

Draft one

Review of Key Constitutional Bodies Established to Support Constitutional Democracy in Post-Apartheid South Africa: Progress and Challenges*

(Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibilities of Governments) #

Introduction

The birth of a democratic state founded on the advancement of human rights and attainment of equality following the end of the apartheid system in 1994, necessitated a government that would be accountable, open and responsive to the needs of the people of South Africa, and ensure that they are able to live in peace and harmony, and free from fear and want. This, however, was going to be a challenge in view of the many decades of apartheid rule and its devastating impact on good governance. The inexperience of the African National Congress (ANC) in governing a country and the retention of apartheid civil servants, including the feared and brutal apartheid security forces, a result of the political settlement between the outgoing regime and the ANC, were also going to pose a serious challenge too.

These challenges necessitated the establishment of independent state institutions that would support the new government in the transformation of the apartheid state and help to strengthen constitutional democracy. In this regard, the 1993 Constitution of South Africa that ushered in democratic governance in South Africa in 1994 provided for the establishment of constitutional bodies to support the fledgling democracy. These institutions were the Public Protector (PP), the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE), the Electoral Commission, and the Auditor General. The Auditor General, established in 1911, existed under the apartheid and colonial eras but was given constitutional status by the 1993 Constitution.

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Article 1 of Part 1 of the Vienna Declaration and Programme of Action adopted by on 25 June 1993 by the World Conference on Human Rights in Vienna, Austria (A/CONF.157/NI/6)

The 1996 Constitution which replaced the 1993 Constitution retained these bodies, introduced a new institution, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and consolidated them under chapter 9 of the Constitution (these institutions are now commonly referred to as Chapter Nine Institutions). It also gave these institutions more powers and more protection - organs of state are required to assist and protect these institutions in order to ensure their independence, dignity and effectiveness, and no person or organ of state is permitted to interfere with their functions. The South African Human Rights Commission for example, was given an additional mandate to request and receive information from organs of state in order to monitor the realization of economic and social rights.¹

International developments at the United Nations in 1993 also had an impact in South Africa's 1993 and 1996 constitutional provisions pertaining to the establishment and role of some of these constitutional bodies, particularly the South African Human Rights Commission, the country's leading national institution for the promotion and protection of human rights. The 1993 Vienna Declaration and Program of Action adopted at the World Conference recognized the importance of national institutions for the promotion and protection of human rights, especially their role finding appropriate redress for human rights violations, the dissemination of human rights information and education on human rights, and encouraged the establishment and strengthening of these institutions by states.² The UN General Assembly also adopted the Principles relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights (Paris Principles) that set out the competence, responsibilities, composition, guarantees of independence, and methods of operation for these institutions.³

National human rights institutions (NHRIs) established in accordance with the Paris Principles⁴ were regarded as the latest addition in international, regional and national human rights systems⁵

¹ Section 184(3) of the Constitution of the Republic of South Africa 1996.

² Article 36 of Part I of the Vienna Declaration, adopted by on 25 June 1993 by the World Conference on Human Rights in Vienna, Austria (A/CONF.157/NI/6).

³ See Part A.1 of the Principles (UN General Assembly Resolution A/RES/48/134 of 20 December 1993).

⁴ Principles Relating to the Status of National Human Rights Institutions (Paris Principles), GA Resolution 48/134 of 20 December 1993.

⁵ Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law,' *Human Rights Law Review* 10, no. 1(2010):1-32. See also, C Raj Kumar, 'National Human Rights Institutions (NHRIs) and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights,' *Human Rights Quarterly* 28, no. 3(2006):755-779; Linda C Reif,

and were expected to be ‘an effective first port of call for victims of human rights violations.’⁶ These institutions were seen as bringing renewed energy, hope and courage in the quest for universal respect of human rights. Kofi Annan the then UN Secretary-General in acknowledging the role of these institutions said:

Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner.⁷

The ombudsman institution, whose model and role the Public Protector is based upon, had long proven itself as a key mechanism in the regulation of public power and usage of public resources in many countries since its establishment in Sweden in 1809.

Notwithstanding the role and importance of these institutions in strengthening constitutional democracy, their challenges from the outset, especially the Public Protector and the South Africa Human Rights Commission, were two fold. How would those wielding political power in the country, the government, government officials, political parties and politicians, respond to scrutiny and intrusion by these unelected entities that could embarrass them and expose their failures and shortfalls, and whether these institutions will receive necessary support from government and other stakeholders to do their work effectively and with no undue interference.

The apartheid government and its officials who formed part of the democratic government in 1994 were not used to the type of scrutiny that some of these institutions entail, and had reacted negatively and sometimes even violently against those pushing for transparency and accountability in the past. The ANC, which was going to be the senior partner in the new government, did also not have the practice and the culture of being accountable to outsiders and had not operated in a transparent manner in its armed struggle against the apartheid regime, nor could it have done so in any case.

‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection,’ *Harvard Human Rights Journal* 13, no. 1 (2000): 2 and Anne Smith, ‘The Unique Position of National Human Rights Institutions: A Mixed Blessing,’ *Human Rights Quarterly* 28, no. 4 (2006): 904-946;

⁶ See the Annual Report of the UN High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General-National Institutions for the promotion and protection of human rights, A/HRC/13/44 of 15 January 2010, paragraph 109.

⁷ Kofi Annan (as UN Secretary-General), ‘Strengthening of the United Nations: an agenda for further change’, Report of the Secretary-General, A/57/387 of 9 September 2002, paragraph 50.

The twenty years of democracy governance in South Africa thus provide a good opportunity to assess the progress Chapter Nine Institutions have made in strengthening and supporting constitutional democracy in the country, the support they have received from government and relevant stakeholders, the challenges they have faced, and their future prospects in the next coming twenty years. The assessment focuses on two of the Chapter Nine Institutions, the Public Protector and the South Africa Human Rights Commission, but also entails relevant experiences and developments pertaining to other Chapter 9 institutions such as the Electoral Commission (commonly referred to as the Independent Electoral Commission (IEC)) and the Commission for Gender Equality (CGE).

The assessment focuses on two main themes in the role of these institutions, the conduct and leadership of members of these institutions in exercising their powers and in carrying out the functions of their respective institutions effectively, impartial and without fear or favor, and the role of the state and the ruling party in supporting these institutions and in upholding their independence. The assessment concludes with a set of recommendations on how these institutions could be made more effective in their role to strengthen and support South Africa's constitutional democracy in the next twenty years.

Progress and achievements in the first twenty years of constitutional democracy

Over the past twenty years of democratic governance in South Africa, Chapter 9 institutions as a collective have played an important role in strengthening constitutional democracy. The Electoral Commission as an example has managed five national and provincial elections that have been declared free and fair and has received regional and internal recognition for its many achievements.⁸ This has been a major accomplishment for a fledgling democracy and has helped to put the country on a firm course of democratic governance that would be difficult to unravel. The Auditor - General with its audit of state expenditure has helped to promote better usage of public resources and thus helped in enhancing the credibility of state bodies in cases where the audit findings and recommendation are acted upon and taken seriously.

⁸ The IEC has won several national, regional and international awards for its work, see, <http://www.elections.org.za/content/about-us/awards/>

The Public Protector and the Human Rights Commission, both established in October 1995, have also played a key role in entrenching a culture of respect for human rights in the country, respect for the rule of law, and in helping to ensure that the state and its various bodies, is indeed open, accountable, and responsive to the needs of the people. The Public Protector with its mandate to investigate the conduct of any organ of state has helped to promote proper and effective use of public power and contributed in rooting out corrupt in government. The Human Rights Commission with its mandate that extends to non-state entities has also made an important contribution in building a new society based on human rights as one of its founding values. The Commission's constitutional mandate to monitor the realization of economic and social rights and its work in the promotion of equality and prevention of unfair discrimination and racism, in particular, has been exemplary. Its litigation role, especially in the Constitutional Court, has made a contribution in entrenching the judicial enforcement and protection of economic and social rights.

The complaints these two bodies receive from the public in relation to abuse of power and the violation of human rights, which they generally respond to by way of investigations, public hearings, and even through litigation for the Human Rights Commission, have helped in building confidence in the state and the rule of law. In the first decade of their establishment and operation, these two institutions received on average, over ten thousand complaints per annum each. Their reports in pursuit of their respective mandates and submissions on legislation⁹ and relevant public policy issues have helped to promote good governance in the country.

The role and contribution of Chapter 9 institutions in the first decade of South Africa democracy in general and that of the Public Protector and Human Rights Commission in particular, were recognized and acknowledged by the ad hoc Committee of the National Assembly established to review the performance of these institutions in 2006 (the Kader Asmal Committee). The Committee focused on four areas in which these institutions were meant to make a significant impact in the context of their mandate to support and strengthen constitutional democracy in South Africa. The areas were; the restoration of the credibility of the state and its institutions,

⁹ The South African Human Rights Commission played a major role in the drafting of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The Commission hosted a unit that drafted the Equality Bill before it was handed over to the Department of Justice and Constitutional Development for processing and tabling in Parliament.

flourishing of democracy and human rights values and norms, respect for the rule of law, and the establishment of a state that is open, responsive to the needs of the people and that is respectful of their rights (the promotion of good governance).¹⁰

In relation to the performance of the South Human Rights Commission, the ad hoc Committee in its report made the following observations and findings:¹¹

Over the past decade, the Commission has built up a reputation amongst human rights activists and members of the public as an active and passionate defender of human rights. With limited financial and human resources, the Commission has made a real difference to the promotion and protection of human rights in the areas it focused on. At the same time, the Commission has managed to retain civil relationships with the Legislature and Executive, and worked with relevant individuals and institutions in other branches of government when this was required.

The Commission has also developed an international reputation as an independent institution for the promotion and protection of human rights and assists human rights commissions elsewhere in Africa with capacity building.

In its concluding remarks on the role of the South African Human Rights Commission, the Committee noted:¹²

It appears to the Committee that the Human Rights Commission more than adequately satisfies requirements as identified in the Committee's terms of reference with regard to professionalism, efficiency and effectiveness. The Committee believes that the work done by the Commission is of vital relevance for South Africa and makes an important contribution to the deepening of democracy and the achievement of a human rights culture in this country.

In a 2007 Public Opinion Survey conducted on behalf of the ad hoc Committee, the South African Human Rights Commission performed much better than the Public Protector in terms of

¹⁰ See, Parliament of the Republic of South Africa. Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. Cape Town, South Africa: National Assembly, 2007, p. 3.

¹¹ Ibid., p.172.

¹² Ibid., p. 184.

public awareness, importance and effectiveness.¹³ A change of leadership and management in the two organizations in 2009 saw a reversal of roles in their performance and impact and how they are perceived by the public in terms of their credibility. Since then, the Public Protector has taken up more high profile matters pertaining to the abuse of power and public resources involving the country's president, members of cabinet, high ranking government officials and even members of other Chapter 9 bodies.

The findings of the Public Protector have led to the dismissals of a few cabinet ministers, the head of the police,¹⁴ and the resignation of the Chairperson of the country's Electoral Commission.¹⁵ The Public Protector's investigations and findings against improper use of public abuse and resources of public power have also benefitted ordinary people and helped to promote and protect their human rights. Examples in this regard include, people who were unreasonably refused identification documents, wrongly denied social grants and having their children wrongfully denied admission in public schools.

In the financial year 2010/2011, the Public Protector received 16 251 complaints from the public about maladministration and settled 14 148 of these complaints. One of the complaints in this regard was against a fellow Chapter 9 institution, the Commissioner for Gender Equality. The Public Protector's finding was that the Commission acted unlawfully and irregularly in the appointment of two of its Commissioners as joint Chief Executive Officers and in the establishment of certain posts by the leadership of the Commission.¹⁶

This display of courage and fierce independence has catapulted the Public Protector way above the South African Human Rights Commission as a leading champion of constitutional democracy in the second decade of South Africa's democracy. The Public Protector has, as a

¹³ 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. Ibid. pp. 259, and 261-262.

¹⁴ See, <http://www.bbc.com/news/world-africa-18414786>

¹⁵ See, <http://mg.co.za/article/2014-09-02-iec-chair-pansy-tlakula-resigns>

¹⁶ See, Public Protector South Africa, Annual Report 2010/2011, p. 15. Available at http://www.pprotect.org/library/annual_report/PUBLIC%20PROTECTOR%20AR%20FINAL.pdf.

result, become a darling of national and international media,¹⁷ national and international human rights bodies,¹⁸ and of the South African public in general.¹⁹

The South African Human Rights Commission, despite being over-shadowed by the Public Protector in the second decade of constitutional democracy has continued to carry out its constitutional mandate of promoting and protecting human rights. It continues to investigate human rights violations, hold public hearings, litigate on human rights issues and organize national and international human rights workshops and conferences even though it no longer receives as much publicity and recognition as it did before 2009.

It has maintained its involvement in regional and international activities of national human rights institutions and in relevant activities of the African Commission on Human and Peoples Rights and of various bodies of the UN, and the UN Human Rights Council in particular.²⁰ It has also managed to retain its status as a national human rights institution that complies with the Paris Principles pertaining to the independence and functions of these institutions as determined by the Sub-Committee on Accreditations of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in November 2012.²¹ This determination grants the Commission observer status with full speaking rights in the UN Human Rights Council and the UN General Assembly.²²

As a result of its regional and international work, the Commission was elected to chair the Network of African National Human Rights Institutions (NANHRI) based in Nairobi, Kenya, for the period 2011 to 2013, and currently chairs the International Coordinating Committee of

¹⁷ The new Public Protector, Thuli Madonsela, was named one of the top most influential people in the world in 2013 by Time Magazine. See, <http://time.com/70854/thuli-madonsela-2014-time-100/> and <http://www.theguardian.com/world/2014/apr/25/thuli-madonsela-south-africa-took-on-jacob-zuma>.

¹⁸ Thuli Madonsela was declared as the Integrity Award Winner for 2014 by Transparency International for her courage and determination in the fight against corruption. See, http://www.transparency.org/news/feature/thuli_madonsela_integrity_award_winner_2014

¹⁹ She has been named newsmaker of the year for 2011, 2012 and 2013 by the Johannesburg Press Club and other media entities. See, <http://www.prisa.co.za/news-and-media-center/mediareleases/37-mediareleases/498-newsmaker-of-the-year> and <http://www.iol.co.za/news/politics/thuli-thanks-public-for-newsmaker-award-1.1627470#.VE77XhZ9yAY>

²⁰ See various annual reports of the SAHRC:

<http://www.sahrc.org.za/home/21/files/Annual%20Report%202012-13.pdf%20October.pdf>

²¹ Report of the ICC's Sub Committee on Accreditation on the SAHRC, November 2012, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCACCreditation/Documents/SCA%20Report%20November%202012%20%28English%29.pdf>

²² See UN Human Rights Council, National institutions for the promotion and protection of human rights, resolution A/HRC/20/L.15 of 05 July 2012 and UN Commission on Human Rights, resolution 2005/74 of 20 April 2005.

National Institutions for the Promotion and Protection of Human Rights (ICC).²³ It also received an award for its work in the African continent at the 25th Anniversary Awards Ceremony of the African Commission on Human and Peoples Rights held in Yamoussoukro, Cote d' Ivoire on October 22, 2012 during the 52nd Ordinary Session of the Africa Commission - came second after the Ugandan Human Rights Commission.²⁴

Challenges in the first twenty years of constitutional democracy

General challenges

Despite the achievements of the South African Human Rights Commission in the first decade of South Africa's constitutional democracy and of the Public Protector in the second decade and the constant good performance of the Electoral Commission and the Auditor General, the other Chapter 9 institutions, the Commission for Gender Equality (CGE) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), have generally not discharged their mandates in a satisfactory manner.

Lamenting on the poor performance of the Commission for Gender Equality in the first decade the ad hoc Committee of Parliament that reviewed these institutions in the first decade of South Africa's democracy said:²⁵

The Committee finds that it must report on the Commission in pain and sorrow rather than in anger. As such it strongly believes that the Commission represents a lost opportunity as until now it has failed to engage in a sustained and effective manner with the policies, approaches and mechanisms to eliminate all forms of gender discrimination, and to promote gender issues in South Africa.

The Committee highlighted several internal and external factors that affected the CGE's ability to give effect to its constitutional mandate as a Chapter 9 institution. These factors also applied to other Chapter 9 institutions in varying degrees.

²³ See, http://www.nanhri.org/index.php?option=com_content&view=article&id=139:nanhri-gets-a-new-chairperson&catid=86&Itemid=628&lang=en

²⁴ See, <http://www.achpr.org/sessions/52nd/info/communique52/> and <http://www.sahrc.org.za/home/index.php?ipkArticleID=139>

²⁵ Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions, note 10 above, p.150.

Internal factors in this regard included inadequate understanding and appreciation of the Commission for Gender Equality's constitutional mandate by its members, poor leadership, lack of independence characterized by the unwillingness of members of the Commission to take a public stand on issues that might embarrass government, internal divisions and tensions, poor relations with external stakeholders and civil society in particular, and inefficient usage of limited resources. External factors included inadequate support by the state, which entails inadequate funding, poor response to findings and recommendations, outdated legislation with respect to the Commission for Gender Equality, and inadequate oversight by parliament and its respective committees manifested by minimal engagement with reports and findings of the Commission.²⁶

In response to the challenges that faced the Commission for Gender Equality in the first decade, the ad hoc Committee, indicated that it had to come to a regretful conclusion that these factors undermined the Commission's efficiency and effectiveness and brought its relevance into question.²⁷ The Committee, as a result, recommended that the Commission should be merged with the South African Human Rights Commission.²⁸

The challenges identified by the ad hoc Committee in relation to the Commission for Gender Equality in the first decade have unfortunately continued to affect the Commission in the second decade, and other Chapter 9 institutions in varying degrees. The Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities have remained as ineffective, inefficient and invisible in the second decade as they were in the first decade.

Leadership

The quality of leadership is a major deciding factor in the impact and effectiveness of Chapter 9 institutions and how these institutions respond to external and internal challenges that generally

²⁶ Ibid., pp. 150-162. The Human Rights Watch in its study on the role of African Human Rights Commissions and their effectiveness in promoting and protecting human rights made similar findings, see, Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*. New York: Human Rights Watch, 2001, pp. 4 - 5.

²⁷ Ad hoc Committee Report, Ibid., p.162.

²⁸ Ibid., p. 164.

affect all of them. On the importance of good leadership in these institutions, the ad hoc Committee in its report said:²⁹

The establishment of and entrenchment of a vibrant human rights culture requires strong leadership from a legitimate, independent and authoritative body.

The commendable performance of the South African Human Rights Commission in the first decade of South Africa's democracy, and that of the Public Protector in the second, are examples on the impact of good leadership in the performance of Chapter 9 institutions. On the other hand, bad and poor leadership, as displayed by the Commission for Gender Equality, has had an adverse effect on their performance and standing in the public.

Leadership challenges played a key role in poor performance of the Public Protector in the first decade. One example of these challenges is the public discord between the then Public Protector, Lawrence Mushwana and his Deputy in 2006 that necessitated the intervention of Parliament, and which, according to the Kader Asmal Report, tarnished the image of the Public Protector.³⁰

Another example are the consequences of a narrow interpretation of the mandate of the Office of the Public Protector in the first decade pertaining to high profile matters that gave an impression that he did not want make adverse findings against high ranking government officials and the ruling party, the ANC - the Kader Asmal Committee also complained about this behavior.³¹ This narrow interpretation resulted in the Public Protector declining to investigate abuses of public funds by individuals close to the African National Congress (ANC), on a flimsy ground that his mandate does not extend to non-state entities even though public funds were involved. This decision was challenged and reversed by the Supreme Court of Appeals in the *Public Protector v Mail & Guardian*.³²

The Court in this matter held:³³

The office of the Public Protector is an important institution. It provides what will often be a last defense against bureaucratic oppression, and against corruption and malfeasance

²⁹ Ibid., p.167.

³⁰ Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions, note 10 above, p. 104.

³¹ Ibid., p.97.

³² 2011 (4) SA 420 (SCA).

³³ Ibid., para. 6.

in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.

The Court further said:

The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised without fear, favor or prejudice. Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but will also call for vigilance and conviction of purpose.³⁴

While there are many factors that have caused the decline in the performance and visibility of the South African Human Rights Commission in the second decade of South Africa's democracy including a decline in taking on high profile matters involving politicians and high ranking government officials, the impact of the appointment of the Public Protector, Harold Mushwana, as the Chairperson of the Human Rights Commission in 2009 cannot be discounted in this regard.

Several scholars and commentators like Professor Pierre De Vos have been critical of the Public Protector and expressed a concern that his appointment would turn the South African Human Rights Commission into a 'toothless tiger.'³⁵ One other commentator, Barney Mthombothi, said that the ANC has undermined these institutions by 'packing them with toadies to do its bidding,' and that the former Public Protector, 'after the wrecking job he did as public protector, has been rewarded with deployment to the Human Rights Commission, where he seems to be succeeding in emasculating it.'³⁶

³⁴ Para., 8.

³⁵ See Pierre De Vos, 'R.I.P. Human Rights Commission?' August 25, 2009, available at, <http://constitutionallyspeaking.co.za/rip-human-rights-commission/>

³⁶ Barney Mthombothi, 'Watchdogs lose bite as Tlakula gets a sabbatical at taxpayers' expense,' Sunday Times July 6, 2014. He further wrote: 'These bodies were meant to guard against the abuse of power, but some of them have been used as tools by those in power.' See also, Catherine Musuva, *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa's Public Protector and Human Rights Commission –EISA Research Report No. 41. Johannesburg: EISA, 2009.* Available at <http://www.content.eisa.org.za/sites/eisa.org.za/files/imports/import-data/PDF/rr41.pdf>

Songezo Zibi, the editor of Business Day newspaper, also questioned the motive of the ANC in the appointment of Lawrence Mashwana as the chairperson of the South African Human Rights Commission in view of his performance in his previous position as the Public Proctor. In his recent book, he says:³⁷

What we now know is that the ANC has long abandoned any pretensions of wanting to give full meaning to the spirit of South Africa's Constitution as it relates to the separation of powers and the fundamental democratic principle of separating the party from the state. In addition to the appointment of extremely dubious characters to the NPA, the 2002 appointment of the ethically moribund Lawrence Mashwana as public protector and later the Human Right Commission in 2009.

On the importance of appointing suitable persons to independent state institutions in order to enhance their ineffectiveness and the challenges in the appointment of ANC loyalists in these institutions, he wrote:³⁸

It is in this area that the policy of cadre deployment has a degenerative effective on the country's young democratic culture and erodes the rights of citizens.

There have been examples in the past, such as the former public protector, Lawrence Mashwana, a former ANC MP, being compelled by the high court to properly investigate the Oilgate Scandal. He left office before he could do so but he is easily the most perfect example of a party sycophant neglecting his constitutional obligations in order to cover up corruption in his political party, to which he clearly had more allegiance.

Lawrence Mashwana, however, is not the only member of the South African Human Rights Commission. There are six other members who can vote against him in any decision making process in the Commission and it would thus be unfair to blame him alone for developments that have seen Commission being surpassed by the Public Protector in terms of credibility and in tackling high profile matters. However, the public and media perceptions around him cannot be

At p. 39, the author wrote: 'The Public Protector's apparent deference to the executive and as a corollary, the ruling party, displayed in his reluctance to investigate fully high-profile cases implicating politicians, and the narrow interpretation of his mandate undermines constitutional democracy by protecting the few and not the many.'

³⁷ Songezo Zibi, *Raising the Bar: Hope & Renewal in South Africa*, Johannesburg: Picador Africa, 2014, p. 170.

³⁸ *Ibid.*, p 132,

discounted in this regard, whether fair or otherwise, and these perceptions seemed to have followed him to the South African Human Rights Commission and they do matter.

The recent resignation of the Chairperson of the Electoral Commission, Pansy Tlakula, over a finding of irregular and unlawful usage of public funds by the Public Protector is another example of the impact of leadership in these institutions. This resignation and surrounding circumstances affected the image of a Chapter 9 institution that has done very well in the execution of its mandate and has received local, national and international accolades for managing the country's elections since 1994 and even assisting other countries in conducting their elections. The Electoral Court on this matter in *United Democratic Movement and Others v Tlakula and the Electoral Commission* held:³⁹

In my view, the respondent compromised the independence and integrity of the Commission to such an extent that her actions complained of constitute misconduct which renders her unsuitable for the office of a commissioner and destructive of the very values of the Commission.

Role of the state, ruling party and opposition parties

Undermining the independence of Chapter 9 institutions

A major challenge that these institutions have faced in the first decade and continue in the second decade is the undermining of their independence by the state and the ruling party. The appointment of members of these institutions that are too close or closely aligned with the ruling party and who generally end up not carrying out their mandate impartially and without fear or favor, as required of them by the Constitution, is one way in which this is achieved. The appointment of Lawrence Mushwana as the Public Protector and later, the chairperson of the South African Human Rights Commission, is an example of this phenomenon. Members of Chapter 9 institutions that become too independent face major criticism and are sometimes subjected to undue political pressure, intimidation⁴⁰ and even insults by some members and supporters of the ruling party.

³⁹ EC 05/14 of 18 June 2014, para. 159.

⁴⁰ See, <http://www.news24.com/SouthAfrica/News/Madonsela-fears-for-her-life-20140831>

The hostility directed at Thuli Madonsela in response to her findings against the country's president, Jacob Zuma, for public funds used to beef up security at his private home in Nkandla and against other high ranking officials, probably constitutes the biggest threat to the role and independence of Chapter 9 institutions today. The contempt and outright insults directed at the Public Protector constitute the worst form of attacks any Chapter 9 institution has received in the last twenty years of South Africa's constitutional democracy and does not augur well for the future. The Public Protector has been called all sorts of names – “ugly,”⁴¹ “thinking she is god”, member and supporter of opposition parties in Parliament, and even a “CIA agent”⁴² by a deputy minister of defense. There have also been calls for her dismissal by supporters of the ruling party.⁴³

On these attacks on the Public Protector, Songezo Zibi concluded:⁴⁴

It has now become the ANC's unstated task to attempt to discredit Advocate Madonsela at every turn in order to undermine the high confidence she enjoys in the public arising out of her attempts to fight the corruption and maladministration referred to her office. The project to undermine her shifted in gear after President Zuma came under the spotlight over Nkandla, the construction of his palatial private residence using about R246m of taxpayers' money.

These attacks show a lack of respect for Chapter 9 institutions and an increasing hostility to attempts to hold government and those in power to account and, in the process, ignore what was said by the court in the *Public Protector v Mail & Guardian*:⁴⁵

The 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

⁴¹ See, <http://www.citypress.co.za/politics/ancyl-cosas-summoned-thuli-madonsela-comments/>

⁴² The Deputy Minister of Defense, 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> and <http://www.anc.org.za/show.php?id=11080>. See also, <http://mg.co.za/article/2014-03-24-party-chastises-ancyl-over-madonsela-must-go-comments> See, <http://www.citypress.co.za/politics/thuli-madonsela-cias-payroll-says-deputy-minister/>

⁴³ The National Executive Committee of the Police and Prison Civil Rights Union (POPCRU), an affiliate of the Congress of South African Trade Unions (COSATU) and an ally of the ANC, called for the dismissal of the Public Protector on October 14, 2014 for her finding against the president of the country and of the ANC, Jacob Zuma. See, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=746373&sn=Marketingweb+detail>

⁴⁴ Zibi, note 37 above, p. 170.

⁴⁵ Public Protector's case, note 32 above, para.5.

functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector.

Intimidating the Public Protector, the Human Rights Commission, and any other Chapter 9 institution is a threat to the promise of representative and accountable government necessary for the strengthening of constitutional democracy in South Africa. The importance of protecting these institutions from any reprisal and intimidation was recognized by the UN Human Rights Council in resolution A/HRC/27/L.25 of September 2014. The resolution also emphasized the need and importance of promptly bringing to justice those guilty of intimidate these institutions.⁴⁶

Undermining the effectiveness of Chapter 9 institutions

The failure to update enabling laws for these institutions, inadequate co-operation with them, and the general disregard of their findings and recommendations by the state is another challenge facing Chapter 9 institutes that is designed to frustrate them and to render them ineffective. As an example, the South African Human Rights Commission Act 54 of 1994 that has been outdated and unconstitutional in some aspects since the adopting of the 1996 Constitution and only got amended 19 years later in 2013.⁴⁷

The failure by government to bring full operation the promotion provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 undermines the work of the South African Human Rights Commission in effectively fighting racism and other forms of unfair discrimination in the country. There is no clear reason or explanation for this failure by both government and parliament. The same situation applies for the failure by government to ratify key international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, and to discharge its reporting obligations pertaining to many regional and international human rights instruments the country has ratified.

⁴⁶ South Africa did not support the resolution.

⁴⁷ The South African Human Rights Commission Act 40 of 2013, replacing Act 54 of 1994, came into operation in January 2014.

The Public Protector and the South African Human Rights Commission have both complained about the poor response by the government to their findings and recommendations.⁴⁸ The response by President Zuma of the findings and recommendations against him by the Public Protector in relation to his private home in Inkandla is behind much of the challenges and threats against the current Public Protector. How this matter is resolved will have a major impact on the future of both the Public Protector and the South African Human Rights Commission.

Inadequate funding

The inadequate financial support for Chapter 9 institutions by the state, save for the Electoral Commission and the Auditor-General, hampers their effectiveness. This is despite repeated requests for adequate funding by both the Public Protector and the South African Human Rights Commission over the past two decades, which the government has not responded to positively. In the South African Human Rights Commission 2013 Annual Report, the Chairperson of the Commission indicated that the Commission's request for an additional R37.35 million supported by the National Assembly Portfolio Committee on Justice and Constitutional Development was ignored by National Treasury which only gave the Commission R6 million.⁴⁹

On the importance of adequate funding for Chapter 9 institutions, especially the Human Rights Commission and the Public Protector, the Constitutional Court in *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) where Langa DP (as he was then) said:

In dealing with the independence of the [Electoral] 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

⁴⁸ See for example, the concerns raised by the Public Protector about a deputy minister (now a cabinet minister) who did not respond to a request for information and only responded after a threat of a subpoena, http://www.pprotect.org/library/investigation_report/Microsoft%20Word%20-%20Gigaba%20Report.pdf. The South African Broadcasting Corporation (SABC), ignored the findings of the Public Protector against its acting chief operating officer who had misrepresented his academic qualifications and appointed him into the position, see, 'When Governance and Ethics Fail' - Report of the PP against the SABC - February 2014 http://www.pprotect.org/library/investigation_report/2013-14/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf and <http://www.citypress.co.za/news/sabc-must-explain-hlaudi-motsoeneng-decision-thuli-madonsela/>

⁴⁹ South African Human Rights Commission, Annual Report 2013, p. v.

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.⁵⁰

The judgment has yet to be fully applied in favor of the South African Human Rights Commission and the Public Protector.⁵¹

Recommendations: Role in the next twenty years of constitutional democracy, future prospects

The future and strength of South Africa's constitutional democracy in the next twenty years will, to a large extent, dependant on the role and impact of Chapter 9 institutions. It is therefore important that these institutions should be supported and strengthened and the challenges they have faced over the past twenty years, their independence, effectiveness, and funding, be effectively addressed.

Independence

The independence of constitutional bodies, their ability to operate impartially and without fear or favor, is an important feature of an effective Chapter 9 institution - a hallmark of an independent and effective institution as per the Paris Principles. The appointment of persons who are closely linked to the government and governing party and unable to take necessary action against key government and/or political figures as required constitutes one of the biggest threats to the independence, credibility and effectiveness of these institutions. The appointment of members of

⁵⁰ Paras. 98 and 99 of the judgment.

⁵¹ See, <http://www.timeslive.co.za/thetimes/2014/10/23/madonsela-no-funds-no-public-protector> and <http://www.iol.co.za/news/politics/fund-chapter-nines-independently-da-1.1769287#.VEiCXBZ9yAY>

these institutions must thus be above board and only suitable and competent persons should be so appointed.

One way to limit undue politicization of the appointment of members of the Chapter 9 institutions is to allow for greater involvement of civil society in the appointment process. Whilst civil society organizations can nominate individuals to be considered for appointment as members of these institutions, they are not involved in the assessment of the candidates and the recommendation for their appointment - these are matters reserved to the National Assembly and its relevant committees.

The involvement of relevant experts outside political parties in the short listing, interviewing and recommendation of candidates for appointments of members of Chapter 9 institutions would be of great benefit to the National Assembly and its relevant committees. It would minimize the politicization of the appointment process that often led to the appointment of candidates that are not very independent in the exercise of their powers in these institutions and would also enhance the credibility of the appointment process and the institutions themselves.

This is not a far-fetched recommendation, nor an unusual one that could bring down the roof of the National Assembly. Section 193 (6) of the Constitution allows for the involvement of civil society in the recommendation process pertaining to the appointment of members of Chapter 9 institutions. This is in line with provisions of section 59(1) (a) of the Constitution which requires the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees. The National Assembly has, however, never invoked section 193 of the Constitution in the appointment process for members of Chapter 9 institutions and there has been no legal challenge in this regard, even though a case could be made on the basis of the obligatory provisions of section 59 of the Constitution.

An amendment of the Constitution in relation to the appointment process of members of Chapter 9 institutions might be another option if the National Assembly does not invoke section 193 of the Constitution and there is no judicial intervention in this regard. The Judicial Service Commission which recommends suitable and fit and proper persons to be appointed as judicial officers by the president of the country in terms of section 174 of the Constitution provides a good model. The Judicial Service Commission, as per section 178 of the Constitution, consists of

a mixture of judicial officers, practicing advocates and attorneys, members of the National Assembly and the National Council of Provinces, one law teacher and persons designated by the country's president.

The threats and insults against Chapter 9 institutions as recently experienced by the Public Protector by supporters of the ANC and even by senior members of government is completely unacceptable and a violation of the spirit and letter of the Constitution. Drastic measures must be taken by the state to put an end to this conduct which is a criminal offence under the enabling law of the South African Human Rights Commission and the Public Protector. The leadership of all Chapter 9 institutions must also take up this matter as a matter of urgency.

Effectiveness

The appointment of suitable persons in these institutions, a better response to their findings and recommendation by the government would help to enhance their effectiveness and impact. The appointment of Thuli Mandonsele is a clear example of what a committed member of a Chapter 9 institution can achieve despite many challenges confronting these institutions.

Parliament, and the National Assembly and its relevant committees in particular, can play an important role in supporting these institutions and ensuring that their findings and recommendations are taken seriously by government and officials and that their requests for information and reports from government receive a satisfactory response. The leadership of Chapter 9 institutions should also show more courage in dealing with poor responses to findings and recommendations of their institutions by organs of state and consider legal recourse when necessary and appropriate.

In relation to the performance of members of Chapter 9 institutions, Parliament should hold these members to account and demand that they carry out their mandates effectively and in accordance with constitutional provisions. This would help Chapter 9 bodies like the Commission for Gender Equality to be more visible and effective. There is certainly no reason why poor performance should be allowed in these institutions by parliament.

Funding

Chapter 9 institutions have to be adequately funded and both parliament and the leadership of these institutions have to ensure that this happens. The leadership of Chapter 9 institutions should show more courage in this matter as well and explore all avenues to ensure adequate funding for their activities.

Other recommendations

- Opposition parties should and can play an important role in supporting Chapter 9 institutions. Civil society organizations and the media can also play a greater role in the activities of these institutions and in helping to ensure that they are effective and are led by appropriate persons with good leadership qualities.
- Implementation of relevant outstanding recommendations of the ad hoc Committee of the National Assembly that reviewed Chapter 9 institutions (the Kader Asmal Report), such as the merger of the Commission on Gender Equality and the South African Human Rights Commission, should be seriously be considered by the National Assembly.

Conclusion

While constitutional bodies have made an important contribution in the support and strengthening of constitutional democracy in South Africa, including the promotion and protection of human rights, they cannot do so effectively and in a sustainable manner without the support of the government, parliament, political parties, and civil society. This support entails the appointment of suitable persons to run these institutions, their adequate funding by government, respect for the activities and recommendations of these bodies, non-interference in their appointment processes by political parties, and objective and constructive scrutiny of the operations of these institutions by all stakeholders including civil society.

The hostile reaction by the state and some members of the ruling party to these institutions, particularly the Public Protector and the South African Human Rights Commission, is of concern. The ANC government having played a key role in the establishment of Chapter 9 institutions and the allocation of millions of public funds for their continued operations seems to be turning against these institutions instead of embracing them and appreciating their role in strengthening constitutional democracy and ensuring that governance is responsive to the needs of the people and is accountable to them.

At the end of the day, these institutions are as strong and as effective as the support they receive from the public and the government, and the quality and the courage of their leadership. The future of constitutional democracy in South Africa depends on the role of these institutions to a larger extent and the support they receive from government and civil society is important.

Those appointed to serve in these institutions must do so without fear and favor and should act in the best interests of the people and the country's fledgling democracy. The Public Protector and the South African Human Rights Commission during the second and first decades of the country's constitutional democracy, respectively, have shown what could be achieved by these institutions when led by able and capable people with courage and commitment to advance human rights and constitutional democracy.

Hostility to these institutions when they make unfavorable findings, ignoring their findings, harassing them and not adequately funding and supporting them is not in the best interests of the country and the strengthening of constitutional democracy. The current political, social and economic challenges facing the country, such as high levels of crime, corruption, unemployment, increasing inequalities and poor service delivery, highlight the need for effective and efficient independent Chapter 9 institutions.

The strength and quality of South Africa's constitutional democracy will depend to a large extent on the effectiveness of many of its Chapter 9 institutions. The recent work of the Public Protector, Thuli Madonsela, augurs well for the country's future. Her efforts and role should hopefully inspire other Chapter 9 institutions that are not performing as well as her office in the second decade of South Africa's democracy. One hopes that there will be greater appreciation of these institutions in the next twenty years of South Africa's democracy by the government, political parties and civil society in general.