

## Chapter 24C

### South African Human Rights Commission

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#### **Establishment and governing principles**

181. (1) The following state institutions strengthen constitutional democracy in the Republic: (a) The Public Protector; (b) The South African Human Rights Commission; (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d) The Commission for Gender Equality; (e) The Auditor-General; (f) The Electoral Commission.

(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.

(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.

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

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

### **Functions of South African Human Rights Commission**

184. (1) The South African Human Rights Commission must (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.<sup>1</sup>

### **General Provisions**

#### **Appointments**

193. (1) The Public Protector and the members of any Commission established by this Chapter must be women or men who (a) are South African citizens; (b) are fit and proper persons to hold the particular office; and (c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in,

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auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

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1 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 184. Section 4 of the Constitution of the Republic of South Africa Second Amendment Act, 1998 changed the reference of the Final Constitution from 'the Human Rights Commission' to 'the South African Human Rights Commission'. Act 65 of 1998. The Interim Constitution set up the first manifestation of the SAHRC. See Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'), ss 115-118. Under the Interim Constitution, the Commission was called the Human Rights Commission and was set up alongside the Public Protector and the Commission on Gender Equality as well as a provision providing for an Act of Parliament to govern restitution of land rights. The Final Constitution then placed the Commission within the scheme of Chapter Nine.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of (a) the Human Rights Commission; (b) the Commission for Gender Equality; and (c) the Electoral Commission.

(5) The National Assembly must recommend persons (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and (b) approved by the Assembly by a resolution adopted with a supporting vote (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

### **Removal from office**

194. (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on: (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

## **24C.1 Introduction**

The South African Human Rights Commission ('SAHRC') is described by many as the first among equals amongst Chapter Nine's State Institutions Supporting Constitutional Democracy.<sup>2</sup> This chapter offers a brief critical history of the

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2 Chapter Nine, entitled 'State Institutions Supporting Constitutional Democracy', refers to seven institutions: the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission, and the Independent Authority to Regulate Broadcasting. For a discussion of each of these institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F; C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29 (Discusses the Independent Electoral Commission.)

institution. It then focuses on those sections in Chapter 9 that establish the SAHRC and enable it to carry out its primary functions: education, mediation, adjudication, litigation, interpretation and monitoring. The chapter then directs its attention to six discrete constitutional issues that affect the operation of the SAHRC and *all* other Chapter 9 Institutions: (1) the doctrine of the separation of powers; (2) independence and accountability; (3) the duty of state organs to assist and to protect; (4) subject matter jurisdiction; (5) the relationship of the constitutional empowerment provisions to institutional establishment legislation; and (6) appointment and removal procedures.

## 24C.2 The SAHRC after ten years

There has been a curious dearth of empirical and critical work on the South African Human Rights Commission.<sup>3</sup> Even high-profile events such as the Davis-Pityana debate, the withdrawal of the SAHRC as amicus in the Treatment Action Campaign litigation, and the racism in the media inquiry have not sparked such research. What research has been conducted tends to focus on the role of the SAHRC in respect of a particular issue, such as socio-economic rights or the rights and recognition of refugees.<sup>4</sup> This relative lack of research and writing on the Commission cannot be due to the subject matter: a comprehensive history of the SAHRC would operate as a prism through which to view the first ten years of South Africa's constitutional democracy. While such an account is far more ambitious than I can offer in these pages, I will outline briefly the SAHRC's political and organisational history before proceeding to discuss the legal framework within which the SAHRC functions and the novel constitutional doctrines to which its very existence gives rise.

### (a) Political and organisational history

While the establishment of a human rights commission in South Africa marked a significant break with the apartheid past, there is a global trend towards national human rights institutions. Such institutions are said to have the effect of

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improving the legality and fairness of public administration as well as providing a mechanism for the domestic implementation of international human rights

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Woolman and Schutte take issue with the description of the SAHRC as the first amongst equals. Unlike the SAHRC, the Auditor-General possesses both political autonomy and financial independence. It produces over 1400 audits per annum that describe, where necessary, malfeasance, maladministration and corruption in government. Its constitutionally-mandated financial audits, compliance audits and forensic audits constitute three of the most powerful tools to ensure transparent and accountable government. The audits have, in many instances, led to dismissals from office and criminal trials. See S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B, § 24B.2

3 But see K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571 (Govender 'SAHRC').

4 See J Klaaren 'Contested Citizenship in South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571 304 (Discussing work of SAHRC in its first five years in respect of refugee protection.)

obligations.<sup>5</sup> The United Nations resolved in 1993 to encourage member states to develop and strengthen such institutions.<sup>6</sup>

A sketch of the current position between the SAHRC (and other Chapter 9 Institutions) and the government with respect to financial and administrative independence is given below.<sup>7</sup> The remainder of this section will outline the Commission's agenda during its first ten years. Two items have occupied prominent slots on the SAHRC's agenda since its establishment: combating racism and promoting economic and social rights. Together with the less heavily emphasized topic of the rights of non-nationals, these areas have been the subject of more than half of the 28 formal reports (including conference reports) that the Commission has issued between 1999 and 2005.<sup>8</sup>

To combat racism, the SAHRC organized a National Conference on Racism in August/September 2000.<sup>9</sup> The conference was preceded by a provincial consultative process and issued the South African Millennium Statement on Racism and Programme of Action.<sup>10</sup> The South African conference preceded the World Conference Against Racism held in August and September 2001 in Durban.<sup>11</sup> While these conferences were not particularly controversial, the Commission's Inquiry into Racism in the Media held in 2000 certainly was.<sup>12</sup> Some print media organizations particularly resisted the potential use of legal process by the Commission to investigate their operations. By the end of the Inquiry, an uneasy truce had been reached between the media and the Commission as to the appropriate limits of the Commission's investigation and reporting powers.

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5 See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1. For a re-examination of a national human rights institution in an African context, see O Okafor & S Agbakwa 'On Legalism, Popular Agency and "Voices of Suffering": The Nigerian Human Rights Commission in Context' (2002) 24 *Human Rights Quarterly* 662.

6 See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A (Suggesting that the creation of Public Protector, like many ombudsmen, reflects a global trend towards such oversight institutions.) See also Govender 'SAHRC' (supra) at 571.

7 See § 24C.4(b) *infra*.

8 All of the SAHRC's publications are available at [http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_41.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_41.shtml) (accessed on 8 February 2006).

9 SAHRC 'National Conference on Racism' available at <http://www.sahrc.org.za> (accessed on 8 February 2006).

10 SAHRC 'Full version: South African Millennium Statement on Racism and Programme of Action' available at <http://www.sahrc.org.za> (accessed on 8 February 2006).

11 SAHRC 'World Conference Against Racism' available at <http://www.sahrc.org.za> (accessed on 8 February 2006).

12 C Braude 'Faultlines: Inquiry into Racism in the Media' available at <http://www.sahrc.org.za> (accessed on 8 February 2006).

A second important item on the Commission's agenda has been the constitutionally mandated promotion of economic and social rights.<sup>13</sup> The Commission similarly struggled to find a common understanding with non-governmental organization actors ('NGOs') as it had with the media. NGOs wished both to see a

stronger role taken by the Commission and to have greater participation themselves within the investigation process. While it met with some initial resistance, the Commission has employed innovative strategies to increase NGO participation, has solicited more general participation through public education campaigns that have employed cross-generational strategies and has promoted the use of the right of access to information by communities to fulfill socio-economic rights.

### **(b) Institutional structures**

The establishment legislation for the Commission, enacted in terms of the Interim Constitution, is the Human Rights Commission Act ('HRCA').<sup>14</sup> The Commission describes its structure as follows:

The SAHRC is made up of two sections: the Commission, which sets out policy, and a Secretariat, which implements policy. The Chairperson is overall head, and the Chief Executive Officer (CEO) is head of the Secretariat, accountable for the finances of the SAHRC and has responsibility for the employment of staff. To facilitate the work of the Commission, the Secretariat is divided into departments: Legal Services; Research and Documentation; Education and Training; Media and Communications; Human Resources; and Finance and Administration. The SAHRC has also established provincial offices to ensure its services are widely accessible.<sup>15</sup>

The Commission has had a steady growth in capacity and staff over the ten year period.<sup>16</sup> That said, HRCA s 16's provision for a chief executive officer has led, as both reported in the media and the courts, to conflicts between the CEO and the Commissioner who acts as the SAHRC Chairperson.<sup>17</sup>

In terms of the Interim Constitution, the first round of Human Rights Commissioners were interviewed in 1994 by Parliament and recommended by a 75% special majority. These seven full-time and four part-time commissioners were appointed in 1995 and the Commission was inaugurated on 2 October 1995.<sup>18</sup> The Commissioners elected Commissioner Dr Barney Pitso Rosteck to serve as the Chairperson of the Commission. After several initial Commissioners had resigned and had been

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13 See § 24.C(d)(i) *infra*.

14 Act 54 of 1994. The HRCA has been amended once, in respect to the hiring of staff. See Public Services Laws Amendments Act 47 of 1997.

15 SAHRC 'About the SAHRC: Structure' available at <http://www.sahrc.org.za> (accessed on 5 January 2006).

16 Section 5 of the HRCA provides for committees of at least one Commissioner sitting together with other persons. Several of these s 5 committees have been established in order to pursue specific subject matters as well as liaison.

17 See *Esack NO & Another v Commission for Gender Equality* 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W) (Noting tension between CEOs and Commissioners in other Chapter Nine Institutions.)

replaced, a second round of recommendations and appointments was conducted in terms of the 1996 Constitution. In 2002, Jody Kollapen was elected as the second SAHRC Chairperson.

## 24C.3 The powers and functions of the SAHRC

### (a) Overview

The powers and functions of the SAHRC flow primarily from the Final Constitution and from the Commission's establishment legislation. Other pieces of human rights legislation (such as the Equality Act and the Promotion of Access to Information Act) confer additional powers and duties upon the SAHRC.

FC s 184(1) gives the SAHRC a general mandate to promote, to monitor and to assess the observance of human rights in South Africa. In particular, FC s 184(1)(a) requires the Commission to 'promote respect for human rights and a culture of human rights'; FC s 184(1)(b) requires the Commission to 'promote the protection, development and attainment of human rights'; and FC s 184(1)(c) obliges the Commission to 'monitor and assess the observance of human rights in the Republic.' FC s 184(2), which is clearly meant to be read in conjunction with FC s 184(1), provides:

The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power — (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.

Finally, FC s 184(4) creates the requisite space for the Commission to acquire additional powers and functions 'prescribed by national legislation.'<sup>19</sup> The subsections of FC s 184 appear to be best read as a whole, granting functions and powers to the Commission already established by FC s 181.<sup>20</sup> The sub-sections below explore the powers of the Commission.

### (b) Promotion: public education and information

A significant portion of the Commission's activities thus far has taken the form of public education. In the year ending in March 2002, the Commission conducted 214 workshops and training programmes that reached 8484 people and offered 75 seminars and presentations that reached 11 499 people.<sup>21</sup>

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18 Govender 'SAHRC' (supra) at 592. ('Commissioners were drawn from different political backgrounds and race and gender representivity was clearly taken into account when appointments were made.'

19 FC s 184(3)(Discussed at § 24C.3 infra).

20 See § 24C.4(d) infra (Discussion of the relationship between these constitutional provisions and the interpretation of the establishment legislation.)

21 See South African Human Rights Commission *Sixth Annual Report* (2001/2002) 5. Among other topics, the Commission conducts public education on constitutional rights generally, on socio-economic rights and on the right of access to information.

Sectoral specific legislation, such as the Promotion of Access to Information Act ('PAIA'), imposes additional duties on the SAHRC with respect to the promotion of specific human rights. PAIA requires that the SAHRC adopt a promotional role with respect to access to information legislation.<sup>22</sup>

### **(c) Protection: mediation, adjudication, litigation and interpretation**

The SAHRC can protect human rights through a variety of dispute resolution mechanisms.

#### **(i) Mediation**

Section 8 of the HRCA gives the Commission the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. An important part of these powers lies with the Commission's power to make recommendations and findings. Any recommendation or finding made by the Commission as a result of such a process is not directly binding on a public or private body. However, public bodies are under a constitutional duty to assist the Commission to ensure its effectiveness and, in the Commission's experience, its recommendations made in terms of s 8 — even those calling for specific action in specific circumstances — are usually acted on by public bodies.

Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') empowers an equality court to refer disputes to an alternative forum.<sup>23</sup> In many instances, this forum is the SAHRC. Even before the enactment of PEPUDA, the SAHRC had numerous successes in its mediation efforts.<sup>24</sup> It is likely that the SAHRC's mediation docket will increase, given the flow of mediation referrals from the Equality Courts.

#### **(ii) Adjudication/Litigation/Interpretation**

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22 See J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2002) Chapter 62.

23 Act 4 of 2000.

24 For one account of a successful mediation by the SAHRC with respect to tolerance for gay rights in public schools, see K Govender 'Assessing the Constitutional Protection of Human Rights in South Africa during the First Decade of Democracy' in S Buhlungu, J Daniel & R Southall (eds) *State of the Nation: South Africa 2005–2006* (2006)(Govender 'First Decade of Democracy') 93, 107. In 1999, the SAHRC intervened successfully on behalf of a nursing sister who had been detained and treated at Sterkfontein Hospital by her colleagues. The nursing sister was released and allowed to write a scheduled examination '(which she passed!)'. SAHRC *Fourth Annual Report* (1999) available at [www.sahrc.org.za](http://www.sahrc.org.za) (accessed on 3 February 2006). In one effort in KwaZulu-Natal, residents living in small flats in the poorest area of Chatsworth faced eviction from their homes for not paying rent: 'Most of them [had] been moved from the Magazine Barracks in terms of the previous Groups Areas Act, and [had] paid rent to the council for more than twenty years. The SAHRC met with the various groups and with their legal representatives to decide on strategy for the defence, reducing issues and preventing unnecessary costs working with the Legal Resources Centre (LRC).' See 'KwaZulu-Natal Evictions' (2000) 2(2) *Kopanong* available at [www.sahrc.org.za](http://www.sahrc.org.za) (accessed on 3 February 2006). For further accounts of such mediation, see the SAHRC website at <http://www.sahrc.org.za>.



To date, the Commission has exercised its power of adjudication in a very limited range of instances.<sup>25</sup> While a decision made in resolving these complaints is not understood to be binding on the parties to the dispute, some state organs have treated the Commission's decisions as binding. The Commission has held adjudication hearings in the context of obtaining information from other state organs

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via subpoena regarding the fulfilment of socio-economic rights. Most often, these SAHRC hearings have concluded with decisions made against state organs that failed to provide timely or adequate information.<sup>26</sup> Here, the Commission has not only initially issued the subpoena but has also decided upon the adequacy of the state organ's compliance with the duty to provide information in terms of FC s 184(3).<sup>27</sup> The Commission has also held adjudication hearings and published judgments in appeals from complaints made to the Commission. For instance, a three member panel chaired by a Commissioner of the Commission upheld an appeal of a hate speech complaint regarding the slogan 'kill the farmer, kill the boer' which the Commission had previously determined was not hate speech.<sup>28</sup>

In terms of its establishment Act, the SAHRC has express litigation powers.<sup>29</sup> In this respect, the SAHRC differs, at least at the level of establishment legislation, from other Chapter 9 Institutions. The only other institution that has engaged in rights protection through litigation is the CGE. Although the CGE has asserted and exercised a power to intervene in the judicial process as an amicus, it has not as yet initiated a case in its own name.<sup>30</sup> By contrast, the SAHRC has initiated litigation<sup>31</sup>—although it does so infrequently.<sup>32</sup> The Constitutional Court has stated that, in its litigation capacity, the SAHRC enjoys no privileged status which would allow it to be exempted from the Court's rules of procedure.<sup>33</sup> But note that such lack of privileged status does not deny the Commission potential influence in the exercise of the Court's discretion within the rules

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of procedure. Lower courts have at times acknowledged the SAHRC's support of litigation in the context of deciding standing and other procedural issues.<sup>34</sup>

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25 See Govender 'SAHRC' (supra) at 589 (Noting the example of the SAHRC's finding of discrimination against foreign doctors, which was rejected initially in the High Court, but subsequently vindicated by the Supreme Court of Appeal.)

26 See J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-Economic Rights' (2005) 27 *Human Rights Quarterly* 539 (Klaaren 'A Second Look').

27 See § 24C.3 *infra*, for discussion of monitoring the implementation of socioeconomic rights.

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

29 See HRCA s 7(e).

30 See S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F, 24-14 — 24-15.

One aspect of the SAHRC's role in protecting human rights that may grow more significant is the Commission's power of constitutional interpretation.<sup>35</sup> This interpretive power of the Commission, as a Chapter Nine Institution, is one that the Constitutional Court has acknowledged and encouraged. A five-judge minority of the Court deciding *S v Jordan* stated:

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that [the legal provision at issue] is unfairly discriminatory on grounds of gender reinforces our conclusion.<sup>36</sup>

There would seem no reason in principle why this privileged interpretive role should not be extended to the SAHRC and other Chapter 9 Institutions.

#### **(d) Respect and fulfill: Monitoring**

##### **(i) Monitoring: Socio-economic rights**

While the content of the function may not be (as yet) precise, the Final Constitution does clearly envisage a separate and special role for the SAHRC with respect to socio-economic rights. FC s 184(3) provides:

Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken

31 Govender 'SAHRC' (supra) at 589. The Commission has been an amicus or party in numerous cases. See, eg, *Bekker & Another v Jika* 2002 (4) SA 508 (E), [2002] 1 All SA 156 (E); *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC), 1999 (2) SACR 622 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W), [1998] 3 All SA 26 (W); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others*; *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('Grootboom'). Other cases are not reported. The Commission has acted against a vacation resort that evicted a family accompanied by two black children. See 'Settlement of the Equality Court case against the Broederstroom Holiday Resort' available at <http://www.sahrc.org.za> (accessed on 3 February 2006). In the magistrate's court, it has won a case on behalf of a learner who was allegedly assaulted and subject to racist remarks. See 'Landmark Victory: Edgemead Race Case' available at <http://www.sahrc.org.za> (accessed on 3 February 2006).

32 See § 24C.3 infra.

33 See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

34 See *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape & Another* 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E).

35 See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 3; C Botha 'Interpretation of the Bill of Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 32.

36 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 70.

towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

FC s 184(3) is the only place in the Final Constitution where a specific list of socio-economic rights is provided.

The nature of this role has been the topic of debate, both academic and, more importantly, between the Commission and non-governmental organisations. The academic debate has focused primarily on whether the appropriate model for the role of the SAHRC in terms of FC s 183(4) should be an international or a national model.<sup>37</sup>

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While an uneasy compromise has been reached, non-governmental organisations continue to demand greater participation within and access to the intra-governmental reporting process upon which the SAHRC has embarked.<sup>38</sup> All the while, contestation of this role has continued within government, as the SAHRC has attempted to expand its role with respect to socio-economic rights in the face of government inattention.

### **(ii) Monitoring: Remedial orders of courts**

In *Grootboom*, the Constitutional Court endorsed a significant monitoring role for the SAHRC. In its remedy, which took the form of a declaratory order because the applicants had accepted an offer of alternative accommodation, the Court requested that the SAHRC adopt a supervisory role to ensure the government compliance with the Court's order.<sup>39</sup> Such a monitoring role — complementary to the reactive information-gathering function of a court — may become increasingly important in the operation of the Commission. Given the categories of government incompetence, inattentiveness and intransigence identified by Roach and Budlender in their study of government responses to judicial remedies, an enhanced supervisory role for the SAHRC may be necessary to ensure effective rights enforcement.<sup>40</sup>

### **(iii) Monitoring: Investigations and hearings**

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37 See Klaaren 'A Second Look' (supra) (In national jurisdictions with established justiciability of socioeconomic rights, effective promotional strategies for a human rights commission should eschew international models and pursue greater participation, transparency, and access to information); C Heyns 'Taking Socio-economic Rights Seriously: The 'Domestic Reporting Procedure' and the Role of the South African Human Rights Commission in Terms of the New Constitution' (1999) 32 *De Jure* 195 (Advocating adoption of the international reporting procedures at the national domestic level.) See also S Liebenberg 'Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 405.

38 See D Newman 'Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda' (2003) 19 *SAJHR* 189.

39 *Grootboom* (supra) at para 97.

40 K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325 (Delineating reasons for government violations in terms of government incompetence, inattentiveness, and intransigence.)

The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement<sup>41</sup> to the conflict between the right to equality and the freedom to associate.<sup>42</sup> These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media.<sup>43</sup> The Commission's early reports on the lack of respect for the rights of non-nationals in post-apartheid South Africa and on the conditions of detention at an official repatriation facility, Lindela, were greeted with harsh words by government and department officials (especially the Department of Home Affairs).

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## 24C.4 SAHRC and chapter nine constitutional doctrine

Several constitutional issues of great import are common to the SAHRC and to other Chapter 9 Institutions. This section explores six of these doctrines.<sup>44</sup>

### (a) Separation of powers

The first issue concerns the relationship of the SAHRC and the Chapter 9 Institutions to the doctrine of the separation of powers.<sup>45</sup> While a separate chapter treats that doctrine, four points specifically relating to Chapter Nine are worth making here.

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- 41 SAHRC 'Report on the Public Hearings into the Use of Boom Gates and Road Closures' available at [http://www.sahrc.org.za/sahrc\\_cms/publish/article\\_132.shtml](http://www.sahrc.org.za/sahrc_cms/publish/article_132.shtml) (accessed on 8 February 2006).
- 42 SAHRC 'Report on the Public Hearings into Equality and Voluntary Associations' (forthcoming) soon to be available at [http://www.sahrc.org.za/sahrc\\_cms/publish](http://www.sahrc.org.za/sahrc_cms/publish) (Manuscript on file with authors.)
- 43 K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571, 584–86 (Govender 'SAHRC')(Discussing the Investigation into Racism in the Media.)
- 44 Treatment of many of these doctrines, as they relate specifically to the six other Chapter 9 Institutions, can be found in Chapters 24A through 24F. See, eg, M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & J Soweto Aullo 'Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F; C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 (Discusses the Independent Electoral Commission.)
- 45 See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 12.

A first point relates to the status of the institutions established by Chapter Nine. The six institutions listed and established in terms of FC s 181(1)<sup>46</sup> are not mere creatures of statute. As creatures of the Final Constitution, the SAHRC and the other Chapter 9 Institutions enjoy a status and an authority that can potentially override unconstitutional legislative provisions. (The lone institution referred to in Chapter Nine that is not constitutionally established is the independent authority to regulate broadcasting ('ICASA').)

A second more theoretical point concerns the extent to which the Chapter 9 Institutions are a central part of a uniquely South African scheme of constitutional structuring and separation of powers. The argument made here is that the constitutional establishment of a complex of independent institutions apart from the judiciary in order to promote and protect human rights is a fundamental feature — a basic structure — of South African constitutional democracy.<sup>47</sup> If

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correct, this basic structure argument has at least one immediate implication. While constitutional amendments to Chapter Nine may (and arguably at times should) change the internal arrangements of these institutions, any amendment that detracted from the capacity of this set of independent human rights institutions to discharge its responsibilities would need, at the very least, to acknowledge its intention to alter the constitutional structuring and separation of powers doctrine of the Final Constitution.<sup>48</sup> And any constitutional amendment that did away with this complex of independent institutions entirely would eliminate this basic structure. The Constitutional Court itself has noted that amendments to the Final Constitution that alter the basic structure of our constitutional democracy could have their constitutionality challenged on substantive and not merely procedural grounds.<sup>49</sup>

Third, a separation of powers doctrine that claims to arise organically out of the text of the Final Constitution must recognize the complementarity of the SAHRC and the Constitutional Court. Both the SAHRC and the Constitutional Court are designed

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46 That section together with FC ss 193 and 194 also covers the Chapter 9 Institutions generally. Although it does not establish ICASA, Chapter Nine does govern the Independent Authority to Regulate Broadcasting once Parliament has acted to establish such an institution. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E (Noting that the independent authority to regulate broadcasting is not listed in section FC s 181(1)).

47 While it is not necessary, the constitutional argument made in this paragraph may be bolstered through reference to public international law. In a reading informed by international human rights obligations, Chapter Nine can be seen as part of the national machinery referred to in the Paris Principles as well as in the Beijing Declaration. See K Govender 'SAHRC' (supra) at 571; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D.

48 I use the term 'constitutional structuring and separation of powers doctrine' here to acknowledge narrow readings of the separation of powers doctrine that limit that doctrine to three branches of government. Although the separation of powers doctrine is not identified as a founding value in FC s 1, the case can be, and has been, made that the doctrine is a basic structure of the Final Constitution. See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

49 *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC).

to protect and to promote respect for human rights. The outlines of this complementarity are only beginning to be defined.<sup>50</sup> According to Karthy Govender:

[I]nternational standards require that the [national human rights] institutions do more than simply function as a surrogate court of law. Their role is to actively protect and promote human rights and not to exist simply as an investigative mechanism which reacts to human rights violations. The institutions must work systematically and holistically towards the attainment of internationally recognized human rights.<sup>51</sup>

Some of the post-Certification judgments of the Constitutional Court have acknowledged the distinctive role that the SAHRC and other Chapter 9 Institutions will play in creating a new constitutional culture in the Republic. In *New National Party*, Justice Langa wrote:

The establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of State who must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on the those

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organs of State to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness.<sup>52</sup>

Finally, a specific strand of the reasoning that should be taken into account in theorizing the position of the SAHRC and other Chapter 9 Institutions vis-à-vis a new separation of powers doctrine is the one that emerges from the Court's decision in *Independent Electoral Commission v Langeberg Municipality*.<sup>53</sup> The *Langeberg Municipality* Court reasoned that the IEC was an organ of state, but not one within the national sphere of government.<sup>54</sup> The Court noted that Chapter Nine makes a distinction between the state and the government and that FC s 181 emphasizes the independence of Chapter 9 Institutions.<sup>55</sup> This distinction between the state and the government and the related independence of the Chapter 9 Institutions must be clearly enunciated in any South African doctrine of the separation of powers. In addition to incorporating this Chapter Nine independence, such a doctrine needs to uphold both democracy and human rights, to adopt a historically and culturally

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50 See M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; J Klaaren 'Structures of Government and the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3.

51 Govender 'SAHRC' (supra) at 572.

52 *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*New National Party*') at para 78.

53 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*Langeberg Municipality*').

54 See S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

55 FC s 181(2).



contextual approach, and to adopt a critical view of structures of power. The content of this independence for the SAHRC and other institutions is explored further below.

## **(b) Independence and accountability**

A critical constitutional issue concerns the meaning of the independence clearly and fundamentally granted to the institutions referred to in Chapter Nine.<sup>56</sup> The broad outlines of Chapter Nine institutional independence have been sketched by the Constitutional Court in *First Certification Judgment*<sup>57</sup> and two separate cases involving the Electoral Commission.<sup>58</sup>

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Before turning to the Court's pronouncements on the subject, two points are worth making. First, despite (or more likely because of) the complementarity of

- 56 FC s 181(2) decrees that the Chapter Nine institutions established by FC s 181(1) 'are independent'. FC s 181(3) provides that '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.' FC s 181(4) places a duty of non-interference on persons and other organs of state.
- 57 See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E (Noting Constitutional Court discussion of independence and impartiality of Auditor-General, Public Protector, and Public Service Commission).
- 58 See *New National Party* (supra) at paras 98–100 (Discussion of nature of the independence of the IEC); *Langeberg Municipality* (supra) at para 27 (IEC is independent and not within national sphere of government). For more on the distinction between 'organs of state; and 'spheres of government' see S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14. See also G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 (Discussion of the independence of the Electoral Commission.) Bishop and Woolman state that the test for financial independence of the Chapter 9 Institutions after *New National Party* Court runs as follows:

In *New National Party v Government of the Republic of South Africa & Others*, the Constitutional Court identified two essential desiderata for independence. Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate. Secondly, the funds must come from Parliament and not from the executive. Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise.

However, the *New National Party* Court, without saying as much, would appear to have concerns that go beyond those of mere fiscal viability. The *New National Party* Court seems somewhat vexed by the ability of Chapter 9 Institutions to discharge their oversight responsibilities with respect to the executive if the executive retains the discretion to decrease (or increase) funding in future. When questions of sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution. Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament.

See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, January 2006) Chapter 24A, 24A-5. Justine White identifies similar criteria for any judicial assessment of Chapter 9 Institution independence. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E, 24E-5:

Chapters Eight (treating the judiciary) and Nine, Chapter Nine 'independence' is qualitatively different from judicial independence. Martin Shapiro's work on the institution of courts in society provides a window on to the independence of the Chapter 9 Institutions that demonstrates that the institutional legitimacy of Chapter 9 Institutions is based not on consent but on the provision of a mediate solution. In this view, the Chapter 9 Institutions do not have the same category of legitimacy problems (in particular, the problems of the perception of bias and the actual introduction of a third interest) as do the courts.<sup>59</sup> Second and relatedly, Chapter 9 Institution independence is grounded in a distinction between the state and the government. As *New National Party* and *Langeberg Municipality* made clear, the Chapter 9 Institutions are not part of the government. As a result, they are not bound to follow the cooperative government principles of Chapter Three and, more importantly, may not be managed by any sphere of government.<sup>60</sup> The non-participation of the Chapter 9 Institutions in government further underwrites their independence.

The Court has identified two important but distinct attributes of Chapter Nine independence as financial independence and administrative independence.<sup>61</sup>

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Despite the Constitutional Court's treatment of the issue, the precise content of both these guarantees has remained contested. The Constitutional Court's judgment in *New National Party* began a process of redefining the relationships between Parliament, government, and the Chapter 9 Institutions.<sup>62</sup> The subsequent political process was supposed to address such problems as under-funding and disparate funding among the Chapter 9 Institutions.<sup>63</sup> Despite the complexity of the institutional issues undoubtedly raised by this process, it is cause for comment that the financial and administrative independence called for by the Constitutional Court for the institutions of Chapter Nine has not, over five years later, been achieved.

### **(c) The duty of state organs to assist and protect**

According to FC s 181(3) other organs of state must 'assist and protect' the Chapter 9 Institutions 'through legislative and other measures.' This duty echoes the duties of cooperative government imposed on organs of state in FC Chapter Three and the

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(1) an independent body is one that is outside government; (2) an independent body is one whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the Executive and can be removed only on objective grounds relating to job performance; (3) an independent body is one that is sufficiently well funded by Parliament to enable it to perform its functions; and (4) an independent body is one that has control over its own functions.

59 See M Shapiro *Courts: A Comparative and Political Analysis* (1981). The legitimacy of the Chapter 9 Institutions comes from searching for a mediate solution, not resolving a dispute in an unbiased forum.

60 See S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14, 14-12.

61 To some extent, the issue of administrative independence overlaps with the duty of state organs to assist and protect the institutions of Chapter Nine, addressed in the next sub-section.

62 Govender 'SAHRC' (supra) at 581.



duties imposed on organs of state to 'assist and protect the courts' found in FC s 165(4).

Although rendered in rather emphatic terms, this duty appears to be honoured in the breach. SAHRC Commissioner Karthy Govender has argued that this duty must be taken more seriously if the SAHRC and the other Chapter 9 Institutions are to discharge effectively their constitutional mandates:

The challenge facing [the Chapter Nine] institutions is to convince those exercising power that they are not simply to be tolerated but should be pro-actively assisted. There will be a necessary tension between them and organs of state, as there sometimes is between courts of law and the government. What is required is an understanding that the exercise of power in South Africa is subject to constraints and that these institutions together with the courts have been given a legitimate overseeing role by the drafters. There is an unquestionable acknowledgement that the judgments of the Court must be respected and applied. The Constitution seeks to enhance the reputation and stature of the institutions so that its findings and opinions are afforded the necessary respect.<sup>64</sup>

The Constitutional Court has had occasion to enforce this duty. In *New National Party*, the Court held that if the Electoral Commission needed the government to provide staff to participate in the voter registration process, the government had a duty to do so.<sup>65</sup> In the view of the *New National Party* Court, the government had failed to fulfil the duty to assist the Electoral Commission.

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#### **(d) The relationship of the constitutional empowerment provisions to establishment legislation**

The issue of how to understand the relationship between constitutional establishment provisions and the legislative establishment provisions has two faces: (1) to what extent are legislative enactments subject to constitutional strictures; (2) to what extent are the Chapter 9 Institutions creatures of statute and not creatures of the Final Constitution. Surprisingly enough, in South Africa's brief constitutional history, more attention has been paid to the latter issue. While the Independent Communications Authority of South Africa ('ICASA') benefits from the placement of its empowering provision (FC s 192) within the scheme of Chapter Nine, it lacks the express protection of the general provisions — FC ss 193 and 194. I would, however, argue that once Parliament has acted to establish ICASA, using at least in part the

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63 See S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F, 24F-8-9 (Quoting SAHRC Chairperson Pityana on five years of discouragement in terms of under-funding). With respect to the institutions directly established by Chapter Nine, the pressing issue has been that of financial independence. Ibid. With respect to the independent authority to regulate broadcasting, the apparently more pressing issue has been that of administrative independence. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E.

64 Govender 'SAHRC' (supra) at 581.

65 See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29-29.

authority of FC s 192, that body then enjoys the benefits of the general provisions of Chapter Nine.

The situation of the SAHRC is the obverse of ICASA. FC s 184 sets out, in some detail (especially when read with FC ss 181, 193 and 194), the functions of the SAHRC, while the establishment legislation first passed by Parliament under the Interim Constitution, the Human Rights Commission Act, constitutes an elaboration of the constitutional establishment provisions.

There are some notable differences among the empowering provisions of the various institutions.<sup>66</sup> In FC s 190(1)(a) and (b), the Electoral Commission 'must manage elections . . . in accordance with national legislation' and 'must . . . ensure that those elections are free and fair'.<sup>67</sup> The Auditor-General must audit and report on the accounts of 'all' departments and 'all' municipalities but the coverage of other institutions is to be 'required by national or provincial legislation' in terms of FC s 188(1). The SAHRC and the Commission for Gender Equality have 'the power[s], as regulated by national legislation, necessary to perform [their] functions'.<sup>68</sup> The Commission for the Promotion of and the Protection of the Rights of Cultural, Religious and Linguistic Communities has diminished powers, enjoying only 'the power, as regulated by national legislation, necessary to achieve its primary objects'.<sup>69</sup> The provisions relating to the Public Protector do not have an initial objects or duties clause and state simply that the Protector 'has the power, as regulated by national legislation' to engage in three specifically listed functions.

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One could, on the basis of these differences, rank the constitutional strength of the Chapter 9 Institutions.<sup>70</sup> Constitutional review would be of varying degrees of intensity for different commissions depending upon their place in the hierarchy. While our jurisprudence could, logically, veer in such a direction, the purposive approach to interpretation adopted by our courts tends to eschew such formal distinctions.

In any case, constitutional challenges to the establishment legislation are not likely to engage questions as to whether the legislation is within the bounds of the 'empowering' constitutional provision. They are more likely to determine whether the legislation is under-inclusive (does not go far enough) with respect to the

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66 The one similarity is in the provisions making clear that each institution 'has the additional powers and functions prescribed by national legislation.' See FC ss 182(2), 184(4), 185(4), 187(3), 188(4), and 190(2). This section and national legislation granting such powers and functions should arguably be read in conjunction with FC s 181(3). Thus, where provincial legislation relating to the institutions of Chapter Nine could be interpreted not to conflict with national legislation, such legislation would comply with these sections. Furthermore, the purpose of these provisions may reflect the pre-Final Constitution enactment of establishment legislation.

67 There is no reference to national legislation in FC s 190(1)(b), while there is in (a) and (c).

68 See FC ss 184(2) and 187(2). The plural is used in FC s 184(2) (SAHRC) and the singular in FC s 187(2) (CGE).

69 FC s 185(2).

70 By establishment legislation, one means the legislation referred to in these sections apart from the legislation prescribing additional functions and powers.

constitutional provisions.<sup>71</sup> While it is thus broadly correct to regard the establishment legislation as implementing the constitutional provisions with respect to each of the institutions of Chapter Nine, the powers and the functions of the SAHRC and the other institutions are not necessarily congruent with those of their establishment legislation. In some cases, that legislation may fail to recognize the full extent of the institution's constitutional authority. In other cases, that legislation may unduly limit it. In any case, the Chapter Nine constitutional provisions — specific and general — will be of clear assistance in purposively interpreting the details of the establishment legislation.

### **(e) Subject matter jurisdiction**

In terms of the constitutional text, subject matter jurisdiction may, and in some cases, does overlap between various Chapter 9 Institutions. The subject matter of the Public Protector,<sup>72</sup> the CRLC and the CGE overlap with that of the SAHRC.<sup>73</sup> While the SAHRC is clearly the best candidate for having the broadest subject matter, the other institutions enjoy expansive constitutional mandates. This characteristic of overlapping subject matters might support a rather holistic reading of

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any jurisdictional disputes. Such disputes, however, are likely to be limited since the Chapter 9 Institutions have already put into place referral and other coordination systems so that they may more effectively pursue their individual and collective mandates.<sup>74</sup>

### **(f) The appointment and removal of persons**

The constitutional provisions governing the appointment and removal of members of the SAHRC and the other Commissions as well as the Public Protector and the Auditor-General are contained in the two general provisions of Chapter Nine. The basic template is appointment by the President upon recommendation of the

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71 In this sense, such establishment legislation occupies an analogous constitutional position to the national legislation referred to in FC ss 32 and 33 and which gives effect to the rights of access to information and just administrative action. Arguably, Parliament's interpretive competence in institutional design should be taken into account in assessing the constitutionality of such legislation. See, generally, I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 29–32. Nonetheless, the significant difference is that several sections of constitutional text — indeed the whole of Chapter Nine — explicitly delineate the structures of the human rights institution that are intended to promote and protect human rights.

72 Both institutions are involved in implementing the Promotion of Access to Information Act, albeit in different roles.

73 On overlap of subject matter of CGE with SAHRC, see C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D, 24D-1. On overlap of subject matter of CRLC with SAHRC, see S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F, 24F-8.

74 See S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F, 24F-18.

National Assembly. The recommendation follows nomination by a committee proportionally composed of members of all parties represented in the Assembly.

The appointment processes of the various Chapter 9 Institutions do differ. The Final Constitution requires specialized knowledge for the Auditor-General and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Special majorities (60%) are provided for the appointments of the Auditor-General and the Public Protector, but not for members of the various Commissions. Further distinctions are introduced by the establishment legislation for the various institutions. For example, recommendations for appointment to the Electoral Commission are made by a committee comprised of representatives of three other Chapter 9 Institutions and chaired by the Chief Justice.<sup>75</sup>

With respect to the removal provisions, two potentially significant changes were made in the Final Constitution. The Constitutional Assembly chose to adopt wording apparently reducing the discretion of the President, in acting upon the recommendations of the National Assembly, in making the appointment to the Commissions and wording allowing for the Parliamentary recommendations for appointment to be effected by a simple rather than a special majority.<sup>76</sup> These changes have led some commentators to allege that the selection process has been unduly politicised.<sup>77</sup>

Chapter 9 Institution office bearers may only be removed on the grounds of

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misconduct, incapacity, or incompetence. A National Assembly committee must make a finding of the existence of such a ground. Apart from the Public Protector and the Auditor-General (where a two-thirds majority is required), a simple majority of the National Assembly must approve the removal. The two-thirds majority required for removal of the Auditor-General and the Public Protector was a direct response by the Constitutional Assembly to failure of the first draft of the Final Constitution to secure certification from the Constitutional Court.<sup>78</sup>

In some instances, the establishment legislation adds additional procedural steps to the removal process. For instance, s 3(b) of the HRCA goes beyond the constitutional requirement and further requires a 75% majority of Parliament to approve the removal resolution for a member of the SAHRC. Similarly, a National

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75 See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29-27.

76 Govender 'SAHRC' (supra) at 573.

77 J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *SAJHR* 587 (Criticizing selection process as politicized). The selection process may of course be a political exercise in a number of different senses.

78 See *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*'). While the Court justified the differential treatment of the Public Protector on the grounds that '[t]he office inherently entails investigation of sensitive and politically embarrassing affairs of government', Karthy Govender has argued that '[f]rom a perspective of principle, there ought to be no difference between the process used to remove the Public Protector and Auditor General from office and that used to impeach other Chapter 9 office bearers.' Govender 'SAHRC' (supra) at 574-5.

Assembly committee finding that a member of the Electoral Commission be removed must be preceded by a recommendation of the Electoral Court.<sup>79</sup>

At least one writer, Karthy Govender, has argued that a Parliamentary resolution effecting the removal of Chapter Nine commissioners must be preceded by a full and fair hearing before a committee with members capable of impartial adjudication since 'the deliberations and determination of the committee would amount to administrative action.'<sup>80</sup> Govender's argument turns on the proposition that parliamentary committee action amounts to administrative action in terms of FC s 33 and that the committee 'is making a specific determination as required by the enabling legislation.'<sup>81</sup> The weakness in this line of reasoning lies in its characterization of parliamentary committee action as administrative action. The committee's power to take such action is sourced directly in FC s 194(1)(b). Whether fair hearings are required would, therefore, appear not to turn on the requirements of FC s 33.<sup>82</sup>

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79 G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29-27.

80 Govender 'SAHRC' (supra) at 574-79 (Justifying this argument on the basis of the holdings in *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C); *Pharmaceutical Manufacturers of South Africa & Others In Re: Ex Parte Application of President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *President of the Republic of South Africa & Others v SARFU & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) and the text of FC ss 33 and 194). In Govender's view, in order to be fair (in addition to the committee being impartial): 'there must be notice of the proposed action and the grounds asserted for it; the commissioner concerned must be offered the opportunity to present his or her case; given the seriousness of the matter, the commissioner must be legally represented; there must be an opportunity to lead and test evidence; and there must a statement of reasons for the final decision.'

Govender 'SAHRC' (supra) at 579.

81 Ibid.

82 For more on the extent to which the exercise of constitutional powers by spheres of government or organs of state are subject to the strictures of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.5.