CHAPTER -IV

IMPORTANT HUMAN RIGHTS CASES DEALT BY NATIONAL HUMAN RIGHTS COMMISSION OF INDIA AND SOUTH AFRICA SINCE THEIR INCEPTION

4.1 INTRODUCTION

Investigating alleged human rights abuse is fundamental to the work of most NHRIs. While the focus is generally geared towards national remedies, there are international and regional bodies when NHRIs play a role. For example, when the protocol on the establishment of the African Court of Justice and Human Rights comes into force (which provides for the merger of the existing African Court on Human and Peoples Rights and African Court of Justice), unlike NGOs and other non-State actors, NHRIs will be entitled to bring cases directly to the new Court – and there is already precedent for NHRIs bringing cases before the African Commission on Human and Peoples’ Rights.

According to the Paris Principle, NHRIs may have additional power through a quasi-judicial mandate, and these NHRIs are required to receive, investigate and resolve complaints (including through settlements, binding decisions and/or on the basis of confidential interventions); to inform complaints of their rights, and of available remedies; and to promote access to remedies, to hear complaints and transmit them to competent authorities; and to make recommendations to competent authorities by redress.

UNCT staff who work with NHRIs in the early stages of establishment must ensure that technical assistance (TA), if it is part of the engagement, includes developing internal capacity to undertake these functions, including to establish effective case management systems in support of an investigation system.

4.2 ASSESSMENT OF NHRC OF INDIA

The creation of National Human Rights Commission under the Protection of Human Rights Act, 1993 marked the beginning of a new era of human governance in India. It
is true that the PHR Act did not fulfill the long-cherished desires of human rights activists or other social activists ‘flour country primarily for the reason that it made the NHRC a recommendatory or advisory body\(^1\). Even the Commission itself is aware of this fact is evident from the following observation of the Commission in its 1997-98 Report: It recalls only too well that at the time of its establishment, many were only sceptical as to whether it (Statute of the Commission) provided a sound enough basis on which an effective national institution could be built. The Commission was not however deterred by this, even as it readily shared the view that weakness and ambiguities in its Statute would need to be reminded at the earliest, and the light of Experience gained.\(^2\)

The basic approach of the Commission, namely its determination to come to grips as early as possible, with gravest areas of human rights violation has encouraged people to protect their human rights through the Commission.\(^3\) Immediately after the Commission was set up, it issued directives to all State governments to ensure that incidents of custodian deaths or rape must reported to the Commission within 24 hours by the district Magistrate/Superintendent of Police failing which the Commission would presume that there was an attempt to suppress the incidents. Following these instructions a number of reports have been received from different States in respect of deaths which have occurred in police or judicial custody. These reports are studies by the Commission and action recommended against officers found, prima facie, guilty. One very significant development in this connection has been a higher level of awareness among officials along with reports of the commission on incidents of custodial deaths.\(^4\)

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\(^2\) NHRC, *Annual Report 1997-98*, paras 17.4 and 17.5, p. 79.

\(^3\) A. Ray “National Human Rights Commission of India, Formation, Functioning & Future Prospects” Khama Publishers, Delhi, 2005

Nevertheless, Nineteen years after it was established, the NHRC has received popular recognition as indispensable institution of governance due to its sincere and spontaneous efforts to maintain the standards of integrity, efficiency and probity and to ensure accountability and transparency in its functioning. Consequently, it now enjoys great moral authority and the responses to its recommendations by the concerned agencies of central and State governments are overwhelming. By and large, the commission’s recommendations for the grant of immediate interim relief to the victims or the members of their families have been adhered to by the concerned governments or authorities, although this is not always so in case of its recommendations for departmental or criminal actions.

The National Human Rights Commission prepares and submits annual report to the Central Government about the position of human rights in the country. From the past years reports it is clear that it has been successfully working from the date of its inception. The NHRC has already received more than four lakhs complaints from various parts of the country These complaints covered almost all the aspects of the violations of human rights including excesses by armed forces and police, custodial deaths and rape, torture child labour and bonded labour disappearances, dowry deaths and indignity to women the rights of the disadvantaged sections of society especially of SCs and STs, conditions relating to jails, violence in areas of insurgency and Terrorism spherical problems of minority communities and environmental issue affecting the right to life and dignity and reasonable health. The commission either dismissed or disposed of complaints according the provisions as prescribed by the law and the Protection of Human Rights Act. During the years 1993-2011 (Nineteen years), the NHRC has made great progress in effectively enforcing human rights. It has made many accomplishments and made many significant recommendations for changes in the laws as well as the Protection of Human Rights Act, 1993. Here some cases are mentioned as examples to know how NHRC has been handling the cases since its inception.
### IMPORTANT HUMAN VIOLATION CASES HANDLED BY THE NHRC OF INDIA SINCE ITS INCEPTION.

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Inhabitants of a cluster of villages in Barwah Tehsil of Baramulla district, Jammu & Kashmir, submitted a written complaint to the Commission alleging the death, in the custody of the armed forces, of Muhammad Akbar Sheikh on 27 December 1993. It was asserted that he was seized during an army crackdown in the area on that date and that his dead body was handed over to the police in Baramulla on 29 December 1993.

Proceeding under Section 19 of the Protection of Human Rights Act 1993, the Commission called for reports from the Defence and Home Ministries. The reply of the Defence Ministry, dated 6 September 1994, forwarded a report from Army Headquarters. According to that report, the 15 Punjab Regiment was involved in an operation against militants on 27 December 1993 around the village of Fategarh, Tehsil Barwah, District Baramulla. A cordon was established at 0700 hours and a search started at about 0900 hours.

All male adults were collected at the local government high school. Muhammad Akbar Sheikh agreed to assist one of companies of the unit in the matter of the search. Five hideouts were shown to the search party and weapons and ammunition too were recovered. The search continued till 1800 hours. The period being the last week of December 1993, the weather was harsh and the terrain difficult. The report attributed the death of Muhammad Akbar Sheikh to exhaustion.

After carefully analyzing the report, the Commission observed that it was apparent that the deceased had been totally exhausted. The valley was in the grip of severe cold at that time. The record further indicated that Muhammad Akbar Sheikh was not a man in normal health. In such circumstances, it was the obligation of those who wanted to utilize his services for the purpose of the search, to take proper care of him. It was evident that exhaustion in this case was the result of the strain put upon him by the search party. Though the case was not one of custodial death, the situation was more or less akin to it.

After considering all aspects of the case, factual and legal, the Commission was of the opinion that Muhammad Akbar Sheikh's life could have been saved if appropriate
care had been taken of him by the armed forces. Holding the latter responsible for negligence in the death of Muhammad Akbar Sheikh, the Commission directed the Ministry of Defence to pay Rs. 50,000/- as compensation to the legal heirs of the deceased.

Accepting the recommendations of the Commission, the Ministry of Defence issued a sanction order on 2 December 1994 for the payment of the compensation. The Commission took note of this on 22 December 1994.


A reference to this case was made in the annual report of the Commission for the year 1996-97. Having heard the learned Counsel for all the parties on the preliminary questions noticed and formulated in the course of the Commission’s order dated 28 January 1997 as also those arising out of the objections filed by the respondents, the Commission pronounced its interim orders in the case of alleged mass cremation of unidentified dead bodies in Punjab on 12 May, 1997.

The issues considered by the Commission essentially related to the question whether in terms of the remit of the Supreme Court, the Commission did indeed function as a body sui generis or whether it should function strictly within the parameters of the provisions of the Protection of Human Rights Act 1993 bringing into operation the limits of the Commission’s jurisdiction imposed under Section 36(2) of the said Act. Other points considered during the preliminary hearings were the following:

- Whether in terms of the remit, other issues raised in the writ petitions before the Supreme Court passed orders, should also be decided by the Commission and if so what these other issues and their scope were;
- Whether the Commission could itself set up adjudicatory mechanisms for speedier disposal of the various claims subject to the imprimatur of the Commission;
- The concept and the content of the idea of ‘compensation’ available to the victims or their dependents by way of reparation.
The Commission also considered a point of objection raised by some of the respondents that the order of the Supreme Court, constructed as authorising the Commission to adjudicate the claims, would itself amount to a delegation of the Supreme Court’s own judicial power to the Commission, impermissible under the Constitutional dispensation. The Commission felt that these objections might also have to be resolved at the preliminary stage.

Having considered the matter in detail, particularly in regard to the legal provisions as well as the facts and circumstances, the Commission passed an Order on 4 August, 1997, disposing of the preliminary issues.

In regard to the objection relating to the time limitation on its jurisdiction, the Commission took the position that the Supreme Court, by its Order had designated the Commission as a body sui generis to carry out the functions and to determine issues as entrusted to it by the Supreme Court. "The shackles and limitation under the Act are not attracted to this body as, indeed; it does not function under the provisions of the ‘Act’ but under the remit of the Supreme Court". "As a logical consequence, the powers of the Commission in carrying out this mandate are not limited by Section 36(2) or other limiting provisions, if any, under the ‘Act’," the Commission ruled.

The Commission also "answered in the negative" the objections relating to the legality of the alleged delegation of authority by the Supreme Court, stating that the Court’s order made it clear that it had "not created any exclusive final adjudicatory jurisdiction in the Commission", but implied that "the Commission discharged its functions as an instrumentality or agency of the Court".

The Commission further Stated that it would need to augment greatly its logistical capability; it would have to induct officers with judicial experience to record and process the evidence and conduct enquiries under the directions of the Commission and recommend appropriate compensation subject to final endorsement by the Commission.

The Commission directed that since a large number of alleged cremations were said to have taken place, the appropriate procedure might be to invite by public notice, claims
in an appropriate proforma, from those who are aggrieved and such cases shall be enquired into to ascertain whether the deaths and subsequent cremations or both were the result of acts which constituted violation of human rights or constituted negligence on the part of the State and its authorities in preventing such violations. If either of these questions were answered in the affirmative, then the basis for the quantification of compensation would have to be decided.

On receipt of the above Order of the Commission, the Ministry of Home Affairs filed a petition seeking clarification of the Supreme Court’s Order of 12 December 1996, in the light of Commission’s orders settling the objections of the Government of India and laying down modalities which it intended to follow in pursuing the inquiry into this case. As on 31 March 1998 the matter was pending before the Court.

**CASE 3: (1997-98): Measures to prevent deaths by starvation in Orissa**

Pursuant to the orders of the Supreme Court of 26 July, 1997, the Indian Council for Legal Aid and Advice filed a petition before the Commission seeking interim measures to prevent deaths by starvation that had reportedly occurred in what are popularly known as the ‘KBK Districts’ of Orissa which now, in fact, comprise the eight districts of Kalahandi, Nuapada, Bolangir, Sonepur, Koraput, Malkanagiri, Nabarangpur and Rayagada. Prior to that, the Commission had received a letter from the then Union Agriculture Minister, Shri Chaturanan Mishra, requesting the Commission to undertake an investigation into the alleged deaths by starvation. The Commission had, thereupon, sent a team of officers, comprising the Secretary-General and the Director General (Investigation) to visit the affected parts and submit a report to it. The Commission also received a joint memorandum signed by seven members of the Orissa State Legislative Assembly in which they listed 14 cases of deaths occurring allegedly as a result of starvation.

The allegations of deaths by starvation and the seemingly recurrent nature of this tragic occurrence in the ‘KBK districts’ raised issues that were both grave in implication and contentious in substance. After examining the report of its own team
and the response of the State Government, and after reflecting on the petitions submitted by the Indian Council of Legal Aid and Advice and Others, the Commission considered it important to conduct in-depth hearings on this entire matter and to proceed in a non-adversarial manner with the full involvement and cooperation of all parties concerned.

The Commission’s recommendation followed upon 11 hearings held by it between 3 September 1997 and 29 January 1998, examining all aspects of the matter, an examination that included, inter alia, economic theories relating to starvation and famine, the economic, social and environmental history of Orissa - and of the ‘KBK districts’ in particular - over the past decades, the codes and criteria governing the conduct and reaction of State Governments and the Centre to situations such as those obtaining in the ‘KBK districts’ and, above all, the practical measures that could be taken in the interim, and be dovetailed into long-term plans, to end the scourge of deprivation, malnutrition and cyclical starvation in the districts concerned.

After due consideration, the Commission also arrived at the view that interim measures should be undertaken over a period of two years, subject to such periodic reviews as it may consider appropriate and necessary, and that these interim measures should be as follows:

**Monitoring Arrangements**

- At the State-level, a Monitoring Committee is established under the authority of the Chief Secretary, to guide and supervise the over-all effort.

- In addition, and without in any way wishing to transgress the normal lines of command and control, the Commission intended to appoint an eminent person to serve as its Special Rapporteur for the ‘KBK districts’ in order to keep itself fully informed of developments in respect of these districts and to interact, on its behalf, with all concerned authorities, whether at the State, district or other levels, as it may deem to be appropriate and necessary. The name of this
Special Rapporteur, in regard to whom the parties have been consulted, would be announced shortly.

**Specificity of Programmes**

- The Commission - after careful discussion with all concerned - received from the State Government a specific set of commitments district-wise and programme-wise, for the period 1 December 1997 to 31 April 1998, in respect of each of the 8 districts belonging to the ‘KBK’ group in respect of the programmes relating to Rural Drinking Water Supply, Social Security, Soil Conservation and Primary Health Care. The State Government would provide to the Commission an appraisal in respect of these programmes.

**Emergency Feeding Programme**

After reviewing the suggestions and views on this programme, the Commission was of the opinion that:

- The Emergency Feeding programme, as devised, should continue on a once-a-day basis. However, the programme should be available each day of the month.

- If any needy persons had been inadvertently omitted from the programme, they could be added to those being fed, on the advice of the concerned gram sabha/gram panchayat, the competent State authorities or the Special Rapporteur of the Commission.

**Old Age Pensions, Disability Pensions & Other Social Security measures:**

- The Commission was of the view that all those who qualify for old age pensions, disability pensions and other social security measures under the existing criteria governing such schemes, should be included among the beneficiaries.

- Monitoring system should be established by the State Government, which would ensure that were no delays in the monthly disbursement of pensions and such benefits and to distribute identity cards to the beneficiaries as one means of off-setting such delays.
Employment Generation in Agriculture, Ecological Security, Soil Conservation, Irrigation and other schemes

- The Commission noted the quantitative undertakings in regard to employment generating activities in respect of which, the Commission urged the tightening of monitoring systems.

Public Health

- The Commission observed the deleterious, indeed devastating effects of malnutrition on young women and mothers, that was taking a cruel toll on them and that was leading, in addition, to an unacceptably high incidence of low-birth weight amongst the children being born, a deficiency that in turn prevented the full development of their human potential, and recommended that the Monitoring Committee took maximum steps to ensure that measures were taken in the ‘KBK districts’ to provide the iron and iodine supplements and the vitamin A that was required by young women to prevent such needless harm from occurring.

- The Commission further recommended that a health-cum-nutritional survey be undertaken for these districts by an independent agency.

Land Reform

- It had been pointed out to the Commission in the hearings that the issue of land reforms was inextricably linked to the future well-being, or decline, of these districts. The Commission saw value in this suggestion and urged the State Government to constitute such a Committee with the request that it gave its report, within a fixed time-frame, on the measures that should be taken in these districts to remedy the present situation that was marked by a lack of land reforms, the alienation of land, migration and numerous other concomitant ills.

The Commission proposes to revert to longer-term issues raised in respect of the ‘KBK districts’ separately and at a later stage.

Killing of four persons in a fake encounter by the police: Uttar Pradesh (Case No. 12235/24/98-99)

Shri Panna Lal Yadav, a resident of Village Daulatiya, District Varanasi, Uttar Pradesh, alleged, first by means of a telegram dated 19 October 1998, and then through a longer complaint, that his son Om Prakash and three others had been killed by the police in a fake encounter on 17 October 1998. The SP, Sant Ravi Das Nagar, through a communication dated 18 October 1998, also informed the Commission that four criminals had been killed in an encounter with the police in the area of the Bhadoi police station, on 17 October 1998. It was reported that secret information had been received by the police that, on 17 October 1998, one Dhanjay Singh, a dreaded criminal carrying a reward of Rs. 50,000/- on his head, would commit a dacoity at the petrol pump of one Satyanarayan Harsh on the Mirzapur-Bhadoi Road. Accordingly, Shri Akhilanand Misra, Circle Officer, Bhadoi, constituted three teams to track down the criminals and proceeded to the spot. At about 11.30 am, the police found four persons coming towards the petrol pump, who on seeing the police party, ran away and took shelter in the nearby bushes. They indiscriminately started firing at the police party, which returned the fire. After 15 minutes of firing, the police party found four dead bodies at the site, including one of the dreaded criminal, Dhanjay Singh, the son of the complainant. The Commission found the police version unconvincing, and therefore ordered its own investigation wing to look into the matter. Accordingly, a team headed by a Deputy Superintendent of Police conducted an enquiry. Their report indicated that the alleged encounter was a fake one. The SP, Sant Ravi Das Nagar, also started that a agisterial enquiry had been ordered into the matter by the District Magistrate, and the State Government had ordered the Crime Branch Central Investigation Department (CBCID) to conduct an enquiry.

On the basis of the enquiry of the CBCID, a case was subsequently registered against 36 persons, including 34 police officials. The CBCID enquiry, on the basis of evidence, opined that the encounter on 17 October 1998 was a fake one, and that, in fact, four innocent persons had been taken out by the police from a nearby hotel and later brutally killed. By way of immediate interim relief, the Commission ordered, the
payment of compensation of Rs. 4 lakhs each to the next of kin/families of each of the victims, namely, Shri Om Prakash Alias Munna Yadav, Ajay Kumar Singh, Krisan Harijan and Shamim Natte. The Commission ordered that in each instance, Rs. 50,000/- should be paid in cash and the remaining amount of Rs. 3,50,000/- should be put in and nationalised bank for five years in the name of kin of the victim, the interest on which should be paid at quarterly intervals to the next of kin. The Commission also recommended to the Government of UP that the CBCID enquiry should be completed expeditiously and a charge sheet filed in the competent court of law for the prosecution of the accused persons.

The Commission has received a report from the Government of Uttar Pradesh stating that of Rs. 4 lakhs recommended by the Commission, Rs. 2 lakhs has been paid to each of the families of the four victims. The Commission has since been informed by the Government of UP that the State CID has finalised its enquiry and has sought the State Government’s approval for the prosecution of 34 police officials involved in the case. In addition, departmental action is also being taken against 42 police personnel found guilty of various acts of commission and omission in the matter.

Comment

The law in India recognizes the right of a citizen to private defence, and in the course of such private defence, even the causing of death can be justifiable in some circumstances. The same right of self-defence is available to a policeman. In addition, if the use of force in the course of an attempt to arrest a person accused of an offence punishable with death or imprisonment for life, results in causing of death, it can also be justifiable under law.

However, if a death is caused in an encounter that cannot be justified on the ground of a legitimate exercise of the right to private defence, or in proper exercise of the power of arrest under Section 46 of Criminal Procedure Code, the police officer causing the death would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case is justified, will therefore depend upon the facts established after a proper investigation.
Deeply concerned by complaints of fake encounters, the Commission laid down the procedure to be followed in all cases of encounters in its directions on Complaint No.234 (1-6)/93-94 brought before the Commission by the Andra Pradesh Civil Liberties Committee. That procedure, which was spelt out in letter dated 29 March 1997, from the then Chairperson of the Commission to the Chief Ministers of all States and Union Territories, commended the following steps:

- When the police officer in-charge of a police station receives information about the deaths in an encounter between the police party and others, he shall enter that information in the appropriate register.

- The information as received shall be regarded as sufficient to suspect the commission of a cognizable offense, and immediate steps should be taken to investigate the facts and circumstances leading to death to ascertain what, if any, offence was committed and by whom.

- As the police officers belonging to the same police station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as the State CID.

- The question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.


(Case No. 817/20/2001-2002)

The Commission received a complaint on 20 July 2001 from Shri Mahavir Prasad alleging that Shri Babu Lal Baswal, a manufacturer of carpets, had employed child labourers. They were reportedly being exploited, made to work under oppressive conditions and not being paid wages. The complainant further stated that he had not been paid contracted wages for the work that he had done for Shri Babu Lal Baswal.

Upon notice being issued to the District Collector, Tonk, Rajasthan, the Commission received a report which indicated that no child labourers had been found to be working at the alleged site at the time of an inspection that had been conducted by the
Assistant Labour Commissioner on 25 July 2001. However, the enquiry indicated that some child labourers were employed by the complainant at the loom belonging to Babu Lal and had not been paid wages for the months of April, May and June. A claim petition had been filed in the competent court on 25 July 2001. In compliance with the directions of the Apex Court, 11 cases of child labour had been instituted in the competent court against Shri Babu Lal Baswal.

Having regard to the employment of a number of child labourers by the accused, in contravention of the provisions of Section 3 of the Child Labour (Prohibition & Regulation) Act, 1986 and the institution of cases in the court against the offending employer, by its proceedings dated 2 May 2002 the Commission directed the District Magistrate, Tonk, Rajasthan to prepare a list of the child labourers who were employed by the carpet weaving unit, to recover a sum of Rs.20,000/- per child from the offending employer, and to deposit that sum in a fund to be known as the Child Labour Rehabilitation & Welfare Fund. The State Government was also directed to contribute Rs.5,000/- per child to the said fund in accordance with the directions of the Apex Court. The Commission directed that the fund so generated shall form a corpus, the income of which shall be used only for the concerned child.


A news item titled Students in rural Jharkhand forced to desert schools as Naxals go on overdrive recruiting young blood published in The Pioneer (Ranchi) on October 8, 2004 States that the naxalites have sent a message to villagers to send one boy girl from each house, but villagers refused. Naxalities again sent similar messages to the schools as a result whereof a number of students stopped going to the school and attendance came down to 10% of 450 students in the school. It is further Stated that young students are being used by Maoist ultras for passing on information regarding police movement. Some of them are trained, taught the modern ideology and moulded in their culture to come up as the next generation of Maoist activists.
As the report indicated prima-facie violation of human rights and exploitation of children, the Commission vide proceedings dated October 13, 2004 directed Chief Secretary and DGP, Government of Jharkhand to send a factual report in the matter.

The DIG(HR) Jharkhand, vide communication dated March 14, 2005 reported that no such incident was noticed in the reports received from Districts Deogarh, Jamshedpur, Dumka, Simdega, Kodarma, Bokara, Sarai Kela-Kharsoan, Jamtara, Lohardagga, Pakur, Gumla, Gadwa and Sahebganj. However as per reports received from SP, Palamu, information regarding Naxalites campaigning for recruitment of one youth from each house and forcing the children from rural areas to quit the schools and joined the movement had been substantiated.


The Commission received a complaint from the spokesperson of the Catholic Bishops Conference of India (CBCI) regarding violence in the Kandhamal District of Orissa on 24 and 25 December 2007. Some churches and Christian institutions were destroyed and several houses and other properties were damaged. The CBCI Stated that these attacks seemed to be a planned effort to disturb communal peace by some misguided fundamentalists and anti-social elements. The incident was highlighted by media and the Commission also received representations in the matter from many individuals and organizations, including Global Council of Indian Christians, Synodical Board of Social Services, Public Interest Legal Support Research Centre and Passion for Global Peace and World Vision. Further, the National Campaign on Dalit Human Rights also sent a representation, raising the issue of victimization and discrimination against the Pana community.

Pursuant to the Commissions directions, the Director General (Investigation), NHRC and the Inspector General of Police, Orissa submitted a report and also forwarded the enquiry report of the High Level Committee set up by the Government to go into various aspects of the incident. The analysis of the enquiry report revealed that communal tension had been rising in the area due to the changing socio-economic
equations of the Kandhas tribe (who are numerically the most dominant tribe in the State as well as in the district of Kandhamal) and the Kui-speaking Panas, who have the status of Scheduled Caste and used to work on farms of the Kandhas. With the passage of time, the Panas progressed faster vis-a-vis the Kandhas. A substantial number of Panas converted into Christianity but wanted to retain the benefits of reservation as a Scheduled Caste. Some Panas formed an association and demanded Scheduled Tribe status for Kui-speaking Panas. The tribal communities under the banner of Kandhamal District Kui Samaj Coordination Committee gave a call for a 36-hour bandh in the district. The bandh coincided with communal violence at Bramanigaon where some people of the Hindu community protested against erection of arches by the Christians to celebrate Christmas. The situation further flared up when Swami Laxmnanad Saraswati of the Vishwa Hindu Parishad (VHP) was allegedly detained and assaulted by the mob belonging to the Christian community when he was proceeding to Bramanigaon. The district administration found it difficult to handle the situation effectively because of its limited resources. Mobs from both the communities indulged in violence. The maximum destruction of property took place at Barakhama where houses of Christians and their properties were destroyed by some Hindus. Violence also erupted at Bramanigaon where Hindus who were in a minority, became victims.

The High Level Committee concluded that the incidents were part of a sudden flare up of communal passions and denied allegations of it being a planned effort by anti-social and fundamentalist elements to disturb communal peace. The report stated that all possible measures were taken to control the situation. Adequate forces, including platoons of Orissa, Special Armed Police, CRPF, RAF and Special Operation Groups, were deployed. Till 15 January 2008, 123 cases were registered and 162 persons, including 137 Hindus, were arrested. The State Government announced a relief package for the victims. This included three months ration for the affected families, Rs. 2,00,000 to all riot-affected institutions, ex-gratia payment of Rs. 20,000 and Rs. 50,000, respectively, for partly and fully-damaged houses.

The report and findings of NHRCs investigation team are more or less on the same lines as those of the High Level Committee. The team also noticed a great resentment
against the activities of one NGO. These observations of the team indicate that the violence was primarily stroked by communal passions and ethnic consideration played a secondary role.

Meanwhile, the President of the Global Council of Indian Christians sent another complaint, dated 6 March 2008, reporting several incidents of inaction against the perpetrators of violence towards Christians. The Council also alleged that Christians were being falsely implicated, accused of being Naxalites and arrested; in the Barakhama Relief Camp, women were being forced to give-up Christianity by the armed police of the State Government; and the District Administration was found to be persuading the Christians, whose houses had been destroyed in the communal violence, to move to other areas.

Taking cognizance of the complaint, the Commission issued a notice to the Chief Secretary, Government of Orissa, calling for a report within four weeks. The report received recently from the Superintendent of Police, Kandhamal is under consideration of the Commission.


The Commission took suo motu cognizance of a programme, “Operation Kalank” telecast on TV channel Aaj Tak’ on 25 October 2007, accusing the State functionaries of Gujarat, including the Chief Minister, the Minister of State for Home Affairs and the police officers, for abetment of killing of innocent citizens in the wake of post-Godhra violence in Gujarat. The Commission also received a complaint from Shri Abdur Rahman Mohammad Yusuf Anjaria in the matter.

The Commission directed the Government of Gujarat to communicate their consent for a CBI investigation into the authenticity of the tapes and allegations made therein to it and the Central Government within two weeks.

In response, the Government of Gujarat expressed its inability to give its consent for a CBI investigation on the ground that the Commission of Inquiry, under the provisions
of the Commission of Inquiry Act, 1952, headed by Justice Shri G.T. Nanavati, former Judge of the Supreme Court, and Justice Shri K.G. Shah, former Judge of the High Court of Gujarat and High Court of Mumbai, had already been appointed to enquire into various aspects of the post-Godhra violence, including the role and conduct of the Chief Minister/other Minister(s) in his Council of Ministers, Police Officers and other individuals and organizations.

It was also contended on behalf of the State Government that no investigation by an agency like CBI into the alleged exposure by the telecast of ‘Operation Kalank” is required as necessary actions have already been taken and the trials are pending. In the meantime, if any further material is made available, it can very well be placed before the concerned Courts.

The Commission thoroughly deliberated on the submissions made by the State Government of Gujarat and all aspects of the issue. The Commission noted that the “PHRA, 1993 mandates the Commission to enquire into any violation of human rights or negligence in preventing such violation. The status of the Commission conducting the inquiry under the Act is that of a Civil Court. It is not an administrative or fact-finding Commission such as those constituted under the Commission of Inquiry Act 1952, but a quasi-judicial body whose jurisdiction cannot be easily ousted.”

As per Section 36(1), the Commission is barred to inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force. Under Section 36 (1) of the Act, the phrase any other Commission’ follows the words State Commission’. This scheme of the Section makes the intention of the Legislature clear. Any other Commission’ contemplated by Section 36 (1) has to be akin to State Commission or National Human Rights Commission and it must have functions and powers similar to the State Commission or NHRC. A Commission constituted under the Commission of Inquiry Act shall obviously not fall in that category because such a Commission is in the nature of an administrative body and its role is not that of a quasi-judicial body, such as the NHRC or State Commissions.
Further, there is a fundamental difference between the National Human Rights Commission and a Commission appointed under the Commission of Inquiry Act (for short the Inquiry Commission) in the matter of constitution, tenure, functions and powers. As such, the jurisdiction of NHRC is not ousted merely because Justice Nanavati Commission and Justice Shah Commission are seized of cognate issues.

The pendency of criminal cases in the Courts and transfer petitions in the Supreme Court can also not operate as a bar to the jurisdiction of NHRC.

NHRC has the discretion whether or not to assume jurisdiction when a matter is subjudice. It may well be that after investigation or inquiry into the matter, the Commission may decide to intervene in a judicial proceeding u/s 12(b) of the Act.

Section 12(a) of the PHRA casts a duty on NHRC to inquire into complaints of violation of human rights or abetment thereof or negligence in the prevention of such violation by a public servant.

Further, as per Section 14(1) of the Act, NHRC may, for the purpose of conducting investigation pertaining to the inquiry, utilize the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case maybe.

The term investigation u/s 14 (1) of the Act is different from police investigation under CrPC. It is an investigation in aid of the inquiry u/s 12 of the Act. An investigation contemplated by Section 14 (1) of the Act does not result in a Final Report or a challan, as in the case of police investigation, but yields a report which is subject to the scrutiny of NHRC.

CBI is an independent investigative agency under the Delhi Special Police Establishment Act. While investigating criminal offences under Delhi Special Police Establishment Act, the CBI discharges the investigative functions of police and it exercises powers and jurisdiction under CrPC. Since the police or policing is within the exclusive jurisdiction of the State (Entry 2, List I Schedule VII of the Constitution of India), Section 6 of the Delhi Special Police Establishment Act provides that the
consent of the Government of the State, in which the investigation is to be conducted, shall be necessarily obtained before commencement of CBI investigation in that State.

The position is, however, different when CBI conducts investigation under the provisions of Section 14 of the PHRA. While making investigation u/s 14 of the Act, CBI works under the direction of NHRC and it exercises limited powers enumerated in Sub-section 2 of Section 14. Therefore, the term ‘concurrence’ in Section 14 (1) of the Act has a different connotation. It simply means concurrence in respect of borrowing and utilizing the services of any officer or investigation agency.

Since CBI is an investigation agency of the Central Government, NHRC was only required to ask the Central Government to give its concurrence to lend the services of CBI and it was not legally bound to obtain the concurrence of the State Government of Gujarat before requisitioning the services of CBI for investigating the authenticity of the tapes of “Operation Kalank” and the allegations contained therein. The concurrence of the State Government was requested as a matter of courtesy only.

NHRC found the State Governments reservations concerning it’s jurisdiction as untenable and misplaced. Therefore, NHRC reiterated its’ earlier decision to direct a CBI investigation and also directed that the Government of India be asked to communicate its concurrence to lend the services of CBI for investigating the authenticity of the tapes of the sting operation telecast by ‘Aaj Tak under the caption “Operation Kalank” and the revelations made therein. The report of CBI is awaited.


On 16 April 2008, while hearing the Writ Petition (Civil) No. 250/07- Nandini Sundar & Others Vs. State of Chhattisgarh and another Writ Petition (Criminal) No.119/07 - Kartam Joga & Others Vs State of Chhattisgarh, the Supreme Court observed that in view of the serious allegations relating to violation of human rights by Salwa Judum and Naxalites and the deplorable living conditions of inhabitants in the refugee
settlement colonies, it would be appropriate for the National Human Rights Commission to examine/verify the allegations.

Subsequently, the Commission directed that a Fact Finding Committee consisting of its officers from the Investigation Division be constituted to conduct a spot enquiry.

In order to assess the living conditions in the camps, the Fact Finding Committee visited 21 temporary relief camps out of 23 in Dantewada and Bijapur districts. Other than this, the Fact Finding Committee visited a number of villages (36) located in the jurisdiction of different police stations.

Two officers of the enquiry team also visited a few villages in Warangal and Khammam districts of Andhra Pradesh, to interact with tribals who had allegedly been forced out of Chhattisgarh due to violations committed by Salwa Judum. A public hearing was organized too at Cherla in Khammam District, while one day was earmarked to meet the villagers brought along by the petitioners at Dantewada.

The spot enquiry was conducted in two phases, during which the Fact Finding Committee looked into 168 specific allegations made by the petitioners. The Committee completed the enquiry despite the difficult terrain, inaccessibility of the villages, and hostility of the Naxalites.

The findings of the Fact Finding Committee revealed that formation of Salwa Judum was a spontaneous revolt of the tribals against years of atrocities and harassment suffered by them at the hands of Naxalites. Ever since it was started, there were many areas, both in Dantewada and Bijapur districts, which were previously inaccessible due to the presence of the Naxalites, but these were now under the control of the local police and security forces. The local police and the security forces had succeeded in reducing the prevailing tension between the tribals and Naxalites.

Since the support of the villagers was found to be an essential ingredient for the sustenance of Salwa Judum, the Naxalites, on the other hand, were also trying their best to win over the tribals who had joined Salwa Judum. The Special Police Officers (SPOs), recruited under Section 17 of the Police Act, 1861 and Section 9 of Chhattisgarh Police Act, 2000 also had a very vital role to play in curbing the menace
of Naxalism in Bijapur and Dantewada districts. However, in some instances, the security forces and the SPOs prima facie seemed to be responsible for extra-judicial killings. It was indicated in the report that such instances need to be enquired into, for those acting on behalf of the State must act within the boundaries of law (howsoever grave the provocation) and be accountable. The State authorities were able to provide information relating to seven instances only in which criminal cases had been registered against the SPOs. It was learnt that 1,579 SPOs had been dismissed from the service for various misdemeanours.

Though the petitioners had listed a number of cases of killings, rapes and other crimes, hardly any of the alleged incidents had been verified by the petitioners themselves. Moreover, many of the allegations were found to be based on hearsay. Allegations leveled in the petition against Salwa Judum were prima facie true to the extent of burning of houses and looting of property. The allegations against Salwa Judum with regard to a large number of killings were not found to be true. During the enquiry of some specific allegations, the Fact Finding Committee did not come across any case of rape which could be substantiated.

On the other hand, it was ascertained that the Naxalites had not only selectively killed Salwa Judum leaders and supporters, but they were also responsible for the indiscriminate killing of many tribals and security personnel. During the course of the enquiry it was revealed that many villagers were found to be missing. It was, however, not clear whether they had joined the Naxalites, or were hiding in the jungles, or had moved out of Chhattisgarh, or had since been killed.

The enquiry team did not come across any evidence to suggest that the district administration had deliberately withdrawn any development activity or service from a village because the villagers had not supported Salwa Judum. Instead of providing alternate accommodation, the State Government had in many instances allowed the security forces to occupy school and ashram buildings which were specifically meant for imparting education. This tendency of the State Government has to be checked and corrective action needs to be taken accordingly. Except on certain specific counts, the overall condition in the temporary relief camps was found to be satisfactory.
A large number of civilians had been displaced ever since Salwa Judum movement was started. Few of the civilians had taken temporary shelter in various camps in Bijapur and Dantewada districts, while the others had been forced to go to Andhra Pradesh. On the whole, the movement of Salwa Judum cannot be held solely responsible for these displacements. Moreover, the State Government of Chhattisgarh cannot be said to have deliberately or actively pursued a displacement policy for civilians. These displacements, by and large, were a fallout of the decision taken by the tribals to take on the Naxalites.

The selective killings of Salwa Judum leaders, activists and other attacks on them by the Naxalites was to a large extent responsible for changing the complexion of the movement from a non-violent one to that of an armed resistance.

It was the submission of the Fact Finding Committee that the State Government cannot be held responsible for sponsoring the Salwa Judum movement though it certainly had extended its support to it by way of providing security to the processions and meetings of Salwa Judum and also to the inhabitants of the temporary relief camps.

While the Naxalites were involved in violations of human rights, there had been instances where the activists of Salwa Judum, SPOs and the security personnel too were found to have been involved in activities that resulted in violation of human rights. In fact, the violations committed by the latter were of more serious nature as the State must act within the prescribed rule of law even in the face of grave provocation.

The report of the Fact Finding Committee was submitted to the Commission, which recorded its appreciation on the commendable work done by the Investigation Division under extreme difficult conditions. The Commission subsequently forwarded the entire report of the Fact Finding Committee to the Supreme Court. The Apex Court too placed on record its appreciation for the “meticulous work” carried out by the Commission’s Fact Finding Committee. The Supreme Court directed the State Government of Chhattisgarh to implement the recommendations given by NHRC.
PART-II

Important Human Rights Violation Cases Dealt by South African Human Rights Commission Since Its Inception

Whatever their type, NHRIs should be established by law; preferably their existence should be entrenched in the Constitution, thus ensuring their long-term existence. This statutory basis is the most secure way to guarantee the institution’s independence, as well as defend its legal powers if these are challenged.

The establishment and existence of the SAHRC must be viewed against both the international and the national legislative and policy frameworks that gave effect to it and within which it operates. This chapter answers a number of questions in this regard, such as: Has this framework been sufficiently enabling for the clear structuring and functioning of the Commission? And what are the key amendments needed to the legislation for it to be more facilitating? In addition to enabling legislation, establishing an NHRI involves setting out ‘founding principles’ to guide its operation. Faced with a clean slate in 1995, the SAHRC set out a number of founding principles. This chapter will discuss three of those principles that in many ways influenced the way in which the Commission approaches its work.

With the legislative framework and founding principles as its background, the SAHRC has to interpret and give effect to its mandate. How the Commission understands and interprets its mandate as set out in the legislation; what some of the key challenges are that the Commission has faced in interpreting its mandate; how the mandate has broadened since the Commission’s inception; and what the practical implications of this are.

Making the leap from a broad understanding of the mandate to discharging the mandate with the limited resources available requires strategic thinking, setting measurable objectives, and assessing the effect and impact of programmes and interventions. It is therefore important to investigate both to what extent the Commission has been successful in thinking strategically, and what influences the priorities it sets.
Although its mandate is a national one, the SAHRC operates within an international human rights context. This necessitates a discussion on the nature and extent of the SAHRC’s involvement outside South African borders. This involvement ranges from engagement with regional and international human rights bodies and institutions, to the perhaps more contentious question of commenting on human rights abuses outside South African borders. Does the SAHRC have a legal mandate for involvement outside its national jurisdiction, and is it clear about what it wants to achieve through this? The chapter will conclude with recommendations on how a more enabling legislative framework can be created, and how to address some of the challenges faced in interpreting the mandate.

### South African Human Rights Commission in the Constitutional Court

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<tr>
<td><em>S v Twala (South African Human Rights Commission Intervening)</em> CCT 27/99</td>
<td>2 Dec. 1999</td>
<td>Intervening Party</td>
<td>The final constitution gives accused persons an absolute right of appeal on all issues regardless of prospects of success</td>
<td>The court had to decide whether s. 316 read with s. 315 (4) of the Criminal Procedure Act which allows a person who has been convicted and sentenced by a High Court to appeal against that decision only if permission had been given by the High Court or supreme Court of Appeal is consistent with the Constitution. The court had to measure these sections against that part of the Constitution which gives to every accused person the right to a fair trial, including the right to appeal or review by a higher court. <em>S v Rens</em> considered. The court unanimously dismissed the application while reiterating that final Constitution nonetheless requires that provision be made for a reassessment of issues by a higher court than that in which the accused was convicted and right to appeal laws must be fair.</td>
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<td><em>Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v. Sithole and Others; SA</em></td>
<td>15 Oct 2004</td>
<td>Direct Access Applicant</td>
<td>Challenged the constitutionality of the whole of section 23 of the Black Administration Act on the basis that it violated</td>
<td>Confirmation proceedings and an application for direct access concerning the constitutionality of the system of male primogeniture in African customary law, as well as of certain provisions of the Black Administration Act and its regulations which regulated interState succession</td>
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<td>Human Rights Commission and Another v. President of the RSA and Another CCT 49/03; CCT 69/03; CCT 50/03</td>
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<td>the rights to equality dignity and the best interests of the child.</td>
<td>for black eStates. The impugned customary rule and legislative provisions were held to be unfairly discriminatory, contrary to ss. 9(3) and 10 of the Constitution. Both of the substantive rules governing inheritance and the procedures whereby the eStates of black people were treated differently were struck down. From thenceforth, eStates that would previously have devolved in terms of the unconstitutional regime were held to devolve in terms of the rules set out in the Intestate Succession Act. Special provision was made in the order for polygamous unions.</td>
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<tr>
<td>M v The State CCT 53/06 26 Sept 2007</td>
<td>Contributed law report on the impact of the imprisonment of women on their children</td>
<td></td>
<td>This matter concerns the impact of the constitutional injunction that the best interests of a child are paramount in all matters concerning the child on sentencing of primary caregivers of young children. Appellant unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal against the order of imprisonment for fraud and applied to this Court for leave to appeal. The majority in this court held that focused and informed attention needed to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position adequately to balance all the varied interests involved, including those of the children placed at risk. The Regional Magistrate had passed sentence without giving sufficient independent and informed attention as required by s. 28(2) read with s. 28(1)(b) of the Constitution, to the impact on the children of sending M to prison. The court held that in the light of all the circumstances of this case M, her children, the community and the victims who will be repaid from her earnings, stand to benefit more than her being placed under correctional supervision than from her being sent</td>
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<td>9 Oct 1998</td>
<td>Second Appellant</td>
<td>Challenged the constitutionality of common law and statutory prohibitions against sodomy.</td>
<td>Application for confirmation of a High Court order declaring the common law proscription of sodomy, s. 20A of the Sexual Offences Act, and the inclusion of sodomy both in schedule 1 to the Criminal Procedure Act and the schedule to the Security Officers Act constitutionally invalid. This Court confirmed the declarations of invalidity and made additional orders dealing with the retrospective effect of each declaration of invalidity.</td>
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<td>21 Sept 2000</td>
<td>Amicus Curiae</td>
<td>Broaden argument of the applicant to contend that even adults without children were entitled to shelter under s. 26 of the Constitution. Also agreed to monitor State compliance with its 26 obligations in accordance with the Court’s order, and to prepare a report on this.</td>
<td>Applicants requested the Court to enforce an undertaking made by the respondent during the hearing of CCT 11/00 to provide temporary shelter. Matter settled and agreement made an order of Court.</td>
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4.3 IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION)


HAVING read the documents filed of record and having considered the matter the Court Ordered the followings:
That it is declared that the Respondents may not detain any person at the Lindela Repatriation Facility for a period that exceeds thirty days after the date on which that person was first arrested and detain pending his or her removal from the country unless such detention has been authorised by a Judge of this Court acting in terms of Section 55(5) of the Aliens Control Act 96 of 1991.

That the Respondents are directed to make all reasonable arrangements necessary to ensure that 28 March 2000 (or such later date which may be specified by this Court) no person is detained at the Lindela Repatriation Facility for a period that exceeds thirty days after the date on which that person was first arrested and detained pending his or her removal from the country unless such detention has been authorised by a Judge of this Court acting in terms of Section 55 (5) of the Aliens Control Act 96 of 1991.

That the First Respondent is directed to serve on the first Applicant and lodge with the Registrar of this Court on or before Wednesday 1 March 2000 an affidavit setting out the manner in which it will comply with paragraph 2 of this order.

That the Second Respondent is directed to serve on the First Applicant and lodge with the Registrar of this Court on or before Wednesday 1 March 2000 an affidavit setting out the manner in which it will comply with paragraph 2 of this order.

Pending finalisation of this application, the Second Respondent is directed to make available to the First Applicant on a fortnightly basis, commencing on Friday 3 March 2000, a list providing the following information in respect of each person who was in detention at the Lindela Repatriation Facility on the Wednesday 48 hours previously:-

- The person’s full names.
- The person’s country of origin
- The date on which the person was first detained pending his or her removal from the Republic.
- The date on which the person was first detained at the Lindela Repatriation Facility pending his or her removal from the Republic.
• Whether any detention of the person in excess of thirty days after the date contemplated in paragraph 3 has been authorised by a Judge of this Court in terms of Section 55(5) of the Aliens Control Act 96 of 1991.

• Whether any detention of the person in excess of ninety days after the date contemplated in paragraph 3 has been authorised by a Judge of this Court in terms of Section 55(5) of the Aliens Control Act 96 of 1991.

That the Respondents are directed to show cause on 28 March 2000 why they should not be interdicted from detaining any person at the Lindela Repatriation Facility for a period that exceeds thirty days after the date on which that person was first arrested and detained pending his or her removal from the country unless such detention has been authorised by a Judge of this Court acting in terms of Section 55 (5) of the Aliens Control Act 96 of 1991.

That the Respondents are directed jointly and severally to pay the costs of the First Applicant.

### 4.4 SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

In the matter of: African National Congress Youth League V. Dullah Omar Region o.b.o Ward 95 Makhaza Residents and City of Cape Town in Case Reference No: WC/2010/0029.

#### 4.4.1 Mandate

The South African Human Rights Commission (hereinafter referred to as the Commission) is an institution that was established in terms of Section 181 of the South African Constitution Act 108, of 1996, (hereinafter referred to as the Constitution);

The Commission is mandated in terms of Section 184(1) of the Constitution to:

a) Promote respect for human rights and a culture of human rights;

b) To promote the protection, development and attainment of human rights; and

c) Monitor and assess the observance of human rights in the Republic.
In terms of Section 184(2) of the Constitution the Commission has the powers to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate on human rights related matters.

The Commission’s authority and powers are supplemented by the provisions contained in the Human Rights Commission Act 54 of 1994 together with the Regulations in respect of the procedures in conducting investigations dealing with alleged human rights violations.

4.5 COMPLAINT OF A VIOLATION OF THE RIGHT TO DIGNITY AND PRIVACY

In terms of section 184 (3) of the Constitution, the Commission has a specific mandate to monitor the measures taken by relevant organs of State towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

On the 21 of January 2010 the Commission received a complaint from the African National Congress Youth League - Dullah Omar Region (hereinafter referred to as the Complainant).

The complaint was lodged on behalf of the community members of Ward 95 Makhaza, Khayelitsha in Cape Town.

The Complainant alleges that the City of Cape Town, the Respondent herein, has violated the right to human dignity of the residents of Makhaza as well as the individual community members’ right to privacy.

The complaint stems from the action by the Respondent to install single flush toilet structures in the area without enclosing them.

In and during 2007 the Respondent embarked on a project to install single flush toilets for each household in Makhaza. It is alleged by the Respondent that the community had been informed that they would have to cover the cost of having these toilets.

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5 GN 817 in GG No. 30022 of 6 July 2007
6 The community of Ward 95, Makhaza, are a poor community with high levels of unemployment. The community is housed diversely in shacks and brick buildings.
7 Section 10 of the Constitution
8 Section 14 of the Constitution
enclosed. The residents were informed that the toilets would be a temporary measure until houses were built.

Three years later the temporary solution remains in place. 1 265 toilets of the 1316 toilets that were installed by the Respondent have been enclosed by residents at their own expense. The complaint before the Commission relates to the remaining 51 unenclosed toilets.

The 51 unenclosed toilets have not been covered by residents as they feel that the Respondent is responsible for enclosing the toilets and the community members State that they cannot afford to enclose the toilets at their own expense.

The one is to one toilets i.e. one flush toilet for every household replaces the current National standard structures (initially installed in the Makhaza area and still being used by the residents)⁹ being the one is to five toilets i.e. one toilet to be shared and used by five households (irrespective of individual numbers residing in the household).¹⁰

Clearly one household to one toilet is a more preferable and convenient short term solution in comparison to the one is to five schemes. The sustainable solution to sanitation is to address the housing backlog.

4.5.1 Steps Taken by the Commission

The Commission received the complaint on 19 January 2010. Thereafter the Western Cape Provincial Office of the Commission commenced its investigation with an inspection in loco on Monday 25 January 2010 where the abovementioned was observed and noted.

After initial consultations and correspondence with both of the parties, the Commission scheduled a mediation session with both the parties on the 9 of February 2010 in an attempt to reach an amicable and expeditious solution to the situation.

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⁹ These have remained in Makhaza and are still in use by residents. The one toilet per one household is in addition to these existing toilet structures-the 1:5 toilet facilities are enclosed.
ⁱ⁰ The residents of Makhaza refused this system as they felt that the system was not shared equally by all, i.e. not everyone cleaned the shared toilets, getting keys to padlocks for five households was problematic and at times keys went missing and the facilities could not be used.
The attempted mediation broke down and the Chairperson decided to terminate the mediation as it was clear that the parties could not come to a compromise.

The parties were then advised that the Commission would now proceed to make a finding that would determine whether the Respondent had indeed violated the rights of the Makhaza residents when they installed toilet facilities without enclosing them as alleged by the Complainant.

The Respondent subsequently, during the course of the mediation process, expressed its support for the Commission’s decision to make a finding, since it (Respondent) had planned similar projects in other areas.

Subsequent to widespread media reports, the Respondent that on the 30 of May 2010, allegedly attempted to enclose the 51 toilets with corrugated metal sheets. However, These metal enclosures were subsequently allegedly removed by Makhaza residents.

It was further reported in the media that on the 31 of May 2010 the remaining 51 unenclosed toilets were removed by the Respondent resulting in residents not having access to their own toilets and thus they were in effect forced to revert to using the already installed communal toilets.

4.6 SOUTH AFRICAN HUMAN RIGHTS COMMISSION VERSUS JON QWULANE CASE NUMBER: 44/EQ/JHB/2011

4.6.1 Judgment of the Equality Court of Johannesburg for the Protection of Human Rights in South Africa

This is an application for judgment by default in terms of Rule 32 of 1944. The court finds that there has been proper service on the respondent. The respondent was not in attendance at court. The complainant relied on the founding affidavit and argued the matter.

The compliant is undefended. The respondent has filed no papers. In the circumstances there is only one version before court. It is that of the compliant. The court is not going to repeat the argument presented as it already forms part of the record. This argument is accepted.
In the totality of the submissions tendered by the compliant the court finds the following:

- The complainant has the necessary locus standi to institute these proceedings.
- This court has the necessary jurisdiction to adjudicate this matter.
- The contents of the article and cartoon amount to hate speech.
- The article and cartoon propagates hatred and harm against homosexuals. Homosexuals as represented by the complainant have suffered emotional pain and suffering as a result of the action of the respondent.

The court therefore grants judgment in favour of the complainant as follows:

The respondent is ordered to make an unconditional apology to the gay and lesbian community. Such apology is to be published in the Sunday Sun as well as one other national newspaper.

Damages in account of R100 000-00 is granted. Such amount is to be paid to the complainant and to be used to promote and raise awareness regarding the rights of gays and lesbians.

A CASE STUDY ON RIGHT TO HOUSING (ON SOCIO-ECONOMY RIGHTS)

National Jurisprudence

Litigation on housing rights has focused on the State’s failure to cater for people living in desperate circumstances while they wait in the queue for low-cost housing. The landmark case has been the Government of the Republic of South Africa and Others v Grootboom and Others. The court found that the State’s policy was not reasonable as it did not cater for people living in situations of crisis or desperate need.

11 2001 (1) SA 46 (CC).
Chapter IV: Important Human Rights Cases Dealt By National Human Rights Commission of India and South Africa Since Their Inception

**Government of the Republic of South Africa and Others v Grootboom and Others 001 (1) SA 46 (CC)**

The *Grootboom* case concerned a community of people who invaded land they renamed ‘New Rust’ after having left an area known as Wallacedene in the Western Cape Province. The private owner of the invaded land, under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE), obtained an eviction order against the community. The community members sought shelter on the Wallacedene sports field after the order was executed. Their attorney wrote a letter requesting urgent assistance to the relevant local government authority (the Oostenberg Municipality). Relying on Section 6 (1) and (2), and Section 8 (1) (c) of the 1996 Constitution, the community then sued the Municipality in the Cape High Court for temporary shelter. An order in terms of Section 8 (1) (c) was granted by Davis J, instructing the respondent to provide shelter for the children of the Wallacedene community and accompanying parents. The State appealed against the order to the Constitutional Court.

The essence of the Constitutional Court’s decision in *Grootboom* is that where the State is required to progressively realise a socio-economic right, both government policy and the measures taken to implement that policy must be ‘reasonable’. When a policy fails to cater for people in ‘desperate need’ it is not ‘reasonable’.

In so doing, the direct applicability of the United Nations Committee on Economic, Social and Cultural Rights General Comment 3 of 1990 paragraph 10 on minimum core obligations was rejected by the Constitutional Court. The reference in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights to the obligation on a State Party to promote Covenant rights ‘to the maximum of its available resources’ was interpreted by the comment to mean that State parties had to devote all the resources at their disposal first to satisfy the ‘minimum core content’ of the right in question.

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There were two bases for the Constitutional Court’s rejection of this approach in *Grootboom*. Firstly, and particularly given regional variations and the rural/urban divide, the court held that there was insufficient evidence before it to allow it to determine the minimum core content of the right to housing in Section 6 of the 1996 Constitution. Secondly, the primary emphasis in South Africa should be placed on whether government policy was reasonable, especially given the textual differences between Section 6 (1) of the 1996 Constitution and Articles 1 and 11.1 of the ICESCR. An indicator of this larger inquiry is the minimum core content of the right to housing. A housing policy was clearly unreasonable and therefore unconstitutional that did not cater for people in desperate need. With the inevitable budgetary implications, the appellant was accordingly ordered to amend its policy. However, the court stopped short of ordering the government to prioritise spending on the provision of emergency shelter, as the wholesale adoption of General Comment 3 paragraph 10 would have entailed.

In paragraphs 39 to 46 of the judgement in *Grootboom*, the three constituent parts of Section 6 are considered separately.

The allocation of responsibilities to different spheres of government is what is primarily involved when reference is made to ‘reasonable legislative and other measures’.

Although not the only way, it also means that the policy must be theoretically capable of realising the right in question; and that the implementation strategy itself must be reasonable. A programme that excludes a significant segment of society cannot be said to be reasonable.

With regard to the ‘progressive realisation of the right’ part of Section 26 (2), the United Nation Committee on Economic Social and Cultural Rights General Comment 3 paragraph 10 interpretation to the effect that provision like this ‘imposes an obligation to move as expeditiously and effectively as possible towards that goal’, was adopted by the court. With such an approach the ‘deliberately retrogressive measures’ are impermissible.
Impact of Section 26 (3) on the common law pleading requirements in an action for ejectment

One needs to consider the impact of the constitutional eviction principle on common law evictions in normal landlord-tenant evictions, where the land reform laws have been said not to apply.

*Graham v Ridley*\(^{13}\) and *Chetty v Naidoo*\(^{14}\) set out the common law pleading requirements in an action for ejectment. According to these two cases, ownership of the land and the fact that the defendant is in occupation, are the only two things that the plaintiff needs to allege and prove. The owner must obviously answer this plea in his or her application if the defendant pleads lawful occupation in terms of a lease agreement. The plaintiff assumes the onus of proving lawful termination of the defendant’s right to occupy the land in terms of an agreement of lease if the plaintiff at any point concedes the existence of such an agreement (which strategically s/he may be forced to do).

Section 6 (3) of the 1996 Constitution provides:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In *Ross v South Peninsula Municipality*\(^{15}\) the court held that the common law with regard to evictions had been altered by Section 6 (3) of the Constitution. As opposed to the common law situation where a person who seeks to evict an illegal occupier from his or her home simply had to allege ownership of the premises and occupation by the defendant, the court argued that Section 6 (3) placed an extra onus of proof on the plaintiff to inform the court of circumstances justifying the eviction, placing sufficient information before the court to enable it to exercise its constitutional discretion and consider all the relevant circumstances. The court, when considering which circumstances would be relevant in such a case, determined that the PIE Act could provide guidance and that the legislature’s interpretation of the constitutional

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\(^{13}\) 1931 *TPD* 476.

\(^{14}\) 1974 (3) *SA* 13 (A).

\(^{15}\) 2000 (1) *SA* 589 (C).
requirement meant that the ‘rights and needs of the elderly, children, disabled persons and households headed by women’ should be protected.\textsuperscript{16}

In the decision of Betta Eiendomme (Pty) Ltd v Ekple-Epoh\textsuperscript{17} the court held that the ‘normal landlord and tenant’ relationships are not affected by Section 26 (3), thereby declining to follow Ross. The court in Betta Eiendomme approached the matter in the following way: the common law regarding the right of ownership makes it clear that a landowner is entitled to possession of his or her property under normal circumstances; the common law right of ownership ‘as recognised before the Constitution has not been affected by the Constitution’, and ownership ‘still carries within it the right to possession’; the restriction of the owner’s rights as against an illegal occupier of the land is neither required by the text of Section 6 (3) nor the constitutional obligation to promote the values that underlie the Constitution or the spirit, purport and objects of the Bill of Rights; and lastly, the mere fact that the plaintiff is the owner and that the defendant is in possession renders it ‘right and proper’ that the owner be granted an eviction order, in the absence of constitutional or legislative interference with the owner’s rights, ‘against someone who has no business interfering with the possession’.\textsuperscript{18}

The court restricted Section 6 (3) of the Constitution’s application to cases where the ejectment order is sought under apartheid-style legislation, therefore depicting it as a ‘never again’ provision. Flemming DJP argued that the court in Ross was wrong to cite the PIE Act for guidance on ‘relevant circumstances’. The need to protect ownership rights and the concomitant rights of contract, together with the impact of ‘squatting’ on the South African economy (of which the court took judicial notice), are rather the circumstances that one should consider when applying Section 6 (3). The court held, later on in the judgment, that relevant circumstances were those circumstances that had been made relevant by the pleadings. The court need not go in search of relevant circumstances, i.e. the ordinary adversarial model applied, where

\textsuperscript{17} 2000 (4) SA 468 (W).
\textsuperscript{18} Op cit note 28 at page 397–8.30. 2002 (4) SAHRC.
the defendant had not pleaded anything, as is by definition the case in an application for default judgment.

The Supreme Court of Appeal (SCA) settled the controversy over the impact of Section 6 (3) on the common law in *Brisley v Drotsky*\(^\text{19}\), while upholding the basically conservative approach relating to the effect of the Constitution established in *Betta Eiendomme*, overturning both *Ross* and in part *Betta Eiendomme*. The majority of the court held, contrary to *Betta Eiendomme*, that Section 6 (3) was not of vertical application only and that in cases of this nature, an eviction order may only be granted once the relevant circumstances have been considered. For purposes of Section 6 (3), the relevant circumstances, according to the SCA, are circumstances that are legally relevant, rather than the personal circumstances of the person facing eviction, including the availability of alternative accommodation. However, it also decided, contrary to *Ross*, that Section 6 (3) did not grant the courts a discretion to deprive the landowner of an eviction order that s/he would otherwise – in the absence of a statutory or other right to occupy – have been entitled to, based on the personal circumstances of the occupier and his/her family or the availability of alternative accommodation. The court’s discretion to refuse to grant an eviction order, where the owner is otherwise entitled to such an order, is not conferred on the courts by Section 6 (3). Consequently, in the absence of a statute which explicitly confers an equitable jurisdiction on a court, and, except insofar that right is limited by the Constitution, another statute, a contract or some other legal basis, an owner is entitled to possession of his property and an eviction order against a person who occupies his property unlawfully.\(^\text{20}\)

**4.7 SOUTH AFRICAN HUMAN RIGHTS COMMISSION’S INTERVENTION ON THE PROCESS OF THE SUBSTITUTION OF THE DEATH**

The South African Human Rights Commission (SAHRC) was approached by the Registrar of the Constitutional Court to consider and comment on why certain

\(^\text{19}\) *Op cit note* 8 at page 403.
\(^\text{20}\) *Ibid*
prisoners, originally sentenced to death, (the applicants) had not had their sentences converted.\textsuperscript{21} The Registrar was of the view that: “The problem with these cases are that there seems to be undue delay in bringing them to a speedy and satisfactory conclusion.”\textsuperscript{22} The death penalty was declared unconstitutional in South Africa in 1995, yet seven years later a large number of prisoners continue to reflect this penalty. Applicants, however, do still not have certainty regarding their new sentence, which impacts upon their ability to obtain parole and privileges.

4.7.1 The Investigation

The SAHRC set out to understand the process involved in converting applicants’ sentences and the difficulties experienced in this regard. Our aim was to ascertain where the blockages were and to assist the role players to carry out their duties in terms of the legislation. Our original objective was to finalise this process by formulating a definitive list of those applicants who had not been assisted. As the project evolved, so did our objective, as set out below.

4.7.2 Background

The last execution in South Africa occurred on the 14 November 1989, and thereafter the State issued a moratorium on executions\textsuperscript{5}. In 1995 the Constitutional Court handed down its first judgment, the Makwanyane\textsuperscript{6} decision, which abolished the death penalty as a form of punishment in South Africa. In that matter the court held that the punishment of anyone by death was cruel and inhumane and therefore unconstitutional as it inter alia violated s 10 and s 11 of the South African Bill of Rights, namely the right to human dignity and the right to life. The court further ordered that the provisions of s 277(1) of the Criminal Procedure Act\textsuperscript{23}, and all corresponding legislation and provisions were declared to be unconstitutional and therefore invalid. It was further ordered that the State and all its organs were forbidden from executing any person already sentenced to death. Official records

\textsuperscript{21} The SAHRC would like to thank the European Foundation for Human Rights, without whose kind support, this report would not be possible
\textsuperscript{22} 21/2000/0552 Mbelu: Prisoners Death Row
\textsuperscript{23} Criminal Procedure Act No. 51 of 1977
indicate that there were 430 people who had been under sentence of death at the time of the Makwanyane judgment. As a result of that judgment, legislation was passed to provide for the procedure to be followed in setting aside the death sentences and the substitution of such sentences with an appropriate sentence.

4.7.3 The Legislation

The enabling legislation is the Criminal Law Amendment Act 105 of 1997 (the Act). The commencement date of the Act was 13 November 1998. The Act was intended to provide the process by which the death penalty cases were to be reviewed and substituted by other punishment.

1. The Act classifies prisoners into three categories:

   a. Section 1(1) deals with cases where the prisoner has exhausted all avenues of appeals or reviews.

   b. Section 1(7) and s 1(10) addresses situations where there are appeals against the sentence and not against the conviction. In this instance the case shall be heard by the full court of that division as would be required by the Criminal Procedure Act, 1977.

   c. Section 1(10) deals with all other cases where the sentence of death was imposed and which were not disposed of by that court.

2. In the cases which are covered by s 1(7) and s 1(10), the affected persons still have recourse to the courts and their death sentences will be substituted during this ongoing process. Our focus was on s 1(1) cases where the matters had already been finalised and the sentence was that of death. In these matters, the prisoners had exhausted all legal avenues available to them. It is these prisoners who have yet to receive a substituted sentence, and are the subject of this investigation.

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24 Legal Aid Board Report on the Death Sentence Appeals in terms of sec 1 (1) Act 105 of 1997 (the LAB report). According to the LAB report, the figures that were supplied to them by the Ministry of Justice indicate that there were 497 cases and out of those 387 of those cases have been substituted with other forms of punishment

25 This assertion that 430 were affected was made in the Makwanyane case and was not disputed by the State.
Chapter IV: Important Human Rights Cases Dealt By National Human Rights Commission of India and South Africa Since Their Inception

3. The process involved in converting the death penalty cases in terms of the Criminal Law Amendment Act No. 105 of 1997 is very complex:

- In terms of s1 of the Act the Minister of Justice has to notify the Registrar of the High Court of the cases which have to be heard.
- Often the records pertaining to these matters have been in the archives for a while so it is necessary to locate the original court files and ensure that the documentation was complete and in order.
- The Director of Public Prosecutions has to ensure that the Heads of Arguments are filed on behalf of the State and the LAB has the duty to appoint counsel who will file Heads of Argument on behalf of the applicant.
- When both sides have filed the Heads of Arguments, and the matter has been set down, the matter is then allocated to a court for hearing. The court shall, where possible, consist of the judge who sentenced the prisoner to death, failing which the Judge President will designate another judge to handle the case. As already Stated, the court shall then consider the written arguments as well as the evidence that was led at the hearing when the applicant was originally sentenced to death.
- Oral argument may be requested by the presiding judge if that is deemed necessary. In conclusion, the judge is required to make a recommendation regarding a new sentence.
- These recommendations are submitted to the Office of the President for consideration. If the President approves the recommendations then he is required to attach his signature as confirmation. The President may, after careful consideration, impose a different sentence from the one recommended by the court.
- According to the Act no appeals will apply in respect of either the proceedings, or the recommendation of the court in terms of the court process.
- The process of submitting recommendations to the Office of the President is facilitated through the Department of Justice. Initially there was some
confusion in terms of the process. It was established that in some instances some Registrars were sending the information directly to the President’s office and that caused misunderstanding and some delay to a certain extent.

- As soon as the President has reviewed and signed the request, the Department of Justice notifies the court Registrars as well as the Department of Correctional Services about the finalisation of the matter. The Department of Correctional Services would then inform the prisoners of their new status and sentence. The LAB, through the officer representing the individual, also has an obligation to inform the applicant about the progress of the process and the final outcome.

4.7.4 Information compiled by the SAHRC

In summarised form, the SAHRC’s list indicated the following:

<table>
<thead>
<tr>
<th>Name of the High Court</th>
<th>No of outstanding cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Cape Provincial Division</td>
<td>11</td>
</tr>
<tr>
<td>2. Orange Free State Division</td>
<td>16</td>
</tr>
<tr>
<td>3. Bophuthatswana Provincial Division (Mmabatho)</td>
<td>3</td>
</tr>
<tr>
<td>4. Venda Provincial Division (Thohoyandou)</td>
<td>6</td>
</tr>
<tr>
<td>5. Durban Coastal Local Division</td>
<td>22</td>
</tr>
<tr>
<td>6. Natal Provincial Division (Pietermaritzburg)</td>
<td>11</td>
</tr>
<tr>
<td>7. Transkei Provincial Division (Umtata)</td>
<td>15</td>
</tr>
<tr>
<td>8. Eastern Cape Provincial Division (Grahamstown)</td>
<td>2</td>
</tr>
<tr>
<td>9. Witwatersrand Local Division</td>
<td>47</td>
</tr>
</tbody>
</table>

| Total number of cases outstanding                          | 133                     |

It is important to bear in mind that the figures shown above are only those records received from the different Registrars and the DPP. The SAHRC attempted to reconcile this list with the lists we received from the Department of Correctional Services and from the Department of Justice, but the lists did not reconcile. When attempting to reconcile these lists, we experienced a number of problems, such as:
• The list from Justice contained only some names that appear on the list from Correctional Services and vice versa. Even with respect to the Registrars’ list there are inconsistencies regarding whether the applicants cases on these lists are pending.

• Furthermore the format used to compile the lists of cases that are pending and that of cases that have been finalized, are not the same. Each office or department uses its own format.

• Some lists are compiled in such a way that they focus on the case numbers and not on the number of accused in each case. Other lists, however, will indicate the number of people still in prison, meaning that they are focusing on the names and numbers of individuals, and not each case. This has a direct bearing on how the numbers of outstanding cases are counted and recorded. For example, one may be led to believe that there are five outstanding cases in a particular high court, only to learn at a later stage that there is actually one case, which has five applicants.

• Due to a lack of coherent communication between the role players regarding these matters, finalised matters may on occasion, appear as pending in certain department’s records. This has led to confusion and inaccuracies regarding the status of certain matters.

• In certain instances a name appears on more than one list with the name spelt differently on each list. We might assume that the record is that of the same person but we are unable to confirm this because the case numbers might be different or there is no case number next to the name on the other list.

The aforementioned inconsistencies have led to confusion and have militated against us determining an accurate list of both names and numbers of affected applicants.

4.8 RECOMMENDATIONS

1. There should be a focal point in the form of a designated person, in each of the offices of the role players who will liaise with each other.26 The Department of

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26 DCS: Erns Kriek; LAB: Janie Kriel; Department of Justice: Tessie Bezuidenhout tbezuidenhout@justice.gov.za
Justice has a pivotal role to play and the SAHRC is of the view that it should be the lead actor in these matters. In particular, the Department of Justice should collate all the statistics and ensure that it, and its partners, communicate effectively to ensure that these matters are finalised.

2. It is important to obtain consensus from all the role players to agree to use the same format when compiling their lists. If possible agreement should be reached on the format of a national database, which is accessible to all the role players concerned.

3. The LAB as the main promoter of this issue, should be acknowledged as such and should be supported in its attempts to finalise these matters. It should be able to collect correct information from all the role players and be able to ascertain the exact numbers of outstanding cases. The SAHRC will work closely with the LAB to assist the facilitation of this procedure, insofar as possible.

4. The SAHRC will forward a copy of this report to the LAB and the Parliamentary Portfolio Committee on Justice as it emphasises the importance of finalising these matters. The SAHRC can substantiate and support many of the concerns raised by the LAB, and the SAHRC should advise the Portfolio Committee accordingly.

5. The Departments of Justice and that of Correctional Services should strengthen their liaison and communication regarding these cases to ensure that they update their records and inform the prisoners and prisons about new sentences in those matters that have been finalized.

6. The Judicial Inspectorate should establish a relationship with the LAB so they are able to advise the LAB whether there are any applicants in any of the prisons that have been visited. This will assist in ensuring that no case is left unattended. The concerns raised by the Nkisimane case, as discussed above, may fall into the purview of the Office of the Judicial Inspectorate as their Independent Prison Visitors will be alerted to those prisoners who remain un-sentenced.

7. The Judicial Inspectorate, through its Independent Prisons Visitors, should initiate a campaign, consisting of placing notices and posters in all prisons
throughout South Africa, alerting both inmates and prison personnel to the legal situation regarding applicants. In this way, those persons who have yet to have their sentences revisited, will be able to contact the LAB to initiate the finalisation of their matters.

8. The central role-players, namely the Department of Correctional Services, the Department of Justice and the LAB should meet quarterly to review their progress in these matters. It is noted that the LAB intends finalising all matters by 30 June 2003, and it is suggested that the first meeting be held in the first quarter of 2003.

Analysis

A copy of this report should be submitted to all role-players, in order to assist in educating as many stakeholders as possible, about their role and duties. The LAB should continue to play an active role in ensuring cases are finalised as soon as possible. The SAHRC would like to be kept up to date on the progress of these matters, on a quarterly basis, in order to ascertain whether the SAHRC can offer further assistance in order to ensure that these matters are finalised. It is suggested that the LAB furnish the SAHRC with updates, due to the LAB’s pivotal role in this process.

4.9 Conclusion

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 enacts the provisions for 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 has dealt with human rights
violation of all the citizens of India in a very significant manner. Accordingly, major human rights violation cases investigated by the National Human Rights Commission were taken up very seriously by the Government of India as well as the provincial governments in India.

In contrast a brief study has been conducted in this chapter about the major human rights violation cases in South Africa since its inception, it is really much effective and people oriented as because they have redressed the violation in a quite democratic manner. During the constitutional negotiations and the run-up to the interim Constitution, there was a need for institutions supporting democracy and a push for a human rights organisation. However, it is unclear how much thought went “into what exactly it would do”, because there “continues to be different understandings of that”.

SAHRC to play a watchdog role as far is Government is concerned: “Rights bodies have the right to say to us (the Government) ‘show us your figures, why didn’t you reach 100 percent?’ and thereby hold Government accountable for delivery on its mandate”. 