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Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and Public Protector

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Strengthening Constitutional Democracy:
Progress and Challenges of the South
African Human Rights Commission and
Public Protector

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STRENGTHENING CONSTITUTIONAL DEMOCRACY

*Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.*¹

I. INTRODUCTION

The birth of a democratic state founded on the values of human rights and 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: a government that would ensure that the people of South Africa are able to live in peace and harmony, free from fear and want. This would not be easy, 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, would be challenging as well.²

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 and the promotion and protection of human rights. In this regard, the 1993 Interim Constitution of South Africa, which ushered in democratic governance in South Africa in 1994, established certain constitutional bodies to support the fledgling democracy.³ These institutions are the Public Protector,⁴ the South African Human Rights Commission (SAHRC),⁵ and the Commission for Gender Equality (CGE).⁶ The Independent Electoral Commission (IEC) and the Auditor-General were already in existence and recognized by the Interim Constitution.⁷

The 1996 Constitution, which replaced the Interim 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.⁸ These six institutions are generally referred to as the Chapter 9 institutions.

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1. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, § 1 ¶ 1, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter *Vienna Declaration and Programme of Action*].
 2. The retention of apartheid civil servants was the result of a political settlement between the outgoing regime and the ANC. See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 *FORDHAM INT'L L.J.* 1464, 1531–32 (1996).
 3. The 1993 Interim Constitution came into effect on April 27, 1994 to facilitate a new constitutional order. See John Dugard, *International Law and the South African Constitution*, 8 *EUR. J. INT'L L.* 77, 77–78 (1997).
 4. S. AFR. (INTERIM) CONST., 1993, § 110.
 5. *Id.* § 115.
 6. *Id.* § 119.
 7. See *id.* §§ 191, 124.
 8. See S. AFR. CONST., 1996, § 181.

The collective constitutional mandate of these institutions is to support and strengthen constitutional democracy in South Africa.⁹ The Constitution requires them to be independent, subject only to the Constitution and the law, and to carry out their responsibilities “without fear, favour or prejudice.”¹⁰ Organs of state,¹¹ however, have an obligation to “assist and protect these institutions to ensure [their] independence, impartiality, dignity and effectiveness.”¹² Interference with the functioning of these institutions by any person or organ of state is prohibited by the Constitution.¹³ These institutions are accountable to the National Assembly of the South African Parliament and must report to the Assembly at least once a year regarding the discharge of their respective mandates.¹⁴

The SAHRC, the country’s leading national institution for the promotion and protection of human rights, has the following constitutional functions: to “promote respect for human rights and a culture of human rights;” to “promote the protection, development and attainment of human rights;” and to “monitor and assess the observance of human rights in [South Africa].”¹⁵ The SAHRC also has power to “investigate and . . . report on the observance of human rights;” “secure appropriate redress where human rights have been violated;” conduct research on human rights issues; provide education and awareness on human rights; and request and receive information from organs of state on measures instituted to give effect to human rights, particularly to those pertaining to housing, education, and health care services.¹⁶

The Public Protector, another key Chapter 9 institution, has a constitutional mandate to “investigate any conduct in state affairs . . . that is alleged or suspected to

9. *Id.* (“The [Chapter 9 institutions] strengthen constitutional democracy in the Republic.”).

10. *Id.* § 181(2).

11. An “organ of state” is defined as:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

Id. § 239.

12. *Id.* § 181(3).

13. *Id.* § 181(4).

14. *Id.* § 181(5).

15. *Id.* § 184(1). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Promotion of Access to Information Act 2 of 2000 provide additional functions for the South African Human Rights Commission.

16. S. AFR. CONST., 1996, § 184(2)–(3). The South African Human Rights Commission Act 54 of 1994 and its replacement, the South African Human Rights Commission Act 40 of 2013, both provide additional powers for the SAHRC. These include the power to bring proceedings in any competent court in the Commission’s name or on behalf of any person or group in realization of its mandate. South African Human Rights Commission Act 40 of 2013 § 13(3)(b).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

be improper or to result in any impropriety or prejudice,” and to report on the findings of its investigations and take “appropriate remedial action” where there has been an improper use of public power.¹⁷

International developments at the General Assembly of the United Nations (UN) in 1993 had an impact on South Africa’s 1993 and 1996 constitutional provisions pertaining to the establishment and role of some of its constitutional bodies, particularly the SAHRC. The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993, recognized the importance of national institutions for the promotion and protection of human rights, especially their role in addressing human rights violations and in the dissemination of information and education on human rights.¹⁸ In addition, it encouraged the establishment and strengthening of such institutions by states.¹⁹

The UN General Assembly also adopted the Principles Relating to the Status of National Institutions (the “Paris Principles”) that set out the competence, responsibilities, composition, guarantees of independence, and methods of operation for these institutions.²⁰ National human rights institutions (NHRIs) established in accordance with the Paris Principles were regarded as the latest addition in international, regional, and national human rights systems²¹ and were expected to be “an effective first port of call for victims of human rights violations.”²² These institutions were seen as bringing renewed energy, hope, and courage in the quest for universal respect for human rights. Kofi Annan, the then-UN Secretary-General, in acknowledging the role of these institutions, said “[b]uilding 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.”²³

17. S. AFR. CONST., 1996, § 182(1). The mandate of the Public Protector does not, however, extend to the exercise of judicial authority. *Id.* § 182(3). The Public Protector Act 23 of 1994, the Executive Members’ Ethics Act 82 of 1998, and the Prevention and Combatting of Corrupt Activities Act 12 of 2004 afford additional functions to the Public Protector.

18. *Vienna Declaration and Programme of Action*, *supra* note 1, § I ¶ 36.

19. *Id.*

20. G.A. Res. 48/134, annex, Principles Relating to the Status of National Institutions (Dec. 20, 1993). According to these principles, NHRIs should have a broad legislative or constitutional mandate to promote and protect human rights, to be pluralistic in composition, and to be independent from government in terms of composition, methods of operation, and funding. *Id.*

21. See generally Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1 (2010); C. Raj Kumar, *National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 HUM. RTS. Q. 755 (2006); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 2 (2000); Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?*, 28 HUM. RTS. Q. 904 (2006).

22. U.N. Secretary-General, *National Institutions for the Promotion and Protection of Human Rights*, ¶ 109, U.N. Doc. A/HRC/13/44 (Jan. 15, 2010).

23. U.N. Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change*, ¶ 50, U.N. Doc. A/57/387 (Sept. 9, 2002).

Notwithstanding the role and importance of the Chapter 9 institutions in strengthening South Africa's constitutional democracy, their challenges from the outset, especially those facing the Public Protector and the SAHRC, were manifold. How would those wielding political power in the country, including the government, its officials, political parties, and politicians, respond to scrutiny and intrusion by these unelected entities that could embarrass them and expose their failures and shortfalls? Would these institutions receive the necessary support from the government and other stakeholders to do their work effectively with no undue interference? Would there be attempts to undermine these institutions by appointing members that were too closely aligned with the ruling party to carry out their functions and exercise their powers effectively? Would those members who carry out their mandate impartially, without fear, favor, or prejudice, be constantly harassed and intimidated? Finally, would these institutions be able to deal with high levels of crime, corruption, unemployment, increasing inequalities between the rich and poor, and inadequate delivery of public services such as housing, roads, education, and health care services?

The ANC, which was going to be the senior partner in the new government, did 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. The Chapter 9 institutions would also operate in a new government that consisted partly of former apartheid government officials who were not used to the type of scrutiny that these institutions exercise. Many of these former officials had reacted negatively, and sometimes even violently, against those pushing for transparency and accountability.²⁴

The passage of twenty years of democratic governance in South Africa provides a good opportunity to assess the progress Chapter 9 institutions have made. While this article mainly focuses on the Public Protector and the SAHRC, in light of their roles and their importance in South Africa's constitutional democracy, other Chapter 9 institutions, such as the Independent Electoral Commission (IEC) and the Commission for Gender Equality (CGE), are also taken into account.

Part II of this article examines the progress and achievements of the SAHRC and the Public Protector in the first two decades of South Africa's democratic government through a general overview of their performance, followed by a specific assessment of each. Additionally, Part II examines the impact of changes in leadership in the two institutions in 2009. Part III reflects on the role of the state and the ruling party in supporting these institutions and in upholding their independence. It will look into the quality of leaders appointed to these institutions by exploring how they are exercising their powers and whether they are carrying out their functions effectively, impartially, and without fear, favor, or prejudice. This

24. Many of those who opposed the system of apartheid, including human rights activists, were subjected to torture and other forms of cruel and degrading punishment, and others were assassinated. *See* 2 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 8, 11 (Oct. 29, 1998). *See generally* DE WET POTGIETER, TOTAL ONSLAUGHT: APARTHEID'S DIRTY TRICKS EXPOSED (Ronel Richter-Herbert ed., Marlène Burger trans., 2007).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

section will also include experiences of other Chapter 9 institutions. Part IV discusses recommendations on how the Chapter 9 institutions could be made more effective in strengthening and supporting South Africa's constitutional democracy in the next twenty years. Part V concludes the article.

II. PROGRESS AND ACHIEVEMENTS IN THE FIRST TWENTY YEARS OF CONSTITUTIONAL DEMOCRACY

A. General Overview

Over the past twenty years of democratic governance in South Africa, Chapter 9 institutions have collectively played an important role in strengthening constitutional democracy. For example, the IEC has managed five national and provincial elections that have been declared free and fair²⁵ and has received regional and international recognition for its many achievements.²⁶ This has been a major accomplishment for a fledgling democracy and has helped to put the country on a firm course of democratic governance. The Auditor-General, through its audit of state expenditure, has promoted better usage of public resources and enhanced the credibility of state bodies in cases where its negative audit findings and recommendations are acted upon and taken seriously.²⁷

The Public Protector and the SAHRC, both established in October 1995, have played key roles in entrenching a culture of respect for the rule of law and human rights and in helping to ensure that the state and its various bodies are indeed accountable, transparent, and responsive to the needs of the people. The Public Protector has helped to promote proper and effective use of public power and contributed to exposing and rooting out corruption in government,²⁸ while the SAHRC has made an important contribution to the building of a new society based on human rights.²⁹ The SAHRC's work in the promotion of equality and prevention of unfair discrimination, and racism in particular, has been exemplary in this

25. See *South Africa - First 20 Years of Democracy (1994-2014)*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/south-africa-first-20-years-democracy-1994-2014> (last visited Feb. 15, 2016).

26. The IEC has won several national, regional, and international awards for its work. See *Awards*, ELECTORAL COMMISSION S. AFR., <http://www.elections.org.za/content/about-us/awards/> (last visited Feb. 15, 2016).

27. E.g., Andisiwe Makinana, *Parliament Showers Outgoing AG Nombembe with Praise*, MAIL & GUARDIAN (Nov. 6, 2013), <http://mg.co.za/article/2013-11-06-parliament-showers-outgoing-ag-nombembe-with-praise>.

28. For a list of the Public Protector's published investigation reports on abuse of power and public resources, see *Investigation Reports*, PUB. PROTECTOR S. AFR., http://www.publicprotector.org/library/investigation_report/investigation_report.asp (last visited Feb. 15, 2016). In recognition of her contribution as the current Public Protector, Ms. Thulisile "Thuli" Madonsela has been awarded four honorary Doctor of Laws degrees by four South African universities since 2013. See *Public Protector Thuli Madonsela Receives Fourth Honorary Doctor of Laws Degree*, S. AFR. GOV'T (June 9, 2015), <http://www.gov.za/speeches/public-protector-get-her-fourth-honorary-doctor-laws-degree-9-jun-2015-0000>.

29. See YVONNE ERASMUS, S. AFR. HUM. RTS. COMM'N, CRITICALLY REFLECTING ON AN INSTITUTIONAL JOURNEY 2002-2009, at 94-95, 104 (2009).

regard.³⁰ The institution's litigation, especially in the Constitutional Court, has made a significant contribution to entrenching the judicial enforcement and protection of economic and social rights.³¹

These two bodies generally respond to the complaints they receive from the public in relation to abuse of power and the violation of human rights through investigations,³² public hearings,³³ and, in the case of the SAHRC, litigation.³⁴ The Public Protector and SAHRC's responses to complaints have helped in building confidence in both the state and the rule of law. In the first decade of their establishment and operation, these two institutions each received, on average, over 10,000 complaints per annum.³⁵ In 2014, the Office of the Public Protector finalized 24,642 cases out of 39,817 received,³⁶ while the SAHRC finalized 8,550 cases out of 9,217.³⁷ Their reports in pursuit of their respective mandates and on relevant public policy issues, as well as their submissions on legislation,³⁸ have helped to promote good governance and respect for human rights.

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30. The SAHRC has produced numerous reports over the years on the realization of economic and social rights in South Africa in line with section 184(3) of the Constitution and has held several public hearings on these rights. *See* S. AFR. HUM. RTS. COMM'N, REPORT ON ECONOMIC AND SOCIAL RIGHTS 9, 57 (2012–2013).
 31. ERASMUS, *supra* note 29, at 59; S. AFR. HUM. RTS. COMM'N, EQUALITY ROUNDTABLE DIALOGUE REPORT 10 (2014) [hereinafter SAHRC EQUALITY ROUNDTABLE REPORT]; *see also* *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC).
 32. *See generally supra* notes 28, 30 and accompanying text.
 33. The SAHRC has held over nineteen public hearings on human rights issues, ranging from poverty to acts of racism. *See Hearing Reports*, S. AFR. HUM. RTS. COMM'N, <http://www.sahrc.org.za/home/index.php?ipkContentID=15&ipkMenuID=19> (last visited Feb. 15, 2016); *see also* ERASMUS, *supra* note 29, at 104. The Public Protector holds an annual National Stakeholder Consultative Dialogue in the Western Cape that covers healthcare issues and poverty. Media Release, Pub. Protector S. Afr., Public Protector Launches Annual National Stakeholder Consultative Dialogue (June 20, 2013), http://www.pprotect.org/media_gallery/2013/20062013.asp.
 34. *See supra* note 31.
 35. PARLIAMENT OF THE REPUBLIC OF S. AFR., REPORT OF THE *AD HOC* COMMITTEE ON THE REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS 99, 179 (2007) [hereinafter *AD HOC* COMMITTEE REPORT].
 36. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2013/14, at 57 (2014).
 37. S. AFR. HUM. RTS. COMM'N, ANNUAL REPORT 18 (2014) [hereinafter SAHRC ANNUAL REPORT 2014].
 38. The SAHRC played a major role in the drafting of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The Commission hosted a unit that produced the draft bill before it was handed over to the Department of Justice and Constitutional Development for processing and tabling in Parliament. *See* S. AFR. HUM. RTS. COMM'N, THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION BILL, 1999, at 1–2 (Nov. 23, 1999). The Commission has made over forty written submissions on draft laws in Parliament since 1999. *See Submission on Legislation*, S. AFR. HUM. RTS. COMM'N, <http://www.sahrc.org.za/home/index.php?ipkContentID=19&ipkMenuID=26> (last visited Feb. 15, 2016).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

B. General Performance into the Early Second Decade

The role and contribution of Chapter 9 institutions in the first decade of South Africa's democracy were recognized by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions (the "Committee"), established by the National Assembly in 2006.³⁹ 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: (1) the restoration of the credibility of the state and its institutions; (2) the flourishing of democracy and human rights values and norms; (3) respect for the rule of law; and (4) the establishment of a state that is "more open and responsive to the needs of its citizens and more respectful of their rights."⁴⁰

In relation to the performance of the SAHRC, the Committee made the following observations and findings in its report:

Over the past decade, the [SAHRC] 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 [SAHRC] has made a real difference to the promotion and protection of human rights in the areas it focused on. At the same time, the [SAHRC] has managed to retain civil relationships with the Legislature and Executive, and has worked with relevant individuals and institutions in the other branches of government when this was required. . . . The [SAHRC] 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.⁴¹

In its concluding remarks on the role of the SAHRC, the Committee noted:

It appears to the Committee that the [SAHRC] 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 [SAHRC] 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.⁴²

The Committee was not so kind on the performance of the Public Protector. Though the Committee did not place the entire fault on the Public Protector, in relation to its usage of statutory power, the Committee made the following observation: "The Public Protector has extensive powers to demand public information but has only had to resort to subpoenas on two occasions to obtain the necessary information. Nevertheless, the Committee notes that investigations are often delayed by the failure of departments

39. *AD HOC COMMITTEE REPORT*, *supra* note 35, at ix.

40. *Id.* at 3.

41. *Id.* at 172.

42. *Id.* at 184.

or public entities to co-operate in a timely fashion.⁴³ The Committee was also unhappy with the Public Protector's lack of proactivity.⁴⁴ Despite having statutory powers to conduct self-initiated investigations; the Public Protector had initiated only ten cases in 2006–2007.⁴⁵ The Committee noted that “[i]n cases where a matter is one of great public importance, the public would expect the Public Protector to act.”⁴⁶

Internal governance and leadership challenges due to public disputes between the Public Protector and the Deputy Public Protector⁴⁷ were of concern to the Committee.⁴⁸ The Committee was of the view that such disagreements “tarnish the image of the office and undermine its credibility.”⁴⁹ Additionally, the Committee found that “the public is not aware of the Public Protector, despite its outreach activities and the establishment of provincial and regional offices.”⁵⁰ This lack of public awareness was attributed to a “weak . . . informal and intermittent” relationship between civil society and the Public Protector.⁵¹ In a 2007 survey of public perceptions conducted on behalf of the Committee, the SAHRC performed much better than the Public Protector in terms of public awareness, importance, and effectiveness.⁵²

C. Beyond the Committee Review: Performance Under New Leadership

The change of leadership and management in the SAHRC and the Public Protector in 2009 resulted in a marked role reversal in the quality of each institution's performance and the public's perception of its credibility. In 2009, the leader of the Public Protector⁵³ since 2002, Lawrence Mushwana, a former Member of Parliament, was appointed as the new Chairperson of the SAHRC on behalf of the ruling party, the ANC,⁵⁴ while Thulisile “Thuli” Madonsela, one of the drafters of the Constitution,

43. *Id.* at 98.

44. *See id.* at 100.

45. *Id.*

46. *Id.*

47. The Public Protector Act 23 of 1994 was amended by the Public Protector Amendment Act 22 of 2003 to introduce the post of a Deputy Public Protector who exercises powers delegated to him or her by the Public Protector.

48. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 104.

49. *Id.*

50. *Id.* at 101.

51. *Id.* at 102.

52. *Id.* at 258–59. According to the survey, 65% of the public was aware of the SAHRC while 42% was aware of the Public Protector. *Id.* at 259. In addition, 62% regarded the SAHRC as important, while only 40% saw the Public Protector as important. *Id.* at 261. Forty-four per cent felt that the SAHRC was effective, while only 27% felt the Public Protector was effective. *Id.* at 262.

53. The term “Public Protector” is used to refer to the Office of the Public Protector as well as the leader of the institution.

54. *Mabedle Lawrence Mushwana*, S. AFR. HUM. RTS. COMM'N, <http://www.sahrc.org.za/home/index.php?ipkContentID=46> (last visited Feb. 15, 2016).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

became the new Public Protector.⁵⁵ Since 2009, the Public Protector has taken up investigations into more high-profile matters pertaining to the abuse of power and public resources by the country's President,⁵⁶ high-ranking government officials,⁵⁷ and even members of other Chapter 9 institutions.⁵⁸

The Public Protector's findings have led to the dismissal of a few Cabinet ministers⁵⁹ and the Chief of the South African Police Service,⁶⁰ as well as the resignation of the Chairperson of the IEC.⁶¹ The Public Protector's investigations into abuse of power and improper use of public resources have also benefitted ordinary people by helping to promote and protect their human rights. For example, the Public Protector has addressed complaints by those who were unreasonably denied basic government services such as access to social grants⁶² and those whose children were wrongfully denied access to schoolbooks.⁶³

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55. *Profile of Advocate Thulisile (Thuli) Madonsela: Public Protector-RSA*, PUB. PROTECTOR S. AFR., http://www.pprotect.org/about_us/profile_public_protector.asp (last visited Feb. 15, 2016).
 56. See PUB. PROTECTOR S. AFR., *SECURE IN COMFORT: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY AND UNETHICAL CONDUCT RELATING TO THE INSTALLATION AND IMPLEMENTATION OF SECURITY MEASURES BY THE DEPARTMENT OF PUBLIC WORKS AT AND IN RESPECT OF THE PRIVATE RESIDENCE OF PRESIDENT JACOB ZUMA AT NKANDLA IN THE KWAZULU-NATAL PROVINCE: REPORT NO. 25 OF 2013/14 (2014)* [hereinafter *SECURE IN COMFORT*].
 57. See PUB. PROTECTOR S. AFR., *THE COST OF TRAVEL: A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE ETHICS CODE AND THE CONSTITUTION BY THE MINISTER AND DEPUTY MINISTER OF SPORT AND RECREATION, THE HON. FIKILE MBALULA, MP AND GERHARDUS OOSTHUIZEN, MP: REPORT NO. 18 OF 2014/15 (2015)*.
 58. See PUB. PROTECTOR S. AFR., *UNSETTLED BUSINESS: REPORT ON AN INVESTIGATION INTO ALLEGATIONS THAT THE COMMISSION FOR GENDER EQUALITY UNFAIRLY EXCLUDED ITS FORMER CHIEF EXECUTIVE OFFICER WHEN THEY PAID ARREAR CONTRIBUTIONS TO THE PROVIDENT FUND TO MIDDLE AND SENIOR MANAGEMENT SERVICE EMPLOYEES, AND TO PAY HER CELLULAR TELEPHONE BENEFITS FOR THE PERIOD SHE WAS ON PRECAUTIONARY SUSPENSION: REPORT NO. 13 OF 2014/2015 (2015)* [hereinafter *UNSETTLED BUSINESS*].
 59. *South Africa's Jacob Zuma Fires Top Ministers*, BBC News (Oct. 24, 2011), <http://www.bbc.com/news/world-africa-15434529>.
 60. *South Africa Police Chief Bheki Cele Fired by Jacob Zuma*, BBC News (June 12, 2012), <http://www.bbc.com/news/world-africa-18414786>.
 61. In 2014, Pansy Tlakula resigned as IEC Chairperson after Public Protector Madonsela found Tlakula "committed gross maladministration" in the procurement of a lease for a new headquarters for the IEC. *Tlakula and IEC Committee Guilty of Gross Maladministration*, SABC NEWS (Aug. 26, 2013), www.sabc.co.za/news/a/2a78fc8040dd8ae49ebfbf434f2981a1/Tlakula-and-IEC-committee-guilty-of-gross-maladministration--20130826; see also Verashni Pillay, *IEC Chair Pansy Tlakula Resigns*, MAIL & GUARDIAN (Sept. 2, 2014), <http://mg.co.za/article/2014-09-02-iec-chair-pansy-tlakula-resigns>.
 62. PUB. PROTECTOR S. AFR., *ACCOUNTABILITY: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE SOUTH AFRICAN SOCIAL SECURITY AGENCY IN IMPLEMENTING THE DECISIONS OF THE INDEPENDENT TRIBUNAL FOR SOCIAL ASSISTANCE APPEALS: REPORT NO. 6 OF 2014/15 (2014)*.
 63. PUB. PROTECTOR S. AFR., *LEARNING WITHOUT BOOKS: REPORT ON AN INVESTIGATION INTO ALLEGED SHORTAGES AND INCORRECT SUPPLY OF SCHOOL WORKBOOKS BY THE NATIONAL DEPARTMENT OF BASIC EDUCATION TO EASTERN CAPE SCHOOLS: REPORT NO. 19 OF 2013/14 (2013)*.

In the financial year 2010–2011, the Public Protector received 16,251 complaints from the public about maladministration and settled 14,148 of those complaints.⁶⁴ One of the complaints was against a fellow Chapter 9 institution, the CGE.⁶⁵ The Public Protector found that the CGE had acted unlawfully and irregularly in the appointment of two of its commissioners as joint Chief Executive Officers in violation of the CGE's enabling legislation.⁶⁶

This display of courage and fierce independence in the leadership of the Public Protector following Madonsela's appointment has catapulted the institution far above the SAHRC as a leading champion of constitutional democracy in the second decade of South Africa's democracy. As a result, Madonsela and the Office of the Public Protector have become darlings of national and international media, fellow national and international human rights bodies, and the South African public in general.⁶⁷

Despite being overshadowed by the Public Protector in the second decade of South Africa's constitutional democracy, the SAHRC continues to carry out its constitutional mandate of promoting and protecting human rights by investigating human rights violations, holding public hearings, litigating on human rights issues, and organizing national and international human rights workshops and conferences.⁶⁸

The SAHRC has also maintained its involvement in regional and international activities of NHRIs and in relevant activities of the African Commission on Human and Peoples' Rights, various bodies of the UN, and the UN Human Rights Council in particular.⁶⁹ The SAHRC has managed to retain its status as a NHRI that

64. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2010/2011, at 7 (2011) [hereinafter PUB. PROTECTOR ANNUAL REPORT 2010/2011].

65. See PUB. PROTECTOR S. AFR., A CONSTITUTIONAL INSTITUTION IN NEED OF GOOD GOVERNANCE: REPORT ON AN INVESTIGATION INTO COMPLAINTS RELATING TO MISCONDUCT AND MALADMINISTRATION IN CONNECTION WITH THE AFFAIRS OF THE COMMISSION FOR GENDER EQUALITY: REPORT NO. 22 OF 2010/11 (2010) [hereinafter A CONSTITUTIONAL INSTITUTION IN NEED OF GOOD GOVERNANCE].

66. See PUB. PROTECTOR ANNUAL REPORT 2010/2011, *supra* note 64, at 15. See generally A CONSTITUTIONAL INSTITUTION IN NEED OF GOOD GOVERNANCE, *supra* note 65.

67. In 2014, Madonsela was named one of the most influential people in the world by *Time* for her work as Public Protector. Lamido Sanusi, *Thuli Madonsela*, TIME (Apr. 23, 2014), <http://time.com/70854/thuli-madonsela-2014-time-100/>. Madonsela was also declared the winner of the global Integrity Award by Transparency International for her courage and determination in the fight against corruption. *Thuli Madonsela – Integrity Award Winner 2014*, TRANSPARENCY INT'L (Oct. 15, 2014), http://www.transparency.org/news/feature/thuli_madonsela_integrity_award_winner_2014. In addition, Madonsela and the Office of the Public Protector received the Newsmaker of the Year award two years in a row by the Johannesburg Press Club. The annual award considers the amount of news generated by a nominee, the manner in which a nominee generates news, and “to what extent the country benefit[s] from such news.” Media Release, Pub. Relations Inst. S. Afr., Newsmaker of the Year (Apr. 25, 2013), <http://www.prisa.co.za/news-and-media-center/mediareleases/37-mediareleases/498-newsmaker-of-the-year>.

68. For example, in 2013–2014, the SAHRC resolved 8,550 human rights violation cases. SAHRC ANNUAL REPORT 2014, *supra* note 37, at 29.

69. For more information on the SAHRC's recent involvement and participation in various regional and international activities, see S. AFR. HUM. RTS. COMM'N, ANNUAL REPORT (2013) [hereinafter SAHRC ANNUAL REPORT 2013].

STRENGTHENING CONSTITUTIONAL DEMOCRACY

complies with the Paris Principles pertaining to its independence and functions as determined by the Sub-Committee on Accreditation (the “Sub-Committee”) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).⁷⁰ This determination grants the SAHRC observer status with full speaking rights on all agenda items in meetings of the UN Human Rights Council and the UN General Assembly.⁷¹

As a result of its regional and international work the SAHRC was elected to chair the Network of African National Human Rights Institutions based in Nairobi, Kenya, from 2011 to 2013.⁷² The SAHRC currently chairs the ICC.⁷³ In 2012, the institution received an award for its work on the African continent at the 25th Anniversary awards ceremony of the African Commission on Human and Peoples’ Rights, held in Yamoussoukro, Côte d’Ivoire, during the 52nd Ordinary Session of the African Commission.⁷⁴

D. General Challenges in the First Twenty Years of Constitutional Democracy

While the SAHRC, the Public Protector, the IEC, and the Auditor-General have consistently performed well in the first twenty years of South Africa’s constitutional democracy, the other Chapter 9 institutions, the CGE and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, have generally not discharged their mandates⁷⁵ in a

70. See INT’L COORDINATING COMM. OF NAT’L INSTS. FOR THE PROMOTION AND PROT. OF HUMAN RIGHTS, REPORT AND RECOMMENDATIONS OF THE SESSION OF THE SUB-COMMITTEE ON ACCREDITATION (SCA) (2012). This helped the SAHRC in getting elected to chair the ICC for 2013–2014 and become the first African NHRI to hold such position. See *South African Human Rights Commission Voted as New ICC Chair*, COMMONWEALTH F. NAT’L HUM. RTS. INSTITUTIONS (Nov. 28, 2012), <http://cfnhri.org/south-african-human-rights-commission-voted-as-new-icc-chair/>. As of January 2014, the SAHRC has maintained compliance with the Paris Principles. See *Chart of the Status of National Institutions: Accreditation Status as of 28 January 2014*, INT’L COORDINATING COMM. OF NAT’L INSTS. FOR THE PROMOTION AND PROT. OF HUMAN RIGHTS (ICC), http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf (last visited Feb. 15, 2016).

71. See *ICC Sub-Committee on Accreditation (SCA)*, INT’L COORDINATING COMM. OF NAT’L INSTS. FOR THE PROMOTION AND PROT. OF HUMAN RIGHTS (ICC), <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> (last visited Feb. 15, 2016); see also Commission on Human Rights Res. 2005/74 (Apr. 20, 2005); Human Rights Council Res. 20/L.15, U.N. Doc. A/HRC/20/L.15 (June 29, 2012).

72. See Media Statement, Isaac Mangena, Spokesperson, S. Afr. Hum. Rts. Comm’n, SAHRC to Become Chair of International Human Rights Body (Nov. 9, 2012), <http://www.sahrc.org.za/home/index.php?ipkArticleID=149>; see also *Nanhri Gets a New Chairperson*, NETWORK NATL. HUM. RTS. INSTITUTIONS, http://www.nanhri.org/index.php?option=com_content&view=article&id=139:nanhri-gets-a-new-chairperson&catid=86&Itemid=628&lang=en (last visited Feb. 15, 2016).

73. See *supra* note 70 and accompanying text.

74. See *SAHRC Receives African Commission Award for its Commitment to the Realisation of Human Rights*, S. Afr. HUM. RTS. COMM’N (Oct. 10, 2012), <http://www.sahrc.org.za/home/index.php?ipkArticleID=139>. The SAHRC was the runner up to the Uganda Human Rights Commission. *UHRC Wins an Award*, UGANDA HUM. RTS. COMM’N, <http://www.uhrc.ug/uhrc-wins-award> (last visited Feb. 15, 2016).

75. See generally S. AFR. CONST., 1996, §§ 185, 187.

satisfactory manner. Lamenting the poor performance of the CGE in the first decade of South Africa's democracy, the Committee said:

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.⁷⁶

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.⁷⁷ The internal factors included inadequate understanding and appreciation of the CGE's constitutional mandate by its members; poor leadership; lack of independence characterized by the unwillingness of CGE members 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.⁷⁸ The external factors included inadequate support by the state, which includes inadequate funding; poor responses to findings and recommendations; outdated legislation; and inadequate oversight by Parliament and its respective committees manifested by minimal engagement with reports and findings of the CGE.⁷⁹ In response to the challenges that faced the CGE in the first decade, the Committee regretfully concluded that these factors had undermined the CGE's efficiency and effectiveness, ultimately bringing its relevance into question.⁸⁰ As a result, the Committee recommended that the CGE be merged with the SAHRC.⁸¹

The challenges identified by the Committee after the first decade have, unfortunately, continued to affect the CGE in the second decade, as the Commission remains as ineffective, inefficient, and invisible in the second decade as it was in the first decade.⁸² These internal and external shortcomings apply to the other Chapter 9 institutions in varying degrees. The next section reviews the effect of some of these factors, particularly with respect to the Public Protector and the SAHRC.

76. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 150.

77. *Id.* at 150–62.

78. *Id.*

79. *Id.* The Human Rights Watch, in its report 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* 4–5 (2001).

80. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 162.

81. *Id.* at 164.

82. The Committee indicated that only about thirty-four per cent of those surveyed in 2002 knew about the Commission. *Id.* at 155. Not much has changed today, as the CGE remains invisible in the media (both electronic and print). According to its 2013–2014 annual report, the CGE received only 894 complaints. *COMM'N FOR GENDER EQUAL., ANNUAL REPORT 2013/2014*, at 49 (2014).

III. THE VALUE OF LEADERSHIP AND THE ROLE OF THE STATE AND THE RULING PARTY IN SUPPORTING THE CHAPTER 9 INSTITUTIONS

A. *The Importance of Quality Leadership*

On the importance of good leadership in Chapter 9 institutions, the Committee said “the establishment and entrenchment of a vibrant human rights culture requires strong leadership from a legitimate, independent and authoritative body.”⁸³ The commendable performance of the SAHRC prior to 2009, and that of the Public Protector thereafter, provide examples of the impact good leadership can have on the performance of Chapter 9 institutions. On the other hand, bad and poor leadership, as displayed by the CGE, has had an adverse effect on its performance and standing in the public.⁸⁴

Leadership challenges played a key role in poor performance by the Public Protector in the first decade. One example of these challenges is the discord between the then-Public Protector, Lawrence Mushwana, and his Deputy in 2006,⁸⁵ which, according to the Committee, “tarnish[ed] the image of the [Public Protector].”⁸⁶ This discord entailed allegations made by the Deputy Public Protector against the Public Protector of sexual harassment and an autocratic style of management.⁸⁷

Another example can be seen in Mushwana’s narrow interpretation of his mandate as the Public Protector in relation to high-profile matters in the first decade, which gave the impression that he did not want to make adverse findings against high-ranking government officials and the ruling party, the ANC.⁸⁸ This narrow interpretation resulted in the Public Protector declining to investigate abuses of public funds by individuals close to the ANC, on the flimsy ground that the mandate did not extend to non-state entities, even though public funds were involved.

The Supreme Court of Appeal, in *Public Protector v. Mail & Guardian*, challenged this narrow interpretation.⁸⁹ In this case, Imvume Management, a private company

83. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 167.

84. An example in this regard is the dispute between the CGE and its former Chief Executive Officer over the non-payment of her cellular phone charges for official calls during the period between May 2008 and November 2009, when she was on precautionary suspension from work. The matter ended up with the Public Protector in October 2010. The Public Protector made a finding against the CGE and requested that the former Chief Executive Officer be paid back with interest. *See UNSETTLED BUSINESS*, *supra* note 58, at 26–28.

85. *See Mmanaledi Mataboge, Shock R7m Payout for Mushwana*, *MAIL & GUARDIAN* (Oct. 30, 2009), <http://mg.co.za/article/2009-10-30-shock-r7m-payout-for-mushwana>.

86. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 104.

87. Mushwana’s Deputy, Mamiki Shai, threatened to sue him in 2006 for harassment, emotional torture, and defamation of character. Wendy Jasson da Costa, *Public Protector Stand-off Set to Go to Court*, *IOL NEWS* (Aug. 7, 2006), <http://www.iol.co.za/news/south-africa/public-protector-stand-off-set-to-go-to-court-1.288361>.

88. *See Mataboge, supra* note 85. The Committee also complained about this conduct. *See AD HOC COMMITTEE REPORT*, *supra* note 35, at 98.

89. 2011 (4) SA 420 (SCA) at paras. 3, 92–93.

with close links to the ANC, had obtained ZAR15 million⁹⁰ as an advance for a transaction from a state oil company, PetroSA.⁹¹ Imvume Management then transferred ZAR11 million to the ANC and could not pay back the money to the state company.⁹² This matter was subsequently brought to the Public Protector to investigate improper conduct and maladministration on the part of PetroSA and Imvume Management.⁹³ The Public Protector, Mushwana, found no merit in the matter because Imvume Management and the ANC, according to him, were not public bodies and therefore did not fall under his jurisdiction, and further because the state funds ceased to be public funds once they passed into the hands of private entities.⁹⁴ The Court in this matter held:

The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance 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.⁹⁵

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, favour 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 it will always call for vigilance and conviction of purpose.⁹⁶

While there are many factors that have caused the decline in the SAHRC’s performance and visibility in the second decade of South Africa’s democracy, the impact of the appointment of the former Public Protector Mushwana as the Chairperson of the SAHRC in 2009 cannot be discounted.⁹⁷

90. ZAR refers to Rand, South Africa’s currency.

91. *Mail & Guardian*, 2011 (4) SA 420 at paras. 33–34, 37, 42.

92. *Id.* at paras. 47, 49.

93. *Id.* at paras. 50, 76, 86.

94. *Id.* at paras. 92–93.

95. *Id.* at para. 6. The Supreme Court of Appeal rejected Mushwana’s decision as artificial and baseless in law. *See id.* at paras. 116, 123, 134, 139–41.

96. *Id.* at para. 8 (quoting S. AFR. CONST., 1996, § 181(2)).

97. An analysis of the SAHRC’s annual report shows that there was a decline in the number of human rights complaints the Commission received after the appointment of Mushwana and new commissioners at the end of 2009. This is a good indication of public perception, awareness, and confidence in a body like the SAHRC. In 2008–2009, the Commission received 8,556 complaints. S. AFR. HUM. RTS. COMM’N, ANNUAL REPORT 20 (2009). These increased to 9,326 in 2009–2010, S. AFR. HUM. RTS. COMM’N, ANNUAL REPORT 27 (2010), and drastically declined to 5,626 in 2010–2011, S. AFR. HUM. RTS. COMM’N, ANNUAL REPORT 22 (2011), increasing slightly to 5,784 in 2011–2012, S. AFR. HUM. RTS. COMM’N, ANNUAL REPORT 7 (2012).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

Several scholars and commentators were critical of Mushwana as the Public Protector and expressed concern that his appointment as the Chairperson of the SAHRC would turn the SAHRC into a “toothless tiger.”⁹⁸ Another commentator, Barney Mthombothi, said that the ANC had undermined these institutions by “packing them with toadies to do its bidding,” and that Mushwana, “after the wrecking job he did as public protector, has been rewarded with deployment to the [SAHRC], where he seems to be succeeding in emasculating it.”⁹⁹

Songezo Zibi, the editor of *Business Day*,¹⁰⁰ also questioned the motive of the ANC in appointing Mushwana as the Chairperson of the SAHRC in view of his performance in his previous position as the Public Protector. In his recent book, Zibi says:

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 [National Prosecuting Authority], the 2002 appointment of the ethically moribund Lawrence Mushwana as public protector and later the [Chairperson of the SAHRC] in 2009, there is the new and constant public harassment of Advocate Thuli Madonsela, public protector since 2009.¹⁰¹

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

It is in this area that the policy of cadre deployment has a degenerative effect 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 Mushwana, 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.¹⁰²

98. E.g., Pierre de Vos, *R.I.P. Human Rights Commission?*, CONSTITUTIONALLY SPEAKING (Aug. 25, 2009), <http://constitutionallyspeaking.co.za/rip-human-rights-commission/>.

99. Barney Mthombothi, *Watchdogs Lose Bite as Tlakula Gets a Sabbatical at Taxpayers’ Expense*, SUNDAY TIMES (July 6, 2014), <http://www.timeslive.co.za/sundaytimes/2014/07/06/watchdogs-lose-bite-as-tlakula-gets-a-sabbatical-at-taxpayers-expense>. Mthombothi 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.” *Id.*; see also CATHERINE MUSUVA, PROMOTING THE EFFECTIVENESS OF DEMOCRACY PROTECTION INSTITUTIONS IN SOUTHERN AFRICA: SOUTH AFRICA’S PUBLIC PROTECTOR AND HUMAN RIGHTS COMMISSION 39 (2009) (“[T]he 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 undermine constitutional democracy by protecting the few and not the many.”).

100. *Business Day* is a daily newspaper in South Africa.

101. SONGEZO ZIBI, RAISING THE BAR: HOPE & RENEWAL IN SOUTH AFRICA 170 (Alison Lowry ed. 2014).

102. *Id.* at 132.

Lawrence Mushwana cannot be held completely accountable for the quality of the SAHRC's performance. There are seven other members who can vote against him in any decisionmaking process.¹⁰³ However, the public and media perceptions around him cannot be discounted, whether fair or otherwise, and seem to have followed him to the SAHRC.

The recent resignation of the Chairperson of the IEC, Pansy Tlakula, over the Public Protector's finding of irregular and unlawful use of public funds is another example of the impact of leadership in these institutions.¹⁰⁴ This resignation and surrounding circumstances affected the image of a Chapter 9 institution that has done very well in the execution of its mandate. The IEC has received local, national, and international accolades for managing the country's elections since 1994 and for assisting other countries in conducting their elections.¹⁰⁵ In *United Democratic Movement v. Tlakula*, the Electoral Court held that "the respondent [Pansy Tlakula] 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 [is] destructive of the very values of the Commission."¹⁰⁶

B. Undermining the Independence of Chapter 9 Institutions

Another major challenge that these institutions have faced in the first decade, and continue to face in the second decade, is the undermining of their independence by the state and the ruling party. This challenge is seen in the appointment of members that are too close or closely aligned with the ruling party and who generally fail to carry out their mandate impartially, as required by the Constitution. The appointment of Mushwana as the Public Protector, and later as the Chairperson of the SAHRC, is

103. According to section 5 of the South African Human Rights Commission Act 40 of 2013, the Commission should consist of eight commissioners appointed by the President, at least six of whom should be appointed on a full-term basis. Section 7 further provides that the Chairperson of the Commission is accountable to his fellow commissioners for the exercise of his powers and functions on behalf of the Commission, and section 10(4) provides that "[t]he decision of the majority of the commissioners . . . is the decision of the Commission." South African Human Rights Commission Act 40 of 2013 §§ 5(1)–(2), 7(3), 10(4). Therefore, whatever the Chairperson of the Commission does or does not do is with the consent and support of the majority of his fellow commissioners.

104. See *supra* note 61 and accompanying text. In the Public Protector's report *Inappropriate Moves* from August 2013, the Chairperson of the IEC was found to have flouted tender procedures in securing the lease of new premises and furniture for the institution for an amount over ZAR130.8 million, and did not disclose a conflict of interest in that her friend was a shareholder in the leased property. This conduct, according to the Public Protector's finding, had the impact of undermining public confidence in the IEC. See PUB. PROTECTOR S. AFR., *INAPPROPRIATE MOVES: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE OFFICE PARK TO ACCOMMODATE THE HEAD OFFICES OF THE ELECTORAL COMMISSION: REPORT No. 13 OF 2013/2014*, at 207–18 (2013).

105. See *Awards*, ELECTORAL COMMISSION S. AFR., <http://www.Elections.Org.Za/Content/About-Us/Awards/> (last visited Feb. 15, 2016).

106. 2015 (5) BCLR 597 (Elect Ct) at para. 159.

STRENGTHENING CONSTITUTIONAL DEMOCRACY

an example of this phenomenon.¹⁰⁷ Mushwana, in his time as Public Protector, was criticized as “succeeding only in protecting the ANC from the people instead of protecting the people.”¹⁰⁸

Members of Chapter 9 institutions that become too independent face major criticism and are sometimes subjected to undue political pressure, intimidation, and even insults by some members and supporters of the ruling party.¹⁰⁹ The hostility directed at the current Public Protector 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 represents the biggest threat to the role and independence of Chapter 9 institutions today.¹¹⁰ The contempt and outright insults directed at Madonsela constitute the worst form of attacks that any Chapter 9 institution has received in the last twenty years of South Africa’s constitutional democracy and do not augur well for the future. Madonsela has been referred to as a “CIA agent” by a Deputy Minister of Defence¹¹¹ and “ugly” by the Congress of South African Students.¹¹² Government officials have also accused Madonsela of “acting as . . . if [she] were God”¹¹³ and being a member and supporter of opposition parties in Parliament.¹¹⁴ There have also been calls for her dismissal by supporters of the ruling party.¹¹⁵ Of these attacks on the Public Protector, Songezo Zibi concluded:

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

107. See Mataboge, *supra* note 85.

108. *Id.*

109. See *Criticise Thuli, Don’t Insult Her*, MAIL & GUARDIAN: EDITORIALS (Sept. 12, 2014), <http://mg.co.za/article/2014-09-11-editorial-criticise-thuli-dont-insult-her>; *Madonsela ‘Feared for Her Life’ During Nkandla Investigation*, MAIL & GUARDIAN (Mar. 23, 2014), <http://mg.co.za/article/2014-03-23-madonsela-feared-for-her-life-during-nkandla-investigation>.

110. See *supra* note 109. For more information on the Public Protector’s findings surrounding Nkandla, see SECURE IN COMFORT, *supra* note 56.

111. Baldwin Ndaba, *Thuli a CIA Spy, Says Deputy Minister*, IOL NEWS (Sept. 8, 2014), <http://www.iol.co.za/news/politics/thuli-a-cia-spy-says-deputy-minister-1.1747300#VF BWBRb55-Q>

112. See ANCYL, *COSAS Summoned Over Thuli Madonsela Comments*, NEWS24: CITY PRESS (Mar. 24, 2014), <http://www.citypress.co.za/politics/ancyl-cosas-summoned-thuli-madonsela-comments/>.

113. Alexis Okeowo, *Can Thulisile Madonsela Save South Africa from Itself?*, N.Y. TIMES MAG. (June 16, 2015), http://www.nytimes.com/2015/06/21/magazine/can-thulisile-madonsela-save-south-africa-from-itself.html?_r=0.

114. Bongani Hans & Siyabonga Mkhwanazi, *Nkandla: Thuli Blasts Nhleko’s Report*, IOL NEWS (Aug. 3, 2015), <http://beta.iol.co.za/news/politics/nkandla-thuli-blasts-nhlekos-report-1894214>; Jan-Jan Joubert & Bianca Capazorio, *Madonsela Feels Hostility of ANC MPs*, BUS. DAY (Apr. 30, 2015), <http://www.bdlive.co.za/national/2015/04/30/madonsela-feels-hostility-of-anc-mps>.

115. The National Executive Committee of the Police and Prison Civil Rights Union, an ally of the ANC, called for the dismissal of Madonsela in 2014 for her finding against the President of the country and of the ANC, Jacob Zuma. See Nkosinathi Theledi, *Thuli Madonsela Should be Dismissed - POPCRU*, POL. WEB (Oct. 14, 2014), <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=746373&sn=Marketingweb+detail>.

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 into high gear after President Zuma came under the spotlight over Nkandla, the construction of his palatial private residence using about [ZA]R246m of taxpayers' money.¹¹⁶

These attacks show a lack of respect for Chapter 9 institutions and an increasing hostility toward attempts to hold the government and those in power accountable. In so doing, they ignore what the Supreme Court of Appeal said in the *Public Protector v. Mail & Guardian*:

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 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.¹¹⁷

Intimidating the Public Protector, the SAHRC, and any other Chapter 9 institution threatens the promise of representative and accountable government necessary for the strengthening of constitutional democracy in South Africa. The UN Human Rights Council recognized the importance of protecting these institutions from any reprisal or intimidation in a 2014 Resolution.¹¹⁸ The Resolution emphasized the need and importance of promptly bringing to justice those guilty of intimidating these institutions.¹¹⁹ In this regard, the Human Rights Council stated that:

[NHRIs] and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations in their countries.¹²⁰

116. ZIBI, *supra* note 101, at 170.

117. 2011 (4) SA 420 (SCA) at para. 5.

118. Human Rights Council Res. 27/18, U.N. Doc. A/HRC/RES/27/18, ¶ 9 (Oct. 7, 2014).

119. *Id.* ¶ 11. South Africa did not support the resolution. See Human Rights Council Res. 27/18, U.N. Doc. A/HRC/27/L.25 (Sept. 23, 2014) [hereinafter H.R.C. Res. 27/L.25].

120. H.R.C. Res. 27/L.25, *supra* note 119, ¶ 9. This came at the time when the Supreme Court of the Maldives had just brought legal proceedings against the Human Rights Commission of the Maldives for its submission on the country's human rights assessment in the Universal Periodic Review process of the UN Human Rights Council. Interestingly, Lawrence Mushwana, in his capacity as the Chairperson of the ICC, wrote to the UN Secretary-General and others in protest against this conduct. E-mail from Mabledle Lourence Mushwana, ICC Chairperson, to Ban Ki-moon, UN Sec'y-Gen., Members of the Office of the High Comm'r for Human Rights and the UN Human Rights Council, and Special Rapporteurs (Sept. 25, 2014), <http://nhri.ohchr.org/EN/News/Documents/ICC%20Letter%20on%20the%20situation%20of%20the%20HRC%20of%20the%20Maldives.pdf>. Mushwana also wrote a letter, in 2015, to then-Prime Minister of Australia Tony Abbott in relation to attacks on the President of the Australian Human Rights Commission, Professor Gillian Triggs, following the release of the Commission's report on human rights violations in Australia. E-mail from Mabledle Lourence Mushwana, ICC Chairperson, to Tony Abbott, Prime Minister of Australia (Feb. 23, 2015), <http://>

STRENGTHENING CONSTITUTIONAL DEMOCRACY

C. Undermining the Effectiveness of Chapter 9 Institutions

The failure to update the enabling laws for these institutions, the inadequate cooperation with the institutions, and the general disregard for their findings and recommendations by the state is another challenge facing Chapter 9 institutions that is designed to frustrate them and to render them ineffective. An example is the South African Human Rights Commission Act 54 of 1994 (the “1994 HRC Act”).¹²¹ The 1994 HRC Act was rendered outdated and even unconstitutional in some aspects by the adoption of the final Constitution.¹²² For example, the 1994 HRC Act made references to provisions of the Interim Constitution, which has been repealed by the final Constitution;¹²³ required the Commission to submit quarterly reports to the President in violation of the final Constitution;¹²⁴ and made no reference to the Commission’s mandate to monitor socioeconomic rights accorded to it by the final Constitution.¹²⁵ It was finally repealed twenty years later, in 2014.¹²⁶

The Committee indicated that the staff regulations promulgated under the 1994 HRC Act were outdated and created serious labor challenges for the SAHRC.¹²⁷ On these challenges, the Committee “note[d] with concern that the delay in updating the [1994 HRC] Act and its associated regulations affects the ability of the Commission to carry out its mandate effectively and efficiently, and impacts negatively on its operational efficiency.”¹²⁸

The failure by the government to bring into full operation the promotional provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, especially section 28, which allows the SAHRC to prepare and publish reports on racism, gender, and disability issues,¹²⁹ undermines the work of the SAHRC in effectively fighting racism and other forms of unfair discrimination in the country. This was supported by the Committee:

www.ishr.ch/sites/default/files/article/files/the_prime_minister_of_australia.pdf. It is interesting that there is no record of any public media statement issued by Lawrence Mushwana or his fellow commissioners in support or defense of Thuli Madonsela as the Public Protector against attacks by ANC officials and supporters.

121. Human Rights Commission Act 54 of 1994 (repealed 2014).

122. *See AD HOC COMMITTEE REPORT*, *supra* note 35, at 171–72.

123. The preamble to the 1994 HRC Act specifically referenced sections 115 through 118 of the Interim Constitution. *See also* Human Rights Commission Act 54 of 1994 § 3(1) (referring to section 115(1) of the Interim Constitution) (repealed 2014).

124. *See* Human Rights Commission Act 54 of 1994 § 15 (requiring the SAHRC to submit quarterly reports to the President). *But cf.* S. AFR. CONST., 1996, § 181(5) (requiring accountability and reporting by the SAHRC to the National Assembly).

125. *See* S. AFR. CONST., 1996, § 184(3).

126. South African Human Rights Commission Act 40 of 2013 § 24(1) (repealing Human Rights Commission Act 54 of 1994).

127. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 171.

128. *Id.* at 172.

129. *See* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 28.

The Committee finds it regrettable that six years after the [Promotion of Equality and Prevention of Unfair Discrimination] Act came into force, the regulations that would bring [section 28] into operation have yet to be promulgated. This delay adversely affects the [SAHRC's] effectiveness in promoting the right to equality, which is central to the enjoyment of all other human rights in South Africa.¹³⁰

There is no clear reason or explanation for this failure by both the government and Parliament.¹³¹ The government has similarly failed to ratify key international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³² and to discharge its reporting obligations pertaining to many regional and international human rights instruments the country has ratified. The ICESCR provides for many human rights that the SAHRC deals with,¹³³ and its ratification would be of great assistance. The reporting obligation the ICESCR imposes on the state would assist the SAHRC's effort to report on how socioeconomic rights are promoted and protected in South Africa.¹³⁴

The Public Protector and the SAHRC have both complained about the poor response by the government to their findings and recommendations.¹³⁵ The response by President Zuma to the findings and recommendations against him in relation to his private home in Nkandla is behind many of the challenges and threats against the current Public Protector.¹³⁶ How this matter is resolved will have a major impact on the future of both the Public Protector and the SAHRC.

130. *AD HOC COMMITTEE REPORT*, *supra* note 35, at 175.

131. *Cf. SAHRC EQUALITY ROUNDTABLE REPORT*, *supra* note 31, at 13 (“A potential explanation . . . may be related to uncertainty as to whether government has the professional capacity and resources to fully meet its obligations to promote and monitor the implementation of the required legislation.”).

132. South Africa signed the ICESCR in 1994. International Covenant on Economic, Social and Cultural Rights, *signed* Oct. 3, 1994, 993 U.N.T.S. 3.

133. *See id.* art. 11 (recognizing a right to adequate food, clothing, and housing).

134. *See id.* arts. 16–17. It should be noted that in 2015, the government decided to ratify the ICESCR. A few days after the ratification, the SAHRC called on the government to “expedite the domestication” of the ICESCR. Media Release, Isaac Mangena, Spokesperson, S. Afr. Hum. Rts. Comm'n, SAHRC Welcomes Government's Decision to Ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Jan. 18, 2015), <http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=318>.

135. For example, in one incident the Public Protector raised concerns about a Deputy Minister (now a Cabinet Minister) who did not respond to a request for information. *See* PUB. PROTECTOR S. AFR., REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE DEPUTY MINISTER OF HOME AFFAIRS, MR. M.K.N. GIGABA MP: REPORT NO. 34 OF 2008/2009, at 20 (2009); *see also* Media Statement, Isaac Mangena, Spokesperson, S. Afr. Hum. Rts. Comm'n, SAHRC Finds Against Several Government Entities for Violating Public's Right to Water and Sanitation (Dec. 20, 2013), <http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=253>.

136. The President's response was to the effect that his own Minister of Police would determine whether he should pay back any of the ZAR246 million in public funds spent on his private residence. *See* Siphokhe Kekana, *Zuma Responds to Madonsela's Letter*, SABC NEWS (Sept. 11, 2014), <http://www.sabc.co.za/news/a/9f8e5580456f5e32afc2afc7c599c9eb/Zuma-responds-to-Madonsela's-letter>.

STRENGTHENING CONSTITUTIONAL DEMOCRACY

D. Undermining Effectiveness Through Inadequate Funding

The inadequate financial support for Chapter 9 institutions by the state, save for the IEC¹³⁷ and the Auditor-General,¹³⁸ hampers their effectiveness.¹³⁹ This is despite repeated requests for adequate funding by both the Public Protector and the SAHRC over the past two decades, which the government has not responded to positively.¹⁴⁰ The Committee acknowledged that “financial independence is an important indicator of the independence of Chapter 9 and associated institutions.”¹⁴¹ The Committee recommended that the budgets of all Chapter 9 institutions be determined by Parliament and not the respective government departments which then determined their budgets.¹⁴²

On the importance of adequate funding for Chapter 9 institutions, the Constitutional Court, in *New National Party of South Africa v. Government of the Republic of South Africa*, said:

In dealing with the independence of the [IEC], it is necessary to make a distinction between two factors, both of which, in my view, are relevant to “independence”. The first is “financial independence”. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.¹⁴³

The judgment has yet to be fully applied in favor of the SAHRC and the Public Protector.¹⁴⁴

137. See *AD HOC COMMITTEE REPORT*, *supra* note 35, at 50.

138. See *id.* at 76.

139. See *id.* at 19–20.

140. See *id.* at 19.

141. *Id.*

142. See *id.* at 20.

143. 1999 (3) SA 191 (CC) at para. 98.

144. See Emsie Ferreira, *Separate Oversight for Chapter 9s: DA*, IOL News (Apr. 30, 2015, 3:58 PM), <http://www.iol.co.za/news/politics/separate-oversight-for-chapter-9s-da-1.1852457>; *Fund Chapter Nines Independently: DA*, IOL NEWS (Oct. 22, 2014, 8:41 PM), <http://www.iol.co.za/news/politics/fund-chapter-nines-independently-da-1.1769287#VEiCXBZ9yAY>; Thabo Mokone, *Madonsela: No Funds, No Public Protector*, TIMES LIVE (Oct. 23, 2014), <http://www.timeslive.co.za/thetimes/2014/10/23/madonsela-no-funds-no-public-protector>.

There have been no significant improvements, however, since the Constitutional Court's finding and the recommendation of the Committee. The Chairperson of the SAHRC, in the institution's 2013 Annual Report, indicated that the SAHRC's request for an additional ZAR37.35 million, supported by the Portfolio Committee on Justice and Constitutional Development, was ignored by the National Treasury, which only gave the SAHRC ZAR6 million.¹⁴⁵ The Committee expressed concern over the location and process for funding of the Chapter 9 institutions.¹⁴⁶ The Vote of the Department of Justice and Constitutional Development contains the budget allocations for the SAHRC, CGE, and the Public Protector.¹⁴⁷ The Department, however, does not have the power to adjust the budget allocations.¹⁴⁸ Rather, the Department acts "merely as a conduit for the transfer of monies to the relevant institutions."¹⁴⁹ Among the concerns preventing effective financial independence of the Chapter 9 institutions was the Committee's finding that many of them "are not able to defend their budget submissions."¹⁵⁰

IV. RECOMMENDATIONS: PROSPECTS FOR THE NEXT TWENTY YEARS OF CONSTITUTIONAL DEMOCRACY

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

A. Independence

The independence of constitutional bodies, including their ability to operate impartially, is an important feature of an effective Chapter 9 institution and a hallmark of an independent and effective institution as per the Paris Principles. The appointment of persons closely linked to the government and governing party who are unable to take necessary action against key government 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 these institutions must thus be above board. Only suitable and competent persons should be appointed.

One way to limit undue politicization of the appointment of members in 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

145. Mabedle Lawrence Mushwana, *Foreword* to SAHRC ANNUAL REPORT 2013, *supra* note 69, at iv–v.

146. *AD HOC* COMMITTEE REPORT, *supra* note 35, at 19.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

STRENGTHENING CONSTITUTIONAL DEMOCRACY

in the assessment of the candidates and in making recommendations for their appointment—these are matters reserved to the National Assembly and its relevant committees.¹⁵¹

The involvement of relevant experts outside the political parties in the shortlisting, interviewing, and recommendation of candidates for appointment to 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 has often led to the appointment of candidates that are not very independent in the exercise of their powers and would also enhance the credibility of the appointment process and the institutions themselves.

This is not a far-fetched recommendation. The Constitution allows for the involvement of civil society in the recommendation process pertaining to the appointment of members of Chapter 9 institutions.¹⁵² This is in line with another provision of the Constitution, which requires the National Assembly to “facilitate public involvement in the legislative and other processes of the Assembly and its committees.”¹⁵³ To date, however, the National Assembly has never invoked these provisions of the Constitution in the appointment process for members of Chapter 9 institutions, and there has been no legal challenge in this regard.¹⁵⁴

If the National Assembly does not invoke these provisions of the Constitution, and there is no judicial intervention, an amendment to the Constitution regarding the appointment process may be another option. The Judicial Service Commission, which recommends suitable, fit, and proper persons to be appointed as judicial officers by the President in terms of the Constitution, provides a good model.¹⁵⁵ The Judicial Service Commission 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 President.¹⁵⁶

The threats and insults against Chapter 9 institutions by ANC supporters and senior members of government are unacceptable and a violation of the spirit and letter of the Constitution. This hostility places pressure on the independent status of the Chapter 9 institutions and negatively affects their ability to effectively carry out their mandates. Drastic measures must be taken by the state to put an end to this

151. In accordance with section 193 of the Constitution, all members of Chapter 9 bodies are appointed by the President following a recommendation by the National Assembly. The recommendation of the National Assembly is based on nominations made by relevant committees of the National Assembly constituted by members of political parties in proportion to the number of seats they occupy in the Assembly. S. AFR. CONST., 1996, § 193(4)–(5). The process is generally politically charged, and political parties often nominate and recommend persons they favor. The public is allowed to nominate candidates, *id.* § 193(6), but does not take part in their shortlisting and interviewing, *see AD HOC COMMITTEE REPORT, supra* note 35, at 24–25.

152. S. AFR. CONST., 1996, § 193(6).

153. *Id.* § 59(1)(a).

154. However, such a case could be made on the basis of the obligatory provisions of the Constitution. *Id.* § 59.

155. *Id.* § 174.

156. *Id.* § 178(1).

conduct, which is considered a criminal offense under the enabling laws of the SAHRC and the Public Protector.¹⁵⁷ The leadership of all Chapter 9 institutions must also take this issue up with a greater sense of urgency.

B. Effectiveness

The appointment of suitable persons to these institutions and better responses to their findings and recommendations by the government would help to enhance their effectiveness and impact. Public Protector Thuli Madonsela's service is a clear example of what a committed member of a Chapter 9 institution can achieve.

Parliament, and the National Assembly and its relevant committees in particular, can play an important role in supporting these institutions by ensuring that the government and officials take the institutions' findings and recommendations seriously and that their requests for information and reports from the government receive a satisfactory response.¹⁵⁸ The leadership of Chapter 9 institutions should also show more courage in dealing with poor responses to the findings and recommendations of their institutions by organs of state and should consider legal recourse where necessary and appropriate.

With regard to the performances of members of Chapter 9 institutions, Parliament should hold Chapter 9 members accountable and demand that they carry out their mandates effectively and in accordance with constitutional provisions. This would help Chapter 9 institutions, such as the CGE, be more visible and effective.¹⁵⁹ There is certainly no reason why Parliament should allow poor performance in these institutions.

C. 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 and explore all avenues to ensure adequate funding for their activities. One avenue is litigation if the government and other organs of state do not discharge their constitutional obligations to "ensure the independence, impartiality, dignity and effectiveness of these institutions."¹⁶⁰

157. Any person who "insult[s] the Public Protector or the Deputy Public Protector," Public Protector Act 23 of 1994 § 9(1), or "interferes with the functioning of the office of the Public Protector" commits a criminal offense, *id.* § 11(1). If convicted, the individual faces "a fine not exceeding [ZA]R40,000 or . . . imprisonment for a period not exceeding 12 months or . . . both [the] fine and . . . imprisonment." *Id.* § 11(4). And under section 22 of the South African Human Rights Commission Act 40 of 2013, it is a criminal offense, punishable by a fine or imprisonment not exceeding six months, for any person or organ of state to fail to provide the Commission with the assistance needed to carry out its functions and exercise its powers. South African Human Rights Commission Act 40 of 2013 § 22(h).

158. Parliament has a constitutional mandate to "maintain oversight of . . . the exercise of national executive authority, including the implementation of legislation; and . . . any organ of state." S. AFR. CONST., 1996, § 55(2)(b).

159. See discussion *supra* Section II.D (reviewing the CGE's effectiveness).

160. S. AFR. CONST., 1996, § 181(3).

STRENGTHENING CONSTITUTIONAL DEMOCRACY

D. Other Recommendations

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 led by appropriate persons with strong leadership qualities. Greater media coverage of these institutions in terms of their successes, failures, and challenges would enhance public awareness, which could lead to necessary public pressure on the government to ensure that these institutions are adequately supported and protected. Public pressure is also necessary to ensure that these institutions discharge their mandates effectively. Additionally, the National Assembly should seriously consider the implementation of the Committee's relevant outstanding recommendations, such as the merger of the CGE and the SAHRC.¹⁶¹

V. CONCLUSION

While the Chapter 9 institutions have made an important contribution in supporting and strengthening constitutional democracy in South Africa, they cannot continue to 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; adequate funding by the government; respect for the bodies' activities; respect for and implementation of the bodies' recommendations; 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 future of constitutional democracy in South Africa depends on the role of these institutions and on the support they receive from the government and civil society. The hostile reaction by the state and some members of the ruling party to these institutions, particularly to the Public Protector and the SAHRC, is of concern. The ANC government played a key role in the establishment of the Chapter 9 institutions and in the allocation of millions of public funds for their continued operation. However, the government now seems to be turning against these institutions instead of embracing them and appreciating their role in strengthening constitutional democracy and ensuring that governance is accountable and responsive to the needs of the people.

At the end of the day, these institutions are as strong and effective as the support they receive and the quality and courage of their leadership. Those appointed to serve in these institutions must do so without fear, favor, or prejudice and should act in the best interests of the people and the country's fledgling democracy. During the first two decades of the country's constitutional democracy, the Public Protector and the SAHRC, respectively, have shown what can be achieved by these institutions when they are led by able and capable people, with courage and commitment to the advancement of human rights and constitutional democracy.

Showing hostility toward these institutions when they make unfavorable findings, ignoring their findings, harassing them, and inadequately funding or supporting them

161. See *AD HOC COMMITTEE REPORT*, *supra* note 35, at 37–40.

is not in the best interest 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;¹⁶² corruption;¹⁶³ unemployment;¹⁶⁴ increasing inequalities;¹⁶⁵ and poor delivery of public services such as health, housing, and education that leads to thousands of public protests, some accompanied by violence and destruction of public and private property,¹⁶⁶ 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 Public Protector Thuli Madonsela augurs well for the country's future. Her efforts will 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 can only hope 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.

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162. South Africa has one of the highest murder rates in the world. *See SA's Murder Statistics in 7 Charts*, IOL NEWS (Oct. 6, 2015, 7:01 AM), <http://beta.iol.co.za/news/sas-murder-statistics-in-7-charts-1925800>; *South Africa 'A Country at War' as Murder Rate Soars to Nearly 49 a Day*, THE GUARDIAN (Sept. 29, 2015), <http://www.theguardian.com/world/2015/sep/29/south-africa-a-country-at-war-as-rate-soars-to-nearly-49-a-day>.
163. Lisa Steyn, *South Africa: The Land Where the Corrupt Go Free*, MAIL & GUARDIAN (Sept. 14, 2015), <http://mg.co.za/article/2015-09-14-south-africa-the-land-where-the-corrupt-go-free>.
164. Patrick McGroarty, *South Africa Unemployment Hits 11-Year High*, WALL ST. J. (May 26, 2015, 3:01 PM), <http://www.wsj.com/articles/south-africa-unemployment-hits-11-year-high-1432640795>.
165. *See* Gavin Keeton, *Inequality in South Africa*, NGO PULSE (Nov. 3, 2014), <http://www.ngopulse.org/article/inequality-south-africa>.
166. *See* Jane Duncan, *The Politics of Counting Protests*, MAIL & GUARDIAN (Apr. 17, 2014), <http://mg.co.za/article/2014-04-16-the-politics-of-counting-protests>; *see also* Laura Grant, *Taking to the Streets: Who is Protesting and Why?*, MAIL & GUARDIAN (Apr. 28, 2014), <http://mg.co.za/data/2014-04-28-taking-to-the-streets-who-is-protesting-and-why>.