a far more active and involved role for the IEC in the administering of elections. Specifically, the role of the commission should be one that goes beyond an abstract or objective assessment of success or failure of an election, and instead, should focus on playing a pro-active role in establishing a fair and robust electoral process.

Section 190(1) of the Constitution sets out the functions of the commission, which are to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, ensure that such elections are free and fair and declare the results of such elections within as short a period of time as possible. In an effort to restrict itself to the bare framework of the institution, the Constitution left the construction of the details of the functioning of the institution to parliament.

Thin compliance

The Electoral Act was passed in order to give detailed shape to the institution and delineate its powers and functions. In terms of the Electoral Act, the functions of the IEC are the promotion of democratic electoral processes, the managing of elections of national, provincial and municipal legislative bodies, compiling a national common voters' role and declaring the results of an election.

The IEC must be composed of at least three persons, however, a greater number of commissioners may be provided for by parliament in governing legislation. The role of a commissioner is reserved for South African citizens and no commissioner may hold a significant political position. Finally, one of the members of the commission must be a judge.

Recommendations for appointment are made from a list of candidates prepared by a panel of representatives from the SAHRC, the Gender Commission and the Public Protector. The panel is chaired by the chief justice of the Constitutional Court. The panel submits a list of no fewer than eight candidates to a committee of the National Assembly. In preparing the list, the panel must act in accordance with the principles of openness and

⁸⁶ Section 1(d) of the Constitution. This mirrors the position in Sunstein (2001: 6) that the central goal of a constitution should be to create the preconditions for a well-functioning democratic order.

⁸⁷ *New National Party* para. 76.

⁸⁸ Act 73 of 1998.

transparency. In terms of the Electoral Act, the panel must take into account a person's suitability, qualifications and experience in the process of recommending a candidate.

The committee within the National Assembly to which the panel submits its recommendation must be proportionately composed of representatives from all political parties in the National Assembly. This committee then nominates candidates from the panel recommendations and presents them to the National Assembly which, by adoption of resolution, recommends the candidates for appointment by the President.

Employing a thin metric for performance, the IEC has arguably been a success. To date, it has presided over five national and provincial elections as well as three local elections and all but one local election has been proclaimed free and fair.⁸⁹ The one local election that failed to meet that standard will be discussed further in the thick compliance section below. Furthermore, there has been no serious complaints of election fraud in any of the country's elections and the results have largely been accepted.

Thick compliance

Despite the lack of allegations of election fraud, there have been instances where the principles which underlie the Constitution's guarantee of the right to participate in the political process has been tested. The first such instance was with respect to the voting rights of prisoners in *August v IEC*⁹⁰. For the 1999 general elections, the Electoral Act disqualified citizens who were imprisoned for certain specified criminal offences such as murder, robbery and rape. Other prisoners were entitled to vote. However, the IEC decided not to establish any measures for enabling prisoners to vote who fell outside the exclusions. The question before the Court was whether the failure of the IEC to establish means that would allow the otherwise eligible prisoner to vote constituted an unjustifiable violation of the prisoners' right to vote.

The Court held that even though prisoners suffered legitimate limitations with respect to movement or contact with the outside world, they retained a residue of rights that could not be limited simply by virtue of their status as prisoners. The Court found that the IEC's establishment of a system of registration and voting that did not cater for otherwise eligible prisoners, effectively disenfranchised this group of citizens and thus constituted a violation of their right to vote. The violation could not be justified as there was no law of general application allowing for such a deprivation: only such a law could be tested against the requirements of the limitations clause (discussed in the Rights Chapter).

The second event that tested the IEC came about as a continuation of the events that transpired in the *August v IEC* matter. In response to the judgment in *August*, parliament amended the Electoral Act in a manner which had the effect of rescinding the right to vote from all prisoners. In *NICRO*, the Constitutional Court held that these provisions that denied all convicted prisoners the right to register for and vote in elections were unconstitutional.⁹¹ The government failed to articulate its purpose clearly for these provisions and the provision also appeared to be over-broad. While this case does not directly deal with the actions of the IEC, but rather with the amendment to a piece of legislation, it displays the weakness in the Constitution's construction of the mandate of the IEC. It is far too easily altered by parliament in a manner which can render the institution a failure in terms of the very goals of the Constitution. The *NICRO* case though overall represents the constitutional system functioning well in that the Constitutional Court overruled the parliamentary denial of the rights of prisoners.

However, it is strange that the Constitution's drafters chose to adopt an extreme form of minimalism with respect to this important institution while displaying a desire to regulate far more of the detail in relation to other institutions. The effect of such minimalism is that the mandate and especially the powers of the institution are left largely to parliament to decide. Without a stable, and constitutionally constructed, mandate, there is a risk that the independence and effective functioning of the IEC may be jeopardised through an amendment to the legislation which would imperil South African democracy more generally.

Finally, in 2012 several allegations of maladministration were laid against the IEC. Specifically, the IEC was alleged to have procured office space from an individual who also happened to be the business partner of the

⁸⁹ See Election Reports published by the IEC for national and provincial elections available at <http://www.elections.org.za/content/Elections/Election-reports/> (accessed on 21 March 2016).

⁹⁰ *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (*August v IEC*).

⁹¹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (*NICRO*).

Chief Electoral Officer of the IEC, Pansy Tlakula. Following an investigation, the Public Protector found that the procurement process adopted by Tlakula in securing the office space was ‘grossly irregular’.⁹² The Public Protector’s report was released in August 2013. Furthermore, it was found that several payments made to the lessee could not be justified and were far above the amounts stipulated in the rental agreement. The Public Protector included as a remedial action that the speaker of parliament, along with the IEC (to the exclusion of Tlakula), should consider whether action should be taken against Tlakula. The matter was then taken to the specialised electoral court by several opposition political parties.⁹³ In June 2014, the court recommended that the misconduct described in the Public Protector’s report warranted Tlakula’s removal. After several attempts to clear her name, Tlakula resigned in September 2014.

It is difficult to point to a specific constitutional failure in this set of facts. However, what is alarming is that the removal of Ms Tlakula only took place as a result of her resignation even though an investigation had taken place and a finding of misconduct had been made, as well as a recommendation by the Electoral Court. Furthermore, her resignation came almost 2 years after the allegations were first made. It is quite clear that such allegations made with respect to a senior officer of the IEC does a great deal of damage to the integrity of this vital institution. In such cases, it would be preferable to have a system of investigation that is not only independent and rigorous, but also swift. It is clear that such a system has not been put in place. Independent disciplinary processes for senior members of important chapter 9 institutions thus need to be considered and should be established in a similar manner to those relating to the judiciary such that removal through a complex process is not the only option available (we have shown in Chapter 5 that there has until recently also been a lack similar disciplinary processes within the judiciary).

With respect to the IEC’s role in ensuring that the elections are held free and fair, there has only been one case in which it has failed to meet that standard. In the 2015 municipal election in the Tlokwe area, candidates who had been unsuccessful in being elected as ward councilors alleged that certain voting irregularities had rendered the election unfair. These candidates lodged a complaint with the IEC claiming that the commission had registered individual voters in the ward elections despite the fact that they were not resident in those wards. This situation constituted a violation of elections laws and, they claimed, was done in order to bolster the ANC’s constituency in the wards. Furthermore, the IEC had not obtained the addresses of many of the voters who registered which made it impossible to determine in which ward they were legitimately entitled to vote. The matter was investigated by the IEC which found that even though a number of voters had been incorrectly registered and were therefore not entitled to have voted, the result of the election was not materially affected by the error. As a result, the IEC maintained that the elections were both free and fair. This decision was taken on review to the Electoral Court and, finally, to the Constitutional Court.

The Constitutional Court found that the right to vote in the Constitution yielded the principle that only those legally entitled to vote should be permitted to do so.⁹⁴ The Court held that the IEC’s registration of individuals for voting in wards in which they did not live violated this principle. As a result, the Court found that the IEC had failed in its role to ensure that the election was free and fair. However, the Court pointed out that the matter of overturning an election result was ‘serious’ and could not be done without considering factors such as the expense of holding a new election.⁹⁵ Nevertheless, the Court found that the election must be understood in the context of the hard-won constitutional right to vote. In the end, the Court set-aside the flawed election and ordered that they be re-held.⁹⁶ The failure on the part of the IEC here is serious and it appears that it lacks much information concerning the addresses of many members of the electorate. As such, there is currently an application before the Constitutional Court to decide what must be done in this regard as the local government elections in 2016 are possibly in jeopardy.

⁹² Public Protector Report on an investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission, Report No 13 of 2013/2014, August 2013 (Public Protector’s report).

⁹³ *United Democratic Movement and Others v Tlakula and Another* (EC 05/14) [2014] ZAEC 5; 2015 (5) BCLR 597.

⁹⁴ *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC) (*Kham*).

⁹⁵ *Kham* para 98.

⁹⁶ *Kham* para 113.

6.4. The Performance of Chapter 9 institutions and Recommendations

Areas of performance

All the institutions envisaged in chapter 9 of the Constitution have been created and legislative frameworks instituted to govern them. Thin compliance with constitutional prescriptions has thus, in general been achieved. The picture in relation to thick compliance is more variable.

In certain instances, such as in relation to the recent work of the Public Protector, they have been highly effective in exposing maladministration and corruption in state institutions. The number of complaints that the Public Protector has to deal with has increased vastly as the perception of the independence and effectiveness of the institution has improved with the current incumbent. Many of its successes are not reported and help ordinary people on a daily basis. The high profile cases and the clear independence and rigour of the findings have helped to enhanced the legitimacy for this institution which has really evolved into an effective watchdog.

The SAHRC conducts many important activities and has released a number of reports on socio-economic rights, for instance, that monitor the government's realisation of its obligations. Its efforts in this regard are, however, not consistent and more regularity needs to be introduced in its reporting.

The IEC has conducted all the elections at various levels in South Africa since the inception of the democratic order in 1994. All have been declared free and fair and no serious complaints have arisen about electoral fraud. Overall, the institution thus appears to have largely achieved its goals.

Areas of underperformance and recommendations

Whilst there have been significant successes in relation to these institutions, there are areas of concern which arise from the constitutional design itself, the legislation and the performance by these institutions of their roles. We summarise the key findings emerging from the analysis above, some of which require amendment to the existing constitutional and legislative frameworks.

Financial and budgetary concerns

As described with several of the institutions above, the funding of institutions such as the SAHRC, Gender Commission and the Public Protector are located within the budget appropriations of the national government departments. This feature of the financial arrangements reduces the level of independence these institutions have from the national executive and exposes them to the possibility of undue influence. The silence of the Constitution on issues of financial independence could therefore be considered a concerning shortcoming. While the Constitution should not itself regulate the details of the funding process, it could possess an abstract standard of financial independence that would have rendered any influence or potential influence by the national executive over funding of chapter 9 institutions unlawful.

Overlapping jurisdictions

We have also identified overlaps in the jurisdiction of three chapter 9 institutions, the SAHRC, the Gender Commission and the CRL Commission. We have identified how this overlap leads to various pathologies which may impact upon their effectiveness. Consideration should be given, as was suggested in the Asmal Report, to merging these bodies and creating one chapter 9 institution which would address the broad area of fundamental rights and the achievement of equality.

Appointment process

While the Constitution provides for some guidance as to the selection criteria for chapter 9 institutions, it lacks in other features of an efficient appointment process. For instance, the recommendation and appointment by the President of commissioners to important institutions such as the SAHRC or Public Protector occurs with no mandatory public vetting process or public involvement. Section 193(6) of the Constitution provides for the involvement of civil society in the recommendation process at the discretion of parliament. This situation has the potential to limit the awareness among the public of the important processes involving the supportive pillars of the democracy, as well as the opportunity for the public to voice concerns over the suitability of particular

candidates. Having such a mandatory selection process would therefore enhance transparency and the overall credibility of these public bodies.

Ultimately, the manner in which the appointment process is currently structured renders it susceptible to political influence. It is in the best interests of political representatives and appointees who may be embarrassed by the findings of these institutions to ensure that individuals are appointed that do not wholeheartedly pursue the goals set out in the Constitution. Adequate safeguards therefore need to be instituted in this regard.

Public awareness

In 2007, a Public Opinion Survey conducted on behalf of the ad hoc parliamentary committee tested amongst citizens, the public awareness, importance and effectiveness of several of the chapter 9 institutions. According to the survey, 65% of the public was aware of the SAHRC compared to 45% for the Public Protector and 62% regarded the SAHRC as important while only 40% saw the Public Protector as being important. In our own survey in Gauteng, we found that only 58% of those sampled had heard about the SAHRC which is concerning and suggests a decline in public awareness around the institution since 2007. Greater efforts need to be expended by the chapter 9 institutions to make the public aware of what they do and the recourse they can seek through approaching them. Without doing so, they cannot effectively fully achieve their goals.

Lack of disciplinary process

It would be naïve to assume that the occupants of important positions within chapter 9 institution will never fall short of ethical or lawful standards. In such cases it is important that processes are in place to allow for expeditious, independent and transparent investigation, as well as adequate disciplinary mechanisms which include sanctions that do not necessarily entail the removal of an office-bearer. Such a process would ensure that the integrity of these institutions is maintained and that the work of the institutions is not engulfed in long-running scandals.

Shortcomings related to specific institutions and recommendations

The Constitution as we saw did not clarify the effect of the remedial actions required by an institution such as the Public Protector. A judgment of the Constitutional Court is awaited in that regard but clarification in this regard could be the subject of a Constitutional amendment.

The SAHRC is required to gather information concerning the activities of state organs in relation to a range of socio-economic rights. No provision requires a report to be compiled of these activities at regular intervals which is released publicly. The imposition of such an obligation should be considered and perhaps extended beyond the realm of socio-economic rights into areas such as the advancement of the right to equality.

The Constitutional provisions around the IEC are minimal and should perhaps be extended to constitutionalise protection of its independence and functioning in all respects given its importance to the health of South African democracy.

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