1.1 BACK GROUND TO NATIONAL HUMAN RIGHTS COMMISSION IN INDIA AND SOUTH AFRICA

There is wide agreement in the world today, especially among democracies, on the political significance of human rights. This is increasingly being supplemented by a desire to provide for and devise appropriate human rights institutions. In many cases, the State is seen as a violator of human rights, and in other the State assumes the political responsibility to protect the rights of the vulnerable. Hence, in designing human rights institutions it is imperative that such institutions play an autonomous role. Human Rights Commissions are being set up almost everywhere, though these become durable structures when created by the State to redress various wrongs among people, wrongs created or perpetrated by socio-political institutions or those that reflect past practices. National Human Rights Commissions have been set up by many democracies, including in India and South Africa. However, such institutions are of recent origin and in order to understand their efficacy it is important that a proper study be done, especially with a comparative focus, to provide a useful understanding of institutional effectiveness in determining its autonomy.

What are human rights? Human rights are those rights which are considered to be absolutely essential for ensuring the survival and a decent life to all human beings irrespective of their differences. Depending on the terminology adopted, they can also been referred to as fundamental right, basic rights, and even natural rights. Every society creates legitimate authority that encompasses the relationships between its members and their relationship to the political authority. Human rights consideration are relevant to almost every sphere to governmental activity and indeed, to many others areas of public and private
The second half of the twentieth century saw the internationalization of human rights norms, which can be seen as the rationale behind the general notion that the protection of human rights is an international responsibility. However, the recent proliferation of National Human Rights Institutions (NHRIs) shows that the protection of human rights is not only an international responsibility but also a national one. Their establishment is crucial to ensure monitoring and protection of human rights at the national level. Considering the above, a NHRI could therefore be seen to refer to a body whose functions are specifically defined in terms of the promotion and protection of human rights. Burdekin and Evans have suggested that any definition of what constitutes a NHRI must allow for broad, inclusive approach. Taking this suggestion into consideration, the United Nations (UN) has defined a NHRI as a body that is established by a government under the constitution. By law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights. The UN definition is too broad to be focused and too inclusive of several bodies, which might not qualify as NHRIs. For example, the South African Commissioner for Gender Equality could not qualify as a NHRI since it deals with one aspect of gender. It will be more appropriate to have a definition that is more specific so as to encompass other institutions dealing with specific human rights issues.

Some have argued that these institutions are not a wise use of scarce resources and that an independent judiciary and democratically elected parliament are sufficient to ensure that human rights abuses do not occur in the first place. It is my view that a democratically elected parliament will not suffice. The parliament must also be effective so as to prevent human rights abuses. Thus,

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3 Burdekin, B and Evans, C National Human rights institutions: A global trend” Canadian Human Rights Foundation newsletter, 2000 Volume XV; No. 2
one may question why the need for NHRI's when courts could address human rights issues. Some countries, for example the United States of America (USA) do not have NHRI’s since they have effective courts and parliament. Which are adequate mechanisms for the promotion and protection of human rights. Thus creating a NHRI in the USA for example would seem rhetorical. This is true when one looks at the case of Canada where the presence of ethnic groups not being able to access court promoted the creation of a NHRC. Thus courts were seen as inadequate and a NHRC was seen as an adequate mechanism to protect the rights of these ethnic groups.

Predictably, UN Studies have shown the NHRI's have become instruments for the protection and promotion of fundamental human rights and freedoms.  

Despite this, it should be noted that these institutions have an important and constructive role to play in the promotion and protection of human rights, and it has become increasingly apparent that the effective enjoyment of human rights calls for their establishment.

![Figure 1: Institutional Type of NHRI's](source: OHCHR, NHRI Survey 2009)

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1.1.1 Types of NHRIs

The abundance of NHRIs presents both opportunities and challenges for the domestic implementation of international norms. Consequently, it is imperative to categorize the various types of national institutions when analyzing such institutions. The UN broadly groups NHRIs into three categories: Human Rights Commissions (HRCs), Ombudsman, and specialized national institutions they have included parliamentary bodies and hybrid institutions. Considering the above, it is clear that some of the categories are either too broad or amorphous. There is a lot of confusion over the categorization of NHRIs. This probably stems from the fact that several national institutions co-exist in the same country, for example in India and South Africa, where more than one national intuition co-exist. However, taking into account the juridical contents of NHRIs they can be categorized as follow.

**National Ombudsman:** This is a single-member institution that originated in Sweden and has been enthusiastically embraced throughout Europe. An Ombudsman protects individuals against misconduct of maladministration of the government. It should be noted that an Ombudsman in this context refers to the Swedish model of an Ombudsman. In some cases, an Ombudsman is not a single person but constitutes more than one person under the status of an Ombudsman; or it constitutes many persons under the supervision of one person. In Zambia for example, though there is one Ombudsman, a team of members, roughly four at Ombudsman. For example, a new concept has been developed in South Africa referred to as “Public Protector.”

**National Human Rights Commission:** These are multi-member institutions with a role to protect and promote human rights. They are concerned primarily with the promotion and protection of persons against all forms of discrimination and with the

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6 On the one hand, the rise of NHRIs raises the domestic profile of human rights issues. On the other, the rise of often overlapping institutions introduces a host of coordination problems for local authorities.


8 South Africa has a HRC and the public protector; and Hungary has a Parliamentary Commissioner for Civil Rights and one for National and Ethnic Minority Rights.

9 Gender activists who took part in multi-party negotiations leading to the creation of the Public Protector insisted that the “Man” part of the appellation “Ombudsman” may be perceived by many as discriminatory. It was agreed that the office be given a more gender-neutral name. Therefore, “Public Protector” was found to be the ideal name, as it does not have any sexiest tone. However, Prof Hansunglule recalls an interesting debate during a Human Rights workshop in South Africa held in 1998, attended by officers from the SAHRC, Public Protector and others. In the workshop, former Swedish Ombudsman and judge of the Appeal Court of Sweden attempted to explain that ombudsman did not have any reference to “man” in its original conception. But South African participations still insisted that the term could be gender insensitive.
protection of civil and political rights. However a few of these institutions have been empowered to protect socio-economic rights.\textsuperscript{10} These commission also engage in training and education of people on human rights issues. The word “commission” has been defined as “a government agency having administrative, legislative of judicial powers”.\textsuperscript{11} Therefore, a court or soft forum engaged in the promotion and protection of human rights falls under this category.

**Figure 2: NHRIs: Central Element of National Protection Systems**

**Human Rights Bodies:** These bodies can either be parliamentary bodies, specialized bodies, or other bodies dealing with human rights issues. In general most human rights bodies tend to undertake a broad range of functions (or specific functions in the case of specialized institutions) such as monitoring human rights conditions, overseeing government implementation of human rights treaties and assisting in the development of national human rights plans. Therefore, any body, which is a forum to make a complaint regarding any human rights issue, and specialized national institutions that are designed to protect the rights of particular vulnerable groups, such

\textsuperscript{10} For example the SAHRC.
as ethnic minorities, indigenous populations, refugees, women or children, also fall under the arm of human rights bodies.

**Hybrid Institutions:** These are mixture of national Ombudsman and NHRCs. They can also be referred to as quasi HRCs. Examples of such bodies include Ghana’s Commission of Human Rights and Administrative Justice (CHRAJ) and the Palestinian Citizen’s Rights Commissions.

Human Rights can be located in the nation of natural rights that was propounded in the seventeenth Century by philosopher John Locke who urged that certain rights are ‘natural’ to individuals as human beings’ having exited even in the State of nature before the development of society and emergence to the State. Proponents of natural rights urged that natural rights are rights belonging to a person by nature and because he can a human being, not by virtue of his citizenship in a particles law country or membership in a particular religion or ethnic group. He was during the period of French Revolution in 1789 that natural rights were elevated to the statues of legal rights with the formulation of the Declaration of the Rights of Man. The Declaration defined the ‘natural and imprescriptibly rights of Man’ as liberty’ property, security and resistance to oppression.

### 1.2 NATIONAL HUMAN RIGHTS INSTITUTIONS: NORMATIVE STANDARDS

NHRIs have an important and constructive role to play in the promotion and protection of human rights. For these institutions to promote and protect human rights effectively, it is necessary for a standard to exist, which relates to their functioning and by which such institutions will abide. A standard is relevant for reasons of uniformity and assessment of national institutions, especially with respect to the legal status of such institutions. The creation of the International Co-ordination Committee

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of National Institutions in 1993, which comprises representatives of all regions, further emphasizes the importance of standards.\textsuperscript{16} This Committee has a Credentials Committee, which accredits NHRIs after examining their compliance with international standards. Moreover, due to the varying political context in which NHRIs are created there is a need to set standard which such institutors should follow to ensure efficiency and legitimacy. This chapter focuses on normative standards relating to NHRIs at the international, regional and national levels, with specific reference made to the NHRC of India and the SAHRC, when discussing the normative standards at the national level.

1.3 INTERNATIONAL NORMATIVE STANDARDS

At the international level, recognition of the contribution of NHRIs has become firmly entrenched during the last decade. This called for the need for international standards by which NHRIs have to conform. The result of which was the Paris Principles,\textsuperscript{17} adopted in 1993 by the UN General Assembly. Consequently, many NHRIs have been set up on the basis of the Paris Principles. Even through the Paris Principles have been implemented mainly by third world countries and a few developed countries. It is however very important with respect to its legal status since it has been adopted by the UN General Assembly. Furthermore, the Vienna Declaration and Programme of Action adopted by the World Conference in 1993 encouraged the establishment of NHRIs and recognised the Paris Principles.

1.3.1 The Paris Principles

The Paris Principles were a product of the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris from 7\textsuperscript{th} - 9\textsuperscript{th} October 1991.\textsuperscript{18} The output was a set of recommendations and principles, adopted

\begin{itemize}
\item \textsuperscript{16} Burdekin and Evans (n 4 above ) 1
\item \textsuperscript{18} About 35 countries were represented. The seminar had observers from the European Court as well as from the Inter-American Court and Commission, but none from the African Commission on Human and Peoples’ Rights.
\end{itemize}
by the UNHRC the following year, and later adopted by the UN General Assembly in 1993. The Paris Principles provide for institutional competence in the promotion and protection of human rights. In sum, the key criteria for NHRIs as laid down by the Paris Principles are:

- Independence guaranteed by statute or constitution
- Autonomy from government
- Pluralism, included in membership
- A broad mandate based on universal human rights standards
- Adequate powers of investigation
- Sufficient resources.

1.3.2 Brief Analysis of the Paris Principles

There exist a lot of questions regarding the substance and status of the Paris Principles. Firstly, the status of the Paris Principles has been an issue of debate, which reveals some doubts as to whether it is legally binding or not. In my view, the Paris Principles is not a treaty. Therefore, they are of the character of “soft law” and not “hard law” and thus have no legal forces. This explains why some NHRIs do not abide by the Paris Principles, as they are not bound by the Principles.

Secondly considering the substance of the Paris Principles, it is obvious that the Principles, as has also been pointed out by the international Council on Human Rights, are inadequate in a somewhat paradoxical way. This is based on the premise that while the Paris Principles lay down standard to be met by NHRIs, it is surprising the some institutions have been effective in their own context without following the Paris Principles. That is, they had limited independence and inadequate funding yet have made a positive impact on the human rights situation in their countries. But some institutions set in conformity with these Principles have been completely

20 It should be noted that NHRI have been created with a broad mandate in the African continent and in the commonwealth of independent Status of the former Soviet Union (CIS). Institutions with a broad mandate on the African continent include Ghana (1993), Nigeria (1996), and Uganda (1996). In the ICHR.
21 An example of such institutions is the Ugandan Human Rights Commission (UHRC)
ineffective. This is because, although such institutions are established in conformity with the Paris Principles, the main reason for their establishment was to foster only the appearance of concern and to forestall domestic or international pressure or criticism. For example the creation of the NHRC was motivated by the desire to deflect criticism of the government’s recalcitrance to political liberalisation.

Furthermore, the Paris Principles have shortcomings which allows the principles to appear to be noting more than normative standards. Firstly although the UN has classified an Ombudsman as a NHRI according to the Paris Principles, “the Ombudsman, mediators and similar institutions form other bodies” and are not defined as national institutions. At least an Ombudsman plays a significant role in the promotion and protection of human rights and should therefore be regarded and treated as a national institution. Secondly, criteria for the appointment of members are too general, thus allowing for politically motivated appointments. This can only be prevented if the Paris Principles is more specific, and if the terms of appointment include a definition of method of appointment. Thirdly, although dismissal criteria have been elaborated in the UN handbook. It would be more appropriate if it were also included in the Paris Principles.

However, its worth noting that conforming to the Paris Principles is not enough since this will not guarantee a resilient HRC without commissioner of integrity and a government committed to making respect HRC without commissioner of integrity and a government committed to making respect of human rights a reality. In addition, although the Paris Principles appear to be nothing more than normative standard, but points of reference for setting up NHRI.

1.4 REGIONAL NORMATIVE STANDARDS

The formulation of standards governing NHRI did not end with the formulation of the Paris Principles. They became, inevitably, the starting point for further exploration and dialogue at the UN as well as various regional levels. At the regional level, it is important to distinguish between the two types of standards that NHRI have to

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23 UN Handbook.
conform to “hard” and “Soft” standard. Isolated but important “hard” normative standards can be found in regional human rights instruments such as the ACHPR. While “soft” standards can be found in declarations such as the Harare Declaration and the Yaounde Declaration.\(^{24}\)

Article 26 of the ACHPR places a legal obligation on State parties to strive through NHRIs to ensure that Charter rights are adhered to. It is therefore implied from research and teaching under article 26 that these bodies have to be set up. This is also seen when under article 62 of the ACHPR, States in performing reporting obligation, also State whether they have set up these institutions.\(^{25}\) Furthermore, article 45 of the ACHPR places an obligation on State parties to co-operate with the UN to establish NHRI s and also an obligation on seen as standards by which NHRI’s in Africa must conform to in carrying out their functions. Since they must ensure the promotion and protection of the ACHPR, the African Commission has laid down criteria that NHRI’s in Africa must follow to be able to apply for affiliate status with the African Commission.\(^{26}\) These criteria lay down standards that such institutions have to conform to if they have to apply for affiliate status. The criteria are as follows.

- The national institution should be duly established by law, constitution or decree,
- That it shall be a national institution of a State party to the African Character,
- That the national institution should conform to the Paris Principles,
- That a national institution shall formally apply for status in the African Commission

The above standards have been criticised as being broad and not particularly discriminating in distinguishing between autonomous and complaint Commission. It is my view that it would be difficult to distinguish between these commission since most Commission are hardly autonomous in practice. The word “decree” in the first

\(^{24}\) The premise for distinguishing between “hard” and “Soft” standards stems from the differentiation between “hard law” and “soft law”. The Therefore, “hard” standards are treaty standards thus binding while “soft” standards are non-treaty standards thus not binding.

\(^{25}\) Article 62 provides for State parties to submit every two years a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

citation could raise some serious problems since some institutions are establishment by decree that is issued by one person, for example, the military decree creating the Nigerian HRC. Also, regarding the second criterion and looking at the position of Morocco raises questions. Customary international law standards are required by all State Parties whether they are parties to the ACHPR or not. This raises the question whether Morocco cannot set up such an institution since it is not a party to the ACHPR. The last criterion also is too positive and some NHRIs will fell this will compromise their independence. Reasons being that they might not want to apply for affiliate status but will wish to attend sessions of the African Commission.

Furthermore, regional conferences have been held, which have resulted in declarations that can be seen as standard setting for NHRIs. These declarations include amongst others: Firstly, the Harare Commonwealth Declaration, 1991\(^{27}\) which reaffirms the Declaration of Commonwealth Principles agreed in Singapore in 1971.\(^{28}\) Those who met in Harare pledged to work for the promotion and protection of fundamental political values of Commonwealth namely democracy, democratic processes and institutions, which reflect national circumstances and fundamental human rights. The result of this was the establishment of HRCs in Uganda, Ghana and Malawi. They represented a “new breed” of institutions designed to promote and protect human rights and the concepts of good governance, accountability and the rule of law that form the basis of the Harare Declaration. In sum, the Harare standards include: Pledge by governments to assist in creating and building the capacity of requisite institutions; to protect and promote fundamental human rights; to strive to promote in their respective countries those representative institutions and guarantees for human rights and personal freedom under law; and to support the UN and other international institutions in the promotion of international consensus on major global, economic and social issues.

Secondly, the Yaoundé Declaration of 1996 can also be seen as standard setting for NHRIs in Africa.\(^{29}\) The Declaration was product of the Fist African Conference of


\(^{29}\) The Yaoundé Declaration (http://www. Nhri.net/pdf/the%yaounde%20declaratrion.pdf.) accessed on 18 September 2010).
National Institutions for the Promotion and Protection of Human Rights, held in Yaoundé, Cameroon from 5-7 February 1996. It reaffirms the important role NHRIs must play to promote human rights and provide remedy when those rights are violated.

1.5 NATIONAL NORMATIVE STANDARDS

The World Conference of Human Rights Recognised that it is the right of each State to choose the framework, which is best suited to its particular needs at the national level. This stems from the premises that effective implantation of international human rights standards is ultimately a national issues. This therefore allows for governments to set up rules governing their respective NHRIs which they establish with a role to promote and protect human rights. These institutions also ensure that the government and other bodies effectively apply laws and practices concerning human rights. This means that these institutions have to conform to human rights and regulating NHRI s at the national level are national normative standards for each national institution in their respective countries. This section of the study will focus on national normative standards in India and South Africa, as the study’s main focus is the NHRC of India and SAHRC.

1.6 BACKGROUND TO THE STUDY

The protection and promotion of human rights is one of the topical issues of debate in the international arena. The establishment of NHRIs to fulfil this has, in some cases, proved very costly, bureaucratic, controversial and problematic. Despite the aforesaid, it is generally accepted that the major threat to the protection and promotion of human rights at the national level, stems from the ineffectiveness of NHRIs which may, in some cases, be associated with lack of commitment by governments towards the promotion and protection of human rights and in other cases, lack of commitment by civil society. However, in Africa, the appearance of NHRIs would seem to indicate that even some of the most repressive African Governments appear to accept the international discourse and an acknowledgment that human rights should be part of their government portfolio. It is against the above-mentioned that this thesis is written.

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1.7 CONSTITUTIONALIZATION OF HUMAN RIGHTS IN COMPARATIVE PERSPECTIVE

Constitutional experts argue that the presence of a certain number of common constitutional features makes a comparison of constitutions justifiable including those divided by historical time and geographical space. India’s two centuries of British rule, which ended on August 15, 1947, began not with the swift fall of her frontiers to marauding foreign invaders. Indeed, because mercantile capitalism was the first phase of European imperialism, the English-lured by India’s species and silks arrived as traders in the early seventieth century. South Africa’s colonial history has similar beginnings.\(^{31}\) The attraction of diamonds and gold in the Witwatersrand region beckoned the British to immigrate to and invest in South Africa.\(^{32}\) Following the British victory in the Anglo Boer wars, the fusion of the two independent boer Republics with the British colonies gave rise to the Union of South Africa in 1910, that is, the racially divided South Africa.\(^{33}\) South Africa acquired sovereign status (within the British Empire) in 1934 and became a republic in 1961.\(^{34}\)

India and South Africa were both trying to escape a bitter past and usher in a new constitutional dawn of freedom and social justice. Constitution-making was therefore transformative in both cases.\(^{35}\) These two democratic countries have adopted written constitutions with entrenched bills of rights and embraced the doctrine of constitutional supremacy. Significantly they share a unified vision of human rights and have reposed faith in the principle of judicial review in their commitment to not only limiting political power\(^{36}\) but also translating their vision of social justice.\(^{37}\)

Furthermore, India is a multiethnic and multi religious nation reflecting a breathtaking diversity of castes, religions, languages, and cultures. South Africa’s diversity is equally

\(^{31}\) Cottrell, supra note 4, at 14-15 An influx of the French, Huguenot refugees, the Dutch, and Germans (all of whom collectively comprise the Afrikaner population today) into South Africa followed the arri

\(^{32}\) Id.

\(^{33}\) Id at 65-66, The fusion of the two boer Republics of Transvaal and the Orange free State with the two British colonies of the Cape and Natal in 1910 gave birth to the Union of South Africa. Id.

\(^{34}\) Id.

\(^{35}\) See Generally Karl E. Klare, Legal Culture and Transformative Constitutionism, 14 S. AFR. J. Hum. Rits. 146, 156( 1998)

\(^{36}\) Constitutionalism and Democracy: Transitions in the contemporary world at XVIII XXI (Douglas Greenberg et al eds, 1993) (hereinafter constitutionalism and Democracy).

\(^{37}\) See eg. India Const. Pts III IV, Pmbl The preamble states:
seductive, with its Constitution recognizing eleven national language\textsuperscript{38} among many recognized ethnic groups. Thus, to quote Nelson Mandela, beside “the cold facts of geography and history; (and) the shared passion in pursuit of justice and happiness” that bind India and South Africa, \textsuperscript{39} both these countries share a common law tradition and are also ethnically and culturally diverse nations.\textsuperscript{40} India’s actual constitution-making process was, broadly speaking, elitist in nature. Technically speaking, the constituent Assembly was a body created and convened by the British but dominated by the INC members who were indirectly elected, not on the basis of universal adult franchise, but by the invidious principle of communal representation. By contrast, the South Africa Constitution was forged by a sharply participatory process.

The Indian and South African constitution-making processes took place amidst radically different international political settings. Far from condemning colonialism, international law was central to its development. \textsuperscript{41} Therefore India’s liberation was primarily the product, not of international pressure, but of a uniquely waged, prolonged, local anti-colonial movement leavened by the cataclysmic effects of World War II. In contrast, international pressure in part contributed to dismantling apartheid in South Africa. Interestingly, it was India’s complaint to the U.N. General Assembly in 1946 about South Africa’s discriminatory treatment towards Indians that first internationalized apartheid.\textsuperscript{42} Within the next forty years, apartheid collided with the growing international human rights standards that characterized it as a crime and ostracized its practitioners until at last it collapsed under its own weight.

Drawn up at a time when the modern international human rights movement was in its embryonic stage, there were no coercive as opposed to inspirational international influences over the Indian Constitution’s content. Rather, far from reflecting any powerful international influence, the Indian Constitution has arguably contributed to the development of international human rights law.\textsuperscript{43}

\textsuperscript{38} See S. AFR Const 6
\textsuperscript{39} Mandela, supra note 1.
\textsuperscript{40} See Heinz Klug, South Africa in Legal Systems of the world A Political social, and cultural encyclopedia 1483, 1485 (Herbert M. Kritzer ed. 2002)
\textsuperscript{41} See, e.g Antony Anghie, Imperialism, sovereignty and the making of international law 310 (2005).
\textsuperscript{42} Id at 52
\textsuperscript{43} See infra Part VI.
Two developments in international law that have impacted South Africa’s reconstruction and are quite dramatic when compared to the international situation in the early 1940s when India was asserting its rights to self-determination are the reception of democratic governance into international law. The globalization of constitutionalism, the adoption of “constitutional principles” by the Western Contact Group (on Namibia) in 1982 to guide both the process for creating and the final content of a new constitution for Namibia, contributed to the development, for the first time, of the notion of an internationally scripted, constitutional framework to guide the negotiations of local conflicts and constitution-making bodies. Constitutionalism received yet another fillip with the democratization processes unleashed by the Soviet Union’s Demise.

A significant development that was directly tied to the South African reconstruction process was the World Bank’s conclusion in 1989 that unless the rule of law and good governance were injected into the African political culture, there was no hope of reversing Africa’s economic mess.

These developments constitute the milestones in the globalization of constitutionalism and the backdrop against which South Africa’s constitutionalism story unfolded. Finally as Stated earlier, South African leaders also looked to and drew from the Indian experience in crafting remedies for common problems.  

The foregoing demonstrates that constitution-making in India and South Africa differs in many respects while being similar in others and is thus an ideal situation for a coherent comparative analysis.

Daniel Elazar argues that the essence of constitution-making has to do with question of constitutional choice, and the vital question to be asked, then, are not just about “what is chosen but who does the choosing and how it is done.” Indian and South African constitution-makers traversed two divergent paths in arriving at the same destination of constitutional supremacy and judicial review. Indians; long-expressed demands for a written proclamation of court-policed rights attest to their

44 See supra note 15 and accompanying text.
45 Elazar, supra note 239, at 232, 244
unwillingness to conform to the Dicean view of rights. Scholars have argued that being long suspicious of their colonial masters’ designs, Indians found, in a written bill of judicially enforceable rights, tangible safeguards against oppression.\(^\text{46}\) The presence of different religious groups also spurred them to steer in the direction of juridical constitutionalism to both assuage minorities’ fears of being trampled by a Hindu majority and to disapprove Britain’s dubious claims in this regard. The developing of the concept of human rights is relatable to the different stages of evolution of the human society from the primitive slavery to the present democracy. The emergence of human rights, in its modern forms, had its origin in international law with the birth of the United Nations and thereby adding to a new impetus to the concept- both in theory and practice. Many modern States, as a result, have been parties to various international covenants, conventions and treaties on Human Rights. These provisions are now well established in their respective domestic laws.

The conception and principles of human rights are now found both in international law and domestic law of many modern States. “There is common agreement that every individual has both political-civil and economic-social claims upon his/her society. But in a world of Nations States, the strength of commitment of human rights and the extent to which it is realized depends on the particular State and its institutions; the condition of human rights thus differ markedly in different societies. Some States, and some groupings of States, are identified by differing ideologies connoting different conception and commitments of human rights.\(^\text{47}\)

The Indian Constitution-makers produced a document owing allegiance- to different ideologies. They sought to fashion a Constitution on the bourgeoisie understanding of the ideals of liberty and equality. The revolutionaries that they were, and pressed as they were by the forces of progress, they were alive to the march of history and the significance of the Russian socialist Revolution and so they accommodated in some measure the principle of socialism. The result was the dichotomy of the Indian constitution which projected certain individuals freedom and rights, as basic, and incorporated them into Part-III of the Constitution as Fundamental Rights while

\(^{46}\) See AUSTIN, Supra note 11, at 54

\(^{47}\) Prabhat Ranjan Bhattacharya, \textit{Human Rights And Democracy} (2005) at P 47
relegating other significant rights as socialist principles are incorporated in Part-IV of the Constitution known as Directive Principles of State Policy. 48

The constitution of the Republic of India, which came into force on 26th January, 1950 with 395 articles and 9 schedules is one of the most elaborate fundamental laws ever adopted. The preamble of the constitution pledges to secure to all citizens of India, justice-social, economic and political, liberty of thought. Expression belief, and worship, equality of status and of opportunity: and fraternity assuring the dignity of the individual and the unity and integrity of the nation. As Stated earlier, two parts of the Constitution embody most of the human rights, by distinguishing between judicially enforceable fundamental rights and rights not so enforceable. It would be worthwhile here to have a general idea about those provisions mentioned in Part III and Part IV of the constitution of India.

The Judicially enforceable fundamental rights, which encompass all seminal civil and political rights and some of the rights of the minorities, are enshrined in Part III of the constitution (Articles 12 to 35). These include the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural, and educational rights, and the right to constitutional remedies.

Article 14 proclaims the general rights of all persons to equality before the law, while Article 15 prohibits the State from discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth and prohibits any restriction on any citizen’s access to any public places, including wells and tanks.49 Equality of opportunity for all citizens in matters of public employment are guaranteed under Article 16. Article 17 abolishes unsociability and makes its practice an offence publishable under law. Both Articles 15 and 16 enable the State to make special provisions for the advancement of socially and educationally backward classes for such castes and tribes as recognized in the Constitution (known as Scheduled Castes and Scheduled Tribes) require very special treatment for their advancement. Article 18 abolishes all non-military or non-academic titles.50

48 V.G Palshikar, Human Rights and Environmental Protection. AIR 2003 (Journal Section) 93
50 Shobha Saxena, Globalization of Market Economy a Curse for Human Rights of Women of developing Courtiers. A.I.R 2004 (Journal Section) 139.
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The right of freedom, guaranteed to all citizens under Article 19 encompass the right to freedom of speech and expression, the right to assemble peaceably and without arms, the right to form associations or unions, the right to move freely throughout the territory of India, the right of residence, the right to practice and profession or to carry on any occupation, trade or business. The protection of person in respect of conviction of offences, under Article 20, includes protection against ex post facto criminal laws, the principle of *Autre Fois* convict and the right against self-incrimination. Article 21, the core of all fundamental rights provisions in the Indian constitution, ordains, “NO person shall be deprived of his life or personal liberty except according to procedure established by law” The rights of a person arrested and detained by the State authority are provided in Article 22. These include the right to be informed of the grounds of arrest, the right to legal advice and the right to be produced before a magistrate with in 24 hours of arrest (except where one is arrested under a preventive detention law).

The right against exploitation includes prohibition of trafficking in human beings and forced (Article 23) and prohibition of employment of children below 14 years of age “to work in any factory or mine or in any other hazardous employment.”

Subject to public order and morality, all persons are equally entitled to freedom of conscience and the right to profess, practice and propagate religion (Article 25). Every religion’s denomination or section also has the right to establish and maintain religious institutions and manage their religions affairs (Article 26) No one may be compelled to pay any tax for the promotion of any particular religion (Article 27). The wholly State- funded educational institutions are barred from imparting religious instruction (Article 28).

The rights of any action of citizens or a minority to promote its distinct language, script or culture, to have access to State- funded educational institutions (Article 29) and to establish and maintain educational institutions of its choice (Article 30) are also guaranteed.

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51 Hrudaya ballav Das, Human Rights: A Dicta of a Civilized Society, note a mere Constitutional Guarantee, A.I.R 2004 (Journal Sections) 60
52 *John Vallamatton V. Union of India*, AIR 2003 SC 2902
The right to constitutional remedies is essentially the right to move Supreme Court of India for enforcement of the above rights (Article 32). The Supreme Court is vested with wide constitutional powers in this regard. They include the power to issue directions, orders or writing by enforcement of the fundamental rights (Art. 32(2)). State High Courts too have identical powers (Article 226). As laws inconsistent with or in derogation of the right conferred by Part III of the Constitutions are void (Article 13) the courts have power to adjudge the constitutional validity of all laws. Furthermore, by virtue of Article 141, the law declared by the Supreme Court shall be binding on all courts in India.53

1.8 HUMAN RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY IN INDIAN CONSTITUTION

Judicially non-enforceable rights in Part IV of the Constitution are chiefly those of economic and social in character. However, as Article 37 makes it clear, their judicial non-enforceability does not weaken the duty of State to apply them in making laws, since they are “Nevertheless fundamental in the governance of the country”. Additionally, the innovative jurisprudence of the Supreme Court has not read into Article 21 (The right of life and personal liberty) many of these principles and made them enforceable.54

The duties of the State encompass security of a social order with justice, social, economic and political, striving to minimize and eliminate all inequalities (Article 38). Security for “The citizens, men and women equally” the right to an adequate means of livelihood (Article 39(a)) Distribution of ownership and control of community resources to sub serve the common good (Article 39(b)) prevention of concentration of wealth and means of production of the common detriment (Article 39(c)) Securing of equal pay for equal work for both men and women (Article 39 (d)) preventing of abuse of labour, including child labour Article 39(e) Ensuring of child development (article 39(f)) Ensuring of equal Justice and free legal aid (article 39(g)), Organization of village democracies (Article 40,) Provisions of the right work education and public

53 R & Trust bv. Koramangala Resident Vigilance Group, 2005 SCCL Com 41.
54 Kamlaker V. State of Maharashtra, 2004 (1) All India CF.LR 122
assistance in case of unemployment, old age sickness and disability (Article 41),
Provision of humane conditions of work (Article 42) living wage and a decent
standard of life (Article 43), Securing of participation of workers in the management
of industries (Article 43-A) provisions of uniform civil code for the whole country
(Article 44), Provision of free and compulsory education for all children under
fourteen years (Article 45), Promotion of educational and economic interests of
weaker sections of the people and their protection from injustice and all forms of
exploitation (Article 46.) Raising of the standard of living, improving the level of
nutrition and public health and prohibition or intoxication drinks and of drugs
(Article 47), Scientific reorganization of animal husbandry-and agricultural economy
(Article 48) protection of monuments and things of artistic or historical importance
(Article 49) Separation of judiciary from executive (Article 50) and Promotion of
international peace and Security (Article 51).

“The freedom of India Stated in South Africa; and (India) freedom will not be complete
till South Africa is free” 55 These poignant words capture the historic links between India
and South Africa. Indeed, Mahatma Gandhi, who later led the Indian freedom movement,
had coined and first tested Satyagraha 56 and civil disobedience his unique nonviolent
methods in resisting discrimination as a young lawyer in South Africa. Thereafter, on his
return India he deployed these strategies of popular struggle which enable and people
from peasants to princes to participate in politics and receive lesions in both exercising
political power and challenging its arbitrary exercise. Through these inclusive political
campaigns and his “constructive work” he brought about revolutionary political and
social change without bloodshed in India the heritage of Gandhi and of Satyagraha is thus
a common heritage of South Africa and India.

Although constitutionalism is an elusive term, democratic governance and rights
protection are broadly accepted as its essential elements, and judiciaries have
traditionally been regarded as its key prompters. This Article examines and compares,
from a human rights perspective, both the constitution-making processes and the bills

55 Nelson Mandela, Rajiv Gandhi Foundation Lecture (Jan 25, 1995) (quoting India’s Prime Minister
56 See M.K Gandhi Non violent Resistance (Satyagraha), At VIII 6 (Schocken Books 1961) (1951)
Satya in Sanskrit means truth and Agraha is used to described an effort or endeavor.
of rights of the Indian\textsuperscript{57} and the South African Constitutions. The emphasis in this study is on the making of constitutions. It examines the impact on their content of the radically divergent processes by which these constitutions those processes occurred.

\subsection*{1.8.1 Human Rights in South African Constitution}

A human rights culture could not develop in apartheid South Africa.\textsuperscript{58} The system bred intolerance, a culture of violence, and lack of respect for life and, indeed, rights in general. After the fall of apartheid there was therefore an urgent need to help create and foster a human rights culture and to demonstrate the value of and need for human rights.

Four years after the country’s first democratic elections in 1994, South Africa is a far better place, at least as far as human rights are concerned, than at any other time in its history.\textsuperscript{59} This is not to say that a human rights culture has been established or that human rights issues are at the top of the national agenda. In fact the transition to a human rights-based constitutional democracy is proving to be a challenging task. However, there have been significant efforts and achievements: political violence has diminished considerably,\textsuperscript{60} enabling free political activity in most parts of the country; the security forces are being restructured; important human rights legislation has been passed; and all human rights institutions provided for in both the Interim and Final Constitutions have finally been established.

Nevertheless, significant obstacles remain, including the ongoing, though significantly reduced, political violence in KwaZulu-Natal, the slow rate of change in the police and the prison services, and the continuing violence in the taxi industry. In addition, some of the values enshrined in the Interim Constitution are being assailed from a variety of

\textsuperscript{57} Part III of the Indian Constitution contains “Fundamental Rights” an array of judicially enforceable civil and political rights. Hereinafter, the terms “Part III” and “fundamental Right” shall be used interchangeably.


\textsuperscript{60} See, e.g., KZN Violence Plummeted, Cape Times, 19 Nov. 1996, at 1.
quarters. The popular response to crime presents one avenue of attack,\textsuperscript{61} another derives from perceptions that “illegal immigrants” are responsible for an escalation in drug dealing and other crimes\textsuperscript{62} and the “practicalities” of government open a third route for criticism.

The high rate of crime is a critical issue, with major ramifications for human rights, particularly in view of the fact that many South Africans perceive the crime rate to be higher than it really is.\textsuperscript{63} Corruption, particularly in government, seems widespread and has the potential to derail the building of a human rights culture.\textsuperscript{64} Reducing the crime rate is therefore crucial but so is concrete improvement in the lives of the millions of poor South Africans, particularly in relation to housings and employment. Until the government delivers on its election promises and on socioeconomic rights contained in the Final Constitution, promoting human rights will continue to be more of a dream than a reality.

To determine whether a human rights culture is being developed in South Africa it is important to assess the impact of the various institutions and structures that play a role in the promotion and fostering of human rights.

This Chapter this article therefore examines the Interim Constitution, the Final Constitution, parliament, the Constitutional Court, and “State institutions supporting democracy” and human rights issues in making such an assessment. These institutions are already under scrutiny; a major concern is the high cost of these various institutions (believed to be over R300 million per year), and related public perceptions that statutory human rights bodies and the individuals\textsuperscript{65} appointed to them are “on the gravy train.”\textsuperscript{66} In the absence of solid results, such perceptions could have a disastrous

\textsuperscript{62} See Reports of Aliens Flood Strokes Xenophobia, Bus. DAY, 1 Mar, 1996.
\textsuperscript{63} See Crime Will Cost South African Economy as Much as the RDP, supra note 6, at 7.
\textsuperscript{64} See A-loota Continua, FIN. MAIL, 21 June 1996
\textsuperscript{65} See Legislators Don’t Earn Their Enormous Salaries - DP, CAPE TIMES, 16 Feb. 1996, at 5. This is also the perception of other members of government, Id.
\textsuperscript{66} See Reality and the Cost of Commissions and Advisers, FIN. MAIL, 20 Sept. 1996, at 19; Gravy Train Adds 33Gm Coach, CAPE TIMES, 7 Nov. 1 996, at 1; Commissions on Human Rights, CAPE TMES, 28 Nov. 1996, at 2. See generally Jobs for Pals, FIN, MAIL, 27 Sept. 1996.
impact on the legitimacy of these institutions. Finally, this Chapter looks briefly at policing, correctional services, the military, nongovernmental organization involved in human rights, and the status of women in order to draw a conclusion about the current position and future prospects of human rights in South Africa.

1.8.2 The Interim Constitution

Since the inauguration of its first democratic government in May 1994, until the adoption of the Final Constitution in February 1997, South Africa had an Interim Constitution, which included a chapter on fundamental rights, commonly referred to as the Bill of Rights. The Interim Constitution was the foundation for the new South Africa. It facilitated the national, provincial, and local governmental elections of 1994, 1995, and 1996, which were milestones in the country’s transition to democracy. It also changed the structure of government and, significantly, the role of the courts. The Bill of Rights ensured, for the first time in South Africa’s history, that citizens of the land were protected from those authoritarian abuses, such as detention without trial, that were the hallmark of the apartheid order. The Interim Constitution further provided for the establishment of a number of “rights” institutions, including the Human Rights Commission, the Commission on Gender Equality, the Commission on the Restitution of Land Rights, and the Public Protector. It also provided for a process, embodied in the Truth and Reconciliation Commission, whereby amnesty could be obtained for politically motivated crimes committed during the apartheid years.

These were the pillars put into place by the Interim Constitution to create a framework in which human rights would be respected. However, these new institutions are functioning with different levels of energy and efficiency and some have yet to demonstrate their capacity for achieving the objectives for which they were established.

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1.8.3 The Final Constitution

A. The Drafting Process: Over a period of four years beginning in 1990, the former government and liberation movements successfully negotiated a two-phase transition to democracy. The drafting of the Final Constitution was the second phase. The constitution-making body, the Constitutional Assembly (CA), was composed of the 490 members of the elected National Assembly and Senate. The CA was given two years to draft a constitution that accorded with the negotiated thirty-four Constitutional Principles contained in the Interim Constitution. Adoption of the Final Constitution required a two-thirds majority in the CA and certification by the Constitutional Court that the document complied with the thirty-four principles.

Seeking to observe the democratic principles of openness and inclusiveness, the CA embarked on a program to ensure public participation in the writing of the Final Constitution. The CA’s publicity and educational campaigns were commendable, generating considerable public interest in, and understanding of a complex process. Over 1.7 million submissions, mainly petitions, were received from citizens before a draft text was published in November 1995 for public comment. Over five million copies of the draft, available in all eleven official languages, were distributed. In the subsequent drafting phase, the CA received over 7,500 submissions and petitions bearing almost 250,000 signatures by the 20 February 1996 deadline for public input.

The CA’s education and publicity campaigns have received wide acclaim. An evaluation commissioned by the CA and undertaken by the Community Agency for Social Enquiry (CASE) revealed that the CA campaigns had been highly successful in imparting awareness of the constitutional process to South Africans at large and in

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69 For a detailed analysis of the Final constitution see Jeremy Sarkin, The Drafting of the Final Constitution from a Human Rights Perspective (forthcoming).
71 See Excellent Results for CA Media Campaign, CONST, 22 Apr.-18 May 1996, at 7.
72 See The Working Draft Reached Millions, Const. Talk 9-29 Feb. 1996, at 2. Much emphasis was placed on using plain language to make the text accessible to all South Africans. Sometimes, however, clarity and precision suffered. See id.
73 See Nearly 250,000 Submissions Received, CONST TALK, 8-28 Mar. 1996, at 5,
eliciting their participation. The principal flaw revealed in the evaluation was that marginalized groups benefitted least. It is clear that education programs should therefore continue.

While the CASE statistics show a high response level to the invitation to participate, the extent to which public comment impacted on the final text remains unclear. The CASE inquiry revealed that 41 percent of respondents believed that their submissions would be treated seriously, with people living in rural areas having the most faith and white people having the least,

The shape and nature of negotiations following publication of the November 1995 draft biggest that as the process drew to a close, political party dynamics took precedence over public participation. By the time the February deadline for public comment arrived, the published draft had been superseded by two later drafts and political agreement on some issues had been reached. Thus, transparency and confidence in the participation program were sacrificed in the interest of reaching political settlement. There were attempts to allay fears that comments from the public were being disregarded, including publication of a draft referring to submissions. However, an account of how comments from the public impacted on the text and, indeed, the true history of this final stage of negotiations, including the compromises and trade-offs involved, remains to be told. Disclosure from those involved could be crucial to securing confidence in participatory programs for future legislative and governmental processes.

B. Bill of Rights in the South African Constitution: The Bill of Rights contained in the Final Constitution, which came into force on 4 February 1997, improves on the interim Bill of Rights in some respects, such as the establishment of certain socioeconomic rights. However, the language used circumscribes most of these rights by placing the duty on the State “to take reasonable legislative and other measures” to “progressively realise” such rights. Thus the realization of socio-economic rights will largely depend on the State’s ability and willingness.

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74 See Excellent Results for CA Media Campaign, supra note 27, at 7.
75 See generally Sarkin, supra note 24.
Another significant shift between the interim and Final Constitutions is the fact that the new Bill of Rights will not only apply between the State and citizen (vertical application) but also, to the extent that the rights permit, between private persons (horizontal application). The extent of such horizontal application will be determined by the Constitutional Court. Other improvements in the final text relate to equality, just administrative action, children’s rights, and the right to freedom and security of the person, which includes a provision on reproductive autonomy.

However, the new Constitution is regressive in some respects. This retreat reflects the impact that fears relating to crime have had on the drafting process.77 The continuing debate on whether the death penalty should be reinstated gives some indication of the emphasis on crime-related fears that diluted the full realization of the drafters’ human rights ideals. The constitutional provision seeking to insulate the new bail law from constitutional challenge is an example of this dilution. Section 35(1)(f) States:

Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

Unlike the corresponding provision in the Interim Constitution, this formulation has implications for the burden of proof in bail proceedings. The intention was to ensure that bail legislation enacted in 1995, which reverses the burden of proof by placing it on the accused, survives constitutional scrutiny.78 However, reverse burden of proof provisions in bail proceedings not only violate human rights, but, in the South African context, also discriminate inequitably against unrepresented accused persons.

Another problematic provision is section 35(1)(e), which purports to give an arrested person the right “at the first court appearance after being arrested, to be charged or informed of the reason for the detention to continue, or to be released.” The difficulty


is the assumption that there could be a reason for further detention other than a charge pending against the arrested individual. Thus this section seeks to limit the protections available to accused individuals.

Another clause that is weakened in the Final Constitution is the limitations clause. This provision is supposed to safeguard rights from undue limitation, particularly by the government. Negotiations on the clause in the Constitutional Committee centered on whether limitations on rights should have to be “necessary” or only “reasonable and justifiable,” noting that the latter test introduces a lower level of scrutiny than the former. The argument that ultimately persuaded negotiators and subsequently resulted in the adoption of the lower test was that this was necessary in order to facilitate government’s fight against crime. However, the entrenchment of a human rights culture requires a stricter test to apply to the limitation of rights. Given South Africa’s history of human rights abuse and the difficult challenges involved in the current transformation and the building of a human rights culture, the Constitution ought to have offered maximum protection to human rights.79

A further concern is that the constitutional negotiations resulted in increased executive and parliamentary power. In contrast, human rights protections are weak in several parts of the Constitution. For example, checks and balances on the exercise of powers to appoint judges and various members of human rights institutions are problematic. However, the Constitution shows a commitment to democracy and human rights by making provision for six “State institutions supporting constitutional democracy.” These six institutions are: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission.

The Constitutional Court, which sent a number of provisions back to the CA for reworking in September of 1996,80 met on 18 November of that same year to

79 See Sarkin, supra note 24.
reexamine the revised text. It certified the text on 4 December 1996 and the Constitution came into force on 4 February 1997.

1.9 HISTORICAL DEVELOPMENT OF NHRIs

The historical development of NHRIs in the UN goes as far back as 1946\textsuperscript{81}, when it was discussed in the Second Session of the UN Economic and Social Council (ECOSOC) ECOSOC’s decision was to invite member States to “consider the desirability” of establishing local bodies in the form of “information groups or local human rights committees” to function as vehicles for collaboration with the UN Commission on Human Rights (UNCHR).\textsuperscript{82} In 1960, this issue was raised again with a view to broaden the form of these bodies.\textsuperscript{83} Subsequently, the growth of human rights instruments in the 1960s and 1970s saw the need for mechanisms to guarantee the implementation of these instruments at the national level. The result of this was the Seminar on National and Local Institutions for the Promotion and Protection of Human Rights” held in Geneva in September 1978.\textsuperscript{84} At this Seminar, the first set of guidelines outlining the general functions of national institutions was adopted. They were later endorsed, by the UNCHR and the General Assembly.\textsuperscript{85}

Consequently, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7 - 9 October 1991 saw the birth of the Paris Principles\textsuperscript{86}. The Paris Principles” was a set of recommendations and principles, later endorsed by the UNCHR as the official principles relating to the status of national institutions. Its aim is to ensure as much autonomy of NHRIs from government, particularly the executive. However, in practice, most HRCs find it difficult to maintain such a distance. Furthermore, the need for NHRIs was exacerbated at the World Conference on Human Rights in Vienna in 1993, leading to an explosive growth in the number of NHRIs particularly in developing countries.

\begin{thebibliography}{99}
\bibitem{81} The Swedish model of NHRI goes as far back as 1713 when King Charles XII appointed an Ombudsman, then called “Chancellor of justice”.
\bibitem{83} ECOSOC Resolution 772 B(XXX) of 25 July 1960.
\bibitem{84} St/HR/SER A/2, Chapter V. Lindholt.
\bibitem{85} A/RES/33/46 of 14 December, 1978.
\end{thebibliography}
1.9.1 National Human Rights Commission of India and South Africa in the Protection of Human Rights: National Normative Standards

1. **NHRC of India:** As per the protection of the Human Rights Act, 1993 the NHRC has neatly arranged its structural framework in order to execute its functions. The details of the Protection of Human Rights Act mentioned at appendix-III. It has been systematically arranged for the smooth functioning and to fulfill the objectives of the Act for better protection of human rights.

Respect for the dignity of an individual and striving for peace and harmony in society has been an abiding factor in Indian culture. The Indian culture has been the product of assimilation of diverse cultures and religions that came into contact in the enormous Indian sub-continent over time. The international community has recognised the growing importance of strengthening national human rights institutions. In this context, in the year 1991 a UN-sponsored meeting of representatives of national institutions held in Paris, a detailed set of principles on the status of national institutions was developed, these are commonly known as the Paris Principles. These principles, subsequently endorsed by the UN Commission on Human Rights and the UN General Assembly have become the foundation and reference point for the establishment and operation of national human rights institutions.

2. **Establishment of National Human Rights Commission:** The Government of India did realise the need to establish an independent body for promotion and protection of human rights. The establishment of an autonomous National Human Rights Commission (Commission) by the Government of India reflects its commitment for effective implementation of human rights provisions under national and international instruments. The Commission is the first of its kind among the South Asian countries and also few among the National Human Rights institutions, which were established, in early 1990s. The Commission came into effect on 12 October 1993, by virtue of the Protection of Human Rights Act 1993. Fourteen Indian States have also set up their own human rights commissions to deal with violations from

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87 Commission on Human Rights Resolution 199254 of 3 March 1992
89 http://www.asiapacificforum.net/about/paris_principles.html, visited on 18 April 2005
90 The fourteen States are: Assam, Chattisgarh, Himachal Pradesh, Jammu & Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal. See http:nhrc.in visited on 12 April 2005
within their States. The Act contains broad provisions related with its function and powers, composition and other related aspects.91

Section 2 (d) of the Act defines human rights as rights relating to life, equality and dignity of the individual guaranteed by Constitution or embodied in the international covenants and enforceable by Courts in India. The Indian Constitution provides certain rights for individuals in Part III of the Constitution, which are known as the fundamental rights. Part IV sets out the Directive Principles of State Policy92. While the former guarantees certain rights to the individual, the latter gives direction to the State to provide economic and social rights to its people in specified manner. The word fundamental means that these rights are inherent in all the human beings and basic and essential for the individual. However, the rights guaranteed in the Constitution are required to be in conformity with the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in view of the fact that India has become a party to these Covenants by ratifying them.93 The justifiability of fundamental rights is itself guaranteed under the Indian Constitution.94 The responsibility for the enforcement of the fundamental rights lies with the Supreme Court by virtue of Article 32 and by Article 226 to the High Courts.

1.9.2 The South African Human Rights Commission (SHARC)

The SAHRC is one of the most respected NHRIs in Africa. It is well-funded by the State, enjoys considerable independence, and commands a lot of respect from the population in the country. It is one of the many institutions established in post-apartheid South Africa to address the ills associated by years of racial discrimination in the country.

The SAHRC was established in 1995, following the coming into force of the Human Rights Act, 199495. Also relevant to this institution is Article 184 of the South African Constitution of 199696, which partially provides for its functions.

92 Articles 38 to 51-A contain the Directive Principles of State Policy. The idea to have such principles in the Constitution has been borrowed from the Irish Constitution. The Directive Principles are not enforceable by the Court.
93 India ratified both instruments on 10 April 1979.
95 Act No. 54 of 1994.
1.9.3 The Set-up and Structure of the SAHRC

The SAHRC has headquarters in Johannesburg as well as regional offices. The main offices at the headquarters are those of the Chairperson, the Chief Executive Officer, Media Relations, Communications and Publications, Complaints Registration, Human Resources, Legal Services, Education and Training, Research and Documentation, and the Promotion of Access to Information Act Office. The regional offices are situated in the Eastern Cape Province (in East London); the Free State Province (in Bloemfontein); the Gauteng Province (in Houghton); the KwaZulu-Natal Province (in Durban); the Limpopo Province (in Polokwane); the Mpumalanga Province (in Nelspruit); the Northern Cape Province (in Upington); the North West province (in Rustenburg); and the Western Cape Province (in Cape Town). Therefore, the country is relatively well covered by the Commission.

1.9.4 Composition of the SAHRC

While taking into account the requirements of the Paris Principles in the process of making appointments to the SAHRC, the leadership in South Africa also gave due regard to the history and social set-up of the country. Therefore, in appointing Commissioners, a candidate’s colour, ethnic origin, professional background and history played a central role. For instance, it would do more harm than good to the Commission and the country to appoint a person who had been a very active supporter of the apartheid regime.

In order the make the Commission self-sustaining in handling the issues submitted to it, it was necessary to mix disciplines among the Commissioners appointed.

This also assisted the Commissioners themselves in respect of allotting themselves Commission work, by taking their respective specialisations into account.

1.9.5 Mandate of SAHRC

The SAHRC has three main functions. These are, firstly, to promote respect for human rights and a culture of human rights; secondly, to promote the protection,  

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This office within the Commission is supposed to promote the operation of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
development and attainment of human rights: and thirdly, to monitor and assess the observance of human rights in the country.\textsuperscript{98}

In order to be able to carry its mandate, the Commission has been granted wide powers under the law. These include the power to investigate and 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.\textsuperscript{99}

At the same time, the Commission has a duty to various relevant organs of State to provide itself with information on the measures that these State organs have taken each year towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. Other powers and functions of the Commission are stipulated in the Human Rights Commission Act, 1994\textsuperscript{100}.

\section*{1.1.10 STATEMENT OF RESEARCH PROBLEM}

Implementation of human rights instruments, and protection and promotion of human rights at the national level is a contemporary phenomenon that is still developing. The ACHPR and the Paris Principles provide for the creation of national institutions to carry out this task. This has led to NHRIs becoming more prominent actors in the national regional and international arena. However, NHRIs still face the problems of:

- Legitimacy;
- Operational constraints; and
- Ignorant population.

These factors constrain the effective functioning of these institutions. It should be noted that the key constraint on the effective functioning of NHRIs is legitimacy. Such institutions usually find themselves not legitimate in the eyes of the people they are created to serve.\textsuperscript{101}

\textsuperscript{98}See Article 184(1) of the Constitution of the Republic of South Africa. On this see Van Zyl (2004:30)

\textsuperscript{99}Article 184(2), Constitution of the Republic of South Africa.

\textsuperscript{100}Act No. 54 of 1994.

\textsuperscript{101}For example, the South African HRC has legitimacy but that of Cameroon and Zambia do not since they are perceived to have been created by government to compromise human rights criticisms.
The above brings to mind the question — what makes a NHRI effective? Generally, there is no consensus as to the effectiveness of NRHIs. This study has therefore been triggered by widespread perceptions and reports within civil society that such institutions are left at the mercy of governments in power. Others have seen such institutions as a “double-edged sword - in the best of circumstances, they strengthen democratic institutions but they can also be mere straw men, part of governments administrative machinery to scuttle international scrutiny.\footnote{National human rights institutions in the Asian-Pacific region: Report of the alternate NGO consultation on the Second Asian-Pacific Regional Workshop on National Human Rights Institutions, March 1998 <http://www.hrdc.net/nhris/AsiaPacNHRIs.rtf> (accessed on 2 September 2002).} Another issue that has actuated this study is the misconception that people have about some NRHIs. This misconception originates not so much from the actual operation of HRCs but from the history of past Ombudsman institutions that have purported to protect human rights.

1.11 OBJECTIVES OF THE STUDY

The thesis from a comparative dimension, analysis NRHIs with specific reference to the National Human Rights Commission of India and the South African Human Rights Commission (SAHRC). The objectives of this study are:

- To expose the developing concept of NRHIs;
- To generate interest and awareness to the concept;
- To contribute towards learning of the dimensions of the concept.
- To appreciate the difficulties these institutions have to face; and
- To recommend measures designed to ameliorate some of the problems NRHIs face.

1.12 SIGNIFICANCE OF THE STUDY

This study is of particular significance given that South Africa is going through a transitional phase from apartheid to democracy.

Promotion and protection of human rights is becoming even more important. NRHIS constitute an important if not the most relevant tool towards a human rights culture in South Africa and India.
1.13 HYPOTHESIS

This study endeavours to test the hypothesis that NHRCS, in order to effective, need to be insulated from the wider society and yet respond to this milieu in order to do justice to human rights protections. The study underscores that public legitimacy is the most important factor serving effectiveness of NHRCS of India and South Africa.

1.14 RESEARCH QUESTIONS

I refined our basic interest in the question of what makes a human rights institutions effective into three areas of research.

(a) How far have National Human Rights Commissions succeeded in gaining public, as opposed to mostly formal legitimacy? Under what conditions do they become an effective and trusted part of the human rights machinery?

(b) How do national institutions make themselves accessible to those sections of society that are most vulnerable to human rights violations? Implicit in this question is the assumption that those who are most likely to have their rights violated are least able to gain access to formal and governmental styles institutions.

(c) How far does the effectiveness of national institutions derive from the linkage that they are able to build with other institutions in society. This question addresses both of India and South Africa linkages that they are able to build with other institutions in society? This question addresses both link with civil society, including non-governmental organizations, governmental institutions clearly this is not an exhaustive list of criteria for effectiveness – rather it is a way of approaching the issue that highlights the importance of the acceptability of an NHRI to civil society at large. Inevitably a series of other issues arose and form the comments that were made on the initial draft. In some instances I have simply chosen not to address issues that were beyond the aims of the research, rather than address them inadequately. In other instances for example, the issue of international assistances to NHRIsthe thesis touches on the subject but also little more than raise questions for further discussion and research.
1.15 RESEARCH METHODOLOGY

The study based on both primary as well as secondary data and through the process of interviews (of the key functionaries of National Human Rights Commissions of India and South Africa).

The primary and secondary are collected through information disseminated by the organizations, reports, articles, magazines, such as Africa world affairs, Human Rights Bulletin, Asia watch, human rights manual, human rights watch report, annual report of the Commissions.

After the completion of the collection of secondary data, the data have been finally processed using appropriate techniques.

For collection of primary data as well as secondary data about NHRC of India I have visited and interviewed the following persons in India.

1. Sh. K.G. Balakrishnan, Chairperson, NHRC, Former Chief Justice of India.
2. Smt. Meera Kumar, Hon’ble Speaker, Lok Sabha
3. Sh. M.C. Bhandare, Hon’ble Governor of Odisha.
4. Sh. Arjit Prasayat, Former Judge, Supreme Court of India.
5. Sh. George Methew, Director, Institute of Social Science, New Delhi.
6. Sh. R.C. Khuntia, Member of Parliament, Rajya Sabha.
7. Prof. Pralaya Kanungo, Chairperson, CPS, JNU.

I have visited and interviewed many social activist, human rights activist and leading professors, those who work in the field of human rights in our country.

The primary data I have collected from both the countries India & South Africa in a systematic manner. I visited South Africa sponsored by ICSSR, New Delhi for my research. I visited the following institute and met the following persons in South Africa and interviewed them.

1. Mr. Nelson Mandela, Former President, Republic of South Africa.
2. Mrs. Ela Gandhi, President, Gandhi Development Trust, Durban.
I have met so many social activists, human rights activist and so many leading professors those who teach human rights and law in South African Universities. Besides all these, I have met the key functionaries of South African Human Rights Commission.

1.6 SCOPE OF THE STUDY

This thesis is organized into six chapters.

- Chapter one deals with general introduction and background NHRIs.
- Chapter two deals with Human Rights discourse in India and South Africa.
- Chapter three deals with structure and function of National Human Rights Commission in India and South Africa.
Chapter 1: Introduction

- Chapter four deals with prominent human rights violation cases are dealt by both the commission since their inception.
- Chapter five deals with role of Civil Society in the protection of Human rights in India and South Africa.
- Chapter six deals with the conclusion of the study which provides recommendations, design to ameliorate some of the problems NHRIs face.

1.17 LITERATURE REVIEW

A number of human rights scholars have considered the subject of NHRIs. However, this show that very little has been done with respect to comparative studies or on the jurisprudence of such institutions.

Hossain et al bring together the experiences of NHRIs and Ombudsman institutions throughout the world. These experiences were presented at the International Conference on the establishment of the Ethiopian HRC. This compilation also brings together the papers of scholars on NHRIs. The problem with this compilation is that some of the articles on specific NHRCs are written by their respective chairperson, which makes it doubtful if they present a clear picture of the actual functioning of the Commissions on the ground.\(^{103}\)

Human Rights Watch analyses government HRCs in Africa. Its report is divided into two parts: an analytical overview followed by a series of country chapters that examine in greater detail NHRCs of seventeen countries in sub-Saharan Africa. One of the questions considered by Human Rights Watch is: are sponsored human rights bodies to be regarded with suspicion and distrust or should their development be encouraged and supported?

Burdekin and Gallagher\(^ {104}\) discuss the concept of NHRIs and provide an illustrative overview of their work. This study also highlights the key criteria for an effective institution. A survey is then done on recent developments in the area of national

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\(^{103}\) Solomon Nfor Gwei (Chairman of NCHRF at the time) shares with us the experience of the NCHRF, its establishment, operations and challenges. Barney Pityana (Chairman of SAHRC at the time) shares with us the experience of the SAHRC, its establishment and operation, relations with the executive, independence, accountability and its challenges.

institutions with particular reference to the work of the United Nations High Commissioner for Human Rights in promoting the establishment of new institutions and strengthening existing ones.

Hatchard\textsuperscript{105} critically examines the organisation, functions and powers of HRCs in Commonwealth Africa, while pointing out important lessons that these institutions provide for other countries worldwide. He considers the requirement for maintaining their independence with specific reference to the Ugandan Human Rights Commission (UHRC). Examples are drawn from Malawi, Ghana, South Africa and other jurisdictions.

The International Council on Human Rights focuses its analysis on the actual performance of NHRIs. Ghana! Mexico and Indonesia are used as case studies. The study offers a comprehensive overview of global experience of national institutions. It further demonstrates that the legitimacy and performance of NHRIs must keep in view the different socio-political circumstances under which the institutions have emerged. The study States that there is no single model of NHRI for the world, but that there are however principles of independence, integrity and good performance which must be kept in view.

Lindholt el al put together the views of authors, with regard to the establishment development and functions of NHRIs. This study discusses, among other issues, standard setting and achievements, effectiveness/ guarantees of independence, and general aspects of quasi-judicial competences of NHRIs.

To conclude, the core of this study is therefore to contribute to the debates on the effectiveness of NHRIs. Moreover, the available literature shows that the issue of human rights jurisprudence by the NHRIs has not been addressed. This is the point where the contribution of this study is very significant as it takes this into consideration.

Subash C. Kashyap,\textsuperscript{106} attempts to clarify the meaning, scope and ramifications of the concept of human rights in India and the role that parliament has played in safeguarding them. The focus throughout is on the actual role of parliament in the field of human rights in India as typified by two illustrative case studies one in the matter of property right and the other concerning restoration of basic human rights of non-discrimination and securing of adequate advancement and welfare of the scheduled castes and scheduled tribes.

T.S. Batra,\textsuperscript{107} is much worried about the violation of human rights. He explains, on the one hand, how human rights are proclaimed to be inviolable and on the other hand, human beings seeking such rights are tortured, killed and burnt alive.

R.S. Agarwal,\textsuperscript{108} deals with the nature and condition of human rights in developing countries. According to him, each country is entitled to develop its own forms and methods for the realization of civil, political, economic, social and cultural rights.

H.O. Agarwal,\textsuperscript{109} examines international standards for the protection of human rights and then compares them with that of Indian standards. In this regard, he throws tight upon how there is a difference of theme and reality. He enumerates those fundamental rights which have been enshrined in Part III of the Indian Constitution. Besides this, he also enlists those rights which are available to the citizens of India by liberal interpretations of Article 21 which otherwise are not specially mentioned in the Constitution.

Justice V.R. Krishna Iyer,\textsuperscript{110} with refreshing fearlessness and passion for socio-spiritual betterment, explores men and matters, issues and themes, displaying a deep commitment to humanity. The author has rightly examined the interaction of law and social change in the context of Indian legal system. He has gone beyond and written

\textsuperscript{106} Subash C. Kashyap, \textit{Human Rights and Parliament} (19th)
\textsuperscript{107} T.S. Batra, \textit{Human Rights - A Critique} (1979)
with zeal and amazing originality on a panorama of subjects. This work is a combination of stimulating scholasticism and sparkling style.

R.C. Hingorani’s\textsuperscript{111} shows how far international human rights are observed in the Indian context. This book classifies rights into five categories, i.e., civil, political, economic, social and cultural rights and then examines the Constitution of India to assess the availability of these rights to Indians. But this is not an in-depth study of implementation of human rights in India because it ignores judicial activism in this field. It only presents an overview of rights guaranteed to Indians.

Attar Chand’s\textsuperscript{112} is an important publication which enumerates various rights guaranteed in the contemporary political system of the world. This book is useful to have a composite picture of rights and restrictions imposed upon those rights. A close study of this literature makes possible to rightly assess the position of realization of these rights in the Indian context.

Prof. Aswini K Ray’s\textsuperscript{113} analysis the politics of emergency as imposed b) Indira Gandhi in between 1975-77 and its far-reaching impact on the India’s subsequent developmental politics. According to him, the present Civil Rights Movement owes its origin to emergency era and inherently to some of the leading events such as the “increasing weakness in professional efficiency of the State apparatus and many of the democratic institutions like the bureaucracy, political parties, judiciary and the media, their social bias and political partisanship and the growing incredibility in popular perceptions which hate a close bearing on India’s quest for nation-building, economic development and social transformation. In addition to this, he also argues that brutalization of State machinery, criminalization of politics, use of money, muscle and mafia in electoral practices, misuse of preventive detention, intensification of the social and regional tensions in Kashmir, Assam, Punjab, Andhra Pradesh, Tamil Nadu and Karnataka, the demand for regional autonomy and the emergence of

\textsuperscript{111} R.C. Hingorani’s, Human Rights in India (1985)
\textsuperscript{112} Attar Chand’s, Politics of Human Right and Civil Liberties (1985)
\textsuperscript{113} Prof. Aswini K Ray’s, Civil Rights Movement and Social struggle in India (1986)
democratic groups like PUCL, PUDR, APCL, etc., are also some of the results of this movement. His article, after all, is an eloquent analysis of the civil rights movement and social struggle in India.

Gurbax Singh\(^\text{114}\) discusses in details various legal safeguards pertaining to human rights and the role of different statutory commissions constituted under the Commission of Inquiry Act. 1952. He has extensively interpreted the provisions, procedures, limitations and recommendations of the N from the various angles. This book is quite useful for those who are actively engaged in the task of protecting human rights as lawyers, social workers, human rights activists and research scholars working on human rights.

From the above-mentioned literature, it is clear that almost all writers have dealt with the concept of human rights: it’s theoretical, legal, and political aspects; its practicability and its violation, and above all the response of the State towards it. But none of them have explored the basis of the formation, nature and functioning of the NHRC. So the present research endeavors to examine all the factors and features which are responsible for the formation and functioning of this new organization.

KEIGHTLEY, R in his work International human rights norms in a new South Africa put together the views of the authors with regard of protecting human rights in a future South Africa extends beyond the orbit of the country’s domestic law.

SACHS A,\(^\text{115}\) has explained the issue of a bill of rights in post apartheid South Africa is proving highly controversial. A great number of lawyers and social scientists in South Africa are inclined to see a Bill of rights as a mean of projects group privileges under the guise of protecting group rights. The author, however, regards a Bill of Rights as an instrument for enlarging the freedom of the approved majority, thereby creating a South Africa in which equal rights become a reality and in which the whole population, irrespective of colour or origin live in peace and with dignity.


\(^{115}\) SACHS, A “Towards a bill of Rights in a democratic South Africa”
A number of human rights Scholars have considered the subject of NHRCs. However, this shows that very little has been done with respect to comparative studies on the Jurisprudence of such commission.

The various studies made so far make an attempt toward analyzing the human rights conditions in India and South African but a detailed study on the NHRC still remain unexplored.