THE HUMAN RIGHTS COMMISSION ET AL: WHAT IS THE ROLE OF SOUTH AFRICA'S CHAPTER 9 INSTITUTIONS?

C Murray*

1 Introduction

In Chapter 9, the South African Constitution establishes six independent "state institutions supporting constitutional democracy". They are the Public Protector (or, in international jargon, ombudsman), the South African Human Rights Commission (HRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Commission), the Commission for Gender Equality (CGE), the Auditor-General and the Electoral Commission.[1] The first section of Chapter 9 asserts the independence of these six institutions in strong terms. It states:

> (2) 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.
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> (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

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* Professor of Constitutional Law and Human Rights at the University of Cape Town. I would like to thank Tendai Nhenga and Sara Hilliard for research support while I was writing this article.

1 A seventh institution is referred to in Chapter 9, an independent broadcasting authority. However, unlike the other six, this institution is not established by the Constitution. Instead, s 192 states that it must be established by law. In fact, an independent broadcasting authority was established in 1993, before the interim Constitution came into effect (*Independent Broadcasting Authority* Act 153 of 1993). The *Independent Communications Authority of South Africa* Act 13 of 2000 replaced or, rather, renamed and redesigned the authority, which is now the Independent Communications Authority of South Africa (ICASA). Although the Constitution says that this authority must be independent, the provisions of s 181, which establish the independence of the other six institutions, do not apply to it. Instead, the way in which its independence is protected is left to ordinary law.

(4) No person or organ of state may interfere with the functioning of these institutions.

Models for the Chapter 9 institutions were drawn from around the world. The first ombudsman was established in 1713 in Sweden.[2] It must be the oldest state institution located outside government with the power to investigate governmental affairs on behalf of citizens.[3] The idea of an auditor general is even older, although auditors are not always separated from government. The earliest antecedent of the Auditors-General or Audit Officers now common in Commonwealth countries may be the English Auditor of the Exchequer referred to in documents from 1314.[4] Independent human rights institutions are newer, but international guidelines for their status, composition, responsibilities and methods of operation were adopted by the United Nations in 1993 in the "Paris Principles".[5] Both the HRC and the CGE, which could be described as a specialist human rights institution, are modelled on the Paris Principles.

South Africa established both an Auditor-General and an ombudsman (now called the Public Protector) before 1994.[6] Their continued existence became part of the pact between the apartheid government and the African National Congress, which opened the way for the 1994 elections. Constitutional Principle XXIX in the set of 34 constitutional principles that encapsulated the pact and were incorporated in the Interim Constitution, read:

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2 See Barrie 1995 *De Rebus* 580 referring to Baxter L *Administrative Law* 279.

3 The first ombudsman in Africa seems to have been established in Tanzania in 1966 (Hatchard, Ndulo and Slinn *Comparative Constitutionalism* 208-209).

4 See UK National Audit Office http://www.nao.org.uk/about/history.htm 11 Nov.

5 Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993 available at OHCHR http://www.ohchr.org/ 26 Jul.

6 The *Advocate-General* Act 118 of 1979 established an Advocate-General with the power to investigate matters relating to financial impropriety in the public sector. In 1991 the name of this office was changed to Ombudsman and the title of the Act similarly amended. The 1991 amendments also extended the powers of the office holder under the Act to matters in which "the State of the public in general is being prejudiced by maladministration in connection with the affairs of the State" (s 4(aA) inserted by *Advocate-General Amendment* Act 104 of 1991).

> The independence and impartiality of … 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 the public service.

Although only two of the Chapter 9 institutions, the Auditor-General and the Public Protector, were made essential ingredients of the final Constitution, three other independent institutions with related mandates were included in the Interim Constitution: the HRC, the Independent Electoral Commission and the CGE.[7] In 1996, the Constitutional Assembly added yet another to the group, the Commission on the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities. Now grouped together in Chapter 9 of the Constitution, they are colloquially referred to as the "Chapter 9s".

As in the past, over the last year or so press coverage of the "Chapter 9s" has often been critical. One sometimes has the impression of institutions lurching from one crisis to another. Criticism of the Chapter 9 institutions varies of course. There are the essentially political allegations that their work is insufficiently independent. Most recently the Public Protector was at the receiving end of such criticism in the context of the investigation into the "Oilgate" affair.[8] There are also concerns that members of the Commissions are partisan. This issue was raised in an unexpectedly direct way when it emerged that a number of members of the CGE were on ANC party lists for the 2004 elections. Sometimes critics object to the manner in which the Chapter 9s prioritise their work or the way in which they go about it. More mundanely, there are allegations of ineffective management – the HRC was publicly exposed to

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7 Since 1993 the name of each of these institutions has been changed: The CGE was called the Commission on Gender Equality in the interim Constitution. It is now the Commission for Gender Equality. The interim Constitution's Independent Electoral Commission is now the Electoral Commission and the interim Constitution's Human Rights Commission is now the South African Human Rights Commission.

8 Boyle *Sunday Times* http://www.sundaytimes.co.za/ 14 Nov; Calland *Mail & Guardian* http://www.mg.co.za/ 14 Nov; Bruce *Business Day* http://www.businessday.co.za/ 14 Nov.

such criticism very recently, but other Chapter 9s have not escaped these problems.[9]

Sometimes information that the public receives about the Chapter 9s will be misleading. Sometimes, of course, it is right. Each of the issues that I have mentioned, and others that have come under the public eye, is important and demands attention. Allegations that institutions set up to be independent are partial are very serious. But I mention these issues for another reason. Many of them reflect a lack of understanding of the roles of the Chapter 9s on the part of the institutions themselves, government, Parliament and, sometimes, their critics and the public.

In this paper I discuss the mandate of these institutions and in so doing I hope to contribute to the process of developing a shared understanding of their constitutional role and to provoke some discussion of the implications of South Africa's current political context on that role. Here, the electoral dominance of the governing African National Congress is particularly significant.[10]

The six institutions established by Chapter 9 of the Constitution have distinct roles and responsibilities. Nevertheless their grouping under Chapter 9 is not accidental and I think that they all share two roles: that of checking government (or, in the language of the Constitution, of contributing to accountable and government or "monitoring" government), and that of contributing to the transformation of South Africa into a society in which social justice prevails. Before explaining these shared roles, I will discuss what they have in common – why they are all considered "state institutions supporting constitutional democracy".[11] Then, moving onto their mandate, I will describe the two roles

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9 On the HRC see, eg Naidu *Sunday Times* http://www.sundaytimes.co.za/ 14 Nov. See for a discussion of the CGE, Seidman 2003 *Feminist Studies* 541.

10 The ANC has 294 out of 400 seats in the National Assembly.

11 It is arguable that the Municipal Demarcation Board, established under s 155(3) of the Constitution, should be grouped with the Chapter 9s. However, it is not established by the Constitution. Other independent institutions in the Constitution like the Financial and Fiscal Commission, the Reserve Bank, the Public Service Commission and the independent body that makes recommendations concerning remuneration of public officials under s 219(2) of the Constitution seem distinguishable. They all contribute to

that I think they share. Thirdly, I will comment briefly on the distinct roles of each of the Chapter 9s. And, finally, and even more briefly, I will look at the roles of their individual members.

2 What sets the Chapter 9 institutions apart?

Although Chapter 9 brings together six distinct institutions, they have important things in common which suit them for their twofold roles as institutions intended both to check government and to contribute to transformation. Three features are relevant here:

- Although they are state institutions, they are outside government; they are not "a branch of government".
- Like the courts, they are expected to be independent and impartial.
- To differing degrees they are "intermediary institutions", providing a link between people on the one hand and the executive and Parliament on the other.

To start with what the Chapter 9s are not: Under the traditional framework of separation of powers, government is divided into three "branches" within which all government institutions fall.[12] However, the Chapter 9 institutions are not legislative, judicial or executive organs – they are not "a branch of government". And they do not exercise power in the same way as the executive, legislature or Parliament do. Although they all have some form of investigatory power and certain administrative powers, they do not "govern".[13]

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good governance but their relationship to government is closer than that of the Chapter 9s.

12 See, for a similar point, Dickson 2003 *Public Law* 273.

13 See Goldstone j in *President of the RSA v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at par [11] who says that there are only three branches of government. The first electoral commission had a power very similar to that of courts. It was required to assess the election process and declare whether or not the elections were free and fair (s 18 *Independent Electoral Commission* Act 150 of 1993). This power has been removed.

Secondly, as we all know, the Chapter 9s are intended to be independent and impartial – not only outside government, but also outside partisan politics and free from interference by other organs of state. The Constitution asserts their independence in strong terms, using language virtually identical to that used to declare the independence of the courts.[14] But independence and impartiality cannot be created by declarations.[15] To secure their independence, the selection of people to office under Chapter 9, with the exception of the commissioners on the CRL Commission, must be by a special majority in the National Assembly and their dismissal likewise requires a special parliamentary majority.[16] This is a common device for ensuring that public officials command broad political support and are not merely the cronies of the governing party. This in turn means that their work is credible to all parties and is not seen as partisan.

By locating Chapter 9s outside government and attempting to secure their independence, the Constitution also presumably intends to depoliticise the issues with which they deal. This is clearly the reason for entrusting the task of running elections to a Chapter 9 institution.

Thirdly, the Chapter 9s are what might be called "intermediary institutions", providing a different opportunity for public participation in public life to that

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14 Unlike the courts, Chapter 9s are expected to account to Parliament (s 181(5)). However, in requiring them to account to Parliament, the Constitution could not permit their independence to be undermined and so their accountability and their relationship to Parliament must be different from that of a Minister.

15 Establishing the proper relationship between the executive and the Chapter 9s has proved to be difficult. See, e.g., *NP of SA v Government of the RSA* 1999 3 SA 191 (CC) par [89]ff.

16 S 193 and 194 of the Constitution deal with the appointment and removal of officers of the Chapter 9 institutions. Stricter provisions apply to the Public Protector and the Auditor-General. Their appointment requires the support of 60 percent of the National Assembly and their removal requires a two-thirds majority in the National Assembly. The appointment and removal of members of the HRC, the CGE and the Electoral Commission requires the support of a majority of the members of the National Assembly. This is a slightly greater number than is required for the passage of legislation. S 11 of the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* Act 19 of 2002 sets out an elaborate appointment procedure for the members of the CRL Commission but Parliament is not involved. The dismissal of members of the CRL Commission is covered by the same constitutional provision that provides for the dismissal of members of other Chapter 9 commissions.

provided in political processes. Located between citizens and the government, they provide a way in which the needs of citizens can be articulated outside the loaded environment of party politics. If the Chapter 9s are truly independent they can provide a reliable voice for people, unburdened by the political exigencies of the day or vested interests. This potential link to the people is what makes the Chapter 9s uniquely able to fulfil the dual roles of checking government and contributing to the programme of transformation to which the Constitution commits us.[17]

We are becoming familiar with this intermediary role through the work of the HRC. Its recent public hearings on education provide a good example. Prompted by the large number of complaints that the Commission has received about the government's failure to fulfil its obligation to provide a right to basic education, the hearings provided an opportunity for citizens and the government to raise concerns about education.[18] Because hearings like this are generally not adversarial and because the reports drafted by the Commission after previous hearings have credibility, the hearings provide an effective way of assessing problems and drawing government's attention to them.

But it is not only the three human rights institutions, the HRC, the CGE and the CRL Commission, that might be expected to fulfil this intermediary role. Barrie describes the role of the Public Protector thus:

> Not only are grievances remedied, but the likelihood of their recurrence is lessened. This, ombudsmen accomplish by acting as conduits of communication between citizens and the government.[19]

The importance of institutions which can serve as intermediaries between the people and government in a young democracy in which many people are impoverished, have limited access, if any, to services and no contact with

17 See Kumar 2003 *Am University Int'l LR* 297: "[National Human Rights Institutions] should develop internal mechanisms that involve civil society to ensure that human rights do not remain an official or quasi-official discourse, but rather become a democratised debate involving all sections of the society."

18 Blaine *Business Day* http://www.businessday.co.za/ 10 Oct.

19 Barrie 1995 *De Rebus* 583.

politicians is captured poignantly in a conversation related by a Commissioner on the HRC. At the end of a public hearing organised by the HRC in a remote rural area, a participant thanked him profusely. Embarrassed and acutely aware of how little the HRC could do to address the huge need of the community, the Commissioner said "But we have done nothing". The reply was immediate: "You have told us that we are not alone."[20]

3 The mandate of the Chapter 9 institutions: checking and transforming

In certain senses, the Chapter 9 institutions are a mixed bag with widely different mandates. The jobs of the Electoral Commission, the Auditor-General and the CRL Commission may seem to have nothing in common. But, as noted above, I think that they share a common mandate: they are intended both to check government – by enhancing its accountability – and to contribute to the constitutional project of transformation. Certainly, the appropriate emphasis on transformation and checking government varies from institution to institution, but, nevertheless, to some extent both responsibilities touch each Chapter 9. In bearing these two responsibilities their role is entirely congruent with the overall constitutional commitment to limited government and transformation that is captured succinctly in the Preamble to the Commission:

> We ….adopt this Constitution …so as to …[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law - and [i]mprove the quality of life of all citizens and free the potential of each person.

3.1 Checking

The idea that government should be checked is familiar. In liberal democratic constitutions like ours, checks and balances on government take many forms.

20 Conversation with Dr Leon Wessels, HRC Commissioner, 3 November 2005.

The requirement that the executive account to Parliament and Parliament's power to dissolve the executive are ways in which Parliament can check the executive and curb abuses of its power. The power of the Constitutional Court to declare laws unconstitutional allows the courts to check Parliament and ensure that it always acts within the constraints of the Constitution. Less directly, the role of the Judicial Service Commission in appointing judges provides a check on the judiciary by giving the executive, Parliament and the legal profession a say in the composition of the judiciary.

The traditional "checks and balances" intended to control government and the use of power have developed over centuries. However, they have not always been effective. In particular, in parliamentary systems the relationship between the executive and legislature often leaves the majority in Parliament disinclined to exert control over the executive. Instead, it interprets its role as supporting the government. This problem is exacerbated in systems like that in South Africa in which one party dominates and under an electoral system in which accountability to citizens is easily perceived as less important than accountability to party structures.

Institutions like the Chapter 9s are intended to supplement the traditional methods of securing accountable government. Thus, in 1997, the Constitutional Court described them, 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.[21] But the checking role of the Chapter 9s is different from that that one branch of government exercises over another in a system of separation of powers with checks and balances. As already noted, the Chapter 9 institutions are not a branch of government. They do not have governmental power. Unlike the courts, they cannot conclusively declare government action to be unconstitutional or illegal. Unlike Parliament they cannot require the executive to resign. Unlike the executive, they cannot

21 *Ex Parte Chairperson of the Constitutional Assembly: In Re-Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) par [25]. The court makes this comment in the context of a discussion of the protection of cultural rights, but it applies more generally too.

control the legal system by choosing our top judges or control the implementation of policy by managing the budget. They cannot order the executive to act in a certain way and they cannot penalise unconstitutional behaviour. Indeed, in conferring a checking role on the HRC, the CGE and the CRL Commission, the Constitution uses less direct language too – it gives them the power to "monitor" government (and other institutions). In short, the check that the Chapter 9s provide on the exercise of government power is not through the exercise of power. Instead, they check government power by providing a legitimate and authoritative account of government's record, which can be used by citizens and Parliament in scrutinising government's performance.

This manner of securing accountable government has been described in various ways. An increasingly familiar distinction in discussions of accountability is that between enforceability and answerability. Reif puts it this way:

> Answerability is … the power given to an institution to ask "accountable actors" to give information on their decisions and to explain the facts and the reasons upon which these decisions are based, whereas the enforcement element of accountability is composed of punishment or other negative sanctions for inappropriate behaviour.[22]

Under this distinction, a Chapter 9 institution such as the Auditor-General or the HRC does not have the power to enforce accountability, but can demand an account of what the state and other actors have done. In other words, these bodies are answerable to the Chapter 9s.

Another way of understanding the accountability function of the Chapter 9s is to look at the mechanisms that they can use to control – or check - government. Again Reif is helpful. Drawing on Hertogh and Oosting, she distinguishes enforcement and compliance and says:

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22 Reif 2000 *Harv Human Rights J* 28 drawing on Schedler Conceptualizing Accountability 14-17.

> If the focus is on compliance, it is possible to look not only at the effectiveness of mechanisms to obtain enforcement of the law (the "sticks" approach), but also at approaches or incentives that engender voluntary conformity with the law (the "carrots" approach).[23]

She would then characterise the control that our Chapter 9s can apply to government as "'cooperative control' as opposed to the 'coercive control' of the courts".[24] She describes this distinction further:

> Cooperative control is facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behaviour. In contrast, coercive control is reactive, and control is imposed by unilateral decision.

Understanding the role of the Chapter 9s as requiring answers (or explanations or accounts) from government (and other actors) and as more cooperative than coercive, seems to be a helpful way of understanding their role as a check on government. The Auditor-General provides a good example of this form of checking government. When the Auditor-General audits government's annual financial statements he (or she) provides a professional appraisal of government's spending against the budget agreed to by Parliament at the beginning of the financial year. In so doing he provides Parliament and the public with an independent account of the government's behaviour. However, the Auditor-General has no power to act on findings of financial mismanagement or unauthorised spending. That power is vested in Parliament. The Auditor-General's authority lies in his power to get information and the credibility of his reports. The credibility of the reports in turn lies both in the quality and professionalism of the work of the Auditor-General's office and in the legitimacy of the office as an independent constitutional institution. Ultimately, the force of the Auditor-General as an institution that contributes to accountable government lies in influence, not in formal power.

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23 Reif 2000 *Harv Human Rights J* 30 referring to Hertogh and Oosting 1996 *Eur YB Comp Gov't & Pub Admin* and Hertogh 1998 *Int'l Ombudsman YB* 69.

24 Reif 2000 *Harv Human Rights J* 31 referring to Hertogh 1998 *Int'l Ombudsman YB* 69.

As an intermediary institution that brings people outside the state sector into accountability processes, the Auditor-General is weak. He (or she) provides information which the public can use to hold the government to account, but he does not actively engage the public. However, as an institution that enforces accountability by making government answerable, the Auditor-General is the most powerful of the Chapter 9s. This is partly due to the professional (and objective) nature of the work of the Auditor-General and perhaps partly to the fact that the institution is well-established both here and in other democracies.

The role of the Chapter 9s as institutions making government answerable and exerting "cooperative" control is also evident when one looks at the work of the CGE or the HRC. They are intended to investigate the implementation of rights and engage with government and, particularly, Parliament. Like the Auditor-General, they can demand that the government provides an account of its actions. The Human Rights Commission's reports on social and economic rights are a good example of the way in which the Chapter 9s can contribute to accountable government through influence rather than enforcement. In compiling these reports it has an opportunity to verify information from government by drawing on information from the public. In this way it both draws the public into accountability processes and provides Parliament and the public with a credible assessment of government performance.

Of course, the effectiveness of these "soft" accountability mechanisms is not guaranteed by constitutional declarations of their independence and impartiality, special appointment processes or security of tenure. This is especially the case in a situation of one-party dominance where super majorities for appointment and dismissal are rendered ineffective in securing inter-party support because the governing party can choose the incumbents of the Chapter 9 institutions.[25] In such circumstances, the challenge the

25 See, for instance, Anon *Sunday Times* http://www.sundaytimes.co.za/ 14 Nov: "Not surprisingly, my media colleagues staged a synchronised volcanic eruption calling Mushwana's findings, among other things, a whitewash. The real question, though, is

individuals in office under Chapter 9 face to establish their credibility and to fulfil their responsibilities effectively, is formidable.

3.2 Transformation

The second shared constitutional mandate of the Chapter 9s is to contribute to the project of transformation that the Constitution embraces. Its commitment to transformation sets the South African Constitution apart from many, if not most, other constitutions.[26] It is not a static document, simply setting up institutions to govern and describing the allocation of power. Instead, it commits South Africa to a massive programme of transformation. This is reflected in the Preamble, but made much more concrete in other provisions of the Constitution, particularly the provisions in the Bill of Rights, obliging the state to implement social and economic rights.[27] It is carried through to the mandates of the Chapter 9 institutions. Thus, s 184(1) says that the HRC must –

> …*promote* respect for human rights and a culture of human rights; [and] *promote* the protection, development and attainment of human rights.[28]

The Commission for Gender Equality has a similarly forward-looking role. It must –

> …*promote* respect for gender equality and the protection, development and attainment of gender equality.[29]

The mandate of the CRL Commission picks up another aspect of South Africa's transformation. It must –

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whether we should be in the least bit surprised that an office set up by government to investigate the affairs of government should fall so short of expectations."

26 For an excellent discussion of the South African Constitution as a transformative document see Klare 1998 *SAJHR* 146.

27 See s 8 and 26 - 9.

28 S 184(1)(a) and (b).

29 S 187(1).

> …*promote* respect for the rights of cultural, religious and linguistic communities.[30]

All three institutions are also mandated to educate and the constitutional briefs of both the CRL Commission and the CGE include lobbying.

These provisions give the HRC, the CGE and the CRL Commission an explicit mandate of transformation and mobilisation. They are expected to build support around human rights norms and build up networks of citizens committed to the basic values of the Constitution. In so doing they will strengthen the ability of the new democratic order to protect the values spelt out in section 1 of the Constitution.

The transformation mandate is perhaps weaker in the other Chapter 9s (although the Electoral Commission's statutory mandate includes education).[31] Nevertheless, each contributes to the transformation project. Even the most contained of the institutions, the Auditor-General, has embraced an approach to its role that is more proactive and forward looking than a purely checking function might be. First, supplementing traditional audit reports with reporting on under spending the Auditor-General has alerted government (and the public) to central problems with the current transformation agenda. Secondly, the Auditor-General is exploring ways of doing "performance auditing" which goes beyond traditional auditing and provides an assessment of the effectiveness of financial management policies.

It is possible for these two responsibilities – checking government and promoting transformation – to be seen as contradictory or in tension with one another. Checking government may be seen to set the Chapter 9s in opposition to the government, while some believe that any contribution to the transformation process must necessarily be synchronised with government policy. But there is no necessary tension nor did our constitution-makers

30 S 187(1).
31 S 5(1)(d) and (k) *Electoral Commission* Act 51 of 1996.

visualise a tension or contradiction. In an excellent analysis of the work of the CGE, Gay Seidman puts it this way:

> As in many other new democracies, South Africa's democratically elected constituent assembly recognized that a negotiated transition meant change would be slow and gradual. … Even after the 1994 elections, new ministers had to rely heavily on the civil servants already in place for information and for policy implementation. In this context, independent horizontal bodies appeared as important innovations designed to offer channels through which citizens could appeal outside the normal structures of government, as they sought to define their newly granted constitutional rights in practice. … [Independent institutions] were … designed to give the new government greater flexibility, to challenge past practice, and to create a more democratic polity and culture.[32]

Here, checking (or monitoring) government and transformation are two sides of the same coin and accountable government is envisaged as the partner of responsive government.

4 Individual mandates of the chapter 9 institutions

Despite my argument that the Chapter 9s have responsibilities in common, each does have a distinct role to play in South Africa's constitutional order. I will not discuss the details of each of their specific roles here, but will simply make three general points.

First, the different roles of the different Chapter 9s fit neatly together. From the Electoral Commission, whose role it is to protect events that are the very foundation of democracy to the CRL Commission, which is entrusted with the task of maintaining diversity and protecting difference in what is still a very fragile – and recently united – polity, the Chapter 9s cover key aspects of constitutional government. In particular, I think that the three human rights institutions, whose mandates are in most danger of overlapping, complement

32 Seidman 2003 *Feminist Studies* 545.

each other neatly. HRC clearly has the broadest mandate, but that is focused (without being limited) by the requirement to monitor social and economic rights. The CRL Commission and CGE supplement the work of the HRC with their specialised focuses.[33]

Secondly, the individual mandates of the Chapter 9s are very broad. This, again, is particularly the case in relation to the three human rights institutions. For instance, they are not only responsible for promoting and protecting human rights *vis a vis* the state, but their mandate also extends to the private sector. Moreover, the Constitution and their enabling statutes provide a long list of functions that they can perform in fulfilling their mandates.[34] These lists are a clear indication of the discretion that the Commissions have in determining what they will do – the intention seems to be to ensure that they have real flexibility in fulfilling their mandates.[35]

The third point concerns the implementation of the mandates of the three human rights institutions. The fact that they have distinct roles and that their enabling legislation gives them considerable flexibility in fulfilling these roles should not be taken to mean that their mandates are easy to implement or easily interpreted. First, there are obvious issues of prioritising and much of the criticism of the Chapter 9s in the past has related to the way in which they have prioritised tasks. However, as Seidman shows in relation to the CGE, the interpretation of mandates raises more substantial issues than what should be done first. She suggests that the virtual stalemate in the CGE in 2000 was

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33 There is debate about the continued existence of these three separate institutions. In particular, questions are asked about the role of the CGE. The debate is not new. When it was included in the interim Constitution there were three views: (i) that gender rights (or, really, women's rights) were in danger of marginalisation and that a special focus was imperative; (ii) that a special institution for gender rights was an important transitional tool for ensuring that gender was 'mainstreamed' in South Africa and, more particularly, on the new government's agenda; and (iii) that a separate institution for gender rights would simply itself marginalise women's interests as other institutions would comfortably relinquish responsibility and leave the institution with an impossible burden.

34 See in particular: *Commission for Gender Equality* Act 39 of 1996, s 11; *South African Human Rights Commission* Act 54 of 1994, s 7; and *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* Act 19 of 2002, s 5.

35 This follows the requirements of the Principles relating to the Status of National Institutions (The Paris Principles), see n 5 above.

caused in part by deep disagreement about the approach of the Commission. For some Commissioners, she suggests,

> …the Commission structure held out the promise that they could voice a feminist critique from within government, representing 'women's interests' in feminist terms. However, [others] stressed the importance of mobilizing wider support for feminist concerns, a project that seemed to require a more moderate, pragmatic profile.[36]

It may be argued that a commission mandated to promote gender equality is especially likely to become mired in such ideological problems because its mandate requires it to challenge basic social patterns of gender relations, inequality and power. However, it is unlikely that the other two human rights commissions are entirely free from dealing with value-laden issues. Each of the institutions needs to make difficult decisions about how best to present their findings and engage with government. Views will differ on what demands are fair - and what is strategic. In addition, Commissioners will find themselves in disagreement on specific issues. In particular, the CRL Commission will surely be confronted with questions relating to the degree to which cultural groups should assimilate or be protected in isolation from others. Questions like these divide communities across the globe. The Sharia tribunals proposed for Ontario recently provide an example of such an issue confronted in practice.[37] They raised complicated questions concerning the appropriate line between self-regulation and regulation by the state on which our Commissioners – like Canadians – would surely differ. The Commissions cannot avoid questions which are of immediate importance to South Africans and still retain credibility. Accordingly, they need to find ways of dealing with disagreement.

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36 At 542.

37 For a discussion, see Duff-Brown http://www.beliefnet.com/ 8 Nov; Tynes *BBC News* http://news.bbc.co.uk/ 8 Nov; Carter *BBC News* http://news.bbc.co.uk/ 8 Nov.

5 The role of individual commissioners

The offices of the Public Protector and the Auditor-General are each held by a single person, but the four other institutions set up by Chapter 9 consisted of a number of commissioners: currently six in the case of the HRC, eight for the CGE, 18 for CRL Commission and five for the Electoral Commission. At the moment, individual Commissioners have a relatively low public profile. Instead, what prominence the Commissions have is attached to their institutional profile and the commissions usually seem to speak with one voice.

There is obvious value in building a strong institutional profile for new institutions. But, as the Truth and Reconciliation Commission showed, commissioners with high public profiles are likely to contribute to the profile of the commissions themselves, not undermine it. Were commission members to be household names, the work of the commissions would be more visible. Commissions risk being faceless institutions, lost in the maze of acronyms that inhabit post-1994 South Africa. Building the public profile of their members can counter this. Moreover, a public familiar with the Chapter 9 commissioners will also see South Africans from diverse backgrounds united in a commitment to promoting good governance and human rights. This example itself would contribute to the fulfilment of the mandate of the Chapter 9s.

The suggestion that Commissioners with strong public profiles would enhance the status of the Commissions and their ability to fulfil their functions is unlikely to be controversial. However, people are likely to differ on the question whether Commissioners have individual mandates or if the Commissions should act as single units, presenting single views on the issues on which they report.

There are strong arguments for consensus reports from the Commissions. They settle matters and are inevitably more influential than divided positions would be. However, reports which reflect no dissent will not always be credible. As I suggest in the previous section, it is unlikely that Commissioners will always agree on the issues with which they deal.

Many commissioners feel that the public wants – and deserves – clear answers and that dissenting opinions cloud issues.[38] This is, of course, true. However, many of the issues with which the commissions deal are cloudy and persistent unanimity on matters on which reasonable people around the world disagree will eventually undermine the credibility of the institutions and, when reports support the government, give credence to complaints that they are too executive minded. The CRL Commission faces such a test now. It is engaging with the South African Law Reform Commission on the question of Muslim personal law and the draft bill that the Law Commission has prepared on the subject. The Muslim on the CRL Commission has been asked to represent the Commission in this process. But will his view (in support of the current version of the Law Commission's Bill which gives substantial powers to shari'a courts) be accepted by all other members of the Commission? That is unlikely. The Muslim community itself is divided on the draft bill. Moreover, the CRL Commission's approach to this bill will also signal its views on the broader issue of the appropriateness of special legal regimes for different communities in South Africa. All the members of the CRL Commission need to reflect carefully on this question and one would expect their divergent views to be properly represented.

So, while it might be easy for Commissioners to reach agreement on many of the smaller issues that they confront, the more substantial issues will surely often engender disagreement. And, properly explained disagreements amongst commissioners could serve South Africa's young democracy well. First, it could deepen debate on the issues concerned (much as the divided report of the Electoral Task Team of 2003).[39] Secondly, it would allow the Commissions to provide a role model for the kind of tolerance of divergent views that is an essential ingredient of a constitutional democracy.[40]

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38 There is at least one example of a Commissioner distancing herself publicly from the position of a Commission. Helen Suzman, Commissioner on the HRC, made a public statement that she did not support the majority position of the HRC on the Equality Bill when it was being discussed.

39 Electoral Task Team http://home-affairs.pwv.gov.za/ 11 Nov.

40 The practice of the Constitutional Court seems to provide a good model. Like other courts in common-law jurisdictions, the Constitutional Court allows both dissenting opinions and

6 Conclusion

The institutions established in Chapter 9 have important mandates. Their role is particularly significant now because constitutional democracy in South Africa faces a number of specific interrelated challenges:

- First, it is a young and impressionable democracy and our understanding of constitutional democracy and the rule of law is still developing. Located outside government, but with constitutional legitimacy, the Chapter 9s have an opportunity to explain what constitutional democracy means[41] and provide examples of the value of real debate and the tolerance of a diversity of opinions.

- Second, the South African government is faced with the formidable challenges of huge needs and expectations with limited human capacity. To meet the challenge, the state has broad discretionary powers. At the same time, administrative systems are immature and under great pressure. As public watchdogs, the Chapter 9s can hold government to account, reassuring the public when all is well and alerting it to problems when it is not.

- Thirdly, we are a one-party dominant state. It is important to note that dominance is not illegitimate. Instead, it is a reflection of the ANC's success in government. Nevertheless, it brings with it the danger that the party comes to feel that it owns the system and pays limited attention to opposition or even the voters. As intermediary institutions the Chapter 9s offer citizens an opportunity to express their needs and concerns. The Chapter 9s can also demonstrate the compatibility of constructive debate

concurring opinions that reflect slightly different approaches. However, its record suggests that on certain issues of outstanding national importance such as the certification of the Constitution, great effort was made to reach consensus.

41 The National Conference on Racism held by the HRC in 2000 clearly did this. See, e.g., Ansell 2004 *Politikon* 3.

with government with the programme of transformation and nation-building.

The challenges that constitutional democracy in South Africa faces are challenges for the Chapter 9 institutions too. In particular, they are still finding their feet and developing their understandings of their roles. Like all other South African institutions, they struggle with limited resources. In addition, one-party dominance weakens the impact of the constitutional devices related to appointment and tenure that are intended to protect their credibility and independence. The dominance of the ANC also implicitly challenges the efforts of the Chapter 9s to create a space for critical debate outside government. The democratic legitimacy of the government is still firmly underpinned by its liberation legitimacy. This is often taken to give it a monopoly on understanding the goals of transformation and makes it difficult to establish legitimate parallel voices.

However, if the Chapter 9s are to fulfil their mandates and live up to the title "Institutions Supporting Constitutional Democracy", they must open up a space for participation in public life outside government. Responsive and accountable government and an environment of tolerance and trust are essential ingredients of the constitutional democracy anticipated by the Constitution. The Chapter 9s are expected to contribute to building all these by what they do and how they do it.

In short, we need the Chapter 9s – but we need them to be independent, rigorous in overseeing government and relentless in pursuing transformation.

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