

Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence, and the Transition to Democracy

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Institutions supporting democracy: The Commission for Gender Equality – working with civil society organisations to leverage constitutional rights to gender equality

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1. Introduction

My input¹ describes the work of the South African Commission for Gender Equality, the opportunities it presents to leverage state accountability on gender equality obligations and commitments, the challenges and successes faced in this regard in enhancing women's access to justice and rights, and opportunities to collaborate with civil society organisations in fulfilling its mandate. In South Africa, women form the majority of individuals who are marginalised, vulnerable and socially excluded. This is brought about by discriminatory attitudes and practices in all three spheres of family, community and government, and unacceptably high levels of physical abuse and sexual violence against women. Undeniably, South Africa's history of apartheid and patriarchy has had a profound impact on both women and men.

2. Role of institutions supporting democracy in strengthening South Africa's constitutional democracy

The new Constitution finalised in 1996 recognises this gender inequality and guarantees, in principle, access to equality and justice, and freedom from

¹ This input is drawn from Hicks J, 'Constitutional bodies – leveraging state accountability: The case of the South African Commission for Gender Equality', in Malena, C (ed) *Social Accountability in Africa: Practitioners' Experiences and Lessons*, Affiliated Network for Social Accountability, 2010

discrimination. Legislative provisions have been developed to address and promote gender and racial equality and non-discrimination. However, access to rights and protection from discrimination remain a pipe dream for the majority of South Africa women, and gender inequality, discrimination and oppression continue to shape inequality in our society.

As part of its recognition of the need to address inequality, South Africa created a particular set of state institutions to ensure that despite an unequal society marked by discrimination, citizens could access and leverage the political, civil and socio-economic rights outlined in the Constitution. The authors of the Constitution realised that 'though guaranteed by the Constitution, such rights would not necessarily translate into a lived reality'. Six independent, statutory bodies were provided for in Chapter 9 of the Constitution as safeguards for South Africa's new democracy, with the specific role to ensure that these rights are realised, especially by vulnerable groups in society' (HSRC, 2007, vii).

These institutions, referred to as Institutions Supporting Democracy (ISDs), or Chapter 9 institutions, form a 'bridge' between the state and civil society. Their role broadly is to fulfil a monitoring, reporting, research and activism function (Bentley, 2006), with the purpose of 'protecting and promoting human rights, and thereby advancing democratic practice' (HURISA, 2007). Overall they are responsible for holding the state accountable, 'by ensuring the consistent adherence by public institutions to the rule of law as well as inculcating a culture of respect for human rights by both the State and all members of civil society' (*ibid*, p28-29).

ISDs are accountable to Parliament, which holds oversight powers over the functioning of these entities, approving their budgets and assessing whether constitutional and legislative functions and mandates have been complied with. This oversight function is:

informed by the provision 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 (section 181(2)). Furthermore, the Constitution requires other organs of state, through legislative and other measures, to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions (section 181(3)). No person or institution may interfere with the functioning of these institutions (section 181(4)) (Ad Hoc Joint Sub-Committee on Oversight and Accountability, 2005, p7).

The constitutional guarantees, backed up by the ISDs, 'lay the groundwork for improving government accountability' (*ibid*) for delivering on constitutional rights, as well as the significant commitments outlined in regional and international treaties and conventions. As a result, South Africa, like a number of African countries, has witnessed substantive legislative reform advancing gender equality and women's rights. These have included the removal of discriminatory provisions in national and local legislation in areas such as employment, property ownership and inheritance, and the incorporation of new gender equality provisions into national constitutions. There have also been some significant successes in efforts to integrate gender equality goals into national development plans and strategies, including poverty reduction strategies (Alberdi, 2008).

Yet despite these gains,

a profound concern remains about the slow pace of implementation... Legislative frameworks still include gender-discriminatory provisions, and have serious gaps in their protection of women's rights. Where new laws have been adopted, they often provide little or no enforcement measures and include no provisions for redress. This is often the case, for

example with laws prohibiting violence against women (POWA, 2007, p27-28).

In a context marked by overwhelming challenges in accessing state information and unequal service delivery between urban and rural areas, this is evidenced in accounts of rural woman struggling to access a child support grant, or the treatment of immigrants attempting to secure identity documentation. As a result, the state system fails to respond adequately to the needs of the most marginalised of its citizens. This particularly impedes women's access to justice and constitutionally guaranteed rights, and prejudices their dignity and survival.

The CGE therefore occupies a vital role in the state architecture, within the context of the National Gender Machinery, with the potential to leverage and ensure state accountability and delivery on international, constitutional and legislative commitments to promote gender equality and enhance the status of women. The CGE occupies a central role in ensuring that the political, civil and socio-economic rights and freedoms outlined in the Constitution become a lived reality, particularly for marginalised women. A further critical role, particularly for the CGE, is to monitor and assess if the state is complying with its international obligations, including exercising due diligence to prevent violence against women (POWA, *op cit*)

It is this unique location and set of powers that positions the CGE as a powerful actor to track state implementation of policies, programmes and commitments, gather evidence of shortcomings and make recommendations to Parliament. With substantive powers of subpoena and litigation, this creates a significant ally for civil society and communities to act against abuse of rights and call for appropriate state response to address failures to deliver on political, civil and socio-economic rights.

3. Collaboration between ISDs and civil society organisations in leveraging constitutional rights to gender equality

The CGE Act calls upon the CGE to liaise and interact with organizations promoting gender equality, and other sectors of civil society, to further the object of the Commission (section 11). Civil society has been described as the “third sector”, following the public sector (government) and private sector (business). However, this in no way describes the relationships of power between these three stakeholders. While we have seen close collaboration between government and business, and a significantly increased influence of business on the policy formulation process, the converse has happened with the civil society sector’s relationship with government.

This demonstrates a vital space and opportunity for CGE interaction and engagement with civil society. By virtue of the legal mandate and very clear powers allocated by the CGE Act, by bringing its influence to bear on advocacy interventions and strategic issues that fall within its mandate and are being taken up by civil society, the CGE can elevate campaigns and advocacy interventions to ensure that they receive the attention of policy-makers, and that they are adequately responded to. While the CGE cannot force government to take on many of its recommendations, it does have legal clout to draw upon when government action is in contravention of its obligations with regard to gender equality.

For instance, the CGE has collaborated on the following civil society campaigns, and taken up issues brought to its attention by civil society organisations:

- **Maternity benefits campaign:** The CGE worked with the Legal Resources Centre, to develop a position paper assessing state implementation of constitutional and International Labour Organisation obligations in relation to the provision of maternity protection and benefits for all classes of

working women. Analysis reveals that the state has not effectively implemented its obligations in this regard, impacting particularly on women in the informal economy, and self-employed women. The CGE convened consultative community dialogues with women in all of the nine provinces, and partnered with the Congress of South African Trade Unions (COSATU) to develop a call for a review of maternity protection and provisions of the Unemployment Insurance Fund in this regard, adopted at its National Gender Conference in 2012. The CGE submitted its recommendations to the Department of Labour, and to Parliament, as part of its review of labour legislation, and effectively lobbied the South African Law Reform Commission to agree to investigate and review legislation in relation to maternity benefits, to ensure women in the informal economy have access to same. This investigation has commenced in mid 2014, and the CGE is engaging with same, pushing back the scope of the Terms of Reference of this investigation, and preparing a submission to the SALRC, based on its research and consultative findings.

- ***Manyiseni service delivery complaint:*** The CGE was approached by an impoverished community in Manyiseni, on the borders between South Africa, Mozambique and Swaziland, in relation to extreme poverty, poor infrastructure and limited services impacting primarily on poor rural women. As part of the CGE's legal investigation into this complaint, the CGE conducted a hearing in this community, to receive testimonies from local women's organisations and other structures, and drawing in local authority and departmental stakeholders to account. The CGE worked with a local civil society, to develop and lodge a formal petition to the KwaZulu-Natal Legislature, which was subsequently investigated and endorsed by that institution, accordingly calling upon provincial

departments to address community calls for improved access to roads, health clinics and water.

- ***Traditional Courts Bill:*** The CGE was alerted to the gender implications of the TCB as tabled in Parliament, by local research organisation, Law, Race and Gender at the University of Cape Town, noting the implications of the Bill for rural women in particular, in their envisaged compulsory subscription to traditional, male-dominated tribal authorities, and the concomitant stripping of their civil rights. The CGE strategised with local partners and convened a joint meeting with the then Minister for Women, Children, People with Disabilities, and local non-governmental organisation, Sonke Gender Justice, and gained her support in publicly calling for the rejection of the Bill, effectively raising political resistance to this piece of legislation. The CGE campaigned to raise awareness on the Bill among rural constituencies in the various provinces, and ensured that it monitored all provincial public hearings convened by the nine provincial legislatures, making formal written submissions at provincial and national legislative hearings. The Bill was eventually, effectively withdrawn from the Parliamentary agenda, as a result of the majority of the nine provinces rejecting the Bill, after much unusual deviation from standard Parliamentary procedure in contemplating provincial votes, and returned to the Executive for review.
- ***Women's health:*** The CGE was approached by a local non-governmental organisation, Her Rights Initiative, to consider its research report into the forced/coerced sterilisation of HIV positive women in state hospitals in certain provinces. The CGE convened a meeting with the provincial Minister for Health in KwaZulu-Natal, one of the effective provinces, to present research findings, and lobby the Minister to issue a policy directive

to clarify the Department's stance and standard procedures on sterilisation, particularly in relation to HIV positive women, and implement measures to raise awareness and provide necessary training among state health practitioners. The CGE is working closely with HRI to receive and address a formal complaint in relation to individual women affected by this practice, to investigate same and tackle the Department of Health to compensate these individual women, and undertake remedial action to correct these system failures and abuse of rights.

- ***Decriminalisation of sex work:*** The CGE worked with the Women's Legal Centre to receive a formal complaint by sex workers, document systematic abuse and violation of their constitutional rights, at the hands of South African Police Service officers. This has prompted a formal investigation into the complaint, with the CGE convening a task team of stakeholders in the sector to assist in assessing and advising on a potential Constitutional Court challenge to a court ruling impeding sex workers' access to rights. This will commence with a formal hearing as a means of collecting evidence from state institutions and obtaining information from the Department of Justice and Constitutional Development in relation to the SALRC's final recommendations in relation to the possible decriminalisation of sex work, which may result in public interest litigation to overturn the ruling, call upon the state to initiate appropriate legal reform, and address SAPS abuse. Simultaneously, the CGE conducted its own legal research into international and constitutional obligations in relation to the rights of sex workers, and international best practice in relation to the vexed issue of their legal status. Buttressed by consultative dialogues with stakeholders in the sector, the CGE released a formal position paper clearly calling for the full decriminalisation of sex work as the only means to protect the constitutional rights of sex workers, and

eradicate discrimination and abuse. The CGE tabled this position in Parliament, and has conducted numerous public information interventions to raise awareness around this issue and build support for this position. The CGE speaks out actively in support of the rights of sex workers, and is engaging with various local provincial initiatives to address abuse and stigma.

- ***Non-implementation of Gender-based violence (GBV) legislation:*** The CGE responded to a study by local non-governmental organisation Tshwaranang Legal Advocacy Centre, into the poor implementation by the state of Sexual Offences and Domestic Violence Acts. The CGE engaged with the Forum of South African Directors-General to secure a presentation slot by TLAC on their study findings, with recommendation for various departments on how to improve their implementation of this critical legislation. The CGE further engaged with Parliament regarding concerns in relation to lack of oversight of Parliament in relation to these implementation failures, and the need to hold departmental heads to account, and engaged with the Department of Justice and Constitutional Development on refining identified shortcomings in its long-outstanding, drafted Sexual Offences Act policy framework. This work is still underway.
- ***Gender transformation in the Judiciary:*** The CGE responded to a formal complaint from Sonke Gender Justice and other concerned institutions and individuals, relating to the poor representation of women in the judiciary, and the non-appointment of women to positions of judges. Flowing from its investigation into the complaint, the CGE engaged with the Judicial Service Commission on criteria for appointments, and ensuring women jurists' consideration in forthcoming vacancies at the Constitutional Court and Labour Appeals Court. The CGE further

engaged with legal stakeholders to advertise such vacancies, and to nominate women for these positions. While engagements in relation to such and broader gender transformation in the judiciary are ongoing, the CGE is proud to report the successful appointment of Judge Molemela as Judge President of the Free State Division.

- ***Addressing harmful traditional and religious practices:*** Responding to numerous reported instances and complaints by local community based organisations of forced and arranged early child marriages in certain traditional and religious communities, the CGE has initiated a legal investigation into the practice, and the state's response to eradicate such harmful practice, in light with its constitutional obligations, and those set out in international, continental and regional treaties and conventions. The CGE conducted research and consultative hearings in the provinces of KwaZulu-Natal and the Eastern Cape, where the practice has been most evident, and tabled its findings and recommendations with provincial executive councils and Parliament. The CGE has engaged with the National Prosecution Authority in relation to its non-prosecution of such cases, and is working with SAPS, NPA and Department of Justice and Constitutional Development stakeholders to ensure investigation and prosecution of known cases. The CGE is further collaboration with the Department of Cooperative Governance and Traditional Affairs, provincial houses of traditional leaders, and affected religious institutions to raise awareness around and eradicate the practice.
- ***One Woman, One Hectare of Land:*** The CGE is working with the Rural Women's Movement to campaign for the state to take up its radical campaign to increase women's access to land and land ownership. Informed by legal and comparative research into women's land

ownership in South Africa, and that of women in neighbouring African countries post land reform interventions, the CGE has developed a position paper in response to necessary legal reform to fast-track women's ownership of land, to eradicate women's poverty. The CGE has submitted its position to Parliament, the Women's Ministry and the Department of Rural Development and Land Reform, and is working with the RWM to build a grassroots-based campaign to support such legal reform.

In this manner, by collaborating jointly with relevant CSOs on particular issues, the CGE is able to generate sufficient critical mass and political attention for an issue such as access to maternity benefits to get onto the policy agenda. Likewise, by aligning itself with civil society struggles and taking up issues that are of common interest, the CGE can lend its investigative powers to ensure that critical information, and responses, are obtained from government. In this way, the CGE can ensure that it enables 'vulnerable groups (women, children, black and rural South Africans) to access and realise their constitutionally enshrined human rights' (HSRC, 2007, p vii).

4. Critiques of and challenges facing ISDs in fulfilment of mandates

The GCE has faced challenges in delivering on its constitutional and legal mandate to leverage state accountability and delivery on gender equality. Some of these challenges were highlighted in a review undertaken by Parliament in 2007 that aimed to measure the extent to which the ISDs have transformed society and entrenched human rights. This followed criticism by politicians and the media, and several reviews by civil society and donor institutions.

Some of the critiques raised and challenges faced include the following:

Insufficient collaboration with and awareness among CSOs

From these reviews emerges a consistent call for the CGE to work more effectively with its sister ISDs and CSOs to take up issues through advocacy and apply pressure on government to respond to its obligations. The overall impression was that such collaboration is inadequate and *ad hoc* in nature, and in breach of the CGE's legal obligations. Civil society organisations called for a more formalized and regular interaction with the CGE, such as the adoption of civil society advisory boards, or annual consultative forums. The CGE was advised to take proactive steps to formalize interaction with civil society bodies and build structured relationships. This would support consultation to feed into strategic planning, and ensure the relevance of its work to its constituency.

It is worth noting, that as pointed out in one of the civil society reviews of the ISDs, or Chapter 9 institutions,

... the key ingredient of the success of the relationship between the studied Chapter 9 institutions and CSOs is the public's knowledge of their rights and how to act upon any violation of these rights. Thus, popularity of the Chapter 9 institutions amongst CSOs is imperative for a functional collaboration between the two. It is the acknowledged responsibility of both the Chapter 9 institutions and CSOs to educate the public about human rights. Although each of the parties may do this differently, a sustained structured relationship between the two is crucial. This means that the meetings should be mandatory and regular, inclusive of all CSOs, and should prioritise human rights issues of the day. Indeed, both the Chapter 9 institutions and CSOs value this kind of relationship as important for the achievement of human rights and administrative justice (Ibid, p ix).

Difficulty in measuring gender equity

It is clear from the reviews of the CGE conducted by both Parliament and individual CSOs that there is a need to develop a common framework

regarding indicators for the monitoring and evaluation of gender equality work. It is the view of the CGE that this process will do much to rationalize the prevalence of unrealistic and sometimes contradictory expectations of the CGE on the part of civil society. However, the CGE accepts that the concept of civil society itself is not a unitary concept, and that it is never likely to be able to please everybody.

One of the reviews noted in this regard:

The major difficulty in forging this kind of relationship stems from disagreement over the strategies for promoting, monitoring and protecting human rights. These range from issues of priority, different understanding of the roles of Chapter 9 institutions, ideological orientation (as in disagreements over which gender discourse to pursue in the case of CGE) and different conceptions of the independence/autonomy of the organisations. These disagreements often lead to CSOs misinterpreting the role and function of the institutions (Ibid, p ix).

Use of powers and availability of resources

It is apparent that the effective use of constitutional institutions such as the CGE to leverage state accountability therefore depends on building working relationships between the institution and CSOs, founded on broader public education on rights, and how to recognise and react to their abuse. However, further disadvantages brought about by the location and resourcing of the ISDs can diminish their ability to bring pressure to bear on the state to adequately address shortcomings. This was noted in an additional review, which highlighted the fact that:

One of the most striking aspects of the three Chapter Nine institutions is that their recommendations are not binding or enforceable against the state. They are merely advisory. This means that in practice, state departments may

choose to either implement or ignore such recommendations in the absence of threats of litigation by the constitutional bodies. (HURISA, 2007)

This requires ISDs such as the CGE to be more proactive and make more effective use of its powers of subpoena and litigation, to 'put pressure on the state to deliver on its political, social and economic obligations' (*ibid*). This in turn requires agency on the part of the institutions to ensure that adequate financial and human resources are made available for them to pursue programmatic interventions, and where necessary, take up costly litigation measures.

5. Strengthening collaboration between ISDs and civil society organisations

It is clear from the arguments above, the value of an independent, empowered mechanism such as a gender commission, to hold a state to account for delivery on gender equality commitments and obligations. The interventions and achievements highlighted above reveal the potential and real impact strategic collaboration between the CGE and CSOs can bring about in this regard. The joint campaigns and advocacy interventions outlined, supplemented by effective use of the CGE's legal powers, can serve to ensure that the state responds to gaps in its policy frameworks and implementation, and service delivery shortcomings, impacting on women's realisation of substantive gender equality, in relation to socio-economic rights in particular.

Similarly, what the above challenges and critique of the CGE reveal, is the need for focussed and targeted interventions to strengthen linkages between CSOs and ISDs, to ensure that potential leverage of state accountability, and thereby citizen access to rights, is realised. Several recommendations emerge in this regard, for consideration both in the current programme formulation and uptake of issues of the CGE, as well as the design and implementation of such an institution by other states:

1. **The value of creating state institution/civil society forums.** These would enable 'structured and continuous relationships' between the institution and civil society (HSRC, *op. cit.*, p x-xi). This could be designed as a formal space to share and shape priorities and programmes, deliberate on issues of concern and findings and jointly strategise on advocacy interventions. The purpose of the forum could be multiple: for CSOs to share with the ISDs their strategic issues and advocacy campaigns and request assistance in taking these up; for the deliberation of issues and formulation of joint advocacy campaigns; and to identify potential areas for partnership and collaboration, to strengthen each others' work. Such a space would also permit broader conversation on gender discourse and facilitate greater understanding on institutional performance, priorities and limitations.

2. **The need for CSOs to formulate strategies to engage with state institutions** (*Ibid*). Civil society institutions themselves need to strategise around making use of the location and powers of constitutional institutions such as the CGE to strengthen their own advocacy campaigns and ensure their issues of concern are taken up by policy makers, as demonstrated in examples cited above.

3. **The need for extensive public awareness and education** (*Ibid*). Both constitutional institutions and CSOs need to expand their public education and awareness programmes to accelerate communities' understanding of their rights, and how an institution such as the CGE can be used to address the non-delivery or abuse of these.

4. **The need for tailored outreach strategies.** Institutions such as the CGE would need to craft tailored outreach strategies and programmes to ensure that ‘the least advantaged (especially in rural areas’ are able to take up their services (*Ibid*).
5. **The need for adequate budget and resource allocation.** CGE experience has revealed that when the state budget allocation is required predominantly to cover operational costs, this leaves a minimal allocation for programme interventions, which impacts significantly on the extent and depth of work that can be undertaken. The CGE is engaging with Executive and Parliamentary stakeholders to address budgetary shortcomings, aggravated by the recent budget cuts imposed on all state entities.
6. **The need for the institution to make full use of its powers.** As noted, unless an institution such as the CGE makes full use of its powers, including those of subpoena and litigation, in holding the state to account, it is unlikely to achieve its full potential in leveraging state accountability, and may be disregarded by the state. A negative spin-off is the fuelling of public perception of bias in favour of the state, or the perceived undermining of the institution’s independence.

6. Conclusion

South Africa has crafted a unique set of institutions to enhance and ensure the attainment of democracy in South Africa. These provide citizens and organised structures with a platform to obtain critical information in relation to their constitutional rights, lodge complaints of and have investigated instances of abuse of constitutional rights, and hold the state to account for the delivery on

these rights. For women in South Africa, the role of the CGE is critical in ensuring that we see the attainment not only of *formal gender equality*, in the pursuit of parity in women's representation, or the recognition and protection of women's rights through formal legal frameworks, but in addition the *substantive gender equality* vital to women's equal status as citizens, and their quality of life, witnessed through delivery on their socio-economic rights.

The CGE is informed and buttressed by civil society organisations in its exercise of its mandate in this regard, through asserting its independence and powers in leveraging state response, delivery and accountability in relation to the numerous constitutional guarantees fundamental for women's development, empowerment and in critical instances, their very survival. Reflection of gains and persistent obstacles in this regard, twenty years post democracy, have revealed that while South Africa has much to be proud of in its recognition and promotion of women's formal equality, much vigilance and work is required of the state, the CGE and civil society to address systemic shortcomings and challenges impeding the attainment of women's substantive equality.

References

Ad Hoc Joint Sub-Committee on Oversight and Accountability, 'Constitutional landscape of the constitutional provisions dealing with the interrelated themes of oversight, accountability, transparency and responsiveness in respect of Parliament's functions', Parliament, November 2005

Alberdi, Inés, Executive Director, UNIFEM, 'Legislative Reform Lays Foundation for Advancing Gender Equality and Women's Rights', Third Meeting of the Africa-Spain Women's Network, 12 May 2008

Bentley, Dr Kristina, 'The Role of the Chapter 9 Institutions in the Promotion and Protection of Gender Equality in South Africa', Gender Mainstreaming Seminar, University of Cape Town, 2006

Commission on Gender Equality Act, No. 39 of 1996

Commission for Gender Equality, 'Continuing dialogues for effective and substantive gender equality in South Africa: Commission on Gender Equality (CGE) responds to the *Ad Hoc* Committee on the Review of Chapter 9 and Related Institutions', 2007

Commission for Gender Equality, *Strategic Plan: 2008-2013*, 2008

Constitution of the Republic of South Africa, Act 108 of 1996

HURISA, 'The effectiveness and impact of three constitution building institutions in South Africa: South African Human Rights Commission, Commission for Gender Equality, The Public Protector', 2007

HSRC, *Assessment of the Relationship between Chapter 9 Institutions and Civil Society*, Final Report, 15 January 2007

Parliament, '*Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions', 2007

People Opposing Women Abuse (POWA), 'Review of State Institutions Supporting Constitutional Democracy', 2007