6.1 LEGITIMACY

This thesis chose to look at the public legitimacy of NHRCs, rather than the merely formal legitimacy contained in law, because it was assumed that the credibility and effectiveness of such institutions derived more from what they did than from what they said they would do. Yet it was apparent throughout that many of the criteria that people applied to judge public legitimacy went to the heart of the formal legal basis of the institution: who was a member of the institution, whether they were independent of government, whether the NHRC had a mandate to tackle the sensitive human rights issues, and whether its findings had any effect. Beyond that, most of those interviewed made a judgement about the political will of an institution: was it prepared to tackle the difficult issues that would put it into conflict with the government? Would it address the needs of the victims of human rights violations and the priorities of civil society institutions?

6.1.1 Autonomous national institutions

It was apparent in all the countries studied that there are very wide misapprehensions about what constitute autonomous national institutions - or indeed whether such institutions are valid or valuable. In some cases, this is because there is simply no history of independent institutions at all. This is so in many African countries, for example, where national human rights institutions have proliferated in recent years but the political culture of the military or one-party state has not really been overcome.

An alternative objection to these autonomous national institutions is that they are undemocratic. This is the view that is sometimes quietly voiced in government circles in, for example, India and South Africa. Both countries are democracies and government supporters argue that human rights institutions are alright in their place but should not be allowed to thwart the democratic will of the people. It is perhaps an
irony that the left-leaning governments of these two countries should echo the most conservative of Western political theorists. The weakness of their approach is that it defines the democratic process exclusively in terms of the ballot that is cast once every four or five years. Yet the existence of autonomous (albeit subordinate) institutions is a vital mechanism for ensuring the accountability of governments and in particular underlining the primacy of constitutional principles. Indeed, this is where national human rights institutions work particularly well - keeping democratic governments on the straight and narrow and providing the electorate with an impartial audit of their performance on human rights.

Yet, there is often a misunderstanding of the character of national human rights Commissions from the other side too. Many of the criticisms articulated by NGO activists, for example, amount to saying that NHRCS are not NGOs. Yet the reality is that if national institutions had the attributes and behaviour of NGOs they would be useless at the job they are supposed to do. For one thing, a national institution must be seen to belong to the nation as a whole. It should be endowed with statutory powers which enable it to carry out its functions-such as the power to subpoena evidence or to make recommendations-but that also carries with it a certain accountability. Not least of all, to be effective they must gain a degree of trust from those working within government, as well as in civil society. This does not mean compromise with those who violate human rights. It does mean pragmatically understanding the constraints within which government operates and helping to design solutions to protect human rights in the real world within which they operate. National institutions at their best should act as a conduit through which the grievances of civil society are brought to the attention of government. They can only do this effectively if they stand somewhat apart from civil society.

The independence of the Human Rights Commissions from the executive branch of government is generally regarded as a precondition for its effective functioning and credibility. Yet the independence of a Human Rights Commission can only ever be analogous to that of the judiciary - in other words, it should be independent in its functioning, but will have inevitable links to other branches of government in its appointment, its financing and the exercise of its powers. Indeed, one of the values of
a national institution in the investigation of human rights violations is its capacity to exercise statutory powers to, for example, compel disclosure of information or the appearance of witnesses. Equally, when a human rights institution reports on violations, this constitutes a form of official acknowledgement which is different in quality from reports by non-governmental human rights bodies.

6.1.2 National Human Rights Commissions in new democracies

When a national human rights institution is established at the moment of political transition, the likelihood is that its public legitimacy will be greatest. In these circumstances, where a whole new constitutional order is being developed, there is a greater chance that the institution will appear to belong to the nation as a whole rather than to the government of the day. Partly, this may be because the new institution is enshrined in a new constitution, in South Africa.

A national institution established at the moment of transition may represent a political compromise between old and new rulers or between different political forces. It may derive strength from that, but this may also make it subject to political pressures. The South African Human Rights Commission bears the influence of the political circumstances of its creation - for example the continuing presence of members of white minority parties on the commission is presumably intended to reassure their communities, even though the principal victims of human rights abuse are found among the black majority.

6.1.3 Mandate of NHRIs

According to PHRA of India, Section 2(d) of the Act defines as “rights relating to be, equality and dignity of the individual guaranteed by the constitution or embodied in the international covenants and enforceable by courts in India”. Thus the law requires the NHRC to concentrate more on civil and political than on social and economic rights. This is somewhat unfortunate as a human rights commission can really play an effective role in pressurizing the government to provide social and economic justice to citizens.
The South Africans appear to have realized this as they have mandated, through article 184(3) of the Constitution of the republic of South Africa, 1996, their human rights commission to “require relevant organs of state to provide the commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and environment. A similar type of provision in law governing the human rights commission in this country can act as a pressure point on the government to explain as to how they have done.

The most serious limit on the powers of investigation of the Indian NHRC relates to allegations of human rights violations by the armed forces. The NHRC is not empowered to investigate such complaints directly, but only to “seek a report” from the central government. It can make a recommendation to government on the strength of that report, but clearly the practical effect is to put the armed forces beyond the NHRC’s reach. The armed forces are defined as the army, the paramilitary forces and the central police force. This exclusion of jurisdiction has particularly serious consequences in the context of the continuing conflict in Kashmir.

The NHRC itself has requested a change in the Act to extend its powers in this area, while the Human Rights Committee, reviewing India’s implementation of the International Covenant on Civil and Political Rights, also voiced its concern:

> The Committee regrets that the National Human Rights Commission is prevented by Clause 19 of the Protection of Human Flights Act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the Central Government. The Committee recommends that these restrictions be removed, and that the National Human Rights Commission be authorized to investigate all allegations of violations by agents of the State.¹

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¹ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, concluding observations of the Human Rights Committee (CCPR/C/60/IND/3)*, 1997.
6.1.4 Accountability

There is much discussion - rightly - about how to guarantee the independence of NHRCS. Less attention is devoted to the question of how they are held accountable for what they do. Accountability cuts both ways. It is partly about creating a line of authority that will ensure the national institution can do its job without interference from those whom it is trying to hold to account. It is also about ensuring that the institution’s clientele - the public at large - are able to see what it is doing in their name and ensure that it is performing properly.

The area where accountability is most likely to become a matter of dispute is over budgetary matters - the most effective means by which a government can render a national institution ineffective. This can happen even when the independence of an institution’s budgetary control appears to be assured, as in India and South Africa, where the constitution are apparently unambiguous, have experienced similar problems. The SAHRC is accountable to the National Assembly and is required to report to it at least once a year. But the question of who controls the SAHRC’s budget has been a matter of dispute with the government. The commission has been made subject to the authority of the Ministry of Justice - a situation that the SAHRC regards as inappropriate since that is the line ministry with responsibility for human rights. The 1999-2000 budget allocation for the SAHRC was determined by the Ministry of Justice without reference to the commission. The latter argues that it is being prevented from reaching full effectiveness by these budgetary constraints - pointing for example to the failure to set up provincial offices. The government argues that no public institution is immune from the general mood of financial stringency that must prevail. It is bolstered in that view by the mood of the public - or perhaps more accurately, of a section of the mass media - which holds that money is being wasted on the proliferation of autonomous statutory institutions. These arguments seem false. In fact, financial oversight in relation to the SAHRC should be exercised by Parliament, which is responsible both for approving the overall government budget and for holding the commission to account. It is unclear why the Ministry of Justice should be involved at all. The constitution clearly requires the commission to participate in the budgetary process as if it were a government department, which makes the current situation apparently unconstitutional.
The annual report of National Human Rights Commissions (NHRC) is a vital public document that not only provides a regular audit of the government’s performance on human rights but also an account of what the national institution has done. It is vitally important that all the findings and recommendations of the institution be publicly available, whether through the annual report or some other mechanism. The institution should use the media to publicise exemplary recommendations. There may be some tension between the confidentiality of the investigation process, which is often in the interests of the complainant, and the need to publicise findings. However, the National Human Rights Commissions (NHRC) has an obligation to a public that is broader than the sum of its individual complainants. Rendering a full public account of its action is also part of making an institution effective.

This broader public accountability is also achieved through the relationship that an NHRC has with non-governmental bodies. If membership of the national institution includes non-governmental human rights bodies and other civil society organisations, this creates a line of accountability. Similarly, regular consultations with human rights activists and civil society organisations not only allow the NHRCS to benefit from their experience and insights but give the latter an opportunity to scrutinise the institution’s performance.

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

In an attempt to curb Human Rights violations, close to 100 countries have established national human rights institutions to serve as independent bodies for the protection and promotion of human rights. In Africa, 24 such institutions have been established.² The purpose of this conclusion chapter is to examine the effectiveness of

these institutions, focusing particularly on the National Human Rights Commission of India (NHRC) and the South African Human Rights Commission (SAHRC).

The National Human Rights Commission of India (NHRC) was established under the Protection of Human Rights Act, 1993. Defining human rights as, the rig relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants—that is, ICCPR and ICESCR\(^3\) and enforceable by courts in India\(^4\), the legislation has been enacted ‘for better protection of human rights.’\(^5\) The NHRC of India was the first such commission to be constituted in the South Asian region; its constitution was essentially a consequence of mounting international pressure and criticism of the Government’s apathy towards human rights issues.

The NHRC is composed of a chairperson who is a former Chief Justice of the Supreme Court, and four other members, a present or former judge of the Supreme Court, a present or former Chief Justice of a High Court, and ‘two persons having knowledge of, or practical experience in, matters relating to human rights.’ The President of India appoints the Chairperson and other members of the NHRC based on the recommendations of the Prime Minister of India, the Speaker of Lok Sabha, the Home Minister, the Leader of the Opposition in the Lok Sabha, the Leader of the Opposition in the Rajya Sabha and the Deputy Chairman of the Rajya Sabha.

The Protection of Human Rights Act, 1993, also calls for the establishment of State Human Rights Commissions in order to complement the functioning of the NHRC as also to ensure that redress mechanisms are within easy reach of complainants across the country.

Although the SAHRC came into being under similar political circumstances, its establishment was not recommended by a commission of inquiry. The establishment

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of the SAHRC was an integral part of South Africa’s paradigm shift from the apartheid legacy to a new constitutional order based on respect and protection of human rights. The SAHRC was established with a view to ensure that ‘the appalling human rights abuses of South Africa’s past could not be repeated’.


The decision to focus specifically on the independence of the NHRC and the SAHRC is based on two factors. Firstly, India and South Africa share a chequered history in which the violation of human rights was the norm rather than the exception. With the lessons from the demise of post-colonial democracies in other African countries, in contrast South Africa found itself facing the huge task of consolidating its recently attained democracies. The NHRC of India and the SAHRC were thus established to show unequivocal government commitment to a culture of respect, protection and promotion of human rights. The second factor is the fact that there has recently been much debate in the media and in academic circles on the independence of these two institutions.

### 6.1.5 Importance of independence

The independence and impartiality of national human rights institutions are frequently cited as prerequisites for their effective operation.\(^9\) As far as national human rights

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\(^7\) Chapter 8 of the interim Constitution provides for the office of the Public Protector, a Human Rights Commission and the Commission on Gender Equality. In addition to these institutions, the final Constitution of the Republic of South Africa Act 108 of 1996 provides for a Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities (art 185-186), an Auditor-General (art 188), an Electoral Commission (art 190-191) and an Independent Authority to Regulate Broadcasting (art 192).


commissions are concerned, the United Nations (UN) maintains that such institutions should operate in such a manner that their independence is beyond reproach. The Paris Principles, which were adopted at a workshop organised under the auspices of the UN Commission on Human Rights, provide as follows with regard to the independence of national human rights institutions:

6.1.6 Composition and guarantees of Independence

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

a. Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

b. Trends in philosophical or religious thought;

c. Universities and qualified experts;

d. Parliament;

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

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

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10 UN Centre for Human Rights, (Guide Lines) page 10
11 The Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights, Resolution 18/134 of 20 December 1993. The principles were adopted at a workshop that was held in Paris from 7 to 9 October 1991.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution’s membership is ensured.

The effectiveness of National Human Rights Commissions primarily depends on their capacity to act independently of government. It also depends to a large extent on the institutions’ demonstrated ability to act independently of all other activities, governmental or not, that may impinge on their work. Thus, independence is one of the yardsticks against which the competence of a national human rights Commissions as an effective mechanism for the protection and promotion of human rights is to be tested.

Although the establishment of a national human rights Commissions inevitably entails the imposition of specific restrictions on the institution, it is vital that restrictions on independence be minimal. Restrictions must not be of such a nature that the institution is rendered incapable of discharging its responsibilities. According to the Paris Principles and the guidelines laid down by the UN Centre for Human Rights, the following four criteria are used to determine the independence of national human rights institutions:

- Does the institution enjoy legal and operational independence?
- Does the institution have clearly defined appointment and dismissal procedures?
- Does it control its own finances?
- Is it composed of individuals capable of acting independently?

All of these requirements are necessary manifestations of independence and require respect and observance from government. In the next section, each of these requirements is discussed in the light of the NHRC and of India the SAHRC. To that extent, this study is a comparative analysis of the effectiveness of the two institutions.
6.1.7 Legal and Operational Independence of NHRIs

The National Human Rights Commission of India was established on 12th October, 1993. Pursuant to the Protection of Human Rights Act (PHRA) “Rather than being seen as an organ of the genuine accountability, the NHRC was viewed politically as a means of deflecting increasing international criticism.” Since its inception the various human rights commissions have evolved from effective accessible avenues for addressing the people’s human rights grievances to inefficient bureaucratic enclaves of forms government officials with hefty pensions and little concern for the people. The available statistics indicate that the NHRC fails to conclude approximately 80 percent of its cases.

The PHRA delineates the duties, responsibilities and powers of the NHRC of India. Under the Act, the NHRC, India is to enquire suo motu or upon a petition into matters pertaining to human rights violations. It may intervene in any judicial proceeding on human rights, summon or seek attendance of witnesses procure documents and evidence and visit any institution of detention to study and make recommendations. The NHRC may also investigate through any officer or investigating agency of the centre or state governments. The Commission is responsible for ensuring the persons prejudicially affected in matters involving human rights are heard. Despite its broad language the PHRA envisages an NHRC with merely recommendatory powers and in appropriate objective: that of preserving India’s international image. The NHRC lacks jurisdiction to independently investigate human rights violations committed by the armed forces, it has no enforcement power. Whatsoever, moreover the NHRC must rely on the Central Government for what ever funds it may think for it.” And must utilise government police and agencies for investigative functions, its appointment process is highly politicised and virtually ensures a government-friendly NHRC. The procedure is kept confidential and civil society plays no-role in the process of selection of its chairperson or members. Despite a legislative mandate that two members of the Commission be chosen from among people with knowledge of or experience with matter involving human rights, the overwhelming majority of appointees are former officials or people with close ties to the Central Government.
Staff is borrowed from other government al departments including the intelligence services.

**The SAHRC:** The SAHRC is an independent, constitutionally entrenched institution.\(^{12}\) The SAHRC is explicitly designated as a state institution supporting constitutional democracy.\(^{13}\) The Commission is subject only to the Constitution and other organs of state are obliged, through legislative and other measures, to assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness.\(^{14}\) They are also barred from interfering with its functioning.\(^{15}\)

Despite constitutional guarantees, practical problems remain in respect of the nature of the obligations imposed by the Constitution.\(^{16}\) The problem is said to be complicated by the ‘variations of understanding of the nature and meaning of independence depending on who spoke among cabinet ministers’.\(^{17}\) The problem of the independence of the SAHRC is also said to stem from the fact that ‘politicians seemed resentful about the extent of the independence from state institutions’.\(^{18}\)

Having realised the gravity of the problem and the fact that political whims were likely to affect its independence, the Commission decided that its members should desist from active participation in party politics and a register of members’ interests were opened.\(^{19}\) This was done immediately upon the commissioners assuming office. In an attempt to be people-centred, the Commission also forged links with nongovernmental organisations (NGOs) and human rights experts through its standing

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12 Sec 181 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution). *It should be noted that the SAHRC was established under sees 115-118 of the interim Constitution and the Human Rights Commission Act 54 of 1994 was passed under this Constitution.*

13 See in this regard ch 9 final Constitution.

14 Sec 181(3) final Constitution.

15 Sec 181(4) final Constitution.


17 Pityana (n 30 above) 5. *The Commission also noted in its fourth annual report to parliament (SAHRC Fourth Annual Report December 1998-December 1999) that there is a lack of understanding of the role of the Commission within government circles and an inability to utilise the Commission to good effect. The problem, the Commission observes, emanates from the fact that ‘in the minds of some civil servants and ministers, the Commission is of no more than nuisance value’.*

18 Pityana (n 30 above) 5.

committee system. By incorporating the knowledge of people from outside, the Commission sought to emphasise the importance of partnerships with experts and members of civil society in the development of a national culture of human rights.

Although the SAHRC generally performs its functions independently of executive and political manipulations, there is a growing concern within the human rights community that it is not effectively discharging its constitutional mandate. The Commission has been criticised for ‘focusing on the ‘softer’ human rights issues and ignoring human rights issues with major relevance for South Africa’. Concerns have also been raised about the Commission’s operation and its broad mandate to protect and promote human rights.

Section 9(1)(c) of the Human Rights Commission Act provides the SAHRC with the power to require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation. In the recent past, the Commission used its power to subpoena prominent government officials to appear before it. It is therefore my argument that,

20 According to sec 5(1) of the Human Rights Commission Act 54 of 1994, the Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it. Sec 5(4) further provides that the committee shall, subject to the directions of the Commission, exercise such powers and perform such duties and functions of the Commission as the Commission may confer on or assign to it and follow such procedure during such exercising of powers and performance of duties and functions as the Commission may direct. In accordance with the section, the SAHRC has established standing committees consisting of commissioners and outside experts and stakeholders who advise the Commission on policy and help implement the Commission’s programmes.

23 As above.
24 The US State Department in its South Africa country report on human rights practices for 1998 noted that ‘the SAHRC’s operations have been hampered by red tape, budgetary concerns, the absence of civil liberties legislation, several high-level staff resignations, and concerns about the Commission’s broad mandate.’ The report is available on <http://www.state.gov/www/global/human_rights/1998_hrp_report/southafr.html> (accessed 14 May 2001).
25 Government officials subpoenaed by the Commission in the past include: the premier of the Northern Cape, Mr Manne Dipico; the MEC for Health in Mpumalanga, Ms Sibongile Manana; the former chief of the South African National Defence Force (SANDEF), General Georg Meiring and the former Minister of Health, Dr Nkosazana Zuma.
despite the minor pitfalls, the SAHRC has managed to perform its functions independently of the government.

Although it is perfectly legitimate to evaluate and criticise the NHRC of India and the SAHRC, it is important that we do not lose sight of the fact that the two Commissions have only been operational for 19 years and 16 years respectively. The process of establishing themselves is a slow, hard, and sometimes painful process requiring great endurance and patience. Their success depends on various factors, including social, economic and political. Credit must be given where it is due, and where it is not, criticism should be levelled. The discussion now focuses on the appointment and dismissal procedures and processes of the NHRC of India and SAHRC.

6.1.8 Effectiveness Through Appointment and Dismissal Procedures

Appointment of the NHRC of India’s Chairperson and Members: In accordance with section 4 of the PHRA, the chairperson and members of the Commission are appointed by the President of India on the basis of the recommendations of a Committee comprising the Prime Minister, as the Chairperson, the speaker of the Lok Sabha, the Home Minister, the Leaders of the opposition in the Lok Sabha and Rajya Sabha, and the Dy Chairman of the Rajya Sabha as members.26

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

In 2009, the NHRC still lacked an official Chairperson. Acting chairperson Shri Govind Prasad Mathur27 temporarily presided over the Commission until the retirement of the chief justice of the Supreme Court of India (CJ), Mr. Justice K.G. Balkrishan as expected, less than a month after demitting his position as chief justice of Supreme Court of India, the Sixth and Current Chairperson of the NHRC of India was appointed on 3rd June, 2010. There remains a great lack of diversity in the NHRC of India. There are continued to be no full woman members or persons with disability in the NHRC. Despite positions being aside for the members with expert knowledge

26 www.nhrc.nic.in
27 Interview with Justice Ranghanath Mishra, Former Chairperson, NHRC.
of practical experience of human rights. The appointment Committee has continued to fill these posts only with Indian Police Service (IPS) officers or Indian Foreign Service (IFS) officials.

The NHRC is, therefore composed of officials who have spent their careers in the field, as representatives of India promoting the image of India and strengthening its relations with other Countries, rather than of civil society leaders and experts who have spent their careers in the field of investigating human rights violations, assisting and empowering marginalized groups, or educating Communities. Although India is proud of such eminent figures, Prof Upendra Buxi and Mr. Harsh Mander, they are never considered for appointment to the NHRC. In Nineteen Years, there has never been a Civil Society representative among the twenty former members of the Commission.

The selection and appointment process is non-transparent without any broad Consultation; the vacancies are not advertised broadly to maximize the number of potential candidates from a wide range of backgrounds. It remains to be seen how the NHRC will respond to this lack of diversity and pluralism in its application for re-accreditation to the ICC prior to the establishment of the NHRC, the National Commission of Women (NCW), National Commission of Minorities (NCM), and the National Commission for Scheduled Castes and Schedules Tribes (NCSC and ST) were, the only NHRCS protecting human rights in India. After the establishment of the NHRC, these institutions were joined by the creation of the National Commission for the protection of Child’s Rights (NCPCR), the National Commission for persons with Disabilities (NCPWD), and the Central Information Commission (CIC). The impetus for the creation of an overall NHRC in 1993 was to build a team of NHRCS working together to more effectively promote and protect human rights throughout India. In order to ensure this, the Chairpersons of the existing NHRCS were made ‘deemed members’ of the NHRC.

The SAHRC: Under the interim Constitution, the formal power of appointment of members of the SAHRC vested with the president who had to appoint persons nominated
by a joint committee of the two houses of parliament.\(^{28}\) Commissioners are appointed to hold office for a fixed term of up to seven years, which is renewable only once.\(^{29}\) Although the interim Constitution contained detailed appointment procedures, neither the independence of the SAHRC nor dismissal procedures were provided for in the interim Constitution. These matters were left to the legislature and are covered in greater detail by the Human Rights Commission Act. In terms of section 3 of the Act, the president is given the power to remove any member of the SAHRC if a joint committee of parliament requests such a removal. The request has to be approved by parliament by means of a resolution adopted by a majority of at least 75% of the members present and voting. The Act does not set out the reasons for which or the circumstances under which a member may be dismissed. These are set out in section 194 of the final Constitution. The section provides that members of the SAHRC may be removed from office only on:

a. The ground of misconduct, incapacity or incompetence;
b. A finding to that effect by a committee of the National Assembly; and
c. The adoption by the Assembly of a resolution calling for that person’s removal form office.\(^{30}\)

The procedure for the appointment of members of the SAHRC is now governed by section 193 of the final Constitution, which repealed the interim Constitution. In terms of section 195, the President appoints the commissioners on the recommendation of the National Assembly.\(^{31}\) The marked distinction between the appointment procedure of the NHRC of India and the SAHRC should be noted: In the case of the NHRC it is the President of India who makes the appointment subject to approval by parliament, whereas in the case of the SAHRC the President approves the appointment on the recommendation of the National Assembly.

The process for the appointment of members of the SAHRC started in early 1995. The public was invited, by advertisement in the press, to submit nominations to the joint

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\(^{28}\) Sec 115(3) interim Constitution.

\(^{29}\) Sec 3 Human Rights Commission Act 54 of 1994.

\(^{30}\) Sec 194 (1)(a)-(c) final Constitution.

\(^{31}\) Sec 193 (4) final Constitution.
However, no short-listing process took place. The committee decided that all nominees should be interviewed. By March 1995 each political party had submitted its proposed list of commissioners. The nomination of the 11 commissioners was unanimously approved by parliament on 6 April 1995. Former President Nelson Mandela made the formal approval of the appointments on 1st October 1995. After six months the appointments were approved by parliament. The delay in approval of the appointments by the President is said to have been caused by, among others, negotiations between the Department of Justice and the nominees about their salaries, the seat of the Commission, and who would serve as full-time and who part-time.

Despite the political consensus surrounding the appointment of the SAHRC commissioners, human rights activists expressed fierce criticism of the practicalities of the procedure and the politicised nature of the process. The following discrepancies were identified during the interview process:

Firstly, no single member of the joint parliamentary committee except Chairperson Bulelani Ngcuka was present for all the interviews. Secondly, white men consistently dominated the interviewing panel. Thirdly, interviews were very short, lasting only 20 to 30 minutes. Fourthly, the questioning of nominees was grossly inconsistent. Fifthly, a number of questions were inappropriate, and lastly, there was little media coverage of the process.

Given the highly politicised nature of the appointment process of the SAHRC commissioners under the interim Constitution, it is becoming increasingly apparent that necessary safeguards have to be put in place to prevent a future recurrence of the problem. If this is not done the legitimacy and independence of the institution will be grossly jeopardised. Perhaps the first step in addressing this impasse will be to forbid future appointees from holding or having held any political office. Another alternative will be to review the nature and role of parliament’s participation in the process.

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32 The committee operated under the chairpersonship of African National Congress (ANC) Senator Bulelani Ngcuka, now the Director of Public Prosecutions.

33 It is important to note that the nomination and appointment of SAHRC commissioners under the interim Constitution were very much a political compromise. This, however, is no longer the position under the final Constitution.
Sarkin proposes that ‘while parliament should undoubtedly play a role in the determination of the composition of the SAHRC, it is also essential that adequate safeguards, as well as checks and balances be put in place to prevent unwarranted political manipulation’. He is of the view that an independent panel should be created to receive nominations, perform interviews, and recommend candidates for appointment. This should, however, not be construed to mean that parliament should play no role in the appointment process. The most tenable situation will be for a limited number of parliamentarians, as elected representatives of society, to serve on the proposed panel. However, the majority of the panellists should be non-partisan members of civil society. Such a panel, Sarkin suggests, should be composed of one member nominated by the president’s office; one member nominated by the National Council of Provinces; one member nominated by the National Assembly; and four members of civil society nominated by the SAHRC, the CGE, the Public Protector, and the Auditor General respectively. To this list he wishes to add three members nominated by law faculties of institutions of higher learning in South Africa.

**Analysis:** In conclusion on the point of appointments, I would like to reiterate that civil society should play a clearly defined role in the appointment of members of both the NHRC of India and the SAHRC. An inclusive approach should be adopted in order to afford civil society a more participatory role in the process. The public may, for instance, be afforded an opportunity to comment on the nominations, to lodge objections to the appointment of certain nominees, or to provide input into the interview questions. This will inevitably require the adoption by the stakeholders of a rigorous advertising campaign of the process. To ensure maximum participation by the public in the process, such a campaign will inevitably have to set out lucid time frames for the receipt of nominations and for lodging objections. The campaign will also have to entail substantial and sufficient advertising of the interview times and schedules.

34 Sarkin (n 36 above) 610. *The primary purpose of undertaking this venture will be to ensure that the institution functions independently of party politics.*

35 Legal academics constitute what one can term the ‘brain’ of the legal profession and will therefore add impetus to the proceedings.

36 For a detailed suggestion on how the publicity plan can be conducted, see Sarkin (n 36 above) 612.
Financial Independence: The NHRC of India lacks the resources necessary to run an effective, powerful NHRCS that can protect and promote the human rights of over 1 billion people. The budget for 2010-2011 has been reduced from 24.10 crores INR (USD $5,127,655) to 18 crores INR (USD $3,829,771). In other words, the government of India has allocated a mere 0.158 INR(USD 0.00335991) per person or less than one third of a United States penny7 per person, per year, towards the protection and promotion of human rights.

Scarcity of resources-or rather resources not being used for human rights related functions-is another big problem. Large chunks of budget of commission go in office expenses and in maintaining their members, leaving disproportionality small amounts for other crucial areas such as research and rights awareness programmes.

The Government of India has decided to curtail the annual allocation of the National Human Rights Commission (NHRC) for the current financial year by 20 per cent.37

The SAHRC: One of the ways in which the independence of the SAHRC has been rigorously tested has been in the administrative arrangements for the funding of the Commission. Although the SAHRC is assured financial independence by the Human Rights Commission Act, it competes with other departments in the Ministry of Justice for funds. The Commission pointed out in its maiden report38 that the Ministry of Justice had made provision for it out of its own budget. This arrangement, the Commission argues, does not appear to be what the Human Rights Commission Act intended. The Commission’s main objection against the present financial arrangement is twofold. Firstly, the Commission does not believe that state officials should dictate to it how it should do its work. Secondly, the Commission feels that it is grossly inappropriate for a national institution to be dependent upon and supervised by a governmental department to undertake its work.

The present financial arrangement does not in any way comply with international standards for the maintenance of independent national human rights institutions. Government’s commitment towards human rights inevitably lies in the amount of financial independence it provides to the Commission and the present arrangement

37 http://www.igovernment.in/site/nhrc-budget-slashed-20-2010-11-37817
38 Hatchard (n 50 above) 36.
does not appear to comply with that commitment. The provision of an adequate and independent budget helps establish and maintain an effective and clearly independent and impartial institution.

In New National Party of South Africa v Government of the Republic of South Africa, the South African Constitutional Court noted the importance of guaranteeing both financial and administrative independence to the Independent Electoral Commission (IEC). As the IEC is also explicitly designated as a state institution supporting constitutional democracy, the findings of the Constitutional Court in this regard apply with the necessary force to other chapter 9 institutions. As far as financial independence is concerned, the Court remarked that.

In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which ... are relevant to ‘independence’. The first is ‘financial independence’. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution . . . This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before parliament or its relevant committees.

At the moment the situation regarding the budget and financing of the SAHRC has allegedly reached rock-bottom and is a cause for concern. The Department of State Expenditure, without consultation, has allegedly adopted a practice of not designating funds to be made available to the Department of Justice for the budget of the

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39 Corder, Jagwanth & Soltau (n 76 above) 88.
40 See discussion below.
42 The SAHRC has threatened to take the issue of the financing of the institution to the Constitutional Court if it is not resolved as a matter of urgency. The threatened lawsuit will, if pursued, sour relations between the government and the institution.
Commission.\textsuperscript{43} Contrary to the express provisions of section 16(3) of the Human Rights Commission Act, the SAHRC is allegedly not invited to participate in the budgetary process that determines its annual budget or in the determination of its Medium Term Expenditure Plans. The Department of Finance allegedly insists on communicating with the Department of Justice about the financial arrangements of the SAHRC. The Department of Finance is reported to have sought to inscribe the arrangement into law by requiring that in terms of the Treasury Control Bill,\textsuperscript{44} the accounting officer of the SAHRC account to the accounting officer of the Department of Justice.

\textbf{6.1.9 Analysis}

The allocation of adequate resources and an independent budget are essential to a national human rights institution for three major reasons. First of all, they help establish and maintain an effective and clearly independent and impartial institution. Secondly, financial security is a prerequisite to the satisfactory development of national institutions. Thirdly and lastly financial independence ensures that institutions are free to utilise their resources without political interference or manipulation.\textsuperscript{45}

\textbf{6.1.10 Independence Through Composition}

The Paris Principles, because National Human Rights Institutions themselves have formulated them, are the benchmark against which the composition of these institutions may be judged. These principles delineate broad guidelines for a composition that can minimally ensure the independence and pluralism of national human rights institutions. These principles require that a commission “shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralistic representation of the social forces (of civilian society) involved in the protection and promotion of human rights”.\textsuperscript{46}

\textsuperscript{43} The author is indebted to Donna Reid (Communication Technician) of the SAHRC for the information.

\textsuperscript{44} Now the Public Finance Management Act 1 of 1999.

\textsuperscript{45} For further exposition, see in this regard Commonwealth Secretariat (n 7 above) 30.

\textsuperscript{46} The Paris Principles ‘Composition and Guarantees of Independence and Pluralism’ art 1.
The composition of national human rights commissions is ‘a threshold issue that is inextricably linked to the commission’s mandate and independence in any particular jurisdiction’. Human rights commissions form an informal counter to the frequently formal adversarial methods of adjudication. As quasi-judicial bodies, they are vital to the interests of the poor as an approachable place for conciliation and enforcement of rights. Serving this broad segment of the population makes diversity of composition a prerequisite. Therefore, human rights commissions must include NGOs, women, men, differently-abled people and other minorities. I consider whether the composition of the NHRC and the SAHRC complies with this requirement.

**The NHRC of India:** The human rights Act, 1993 sets out the legal framework of the NHRC. The composition of NHRC is high-powered as three out of its five members are judges. The Chairpersons of the National Commission for minorities, the national Commission for the Scheduled Castes and scheduled tribes (SC/ST) and the National Commission for women are all deemed (ex-officio) members of the Commission. This composition gives NHRC certain degree of legitimacy, solemnity and credibility as the act disallows any person other than a forms chief justice of the Supreme Court of India to be appointed as the chairperson of the Commission, but at the same time of attracts criticism of being retired persons den’t.

**The SAHRC:** In contrast to the NHRC and despite being political appointees, commissioners of the SAHRC reflect a composition that is truly representative of all the social forces of South African society. Of the 11 commissioners, six are lawyers, two theologians, one a psychologist, one an academic, and one a social worker. Most of the commissioners have also been and are still actively involved in NGO work. This brings credibility and respect to the Commission.

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47 Commonwealth Secretariat (n 7 above) 35.
48 The protection of Human Rights Act, 1993,3(3)
49 Colin Gonsalves, Sr Advocate at the Supreme Court and founder director of the Human Rights law Network (HRLN), Personal Interview (New Delhi,Aug,2011)
50 The commissioners also come from diverse political backgrounds and adhere to different political ideologies. For example, Dr Barney Pityana was an ANC member, while Commissioner Leon Wessels was an active member of the then National Party.
6.1.11 Analysis

The above analysis depicts that, on the whole, the SAHRC is broadly representative of South African society. Against this backdrop, it is clear that the NHRC of India and SAHRC comply with the conditions laid down by the Paris Principles for a composition that ensures the pluralist representation of the social forces involved in the promotion and protection of human rights. This composition guarantees the independence of the Commission from the executive and affords the institution credibility.

The above analysis depicts that, on the whole, the SAHRC is broadly representative of South African society. Against this backdrop, it is clear that the SAHRC, unlike the NHRC of India, complies with the conditions laid down by the Paris Principles for a composition that ensures the pluralist representation of the social forces involved in the promotion and protection of human rights. This composition guarantees the independence of the Commission from the executive and affords the institution credibility.

Establishing and maintaining independent and effective national human rights institutions are challenges that all governments have to meet. This is so because national human rights institutions not only provide a new layer of accountability, but they also ‘contribute towards the establishment of a fresh constitutional order in which human rights are widely known and fully respected’. Drawing from the experiences of the NHRC of India and the SAHRC, this research demonstrates not only the potential of national human rights institutions as appropriate for the protection and promotion of human rights, but also the care necessary to make them genuinely independent and effective. As the study demonstrated, national human rights institutions are vulnerable to executive and bureaucratic manipulations. Consequently, their effectiveness depends largely upon legal and operational autonomy, financial autonomy, clear and transparent appointment and dismissal procedures, and the appointment of demonstrably able, independent, and effective commissioners.

51 The commissioners are also, to a great extent, a true reflection of the racial demographics in the country.
52 The commissioners are also, to a great extent, a true reflection of the racial demographics in the country.
53 Hatchard (n 50 above) 51.
6.1.12 Recommendations

It may be difficult to prescribe exhaustively how the vexed issue of the independence of national human rights institutions should be addressed globally. However, the following recommendations can be made in respect of both the NHRC and the SAHRC. In the first instance, urgent attention must be paid to the financial arrangements of the SAHRC. Mechanisms need to be put in place to affirm the independence of the Commission so as to honour the legislative requirement that the Commission participates in the budget process, not through another state department, but as if it was a fully-fledged department of state.

Secondly, the system of appointment of members of the two institutions needs to be reviewed. Civil society has to be afforded a more participatory role in the appointment process so that it can have more confidence in the institutions. The institutions must also develop a mechanism for the effective link with human rights organisations and civil society organisations as a whole. Furthermore, there must be institutionalised dialogue between the institutions and civil organisations in a manner that would ensure that current human rights issues and concerns are recognised and addressed.

Lastly, there should be mutual respect for the relationship between the two institutions and their respective governments, so as to guarantee the independence of the former. It is also recommended that governments desist from exercising political interference in the activities of the institutions. Similarly, commissioners should desist from political activism upon assumption of office. In this way the credibility of these institutions and their respective governments will remain intact and unhampered. If these concerns are addressed, the NHRC of India and the SAHRC will certainly raise the protection and promotion of human rights to a higher level. However, this will only be possible if the respective governments have the political will to respect the institutions’ autonomy, thus enhancing their credibility and effectiveness.