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Prospect of merging the South African Human Rights Commission and Commission for Gender Equality into a single human rights body

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ABSTRACT

A decade after the introduction of Chapter 9 institutions supporting democracy, the Ad Hoc Parliamentary Committee appointed to review these institutions found that all except the South African Human Rights Commission (SAHRC) are generally ineffective and have been unsuccessful in fulfilling their constitutional mandates. These failures were attributable to a range of internal issues and disputes; the most notable being the essence of their independence and how it should be weighed against both their duty to the National Assembly and their position in keeping the executive and legislature accountable. The Committee further revealed that the proliferation of these bodies diminished their effectiveness and accessibility to the public as there was confusion as to which body to approach. The SAHRC and the Commission for Gender Equality (CGE) are particularly important in this regard due to their powers to accept public complaints, make recommendations and report on human rights and issues related to gender equality.

This thesis builds on the key recommendation of the Committee with a specific focus on the SAHRC and CGE. It seeks to explore how the merging of these two institutions can play an integral role in the enforcement of the Constitution by creating an environment conducive to the furtherance of fundamental human rights. The thesis argues that the interdependence and indivisible disposition of human rights suggests that a single body is best suited to resolve the barriers and disparities that impact several groups and further espouse institutional mechanisms to address human rights violations.

The reality that informs the recognition of the SAHRC and CGE is that, although the former has a broader mandate to protect human rights and the latter is designed to resolve gender equality issues; both institutions are structured to reinforce constitutional democracy through promotion, protection and monitoring on the observance of human rights, and gender equality violations. Hence, anintegrated human rights body, composed of the SAHRC and the CGE, with more institutional muscle and administrative capacity would achieve a broader reach that would enable it to manage more efficiently with the complaints of ordinary citizens while holding functionaries to account.

ABBREVIATIONS AND ACRONYMS

African Commission	African Commission on Human and Peoples' Rights
African Network	Network of African National Human Rights Institutions
Asmal Report	Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions
AU	African Union
Banjul Charter	African Charter on Human and Peoples' Rights
CALS	Centre for Applied Legal Studies
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CASAC	Council for the Advancement of the South African Constitution
CCL	Centre for Child Law
DOI	Dullah Omar Institute
IESA	Inclusive Education South Africa
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGE Act	Commission on Gender Equality Act 39 of 1996
CGE	Commission for Gender Equality
CHR	United Nations Commission on Human Rights
CODESA	Convention for a Democratic South Africa
CRC	Convention on the Rights of the Child
CRL	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CRPD	Convention on the Rights of Persons with Disabilities
ECOSOC	United Nations Economic and Social Council

GBV	Gender-based Violence
HRC	United Nations Human Rights Council
HRE	Human Rights Education
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR Committee	Human Rights Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR Committee	Committee on Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IPV	Intimate Partner Violence
MPNP	Multi-party Negotiating Process
NACHRET	National Centre for Human Rights Education and Training
NHRIs	National Human Rights Institutions
NSP	National Strategic Plan
NYC	National Youth Commission
OAU	Organisation of African Unity
OHCHR	United Nations Office of the High Commissioner for Human Rights
OISD	Office on Institutions Supporting Democracy
OPCAT	Optional Protocol to the Convention on Torture
Optional Protocol	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
PAIA	Promotion of Access to Information Act 2 of 2000

PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SAHRC	South African Human Rights Commission
SAHRC Act	South African Human Rights Commission Act 14 of 2013
SCA	Sub-Committee Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

KEYWORDS

Chapter 9 institutions; South African Human Rights Commission; Commission for Gender Equality; South African Human Rights Commission Act; Commission on Gender Equality Act; Asmal Report; Constitutionalism; Transformative Constitutionalism; Constitution-making in Africa; National Human Rights Institutions; Paris Principles; International Human Rights; International Bill of Human Rights.

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CHAPTER 1

INTRODUCTION

1.1. BACKGROUND

Although the South African Constitution has been hailed as one of the best and most progressive constitutions in the world, there have been many criticisms levelled against it and the role of Chapter 9 institutions in the current constitutional dispensation. At the heart of this thesis lies the question of whether it is feasible to amalgamate the South African Human Rights Commission (SAHRC) and Commission for Gender Equality (CGE) into a single human rights body to enhance the effectiveness and independence of these institutions. An exploration of this issue demands an extensive assessment of the role that these two institutions play in ensuring that South Africa's institutional and legal framework – rooted in its State obligation to 'respect, protect, promote and fulfil' the rights entrenched in the Bill of Rights[1] – is translated into reality. However, an assessment of such a question should be preceded by a discussion of constitutionalism as a founding concept in South Africa and the African continent.

Constitutionalism, as a theory of constitutional law, describes as opposed to prescribing what the Constitution and constitutional law should do, the governance structure and its control. It adequately describes the organism or political organisation of the State; in short, it is about power and the limits of power. To this effect, Kibet and Fombad advance:

> 'the primary function of constitutions is to strike this balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic'.[2]

In the early years of its independence, Africa's post-colonial history was marked by political turmoil, military coups, civil war, and severe human rights violations.[3] Therefore, a mechanism that would control State power was required. In this regard, constitutionalism requires that the State has enough power to pursue the common good. Still, its powers are restricted to avoid the abuse of power and

[1] S 7 of Chapter 2 of the Constitution reads:
'(1) This Bill of Rights is a cornerstone of democracy in South Arica. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect. protect. promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

[2] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRLJ* 342.

[3] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRLJ* 341.

protect society's interests. It seeks to ensure respect for human dignity and worth by limiting the State's power, says Devenish, even when the exercise of such power reflects the majority's will, and this requires public accountability.

The South African Constitution's content,[4] enacted legislation, or the courts' jurisprudence could neither be explained by a single account of South African constitutional law.[5] This complexity is attributable to constitutionalism comprising a range of aspects, such as preserving fundamental rights and freedoms, the principle of separation of powers, the independence of the judiciary, the review of constitutional laws and the control of constitutional amendments. However, Fombad warns that such factors are not a guarantor of constitutionalism.[6] With this background, it is evident that a process by which people could obtain redress for human rights violations and the enforcement of constitutional obligations was essential to ensure justice.

In 1994, South Africa emerged from a history of social division and institutionalised racism that saw the violation of human rights and disregard for fundamental principles of law.[7] As a result, most State institutions were viewed as creatures of colonial laws. This created mistrust amongst most people and a lack of credibility since they were not accountable in any credible way, either to the judiciary or to one another.[8] Hence, in 1996 with the enactment of the South African Constitution, Chapter 9 institutions were introduced with the primary purpose of fostering and strengthening constitutional democracy and safeguarding fundamental rights.

A transition from parliamentary supremacy to constitutional supremacy saw a substantial need for these Chapter 9 institutions' independence to protect them from undue interference and ensure efficient execution of their functions. Section 181(2) of the Constitution outlines that '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'.[9] To ensure their independence, section 181(3) demands that all other organs of State 'assist and protect these institutions'.[10] Furthermore, section 181(4) forbids individuals and organs of State from interfering

[4] Constitution of the Republic of South Africa 1996 (the Constitution).
[5] S Woolman, T Roux & M Bishop 'A Baedeker to Constitutional Law of South Africa' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 1 at 1.
[6] C Fombad Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) *Buffalo Law Review* vol 59 at 1014.
[7] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 160.
[8] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 160.
[9] S 181(2) of the Constitution.
[10] S 181(3) provides "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."

with these institutions' functioning.[11] Subsequently, section 181(5) provides that 'these institutions are accountable to the National Assembly, and must report…to the Assembly at least once a year'.[12]

1.2. THE RESEARCH PROBLEM

Despite this progress, however, most Chapter 9 institutions have been unsuccessful in achieving their constitutional obligations. Internal issues and disputes have been associated with this failure. The most notable is the essence of their independence and the manner it should be weighed against both their duty to the National Assembly and their role in holding functionaries accountable.[13] These issues continue to impede the efficacy of Chapter 9 institutions which is primarily a concern since the plethora of issues facing the country rest on the core human rights that these institutions are charged with promoting and supporting.

The Ad Hoc Committee on the Review of Chapter 9 Institutions and Associated Institutions was formed in 2006 to review these institutions' efficacy and performance and determine whether their constitutional obligations were being achieved.[14] The institutional review was undertaken in the midst of uneven performance and internal discord among the institutions, with the outcome that some were generally ineffective and unproductive.[15] The ten-member,[16] multiparty Ad Hoc Committee established that, amongst other issues, the proliferation of these institutions diminished their efficiency and accessibility to the population as there was confusion as to which body to approach.[17] To address these obstacles, the main recommendation in the Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions (Asmal Report) was 'the establishment of a strengthened, highly organised and unitary body, called the South African Commission on Human Rights and Equality'.[18]

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[11] S 181 (4) states that "No person or organ of state may interfere with the functioning of these institutions."
[12] S 181 (5) affirms that "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."
[13] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 161.
[14] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 175.
[15] L Ensor 'Asmal rights report rings the changes, but will they gain acceptance?' *Business Day* 23 August 2007 available at *https://www.ffc.co.za/docs/news/2007/2007-08-23%20Asmal%20rights%20report%20rings%20the%20changes_Business%20Day.1.pdf, (*accessed on 21 October 2020).
[16] Members comprised five from the ruling party and five from opposition parties: Hon Prof Kader Asmal (Chairperson), Hon Mr SL Dithebe, Hon Ms C Johnson, Hon Adv TM Masutha later replaced by Hon Mr CV Burgess, Hon Mrs MJJ Matsomela, Hon Dr JT Delport, Hon Ms M Smuts, Hon Mr JH van der Merwe, Hon Mrs S Rajbally, Hon Mr S Simmons. Parliamentary support staf: Dr L Gabriel, Mr M Philander, Ms C Silkstone, Mr T Molukanele, Adv A Gordon (Adv M Vassen as alternate), Ms T Sepanya, Ms L Monethi, Ms J Adriaans, Mr T Schumann, and Mr E Nevondo.
[17] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 175.
[18] It is essential to note that the Committee recommended the amalgamation of the South African Human Rights Commission (SAHRC), the Commission on Gender Equality, the National Youth Commission, the Commission for Cultural, Religious and Linguistic Communities and the Pan South African Language Board. The report further

The rationale was that this body would be better equipped to address many of the issues currently facing human rights' promotion and protection in South Africa by overcoming fragmentation, improving accessibility and enabling human rights to be addressed in a coherent manner.[19]

This thesis builds on the Committee's key recommendation with a specific focus on the SAHRC and CGE. It explores how the amalgamation of these two institutions can play an integral role in enforcing the Constitution by creating an environment conducive to furthering and realising fundamental human rights. The reality that informs the recognition of the SAHRC and CGE is that, although the former has a broader mandate to protect human rights and the latter is designed to resolve gender equality issues; both institutions are structured to reinforce constitutional democracy through oversight, assessment and reporting on the observance of human rights, and gender equality violations.[20] Moreover, due to their powers to accept public complaints, investigate and make recommendations on human rights and issues related to gender equality, the SAHRC and the CGE are especially important to promoting and defending human rights in South Africa.[21] They further mediate and propose remedies. One of the ways the SAHRC does this is by monitoring and analysing the implementation of socio-economic rights by the State. Conversely, the CGE does this by concerted efforts in outreach, education, research on human rights and gender equality. Hence, even though a disparity exists in the gendered mandate of the CGE, the overlapping functions of these institutions are undeniable.

In this regard, Stevens and Ntlama opine that these institutions' roles are twofold: they must maintain a consultative role with the government by reviewing government performance while maintaining a reputation of being efficient and accessible to the public.[22] Therefore, it can be deduced that these functions place these institutions in a precarious position. To this effect, De Vos states that they must tread carefully in order to ensure the legislature's and executive's cooperation while simultaneously maintaining their independence by scrutinising executive or legislative actions.[23] Consequently, considering that the Constitution places trust in these institutions as tools for social and

recommended that the Electoral Commission, auditor-general, Public Protector, Public Service Commission, Independent Communications Authority of SA and the Financial and Fiscal Commission, remain independent.

[19] L Ensor 'Asmal rights report rings the changes, but will they gain acceptance?' *Business Day* 23 August 2007 available at *https://www.ffc.co.za/docs/news/2007/2007-08-23%20Asmal%20rights%20report%20rings%20the%20changes_Business%20Day.1.pdf, (*accessed on 21 October 2020).

[20] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 47.

[21] S Liebenberg 'Human Development and Human Rights South African Country Study' (2000) *Human Development Report 2000 Background Paper* at 23.

[22] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 60.

[23] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 163.

economic reform, independence is of utmost necessity. To succeed in this place of confidence, it follows that these institutions adopt a more assertive stance in executing their mandates.

While the SAHRC has succeeded in exercising strong and independent oversight over members of the executive and legislature, the same cannot be said for the rest of the Chapter 9 institutions. Hence, an integrated human rights body, composed of the SAHRC and the CGE, with more institutional muscle and administrative capacity, would achieve a wider outreach enabling it to manage the complaints of citizens more efficiently while holding functionaries to account. Simultaneously, the combined resources would ensure that the single body is well funded and has the needed legal power to not only address systematic rights abuses but also act as a forum for the millions of people without access to justice.[24]

1.3. STATEMENT OF PURPOSE

This thesis aims to examine whether the integration of the SAHRC and the CGE into a cohesive human rights body would address most of the challenges facing the existing Chapter 9 institutions in South Africa. The point of departure in answering such a question lies in examining the institutional and legal framework in protecting human rights and the development of National Human Rights Institutions (NHRIs). This discussion would take place from an international, regional and national perspective, allowing a simultaneous investigation of the prospects and shortcomings existing at all three levels. This discussion will be followed by an analysis of the history and development of transformative constitutionalism in South Africa and its role in shaping the framing of Chapter 9 institutions. The purpose will be attained with a predetermined stance that the interdependence and indivisible disposition of human rights suggests that a single body is best suited to resolve the barriers and disparities that impact several groups and further espouse institutional mechanisms to address human rights violations.

1.4. RESEARCH QUESTIONS

1.4.1 What is the international institutional and legal framework in the protection of human rights? To what extent has international and regional law developed in respect of devising guidelines for NHRIs?

1.4.2 How did constitutionalism and the pre- and post-democratic constitutional era, shape the framing of Chapter 9 institutions in South Africa?

[24] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 41.

1.4.3 What institutional and legal role do the SAHRC and CGE play in the national forum? What issues adversely affect the SAHRC and CGE in executing their function of upholding and supporting constitutional democracy?

1.4.4 How best can these institutions be amalgamated to ensure effective implementation of the Constitution and transformative constitutionalism as envisioned by Chapter 9 of the Constitution?

1.5. RESEARCH METHODOLOGY

The research methodology for this thesis is desktop based. This thesis will utilise two types of sources, mainly: primary and secondary. The primary sources to be consulted include, but are not limited to, case law, legislation, international treaties and agreements and original reports. An analysis of secondary sources will comprise journal articles, textbooks, and internet articles.

This research will be based mainly on descriptive and analytical methods. A descriptive approach would be used to identify both historical and current institutional and legal frameworks, concentrating on the implementation of constitutional values and principles through Chapter 9 institutions. Also, this thesis is analytical in the sense that it will explore the ideological attack on transformative constitutionalism from a range of political quarters – the most robust opposition being from constitutional abolitionists – who are motivated by alternative philosophies such as neo-marxism, critical legal studies and critical race theory. Against this, it will further analyse the role of the SAHRC and CGE in promoting constitutionalism and whether amalgamation of the two institutions can better achieve such a mandate.

1.6. LIMITATION OF STUDY

As with the majority of studies, the current study is subject to limitations. The first is that the thesis will not discuss all international and regional human rights instruments and bodies that contribute to human rights protection. Instead, the thesis will focus on specific international and regional human rights instruments and bodies to determine the international and regional framework in protecting human rights and the development of NHRIs. For example, this thesis limits its research to the International Bill of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and related implementation mechanisms when considering the international institutional and legal framework. Furthermore, in determining the institutional framework of NHRIs at the international and regional level, the thesis restricts its research to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), the Sub-Committee on Accreditation (SCA) of the International Coordinating

Committee, the Paris Principles, Network of African National Human Rights Institutions (African Network), and the African Commission on Human and Peoples' Rights (African Commission). The second limitation relates to the interrelationship between rights. Owing to the complexity of the concepts of interrelation, indispensability, interdependence and indivisibility – this research will be restricted to an analysis of the indivisibility and interdependence between first – and second-generation rights. In this regard, third-generation rights will not be discussed. Lastly, as alluded to above, this thesis will not include an extensive discussion of all the South African Chapter 9 institutions. Rather, it centres on the SAHRC and CGE, whose mutual special intermediary status and powers place them as powerful actors in promoting, protecting, and monitoring human rights in South Africa

1.7. CONCEPTUAL FRAMEWORK

As the country progresses into the third decade of democracy, there are increasing demands for constitutional change,[25] and the Constitution has come under sustained ideological attack from a range of critics. Some criticism relates to the implementation of the Constitution and its failure to deliver on its promises. On the other hand, there is criticism of the constitutional project, including the constitutional text, its normative content and the negotiated settlement.[26]

Joel Modiri affirms that there are four dominant positions around the Constitution.[27] First, anti-transformation conservatives; this group believes that the Constitution should play a minimal role and should seek to accommodate the interests of the previous ruling elite.[28] Second, constitutional optimists; people who belong to this group, generally believe that the Constitution is transformative and represents a fundamental and radical break from the past.[29] They contend that the problem lies in its implementation and not its roots. Third, constitutional sceptics; this group consists of legal theorists, mostly academics who are sceptical of the overemphasis on the Constitution.[30] The people belonging to this group would argue that the Constitution has deep liberal and Eurocentric roots that need to be examined and that the Constitution and law are fundamentally limited forms of social change. It is

[25] H Klug 'Challenging Constitutionalism in Post-Apartheid South Africa' (2016) *Constitutional Studies* vol 2 at 41.
[26] F Cachalia 'Democratic constitutionalism in the time of the postcolony: beyond triumph and betrayal' (2018) *South African Journal on Human Rights* vol 34 at 381.
[27] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[28] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[29] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[30] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

essential to note that this group does not condemn the Constitution; instead, they are cautious to over celebrate it. Fourth, constitutional abolitionists; this group contends that the problem is much more fundamental than the interpretation or text of the Constitution. They focus on whether the Constitution is an appropriate response to South African history and questions its origins.[31]

For the present question, this thesis will focus on the main critiques, the second and fourth positions, as outlined by Modiri. The second position consists of legal scholars who aver that the Constitution is fundamentally flawed and inscribes text with Western forms of reasoning and knowledge, therefore perpetuating the subordination of indigenous cultural forms.[32] In contrast, the fourth position comprises scholars who argue that the failure to deliver transformation is not the Constitution's, but 'a government that has forgotten its promises'.[33] At the core of these divergent views is the investigation of the "negotiated revolution" that contributed to the country's democratic transition.[34]

Modiri, who identifies with the constitutional abolitionists' position, advances that to understand the meaning of the negotiated settlement, one should first seek to understand what constitutions aim to achieve in the post-colonial period.[35] According to Modiri, a Constitution is principally concerned with forming society's legal and political order; it is much more than a set of legal text and provisions. Instead, it is the embodiment or should be the embodiment of the foundational norms, governing values and national culture of the community, however diverse.[36] It should seek to represent somethingof that community's understanding of the law, morality, and justice.[37] In this regard, Modiri contendsthat South Africa's Constitution falls short, as its constitutional democracy has been emptied over time

[31] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[32] F Cachalia 'Democratic constitutionalism in the time of the postcolony: beyond triumph and betrayal' (2018) *South African Journal on Human Rights* vol 34 at 382.
[33] P Andrews 'South Africa's problems lie in political negligence, not its Constitution' *The Conversation* 4 July 2017 available at *https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its constitution-80474,* (accessed on 20 July 2020).
[34] H Klug 'Challenging Constitutionalism in Post-Apartheid South Africa' (2016) *Constitutional Studies* vol 2 at 42.
[35] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[36] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[37] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

by the lack of tangible historical justice and the absence of an emancipatory sense of dignity and equality in the Black majority's lives.[38]

With this backdrop, Modiri turns to elaborate on the meaning of the "negotiated revolution" and notes, in this regard, that if one looks at the negotiated settlement reached in South Africa, they have to accept that the old order was kept alive because of the compromises that happened at the time.[39] The scholar advances that the South African Constitution is not decolonial or revolutionary.[40] A negotiated Constitution essentially means colonial Apartheid, spatial segregation, and economic inequality has been allowed to continue and continues to produce unfreedom. He says that the negotiated settlement suspended the struggle; so, there is the old South Africa status with white South Africa remaining in its place.[41]

To illustrate the above point, Modiri asserts that the constitutional revolution in South Africa changed the overall structure of society except where it is most necessary.[42] For instance, new names were given to streets and buildings, numerous publications appeared in African languages, a new national flag was introduced and a multitude of Apartheid laws were repealed, amongst other changes.[43] Yet, on the contrary, economic arrangements, racial and spatial inequality, hegemony, epistemic trauma, and labour repression were not affected by the new constitutional order.[44] He says that any statistic that measures the quality of life of South Africans today will show that the social division continues, inequality continues to be increased and expanded and that the structures of the Apartheid government are resilient.[45]

On the contrary, some critics accept as accurate that 'South Africa's problems lie in political negligence, not its Constitution', and that if properly implemented and executed, the provisions of the

[38] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 303.
[39] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[40] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[41] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).
[42] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 315.
[43] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 315.
[44] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 315.
[45] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

Constitution are capable of changing the lives of South Africans.[46] Ngcukaitobi identifies as a constitutionalist believer and thus, belonging to the constitutionalism optimist position, holds the same views and adopts a liberal understanding of the South African Constitution.[47] He argues that if there is any lesson to be learned from the South African constitutionalism trial and error experiment, it is that constitutions do not reform society; governments do.[48] However, only when they have the political will to do so.[49] Ngcukaitobi argues that South Africa cannot achieve a thorough transformation and effectively change society's widespread structural inequalities by tampering with the law.[50] Nor is legal fundamentalism the solution. Change only occurs through social activism and political action.[51] However, political action without the rule of law rapidly degenerates into the rule of the powerful against the weak.[52] He advances that the tools that can heal the past, regulate the future, and deliver a just future are not in the Constitution but instead in the realm of economics, politics, philosophy, and law.

Ngcukaitobi contends that although there may be a legal framework, if the State is unable to populate the framework with real meaning, it will qualify as an empty vessel.[53] He further advances that a Constitution gains its substance by ensuring and fulfilling its promises.[54] Consequently, the rule of law focusing on narrow legalism ultimately loses meaning and legitimacy, invoking contempt in people without land. Hence, the law can be easily captured and used to the detriment of the poor as an instrument for promoting the rights of the wealthy.

This thesis concedes that the criticisms expressed by the constitutional abolitionists are valid. However, it argues that these critiques are misdirected. To highlight the current dire state of economic, social, and political life in the country, we ought to guard against the use of the Constitution as a

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[46] P Andrews 'South Africa's problems lie in political negligence, not its Constitution' *The Conversation* 4 July 2017 available at *https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its constitution-80474,* (accessed on 20 July 2020).

[47] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

[48] T Ngcukaitobi 'Land reform needs laws and imagination' Mail & Guardian 21 September 2018 available at *https://mg.co.za/article/2018-09-21-00-land-reform-needs-laws-and-imagination/,* (accessed on 20 July 2020).

[49] T Ngcukaitobi 'Land reform needs laws and imagination' Mail & Guardian 21 September 2018 available at *https://mg.co.za/article/2018-09-21-00-land-reform-needs-laws-and-imagination/,* (accessed on 20 July 2020).

[50] T Ngcukaitobi 'Land reform needs laws and imagination' Mail & Guardian 21 September 2018 available at *https://mg.co.za/article/2018-09-21-00-land-reform-needs-laws-and-imagination/,* (accessed on 20 July 2020).

[51] T Ngcukaitobi 'Land reform needs laws and imagination' Mail & Guardian 21 September 2018 available at *https://mg.co.za/article/2018-09-21-00-land-reform-needs-laws-and-imagination/,* (accessed on 20 July 2020).

[52] T Ngcukaitobi 'Land reform needs laws and imagination' Mail & Guardian 21 September 2018 available at *https://mg.co.za/article/2018-09-21-00-land-reform-needs-laws-and-imagination/,* (accessed on 20 July 2020).

[53] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

[54] D Moseneke, Z Yacoob, T Ngcukaitobi, M Pillay, J Modiri and K Ozah 'Can Constitutionalism heal the past, regulate the future and deliver a just future?' *Department of Jurisprudence* 18 October 2018 at the University of Pretoria Conference Centre available at *https://www.youtube.com/watch?v=cyyjEeBZZ80* (accessed on 1 July 2020).

scapegoat to divert attention from the failures of the government. While the end of Apartheid has produced one of the world's most egalitarian constitutions, it and the guarantees of human rights for all cannot overcome the systemic economic inequalities inherent in South African post-Apartheid capitalism. A simple vote without food, shelter, and healthcare uses first-generation rights to mask the deep underlying issues that dehumanise people: poverty, homelessness and unemployment. To have real meaning, such rights must be accompanied by a living strategy rooted in the Constitution's fundamental values.

This thesis aims to contribute to the above divergent views by proposing that institutions supporting democracy should adopt a more assertive role in addressing the concerns surrounding the implementation of the Constitution and protection of socio-economic rights in the country. It further argues that the participation of the SAHRC and CGE can and has led to the law's engagement in improving citizens' lives, as was observed in *Bhe v Khayelitsha Magistrate; Shibi v Sithole*[55] which will be discussed in chapter 4 of this thesis. It is evident from this case that where the provisions encompassed in the Constitution have been implemented and progressively realised through proactive participation from Chapter 9 institutions, transformation is achieved. The Constitution does not and indeed cannot provide easy solutions to all the moral, social, economic, and political dilemmas that South Africans face. The constitutional principles have been settled, but the application of these principles to specific cases must be made by the judiciary and institutions established to support the consolidation of constitutional democracy.

1.8. CHAPTER OUTLINE

(a) Chapter 1

The first chapter is an overview of the thesis, research questions and limitation of the study.

(b) Chapter 2

The second chapter will discuss the international institutional and legal framework, focusing on the International Bill of Human Rights and its contribution to protecting human rights. It will further analyse the degree to which international and regional law has evolved concerning the formulation of NHRIs guidelines and determine the role of relevant international and regional human rights bodies in those developments.

[55] *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

(c) Chapter 3

This chapter will build on the brief history set out in Chapter 1 by allowing for a more in-depth discussion of the development of constitutionalism in South Africa and its role in shaping the framing of Chapter 9 institutions. This chapter reflects on a transition in legal culture, including a shift from a 'culture of authority to a culture of justification'.

(d) Chapter 4

Chapter four will investigate the role of two Chapter 9 institutions: the SAHRC and CGE, in the promotion, protection and monitoring of human rights. It will analyse the issues that continue to impede these two institutions' efficacy and affect their role in maintaining and fostering constitutional democracy. It will further explore the feasibility of merging the SAHRC and CGE, taking into account the effect that the merger might have on gender equality issues.

(e) Chapter 5

Chapter five will be the conclusion. It will reiterate this thesis's core findings and make recommendations to answer the research questions.

1.9. CONCLUSION

This thesis's main objective is to analyse whether a cohesive human rights body comprising the SAHRC and CGE is a viable solution for enforcing fundamental human rights protected by the Constitution. The international, regional, and national institutional and legal framework will also be considered, and the suitable recommendations formulated thereafter.

CHAPTER 2

INTERNATIONAL AND REGIONAL INSTITUTIONAL AND LEGAL FRAMEWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS

2.1. INTRODUCTION

'The South African Constitution is reputed to be one of the most international law-friendly constitutions in the world'.[56] International law is found in many provisions of the Constitution, thus necessitating at least a basic understanding of international law's fundamental rules and principles before studying the Constitution.[57] Dugard defines international law as 'a normative body of rules and principles which are binding upon States in their relations with one another'.[58] However, since public international law is consensual and permits states a large measure of discretion in the enforcement of international law, this thesis proffers that Dugard's definition is antiquated as it does not recognise other bodies that are actively participating in the public international law level. Shaw's concept of public international law, which incorporates 'relations between States in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions', is preferable.[59]

As international law has expanded and diversified, so has its importance, particularly in the International Human Rights Law discipline. Human rights protection in the international institutional and legal framework is fragmented with several human rights instruments[60] and institutions. To ensure efficiency and implementation, the focus has shifted to strengthening the regional and national frameworks. To this end, NHRIs have emerged as an integral part of ensuring effective implementation of international and regional instruments that impose human rights obligations on States. Dinokopila observes, however, that the participation of such institutions is contentious; while the domestic status of NHRIs does not give rise to any doubts, their role and participation in the international and regional realms is not at all clear.[61]

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[56] D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) *African Human Rights Law Journal 16*(2) at 311.
[57] The preamble to the Constitution explicitly states that the people of South Africa wish to 'build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. Furthermore, section 39(1)(b) of the Constitution enjoins the courts, tribunal or forums to consider international law when interpreting the Bill of Rights. Sections 231(4), 232 and 233 of the Constitution also establish the role of international law in the domestic framework.
[58] J Dugard 'International Law' 4ed (2011) *Juta & Co Ltd* at 1.
[59] M Shaw 'International Law' 6ed (2014) *Cambridge University Press* at 2.
[60] The term 'human rights instruments' will encompass international, binding and non-binding (soft law), treaties and other agreements (such as Declarations, Conventions, Covenants, Charters, Protocols, General Comments or other documents), that solidify fundamental rights and regulate their implementation.
[61] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights'(2008) *African Human Rights Journal Law* at 28.

In light of these observations, this chapter will examine the degree to which international and regional law has evolved concerning the development of guidelines for NHRIs. In addressing this issue, the starting point will be to trace the trajectory of human rights protection in the international institutional and legal framework. Following this analysis, the thesis will then assess the development of NHRIs and their framework, as outlined in the Paris Principles. Ultimately, the aim of this chapter is to shed light on an otherwise unclear area of law, particularly as it relates to the nature and role of NHRIs at the international and regional levels. This understanding is essential for every State that seeks to resolve concerns that obstruct the NHRIs' mission of facilitating the efficient enforcement of international and regional human rights instruments domestically.

2.2. THE INTERNATIONATIONAL BILL OF HUMAN RIGHTS

The United Nations (UN) has been responsible for shaping a comprehensive and extensive international human rights legal and institutional framework since its inception in 1945.[62] Several scholars hold that the UN human rights system dates back to the 1948 Universal Declaration of Human Rights (UDHR),[63] which Smith says is 'the first, and possibly singularly most important, step taken by the UN' in the furtherance of international protection of human rights.[64] According to Lattmann, Tóth and Vizi, the UDHR contained 'the first list of human rights' recognised by the UN.[65] Other scholars, such as Rehman, Stevens, and Ntlama, accept that the UDHR not only enfolds 'a remarkable range of rights'[66] but is also assigned the task of interpreting the 1945 UN Charter.[67] This idea will be elaborated further below.

Moreover, Mayrhofer claims that the adoption of the UDHR signalled the beginning of a 'three-step process' which began with the development of the UDHR, followed by the ratification of two binding treaties, and culminated in the introduction of accompanying monitoring mechanisms.[68] As

[61] A Smith 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28(4) *Human Rights Quarterly* at 908.
[62] M Mayrhofer et al. 'International Human Rights Protection: Institutions and Instruments' (2014) *FRAME Deliverable 4.1* at ii.
[63] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). The UDHR was adopted by the General Assembly, with 48 States supporting the adoption, none contesting and eight nations abstaining from the vote (Byelorussian SSE, Czechoslovakia, Poland, South Arabia, Ukrainian SSR, USSR, Union of South Africa, and Yugoslavia).
[64] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 37.
[65] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 24.
[66] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 77.
[67] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 54.
[68] M Mayrhofer et al. 'International Human Rights Protection: Institutions and Instruments' (2014) *FRAME Deliverable 4.1* at 4.

mentioned, the UDHR spawned two main Covenants.[69] One of these was the International Covenant on Civil and Political Rights (ICCPR),[70] and the other was the International Covenant on Economic, Social and Cultural Rights (ICESCR)[71]. Because they are regarded as the cornerstone of international human rights protection, the UDHR, ICCPR, and ICESCR are collectively referred to as the International Bill of Human Rights. Smith furthers this by stating that the International Bill of Human Rights is the starting point in examining modern international human rights.[72] The author associates this with the notion that while the UDHR has articulated the status quo of rights that have been accepted as a universal standard, the International Covenants elaborate on these rights with a much more comprehensive, enforceable legal framework.[73] These instruments' interrelationship will prove particularly important when exploring the concept of indivisibility and interdependence of human rights. However, for the present purposes, the thesis now shifts its focus to the significance of each of the instruments constituting the International Bill of Human Rights.

2.2.1. 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS

From the onset, it is essential to point out that by virtue of being a Declaration, the UDHR is, by definition, a non-binding instrument.[74] Rehman fittingly points out that the UDHR was never meant to be legally binding; instead, 'the intention of those who drafted the Declaration was to provide guidelines which States would aim to achieve'.[75] Notwithstanding the non-binding nature of the UDHR, the instrument does impose several obligations on member States, one of which is the 'obligation to promote universal respect for and observance of human rights and fundamental freedoms'.[76] In this regard, Stevens and Ntlama advance that by imposing such obligations, the UDHR 'laid the foundation for the argument that Member States had a duty to promote, respect and fulfil civil, political and socio-economic rights'.[77] This thesis shares the same sentiments and holds that the UDHR undoubtedly played a critical role in setting universal human rights values. The relevance of its contemporary impact is evidenced in both the preambles of international human rights treaties and

[69] This thesis will use the term 'United Nations International Covenants of 1966' to collectively refer to the ICCPR and ICESCR.
[70] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 23 March 1976, in accordance with Article 49 of the ICCPR.
[71] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 3 January 1976, in accordance with Article 27 of the ICESCR.
[72] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 30.
[73] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 30.
[74] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 38.
[75] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 79.
[76] In its preamble, the UDHR emphasises that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.
[77] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 54.

the inclusion of its provisions in national constitutions and constitutional documents that function as a guide for governments.

With this understanding, it is clear that the UDHR's substantial contribution to the development of the international human rights system can neither be disputed nor ignored. However, Rehman warns that a question may arise relating to the Declaration's non-binding character and the practical relevance of its consideration.[78] This thesis will respond by arguing that despite the non-binding nature of the UDHR, its substantive provisions have been widely accepted since the 1950s and have since then become binding.[79] This argument is based on the premise that the UDHR derives binding authority from three sources.[80]

First, as was previously stated, the UDHR arguably serves as an authoritative reference for interpreting human rights provisions pronounced in the UN Charter. Rehman takes this argument further and contends that the authoritative interpretation of the UDHR is 'substantiated by both the *travaux preparatoires*[81] of the Declaration and from its text'.[82] Concerning the former, the author advances that the *travaux preparatoires* of the UDHR indicates that several State representatives regarded the UDHR as 'a document interpreting the human rights provisions of the Charter'.[83] In addressing the latter, the author draws from Rodley's argument, asserting that the UDHR's preamble by referring to Articles 55 and 56 of the UN Charter suggests that 'each right contained in the Universal Declaration is effectively incorporated into [the] Charter articles 55 and 56'.[84]

Secondly, it could be argued that the UDHR's wide acceptance and binding nature of most of its provisions satisfy the customary international law test.[85] According to Rehman, 'there is overwhelming evidence of State practice with the requisite opinio juris to confirm the customary

[78] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 79.
[79] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 38.
[80] Article 38(1) of the Statute of the International Court of Justice provides that: 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'
[81] This term is used to refer to the official record or documents used during the negotiation and drafting of a treaty.
[82] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 79.
[83] See J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 79. In this regard, Rehman lists a number of examples to substantiate his argument. One such example is that of 'The Chinese representative who was of the view that, while the United Nations Charter placed Member States under an obligation to observe human rights, the Universal Declaration of Human Rights "stated these rights explicitly".
[84] See J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 79.
[85] Two requirements must be met before a practice or instrument becomes a part of customary rule of international law: first, the practice must be uniform, constant, and widely adopted by various States (Usus) and second, the practice must be accepted as law by the States involved (Opinio juris).

binding nature of many of the provisions of the Declaration'.[86] In 1970, Judge Ammoun lent his support to this notion, based on Article 38(1)(b) of the Statute of the International Court of Justice, by writing in a separate opinion on the Namibia case that the affirmations of the UDHR:

> 'can bind States on the basis of custom within the meaning of paragraph 1(b)…whether because they constituted a codification of customary law… or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute'.[87]

Some commentators, however, contend that not all rights enunciated in the UDHR have been developed into customary international law. One such commentator is Smith, who, while acknowledging that no State can evade the impact of the UDHR, contends that 'arguably, not all rights in the Universal Declaration have crystallised into custom: decisions should be based on an analysis of the status of the right in question'.[88]

Thirdly, as previously mentioned, the contents of the UDHR are firmly entrenched in international, regional and national human rights instruments of many States. It can be argued that this is indicatory of them forming part of jus cogens. [89] As such, Lattmann, Tóth and Vizi point out that 'today it is nearly impossible to argue against the legally binding nature of its norms, especially that all of them has been reaffirmed by legally binding international conventions'.[90] Smith concurs, noting:

> 'NGOs rely on the Universal Declaration as the standard of human rights; some such as Article 19, the international NGO on freedom of speech, even take their name from the Universal Declaration'.

Rehman adds that the important affirmation of the fundamental rights contained in the UDHR confirms the jus cogens character of it, which has become 'firmly established in international law'.[91] However, the author further states that although nearly all of these provisions form 'part and parcel'

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[86] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 80. Rehman notes that evidence of the UDHR as custom can be derived from its constant reaffirmation by the GA.
[87] *Namibia Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion Sep. Op. Ammoun 1971 *ICJ* Reps 16 at 64.
[88] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 38. Smith uses the American case of *Filatiga v Pena-Irala* to illustrate this point, noting that the court found that the prohibition on torture 'has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights'. *See Filártiga v Peña-Irala (1980)* F 2d 876 (2d Cir. 1980).
[89] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 25.
[90] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 25.
[91] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 82. Examples of UDHR fundamental rights with jus cogens character are contained in Articles 2, 3, 4, 5, 10 and 11 of the UDHR.

of every human rights instrument, some rights do not form part of the body of jus cogens and to categorise them as such would be inaccurate.[92]

The above discussion has illustrated that, while the practical relevance of the UDHR has been called into question, the UDHR remains a remarkable instrument, used either as an interpretative aid, a source of customary law or as part of jus cogens. The relevance of the UDHR in examining the international protection of human rights is evident. Due to the widespread acceptance and implementation of the fundamental rights reflected in the UDHR, it appears as though a binding authority has been reached – to an extent. The views expressed by the scholars above is an accurate reflection of the respect and command which the UDHR invokes.

2.2.2. THE UNITED NATIONS INTERNATIONAL COVENANTS OF 1966

Following the adoption of the UDHR in 1948, the ICCPR and ICESCR were adopted in 1966 and entered into force in 1976.[93] Lattmann, Tóth and Vizi note that the Covenants' main differences lie in their nature and the obligations they impose on States.[94] Article 2 of both covenants define States' general obligations. The ICCPR enjoins States to 'respect and to ensure to all individuals' the rights contained in the Covenant immediately, allowing for limitations only to the extent the Covenant provides.[95] Conversely, the ICESCR provides for the 'progressive realisation of rights', which is dependent on 'available resources' of States and requires States to 'take steps…by all appropriate means'.[96] Hence, while the former calls for immediate recognition and enforcement of human rights, the latter sets its obligation to a somewhat 'lower-level' as States are only required to do their best to ensure human rights.[97] Notwithstanding, Shaw stresses that the rights contained in these covenants are intended to be binding obligations.[98]

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[92] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 82. The rights Rehman is referring to can be found in Articles 14, 18, 22, 24, 25 and 27.

[93] South Africa is signatory to these both these treaties and this will become important when the thesis assesses the obligation it imposes on South Africa to ensure that the commitments that it's undertaken in terms of these treaties are in fact implemented.

[94] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 40.

[95] Article 2(1) of the ICCPR, reads:
'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[96] Article 2(1) of the ICESCR, states:
'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[97] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 45.

[98] M Shaw 'International Law' 6ed (2014) *Cambridge University Press* at 314.

As their titles indicate, the ICCPR is concerned with civil and political rights, such as the right to liberty and equality, and accessibility to information and participation in the political life of the community and society. In comparison, the ICESCR endeavours to promote participation in economic, social, and cultural activities. Furthermore, Neves-Silva states that while the ICCPR is focused on individual freedoms, the ICESCR focuses on citizens' social welfare by guaranteeing fair and equal conditions to citizens.[99] Thus, Smith notes that the ICCPR details first-generation rights, basic fundamental rights required for a healthy, democratic society to thrive.[100] By way of contrast, the ICESCR comprises second-generation rights – which, according to Stevens and Ntlama, 'create an environment that is conducive to the realisation' of particular rights, depending on the available resources.[101] Neves-Silva, aptly points out that despite the rights being contained in two covenants, 'human rights must be [seen] as a system where all rights are interdependent, indivisible and interrelated'.[102] Stevens and Ntlama concur, noting that:

> 'The traditional classification of rights should not be regarded as the unequivocal acceptance that first-generation rights are more important than second or third generation rights. The general argument is that all human rights are interlinked, interconnected and interrelated.'[103]

This thesis holds the same sentiments as those expressed by Neves-Silva, Stevens and Ntlama. It now turns to a discussion of the indivisibility and interdependence between human rights.

2.2.3. THE INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS

One of the main arguments in this thesis pertains to the interrelationship between rights and whether the interdependence and indivisibility permits the consolidation of human rights institutions that were initially established to cater to different rights. Thus, to determine the practicality of such a recommendation, the thesis must first explore the international human rights position in relation to the interdependence of human rights. As a starting point, Nickel suggests that human rights' indivisibility is 'an official doctrine' of the UN, supported both by the General Assembly and the UN Office of the

[99] P Neves-Silva, GI Martins & L Heller 'Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation' (2019) *BMC International Health Human Rights 19(1)* at 1.
[100] RKM Smith 'International Human Rights' 5ed (2012) *Oxford University Press* at 38.
[101] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 51.
[102] P Neves-Silva, GI Martins & L Heller 'Human rights' in C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at interdependence and indivisibility: a glance over the human rights to water and sanitation' (2019) *BMC International Health Human Rights 19(1)* at 1.
[103] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 50.

High Commissioner for Human Rights (OHCHR).[104] Hence, the main UN General Assembly resolutions have endorsed the concept of interdependence of human rights. An early assertion was made in the 1968 Proclamation of Teheran:

> 'Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible'.[105]

The 1993 Vienna Declaration reiterated the above concept, noting:

> 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[106]

In fact, Rehman argues that the indivisibility of rights dates back to 1948 when the UDHR affirmed the interdependence and interrelatedness of all human rights.[107] However, despite this background, the debate about whether human rights should be considered indivisible remains prevalent. Various writers have expressed their views on this matter. One such writer is Nickel, and he defined indivisibility as being 'the idea that no human right can be fully realised without fully realising all other human rights'.[108] For the author, 'indivisibility and interdependence are not the same'.[109] This is because indivisibility demands a much stronger type of interdependence, one where the right exists only if the other is realised and inversely, thus establishing reciprocity.[110] On the contrary, interdependence takes place when one right presupposes another for it to exist, but reciprocity is lacking, which is to say that the former right will be reliant on the latter, but the latter right will not

[104] JW Nickel 'Rethinking indivisibility: towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 30(4) at 985.
[105] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 para 13.
[106] *Vienna Declaration and Programme of Action* (1993) adopted by the World Conference on Human Rights in Vienna on 12 July 1993 A/CONF.157/23 para 5, part 1.
[107] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 140.
[108] JW Nickel 'Rethinking indivisibility: towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 30(4) at 984.
[109] JW Nickel 'Rethinking indivisibility: towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 30(4) at 987.
[110] JW Nickel 'Rethinking indivisibility: towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 30(4) at 990.

require the former to be realised.[111] As a result, in this author's opinion, many rights are interdependent, but not indivisible.

In a study convened by Neves-Silva, Martins and Heller about the interdependence and indivisibility of rights, they attempted to examine whether the violation of the right to access water and sanitation inhibits the realisation of other rights.[112] The authors' research concluded that interdependence and indivisibility between the right to water and sanitation and the rights to health, housing, and education exist.[113] According to the authors, this is because without obtaining education and health rights, homeless people cannot re-enter society, thus making it difficult to access other fundamental rights.[114]

These findings align with Kaufman, who conducted a study to analyse the links between first-generation and second-generation rights.[115] While Kaufman acknowledged that the correlations between these categories vary in strength, the author identified close links between the civil and political liberties (first-generation rights) and the impact their success or failure has in developing socio-economic rights (second-generation rights).[116] According to Minkler and Sweeney, the notion of indivisibility and interdependence finds its roots on the understanding that, to guarantee a person's dignity, all human rights should be realised.[117] Thus, a structure of human rights is developed such that the infringement of one right is detrimental to the realisation of all the other rights.[118]

This thesis aligns itself with the views of the above authors. This is to say that first-generation rights should not be perceived as more important than other human rights. Fulfilling each human right is a goal in itself and as a means to the actualisation of all types of rights; hence, failure to give effect to civil and political rights adversely affects the realisation of economic, social and cultural rights and vice versa.

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[111] JW Nickel 'Rethinking indivisibility: towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 30(4) at 991.
[112] P Neves-Silva, GI Martins & L Heller 'Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation' (2019) *BMC International Health Human Rights 19(1)* at 3.
[113] P Neves-Silva, GI Martins & L Heller 'Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation' (2019) *BMC International Health Human Rights 19(1)* at 6.
[114] P Neves-Silva, GI Martins & L Heller 'Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation' (2019) *BMC International Health Human Rights 19(1)* at 6.
[115] D Kaufmann 'Human rights and governance: the empirical challenge' (2004) *World Bank Institute* at 3.
[116] D Kaufmann 'Human rights and governance: the empirical challenge' (2004) *World Bank Institute* at 23.
[117] L Minkler & S Sweeney 'On the invisibility and interdependence of basic rights in developing countries' (2011) *Human Rights Quaterly* at 352.
[118] L Minkler & S Sweeney 'On the invisibility and interdependence of basic rights in developing countries' (2011) *Human Rights Quaterly* at 353.

2.2.4. BRIEF OVERVIEW OF THE IMPLEMENTATION MECHANISMS

The UN Human Rights Committee (ICCPR Committee) is the body 'responsible for oversight of the implementation of the civil and political rights' contained in the ICCPR.[119] It was established under article 28 of the ICCPR and comprises 18 members (often called 'experts') who are elected by States parties to the ICCPR to serve in their personal capacity for a term of four years.[120] This Committee should not be confused with the UN Commission on Human Rights, which was replaced by the UN Human Rights Council in 2006. The ICCPR Committee has four monitoring functions outlined by the OHCHR.[121] First, the Committee receives and assesses reports prepared by State parties detailing the measures adopted to realise the rights encompassed in the Covenant.[122] Rehman highlights the importance of this function, stating 'the reporting procedure…is the principle mechanism of implementation and…only compulsory procedure to which all State parties must comply'.[123]

Secondly, the Committee produces General Comments that interpret and clarify the ICCPR's provisions.[124] Lattmann, Tóth and Vizi advance that in addition to assisting State parties to fulfil their responsibilities under the Covenant, these General Comments also serve as important documents in international human rights law. They provide a professional interpretation of the text and serve as an auxiliary source.[125] Thirdly, the Committee receives complaints from individuals claiming that their Covenant rights have been violated by a State party.[126] In this regard, it is noteworthy that all available

[119] UN Office of the High Commissioner for Human Rights 'Fact Sheet 15, Civil and Political Rights: The Human Rights Committee' Rev 1(2005) *UN Office of the High Commissioner for Human Rights* at 2.
[120] Article 28 of the ICCPR, states:
1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

[121] UN Office of the High Commissioner for Human Rights 'Fact Sheet 15, Civil and Political Rights: The Human Rights Committee' Rev 1(2005) *UN Office of the High Commissioner for Human Rights* at 12.
[122] UN Office of the High Commissioner for Human Rights 'Fact Sheet 15, Civil and Political Rights: The Human Rights Committee' Rev 1(2005) *UN Office of the High Commissioner for Human Rights* at 14.
[123] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 115.
[124] UN Office of the High Commissioner for Human Rights 'Fact Sheet 15, Civil and Political Rights: The Human Rights Committee' Rev 1(2005) *UN Office of the High Commissioner for Human Rights* at 13.
[125] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 44.
[126]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9. Article 1 of this Protocol, reads:
'State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.'

domestic remedies must be exhausted before petitioning the Committee.[127] Lastly, the Committee also considers certain inter-State complaints of non-compliance made by one State party against another.[128]

The Committee on Economic, Social and Cultural Rights (ICESCR Committee) is responsible for observing the enforcement of the provisions contained in the ICESCR. However, unlike the ICCPR, which provided for the ICCPR Committee in its Covenant, the ICESCR had initially tasked the UN Economic and Social Council (ECOSOC) with the monitoring function. However, the ICESCR Committee was subsequently created by the ECOSOC in 1985 to have a body to which the monitoring task can be delegated.[129] Initially, the reporting procedure was the only mechanism applied by the Committee to monitor the observance of the ICESCR.[130] However, after calls for a 'stronger mechanism, drafting a complaint procedure was introduced in 2008 under the Optional Protocol to the ICESCR'.[131] This Protocol provides the Committee with the competence to receive and consider individual complaints and inter-State complaints.[132] However, the full strengths of the new developments have not been realised since their existence is relatively new.[133]

2.2.5. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The preceding discussion on the International Bill of Human Rights, necessitates a discussion of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[134] CEDAW, as the name implies, is the key treaty that promotes women's equal rights and the eradication of discrimination against women on an international scale.[135] The UN General Assembly adopted this convention, dubbed the 'International Bill of Rights for Women' in 1979. [136] Article 1 of CEDAW defines 'discrimination against women' as:

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[127] Article 5(2)(b) of the First Optional Protocol to the ICCPR, states;
'The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.'

[128] UN Office of the High Commissioner for Human Rights 'Fact Sheet 15, Civil and Political Rights: The Human Rights Committee' Rev 1(2005) *UN Office of the High Commissioner for Human Rights* at 15.

[129] UN Economic and Social Council 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' Adopted at the 22nd plenary meeting, 28 May 1985 E/RES/1985/17 on 28 May 1985.

[130] J Rehman 'International Human Rights Law' 2ed (2010) *Pearson Education Limited* at 166.

[131] The General Assembly adopted resolution A/RES/63/117, on 10 December 2008.

[132] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 46.

[133] This Protocol entered into force in 2013.

[134] Adopted and opened for signature, ratification and accession by General Assembly resolution 34/ 180 of 18 December 1979; entry into force 3 September 1981, in accordance with article 27(1) of the CEDAW. South Africa ratified the CEDAW in 1996. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en* (accessed on 27 February 2021).

[135] P Khanna, Z Kimmel & R Karkara 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth' (2016) *UN Women* at 1.

[136] South Africa ratified the CEDAW in 1996.

> 'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

Article 2 of CEDAW further obligates signatory states to adopt a number of steps to eliminate all forms of discrimination against women and girls. CEDAW, which consists of a preamble and thirty articles, has been praised for its role in advancing women's rights and gender equality throughout the world, as well as for 'providing the basis for judicial decisions, and constitutional, legal and policy reforms at the country level'.[137] However, Lattmann, Tóth and Vizi note that, despite its admirable goals, the convention has encountered and continues to encounter significant challenges.[138] One such challenge, according to Forere and Stone, is CEDAW's limited application in the African context, as the convention fails to describe biases and restrictions unique to Africa.[139]

The primary interpretive and supervisory body of CEDAW is the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee).[140] State parties to the convention are required to submit national reports at least every four years to this Committee, outlining the measures undertaken to comply with their CEDAW obligations.[141] The 1999 adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol) further strengthened enforcement mechanisms.[142] The Optional Protocol, for example, allows for the submission of individual and group petitions alleging violations of CEDAW, as well as the launch of investigations into egregious or systemic violations of CEDAW.[143] The former is referred to as the communications procedure by Lattmann, Tóth, and Vizi, while the

[137] P Khanna, Z Kimmel & R Karkara 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth' (2016) *UN Women* at 4.
[138] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 46.
[139] M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *AHRLJ* at 439.
[140] JL Ernst 'The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary Edited by Marsha A. Freeman, Christine Chinkin and Beate Rudolf' (2012) *Melbourne Journal of International Law 13(2)* at 890.
[141] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 48.
[142] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) ('Optional Protocol'). Given that South Africa also ratified the Optional Protocol, it has committed itself to be bound by the provisions of CEDAW and its Optional Protocol.
[143] JL Ernst 'The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary Edited by Marsha A. Freeman, Christine Chinkin and Beate Rudolf' (2012) *Melbourne Journal of International Law 13(2)* at 891.

latter is referred to as the inquiry procedure.[144] This discussion has demonstrated that CEDAW and its oversight mechanisms, the CEDAW Committee and the Optional Protocol, have undoubtedly aided in propelling countries ahead in adopting palpable efforts to achieve equality for women.

2.2.6. OTHER HUMAN RIGHTS TREATIES

In addition to the ICCPR, ICESCR and CEDAW there are further treaties that codify and focus on specific human rights, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[145] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[146] the Convention on the Rights of the Child (CRC),[147] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW),[148] the Convention on the Rights of Persons with Disabilities (CRPD),[149] the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[150]

The above treaties attest to the fact that there have been considerable efforts to protect sectors of vulnerable groups requiring protection. These conventions support this by reflecting the particular vulnerabilities and safeguards afforded to their human rights. Equally, Africa, under the leadership of the AU, initially under the Organization of African Unity (OAU), which was designed to protect and liberate countries from colonisation, passed the African Charter of Human and Peoples' Rights (Banjul Charter) which was adopted in 1981.[151] Thus, apart from international agreements, the AU uses treaties

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[144] T Lattmann, N Tóth & B Vizi 'International Protection of Human Rights' (2014) *National University of Public Service* at 48.

[145] Adopted by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969, in accordance with article 19 of the ICERD. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en* (accessed on 27 February 2021).

[146] Adopted by General Assembly Resolution 39/46 of 10 December 1984; entry into force 26 June 1987, in accordance with article 27(1) of the CAT. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en* (accessed on 27 February 2021).

[147] Adopted by General Assembly Resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49(1) of the CRC. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en* (accessed on 27 February 2021).

[148] Adopted by General Assembly Resolution A/RES/45/158 of 18 December 1990; entry into force 1 July 2003, in accordance with article 87(1) of the ICRMW. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en* (accessed on 27 February 2021).

[149] Adopted by General Assembly Resolution A/RES/61/106 of 13 December 2006; entry into force 3 May 2008, in accordance with article 45(1) of the CRPD. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en* (accessed on 27 February 2021).

[150] Adopted by General Assembly Resolution A/RES/61/177 of 20 December 2006; entry into force 23 December 2010, in accordance with article 39(1) of the ICPPED. Available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en* (accessed on 27 February 2021).

[151] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

and instruments designed to protect human rights at the regional level. Accordingly, signing the international and regional treaties and covenants above obligates States to implement these international commitments on the national level and domesticate them. Below is a discussion of how States seek to do so using NHRIs.

2.3. NATIONAL HUMAN RIGHTS INSTITUTIONS

As outlined above, the UN framework has a long tradition of encouraging States to set up human rights bodies to fulfil their human rights duties.[152] NHRIs as a concept date back to 1946 when the ECOSOC made its first call to member States to form 'local human rights Committees' following the Nuclear Commission's recommendation on Human Rights. However, despite further encouragement from ECOSOC and the UN Commission on Human Rights (CHR)[153] over the ensuing decades, progress towards creating NHRIs was slow. It was in the 1990s that NHRIs became a well-established and widely accepted concept.

2.3.1. DEFINING A NHRI

Before examining the evolution of NHRIs, it is essential to understand what an NHRI is. The OHCHR has defined NHRIs as 'State bodies with a constitutional and/or legislative mandate to protect and promote human rights'. [154] In concurrence, the African Commission defines NHRIs as:

> 'statutory bodies established by governments in Africa and charged with the responsibility of promoting and protecting human rights institutions in their respective countries'.[155]

Scholars such as Pohjolainen, Haász and Dinokopila have employed different definitions for NHRIs. For instance, though acknowledging the inherent difficulty of a single universally accepted definition, Pohjolainen argues that NHRIs should generally be defined as 'an independent body established by a national government for the specific purpose of advancing and defending human rights at the domestic

[152] The Asia Pacific Forum of National Human Rights Institutions 'Fact Sheet 1: What are national human rights institutions?' (2020) available at *https://www.asiapacificforum.net/support/what-are-nhris/what-are-nhris/#:~:text=They%20were%20developed%20at%20a,promote%20and%20protect%20human%20rights* (accessed on 10 November 2020).

[153] The 1995 Handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights refers at times to the "Commission on Human Rights" in relation to the period before April 2006. The Human Rights Council replaced the Commission on Human Rights that month (see General Assembly resolution 60/251). The Human Rights Council, while different in membership and in its responsibilities, also assumed "all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights" with the requirement to "improve and rationalize" them where necessary.

[154] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 13.

[155] African Commission on Human and Peoples' Rights 'National Human Rights Institutions' available at *https://www.achpr.org/nhris* (accessed on 10 November 2020).

level'.[156] Haász simply defines NHRIs as 'key domestic mechanisms for promotion and protection of human rights'.[157] Ultimately, it is evident that there is no universally agreed concept of NHRI. Dinokopila has acknowledged the challenge of defining the term, noting in this regard: 'the definition of NHRIs seems to be contextual, and varies, depending to a large extent on the nature of the study and the purpose for which the study is being undertaken'.[158]

Dinokopila takes the analysis further and establishes that NHRIs were initially developed for the UN to use their access to national authorities and communities to publicise human rights activities, thereby promoting the enforcement of international human rights standards and norms domestically.[159] NHRIs can, therefore, be defined as being located at a 'crossroads between government and civil society'.[160] To this end, Smith States that the unique role of NHRIs between government and civil society 'distinguishes them from being either a classic government agency or a[n] NGO'.161

This thesis proffers that while the definition for NHRIs is not yet universal, it can be inferred from the above that NHRIs are embedded in the obligation for accountability and redress for human rights violations. While this is accomplished through numerous ways, depending on the context, this thesis advances that the following features are most paramount: autonomy from governments, protection, and advancement of human rights at the domestic level; and the aim of ensuring that States are accountable for their international, regional, and national human rights obligations. Thus, the thesis agrees with the above definitions and additionally concurs with the views expressed by Dinokopila and Smith about the nature of NHRIs.

2.4. INSTITUTIONAL FRAMEWORK OF NHRIs AT INTERNATIONAL LEVEL

2.4.1. A BRIEF HISTORY

As alluded to above, the concept of NHRIs originated from the UN and was first discussed by the ECOSOC in 1946,[162] two years prior to the proclamation of the UDHR as a 'common standard of

[156] A Pohjolainen 'The Evolution of National Human Rights Institutions - The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 6.
[157] V Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* at 165.
[158] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 29.
[159] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 34.
[160] A Smith 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28(4) *Human Rights Quarterly* at 908.
[161] A Smith 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28(4) *Human Rights Quarterly* at 908.
[162] UN Economic and Social Resolution 2/9 of 21 June 1946.

achievement for all peoples and all nations' by the UN General Assembly.[163] Hence, it is apparent that the idea was conceived in the earliest years of the UN. It was further confirmed in a 1978 Seminar on National and Local Institutions for the Promotion and Protection of Human Rights.[164] The CHR organised this seminar intending to suggest and draft a set of guidelines for the composition and operation of NHRIs.[165] The CHR and General Assembly consequently endorsed these guidelines. In addition, the Assembly further urged States to:

> 'take appropriate steps for the establishment, where they did not already exist, of national institutions for the promotion and protection of human rights, and requested the Secretary-General to submit a detailed report on existing national institutions'.[166]

Consequently, Meuwissen considers this seminar to be the first attempt to establish a standardised NHRI concept and the first apparent reference to NHRIs as a term.[167] Sharing the same sentiments, Pohjolainen adds that during this time, the UN negotiations were one of the few places where governments deliberated the issue of 'domestic implementation'.[168] Furthermore, following the

[163] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 4.

[164] UN General Assembly '*National institutions for the promotion and protection of human rights'* 14 December1978, A/RES/33/46.

[165] These guidelines suggested that the functions of national institutions should be:
To act as a source of human rights information for the Government and people of the country,
To assist in educating public opinion and promoting awareness of and respect for human rights,
To consider, deliberate upon and make recommendations regarding any particular state of affairs that may exist nationally and which the Government may wish to refer to them,
To advise on any questions regarding human rights matters referred to them by the Government,
To study and keep under review the status of legislation, judicial decisions, and administrative arrangements for the promotion of human rights, and to prepare and submit reports on these matters to the appropriate authorities,
To perform any other function which the Government may wish to assign to them in connection with the duties of the State under those international instruments in the field of human rights to which it is a party,
As regards the structure of such institutions; the guidelines recommended that they should:
Reflect in their composition wide cross-sections of the nation, thereby bringing all parts of the population into the decision-making process in regard to human rights,
Function regularly, and that immediate access to them should be available to any member of the public or any public authority,
In appropriate cases, have local or regional advisory organs to assist them in discharging their functions.

[166] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 4.

[167] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 2.

[168] A Pohjolainen 'The Evolution of National Human Rights Institutions –The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 124.

seminar, the UN's role in promoting NHRIs became progressively clear, resulting in the General Assembly and the CHR passing several resolutions regarding NHRIs in the 1980s.[169]

2.4.2. THE 1991 FIRST INTERNATIONAL WORKSHOP IN PARIS

In 1991, the First International Workshop of National Institutions for the Promotion and Protection of Human Rights took place, and it was a significant turning point in the brief history of NHRIs.[170] At this workshop, a draft specifically recommending NHRIs was endorsed by the CHR in resolution 1992/54 as the Principles relating to the status of national institutions (the Paris Principles) and subsequently by the General Assembly in 1993 in resolution 48/134.[171] After the Paris Principles, which reflected the refining and expansion of the 1978 Guidelines, several States adopted an NHRI by establishing a new institution or transforming established institutions such as ombudsmen.[172] The Paris Principles have now been incorporated into the human rights lexicon and are widely accepted as a means of recognising the validity and credibility of NHRIs.[173]

Meuwissen compares this workshop to the 1978 seminar mentioned above, noting some essential distinctions. First, the 1991 international workshop was headed by NHRIs, compared to the 1978 seminar led by government officials.[174] Secondly, the purpose of the 1991 meeting was more modest relative to the 1978 seminar that initially sought to establish guidelines for NHRIs.[175] This is because the aim of the CHR resolution informing the 1991 Conference was to urge existing NHRIs to 'step up their action' and strengthen coordination between existing bodies.[176] Hence, the Paris Principles go further than the 1978 guidance by pointing out the role NHRIs are supposed to play (oversight and

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[169] A Pohjolainen 'The Evolution of National Human Rights Institutions –The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 124.

[170] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 1.

[171] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 5.

[172] According to these Principles, a national institution shall, have the following responsibilities:
To submit recommendations, proposals and reports on any matter relating to human rights (including legislative and administrative provisions and any situation of violation of human rights) to the Government, parliament and any other competent body,
To promote conformity of national laws and practices with international human rights standards,
To encourage ratification and implementation of international standards,
To contribute to the reporting procedure under international instruments,
To assist in formulating and executing human rights teaching and research programmes and to increase public awareness of human rights through information and education,
To cooperate with the United Nations, regional institutions and national institutions of other countries.

[173] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 7.

[174] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 4.

[175] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 4.

[176] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 4.

implementation of human rights standards) and the manner in which this should be achieved (ensuring independence from government and civil society).[177] This indicates that at the 1991 Conference, these NHRIs focused on maintaining their independent status and sought to ensure that they do not act as 'mouthpieces of government'.[178]

2.4.3. THE 1993 WORLD CONFERENCE ON HUMAN RIGHTS IN VIENNA

Subsequent to 1991, the work of the UN in relation to NHRIs gained considerable momentum. As envisioned by the drafters of the Paris Principles, the CHR immediately adopted the Paris Principles and communicated them to the Preparatory Committee of the 1993 World Conference.[179] The 1993 World Conference on Human Rights in Vienna adopted the Vienna Declaration and Programme of Action, which confirmed numerous fundamental principles, including the interdependence and indivisibility of all human rights and establishing a contemporary human rights agenda.[180] Pohjolainen asserts that due to Vienna's success, the UN's role in the field of human rights was elevated.[181] Meuwissen further observes that this Conference had a significant impact on the Paris Principles' international recognition, as the 171 attendant States acknowledged 'the important and constructive role'[182] played by NHRIs.[183] Beredugo concurs with these sentiments, stating that this World Conference echoed the important position of NHRIs and also called on States to strengthen them to enable better promotion and defence of international human rights.[184] Notably, since this World Conference in 1993, the UN has engaged in regular NHRIs international conferences and meetings.[185]

2.4.4. THE 1993 SECOND INTERNATIONAL WORKSHOP AT TUNIS

The Second International Workshop of National Institutions for the Promotion and Protection of Human Rights was the cornerstone of NHRIs.[186] NHRIs complying with the Paris Principles were, for

[177] Equality and Human Rights Commission 'Human Rights Report: Fulfilling the Paris Principles' (2010) *Equality and Human Rights Commission* at 7.
[178] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 5.
[179] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 7.
[180] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 5.
[181] A Pohjolainen 'The Evolution of National Human Rights Institutions – The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 125.
[182] Vienna Declaration and Programme of Action (25 June 1993) para 36.
[183] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 7.
[184] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 99.
[185] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 8.
[186] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 7.

the first time, recognised as essential actors in promoting and defending human rights, and their creation and development was officially advocated.[187] In essence, the Paris Principles were deemed the international standard and minimum requirements that NHRIs should follow to be considered credible by their peers and within the UN framework.[188] The workshop formally formed the ICC in an attempt to strengthen cooperative ties.[189]

2.4.5. INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

As outlined above, the ICC was initially established at the Second International Workshop in Tunis in 1993. The OHCHR has defined it as:

> 'an international, independent body that promotes the establishment and strengthening of NHRIs in conformity with the Paris Principles'.[190]

Through this definition, it can be inferred that the ICC is mandated to use the Paris Principles as guidelines for deciding membership of the SCA. In this regard, Mayrhofer states that the SCA assesses NHRIs for compliance with the Paris Principles by reviewing the mandate, composition and functions of NHRIs to determine their accreditation status.[191] The OHCHR is a permanent observer on the SCA and serves as the secretariat of the ICC.[192] 'Accreditation' is the formal recognition that the Paris Principles are to be wholly complied with by NHRIs, and it occurs in compliance with the code of practice of the SCA of the ICC.[193] As alluded to above, there are currently three levels of accreditation: A-status institutions are in compliance with the Paris Principles and are therefore voting members of ICC, B-status are observer members and may participate in ICC meetings as observers without the

[187] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 7.
[188] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 30.
[189] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 6.
[190] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 30.
[191] M Mayrhofer et al. 'International Human Rights Protection: Institutions and Instruments' (2014) *FRAME Deliverable 4.1* at 70.
[192] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 44.
[193] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 44.

right to vote, and C-status consists of institutions that are non-compliant and have no rights or privileges with the ICC, but may be invited to participate as observers.[194]

However, Haász advances that despite the significance of accreditation, some scholars have approached accreditation with scepticism, calling into question the issue of reliability.[195] Such scholars question the NHRIs' full compliance with the Paris Principles and consider the accreditation criteria, including the Paris Principles, too weak and thus unreliable.[196] While others, such as Murray, express reservations about the accreditation's emphasis on the NHRIs' mandate and regulations as opposed to the institutions' functional efficacy, and efficiency.[197]

In light of the above, the thesis accepts that the SCA still has room for considerable growth in strengthening its processes and criteria. However, in an endeavour to highlight such shortcomings, one ought to guard against underestimating its role and significance on the international plane. The Paris Principles currently serve as the benchmark for NHRIs and thus provide the key elements for measuring and assessing the status of NHRIs. Furthermore, although they are not binding, these Principles have 'gained considerable political and moral weight' owing to the international acceptance of its framework.[198] Similarly, the SCA has played and continues to play a crucial role in encouraging compliance with such principles and thus provide the yardstick by which to assess the structure and operations of NHRIs.

2.4.6. PARIS PRINCIPLES AT INTERNATIONAL LEVEL

Against the preceding background, it is evident that the international institutional framework of NHRIs is compiled in a variety of texts, namely, the Paris Principles, the ICC Sub-Committee on Accreditation General Observations, the Handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights, the UN Fact Sheet 19: National Institutions for the Promotion and Protection of Human Rights and the 1978 Guidelines on the Structure of National Institutions for the Protection and Promotion of Human Rights.[199] In sum, these instruments outline the responsibility of NHRIs in the promotion and protection of universal human rights principles. According to Pohjolainen, the Paris Principles 'provide the minimum

[194] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 45.
[195] V Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* at 171.
[196] V Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* at 171.
[197] V Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* at 171.
[198] A Pohjolainen 'The Evolution of National Human Rights Institutions - The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 9.
[199] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 30.

standards for the establishment of NHRIs'.[200] However, Dinokopila also warns that while these instruments shape the basis of the recommended framework for establishing NHRIs, much also depends on the extent of constitutional rights and the scale, composition and historical context of the State concerned.[201]

The Paris Principles were adopted in March 1993 by the CHR and are now considered the minimal requirements needed by States wishing to set up such institutions.[202] According to Haász, the main tasks of NHRIs as outlined by the Paris Principles are:

> 'monitoring of human rights and their implementation; political consultation; investigation of human rights violations; awarenessraising, such as human rights education; and cooperation with other institutions having competence in the areas of human rights promotion and protection at the national, regional, and international levels'.[203]

Hence, it is evident from these characteristics that the Paris Principles promote cooperation between NHRIs and the relevant international and regional human rights institutional and legal mechanisms.

However, Dinokopila maintains that the extent of the cooperation of NHRIs remains an area of contention among international human rights scholars.[204] The author adds that the instruments, from which the NHRIs claim their authority, are not explicit about their engagement in the international setting, thus undermining their international and regional participation.[205] To fill this vacuum, says Dinokopila, a liberal reading of these documents has been adopted by scholars in an effort to accommodate more extensive international and regional participation of NHRIs.[206]

Furthermore, Pohjolainen reiterates that the Paris Principles 'do not possess the quality of legally binding international rules'.[207] This is because they initially represented the views and contributions

[200] A Pohjolainen 'The Evolution of National Human Rights Institutions –The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 6.
[201] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 31.
[202] A Smith 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28(4) *Human Rights Quarterly* at 912.
[203] V Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* at 169.
[204] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 33.
[205] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 33.
[206] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 33.
[207] A Pohjolainen 'The Evolution of National Human Rights Institutions –The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 9.

of a few NHRIs, some NGOs and some governments, even though the workshop responsible for drafting and adopting the Principles was assembled according to the CHR's request.[208]

Accordingly, no specific UN human rights treaty obliges State parties to create NHRIs compliant with the Paris Principles. Instead, the UN treaty bodies steadily urge member States to define and improve NHRIs compliance with the Paris Principles.[209] To this end, Meuwissen states that the establishment of NHRIs under the Paris Principles is now being supported by various actors and the Principles have been incorporated in binding treaty law; the Optional Protocol to the Convention on Torture (OPCAT)[210] and the Convention on the Rights of Persons with Disabilities (CRPD)[211] are such examples. The Paris Principles are stated in these instruments as criteria that should be considered by States when creating a domestic process under the respective Conventions.[212]

2.5. INSTITUTIONAL FRAMEWORK OF NHRIs AT REGIONAL LEVEL

2.5.1. A BRIEF HISTORY ON THE NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS

The international community depends heavily on the assistance it gets from regional human rights structures such as those operating in Africa, the Americas and Europe.[213] This is because regional human rights systems are becoming increasingly active by playing a complementary role in reinforcing international human rights standards.[214] For this thesis, the focus will be on the African continent and related framework.

NHRIs have emerged as the leading paradigm for responding to Africa's post-colonial history, that is marked by severe human rights violations. To this effect, the African Commission has noted that NHRIs continue to play a substantial role in strengthening the Commission by facilitating the ratification of human rights treaties in member countries.[215] Furthermore, the OHCHR has identified regional, subregional networks and NHRIs as a significant complement to the international system,

[208] A Pohjolainen 'The Evolution of National Human Rights Institutions –The Role of the United Nations' (2006) *The Danish Institute for Human Rights* at 9.
[209] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 12.
[210] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), New York, 18 December 2002. Art. 17 *juncto* art. 18, para 4.
[211] Convention on the Rights of Persons with Disabilities (CRPD), New York, 13 December 2006. Art. 33, para 2.
[212] K Meuwissen 'The Paris Principles and National Human Rights Institutions: Lost in Translation?' (2015) Working Paper No. 163 *Institute for International Law* at 1.
[213] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: A handbook on the Establishment and Strengthening on National Institutions for the Promotion and Protection of Human Rights' (1995) *Professional Training Series No. 4* at 3.
[214] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 4.
[215] African Commission on Human and Peoples' Rights 'National Human Rights Institutions' available at *https://www.achpr.org/nhris* (accessed on 10 November 2020).

owing to their right to attend the HRC as observers and participate in various processes.[216] This increases the frequency of engagements between institutions within the same geographic region as they meet and address matters of mutual concern.[217] The networks identified by the OHCHR are The Network of African National Human Rights Institutions; The Network of National Institutions for the Promotion and Protection of Human Rights in the Americas; The Asia-Pacific Forum of National Human Rights Institutions; and The European Group of National Institutions for the Promotion and Protection of Human Rights.[218]

In 2007, The African Network was formed, with the aim of encouraging African NHRIs to be more efficient and cooperative.[219] The African Network has recognised the important role of NHRIs in elections, democratic governance and fostering democratic development.[220] Furthermore, the African Network serves as a regional forum for inter-institutional relations, collaboration, and cooperation among African NHRIs.[221]

2.5.2. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

NHRIs have also received recognition in the framework of the OAU. In this respect, the 1979 UN Seminar on Regional Human Rights Commissions, led to the adoption of the 1981 Banjul Charter. With regard to NHRIs, the significance of the Charter was in article 26, which requested governments to:

> 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms.'

Against this background, Dinokopila asserts that there is an enhanced degree of cooperation between the African Commission and NHRIs, whose legitimacy is drawn from articles 26 and 45(1)(c) of the Banjul Charter.[222] Essentially, as in Article 26 referred to above, Section 45(1)(c) equally obliges the

[216] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 5.
[217] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 5.
[218] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 5.
[219] The Network replaced the Coordinating Committee of African NHRIs, set up in 1996. Its Constitution was signed at the sixth Conference of African NHRIs (Kigali, October 2007) and provides for a permanent secretariat in Nairobi with the financial support of OHCHR.
[220] UN Office of the High Commissioner for Human Rights (OHCHR) 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) *Professional Training Series No. 4(Rev.1)* at 5.
[221] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 104.
[222] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 26.

African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. Moreover, NHRIs should engage with the African Commission in compliance with the 1998 Resolution on granting affiliate status to National Human Rights Institutions in Africa.[223] This Resolution specifies the rights and responsibilities of NHRIs and the requirements an NHRI must meet before the African Commission to achieve its affiliate status. Accordingly, NHRIs also support the African Commission at the national level in fostering and protecting human rights.

2.5.3. PARIS PRINCIPLES IN AFRICA

Compliance with the Paris Principles entitles NHRIs to a number of benefits and international recognition, such as accreditation status and participation rights with the HRC, the ICC and the African Commission.[224] To highlight this issue, Beredugo states that even NHRIs membership in the African Network is contingent on conformity to the Paris Principles.[225] However, considering that these Principles are the minimum guidelines, States may depart from them to the extent they deem necessary, ensuring their essence is retained.[226]

Dinokopila's earlier proposition of constitutional culture is of relevance in this regard.[227] Hence, States comply with the Principles while considering the State's constitutional mandate, legislation and history. Sharing the same sentiments as Dinokopila, Beredugo advances that in a continent with 'diverse political, economic, social, religious, and cultural backgrounds, experiences and challenges' uniformity of enforcement is not to be anticipated.[228] However, Beredugo concludes by saying despite this, the Paris Principles are reasonably complied with by a majority of the NHRIs in Africa to varying degrees.[229]

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[223] AU 'Resolution on granting affiliate status to National Human Rights Institutions in Africa' (1998) *ACHPR* Available at *https://archives.au.int/bitstream/handle/123456789/2051/ACHPR%20and%20NHRI%20CRITERIA_E.pdf?sequence=1&isAllowed=y* (accessed on 26 December 2020).

[224] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 104.

[225] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 105.

[226] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 105.

[227] BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2008) *African Human Rights Journal Law* at 31.

[228] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 105.

[229] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 121.

With the above historical context, it is evident that there is a constant need to engage the African States regarding compliance with their legal obligations. With this understanding, the thesis turns to the obligation and ability of NHRIs to further socio-economic, civil and political rights implementation in the continent. Beredugo advances that while States assume the responsibility to fulfil such rights, the substantive implications of taking on this role have been challenging for Commonwealth African States.[230] This obligation has been expressed and affirmed by the ICESCR Committee in General Comment 10 and the HRC in several of its resolutions and asserted by the NHRIs themselves.[231]

The plethora of these documents imply that States and their NHRIs have undertaken an international and regional commitment to foster and promote the human rights contained in their ratified treaties.[232] This is further demonstrated by the Abuja Declaration, in which NHRIs in Africa agreed not only to make socio-economic rights a core component of their action plans but also to commit to other obligations in ensuring full conformity to the Paris Principles and sharing 'best practices' in the enforcement of socio-economic rights.[233]

2.6. CONCLUDING REMARKS

This chapter included a discussion of the International Bill of Human Rights and CEDAW while highlighting the contribution of their provisions and oversight mechanisms in the protection of human rights. The relevance of the international and regional institutional and legal framework in examining the NHRIs is indispensable. Due to the international law principles reflected in the South African Constitution, the above analysis will prove essential in the next chapter. The evolution of guidelines for NHRIs at both the international and regional level outlined that the history, structure and constitutional mandate of a State can shape its NHRIs. Furthermore, the broad array of texts reflects the intricacy of balancing all the competing interests at play in addressing the promotion and protection of human rights at international and regional levels. This essentially means that NHRIs in Africa

[230] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 121.
[231] CESCR General Comment 10. For instance, in General Comment 10, the CESCR not only stresses that NHRIs have a potentially crucial role to play in fostering and maintaining the indivisibility and interdependence of all human rights but also urges these institutions to provide full importance to socio-economic rights in all their respective activities.
[232] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 122.
[233] AJ Beredugo 'The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic right in Commonwealth Africa' (unpublished LLD thesis, University of Pretoria, 2014) at 124.

recognise and assume their international and regional duty to advance the implementation of all human rights, despite the domestic status of those rights.

CHAPTER 3

SHAPING CHAPTER 9 INSTITUTIONS IN SOUTH AFRICA

3.1. INTRODUCTION

Since independence from colonial rule, new constitutions have been adopted in Africa that foster constitutionalism and good governance. African States have introduced constitutionalism elements into their constitutions, such as recognition and protection of human rights and freedoms, separation of powers, independence of the judiciary, review of constitutionality of the law, regulation of constitutional amendments and institutions to foster democracy.[234] The underlying principle behind constitutionalism, Fombad maintains, is the need to ensure that a Constitution does not become a smokescreen that conceals violations by politicians and blatant disregard for the law.[235] Hence, one of the conditions thought to be necessary for constitutionalism to thrive is trust in State institutions as they are entrusted to provide a process by which people can obtain redress for human rights violations. Hence, this chapter will first outline the development of constitutionalism and transformative constitutionalism in the South African context, followed by an assessment of the impact of Chapter 9 institutions in fostering and strengthening constitutional democracy.[236]

3.2. CONTEMPORARY CONSTITUTION-MAKING

Tribe and Laundry present constitution-making as an opportunity to right past wrongs and further structure the future.[237] For these authors, constitution-making 'offers a glimmer of hope to compose the atmosphere in which the politics of the future will be conducted'.[238] This thesis holds that the significance of this point is evident in the preamble and transformative nature of the South African Constitution.[239] With that fundamental understanding of constitution-making in mind, Tribe and Laundry assert that the four primary features that define any constitution-making are 'process,

[234] C Fombad Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) *Buffalo Law Review* vol 59 at 1016.
[235] C Fombad Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) *Buffalo Law Review* vol 59 at 1015.
[236] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 160.
[237] LH Tribe & TK Laundry 'Reflections on Constitution-Making' (1993) *American University International Law Review 8 no. 2/3* at 630.
[238] LH Tribe & TK Laundry 'Reflections on Constitution-Making' (1993) *American University International Law Review 8 no. 2/3* at 630.
[239] The preamble of the Constitutions reads: 'We therefore…adopt this Constitution…so as to… *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'..*

structure, substance, and compromise'.[240] This thesis will focus primarily on the process used in constitution-making.

Saunders informs us that contemporary constitution-making, particularly in the last twenty years, recognises three things: first, the authority for a Constitution must come from the people of the State which requires some form of participation; second, constitutions are increasingly created for multicultural societies often after long periods of conflict and not for homogenous people. This relates to historical religious and linguistic communities, which may need nation-building cohesion, minority protection from the majority. Lastly, the involvement of the international community, such as international law becoming part of constitutions and international experts participating in the national processes of constitution-making approaches.[241] However, Jackson holds the view that 'the goal of constitution-making should be understood, not as producing a written constitution, but as promoting constitutionalism'.[242]

Saunders further advances that the final feature of contemporary constitution-making is the emphasis on process instead of the content of the Constitution or, in other words, on how the Constitution is developed as opposed to what it contains at a particular point in time.[243] This assertion aligns with the earlier observations of Tribe and Laundry, who observed that 'the connections between form and substance are too strong for anyone to deny the importance of process, or to ignore its susceptibility to manipulation'.[244] Hence, it is evident from the assertions presented that the process utilised to draft the Constitution can add legitimacy to it, augment public awareness of it and expect the Constitution to be observed in both spirit and form. This thesis now turns to discuss three principal phases that are involved in the constitution-making processes, with a focus on the processes adopted in South Africa.

3.3. PRINCIPAL PHASES OF CONSTITUTION-MAKING PROCESSES

3.3.1 AGENDA-SETTING

Saunders suggests that the first phase in the constitution-making process is the agenda-setting; this is the road map on the way forward, where there is the resolution of deadlocks and possibly illegal continuity of old constitutional arrangements.[245] In this regard, Jackson notes that the negotiation

[240] LH Tribe & TK Laundry 'Reflections on Constitution-Making' (1993) *American University International Law Review 8 no. 2/3* at 631.
[241] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 2-3.
[242] VC Jackson 'What's in a Name – Reflections on Timing, Naming, and Constitution-Making' (2008) 49 *William & Mary Law Review* at 1254.
[243] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 3.
[244] LH Tribe & TK Laundry 'Reflections on Constitution-Making' (1993) *American University International Law Review 8 no. 2/3* at 632.
[245] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 4.

process in South Africa marked 'a clear break from the prior regime'.[246] This phase in South Africa involved negotiations in the Convention for a Democratic South Africa (CODESA) and Multi-party Negotiating Process (MPNP) that saw the adoption of the 1993 interim Constitution.[247] For Klug, the interim Constitution 'marked a dramatic, substantive revolution in South African law'.[248] Ebrahim and Miller, add that the creation of the interim Constitution was 'as important a milestone as the adoption of the final Constitution'.[249]

Furthermore, the legitimacy of the constitution-making body is crucial in this phase. In this regard, Ebrahim and Miller discuss the Constitutional Assembly as having stressed openness and inclusiveness in its operations.[250] Saunders adds that a relatively open participation process, including transitional instruments[251] to address the old regime's lack of legitimacy as a tool towards gaining legitimacy of the new regime in the final Constitution, also significantly contributed to the process.[252] Notably, despite the mistrust between the two main negotiating parties,[253] the process yielded some legitimacy, partly due to a sufficient level of trust being established between stakeholders to facilitate agreement on the new Constitution's framework.[254] Jackson made a similar observation in earlier work and lauded the negotiation parties, noting:

> 'One must not ignore the importance of the personal characteristics and self-restraint of much of the leadership in the South African negotiations, which also helped to create space for a constitutional transition that was surprisingly deliberative and broadly inclusive'.[255]

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[246] VC Jackson 'What's in a Name - Reflections on Timing, Naming, and Constitution-Making' (2008) 49 *William & Mary Law Review* at 1268.

[247] This process lasted approximately two years. On 20 and 21 December 1990 the first session of CODESA (Convention for a Democratic South Africa) was held, followed by CODESA 2 on 15 May 1992. However, after tension and conflict between the parties the CODESA talks came to a halt. In March 1993 full negotiations began at the World Trade Centre under the name Multi-party Negotiating Process (MPNP). This body went on to draw up and adopt the 34 constitutional principles to guide the Constitutional Assembly (CA) tasked with drawing up the final Constitution. The negotiation process culminated in the passing of the Constitution of the Republic of South Africa Act 200 of 1993.

[248] H Klug 'Participating in the Design: Constitution-Making in South Africa' (1996) *Review of Constitutional Studies 3, no. 1* at 55.

[249] H Ebrahim & L Miller 'Creating the birth certificate of a new South Africa: constitution making after apartheid' in Miller, LE & Aucoin, L (eds) *Framing the state in times of transition: case studies in constitution making* (2010) *Chapter 5* at 120.

[250] H Ebrahim & L Miller 'Creating the birth certificate of a new South Africa: constitution making after apartheid' in Miller, LE & Aucoin, L (eds) *Framing the state in times of transition: case studies in constitution making* (2010) Chapter 5 at 121. According to these authors, three fundamental principles were adopted by the Constitutional Assembly to ensure its credibility, namely: inclusiveness, accessibility and transparency.

[251] One such instrument, according to Jackson, is the South African Interim Constitution. The author refers to this Constitution as a 'transitional constitution' because it sought not only to entrench itself as law for a short period, but also to advance entrenched principles from which future constitution makers cannot depart i.e. the 34 constitutional principles which served as the foundation of the final Constitution.

[252] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 4.

[253] The main negotiating parties were the African National Congress (ANC) and National Party (NP).

[254] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 5.

[255] VC Jackson 'What's in a Name - Reflections on Timing, Naming, and Constitution-Making' (2008) 49 *William & Mary Law Review* at 1270.

This thesis accepts the process used in this stage of constitution-making. It is among the most daunting challenges that negotiation partners face in this process to bring calm when operating in the middle of uncertainty, and indeed to find a consensus also in the face of conflicting views and policies. With deep-seated racial and divisive problems having run wild in South Africa, the nation was profoundly fractured at this stage, and trouble was brewing. The gravity of the task, the difficulties with CODESA and multiparty negotiation forum, all attest to the fact that this was an incredibly challenging time for parties to reconcile their interests and broker the power-sharing to come. Hence, the negotiation parties had to show great restraint and pursue a settlement of as little aggression as possible. The parties comprising the MPNP and leading the talks at the time showed real ingenuity in that regard. As a consequence, although, there was a considerable risk of violence in the South African transition, in the end, it was, for the most part, averted. Additionally, the inclusivity displayed in this phase of the process was internationally applauded as a seamless transformation in contrast to other countries.[256]

3.3.2 CONSTITUTION'S DESIGN, DRAFTING AGREEMENTS AND APPROVAL

The second process comprises the Constitution's design, its drafting agreements, and approval.[257] Tribe and Laundry advance that as drafters are entrusted with the fate of a country going forward, they must assume tremendous obligations, noting:

> 'The content of a constitution is likely to have an enormous impact in shaping the lives and character of the people who live under it, and who take steps to affirm it as their own even in the remarkable circumstance of their disagreement with what it requires of them'.[258]

It follows then that extensive public participation is expected and practised in this phase. In this regard, Saunders notes that three mechanisms are employed, either alone or in combination. First, an advisory body constituted by experts or representatives or both.[259] The second mechanism, an elected body such

[256] For example, Tribe and Laundry compare this process to that adopted in the United States of America and note in this regard: 'The heterogeneity of the nineteen parties of CODESA" can be contrasted with the homogeneity of those who wrote the Constitution of 1787, but it must be recognized that ours was an artificially created homogeneity. The Constitution was not being written only for white, freeholding, property-owning males, yet they were the only ones consulted.

[257] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 6.

[258] LH Tribe & TK Laundry 'Reflections on Constitution-Making' (1993) *American University International Law Review 8 no. 2/3* at 640.

[259] The 1995 three-member Constitutional Review Commission appointed by the President of Fiji offers one example.

as the Constitutional Assembly in South Africa. [260] The third mechanism is referendums on the draft Constitution as happened in Rwanda and Zimbabwe who provided referendums on the draft text.[261]

The South African constitution-making process is said to have been a representative participation process. Furthermore, Hart advances that women and minorities participated in working groups guaranteed by the procedural rules.[262] However, Saunders contends that this was still mostly a top-down process as the public did not get to vote on the final text; instead, the Constitutional Court ratified the text in the two Certification Judgments.[263] In addition, Saunders notes in this regard, that although South Africa was admired for the considerable amount of public submissions, there were concerns raised about the extent to which such submissions had been taken into account.[264]

Nevertheless, it is clear from the discussion above that participation in this process of constitution-making is supposed to be significant for the people of the relevant States, and the kind of participation is usually up to the States concerned. Many of the modern constitutions employed differing democratic engagement strategies during the third wave of constitutionalism and constitution-making.[265] This is merely done to uphold the legitimacy of the Constitution and to ensure that it represents the will of the people. However, it is solely up to the executive whether the Constitution is applied after it has been agreed upon.[266]

3.3.3 IMPLEMENTATION

Saunders proposes that it is imperative to establish a constitutional culture in which constitutional mandates are understood; both the text and spirit of the Constitution are observed by those responsible for exercising public power, the civil society, and security services.[267] Fombad identifies four formal and informal mechanisms that can be utilised in the implementation stage of constitution-making.[268]

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[260] The Interim Constitution provided for a Parliament made up of two houses: the National Assembly and ninety-member Senate (currently known as the National Council of Provinces, NCOP). The Constitutional Assembly comprised both of both houses, and was tasked with drawing up a final Constitution guided by the 34 fundamental principles within two years.

[261] *See* V Hart 'Constitution-making and the right to take part in public affairs' in Miller, LE & Aucoin, L (eds) Framing the state in times of transition: case studies in constitution making (2010) *United States Institute of Peace Press* at 35.

[262] V Hart 'Constitution-making and the right to take part in public affairs' in Miller, LE & Aucoin, L (eds) *Framing the state in times of transition: case studies in constitution making* (2010) Chapter 2 at 34.

[263] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 8.

[264] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 8.

[265] V Hart 'Constitution-making and the right to take part in public affairs' in Miller, LE & Aucoin, L (eds) *Framing the state in times of transition: case studies in* constitution making (2010) Chapter 2 at 44.

[266] R Stacey 'Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process' (2011) *Oxford University Press and New York University School of Law* at 612. Countries such as Kenya have foreseen challenges with implementation and put in place particular institutions to assist with that implementation process going forward. For example, the Kenyan High Court has itself recognised that the Constitution rests on an extra-constitutional spirit of the people.

[267] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 9.

[268] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 15.

First, constitutions may include time limit provisions for the implementation of certain obligations.[269] Sections 32(2)[270] and section 33(3)[271] of the South African Constitution, which required Parliament to enact legislation relating to the rights of access to information and administrative justice, are examples of such provisions. Secondly, constitutions may provide specialised institutions that will implement its provisions.[272] Relevant for this thesis are the Chapter 9 institutions, introduced by the South African Constitution, entrusted with furthering democratic values and advancing the Constitution's fundamental values.[273]

The third mechanism consists of actors in constitutions that play a role in the defence, interpretation, and implementation of the Constitution.[274] For instance, the executive in policy formulation, the legislature in developing appropriate legislation, and the judiciary as an overseer. Lastly, actual and potential action from an active citizenry and civil society organisations, including the media and professional persons.[275] In this respect, Fombad points out that a Constitution's efficacy is dependent on its performance in expressing the people's desires and hopes as much as it does on its ability to protest and protect it against any real, 'threatened, active or passive' breach of its provisions.[276]

Given this sense, this thesis argues that the implementation phase varies from the other two processes because it is an evolving process which necessitates continual realization and execution. To do this, many parties must work together to create a community in which respect for human rights, transparency, and implementation of the commitments as stated in the Constitution are both anticipated and the standard. Hence, Saunders' earlier proposition of constitutional culture is of great relevance in this stage of constitution-making. The government and other bodies must understand their

[269] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 15.
[270] S 32(2) of the Constitution reads: "National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state."
[271] S 33(3) of the Constitution provides:
"National legislation must be enacted to give effect to these rights, and must:
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."
[272] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 16.
[273] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in *Assessing the Performance of South Africa's Constitution* (2016) International Institute for Democracy and Electoral Assistance at 2.
[274] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 16.
[275] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 20.
[276] C Fombad 'Problematising the issue of constitutional implementation in Africa' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 20.

constitutional mandates, and display reverence for the Constitution's text and spirit.[277] This thesis also concurs with the assertions of Fombad in that the Constitution will only accomplish the goal of fostering constitutionalism, good governance and regard for the rule of law if the implementation and compliance of the Constitution are certain and don't depend on any individuals' or institutions' goodwill.[278]

3.4. TRANSFORMATIVE CONSTITUTIONALISM

Having discussed the constitution-making process, it is essential to explore the concept of transformative constitutionalism and how its main elements contribute to the evolving constitutional democracy of South Africa.

3.4.1. CONCEPT OF TRANSFORMATIVE CONSTITUTIONALISM

There is no universally agreed concept of transformative constitutionalism.[279] The former Chief Justice of the Constitutional Court, Pius Langa, acknowledged the challenge of defining the term on a legal basis, noting in this regard: 'it is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.'[280] There needs to be consensus, however, for an understanding of transformative constitutionalism. Hence, it is accepted that transformative constitutionalism is prescriptive by indicating how the State's power should be exercised and normative by establishing the values to be respected in the exercise of such power. Put differently, it is not merely descriptive since it sets out the government structure and requires it to be laid down in a written Constitution. For Kibet and Fombad, transformative constitutionalism recognises Africa's 'past failures of constitutionalism' have resulted in substantial State abuses of fundamental rights and the courts' subsequent failure to protect those rights.[281]

With this historical context, transformative constitutionalism, therefore, sets out the structure of the government by furthering three essential elements. First, the separation of powers into legislative, executive and judicial powers, the exercise of which is balanced against each other. Secondly, the origin of the power of the State lies in the will of the people, and thus the State is limited to the exercise of the power conferred to it. Lastly, judicial review as an assurance that the rules and obligations

[277] C Saunders 'Constitution-making in the 21st century' (2012) 4 *International Review of Law* at 9.
[278] C Fombad 'Introduction' in C Fombad (ed) The implementation of modern African constitutions: challenges and prospects (2016) *Pretoria University Law Press* at 4.
[279] J Brickhill & Y Van Leeve 'Transformative Constitutionalism: Guiding Light or Empty Slogan?' in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 351.
[280] J Brickhill & Y Van Leeve 'Transformative Constitutionalism: Guiding Light or Empty Slogan?' in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 351.
[281] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRLJ* at 341.

provided for in the Constitution are complied with and implemented. The third element has garnered some controversy as it probes into whether the constitutional system advocated by constitutionalism creates an inherent tension between the majority's rule and unelected judges' decisions to invalidate decisions made by elected representatives. Modiri submits that:

> 'In these critiques, the constitution was conceived as an obstacle to Black majority rule and was seen to subvert the democratic legitimacy of the ruling party by subjecting the decisions of the executive to the scrutiny of the judiciary'.[282]

However, Kibet and Fombad believe that judicial review is of the utmost necessity. This assertion is based on the rationale that the judiciary is at the heart of transformative constitutionalism. This is because the principle places trust in the law and the courts, as 'guardians of the Constitution', to bring about change and reform in society.[283]

3.4.2. ELEMENTS OF TRANSFORMATIVE CONSTITUTIONALISM

While the definition and nature of transformative constitutionalism may be contested, many of its elements can be ascertained. Former Chief Justice, Pius Langa, advances that transformative constitutionalism demands two things: first, a society founded on substantive equality and, second, a transformation of the legal culture.[284] Concerning the first aspect, he points out that transformative constitutionalism calls for a social and economic revolution: this includes the realisation of socio-economic rights and greater access to education and opportunities through various processes, including affirmative action measures. Kibet and Fombad express the same sentiments and suggest that this requires a concerted attempt to empower historically marginalised sectors of society by utilising instruments that seek to protect human rights and achieve social transformation.[285]

The above leads us to the second aspect: a transformation of legal culture, which involves a shift in the perception of the law and its position in society and politics.[286] Former Chief Justice Pius Langa asserts that this shift from Apartheid to democracy moves from a 'culture of authority' to a 'culture of justification'- a culture that demands all decisions to be justifiable in terms of the rights and values

[282] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* at 312.
[283] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRLJ* at 357.
[284] J Brickhill & Y Van Leeve 'Transformative Constitutionalism: Guiding Light or Empty Slogan?' in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 351-352.
[285] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRLJ* at 353.
[286] J Brickhill & Y Van Leeve 'Transformative Constitutionalism: Guiding Light or Empty Slogan?' in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 353.

that the Constitution enshrines.[287] In the next section, this thesis focuses on how Chapter 9 institutions have aided such a transition.

3.5. STATE INSTITUTIONS SUPPORTING DEMOCRACY

Chapter 9 institutions find their roots in both pre-and post-constitutional era. The Auditor-General and Public Protector were established pre-1994 and were negotiated into the Constitution during the negotiation process.[288] The SAHRC, CGE, Electoral Commission were introduced in the interim Constitution while the Constitutional Assembly incorporated the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) in the Final Constitution.[289] Calland and Pienaar assert that these institutions 'form an integral part' of the constitutional framework and act as an additional dimension of the system of checks and balances provided by the government branches on each other's authority and by the Constitution itself.[290] Furthermore, these institutions' objective and duties differ in some respects, each with a constitutional mandate about a particular substantive area of society.[291] However, for this chapter's purposes, the focus will be on these institutions' shared constitutional mandates, as outlined in section 181 of the Constitution.[292]

Chapter 9 institutions were introduced with the primary purpose of fostering and strengthening constitutional democracy and safeguarding fundamental rights. A transition from parliamentary supremacy to constitutional supremacy saw a substantial need for these Chapter 9 institutions' independence to protect them from undue interference and ensure efficient execution of their functions. Accordingly, section 181(2) of the Constitution outlines that:

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[287] J Brickhill & Y Van Leeve 'Transformative Constitutionalism: Guiding Light or Empty Slogan?' in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 353.

[288] V Langeveldt 'The Chapter 9 institutions in South Africa' (2012) *Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper 287* at 1.

[289] C Murray 'The Human Rights Commission Et Al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal*, 9(2) at 124.

[290] R Calland & G Pienaar 'Guarding the guardians: South Africa's chapter nine institutions' in D Plaatjies, R Calland, G Pienaar, M Chitiga-Mabugu, C Hongoro, T Meyiwa, M Nkondo & F Nyamnjoh *State of the Nation South Africa 2016: who is in charge?: Mandates, accountability and contestations in the South African state* (2016) Human Sciences Research Council at 67.

[291] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 2.

[292] S 181 (1) of the Constitution states:

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

> '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.'[293]

This provision ensures that Chapter 9 institutions are outside partisan politicians; thus, strengthening their independence and impartiality in their investigatory functions of government affairs on behalf of citizens.[294] To highlight their independence, section 181(3) demands that all other organs of State[295] 'assist and protect these institutions'. Furthermore, section 181(4) forbids individuals and organs of State from interfering with these institutions' functioning. Subsequently, section 181(5) provides that 'these institutions are accountable to the National Assembly and must report…to the Assembly at least once a year'.

The Ad Hoc Committee draws two main conclusions from the above provisions. First, independence is not tantamount to impartiality.[296] Thus, a body exercising its duties impartially does not equate to its independence being preserved. Secondly, other organs of State have a constitutional obligation to facilitate the work of Chapter 9 institutions.[297] De Vos has described Chapter 9 institutions as 'watchdogs' established to facilitate constitutional democracy and hold the executive and legislature to account.[298] However, Langeveldt expounds that since 'these institutions are not directly a branch of government', their role is purely investigatory and administrative.[299]

Konstant, contributing to this discussion, notes that the Constitutional Court in *Langeberg Municipality*[300] states that, notwithstanding the contention that Chapter 9 institutions are not part of the conventional tri-partite government, these institutions undeniably serve a 'governmentfunction'.[301] This stance has led to two critical points of view. One claims that the essence of Chapter

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[293] S 181(2) of the Constitution.
[294] V Langeveldt 'The Chapter 9 institutions in South Africa' (2012) *Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper 287* at 2.
[295] Section 239 of the Constitution stipulates that an "organ of state" means- '(a) any department of state or administration in the national, provincial or local sphere of government'. Examples could be the Executive (the Cabinet), the Legislature (Parliament), and Judiciary (the courts).
[296] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 10.
[297] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 10.
[298] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 161.
[299] V Langeveldt 'The Chapter 9 institutions in South Africa' (2012) *Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper 287* at 1.
[300] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (Langeberg Municipality) para 24.
[301] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 3.

9 institutions is that of active participation in governance, but not of forming a part of the government, whilst the other suggests that these institutions act as an intermediary between the citizens of the country and the other branches of the government. De Vos attributes the confusion surrounding Chapter 9 institutions' independence and their role as 'watchdogs' to a conflict in the Constitution itself.[302] As outlined above, while section 181(2) guarantees Chapter 9 institutions' independence, section 181(5) also makes them accountable to the National Assembly. Hence, this places these institutions in a precarious position as they seek 'to strike a balance between the independence of Chapter 9 institutions on the one hand and their accountability to the legislature on the other hand'.[303] Konstant states that this leads to the question of 'how does an institution remain accountable to a political institution and remain independent of political influence?'.[304] Murray offered a solution in her earlier work, stating that the National Assembly's oversight over these institutions should never impede their independence, nor should it be the same as that exercised over the executive.[305]

Some scholars criticise the inability of Chapter 9 institutions to enforce their recommendations and impose punishments, underpinning the perception that they are but 'toothless watchdogs'.[306] In this regard, Langeveldt contends that such incapacity is not due to incompetence on the part of such institutions; instead, it speaks to their constitutional purpose which is not dependent on the existence of 'teeth' for efficiency. Moreover, Konstant opines that it is essential to bear in mind that these institutions do not have any of the government's powers, limiting the remedies they can provide.[307] De Vos, concurring with Langeveldt and Konstant's views, clarifies that Chapter 9 institutions do not 'perform the same function as the judiciary'.[308] Consequently, they should be treated differently as their findings and recommendations do not have the same weight as court judgments.[309] However, the sentiments shared by Stevens and Ntlama confirm that, despite its recommendations not being binding,

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[302] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 162.

[303] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 171.

[304] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 7.

[305] C Murray 'The Human Rights Commission Et Al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal*, 9(2) at 127.

[306] V Langeveldt 'The Chapter 9 institutions in South Africa' (2012) *Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper 287* at 4.

[307] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 5.

[308] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 172.

[309] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 173.

the SAHRC has gained an influential position by responding swiftly to allegations of human rights abuses; thus its recommendations cannot be considered as being without legal force.[310]

It is evident from the above discussion that some scholars tend to be critical of the role of Chapter 9 institutions. At the same time, some such as Murray, claim that this critique reflects the inability of governments and the public to understand the position of Chapter 9 institutions.[311] The author evaluates the mandate of these institutions and concludes that they all share two roles: 'checking government and contributing to the transformation of South Africa into a society in which social justice prevails'. [312] In this respect, de Vos suggests that as a result, these institutions find themselvesin a difficult position as they must execute their mandates while holding to account the government officials and institutions whose co-operation they need.[313] Furthermore, Konstant cautions that in assessing the efficiency of Chapter 9 institutions, it ought to be taken into account that these institutions were not created to offer a 'magic bullet' to solve all governmental issues and achieve the realisation of all constitutional promises. Instead, the point of departure in assessing their effectiveness should lie in establishing their purpose, the resources available to them to fulfil that purpose and a consideration of how they have progressed in that regard.[314]

The 2016 judgment of the Constitutional Court in the matter of *Economic Freedom Fighters v Speaker of the National Assembly ('EFF case')* helped to clarify the question of the power of Chapter 9 institutions, especially the Public Protector, to implement their recommendations.[315] The unanimous decision confirmed the SCA's decision in *SABC v DA*, ruling that the Public Protector's recommendations are binding and must be implemented unless set aside by a court.[316] Thus, the President's failure to comply with the report was inconsistent with the South African Constitution.[317] The Constitutional Court adopted a purposive interpretation of the Constitution, with Mogoeng CJ

[310] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 63.
[311] C Murray 'The Human Rights Commission Et Al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal*, 9(2) at 136.
[312] C Murray 'The Human Rights Commission Et Al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal*, 9(2) at 136.
[313] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 176.
[314] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 2.
[315] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).
[316] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 68.
[317] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 103. The court declared that the President failed to fulfil his constitutional obligations, in terms of sections 83(b), 182(1)(c) and 181(3) of the Constitution of South Africa.

noting that without the power to make binding recommendations, the Public Protector would be ineffectual.[318]

As a result, the National Assembly's decision to absolve the President from complying with the report was 'inconsistent with its obligations to scrutinise and oversee executive action'.[319] Accordingly, the court held that the National Assembly had failed to fulfil its constitutional obligations to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The court's ruling essentially mirrored the remedial steps required by the Public Protector.

3.6. CONCLUDING REMARKS

Chapter 9 institutions' fundamental objective is rooted in the Apartheid history that informs the South African Constitution.[320] These institutions were introduced to help restore public confidence in State institutions and advance the Constitution's goals.[321] While Chapter 9 institutions have made great strides in upholding constitutional values and catering to citizens' needs, there are still issues with inadequate funding, proliferation, and inaccessibility of these institutions. These issues will be discussed at great length in the next chapter, focusing on the SAHRC and the CGE.

[318] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 49.
[319] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 104.
[320] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 3.
[321] P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) in DM Chirwa & Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* at 160.

CHAPTER 4

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND COMMISSION FOR GENDER EQUALITY

4.1. INTRODUCTION

With the advent of constitutional democracy in South Africa, Chapter 9 institutions were introduced in section 181 of the Constitution to foster and strengthen constitutional democracy and safeguard fundamental rights. As alluded to in the preceding chapters, relevant to this thesis are the SAHRC and CGE, which are internationally recognised and modelled on the 1993 'Paris Principles'– adopted to provide international guidelines for the composition and responsibilities and methods of operation of NHRIs.[322] The establishment of the SAHRC and CGE in compliance with Paris Principles issignificant as they are entrusted with transmitting and implementing international norms at the domestic level and the transition of national human rights expertise to international human rights. Thischapter will analyse the extent to which the SAHRC and CGE maintain and foster constitutional democracy, emphasising the institutional and legal role played by the SAHRC and CGE at the nationallevel. It will undertake this analysis by examining these institutions' constitutional and legislative mandates, paying attention to the provisions that outline their purpose, enabling them to execute theirfunctions.

4.2. THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

South Africa is a transitional society[323], and as such, there have been concerted efforts to transform the society from one that was characterised by oppression, abuse and disregard of fundamental rights to one founded on equality, respect and dignity of all.[324] The SAHRC was introduced in the 1993 interim Constitution, which provided a Human Rights Commission's establishment to 'promote the observance of, respect for, and protection of fundamental rights'.[325] The provisions in the interim

[322] The General Assembly of United Nations affirmed the Paris Principles, which were adopted by General Assembly resolution 48/134 of 20 December 1993.

[323] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 60.

[324] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 167.

[325] Section 116 (1) of the Interim Constitution of the Republic of South Africa Act 200 of 1993 reads:

The Commission shall, in addition to any powers and functions assigned to it by law, be competent and be obliged to-

(a) promote the observance of, respect for and the protection of fundamental rights;
(b) develop an awareness of fundamental rights among all people of the Republic;
(c) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights;

Constitution provided the basis for enacting the Human Rights Commission Act 53 of 1994 and this legislation saw the SAHRC's inauguration on 2 October 1995 and its launch on 21 March 1996.[326]

The Human Rights Commission was subsequently incorporated in Chapter 9 of the final Constitution.[327] Since it was established, the SAHRC has directed its efforts to: 'raising awareness of human rights issues; monitoring and assessing human rights; education and training on human rights; addressing human rights violations and seeking effective redress'.[328] Unlike the mandates of its sister institutions, the SAHRC's mandate is comprehensive and encompasses 'almost every aspect of civil, political, social and economic rights'.[329] To this effect, Stevens and Ntlama advance that the duties of the SAHRC are not confined to a certain category of human rights; instead, the SAHRC has a responsibility to defend, uphold and observe all human rights.[330] Owing to this broad mandate, the legal mandate of the SAHRC is encompassed in several legal documents, namely: the 1996 Constitution; the South African Human Rights Commission Act 14 of 2013 (SAHRC Act); the Promotion of Access to Information Act 2 of 2000 (PAIA); and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).[331]

4.3. LEGAL MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Klaaren states that 'the powers and functions of the SAHRC flow primarily from the Constitution'.[332] Section 181(1)(b) provides for establishing the SAHRC, and section 184 sets out this Commission's mandate and functions. The SAHRC derives its enabling powers from the SAHRC Act (which repealed the Human Rights Commission Act 54 of 1994). To explore the legal mandate of the SAHRC, its mandate, functions and powers as set out in the Constitution and other enabling legislation will be discussed. The point of departure is section 184(1) of the Constitution which gives the SAHRC a general mandate to '(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

(d) undertake such studies for report on or relating to fundamental rights as it considers advisable in theperformance of its functions; and
(e) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights.

[326] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 168.
[327] The Human Rights Commission was renamed as the South African Human Rights Commission.
[328] *See* South African Human Rights Commission *https://www.sahrc.org.za/index.php/what-we-do/programmes* (accessed on 01 February 2021).
[329] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 167.
[330] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 61.
[331] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 167.
[332] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 6.

of human rights' in South Africa.[333] Furthermore, the SAHRC Act prescribes additional powers and functions to the SAHRC concerning this mandate.[334]

4.3.1 PROMOTING RESPECT FOR HUMAN RIGHTS

According to section 184(1)(a) of the Constitution, the SAHRC is 'mandated to promote respect for human rights and a culture of human rights'. To facilitate this goal's achievement, the SAHRC has an obligation in terms of the Constitution and the SAHRC Act to 'conduct public education and promote public awareness of human rights'.[335] Mubangizi highlights the importance of this function, writing that:

> 'the effective enjoyment of human rights largely depends on the level of awareness of such rights and how to enforce them. People cannot enforce rights that they are unaware of'.[336]

To this end, most of the Commission's work so far has been related to human rights education (HRE).[337] Horn attributes this to the fact that 'human rights commissions are often seen as excellent vehicles for HRE'.[338] However, Mubangazi advances that some critics have argued that governments use human rights commissions to control and manage the HRE content. He further notes that while it is unclear whether this idea extends to the SAHRC, such an argument is premised on the fact that governments fear successful education would lead to more public challenges on government actions, demands for redress, and human rights violations.[339] Cardenas is one scholar who expresses such concern, noting that less than one-tenth of the SAHRC's budget is devoted to HRE.[340] She further advances that even though this figure is more than most States commit to human rights education, it remains disproportionate to human rights education's apparent centrality in the SAHRC's mandate.[341]

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[333] Section 184(1) of the Constitution stipulates:
(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.

[334] Section 184(4) of the Constitution.

[335] Section 184(2)(d) of the Constitution and section 13(1)(b)(i) of the SAHRC Act.

[336] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 497.

[337] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 6.

[338] N Horn 'Human rights education in Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) at 65.

[339] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 505.

[340] S Cardenas 'Constructing Rights? Human Rights Education and the State' (2005) 26 *International Political Science Review No. 4* at 371.

[341] S Cardenas 'Constructing Rights? Human Rights Education and the State' (2005) 26 *International Political Science Review No. 4* at 371.

Nonetheless, the SAHRC plays an essential role in HRE by adopting various approaches and programmes. The first is the establishment of the Advocacy and Communications unit, which 'works towards the promotion of human rights to create awareness, deepen understanding of human rights and ensuring attainment of a culture of human rights'.[342] Mubangizi advances that this is executed through various advocacy methodologies; including 'education and training, community outreach initiatives, public dialogue, conferences, workshops, seminars and presentations'.[343]

Couzens highlights that one of the SAHRC's major accomplishments is that it contributed to the writing and adoption of the HRE as a school program in the curriculum.[344] This is particularly important because teaching children about their rights and their interaction with the SAHRC enables them to approach the Commission without reliance on adult support.[345] Furthermore, this Unit has been instrumental in providing 'human rights clinics as a model for outreach' to rural and disadvantaged communities; large stakeholder commitments on core topical topics related to equality and socio-economic rights and the development of promotional and supporting resources to complement the Unit's advocacy activities. [346]

The creation of the National Centre for Human Rights Education and Training (NACHRET) in 2000 was one of the most formal initiatives of the SAHRC in HRE– although this centre is no longer operational.[347] The NACHRET was the SAHRC's official training provider. Cardenas opines that the SAHRC was 'a pioneer in setting up [this] centre' and has praised it for being a unique step towards bridging formal and informal HRE efforts.[348] Mubangizi concurs and holds that this centre has provided extensive HRE to 'both State and non-State actors, through workshops, courses and seminars'.[349] The Ad Hoc Committee has also commended the NACHRET and its range of activities.[350] Horn has praised the centre for being an exemplary model that '…still serves as an

[342] *See* South African Human Rights Commission *https://www.sahrc.org.za/index.php/what-we-do/programmes* (accessed on 01 February 2021).
[343] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 506. In addition to curricular involvement, the SAHRC also provides professional training (including providing training programmes for target groups such as the police, health workers and teachers) and informal dissemination of human rights information, which includes taking out advertisements on radio and in newspapers.
[344] M Couzens 'An analysis of the contribution of the South African Human Rights Commission to protecting and promoting the rights of children' (2012) *South African Journal on Human Rights* at 562.
[345] M Couzens 'An analysis of the contribution of the South African Human Rights Commission to protecting and promoting the rights of children' (2012) *South African Journal on Human Rights* at 562.
[346] *See* South African Human Rights Commission *https://www.sahrc.org.za/index.php/what-we-do/programmes* (accessed on 01 February 2021).
[347] JC Mubangizi 'A comparative discussion of the South African and Ugandan Human Rights Commissions' (2015*) 48 The Comparative and International Law Journal of Southern Africa* at 132.
[348] S Cardenas 'Constructing Rights? Human Rights Education and the State'(2005) 26 *International Political Science Review No. 4* at 372.
[349] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 506.
[350] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 177.

example of how educators from civil society and government can be brought together to coordinate focused human rights education without too much duplication'.[351]

Even though the SAHRC has made great strides in HRE, its involvement has not been without difficulties and the main criticisms are now discussed. First, the SAHRC's is mostly financed by the State.[352] In this regard, Mubangizi's earlier proposition of State control is of great relevance. This is because, despite the SAHRC's institutional independence being constitutionally assured, there is no deterrence of State control through budgetary mechanisms.[353] Unsurprisingly, serving as an intermediary situated between the State and society, this has had an adverse impact on the credibility of the SAHRC. According to Cardenas, this has led to the SAHRC often being perceived as siding with the State or not pushing the State sufficiently to fulfil its commitments.[354] Secondly, Cardenas notes that concerns have been expressed about the SAHRC's lack of accessibility to the rural population and marginalised members of society who most need the services of the SAHRC.[355] For instance, the Ad Hoc Committee observed that most HRE and public awareness programmes remain 'urban-based'.[356] Thirdly, the SAHRC has a vast and extensive mandate, which is disparate to its limited capacity and resources because of budgetary restrictions. Mubangizi further advances that the HRE function of the SAHRC usually bears the brunt of criticism when the other activities of the SAHRC fall short.[357]

The SAHRC's 2019/2020 Annual Report details education and awareness-raising initiatives that have been adopted to enable individuals to successfully realise their rights and guarantee that human rights educational materials are accessible to both urban and rural populations.[358] The Commission sought to accomplish these objectives through public outreach and key stakeholder engagements, School Moot Court competitions, national and provincial human rights dialogues, media and communications activities and as well as the production of accessible educational material.

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[351] N Horn 'Human rights education in Africa' in A Bösl & J Diescho (eds) Human rights in Africa: Legal perspectives on their protection and promotion (2009) at 67.
[352] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 507.
[353] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 507.
[354] S Cardenas 'Constructing Rights? Human Rights Education and the State'(2005) 26 *International Political Science Review No. 4* at 373.
[355] S Cardenas 'Constructing Rights? Human Rights Education and the State'(2005) 26 *International Political Science Review No. 4* at 373.
[356] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 178.
[357] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 507.
[358] South African Human Rights Commission 'Annual Report (For the year ended 31 March 2020)' *South African Human Rights Commission*. Available at *https://www.sahrc.org.za/index.php/sahrc-publications/annual-reports* (accessed on 20 June 2021) at 20.

These efforts yielded impressive results, with the SAHRC's engagement reach increasing from approximately 34 000 people/stakeholders in the previous quarter to more than 40 000 in this quarter.[359] Furthermore, the Commission's reach and exposure through media and communications activities significantly expanded during this period, with over 10,000 media items published, aired, or transmitted electronically on the SAHRC's work and human rights in South Africa.[360] The SAHRC's success in this regard is commendable, as the Commission was reported to have reached an audience of more than 9 billion individuals across the country in the 2019/2020 fiscal year .[361]

4.3.2 PROMOTING THE PROTECTION OF HUMAN RIGHTS

The protective mandate of the SAHRC is detailed in section 184(1)(b) of the Constitution. To enable the SAHRC to fulfil this obligation, the Constitution further recognises the SAHRC's powers to investigate and report human rights compliance and secure appropriate remedies for human rights violations.[362] In its 2019/2020 Annual Report, the SAHRC reiterates that the Commission's protective duty includes responding to human rights issues in the country by processing complaints, conducting investigations, instituting litigation, and hosting hearings to address systematic challenges.[363] This part of the chapter aims to provide an overview of the SAHRC's work in the aforementioned components.

(a) Investigating

The SAHRC derives its investigative powers from the Constitution and the SAHRC Act. According to the latter, the SAHRC can investigate any alleged human rights violation, through 'its own initiative or on receipt of a complaint'.[364] Additionally, to discharge this function, the SAHRC is empowered with the legal tools that it requires, including the 'power to subpoena witnesses, enter and search

[359] South African Human Rights Commission 'Annual Report (For the year ended 31 March 2020)' South African Human Rights Commission. Available at https://www.sahrc.org.za/index.php/sahrc-publications/annual-reports (accessed on 20 June 2021) at 23.
[360] South African Human Rights Commission 'Annual Report (For the year ended 31 March 2020)' South African Human Rights Commission. Available at https://www.sahrc.org.za/index.php/sahrc-publications/annual-reports (accessed on 20 June 2021) at 25.
[361] South African Human Rights Commission 'Annual Report (For the year ended 31 March 2020)' South African Human Rights Commission. Available at https://www.sahrc.org.za/index.php/sahrc-publications/annual-reports (accessed on 20 June 2021) at 25.
[362] Section 184(2)(a) and (b) of the Constitution states:
(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.
[363] South African Human Rights Commission 'Annual Report (For the year ended 31 March 2020)' South African Human Rights Commission. Available at https://www.sahrc.org.za/index.php/sahrc-publications/annual-reports (accessed on 20 June 2021) at 26.
[364] Section 13(3)(b) of the SAHRC Act. The procedure for handling complaints is provided under the gazetted complaints handling procedures of the South African Human Rights Commission, available at *https://www.sahrc.org.za/home/21/files/Complaints%20Handling%20Procedures%20-%20SAHRC%20-%20Public%20-%201%20January%202018.pdf* (accessed on 7 February 2021).

premises, and attach articles of relevance to its investigation'.[365] The investigations are usually resolved through a report that includes parties' relevant findings and recommendations.[366] In that regard, Adam asserts that the SAHRC routinely handles the service delivery of socio-economic rights, in cases where the complainant claims that an organ of State has failed to fulfil their obligations.[367] However, although the SAHRC receives a high volume of complaints, Adams writes 'many people living in rural parts of South Africa experience limited access to the SAHRC since the Commission's nine provincial offices are located in urban areas'.[368]

Against this background, the thesis turns to discuss an example of an investigation conducted by the SAHRC. In 2012, extensive media reports indicated significant shortcomings in the distribution of textbooks in the province of Limpopo. As a result, a civil movement culminated in litigation, and a series of court rulings increased public awareness of this issue. In Mid-2013, after having conducted an earlier preliminary assessment, the Commission launched an investigation into the distribution of learning materials in the region. In identifying the root causes of the difficulties in delivering textbooks and the magnitude of the issue, the SAHRC focused the inquiry on seven predefined issues.[369] The Commission found large gaps between provinces with respect to proficiency and progress in handling the supply of textbooks.[370] Accordingly, the Commission established that if a school has not received learning materials timely or has received inaccurate supplies, the right to basic education set out in section 29(1)(a) of the Constitution is thus violated.[371] However, despite the involvement of the

[365] Section 15 and 16 of the SAHRC Act.

[366] R Adams 'The role of the South African Human Rights Commission in ensuring state accountability to address poverty' in E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020) Chapter 12 at 267.

[367] R Adams 'The role of the South African Human Rights Commission in ensuring state accountability to address poverty' in E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020) Chapter 12 at 267.

[368] R Adams 'The role of the South African Human Rights Commission in ensuring state accountability to address poverty' in E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020) Chapter 12 at 263.

[369] These questions were as follows:

a. The number of schools in the province, including the number of section 21 (or self-governing) schools;
b. The process employed by schools in the procurement of primary learning materials;
c. The success of the method employed;
d. Major challenges faced in the delivery of primary learning materials;
e. The steps taken by the PED to overcome these challenges;
f. The mechanisms employed by the DBE and the PED to monitor and assess the delivery of primary learning materials; and
g. Any steps taken to address the interests of learners with disabilities.

[370] SAHRC (2014) 'Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide' available at *https://www.sahrc.org.za/home/21/files/Delivery%20of%20Learning%20Material%20Report%20Final%20.pdf* (accessed on 5 February 2021).

[371] SAHRC (2014) 'Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide' at 53.

SAHRC, the problem of inaccessibility persists and it 'predominantly affects rural or impoverished children'.[372]

(b) Dispute Resolution

The SAHRC protects human rights by adopting a broad range of dispute resolution mechanisms.[373] The SAHRC Act grants the SAHRC the authority to settle any conflict or rectify any act or omission concerning a fundamental right by mediation, conciliation or negotiation.[374] An essential part in these powers is the Commission's ability to 'make recommendations and findings'.[375] Konstant advances that these include 'the power to conduct mediations to resolve human rights disputes, adjudicate any such disputes, and litigate on behalf of victims of human rights violations'.[376] In this regard, it is essential that even though the Commission does not issue 'binding' decisions, it does seek to respond to complaints through negotiation and mediation and by making recommendations.[377] Moreover, Klaaren reiterates that:

> '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'.[378]

Furthermore, to enforce its provisions, especially section 4(2) and section 13(4) of the SAHRC Act, the penalty clause indicates that it is an offence to fail to provide the assistance specified in these sections and the penalty, if found guilty is 'a fine or imprisonment for a period not exceeding six months'.[379] Organs of State can therefore not refuse to assist the SAHRC as is 'reasonably required for the protection of the independence, impartiality and dignity of the Commission'.[380] Additionally,

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[372] SAHRC (2014) 'Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide' at 53.
[373] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 7.
[374] Section 14 of the SAHRC Act.
[375] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 7.
[376] A Konstant 'Chapter 6. The Performance of Chapter 9 Institutions' in Assessing the Performance of South Africa's Constitution (2016) *International Institute for Democracy and Electoral Assistance* at 14.
[377] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 177.
[378] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 7.
[379] Section 22(h) of the SAHRC Act:
'A person who fails to afford the Commission the necessary assistance referred to in section 4(2) or 13(4) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months'.
[380] Section 4(2) of the SAHRC Act.

PEPUDA grants the equality court the authority to refer disputes to an 'alternative forum'.[381] In a number of cases, this forum is the SAHRC and Klaaren notes that it has had several successful interventions.[382]

(c) Adjudication/Litigation

To date, in a somewhat small number of cases, the Commission has exercised the power of adjudication. Although it is not recognised that a decision taken to settle these complaints is binding, the decisions of the Commission have been regarded as binding by specific State organs.[383] To obtain information from other State bodies through subpoena the Commission has held adjudication hearings, which resulted in decisions taken against State organs that did not provide timely or sufficient information.[384] Klaaren notes that in such cases the Commission has initially issued the subpoena and decided on the State organ's compliance with the obligation under section 184(3) of the Constitution.[385]

Moreover, the SAHRC Act gives the SAHRC express litigation competence: 'bring proceedings in a competent court or tribunal in its name, or on behalf of a person or a group or class of persons'.[386] In this respect, unlike the other institutions, the SAHRC has powers to protect human rights through litigation. The CGE is the only other institution currently providing a similar level of protection through interventions as an amicus, but not initiating litigation.[387] Through comparison, although it does so infrequently, the SAHRC has initiated litigation.[388]

Bhe v Magistrate, Khayelitsha; Shibi v Sithole[389] demonstrates an example of initiated litigation by the SAHRC; where the SAHRC acted as a litigant and the CGE participated *amicus curiae*. In this matter, the SAHRC – together with the Women's Legal Centre Trust – challenged the constitutionality of section 23 of the Black Administration Act 38 of 1927, and the rule of male primogeniture in the

[381] Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[382] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 7.
[383] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 7.
[384] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 8.
[385] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 8.
[386] Section 13(3)(b) of the SAHRC Act.
[387] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 9.
[388] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 9.
[389] *Bhe and Others v Magistrate, Khayelitsha, and Others*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

context of the customary law of succession.[390] The court found 'the rule of male primogeniture is inconsistent with section 9(3) of the Constitution' as it had not been given 'the space to adapt and to keep pace with changing social conditions and values'.[391] This decision was commended for dissecting the relationship between culture and equality and further affirmed gender equality in a customary framework. It further revealed the importance of these bodies in remaining proactive to achieve redress and transformation across all sectors of South African society.

4.3.3 MONITORING AND ASSESSING OBSERVANCE OF HUMAN RIGHTS

Since its inception, the SAHRC has worked with the government to uphold the Bill of Rights and to hold the government accountable to society in fulfilling its constitutional responsibilities. As will be discussed in this section, the SAHRC does this by monitoring State progress in realising socio-economic rights and compliance with court orders concerning socio-economic rights. The SAHRC is mandated in terms of section 184(1)(c) to 'monitor and assess the observance of human rights in the Republic'.[392] Section 184(3) reflects the SAHRC's monitoring function, stating that the State's relevant organs must provide the Commission with information annually detailing measures taken to implement the rights encompassed in the Bill of Rights.[393] In this respect, it serves as a check 'on the legislative and executive branches of government' while supporting them with promoting and protecting human rights.[394] Klaaren further states that this provision is significant because it is 'the only place in the Constitution' that provides an explicit list of socio-economic rights.[395] He further advances that the subsections of section 184 are best read as whole since they grant additional duties and competences to the SAHRC that are also conferred by section 181.[396]

According to Liebenberg, the SAHRC has quite a significant mandate as per the Constitution to oversee the realisation of the country's socio-economic rights.[397] In addition to the constitutional mandate assigned to the SAHRC, the SAHRC Act further grants certain powers and functions to

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[390] *Bhe and Others v Magistrate, Khayelitsha, and Others*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) para 3.
[391] *Bhe and Others v Magistrate, Khayelitsha, and Others*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) para 82 and 210.
[392] Section 184(1)(c) of the Constitution.
[393] Section 184 (3) reads:

> (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.

[394] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 167.
[395] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24C at 9.
[396] J Klaaren 'South African Human Rights Institution' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, January 2013) Chapter 24C at 6.
[397] S Liebenberg 'Human Development and Human Rights South African Country Study' (2000) *Human Development Report 2000 Background Paper* at 24.

enhance the Commission's monitoring function. Section 18 of the SAHRC Act bestows an obligation on the SAHRC to produce reports on State progress with respect to the implementation of socio-economic rights.[398] Additionally, the SAHRC meets with the National Assembly at least once a year to report on its activities, the general functions it has performed and the attainment of its objectives.[399] The SAHRC can also submit reports on the findings related to functions and investigations of a serious nature that it has carried out or conducted at any time it deems necessary.[400]

The Ad Hoc Committee noted that the position of the SAHRC in this regard is of vital importance, particularly for a large number of South Africans for whom the enforcement of the socio-economic rights detailed in the Bill of Rights is a priority, as it concerns their everyday struggle for survival.[401] Given the enormous socio-economic inequalities that remain in South Africa, the SAHRC is under immense pressure to deliver on its mandated commitments on socio-economic rights which are embodied in the Constitution. If these rights are not duly treated, the full realisation of civil, political, social and economic rights which are enshrined in the Constitution will not be attained. This should be a primary concern.

4.4. THE COMMISSION FOR GENDER EQUALITY

'Gender equality is an internationally, regionally and nationally recognised undertaking'.[402] The CGE was founded in 1997. Like its sister institution (the SAHRC), the CGE finds its roots in the interim Constitution, from which it was mandated 'to promote gender equality and to advise and to make recommendations to Parliament or any other legislature concerning any laws or proposed legislation which affects gender equality and the status of women'.[403] It was ultimately encompassed in Chapter 9 of the final Constitution and characterised as a 'State institution strengthening constitutional

[398] Section 18 of the SAHRC Act.
[399] Section 18(1) of the SAHRC Act.
[400] Section 18(2) of the SAHRC Act.
[401] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 169.
[402] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 64.
[403] Section 119 of the interim Constitution of the Republic of South Africa Act 200 of 1993 states:

(1) There shall be a Commission on Gender Equality, which shall consist of a chairperson and such number of members as may be determined by an Act of Parliament.
(2) The Commission shall consist of persons who are fit and proper for appointment, South African citizens and broadly representative of the South African community.
(3) The object of the Commission shall be to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.

democracy'.[404] Furthermore, the CGE has additional powers and functions prescribed by national legislation: Commission on Gender Equality Act 39 of 1996 (CGE Act)[405] and PEPUDA.

Albertyn asserts that the CGE is an unusual institution in comparative international terms.[406] Hicks advances that South Africa chose to establish the CGE 'as a distinct body whose role is to leverage State accountability on gender equality', instead of assigning gender into generic human rights bodies like most countries.[407] As a result, South Africa has earned global acclaim for its positive record on gender equality initiatives.[408] In essence, as Stevens and Ntlama opine, the inception of the CGE encapsulates the ideals of the South African society, which are based on equality and dignity.[409]

Albertyn maintains that the CGE's institutional origins lie in the concept of 'an independent human rights Commission' and a need to establish specific structures both within and outside government to further the ideas of gender equality and women's human rights.[410] In that regard, Hicks confirms that:

> 'The CGE occupies a central role in ensuring that the political, civil and socioeconomic rights and freedoms outlined in the Constitution become a lived reality, particularly for marginalised women.'.[411]

Hence, the main task of the CGE is centred around promoting the rights and needs of women by transforming institutions, policies, procedures, budgetary allocations and government priorities to

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[404] Section 181(1) of the Constitution.

[405] This act was established in terms of section 119 of the interim Constitution of the Republic of South Africa Act 200 of 1993. The preamble reads:

> WHEREAS section 119 of the Constitution provides for the establishment of a Commission on Gender Equality; the determination of the members of the Commission; the requirements for appointment as members of the Commission;
> AND WHEREAS the Constitution provides that the object of the Commission on Gender Equality shall be to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women;
> AND WHEREAS section 120 of the Constitution provides that an Act of Parliament shall provide for the composition, powers, functions and functioning of the Commission on Gender Equality and for all other matters in connection therewith.

[406] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 2.

[407] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) *Social Accountability in South Africa – Practitioners Experiences and Lessons* (2010) Chapter 8 at 123.

[408] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 64.

[409] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 64.

[410] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 1.

[411] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) Social Accountability in South Africa – Practitioners Experiences and Lessons (2010) Chapter 8 at 126.

cater for the achievement of gender equality.[412] The CGE works closely with other bodies such as the SAHRC, Public Protector, Parliamentary structures[413] and Government structures[414] to accomplish this objective.

4.5. LEGAL MANDATE OF THE COMMISSION FOR GENDER EQUALITY

Section 181(1)(d) of the Constitution provides for establishing the CGE and section 187 sets out this Commission's functions. The mission of the CGE is to 'promote respect for gender equality and the protection, development and attainment of gender equality'.[415] This body is responsible for promoting and protecting gender equality; this is done through investigating, conducting research, keeping the public informed through public education, developing policy and other legislative measures.[416]

The Constitution further confers additional powers and functions to the CGE, which the CGE Act prescribes.[417] The CGE's constitutional mandate is 'both vertical and horizontal'.[418] This is because its oversight function extends to organs of State, statutory and public bodies, and 'private businesses, enterprises and institutions'.[419] It is also sanctioned to evaluate policies and investigate 'any gender-related issues' in the public or private domains.[420] The CGE has translated its constitutional mandate and related obligations into four strategic objectives to guide the organisation, namely: advancing gender equality through enabling legislation; promoting and protecting gender equality through public awareness, education, investigation and litigation; monitoring and assessing issues which undermine the attainment of gender equality; and sustaining an efficient institution dedicated to addressing gender related issues.[421]

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[412] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 1.

[413] The Joint Committee on Improvement of Quality of Life and Status of Women is one such structure and is located in Parliament.

[414] The Office on the Status of Women (OSW) which is based within the Presidency and the Gender Focal Points located in national line ministries. It is essential to note that these structures are replicated at provincial level.

[415] Section 187(1) of the Constitution.

[416] Section 187(2) of the Constitution reads:
'The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.'

[417] Section 187(3) of the Constitutions states:
'The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.'

[418] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 5.

[419] Section 11(1)(a) of the CGE Act.

[420] Section 11(1)(a) and (e) of the CGE Act.

[421] Commission for Gender Equality '2019-2020 Annual Report' *Commission for Gender Equality*. Available at *http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf* (accessed on 23 June 2021) at 32.

4.5.1 PROMOTING RESPECT FOR GENDER EQUALITY

The CGE Act requires the CGE to 'develop, conduct public information and education programmes to foster public understanding' of issues relating to gender equality.[422] PEPUDA imposes an additional obligation, stating that the CGE must support the State 'to develop an awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality'[423] and 'conduct information campaigns to popularise'[424] the Act. These, according to Albertyn, are essential roles in combating the societal norms and discriminatory practices that reinforce gender inequalities.[425]

To this end, Manjoo states that:

> Public awareness and the provision of information have occurred through workshops, consultative conferences, gender dialogues, provincial road shows, campaigns, information and evaluation workshops.[426]

The Commission has also adopted a key initiative that involves the media in discussions, training, and attempts to impact change on gender issues.[427] Furthermore, the CGE also runs public education initiatives through the media on a variety of topics related to women's rights.[428] However, Hicks argues that this leaves much to be desired as there are still significant barriers to obtaining State records and uneven service distribution between urban and rural communities, as demonstrated by reports of rural mothers unable to obtain a child-care grant or the handling of immigrants seeking to obtain identification documents.[429]

One of the CGE's strategic objectives, as stated in its 2019/2020 Annual Report, is to promote gender equality through public awareness and education.[430] To accomplish this goal, the CGE used a variety of programs and processes, including gender mainstreaming, community radio stations,

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[422] Section 11*(b)* of the CGE Act.
[423] Section 25(1)*(a)* of PEPUDA.
[424] Section 25(1)*(c)*(vi) of PEPUDA.
[425] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 6.
[426] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) *14 Griffith Law Review* at 273.
[427] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) *14 Griffith Law Review* at 273.
[428] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 8.
[429] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) Social Accountability in South Africa – Practitioners Experiences and Lessons (2010) Chapter 8 at 126.
[430] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 74.

outreach, advocacy and legal clinics, and gender stakeholder dialogue. Although, provinces identified municipalities with whom they will collaborate, there were issues of insufficient resources, both human and financial capital, to kick start gender streaming therefore impeding program execution.[431] On the other hand, the CGE saw great success in disseminating information about gender-based violence (GBV), intimate partner violence (IPV) and sexual and reproductive health and rights through 62 radio slots with radio stations that reach a large portion of the South African population.[432]

Furthermore, the CGE conducted 73 outreach, advocacy and legal clinics to raise awareness about access to justice and people's rights, as well as to collect more gender-related complaints from affected individuals who have experienced any form of gender-related discrimination and violence.[433] Hence, it is evident from the CGE's most recent Annual Report that the CGE has made significant efforts to educate the public about gender issues and to create strategic relationships with key actors in community development at the local government level.

4.5.2 PROTECTION OF GENDER EQUALITY

(a) Investigative and dispute resolution function

The CGE has established an appropriate complaints system and procedures to resolve problems of gender-related human rights violations.[434] In this regard, in addition to initiation investigations on its accord, the CGE also receives complaints from the public, referrals from the SAHRC and the Public Protector.[435] Hence, due to the budget restraints on the CGE, the rise in the number of complaints filed has resulted in the CGE referring complaints to other bodies (as authorised by the CGE Act).[436] It is essential to also note that although the CGE has strong investigative powers, including the power to subpoena persons and documents,[437] compel evidence[438] and enter premises and search and seizure[439] such powers are used infrequently.[440] However, over the years, the CGE has experienced a shift from

[431] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 76.
[432] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 76.
[433] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 78.
[434] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) 14 Griffith Law Review at 274. The CGE derives these powers from Section 11 of the CGE Act. This section makes provision for two types of investigations: those related to individual complaints brought to the Commission; and those initiated by the Commission.
[435] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 80.
[436] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 7.
[437] Section 12(4)(b) of PEPUDA.
[438] Section 12(5) of PEPUDA.
[439] Section 13 of PEPUDA
[440] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 7.

a reactive to a proactive approach in addressing issues of gender equality. Stevens and Ntlama maintain that the boldness of the CGE is shown by its investigation into the uThukela District Municipality bursary program, which grants bursaries to young people on the condition that they remain virgins until the end of their schooling.[441]

The CGE underlined in its latest Annual Report that complaint processing and determining the appropriate remedy of gender violations are an integral part of its strategic aim to 'take action against infringements of gender rights' and 'the implementation of appropriate redress'.[442] During the 2019/2020 financial year, 428 complaints were opened by the CGE, 438 were closed and 493 were pending in the report.[443] In the same period, the CGE notably convened a multiparty engagement on IPV to ascertain whether the current narrative on withdrawal of IPV cases is true.[444]

The Commission found that 'the justice cluster is fraught with many challenges' including: the South African Police Service's lack of urgency in responding to reported cases, consultation with victims taking place in an open area at the police station, thus violating the victim's privacy and dignity, and societal and media expectations on victims that are in disregard of victims' interests and needs.[445] These findings were significant because they subsequently influenced the the CGE's approach to addressing attrition of IPV cases in the country.

(b) Litigation function

While the authority to litigate is not explicitly provided for in its Act, the CGE has asserted its prerogative to do so to enforce women's rights.[446] Albertyn maintains that by intervening as *amicus curiae* in cases relating to structural gender discrimination or the interests of vulnerable groups of women, the CGE ensures that such rights are protected.[447] Manjoo further notes that the participation of the CGE is essential as it contextualizes information which may be beyond the scope of the court.[448]

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[441] C Stevens & N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016*) Law Democracy & Development* at 66. The CGE's finding that the scheme is unfair and unconstitutional as it places a greater burden on young women than young men and entrenches a systemic discrimination that reinforces a harmful stereotype was met with contempt by the Municipality- supported by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

[442] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 80.

[443] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 81.

[444] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 87.

[445] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 87.

[446] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 9.

[447] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 9.

[448] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) 14 Griffith Law Review at 275.

In *S v Jordan* the Constitutional Court was confronted with a constitutional challenge to the Sexual Offences Act, which criminalises providing sex for reward (sex work) and brothel-keeping.[449] Under the section, it is illegal for sex workers to offer their services, but not illegal for clients to solicit and pay for them.[450] The CGE intervened as *amicus curiae* and underscored that the provision constituted gender discrimination as it had an adverse impact on women, who (according to records and research) are the primary service providers.

In addition, the CGE has also been involved in landmark Constitutional Court cases that have changed the lives of many women and children. The CGE discusses some instances in its 2019/2020 Annual Report, one of which is the present case of *Slindile Madonsela v Kings School.*[451] The complainant is the mother of a 13-year-old girl who was reportedly expelled from a private school for having a relationship with another female student. The complaint was initially lodged with the SAHRC, so the CGE agreed with the SAHRC to institute legal proceedings against the school at the Equality Court, Magistrates' Court in White River. The hearing commenced with the applicant leading evidence-in-chief. The matter has been postponed without a date set for resumption due to the Covid-19 pandemic.[452]

4.5.3 DEVELOPMENT AND ATTAINMENT OF GENDER EQUALITY

(a) Monitoring function

Albertyn regards this function as the CGE's most crucial function, as it essentially acts as a 'watchdog for gender equality' and thus facilitates democracy.[453] Manjoo adds that this function is not limited to a particular sector; instead, 'both private and public bodies have to be monitored by the CGE in terms of its promotion and protection mandate'.[454] This is attributed to section 11(1)(a) of the CGE Act, which explicitly authorises the CGE to oversee and evaluate: 'organs of State, statutory bodies or functionaries, public bodies and authorities and private business, enterprises and institutions'.[455] Albertyn observes, however, that while the scope of the oversight role of the CGE extends to both the State and society, much of its activity has been directed at the State.[456] Some efforts have consisted of

[449] *S v Jordan* (2002) (11) BCLR 1117 (CC).
[450] Section 20(1) (aA) of the Sexual Offences Act.
[451] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 88.
[452] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 88.
[453] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, January 2013) Chapter 24D at 5.
[454] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) 14 Griffith Law Review at 273.
[455] Section 11(1)(a) of the CGE Act.
[456] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, January 2013) Chapter 24D at 6.

monitoring how women and men vote as well as their candidacy, conducting national gender surveys to gain public's current views on gender, as well as, researching and monitoring the development of policies and practices in the private business sector.[457] It has also contributed to the advancement of government policies and procedures. The most recent step in applying the legislation has been the introduction of an Annual Report that monitors and reports on government departments' compliance with the Act.[458]

(b) Advocacy and advisory function

The CGE is required to advance gender equality and to contribute to the development of democracy in the country as a 'constitutional guardian of democracy'.[459] In this regard, the CGE Act requests the CGE to collaborate and engage with gender equality organisations and other civil society sectors in order to reach the Commission's objective.[460] To this end, Albertyn argues that these measures have the dual goal of eliminating barriers that hinder advancement towards equality and develop constructive measures that encourage equality.[461] Furthermore, PEPUDA details additional duties of the State to promote equality.[462] Manjoo argues that the monitoring role of the CGE extends to the international and regional level since South Africa is a party to several human rights instruments, and the Commission has a monitoring role herein.[463] However, for this thesis, that aspect will not be canvassed. The advisory role of the CGE essentially means that its recommendations are not binding. However, Hicks argues that while this is true, the CGE has 'legal clout' to draw upon where the government has violated its commitments with regards to gender equality.[464]

Against this backdrop, the CGE 2019/2020 Annual Report revealed several projects and initiatives aimed at monitoring and assessing issues that undermine the promotion and attainment of gender equality. One such effort was the CGE's monitoring of government GBV activities, which included an evaluation of the performance of the Interim Steering Committee (ISC) – a Committee

[457] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) 14 Griffith Law Review at 273.
[458] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, January 2013) Chapter 24D at 6.
[459] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, January 2013) Chapter 24D at 8.
[460] Section 11 of the CGE Act.
[461] C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, January 2013) Chapter 24D at 8.
[462] Chapter 5 of PEPUDA.
[463] R Manjoo 'Case Study: The Commission for Gender Equality, South Africa -Promotion and Protection of Gender Equality - are Separate Structures Necessary' (2005) 14 Griffith Law Review at 276.
[464] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) Social Accountability in South Africa – Practitioners Experiences and Lessons (2010) Chapter 8 at 128.

entrusted with coordinating South Africa's responses to gender-based violence and femicide.[465] The CGE Report highlighted that concerns of openness, accountability, and fragmentation continue to impede the ISC's functioning. The most concerning conclusion was that, at the time the CGE was compiling its report, key aspects of the ISC's work were not completed – including 'the establishment of the national multi-sectoral coordinating body on GBV and the finalisation of the National Strategic Plan (NSP) on GBV.

4.6. FEASIBILITY OF MERGING THE SAHRC AND CGE

The purpose of this chapter is to canvass the legal and institutional roles of the SAHRC and CGE. Any assessment of these institutions' legal and institutional role in supporting constitutional democracy must be carried out in light of their respective duties and mandates, per the provisions of the Constitution and enabling legislation. This is because it is by executing those roles that the CGE and the SAHRC accomplish their mandates. Accordingly, such a study was preceded by a consideration of the social, economic, political and historical contexts of South Africa outlined in the preceding chapters.

4.6.1. COMMON AREAS OF CONCERN IDENTIFIED

The SAHRC and CGE have faced several challenges in delivering on their constitutional and legal mandates. As alluded in chapter 1, the Asmal Report aptly highlighted such challenges.[466] However, owing to the richness of the report and the depth of its recommendations it would be onerous to undertake a thorough analysis of all the challenges identified by the Ad Hoc Committee in this thesis. Instead, it will discuss common areas of concern that were identified in this chapter during an analysis of the constitutional and legal mandates of the SAHRC and CGE above.

Notwithstanding the plethora of laws, programmes, and relatively good performance of the SAHRC and CGE, implementation issues linger. One of the most striking features between the two institutions is the substantial overlap of roles and duplication of activities. For example, as illustrated in this chapter's structure, the duties of the SAHRC and the CGE can be essentially grouped into three general categories: promotion, protection and monitoring. Perhaps, the key difference between the two institutions is that the former has a broader mandate to protect all human rights, while the latter is designed to resolve gender-related issues. Nonetheless, both institutions are structured to reinforce constitutional democracy by promoting and protecting human rights and gender equality, assessing

[465] Commission for Gender Equality '2019-2020 Annual Report' Commission for Gender Equality. Available at http://cge.org.za/wp-content/uploads/2021/01/CGE-Annual-Report-Final.pdf (accessed on 23 June 2021) at 98.
[466] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 19 – 37.

and reporting on the observance of human rights, and gender equality violations. This is further evidenced by their shared powers to keep the public informed through public education, protect human rights by making recommendations, and reporting on human rights and gender equality violation.[467]

The significant overlap between the roles of the SAHRC and CGE further attests that 'human rights are interdependent and indivisible' and cannot be easily categorised. [468] Furthermore, the Ad Hoc Committee raised concerns about the referral system between the SAHRC and CGE, and the danger of a complainant's valid complaint being transferred from one institution to another without being assisted.[469] The existence of such a referral system is a further indication of the overlapping functions of these institutions and the confusion this causes in the public. Hence, this uncertainty – coupled with the existing inaccessibility issues these institutions face– impedes citizens' access to justice and inadvertently leaves them without redress when their rights are violated. This undermines the efficacy of these institutions since one of the essential functions of human rights institutions is to support and protect those who cannot protect themselves.

Furthermore, the Ad Hoc Committee reported that Chapter 9 institutions are largely urban based which adversely affects its accessibility to marginalised and vulnerable people residing in the rural areas.[470] This issue of accessibility is further linked to the promotion mandates of both the SAHRC and CGE. The SAHRC and CGE both have an obligation in terms of the Constitution and enabling legislation to conduct public education and promote public awareness of human rights and gender equality. This is especially important considering the history of the country and is of considerable importance in building a society founded on respect for human rights. However, an assessment of this role revealed that the SAHRC and CGE remain largely inaccessible to the rural population and marginalised members of society, such as women who reside in the rural areas.[471] Another challenge that was noted relates to funding and the availability of resources. While it is generally accepted that the SAHRC is well-financed by the State, the opposite is true for the CGE. Hence, as outlined by the Asmal Report, operating as separate bodies, these institutions have inadequate resources, and their budget allocations are insufficient to meet their main objectives.

[467] These mandates and functions were discussed in this chapter under the three categories of promotion, protection and monitoring.
[468] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 38.
[469] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 181.
[470] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 35.
[471] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) Social Accountability in South Africa – Practitioners Experiences and Lessons (2010) Chapter 8 at 126.

4.6.2. IMPLICATIONS FOR THE MERGER OF SAHRC AND CGE

It's worth noting that, despite the Ad Hoc Committee's detailed recommendations, the Office on Institutions Supporting Democracy (OISD) only requested written submissions on a 'Process to Examine the Feasibility of the Establishment of a Single Human Rights Body' after a 10-year delay.[472] The focus of this thesis will be on the arguments about the implications for gender equality if the CGE ceases to exist as a distinct entity.

As previously stated, South Africa has been lauded for establishing a stand-alone gender equality institution, a practice that is unusual in comparable international terms. One of the primary objections to the merger has been that a single human rights body will undermine the country's commitment to gender equality.[473] An understanding of these arguments must thus be preceded by a consideration of the basis for the CGE's initial inception. According to the CGE, because international experience has demonstrated that when 'one-stop' Commissions exist to address all human rights issues, gender equality acquires a lower status, stakeholders chose to establish the CGE as a separate body to prevent gender issues from becoming second-class issues.[474]

The creation of the CGE was also influenced by the country's historical background; having emerged from a deeply oppressive, sexist and discriminatory past, it was essential to establish a constitutional democracy founded on mechanisms that would promote respect, gender equality and the status of women. In this regard, Hicks affirms that the CGE was created 'within a particular context of patriarchy and gender discrimination' and an advisory position was adopted to distinguish the CGE from a generic human rights body.[475] In accord, Bohler-Muller, Cosser, and Pienaar point out that the Asmal Report highlighted the reality that the CGE's formation as an independent constitutional body was motivated by the necessity to respond to the specific dynamics of South Africa's history of deeply entrenched patriarchy.[476] In its report, the Ad Hoc Committee states:

> 'Agreement emerged about the critical need to establish a separate body to deal with the distinctive needs of women in South Africa, and to prevent the marginalisation of those concerns most closely associated

[472] Office on Institutions Supporting Democracy '"Single Human Rights Body" Feasibility' (25 May 2017) *Parliamentary Monitoring Group.* Available at *https://pmg.org.za/call-for-comment/545/* accessed on 5 June 2021.
[473] J February 'Is a Single Human Rights Body in SA's Best Interest?' (14 June 2017) *Democracy Works Foundation.* Available at *https://democracyworks.org.za/is-a-single-human-rights-body-in-sas-best-interest/* (accessed on 15 June 2021).
[474] Commission for Gender Equality 'Gender Commission on recommendations of Parliamentary Ad Hoc Committee on Chapter nine institutions' (23 August 2007) *South African Government*. Available at *https://www.gov.za/gender-commission-recommendations-parliamentary-ad-hoc-committee-chapter-nine-institutions* (accessed on 20 June 2021).
[475] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) *Social Accountability in South Africa – Practitioners Experiences and Lessons* (2010) Chapter 8 at 124.
[476] N Bohler-Muller, M Cosser & G Pienaar 'Why we need a separate commission for gender equality' (2018) *Human Sciences Research Council* at 2.

with the lives of women… [Hence] the historical oppression of women in a starkly patriarchal society weighed heavily in the decision to establish the CGE'.[477]

The focus of this thesis now shifts to substantive arguments on the implications for gender equality if the CGE and the SAHRC merge. The Report of the Parliamentary Workshop on the AsmalReport in September 2015, in which there were differing opinions on whether a single human rights body is suitable, serves as the starting point for this discussion.[478] According to Justice Navi Pillay, asingle Commission would be able to provide appropriate consideration to all human rights but wouldhave to use a chambers-style approach because no single body would have the capacity to deal with diverse forms of discrimination.[479] Former CRL Chairperson Thoko Mkhwanazi- Xaluva, speaking on behalf of the bodies affected by the proposed 'umbrella' recommendation, voiced the opposite viewpoint, arguing that amalgamation was imprudent. While acknowledging existing overlap concerns, Ms Mkhwanazi- Xaluva argued that 'the tensions and contestations of a broad array of rightsshould be allowed to continue separately as a part of celebrating the diversity in the country'.[480]

This thesis favors Justice Pillay's reasoning. If there are overlaps, then addressing them on an *ad hoc* basis, as Ms Mkhwanazi-Xaluva appears to be suggesting, will inevitably result in inconsistencies and ambiguities, as well as a waste of resources. As the Ministerial Input reflects; while gender and women's issues deserve special consideration, considering the duplication of resources, it is palpable that a single administration would bring considerable cost savings.[481]

As previously indicated, the OISD invited submissions on the merger suggested in the Asmal Report two years after the Workshop was held. From the onset, most commentaries voiced concern about the timeline; having undertaken the enquiry over a decade ago, the delay has caused consternation with several stakeholders who have pointed out that chapter 9 institutions have changed

[477] Parliament of the Republic of South Africa 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) *A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* at 147.
[478] The Speaker of the National Assembly convened a workshop to examine and process the recommendations contained in the Asmal Report. The workshop was attended by: the Deputy Speaker, Mr Lechesa Tsenoli; the Chairpersons of ISD related Portfolio Committees, the Chairpersons or representatives of all the ISDs (with the exception of the National Youth Development Agency); the Minister of Justice and Correctional Services, Adv. T M Masutha; Minister of Communications, Ms A F Muthambi; Minister of Telecommunications, Mr S Cwele; Deputy Minister of Justice and Correctional Services Mr J Jeffery, Deputy Minister of Cooperative Governance and Traditional Affairs, Mr A Nel; the Deputy Minister of Home Affairs, Ms F I Chohan; and a House Chairperson from the National Council of Provinces, Mr A J Nyambi. Mr Cecil Burgess, a former Member of Parliament who was part of the Ad hoc Committee that presented the report under discussion, facilitated the workshop together with the Deputy Speaker of the National Assembly. And former United Nations High Commissioner - Justice Navi Pillay, and UKZN Law Professor, Karthy Govender were invited as guest speakers.
[479] Parliament of the Republic of South Africa 'Workshop on Report of the *Ad Hoc* Committee on the Review of Chapter Nine and Associated Institutions' (2015) *Office on Institutions Supporting Democracy (OISD)* at 20.
[480] Parliament of the Republic of South Africa 'Workshop on Report of the *Ad Hoc* Committee on the Review of Chapter Nine and Associated Institutions' (2015) *Office on Institutions Supporting Democracy (OISD)* at 17.
[481] Parliament of the Republic of South Africa 'Workshop on Report of the *Ad Hoc* Committee on the Review of Chapter Nine and Associated Institutions' (2015) *Office on Institutions Supporting Democracy (OISD)* at 19.

significantly over time. This issue was raised in the Parliamentary Workshop Report, which emphasized the necessity of contextualizing the Ad hoc Committee's recommendations in light of the country's changing landscape. It was noted, for example, that during the Ad Hoc Committee's review, some of the institutions had not been in existence for long, while others were still building effective internal structures and processes.[482] Thus, suggesting that if a comparable investigation were to be conducted today, the results in terms of this specific recommendation would be different.

Similarly, Davis echoes that Lisa Vetten believes that instead of relying on outdated data, a thorough review of current data linked to the relevant institutions is required.[483] Furthermore, in its submission to the Speaker's Office, the Centre for Applied Legal Studies (CALS)[484] stated that instead of examining the Asmal Report, another current assessment should be conducted, and if that review makes the same conclusion, a feasibility study should be conducted.[485]

Holding the same sentiments, Centre for Child Law (CCL), the Dullah Omar Institute (DOI), and Inclusive Education South Africa (IESA) acknowledge that there have been a number of developments, that have over the years strengthened the functioning of these institutions.[486] Similarly, Council for the Advancement of the South African Constitution (CASAC)[487] suggested that at this point the National Assembly establish an Ad Hoc Committee to take the consideration of the Single Human Rights Body forward.[488] The CASAC recommended this after stating that the arguments in

[482] Parliament of the Republic of South Africa 'Workshop on Report of the *Ad Hoc* Committee on the Review of Chapter Nine and Associated Institutions' (2015) *Office on Institutions Supporting Democracy (OISD)* at 17.

[483] R Davis 'What's the urgency? Revival of decade-old proposal on human rights bodies raises questions' (17 May 2017) *Daily Maverick.* Available at *https://www.dailymaverick.co.za/article/2017-05-17-whats-the-urgency-revival-of-decade-old-proposal-on-human-rights-bodies-raises-questions/* (accessed on 10 June 2021).

[484] The Centre for Applied Legal Studies is a registered legal clinic and human rights organisation headquartered at the University of the Witwatersrand's School of Law. CALS is dedicated to the preservation of human rights through empowering individuals and communities and pursuing structural change.

[485] P Madi 'Submission to the Office on Institutions Supporting Democracy (OISD) on the Process to Examine the Feasibility of the Establishment of a "Single Human Rights Body"' (June 2017) *Centre for Applied Legal Studies*. Available at *https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/CALS%20submissions%20to%20OISD%20re%20Single%20Human%20Rights%20Body%20-%2030%20June%202017.pdf* (accessed on 15 June 2021) at 3.

[486] Z Hansungule, S Waterhouse & V Japtha 'Submission to the Office on Institutions Supporting Democracy and The Knowledge Information Services Divisions, Parliament on a Process to Examine the Feasibility of the Establishment of a "Single Human Rights Body"' (20 June 2017) Centre *for Child Law, the Dullah Omar Institute, and Inclusive Education South Africa*. Available at *https://dullahomarinstitute.org.za/women-and-democracy/submissions/final-ccl-doi-iesa-submissions-to-oisd-30-june-2017.pdf* (accessed on 15 June 2021) at 1.

[487] The Council was founded in 2010 by a group of prominent South Africans (including former Constitutional Court judges, lawyers, academics, civil society representatives etc.) with the mission to defend and advance the South African Constitution as a platform for democratic politics and the transformation of South African society. The organisation's main focus is on building a culture of human rights, strengthening institutions of governance and the rule of law, and promoting accountability and integrity in public life.

[488] Council for the Advancement of the South African Constitution 'Submission on the Process to Examine the Feasibility of a Single Human Rights Body' (30 June 2017) *Council for the Advancement of the South African Constitution.* Available at *http://shukumisa.org.za/wp-content/uploads/2017/10/CASAC-Single-Human-Rights-Body-Written-Submission-to-OISD-30-June-2017.pdf* (accessed on 15 June 2021) at 8.

favour of the merger are so compelling that any decision not to implement the Asmal Committee's recommendations would have to be supported by a stronger case than has been presented thus far.[489]

Some organisations, in addition to voicing concerns about the timeline, caution that the CGE's folding into an all-encompassing human rights body might result in the marginalisation of gender problems. SECTION27[490] advised that 'an amalgamation of ISDs that will result in the relegation of any category of rights would be regressive'.[491] Instead, SECTION27 suggests that when considering a merged human rights body, a specialized gender unit should be established to promote gender equality and be given the resources necessary to carry out their mission.[492]

Khoza raises reservations about the National Youth Commission (NYC) being included in the merger suggested by the Asmal Report.[493] However, this concern is not applicable to this thesis since the thesis is concerned with the SAHRC and CGE. Apart from the aforementioned concern, Khoza is of the view that the proposed merger and the reasons behind it are 'sound and fundamental'.[494] Subsequently, Khoza favours the amalgamation of the SAHRC and CGE, noting that it may help address some of the existing gaps in the current human rights monitoring system, especially the fact that there is no institution monitoring whether the state is taking constructive steps to address substantive equality.[495]

On the other hand, several civil society organisations and the CGE itself advocate the CGE's continued existence as a separate autonomous entity, arguing that a merger would have a detrimental impact on resolving gender equality issues. In its response to the Ad Hoc Committee's proposal, the CGE noted that gender inequality is a feature of the South African landscape because of apartheid's extremely gendered character. The CGE expressed the opinion that unless there is a specialised

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[489] Council for the Advancement of the South African Constitution 'Submission on the Process to Examine the Feasibility of a Single Human Rights Body' (30 June 2017) *Council for the Advancement of the South African Constitution.* Available at *http://shukumisa.org.za/wp-content/uploads/2017/10/CASAC-Single-Human-Rights-Body-Written-Submission-to-OISD-30-June-2017.pdf* (accessed on 15 June 2021) at 4.

[490] SECTION27 is a public interest law centre dedicated to influencing, developing, and using the law to achieve social justice in healthcare, basic education, food, and accountability. SECTION27, guided by the values of the Constitution, employs law, advocacy, legal literacy, research, and community mobilization to accomplish structural change and accountability in order to protect the dignity and equality of everyone.

[491] SECTION27 'Submission on Office of Institutions Supporting Democracy Process to Examine the Feasibility of Establishing a Single Human Rights Body' (30 June 2017) *SECTION27.* Available at *http://section27.org.za/wp-content/uploads/2018/06/SECTION27-OISD-Single-Human-Rights-Body-Process-Submission.pdf* (accessed on 15 June 2021) at 4.

[492] SECTION27 'Submission on Office of Institutions Supporting Democracy Process to Examine the Feasibility of Establishing a Single Human Rights Body' (30 June 2017) *SECTION27.* Available at *http://section27.org.za/wp-content/uploads/2018/06/SECTION27-OISD-Single-Human-Rights-Body-Process-Submission.pdf* (accessed on 15 June 2021) at 11.

[493] S Khoza 'Strengthening the institutional mechanisms for monitoring socioeconomic rights' (2007) *ESR Review vol 8 (3)* at 11.

[494] S Khoza 'Strengthening the institutional mechanisms for monitoring socioeconomic rights' (2007) *ESR Review vol 8 (3)* at 11.

[495] S Khoza 'Strengthening the institutional mechanisms for monitoring socioeconomic rights' (2007) *ESR Review vol 8 (3)* at 11.

institution such as the CGE, gender issues will be submerged, inadequately addressed, and recognised.[496]

Given the nature and extent of GBV in South Africa, Bohler-Muller, Cosser, and Pienaar argue that the country requires a specialised institution to spearhead efforts to combat this scourge.[497] As a result, they argue that the CGE should not only be retained as a separate institution, but that it should also be strengthened by additional resources so that it can have a demonstrable impact on the accomplishment of non-sexism, gender equality, and the reduction of GBV.[498] Thus, merging the CGE might have a substantial influence on the gender landscape and the Commission's goal of decreasing the national GBV issue.

Similarly, the CCL, DOI, and IESA emphasize that gender inequality is firmly ingrained in South African society. In this context, independent oversight bodies such as the CGE are crucial for monitoring national action plans, investigating violations of women's rights, and advising on and overseeing the long-term project to transform gender inequality and women's rights.[499] Hicks agrees, adding that an independent, empowered body, such as a gender Commission, can hold a state accountable for delivering on gender equality commitments and obligations.[500]

The main conclusion that can be drawn from these viewpoints is that organisations and civil society regard the CGE as an essential component of South Africa's National Gender Machinery, which requires strengthening, either as a distinct body under the current framework, or as part of the consolidated single human rights body.

4.7. CONCLUDING REMARKS

It was not the intention of this chapter to argue that one of the two institutions under discussion is better than the other. Instead, the aim was to show that the SAHRC and CGE face similar challenges that have affected their constitutional and legislative mandates' realisation in different ways. The aim

[496] Commission for Gender Equality 'Gender Commission on recommendations of Parliamentary Ad Hoc Committee on Chapter nine institutions' (23 August 2007) *South African Government*. Available at *https://www.gov.za/gender-commission-recommendations-parliamentary-ad-hoc-committee-chapter-nine-institutions* (accessed on 20 June 2021).
[497] N Bohler-Muller, M Cosser & G Pienaar 'Why we need a separate commission for gender equality' (2018) *Human Sciences Research Council* at 1.
[498] N Bohler-Muller, M Cosser & G Pienaar 'Why we need a separate commission for gender equality' (2018) *Human Sciences Research Council* at 1.
[499] Z Hansungule, S Waterhouse & V Japtha 'Submission to the Office on Institutions Supporting Democracy and The Knowledge Information Services Divisions, Parliament on a Process to Examine the Feasibility of the Establishment of a "Single Human Rights Body"' (20 June 2017) Centre *for Child Law, the Dullah Omar Institute, and Inclusive Education South Africa*. Available at *https://dullahomarinstitute.org.za/women-and-democracy/submissions/final-ccl-doi-iesa-submissions-to-oisd-30-june-2017.pdf* (accessed on 15 June 2021) at 6.
[500] J Hicks 'Leveraging State Accountability: The South African Commission for Gender Equality' in V Ayer, M Claasen & C Alpín-Lardíes (eds) *Social Accountability in South Africa – Practitioners Experiences and Lessons* (2010) Chapter 8 at 136.

was further to expound that despite the challenges they face, both the SAHRC and the CGE are especially important to promoting and defending human rights in South Africa.

This thesis acknowledges that the two institutions have executed and realised some of their mandates in varying degrees. However, it argues that there is still much that can be done to improve these institutions' efficacy. This is where the principles of constitutionalism and transformative constitutionalism discussed in chapter 1 and 3 are of great relevance. Transformative constitutionalism is rooted in transformation and a constant desire to seek ways to transform the society in ways that will not only enhance the lives of the people but also ensure the full realisation of human rights.

Having discussed the constitutional and legal mandates of the SAHRC and CGE, this thesis suggests that a structured approach to human rights protection, promoting and monitoring by a central body would reduce overlap, improve resources and capabilities, and offer transparency for members of the public seeking redress. At a time where the Constitution and constitutional transformation is under constant attack from a range of critics, it is evident that the special intermediary status and powers of the SAHRC and CGE place them as powerful actors in the implementation of the Constitution and protection of socio-economic and gender equality rights in the country.

CHAPTER 5

RESEARCH FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

The main purpose of this thesis was to analyse the legal and institutional role of Chapter 9 institutions: particularly, the SAHRC and CGE. As outlined in the previous chapters, any review of these institutions' legal and institutional role in supporting constitutional democracy must be undertaken in the light of their international, regional and national position. Accordingly, such study was preceded by a consideration of the international and regional framework in human rights protection. Following this, an analysis of the history of South Africa was conducted; including, a brief discussion of the constitution-making process that paved the way for a democratic South Africa. The value of this historical perspective is important in order to represent the various factors that helped shape Chapter 9 institutions. The above analysis was undertaken with the aim of determining whether it is feasible to merge the SAHRC and CGE into a single human rights body. The findings of that analysis have provided the basis for the thesis recommendations.

5.2 RESEARCH FINDINGS

The research question for chapter two was twofold: first, it called for an evaluation of the international institutional and legal framework in human rights protection and secondly, it looked at the development of NHRIs guidelines in the international and regional sphere. Hence, this chapter was essentially divided into two parts. The thesis wishes to reiterate its main findings:

The thesis discovered that the UN is the leading organisation responsible for shaping the institutional and legal framework for human rights protection at international level. Furthermore, the UN framework dates back to the adoption of the 1945 UN Charter and later the 1948 UDHR, which gave rise to 1966 Covenants: the ICCPR and ICESCR. Together these instruments comprise the International Bill of Human Rights, which serve as the foundation for the international institutional and legal framework for human rights protection.

The thesis further identified two key differences between these 1966 covenants: first, the ICCPR is concerned with civil and political rights, while the ICESCR is concerned with economic, social, and cultural rights. Secondly, while the former appeals for immediate recognition and protection of human rights, the latter merely calls for action to be taken depending on the availability of State resources. Thus, to reconcile rights contained in each document, the UN endorsed the concept of interdependence and indivisibility of human rights. The thesis aligns itself with this notion, arguing that while different

categories of rights exist, first-generation rights should not be regarded as more essential than second-generation rights. This finding is particularly important, as the core argument of this thesis has to do with the integration of human rights organisations that were initially established to cater to different rights.

Notably, in relation to the second issue, it was found that although the rights contained in the International Bill of Human Rights accrue to the individual, the obligation for giving effect to them rests with the party States. Hence, States rely on NHRIs to ensure effective national implementation of international and regional instruments. To achieve uniformity in the structure of NHRIs to a degree, the Paris Principles outline the structure of NHRIs, which involve roles, composition, tasks, and principles.[501]

Against this backdrop, chapter three looked into the establishment of the South African NHRIs, collectively known as the Chapter 9 institutions. In addressing this issue, the research focused on the historic development of constitutionalism in South Africa, from the start of the constitution-making process all the way to the birth of the 1996 South African Constitution. It found that South Africa's divided, and discriminatory history has shaped and continues to shape the transformative nature of its Constitution. Additionally, it was established that the Constitution integrates elements from the International Bill of Human Rights by recognising 'democratic ideals of human dignity, liberty, and freedom' and promoting a culture of human rights respect.[502]

In light of the above, the Chapter 9 institutions introduced in section 181 of the Constitution, were formed in order to promote and reinforce constitutional democracy and safeguard fundamental rights. Moreover, the results concluded that Chapter 9 institutions form an integral part of the constitutional framework and act as an additional dimension of the system of checks and balances provided by the government branches on each other's authority and by the Constitution itself.[503]

Further to this, chapter 4 focused on the two institutions most relevant for this thesis; SAHRC and CGE. It was found that SAHRC and CGE are established in compliance with Paris Principles and that the powers and functions of the SAHRC and CGE flow primarily from the Constitution and enabling legislation. The former receives its general mandate from section 184(1) of the Constitution[504] and the SAHRC Act. Whereas the latter obtains its general mandate from section 187(1) of the Constitution[505]

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[501] E Steinerte & RMM Wallace 'United Nations protection of human rights' (2009) *University of London Press* at 13.
[502] Sections 7(1) and 7(2) of the Constitution.
[503] R Calland & G Pienaar 'Guarding the guardians: South Africa's chapter nine institutions' in D Plaatjies, R Calland, G Pienaar, M Chitiga-Mabugu, C Hongoro, T Meyiwa, M Nkondo & F Nyamnjoh *State of the Nation South Africa 2016: who is in charge?: Mandates, accountability and contestations in the South African state* (2016) Human Sciences Research Council at 67.
[504] The SAHRC has a mandate to '(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'.
[505] The mission of the CGE is to 'promote respect for gender equality and the protection, development and attainment of gender equality'.

and the CGE Act. Looking at the constitutional mandates of these institutions, as well as their recent Annual reports, it was determined that the duties of the SAHRC and the CGE can be categorized as follows: promotion, protection, and monitoring.

Based on the above observation, the thesis identified several areas of concern. First, a substantial overlap and replication in the roles and activities of these institutions was identified. Secondly, the thesis argued that the significant overlap between the roles of the SAHRC and CGE attest to the notion of interdependency and indivisibility of human rights, which was discussed in chapter two. It further shows that human rights cannot be easily compartmentalised, thus leading to confusion since people experience human rights violations in various forms. This uncertainty coupled with the existing inaccessibility issues these institutions face, impedes citizens' access to justice and inadvertently leaves them without redress when their rights are violated. Another challenge that was identified pertains to finances and the availability of resources. While it is generally accepted that the SAHRC is well-financed by the State, the opposite is true for the CGE. The low funding provided to the CGE has limited the CGE's ability to meet its mission and assist disadvantaged populations.

5.3 RECOMMENDATIONS

This thesis proposes that the SAHRC and CGE merge into a single human rights body to help bridge the disconnection between these institutions and ordinary citizens. And to further the constitutional principles of equality, respect for human rights, accountability, and democracy. As this thesis argues for the consolidation of these institutions, questions surrounding the creation, continuation, and success of this body are important.

Conceptually, first, the interdependence and indivisibility of all human rights is essential. This study accepts that the original purpose of the SAHRC and CGE was to serve as two independent entities, but the present convergence and overlapping of their roles and operations undermines their effectiveness and accessibility to the public. According to the findings, it is virtually difficult to divide human rights down into different compartments, which is why misunderstandings among the general public is basically unavoidable. Therefore, interdependence suggests that one single human rights body is best positioned to cope with matters of redundancy and inaccessibility in these institutions. Additionally, fruitful cooperation with civil society organisations is crucial to addressing the problem of human rights education. As Mubangizi remarked in chapter 4 of this thesis:

> 'the effective enjoyment of human rights largely depends on the level of awareness of such rights – and how to enforce them. People cannot enforce rights that they are unaware of'.[506]

Therefore, the proposed body has to rely on outreach and awareness techniques that are community-centered to ensure that services are used to their full benefit. Training and equipping affiliates of civil society groups with the requisite skills to execute human rights education activities and seminars in their communities can potentially enforce this approach. This arrangement would result in both cost savings and the accessibility of continuous human rights education to the general population, especially those residing in rural areas.

Ultimately, an integrated human rights body, composed of the SAHRC and the CGE, with more institutional muscle and administrative capacity, would achieve a wider reach enabling it to manage more efficiently with citizens' complaints while holding functionaries to account. Simultaneously, the combined resources will guarantee that the single body is well funded and has the requisite funds and legal authority to protect human rights and fight structural rights abuses as well as serve as a referral center for South Africans who are unable to seek justice. It goes without saying that the proposed merger of the SAHRC and CGE would not address all these institutions' problems. Instead, the goal of reforming the SAHRC and CGE for amalgamation should be to ensure that both institutions are more holistically effective and better equipped to promote and safeguard our democracy.[507] It is rather alarming that the 2015 Workshop Report still addressed and sought to resolve structural problems identified in the 2007 Asmal Report. This indicates that the concerns identified in the Asmal Report remained unresolved eight years after its publication.

With a national outcry against the justice system's failures to protect women and girls who are victims and survivors of gender-based violence[508] in the face of the COVID-19 pandemic, these institutions play a critical role in promoting human rights and assisting those in need. This role is rooted in the constitutional roots of the country and the transformative nature of its Constitution. As outlined in chapter 1 of this thesis, Chapter 9 institutions have a crucial role to play in upholding and enforcing the values and principles of the South African Constitution, including: the advancement of human rights, the achievement of equality and promotion of a culture of human rights.

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[506] JC Mubangizi 'Human rights education in South Africa: Whose responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* at 497.

[507] SECTION27 'Submission on Office of Institutions Supporting Democracy Process to Examine the Feasibility of Establishing a Single Human Rights Body' (30 June 2017) *SECTION27.* Available at *http://section27.org.za/wp-content/uploads/2018/06/SECTION27-OISD-Single-Human-Rights-Body-Process-Submission.pdf* (accessed on 15 June 2021) at 3.

[508] Amnesty International 'Southern Africa: Homes become dangerous place for women and girls during COVID-19 lockdown' (9 February 2021) Available at *https://www.amnesty.org/en/latest/news/2021/02/southern-africa-homes-become-dangerous-place-for-women-and-girls-during-covid19-lockdown/* accessed on 13 February 2021.

It is essential to reiterate that unlike the Asmal Report recommendation of merging five institutions; this thesis proposes a merger of the SAHRC and the CGE, which organisations have acknowledged is feasible owing to overlaps and shared aims of the two institutions. Furthermore, the thesis does not propose that the CGE be subsumed under the SAHRC, since this terminology implies that the CGE will be under the SAHRC. Instead, the thesis proposes that the two entities combine such that each receives equal attention. It also proposes a chamber-style approach, as recommended by Justice Pillay, in which a single human rights body is formed with multiple chambers within the body to guarantee that gender issues are not secondary.

5.4 AREAS FOR FUTURE RESEARCH

There are limitations in this study that could be addressed in future research. First, this thesis is mindful that the successful establishment of such a body, involves a constitutional amendment to accommodate the desired restructuring of these institutions. To recognize such an amendment, a further legal amendment would be needed to enact the constitutional amendments. Secondly, the thesis realizes that its findings concerned only the SAHRC and CGE. However, the findings could have broader relevance if future research attempted to analyse the prospects of a single human rights body that was proposed by the Ad Hoc Committee. Such a research will expand, the focus to other Chapter 9 institutions in an empirical study, thus conducting interviews with relevant stakeholders, which would be useful to developing practical mechanisms that are sufficiently encompassing. At the time of this thesis, OISD had not responded to the comments and submissions it had requested in 2017. As a result, there is currently no strategy to address concerns about the timeframe of the initial enquiry, and no Committee has been formed to gather data on South Africa's current social, economic, and political landscape.

5.5 FINAL CONCLUSION

The primary aim of the thesis was to contribute to the broader process of creating an integrated human rights body that will not only uphold values of accountability among functionaries but also guarantees that the State remains responsive and attentive to the needs and rights of its people. Emerging from a deeply racist, and authoritarian history, where fundamental human rights were openly abused on an exceptional scale by an unconstitutional government that refused to enforce even the most basic principles of the rule of law, nowhere is the necessity of human rights institutions as crucial as in South Africa. With this in mind the thesis proffered ideas on the merging of the SAHRC and CGE to act as a vehicle for promoting respect and observance of human rights.

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ETHICAL CLEARANCE CERTIFICATE

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Pretty Zinhle Koza (215021219)
School Of Law
Howard College

Dear Miss Pretty Zinhle Koza,

Protocol reference number: 00010685
Project title: Prospect of merging the South African Human Rights Commission and Commission for Gender Equality into a single human rights body

Exemption from Ethics Review

In response to your application received on 14/12/2020 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
Research and Higher Degrees Committee
School Of Law