CHAPTER -III

STRUCTURE AND FUNCTIONS OF THE NATIONAL HUMAN RIGHTS COMMISSION:
INDIA AND SOUTH AFRICA

3.1 NHRC OF INDIA

Incorporation of any right or rights to the citizens by the State is useless unless some protective and enforcing mechanism is provided by the State, for their implementation and protection. Keeping this in view, legislature while enacting any legislation simultaneously enactment the provisions (or their protection and enforcement. The same position seems to be with the newly enacted Protection of Human Rights Act, 1993. It can also be said that the main objectives of The Protection of Human Rights Act, 1993 is to provide for the constitution of the National and State Human Rights Commissions and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto. Thus, it has a twin objective to fulfill, namely, establishment of institutional structure, both at Centre and State levels, and to create enforcement machinery in terms of human rights courts for better protection of human rights. As per the Act, the NHRC of India has arranged its structural and functional framework in order to execute its functions.¹ According foregoing study has been devoted to analyse structural and functional aspects of National Human Rights Commission on various other dimensions under following heads-need for setting-up of the National human Rights Commission; Structure of the National Human Rights Commission Status of the National Human Rights commission; Function and powers of the commission; constitutional validity of the commission lies under the Commission of Inquiry Act, 1952; Status of the commission under International Law and role of the National Human Rights Commission.

3.2 NEED FOR SETTING UP OF THE NATIONAL HUMAN RIGHTS COMMISSION IN INDIA

The decision by the Government of India to set up a human rights panel did not come a day soon. A host of factors led the government to think in terms of Setting up of a

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statutory and recommendatory body on human rights. The issue had been under active consideration for some time at the appropriate official levels. After considered thought, government had announced its intention to prepare a legislation to serve as a basis for such a Commission\(^2\). The issue assumed urgency in the context of alleged violation of human rights in certain States like Jammu & Kashmir, Punjab and Assam. However, some of the important factors which led to the formation of National Human Rights Commission may be summarised as follows:

(i) Over the past several years, India has been severely criticized by Amnesty International, Asia watch and International Red Cross for alleged violations of human rights by the police and security forces in most sensitive areas such as Punjab, Kashmir, Assam and Andhra Pradesh. These violations include custodial deaths, illegal confinement police brutalities, rate and other heinous crimes\(^3\). Denial of permission these reputed international bodies to study and assess our human rights record has created suspicion in the minds of such organizations about the sincerity of our commitment to uphold human rights. The denial to these organizations to visit the sensitive areas was backed by the reasons that it might be prejudicial to the security of the State and hamper the work of restoring peace and transquility which has been adversely criticized on account of the absence of any plausible reasons\(^4\). In order to avoid such criticisms/ reports made by these organizations, the government decided to set-up a native agency to examine its own human rights records.

(ii) The charges of violations of human rights in India are being raised primarily with the incidents of torture, rape and deaths in police custody, and inhuman and degrading treatment of prisoners. Apart from this, rampant violations of human rights arise out of the poor socio-economic conditions of our people, particularly people belonging to the most vulnerable sections-members of the Scheduled castes and Scheduled Tribes, migrant workers and landless labourers.\(^5\) Such violations occur due to the country’s scarce resources and other problems like


poverty, malnutrition, mounting unemployment, illiteracy, unbearable and unhygienic conditions in the slums, lack of primary health care in the rural areas and a horde of other problems including violence, terrorism and outrageous incidents of communal riots. Taking all these into account, it seems that our commitment to human rights is a mere catchy slogan pronounced at public meetings, conferences and seminars. Therefore, there is a need to establish a fact-finding body to recommend ways and means to the Government/ authority to prevent such violations.  

(iii) The growing concern for the promotion and protection of human rights issues both at national and international level could be a probable reason for the Central Government to think in terms of establishing a Human Rights Commission in India. The increasing concern being made about human rights, a real threat has been anticipated in the form of link between economic assistance and human rights conditionalities. The United State of America and United Kingdom are not the only Western countries which have been expressing their concern over the violations of human nights in India, but other donor countries like Sweden, Norway France and Switzerland have also expressed their concern in this regard. They have been influenced by a number of international non-governmental organizations, notably Amnesty International and Church bodies. They acknowledge that there have been instances of arbitrary killings of civilians by terrorist groups in Kashmir and hence stress the point that higher standards are expected from the government officials who are entrusted to uphold and protect basic rights of people.

(iv) Another consideration for the introduction of human rights commission bill could be analysed in the light of Kashmir issue. Pakistan has a long-standing demand to sponsor resolution recommending the visit of a fact-finding mission to Jammu & Kashmir to investigate alleged violations of human rights by the police and other security forces. This issue has been raised at various

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7 Rangananth Misra, *Valedictory Address at the Asia and Pacific Regional Meeting on Tolerance*, Organized by Ministry of HRD, Department of Culture, 4 May, 1995.
international conferences and has become more intense particularly in the World Conference on Human Rights at Geneva on 3rd March, 1993.\(^9\)

(v) In its proposal for “Co-operation, Agreement on Partnership and Development with India (1993), the Election Commission has inserted a clause which states that respect for human rights and democratic principles is the basis for the cooperation between the contracting parties which constitutes a key element to this agreement Election. Prior to it had also emphasised on a resolution on Human Rights, Democracy and Development in 1991. In this resolution, the Election Commission had made the insertion of human rights clauses compulsory in the economic and cooperation agreement between the Election Commission and its member-States and developing countries, towards this end, India has recently received an annual aid of about $ 100 million to $ 150 million for specific projects from the Election Commission. With regard to violations of human rights in India, the European Parliament had also passed a resolution on heightened tension in Jammu & Kashmir State in 1992 in which it condemned all acts of terrorism and repression and abuses of human rights and stressed the point that such acts may influence Election Commissions relations with India and Pakistan. As a party to the Agreement, India had to perform its obligation to fulfill these conditions/clauses imposed by the Election Commission members.\(^10\)

(vi) The various rulings of the Supreme Court, High Courts, the reports of the Law Commission, the National Police Commission and the reports of independent observers have made clear that the immediate need for amending relevant sections of the Code of Criminal Procedure and the Indian Penal Code are necessary. The amendments suggested that it would shift the liability of proof on the police officials in case there is evidence that injury caused while in custody, mandatory judicial enquiry in case of death or disappearance in custody, post-mortem within 24 hours and medical examination in case of all allegation of rape. So the proposed Human Rights Commission may be of useful instrument in this regard.\(^11\)

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\(^10\) Refer *Supra Note 5*, at page 34.

(vii) The need for bringing a central legislation providing for mandatory financial compensation to the victims of custodial crimes is long overdue. Thus, by adopting a three-pronged strategy—first, the establishment of human rights commission, second, amendment of the existing administrative law on crime, and third, a central legislation for compensation for the victims of custodial crimes—India can fulfill its international obligations and live up to the constitutional mandate.\(^\text{12}\)

(viii) Another point of observation is that the judicial process in India is very slow. It often takes years for a case to be decided. The courts are clogged with cases, hence there is a great backlog of pending cases. Besides the technicalities of procedure make it case of ‘justice delayed hence justice denied’. So the proposed Commission could be another redressal mechanism for the promotion and protection of human rights in a more systematic way.\(^\text{13}\)

(ix) Despite the criticisms labelled against India by human rights organizations, “the world community, by and large, perceives India as a stable democracy with an independent judiciary, vibrant legislature and a vigilant press. It is, therefore, incumbent upon us to uphold India’s image at home and abroad by establishing an independent and investigatory watchdog body on human rights” As discussed earlier many countries like Canada, Australia, Mexico, Algeria, Northern Ireland, Japan, Nicaragua and the Philippines have set-up human rights commissions in their respective countries. So it is clear from the available indications that our country should have a Commission similar to those countries. The Commission so set-up can have Indian laws and conditions, and can function in coordination with the existing Commissions meant for safeguard in the rights of the Scheduled Castes and Scheduled Tribes, women and the minorities.\(^\text{14}\)

Taking all these points into consideration, the Government of India introduced the Human Rights Commission Bill in the Lok Sabha on 14th May, 1992. The Bill was referred by the Speaker to the Standing Committee of Parliament on Home Affairs. In view of the


urgency of matter, the Protection of Human Rights Ordinance, 1993 was promulgated by the President on 28th September, 1993. After incorporating certain amendments having regard to the discussions in the said Standing Committee and to replace the Ordinance of 1993, the Protection of Human Rights Bill was passed by both the Houses of Parliament and it came on the Statute Book as the Protection of Human Rights Act, 1993 (10 of 1994). The Commission was initially constituted on 12th October, 1993 under the Protection of Human Rights Ordinance of 28th September, 1993.

3.3 STRUCTURE OF THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

The unique feature of the National Human Rights Commission is its well-arranged and newly developed organisational structure. Organisationally, National Human Rights Commission consists of a Chairperson, Members, Secretary-General, Heads, Sub-heads and other staff of different divisions.

(A) Composition of the Commission

The composition to the Commission can be studied taking into reconsideration the following sub-points:
(i) Chair-person and Other Members:

Section 3 of the Act envisages that the Commission shall consist of:

(a) A Chairperson who has been the Chief Justice of the Supreme Court;
(b) One Member who is, or has been, judge of the Supreme Court;
(c) One Member who is, or has been, the Chief Justice of a High Court; and
(d) Two Members to be appointed from amongst persons having knowledge at, or practical experience in, matters relating to human rights.

In order to facilitate the work to the Commission, the Act also lays down that the Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Caste, Scheduled Tribes, and the National Commission for Women are to be deemed to be the Members of the Commission for the discharge of certain functions, except for function relating to inquiry into complaints of violation of human rights, viz., that mentioned in section 12(a)(i) and (ii) of the Act.
(ii) Appointing Authority: In accordance with section 4 of the Act, the Chairperson and members of the Commission are appointed by the President of India on the basis of the recommendations of a committee comprising the Prime Minister, as the Chairperson, the Speaker of the Lok Sabha, the Home Minister, the Leaders of the Opposition in the Lok Sabha and Rajya Sabha, and the Deputy Chairman of the Rajya Sabha as members.

(iii) Term: The term of office of the Chairperson and members will be of five years from the date of assumption of office or until the age of 70 years, whichever is earlier. On ceasing to hold office, the Chairperson and members shall be ineligible for further appointment under the Government of India or under the Government of any State.

(iv) Removal: The Chairperson or any other member of the Commission can only be removed from his office by an order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court has, on an inquiry he in this behalf, recommended such removal.

(v) Vacancy of the Office of Chairperson: In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President of India may, by notification, authorise one of the members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy. When the Chairperson is unable to discharge his Functions owing to absence on eave or otherwise, such one of the members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

However, no sitting Judge of the Supreme Court or a sitting Chief Justice of a high Court shall be appointed without consultation with the Chief Justice of India.

(vi) Head Quarter of the Commission: The Head Quarter of the Commission shall be at Delhi and there is an additional provision in the Act to establish offices at other place in India with the previous approval of the Central Government.
(B) Officers and Other Staff of the Commission

The Act provides that besides the Secretary – General, the available to the commission staff as may he necessary for the efficient performance of the functions of the Commission. The Commission may appoint other administrative, technical and scientific staff considered necessary in conformity with the rules made by the Central Government in this behalf.

3.3.1 Secretary General

The Secretary of the Commission an officer of the rank of Secretary to the Government of India. As a Chief Executive Officer of the Commission, all the orders, decisions taken by the Commission are authenticated by him. The whole secretariat of the Commission, i.e., all the divisions comes under the overall administrative control of the Secretary- General who is directly responsible to the Commission. Being the chief coordinator of the Commission, he also keeps liaison with the various Ministries of the Government of India.

There are at least five different divisions of the Commission entrusted with specific task, in close consultation and coordination with each other. These are the Investigation Division, the Law Division, the Administration Division, the Information and Public Relations Division, and the Research Division, and the Research Division. In addition to this, the Commission also maintains a library and computer cell. All these components of the Commission call for a more detailed study.

3.3.2 The Investigation Division

The Commission has its own investigatory staff for investigating into complaints either through its own initiative or petition filed by a person in relation to human rights violations. As per the Act, the head of the investigation team is an officer of the rank of Director General of Police who is appointed by the Commission itself. This team includes one Deputy inspector General of Police, 3 Superintendents of Police, 6 Deputy Superintendents of Police, 24 Inspectors of Police and 24 Constables. In addition to this, the Act also envisages the association in appropriate cases of
outsiders as investigators or Servers. However, the specified strength of the division is yet to be achieved.\textsuperscript{15}

As the head of the division the Director General is responsible for the whole process of investigation into complaints of human rights violations. In the process of its inquiry it is also open to the officials of the division to utilise the services of the Central Government or any State Governments as the case may be. During the investigation process an officer/agency whose services are utilised comes under the direction and control of the Commission. The Commission, through the concerned officer or agency has the power to summon and enforce the attendance of any person and to examine him. Thereafter; the officer or agency, utilised for this purpose is required to submit a report to the Commission in a given period of time as prescribed by the Commission, Accordingly the Commission makes its own recommendations.\textsuperscript{16}

Another task of the division is the despatch of delegation. The main aim of the task is to get more information about the violation of human rights and other related problems. For example a delegation has been sent to Jammu & Kashmir for an on the-field investigation. These are the main responsibilities of the division with the hierarchy of functioning.\textsuperscript{17}

\textbf{Table 3.1: Cases disposed off during 2008-09 (including cases of previous years)}

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismiss in Limini</td>
<td>63160</td>
</tr>
<tr>
<td>Disposed off with Directions</td>
<td>17587</td>
</tr>
<tr>
<td>Transferred to State Human Rights Commission</td>
<td>5865</td>
</tr>
<tr>
<td>Complaints/Suo-moto cognizance Cases</td>
<td>14844</td>
</tr>
<tr>
<td>Custodial Death Cases</td>
<td>2349</td>
</tr>
<tr>
<td>Custodial Rape Cases</td>
<td>180</td>
</tr>
<tr>
<td>Encounter Death Cases</td>
<td>11</td>
</tr>
<tr>
<td><strong>Total Cases</strong></td>
<td><strong>103996</strong></td>
</tr>
</tbody>
</table>

Source: NHRC Annual Report 2008-09

\textsuperscript{17} B.V. Somarekhar, \textit{Programmes and prospective of NHRC towards protection of Human Rights in India} (2001) at page 24.
3.3.3 The Law Division

The Law Division of the Commission plays a pivotal role in both receiving of complaints and redressal procedure of such complaints of human rights. It also informs the petitioner and violative agency about the action taken or likely to be taken in that regard. The medium of interaction could, however be through any vernacular language as mentioned in Eighth schedule of the Constitution. However, no fee is chargeable on complaints.

Presently, it is headed by a Registrar, one Joint Registrar one Deputy Registrar, 5 Assistant Registrars, 6 Section Officers, 9 Office Assistants and such other ministerial staff. The functioning of the Law Division of the Commission is quite systematic and meticulous. It acts in a sort of circle. First of all it receives the complaints and after formal registration of these it sends to decision-making body of the Commission. The decision-making bench, after a proper assessment of the complaint, passes orders having three different possibilities. 18

- Dismissal of complaint on the following grounds
  1. The complaints which do not fall within the purview of the Commission;
  2. The matter is subjudice or pending before another commission;

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3. The event which is the object of the complaint had occurred more than one year before making of the complaint;
4. The complaint which is vague anonymous or pseudonymous in nature; and
5. The complaint relating to service matter.

- Disposal of complaints with direction to the concerned authority where the case is to be decided.
- After the proper assessment of a complaint a notice is given, provided the Commission feels that the case comes within its purview and consequently detail reports are demanded from concerned authorities. In case of delays in furnishing the report, the Commission sends reminders 2nd then the concerned agencies/authorities are bound to send the report to the Commission which passes the final order and sends the same back to the authority. However, all these works of the Commission are practically done by this division with the help of the computer-based network system.¹⁹

### 3.3.4 The Administration Division

This Division looks after all administrative, personnel, establishment cadre matters of all the staff and officers of the Commission. It is headed by a Joint Secretary who is the Head of Department and is assisted by a Department, two Under Secretaries, two Section Officers and such other ministerial staff.

This division looks after the meetings of the full Commission daily sittings of the Commission and issues notices for such meetings/sittings. It also arranges the tours of the Commission including foreign tours/visits. It looks after the Protocol arranges staff identity cards, telephones computers and other equipments of the Commission.

The Accounts Branch also function is under the overall charge of the joint Secretary. It has an on date, one Senior Accounts Officer, three Assistant Account Officers and other ministerial staff. This branch looks after all the accounts of the Commission prepares budget as also monitors the same.²⁰

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India and South Africa

The General Section of the division takes care of all the house-keeping jobs, i.e., procurement of stationary stores equipments like Typewriters, Electronic Typewriters. Photostat machines Fax and such other equipments, furniture, etc. it also issues various items of housekeeping to different divisions and staff. It also looks after the maintenance, renovation and repairs, etc., of the office premises as also keeps close liaison with CPWD for the maintenance, etc., of the bunglow allotted to the Chairperson and other members of the Commission. Under Secretary (Estt.) is the head of the office and is also assisted by a Drawing and Disbursing Officer (DDO)

A Hindi Section of the Commission also functions presently under this division. This section arranges translation of complaints from Hindi and other vernacular languages into English as also normal Hindi work of the Commission including translation of Monthly News Letter and Annual Report. It has also introduced correspondence in Hindi in office premises.

The Commission is an autonomous body and its autonomy scheme came into being in April 1994 under the autonomy scheme, various powers of the Ministries/departments of the Central Government have been delegated to the Chairperson. Financial power general financial rules, fundamental and supplementary rules. Central services leave rules and such other rules as applicable to other Ministry/departments of the Government or India have also been delegated to the Commission.21

A steering committee headed by the Chairperson has been set up to look after the budget estimates, revised budget estimates, allocation of funds to various heads and sub-heads, approval of accounts and provisions, directions on the audit report, and such other matters within the competence of the Chairperson as he may like to refer this committee.22

3.3.5 The Information and Public Relation Division

This Division publicises the activities of the Commission through the Print and Electronic Media, headed by an information and Public Relation Officer who also acts as the Editor of the Monthly Human Rights News Letter, Annual Reports and other editorial matters of the Commission. This Division is also responsible for the

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production and distribution of pamphlets/brochures/audio spots, video spots on human rights. As the spokesman of the Commission, the IPRO briefs the media persons, issues press releases and also organises press conferences. Besides this, it also maintains a data base entitled News Paper Clipping Information System (NPCIS), concerning certain important features of press reacting to National Human Rights Commissions work. It also looks after co-ordination with Non-Governmental Organizations and maintains a Directory of Non-Governmental Organizations in the computer system. It also keeps in touch with the representatives of international news agencies/Telecast/Broadcast, etc.23

3.3.6 The Research Division

In order to discharge the responsibility to undertake and promote research in the field of human rights, a Research Division has recently been set-up for this purpose. This Division contact with both private and official persons, prepares and participates in research missions, and monitors news reports on each item relating to human rights. The researchers from different schools and universities are a getting assistance from this Division. Headed by a Senior Research. Off the Research Division works, in close cooperation with the Law Division, and is responsible for giving advice on research matters to the members of the Commission.24

Presently, the Division is underway to prepare reports on various issues relating to human rights on the basis of press clippings. Thee includes custodial deaths, compensate to the victims of crime, child labour, bonded labour, and child prostitution which are some of the burning issues on human rights.

3.3.7 Library

The Commission has also taken steps to set-up a library cum-documentation centre. Presently it maintains around 1900 books and other documents, such as UN Documents, AIR manuals. Supreme Court Reports, Government Reports, NGO

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Bulletin, to name a few, which are of relevance to the Commissions work. The library also subscribes to a few journals. In order to make it more systematic and accessible one, it is proposed to be computerised soon.

3.3.8 Computer Cell

With the number of complaints before the Commission growing rapidly, the computerisation of data has become almost essential in order to take timely and meticulous follow-up. A Pentium (p-5) based system with 28 Terminals, one Laser Printer, three Global and 8 Local printers have been installed. With, the close collaboration with National Informatics Centre (NIC). It has developed a user-friendly package for monitoring, the status of complaints, from receipt to final disposal. As soon as a complaint is received, a case number and the file number were assigned to it by the Law division. Thereafter the details of the complaints are entered into the computer and an acknowledgement printed in the name at Commission is mailed to the concerned complainant. The facility has also been undertaken to update the case record, so that, at any point of time, the status of any complaint can be assessed by the members of the officers of the Commission. It is also proposed to avail up NIC NET connectivity which will facilitate interaction with officials of National Human Rights Commission, human Rights Courts and District Committees (or a direct link with the Commission).25

3.3.9 Status of the National Human Rights Commission

The all-encompassing concept of human rights and its protection by the existing institution, i.e., the National Human Rights Commission, besides an independent impartial, accessible and effective judiciary, indicates that there are equally effective instruments of human rights protection. This very fact underlines the status of the Nation Human Rights Commission, notwithstanding the importance of judiciary of our country. However, the status of the commission is not only derived from is statute but also from various other sources.26

The dynamism of the concept of human rights has given rise to varied meanings of it. It has been perceived differently at different places and in different contexts. In India, however the National Human Rights Commission has legally defined the concept in the following way:

In terms of Section 2 of the Act, “human rights” means the rights relating to the life, liberty, equality and dignity of the individual, guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. “International Covenants” means the international Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December, 1966.

3.4 FUNCTIONS AND POWERS OF THE COMMISSION

There are wide range of functions envisaged for the Commission under section 12 of the Act, ‘all or any’ of which are to be performed by it. These functions are:

(a) To inquire on its own initiative or on a petition presented to it by a victim or any persons on his behalf, into complaints of:

(i) Violation of human rights or abetment thereof or

(ii) Negligence in the prevention of such violation; by a public servant;

(b) To intervene in any proceeding involving any allegation of violation of human rights pending before a court, with the approval of such court;

(c) To visit, underintimation government any jail or any other institution under the control of the State government where persons are detained or lodged for purposes of treatment, reformation protection to study the living conditions of the inmates and make recommendations thereon;

(d) To review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights, and, recommend measures for their effective implementation;

(e) To review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
(f) To study treaties and other international instruments on human rights and make recommendations for their effective implementation.

(g) To undertake and promote research in the field of human rights;

(h) To spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications the media. Seminars and other available means.

(i) To encourage the efforts of non-governmental organizations and institutions working in the field of human rights; and

(j) To carry out such other functions as it may consider necessary for the promotion and protection of human rights.

3.4.1 Powers Relating to Inquiries

The Commission is vested with the wide-ranging powers relating to inquiries and investigation under the Act. While inquiring into complaints under the Act, the Commission could exercise all the powers of a civil court trying a suit under the code of Civil Procedure, 1908, and particular, in respect of the following:

(a) Summoning and enforcing the attendance of witnesses and examining them on oath;

(b) Discovery and production of any document

(c) Receiving evidence on affidavits;

(d) Requisitioning any public record or copy thereof from any court or office;

(e) Issuing commission for the examination of witnesses or documents; and

(f) Any other matter which may be prescribed.

3.4.2 Procedure and Regulations of the Commission

In order to discharge the aforesaid functions of the commission, certain procedures and regulations are followed by it. The Commission convenes its meeting at the discretion of Chairman and also regulates its own procedures.
3.4.3 Inquiry into Complaints

The Commission while inquiring into complaints of violations of human rights may call for information or report the Central Government or any State government or any other authority or organization subordinate thereto, within such time as may be specified by it. If the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into complaint on its own; on the other hand if, on receipt of information or report the Commission is satisfied that no further inquiry is required or that the required action has been initiated or taken by the concerned government or authority, it may not proceed with the complaint and inform the complainant accordingly.\(^{27}\)

3.4.4 Steps after Inquiry

The Commission may take any of the following steps upon the completion of an inquiry:

1. Where the inquiry discloses to the Commission an act of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommended to the concerned government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

2. Approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

3. Recommend to the concerned government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

4. Subject to the provisions of clause (5), of section 181 provide a copy of the inquiry report to the petitioner or his representative;

5. Send a copy of its inquiry report together with its recommendations to the concerned Government of authority and the concerned Government or authorities shall within a period of one month, or such further time as the

\(^{27}\) Programmes and Perspectives of NHRC (2001) at page 124.
Commission may allow, forward a copy of the report, including the action taken or proposed to be taken thereon to the Commission; and

6. Make public its inquiry report together with comments of the concerned Government or authority on its recommendations.

3.4.5 Procedure with Respect to Armed Forces

The term ‘armed forces’ for purposes of the Act means naval, military an air forces and includes any other armed forces of the Union. The Act envisages the procedure in respect to armed forces which is at variance with the procedure set out for complaints of violations of human rights by any other public servant.28

1. The Commission shall notwithstanding other procedures of the Act adopt the following procedure while dealing with complaints of violation of the human rights by members of the armed forces;

(a) It may, either on its own motion or on receipt of a petition, seek a report for the Central Government; and

(b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make us recommendations to that Government.

2. The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

3. The Commission shall make public its report together with its recommendations made with its Central Government and the actions taken by that Government on such recommendations, The Commission shall provide a copy of the report published under sub-section (3) of section 19 to the petitioner or his representative.

As per the Act, the National Human Rights Commission is primarily entrusted with the responsibility of inquiring into complaints against the gross violation of human rights. The status of the Commission is strengthened by the definition, functions and

procedures that it follows. At this stage some important and pertinent questions that arise are whether, besides these provisions, there is any validity of the existence of such a statutory commission in India? Does the Constitution of India permit to set-up such a commission for the purpose of inquiry/recommendation and reporting? Are there any specific guidelines prepared by international Law for composition, responsibilities and operational methodology of the commissions existing in different countries? In order to examine these queries, one has to peep into these provisions which are as follows:

### 3.5 CONSTITUTIONAL VALIDITY OF THE COMMISSION UNDER THE COMMISSION OF INQUIRY ACT 1952

Under article 246 read with Entry 94 List I and Entry 45 List II of the Seventh Schedule of the Constitution the Central Government may appoint a Commission relating to any of the matters mentioned in List I, II or III and the State Government may appoint a Commission relating to List II or List III only. A preliminary objection was that the Commission of Inquiry Act is ultra vires the Constitution or that the appointment under section 3 of the Act amounts to excessive delegation of power to the concerned Government. It was urged first that inquiries cannot be ordered for any purpose other than for legislation and: secondly section 3 is bad for excessive delegation of power to the Government uses the power and functions of both the Parliament and courts. However, in Ramkrishna Dalmia v. Justice Tendulkar case, the Supreme Court was of the view that “the recommend of the Commission are of great importance to the Government in order to enable it to make up its mind as what legislative or administrative measures should be adopted to eradicate the evil found to implement the beneficial object has in view. In the Dalmia case, it was further observed “very wide and discriminatory powers have been conferred on the Government … which may in some cases be misused or abused. Nevertheless the bare possibility that the power may be misused or abused cannot per se induce the court to deny the existence of such power. The discretion is not necessarily discrimination.

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31 *A.I.R. 1958 S.C. 538*
The parliament confined the discretion not to any petty official but to the appropriate
government itself to take action in conformity with the policy and principle laid down
in the Act itself.

The Dalmia case a repelled the second ground that appointment under section 3 of the
Act amounts to usurpation of judicial function and delegation of essential Legislative
power. The court is of the view that it is not correct to say that the Parliament or the
government itself has undertaken to hold inquiry.

Assuming there is delegation of legislative function, the Act having laid down its
policy, such delegation of powers, if any, is not vitiated at all, for legislation by the
delegation will have to conform to the policy laid down by the Act. Not can
Commission usurp the function of the judiciary by the simple reason that even if the
Commission be précised over by sitting judge of the Supreme Court or the High Court,
the Commission cannot claim to be lodged, nor can its proceeding be called judiciary
having no power to pass definite and enforceable judgment. As the commission can
only make recommendations which are not enforceable proprior vigare, there can be
no usurpation of judicial function”.

Hence the National Human Rights Commission has been established keeping in view
the provisions laid down by the Commission of Inquiry Act, 1952.

3.6 STATUS OF THE COMMISSION UNDER INTERNATIONAL LAW

Principles relating to the status of national human rights institution are embodied in
the UN Commission on Human Rights Resolution 1992/54 of March 1992, annex
(official record of the Economic and Social Council, 1992, supplement No. 2
(E/1992/22), Chap. II, Sect. A); General Assembly resolution 48/134 of 20 December,
1993. These provisions are as follows. 32

(A) Competence and Responsibilities

(1) A national institution shall be vested with competence to promote and protect
human rights.

32 Gurbax Singh, *Commentary on the Protection of Human Rights Act*, 1993, Dominion Law Depot,
(Jaipur, 1996) at page 213.
(2) A national institution shall be given as broad a mandate as possible, which shall be clearly so forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

(3) A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the government, parliament and any other competent body, on the advisory basis either at the request of the authorities concerned or through the exercise its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislative the amendment of legislation in force and the adoption or amendment of administrative measures.\(^{33}\)

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general and on more specific matters; and

(iv) Drawing the attention of the government to situations in any part of the country where human rights are violated and making Proposals to it for initiatives to put an end to such situations and where necessary,

expressing an opinion on the positions and reactions of the government.

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above mentioned instrument or accession to those instruments, and to ensure their implementation.

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees and to regional institution pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence.

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institute of other countries that are competent in the areas of the promotion and protection of human rights; and

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in school, universities and professional circles.

(B) Composition and Guarantees of Independence and Pluralism

1. The composition of the national institution and the appointment of its members, whether by means through an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to the established with, or through the presence of the representatives.  

(a) Non Government organizations rest responsible for human rights and efforts to combat racial discrimination trade unions, concerted social and

34 B.V. Somasekhar, Programmes and Perspectives of NHRC towards Protection of Human Rights in India (2001) at page 36.
35 Supra Note 32 at page 221.
professional organizations for example, associations of Lawyers, doctors, journalists and eminent scientists;

(b) trends in philosophical or religious thought

(c) Universities and qualified experts’;

(d) Parliament; and

(e) Government departments (if they are included, these representatives should participate in the.(deliberation only in an advisory capacity)

2. The National institution shall have an infrastructure which is suited to the smooth conduct of its activities, particularly its adequate funding. The purpose of this handing should be to enable it to have its own staff and premises in order to be independent of the government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the institution, without which their can be no real independence, their appointment shall be by an official Act which shall establish the specific duration of the mandate. It is mandate renewable, provided that pluralism of the institution membership is ensured.36

(C) Methods of Operation

Within the framework of its operation, the national institution shall-

(a) Freely consider questions failing within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;37

(b) Here any person and obtain any information and any documents necessary for assessing situations falling within its competence.

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions avid recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after these have been duly convened;

(e) Establish working groups from among its members as necessary and set-up local or regional sect to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions); and

(g) In view of the fundamental role played by non-governmental organizations in expanding the work of national institutions, develop relations with non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism to protecting particularly vulnerable groups (especial children, migrant workers, refugees, physically and mentally disables persons) or to specialized areas.

3.7 PROMOTION OF HUMAN RIGHTS LITERACY AND AWARENESS

The protection of Human Rights Act, 1993, in section 12(h), has expressly mandated the Commission to promote human rights awareness and literacy. In a sense, the entire range of the activities of the Commission serve this broad, encompassing purpose. The decisions that the Commission takes in respect of individual or group complaints, the programmes and projects that it undertakes, the seminars and workshops that it holds, the research it generates, its publications and discourses, all aim to create a culture of human rights in the country environment in which rights can be better promoted and protected.


In the Memorandum of Action Taken on the Commission’s annual report 2000-2001, it has been Stated that the ‘National Action Plan for Human Rights Education has

38 Supra note 32, at page 132.
been adopted by academic institutions bureaucracy and the police. The various authorities which are involved in the implementation have already commenced the implementation of the Human Rights Education Awareness Programme. The Ministry of Human Resource Development (Department of Secondary & Higher Education), which has a major role to pay in the spread of human rights education throughout the country, has taken action by reorientation of school syllabus to bring out the element of human rights, preparation of media animations programs which are being telecast through Gyan Darshan, introducing elements of human rights in foundational courses at graduate level in Universities and Colleges, conducting specialized courses and programmes at Universities, preparation of resource material kit for human rights education in collaboration with the British Council etc. The Central Paramilitary Forces and Police Training Academies have also introduced modules on human rights as part of their training programmes so as to create a better awareness among officers and men on human rights. The Lal Bahadur Shastri National Academy of Administration has also introduced human rights as a subject as part of the training programmes. Government proposes to carry forward this progress made in human rights education to other sections of the society and also involve Non-Governmental Organisations in this task. The Commission welcomes these developments and expresses the hope that the implementation of the National Action Plan for Human Rights Education will proceed carefully, methodically and involve ever-widening sections of society.

With regard to the mass awareness programme, the National Action Plan for Human Rights Education identified Doordarshan and AIR as nodal media units. The Commission, therefore, pursued the matter with the Ministry of Information and Broadcasting to have follow-up action initiated on the Action Plan. The Secretary General of the Commission met with the Secretary, Ministry of Information and Broadcasting to discuss ways of promoting human rights awareness through the

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41 The Government of India has finalized its Action Plan for Human Rights Education, albeit rather belatedly, as part of the observance of the UN Decade for Human Rights Education 1995-2004. That action plan group activities under two broad categories: (i) strategies for raising mass awareness, and (ii) strategies for promoting social empowerment through attitudinal change and the sensitizing of specific target groups such as the police, security forces, students, judicial officers and other through education and training.

42 Refer National Human Rights Commission’s Annual Report 2002-03.
various media units working under the Ministry of Information and Broadcasting. A number of action points emerged for joint co-operation.\(^{43}\)

### 3.7.1 State Mechanism and State Human Rights Commission

The National Human Rights Commission has urged all States and Union territories to constitute State Human Rights Commissions and notify a Court of Sessions to be a Human Right’s Court in each district as envisaged by Secs. 21 and 30 respectively of the Protection of Human Rights Act of 1993. Under a federal system such as ours, it is evident that a concrete responsibility must rest with individual States both to promote and protect human rights and to redress grievances. The decentralisation of the complaint disposal mechanism thus becomes a necessity, not least so as to provide a redressal mechanism that is readily accessible and inexpensive in terms of time and cost.\(^{44}\) Following appeals by National Human Rights Commission and discussions with it, a number of States have decided to set-up State Human Rights Commissions. At present, State Human Rights Commission exist in 14 States that 09 Assam, Himachal Pradesh, Jammu & Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal and Chattisgarh. Accordingly in this chapter in attempt has been made to study the perspective of State Human Rights Commission and specifically Rajasthan State Human Rights Commission. The purpose of this chapter is to study the perspective of the State Human Rights Commission; Structure of the State Human Rights Commission as well as sonic momentous and functional activities of Rajasthan State Human Rights Commission, and to reach at a conclusion about its working, effectiveness, modus operandi and the problems which the commission face while disposing the complaints made to it.

### 3.7.2 Perspective of the State Human Rights Commission

The Protection and Human Rights Act, 1993 enacted thereafter, paved a way for the creation of the National Human Rights Commission as well as Human Rights Commissions in various States in the country. According to the Statement of Objects

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\(^{43}\) B.R. Bisnoi, “Role of the National Human Rights Commission Towards Human Rights Literacy and Awareness”, 2005 (3) RDD 21 (Journal)

and Reasons of the Act, National Human Rights Commission and the State Human Rights Commissions were constituted “for better protection of human rights and for matters connected therewith or incidental thereto”.45

Since, the enactment of the legislation, more than 11 years have gone by. The journey, however, has not been smooth. There have been bumps and potholes on the way in order to identify and overcome some of the structural deficiencies which impede the functioning of the National Human Rights Commission and State Human Rights Commission, a high level committee headed by a former Chief Justice of India was constituted to examine the Act and suggest amendments to make it more functional.46 The committee submitted its report on 18th October, 1999. Based on the report of the Committee, the Commission forwarded comprehensive recommendations to the Union Government in March 2001 for effecting amendments in the Protection of Human Rights Act, 1993 to strengthen the regime of protection of human rights in the country. The amendments have not as yet been brought about though more than five years have lapsed. The Commission is deeply concerned about it and urges the Government to carry out the suggested amendments47. Domestic institutions like the State Commissions can play a important role in the effective implementation of human right standards at the State level. There is a need to have closer interaction between the National Human Rights Commission and the State Human Rights Commissions as both are engaged in pursuit of the same objective—’better protection of human rights’.48

The National Human Rights Commission accordingly organized a meeting with all the State Human rights Commissions in January 2004. It was a modest beginning in as much as while we did not expect nor, plan for any path breaking decisions at that meeting, it was nevertheless a sign of the sincerity and commitment that we all have to the cause of human rights. Through these meetings or, rather interactions, we can see a larger picture. A picture that’s very relevant to at country of our size and diversity. It provides the crucial channel of propagation of ideas from every corner of our country, through the presence if State Commission. Through such annual interactions, we could optimistically see the

46 Ibid, at page 32.
future as one where the National Human Rights Commission and the State Human Rights Commissions work in a participative and harmonious manner. The synergies that would, thus, be created are immeasurable.49

Though the 1993 Legislation placed an obligation on the State Governments to constitute State Human Rights Commission, it is indeed a matter of regret that till date only 14 States have set-up Human Rights Commissions. It is, imperative that all the States and Union Territories which have not as yet constituted State Human Rights Commissions do so expeditiously. The States must appreciate that the Commissions assist the governments concerned in fulfilling their constitutional obligations and responsibilities of protecting and promoting human rights of the citizens and thereby paving a to usher in good governance. Human Rights and democracy are mutually supportive and unless human rights are made focal point by each of the State Governments, good government would remain only an unfulfilled dream.50

Several State Human Rights Commissions have evinced Interest in the working of the National Human Rights and the methodologies and procedures adopted by it. Particular interest has been shown in regard to the Complaints Management System (CMS), for which a software module had been developed by this Commission with the assistance of the National Informatics Centre (NIC). The Commission extended technical assistance to the Rajasthan and Maharastra State Human Rights Commissions to set-up the CMS packages there. It is an illustration of the scope of collaboration between National Human Rights Commission and State Human Rights Commissions. The National Human Rights Commission looks forward to receiving concrete ideas from State Human Rights Commissions on how- to further improve coordination and information sharing. In addition the Commission welcomes suggestions for strengthening National Human Rights Commission and the State Human Rights Commissions.51

In furtherance of its task of better protection and promotion of human rights, the Commission realized that failures in the sphere of human rights in economic, social

51 Prabhat Ranjan Bhattacharya, Human Rights and Democracy (2005) at page 159.
and cultural areas are widespread across the ration and these denials drive the citizens to margins of human existence. The struggle for the promotion and protection of human rights inevitably requires the elimination of aberrations that, over the time, have wounded and fractured our society leaving some more equal that others. The State Human Rights Commissions must, therefore, make all out efforts to minimize such aberrations and create an environment in which rights can be better protected and promoted. It is indeed a Herculean task, but we cannot afford to rest. State Commissions can in their own way supplement the efforts of National Human Rights Commission.\textsuperscript{52}

Recognizing right to health care as an important issue, the Commission during the past year, held five regional Public Hearings in various parts of the Senior officials of State Human Rights Commissions were invited to these meetings in which, individuals or groups who have been denied this right or have not received mandated health care from a public health facility, presented their case before a panel consisting of the National Human Rights Commission and the Slate level public health officials. These regional hearings culminated in the National Public Hearing on Right to Health Care in December 2004, following which a National Action Plan to operationalize the Right to Health Care was discussed. The recommendations inter-alia, include, enactment of State Public Health Services Rules, enactment of State Public Health Protection Acts that define the norms for nutritional security, drinking water quality, sanitary facilities and other key determinants of health. Substantial increase in State budgetary provisions for Public health, operationalising a State level health services monitoring mechanism, consisting of a State Health Services Monitoring and Consultative Committee, to periodically review the implementation of health rights, underlying policy and structural issues in the State. The State Human Rights Commissions in each State have been identified to facilitate the State Health Rights Monitoring Committees and, oversee the functioning of the State level health rights redressal mechanisms.\textsuperscript{53}

\textsuperscript{52} Refer. Annual Meeting of NHRC-SHRC, January, 2004.
\textsuperscript{53} Ibid
The National Human Rights Commission has also been consistently emphasizing a shift of focus from welfare to rights of the disabled. In addition to redressing individual complaints of human rights violations faced by persons with disability; the Commission has been reviewing existing laws and proposed legislations from the perspective of rights of persons with disabilities. For example, the Commission noted that the National Employment Guarantee Scheme announced by the Union Finance Minister in his Budget Speech for 2004-05, restricted the employment guarantee only for all persons. The Commission, therefore, addressed letters to the Union Finance Minister and the Labour Minister pointing out this anomaly created by exclusion of persons with disability and impressed upon them to correct it. As a result of the Commission’s efforts, the subsequent National Rural Employment Guarantee Bill 2004, did not restrict the guarantee to able-bodied persons. On 27th May, 2005 National Human Rights Commission has organised National Conference on disability. Participative role of State Human Rights Commissions in creating awareness in this regard would go a long way to champion the cause of the rights of those differently able persons.54

It came to the notice of the National Human Rights Commission directly as well as through some State Human Rights Commissions that since armed forces had been kept out of the reach of the commissions the allegations of violation of Human Rights at their hands were not being properly addressed. The Commission, therefore, took the issue of the allegations of violations of human rights by the armed forces with the Chief of Army Staff who, appreciating the viewpoint of the Commission, conveyed to it on 24th May 2004 that with a view to further sensitise the Indian Army, it had been decided to appoint officers of the rank of Colonel in various headquarters to monitor cases relating to human rights. The Commission considers it as an appropriate step.55

The Commission had suggested changes in the Child Marriage Restraint Act and sent a draft bill to the Government in 2002. While it is indeed gratifying to note that the Government has accepted all the changes proposed the proposed amendments have not been enacted with the result that the evil of child marriage continues. State Human Rights Commission can play a vital role towards prevention of child marriages.56

55 Ibid. at page 95.
56 Ibid at page 95-96.
State Commissions have proposed certain items for discussion during this 2nd annual meeting. Broadly, the suggestions relate to; Amendments to the PHRA, 1993; Service conditions of Chairperson/members of State Human Rights Commissions; Financial difficulties facing State Human Rights Commissions; Coordination, Training and Information sharing between National Human Rights Commission and the State Human Rights Commissions, etc.  

The National Human Rights Commission and the State Human Rights Commissions have unanimously endorsed and adopted a resolution calling on the State Governments to set up, on priority, State Human Rights Commissions where they do not exist. This was passed at the meeting of the National Human Rights Commission with State Human Rights Commissions held in New Delhi recently. The resolution also stated that where, there are State Human Rights Commissions or, are in the process of being set-up, it maybe ensured that they are structurally and financially independent as envisaged in and fully confirming to, the principles relating to the status of national institutions (the “Paris Principles) which were endorsed by the UN General Assembly Resolution 48/134 of 20 December 1993.

The National and State Commissions also reiterated and reminded the Governments, both, at the Centre and in the States that the primary obligation towards the protection of human rights is that of the State and the National Human Rights Institutions are to facilitate the protection of human rights.

At present State Human Rights Commission exist in 14 States that of Assam, Himachal Pradesh, Jammu & Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Utter Pradesh, West Bengal and Chhattisgarh. The setting up of a State Human Rights Commission in the State of Andhra Pradesh has been notified while in Karnataka, an renouncement was made by the State Government that a State Human Rights Commission would be set-up soon.

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57 Refer. Second Annual Meeting of NHRC-SHRC, 27th May 2005
58 Refer Resolution passed by NHRC-SHRC, New Delhi, 19th May, 2005.
59 Ibid.
Chapter-III: Structure and Functions of the National Human Right Commission: India and South Africa

Enactment of the Amendments to the Protection of Human Rights Act, 1993 which has been pending with the Government of India for the past 5 years found echo at the meet’ at the National Human Rights Commission (National Human Rights Commission) with the State Human Rights Commission (State Human Rights Commissions) held in New Delhi 13 May, 2005.

All the State Human Rights Commissions were of the view that the present Act has certain lacunae, which is presenting in the effective functioning of the National Human Rights Commission as well as State Human Rights Commissions. The meeting among other issues deliberated on the need to create awareness and educate the public on human rights as well as train, impart skills and sensitize the judiciary, prosecutors and police personnel.\(^60\)

Earlier in his opening remarks, Dr. Justice, A.S. Anand, Chairperson of the National Human Rights Commission called upon the State Governments to set-up State Human Rights Commissions in the States and Union Territories if they had not been done and to do so expeditiously. He said the States must appreciate that the Commissions assist the governments in fulfill their constitutional obligations and responsibilities of protecting and promoting human rights of the citizens, in his opinion, human rights and democracy are mutually supportive and unless human rights are made the focal point, good governance would remain an unfulfilled dream.\(^61\)

The Chairperson of National Human Rights Commission also stressed on the effective functioning of the existing State Human Rights Commissions in keeping with the Earls Principles, which emphasize that they should be vested with competence to promote and protect human rights. They should have an infrastructure, which is suited to the smooth conduct of their activities, and be independent of the government.

Justice Anand said that to overcome some of the structural deficiencies which impede the functioning of the National Human Rights Commission and State Human Rights Commission, the Commission in March 2000, forwarded comprehensive recommendations to the Union Government to effect amendments in the Protection a

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\(^{60}\) Refer. Meeting of the NHRC-SHRC, New Delhi, 13 May 2005.

\(^{61}\) Ibid.
Human Rights Act, 1993. Expressing concern at the delay in effecting the amendments, he urged the Government to carry out the suggested amendments, which aimed at strengthening the regime of protection of human rights in the country.

On the issue of child marriages, justice Anand expressed his dismay that even today the media reports that child marriages are taking place. He said it is a shocking State of affairs and an affront to the dignity of women. On the reported recent attack on an Anganwadi worker in Madhya Pradesh, he said, it is sad that he had to pay a heavy price, that of losing her arms for her role in creating awareness amongst the public about the ill effects of child marriages. The National Human Rights Commission, he said, has taken suo-motu cognizance based on media reports and has asked for a report from the State Government within two weeks. The Chairperson also stressed on the need for creating awareness and the vital role State Human Rights Commissions can play in this direction.62

Noting that failures in the sphere of human rights in economic, social and cultural areas are widespread, Justice Anand said that National Human Rights Commission and the State Human Rights Commissions must make all efforts to create an environment in which rights can be better protected and promoted. Outlining some of the recent initiatives of National Human Rights Commission in the field of Health and the Rights of Persons with Disabilities, Justice Anand hoped that the State Commissions could supplement the efforts of National Human Rights Commission.63

3.8 SOUTH AFRICAN HUMAN RIGHTS COMMISSION: STRUCTURE AND FUNCTIONS

The South African Human Rights Commission (SAHRC) is described by many as the first among equals amongst Chapter Nine’s State Institutions Supporting Constitutional Democracy.64 This chapter offers a brief history of the institution. It

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62 Refer Meeting of the NHRC-SHRC, New Delhi, 13 May
63 Ibid.
64 Chapter Nine, entitled “State Institutions Supporting Constitutional Democracy” refers to seven institutions: the Public Prosecutor, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, the Electoral Commission, and the Independent Authority to Regulate Broadcasting.
then focuses on those sections in Chapter 9 that establish the SAHRC and enable it to carry out its primary functions: education, mediation, adjudication, litigation, interpretation and monitoring. The chanter then directs its attention to six discrete constitutional issue that affect the operation of the SAHRC and all other Chapter 9 Institutions: (1) the doctrine of the separation of powers; (2) independence and accountability; (3) the duty of State organs to assist and to protect; (4) subject matter jurisdiction; (5) the relationship of the constitutional empowerment provisions to institutional establishment legislation; and (6) appointment and removal procedure.

3.8.1 South African Human Rights Commission: After 16 years

There has been a curious dearth of empirical and critical work on the South African Human Rights Commission\textsuperscript{65}. Even high-profile events such as the Davis-Pityana debate, the withdrawal of the SAHRC as amicus in the Treatment Action Campaign litigation, and the racism in the media inquiry have not sparked such research. What research has been conducted tends to focus on the role of the SAHRC in respect of a particular Issue, such as socio economic rights or the rights and recognition of refugees\textsuperscript{66}. This relative lack of research and writing on the Commission cannot be due to the subject matter: a comprehensive history of the SAFIRC would operate as a prism through which to view the first ten years of South Africa’s constitutional democracy. While such an account is far more ambitious than I can offer in these pages, I will outline briefly the SAHRC’s political and organizational history before proceeding to discuss the legal framework within which the SAHRC functions and the novel constitutional doctrines to which its very existence gives rise.

(A) Political and Organisational History

While the establishment of a human rights commission in South Africa marked a significant break with the apartheid past, there is a global trend towards national human


rights institutions. Such institutions are said to have the effect of improving the legality and fairness of public administration as well as providing a mechanism for the domestic implementation of international human rights obligations. The United Nations resolved in 1993 to encourage member States to develop and strengthen such institutions.  

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

To combat racism, the SAHRC organized a National Conference on Racism in August/ September 2000. The conference was preceded by a provincial consultative process and issued the South African Millennium Statement on Racism and Programme of Action. The South African conference preceded the World Conference against Racism held in August and September 2001 in Durban. While these conferences were not particularly controversial, the Commission’s Inquiry into Racism in the Media held in 2000 certainly was. Some print media organizations particularly resisted the potential use of legal process by the Commission to investigate their operations. By the end of the inquiry, an uneasy truce had been

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67 See M. Bishop and S. Woolman ‘Public Protector’ in S. Woolman, T. Rouz, J Klaaren, A. Steein & M. Chaskalson (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2005) Chapter 24A (Suggesting that the creation of Public Protector, like many ombudsmen, reflects a global trend towards such oversight institutions) See also Govender ‘SAHRC’ (supra) at 571.  
68 See 24C.4 (b) e infra.  
reached between the media and the Commission as to the appropriate limits of the Commission’s investigation and reporting powers.

A second important item on the Commission’s agenda has been the constitutionally mandated promotion of economic and social rights. The Commission similarly struggled to find a common understanding with non-governmental organization actors (‘NGOs') as it had with the media. NGOs wished both to see a stronger role taken by the Commission and to have greater participation themselves within the investigation process. While it met with some initial resistance, the Commission has employed innovative strategies to increase NGO participation, has solicited more general participation, through public education campaigns that have employed cross-generational strategies and has promoted the use of the right of access to information by communities to fulfill socio-economic rights.

(B) Institutional structures

The establishment legislation for the Commission, enacted in terms of the Interim Constitution, is the Human Rights Commission Act (‘HRCA’). The Commission describes its structure as follows:

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

The Commission has had a steady growth in capacity and staff over the ten year period. That said, HRCA’s 16’s provision for a chief executive officer has led, as
both reported in the media and the courts, to conflicts between the CEO and the Commissioner who acts as the SAHRC Chairperson.\textsuperscript{78}

In terms of the Interim Constitution, the first round of Human Rights Commissioners were interviewed in 1994 by Parliament and recommended by a 75\% special majority. These seven full-time and four part-time commissioners were appointed in 1995 and the Commission was inaugurated on 2 October 1995\textsuperscript{79}. The Commissioners elected Commissioner Dr. Barney Pityana to serve as the Chairperson of the Commission. After several initial Commissioners had resigned and had been replaced, a second round of recommendations and appointments was conducted in terms of the 1996 Constitution. In 2002, Jody Kollapen was elected as the second SAHRC Chairperson.

\textsuperscript{78} See \textit{Esack NO & Another v. Commission for Gender Equality 2001} (1) SA 1299 (W), 2000 (7) BCLR 737 (W) (Nothing tension between CEOs and Commissioners in other Chapter Nine Institutions.

\textsuperscript{79} \textit{Govender SAHRC (supra) at} 592. (Commissioners were drawn from different political backgrounds and race and gender representivity was clearly taken into account when appointments were made).
3.8.2 The Powers and Functions of the SAHRC

(A) Overview

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

FCs 184(1) gives the SAHRC a general mandate to promote, to monitor and to assess the observance of human rights in South Africa. In particular, FC 184(l)(a) requires the Commission to ‘promote respect for human rights and a culture of human rights’; and FCs 184(1)(e) obliges the Commission to ‘monitor and assess the observance of human rights in the Republic.’ FCs 184(2), which is clearly meant to be read in conjunction with FCs 184(1), provides:

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

Finally, FC s 184(4) creates the requisite space for the Commission to acquire additional powers and functions ‘prescribed by national legislation.\textsuperscript{80} The subsections of FC s 184 appear to be best read as a whole, granting functions and powers to the Commission already established by FCs 181. The sub-sections below explore the powers of the Commission.

(B) Promotion: Public Education and Information

A significant portion of the Commission’s activities thus far has taken the form of public education. In the year ending in March 2002, the Commission conducted 214

\textsuperscript{80} FCs 184(3) (Discussed at 24C.3 infra)
workshops and training programmes that reached 8484 people and offered 75 seminars and presentations that reached 11499 people.81

Sectoral specific legislation, such as the Promotion of Access to Information Act (PAM), imposes additional duties on the SAHRC with respect to the promotion of specific human rights. PALA requires that the SAHRC adopt a promotional role with respect to access to information legislation.82

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3.8.3 Protection: Mediation, Adjudication, Litigation and Interpretation

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

3.8.4 Mediation

Section 8 of the HRCA gives the Commission the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. An important part of these powers lies with the Commission’s power to make recommendations and finding. Any recommendation or finding made by the Commission as a result of such a process is not directly binding on a public or private body. However, public bodies are under a constitutional

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81 See South African Human Rights Commission Sixth Annual Report (2001/2002) 5. Among other topics, the Commission conducts publication education on constitutional rights generally, on socioeconomic rights and on the right to access to information.
duty to assist the Commission to ensure its effectiveness and, in the Co experience, its recommendations made in terms of S 8 even those calling for specific action in specific circumstances are usually acted on by public bodies.

Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act (‘PEPUDAD empowers an equality court to refer disputes to an alternative forum.\(^83\) In many instances, this forum is the SAHRC. Even before the enactment of PEPUDA, the SAHRC had numerous successes in its mediation efforts.\(^84\) It is likely that the SAHRC’s mediation docket will increase, given the flow of mediation referrals from the Equality Courts.

### 3.8.5 Adjudication/ Litigation/Interpretation

To date, the Commission has exercised its power of adjudication in a very limited range of instances. While a decision made in resolving these complaints is not understood to be binding on the parties to the dispute, some State organs have treated the Commission’s decisions as binding. The Commission has held adjudication hearings in the context of obtaining information from other State organs via subpoena regarding the fulfillment of socio-economic rights. Most often, these SAHRC hearings have concluded with decisions made against State organs that failed to provide timely or adequate information.\(^85\) Here, the Commission has not only initially issued the subpoena but has also decided upon the adequacy of the State organ’s compliance with the duty to provide information in terms of FCs 184(3). The Commission has also held adjudication hearings and published judgments in appeals from complaints made to the Commission. For instance, three member panel chaired by a commissioner of the Commission upheld an appeal of a late speech complaint regarding the slogan ‘kill the farmer, kill the boer’ which the Commission had previously determined was not hate speech.\(^86\)

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\(^83\) Act 4 of 2000


In terms of its establishment Act, the SAHRC has express litigation powers. In this respect the SAHRC differs, at least at the level of establishment legislation, from other Chapter 9 Institutions. The only other institution that has engaged in rights protection through litigation is the CGE. Although the CGE has asserted and exercised a power to intervene in the judicial process as an amicus, it has not as yet initiated a case in its own name. By contrast, the SAHRC has initiated litigation\(^{87}\) - although it does so infrequently.\(^{88}\) The Constitutional Court has started that, in its litigation capacity, the SAHRC enjoys no privileged status which would allow it to be exempted from the Courts rules of procedure. But note that such lack of privileged status does not deny the commission potential influence on the exercise of the Court’s discretion within the rules of procedure. Lower courts have at times acknowledged the SAHRC’s support of litigation in the context of deciding standing and other procedural issues.\(^{89}\)

One aspect of the SAHRC’s role in protecting human rights that may grow more significant is the Commission’s power of constitutional interpretation.\(^{90}\) This interpretive power of the Commission, as a Chapter Nine Institution, is one that the Constitutional Court has acknowledged and encouraged. A five-judge minority of the Court deciding S v Jordan stated.

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect development, promote respect for and attain gender equality. This Court is of course not bound by the Commission’s views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that legal provision at issue) is unfairly discriminatory on grounds of gender reinforces our conclusion.\(^{91}\)

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87 Goveder ‘SAHRC’ (Supra) at 589.
88 See, 24C.3 infra.
89 See Ngxuza & Others v. Permanent Secretary, Department of Welfare, Eastern Cape & Another 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E).
91 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 70.
There would seem no reason in principle why this privileged interpretive role should not be extended to the SAHRC and other Chapter 9 Institutions.

- Respect and fulfill: Monitoring
- Monitoring: Socio-economic rights

While the content of the function may not be (as yet) precise, the Final Constitution does dearly envisage a separate and special role for the SAHRC without socio-economic rights. PC s 184(3) provides:

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

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

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

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

**3.8.6 Monitoring: Remedial orders of Courts**

In Grootboom, the Constitutional Court endorsed a significant monitoring role for the SAHRC. In its remedy, which took the form of a declaratory order because the

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applicants had accepted an offer of alternative accommodation, the Court requested that the SAHRC adopt a supervisory role to ensure the government compliance with the Court’s order. 93 Such a monitoring role-complementary to the reactive information-gathering function of a court - may become increasingly important in the operation of the Commission. Given the categories of government incompetence, inattentiveness and intransigence identified by Roach and Budlender in their study of government responses to judicial remedies, an enhanced supervisor role for the SAFIRC may be necessary to ensure effective rights enforcement.94

3.8.7 Monitoring: Investigations and hearings

The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement95 to the conflict between the right to equality and the freedom to associate. These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media. The Commission’s early reports on the lack of respect for the rights of non-nationals in post-apartheid South Africa and on the conditions of detention at an official repatriation facility, Lindela, were greeted with harsh words by government and department officials (especially the Department of Home Affairs).

3.8.8 SAHRC and Chapter Nine Institutions Doctrine

Several constitutional issues of great import are common to the SAHRC and to other Chapter 9 Institutions. This sec explores six of these doctrines.

93 Grootboom (supra) at para 97.
94 K Roach & G Budlender “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate; Junst and Equitable (2005) 122 South African Law Journal 325 (Delineating reasons for government violations in terms of government incompetence, inattentiveness, and intransigence).
(A) Separation of Powers

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

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

A second more theoretical point concerns the extent to which the Chapter 9 Institutions are a central part of a uniquely South African scheme of constitutional structuring and separation of power. The argument made here is that the constitutional establishment of a complex of independent institutions apart from the judiciary in order to promote and protect human rights is a fundamental feature - a basic structure - of South African constitutional democracy. If correct, this basic structure argument has at least one immediate implication. While constitutional amendments to Chapter Nine may (and arguably at times should) change the internal arrangements of these institutions, any amendment that detracted from the capacity of this set of independent human rights institutions to discharge its responsibilities would need, at the very least, to acknowledge its intention to alter the constitutional structuring and separation of powers doctrine of the Final Constitution. And any constitutional amendment that did away with this complex of independent institutions entirely would eliminate this basic structure. The Constitutional Court itself has noted that amendments to the Final Constitution that alter the basic structure of our constitutional democracy could have their constitutionality challenged on substantive and not merely procedural grounds.


97 That Section together with FCs 193 and 194 also covers the Chapter 9 Institutions generally. Broadcasting once Parliament has acted to establish such an institution. See J White ‘Independent Communications Authority of South Africa (2nd Edition, OS, March 2005) Chapter 24E (Nothing that the independent authority to regulate broadcasting is not listed in section FCs 181(1).

98 President of the Republic of South Africa v. United Democratic Movement 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC).
Third, a separation of powers doctrine that claims to arise organically out of the text of the Final Constitution must recognize the complementarily of the SAHRC and the Constitutional Court. Both the SAHRC and the Constitutional Court are designed to protect and to promote respect for human rights. The outlines of this complementary only beginning to be defined.  

According to Karthy Govender

International standards require that the (national human rights) institutions do more than simply function as a surrogate court of law. Their role is to actively protect and promote human rights and not to exist simply as an investigative mechanism which reacts to human rights violations. The institutions must work systematically and holistically towards the attainment of internationally recognized human rights.

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

The establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of State who must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on the organs of State to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness.

Finally, a specific strand of the reasoning that should be taken into account in theorizing the position of the SAHRC and other Chapter 9 Institutions vis-à-vis a new separation of powers doctrine is the one that emerges from the Court’s decision in Independent Electoral Commission v. Langeberg Municipality. The Langeberg

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100 Govender ‘SAHRC’ (supra) at 572.
102 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) (Langeberg Municipality)
The Municipality Court reasoned that the IEC was an organ of State, but not one within the national sphere of government.\textsuperscript{103} The Court noted that Chapter Nine makes a distinction between the suite and the government and that FCs 181 emphasizes the independence of Chapter 9 Institutions. This distinction between the State and the government and the related independence of the Chapter 9 Institutions must be clearly enunciated in any South African doctrine of the separation of powers. In addition to incorporating this Chapter Nine independence, such a doctrine needs to uphold both democracy and human rights, to adopt a historically and culturally contextual approach, and to adopt a critical view of structures of power. The Council of this independence for the SAHRC and other institutions is explored further below.

\textbf{(B) Independence and accountability}

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

Before turning to the Court’s pronouncements on the subject, two points are worth making. First, despite (more likely because of) the complementary of Chapters Eight (treating the judiciary) and Nine, Chapter Nine ‘Independence’ is qualitatively different from judicial independence. Martin Shapiro’s work on the institution of courts in society provides a window on to the independence of the Chapter 9 Institutions that demonstrates that the institutional legitimacy of Chapter 9 Institutions is based not on consent but on the provision of a mediate solution. In this view, the Chapter 9 Institutions do not have the same category of legitimacy problems (in particular, the problems of the perception of bias and the actual introduction of a third interest) as do the courts. Second and relatively, Chapter 9 Institution independence is grounded in a distinction between the State and the government. As New National

\textsuperscript{103} See S Woolman, T Roux, B Bekink
Party and Langeberg Municipality made clear, die Chapter 9 Institutions do not part of the government. As a result, they are not bound to follow the cooperative government principles of Chapter Three and, more importantly, may not be managed by any sphere of government. The non-participation of the Chapter 9 Institutions in government further underwrites their independence.

The Court has identified two important but distinct attributes of Chapter Nine independence as financial independence and administrative independence.

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

3.8.9 The Duty of State Organs to Assist and Protect

According to FC s 181(3) other organs of State must ‘assist and protect’ the Chapter 9 Institutions ‘through legislative and other measures’. This duty echoes the duties of cooperative government imposed on organs of State in FC Chapter. Three and the duties imposed on or of State to ‘assist and protect the courts’ found in FC s 165(4).

105 Govender ‘SAHRC’ (supra) at 581.
Table 3.2: Finalised investigated complaints (all provinces, including head office = 5246), 1st April 2008-31st March 2009

<table>
<thead>
<tr>
<th>Complaints registered</th>
<th>Investigations (Finalized)</th>
<th>Investigations (Open)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head office</td>
<td>101</td>
<td>103</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>373</td>
<td>85</td>
</tr>
<tr>
<td>Limpopo</td>
<td>172</td>
<td>434</td>
</tr>
<tr>
<td>Free State</td>
<td>211</td>
<td>673</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>49</td>
<td>219</td>
</tr>
<tr>
<td>Western Cape</td>
<td>152</td>
<td>1464</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>266</td>
<td>54</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>46</td>
<td>73</td>
</tr>
<tr>
<td>Gauteng</td>
<td>105</td>
<td>344</td>
</tr>
<tr>
<td>North West</td>
<td>188</td>
<td>129</td>
</tr>
</tbody>
</table>


Figure 3.1: Finalised investigated complaints (all provinces, including head office = 5246), 1st April 2008-31st March 2009
Although rendered in rather emphatic terms, this duty appears to be honoured in the breach. SAHRC Commissioner Karthy Govender has argued that this duty must be taken more seriously if the SAHRC and the other Chapter 9 Institutions are to discharge effectively their constitutional mandates:

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

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

3.8.10 The relationship of the constitutional empowerment provisions to establishment legislation

The issue of how to understand the relationship between constitutional establishment provisions and the legislative establishment provisions has two faces: (1) to what extent are legislative enactments subject to constitutional strictures; (2) to what extent are the Chapter 9 Institutions creatures of statute and not creatures of the Final Constitution. Surprisingly enough, in South Africa’s brief constitutional history, more attention has been paid to the latter issue. While the Independent Communications

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107 Govender ‘SAHRC’ (supra) at 581.
Authority of South Africa (‘ICASA’) benefits from the placement of its empowering provision (FC’s 192) within the scheme of Chapter Nine, it lacks the express protection of the general provisions - FC’s 193 and 194. I would however, argue that once Parliament has acted to establish ICASA, using at least in part the authority of FC s 192, that body then enjoys the benefits of the general provisions of Chapter Nine.

The situation of the SAHRC is the obverse of ICASA. FC s184 sets out, in some detail (especially when read with FC’s 181, 193 and 194), the functions of the SAHRC, while the establishment legislation first passed by Parliament under the Interim Constitution, the Human Rights Commission Act, constitutes an elaboration of the constitutional establishment provisions.

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

One could, on the basis of these differences, rank the constitutional strength of the Chapter 9 Institutions. Constitutional review would be of varying degrees of intensity for different commissions depending upon their place in the hierarchy. While

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109 There is no reference to national legislation in FCs 190(1)(b), while there is in (a) and (c).
110 see FCss 184(2) 187(2). The plural is used in FCs 184(2) (SAHRC) and the singular in FC s 187(2)/(CGE).
111 By establishment legislation, one means the legislation referred to in these sections apart from the legislation prescribing additional functions and powers.
our jurisprudence could, logically, veer in such a direction, the purposive approach to interpretation adopted by our courts tends to eschew such formal distinctions.

In any case, constitutional challenges to the establishment legislation are not likely to engage questions as to whether the legislation is within the bounds of the ‘empowering’ constitutional provision. They are more likely to determine whether the Legislation is under-inclusive (does not go far enough) with respect to the constitutional provisions. While it is thus broadly correct to regard the establishment legislation as implementing the constitutional provisions with respect to each of the institutions of Chapter Nine, the powers and the functions of the SAHRC and the other institutions are not necessarily congruent with those of their establishment legislation. In some cases, that legislation may fail to recognize the extent of the institution’s constitutional authority. In other cases, that legislation may unduly limit it. In any case, the Chapter Nine constitutional provisions specific and general will be of clear assistance in purposively interpreting the details of the establishment legislation.

3.8.11 Subject Matter Jurisdiction

In terms of the constitutional text, subject matter jurisdiction may, and in some cases, does overlap between various Chapter 9 Institutions. The subject matter of the Public Protector\(^{112}\), the CRLC and the CGE overlap with that of the SAHRC. While the SAHRC is clearly the best candidate for having the broadest subject matter, the other institutions enjoy expansive constitutional mandates. This characteristic of overlapping subject matters might support a further holistic reading of any jurisdictional disputes. Such disputes, however, are likely to be limited since the Chapter 9 Institutions have already put into place referral and other coordination systems so that they may more effectively pursue their individual and collective mandates.\(^{113}\)

\(^{112}\) Both Institutions are involved in implementing the Promotion of Access to Information Act, albeit in different roles.

3.8.12 The appointment and removal of persons

The constitution provisions governing the appointment and removal of members of the SAHRC and the other Commissions as well as the Public Protector and the Auditor-General are contained in the two general provisions of Chapter Nine. The basic template is appointment by the President upon recommendation of the National Assembly. The recommendation follows, nomination by a committee proportionally composed of members of all parties represented in the Assembly.

The appointment processes of the various Chapter 9 Institutions do differ. The Final Constitution requires specialized knowledge for the Auditor-General and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and linguistic Communities. Special majorities (60%) are provided for the appointment of the Auditor-General and the Public Protector, but not for members of the various Commissions. Further distinctions are introduced by the establishment legislation for the various institutions. For example, recommendations for appointment to the Electoral Commission are made by a committee comprised of representatives of three other Chapter 9 Institutions and chaired by the Chief Justice.114

With respect to the removal provisions, two potentially significant changes were made in the Final Constitution. The Constitutional Assembly chose to adopt wording apparently reducing the discretion of the President, in acting upon the recommendations of the National Assembly, in making the appointment to the Commissions and wording allowing for the Parliamentary recommendations for appointment to be effected by a simple rather than a special majority.115 These changes have led some commentators to allege that the selection process has been unduly politicized.116

Chapter 9 Institution office bearers may only be removed on the grounds of misconduct, incapacity, or incompetence. A National Assembly committee must make

115 Govender ‘SAHRC’ (supra) at 573.
116 J Sarkin ‘Reviewing and Reformulating Appointments Process to Constitutional (Chapter Nine) structures’ (1999) 15 SAAJHR 587 (Criticizing selection process as politicized). The selection process may of course be a political exercise in a number of different senses.
a finding of the existence of such a ground. Apart from the Public Protector and the Auditor-General (where a two-thirds majority is required), a simple majority of the National Assembly must approve the removal. The two-thirds majority required for removal of the Auditor-General and the Public Protector was a direct response by the Constitutional Assembly to failure of the first draft of the Final Constitution to secure certification from the Constitutional Court.

In some instances, the establishment legislation adds additional procedural steps to the removal process. For instance, s 3(b) of the HRCA goes beyond the constitutional requirement and further requires a 75% majority of Parliament to approve the removal resolution for a member of SAHRC. Similarly, a National Assembly committee finding that a member of the Electoral Commission be removed must be preceded by a recommendation of the Electoral Court.\textsuperscript{117}

At least one writer, Karthy Govender, has argued that a Parliamentary resolution effecting the removal of Chapter Nine commissioners must be preceded by a full and fair hearing before a committee with members capable of impartial adjudication since the deliberations and determination of the committee would amount to administrative action. Govender’s argument turns on the proposition that parliamentary committee action amounts to administrative action in terms of FC s 33 and that the committee ‘is making a specific determination as required by the enabling legislation’.\textsuperscript{118} The weakness in this line of reasoning lies in its characterization of parliamentary committee action as administrative action. The committee’s power to take such action is sourced directly in EC s 194(1)(h). Whether fair hearings are required would, therefore, appear nor to turn on the requirements of FC s 33\textsuperscript{119}.

\textsuperscript{118} Ibid
\textsuperscript{119} For more on the extent to which the exercise of constitutional powers by spheres of government or organs of State are subject to the structures of the Bill of Rights, see S. Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein & M. Shaskalson (eds) \textit{Constitutional Law of South Africa} (2\textsuperscript{nd} Edition, OS, March 2005) Chapter 31, 31.5
3.9 CONCLUSION

The International Community has demonstrated renewed interest in the protection and promotion of human rights during the last few decades. By signing and ratifying human rights instruments many States have incurred legal obligation to implement international human rights standards domestically. Despite the renewed interest, human rights violations remain rampant in India and South Africa and even in throughout world. In most instances, such violations are directly attributable to States and their governments.

In an attempt to curb these violations, so many countries in the world have established national human rights institutions to serve as independent bodies for the protection and promotion of human rights. The purpose of this chapter is to examine the structure and functions of NHRC of India of South Africa.

This chapter comprises the structures and functions of the Commissions. I truly present the Similarities and the difference between NHRC of India and South Africa.

In India the National Human Rights Commission was established on October 12, 1993 an act of parliament titled (The protection of Human Rights Act, 1993) but The South African Human Rights Commission came into being and was an integral part of South African’s paradigm shift from the apartheid legacy to a new Constitutional order based on respect and protection of human rights. The SAHRC was established with a view to ensure in October 1995.pursuant to the appalling human rights abuses of South Africa’s part couldn’t be repeated.

Section 2(d) of the protection of the Human Rights Act defines “human rights” as “rights” relating to life, equality and dignity of the Individual guaranteed by the Constitution of embodied in the International Covenants and enforceable by Courts in India. Thus the law requires the NHRC to concentrate more on Civil and political than on social and educational rights.

This is somewhat unfortunate as a human rights commission can really play an effective role in pressurizing the government to provide social and economic justice to citizen.

The South Africans appear to have realised this as they have mandated, through Article 184(3) of the Constitution of the Republic of South Africa, 1996, South
African Human Rights Commission to 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 environment.”

As per section 3 of the PHRA in India the Commission shall consist of five members, three of whom should be from the judiciary and two from amongst persons having knowledge of, or practical experience in the matter relating to human rights” selection of Chairperson and members of the Commission is made on the recommendations of a committee consisting of the prime minister. Home minister, Speakers and the leaders of the opposition in both the homes (Rajya Sabha and Lok Sabha) and by chairman of the Rajya Sabha.

The Committee, finally sends the name to the president for final appointment. However, In South Africa people with relevant experience are nominated for the position of Commissioner. Their names are then sent to the parliamentary standing Committee on Human Rights who develop a short-list and interview the short listed candidates.

Then they submit their recommendations to the National Assembly who vote on the matter. The National Assembly then recommends the person to the president, who appoints the person as a Commissioner. In India the NHRC is accountable to the parliament, and must report on its activities and the performance of its functions to the parliament at least once a year. Similarly SAHRC is accountable to the National Assembly and must report on its activities and its performance of its functions to the Assembly at least once a year.

The Commission is supposed to be completely independent if its functioning, even though the Act doesn’t say so. In fact, there are provisions in the act which underscores the dependence of the Commission of the Government. According to section II of the Act makes it dependent on the Government for its manpower requirements.
According to section 32 of the Act, the Central Government shall pay to the commission by way of grants, such sums of money as it consider fit. In contrast the SAHRC receives its core funding from government sources but a trust has also been set up to enable funding from donations. This reduces the dependence of the Commission on government funds and therefore adds to its independence.

The NHRC was established on 12th October 1993. Its statute is contained in the Protection of Human Rights Act, 1993 as amended vide the Protection of Human Rights (Amendment) Act, 2006. The constitutions of NHRC is in conformity with the Paris Principles that were adopted at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in October 1991, and endorsed by the General Assembly of the United Nations in its Resolution 48/134 of 20 December 1993. The Commission is an embodiment of India’s concern for the promotion and protection of human rights.