



The Constitution

of the Republic of South Africa, 1996



CAPE TOWN, SOUTH AFRICA



THE TENSIONS BETWEEN CULTURAL AND CONSTITUTIONAL VALUES: CHAPTER NINE INSTITUTIONS AND GENDER EQUALITY

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Introduction

The Centre for Conflict Resolution (CCR), Cape Town, and the Johannesburg-based Foundation for Human Rights (FHR) hosted two public dialogues in Cape Town, on 12 August 2015 on “The Role of Tradition and Culture: What Has South Africa Achieved in Gender Equality?”, and on 8 October 2015 on “The Role of Chapter Nine Institutions: Have They Fulfilled Their Constitutional Mandate?”

In the wake of the March 2014 report by South Africa’s Public Protector, Thuli Madonsela, criticising President Jacob Zuma’s use of a reported 246 million Rand (\$23 million) of public funds to upgrade his Nkandla home, the authority and mandate of this office – one of those established by Chapter Nine of South Africa’s constitution to strengthen constitutional democracy – has generated much controversy, attracted close scrutiny, and been challenged in the courts. This has resulted in criticisms that both parliament and the executive are undermining the office of the Public Protector. In October 2015, the Supreme Court of Appeal ruled that the findings of the Public Protector that the South African Broadcasting Corporation’s (SABC) chief operating officer, Hlaudi Motsoeneng, should be suspended and face disciplinary action, could not be ignored. Motsoeneng had been accused of having been irregularly appointed, lying about his academic qualifications, unfairly dismissing employees, and unlawfully increasing his salary. The court added that an individual or body that disagreed with a ruling of the Public Protector could not launch a parallel investigation and decide that the outcome of such an investigation trump the findings, decisions, or remedial actions taken by the Public Protector. The presidency had earlier launched a separate investigation into public spending on the president’s private residence through the minister of police, Nkosinathi Nhleko, whose report was endorsed by the ruling African National Congress (ANC)-dominated parliament and absolved the president of any liability. Barney Pitso, former chair of the South African Human Rights Commission (SAHRC), noted that this case demonstrated the continuing need for, and challenges faced by, Chapter Nine institutions.

“The March 2014 report by South Africa’s Public Protector, Thuli Madonsela, criticising President Jacob Zuma’s use of public funds to upgrade his Nkandla home, has generated much controversy”



PRESIDENT JACOB ZUMA’S HOME IN NKANDLA.

Image source - News 24
Photo - Matthew Middleton
<http://www.news24.com/Live/SouthAfrica/News/7-pictures-you-have-to-see-from-media-tour-inside-Nkandla-20150727>

On the issue of gender, traditional practices that are harmful to women in South Africa and impede the achievement of gender equality exist alongside a constitution that enshrines non-sexism and equality as foundational values within an impressive national gender framework. These practices include virginity testing, widows’ rituals, polygamy, female genital mutilation (FGM), and early and forced marriages. Despite the harmful nature of these practices and their violation of national and international human rights laws, Shamillah Wilson, a gender expert, noted that such customs persist because they continue to be justified by culture and religion, and have thus taken on an aura of morality in the eyes of some of those practicing them.

Chapter Nine of South Africa's 1996 constitution established seven state institutions to protect constitutional democracy, each with a specific mandate that is detailed in enabling legislation



(FROM LEFT TO RIGHT), MS BRIGALIA BAM, FORMER CHAIR OF THE INDEPENDENT ELECTORAL COMMISSION; PROFESSOR BARNEY PITRYANA, FORMER CHAIR OF SOUTH AFRICA'S HUMAN RIGHTS COMMISSION; AND MR MFANOZELWE SHOZI, CHAIR OF THE COMMISSION FOR GENDER EQUALITY, AT THE PUBLIC DIALOGUE "THE ROLE OF CHAPTER NINE INSTITUTIONS: HAVE THEY FULFILLED THEIR CONSTITUTIONAL MANDATE?", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN OCTOBER 2015.

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1. Overview of Chapter Nine Institutions

Chapter Nine of South Africa's 1996 constitution established seven state institutions to protect constitutional democracy, each with a specific mandate that is detailed in enabling legislation. These institutions are: the Public Protector, the South African Human Rights Commission, the Auditor General, the Independent Communications Authority of South Africa (ICASA), the Electoral Commission, the Commission for Gender Equality (CGE), and the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (CRL Rights Commission). Together, these bodies are mandated to watch over the other organs of government and ensure that their workings are made transparent and accountable to South Africa's 54 million citizens; that the government embodies democratic values and adheres to the rule of law; and that a culture of respect for human rights prevails within both the state and civil society.

Chapter Nine institutions are accountable to South Africa's parliament, but are independent and subject only to the constitution and the law. They are mandated to exercise their powers and perform their functions without fear or favour, and free from external interference. Section 181 of the constitution requires other organs of state – through legislative and other means – to assist and protect these institutions in order to ensure their independence, impartiality, and effectiveness. Chapter Nine bodies execute their mandates in various ways: through undertaking research in relation to their specific functions; providing public education on the constitution and its bill of rights; monitoring implementation of international human rights instruments; investigating complaints relating to government, private institutions, and individuals; issuing reports with recommendations for remedial action; litigating and making submissions to parliament on legislation; and conducting complementary oversight with parliament and civil society.

2. Challenges Facing Chapter Nine Institutions

In September 2006, the South African parliament appointed an ad hoc committee led by former education minister and ANC member of parliament, Kader Asmal, to assess the extent to which society - over a decade into democracy - had been transformed and human rights entrenched by Chapter Nine institutions. Nearly nine years after the report was published, no meaningful parliamentary debate has taken place on the document. Yet, three key issues contained in this report still remain relevant.

The first is related to the independence of Chapter Nine institutions, which is closely linked to funding. This is among the greatest challenges facing these institutions, because these entities rely entirely on state financing and sometimes struggle to convince parliament and the various government ministries – finance, home affairs, and justice and constitutional development – through which the funding is channelled, to provide them with the funds they require to do their work.

“The Commission for Gender Equality was established to promote respect for gender equality and the protection, development, and attainment of gender equality”



(FROM LEFT TO RIGHT), MS THOKO MKHWANAZI-XALUVA, CHAIR, CRL RIGHTS COMMISSION; MS SHAMILLAH WILSON, CONSULTANT, CENTRE FOR CONFLICT RESOLUTION; AND MS NOMBONISO GASA, RESEARCHER, WRITER, AND POLITICAL ANALYST, AT THE PUBLIC DIALOGUE “THE ROLE OF TRADITION AND CULTURE: HAS SOUTH AFRICA ACHIEVED IN EQUALITY?“, HELD AT THE TB BARRY LECTURE THEATRE AT THE PLANETARIUM, CAPE TOWN, IN AUGUST 2015.

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The second issue is about the process for selecting commissioners and appointing chairs of Chapter Nine institutions. Former chair of South Africa’s Electoral Commission, Brigalia Bam, noted that, with the growing recognition of the influence of some of the Chapter Nine institutions, political parties and civil society organisations now lobby for particular candidates to be appointed to these bodies. In addition, there have been allegations of attempts by politicians to interfere with the selection process of commissioners by influencing the composition and decisions of the interview panel. The temptation is also growing within the ruling ANC to pick commissioners indirectly by using its parliamentary majority to endorse or pre-select particular candidates for presentation to President Zuma for consideration.

Chapter Nine institutions are themselves divided about the appointment of their chairs. For example, the Electoral Commission has expressed views favouring the appointment of chairs by fellow commissioners through a vote, while the Commission for Gender Equality appears to prefer that president Zuma appoint chairs to avoid causing internal divisions between the commissioners.

The third issue in the Asmal report concerns the relationship of Chapter Nine bodies with parliament. These institutions are accountable to the legislature and submit reports to specific parliamentary portfolio committees. However, these legislative committees often do not engage sufficiently with these reports; parliamentarians do not always fully understand the specialised work of these committees; and many staff working in parliament are unfamiliar with the legal framework of these bodies. South Africa’s parliament also does not seem to appreciate the support that these institutions provide in the effective performance of its oversight role over government, and has not always acted on reports requiring government departments to be called to account. Mfanozelwe Shoji, chair of the Commission for Gender Equality, further observed that some opposition parties use reports from these institutions to pursue parochial, partisan politics.

3. Gender Equality and the Tensions Between Traditional and Constitutional Values

The Commission for Gender Equality is the main Chapter Nine institution tasked with addressing gender issues, although there are other structures within the executive that together make up South Africa’s national gender machinery. The commission was established to promote respect for gender equality and the protection, development, and attainment of gender equality. The CRL Rights Commission is tasked with promoting and protecting cultural, religious, and linguistic rights, and seeks to foster the rights of South Africans freely to observe and practice the culture, religion, and language of their choice based on the 1996 constitution. The commission also deals with gender issues insofar as they are linked to cultural issues. The overlapping human rights-related mandates of these two institutions with regard to issues of gender equality have exposed tensions caused by the co-existence of customary law and constitutionalism. This has given rise to conflicts between these two institutions as they have on occasion taken different

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PARTICIPANTS AT THE CCR PUBLIC DIALOGUE "THE ROLE OF TRADITION AND CULTURE: HAS SOUTH AFRICA ACHIEVED IN EQUALITY?", HELD AT THE TB BARRY LECTURE THEATRE AT THE PLANETARIUM, CAPE TOWN, IN AUGUST 2015.

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positions on matters that straddle their individual mandates. However, the two commissions have also cooperated in joint and successfully litigated landmark cases that have the potential to contribute significantly to South Africa's evolving gender and human rights landscape.

According to its chair, Thoko Mkhwanazi-Xaluva, the CRL Rights Commission has rejected the notion that culture is always dynamic, arguing that this theory is often advanced by those who want to distort and misuse culture in order to take advantage of girls and women. For her, there is a need to differentiate between actual cultural practice and what culture has become over time. The commission strives to claim back culture and tradition by advocating for a return to practices of the past that allegedly protected women. These practices include: the rites of passage that girls had to go through until they were deemed ready for marriage; customs that provided rights to women in polygamous marriages and involved women in decision-making within families and in the community; and *ukuthwala*. According to one view, in ancient times, *ukuthwala* - mainly practiced in the Eastern Cape and KwaZulu-Natal provinces - was accepted as an unconventional path to marriage between two consenting adults whose marriage negotiations had fallen apart, usually because the parents were demanding too high a bride price. This system was therefore viewed as the only alternative path for young adults in such circumstances. Its many critics, however, see *ukuthwala* as an odious practice in which men and their friends kidnap girls and young women in order to force them into marriage against their will in flagrant violation of their rights.

There has been a fierce debate between the Commission for Gender Equality and the CRL Rights Commission on the issue of *ukuthwala*. According to the gender commission, the practice goes against South Africa's constitutional ethos and infringes the rights of citizens; while the CRL Rights Commission has argued that people have a cultural right to practice *ukuthwala*. The constitution is, however, clear about the supremacy of constitutional values over cultural values.

The CRL Rights Commission's understanding of culture has often been challenged by gender activists. Nomboniso Gasa, a political analyst, defined culture as a sociological process that defines human relations and expressions at a macro level. Culture entails overlapping layers, relations, and intersections with a range of other forms of relationships, social organisations, and belief systems. She thus argued that there was not a single homogenous culture because of the diversity of historical relationships that inform how people relate to each other. It is thus important to rethink and revisit how African cultures are conceptualised and located within human civilisations.

The CRL Rights Commission has, for example, controversially claimed that the practice of virginity testing is conducted with the consent of girls, arguing that it is not for those in power to determine what they think is in the best interests of girls who decide to undergo virginity testing. Instead, one

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A PARTICIPANT AT THE CCR PUBLIC DIALOGUE “THE ROLE OF CHAPTER NINE INSTITUTIONS: HAVE THEY FULFILLED THEIR CONSTITUTIONAL MANDATE?”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN OCTOBER 2015.

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must recognise that these girls have a voice of their own and are in control of their bodies. Nomboniso Gasa argued that this view was problematic in overlooking pre-existing patriarchal structures in South Africa within which consent and the dynamics of unequal power between men and women should be examined. The female body, in the context of virginity testing in a patriarchal society, becomes a site of proof of innocence or guilt, a site of pleasure or displeasure, a site of honour or dishonour. If a child has to prove her purity, it means that already the parents and the grandparents, and the community itself, are judging that child.

Recent debates over the Traditional Courts Bill, which would have given legal force to some customary law mechanisms, appear to exemplify a tension between egalitarian law and anti-egalitarian tradition. The bill was ultimately defeated in March 2014, in part due to activism by civil society groups, the Commission for Gender Equality, and other critics who argued that it would have undermined the legal and constitutional rights of women. Opponents of the bill further argued that it distorted traditions to empower local elites – including traditional leaders – and that misogynistic “traditions” are sometimes based on colonial and apartheid-era relations of dominance rather than on deeply entrenched African cultural values. A revised Traditional Courts Bill was to be tabled in parliament in November 2015. This did not happen, though the revised bill could still be introduced at a later date.

Policy Recommendations

The following ten recommendations emerged from the two public dialogues:

1. The process of appointing commissioners of Chapter Nine institutions should be free of political interference to ensure their independence. Furthermore, there is a need to put in place regulation that prevents commissioners from taking up political positions soon after serving their terms, to ensure that they remain non-partisan throughout their tenure.
2. A committee to review the two-decade performance of Chapter Nine institutions should be established to make concrete recommendations for strengthening these institutions.
3. The budget allocated to Chapter Nine institutions, whose funding is insufficient to fulfil their mandate, should be increased.
4. South Africa’s parliament should discuss and adopt its own 2007 “Report of the Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions”. Following this, the legislature should provide guidance on whether some of the institutions with an overlapping human rights mandate should be amalgamated.

Clear instruments to assess and evaluate specific aspects of the extent to which Chapter Nine institutions are fulfilling their mandates should be developed



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5. A report card must be developed to rate the media's reporting on gender equality issues, as the press has a critical role to play in promoting public awareness of gender issues.
6. The South African government should reconsider its current models of funding to Chapter Nine institutions with a view to reducing red tape and safeguarding their independence. The government could establish an independent body to manage the funds allocated to Chapter Nine institutions, or channel the funds through parliament to which these institutions are constitutionally accountable.
7. Clear instruments to assess and evaluate specific aspects of the extent to which Chapter Nine institutions are fulfilling their mandates should be developed, as no such measures currently exist.
8. Legislation should be passed to ensure that public and private sector institutions adhere to gender parity, in line with the 2008 Southern African Development Community (SADC) Protocol on Gender and Development, which South Africa ratified in 2011.
9. Law enforcement – especially relating to violations of legislation promoting the rights of women in South Africa – must be strengthened. The criminal justice system should also be improved to prosecute offenders and provide justice to victims.
10. Past cultural practices that granted power, leadership, and decision-making roles to women should be resuscitated and reclaimed.