

## **CASE STUDY: THE COMMISSION FOR GENDER EQUALITY, SOUTH AFRICA**

### **Promotion and Protection of Gender Equality — are Separate Structures Necessary?**

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South Africa is a country that reflects the dilemma and difficulties faced by a developing country which is attempting to achieve gender equality and the protection of women's human rights in the face of a massive legacy of both racial and gender discrimination and oppression. The promotion of gender equality and the prohibition of gender-based discrimination are addressed in both constitutional and legislative measures, and also separate structures to support this objective. Debates are currently taking place, both inside and outside government, about the necessity for establishing separate commissions like the Commission for Gender Equality (CGE) and the South African Human Rights Commission (SAHRC), amongst others. This paper critically examines the functioning of the CGE within the context of rising concerns about gender mainstreaming and its impact. This paper maintains that constitutional provisions and institutions assist in mainstreaming and making visible the issue of women's emancipation and gender equality.

## **Introduction**

The Commission on Gender Equality (CGE) is committed to creating a society free from gender discrimination, and all other forms of oppression, in which all people will have the opportunity and means to realize their full potential, regardless of race, sex, gender, class, religion, sexual orientation, disability, or geographical location.

— Vision of the CGE, April 1999

Gender equality and the right not to be discriminated against on the grounds of gender appear to be but a concept with little or no impact on women's realities. Women's lives in South Africa continue to be characterized by race, class and gender-based access to resources and

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opportunities, imbalances as well as political, social and economic inequalities ... However, persistent patriarchal systems, as well as male dominance in all spheres of society define why women are continuously confronted with inequalities, and why they remain oppressed and discriminated against despite a commitment to gender equality as expressed within South Africa's Constitution and legislation.

— *Rights Now*, June 2001<sup>1</sup>

The above quotes succinctly capture the dilemma and difficulties faced by a developing country which is attempting to achieve gender equality and the protection of women's human rights in the face of a massive legacy of both racial and gender discrimination and oppression. The inherited legacy of the past, particularly for black women, includes oppression and discrimination based on factors such as race, class, gender and geographic location.<sup>2</sup> South African women's struggle against racial oppression dates back to 1913, and the constitution bears testimony to that struggle by explicitly recognising the injustices of the past; it also honours those who suffered for freedom and justice. President Mandela, in his speech at the opening of the first democratically elected parliament in April 1994, recognised that the fight for equality between women and men was subordinate to the struggle against racial oppression in South Africa and stated that 'freedom cannot be achieved unless women have been emancipated from all forms of oppression'. The promotion of gender equality and the prohibition of gender-based discrimination are addressed in both constitutional and legislative measures. Furthermore, legislation and policies have also been implemented to create structures to support the promotion and protection of gender equality. Albertyn et al argue that: 'It is possible to characterize the new South African state as "women-friendly", as it contains both the formal political will and the institutional mechanisms to advance gender equality.'<sup>3</sup>

### Historical Context

It has been argued that it is crucial to examine the historical and political contexts under which national structures for women and/or gender were set up, as it has relevance for the consequences and the shaping of views on the goals of gender equality.<sup>4</sup>

At a global level, the establishment of separate structures to promote and protect gender equality and improve the status of women was raised at the United Nations level in 1962 by the Commission on the Status of Women. Subsequently, 1975 was declared International Women's Year, with the First World Conference on Women taking place at that time. The next decade was declared the Decade for Women, and a UN Declaration on Women encouraged

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<sup>1</sup> Rights Now (1999), p 1.

<sup>2</sup> Albertyn et al (1999), p 3.

<sup>3</sup> Albertyn et al (1999), p 21.

<sup>4</sup> Mama (2000b), p 1

member states to set up national women's machinery to improve the quality of life and status of women. The 1970s saw, at a global level in general and in developing countries in particular, efforts at integrating women into development using a welfare and anti-poverty paradigm. The objective was largely to make more resources available and to create more access to economic opportunities for women — in other words, the 'women in development' approach. The 1980s saw a paradigm shift to a 'gender and development' approach which worked towards mainstreaming or institutionalising gender concerns. This was in response to the recognition that unequal power relations structure the lives of women, and that there had been a failure to address this at the political, legal, economic or social levels. The transformation of society required the improvement of women's position, relative to men, in order to achieve equity and respect for the human rights of both women and men. The empowerment of women was a crucial component of a model that challenged the system of power, status and privilege in the quest for justice and equity for women.<sup>5</sup> The Platform for Action document which emanated from the 1995 UN conference in Beijing again emphasised the importance of national women's/gender machineries to be given 'primary responsibilities for ensuring the integration of gender into the policies, programs and plans of government at all levels'.<sup>6</sup>

At the African regional level, the first structures for women were set up after independence in Liberia, Tunisia and Egypt in the 1940s and 1950s. According to Mama,<sup>7</sup> these structures were primarily concerned with involving women in nation-building, and were not set up to assist in challenging existing gender relations. Hence access was created for women in both the public and the economic sectors. The 1970s and 1980s saw a proliferation of UN-sponsored, development-focused 'national women's machineries' being set up in Africa, as per the UN Declaration. At the political, institutional, social and economical levels, these structures were characterised by certain common features. These included political patronage in membership; first lady syndrome; the setting up of women's wings in the ruling parties; the setting up of bureaucratic structures inside government; structures which had developmental goals as opposed to gender equality goals; structures which had a mechanical and add-on approach to gender equality issues; the ghettoisation of women's issues; inadequate resources, and hence a dependency on donor funding; limited mandates and powers; bureaucratic resistance and/or territorial attitudes to the concept of gender mainstreaming; and authoritarian styles of decision-making coupled with a lack of consultation. Some debates during this period focused on issues of mandate, functions, structure and location of national women's machineries. In terms of structure and location, the models proposed included a women's ministry within government, some structure at the highest decision-making level (for example, in the presidency)

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<sup>5</sup> Oxfam (1995), p 7.

<sup>6</sup> Ofei-Aboagye (2000), p 14.

<sup>7</sup> Mama (2000b), p 1.

or a constitutionally protected independent commission located outside government.

Another crucial debate was around the issue of women's relationship with a post-colonial state and the implications of engaging or not engaging with the state. Some questions raised included: Was the state a potential tool for the advancement of gender equality? Could one change the patriarchal nature of the state by working both with and within it, rather than lobbying for change from outside it? It is argued by some that the institutionalisation of gender equality 'has created the space for government manipulation of the gender equality agenda for its own ends and also for the national machinery to be distant from the women's movement'.<sup>8</sup>

The national machineries that were set up had wide mandates and multiple functions, resulting in large workloads which required a range of skills to fulfil the mandates. The mandates included some or all of the following: policy formulation and analysis; legal reform; advocacy; mainstreaming gender equality across government; coordination and monitoring of implementation of policies and programs; and education and training to raise awareness around women's human rights and gender equality. Mama argues that the UN-recommended national machinery models were posited on 'liberal, rather than radical assumptions about the nature of women's unequal position in society, and they seek to give women some space within the state, rather than to change, much less transform it'.<sup>9</sup>

South Africa has benefited, from the experiences of both the developed and the developing world with respect to fulfilling its commitment to the promotion and protection of gender equality in a non-sexist and non-racist democratic state. Previous struggles and demands of women are reflected in a 1954 Women's Charter, drawn up by women working across the racial divide. The struggle for gender equality and women's human rights became more visible again during the period of serious political negotiations around 1989. The African National Congress's National Executive Committee issued a policy in 1990 on the Emancipation of Women in South Africa. It also encouraged the African National Congress Women's League to initiate the idea of drafting a women's charter to ensure that gender equality was part of the constitutional negotiation process and that women's needs and interests were reflected in the laws and policies of a new South Africa. Women united across the political and racial divide to form the Women's National Coalition and consultations were held with women across the country. In 1994 a Charter for Effective Equality was produced, and this served as the basis for the debates around a framework that was needed to promote and protect gender equality.

South African women were wary of the possibility of marginalisation of women post-liberation, and hence chose not to go the route of a government ministry for women, as had happened in many parts of Africa. The option chosen was a National Gender Machinery framework that created multiple

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<sup>8</sup> Tsikata (2000), p 16.

<sup>9</sup> Mama (2000b), p 15.

sites of negotiation and advocacy in mainstreaming gender equality and the advancement of women. The structures include:

- The Office on the Status of Women (OSW), which is located in the Presidency and was created through an executive memorandum. The OSW is an administrative body that serves as an internal accountability structure within government in respect of its gender commitments. It is tasked with formulating a national gender policy, ensuring that all government policy is consistent with this policy, coordinating and implementing this policy, and arranging for training in gender planning and policy analysis in all government departments.
- At the legislative level, a committee was set up in parliament called the Joint Monitoring Committee on the Quality of Life and Status of Women (JMC). The JMC's principal responsibilities in respect of gender equality and the advancement of women are to monitor and evaluate progress with regard to the improvement in the quality of life and status of women, to serve as a facilitating forum for public input into legislative processes affecting the advancement of women and gender equality, and also to serve as an internal accountability mechanism within parliament to monitor legislation and debates, in order to ensure that there is a gender focus. It also specifically monitors and assesses whether government is compliant with its national and international commitments.
- The third component is the Commission for Gender Equality (CGE), which is a constitutionally created independent commission outside of government.
- The last component of the gender machinery is civil society in general, but the women's movement in particular.

### **The Commission for Gender Equality**

The establishment of a Commission for Gender Equality (CGE) is provided for in Section 119 of the *Interim Constitution Act 200 of 1993* (the Interim Constitution) and Section 181(1) of the *Constitution of the Republic of South Africa Constitution Act 108 of 1996* (the Final Constitution). The powers and functions of the CGE are set out in sections 119 and 120 of the Interim Constitution, Section 187 of the Final Constitution and Section 11 of the *Commission on Gender Equality Act 39 of 1996*.

The role of the CGE is largely to promote respect for gender equality and the protection, development and attainment of gender equality. In terms of its enabling legislation, it has powers to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. Despite its broad mandate, the CGE has limited and unenforceable powers to achieve such a mandate, due to its powers being restricted to an advisory role in respect of both the public and private sectors. The CGE is independent and subject only to the Constitution and the law. It must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the CGE. In fact, other organs of state, through legislative and other measures, must assist and protect the CGE to ensure its independence, impartiality, dignity and effectiveness.

The elements for the effective functioning of a national human rights institution, as referred to in the Paris Principles (that is, independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability) are largely met in respect of the CGE. As regards the element of independence, the issue of financial autonomy is a contentious one. The present budget is derived via the Ministry of Justice and not directly through a parliamentary vote, making the institution dependent on state funding. This is seen as either compromising or leading to perceptions of compromise of independence, as the CGE has an oversight role over the ministry. The element of operational efficiency is also a challenge due to inadequate resources, questionable working methods, and inappropriately qualified and skilled personnel in many instances. The issue of accountability is also problematic, as a factor compounding the situation is that, while the commission is accountable to parliament, it also has to be directly accountable to the constituency for which it was established. The absence of a women's movement in the country has resulted in the inability of civil society to hold the CGE accountable. Parliament has also found it difficult to hold the CGE substantively accountable, due to its own constraints.

### **Implementation of the Mandate**

#### *Monitor and Evaluate Policies and Practices*

Both private and public bodies have to be monitored by the CGE in terms of its promotion and protection mandate. The Commission has an advisory role in this respect, in that it can make recommendations but does not have enforcement powers. Some projects have included: monitoring of elections by looking at the participation of women and men in elections both as voters and as candidates; the conducting of a gender opinion survey amongst the general public to elicit current thinking on gender; the conducting of audits at local, regional and national levels to determine what the needs and interests were and what the CGE should focus on; and the conducting of a survey of policies and practices that exist in the private business sector. The monitoring function has resulted in the CGE being educative, as well as developing and providing tools for use by the state and the private sector for internal monitoring purposes.

#### *Awareness-raising*

The Commission has a mandate to develop, conduct and manage information programs to foster public understanding of matters pertaining to gender equality. Public awareness and the provision of information have occurred through workshops, consultative conferences, gender dialogues, provincial road shows, campaigns, information and evaluation workshops. A variety of media, including print, electronic, audio and video, are used in the promotional and educative work of the CGE. Through these media, a vast range of issues have been addressed, ranging from gender equality concepts, domestic violence, maintenance and customary marriages to labour laws, democracy and governance issues, virginity testing and witchcraft violence issues. The CGE is also working with the media to discuss, train and attempt to effect

transformation within it in respect of gender issues. Two important interventions in this sector led to the CGE assisting in the drafting of Codes of Conduct for both the Advertising Standards Authority (ASA) and the Independent Broadcasting Authority (IBA).

#### *Evaluate and Make Recommendations on Existing and Proposed Legislation*

In the first term of the CGE, an audit of gender and sex discriminatory legislation that still existed on the statute books was conducted. This was then passed on to parliament and the Law Commission with recommendations. The evaluation function is largely achieved through submissions that are made to parliament and/or the South African Law Commission on various Bills. Attempts are made to elicit inputs from individuals and communities to inform such submissions. It is the view of the commission that submissions should reflect the views of ordinary people in communities and not just elite interest groups. The CGE also includes in its submissions information gathered during its public education and complaints functions. Research reports are often presented to parliament in support of submissions. Some of the recent issues on which the CGE has submitted inputs include: a proposal for the inclusion of both domestic workers and farm workers (the most vulnerable sector) in the law governing unemployment insurance benefits; an amendment to the witchcraft suppression laws, to increase the punishment for violations; input on reforms to the rape laws to include gender-neutral language which would then include gay and lesbian relationships; proposals to de-link maternity benefits from other unemployment benefits and also to look again at the issue of quantum of maternity benefits, especially for women at the lower income level; input into the equality and employment equity laws; and submissions on customary/traditional law issues.

#### *Adoption of New Legislation*

The Commission can recommend to parliament any new legislation that may help with the promotion of and protection of gender equality and the status of women. A current project of the CGE is that of proposing an alternative Bill to the one that has been tabled by the Law Commission for the recognition of Muslim marriages. The concerns of numerous interest groups and also the CGE on the form of codification of religious law, and consequently the violation of gender equality, have led to this project.

#### *Investigation of Alleged Violations of Gender Equality*

The CGE has set up an effective complaints mechanism and processes which address issues of conciliation, investigation and remedies for violations. It can investigate gender-related issues of its own accord, or on receipt of a complaint, and must endeavour to rectify the problem through mediation, reconciliation or negotiation, or refer it to another appropriate forum. Assistance in setting up the complaints mechanism and training in reconciliation, investigation and mediation was provided by the Australian

Human Rights and Equal Opportunities Commission. The majority of complaints relate to maintenance and domestic violence, with women being the majority of complainants.

### *Litigation*

The CGE has also intervened in legal cases as *amicus curiae* (friend of the court), thereby providing information which is not necessarily within the purview of the court. Some examples include:

- *Amod v Multilateral Motor Vehicle Accident Fund*.<sup>10</sup> This was a case where the fund refused to deal with a claim by a widow of a Muslim marriage for damages for loss of support following the death of her husband in a car accident, as she was not considered a legal spouse under South African law. The non-recognition of Muslim marriage, and also any consequent factual duty of support which arose thereof, constituted discrimination based on marital status in terms of the Constitution. The CGE intervened as *amicus curiae* in the Supreme Court of Appeal, and used information from its complaints database to show that there were numerous such cases where women were being deprived of compensation either by this fund or the Unemployment Insurance Fund on the basis of non-recognition of Muslim marriages.
- *S v Jordan*.<sup>11</sup> The CGE intervened as *amicus curiae* in a challenge to the discriminatory aspects of the sexual offences law which criminalised commercial sex work and the keeping of a brothel. The section criminalises sex workers who provide services, but not clients who receive and pay for such services. The *amicus* intervention in the Constitutional Court pointed out that this provision constitutes gender discrimination, as it largely impacts on women. The CGE records and research showed that women are primarily the service providers and that this provision has had an adverse impact on them.
- *S v Baloyi*.<sup>12</sup> This case was a challenge to the constitutionality of a provision of the *Prevention of Family Violence Act 133 of 1993*. The allegation was that section 3(5) reversed the onus of proof in domestic violence cases, and thus violated the presumption of innocence right of an accused. The CGE made representation to the court on its statistics, which showed the extensive usage of this law by victims/survivors of domestic violence as a cost-effective and quick remedy.
- *Bannatyne v Bannatyne*.<sup>13</sup> The CGE acted as *amicus curiae* in a maintenance case where it raised core issues relating to the extent to which remedies available in the maintenance law are accessible and effective. The intervention showed the gendered nature of maintenance, the different experiences of women in receiving maintenance payments and the rise in feminisation of poverty post-divorce. It also highlighted

<sup>10</sup> *Amod v Multilateral Motor Vehicle Accident Fund* (1999) (4) SA 1319 (SCA).

<sup>11</sup> *S v Jordan* (2002) (11) BCLR 1117 (CC).

<sup>12</sup> *S v Baloyi* (2000) (1) BCLR 86 (CC).

<sup>13</sup> *Bannatyne v Bannatyne* (2003) (2) BCLR 111 (CC).



how this operates as a barrier to women attaining substantive equality and enjoying equal protection and benefit of the law.

### *Advising and Assisting in the Implementation of International Conventions*

South Africa is a party to a number of regional as well as international human rights instruments, and the commission has a monitoring role herein. At the regional level recently, the Draft Protocol on Women to The African Charter on Human and People's Rights was being discussed, and the CGE organised a consultation among African countries to share experiences and learning, and also developed a submission which was tabled with government.

### *Research*

Research is conducted and reports are presented to relevant stakeholders, including parliament. Recent research topics include: the Unemployment Insurance Fund, maternity benefits, gender budgeting at the local government level, implementation of the *Maintenance Act*, violence against women and discrimination in the legal profession.

### **Challenges**

South African women activists made strategic choices in terms of structures to promote and protect gender equality, both before and after the advent of democracy. The CGE was one such choice. Unfortunately, this was hampered in the 1997 implementation phase and in subsequent years by many factors including the change in the political and economic environment of the country. Challenges faced include the following:

- The shift in macro-economic policy by government resulted in the imposition of fiscal constraints on the implementation of policies, programs and laws. The 1997 and subsequent budget struggles of the CGE bear testimony to this. The first budget allocation, which was a third of what was allocated to the South African Human Rights Commission (SAHRC), was insufficient to cover the salaries of commissioners. Hence no office could be set up, nor could staff be hired.
- Another factor was the change in the political climate at that time, with debates both inside and outside government about the necessity for establishing commissions like the CGE and the SAHRC. The legal and structural gains in respect of gender equality came under attack. Hence, from inception, the CGE had to defend its right to exist as a separate independent institution.<sup>14</sup> The political climate and the budgetary constraints did result in close collaboration and the sharing of scarce resources amongst two of the institutions set up in terms of Chapter 9 of the Constitution — that is, the CGE and the SAHRC. Unfortunately, this resulted in perceptions of the CGE as an extension of the SAHRC,

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<sup>14</sup> Albertyn (1999), p 34.

and also reinforced the view that there ought to be rationalisation of institutions that had been created in the Constitution to support and strengthen democracy.

- The resignation of the highly respected and competent chairperson of the CGE early in its existence, and the subsequent one-year delay by the president in appointing another chairperson, also impacted negatively on the functioning of the institution.
- The protracted, costly and acrimonious legal battle with the first chief executive officer threatened to tear the CGE apart. It also led to an unsuccessful application to parliament by the CGE for the removal of a commissioner.
- There is a perception and reality (sometimes) that the CGE has been slow in fulfilling its mandate to act as a structure of oversight and accountability. This is especially visible in respect of its lack of action in challenging government's failure to adhere to its commitments to gender equality.
- The reactive as opposed to a proactive approach to interventions has also led to criticism generally, but more especially by the women's movement.
- The challenge of dealing with staff with inappropriate or no requisite skills has had an impact on the operations of the institution. This has also impacted on commissioner–staff relationships and also relationships between commissioners. The silo methodology of work in the different departments and on the different themes, and the lack of follow up in many instances is also a source of concern. There have been attempts to work in a more coherent and holistic manner in recent times. On some levels the CGE has become characterised by conflict and competition, rather than cooperation and support. The issues of role definitions, authority and power have become new sites of battles.
- The problem of the difference in vision is manifested in how the majority of the staff see the CGE — that is, as a career opportunity, and not as a political and strategic space.
- The CGE must be directly accountable to the constituency which it was established to assist and protect, but the absence of a strong women's movement has resulted in the inability of civil society to hold the CGE accountable. Due to the CGE being perceived as a women's organisation, other members of civil society do not see a role in demanding accountability.
- The wide mandate with very broad and vague wording has led to differing understanding and interpretations of the mandate, both internally and externally.
- The diversity that exists between and amongst commissioners and staff has brought both strengths and limitations to the CGE. These range from political differences and affiliations to different values, different conceptual ideologies and language barriers. The previous commissioners have also admitted to race and class tensions which were never addressed in the CGE. The issue of historical mistrust and a

non-partisan approach to work in an independent statutory institution is also not discussed. Political patronage also sometimes defines the roles and functions that the CGE undertakes.

### Conclusion

The work of the CGE is largely focused on women's legal capacity, ranging from working on law reform, attempts to effect changes in the administration of justice, and conducting of legal literacy and human rights campaigns to raise awareness. In spite of these efforts, the rights entrenched in the Constitution for the protection and promotion of gender equality remain paper rights for many women. The South African reality is one in which cultural, traditional and religious patriarchal practices discriminate against and oppress women. The promotion and protection of gender equality has become even more difficult as the legacy of inherited inequality has been compounded by increasing levels of poverty, the pandemic of HIV/AIDS, the increasing levels of gender-based violence both in the private and the public sectors, and the increasing divide between rural and urban communities. It is questionable whether it is realistic to expect the CGE to redefine gender relations in society, and thus succeed in building a society based on gender equality and gender justice. In light of the structural and financial challenges identified above, this task appears to be almost impossible.

Tsikata argues that:

some African governments resist them [constitutional bodies] by starving them of resources and ignoring their decisions. Thus, being a constitutional body does not guarantee success without other favorable conditions such as good quality leadership and staff, a vigilant civil society, a progressive media culture and last but not least, a government that is serious about democracy.<sup>15</sup>

The inclusion of an independent judiciary as a crucial component is also necessary. I would argue that the above viewpoint is not unique to Africa, but is a universal one when one discusses gender equality structures and processes. The crucial debate for women's rights activists ought to be whether there is a need for state-created structures for women's advancement, and if so, what measures need to be taken to address the political and other structural impediments to their successful and effective functioning.

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