

THE KENYA NATIONAL HUMAN RIGHTS COMMISSION AND THE PROMOTION,
PROTECTION AND MONITORING OF SOCIO-ECONOMIC RIGHTS IN KENYA

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ABSTRACT

The promulgation of the 2010 Constitution of Kenya introduced socio-economic rights (SERs) amid widespread poverty and rising inequality. This study seeks to answer the overarching question, what role can the Kenya National Commission on Human Rights (KNCHR) play in promoting, protecting and monitoring SERs in Kenya? Further research questions included whether the KNCHR has the requisite powers to perform its mandate and what lessons could be learned from the South African context. The research sought to understand how the local context affects the ability of KNCHR to carry out its mandate. Likewise, it analyses some of the contributions KNCHR has made in the promotion and protection of SERs while identifying the challenges the Commission faces in carrying out its mandate.

Several methodologies were utilised to answer the research questions above. The methodologies included the doctrinal method, analysis of secondary sources and interviews with key informants. A comparative legal research methodology was also employed, with the SAHRC being used as a case study on how NHRIs can promote, protect and monitor SERs.

The findings from the research argue that the Paris Principles provide the minimum guidelines on the establishment of NHRIs. Compliance with these Principles has not necessarily guaranteed the effectiveness of NHRIs. Any assessment of an NHRI should be based on its performance and legitimacy considering the local factors obtaining within its jurisdiction. The domestic protection and judicial enforcement of human rights in Kenya, though crucial to the realisation of SERs, has been fraught with challenges. These challenges have meant that the realisation of SERs has been curtailed and necessitated complementary institutions for human rights to be realised. Given the country's constitutional architecture, the KNCHR was one such institution that could complement the role of the judiciary given its wide mandate.

With SERs a new feature of the 2010 Constitution, the KNCHR had to find ways to promote SERs in the country considering the local peculiarities such as poverty, a highly political climate and lack of political goodwill from the legislature and executive sometime characterised by open hostility. These challenges and the new nature of

these rights called for a comparative study with the SAHRC given some similarities between the two jurisdictions. The SAHRC provided valuable lessons having had more experience in dealing with SERs while navigating similar challenges the KNCHR faced or might face.

The findings of the research prompted recommendations directed at the KNCHR and other stakeholders, specifically the legislature and executive on how to address the challenges curtailing the performance of the KNCHR in general and particularly ways in which the Commission could go about in promoting, protecting and monitoring SERs.

Key words

NHRIs, socio-economic rights, KNCHR, SAHRC, promotion, protection and monitoring of human rights.

LIST OF ABBREVIATIONS

AI	Amnesty International
Article 59 Commissions	Kenya National Commission on Human Rights, Commission on Administrative Justice and National Gender and Equality Commission.
CAJ	Commission on Administrative Justice.
CGE	Commission on Gender Equality.
CEDAW	Convention on the Elimination of All Forms for Discrimination against Women.
CESCR	Committee on Economic, Social and Cultural Rights.
CHR	UN Commission on Human Rights.
CIC	Commission for the Implementation of the Constitution.
CKRC	Constitution of Kenya Review Commission.
CRC	Convention on the Rights of the Child.
CPRD	Convention on the Rights of Persons with Disabilities.
CPRs	Civil and Political Rights.
DBE	Department of Basic Education.
EALS	East African Law Society.
HRBAD	Human Rights Based Approach.
HRC	Human Rights Council.
HRW	Human Rights Watch.
ICC	The International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights.
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICHRP	International Council on Human Rights Policy.
ICJ	International Commission of Jurists.
JSC	Judicial Service Commission.
KANU	Kenya African National Union.
KHRC	Kenya Human Rights Commission.
KNCHR	Kenya National Commission on Human Rights.

KNHREC	Kenya National Human Rights and Equality Commission.
MDGs	Millennium Development Goals.
MNCs	Multi-National Corporations.
NAPA	National Policy and Action Plan for Human Rights 2014.
NGEC	National Gender and Equality Commission.
NGO(s)	Non-governmental organization(s).
NHRI(s)	National human rights institution(s).
OHCHR	United Nations Office of the High Commissioner.
OISD	Office on Institutions Supporting Democracy.
OPCAT	Optional Protocol to the Prevention of Torture.
PAIA	Promotion of Access to Information Act.
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act.
PIL	Public Interest Litigation.
SAHRC	South African Human Rights Commission.
SANGOCO	The South African NGO Coalition.
SCA	Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.
SDGs	Sustainable Development Goals
Second MTP	The Second Medium Term Plan 2013-2017.
SERs	Socio-economic Rights.
UDHR	Universal Declaration of Human Rights
UN	United Nations.
UNDP	United Nations Development Programmes.
UNGA	United Nations General Assembly.
UPR	Universal Periodic Review.

CHAPTER ONE

INTRODUCTION

1.1 Background and context of research

Despite the renowned status of human rights in international law characterised by the widespread ratification of international human rights treaties, the enjoyment of human rights remains a dream for many. There have been efforts by individual states to include human rights in their constitutions but effective measures, policies, programs, and resources to translate these into realities have not accompanied this constitutionalisation. Human rights have gained prominence in Kenya, particularly since the promulgation of the Kenyan Constitution in 2010.¹ For one, the 2010 Constitution contains a justiciable bill of rights with provision for the protection of both civil and political rights and economic, social and cultural rights in article 43. The predecessor to the 2010 Constitution, the 1969 Constitution², did not make provision for socio-economic rights and did not assign human rights in general a significant role, as was customary with most Commonwealth nations' independence constitutions at the time. Even with the wave of democratic reforms taking place in Africa in the 1990s, the progressive interpretation of the bill of rights was absent.

The situation has changed now as human rights form an “an integral part of Kenya’s democratic State and is the framework for social, economic and cultural policies.”³ Since they form an integral part of the Kenyan society, it is important that a definition of human rights be proffered before further discussion. “Human rights” as a subject of this research are “... the attempt to express in law what it means to be human and what human beings require to live fully human lives; the essential entitlements of each person, derived from her or his dignity as a human being.”⁴ These rights are recognised in chapter four of the Kenyan Constitution, as are together with all the international and regional treaties duly ratified.⁵

¹ In terms of article 2 (1) the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The Kenyan Constitution was promulgated in August 2010.

² The executive with the help of parliament amended the 1969 Constitution several times.

³ Article 19 (1) Constitution of Kenya 2010.

⁴ Asia Pacific Forum of National Human Rights Institutions (APF) *International Human Rights and the International Human Rights System; Manual for National Human Rights Institutions* (2012) 6.

⁵ In terms of article 2(6) of the Constitution of Kenya, 2010.

Human rights are enhanced by the national values contained in article 10 of the Constitution that are to guide the interpretation and implementation of the Constitution. What this means is that human rights are to be considered always when organs of state are performing their functions. Among the national values are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.⁶ The inclusion of human rights as a national value signposts the intention of the constitutional drafters and Kenyans through their endorsement of the Constitution to be guided by human rights. It also makes it imperative for human rights to always be considered by organs of state while carrying out their duties, a change from the previous constitutional dispensation that was not guided by a set of national values.

Of relevance for the purposes of this research is the establishment and restructuring of, the Kenya National Human Rights and Equality Commission (KNHREC) in terms of article 59(4) of the Constitution. The functions of this Commission include the promotion and protection of human rights in Kenya.⁷ The KNHREC was split in terms of article 59 (5) of the Constitution to form the Kenya National Commission on Human Rights (KNCHR),⁸ the Commission on Administrative Justice (CAJ), and the National Gender and Equality Commission (NGEC).⁹ The constitutionalisation of KNCHR can also be attributed to the willingness of Kenyans (through their majority support during the Constitutional referendum) to achieve constitutional reform that would allow for the promotion and protection of all human rights without distinction between civil and political rights on the one hand and economic, social and cultural rights on the other.¹⁰

The extent of the commitment to human rights in the Kenyan Constitution is illustrated by the inclusion of the entire corpus of human rights made up of civil,

⁶ Article 10 (2) (b) Constitution of Kenya 2010.

⁷ See article 59 (2) (a) – (k) of the Constitution of Kenya 2010 for the functions of the KNHREC.

⁸ In terms of Kenya National Commission on Human Rights Act 14 of 2011.

⁹ In terms of National Gender and Equality Commission Act 15 of 2011.

¹⁰ R Carver and P Hunt "National Human Rights Institutions in Africa" in K Hossain (eds) *et al Human rights commissions and Ombudsman Offices: National Experiences Throughout the World* (2000) 733. See also R Murray *The Role of National Human rights Institutions at the International and Regional Levels: The Experience of Africa* (2007) 1 explaining the reasons behind the establishment of NHRIs in Africa in general.

political, social, economic, and cultural rights. The nature of socio-economic rights (SERs) has for a long time generated debate in many domestic jurisdictions and it is bound to be no different in Kenya that has joined several nations on the African continent in constitutionally entrenching these rights.¹¹ The debate can be summarised in terms of three interrelated issues. First is the contention that, unlike civil and political rights (CPRs), SERs are not suited to judicial enforcement i.e. they are not justiciable.¹² According to Ghai, justiciability should be understood in two senses with the first referring to the often-argued reasoning that courts lack the capacity to deal with the implementation and enforcement of SERs. Secondly, he states that SERs are considered non-justiciable because most states have chosen to exclude courts from adjudicating on SERs matters by casting these rights as Directive Principles of State Policies (DPSP).¹³ Both issues raised by Ghai are addressed in the Kenyan context. Article 20 of the Constitution provides that SERs are justiciable. The High Court in Kenyan has also dealt with several cases dealing with the rights enshrined in article 43 thus showing its capability to deal with SERs litigation.¹⁴

SERs are viewed as positive rights requiring action from the state in the form of legislative and policy measures backed by enormous financial resources compared to civil and political rights (CPRs) which require negative protection.¹⁵ Whereas there may be some truth in this basic distinction, experience has shown that all rights require some form of financial commitment from the State for them to be fulfilled. For instance, the right to vote requires the state to fund the authority in charge of conducting elections. More importantly, CPRs and SERs have been found to be universal, interdependent, interrelated and indivisible. What this means is that the

¹¹ South Africa and Namibia are some of the African countries with SERs enshrined in their Constitutions.

¹² See D Beetham "What Future for Economic and Social Rights?" (1995) XLIII *Political Studies* 41-42.

¹³ See Y Ghai "Introduction" in Y Ghai and J Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 1.

¹⁴ See *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council* (2011) eKLR; *Consumer Federation of Kenya (Cofek) v Attorney General & 4 others* [2012] eKLR; *John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others* [2011] eKLR.

¹⁵ P Alston & G Quinn "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156 at 159. See HJ Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* 2nd edition (2000) 246.

fulfilment of CPRs can lead to the promotion of SERs and vice versa. For instance, the right to life is better promoted when there is increased access to the right to food, education and health. Therefore, states have an obligation to implement both categories of human rights equally.¹⁶ Lastly, while it is true that judicial pronouncements on SERs may increase the existing tension between the executive and judicial branches of government,¹⁷ boundaries are set in the Kenyan Constitution, which provides that the courts may not interfere with resource allocations solely because it would have reached a different decision.¹⁸

Over time, state practice and interaction between states at the UN has revealed that not only the three arms of government can make meaningful contribution towards the realisation of human rights. The judicial enforcement of SERs although important in terms of giving content to rights and expounding on state obligations, does not always result in the wider enjoyment of SERs. The achievement of human rights has been found to necessitate the establishment of several independent institutions outside the traditional three arms of government promote good governance and constitutional democracy.¹⁹ These come in different forms in different jurisdictions but include the ombudsman, national human rights commissions, and electoral commissions, among others.²⁰ Of interest to this research is the utility of the NHRI as a support institution.

KNCHR is a national human rights institution (NHRI). An NHRI is a “statutory body, sponsored or funded by the state, set up either under an act of parliament, the constitution, or by decree with specific powers and a mandate to promote and

¹⁶ See Vienna Declaration, World Conference on Human Rights UN DOC A/CONF. 157/24 para 5; See also CESCR General Comment No. 3 (1990) The Nature of States Parties Obligations (article 2, paragraph 1) UN Doc. E/1991/23, Annex III.

¹⁷ Coomans *Justiciability of Economic and Social Rights* 4; E Christiansen “Adjudicating non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court” (2006) 38 *Columbia Human Rights Law Review* 321 at 322.

¹⁸ See article 20 (5) (c) Constitution of Kenya 2010.

¹⁹ See CS Elmendorf “Advisory Counterparts to Constitutional Courts” (2007) 56 *Duke Law Journal* 953 at 955.

²⁰ For example, in Kenya a number of constitutional commissions and independent offices have been established to enhance the implementation of the Constitution. In South Africa, ‘chapter nine institutions’ exist to support constitutional democracy.

protect human rights.”²¹ NHRIs do not form part of the three arms of government²² and have a specific mandate to promote and protect human rights, unlike the judiciary whose general role is the administration of justice.²³ In the Kenyan context, the Constitution of Kenya Review Commission (CKRC) in its final report on the constitutional reform process identified constitutional commissions as bodies that seek to promote and enforce constitutional provisions. In order for them to carry out their functions, they need to be independent, have a clear mandate, and be accessible and accountable to the legislature and/or the executive.²⁴ It should be noted from the outset that NHRIs are expected to be independent while at the same time the accountability to the legislature is only restricted to justifying their performance in relation to the funding accorded to them.

NHRIs link the people to the government and aid in the transformation of the society due to the unique position they hold between government and the civil society.²⁵ They have also been justified as a means by which to ensure greater compliance with human rights obligations by states;²⁶ perhaps an explanation for their widespread occurrence in different domestic jurisdictions. The developments in Kenya mirror efforts by other states to promote and protect human rights through NHRIs. Moreover, these developments reflect the important role these institutions can play within the domestic human rights set up.²⁷ Furthermore, NHRIs provide

²¹ A Smith “The Unique Position of National Human Rights Institutions: A Mixed Blessing?” (2006) 28 *Human Rights Quarterly* 909. See also OCHR *National Human Rights Institutions History, Principles, Roles and Responsibilities* (2010) 13.

²² See C Murray “The Human Rights Commission Et Al: What Is the Role of South Africa’s Chapter 9 Institutions?” (2006) 2 *PER* 1 at 5. Mertus *Human Rights Matters: Local Politics* 3.

²³ See AA An-Na’im “To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights” in Y Ghai and J Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 14.

²⁴ Constitution of Kenya Review Commission (CKRC) *The Final Report of the Constitution of Kenya Review Commission* (2005) 311-312. <http://mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/Main%20report%20CKRC%202005.pdf> (accessed 24 February 2015).

²⁵ Murray 2006 *PER* 7. See also Smith 2006 *Human Rights Quarterly* 906.

²⁶ RKM Smith *Texts and Materials on International Human Rights* 2nd Edition (2009) 313. Smith has argued that NHRIs appear to be a potential panacea for many ills of the international system. The UN has continuously championed for the formation of NHRIs to promote human rights in domestic jurisdictions. See also B Nowrojee *Protectors or pretenders? Government Human Rights Commissions in Africa* (2001) 1.

²⁷ R Goodman and T Pegrarn (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2011) 1; ME Tsekos “Human rights institutions in Africa” (2002) 9 *Human Rights Brief* 21; J Koo & FO Ramirez “National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004” (2009) 87

support to organs of State, such as the executive, legislature and an independent judiciary, in promoting human rights and in the development of healthy and pluralistic democracies.²⁸ Moreover, they are less costly and less formalistic than courts when resolving human rights matters.²⁹ NHRIs possess some powers of court, such as the authority to issue summons to compel appearance or the production of evidence when dealing with complaints. In some instances, NHRIs are empowered to give binding recommendations when handling complaints on human rights matters, this role means that they act like courts without necessarily sticking to stringent court procedures. NHRIs and the judiciary share the same aim of protecting human rights in addition to sharing the same methods of securing evidence with the only difference being that NHRIs have a narrower substantive mandate, that of promoting and protecting human rights. Human rights are likely to be furthered where NHRIs and the judiciary seek ways to complement each other's work.³⁰

The detailed and robust provision for human rights in the Constitution together with the inclusion of SERs provides an opportunity to change the lives of many Kenyans. SERs require the state to commit itself to using the maximum available resources towards the progressive realisation of these rights³¹, which in turn ought to lead to better socio-economic conditions for Kenyans.³² The state has an obligation to observe, respect, protect, promote and fulfil these rights.³³ These obligations have been understood to mean as follows, the obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The

Social Forces 1321; B Lindsnaes, L Lindholt & K Yigen(eds) *National Human Rights Institutions Articles and working papers Input to the discussions on the establishment and development of the functions of national human rights institutions* (2000) 13. S Cardenas, "Sovereignty Transformed? The Role of National Human Rights Institutions" in N Shawki and M Cox (eds) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (2009) 27.

²⁸ Commonwealth Secretariat *National Human Rights Best Practice* (2001) 3.

²⁹ C Raj Kumar "National Human Rights Institutions: Good governance perspectives on institutionalization of human rights" (2003) 19 *American University International Law Review* 266 at 296.

³⁰ Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21-24 October 2008 The Nairobi Declaration para 33. <http://www.ohchr.org/Documents/Countries/NairobiDeclarationEn.pdf> (accessed 3 June 2013)

³¹ Articles 21 (2) Constitution of Kenya 2010. See also Article 2 of ICESCR.

³² C Mbazira *Litigating Socio-economic Rights in Southern Africa; A Choice between Corrective and Distributive Justice* (2009) 3.

³³ Article 21 (1) Constitution of Kenya 2010. This provision has some similarities to Sections 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996 as will be discussed in detail in Chapter 5.

obligation to protect requires states to protect individuals and groups against human rights abuses.³⁴ Lastly, the obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights.³⁵ The state is traditionally made up of the three arms of government, which are responsible for the realisation of human rights while carrying out their mandates as provided for by law.³⁶

However, as earlier alluded to, support institutions exist to complement the primary responsibility of the state to fulfil human rights obligations. Therefore, the constitutionalisation of the KNHREC, to promote and protect human rights, is an indication of the important role it is expected to play in making the rights in the bill of rights a reality. In fact, it should be viewed as one of the “other measures” used to promote and protect SERs as envisioned by the Kenyan Constitution. Article 21 (2) Constitution of Kenya provides that;

The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.³⁷

Thus, in the greater scheme of fulfilling human rights obligations, the responsibility is primarily the state’s (normally through the three arms of government performing their functions as stipulated in the Constitution).³⁸ The KNCHR (through its specific mandate of promotion and protection of human rights) fits in as one of the measures put in place by the Constitution to complement the state’s legislative, executive and judicial measures taken to fulfil its human rights obligations. To this end, given the controversies surrounding SERs, the relative unfamiliarity with SERs in the country and the crucial role NHRIs can play in promoting human rights, the KNCHR can be instrumental in the promotion and protection of human rights in general and SERs in Kenya together with other organs of State. This role is clear from the functions of the

³⁴ CESCR General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) Para 32.

³⁵ See CESCR General Comment No. 3 The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)

³⁶ In recent times business entities, have been found to have human obligations given the influence they have on the enjoyment of human rights. See UNOCHR *Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011). The roles of the legislature, executive and the judiciary are set out in chapters 8, 9 and 10 respectively of the Constitution of Kenya, 2010.

³⁷ The ICESCR in article 2 also calls on states to use other measures to promote socio-economic rights. See CESCR General Comment No. 3 para 4.

³⁸ See discussion in 3.3.2.1 on the human rights obligations of the state.

Commission laid out in article 59 of the Constitution, read together with section 8 of the KNCHR Act, 2011. It is further underscored by the deliberate inclusion of the KNCHR in chapter four dealing with bill of rights in the Constitution as opposed to the possibility of listing it as one of the Commissions in chapter 15 of the Kenyan Constitution.³⁹

Amongst KNCHR's functions, indicative of the important mandate given to the Commission to promote, protect and monitor human rights, which form the basis of this research are to:⁴⁰

- a) promote respect for human rights and develop a culture of human rights in the Republic;
- b) promote the protection and observance of human rights in public and private institutions;
- c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic;
act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights, except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination;
- d) perform such other functions as the Commission may consider necessary for the promotion and protection of human rights;

According to Burdekin, an effective and well-functioning NHRI should at a minimum have "a clearly defined, broad-based human rights mandate, incorporated in legislation or (preferably) constitutionally entrenched; independence from government; membership that broadly reflects the composition of society; appropriate cooperation with civil society, including NGOs; and adequate resources."⁴¹ The above requirements are similar to the Paris Principles⁴² a set of

³⁹ Chapter 15 of the Kenyan Constitution contains a list of all the Constitutional Commissions and Independent Offices recognised.

⁴⁰ Section 8 (a) to (c) and (f) Kenya National Commission on Human Rights Act. Read together with Section 53 and 54 of the KNCHR Act and articles 59 (2) and 254 of the Constitution.

⁴¹ B Burdekin and J Naum, *National Human Rights Institutions in the Asia Pacific Region* (2006) 6. See also Kumar 2003 *American University International Law Review* 268; See also M Kjærsum "National Human Rights Institutions Implementing Human Rights" 6-7. R Carver "A New Answer to

minimum guidelines agreed to by NHRIs, in a workshop held in Paris, France, in 1991, for the establishment and strengthening of such institutions. These principles have been endorsed by the UN General Assembly (UNGA) and have become part of international human rights law through their inclusion in the article 18 of the Optional Protocol to the Prevention of Torture (OPCAT) and article 33 of the Convention on the Rights of Persons with Disabilities (CPRD) as minimum guidelines for the establishment of NHRIs. The International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) uses the Paris Principles in the accreditation of NHRIs. Despite their wide acknowledgement as the accepted standard for NHRIs, the Paris Principles have been criticised as being simplistic as they do not deal with all factors affecting the effective operation of NHRIs.⁴³

Matched against the above-mentioned criteria, KNCHR is constitutionally entrenched in terms of article 59 of the Kenyan Constitution. Additionally, it has a clearly defined mandate to promote and protect human rights in Kenya.⁴⁴ The membership of the Commission is also supposed to be representative of the composition of the Kenyan nation.⁴⁵ Moreover, the Act provides for different sources of funding to be accorded to the KNCHR to enable it carry out its functions.⁴⁶ Additionally, it also sets out the appointment and removal procedures of the commissioners. All these provisions are fundamental to the functioning of the Commission. The KNCHR has the required legitimacy, in terms of the Constitution and legislation, to be at the forefront of promoting and protecting human rights by all within the borders of Kenya.⁴⁷ The

an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10 *Human Rights Law Review* 2.

⁴² Principles relating to the Status of National Institutions (The Paris Principles). UN Doc. A/RES/48/134 (1993) Adopted by General Assembly resolution 48/134 of 20 December 1993.

⁴³ See Murray *The Role of National Human Rights Institutions at the International and Regional Levels* 4. OC Okafor & SC Agbakwa "On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context" (2002) 24 *Human Rights Quarterly* 662. C Kumar 2003 *American University International Law Review* 259-290. A critique of the Paris Principles is undertaken in Chapter 2.

⁴⁴ See section 8 (a) to (j) KNCHR Act 2011.

⁴⁵ See section 13 of KNCHR Act 2011.

⁴⁶ See section 45 KNCHR Act 2011.

⁴⁷ See LC Reif "Building Democratic Institutions; The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 10 at 19. See also A Smith 2006 *Human Rights Quarterly* 914-915 discussing the importance of NHRIs being established through legislation as it guarantees independence.

question is whether this legitimacy in terms of law translates into the KNCHR being an effective institution carrying out its mandate.

1.2 Problem Statement

Since the KNCHR is tasked with the promotion and protection of human rights in general, this should also include the promotion and protection of SERs, as human rights are indivisible, interrelated and interdependent.⁴⁸ Several factors prevalent in Kenya inform my argument for the KNCHR to promote this group of rights. Firstly, SERs have been largely neglected on the African continent in general and particularly in Kenya.⁴⁹ This neglect becomes apparent when one considers the poverty situation in Kenya, with 46.9% of the population living in poverty.⁵⁰ There have been calls for “a concerted effort to ensure recognition of economic, social and cultural rights” the world over.⁵¹ The constitutional entrenchment of SERs on its own has not led to the improvement in the quality of life of people. This is in spite of the fact that there is a “deep and dynamic relationship between”⁵² human rights and poverty. Therefore, if these rights are to lead to meaningful changes in the lives of Kenyans living in poverty, the state should put measures in place that would lead to their progressive realisation. I submit that unless the state fulfils its human rights obligations, these rights are unlikely to be translated into real benefits.

Closely linked to the neglect of SERs is the role NHRIs and other domestic institutions play in promoting this corpus of rights. Whereas there has been widespread formation of NHRIs, those in existence have predominantly focused on promoting CPRs at the expense of SERs.⁵³ The focus on CPRs is attributed to a number of reasons that include deliberate exclusion of such a mandate by the

⁴⁸ Maastricht Guidelines para 25. See also CESCR General Comment 10 *the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* E/C.12/1998/25 para 3.

⁴⁹ See O Nowosad “National Institutions and the Protection of Economic, Social and Cultural Rights” in BG Ramcharan (ed) *The Protection Role of National Human Rights Institutions* (2005) 180. M Ssenyonjo “Reflections on State Obligations with Respect to Economic, Social and Cultural rights in international human rights law” (2011) 15 *The International Journal of Human Rights* 969 at 973.

⁵⁰ See Republic of Kenya, First Medium Term Plan (2008–2012) 4 available at <http://www.imf.org/external/pubs/ft/scr/2010/cr10224.pdf> (accessed 26 June 2013).

⁵¹ Vienna Declaration and Programme of Action para 98. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997 para 25.

⁵² A Byaruhanga Rukooko “Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights” (2010) 14 *The International Journal of Human Rights* 13 at 19.

⁵³ See CESCR General Comment 10 para 3.

establishing authority, inadequate capacity to deal with SERs, poor funding, and absence of SERs provisions in the domestic jurisdiction and in some instances a poor understanding by NHRIs of their mandate among others.⁵⁴ The above-mentioned factors are some of the reasons for the failure of the KNCHR's predecessor to focus on SERs. For example, despite having a broad human rights mandate the KNCHR was curtailed in its focus on SERs because the previous Constitution did not make provision for SERs.⁵⁵

Given their potential as agents for the improvement of human rights conditions domestically and the neglect of SERs in their work, there has been a call for NHRIs to focus on these rights.⁵⁶ However, this must be understood to be a complementary role alongside other institutions that might lead to overlaps or create tension. Overlaps are likely to occur when we consider the fact that both the judiciary and NHRIs seek to protect human rights sometimes with similar methods such as handling complaints.⁵⁷ To this end, the KNCHR should heed the call of the CDESCR and equally direct its focus to promoting and protecting SERs in the same way as CPRs while at the same time complementing the role of the judiciary. The South African Human Rights Commission (SAHRC) is an example of an NHRI in Africa that has been constitutionally obligated to consider SERs in carrying out its mandate.⁵⁸

With the inclusion of SERs in the Kenyan Constitution, the role of the judiciary in interpreting and giving content to these rights, how can the KNCHR promote, protect and monitor SERs? The constitutionalisation of KNCHR and the functions it has been assigned are indications of the significant role it is expected to play in the promotion and protection of human rights in Kenya. KNCHR is also mandated to monitor state compliance with human rights treaties⁵⁹, and can act as a bridge

⁵⁴ See further discussion in chapter 2.

⁵⁵ See generally KNCHR *It is Hard to be Good* (2012).

⁵⁶ Maastricht Guidelines para 25. See also CDESCR General Comment 10.

⁵⁷ A Wolman "National Human Rights Institutions and the Courts in the Asia-Pacific Region" (2011) 19 *Asia Pacific Law Review* 237 at 239.

⁵⁸ The SAHRC's relevance to this research shall be later discussed in the methodology section and chapter 5.

⁵⁹ Kenya has ratified the following treaties dealing with socio-economic rights; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);

between international human rights norms and their adaptation to suit local implementation, thus filling the gaps in the local human rights jurisprudence.⁶⁰ NHRIs can be used to monitor the government's compliance with court decisions on human rights matters.⁶¹ Given their focus on the human rights issues, NHRIs can appear as *amicus curiae* and offer crucial insights on human rights issues to aid the courts in making rulings.⁶²

With the influence international law⁶³ is bound to have on Kenya law, can the KNCHR play a pivotal role in the localisation of international human rights standards and compliance with the bill of rights to ensure full enjoyment of SERs? The thesis will also focus on other underlying questions, which speak to the effective functioning of the KNCHR. For instance, it will seek to examine how far the structure of, and the work done by the KNCHR in terms of the Constitution and the KNCHR Act is conducive to the protection and promotion of these rights in Kenya. Moreover, it will assess the relevance of the Paris Principles in relation to the effectiveness of an NHRI, in particular the KNCHR, in performing its mandate. As such it will seek to answer the question, does compliance with the Paris Principles ensure effective promotion of SERs?

In answering these questions, the research seeks to understand how the local context affects the ability of KNCHR to carry out its mandate. Thus, how will factors such as political good will, respect for the rule of law and interaction with other institutions (legislature and executive) be crucial to the KNCHR carrying out its mandate? The research will, by extension, analyse the accessibility of the Commission to the public; perceptions of the KNCHR locally and internationally; appointment and dismissal procedures; qualification of the commissioners; and independence (including financial autonomy). Likewise, it will analyse what

International Convention on the Elimination of All Forms of Racial Discrimination; African Charter on Human and Peoples' Rights (ACHPR).

⁶⁰ Section 8(f) KNCHR Act 2011. See also S Cardenas "National Human Rights Institutions and State Compliance" in *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (2011) 29.

⁶¹ See discussion in chapter 5 on the South African Human Rights Commission.

⁶² See discussion in Chapters 4 and 5.

⁶³ In terms of article 2(6) Constitution of Kenya, 2010.

contributions KNCHR has made in the promotion and protection of SERs and identify the challenges it faces while carrying out its mandate.

The thesis also investigates the complementary role KNCHR can play with the other arms of the government, especially the judiciary.⁶⁴ KNCHR cannot work alone or as an alternative to the judiciary in promoting and protecting human rights. Alongside the judiciary,⁶⁵ KNCHR can be instrumental in paving the way for the adoption of progressive human rights interpretation emanating from the UN and its bodies, and its subsequent application within Kenya by the government.⁶⁶ The thesis will furthermore explore the role the KNCHR can play by working together with other constitutional commissions such as the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ).⁶⁷ Furthermore, it assesses the influence of the Commissions' investigative powers⁶⁸, on the promotion and protection of SERs in Kenya. It will also evaluate KNCHR's reports to parliament and how parliament responds to these reports⁶⁹ to determine how the Commission is held accountable and supported.

The study works with the assumption that, if the KNCHR is to work towards the promotion and protection of SERs, efforts to fulfil these rights by the government can reduce the often adversarial, lengthy and costly nature of court litigation on human rights. It also takes into consideration the very nature of SERs as requiring the state to use the available resources to implement this group of rights; the programmatic nature of the rights, which can only be implemented over time; the debate over their justiciability in courts and the doctrine of separation of powers.⁷⁰ The research views the formation of KNCHR to promote and protect human rights in Kenya as being one

⁶⁴ LC Reif *The Ombudsman, Good Governance and the International Human Rights System* (2004) 82 and 99. Kjærum 2010 *Human Rights Law Review* 11.

⁶⁵ See articles 20 (3), (4) and 23 Constitution of Kenya 2010 on the role of the courts in interpreting the bill of rights.

⁶⁶ Section 8 (f) KNCHR Act 2011. KNCHR has the responsibility to ensure compliance with obligations under international and regional human rights instruments.

⁶⁷ In terms of section 8 (h) of the KNCHR Act 2011.

⁶⁸ Sections 28 – 44 KNCHR Act 2011.

⁶⁹ Section 54 KNCHR Act 2011 read together with article 254 of the Constitution of Kenya 2010.

⁷⁰ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Document E/CN.4/1987/17 para 8. See also EC Christiansen "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" (2007) 38 *Columbia Human Rights Review* 321 at 347 – 348.

of the 'other measures' to achieve the progressive realisation of SERs in Kenya. Accordingly, there seems to be a role the KNCHR can play a role in improving the lives of ordinary Kenyans through advancement and protection of constitutionally entrenched SERs.

Furthermore, because they are independent institutions created by the state to promote and protect human rights, it is necessary to indicate what NHRIs cannot do. Like any other entity within the state, NHRIs have human rights obligations, normally reduced to the obligations to respect, fulfil and protect human rights. These obligations are not similar to those of the state and should be understood as human rights obligations of NHRIs. NHRIs cannot pass formulate laws and policies, implement laws or enforce judicial decisions. As such, their role is advisory in nature and focuses more on sensitising the different human right stakeholders of their human rights obligations and how to go about in realising these rights. Because they are established with the specific purpose to promote and protect human rights, the functions they have from the enabling legislation should be viewed as their obligations unlike the obligations incumbent on the state. Thus, when these institutions are executing their mandate they are performing their human rights obligations, which in most instances are different from the obligations of the state as they normally advocate the fulfilment of human rights obligations by the state, business and other human rights stakeholders. It is with this in mind that the role of NHRIs is analysed.

1.3 Research objectives

The objectives of study are:

1. To analyse the role that the KNCHR, in light of its constitutional and legislative mandate, can play in the promotion and protection of socio-economic rights in Kenya given the local peculiarities within the country.
2. To highlight the challenges faced by the KNCHR in fulfilling its constitutional mandate of promoting and protecting human rights.
3. To interrogate the sufficiency of the constitutional protection and judicial enforcement of SERs as a means of creating a culture of human rights in the country.

4. By way of comparative analysis, study the promotion, protection and monitoring of SERs in South Africa by the SAHRC, with a view to suggesting ways in which the KNCHR can meaningfully contribute to the state's respect of SERs and adherence to the obligations emanating from international human rights law while respecting the role of the judiciary.
5. To contribute to the scholarly debate on the role of NHRIs in promoting SERs in Kenya and Africa in general.

1.4 Research methodology

The overarching methodology is the doctrinal research methodology utilised to discover the legal principles that respond to the research objectives. Doctrinal research is concerned with the analysis of legal rules to clarify ambiguities within rules and formulate coherent doctrines/principles.⁷¹ In this regard, the study locates (through desktop-based research) and critically reviews the relevant primary sources including legislation, constitutions, standards, conventions, declarations, resolutions and relevant case law on national human rights institutions in general and the KNCHR. In addition to the primary sources, it makes use of secondary sources. This involves surveying books, scholarly journal articles, internet materials and reports⁷² which have investigated, analysed and explained the identified the role played by NHRI's in the promotion of SERs. The purpose will be to expose the understanding and elaboration of these principles by different commentators and authors. It also relies on existing country reports on the state of SERs in Kenya and South Africa.

A comparative legal research methodology is also employed to compare the Kenyan scenario with the South African one. A comparative methodology is important as it allows for an analysis of other jurisdictions that can reveal the challenges and successes in one jurisdiction to provide useful lessons for another jurisdiction.⁷³ In

⁷¹ For an exposition on doctrinal research, see P Chynoweth "Legal Research" in A Knight and L Ruddock (eds) *Advanced Research Methods in Built Science* (2008) 28-38. AK Singhal and I Malik "Doctrinal and socio-legal methods of research: merits and demerits" (2012) 2 *Educational Research Journal* 252 – 256.

⁷² The research shall look at reports compiled by NGO's such as Amnesty International and ICHRP; KNCHR and SAHRC in dealing with the promotion and protection of socio-economic rights.

⁷³ This has been acknowledged in the field of research and it is contended that the same applies in the field of human rights law. See JM Smits "Redefining Normative Legal Science: Towards an Argumentative Discipline" in F Coomans, F Grunfeld and MT Kamminga (eds) *Methods of Human*

this instance, the SAHRC is significant to this research for several reasons. Firstly, it is a constitutionally entrenched commission tasked with the protection and promotion of human rights and specifically SERs. This is in terms of section 184 of the Constitution read together with the Human Rights Commission Act.⁷⁴ It is recognised as one of the institutions supporting constitutional democracy in South Africa. Secondly, the South African Constitution was newly promulgated after the end of apartheid thus changing the constitutional dispensation that ushered in a greater respect for human rights similar to the case in Kenya. Thirdly, being an African country, South Africa best provides situations that are not unlike Kenya in terms of challenges related with socio-economic living conditions.⁷⁵ Moreover, the South African Constitution contains justiciable SERs⁷⁶ like those contained in the article 43 of the Kenyan Constitution, with the SAHRC being given a prominent role in the promotion, protection and monitoring of these rights in the same manner as the KNCHR.

A comparative study is also beneficial, as it will offer a deeper understanding of similar issues that are of central concern in the jurisdictions selected.⁷⁷ Such comparison can be beneficial in the process of modification, amendment of laws as may be necessary to address identified shortcomings.⁷⁸ In this instance, South Africa boasts of a progressive human rights record following a change in the constitutional dispensation. Furthermore, the SAHRC has been working for almost 15 years to

Rights Research (2009) 52; L Hantrais "Comparative Research Methods" (1995) 13 *Social Research Update* <http://sru.soc.surrey.ac.uk/SRU13.html> (accessed 4 March 2013).

⁷⁴ Human Rights Commission Act 54 of 1994 and Section 184 of the Constitution of the Republic of South Africa, 1996.

⁷⁵ See discussion in chapter 5.

⁷⁶ See Sections 26–29 of the Constitution of the Republic of South Africa 1996. See also E Wiles "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law" (2006-7) 22 *American University International Law Review* 35 at 37, commenting on the noteworthiness of the South African Constitution in terms of ESC rights. See also International Council on Human Rights Policy (ICHRP), *Performance & Legitimacy: National Human Rights Institutions* 2nd edition (2004) 7 http://www.ichrp.org/files/reports/17/102_report_en.pdf (accessed 17 February 2013).

⁷⁷ SG Verhulst & ME Price "Comparative Media Law Research and its Impact on Policy" (2008) 2 *International Journal of Communication* 406.

⁷⁸ AA Razak *Understanding Legal Research* 21. <http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf> (accessed 5 February 2013).

promote socio-economic rights in South Africa.⁷⁹ To this end, SAHRC has used different approaches, as analysed in this thesis, to promote and protect these rights such as writing reports, litigation, education and research among others. It thus offers a useful model of how the KNCHR can go about creating a culture of human rights, more so, protecting, and promoting SERs. The SAHRC's efforts to promote and protect this group of rights are worth noting as has been suggested by Klaaren who opines, "it is one that the global human rights community should be aware of and support."⁸⁰ Whereas the SAHRC might have its challenges in promoting this group of rights⁸¹, its experience and the situation obtaining from South Africa in promoting economic and social rights can offer meaningful lessons for the KNCHR. Thus, applicable to Kenya and particularly this research, "South Africa provides a particularly instructive case study to examine the kinds of institutions that appropriately monitor the realisation of social and economic rights."⁸²

The research also benefitted from informational interviews with four respondents who were able to shed light on the day-to-day functioning of KNCHR. These interviews were based on specific pre-determined questions on the KNCHR developed in light of reading about the Commission, its mandate and experience. Consequently, interview questionnaires were administered to the identified research sample consisting of selected commissioners and members of staff of the KNCHR involved with protection and promotion of SERs. This method of interviewing was selected for the following reasons: to test whether the legislative framework of the KNCHR and the actual working of the commissions correspond. The Commission's understanding of its SERs mandate and some of the challenges it faces in the execution of the mandate were also explored during the interviews. This approach provided a reliable source of information on the experiences of the KNCHR in

⁷⁹ The SAHRC was established on 12 October 1995. Its focus on this group of rights is informed by the requirement of section 184 (3) of the South African Constitution.

⁸⁰ J Klaaren "A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights" (2005) 27 *Human Rights Quarterly* 539 at 542.

⁸¹ See Klaaren 2005 *Human Rights Quarterly* 547-550 discussing some of the criticisms levelled against the SAHRC on its approach in promoting and protecting SERs.

⁸² DG Newman "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda" (2003) 19 *South African Journal on Human Rights* 191.

dealing with SERs.⁸³ The necessary ethical clearance was sought from the Rhodes University Law Faculty's Ethical Standards Committee before conducting the interviews.

1.5 Significance of the study

Since the promulgation of the 2010 Constitution, a significant attention has been focused on the implementation of the devolved system of government resulting in the roles of other institutions largely being neglected. Because of their pervasive nature, human rights speak to all aspects of life including government efforts to develop and better the living standards of its citizens. However, the enjoyment of SERs in Kenya leaves a lot to be desired. For these rights to be realised the KNCHR should play a leading role and it is necessary that as an institution the workings of this Commission be analysed so that it makes a meaningful contribution to the human rights situation in the country.

Debates on the SERs in Kenya are in their infancy, with many publications speaking to the general changes brought about by the 2010 Constitution⁸⁴ and the courts' interpretation of SERs.⁸⁵ These studies while useful, do not sufficiently acknowledge the role of independent constitutional commissions as well as the society in the interpretation, implementation and enforcement of SERs. The study is significant as it specifically looks at the role the KNCHR can play in the realisation of SERs in Kenya. As such, the study identifies the challenges and opportunities the KNCHR faces in executing its mandate. It offers recommendations to the KNCHR on how best it can execute its mandate on SERs and thus better the standards of living of Kenyans.

⁸³ See Sociological Research Skills Research Methods <http://www.sociology.org.uk/methsi.pdf> (accessed 24 April 2013) for the advantages of using Structured interviews as a means of data collection.

⁸⁴ See YP Ghai & JC Ghai *Kenya's Constitution: An instrument for change* (2011); PLO Lumumba, MK Mbondenyi & SO Odero *The Constitution of Kenya: Contemporary readings* (2011).

⁸⁵ J Biegon & G Musila (eds) *Judicial enforcement of economic, social and cultural rights: Challenges and opportunities for Kenya* (2011).

There is extensive research on NHRIs.⁸⁶ These studies have covered the compliance of NHRIs with the Paris Principles and ways in which to make these institutions work in general. Most of the research has been of a general nature with research on specific NHRIs⁸⁷ focusing on disparate issues such as the independence and factors affecting the independence of NHRIs; effectiveness⁸⁸ of these institutions among others.⁸⁹ The current research is focussed on the role of the KNCHR; particularly it looks at the challenges and opportunities of the KNCHR in fulfilling its SERs mandate in the country.

1.6 Limitations of the research

The research study faced a few challenges as discussed below.

The interview sample used to gather information about the working of the Commission could best be described as convenience samples, i.e. those accessible to the researcher during the field visit to Kenya. Because of this limitation, the information gathered may not necessarily be representative of all the perceptions of the workings of the KNCHR in the areas of SERs.

Further, it was not possible to interview all the intended respondents. The reasons for this ranged from an unwillingness to be interviewed, late replies to interview requests that meant that by the time the interviewees were ready to be interviewed the researcher's field trip to Kenya had ended. Mostly time constraints and the intricacies of socio-legal research made it difficult to access information from the prospective research sample. Whereas, the research would have benefited from more views, the respondents interviewed provided information that would otherwise be unavailable to the researcher.

⁸⁶ See R Goodman & T Pegrarn (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2011). United Nations *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995). S Cardenas *Chains of Justice: The Global Rise of State Institutions for Human Rights* (2014). Office of the United Nations Commissioner for Human Rights *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010). AE Pohjolainen *Evolution of NHRIs: The Role of the United Nations* (2006).

⁸⁷ L Thio "Panacea, Placebo, or Pawn - The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)" (2009) 49 *George Washington International Law Review* 1271-1342.

⁸⁸ C Raj Kumar "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19 *American University International Law Review* 259-300. ICHRP *Assessing the Effectiveness of National Human Rights Institutions* (2005).

⁸⁹ Commonwealth Secretariat *National Human Rights Institutions Best Practice* (2001). B Burdekin *National Human Rights Institutions in the Asia Pacific Region* (2005).

It is hoped that future research can focus on collecting more information from the various stakeholders in the field of SER protection and promotion in Kenya working closely with the KNHCR.

1.7 Delimitations of the research

The research does not engage with the normative content of the SERs because that is widely analysed in research, jurisprudence and in the work of the CESCR.⁹⁰ Instead, the research focuses on the work of NHRIs in dealing with these rights especially the task of increasing the awareness of the different stakeholders in dealing with these rights, while navigating the different bottlenecks that exist within the domestic jurisdiction.

Secondly, the information in this research is information that was available to researcher between February 2013 and October 2016 when the research was conducted. The interviews were conducted in October 2015. There is a specific focus on the work of the KNCHR since the promulgation of the Kenyan Constitution in 2010 until October 2016. Lastly, the law and information from documentary sources are up to date to December 2016 as available.

1.8 Structure of the study

This thesis has six chapters. The current, chapter is an introduction setting out a brief background to the research. It sets out the problem question, justification, methodology, and the structure of the study.

Chapter two engages in a general discussion of NHRIs in international law. It commences by tracing the evolution of NHRIs in international law as spearheaded by the United Nations (UN). To understand the spread of NHRIs the chapter seeks to define these institutions based on certain general characteristics. A discussion of the Paris Principles, the normative guidelines that guide the design of NHRIs is undertaken to understand why the principles have been given prominence. The chapter also highlights the dual roles of promoting and protecting human rights

⁹⁰ Normative content of SERs considers issues such as the availability, accessibility, acceptability, affordability and quality of measures put in place to realise these rights. See discussion in 3.3.2 on human rights obligations.

undertaken by NHRIs and how these are affected by several factors within an NHRI's local jurisdiction.

Chapter three deals with the constitutional protection and judicial enforcement of SERs in Kenya. The promulgation of the 2010 Constitution brought about several changes, among them a comprehensive bill of rights and the introduction of a devolved system of government. The chapter engages in an analysis of the nature of the state's obligations concerning SERs. The interpretation of these rights by the courts and the impact of such interpretation is also analysed. Moreover, the chapter analyses some of the measures put in place, in the form of legislation and policy formulation, as part of the state's obligations towards the fulfilment of these rights. The chapter acknowledges some of the weaknesses of solely relying on the judicial enforcement of socio-economic rights as a means of realising these rights. It thus suggests the use of other complementary mechanisms alongside the judiciary.

Chapter four specifically examines the institutional framework of the KNCHR and its influence on the Commission's SERs mandate. It begins with an analysis of the Constitution and enabling legislation; both have a bearing on organisational performance of the institution. The KNCHR Act, which gives effect to the constitutional provision, is responsible for the establishment of the KNCHR and its mandate. What follows is a discussion of the appointment procedure of the Commissioners, the funding of the Commission, alongside a discussion of the accountability and independence of the KNCHR. The chapter discusses the Commission's mandate and argues for a specific focus on SERs given the situation in the country as informed by the KNCHR's Strategic Plan 2015-2018. Because the KNCHR does not exist in a vacuum, this chapter also identifies some of the internal and external challenges the Commission faces in executing its mandate. The Act's provisions are compared to the Paris Principles to determine whether it meets the conditions of setting up an NHRI as set out in the Paris Principles. The focus is in the areas dealing with independence, choosing of commissioners, mandate and funding.

Chapter five focuses on the South African Human Rights Commission (SAHRC). The evaluation of the SAHRC is in terms of its inclusion in the South African Constitution

to support constitutional democracy and how the Commission fulfils this role in South Africa. The chapter starts with a general discussion of the constitutional protection of SERs in SA amidst the presence of significant poverty in the country. It also looks at the judiciary's interpretation of SERs as they have influenced the work of the SAHRC and the government's general understanding of their obligations. It then looks at the legislative framework that contains the mandate of the Commission and specific examples of the programmes undertaken to promote, protect and monitor socio-economic rights, with a view to understanding some of the successes and failures it has faced in carrying out its mandate. The chapter concludes by establishing that, despite some differences between Kenya and South Africa, there are indeed similarities and the KNCHR can learn valuable lessons from the failures and successes of the SAHRC.

Chapter six is the concluding chapter and it draws conclusions from the discussions in the preceding chapters and proffers recommendations to the KNCHR and other stakeholders close to the KNCHR (the three arms of government) on how best to promote, protect and monitor SERs in Kenya.

CHAPTER TWO

NATIONAL HUMAN RIGHTS INSTITUTIONS IN INTERNATIONAL LAW AND THE PROMOTION AND PROTECTION OF SOCIO-ECONOMIC RIGHTS

2.1 Introduction

On a national level, the promotion and protection of human rights is the responsibility primarily of the government. Under international law, the UN has championed the establishment and strengthening of national human rights institutions in domestic jurisdictions as a means of protecting and promoting human rights. Additionally, democratic reforms and a genuine quest in different jurisdictions across the globe to promote and protect human rights have seen a proliferation of these institutions in different guises, all with the underlying aim to promote and protect human rights. NHRIs do not form part of the traditional three arms of government; instead, they function as a complementary mechanism for the promotion and protection of human rights. In order to carry out their mandate successfully, these institutions are supposed to be independent of the three arms of government and any undue influence.

This chapter covers several issues. In essence, it outlines the origin of NHRIs with a view to understand their roles in the protection and enhancement of human rights. In the absence of a single universally accepted definition of an NHRI, the chapter commences with a consideration of different definitions based on accepted characteristics of NHRIs. From there, I trace the international evolution of NHRIs from the 1940s up to the formulation of the Paris Principles in 1991. The Principles are then analysed based on their interpretation by NHRIs through the system of accreditation. The chapter also considers the relevance of the Paris Principles to the effective functioning of NHRIs, amidst criticisms from several quarters on the inadequacy of these Principles. I also discuss the different types of NHRIs that exist based on the leeway the Principles offer to states on which institutions to establish. Before concluding, the chapter highlights NHRIs role of promoting and protecting human rights and some of the reasons for the slow uptake of SERs by NHRIs.

The overall aim of the chapter is to establish a general basis for understanding widely accepted NHRI standards to facilitate the analysis of the role of the KNCHR and SAHRC in promoting and protecting SERs.

2.2 Definition of National Human Rights Institutions

There is no universally accepted definition of an NHRI. Several definitions have been put forward. For instance in the United Nations Fact Sheet 19, an NHRI is defined as a "... body whose functions are specifically defined in terms of the promotion and protection of human rights."¹ The UN Handbook offers a more comprehensive definition that describes an NHRI as "a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights."² On their part the International Council on Human Rights Policy (ICHRP), defined an NHRI as a "quasi-governmental or statutory institution with human rights in its mandate."³ Cardenas views NHRIs as "a term of art" and defines them as "administrative bodies responsible for promoting and protecting human rights domestically."⁴ It is a term of art because NHRIs exist alongside other institutions that promote and protect human rights as part of their daily function even though they are not specifically established for these roles (for example parliament, judiciary, NGO's) or referred as such.

What can accordingly be established is that an NHRI has the chief characteristic of promoting and protecting human rights within a country's domestic jurisdiction. To this end, this research has adopted a definition that best encapsulates this key characteristic; that of Smith who defines NHRIs as "... statutory bodies and are usually State sponsored and state funded, set up either under an act of parliament, the constitution, or by decree with specific powers and a mandate to promote and protect human rights."⁵ The absence of a universally accepted definition points to the

¹ See United Nations Fact Sheet 19 National Institutions for the Promotion and Protection of Human Rights 3.

² United Nations *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) para 39.

³ ICHRP *Performance and Legitimacy: National Human Rights Institutions* (2004) 3.

⁴ S Cardenas *Chains of Justice: The Global Rise of State Institutions for Human Rights* (2014) 7-8.

⁵ A Smith "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" (2006) 28 *Human Rights Quarterly* 904 at 909.

possibility of NHRIs existing in different guises as human rights commissions, ombudsman, hybrid institutions or human rights institutions. In fact, no two jurisdictions have identical NHRIs. However, these institutions have similar characteristics such as a mandate to promote and protect human rights, be set up by law and funded by the state.

NHRIs have the following characteristics that set them apart from other institutions within the national setup.

- They do not form part of the three arms of government, which is made up of the executive, legislature and judiciary; and ideally should not be under their influence.⁶
- NHRIs need to be independent to carry out their mandates while promoting accountability and therefore, every effort should be made to protect and promote their independence.⁷
- NHRIs receive a huge portion of their funding from the government normally through a budgetary vote charged on the consolidated fund or as part of a given ministry's budget.
- They are established as special support institutions with a constitutional or legislative mandate to specifically promote and protect human rights.⁸ They are thus unlike non-governmental organizations (NGOs) which are largely not for profit, not formed by government and engage in different activities ranging from humanitarian activities to business.⁹ Instead, they have been described as "sitting at the crossroads between government and civil society."¹⁰

⁶ The independence of NHRIs is not straightforward, as they should be held accountable, normally by the legislature and executive. These complexities are further discussed in chapters 4 and 5 dealing with the KNCHR and SAHRC respectively.

⁷ Office of the United Nations Commissioner for Human Rights *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010) 13.

⁸ Commonwealth Secretariat *National Human Rights Institutions Best Practice* (2001) 3. See also discussion on the content and meaning of the Paris Principles in section 2.4 below

⁹ See D Lewis *Non-Governmental Organizations, Definition and History* in HK Anheier & S Toepler (eds) *International Encyclopaedia of Civil Society* (2010) 2. See generally A Clapham "Defining the Role of the Non-Governmental Organizations regarding the UN Human Rights Treaty Bodies" in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21st Century* (2000) 183.

¹⁰ Smith 2006 *Human Rights Quarterly* 908.

Even though their establishment may not be motivated by commitment to promoting human rights,¹¹ the widespread existence of different NHRIs across the globe in diverse legal jurisdictions points to the recognition of their role or potential in promoting and protecting human rights.¹² Former UN Secretary General, Kofi Annan noted that NHRIs “are increasingly being recognized by the international community as mechanisms that are integral to ensuring respect for and effective implementation of international human rights standards at the national level.”¹³ Strong NHRIs and other domestic institutions (free media, strong judiciary, responsible parliament, vocal and active civil society) promote accountability within the state for the benefit of human rights. Additionally, these institutions are thought of as supplementary means, other than domestic treaty ratification, judicial interpretation and the work of the civil society, of bringing international human rights standards closer home.¹⁴ For now, the focus will shift to the history and development of these institutions to understand the evolution of NHRIs and the emergence of the minimum standards of establishment that are likely to influence their effectiveness.

2.3 National human rights institutions in a historical perspective: 1946-1991

The history of NHRIs as we know them today dates back to the 1940s, particularly to 1946, when the Economic and Social Council (ECOSOC) called on governments to form local institutions within the states to assist in furthering the work of the UN Commission of Human Rights.¹⁵ This saw increased interest in the formation of these institutions amongst the then member states of the ECOSOC and the United Nations in general.¹⁶ France created what is considered the first NHRI in the world,

¹¹ See discussion in 4.2 on the establishment of the Standing Committee on Human Rights in Kenya.

¹² At the time of writing, there existed 195 NHRIs in the world. See Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for The Promotion and Protection of Human Rights Accreditation status as of May 2012, [http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NIs%20\(30%20May%202012\).pdf](http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NIs%20(30%20May%202012).pdf) (accessed 28 May 2013).

¹³ Enhancing the Participation of National Human Rights Institutions in the work of the Commission on Human Rights and its Subsidiary Bodies Report of the Secretary-General E/CN.4/2005/107 para 3. See also K Annan *Strengthening of the United Nations: An Agenda for Further Change* Report of the Secretary-General, 9 September 2002 para 50.

¹⁴ JW Koo & FO Ramirez “National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004” (2009) 87 *Social Forces* 1321 at 1322.

¹⁵ Economic and Social Council Resolution 2/9 21 June 1946. See also OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 7.

¹⁶ Economic and Social Council Resolutions 772B (XXX) 25 July 1960. See also JA Mertus *Human Rights Matters: Local Politics and National Human Rights Institutions* (2009) 3; OHCHR *National*

the current French National Advisory Commission for Human Rights (CNCDH) in 1947.¹⁷ It is noteworthy that there have been strong indications that the establishment of these institutions was greatly influenced by the office of the ombudsman, which has its origin in Scandinavia.¹⁸ According to Pohjolainen, states and the Commission for Human Rights (CHR) showed little enthusiasm for the establishment of national institutions to promote and protect human rights at the time because they held the view that the judiciary had been playing the same role of promoting and protecting human rights. This was compounded by the fact that at that time the focus was largely on the establishment of international human rights treaties to avert the violation of human rights after the two world wars.¹⁹

The 1970s were a milestone decade for NHRIs as there was increased acknowledgement of human rights across the world following the adoption of two important human rights instruments, the ICCPR and the ICESCR.²⁰ From 18 to 29 September 1978, the “Seminar on National and Local Institutions for the Promotion and Protection of Human Rights” organised by the CHR, was held in Geneva and draft guidelines for the structure and functions of NHRIs released. The Seminar was important since at the time there was not much understanding of the role these institutions were to play within the domestic legal set up.²¹ The Seminar was part of the commemoration of the 30th anniversary of the Universal Declaration of Human Rights (UDHR) with the CHR, which seemed to have changed its attitude towards NHRIs, repeating its call for states to establish national institutions to promote and protect human rights.²²

Human Rights Institutions History, Principles, Roles and Responsibilities HR/IP/PT/4/Rev.1 (2010) 7.

¹⁷ See G De Beco “National Human Rights Institutions in Europe” (2007) 7 *Human Rights Law Review* 1 at 4.

¹⁸ For more on this, see Cardenas *Chains of Justice: The Rise of State Institutions for Human Rights* (2014) 20-21.

¹⁹ See AE Pohjolainen *Evolution of NHRIs: The Role of the United Nations* (2006) 32-33.

²⁰ See Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 43-44.

²¹ United Nations General Assembly Resolution 33/46 National Institutions for the Protection and Promotion of Human Rights 14 December 1978. See also UN Commission on Human Rights, National institutions in the field of human rights, 8 March 1978, E/CN.4/RES/23(XXXIV) <http://www.refworld.org/docid/3b00f0da2b.html> (accessed 18 April 2013).

²² See UN General Assembly (1977) *A/RES/123(XXXII)*, 16 December 1977, Annex, 1(e) and UN General Assembly (1977) *A/RES/123(XXXII)*, 16 December 1977, Annex, 2(b). See also European Union Agency for Fundamental Rights *National Human Rights Institutions in the EU Member States Strengthening the fundamental rights architecture in the EU I* (2010) 16.

The 1978 guidelines marked an important step in formulating the role and functions of NHRIs as we have come to know them today. At the time, the notion of NHRIs was cast much wider to include the judiciary, legislature, parliament and even NGOs.²³ These guidelines set out, in a rudimentary manner, the roles of NHRIs as understood nowadays. The guidelines did not correspond with the idea that the ECOSOC had in mind in 1946 when it advocated the establishment of such national institutions to transplant international human rights into the domestic sphere. The 1978 guidelines deviated significantly from the ECOSOC conception and recommended that the national institutions be established to promote and protect human rights and to perform certain specific functions at the national level. These functions included acting as the domestic source for human rights; promoting awareness on human rights; advising the government (judiciary, executive and legislature) on human rights matters; to study and review legislation, judicial decisions and their compliance with human rights together with performing any other role delegated by the legislature.²⁴

Despite the endorsement of these guidelines by the UNGA²⁵ and the subsequent issuing of resolutions²⁶ calling for the formation and strengthening of NHRIs, the functions outlined were not elaborated upon at the international level and the details seemed to have been left to the states establishing these institutions. Nevertheless, the UNGA resolutions have been seen as giving impetus to the growth of these across different jurisdictions.²⁷ In 1985, the UNGA directed the UN Secretary General to provide the necessary assistance to member states for the establishment and strengthening of NHRIs.²⁸ The role of assisting states was taken up by the then Centre for Human Rights,²⁹ established under the auspices of the UN advisory

²³ See B Burdekin *National Human Rights Institutions in the Asia Pacific Region* (2005) 6. Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 49.

²⁴ See generally UN Fact Sheet 2.

²⁵ United National General Assembly Resolution 33/46, 14 December 1978, A/RES/33/46.

²⁶ See United Nations General Assembly Resolutions 34/49 of 23 November 1979, 36/134 of 14 December 1981, 38/123 of 16 December 1983 and 39/144 of 14 December 1984,

²⁷ S Cardenas *Sovereignty Transformed? The Role of National Human Rights Institutions* in N Shawki and M. Cox (eds.) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (2009) 30.

²⁸ UN General Assembly Resolution 40/123 of 13 December 1985.

²⁹ The Office of the United Nations High Commissioner for Human Rights and the Centre for Human Rights were consolidated into a single Office of the United Nations High Commissioner for Human Rights on 15 September 1997.

services programme, which offered advisory services for the establishment and strengthening of NHRIs at the domestic level thus concretizing the idea of domestic protection and promotion of human rights.³⁰

These resolutions together with the 1978 Seminar served as a background for the drafting of the Paris Principles. The repeated calls at the international level for the establishment of national institutions in domestic jurisdictions in these resolutions also made sure that the idea of NHRIs remained on the UN agenda.³¹ Several follow-up meetings organised by the United Nations Centre for Human Rights led up to several important workshops in the 1990s.³² Thus, much of the development of NHRIs and human rights was driven at the international level with a few states³³ advocating their formation in other jurisdictions where such did not exist. Those states advocating, at the international level, the establishment of NHRI based their advocacy on their experience of the benefit of an institution outside the arms government in the promotion and protection of human rights.

Some regional efforts led to the diffusion of NHRIs across the globe. For instance, the African Charter on Human and Peoples Rights (ACHPR) adopted on 27 June 1981, called on African States to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present charter.”³⁴ It also called on the African Commission on Human and People’s Rights (African Commission) to encourage the establishment and strengthening of national and local institutions concerned with human and people’s rights.³⁵ The use of word “allow” in the two articles is interesting as it seems to suggest that setting up appropriate national institutions was a matter for others (in this instance NGOs) and not the prerogative or responsibility of the state. In 1982, the Council of Europe and the University of Siena held a seminar on the non-judicial means of protection and promotion of human

³⁰ See Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 54.

³¹ Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 50.

³² United Nations *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) 4. See also UN General Assembly (1979) *A/RES/34/49*, 23 November 1979, para 1

³³ Strong advocates for NHRIs at the UN General Assembly included India, Australia and France.

³⁴ Article 26 African Charter on Human and People’s Rights.

³⁵ See article 45 (1) (a) African Charter on Human and People’s Rights.

rights in Siena, Italy where they recommended the establishment of NHRIs by European states.³⁶ The 1990s was a period that saw further popularisation and acceptance of the concept of NHRIs as necessary institutions for the promotion and protection of human rights in many jurisdictions.

In October 1991, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, organised by the Secretary General of Commission of Human Rights, the French National Consultative Commission on Human Rights and supported by the French government, was held in Paris.³⁷ Led by experts from different parts of the world, and representatives of various NGOs and NHRIs from Australia, Canada, the Philippines and Mexico, the workshop discussed issues to do with the structure, legal mandate and powers of national institutions.³⁸ The calling of this meeting was an acknowledgement of the fact that the existing guidelines were not sufficient to enable the NHRIs that had already been established to work as effectively as expected. It was also done after some of the NHRIs leading the way had gained some experience on how such institutions needed to be structured in order to be effective.³⁹ The workshop's concluding recommendations elevated the role of NHRIs as they clearly identified the role of NHRIs "as the key domestic body which has a general competence to promote and protect human rights."⁴⁰ This was a departure from the 1978 guidelines' view that all national institutions dealing with human rights (for instance, the judiciary, legislature and other commissions, etc.) had the responsibility for the promotion and protection of human rights and implicitly there was no need for setting up a domestic institution to specifically promote and protect human rights. The workshop instead made it clear that NHRIs were to be formed to specifically promote and protect human rights in addition to the already existing mechanisms within local jurisdictions i.e. the judiciary, legislature among others.

³⁶ See Pohjola *National Human Rights Institutions: The Role of the United Nations* 57 – 58.

³⁷ See Report of the Secretary-General E/CN.4/2005/107 para 5. See also Pohjola *National Human Rights Institutions: The Role of the United Nations* 59.

³⁸ See Pohjola *National Human Rights Institutions: The Role of the United Nations* 59. See also E/CN.4/1992/43/Add.1 of 23 January 1992 for a complete list of participants.

³⁹ See *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) para 25

⁴⁰ See Pohjola *National Human Rights Institutions: The Role of the United Nations* 59.

The Paris Principles further developed the idea of NHRIs and their interaction with other institutions (arms of government and NGOs) within the municipal jurisdiction.⁴¹ It would seem that these developments took place amidst a growing realisation that the traditional structures in the domestic jurisdiction were inadequate to realise human rights agreed to in international treaties. Despite several years having passed after the ratification of human rights treaties by states, the human rights situation in many states had not changed for the better; poverty was still a concern, discrimination was prevalent alongside other human rights abuses that these treaties sought to avoid.⁴²

The CHR afterwards endorsed these recommendations in Resolution 1992/54⁴³ through the Economic and Social Council Decision 1992/233 of 20 July 1992. The UNGA adopted the recommendations contained in the report of the International Workshop as the "Principles relating to the status of national institutions." (Commonly referred to as the Paris Principles)⁴⁴ Despite not being legally binding under international law as treaties are, the Paris Principles have now become "the authoritative set of international standards or minimum requirements defining a NHRI."⁴⁵ The endorsement of the Paris Principles by both the Commission on Human Rights and UN General Assembly legitimised the Principles as the normative standard for the establishment and strengthening of NHRIs.⁴⁶ Their wide acceptance

⁴¹ See discussion below on the contents of the Paris Principles in part 2.4.

⁴² This assertion is made based on Vienna Declaration whose preamble recalls...

"... the determination expressed in the Preamble of the Charter of the United Nations to save succeeding generations from the scourge of war, to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, to promote social progress and better standards of life in larger freedom, to practice tolerance and good neighbourliness, and to employ international machinery for the promotion of the economic and social advancement of all peoples.."

⁴³ Commission on Human Rights Resolution 1992/54.

⁴⁴ General Assembly Resolution 48/134 of 20 December 1993. These Principles are commonly known as the 'Paris Principles' due to the location of the meeting.

⁴⁵ S Cardenas *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* 29. See also Koo & Ramirez 2009 *Social Forces* 1326; ICHRP *Performance and Legitimacy: National Human Rights Institutions* 2nd edition (2004) 1.

⁴⁶ M Brodie "Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights" 2011 (80) *Nordic Journal of International Law* 143 at 151.

as the minimum standard for the establishment of NHRIs has accorded the Principles soft law⁴⁷ status.⁴⁸

Additional regional meetings (Africa in November 1992⁴⁹, Latin America in January 1993, Asia in March/April 1993 and the Commonwealth workshop on NHRIs in 1992) and conferences organised by the Commission on Human Rights⁵⁰ were held after the Paris Conference as part of preparations for the Vienna World Conference of Human Rights.⁵¹ These meetings afforded existing NHRIs an opportunity to share ideas and work together in strengthening and popularising these institutions in the different regions.⁵² At the same time, the Commission on Human Rights through the Preparatory Committee for the World Conference on Human Rights⁵³ focused on ways and means to encourage the establishment and strengthening of NHRIs compliant with the Paris Principles.⁵⁴

The 1993 United Nations Conference on Human Rights in Vienna was an important event for international human rights protection and promotion, and catapulted NHRIs into the limelight with several states establishing these institutions for various reasons. One of the reasons at the time was as part of democratic reforms that swept across the globe at the time (as the case of South Africa, Uganda and Ghana). Another reason was as part of peace agreements in which the establishment of such a body was included and lastly, in some instances as part of

⁴⁷ Soft law refers to those international standards set by diplomatic conferences or resolutions of the UN and other international organisations that although intended to guide the conduct of states, do not enjoy the status of law and are not legally enforceable. See generally J Dugard *International Law: A South African Perspective* (2011) 33; D Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000).

⁴⁸ See L Lindholt "National Human Rights Institutions as Independent Actors in Relation to Economic, Social and Cultural Rights" in E Brems, G de Beco & W Vandenhole (eds) *National Human Rights Institutions and Economic, Social and Cultural Rights* (2013) 44. Pohjolainen *National Human Rights Institutions: The Role of the United Nations* 9.

⁴⁹ See Report of the Regional Meeting for Africa of the World Conference on Human Rights Tunis, 2-6 November 1992 A/CONF.157/AFRM/14 A/CONF.157/PC/57.

⁵⁰ See United Nations General Assembly National Institutions for the Promotion and Protection of Human Rights A/RES/48/134 20 December 1993.

⁵¹ UN Fact Sheet 19 National Institutions for the Promotion and Protection of Human Rights.

⁵² OHCHR *National Human Rights Institutions: A Handbook on their Establishment* para 29. See also National institutions for the Promotion and Protection of Human Rights; Report of the Secretary-General A/50/452 para 5.

⁵³ Established by the UNGA see World Conference on Human Rights GA Res. 45/155 of 18 December 1990 para 2.

⁵⁴ See Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 61-63.

efforts to convince the international community that the country was committed to reforms (the case in Nigeria and Kenya).⁵⁵ In all the above instances, the UN was willing to help whenever it was called upon despite the motivation behind the establishment of these NHRIs.

The Vienna Conference has been referred to as a “turning point for human rights governance” at the international level, as it stressed the importance of human rights in guaranteeing the well-being of humanity.⁵⁶ Nowosad has aptly described the resultant Vienna Declaration and Programme of Action adopted at the Conference as being important for “the establishment and strengthening of national human rights institutions....”⁵⁷ At the Conference there was widespread consensus that NHRIs were crucial for the promotion and protection of human rights in the domestic sphere.⁵⁸ In fact, in the resultant Vienna Declaration and Programme of Action adopted by consensus, the 171 delegates at the Conference agreed that there was need for states to establish and strengthen NHRIs. It thus proclaimed its support for the establishment and where appropriate, the strengthening of NHRIs using the Paris Principles as follows:⁵⁹

The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights. The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework that is best suited to its particular needs at the national level.

⁵⁵ C Idike “Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus” (2004) 1 *Essex Human Rights Review* 40 at 46

⁵⁶ See Cardenas *Sovereignty Transformed? The Role of National Human Rights Institutions* 29. The 1990s period has also been referred to as the “the age of national human rights institutions” in OC Okafor and SC Agbakwa “On Legalism, Popular Agency and “Voices of Suffering”: The Nigerian National Human Rights Commission” (2002) 24 *Human Rights Quarterly* 662 at 664.

⁵⁷ O Nowosad “National Institutions and the Protection of Economic, Social and Cultural Rights” in BG Ramcharan (ed) *The Protection Role of National Human Rights Institutions* (2005) 179.

⁵⁸ Mertus *Human Rights Matters: Local Politics and National Human Rights Institutions* 4; S Cardenas “Emerging Global Actions: The UN and National Human Rights Institutions” (2003) 9 *Global Governance* 35.

⁵⁹ Vienna Declaration Part and Programme of Action part I para 36.

Moreover, the Vienna Declaration unanimously reaffirmed the principle of universality, indivisibility, interdependence and interrelatedness of human rights.⁶⁰ This re-affirmation needed to occur in practice given the fact that most states focussed on CPRs at the expense of SERS thus curtailing the overall enjoyment of human rights. This is an important factor when it comes to the work of NHRIs, as they are to promote and protect all human rights equally without the traditional distinction between CPRs on the one hand and SERs on the other hand. In my view, more efforts should be made to promote SERs as they are equally important. The Declaration further contributed to a framework conducive to the establishment and strengthening of NHRIs; it called upon the UNGA to consider the establishment of the Office of the High Commissioner for Human Rights.⁶¹ The declaration also appealed to governments and other institutions to devote sufficient resources to NHRIs.⁶² It also urged the UN to strengthen its efforts to support states wishing to establish NHRIs,⁶³ while encouraging the existing NHRIs to cooperate with each other and to exchange experiences bilaterally, through regional arrangements and the UN.⁶⁴ Subsequently, the UN, through the OHCHR, spearheaded the formation of NHRIs internationally through different means ranging from “standard setting, capacity building, network facilitating, and membership granting.”⁶⁵

It is true that “the diffusion of NHRIs would not have been possible without the active support provided by ... the UN.”⁶⁶ For instance, in 1995 Professor Brian Burdekin (the first head of the Australian Human Rights Commission) was appointed the special adviser on NHRIs by United Nations High Commissioner for Human Rights to offer specialist advice on matters to do with these institutions.⁶⁷ Burdekin’s positive contribution to the spread of NHRIs in the globe has been acknowledged as notable while at the same time anecdotal accounts exist of how his reputed domineering

⁶⁰ Vienna Declaration Part and Programme of Action part I para 5.

⁶¹ Vienna Declaration and Programme of Action part II, para 18.

⁶² Vienna Declaration and Programme of Action part II, para 74.

⁶³ Vienna Declaration and Programme of Action part II, para 84.

⁶⁴ Vienna Declaration and Programme of Action part II paras 85-86.

⁶⁵ S Cardenas “Emerging Global Actors: The United Nations and National Human Rights Institutions” (2003) 9 *Global Governance* 23 at 24. See also Cardenas *Sovereignty Transformed? The Role of National Human Rights Institutions* 32.

⁶⁶ Cardenas 2003 *Global Governance* 28.

⁶⁷ Mertus *Human Rights Matters: Local Politics and National Human Rights Institutions* 137.

character influenced the establishment of some NHRIs.⁶⁸ During his tenure in office, Burdekin was closely involved in advising several governments in the establishment and strengthening of several NHRIs in the world, including the KNCHR in 2002.⁶⁹

The UN has thus been at the centre stage of the formation of many NHRIs in different jurisdictions by extending assistance in different forms.⁷⁰ Because of the UNs efforts, NHRIs over time have arranged themselves in regional networks to assist in the co-ordination and collaboration activities.⁷¹ The following regional chapters of NHRIs exist: in Africa - Network of African National Human Rights Institutions (NANHRI—established in 2007); in Europe – the European Group of NHRIs; in the Americas - Network of National Institutions for the Promotion and Protection of Human Rights in the Americas (created in 2000); and in the Asia Pacific region – the Asia Pacific Forum (APF established in 1997).⁷² Additionally, the UN has supported through sponsorship and co-ordination, regular meetings and conferences of these institutions.⁷³ These networks of NHRIs have established themselves as new actors in human rights politics, because of their influence in state transitions processes, democratization and the domestication of international human right standards.⁷⁴

A second international workshop for NHRIs, held in Tunis from 13-17 December 1993, decided on the creation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) that

⁶⁸ See P Rosenblum “Tainted Origins and Uncertain Outcomes: Evaluating NHRIs” in R Goodman & T Pegrarn (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2011) 303-304.

⁶⁹ See comments of former Attorney General Amos Wako during the parliamentary debate on the KNCHR Bill 2002

⁷⁰ Cardenas 2003 *Global Governance* 24; Murray *The Role of National Human Rights Institutions at the International and Regional Levels* 27.

⁷¹ See United General Assembly Resolution 63/172 National Institutions for the Promotion and Protection of Human Rights A/RES/172 para 20.

⁷² See OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010) 5- 6 for a discussion of Regional NHRI networks.

⁷³ See OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 8 for the different meetings and conferences supported by the United Nations.

⁷⁴ See N Shawki “A New Actor in Human Rights Politics? Trans governmental Networks of National Human Rights Institutions” in N Shawki & M Cox (eds) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (2009) 41; S Cardenas “Adaptive States: The Proliferation of National Human Rights Institutions” *Carr Center for Human Rights Policy Working Paper T-01-04* “National Human Rights Institutions” 6.

can best be described as the international association of NHRIs from all parts of the world.⁷⁵ ICC operations are managed by its Bureau, which is comprised of representatives from each of the four regional groupings: Africa, Americas, Europe and the Asia Pacific. Chief amongst its duties are the coordinating of NHRIs at the international level; accreditation of NHRIs through the Sub-Committee on Accreditation (SCA) of the (ICC);⁷⁶ organisation of international conferences; assisting regional networks of NHRIs. Accreditation of NHRIs by the SCA is a process that assesses members' compliance with the Paris Principles. The SCA has the "mandate to review and analyse accreditation applications and to make recommendations to ICC Bureau members on the compliance of applicants with the Paris Principles."⁷⁷ NHRIs are accredited as follows depending on their level of compliance with the Paris Principles: 'A' status—fully compliant and 'B' status partially compliant. Membership is open to all NHRIs across the globe but voting rights and governance positions are reserved for 'A' status NHRIs.

Accreditation is important as it allows NHRIs a seat at the table of important UN bodies. Participation by NHRIs in the UN Human Rights Council (HRC) and to other relevant treaty bodies is reserved for NHRIs with 'A' ratings.⁷⁸ Further, four elected representatives from 'A status' NHRIs represent each regional grouping in the ICC Bureau. Attending sessions of the HRC provides opportunities for meaningful engagement and follow up on human rights issues on the international level, which can then be transmitted, to the domestic sphere. NHRIs present at such meetings can take the states to task on measures undertaken to address issues raised during review. For instance, the Australian Human Rights Commission has constantly questioned its government's commitment to human rights after the first UPR cycle of

⁷⁵ See Commission on Human Rights, *Report of the 2nd International Workshop on National Institutions for the Promotion and Protection of Human Rights*, Tunis, 13–17 December 1993, 23 December 1993, E/CN.4/1994/45 paras 60 – 64 for discussions on the establishment of the ICC. As of April 2016, the ICC's name was changed to the Global Alliance of National Human Rights Institutions (GANHRI).

⁷⁶ See Commission on Human Rights Resolution 2005/74.

⁷⁷ The SCA's membership consists of one "A status" accredited NHRI for each of the four regional groupings; namely Africa, the Americas, the Asia Pacific, and Europe and the OHCHR as a permanent observer and in its capacity as ICC secretariat. See Accreditation of NHRIs <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (accessed 23 May 2013).

⁷⁸ See Human Rights Council Resolution 16/21 Review of the work and functioning of the Human Rights Council A/HRC/RES/16/21 granting certain roles to NHRIs in the review of the UPR process.

Australia at the UN.⁷⁹ Given the fact that it is a peer review exercise, the rating given to NHRIs can also be an indicator of what kind of expectations to have of these institutions. Those with an A rating should be held to high standards of accountability and expected to be functioning optimally with due consideration to the realities within its domestic jurisdiction.⁸⁰

Whereas much of the push for the establishment of NHRIs was spearheaded globally, it has not been limited to that level. On the African front, the African Charter on Human and Peoples Rights (ACHPR) also recognised the role of these institutions in making the provisions of the ACHPR a reality on the continent. To this end, article 26 of the Charter provides that

"States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall *allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*"

Additionally, convinced of the importance these institutions could play in creating public awareness of human rights in Africa, NHRIs with A status were granted observer status at the African Commission.⁸¹ Among the aims of the AU Resolution granting observer status to NHRIs on the continent was so that they would help the African Commission in promoting and protecting human rights.⁸² On their own, African NHRIs at the first conference of national human rights institutions in Africa held in Yaoundé, Cameroon in 1996 adopted the Yaoundé Declaration, which recommended the creation of new NHRIS in Africa.⁸³

⁷⁹ Australia Human Rights Commission Taking stock of Australia's human rights record – Submission by the Australian Human Rights Commission under the Universal Periodic Review process (2010) <https://www.humanrights.gov.au/taking-stock-australia-s-human-rights-record-submission-australian-human-rights-commission-under> (accessed 30 March 2016).

⁸⁰ See discussion in 2.5 below on the relevance of the Paris Principles and the accreditation process.

⁸¹ Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa 24th Ordinary Session from 22nd to 31st October 1998, in Banjul, The Gambia. <http://www.achpr.org/sessions/24th/resolutions/31/> (accessed 10 November 2013).

⁸² Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa para 4 (d).

⁸³ First African Conference of National Institutions for the Promotion and Protection of Human Rights Yaoundé Declaration 1996 <http://nhri.ohchr.org/EN/Regional/Africa/Documents/THE%20YAOUNDE%20DECLARATION.pdf> (accessed 10 November 2013).

Several other actors have played a role in the proliferation and understanding of NHRIs in Africa and the world. International non-state actors, such as Amnesty International (AI) and Human Rights Watch (HRW), have made efforts to incorporate promote the establishment of NHRIs.⁸⁴ The Bretton Woods institutions (the World Bank and the International Monetary Fund) that have played a key role in the economic restructuring of states through advancement of loans have also had an influence in the strengthening of rights-focused ombudsman institutions as a means of promoting good governance while pursuing economic development such as the Jordan Ombudsman Bureau.⁸⁵ Thus, the period after the Vienna Conference saw a proliferation of NHRIs, with varied compliance with the Paris Principles, across the African continent.⁸⁶ To comprehend the utility of the Paris Principles as standard setting guidelines for the establishment of NHRIs, the discussion will now focus on the content of these Principles.

2.4 Principles relating to the status of national institutions - The Paris Principles

The Paris Principles are widely accepted and used to guide the establishment and strengthening of NHRIs.⁸⁷ At the outset, it is important to highlight what role the Paris Principles play in the greater scheme of the effectiveness of NHRIs. According to Sidoti, the Paris Principles are an evaluating instrument that looks at the structural conformation of an NHRI with the provisions of the Paris Principles. The effectiveness of an NHRI should be assessed on a case-by-case basis based on the execution of its mandate.⁸⁸ Nonetheless, in line with the Paris Principles the following

⁸⁴ See Amnesty International, *NHRIs: Recommendations for Effective Protection and Promotion of Human Rights*, (2001); See also Human Rights Watch [HRW], *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001).

⁸⁵ The World Bank Governance and Public-Sector Management, Ombudsman Institutions <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0,,contentMDK:23543136~pagePK:148956~piPK:216618~theSitePK:286305,00.html> (accessed 21 November 2016). See P Uvin 'On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise' (2002) XVII *The Fletcher Journal of Development Studies* 1 at 3.

⁸⁶ As of November 2015, there were 23 NHRIs on the African Continent.

⁸⁷ See R Goodman and T Pegram "Introduction: National Human Rights Institutions, State Conformity and Social Change" in R Goodman and T Pegram (eds) *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (2012) 9. See discussion below on the relevance of Paris Principles at 2.5.

⁸⁸ See C Sidoti "National Human Rights Institutions and the International Human Rights System" in R Goodman and T Pegram (eds.) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2012) 97.

four broad issues are considered essential for the effective functioning of NHRIs; competence and responsibilities; composition and guarantees of independence and pluralism; methods of operation; and, where applicable, the ability to receive and act upon complaints.⁸⁹

2.4.1 Competence and responsibility

The Paris Principles require an NHRI to be vested with competence to promote and protect human rights. Closely linked with this competence is the requirement that these institutions be given “as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.”⁹⁰ What this means is that an NHRI should be given a clear mandate to promote and protect human rights, codified in text. Constitutional entrenchment is the most desirable means of formation, as constitutions by their very nature are not easy to amend. This is the case with the KNCHR and SAHRC, which are entrenched in the Kenyan⁹¹ and South African⁹² Constitutions respectively. The elaborate procedure for amending constitutions serves to promote independence in instances where NHRIs in performing their functions agitate the government, as these cannot be amended easily.⁹³ The second preferred way of creation of NHRIs is by means of legislation, which requires a set procedure for amendments.⁹⁴ However, a simple majority can amend legislation and this makes it less certain compared to constitutional entrenchment. Institutions formed by executive decrees or orders do not qualify as NHRIs according to the Sub Committee on Accreditation (SCA), as this does not sufficiently ensure permanency and independence.⁹⁵ It is desirable to have

⁸⁹ Murray *The Role of National Human Rights Institutions at the International and Regional Levels: The Experiences of Africa* 4.

⁹⁰ Principles relating to the status of national institutions: Competence and responsibilities para 2. See also B Lindsnaes, L Lindholt & K Yigen (eds) *National Human Rights Institutions Articles and working papers* (2000) 14. K Hossain (ed) *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (2000) 3.

⁹¹ Article 59 of the Constitution of Kenya 2010.

⁹² Section 181 of the Constitution of the Republic of South Africa, 1996.

⁹³ See OHCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 32.

⁹⁴ See Lindsnaes *National Human Rights Institutions* 14–15; Committee on the Rights of the Child, General Comment 2 (2002) *The Role of Independent Human Rights Institutions in the Promoting and Protection of the Rights of the Child* para 8.

⁹⁵ SCA General Observations para 1.1 12. According to SCA, “This is because instruments of the Executive may be modified or cancelled at the whim of the Executive, and such decisions do not require legislative scrutiny.”

a constitutional base supported by legislative text that clearly sets out the broad mandate together with other details desired by the Paris Principles.⁹⁶

The role of promoting and protecting human rights requires an institution with a broad mandate to carry out its mandate. At the same time, the mandate should be defined clearly to avoid overlaps, duplications and conflict with other domestic institutions that might have human rights specific human rights mandates such as equality and cultural rights. The Paris Principles go on to suggest some of the functions that should be given to NHRIs in the founding legislation or constitutional text. They should assist in formulating programmes “for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles.”⁹⁷ Human rights education is integral to any NHRI’s mandate as it allows for the spread of knowledge on human rights in the local jurisdiction. Human rights education translates into increased institutional and individual awareness of human rights entitlements and duties. Closely linked to this is the role of publicizing human rights within the State and its citizenry particularly issues to do with discrimination while taking advantage of the different audiences reached by the press.⁹⁸

Additionally, the Paris Principles anticipate that NHRIs will ensure harmony between national laws and practices on the one hand, with international human rights instruments and standards on the other, by suggesting law reforms where necessary and commenting on different legislative drafts.⁹⁹ This is to ensure effective domestic implementation of human rights treaty obligations of the State. Closely linked to this responsibility is the role of encouraging ratification of international treaties where they have not been ratified by the State or where applicable accession to the same instruments. This role has led to the UN and its treaty monitoring bodies to view NHRIs as a link between international human rights law and its domestication within the local jurisdiction. For instance, the HRC¹⁰⁰ and the Universal Periodic Review

⁹⁶ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 32.

⁹⁷ Paris Principles Competence and Responsibility para 1(d).

⁹⁸ Paris Principles Competence and Responsibility.

⁹⁹ Paris Principles Competence and Responsibilities para 3(b).

¹⁰⁰ See Articles 5(h) and 11 United Nations General Assembly Resolution 60/251, 3 April 2006. See also ICC Sub-Committee on Accreditation General Observations 2013 16-18.

Mechanism (UPR)¹⁰¹ view NHRIs as an essential element in monitoring the fulfilment of human rights obligations.

NHRIs are also to play a role in the treaty monitoring process by contributing to state reports submitted to UN treaty bodies and regional bodies.¹⁰² This guideline has in some instances led to the belief among states that NHRIs are to report favourably on the progress made in meeting treaty obligations or in other instances that NHRIs are responsible for compiling such reports on behalf of the state. The proper view, backed by NHRI best practice, is for NHRIs to submit independently researched alternative reports assessing states' human rights progress.¹⁰³ Furthermore, NHRIs should cooperate with the UN and its organs, regional institutions and other NHRIs in their quest to promote and protect human rights. Such cooperation is necessary given the universal nature of human rights and acquisition of best practices from fellow NHRIs. Co-operation amongst NHRIs and the UN has been greatly emphasised in the quest to make human rights a reality for all.¹⁰⁴ Co-operation has taken the form of the UN and its agencies providing training to NHRIs on how to promote, protect and monitor human rights, which aims at increasing state's respect of their human rights obligations. This co-operation has also seen the representation and participation of NHRIs in HRC sessions where they have made written and oral submissions while being able to follow important discussions and lobby for change or support in certain human rights matters.¹⁰⁵

Although the Paris Principles provide guidance on the functions and responsibilities of NHRIs, it is up to the founding authority (in most instances this would be the legislature which debates the powers and functions of the NHRI or in the case of executive decree, the executive) to determine what kind of functions and

¹⁰¹ See Article 3(m) and 15(c) Human Rights Council Resolution 5/1, 18 June 2007, Annex.

¹⁰² See Paris Principles Competence and Responsibilities para 3 (d).

¹⁰³ See OHCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 109; ICHR *Assessing the Effectiveness of National Human Rights Institutions* 19; M Kjaerum "State Reports" in A Gudmundur, J Grimheden & BG Ramcharan (eds) et al *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller* (2009) 22-23.

¹⁰⁴ See UN General Assembly Resolution 63/169 The Role of the Ombudsman, Mediator and other National Human Rights institutions in the Promotion and Protection of Human Rights A/RES/63/169.

¹⁰⁵ For participation of NHRIs in the Human Right Council Sessions, see Engagement with the United Nations Human Rights Council <http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/Pages/Human-Rights-Council.aspx> (accessed 16 August 2016).

responsibilities an NHRI must have. Perhaps being aware of the latitude states enjoy in establishing NHRIs, the drafters of the Paris Principles strove to make the section on competence and responsibility as comprehensive as possible¹⁰⁶ with the core being the promotion and protection of human rights, which can be achieved in different ways. This has had the effect of giving the founding authorities of NHRIs sufficient scope to establish institutions that are reflective of the “socio-legal and political circumstances, and to include those functions that they deem appropriate.”¹⁰⁷ It should also be read together with the Vienna Declaration and Programme of Action’s recommendation that it is up to the country to decide what kind of NHRI (i.e. human rights commission, human rights ombudsman or a hybrid human rights institute with both characteristics of an ombudsman and human rights commission) they are to have within their jurisdiction.¹⁰⁸ Existing examples of NHRIs have shown that they can be empowered to perform any number of functions/responsibilities as the situation dictates.¹⁰⁹ This is the case with the quasi-judicial competence of NHRIs discussed further below.

What is important is that an NHRI must have what the UN has referred to as a “defined jurisdiction and adequate powers”¹¹⁰ captured in legislative text or the constitution. The need for a defined jurisdiction is because of the overlapping nature of some of the functions carried out by an NHRI, which are/can be carried out by other institutions including the judiciary. It is therefore important that an NHRI’s jurisdiction and powers be clearly defined preferably in legislation with the NHRI having a clearly defined subject matter jurisdiction, of promoting and protecting human rights, to avoid conflicts with other institutions. This clear delineation of powers and jurisdiction is more important in jurisdictions that have an NHRI and other specialised institutions to deal with specific rights and maladministration (such

¹⁰⁶ See C Sidoti *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* 96.

¹⁰⁷ C Raj Kumar “National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights” (2003 – 2004) 19 *American University International Law Review* 259 at 271; See also Pohjolainen *Evolutions of NHRIs: The Role of the United Nations* 7.

¹⁰⁸ Vienna Declaration and Programme of Action Part I para 36.

¹⁰⁹ See functions of NHRIs in South Africa, Ghana, Uganda and Kenya as examples of the different mandates assigned to NHRIs. See also discussion on the different types of NHRIs in section 2.7 below.

¹¹⁰ *UN Handbook on the Establishment of NHRIs* para 86.

as an ombudsman).¹¹¹ This is the case with Kenya¹¹² and South Africa¹¹³ that have a number of institutions with overlapping human rights mandates but the ICC SCA only recognises the KNCHR and SAHRC as NHRIs in terms of the Paris Principles.¹¹⁴ These two institutions have broad mandates and are empowered to promote and protect human rights in their respective jurisdictions that have constitutions with the entire corpus of human rights i.e. CPRs and SERs.

2.4.2 Composition and guarantees of independence and pluralism

The independence of NHRIs is central to the effective execution of its respective mandates to promote and protect human rights with their domestic jurisdiction given the fact that they have to stand up to government and powerful business interests. The UNGA has several times stressed the importance of independence of NHRIs through its General Resolutions.¹¹⁵ Among NHRIs, pluralism has been accepted to mean that there should be diversity (in terms of educational qualification, experience and representativeness of the society taking into account ethnicity, gender and regional balance among others) in the composition of the NHRIs leadership and employees.¹¹⁶ The SCA in giving meaning to the requirement for pluralism has linked it to the, credibility, effectiveness and accessibility of an NHRI.¹¹⁷ These aspects should be judged based on the founding law of the NHRI, the work done by the NHRI and the perception of the NHRI within its jurisdiction.

As far as pluralism is concerned, the Paris Principles recommend that:¹¹⁸

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...

¹¹¹ See *UN Handbook on the Establishment of NHRIs* paras 86 – 94.

¹¹² The NGEC and CAJ.

¹¹³ The Public Protector and The Commission for Gender Equality.

¹¹⁴ Discussion on the overlapping mandate of the KNCHR and SAHRC undertaken in chapters 4 and 5 respectively.

¹¹⁵ The following UN General Assembly Resolutions 54/176 of 17 December 1999; 52/128 of 12 December 1997 and 50/176 of 22 December 1995.

¹¹⁶ See SCA General Observations 20.

¹¹⁷ SCA General Observations 20-21.

¹¹⁸ See Paris Principles Composition and guarantees of independence and pluralism.

The call for pluralism does not mean that NHRIs should be bloated in a bid to accommodate everyone. In practice, this should be a careful balancing exercise meant to achieve representativeness, legitimacy and effectiveness. The composition of NHRIs staff should also be representative and not only the leadership. This would enable a wider consideration of human rights issues that would be ignored if there were no pluralism. Considerations such as having people from different ethnicities, persons with disabilities and special interests among others are things to consider in the appointment of NHRIs leadership and hiring of staff.¹¹⁹

Given the fact that NHRIs are established through the constitution or legislation, it follows that such institutions must be held accountable in terms of the founding laws/authority. As such, the independence called for in these institutions is qualified and does not apply to all aspects of NHRIs performance/existence. In fact, the UN has argued that the independence of NHRIs should be viewed contextually.¹²⁰ NHRIs independence cannot be absolute and in most instances, they should be held accountable by the legislature, as the people's representatives and because they derive their mandate through the constitution or legislation. Moreover, the funding of NHRIs should be approved by the legislature and released by the executive, thus making the notion of independence a controversial one.¹²¹ Despite its relative and at times controversial nature, the independence of NHRIS can be determined in several ways as discussed below.

Independence through legal and operational autonomy: Ideally, an NHRI should be a separate legal entity free of any interference from the government or private sector. Accordingly, it should be able to own property and have all that it requires to operate independently.¹²² Operationally, an NHRI should be able to conduct its day-to-day affairs having set down its own procedure without outside influence from any other source.¹²³

¹¹⁹ SCA General Observations para 1.7 26-27.

¹²⁰ See *UN Handbook on the Establishment of NHRIs* para 69.

¹²¹ See J Matshegka "Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence" (2002) 2 *African Human Rights Law Journal* 68 at 71.

¹²² See *UN Handbook on the Establishment of NHRIs* para 70; OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 40.

¹²³ See *UN Handbook on the Establishment of NHRIs* para 71.

Independence through financial autonomy: There is a strong link between an NHRI's independence and its financial autonomy. Therefore, in terms of the Paris Principles and established practice, NHRIs should have sufficient funds to carry out their mandates efficiently. According to the Paris Principles:

The national institution shall have an 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.¹²⁴

Funds allocated to NHRIs should enable them to hire and retain qualified individuals, acquire necessary assets and services for effective day-to-day running. Moreover, the sources of funding for NHRIs should be stated clearly in the founding legislation or constitution to avoid confusion over funding.¹²⁵ Because in most instances budget approvals are done in parliament, NHRIs should also be afforded an opportunity to appear before parliament to present their budgets before approval. The funding should take into consideration the cost of inflation and as such be adequate ensure the gradual and progressive realisation of the improvement of the NHRIs operations and the fulfilment of its mandate.¹²⁶

Independence through appointment and dismissal procedures: The appointment and dismissal procedures of NHRI members should be provided for in the founding legislation or formalized as regulations or binding administrative guidelines.¹²⁷ Such procedures should state the minimum qualifications of the members, the method of their appointment, duration of such appointments, dismissal procedures and the attendant privileges and immunities such members would enjoy in executing their mandate. When it comes to qualifications, members of NHRIs should have knowledge and experience in the field of human rights that can be proved. Moreover, when appointed to serve, they should serve for a reasonable period that would allow them to make a meaningful contribution towards the fulfilment of the NHRIs mandate. In practice, such a term should be for a minimum of five years. In addition, the dismissal procedure should be specified, with dismissal only occurring after

¹²⁴ Paris Principles Section B (2).

¹²⁵ See *UN Handbook on the Establishment of NHRIs* paras 73–78; OHCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 40–41.

¹²⁶ SCA General Observations 2013 para 1.10 34.

¹²⁷ SCA General Observations 2013 para 1.8 29.

serious breaches have occurred that are likely to impact adversely on the capacity of the member to fulfil their mandate. An example of such breaches would be gross misconduct, or unsuitability to hold office.¹²⁸ Such processes should be transparent and devoid of influence that would hamper the proper functioning of NHRIs.¹²⁹ The independence of the members of an NHRI is very important as it is they who lead the institution in claiming other forms of independence already mentioned above which are crucial to the proper functioning of any NHRI.¹³⁰

Independence through composition: The composition of a NHRI's leadership and staff is likely to promote the institution's independence if it is diverse.¹³¹ This is because diversity in the leadership and staff of the NHRI would allow for representation of different stakeholders, from areas such as academia, the civil society and government in such an institution.¹³² This diverse composition would allow for collective decision making that is unlikely to be unduly influenced, for the benefit of the NHRI's programmes. This would be in line with the Paris Principles, which calls for the NHRIs composition to "ensure the pluralist representation of social forces."¹³³ As such, the leadership of NHRIs should be reflective of the society in which they operate to promote its legitimacy. Moreover, a pluralistic NHRI is likely to be understanding to the diverse needs of the different segments in society such as children, people with disabilities, women and minority groups.¹³⁴ It is contended that pluralism in the leadership and staff composition of NHRIs in deeply divided societies is likely to increase the public legitimacy of NHRIs if they are seen to belong to all citizens in the country. Realistically speaking it would not be possible to have all of society represented in an NHRI as it would lead to having large, expensive and unsustainable institutions.¹³⁵

¹²⁸ These are the grounds for removal of a Commissioner in the KNCHR. The grounds are contained in article 251 (1) of the Constitution.

¹²⁹ SCA General Observations para 2.2.

¹³⁰ See *UN Handbook on the Establishment of NHRIs* paras 77–81.

¹³¹ See *UN Handbook on the Establishment of NHRIs* para 82. See also Paris Principles, 'composition and guarantees of independence and pluralism', 1 and 3.

¹³² See Pohjola *Evolution of NHRIs: The Role of the United Nations 7*.

¹³³ Paris Principles, 'composition and guarantees of independence and pluralism', 1 and 3.

¹³⁴ SCA General Observations para 1.7 26-27.

¹³⁵ See discussion in chapter 4 on how the KNCHR Act and Constitution deal with the issue of inclusion.

Independence through privileges and immunity: The push for recognition for this form of independence amongst NHRIs is recent and has come about because of NHRIs practice. This is because the issue of immunity is not provided for in the Paris Principles but has been recommended by the SCA as one of the practices that directly promote compliance with the Principles.¹³⁶ Granting immunity to members of NHRIs is recognition of the fact that some arm of government or party might be disgruntled with the work of NHRIs and its members. It is thus imperative that immunities and privileges (legal in nature i.e. immunity from prosecution or dismissal; immunity from search, seizure, requisition, confiscation or any other form of interference in their archives, files, documents, communications, property, funds and assets of the office or in their possession) be accorded to members of NHRIs in execution of their duties.¹³⁷ Through immunity and such privileges, members of NHRIs are likely to carry out their functions without fear, favour or prejudice. Such immunity and privilege should only be related to the work carried out by the NHRIs and this should be capable of being objectively identified.

2.4.3 Methods of operation

The Paris Principles envisage different ways in which an NHRI may work in promoting and protecting human rights. Essentially, it foresees an institution capable of conducting inquiries on matters dealing with human rights. Such inquiries may be initiated by the NHRI on its own or because of a complaint or direction from an interested party.¹³⁸ Since the protection and promotion of human rights involves different stakeholders, the Paris Principles foresees the need for co-operation within the local jurisdiction (this would include the judiciary, executive, legislature, business and the civil society) and on the international plane (fellow NHRIs and the UN together with its agencies) in efforts to promote and protect human rights.¹³⁹ Cooperation is one of the ways NHRIs can fulfil their mandates. Accordingly, the Paris Principles recommend that they “maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of

¹³⁶ See SCA General Observations para 2.3 44.

¹³⁷ See SCA General Observations para 2.3 44. See also OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 42.

¹³⁸ Paris Principles A/RES/48/134 6 (a).

¹³⁹ Paris Principles A/RES/48/134 6. Pohjolainen *Evolution of NHRIs: The Role of the United Nations* 7-8.

human rights (in particular ombudsmen, mediators and similar institutions)".¹⁴⁰ In addition, NHRIs are to "develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas"¹⁴¹

Co-operation with stakeholders (those directly connected to the fulfilment of human rights such as the three arms of government, NGOs and business) within the local jurisdiction is significant especially in ensuring the rule of law and administration of justice, which are necessary for the promotion and protection of human rights. The importance of NHRIs cooperating with other participants is heightened, when we consider that these institutions do not always have powers to enforce human rights, but function more based on persuasion and advising.¹⁴² A working relationship with the judiciary is essential because of the vital role of interpreting and applying human rights standards this institution plays within the State and by extension in the development of a strong national human rights system.¹⁴³ The basis of cooperation between NHRIs and the judiciary should be the law coupled with the mutual goal to protect human rights while respecting each other's independence. Thus, the law should ideally provide the right of appearance to NHRIs and leave room for the courts to accord NHRIs friend of court status or where necessary to be joined in litigation matters.¹⁴⁴

Co-operation can take many forms depending on the stakeholder the NHRI is dealing with. This may include conducting public awareness programmes, training and litigation among others.¹⁴⁵ Co-operation on the international plane is equally important especially with the UN and fellow NHRIs in activities such as information

¹⁴⁰ See Paris Principles Methods of Operation (f).

¹⁴¹ See Paris Principles Methods of Operation (g).

¹⁴² LC Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 1 at 19.

¹⁴³ See Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21-24 October 2008, The Nairobi Declaration para 17. <http://www.ohchr.org/Documents/Countries/NairobiDeclarationEn.pdf> (accessed 9 June 2013).

¹⁴⁴ Commonwealth Secretariat *National Human Rights Institutions: Best Practice* (2001) 29-30.

¹⁴⁵ See discussion in chapters 4 and 5 on how the KNCHR and SAHRC have had collaborative efforts with NGOs and other stakeholders.

exchange, submitting reports to UN treaty bodies and or speaking at UN forums. Further, NHRIs should be able to address public opinion to sensitize through different mediums the public, civil society, government and business on human rights.¹⁴⁶

2.4.4 Quasi-judicial powers

The Paris Principles provide for quasi-judicial competence of an NHRI as an “additional principle.”¹⁴⁷ The notion of quasi-judicial powers refers to NHRIs being empowered to investigate matters with some powers of courts such as to summon individuals to appear, production of evidence and give appropriate recommendations on what should or should not be done.¹⁴⁸ Because they are not the same as courts, NHRIs mostly, only issue recommendations and not binding decisions. Where NHRIs have quasi-judicial competence they can “assist human rights victims in seeking legal redress, refer human rights cases to national tribunals, and contribute to the overall development of human rights jurisprudence.”¹⁴⁹ The advantages here are that processes undertaken in terms of quasi-judicial powers are more flexible, less time consuming, informal, non-adversarial, inexpensive and readily accessible to the most vulnerable compared to court processes.

Accordingly, depending on the founding authority, NHRIs may also be empowered to receive complaints and petitions from aggrieved parties.¹⁵⁰ The absence of quasi-judicial powers is not necessarily a hindrance to the ability of an NHRI to carry out its mandate to promote and protect human rights. There have been instances where summons issued by NHRIs have been ignored or these powers challenged in court as being unconstitutional.¹⁵¹ It is therefore important that such powers and the

¹⁴⁶ See 10th International Conference of NHRIs Business and Human Rights, The Edinburgh Declaration 1-5. http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Edinburgh_Declaration_ENG.pdf (accessed (9 June 2013)).

¹⁴⁷ See Paris Principles A/RES/48/134 7.

¹⁴⁸ See OCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 43.

¹⁴⁹ Cardenas 2003 *Global Governance* 26.

¹⁵⁰ An interested party could be an individual, group or individuals or any other party acting on behalf of another who is unable to do so. The KNCHR and SAHRC both have quasi-judicial powers that aid them in fulfilling their mandates.

¹⁵¹ In Kenya, the quasi-judicial competence of the KNCHR was challenged after it was alleged to have been acting as a court yet it was not identified as such in the repealed constitution. See discussion in 4.3.4.

regulations drawn up to enforce them are done in a manner that does not leave them open to constitutional challenge. To this end, NHRIs should engage in a consultative process with legal experts, civil society, academics and others to draw up their regulations.

It is noteworthy that during the accreditation of NHRIs, the SCA considers quasi-judicial competence to be practice that directly promotes compliance with the Paris Principles.¹⁵² It would thus be advisable and in the best interests of increasing an NHRI's effectiveness if it were to have such powers. Nevertheless, in instances where NHRIs have quasi-judicial competence, they can conduct investigations to resolve matters before it through "conciliation either through or, within the limits prescribed by the law, through binding decisions or, where necessary, based on confidentiality."¹⁵³ Such powers are restricted to investigations and recommending appropriate action to the respective authorities concerned. Like the other provisions in the Paris Principles, it is broadly cast and does not offer operational guidelines thus leaving room for each appointing authority to decide what sort of quasi-judicial powers to give to the NHRI.¹⁵⁴ The guiding factor should be that the complaint mechanism, which is an integral characteristic of quasi-judicial competence, should be simple, easily accessible to all, inexpensive and fast and guarantee confidentiality.¹⁵⁵

2.5 Relevance of the Paris Principles

As earlier alluded to, the Paris Principles were formulated by NHRIs together with other participants at the 1991 International Workshop based on their experiences at the time.¹⁵⁶ Despite not having the force of law, these principles have over time through recognition and use by the UN and its bodies become the accepted

¹⁵² See SCA General Observations para 2.5 47-48.

¹⁵³ See Paris Principles A/RES/48/134 (a).

¹⁵⁴ See Raj Kumar 2003 *American University International Law Review* 274.

¹⁵⁵ See the recommendations of Mertus on the ideal complaints mechanism where an NHRI is given quasi-judicial powers in JA Mertus & JE Lord "More than a Seat at the Table: The Gender Politics of National Human Rights Institutions" *American Political Science Association* September 2011 17.

¹⁵⁶ Thirty-five (35) countries were represented at this Conference with observers from the European Court and the Inter-American Court on Human Rights. See B Lindsnaes & L Lindholt "National Human Rights Institutions: Standard Setting and Achievements" in H Stokke & A Tostensen (eds) *Human Rights in Development Yearbook 1998: Global Perspectives and Local Issues* (1999) 8.

minimum standards, and thus the most authoritative guidelines for the establishment and operation of effective NHRIs the world over.¹⁵⁷ According to Goodman and Pegrarn, the legitimacy and wide acceptance of the Paris Principles flow from the fact that these principles were formulated by NHRIs themselves.¹⁵⁸ It could also be argued, through the peer review process of the accreditation, the interpretation of the Paris Principles through best practice has contributed to its legitimacy. The Vienna Conference fortified the status of the Paris Principles as minimum guidelines for the creation of NHRIs capable of executing their mandate of promoting and protecting human rights within the state¹⁵⁹

Carver has described the Paris Principles as "...the most authoritative international statement on the role and structure of NHRIs..."¹⁶⁰ Significantly adding to the important status of the Paris Principles, the ICC, through the Sub-Committee on Accreditation, uses the Paris Principles in the accreditation process of NHRIs across the world.¹⁶¹ The NHRI accreditation process has proved to be an important factor in the international profile of NHRIs, especially participation at the UN and its treaty bodies not to mention the regional networks of NHRIs. In fact, compliance with the

¹⁵⁷ ICHRP *Assessing the Effectiveness of National Human Rights Institutions* (2005) 5. See also European Agency for Fundamental Human Rights *National Human Rights Institutions in the EU Member States* (2010) 11; R Murray *The Role of National Human Rights Institutions at the International and Regional Levels: The Experiences of Africa* (2007) 4. Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 6.

¹⁵⁸ R Goodman and T Pegrarn, "Introduction: National Human Rights Institutions, State Conformity and Social Change" in R Goodman and T Pegrarn *National Human Rights Institutions, State Conformity and Social Change* (2012) 9.

¹⁵⁹ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 9. C Raj Kumar "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19 *American University International Law Review* 259 at 271.

¹⁶⁰ R Carver "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10 *Human Rights Law Review* 1 at 2.

¹⁶¹ Rules of Procedure for the ICC Sub-Committee on Accreditation http://www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/listing_content/downloads/rules-of-procedure/SCA_Rules_of_Procedure.pdf (accessed 9 June 2013). "A" status institutions demonstrate compliance with the Paris Principles. They can participate fully in the international and regional work and meetings of national institutions, as voting members, and they can hold office in the Bureau of the International Coordinating Committee or any sub-committee the Bureau establishes. They are also able to participate in sessions of the Human Rights Council and take the floor under any agenda item, submit documentation and take up separate seating.

"B" status institutions may participate as observers in the international and regional work and meetings of the national human rights institutions. They cannot vote or hold office with the Bureau or its sub-committees. They are not given NHRIs badges, nor may they take the floor under agenda items and submit documentation to the Human Rights Council.

"C" status institutions have no rights or privileges with the ICC or in the United Nations rights forums. They may, attend meetings of the ICC at the invention of the Chair of the Bureau.

Paris Principles seems to be the only accepted minimum standard for the participation of NHRIs in UN matters (i.e. General Assembly and treaty body meetings). While it does not have a direct impact on the protection and promotion of human rights at the domestic level, membership emanating from accreditation of NHRIs and subsequent participation in UN matters is something most states value as these stamps of approval are viewed (internationally and nationally) as a reflection of the particular state's commitment to human rights.¹⁶² In terms of assessing the performance of NHRIs, those with 'A' ratings should be held to high standards and by extension be expected to do more since they comply with the minimum requirements of the Paris Principles.

Because of the access afforded by accreditation status, many UN treaty bodies have taken to strongly recommending that NHRIs comply with the Paris Principles. Pohjolainen has commented on this phenomenon noting that since the early 1990s the UN and its policy-making bodies have adopted resolutions¹⁶³ to encourage its Member States to establish and strengthen national institutions having regard to the Paris Principles.¹⁶⁴ Thus accreditation can have an impact on the general perception of an NHRI or even influence changes to legislation governing the function of an NHRI was the case in Malaysia. In the case of the Human Rights Commission of Malaysia (SUHAKAM), the threat of having its status downgraded from A to B, influenced the government to amend the law to provide for greater independence from the executive.¹⁶⁵ It is noteworthy that even though NHRIs hold their accreditation status in high esteem, an NHRI's accreditation status should not be used as evidence of its effectiveness and or relevance in the jurisdiction it operates. The accreditation process only measures compliance with the Paris Principles and if used, should only be as an indicator of what to expect from an NHRI.¹⁶⁶ Ultimately,

¹⁶² Brodie 2011 *Nordic Journal of International Law* 145. See also Cardenas 2003 *Global Governance* 35.

¹⁶³ These include General Assembly Resolutions A/RES/64/161 (2010) A/RES/ 63/172 (2008); A/RES/63/169 (2008); A/RES/60/154 (2005) A/RES/58/175 (2003); 48/134 (1993) among others.

¹⁶⁴ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 10.

¹⁶⁵ C Renshaw, A Byrnes & A Durbach "Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia" 1 (2011) *Asian Journal of International Law* 165 at 192-197.

¹⁶⁶ See Brodie 2011 *Nordic Journal of International Law* 157-161 who argues that the accreditation process has become more critical requiring NHRIs to provide more information on what they have done to fulfil their mandates in line with the Paris Principles.

NHRIs effectiveness should be assessed in terms of its actual influence within the domestic jurisdiction with its accreditation status used as leverage to demand that they seek to be relevant institutions domestically.¹⁶⁷

Treaty monitoring bodies have not only recognised the role of NHRIs but also the importance of such NHRIs complying with the Paris Principles. For example, in 1993, the Committee on the Elimination of Racial Discrimination advised governments to “establish national commissions or other appropriate bodies, taking into account ... the [Paris] principles”. The Committee on the Rights of the Child in 2002 also called on the establishment of NHRIs in full compliance with the Paris Principles.¹⁶⁸ The important role of NHRIs within domestic jurisdictions and the normative nature of Paris Principles have also been recognised by the international human rights treaty mechanisms. Two recent human rights treaties have also specifically mentioned the Paris Principles as being an important consideration in the establishment of NHRIs.¹⁶⁹ The Optional Protocol to the International Covenant against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)¹⁷⁰ obliges States Parties that have ratified or acceded to create national mechanisms for the prevention of torture. The Protocol underlies the normative nature of the Paris Principles by urging State parties to “give due consideration to the Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights”.¹⁷¹

The Convention on the Rights of Persons with Disabilities¹⁷² (CRPD) also expects national level institutions, most likely NHRIs, to play a crucial role in the domestic monitoring and implementation of the treaty. Such institutions should be established in terms of the Paris Principles: article 33(2) of the CPRD reads.

¹⁶⁷ See the discussion of the KNCHR and SAHRC respectively in chapters 4 and 5.

¹⁶⁸ Committee on the Rights of the Child General Comment 2 (2002) CRC/GC/2002/2 para 4.

¹⁶⁹ See R Carver “One NHRI or many?” Lessons from European Experience” (2011) 3 *Journal of Human Rights Practice* 1 at 4.

¹⁷⁰ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

¹⁷¹ Article 17 Optional Protocol to the International Covenant against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

¹⁷² Convention on the Rights of Persons with Disabilities 2006, GA Res. 61/106 Annex 1, A/61/49 (2006), entered into force on 3 May 2008.

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

From the discussion above, the relevance of the Paris Principles is twofold; first is as a guide for the establishment and or strengthening of independent NHRIs capable of promoting and protecting human rights within the domestic jurisdiction and secondly the accreditation of these institutions to adequately participate on the international human rights scene. The discussion will now proceed to consider some of the criticism levelled against the Paris Principles and how they influence the working of NHRIs.

2.6 Criticisms of the Paris Principles

Since their formulation in the 1990s, the Paris Principles have come under some criticism, with some quarters calling for their supplementation. Amongst the criticisms is that the Principles are general and broad.¹⁷³ According to Pohjola, the Principles "...only provide a very general framework for the structure, mandate and powers of national institutions. What this means that the Paris Principles are not definitive and seem to be left open to states to interpret on how best to comply with them. On the other hand, the Principles have been viewed as "so broad that it is next to impossible to objectively assess whether a national institution is in full compliance with them."¹⁷⁴ This view gains credence when the NHRI accreditation process is taken into consideration. It is hard to point out any NHRI that is in full compliance with the Paris Principles given the fact that there are always recommendations during the accreditation process on how NHRIs can improve.¹⁷⁵ The view is further supported by the ICHRP that termed the Paris Principles as laying down criteria that are met by hardly any national institution in the world.¹⁷⁶

¹⁷³ ICHRP *Assessing the Effectiveness of NHRIs* (2005) 6; Pohjola *The Evolution of NHRIs: The Role of the United Nations* 14. See also Burdekin *National Human Rights Institutions in the Asia Pacific Region* 7.

¹⁷⁴ Pohjola *The Evolution of NHRIs: The Role of the United Nations* 14.

¹⁷⁵ See Reports and Recommendations of the Sessions of the Sub-Committee on Accreditation (SCA) <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx> (accessed 9 June 2016).

¹⁷⁶ ICHRP *Performance and Legitimacy: National Human Rights Institutions* (2004) 2.

These observations, that the Paris Principles are too broad, though true, fail to take into consideration the nature of the Paris Principles as general guidelines and different from a legal document with binding provisions. The SCA seems to recognise this by rating NHRIs in terms of their degree of full compliance with the Paris Principles while at the same time offering guidelines on how NHRIs can be strengthened. I therefore argue that it would be more appropriate to take the Paris Principles as minimum standards to guide states in the establishment of NHRIs.¹⁷⁷ Since states have room to decide what kind of institution to have within their jurisdiction taking into consideration the local peculiarities, it is not possible to have human rights institutions set up in an identical manner to promote and protect human rights.

On the composition, guarantees of independence and pluralism, Raj Kumar has opined that the Paris Principles "...fail to underline the need for measures to ensure the NHRIs' independence and institutional autonomy."¹⁷⁸ Accordingly, the Principles do not specify how the establishing authority is to set up NHRIs to achieve independence.¹⁷⁹ As such, there is no precise notion in practice as to what the independence of NHRIs comprises in the Paris Principles. Although this is valid criticism, the OHCHR and ICC Sub-Committee, together with academics, have strived to give meaning to the provisions of the Paris Principles. Independence should be clear in the law establishing the NHRI and in practice. Furthermore, NHRI best practice as championed by the ICC Sub-Committee has shown that states and NHRIs themselves now understand what the idea of independence entails (as illustrated from the discussion on independence above) and how best to go about in achieving it. Independence can also only be truly determined on a case-by-case basis as NHRIs operate under different circumstances emanating from the domestic jurisdiction in which they function.

Another criticism is of the failure of the Paris Principles to state the optimum conditions requisite within the local jurisdiction before the establishment of an NHRI.

¹⁷⁷ Pohjola *The Evolution of NHRIs: The Role of the United* 14. Pohjola points out that the Paris Principles were "originally meant to serve as minimum standards guiding governments in providing their new institutions with the "essential basis."

¹⁷⁸ Raj Kumar 2003 *American International University Law Review* 271.

¹⁷⁹ Raj Kumar 2003 *American International University Law Review* 271.

The view here is that the formation of NHRIs should be done after or in addition to the existence of “fundamental democratic processes, including free elections, the rule of law and an independent judiciary.”¹⁸⁰ It is true that NHRIs have been established in different jurisdictions with varying forms of democracy and different levels of human rights promotion and protection. However, arrays of NHRIs exist across the world in different jurisdictions as highlighted by Pegram who has noted, “...not all of these political systems can be considered consolidated democracies. Instead, most adopting states present relatively hybrid forms of democracy, from those with a loose adherence to democratic constitutionalism, to even those states enduring dictatorships.”¹⁸¹ This in turn has a bearing on the performance and legitimacy of the NHRI in its domestic jurisdiction and on the international scene.

Further, research has shown that the creation of some NHRIs in the absence of democratic constitutionalism has been window-dressing aimed at convincing the international world and donor community of the state’s commitment to human rights.¹⁸² The political situation domestically has also had a role to play in the establishment of some NHRIs, such as the clamour for democratic change, as was the case in South Africa in the 1990s. In fact, human rights may serve as a substitute for democracy at a time when the latter cannot be fully achieved.¹⁸³ It would thus seem that the establishment of these institutions is not driven purely by a commitment to human rights but several factors, both domestic and international working together to spur the creation of NHRIs as was the case in Kenya and Nigeria.¹⁸⁴ In Kenya for instance, the establishment of the Standing Committee on Human Rights has been attributed to the President’s attempt at appeasing donors.¹⁸⁵ This in turn has affected the ability of some of these institutions to carry out their

¹⁸⁰ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 8. M O’Sullivan “National Human Rights Institutions Effectively Protecting Human Rights?” (2000) 25 *Alternative Law Journal* 236 at 238.

¹⁸¹ T Pegram “Diffusion across Political Systems: The Global Spread of National Human Rights Institutions” (2010) 32 *Human Rights Quarterly* 729 at 730.

¹⁸² See Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001).

¹⁸³ This assertion is informed by happenings in South Africa and Hong Kong. The SAHRC was formed under the interim constitution. In Hong Kong, full democracy was not and is not possible. Yet the Equal Opportunities Commission was formed in 1996 – a year before the return to China.

¹⁸⁴ See C Idike “Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus” (2004) 1 *Essex Human Rights Review* 40 at 46.

¹⁸⁵ Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa: Kenya* 173-174.

human rights mandate especially where it would put them on a collision course with the establishing authority.¹⁸⁶ One of the results has been that institutions formed with the intention to placate the donor community rarely receive the necessary support from government and NGOs.¹⁸⁷ Because of the lack of support due to the motivation behind their establishment, such institutions are unlikely to influence the enjoyment of human rights within their domestic jurisdictions.

The Paris Principles do not give sufficient guidance on the quasi-judicial competence of NHRIs,¹⁸⁸ and makes the granting of these powers optional.¹⁸⁹ Thus, states can choose whether to give NHRIs quasi-judicial powers. Although these are valid criticisms, currently most, if not all the states with these institutions have found a way to provide for quasi-judicial powers for NHRIs in their founding laws based on interaction with other NHRIs at the ICC and through the accreditation process. Examples of these are numerous and include the National Human Rights Commission of India, KNCHR,¹⁹⁰ and SAHRC¹⁹¹ among others. The absence of such powers in an NHRI does not mean it cannot perform its mandate especially in jurisdictions where there are other strong democratic institutions such as an independent judiciary, legislature, free media and a robust civil society. However, from NHRIs best practice and research it is desirable that NHRIs possess quasi-judicial competence that can further their mandates.¹⁹²

In conclusion, it is important to note that the drafting of the Paris Principles by a drafting committee represented by NHRIs from France, Mexico, the Philippines and Australia all of which had different models of NHRIs only captured the views of these representatives to the exclusion of other views that might have led to different

¹⁸⁶ See Human Rights Watch *Protectors or Pretenders Government Human Rights Commissions in Africa* (2001). See also Idike 2004 *Essex Human Rights Review* 46. See also discussion in 4.2.1 on the Standing Committee on Human Rights in Kenya that was first established as part of the ruling party in Kenya.

¹⁸⁷ Necessary support in this instance refers to adequate funding, a broad human rights mandate and guarantee of independence in carrying out their functions.

¹⁸⁸ Raj Kumar 2003 *American International University Law Review* 274.

¹⁸⁹ Pohjolainen *The Evolution of NHRIs: The Role of the United* 60.

¹⁹⁰ See Section 27 of the Kenya National Commission on Human Rights Act.

¹⁹¹ See Section 9 of the Human Rights Commission Act 54 of 1994.

¹⁹² SCA General Observations para 2.10 56-57.

guiding document on NHRIs.¹⁹³ Thus, the drafting process included a political compromise meant to encourage the inclusion of a variety of different models of institutions for the promotion and protection of human rights.¹⁹⁴ This explains the general and broad nature of the Paris Principles which do not seek to be a strait jacket but instead seek to accommodate differences that might have occurred at the time of their drafting and still exist in the different jurisdictions with NHRIs. The criticisms against the Paris Principles do not take into account the developments that have taken place since they were written. The role of NHRIs has changed since 1991 with the focus shifting from mere compliance with the Paris Principles to the actual performance and influence they have within the domestic jurisdiction. The principles have been useful in giving general guidance to the establishing authorities in the jurisdictions where they have been established, given their use in the accreditation process. At the same time, it should not be forgotten that states enjoy the freedom to modify the principles to suit their realities as they have ‘the right ... to choose the framework that is best suited to its particular needs at the national level’.¹⁹⁵ For instance, the SAHRC was specifically mandated to monitor SERs in South Africa at a time when NHRIs were not naturally accorded such a role.¹⁹⁶ The leeway given to states is important as it allows them to establish national institutions that are relevant to their specific realities.

It should be noted that NHRIs themselves have sought to expand their understanding of the Paris Principles through information exchange at the workshops held under the auspices of the ICC. Additionally, guidance offered by the ICC should not be overlooked as it exhibits genuine efforts to give meaning to the content of the Paris Principles through the General Observations of the Sub-Committee on Accreditation (SCA) during the accreditation process.¹⁹⁷ The ICC’s interpretation in general and specifically when dealing with individual NHRI accreditation matters, has led to the strengthening of existing NHRIs and the

¹⁹³ Burdekin *National Human Rights Institutions in the Asia Pacific Region* 23.

¹⁹⁴ See Burdekin *National Human Rights Institutions in the Asia Pacific Region* 23-24; Brodie 2011 *Nordic Journal of International Law* 149.

¹⁹⁵ See GA Resolution 48/134, 20 December 1993, A/RES/48/134 para 12.

¹⁹⁶ See discussion in 5.3 on the establishment and mandate of the SAHRC.

¹⁹⁷ ICC Sub-Committee on Accreditation General Observations as Adopted in May 2013, <http://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf> (accessed 5 February 2014).

establishment of NHRIs with realistic mandates. This interpretation has been informed by state practice, the ICC's experience since 2006 and research on the role of NHRIs.¹⁹⁸ Going forward, I am of the view that the Paris Principles still have relevance in the establishment, assessment and strengthening of NHRIs across the globe.

Therefore, as a set of minimum standards, the Paris Principles are comprehensive enough and their perceived shortcomings should not stop establishing authorities from going beyond the recommendations of these principles in establishing NHRIs. It should be borne in mind that the Paris Principles were formulated over 20 years ago, with a few NHRIs with limited experience on the role they are supposed to play; as such, the principles will never be free from criticisms. Instead, the recommendations should be interpreted in a broad and purposive manner taking into account the peculiarities of each state and the real reason behind the establishment of such institutions within the domestic jurisdiction. Until these Principles are revised to take into consideration the criticisms identified herein, they remain useful in maintaining minimum standards and the leeway given to states to decide what form these institutions can take has led to the emergence of different types of NHRIs as discussed in the next part.

2.7 Types of national human rights institutions

NHRIs reflect things such as national histories, legal traditions, date of formation, and system of government among others that influence the form they take.¹⁹⁹ The leeway given to governments to decide on what will work in their jurisdictions coupled with the broad nature of the Paris Principles has resulted in the existence of different types of NHRIs. The diversity of NHRIs has been aptly described as follows:²⁰⁰

The broad concept of national human rights institution mirrors the situation in the field: it seems that there are as many types of national institutions as there are states. Governments

¹⁹⁸ See SCA General Observations 6.

¹⁹⁹ See J Hatchard et al *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern perspective* (2004) 211.

²⁰⁰ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 16; OHCHR *National Human Rights Institutions: History, Principles, Roles and Responsibilities* 13 – 14.

have applied the Paris Principles and other international recommendations in line with their national interests.

Despite their diverse nature across the world, NHRIs can be divided into the following broad categories, encompassing: the human rights commission model, the advisory committee model, the ombudsman model, and the human rights institute model.²⁰¹ The United Nations has identified the ombudsman and human rights commissions as comprising the majority of national institutions.²⁰² Other broad categories exist, such as those propounded by Cardenas that include; specialized human rights institutions, devoted to protecting the rights of vulnerable groups like children or indigenous people; parliamentary bodies devoted to human rights issues; and national bodies devoted to implementing international humanitarian law.²⁰³ Due to the many guises in which these institutions exist, it is not possible to discuss all of them in this research. Instead, the focus will be on four broad categories i.e. the ombudsman, the human rights commission, hybrid institutions and the human rights institute models as they encapsulate the wide-ranging types of NHRIs that have been accredited by the ICC.

2.7.1 The Human rights ombudsman model

The human rights ombudsman model is the oldest type of institution, predating the rise of international human rights regimes after World War II and the precursor of today's NHRIs.²⁰⁴ In contrast to other NHRIs, ombudsmen do not have explicit human rights mandates. Rather, their principal function has been investigations into allegations of "maladministration" by public officials and advising the three arms of government accordingly. The classical ombudsman is a mechanism that monitors the conduct of public administration to ensure that it is conducted legally and fairly. Describing what an Ombudsman is, Reif states that it is "a public sector institution,

²⁰¹ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 16.

²⁰² United Nations *National Human Rights Institutions: A Handbook on the Establishment* para 39. LC Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Law Journal* 1 at 6.

²⁰³ Cardenas "Adaptive States: The Proliferation of National Human Rights Institutions" 11. See also Koo & Ramirez 2009 *Social Forces* 1324.

²⁰⁴ The ombudsman in its "classical" form has its modern roots in the office of *justitieombudsman* (ombudsman for justice) created in Sweden in 1809. See LC Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 1 at 7-8. R Carver "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10 *Human Rights Law Review* 1 at 5.

preferably established by the legislative branch of government, to supervise the administrative activities of the executive branch.”²⁰⁵ In most instances, most of these institutions miss the threshold of the Paris Principles; they are usually led by a single person and not pluralistic in nature.²⁰⁶ When they deal with human rights, it is largely because of their investigations into fairness and legality in public administration.²⁰⁷ However, over time many ombudsmen have been given a human rights mandate and do not only focus on good governance in public administration.²⁰⁸ They are common in South America where they are referred to as *defensor del pueblo* and Scandinavia.

2.7.2 Human rights commissions

Human Rights Commissions represent the classic and popular²⁰⁹ type of national institutions, which conforms most clearly to the model outlined in the Paris Principles. This type of national institution is sometimes also referred to as the “Commonwealth model” due to its origin and its relatively wide prevalence among the Commonwealth nations.²¹⁰ These are institutions charged explicitly with protecting and promoting human rights norms.²¹¹ Unlike the Ombudsman institutions, a group of commissioners, appointed by the executive and legislature, and not a single person leads human rights commissions. In addition to the protecting and promoting of human rights, they perform other related functions such as education, research, monitoring, documentation, advisory work, and conflict resolution functions.²¹² These Commissions also have quasi-judicial power, which they can use in conducting investigations after which they recommend appropriate action to remedy the situation. A growing number of these institutions have been established over time to

²⁰⁵ LC Reif *The Ombudsman, Good Governance and the International Human Rights System* (2004) 1 -2.

²⁰⁶ See Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 18.

²⁰⁷ See also *UN Handbook on Establishment of NHRIs* para 57.

²⁰⁸ Cardenas “Adaptive States: The Proliferation of National Human Rights Institutions” 12.

²⁰⁹ See OC Okafor and SC Agbakwa “On Legalism, Popular Agency and “Voices of Suffering”: The Nigerian National Human Rights Commission” (2002) 24 *Human Rights Quarterly* 662 at 664.

²¹⁰ Pohjolainen *The Evolution of NHRIs: The Role of the United Nations* 17. Reif 2000 *Harvard Human Rights Law Journal* 9. Majority of these NHRIs can be found in the group the Commonwealth Forum of National Human Rights Institutions.

²¹¹ Cardenas “Adaptive States: The Proliferation of National Human Rights Institutions” 13. See also *UN Handbook on Establishment of NHRIs* para 42.

²¹² M Gomez “Social Economic Rights and Human Rights Commissions” (1995) 17 *Human Rights Quarterly* 155 at 158.

strengthen the domestic mechanisms for human rights protection, such as those in India, Indonesia, Sri Lanka, Uganda²¹³, and South Africa among others.²¹⁴

2.7.3 Hybrid institutions

These are a mixture of national ombudsmen and human rights commissions. Sometimes they manifest themselves as a product of national ombudsmen that have had human rights responsibilities grafted onto their mandates. They therefore work to promote good governance practices and to promote and protect human rights. These adaptations of the ombudsman and human rights commission started to appear in the mid-1970s.²¹⁵ In practice they have multiple mandates but generally undertake two roles; firstly to protect and promote human rights and secondly, to monitor government administration and some instances prevent corruption.²¹⁶ They are particularly favoured in Latin America²¹⁷ and in Central and Eastern Europe.²¹⁸ Notable examples of these hybrid institutions (or “quasi human rights commissions”) include Ghana’s Commission on Human Rights and Administrative Justice,²¹⁹ Tanzania Commission for Human Rights and Good Governance and Russia’s Plenipotentiary for Human Rights.²²⁰

2.7.4 Human Rights Institutes and Centres

These institutions are specialised in nature and tend to have a broad membership of the societies in which they are found although this does not necessarily translate into a broad mandate as would be the case with Human Rights Commissions. Most of them tend to focus on research on and training in human rights matters in and outside of their jurisdiction. A good example of such an institution is the Danish Institute for Human Rights that considers itself an NHRI with an international reach.

²¹³ Article 51(1) of the 1995 Constitution of the Republic of Uganda and Human Rights Act of 1997.

²¹⁴ Reif 2000 *Harvard Human Rights Law Journal* 10.

²¹⁵ Reif 2000 *Harvard Human Rights Journal* 11.

²¹⁶ Reif 2000 *Harvard Human Rights Journal* 11. See also UNDP-OHCHR Toolkit 25

²¹⁷ These include the office of *Defensor del Pueblo* in Colombia (1991), Argentina (1994), Peru (1993, commenced activities 1996), Panama (1997), Bolivia (1998), and Ecuador (1998); the *Procurador para la Defensa de los Derechos Humanos* of El Salvador (Attorney or Counsel for the Defense of Human Rights, 1992); and the *Procurador de los Derechos Humanos* of Guatemala (Human Rights Attorney or Counsel, 1987).

²¹⁸ Reif 2000 *Harvard Human Rights Law Journal* 11.

²¹⁹ Cardenas “Adaptive States: The Proliferation of National Human Rights Institutions” *Carr Center for Human Rights Policy Working Paper T-01-04* 13.

²²⁰ See LC Reif *The Ombudsman, Good Governance, and the International Human Rights System* (2004) 158.

The Danish Institute is the official NHRI of the Denmark (as accredited by the ICC) while at the same time working as the national equality body.²²¹

In conclusion, the local context has been influential in the creation and operationalization of NHRIs. It determines the type of institution chosen –a commission, ombudsman or hybrid institution– and the kind of mandate they are given.²²² Because of the central role played by the local context there might be a situation whereby several overlapping institutions are created to deal with human rights issues. Such is the situation in a number of countries that include South Africa, New Zealand, Bosnia-Herzegovina and Kenya where this situation has led to friction in terms of jurisdiction and institutional overlap.²²³ In South Africa, there are several institutions put in place to develop constitutional democracy envisaged by the Constitution yet their mandates at times put them on a collision course with the recognised NHRI.²²⁴ In countries such as the UK the institutional and jurisdictional overlap between the Equal Opportunities Commission and the Commission for Racial Equality, has resulted in a review of law in order to amalgamate the two institutions into one, Commission for Equality and Human Rights.²²⁵ Having briefly looked at the types of NHRIs, the discussion will now proceed to the dual roles of promoting and protecting human rights.

2.8 NHRIs' role of promoting and protecting human rights

NHRIs play the dual role of promoting and protecting of human rights that entail several functions. These two roles stem from two sources; domestically from constitutions or legislative texts establishing and granting NHRIs their roles; and from

²²¹ See the Danish Institute of Human Rights' website <http://www.humanrights.dk/about-us>

²²² Mertus *Human Rights Matters: Local Politics and NHRIs* 129; S Cardenas "Sovereignty Transformed? The Role of National Human Rights Institutions" in N Shawki & M Cox (eds) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (2009) 30.

²²³ See Cardenas "Adaptive States: The Proliferation of National Human Rights Institutions" 14 – 15 discussing the existence of other institutions alongside NHRIs in some jurisdictions.

²²⁴ These institutions are referred to as 'chapter 9 institutions and include the Public Protector (ombudsman), South African Human Rights Commission (HRC), Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Commission), the Commission for Gender Equality (CGE), the Auditor-General and the Electoral Commission. For an in-depth discussion of these institutions, see C Murray "The Human Rights Commission Et Al: What Is the Role of South Africa's Chapter 9 Institutions?" 2 (2006) *PER* 1-26.

²²⁵ See R Carver "One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? Lessons from the European Experience" 3 (2011) *Journal of Human Rights Practice* 1 at 6.

the treaty obligations States have under international human rights law and regional human rights treaties i.e. the obligations to respect, protect and fulfil human rights.²²⁶ Promotion of human rights is a wide concept that involves different aspects. It therefore follows that NHRIs have at their discretion ways in which to promote human rights depending on the local peculiarities and the available resources. It entails spreading knowledge on, encouraging respect for and compliance with human rights to the public and targeted groups within the state aimed at creating a culture of human rights within the State.²²⁷ Through the promotion of human rights, members of society become aware of their human rights and the available redress mechanisms. Concomitantly, it makes them aware of their duties and responsibilities together with those of the State and its organs in making the enjoyment of human rights a reality for all.²²⁸ In practice and supported by international human rights treaties such as the ICESCR (article 13), the Convention on the Rights of the Child (article 29), the CEDAW (article 10) and CERD (article 7), education is the best way to promote human rights within the State among other awareness raising campaigns such as; media awareness strategies; publications; human rights seminars and/or workshops; community based initiatives and policy developments.²²⁹

Human rights protection on the other hand involves securing the human rights of all those within the state's jurisdiction. It largely involves investigations conducted by the NHRIs to find out about access to and enjoyment of human rights.²³⁰ It consequently also includes the task of monitoring human rights that straddles both the protection and promotion roles of NHRIS.²³¹ Human rights protection also includes research (the gathering of information by observing events, visiting sites and engaging relevant authorities) to establish the state of human rights within the local jurisdiction, a specified group of people or human right with the aim of pursuing remedies and the necessary follow up.²³² The proper execution of this mandate is furthered by quasi-

²²⁶ See National Human Rights Institutions in the EU Member States; Strengthening the fundamental rights architecture in the EU I (2010) 19.

²²⁷ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 57.

²²⁸ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 57.

²²⁹ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 57 – 58.

²³⁰ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 76.

²³¹ OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 112.

²³² See generally UNDP-OHCHR Toolkit 33.

judicial powers allocated to NHRIs to receive individual complaints and conduct investigations on alleged human rights abuses and offering remedies.²³³ From the outset, it is important to note that investigatory powers given to NHRIs are complementary to those of the police service and specific to human rights issues. Such investigations by NHRIs should be speedy and lead to expeditious resolution of human rights abuses identified by the relevant stakeholders. The outcome of these investigations should also be published for public consumption.²³⁴

The protection of human rights, while furthered by NHRIs, often needs a wider protection framework that allows for effective addressing of human rights violations. It thus is understood that several role players including parliament enacting laws and the judiciary interpreting and giving content to human rights should be able to offer effective remedies for human right violations together within a framework that allows for alternative dispute resolution.²³⁵ Whereas the promotion and protection should be of all the human rights enshrined in a country's constitution together with the international human rights treaties it has ratified, this has not always been the case with most countries having focussed on CPRs under the impression that they are easier to implement.

According to the Committee on Economic, Social and Cultural rights (CESCR):²³⁶

Under international human rights law (as well as in terms of its application at the national level), civil and political rights have, in many respects, received more attention, legal codification and judicial interpretation, and have been instilled in public consciousness to a far greater degree, than economic, social and cultural rights.

This has largely been because of the traditional international human rights law distinction made between CPRs on the one hand and SERs on the other.²³⁷ SERs

²³³ See S Cardenas "Sovereignty Transformed? The Role of National Human Rights Institutions" in N Shawki & M Cox (eds) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* 28.

²³⁴ See OHCHR *National Human Rights Institutions; History, Principles, Roles and Responsibilities* 77–92.

²³⁵ See generally UNDP-OHCHR Toolkit 32.

²³⁶ The United Nations CESCR, Fact Sheet No. 16 (Rev. 1) (1991) 2 <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> (accessed 14 March 2016).

²³⁷ See M Craven *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development* (1995) 8 - 9; RKM Smith *Textbook Book on International Human Rights* (2007) 41; J Humphrey *Human Rights and the United Nations – A Great Adventure* (1984) 107. ZF Kabasakal Arat "Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights" (2006) 28 *Human Rights Quarterly* 416 at 430.

speak to the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a society.²³⁸ This distinction has meant that CPRs have enjoyed a great prominence internationally and in many domestic jurisdictions at the expense of SERs. Consequently, and rather unfortunately, a number of NHRIs in executing their mandates have focussed their more of their efforts on CPRs compared to, and at the expense of SERs. This is because of reasons such as; not having the legislative mandate to deal with SERs; and low priority given to the promotion and protection of these rights.²³⁹

The Vienna Declaration and Programme of Action made a call for all states to promote human rights equally. It stressed the indivisibility, interrelatedness and interdependence of all human rights as follows:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.²⁴⁰

2.8.1 NHRIs' focus on socio-economic rights

Because of the symbiotic relationship between human rights²⁴¹, there have been several calls for NHRIs to direct their efforts towards the promotion of SERs alongside the promotion of the traditional CPRs. The CESCR realising the vague nature of mechanisms to promote these rights²⁴² published General Comment 10. In this General Comment, the CESCR noted that NHRIs have a crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights:²⁴³

²³⁸ P O'Connell *Vindicating socio-economic rights: International standards and comparative experiences* (2012) 3; F Viljoen 'The justiciability of socio-economic and cultural rights: Experience and problems' in Y Donders & V Volodin (eds) *Human rights in education, science and culture: Legal developments and challenges* (2007) 53 54

²³⁹ See Nowosad *National Institutions and the Protection of Economic, Social and Cultural Rights* 180.

²⁴⁰ The Vienna Declaration and Programme of Action, World Conference on Human Rights (Vienna, June 14-25, 1993), U.N. Doc. A/Conf.157/23 Part I para 5.

²⁴¹ See JK Mapulanga-Hulston "Examining the Justiciability of Economic, Social and Cultural Rights" (2002) 6 *The International Journal of Human Rights* 29 at 33.

²⁴² See P Eldridge "Emerging Roles of National Human Rights Institutions in Southeast Asia" (2010) 14 *Pacific Review: Peace, Security & Global Change* 209 at 210.

²⁴³ Committee on Economic, Social and Cultural Rights, *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* 12/14/1998 para 2.

[NHRIs] have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.²⁴⁴

The CESCR further notes that NHRIs should be viewed as part of steps taken with a view to achieve progressively the rights in the ICESCR by all appropriate means as required by article 2 of the ICESCR.²⁴⁵ Moreover, the Committee also stresses the need to “ensure that the mandates accorded to all [NHRIs] include appropriate attention to economic, social and cultural rights.”²⁴⁶ It is noteworthy that the Paris Principles do not distinguish between CPRs and SERs and ideally, NHRIs should have readily engaged in promoting and protecting these rights as part of their mandates. Conceivably the distinction came about because of State practice²⁴⁷ of giving prominence to CPRs at the expense of SERs thus necessitating the call made by the CESCR that NHRIs promote all human rights equally. The protection of SERs by states is influenced by factors such as their domestic entrenchment, the judiciary’s approach to SER matters and to some extent the states’ ratification of ICESCR in pursuance of their sovereignty, exercised on behalf of the people through their elected leaders. Thus, NHRIs do not function in a vacuum and the existing domestic human rights framework and other realities in their jurisdictions influence their work and resultant effectiveness.

NHRIs have been called upon to deal with SERs at international gatherings and by other UN treaty bodies as part of their mandate, which in turn helps States in fulfilling their treaty obligations. For example, the Committee on the Rights of the Child, in a 2002 General Comment stated that “Independent national human rights institutions (NHRIs) are an important mechanism to promote and ensure the implementation of

²⁴⁴ CESCR General Comment no 10 para 3.

²⁴⁵ See CESCR General Comment 10 para 1.

²⁴⁶ CESCR General Comment 10 para 4.

²⁴⁷ This was common among commonwealth countries at independence with most of them having CPRs codified. SERs were included as Directive Principles of State Policy and as such were not directly applicable. CPRs were included in the constitutions of Kenya, Uganda, Tanzania, Nigeria etc.

the Convention.”²⁴⁸ It is worth noting that the CRC contains a series of SERs vital for the development of the child. The CRC General Comment similarly promotes the minimum requirements of the Paris Principles concerning the mandate and powers, establishment processes, resources, pluralistic representation of NHRIs.²⁴⁹ In addition, internationally recognised guidelines such as the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights have called upon NHRIs to accord the same attention to SERs as they have to CPRs.²⁵⁰

Promotional and monitoring bodies, such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

Further, the Commonwealth Group of Nations has encouraged its members to “employ all available means to deal with the questions related to the advancement of economic, social and cultural rights” irrespective of whether the founding laws mandate them to deal with these group of rights.²⁵¹ All the above indicates the increasingly central role NHRIs can play in the promotion, protection and subsequent wider enjoyment of these rights within their respective local jurisdictions.

In the domestic sphere where these NHRIs operate, there has been an encouraging trend amongst states to recognise SERs in their laws. South Africa and Kenya are good examples of countries on the African continent with comprehensive and justiciable human rights provisions in their constitutions. Research has shown, that numerous states do indeed have domestic legal provisions on SERs.²⁵² NHRIs ought to have a broad mandate that should enable them to promote both CPRs and SERs as indivisible, interdependent and interrelated rights. Given developments in human rights that have clearly indicated the need to promote all rights equally, it is imperative that NHRIs also focus on promoting SERs or look for means to do so within their domestic jurisdiction. Where these rights are not constitutionally protected, NHRIs should still focus on SERs as part of their human rights mandate.

²⁴⁸ Committee on the Rights of the Child General Comment No. 2 (2002) The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child CRC/GC/2002/2 para 1.

²⁴⁹ See Committee on the Rights of the Child General Comment No. 2 paras 8-18.

²⁵⁰ See Maastricht Guidelines Guideline 25.

²⁵¹ *Protecting Human Rights: The Role of National Institutions*, Commonwealth Conference on National Human Rights Institutions, (4-6 July 2000) 20.

²⁵² Toronto Initiative for Economic and Social Rights has identified at least one SER provision in 95% of the world’s developing country constitutions. See <http://www.tiesr.org/>

Crucially, given the quest by the UN and states gathered at the Millennium Conference to change the living conditions of human beings under the auspices of the Millennium Development Goals (MDGs) and most recently the Sustainable Development Goals (SDGs), it is imperative that NHRIs fully engage in the promotion and protection of SERs. This is because SERs speak most closely to the standard of living of many in the world.²⁵³ Likewise, it is time to engage in action to promote SERs because despite positive developments in human rights, "... many actors working with human rights law still focus solely or mainly on issues relating to civil and political rights and tend to pay lip service to the interdependence and interrelatedness of all human rights."²⁵⁴

2.9 Conclusion

This chapter set out to understand the evolution of NHRIs in international law from 1948 to 1991 and through NHRIs shared best practice what role these institutions are to play. The content of the Paris Principles on what an effective NHRI should be like were unpacked. Establishment in terms of the Paris Principles thus meant that NHRIs would on the face of it, have the necessary competence to promote and protect human rights. However, mere compliance with the Paris Principles did not guarantee an effective institution. Moreover, the competence and mandate of NHRIs was reflective of a country's history, legal tradition, and system of government among others. Therefore, it must be understood that favourable local conditions ought to be in existence before these institutions are established.

The criticisms against the Paris Principles do not take away from the fact that the Principles are the only accepted international guidelines that have found utility in the establishment, strengthening and accreditation of these institutions. It therefore follows that the focus on the Paris Principles' shortcomings tends to take away the important role these institutions can play in making human rights a reality for many not to mention to promote a culture of human rights compliance among states. What is needed is a deeper understanding of how compliance with the Principles can be

²⁵³ See United Nations Millennium Declaration A/55/L.2 para 25.

²⁵⁴ M Ssenyonjo "Reflections on State obligations with Respect to Economic, Social and Cultural rights in international human rights law" (2011) 15 *The International Journal of Human Rights* 969 at 970.

translated to actual fulfilment of NHRIs mandates. The ICC SCA's interpretation and OHCHR's the support to states on the establishment and strengthening of these institutions has led to a better understanding of the Paris Principles. Furthermore, NHRIs and the roles they can play is evolving to accommodate changes in society with the effect that there is a better understanding on how to establish and or strengthen these institutions.

The chapter also analysed the dual roles of promoting and protecting human rights and what they entail. Using their broad mandates, NHRIs have at their disposal many ways through which they can fulfil their mandates. In the past, majority of the NHRIs focussed on CPRs at the expense of SERs despite the interconnected nature of human rights. This necessitated the call for NHRIs to focus their attention of SERs as means of addressing the poverty challenges across the globe. The evolution of this dual role points towards the important role NHRIs have within the domestic jurisdiction. However, the extent to which these roles can be carried out depends on the local peculiarities in the domestic jurisdiction. This includes an understanding of specific role NHRIs play because primarily human rights obligations fall upon the state normally represented by the government.

In conclusion, the Paris principles are important as they give guidance on the establishment of NHRIs. The evolution of NHRIs gives a better understanding of the guidelines on paper and their interpretation in international law and how this can be used to create effective institutions. I therefore argue that the focus should be on understanding how these institutions function within their local jurisdiction and how to strengthen and make them effective in the promotion and protection of human rights. With this in mind, the next chapter will shift the focus to the constitutional protection and judicial enforcement of SERs in Kenya. The purpose is to establish the local conditions in the country and examine how the domestic human rights framework is likely to influence the work of the KNCHR, a constitutionally mandated body specifically tasked with the promotion and protection of human rights.

CHAPTER THREE
**CONSTITUTIONAL PROTECTION AND JUDICIAL INTERPRETATION OF SOCIO-
ECONOMIC RIGHTS IN KENYA**

3.1 Introduction

Socio-economic rights have only gained status as constitutional rights with the promulgation of the Constitution of 2010. This constitutional protection is a paper acknowledgement of the importance and interrelatedness of CPRs and SERs, and their fulfilment by the state can lead to the betterment of the living standards of many Kenyans living in poverty. The focus of this chapter is the provision for, and judicial interpretation of socio-economic rights in Kenya, which are some of the factors that affect the role of an NHRI in promoting SERs. These rights are enshrined in the Constitution and further buttressed by legislation and policy. Given the nature of these rights, a focus on their interpretation by the courts is of interest since the rights are relatively new in Kenya's human rights architecture. The inclusion of these rights in the Constitution is what can be referred to as the *de jure* protection of rights, and is not enough and requires practical implementation (the *de facto* element of these rights) in such a manner that people within Kenya can enjoy.

The chapter commences by outlining the current state of enjoyment of SERs by looking at the poverty situation in the country. This is to motivate a deliberate focus on SERs to address the poverty situation. I then discuss the SERs protected in the Kenyan constitution together with the obligations incumbent on the state. A brief analysis of the court's interpretation of SERs together with other supporting constitutional provisions is pursued to identify the court's interpretation of SERs which is likely to influence the work of the KNCHR in promoting and protecting these rights. It then discusses the challenges implicit in relying on the judicial enforcement of these rights as a means of realising these rights. Because the state has the primary responsibility to fulfil human rights through several ways including legislative and policy measures, the chapter also discusses the protection of SERs by identifying and analysing the key constitutional, legislative and policy frameworks that influence and are likely to influence these rights and the functioning of the KNCHR. This is based on the conclusion in preceding chapter, that a country's socio-political landscape is a strong determinant of the institutions (such as NHRIs)

put in place to promote and protect human rights.

3.2 The State of poverty and socio-economic rights in Kenya

The definition of poverty adopted herein is that of the Committee on Economic, Social and Cultural Rights (CESCR) which views poverty as “a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”¹ According to Mubangizi, poverty has far-reaching consequences for it is not only a deprivation of rights but also renders useless efforts put in place to achieve human rights.² The continued existence of poverty is an impediment to the enjoyment of human rights in general.³ Efforts to address poverty transcend several disciplines such as sociology and economics, with the recent attempts to use the law, especially human rights law as a way to fight poverty.⁴ Widely accepted poverty manifestations such as hunger, lack of adequate shelter, lack of medical care, illiteracy, corruption, increasing crime rate, hopelessness and growing inequality point out to a society that is not enjoying its human rights, especially SERs.⁵ The implementation of SERs by the State can alleviate the manifestations of poverty mentioned above.

Poverty is a reality for many in Kenya. According to the Institute of Security Studies (ISS), Kenya is ranked sixth among countries with a population of over 10 million living in extreme poverty.⁶ In terms of access to health, access to health for

¹ See CESCR Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights E/C.12/2001/10 (10 May 2010) para 8.

² JC Mubangizi "Know Your Rights: Exploring the Connection between Human Rights and Poverty Reduction with specific reference to South Africa" (2005) 21 *South African Journal on Human Rights* 32.

³ See Mary Robinson Realizing Human Rights: "Take hold of it boldly and duly..." Romanes Lecture 1997, Oxford University, 11 November 1997 <http://www.un.org/rights/50/dpi1938.htm> (accessed 1 September 2014). See United Nations General Assembly (UNGA) Human Rights and Extreme Poverty A/RES/67/164 <http://www.refworld.org/docid/51e673b84.html> (accessed 21 October 2014).

⁴ See OLM Ferraz "Poverty and Human Rights" (2008) 28 *Oxford Journal of Legal Studies* 583.

⁵ See W Oluoch-Kosura, PP Marennya, F Place & CB Barret *Indices and Manifestations of Poverty: Informing anti-poverty Policy Choices* Paper for Bridging Qualitative and Quantitative Methods of Poverty Analysis, hosted by KIPPRA, Nairobi, Kenya on March 11 2004 <http://www.saga.cornell.edu/saga/q-qconf/oluoch-k.pdf> (accessed 21 October 2014).

⁶ See S Turner, J Cilliers & B Hughes 'Reasonable Goals for Reducing Poverty in Africa-Targets for Post 2015 MDGs and Agenda 2063' (2014) 10 *African Futures Paper* 1 at 5.

expectant women (which includes antenatal, delivery, and postnatal health services) is below the MDG targets.⁷ In 2015, estimates put the maternal mortality rate at 510 deaths per 100,000 live births⁸, well above the MDG target of 147 per 100,000 by 2015.⁹ This is an indication that not all women and children are able to access and enjoy the right to highest attainable standard of health, which is enshrined in the Constitution.

Rampant corruption in government agencies that are critical in providing crucial services to Kenyans means that those without money to offer bribes cannot access certain services.¹⁰ Furthermore, corruption has not only led to poor implementation of government initiatives meant to provide access to the several human rights such as education, health and food but also the diversion of funds meant to improve these services. Particularly those who are economically and socially disadvantaged feel the deleterious effects of corruption in most instances.¹¹ Former UN Secretary General Koffi Annan has noted the effects of corruption as follows:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.¹²

⁷ The MDG's are used as a standard in this instance because they were accepted by nations as part of the Millennium Declaration, of measures States will seek to improve the quality of life of the human population by the year 2015. The Sustainable Development Goals (SDGs), which have important socio-economic factors such as health, education and food have replaced the MDGs.

⁸ Maternal mortality ratio (modelled estimate, per 100,000 live births) <http://data.worldbank.org/indicator/SH.STA.MMRT> (accessed 15 March 2015).

⁹ See "Kenya's Other Great Catastrophe: Women and Infants Dying in Childbirth," *The Guardian*, September 28, 2013, <http://www.theguardian.com/commentisfree/2013/sep/28/kenya-westgate-maternal-infant-mortality> (accessed 10 June 2014).

¹⁰ See M Wrong 'Everyone Is Corrupt in Kenya, Even Grandmothers' Is East Africa's economic powerhouse becoming the continent's newest lootocracy? http://www.foreignpolicy.com/articles/2014/05/06/everyone_is_corrupt_in_kenya_even_grandmothers (accessed 10 July 2014). See Transparency International Global Corruption Barometer 2013 Kenya <http://www.tikenya.org/index.php/the-global-corruption-barometer?download=199:the-global-corruption-barometer> (accessed 10 July 2014); Heritage Foundation *Index of Economic Freedom 2014 Kenya* <http://www.heritage.org/index/pdf/2014/countries/kenya.pdf> (accessed 10 July 2014). JP Mutonyi "Fighting Corruption: Is Kenya on the Right Track" in R Sarre, DK Das & I Albrecht (eds) *Policing Corruption: International Perspectives* (2005) 69–84. F Matiangi "Case Study on the Role of Parliament in the Fight against Corruption: The Case of the Kenyan Parliament" in R Stapenhurst, N Johnston & R Pelizzo (eds) *The Role of Parliament in Curbing Corruption* (2006) 69.

¹¹ See generally K Olaniyan *Corruption and Human Rights law in Africa* (2014) 2-4.

¹² Secretary-General Lauds Adoption by General Assembly of United Nations Convention against Corruption [SG/SM/8977-GA/10200-SOC/CP/271](http://www.un.org/press/en/2003/sgsm8977.doc.htm) <http://www.un.org/press/en/2003/sgsm8977.doc.htm> (accessed 15 March 2016).

To this end, corruption in Kenya should be dealt with as a matter of urgency if human rights in the Constitution are to be realised for the benefit of the country's population. With a growing population estimated at 45,941,977 in 2014¹³ there is need to ensure access to socio-economic goods (health, education, food and social security) amidst growing pressure on the country's diminishing resources. Forty six percent (46%) of this population live below the poverty line,¹⁴ with the country having a Gini coefficient of 0.445¹⁵ showing great inequality among the rich and poor.¹⁶ In the United Nations Human Development Index (HDI), that measures development in terms of life expectancy, educational attainment and standards of living, Kenya ranks 145th among 187 countries in the UN.¹⁷ Most of the Kenyan population lives in the rural areas where they are largely dependent on subsistence agriculture for income. Inequality is prevalent in Kenya with great disparities in income and access to social services (social security, education, health) and basic amenities (water, food, sanitation and housing) existing in the country.¹⁸

Coupled with a rising cost of living¹⁹ in the recent past, these two issues, poverty and inequality, have negatively affected and will continue affecting the enjoyment of

¹³ According to the World Population Review, Kenya's Population in 2014 is estimated at 45,941,977. See <http://worldpopulationreview.com/countries/kenya-population/> (accessed 10 June 2014); IFAD Enabling poor rural people to overcome poverty in Kenya <http://www.ifad.org/operations/projects/regions/pf/factsheets/kenya.pdf> (accessed 10 June 2014).

¹⁴ The poverty line—the critical threshold value below which an individual or household is determined to be poor. The poverty rate at \$1.25 a day is the proportion of the population living on less than \$1.25 a day, measured at 2005 international prices, adjusted for purchasing power parity (PPP). See Millennium Development Goals Indicators <http://unstats.un.org/unsd/mdg/Metadata.aspx?IndicatorId=0&SeriesId=580> (accessed 12 June 2014).

¹⁵ Society for International & Kenya National Bureau of Standards Development Exploring Kenya's Inequality. Pulling Apart or Pooling Together? Abridged Report (2013) 20. <http://inequalities.sidint.net/kenya/wp-content/uploads/sites/3/2013/10/SID%20Abridged%20Small%20Version%20Final%20Download%20Report.pdf> (accessed 22 August 2016).

¹⁶ The Gini Co-efficient is used to measure inequality among the rich and poor in a country.

¹⁷ See UNDP Human Development Report 2013 The Rise of the South: Human Progress in a Diverse World *Explanatory note on 2013 HDR composite indices* Kenya.

¹⁸ See Kenya National Bureau of Standards and Society for International Development *Exploring Kenya's Inequality: Pulling Apart or Pooling Together?* 2013 <http://inequalities.sidint.net/kenya/wp-content/uploads/sites/3/2013/10/Preliminary%20pages.pdf> (accessed 12 June 2014).

¹⁹ See Geoffrey Irungu "New survey shows high cost of living Kenyans' key worry" *Business Daily* March 31, 2014 <http://www.businessdailyafrica.com/New-survey-shows-high-cost-of-living-Kenyans--key-worry/-/539552/2264512/-/14pfm1pz/-/index.html> (accessed 12 June 2014). Moses Michira "Kenyans still waiting for State to tame rising cost of living" *Standard Digital* New April 19, 2014 <http://www.standardmedia.co.ke/business/article/2000108973/kenyans-still-waiting-for-state-to-tame-rising-cost-of-living> (accessed 12 June 2014).

human rights in Kenya unless they are addressed by the state. In 2005, the UNDP revealed that a strong link exists between poverty and a broad range of rights protected under international and national law.²⁰ To the 46% of the population living in poverty, a bill of rights with SERs holds a great promise for an opportunity to better their living conditions but this will mean nothing to them if at the end of the day they have to struggle to have food or access the health care system. There is thus a pressing need to turn the promises of the Constitution, especially the SERs, into reality.

After the 2013 General Elections, the first one after the promulgation of the 2010 Constitution, a new system of devolved government was introduced. The objectives of devolution, given the country's history are to allow services to reach Kenyans, to stimulate socio-economic development, to protect and promote the interests and rights of minorities and marginalised communities and to allow communities to manage their own affairs and to further their development.²¹ This new system of government consists of the national government and 47 county governments run by governors.²² The introduction of devolution is amongst the most applauded provisions in the 2010 Constitution meant to address some of the historical injustices perpetuated in the past through the abuse of the centralised system of government.²³

The devolution of services such as the provision of health care and water is meant to bring the responsibility for the delivery of services and by extension these services closer to the people.²⁴ If properly implemented it promises to afford all Kenyans a fair chance at improving their living conditions, as these will ideally be addressed directly by the county governments that are expected to be aware of and responsive to the development challenges of its locals.²⁵ Such awareness and responsiveness were

²⁰ See United Nations Development Programme (UNDP) *Human Development Report 2005: International Cooperation at A Crossroads: Aid, Trade and Security in an Unequal World* 54, 57, 227-229.

²¹ See article 174 of the Constitution of Kenya 2010 on the objects of devolved government.

²² See Chapter 11 of the Constitution of Kenya on Devolved Government.

²³ World Bank *Devolution without disruption: pathways to a successful new Kenya* (2012) 4.

²⁴ The functions to be devolved to county governments are in the Fourth Schedule articles 1 to 14 Constitution of Kenya 2010, and include several services directly related to the provision of SERs such as education, the environment, health and water.

²⁵ See Article 174, 175 (a) and (b); and 176 (2) of Constitution of Kenya 2010 on objects and principles of devolved government in the country.

lacking in the previous system (pre-2010) of centralised government where most development projects were concentrated in a few areas at the expense of others thus hampering social and economic development in all areas of the country.²⁶ There is an overlap between human rights and development²⁷, and with different counties undertaking different development initiatives in the areas of health and provision of water and sanitation, access to these rights is likely to be influenced in a positive or negative manner. Because of this, devolution is bound to have an impact on the enjoyment of human rights by Kenyans, as each county takes on different development initiatives.²⁸ The obligations to protect, fulfil, respect and promote human rights²⁹ are the primary responsibility of the state, and in the case of Kenya both levels of government -national and county- will have a central role to play in the realisation of these rights given the functions of devolved government as envisioned in the fourth schedule read together with article 187 (1) of the Constitution. It is thus important to look at the constitutional protection of SERs and the court's interpretation of these provisions.

3.3 Constitutional protection of socio-economic rights in Kenya

SERs can be described as rights that promote access to certain basic needs (resources, opportunities and services) necessary for human beings to lead a dignified life.³⁰ These rights are elaborated in the ICESCR, the leading international human rights law treaty that addresses the issue of SERs.³¹ The protection of SERs in municipal jurisdictions has taken different forms including as directive principles of state policy in India,³² or as part of the bill of rights in South Africa³³ or in terms of

²⁶ See generally JK Mutakha "An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach" LLD Thesis University of the Western Cape (2014).

²⁷ S McInerney-Lankford "Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective" (2009) 1 *Journal of Human Rights Practice* 51 at 53-55.

²⁸ See also S Wekesa Country "Governments and Rights of Marginalised Ethnic Minorities in Kenya: Evaluating the Potential Benefits and Challenges of Devolution" Unpublished LLM Thesis University of Pretoria (2012) at 16-18 discussing some of the socio-economic rights of minorities that can be addressed through devolution.

²⁹ Discussed in 3.3.2 below.

³⁰ See P O'Connell *Vindicating socio-economic rights: International standards and comparative experiences* (2012) 3: F Viljoen 'The Justiciability of Socio-economic and Cultural Rights: Experience and problems' in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 53 at 54.

³¹ The ICESCR provides for a range of socio-economic rights that include the rights to health (article 12), food and housing (article 11), water, social security (article 9), education (article 14) among other rights that have been protected in numerous domestic Constitutions.

³² Articles 36-51 Constitution of India.

regional treaties as is the case in the United Kingdom whose Human Rights Act is influenced by the European Convention³⁴, itself largely influenced by the provisions of the UDHR. The inclusion of these rights in the 2010 Constitution did not elicit much debate compared to the debate that was witnessed during the constitutional drafting process in South Africa.³⁵ The focus during the drafting process was more on controlling the executive power of the president and devolution of government.³⁶ Notably, SERs were included in one form or the other in all the drafts released during the constitutional drafting process going back to the first official draft in 2002.³⁷ The inclusion of SERs suggests there was general agreement that these rights are fundamental and should be included in the final constitution.

In Kenya, the SERs protected in the bill of rights can be classified into two categories as illustrated below. Firstly, the SERs found in article 43 of the Constitution which provides that every person has a right;

- a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b) to accessible and adequate housing, and to reasonable standards of sanitation;
- c) to be free from hunger, and to have adequate food of acceptable quality;
- d) to clean and safe water in adequate quantities;
- e) to social security; and
- f) to education.

The rights in article 43 like all other human rights should be viewed as interdependent, interrelated and indivisible with each other (those in article 43 itself)

³³ Chapter 2, Constitution of the Republic of South Africa, 1996.

³⁴ Through the Human Rights Act 1998. It is composed of a series of sections that have the effect of codifying the protections in the European Convention on Human Rights into UK law.

³⁵ See DM Davis "The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles Focus on Socio-economic Rights" (1992) 8 *SAJHR* 475-490. N Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights Focus on Socio-economic Rights" (1992) 8 *SAJHR* 451-463. E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution Focus on Socio-economic Rights" (1992) 8 *SAJHR* 464-474.

³⁶ See C Mbazira 'The Judicial Enforcement of the Right to the Highest Attainable Standards of Health under the Constitution of Kenya' in J Biegon and G Musila (ed) *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya* (2012) 130.

³⁷ The two drafts the Bomas Draft and the Proposed New Constitution of Kenya-the Wako Draft had SERs in articles 60-67 which were later collapsed into the current article 43 Constitution of Kenya 2010. See also P Chitere et al *Kenya Constitutional Documents: A Comparative Analysis* CMI Report R2006:5 33-37.

and with the other rights recognised in the Constitution.³⁸ Preferably, they should all be fulfilled by the state to ensure maximum enjoyment of all these rights. For example, the importance of the right to education and the overall enjoyment of other rights have been recognised by the CESCR in General Comment no 13 as follows:³⁹

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make.

The second group of SERs in the Kenyan Constitution are those encompassed in the rights of members of particular groups who need further protection because of their status/position in life or a history of marginalisation that the Constitution seeks to address. These groups include women, children, the elderly, marginalised (minority) communities, the youth and persons with disabilities. Among the provisions in the Constitution that protect these vulnerable groups include article 53, that provides for the rights of children. The rights of children to basic health-care, nutrition and basic shelter are specially protected.⁴⁰ Persons with disabilities have the right “to reasonable access to all places, public transport and information; and to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person.”⁴¹ The State is required to take measures to ensure that the youth access relevant education and training whereas article 55 (a) protects minorities and marginalised groups by calling on the state to provide them with special opportunities in educational and economic fields.⁴²

The provisions on SERs cannot be read on their own but together with other constitutional provisions that support the interpretation of these rights. For instance,

³⁸ See generally DJ Whelan *Indivisible Human Rights: A History* (2010); L Minkler & S Sweeney “On the Indivisibility and Interdependence of Basic Rights in Developing Countries” (2011) 33 *Human Rights Quarterly* 351-396.

³⁹ See CESCR General Comment No. 13 The Right to Education para 1.

⁴⁰ See article 53(1) (b) and (c) Constitution of Kenya 2010.

⁴¹ See article 54 Constitution of Kenya 2010.

⁴² Read with article 56 (b) Constitution of Kenya 2010.

the Constitution recognises duly ratified international human rights law treaties and general rules of international law as making part of the law in Kenya. Article 2(5) provides that “the general rules of international law shall form part of the law of Kenya.” Article 2 (6) further stipulates that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.⁴³ This is a departure from the independence Constitution that reflected the traditional English law approach that made it difficult for the courts to directly apply international law.⁴⁴ What article 2(5) and 2(6) do is that they expand the scope of SERs afforded constitutional protection in Kenya, thus allowing for the provisions of international treaties duly ratified by the state to be relied upon in claiming one’s human rights. Other constitutional provisions that point toward the interrelatedness, interdependence and indivisibility of rights include article 3 (1) which states that every person has an obligation to respect, uphold and defend this Constitution. Human rights are also captured as a national value in the Constitution with article 10(2) (b) providing that “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised,” as a national value to guide the nation.

The Constitution seeks to make human rights an integral part of the Kenyan society and as such, it is replete with provisions that underpin the importance of human rights for the transformation of Kenya. Altogether, the current Constitution is transformative in nature as it seeks to dismantle the relics of the previous constitutional dispensation characterised by a centralised authoritarian executive that controlled all the branches of government by introducing new decentralised governance structures guided by national values enshrined in the Constitution, a system of checks and balances characterised by public participation in matters of governance. The transformative nature of the Constitution has been highlighted by the courts on several occasions. In the matter of *Communications Commission of*

⁴³ The Treaty Making and Ratification Act 45 of 2012 was been passed to provide for the process of domesticating international treaties.

⁴⁴ See *Ukunda v Republic* (1970) EA 512 where the East African Court of Appeal ruled that international law is not among the categories of laws that apply directly in Kenyan courts by virtue of the provisions of the Judicature Act. In *Pattni and Another v Republic* [2001] 2 KLR 264 the court held that ruled that even though international norms are of persuasive value, they are not binding in Kenya unless they are incorporated into the Constitution or other statutes.

Kenya & 5 others v Royal Media Services Limited & 5 others, the Supreme Court noted that:⁴⁵

Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law. As Karl Klare states, "*Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*" Such transformative constitutions as the ones of India, South Africa, Colombia, Kenya and others reflect this vision of transformation.

Judge DS Majanja in *Isaac Ngugi v Nairobi Hospital & 3 Others* recognised the transformative nature of the Constitution when he opined that:⁴⁶

I take the position that from the history of the country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary.

In the matter of *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* the court also noted the transformative nature of the 2010 Kenyan Constitution when it observed that:⁴⁷

The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources...

The views of the court on the transformative nature of the Constitution are validated in the wording of article 19. Article 19 (1) provides that the bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies hinting towards a rights-based approach to all government policies. Article 19 (2) supports the preceding article by providing that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the

⁴⁵ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR Para 377.

⁴⁶ See *Isaac Ngugi v Nairobi Hospital & 3 Others* [2013] eKLR para 25.

⁴⁷ *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* 6.

realisation of the potential of all human beings. What this means is that human dignity is an important element in the enjoyment of all the human rights protected in chapter four of the Constitution. The aspiration to protect the human dignity of all human beings is at the core of the human rights concept. Crucially, the protection afforded by SERs speaks to the preservation of every person's human dignity as they deal with the daily necessities of life such as food, health, shelter and water.⁴⁸ Article 19 (3) (b) recognises that the rights and fundamental freedoms in the bill of rights do not exclude other rights and fundamental freedoms not included in the bill of rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter.

Noteworthy is the fact that the bill of rights applies to and binds all persons and organs of state in terms of article 20(1).⁴⁹ In article 260 the Constitution provides that, a person includes a company, association or other body of persons whether incorporated or unincorporated, which means that the bill of rights applies vertically as well as horizontally. This is significant, as the fulfilment of human rights obligations require commitment from each person.⁵⁰ Additionally, article 20 (5) (b) directs the state to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals, when sharing national resources.

Article 20(4) obliges the court, in interpreting the bill of rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the bill of rights. Among these values are those in article 10 of the Constitution, particularly article 10 (2) (b) dealing with human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.⁵¹ These provisions should be read together with article 259 (1) of the Constitution, which provides that,

⁴⁸ See generally BK Goldewijk, AC Baspineiro & PC Carbonari (eds) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural rights* (2002) 8-9.

⁴⁹ Article 20 (1) reads The bill of rights applies to all law and binds all State organs and all persons.

⁵⁰ The view that human rights binds all persons was recognised by the high court in the case of *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme* para 55-59.

⁵¹ See *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR para 31.

the court should “interpret the Constitution in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the and permits development of the law and contributes to good governance.”⁵² In the matter of *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme* case, the High Court illustrated its awareness and willingness to give meaning to article 20 (3) of the Constitution when it opined:⁵³

[T]his Court has a special responsibility to develop, and comprehensively so, the meaning of all the rights in the Bill of Rights, especially social-economic rights such as the right of access to clean and safe water. It is important therefore to elaborate on the normative content of the right to water so as to help the State realise its constitutional obligations.

The court’s interpretation of the bill of rights is necessary to give these rights content that is sensitive to the realities in the country. From the courts’ interpretation organs of state, the executive, legislature and human rights stakeholders can determine the content of human rights and the obligations incumbent on them. It is also important as it is likely to determine the litigation strategies employed to vindicate human rights. This is crucial at a time when the efforts by the legislative and executive arms of government towards re-aligning existing laws and policies with the Constitution have been plagued by challenges such as the drafting of unconstitutional laws⁵⁴ and non-adherence to set timelines.⁵⁵ This being the case, the courts must, in interpreting and implementing these rights promote “the values that underlie an open and democratic society based on human dignity, equality, equity and freedom” and “the spirit, purport and objects of the bill of rights.”⁵⁶ What this means is that whenever a law is not in line with the bill of rights courts should seek ways to interpret it in a manner that respects human rights.

⁵² Article 259 (1) Constitution of Kenya 2010.

⁵³ *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme* eKLR.

⁵⁴ Parliament has passed a few laws whose constitutionality has been challenged. For instance, several clauses in the Security Law (Amendment) Act 2014 were declared unconstitutional by the court in *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR.

⁵⁵ The timeline for the promulgation of several pieces of legislation necessary to implement the Constitution in the Fifth Schedule have not been adhered to such as the Law governing the two-thirds representation in state organs in the country.

⁵⁶ See articles 20 (4) (a) and (b) Constitution of Kenya 2010. A discussion of what this means is undertaken below.

Article 2 (6) is important in the interpretation of SERs in the Kenyan Constitution because a number of SERs similar to those in article 43 are also contained in a number of treaties/conventions ratified by Kenya that could not be directly applied in the courts prior to 2010 due to the dualist nature of the Kenyan legal system.⁵⁷ Kenya has ratified the following international and regional human rights instruments that include SERs the ICCPR⁵⁸, ICESCR⁵⁹, CRC⁶⁰, Convention on the Rights of Peoples with Disabilities⁶¹, ACHPR⁶²; African Charter on the Rights and Welfare of The Child⁶³. The act of ratifying or acceding to a treaty is an act which of itself is supposed to signal a commitment to be bound by the obligations emanating from these treaties. Despite having ratified/acceded to these treaties years before the 2010 Constitution, the situation had been such that the treaties did not find direct or even indirect application in the country until recently. Kenya's accession to these treaties at the time was no different from the common practice by states across the globe to ratify international human rights treaties as window dressing.⁶⁴

The High Court has applied international law in terms of article 2 (6) of the Constitution. For example, in the matter of *Ibrahim Sangor Osman v Minister of State for Provincial*, in making a ruling in a petition challenging the forceful and illegal eviction of a group of people, the court relied on the provisions of article 11 of the ICESCR and the CESCR's interpretation on the prohibition of forced evictions.⁶⁵ In

⁵⁷ See *Beatrice Wanjiku & Another v The Attorney-General & another* High Court of Kenya at Nairobi, Petition 190 of 2011 para 17 where the court discussed the dualist nature of the legal system before the promulgation of the 2010 Constitution.

⁵⁸ Date of Accession 1 May 1972.

⁵⁹ Date of Accession 1 May 1972.

⁶⁰ Date of Accession 2 September 1990.

⁶¹ Date of Accession 9 April 1979.

⁶² Date of Accession 23 January 1992.

⁶³ Date of Accession 25 July 2000.

⁶⁴ See R Goodman & D Jinks "How to Influence States: Socialization and International Human Rights Law" (2004) 54 *Duke Law Journal* 621 at 633 who opine that in terms of the theory of rationalism, states will only ratify a treaty only when ratification yields materials benefits. See also T Maluwa "Beyond Rhetoric: Commitment to the Ratification of African Human Rights and Human Rights Related Treaties" in T Maluwa (ed) *Law, Politics and Rights: Essays in Memory of Kader Asmal* (2014) 65-66.

⁶⁵ See *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 Others* [2011] eKLR.

this matter Muchelule J, used the CESCR General Comment 7⁶⁶ to underscore the fact that evictions should be carried out as a last resort and that the state should put in place measures to realise rights, thus giving content to article 43 on the right to housing and what it entails.⁶⁷ Courts have relied on CESCR General Comments to interpret SERs cases, making use of article 2 (6) of the Constitution as the empowering provision to infuse international human rights law in their judgments.⁶⁸

Through infusion of international law in their judgments, the courts can play a transformative role by adopting progressive interpretation of human rights based on recommendations of treaty bodies such as the CESCR or seeking inspiration from comparable jurisdictions. The Kenyan judiciary can learn from India and South Africa where the courts progressive jurisprudence has aided in social transformation by stressing the plight of the poor as an affront to their human rights.⁶⁹ Already there are signs that the reforms in the judiciary and some of the judicial pronouncements in the cases discussed herein that the courts can play a transformative role. In interpreting the SERs protected in the Constitution, the role of international human rights and comparative law as guiding principles on how these rights can be interpreted and put into practice is important especially given the fact that these rights are new additions in Kenya's human rights infrastructure.

I argue that resort to guidance from international law and treaties by the courts in interpreting the Kenyan Constitution, which has similar provisions, is needed given the fact that the local jurisprudence on these matters is still fledgling. This will therefore plug the gaps in the legal and policy framework in the country. Thus, the inclusion of article 2(6) is not only commendable but also in line with international

⁶⁶ UN CESCR General Comment No. 7: The right to adequate housing (Article.11.1): forced evictions, 20 May 1997, E/1998/22.

⁶⁷ *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 Others* [2011] eKLR.

⁶⁸ See *John Kabui Mwai v Kenya National Examination Council and 2 others* [2011] eKLR 6-7. *Matthew Okwanda v The Minister of Health and Medical Services and 3 others* [2013] eKLR Para 12-14. *Patricia Asero Ochieng & Others v The Attorney General*, High Court of Kenya, Petition No. 409 of 2009 paras 57–67. See also *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Supreme Court of Kenya*, Advisory Opinion Application 2 of 2012, Dissenting Advisory Opinion of Chief Justice Willy Mutunga, para 11.1. *Beatrice Wanjiku & Another v The Attorney-General & Another* [2012] eKLR para 17.

⁶⁹ See S Gloppen "Courts and Social Transformation: An Analytical Framework" in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (2006) 35-36.

best practice in so far as the protection and promotion of human rights is concerned, as recommended by the CESCR in General Comment 9. Such an inclusion of international law domestically allows for the direct and immediate application of ratified international human rights law instruments in national courts and tribunals to complement the existing legal framework.⁷⁰

Thus, in the case of SERs resort to articles 2(5) and 2(6) should be to buttress what is provided for in the Constitution given the fact that some of the provisions in the Constitution are similar to those in the ICESCR. To this end, the words of Majanja J in *Beatrice Wanjiku & Another vs Attorney General and Another* should serve as guidance:⁷¹

[T]he use of the phrase “under this Constitution” as used in Article 2(6) of the Constitution means that the International Treaties and Conventions are subordinate to, and ought to be in compliance with the Constitution. Although it is generally expected that the Government through its Executive ratifies international instruments in good faith on the behalf of and in the best interests of its Citizens, I do not think the framers of the Constitution would have intended that the international conventions and treaties should be superior to the local legislation and take precedence over laws enacted by their own chosen representatives under the provisions of Article 94. Article 1 places a premium, on the sovereignty of the people to be exercised through democratically elected of representatives and a contrary interpretation would put the Executive in a position where it directly usurps legislative authority, through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional setup. I think a purposive interpretation and application of international Law must be adopted when considering the effect of Article 2(5) and (6).

The application of international law should be to assist in giving meaning to the content of human rights in the Constitution in a manner that enables the identification of obligations incumbent on duty bearers.

⁷⁰ See CESCR General Comment 9 The Domestic Application of the Covenant E/C.12/1998/24 para 4.

⁷¹ *Beatrice Wanjiku & Another vs Attorney General and Another* [2012] eKLR para 20.

3.3.1 The nature of socio-economic rights in the Constitution

The SERs contained in the bill of rights are justiciable.⁷² With these rights being part of the Constitution, the focus has been on how the courts can engage with SERs in a manner likely to make them a reality while not encroaching on the preserve of the other arms of government (the legislature and executive).⁷³ That is upholding the principle of separation of powers between the three arms of government and not making any judgments that require major government budgetary or policy shifts. Furthermore, the courts' interpretation influences the roles of other institutions that have human rights obligations especially the legislature and executive; and institutions established to promote good governance and the rule of law under article 59 of the Constitution.

The notion of justiciability of SERs is explicit in article 23 of the Constitution, which empowers the High Court with the authority to uphold and enforce the bill of rights. Article 23 (1) provides that the High Court has jurisdiction, in accordance with article 165 (2) (b), to decide applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. Article 22 and the rules drafted in terms of this provision⁷⁴ accords standing (*locus standi*). In terms of article 22 (2), court proceedings may be instituted by any of the following parties; a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or

⁷² For a discussion on the justiciability of SERs see F Viljoen "The Justiciability of Socio-economic and Cultural Rights: Experience and Problems" in Y Donders & V Volodin (eds) *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (2007) 53–110; JK Mapulanga-Hulston "Examining the Justiciability of Economic, Social and Cultural Rights" (2002) 6 *The International Journal of Human Rights* 29. SBO Gutto 'Beyond Justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79. See also discussion in 1.2 on the meaning of justiciability.

⁷³ See KS McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (2009) 2. See generally MJ Perry 'Protecting Human Rights in a Democracy: What Role for the Courts Judicial Review: Blessing or Curse - or Both - A Symposium in Commemoration of the Bicentennial of Marbury V. Madison' (2003) 38 *Wake Forest Law Review* 635. See also generally NW Orago 'Socio-Economic Rights and the Potential for Structural Reforms: A Comparative Perspective on the Interpretation of the Socio-economic Rights in The Constitution of Kenya, 2010' in MW Kiwinda, EO Asaala & T Kabau (eds) et al *Human rights and Democratic Governance in Kenya: A post-2007 Appraisal* (2015) 39-82.

⁷⁴ See Legislative Supplement No. 47 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. These rules were drafted in terms of article 22(3) Constitution of Kenya, 2010.

more of its members.⁷⁵ What this provision mean is that the possibility of going to court goes well beyond the people who have their own rights violated or threatened and would allow for public interest litigation to take place to vindicate human rights.

Articles 22 and 23 of the Constitution of Kenya are in line with article 8 of the UDHR, which protects everyone's right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.⁷⁶ Critically, they provide an opportunity for the Kenyans living in poverty to approach the courts for the vindication of their SERs by lessening the procedural requirements that would otherwise lock them out of the courts. It also creates an opportunity for lawyers working pro-bono and NGOs to fight for the cause of poor or those who cannot go to court themselves in the name of public interest, thus bringing to the attention of the courts human rights concerns that need to be addressed.

In many instances, cases dealing with SERs deprivation affect large numbers of people who due to poverty are unable to institute legal action and attend courts (the reasons include inadequate money, living in rural areas far from courts, having poor or no education or being in poor health). Thus, where matters are brought before court on their behalf, it is possible that a positive ruling will benefit many people. Where this is not the case, it is argued that a single case touching on these rights can also shed light on other cases that are not before court, thus triggering necessary action from the relevant institutions such the KNCHR to conduct research or where possible remedying the situation by the organ of state responsible. At the moment, the number of cases dealing with SERs before the courts is not high – a possible indicator that perhaps many in the country are not aware of the SERs in the Constitution and how to demand realisation of these rights. This, coupled with the fact that legal fees are high, mean that few cases are brought before the courts.

⁷⁵ A number of cases have been heard by the courts having been brought to court in terms of article 22 (2) such as *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others* [2012] eKLR; *Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its Members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others* [2014] eKLR. *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR.

⁷⁶ See Article 8 Universal Declaration of Human Rights General Assembly Resolution 217A UN Doc 1/810.

There could be several reasons⁷⁷ for this state of affairs that would require further research beyond the scope of this thesis. However, I argue that the inordinate amount of time that it takes before a matter is put on the court roll, heard and dispensed with means that quick relief in most instances is not possible where needed or interim orders are ignored in matters dealing with eviction, discrimination and access to education or emergency health care.

3.3.2 Human rights obligations

3.3.2.1 Obligations of the state

By entrenching SERs, Kenya has assumed what Orago terms as “a continuum of negative and positive obligations for the realisation of those rights.”⁷⁸ These responsibilities, which are trite in international human rights law, include the duties to respect, protect, promote, and fulfil these rights. The case is not any different in Kenya and this is captured in article 21 of the Constitution. According to article 21 (1), “[i]t is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”⁷⁹ These obligations are yet to be interpreted by the Kenyan courts but have gotten their meaning from international law⁸⁰ and comparative municipal jurisprudence such as that of the South African Constitutional Court;⁸¹ they are accepted to generally mean the following: the duty to respect means that the state should refrain from interfering with the enjoyment of rights. This also includes the state not tolerating any practice that might be detrimental to the full enjoyment of the rights protected in the Constitution.⁸² In the event of any interference and/or limitation such interference should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all

⁷⁷ See discussion in 3.4 below on the weaknesses of judicial enforcement of SERs.

⁷⁸ Orago PER/PELJ 176.

⁷⁹ This duty was reiterated in the matter of *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR para 64 where a petition had been brought to court alleging that a Golf's club excluding women from voting was discriminatory and in violation of the Constitution of Kenya.

⁸⁰ From the interpretation of the CESC.

⁸¹ *Soobramoney v Minister of Health (KwaZulu-Natal)* (1998) (1) SA 765 (CC). *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁸² The obligation to respect has been expanded upon on several occasions by the CESC in the following general comments CESC General Comment No. 7, The Right to Adequate Housing para 8. See also African Commission on Human and People's Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* 11-12. *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR) 2001 para 44-45.

relevant factors in the Constitution.⁸³

The duty to protect means that the state and its organs should prevent others from interfering with or violating the enjoyment of rights of an individual or group of people.⁸⁴ The duty to protect is important when one considers the fact that the enjoyment of SERs may be affected by non-state actors which would require that the state put in place concrete measures in the form of legislation and policy to ensure the protection of rights from violation.⁸⁵ The duty to promote human rights means that the state should take measures to create awareness on human rights to all those within its jurisdiction through various awareness raising methods such as education. The duty to fulfil⁸⁶ entails the state adopting the necessary measures to realize the right, which is to make these rights a reality in the lives of those who would otherwise not enjoy these rights were they not protected in the Constitution.⁸⁷ The obligations are the same for all the SERs with the only difference being the measures undertaken to achieve a specific right.

The above obligations cast in broad terms fall on the three arms of government (legislature, judiciary and the executive) that represent the state. Simply put, these arms of government and their functionaries should perform their roles as constitutionally and statutorily determined with due consideration to human rights. Thus, with the judiciary, fulfilling its human rights obligations should be interpretation

⁸³ These factors protected in article 24 of the Constitution of Kenya 2010 include:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

⁸⁴ See Office of the United Nations High Commissioner for Human Rights Frequently Asked Questions on Economic Social and Cultural Rights Fact Sheet 33 11. <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf> (accessed 4 June 2014). *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651.

⁸⁵ D Brand "Socio-economic Rights in south Africa" in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 37-38.

⁸⁶ A Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach" (1989) 10 *Human Rights Law Journal* 35. See also CESCR General Comment No. 12, The Right to Adequate Food para 15.

⁸⁷ See P De Vos "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal on Human Rights* 67. FI Michelman "The Constitution, Social Rights, and Liberal Political justification" (2003) 1 *International Journal of Constitutional Law* 13-34.

of the law and settlement of disputes in a manner that respects human rights.⁸⁸ For the legislature, this should be through its functions of legislating and holding the executive accountable while upholding human rights.⁸⁹ While for the executive this should be fulfilling the programmes set out in legislation, policy documents and enforcing judicial decisions while upholding human rights.⁹⁰ In my view, the courts can offer an authoritative interpretation of what the specific obligations are when matters to do with SERs are litigated. In the absence of the court's interpretation, guidance has been sought from comparable jurisprudence and the work of the UN treaty bodies.

Given the objects of devolution, such as the socio-economic development of communities and proper focus on minority groups, there is a strong indication that efforts to realise such development will in turn have an influence on the realisation of SERs at the county level. The obligations to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights equally apply to county governments because they are state organs closest to the people and are to work together with the national government in fulfilling the policies of the state.⁹¹ In addition, the only interpretation to be given to article 20(1) that the bill of rights applies to all law and binds all state organs and persons; and article 21(1) read together with article 260, which defines a "state organ"; means that county governments also have human rights obligations.⁹²

3.3.2.2 Business and human rights

Human rights obligations are not incumbent only on the state. The influence of business on the enjoyment of human rights both locally and internationally has led to the need to assign human rights obligations to business. In international law this has resulted in the emergence of the UN "Protect, Respect and Remedy" Framework on

⁸⁸ See generally chapter 10, Constitution of Kenya, on the role of the judiciary.

⁸⁹ See generally chapter 8, Constitution of Kenya on the role of the legislature.

⁹⁰ See generally chapter 9, Constitution of Kenya on the role of the executive.

⁹¹ Article 174 Constitution of Kenya 2010 on the objects and principles of devolved government.

⁹² See Human Rights Committee General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 para 3-6. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhsjYoiCfMKolRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3D%3D> (accessed 10 December 2016).

human rights and business⁹³, which guides business conduct to avoid human rights violations. The UN Framework requires the state to provide an ideal environment (through sufficient regulatory and enforcement frameworks) for business to be conducted in a manner that respects human rights. Where state-owned businesses are involved they should be required to exercise human rights due diligence.⁹⁴ In a nutshell, all these are an extension of the already discussed obligations of the state above. Specifically, business has a corporate responsibility to respect human rights in all their activities. The respect for human rights includes respect for international human rights law and labour conventions together with the domestic human rights provisions in areas where they are registered and where they operate.⁹⁵ Thus, businesses have human rights obligations that must be fulfilled and should be made aware of such or held responsible in the event they do not meet these obligations.

3.3.2.3 Limitations of rights

The rights provided for in the Constitution are not absolute.⁹⁶ Accordingly, there will be instances when these rights will be limited in terms of law that complies with the bounds of the limitation clause. In the case of Kenya, the limitation of the rights in the bill of rights must be in terms of the general limitations clause in article 24 of the Constitution.⁹⁷ It provides that:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a) the nature of the right or fundamental freedom;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;

⁹³ UNOCHR Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 6 September 2016).

⁹⁴ See UNOCHR Guiding Principles on Business and Human Rights 7.

⁹⁵ See UNOCHR Guiding Principles on Business and Human 13-24.

⁹⁶ See generally MH Cheadle “Limitation of Rights” in MH Cheadle DM Davis & NRL Haysom (eds) et al *South African Constitutional Law: Bill of Rights* 30–31 commenting on the reasons for the limitation of rights in South Africa that apply to Kenya as well. See also the South Africa’s Constitutional Court’s decision in *De Reuck v Director of Public Prosecution* 2002 12 BCLR 1285 (CC) para 89.

⁹⁷ See *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2014] eKLR para 58 on the courts approach to the limitation of rights in the Constitution.

- d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is the responsibility of the state or person to justify any limitation of rights in the Constitution in terms of article 24 (3) which requires that “the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article has been satisfied.”

The courts in Kenya are yet to deal extensively with the provisions of the limitation clause on the enjoyment of SERs. In *Kituo Cha Sheria & 8 others v Attorney General*⁹⁸ the High Court engaged with the limitation of rights in terms of article 24. In this case, the court had to determine whether the government’s plan to relocate all refugees in the urban areas to two refugee camps in the country, was an infringement of their rights and fundamental freedoms.⁹⁹ In his ruling, Majanja J, making use of comparative law, underscored the importance of the court engaging in an overall balancing exercise while guided by the five listed grounds in article 24 (1) which, he noted, were not an exhaustive list.¹⁰⁰ The limitation of rights cannot be done in the abstract and is to be undertaken on a case-by-case basis to determine whether such limitation is justified.

Over time, the courts will have further opportunity to unpack the content and meaning of this section and particularly consider the analysis in relation to SERs. It is suggested that consideration of comparative municipal jurisprudence such as that of South Africa, which has a similar limitation clause and SERs is recommended. However, the caveat that necessary adaptations should be made to suit Kenya’s

⁹⁸ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR. See also earlier case of *Randu Nzai Ruwa & 2 Others v Internal Security Minister & another* [2012] eKLR.

⁹⁹ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR paras 1-13.

¹⁰⁰ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR paras 76-89. See also *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR. *Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others* [2015] eKLR (Petition 19 of 2015), *Attorney General & another v Randu Nzai Ruwa & 2 others* [2016] eKLR (Civil Appeal 275 of 2012).

realities, must be heeded.¹⁰¹ The discussion will now focus on the nature of SERs and the kind of obligations that fall on the state as primary guarantor of human rights.

3.3.3 Progressive realisation

Because of their nature, the Constitution (article 21(2)) calls on the state to achieve the progressive realisation of these rights through legislative, policy and other measures, including the setting of standards.¹⁰² This provision has some similarities to article 2 (1) of the ICESCR with the only difference being the setting of standards.

Article 2 (1) thus reads: -

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁰³

This introduced the concept of progressive realisation of SERs in international law and is similarly replicated in the sections 26 and 27 of the South African Constitution.¹⁰⁴ The notion of progressive realisation has been explained as a flexibility mechanism¹⁰⁵ afforded to states and an acknowledgement of the fact that the fulfilment of these rights cannot be achieved immediately given the fact that the state as guarantor of human rights has many commitments that require financial resources.¹⁰⁶ Based on this understanding, the state should put in place measures (that take into account the realities on the ground for example the extent of poverty, the specific local circumstances and immediate needs of the people) that are meant to improve the living conditions of the majority within its jurisdiction immediately and in a manner that gets better over time. This should include improving access to the

¹⁰¹ Already the courts have shown an affinity to consider socio-economic rights jurisprudence from South Africa and India as interpretative aids. Although the use of some of these judgements have been questioned as the socio-economic rights architecture between Kenya and SA are not similar.

¹⁰² See also article 1 ACHPR and 2(1) ICESCR read together with article 2(6) of the Constitution.

¹⁰³ Emphasis added

¹⁰⁴ The progressive realisation of socio-economic rights also internationally recognised in article 4 of Convention on the Rights of the Child (CRC) and article 4 Convention on the Rights of Persons with Disabilities (CRPD).

¹⁰⁵ M Sepúlveda *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003) 312; P Alston & G Quinn 'The nature and scope of state parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 at 174.

¹⁰⁶ See CESCR General Comment No 3 (1990) paras 1 and 9.

basic amenities of life and the quality of life of those living in poverty. I argue that such measures call for the monitoring of rights by the government ministries, county government and the KNCHR¹⁰⁷ as progress can only be measured through monitoring and the setting of benchmarks.

The realization of SERs requires the allocation and utilization of financial resources. In fact, there have been assertions that a country's economy can be a key indicator of the level of obligations it can meet.¹⁰⁸ When a country's economy is performing well, efforts should be made to improve the living standards of its inhabitants through increased government expenditure in social development (in areas such as education, health and agriculture among others). In Kenya, this should be through allocation of, at a minimum, the agreed to 15% to health and 10% to agriculture in the annual budget in terms of the Abuja Declaration¹⁰⁹ and Maputo Declaration on Agriculture and Food Security in Africa¹¹⁰, respectively. Although not legal obligations, Kenya has not met these commitments. Courts on their part cannot rule against the government about budgetary allocations and failure to fulfil global commitments like the Abuja and Maputo Declarations. This is because article 20(5) (c) of the Constitution calls on courts and other tribunals not to interfere with decisions of organs of state concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion. Therefore, the courts are constrained on what they can do when it comes to scrutinising government expenditure on socio-economic development. KNCHR as an institution promoting human rights is not constrained by article 20 (5) (c) and in fulfilling its mandate can question the state's commitments to meeting its human rights obligations.

Even though the courts cannot substitute their judgment on expenditure for that of the government, it is morally questionable when there are instances of corruption

¹⁰⁷ See discussion in 3.5.2 below on the National Human Rights Policy and Plan of Action.

¹⁰⁸ See P Alston and G Quinn "Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, The Symposium: The Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156 at 177.

¹⁰⁹ Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases OAU/SPS/ABUJA/3 http://www.un.org/ga/aids/pdf/abuja_declaration.pdf (accessed 15 March 2016).

¹¹⁰ Maputo Declaration on Agriculture and Food Security in Africa <http://www.nepad.org/system/files/Maputo%20Declaration.pdf> (accessed 15 March 2016).

coupled with fruitless and wasteful expenditure in the face of extreme poverty and inequality when such money could be allocated towards social development projects that can increase access to SERs.¹¹¹ It is important that efforts to curb corruption result in the prosecution of suspects and seizure of all its fruits. Nevertheless, we should not overlook or over-emphasise the role of the courts in the realisation of human rights in Kenya. Judicial enforcement of SERs is a necessary cog in the wheel that is the fulfilment of these rights. Through judicial enforcement of SERs, the measures of the legislature and executive (the people's representatives) can be questioned and government directed to fulfil its obligations, particularly when the measures are ineffective, inaccessible or insufficient.¹¹²

Accordingly, when fulfilling SERs obligations, the executive has to show that its resources are allocated in a manner that will give priority to "widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals."¹¹³ Article 20 (5) is not much different from article 2 (1) of the ICESCR which calls for the allocation of resources based on the utilisation of maximum available resources in order to allow for the proper fulfilment of SERs.¹¹⁴ This determination is the preserve of the political branches of the state and is normally fraught with political considerations that are not easy to judge. However, to ensure the widest possible enjoyment of SERs, the state should provide access to these rights and eventual enjoyment evidenced by a positive change in the standards of living of many poor Kenyans (social transformation)¹¹⁵. Legislative, policy and other measures used to guide development in Kenya should reflect a commitment to fulfilling human rights

¹¹¹ See Kenya government loses Sh500 billion to wasteful expenditure Read more at: <http://www.standardmedia.co.ke/business/article/2000086408/kenya-loses-sh500-billion-to-wasteful-expenditure> <http://www.standardmedia.co.ke/business/article/2000086408/kenya-loses-sh500-billion-to-wasteful-expenditure> (accessed 18 August 2014). KNCHR & Transparency International – Kenya *Living Large: Counting the Cost of Official Extravagance in Kenya* (2006).

¹¹² S Cumming & D Rhodes 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 603 at 606.

¹¹³ See article 20 (5) (b) Constitution of Kenya 2010.

¹¹⁴ Article 2 (1) ICESCR. See also General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant).

¹¹⁵ See M Langford *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 1 bemoaning the absence of social transformation in South Africa despite the robust litigation on SERs in the country.

obligations.¹¹⁶ As such, the existence of these measures is a good starting point in determining the state's commitment towards human rights. A purposive reading of article 21(2) indicates that the efforts of the Kenyan government to meet its human rights obligations should be judged based on the legislative, policy and other measures put in place to realise SERs.

The assessment of the government's efforts should be based on the legislative, policy and other measures put in place to realise SERs while comparing them to government promises and commitments taken in international forums. It however should be noted that the drafting of legislative and policy measures to realise these rights is just a start and for them to have meaning they should be backed by the allocation of sufficient resources, political will, making the right choices about inspection, prosecution of crimes, guidance, training etc. to enable their implementation.¹¹⁷ Institutions like the KNCHR can question the government's allocation in the budget to SERs related matters such as health, education, agriculture among others and recommend ways in which state expenditure can be improved for the benefit of human rights.

Since the achievement of the SERs in article 43 is by progressive realisation, what does it mean for the state? Progressive realisation of SERs means that the state should immediately put in place measures aimed at achieving these rights over time.¹¹⁸ The High Court in *Mitu-Bell Welfare Society v Attorney General* rejected the view that since the fulfilment of SERs in the Kenyan Constitution was progressive in nature, they could not be demanded two years after the promulgation of the Constitution and from organs of state with specific mandates in terms of their establishing legislation. In this case, the Petitioners had approached the court seeking to vindicate their rights after their forceful eviction from the land owned by the second respondent Kenya Airports Authority (KAA) a state agency established in terms of the Kenya Airports Authority Act to manage airports in the country.¹¹⁹ At the crux of the case was whether the second respondent had a responsibility to protect,

¹¹⁶ These measures are discussed in section 3.5 below.

¹¹⁷ P Alston and G Quinn (1987) 9 *Human Rights Quarterly* 169.

¹¹⁸ See CESCR General Comment No. 3, para. 9.

¹¹⁹ Act No.3 of 1991, Chapter 395 of the Laws of Kenya.

promote and respect the rights of the applicants to access housing.¹²⁰ The court instead rightly emphasised the interconnectedness of all the rights in the bill of rights and how the fulfilment of one right led to the enjoyment of other rights.¹²¹ To this end the High Court gave direction on what the idea of progressive realisation means when it stated that;

Articles 21 and 43 require that there should be 'progressive realisation' of economic and social rights implying that the state must begin to take steps, and I might add be seen to take steps, towards realisation of these rights.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the [SERs], and what policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.¹²²

Based on this view, in issuing orders, the court directed the KAA to be involved in protecting, promoting and respecting the socio-economic rights of the petitioners¹²³, a decision which the KAA were displeased with and appealed.

The High Court's decision has been overturned by the Court of Appeal.¹²⁴ The Court of Appeal in its ruling granted the appellants prayers among which were that the KAA did not have any human rights obligations having been established with a specific mandate to oversee Kenyan airports.¹²⁵ In what could be described as a blow to the elaboration of the human rights obligations of state agencies, the Court was of the view that the High Court had overstepped its mandate in finding that KAA had an obligation to promote the defendants right to access housing as this was not part of the KAA's legislative mandate.¹²⁶ This decision was contrary to the court's re-affirming its commitment to the realization, justiciability and enforcement of socio-economic rights.¹²⁷ Regardless of the Court of Appeal's overturning the High Court's decision in *Mitu-Bell*, in my view, the Judge Mumbi Ngugi's dictum above still holds true in terms of what progressive realisation entails and the obligations incumbent on the state and its organs in general to put in place measures to realise SERs. Under

¹²⁰ *Mitu-Bell Welfare Society v Hon. Attorney General & 2 others* [2013] eKLR para 50.

¹²¹ *Mitu-Bell Welfare Society v Hon. Attorney General & 2 others* [2013] eKLR para 50-53.

¹²² *Mitu-Bell Welfare Society v Hon. Attorney General & 2 others* para 53. Also mentioned by the High Court in *Mathew Okwanda v The Minister of Health and Medical Services* para 15 - 16.

¹²³ *Mitu-Bell Welfare Society v Hon. Attorney General & 2 others* [2013] eKLR paras 30 - 33.

¹²⁴ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

¹²⁵ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR paras 11 - 13.

¹²⁶ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 141

¹²⁷ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 34.

international law, organs of state have human rights obligations, which should be upheld through its different functionaries. The national values in the Constitution of which human rights are a part of are supposed to guide the conduct of organs of state and its functionaries.¹²⁸ It would thus be counterintuitive to expect state agencies not to be involved in promoting and protecting human rights while performing their functions. To this end, the approach to be taken is that organs of state and their functionaries have human rights obligations that must be performed. The provisions of the National Policy and Action Plan on Human Rights, the government's human rights framework, further buttress this view.¹²⁹

It is apparent from the courts remarks that the progressive realisation of SERs in the Kenyan Constitution imposes both immediate and long-term obligations on the state to put in place legislative and policy measures that provide access to human rights and instances where it is impossible for people to access such rights as in the case of droughts and disasters provide relief. This is an interpretation in the same lines as that recommended by the Maastricht Guidelines that¹³⁰

The fact that the full realisation of most [SERs] can only be achieved progressively ... does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. [...] The State cannot use the "progressive realisation" provisions in article 2 of the Covenant as a pretext for non-compliance.

For that reason, since the promulgation of the Constitution in 2010, the situation should be that more Kenyans are enjoying or getting access to SERs compared to the pre-2010 years. In terms of living conditions, there should be a noticeable improvement in the living standards of poor Kenyans across the country yet the poverty statistics mentioned earlier on point towards increased poverty, growing inequality and increasing costs of living. Additionally, legislative and policy measures (some of which are discussed below) should reflect a clear commitment to bettering the lives of those living in poverty while taking into consideration human rights.¹³¹

¹²⁸ *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* paras 55 – 59.

¹²⁹ See discussion on this document in section 3.5.2.

¹³⁰ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, guideline 8.

¹³¹ This is an idea implicit in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, guideline 8. See also the Limburg Principles, principle 21 that obliges States to expedite the realisation of the rights and not to use the "progressive realisation" standard to defer indefinitely efforts to ensure full realisation.

The governments (national and county) plans and expenditures should be such that they allow for a wider access and enjoyment of the right to health, food, education and social security.

That the realisation of these rights in some instances requires the allocation of considerable economic resources by the government should not be used as a reason not to have any measures in place. Instead, the executive together with the other organs of state should be guided by the national values espoused in the Constitution and a genuine commitment to the full realisation of the SERs in the Constitution if the country is to achieve its developmental goals. Crucially, there should be a willingness to adjust government plans and policies to improve the likelihood of making the rights in the constitution a reality for those living in poverty.¹³² Fundamentally, in seeking an interpretation of article 21(2) of the Constitution on the progressive realisation of SERs and other constitutional provisions, comparative jurisprudence and international human rights law has been and will be instructive to courts and other organs of state with a role in implementing these rights.¹³³

So far, the Supreme Court of Kenya has had an opportunity to give meaning to the concept of progressive realisation in its ruling in the case of *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.¹³⁴ Although this matter dealt with the issue of one-third representation of women in the Senate¹³⁵, it can be used as a guideline in interpreting the obligations to realise SERs. This is because it is an authoritative interpretation, by the country's apex

¹³² L Chenwi, 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742. See also The nature of States parties' obligations: CESCR General Comment No. 3 (1990) and The right to the highest attainable standard of health: CESCR General Comment No. 14 (2000).

¹³³ See R Hirschl "The Rise of Comparative Constitutional Law: Thoughts on Substance and Method" (2008) 2 *Indian Journal of Constitutional Law* 11.

¹³⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Supreme Court Reference 2 of 2012.

¹³⁵ Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1) (b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March 2013.

court, of what the phrase 'progressive realization' means in the Kenyan context, which is a key factor in the implementation of SERs.

On the meaning of progressive realisation means, the Supreme Court was of the view that it

[S]imply refers to the gradual or phased – out attainment of a goal –a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.¹³⁶

Therefore, taking into consideration the guidance offered by the Supreme Court, in assessing the progressive realisation of these rights, it is imperative to contemplate the reality in Kenya and the capacity of the government to fulfil the rights enshrined in the Constitution. The state as represented by the different arms of the government especially the legislature and executive should lead the way in putting in place measures that will promote the progressive realisation of SERS. Where state organs engage in activities likely to affect the realisation of SERs as is the case with eviction in Mitu-Bell then such organs should have human rights obligations. It would thus not be acceptable for the government to intentionally drag its feet in putting in place measures necessary to allow Kenyans to enjoy SERs that can greatly improve their lives if fully implemented. Instead, the state should take immediate legislative, policy and other measures to realise progressively SERs. This would include drafting the necessary legislation required for the implementation of the Constitution as contained in the fifth Schedule. This process has been plagued by delays, disorganisation, and disregard for the procedures to be followed in initiating legislative and policy processes marked by a failure to involve the public and other stakeholders that that has resulted in poorly drafted laws and in some instances unconstitutional laws that are inimical to the implementation of the Constitution.¹³⁷

¹³⁶ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Para 49.

¹³⁷ See V Odhiambo "Constitution Implementation in Kenya" in PLO Lumumba, M Mbondenyei & S Odero (eds) *The Constitution of Kenya: Contemporary Readings* (2013) 303.

Relevant organs of state should be committed to promulgating legislation and formulating the necessary policies through a consultative process with all relevant stakeholders to allow for better enjoyment of SERs such as legislation to control forced evictions, management of water, health, education and the provision for social security among others. A review and amendment of existing legislation and policies to reflect the new constitutional dispensation with respect to human rights and dignity is also necessary. Policies with clear benchmarks should also be put in place to allow for monitoring and measurement of progress in fulfilling these rights.

In addition to calling for the realisation of SERs in a progressive manner, the Constitution identifies the State and its organs as responsible for human rights. Article 21 (3) is clear that all state organs and public officers have a duty to “address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.” Moreover, the state through its legislative arm should enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹³⁸

The state must guard against retrogressive measures taking into account the import of international human rights law, in this case the ICESCR, in the overall interpretation of state obligations in the realisation of SERs. Based on the directions of the CESCR in its general comments, retrogression can only be allowed in strict conditions. Crucially, the state should desist from implementing deliberate retrogressive measures and where such are put in place they should be justified,¹³⁹ while considering issues such as reasonableness of the action; comprehensive examination and consideration of alternatives to the retrogressive action and genuine participation of the affected groups in decision-making among others.¹⁴⁰

While elaborating on the content of specific human rights and obligations of the state

¹³⁸ See article 21(4) Constitution of Kenya 2010.

¹³⁹ See CESCR General Comment No. 3, para. 9; General Comment No. 13, para.45; General Comment No.14, para. 32.

¹⁴⁰ CESCR General Comment No. 19 para. 42.

from these rights, and the protection of human rights by giving effective remedies for human rights violations the judiciary is not the only institution responsible for promoting human rights. The judiciary is one of the crucial institutions necessary for the interpretation, implementation and by extension the effective promotion and protection of human rights. Already, through its interpretation of SERs, the judiciary has sought to give meaning to some of the State's obligations incumbent in the Constitution. A strong judiciary that is fearless in stating the state's SERs obligations is necessary for the implementation and eventual enjoyment of these rights. Even though the judgments passed are important in making human rights a reality in Kenya, it must be noted that the judiciary's role in the implementation of SERs is limited by the fact that realisation of human rights is dependent on several stakeholders with the major ones being the executive, legislature and business using various avenues.

Moreover, some of the judgments on SERs although progressive in seeking to give meaning to the content of rights have been lacking concrete orders to enforce these rights. In my view, despite reliance on international law and comparative jurisprudence from South Africa, India and Canada where courts have issued bold judgments against organs of state, Kenyan courts have been unwilling to render bold judgments. This has left litigants frustrated as was the case in *Mathew Okwanda* where despite the court's reliance on comparative progressive jurisprudence on SERs, it dismissed the case without ordering the respondent to demonstrate measures it had in place to treat diabetes.¹⁴¹ Because of this and other limitations discussed below, it is necessary for legal representatives to argue cases better by seeking non-traditional judicial remedies, judges to be trained on adjudication of SERs and to allow enough room for other stakeholders and the use of other avenues to contribute to the eventual fulfilment of these rights. Such avenues include an active role by the KNCHR, NGOs, other arms of government, learning institutions and business in the promotion and protection of these rights in the country. This need is evident when one considers the fact that the High Court has noted the limited role of the judiciary in fulfilment of human rights in *Kenya Society for the*

¹⁴¹ *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR paras 9-25.

Mentally Handicapped v Attorney General and Others stating that:¹⁴²

In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and a party who comes before the Court.

The courts and the path of litigation are not a panacea when it comes to SERs and thus necessitate the work of other entities to complement the efforts of the judiciary.

3.4 Limitations on the judicial enforcement of socio-economic rights

Judicial enforcement of SERs in Kenya is not without its challenges as revealed by the court's observation in the *Kenya Society for the Mentally Handicapped v Attorney General* case. Other limitations include the fact that the courts' handling of SERs matters tend to be reactive since courts in most instances deal with human rights issues after violations have occurred. This in most occasions also tends to be in an adversarial legal set-up where cases are often dismissed on technicalities making it difficult for courts to deal with substantive human rights concerns. Additionally, in instances where courts deal with human rights violations, relief is only given to those who appeared before it as parties. In the case of SERs, where the violation of this rights tends to affect a large group of people, it means that those who do not have the opportunity to approach the courts do not get the same relief as those who approached the courts yet they are still affected by the same problem. What this means is that in cases where Public Interest Litigation (PIL)¹⁴³ is not pursued, it becomes difficult to litigate on SERs issues that affect many. Moreover, PIL is not guaranteed to bring about the desired change in policy that would be necessary to undo the bottlenecks that hinder the enjoyment of SERs in the country.¹⁴⁴

¹⁴² *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and 5 others* [2012] eKLR para 18.

¹⁴³ "Public interest litigation (PIL) relates to litigation whose focus is on issues of importance to the public at large. One defining characteristic of PIL is that, through cases focusing on either individuals or groups, it seeks to have a broader impact on the pressing, sometimes polarizing, contemporary social issues." See Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) and the Katiba Institute *A guide to Public Interest Litigation in Kenya* <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> (accessed 22 November 2016).

¹⁴⁴ See S Gloppen "Public Interest Litigation, Social Rights and Social Policy" Arusha Conference, "New Frontiers of Social Policy" December 12-15, 2005.

An additional challenge to the judicial enforcement and implementation of these rights is the literal interpretation of the doctrine of separation of powers such that the judiciary cannot instruct the executive on how and what to spend on in instances where the fulfilment of SERs would require state expenditure. To remedy this situation, the executive and legislative arms of government should be open to advice from specialist institutions such as the KNCHR on how best to realise the human rights in the Constitution through allocation of adequate resources. The interpretation of human rights obligations by courts has also resulted in confusion as evidenced by the difference in view between the high court and Court of Appeal on the human rights obligations of a state organ whose actions/omissions have human rights implications.¹⁴⁵ The situation is compounded by the fact that, where other arms of government have felt, misguidedly, that the judiciary has encroached on their territory; there have been threats to the judiciary¹⁴⁶ or worse for the rule of law, total disregard of orders of court.¹⁴⁷

Such contempt of court orders does not inspire confidence that the executive and legislature will respect court orders deemed to encroach on the role of other arms of government in general and those requiring the state to compensate victims of human rights violations. It could be argued, given the country's history of an above-the-law, executive president with unfettered powers and a legislature that has acted on a strict separation of powers, that there is a likelihood that this will be viewed as attempts by the courts to usurp the powers of other arms of the government and function outside their legitimate constitutional role. This is inimical to the rule of law

<http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf> (accessed 10 October 2015).

¹⁴⁵ Compare the decision in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* with that of the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

¹⁴⁶ J Kaberia "Judiciary under threat, funding cuts to hurt public – CJ" Capital News March 2, 2014 <http://www.capitalfm.co.ke/news/2014/03/judiciary-under-threat-funding-cuts-to-hurt-public-cj/> (accessed 3 July 2014).

¹⁴⁷ Moses Michira and Augustine Oduor "Forget it! I won't implement order to raise teachers' pay, President Uhuru Kenyatta" says Standard Digital 12 September 2015 <http://www.standardmedia.co.ke/article/2000176048/forget-it-i-won-t-implement-order-to-raise-teachers-pay-president-uhuru-kenyatta-says> (accessed 10 October 2015). Isaiah Lucheli "Judiciary now at odds with MPs, Executive over JSC probe" Standard Digital 4 December 2013 <http://www.standardmedia.co.ke/article/2000099337/judiciary-now-at-odds-with-mps-executive-over-jsc-probe> (accessed 10 October 2015). See M Akech "Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya" in EW Gachenga & LG Franceschi (eds) et al *Governance Institutions and the Human Condition* (2009) 97.

and should not be allowed to happen as it goes against the national values and prescribed oaths of office taken by public officials to defend the Constitution.¹⁴⁸

The Contempt to Court Act promulgated in 2016¹⁴⁹ will allow for the committal to civil jail of public officers who ignore court orders and their being held responsible for acting against the rule of law.¹⁵⁰ With this being the case, it would not be farfetched to posit that the literal interpretation of separation of powers coupled with legal representatives lodging poorly drafted petitions and not making bold prayers, could be some of the reasons why the courts have been reluctant to issue bold judgments. The extensive reliance on comparative progressive jurisprudence on human rights in general and leeway given to the High Court to offer appropriate relief when adjudicating human rights matters has not led to precedent setting SER judgments. For instance, in *Okwanda*, the petitioner seeking to enforce his rights to the highest attainable health did not include as one of his prayer a direction by the court that the ministry of health put in place a policy on access to diabetes treatment. To this end, despite the court considering the need for such a policy the judge could not make this an order or court and dismissed the whole petition.¹⁵¹ On the side of the executive, there has been disregard of courts orders and a failure on the part of the legislature to hold the executive accountable. Worse still, there have been what seem to be supremacy battles between the three arms of government thus affecting the rule of law and overall implementation of the Constitution.¹⁵²

A further cause for concern is the fact that in Kenya, as in other parts of the world, access to courts is a challenge to those who cannot afford to secure legal representation, with the effect that the courts have been viewed as the preserve of

¹⁴⁸ Article 74 of the Constitution calls for Public Officers to take prescribed oaths of office.

¹⁴⁹ Contempt to Court Act No 40 of 2016 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2046%20of%202016> (accessed 24 August 2017).

¹⁵⁰ There is emerging jurisprudence on committal of government representatives to civil jail for contempt of court in *Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another* [2016] eKLR. *Ibrahim Haji Issak v Kenya Meat Commission & another* [2013] eKLR.

¹⁵¹ *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR paras 6, 24.

¹⁵² See Miguna Miguna "No arm of government is above the law" *The Star* 01 March 2014 http://www.the-star.co.ke/news/2014/03/01/no-arm-of-government-is-above-the-law_c900857 (accessed 6 September 2016). Faith Ronoh "Muturi defiant as Judiciary, House war rages" *Standard Digital* Saturday, November 1st, 2014 <http://www.standardmedia.co.ke/m/article/2000140093/muturi-defiant-as-judiciary-house-war-rages/?pageNo=1> (accessed 6 September 2016).

the rich to protect their interests. This view is slowly changing given some of the reforms undertaken to rid the judiciary of corruption and the right to access to courts brought about by the 2010 Constitution. The reforms put in place have enabled the courts to make use of comparative international law in matters dealing with the interpretation of human rights and access to justice. However, given the fact that the judiciary is plagued by challenges such as corruption, the judiciary should do more if it is to play a significant role in the social transformation of Kenya to a country where human rights play an integral part. Legal aid should be availed to those who cannot afford to institute legal proceedings given the recent increase in the rates to be charged by advocates¹⁵³, and pro bono work by the legal profession encouraged to vindicate human rights. To this end, the recent promulgation of the Legal Aid Act¹⁵⁴ is a step in in the right direction towards providing legal aid.

Finally, the fashioning of remedies for the violations of SERs in the Constitution is likely to prove a challenge for the courts given their limited experience in dealing with these rights. It is contended further that the remedies provided for in article 23 (3) of the Constitution might prove inadequate in the enforcement of SERs thereby limiting the role the courts can play in the enforcement of these rights. The Constitution provides that the courts in dealing with human rights may grant “appropriate relief, including a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under Article 24; an order for compensation; and an order of judicial review.”¹⁵⁵

Traditional court remedies such as injunctions and declaratory orders might prove inadequate to address some of the issues brought before court yet most judges are

¹⁵³ This was done vide Kenya Gazette Supplement, The Advocates (Remuneration) (Amendment) Order, 2014 11th April 2014 <https://kenya.eregulations.org/media/Advocates%20Remuneration%20Order,2014.pdf> (accessed 30 March 2016). See also Kurian Musa Kenyans to pay more for litigation *Standard Digital* April 18, 2014 <http://www.standardmedia.co.ke/article/2000109691/kenyans-to-pay-more-for-litigation> (accessed 30 March 2016).

¹⁵⁴ The Legal Aid Act No. 6 of 2016 Kenya Gazette Supplement No. 56 (Acts No. 6) http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LegalAidAct_No._6_of_2016.pdf (accessed 2 September 2016).

¹⁵⁵ Article 23 (3) (a) – (f) Constitution of Kenya 2010.

likely to resort to such remedies in SERs matters.¹⁵⁶ The remedies envisioned in article 23 leave room to the courts to come up with an appropriate relief, which is capable of enforcement. What this means is that if courts are to issue enforceable remedies in SERs litigation outside the remedies provided for in article 23 (3) there is need to be innovative and as has been argued previously this will require training of the judiciary on matters dealing with human rights adjudication. So far, the High Court in *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others*¹⁵⁷ chose to use the KNCHR, an independent state institution not involved in the litigation, to monitor the execution of its order on issues to do with allocation of houses.¹⁵⁸ There has also been the use of structural injunctions¹⁵⁹ in the *Mitu-Bell*¹⁶⁰ and *Satrose Ayuma*¹⁶¹ cases, but at the time of writing the *Mitu-Bell* decision had been overturned while the court's decision in *Satrose Ayuma* had not been implemented.

Other challenges exist that serve to limit the judicial enforcement and realisation of SERs in the country including a culture of judicial conservatism and deference to executive decisions.¹⁶² It has also been argued that the court in *John Kabui v Kenya National Examination Council* "adopted the same old, cynical, conservative, and state-friendly approach to the interpretation of Article 43 of the Constitution which deals with SERs"¹⁶³ when the court noted that:¹⁶⁴

The realisation of socio-economic right means the realization of the conditions of the poor and

¹⁵⁶ For more on this see NW Orago "Socio-economic rights and the potential for structural reforms: A comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya, 2010" in MK Mbondenyi, EO Asaala & T Kabau *et al* (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 69-70.

¹⁵⁷ [2016] eKLR.

¹⁵⁸ *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others* para 39. See also *Musa Mohammed Dagane & 25 others v Attorney General & another* [2011] eKLR where the court ordered the KNCHR to make a site inspection and report to the court on the findings. See further discussion of these cases in chapter Four.

¹⁵⁹ On the use of structural interdicts, see Orago *Human rights and democratic governance in Kenya: A post-2007 appraisal* 74-78.

¹⁶⁰ See *Mitu-Bell Welfare Society v Hon. Attorney General & 2 others* paras 31-32.

¹⁶¹ *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme* Para 11.

¹⁶² For an in-depth discussion of the courts' shortcomings in the two cases, see The East African Centre for Human Rights (EACHRights) *A Compendium on Economic and Social Rights Cases under the Constitution of Kenya 2010* (2014) 23-25.

¹⁶³ JO Arwa "Litigating socio-economic rights in domestic courts: The Kenyan experience" (2013) 17 *Law and Democracy* 419 at 428.

¹⁶⁴ *John Kabui v Kenya National Examination Council* 6. See also *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR paras 21-22.

less-advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective however is limited resources on the part of the government. The available resource is not adequate to facilitate the immediate provision of socio—economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual. Socio-economic rights are by their very nature ideologically loaded. The realization of these rights involves the making of ideological choices which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.

Moreover, Arwa has noted that the Kenyan judiciary has tended to copy the existing SERs jurisprudence in South Africa without adapting it to suit Kenya's reality.¹⁶⁵ This has led to the importation of the 'reasonableness approach' that has been utilised in South Africa as a measure of the government's efforts to realise its SERs obligations as enshrined in the SA Constitution. The reasonableness approach has been fashioned by the South African Constitutional Court to evaluate compliance with human rights obligations of government measures put in place to realise SERs in the South African Constitution. As a test, it assesses the reasonableness of the measures taken by the government to realize SERs within its available resources.¹⁶⁶ The use of the reasonableness approach does not consider the fact that SER provisions in Kenya are worded differently from those in South Africa. The Kenya Constitution provides for a right to SERs¹⁶⁷ whereas the South African Constitution provides for a right to access SERs.¹⁶⁸ Additionally, international treaties duly ratified form part of Kenyan law (in this instance the ICESCR of which Kenya has ratified and South Africa had not at the time the decisions were made). At the very least, the 'minimum core' approach should be considered given the provisions in articles 2(5) and 2(6) that allows for the application of international law in human rights matters. The minimum core approach posits that despite the government's resources, all

¹⁶⁵ JO Arwa 2013 *Law and Democracy* 424-431.

¹⁶⁶ See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 para 21-22. *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), para 39-44. 67-68. *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721; 2002 (10) BCLR 1033 para 67-68.

¹⁶⁷ Article 43 Constitution of Kenya, 2010.

¹⁶⁸ Section 27 Constitution of the Republic of South Africa, 1996.

within its jurisdiction should enjoy at least essential levels of protection of each of their SERs.¹⁶⁹ This approach is yet to be considered by the courts in the adjudication of SERs matters without giving reasons for the failure to consider this approach.

That the Kenyan judiciary and legal fraternity are insufficiently trained to deal with SERs is a contention that carries weight once we consider the judiciary's history. The Kenyan judiciary has had a history of being riddled with corruption as was uncovered in 2003 by a committee established to investigate corruption in the judiciary.¹⁷⁰ Moreover, the judiciary was rigid in its interpretation of human rights and SERs that were not provided for in the previous constitution. There have been efforts to reform the judiciary dating back from 2003 and recently after the promulgation of the 2010 Constitution.¹⁷¹ However, corruption allegations still dog the judiciary calling into question the integrity and ability of the judiciary to play its role in the overall adjudication of justice.¹⁷² Despite these efforts to reform the judiciary, some of the judges who made rulings in the previous constitutional dispensation are still members of the bench, which points to the possibility of carrying inherent judicial bias against SERs.

The legal education system has only been recently reformed to reflect the provisions of the new Constitution meaning those on the bench do not have the requisite training and by extension appreciation of human rights litigation. Efforts are being made to train judges by the Judicial Training Institute and this should lead to an improvement in the judges understanding of these rights.¹⁷³ Nonetheless, these factors make it difficult for the judiciary to be relied upon to make progressive

¹⁶⁹ See CESCR General Comment No.3 para 10.

¹⁷⁰ See Corruption in Kenyan Judiciary <http://www.icgg.org/downloads/2010/Sitienei.pdf> (accessed 31 July 2014)

¹⁷¹ Some of these efforts included the public vetting of judges of the Supreme Court, Court of Appeal and the High Courts in the country.

¹⁷² See "Judiciary and electoral agency must reclaim shrinking confidence" *Standard Digital* March 29, 2016 <http://www.standardmedia.co.ke/article/2000196407/judiciary-and-electoral-agency-must-reclaim-shrinking-confidence/> (accessed 29 March 2016). Billy Muiruri "Judiciary, poll body struggle to win public trust" *Daily Nation* March 26, 2016 <http://www.nation.co.ke/news/Judiciary-and-poll-body-struggle-to-win-public-trust/-/1056/3134142/-/123lx15/-/index.html> (accessed 29 March 2016).

¹⁷³ The Judiciary Training Institute—JTI <http://www.judiciary.go.ke/portal/page/judiciary-training-institute> (accessed 30 March 2016).

interpretations on the implementation of SERs in the country. Although written in a South African context, the words of former Judge Albie Sachs, apply to the Kenya judiciary. Thus, in the interpretation of SERs, the Kenyan Judiciary is "...likely to get it wrong" because of the "class from which [they] judges traditionally have been drawn, and the nature of [their] legal thinking which tends to look at questions in abstract and formulaic ways that end up favouring the status quo."¹⁷⁴ This of course is not to say that what the judiciary has done so far is not commendable, it indeed is a progressive step in the right direction. However, when dealing with matters to do with daily survival of many Kenyans, the judiciary needs to do more by being bold and assertive in its analysis of SERs not to mention the remedies given to those whose rights have been violated. There should be less judicial conservatism and deference to executive decisions.¹⁷⁵

Because of the challenges and shortcomings discussed above, the judicial enforcement of SERs alone is not sufficient for the realisation of these rights in the country. Arguably, the proliferation of SERs litigation without a sound legal and policy framework, and the absence of respect for the rule of law are inimical to the materialisation of these rights.¹⁷⁶ The delay¹⁷⁷ in formulating the necessary policy and legislative frameworks to aid the full implementation of the Constitution and the re-alignment of existing laws and policies with the supreme law only mean that it will take longer before Kenyans can reap the full benefits of the Constitution. There is

¹⁷⁴ A Sachs "The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case" in J Peris & S Kristian (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 140.

¹⁷⁵ See generally JO Arwa 2013 *Law and Democracy* 424-431. J Oloka-Onyango "Using courts of law to tackle poverty and social exclusion: The case of post-2010 Kenya" (2015) 19 *Law and Democracy* 193 at 210.

¹⁷⁶ See generally S Gloppen "Litigation as a Strategy to Hold the government Accountable for implementing the Right to Health" (2008) 10 *Health Human Rights* 21 at 22.

¹⁷⁷ Constitutional timelines set for the promulgation and review of legislative and policy measures have not been met and in some instances law and policies have been rushed in a bid to meet deadlines. Among the policies that have taken a long time to be formulated are the Human Rights Policy, Legal Aid Bill, Fair Administrative Action Bill and several laws on Land use and management that have ramifications for the enjoyment of SERs. Implementing Kenya's Constitution: status, achievements and challenges Speech by Mr. Charles Nyachae – Chairman, Commission for the Implementation of the Constitution at the "FriEnt Roundtable" – Charlottenstrasse, Berlin – Germany 12 May 2012 <http://www.cickenya.org/index.php/newsroom/speeches/item/103-implementing-kenyas-constitution-status-achievements-and-challenges#.WDSTCbJ95kg> (accessed 22 November 2016).

thus, a strong case for other institutions to complement the work of the judiciary.¹⁷⁸ Other institutions working alongside the courts to make the human rights in the Constitution a reality would be in keeping with the spirit of articles 3 (1) and 21 (1) which place the obligations to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights on the state, organs of state and every person.

Given the fact that the judiciary is hamstrung in the enforcement and eventual realisation of SERs, there is need to explore the possibility of other institutions complementing the judiciary's role. The realisation of human rights requires the involvement of several actors. This is noted by Kabir, who holds that:¹⁷⁹

... effective domestic protection of human rights requires a network of complementary norms and mechanisms. These include the following: state adherence to human rights treaties, implementation of international human rights obligations in domestic law: a legal system that provides comprehensive, substantive and procedural human rights laws, effective and accessible state institutions where individuals can obtain redress for human rights breaches, such as independent courts and national human rights institutions, a cogent and vibrant human rights NGO community; and above all, a population willing to develop a strong human rights culture.

However, such involvement of different role-players must take into cognisance the role of the three arms of government and business among others as they are likely to influence the realisation of human rights. As discussed above judicial pronouncements on SERs and the existent laws and policies are influencing the realisation of these rights.

Paris Principles compliant NHRIs have been mooted as a possible solution to the shortcomings of judicial enforcement of SERs. As discussed in the preceding chapter, these institutions have certain characteristics that make them idea in

¹⁷⁸ See SL Cummings & DL Rhode "Public Interest Litigation: Insights from Theory and Practice" (2009) 36 *Fordham Urban Law Journal* 603 at 604-605, 609 who argue that socio-economic rights litigation cannot work independent of other institutions domestically. See also M Pieterse "Legislative and Executive Translation of the Right to Health Care Services" (2014) 13 *Law Democracy and Development* 3.

¹⁷⁹ AHM Kabir "Establishing Human Rights Commission in South Asia: A Critical Analysis of the Policies and Prospects" (2001) 2 *Asia Pacific Journal on Human Rights and the Law* 1 at 6. See J Donnelly, 'Post-cold War Reflections on the Study of International Human Rights' (1994) 8 *Ethics and International Affairs* 97 at 117.

promoting and protecting human rights. For one they are independent institution created specifically to promote and protect human rights. They can use different ways to fulfil their mandate such as using media, public hearings, investigations and receiving complaints thus identifying and recommending ways to address human rights concerns before it is too late or before they get to court. Moreover, NHRIs are likely to navigate the challenges faced by the courts in the adjudication of these rights by taking advantage of their unique position between government and the civil society. As independent institutions, they can offer advice to organs of state while at the same time acting as a conduit between civil society and the government. They can also utilise their expertise in human rights to make the government aware of international human rights best practice in addition to using its resources for the specific tasks of promoting and protecting human rights the country.¹⁸⁰ The KNCHR is an NHRI, it is therefore crucial to interrogate whether, and how it can play a complementary role to the judiciary while executing its mandate.

Further discussion on what role the KNCHR can play concerning the advancement of SERs in Kenya is dealt with in chapter four. Having looked at the court's interpretation of the human rights provisions in the Constitution and how this might influence the realisation of these rights, the discussion will focus on the legislative and policy measures that influence the fulfilment of SERs. This is done with the understanding that the realisation of SERs can be achieved through the promulgation, interpretation and implementation of legislative and policy measures dealing with these rights

3.5 Legislative and policy measures on socio-economic rights

The constitutional protection of SERs is but one of the necessary steps needed to make these rights a reality on the ground. It is understood that for these rights to be reality, a few things need to be taking place at the same time, key amongst them the formulation of relevant legislation and policies to drive the fulfilment of these rights. On this front, almost five years after the promulgation of the 2010 Constitution, many laws and policies have been drafted to guide the realisation of human rights in general but a lot still needs to be done. This section discusses some of the existing

¹⁸⁰ See discussion in 2.8.

policy measures that are likely to influence organs of state in carrying out their human rights obligations and particularly, the KNCHR in promoting, protecting and monitoring of SERs in the country. The list is not exhaustive and consists of policies I consider as a sample because they have an overarching influence on the drafting of all other legislative and policy measures needed for the implementation of the Constitution.

3.5.1 Kenya Vision 2030

Kenya Vision 2030 is the country's long-term development plan meant to guide the country from a low-income country to a newly industrialising, middle-income economy by the year 2030. It was drafted and launched in October 2006, a few years before the promulgation of the 2010 Constitution. According to the drafters of the blueprint, it aims to accelerate Kenya's progress towards achieving and surpassing the MDGs. Kenya Vision 2030 is anchored on three key pillars: economic, social and political as discussed below.

The objective of the economic pillar is to achieve an economic growth rate of 10% per annum and sustaining the same until 2030.¹⁸¹ It aims to do this by establishing several flagship projects in the tourism, agricultural, mining and financial sectors. The social pillar seeks to create "a just, cohesive and equitable social development in a clean and secure environment" by focusing on a number of human and social welfare projects that include education and training; health; environment; housing and urbanization; gender, children and social development; and youth and sports.¹⁸² These projects are aimed at improving the standards of living and quality of life in the country. The political pillar seeks "an issue-based, people-centred, result-oriented and accountable democratic system."¹⁸³ Vision 2030 is to be achieved using medium term plans covering a period of 5 years each. The current government is guided by the second Medium Term Plan 2013–2017(second MTP) whose theme is "Transforming Kenya: Pathway to Devolution, Socio-Economic Development, Equity and National Unity" in terms of its political manifesto in the 2013 General

¹⁸¹ See Economic Pillar <http://www.vision2030.go.ke/index.php/pillars> (accessed 19 August 2014).

¹⁸² See Social Pillar <http://www.vision2030.go.ke/index.php/pillars/index/social> (accessed 19 August 2014).

¹⁸³ See Political Pillar <http://www.vision2030.go.ke/index.php/pillars/index/political> (accessed 19 August 2014).

Elections.¹⁸⁴ As will be revealed in the discussion below, there have been attempts to draft the second MTP with due consideration to the provisions of the 2010 Constitution.

Vision 2030 is an economic blue print with no deliberate focus on human rights issues. However, the economic blueprint also has ramifications for the enjoyment of human rights in the country given that it seeks to have a “democratic political system founded on issue-based politics that respects the rule of law and protects the rights and freedoms of every individual.”¹⁸⁵ Crucially, Vision 2030 seeks to eradicate poverty as it takes cognisance of the fact that it will be difficult for the country to gain the social cohesion predicted in it (Vision 2030) if significant sections of the population live in abject poverty.¹⁸⁶ Therefore, the projects undertaken under the economic blue print must consider human rights as important due to their entrenchment in the Constitution and the requirement that all policies be in line with the supreme law. It is with this in mind that the discussion of the Vision 2030 and the second MTP prepared to flesh out the next developmental goals of the country is undertaken to identify some of the laws and policies likely to influence human rights.

3.5.1.1 The Second Medium Term Plan 2013-2017

Under the social pillar of the second MTP, the government aims to invest in the people of Kenya through several initiatives that cover education and training with the aim of making free access to quality basic education a reality to all school-going children in the country. The Plan also aims to improve access to health services by providing “equitable, affordable and quality health care of the Highest Standard.”¹⁸⁷ The crucial nature of the environment as an important factor in the existence of humans and the overall enjoyment of human rights are recognised in the government’s plans until 2017. The second MTP aims to enhance a clean, safe and

¹⁸⁴ Republic of Kenya, *Kenya Vision 2030 Second Medium Term Plan 2013 – 2017* <http://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (accessed 18 August 2014).

¹⁸⁵ See Republic of Kenya Sessional Paper 10 of 2012 on Vision 2030. http://www.vision2030.go.ke/cms/vds/VISION_2030_Sessional_Paper_final_09_11_12.pdf (accessed 17 June 2014). See also Republic of Kenya Vision 2030 Popular Version (2007) http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf (accessed 17 June 2014).

¹⁸⁶ Republic of Kenya Sessional Paper on Vision 2030 Executive Summary iii.

¹⁸⁷ See Kenya Vision 2030 Second Medium Term Plan 77-81.

sustainable environment while ensuring access to clean water and decent sanitation services.¹⁸⁸ To cater for the increasing Kenyan population that will put pressure on the finite resources in the country, the MTP intends to provide adequate and decent housing in a sustainable environment for all. This will address the issue of slum dwellings in urban areas and the often-brutal forced evictions that have been witness in some parts of the country.¹⁸⁹

Additionally, the Plan promises to cater for the vulnerable members of the community. The MTP sets out specific plans meant to cater for women, youth, children and vulnerable societies in the country as provided for in the Constitution.¹⁹⁰ The programmes mentioned above speak to the fulfilment of socio-economic aspects, which will have a direct bearing on the enjoyment of the SERs in the Constitution and international human rights law treaties that form part of the laws of Kenya in terms of the Constitution. The development of policies and legislative measures to facilitate the execution of the programmes anticipated in the second MTP, human rights considerations should not be ignored. To put it differently, there is need for a human rights based approach (HRBAD) to the formulation of all policies and legislative measures meant to make vision 2030 a reality.

HRBAD involves the inclusion of human rights in the development process with the aim of addressing the inequalities that might be brought about by development projects. The very essence of this approach is that “the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law.”¹⁹¹ For HRBAD to be adopted there needs to be full commitment from the political players in the country, represented by the legislative arm, illustrated through the various programmes under the political pillar. The drafting of the Kenya Health Policy 2014-2030 is one such effort aimed at infusing human rights in matters of health in order to achieve the right to health as

¹⁸⁸ See Kenya Vision 2030 Second Medium Term Plan 82-86.

¹⁸⁹ See Kenya Vision 2030 Second Medium Term Plan 86-88.

¹⁹⁰ See Kenya Vision 2030 Second Medium Term Plan 88.

¹⁹¹ See OHCHR Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation (2006) 15.

enshrined in the Constitution.¹⁹² The Health Policy proposes to integrate human rights norms and principles in the design, implementation, monitoring, and evaluation of health interventions and programmes.¹⁹³ Through the different policy measures, benchmarks and indicators¹⁹⁴ identified in the document, it seeks to achieve its main goal “to attain the highest possible standard of health in a responsive manner.”¹⁹⁵ Despite the progress made in having a coherent Health Policy, a coordinated approach between the executive on the one hand and the legislature on the other is lacking with several bills dealing with the right to health such as the Health Bill 2015¹⁹⁶, the Reproductive Health Care Bill 2014¹⁹⁷ and the Mental Health Bill 2014¹⁹⁸ pending in parliament.

After the 2013 elections, county governments were put in place as part of the devolution brought about by the 2010 Constitution. Devolution has faced numerous challenges such as revenue allocation and collection, distrust between the national and county governments, wasteful expenditure, among others,¹⁹⁹ that need to be addressed if these governments are to bring services closer to citizens as envisioned by the drafters of the Constitution. There have been challenges with devolution and the second MTP seeks to make devolution work as one of the programmes under the political pillar. According to the government, it aims to ensure “...a rapid and efficient transition to a two-tier government under which county governments assume

¹⁹² See Republic of Kenya, Ministry of Health Kenya *Health Policy 2014-2030 Towards Attaining the Highest Standard of Health* (2014) foreword.

¹⁹³ This includes human dignity; attention to the needs and rights of all, with special emphasis on children, persons with disabilities, youth, minorities and marginalised groups, and older members of the society. See *Health Policy 2014-2030 Towards Attaining the Highest Standard of Health* (2014) 30.

¹⁹⁴ For instance, it seeks to increase life expectancy of Kenyans from 60 years to 72 years, decrease the annual mortality rate from 10.6% to 5.4% per 1000 people

¹⁹⁵ See *Health Policy 2014-2030 Towards Attaining the Highest Standard of Health* (2014) 29.

¹⁹⁶ Kenya Gazette Supplement No 44 National Assembly Bills, 2015 The Health Bill 2015 17th April 2015 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/HealthBill2015.pdf> (accessed 30 March 2016). The bill was introduced by Hon. Aden Duale, the Leader of the Majority party. It has undergone the second reading and is being dealt with at the committee stage.

¹⁹⁷ Kenya Gazette Supplement No 57 Senate Bills, 2014, The Reproductive Health Care Bill 2014 22nd April 2014 http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ReproductiveHealthCareBill2014__1_.pdf (accessed 30 March 2016).

¹⁹⁸ Kenya Gazette Supplement No 61 National Assembly Bills, 2014 The Mental Health Bill 2014, 22nd April 2014 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/MentalHealthBill2014.pdf> (accessed 30 March 2016). The bill went through the first reading on 03/06/2014 after which no debate on the bill has been undertaken.

¹⁹⁹ See Demas Kiprono Kenya: Devolution, Corruption and Elusive Accountability <http://allafrica.com/stories/201510110279.html> (accessed 30 October 2015)

full responsibility of the functions assigned to them under the constitution. Priority at the national level will be given to provision of adequate finance to match functions allocated to counties, and capacity for policymaking and project implementation in all county governments to bring the full benefits of devolution to the people.”²⁰⁰

Furthermore, the MTP seeks to improve governance and respect for the rule of law in the country on the national and county levels which will need to work together to make Vision 2030 a reality given the devolution of some functions such as health to county governments. Some of the programmes that affect the human rights architecture of the country under the rule of law and governance sector include judicial transformation, which is currently guided by the Integrated Judiciary Transformation Framework (IJTF).²⁰¹ The framework aims at transforming the judiciary into a legitimate, effective and independent custodian of justice through ensuring access to and expeditious delivery of justice to all.²⁰² This is together with the government’s plan to harmonise its development programmes with the SDGs.²⁰³ The implementation of the bill of rights in the Constitution is also included amongst the other programmes to be undertaken during the 2013-2017 period through the drafting and implementation of the National Policy and Action Plan on Human Rights, which is discussed next.

3.5.2 National Policy and Action Plan for Human Rights 2014

The current NAPA has been modified from the 2010 Draft NAPA, which because of delays was not tabled and discussed in parliament. This resulted in the 2010 document not reflecting the real situation in the country brought about after the 2013 General Elections that ushered in the devolved system of government. The time it took to have a policy in place on human rights has not helped in creating a culture of human rights in the country especially with organs of state.²⁰⁴ It could be argued that

²⁰⁰ See Kenya Vision 2030 Second Medium Term Plan xiii; 3.

²⁰¹ Judiciary Transformation Framework 2012-2016
<http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf> (accessed 10 November 2013).

²⁰² See Kenya Vision 2030 Second Medium Term Plan 105.

²⁰³ Kenya Vision 2030 Second Medium Term Plan 5-6.

²⁰⁴ Hon Jackson Kiptanui questions the length of time taken to formulate the policy and the criteria to be used to determine the review periods of the Action Plan on Human Rights. See National Assembly Official Report Thursday, 2nd December 2015 15.

had the 2010 Draft been approved, it would set in motion the process of sensitising organs of state of their human rights obligations while at the same time leaving enough room for changes to be effected to reflect the new system of government ushered in 2013. Nevertheless, the policy is a genuine effort by the government to have a guiding document on human rights is commendable. According to the government, “The Bill of Rights thus finds expression in the adoption of a National Policy and Action Plan for Human Rights that strengthens social harmony and cohesion, advances the process of development and promotes accountability.”²⁰⁵ The NAPA seeks to operationalise chapter 4 of the Constitution on the bill of rights with the intention to promote and protect these rights.²⁰⁶ The NAPA is to serve as the government’s framework in developing policies that will enhance the realisation and enjoyment of human rights by all Kenyans at the national and county levels of government.²⁰⁷

Among its objectives are the respect of all human rights by the state and non-state actors, strengthening the capacity of all actors to fulfil human rights, promoting the HRBAD in all sectors, and the mainstreaming of human rights in public policy development and resource allocation.²⁰⁸ The incorporation of HRBAD in all development matters should buttress the state’s duty to fulfil its human rights obligations by calling upon all organs of state to be mindful of human rights in their development planning.²⁰⁹ In other words, there will be a constitutional duty for organs of state to adopt the HRBAD since the NAPA has been drafted to operationalise Chapter Four of the Constitution. Even though ambitious in nature, these objectives as identified show an understanding of what needs to be done to realise human rights. The full implementation of this document is what is important and will determine whether the government is serious about human rights or not.

²⁰⁵ See Office of the Attorney General and Department of Justice Sessional Paper No.3 of 2014 *National Policy and Action Plan for Human Rights* 7. <http://www.knchr.org/Portals/0/Bills/National%20Human%20Rights%20Policy%20and%20Action%20Plan.pdf> (accessed 5 September 2016).

²⁰⁶ See *National Policy and Action Plan for Human Rights* vi

²⁰⁷ See *National Policy and Action Plan for Human Rights* 15.

²⁰⁸ See *National Policy and Action Plan for Human Rights* 12.

²⁰⁹ See *National Policy and Action Plan for Human Rights* 10.

Amongst the key priority areas in the NAPA is a focus on SERs meant to fill the existing gaps in the country. The document thus identifies the following SERs that need to be promoted and protected if the Constitution is to be a reality for Kenyans.

These include:²¹⁰

- i. The right to the highest attainable standard of health, mainly impeded by inadequate health care services;
- ii. The rights relating to property, which are affected by disparities in land ownership and human and wildlife conflict;
- iii. The right to housing as challenged by affordability, access and availability;
- iv. The right to food, as impeded by widespread food insecurity;
- v. The right to clean and safe water in adequate quantities, where access is still a challenge;
- vi. The right to education, as hindered by low quality and inadequate facilities; and
- vii. The right to a clean environment.

The right to social security is not recognised among the SERs that need protection yet it is included in article 43. Nonetheless, the NAPA goes further and enumerates the obligations of the state to promote, protect and fulfil these rights in a progressive manner. For instance, on the right to free from hunger and to have adequate food of acceptable quality, the NAPA declares that “The State shall ensure that everyone is free from hunger and shall progressively ensure that everyone has access to affordable food of acceptable quality in sufficient quantity.”²¹¹ The word progressively is included in all instances where the obligations of the state are enumerated. The policy also identifies the impediments to the full enjoyment of these rights and goes on to suggest priority actions to be undertaken to realize the respective rights.²¹² Additionally, the NAPA identifies the duty bearers and assigns them their respective duties to realise SERs²¹³ thus providing a basis for monitoring the realisation of these rights in court and by article 59 Commissions.

To this end, these commissions are “expected to carry out their mandates under their respective Acts to monitor and evaluate the implementation of this policy.”²¹⁴ With no clear tasks assigned to each the article 59 Commissions, this direction seems to suggest that it is up to the Commissions to decide which area falls within their area of competence. The role of the KNCHR is set out in more detail in the

²¹⁰ See *National Policy and Action Plan for Human Rights* 17.

²¹¹ *National Policy and Action Plan for Human Rights* 26.

²¹² See *National Policy and Action Plan for Human Rights* 22-29.

²¹³ *National Policy and Action Plan for Human Rights* 38.

²¹⁴ *National Policy and Action Plan for Human Rights* 39.

NAPA, which provides that the Commission shall be in charge of strategic level monitoring by doing the following:²¹⁵

- Establish baseline information which can be used as a starting point for all the National Action Plan priority action areas, both as a tool to facilitate targeting and as fixed point from which trends in agreed key indicators for outputs can be tracked.
 - ✓ Systematically collect a range of data at fixed intervals to document changes in the target s population and attribute these to the National Action Plan priority action areas (where appropriate).
- Undertake special analyses as necessary to explore changes in particular agreed key indicators
- Disseminate and publish monitoring information in appropriate formats to implementing agencies, programme structures, donors, and other key stakeholders to facilitate lesson learning and contribute to dialogue and the future design of National Action Plans.

The NAPA also assigns the task of assisting Government Ministries, Departments and Agencies (MDAs) to establish Human Rights Units (HRUs) to act as focal points for human rights to the KNCHR.²¹⁶ Furthermore, MDAs are called upon to provide for human rights realization in their budgets with the government committing itself to providing adequate resources to realise human rights.²¹⁷ All these roles will have to be determined because much detail is not provided on how HRUs can help MDAs fulfil their human rights obligations with the role seeming to fall on the KNCHR. The NAPA is a crucial document that should be publicised to all organs of State and NGOs in the human rights sector. The approval of the document by parliament in December 2015²¹⁸ and the public launch of the same in October 2016 means that the country now has a uniform policy to guide its human rights agenda.²¹⁹

The recognition of the pivotal role the KNCHR is to play in the implementation of the NAPA gives weight to the necessity of inquiring what complementary role this institution can perform to the judicial enforcement of SERs. As argued previously, the KNCHR should be viewed as one the measures put in place to realise human rights.

²¹⁵ *National Policy and Action Plan for Human Rights* 59-60.

²¹⁶ *National Policy and Action Plan for Human Rights* 39.

²¹⁷ *National Policy and Action Plan for Human Rights* 40.

²¹⁸ See National Assembly Official Report (Hansard) Thursday, 2nd December, 2015

²¹⁹ Kenya Launches National Policy And Action Plan On Human Rights <http://www.statelaw.go.ke/?p=588> (accessed November 2016).

3.5.3 The Kenya National Human Rights Commission Act

The KNCHR Act operationalises the commission intended in article 59 of the Constitution. In terms of the Constitution and the Act, the KNCHR is tasked with the promotion and protection of human rights. Considering the limitations of judicial enforcement of SERs, the suggestion is that the KNCHR can be one of the mechanisms through which the State can ensure great promotion and protection of human rights in general including the SERs. Accordingly, chapter four discusses the contents of this Act and role played by the KNCHR in promoting, protecting and monitoring SERs considering the legislative and policy framework mentioned in the preceding discussion.

Kenya's development plans have a direct impact on the enjoyment and eventual realisation of the SERs contained in the Constitution. The two policy measures discussed above hold a lot of promise. However, just as the other policy measures drafted before it, the proper implementation of these policies is the only way its aspirations can be achieved. For this to happen there must be necessary support from all stakeholders within the state especially the three arms of government. Most importantly in seeking to develop policies and other measures, it is vital that this be done taking into account the HRABD that would allow development to be sensitive to the human rights needs of Kenyans.

3.6 Conclusion

In conclusion, the constitutional entrenchment of SERs in Kenya is but one of the many changes introduced in 2010. Without a doubt, international human rights law and comparative jurisprudence will affect the interpretation of these rights in the country. The chapter revealed that Kenya has a robust Constitution that protects the entire plethora of human rights. The judiciary on its part is key in interpreting the provisions of bill of rights, a role that it is slowly growing into given Kenya's constitutional history. Although vital, the judiciary's role in the promotion and protection of SERs in Kenya is curtailed by several factors such as; poor access to courts, by the time plaintiffs go to court to vindicate their rights, the rights have already been violated; the remedies given by the judiciary are in most instances not sufficient or in some cases are blatantly disregarded. Additionally, human rights

litigation tends to be reactionary in nature with the judiciary intervening after one has complained of a human rights violation. This in most instances means that only those who seek relief will get it to the detriment of a similarly affected large group of individuals. This is because often the violation and non-realisation of SERs tends to affect a large group of people in similar circumstances (mostly those suffering from poverty and inequality).

The government on its part has put in place some measures to realise the rights in Constitution. Some of these measures, such as Vision 2030 are not pursued as human rights initiatives but as part of achieving economic development in the country and as such lack a human rights element. A national human rights policy has recently been launched and sets a framework for promoting human rights. The human rights policy suggests a central role for the KNCHR in the overall promotion, protection and monitoring of human rights. Given the limitations of the judiciary and the human rights obligations incumbent on the state, it is necessary to interrogate the role the KNCHR can play in the greater scheme of realising human rights. The next chapter will therefore analyse the KNCHR's structure and its capability as institution to influence the promotion, protection and monitoring of SERs as a way of supplementing the role of the judiciary by plugging the gaps left by the weaknesses inherent in the judicial enforcement of these rights in the country.

CHAPTER FOUR

THE KENYA NATIONAL HUMAN RIGHTS COMMISSION AND SOCIO-ECONOMIC RIGHTS

4.1 Introduction

As established in the previous chapter, the judicial enforcement of SERs and the legislative and policy framework on the realisation of these rights in Kenya are inadequate on their own. The effective implementation and eventual realisation of SERs can be achieved only through the allocation of resources and the joint efforts of all arms of government together with other institutions such as national human rights institutions (NHRIs). To supplement the role of the judiciary, the KNCHR, a constitutional commission established to promote and protect human rights, can play a pivotal role. To understand the role of the KNCHR in promoting and protection SERs, this chapter takes an in-depth look at the structure and functioning of the Kenya National Commission on Human Rights (KNCHR) since the promulgation of the 2010 Constitution.

This chapter traces the evolution of the KNCHR from a committee established by executive decree, to a legislatively mandated commission, to what it is today, a constitutional commission to highlight the role it played in the promotion of human rights. The historical assessment is also to highlight some of the challenges the Commission, in the different guises, faced in executing its mandate. I then analyse the Commission's constitutional and legislative mandates while at the same time looking at some of the programmes undertaken in fulfilment of its mandate, particularly those touching on SERs. I undertake an analysis of the Commission's strategic plan to identify the focus of the KNCHR and plans on how to fulfil its mandate before discussing the challenges the KNCHR faces in fulfilling its mandate concludes the chapter.

4.2 Establishment of the KNCHR: From the Standing Committee on Human Rights to a constitutional commission

The idea of promotion and protection of human rights by a specialised body in Kenya came about after the re-introduction of multi-party politics in 1992.¹ At the time of independence, the protection of human rights in general was not a common feature amongst African countries and Kenya was no different. However, the independence Constitution protected civil and political rights. There is little to no comment on human rights matters in early literature on the 1963 and 1969 Constitutions. In fact, as a young republic enjoying its independence, the promotion and protection of human rights seemed not to be of immediate concern to the country and its leaders. The focus was more on self-determination and economic development.² The establishment and development of a specialised human rights body took place over three distinct periods in Kenya's constitutional evolution. The first period is before the 2002, which as will be discussed below, saw the initial establishment of the Standing Committee on Human Rights by presidential appointment, as a committee designed to focus on human rights matters in the country. The second period was between 2002 and 2010, which saw the establishment of the KNCHR through legislation with a clear mandate, independence and comprehensive powers than its predecessor. The third and most significant period is that after the promulgation of the 2010 Constitution that re-established the KNCHR as a constitutional commission with a constitutionally entrenched mandate to protect, promote and monitor human rights. The period before the 2010 Constitution is relevant as it shows how the Commission operated in a jurisdiction that did not have comprehensive human rights (civil, political, social, economic and cultural rights) provided for in the Constitution. The pre-2010 period provides an opportunity to discuss the opportunities and challenges brought about by the change in the constitutional system and the relevance of the KNCHR as an institution.

¹ See generally PLO Lumumba, MK Mbondenyi & SO Odero (eds) *The Constitution of Kenya: Contemporary Readings* (2013) 1-15.

² See GM Houser "Human Rights and the Liberation Struggle: The Importance of Creative Tension" in E McCarthy-Arnolds, DR Penna & DJC Sobrepeña (eds) et al *Africa, Human Rights and the Global System. The Political Economy in a Changing World* (1994) 13.

4.2.1 The Standing Committee on Human Rights 1995-2002

The first attempt to have an institution specifically to promote and protect human rights was the formation of the Standing Committee on Human Rights (SCHR) in 1995 as an extension of the ruling party Kenya African National Union (KANU).³ The President who was the leader of the ruling party established the SCHR and only later on sought to make it a parliamentary committee through a Gazette Notice⁴ promulgated almost a year later on 21 June 1996 after the members of the SCHR had already been appointed.⁵ Its functions were “(a) to investigate complaints of alleged violation of fundamental rights and freedoms and to educate the public on human rights and freedoms in the Constitution; (b) to investigate complaints of alleged injustice, abuse of power and unfair treatment of any person by a public officer in exercise of his official duties; (c) to educate the public as to human rights and freedoms by such means as the committee deems fit including publication, lectures and symposia.”⁶

The SCHR consisted of ten (10) committee members⁷ working on a part-time basis. It has been argued that none of the members had the human rights expertise to be members of the Committee or to make meaningful contribution to the human rights movement.⁸ It could also be argued that even if they had expertise on human rights, they did not have sufficient independence to influence the human rights agenda at the country at the time, given the limited powers of the Committee and its being under the control of the executive. Also, at the time of its establishment, Kenya was under pressure both internally and externally to improve the human rights conditions

³ See HP Schmitz “Transnational activism and political change in Kenya and Uganda” in T Risse-Kappen, SC Ropp & K Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) 64.

⁴ It was established under Gazette Notice No.3482 of 1996.

⁵ See also Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001)173. http://www.hrw.org/reports/2001/africa/kenya/kenya.html#P1447_316237 (accessed 4 November 2013).

⁶ See Gazette Notice 3482 of 1996.

⁷ The Committee members were drawn from different fields, including academia (Profs Onesmus Mutungi and Hastings Okoth Ogendo were law professors; Prof J Kiteme was an African Studies scholar while Prof. Mohamed Bakari was a Linguistics scholar), law (Mr. MZA Malik was a practising advocate) social work (Ms. Martha Mugambi was a social worker and women’s rights activist), farming (Mr. Norman Brooks was a commercial farmer) and the clergy (Rev. John Gichinga).

⁸ See Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa: Kenya* 177.

in the country.⁹ According to Idike, the establishment of the SCHR was to appease donors who were putting pressure on the government to implement democratic changes in the country, rather than a meaningful attempt to establish a committee that would deal with human rights issues.¹⁰ This establishment of institutions for the promotion of human rights to give the appearance of genuine reforms was not unique to Kenya and seems to have been a common reason behind the initial establishment of these institutions in Nigeria¹¹ and Indonesia.¹² In the case of Kenya, the work done by the SCHR lends credence to assertions that it was merely established as a façade as illustrated below.

Given the motivation behind its formation, as a ruling party committee to promote human rights, the SCHR did not enjoy any form of independence and was inadequately resourced to carry out its functions.¹³ This was largely due to the prevailing political climate and the fact that the SCHR was made of appointees who served at the pleasure of the president, willing and ready to toe the President's and ruling party's line.¹⁴ Furthermore, with the country still reeling from the after effects of single party dictatorship after the reintroduction of multi-party democracy, the Committee was treated as the then ruling party's (KANU) committee on human rights.¹⁵ It was under the direct control of the President, to whom all the SCHR members owed their appointment and they served at his pleasure. In addition, the powers granted to the SCHR were weak and it was rarely able to make public

⁹ G Sayer *Kenya: Promised Land?* (1998) 25 -26.

¹⁰ HP Schmitz "Transnational activism and political change in Kenya and Uganda" 64. C Idike "Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus" (2004) 1 *Essex Human Rights Review* 40 at 46. See generally Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa: Kenya* 173-174. KM Clarke & M Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (2010) 125.

¹¹ See OC Okafor and SC Agbakwa "On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context" (2002) 24 *Human Rights Quarterly* 662 at 665 - 666.

¹² JY Gotanda "Regional Institutions in East Asia and the Pacific: Is the Time Ripe?" (1995) *American Society of International Law Proceedings* 471 at 477

¹³ See submissions made by Dr Amukowa Anangwe, MP during debate on the KNCHR Bill in 2002. Kenya National Assembly Official Record (Hansard) 9 Apr 2002 443.

¹⁴ See Human Rights *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) 175-176.

¹⁵ FB Khan *NHRIs and the Challenges of Independence in a Kenyan Context* (2010) {Unpublished LLM Thesis – Lund University} 37; Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa: Kenya*.

statements on the human rights violations that took place in the country at the time.¹⁶ At the start, the Commission was secretive about its operations and only released its first public report in 1998, after being in existence for 2 years.¹⁷ This delay in sharing information did not do much for the reputation of the Committee and its significance as a meaningful institution for the promotion and protection of human rights in Kenya.¹⁸ This start did not augur well for the future of subsequent bodies established to promote and protect human rights in Kenya in general, as it seemed to predict some of the challenges these bodies would face such as lack of political will from the government, high expectations and in some instances distrust from the civil society¹⁹.

4.2.2 The Kenya National Commission on Human Rights 2002-2010

Not only were there national challenges,²⁰ but also on the international front pressure was placed on states receiving donor funding to institute further democratic reforms. The Kenyan legislature responded by passing the KNCHR Act²¹ in 2002 to establish this KNCHR as a statutory human rights body.²² The parliamentary debate on issue coincided with the constitutional reform process that was ongoing before the general elections scheduled for December 2002. There had been calls for the establishment of a human rights commission by the Constitution of Kenya Review Commission (CKRC) in its draft at the time and it could be argued that efforts by AG at the time borrowed heavily from the recommendations of the CKCR draft.²³ Nevertheless, the KNCHR started operating formally in 2003, shortly after the change in political leadership brought about by the 2002 general elections.

¹⁶ See generally Human Rights Watch 175.

¹⁷ The former Attorney General is on record stating that the SCHR was secretive in its operations at the start. See contribution of Hon. Amos Work Attorney General Kenya National Assembly Official Record (Hansard) 18 Apr 2002 653.

¹⁸ See the contribution of Hon Khamasi MP on the debate of the KNCHR Bill in Kenya National Assembly Official Record (Hansard) 18 Apr 2002 650–651. <https://books.google.co.za/books?id=vujyFc2qftAC&printsec=frontcover#v=onepage&q&f=false> (accessed 10 April 2015).

¹⁹ See discussion in 4.5 below on the challenges the KNCHR faces in fulfilling its mandate.

²⁰ See Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) 175-176.

²¹ Kenya National Commission on Human Rights Act 9 of 2002.

²² See generally A Smith (2006) 28 *Human Rights Quarterly* 909 commenting on some of the reasons for the establishment of NHRIs in different parts of the world.

²³ The Attorney General was an ex officio member of the CKRC.

The KNCHR in 2003 was a vast improvement on the SCHR²⁴ in terms of composition, mandate and arguably in practice, and was tasked to address human rights issues in the Constitution and duly ratified international treaties. The Attorney General and the SCHR through a consultative process involving relevant stakeholders in the human rights field in the country and abroad undertook the drafting of the KNCHR Bill. Prof Brian Burdekin (special advisor to the UN High Commissioner for Human Rights) participated in a workshop held to discuss the KNCHR bill. Also invited were Commissioner Milton Omara of the Uganda Human Rights Commission and Mrs. Shalley Mabutsela of the SAHRC to give their views on how to strengthen the proposed commission.²⁵ Both parliament and the president would be involved in the recruitment process with parliament shortlisting twelve nominees from whom the president would appoint nine commissioners.²⁶ Significantly, the KNCHR was to be an independent body and was granted more elaborate powers compared to the SCHR contained in legislation.²⁷ The Commission was to be autonomous and accountable to Parliament with its reports on human rights matters to be made public. Given the wave of change in the country at the time, many in the first batch of commissioners were appointed from the ranks of the civil society with credible human rights records.²⁸ It is important to note that at the time Kenya was still governed by the 1969 Constitution (as amended over the years) which made no provision for SERs.²⁹

²⁴ See generally K Kindiki "On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment" (2004) 2 *East African Journal of Human Rights and Democracy* 120 at 122.

²⁵ See comments of Attorney General, Amos Wako when debating the KNCHR bill in parliament in 2002. Kenya National Assembly Official Record (Hansard) 3 Apr 2002 385-386.

²⁶ See section 6 KNCHR Act 2002.

²⁷ In the 2002 Act, the KNCHR was "not subject to the direction and control of any other person or authority."

²⁸ The first batch included Mr. Maina Kiai (Chairperson), Ms Violet Mavisi (Deputy Chairperson), Mr. Tirop Kitur, Mr Khelef Khalifa, Mr. Godana Doyo, Ms. Catherine Muyeka Muma, Mr. Lawrence Murugu Mute, Ms. Wambui Kimathi and Ms. Fatuma Ibrahim See generally KNCHR *It is hard to be Good* (2012) highlighting the history of the KNCHR.

²⁹ For a detailed explanation on the challenges and successes of the KNCHR between 2003-2009 see KNCHR *It is hard to Be Good* (2012).

4.2.3 Re-establishment of KNCHR as a Constitutional Commission

The 2010 Constitution introduced several constitutional commissions³⁰ to assist in the implementation of the Constitution, including the Kenya National Human Rights and Equality Commission (KNHREC) in article 59. As earlier mentioned, the constitutional review process saw the recommendation of a human rights commission in one form or the other in the proposed new Constitution with both the CKRC and Bomas Drafts³¹ suggesting a “Commission for Human Rights and Administrative Justice” to ensure promotion, protection and enforcement of human rights. The Wako Draft, on the other hand advocated two commissions, a Gender Commission and a Commission on Human Rights and Administrative Justice.³² This seems to have been the idea behind article 59 (4)³³ of the Constitution, that left parliament with the decision whether to establish a single body or split them into two or more institutions dealing with aspects of human rights and equality.³⁴ The decision to restructure the KNHREC into three distinct bodies was partly influenced by pressure from the Gender Commission established prior to the promulgation of the 2010 Constitution.³⁵ The general view during parliamentary debate on the bills was that an Ombudsman institution should be established to curb maladministration in state departments with the option of merging it with the KNCHR after five years, in

³⁰ They are identified in article 248(2) of the Constitution of Kenya 2010 and include (a) the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission.

³¹ Draft Constitution of Kenya (Bomas Draft) named after the location (Bomas of Kenya) of the constitutional reform conference that adopted it on 15 March 2004. https://katibaculturalrights.files.wordpress.com/2016/04/kenya_4_draft_constitution_bomas_draft_2004.pdf (accessed 2 April 2015)

³² Articles 76 and 77 of the Draft Constitution of Kenya (Wako Draft). Named after the Attorney General, Amos Wako. http://katibainstitute.org/Archives/images/2-2005_Referendum-Wako_Draft.pdf (accessed 2 April 2015).

³³ Article 59(4) provides that (4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions. This was to be done in a timeline of one year after the promulgation of the Constitution as contained in the fifth schedule.

³⁴ From the constitutional drafts, there seems to have been discussion on how many Commissions to have between 2002-2010, indicating the desire of Kenyans to have a specialised body dealing with human rights in one form or the other.

³⁵ Interview with Ms. Catherine Mumma, former Commissioner of the KNCHR and later a Commissioner with the Commission on the Implementation of the Constitution. The Executive through the Minister of Justice presented the Commission for the Implementation of the Constitution (CIC) with three drafts seeking to restructure the KNHREC to the current three Commission that are in existence.

the hope that the human rights and equality situation in the country would have changed. Three bills were tabled before parliament, with a publication period of 5 days instead of the normal 14 days to allow parliament to meet the one-year deadline (27 August 2011) set in the Constitution.³⁶

The reduction in publication and debating times compromised the ability of MPs to engage with the bills and the suitability of having three Commissions instead of two or even one. Parliament, at the insistence of the executive through the Ministry of Justice, eventually enacted legislation to restructure the KNHREC to what are now the KNCHR, the Commission on Administrative Justice (CAJ) and the National Gender and Equality Commission (NGEC).³⁷ There were protests from some quarters about this decision, with the former KNCHR chairperson; Ms. Florence Simbiri viewing the split as burdening taxpayers and diluting the mandate of the proposed Commission.³⁸ The Commission for the Implementation of the Constitution (CIC) on its part noted the failure of Parliament to consider its suggestion that the role of setting SER standards³⁹ be given to the KNCHR instead of the NGEC and the behind the scenes haggling by members of the former KNCHR and the former National Commission on Gender and Development (NCGD) to make sure they were established as Commissions; as some of the reasons for the splitting of the KNHREC.⁴⁰ Others held the view that establishing different institutions, especially one to deal with gender and equality issues, would help promote equality given the history of inequality in the country.⁴¹ As will be illustrated later, the splitting of the

³⁶ See Motion introduced by Justice Minister Mutula Kilonzo in Kenya National Assembly Official Record (Hansard) 20 July 2011P.

³⁷ The Commission for the Implementation of the Constitution *Second Quarterly Report on the Implementation of the Constitution* June 2011 17-18.
http://www.cickenya.org/index.php/reports/item/download/12_a1d9ca5bba80878e7fa27ad78128e781 (accessed 2 April 2015).

³⁸ See 'Delayed implementation could lead to flawed laws' *Celebrating the Constitution-Reject 46* <http://www.mdcafrica.org/index.php/rejects-online/celebrating-the-constitution-reject-issue-46/110-delayed-implementation-could-lead-to-flawed-laws> (accessed 9 April 2015). See also KNCHR *It is Hard to Be Good* (2012) para 10.

³⁹ The KNCHR as the principal human rights organ is better placed to come up with human rights standards compared to the NGEC that is tasked with promoting matters of gender and equality. This is further discussed below.

⁴⁰ The Commission for the Implementation of the Constitution *Third Quarterly Report on the Implementation of the Constitution* July - September 2011 22-23, 66.

⁴¹ Victoria Rubadiri 'Debate rages over splitting rights commission' Capital News 22 July 2011 <http://www.capitalfm.co.ke/news/2011/07/debate-rages-over-splitting-rights-commission/> (accessed 9 April 2015).

KNHREC has brought about some challenges to the overall protection and promotion of human rights by creating overlaps in the mandates of the KNCHR and NGEC. It has also led to the allocation of money to other commissions when it could better be utilised by a single institution with specific Commissioners to deal with administrative justice and equality matters.

4.3 Constitutional and Legislative Mandates

It could be argued that some of the work it did prior to 2010 might have influenced the re-establishment of KNCHR as a constitutional commission. Furthermore, the deliberate inclusion of the Commission in the same chapter as the bill of rights points towards its expected role as the guardian of human rights. The elaborate provisions on human rights in the Kenyan Constitution have created an expectation of greater protection, promotion and eventual enjoyment of human rights. This contention gains credence when the Commission's mandate in article 59 and the KNCHR Act is analysed below.

4.3.1 Mandate of the KNCHR

The KNCHR has the competence to promote and protect human rights pursuant to articles 59 (1); (2) ⁴² and 59 (4) of the Constitution of Kenya⁴³ read together with section 3 of the KNCHR Act. Furthermore, the Act assigns the KNCHR several functions in section 8, discussed below, which are similar to the functions originally given to the KNHREC in the Constitution⁴⁴ except for competence to deal with matters of equality, which is the preserve of the National Gender and Equality Commission (NGEC).

Constitutional entrenchment of human rights alone does not ensure the protection of human rights. This was the case in Kenya prior to 2010 where despite having a perfectly standard bill of rights at independence; these rights were violated and not

⁴² Article 59 (1) reads; There is established the Kenya National Human Rights and Equality Commission.

⁴³ Article 59 (4) reads: Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions

⁴⁴ Section 8 (a) KNCHR Act read with Article 59(2) (a).

widely enjoyed.⁴⁵ Minor gains were made by the KNCHR between 2003 and 2010, significant amongst them being the goodwill it earned.⁴⁶ The changes ushered in by the 2010 Constitution⁴⁷ in general and chapter four, especially call for the creation of public awareness of human rights and their concomitant obligations. The KNCHR has been tasked with the role of promoting respect for human rights and develop a culture of human rights.⁴⁸ A human rights culture refers to the totality of beliefs principles and values underlying human rights. That is respect for all human beings and their dignity based on the understanding that they have these rights because of being human. Most importantly, the culture of human rights ought to be respected.⁴⁹ It is thus a constant appreciation of human rights as a guiding value that ought to be inculcated into every living member of the society.

A culture of human rights in Kenya can only be achieved through the promotion, protection and monitoring of human rights. This will involve creating awareness of human rights, the obligations and entitlement it affords together with the remedies at all levels of society. Given the country's history, it is vital that all within the country know what the human rights entail and the obligations and responsibilities they place on different organs of state together with the remedies than can be sought in the event of their breach. On the part of the organs of state, it is necessary that they are aware of the obligations they should fulfil to facilitate wider enjoyment of human rights. With the increasing impact of business and the extractive industries on the overall enjoyment of human rights, it is also important that they be sensitised on their human rights obligations.⁵⁰

When people are aware of their human rights, it then becomes possible for them to demand that these rights be fulfilled. Consequently, the KNCHR's mandate to

⁴⁵ Parliamentary debates on the KNCHR Act 2002 and the KNCHR Bill 2011 have it on record on the status of human rights before the promulgation of the 2010 Constitution.

⁴⁶ Interview with Ms. Jedidah Wakonyo Waruhiu, Commissioner KNCHR.

⁴⁷ See discussion of this in 3.3.

⁴⁸ Section 8 (a) KNCHR Act 2011.

⁴⁹ See D Irina "A Culture of Human Rights and the Right to Culture" (2011) 1 *Journal for Communication and Culture* 31 at 37.

⁵⁰ See discussion on human rights obligations in 3.3.2.1.

publicise human rights⁵¹ is very significant. The function of promoting human rights in section 8 (a) is closely linked with the one in section 8 (g) of formulating, implementing and overseeing programmes intended to raise public awareness of the rights and obligations of a citizen under the Constitution. Such an exercise should take into consideration all citizens without discrimination. It should be such that an ordinary Kenyan with no formal education to the most learned of Kenyans will be aware of their human rights. It is argued that raising public awareness of human rights and the obligations that come with these rights is likely to further efforts to create a culture of human rights. Public awareness programmes undertaken by the Commission should therefore focus on reaching all within the country. Programmes created by the Commission should take into consideration the different languages spoken in the country, with deliberate efforts to sensitise those from a poor background about their human rights entitlements.

A wide interpretation of the public awareness function is suggested so that the KNCHR can actively be involved in the promotion and protection of human rights in the country. The Commission can work together with the Ministry of Education, the Kenya Institute of Curriculum Development (KICD)⁵², the Kenya School of Government (KSG) and tertiary education institutions to design appropriate human rights education curriculums and sensitization on HRBA. Currently, it has signed a Memorandum of Understanding with Laikipia University and the University of Nairobi to help with the content of a basic course on human rights taken by all first-year students at the institutions. The agreement with the KSG, responsible for the training of senior government officials, is important as it seeks to sensitize government officials on their human rights obligations.⁵³ Such training should sensitise officials of their human rights responsibilities as functionaries of organs of state. By training government officials, it will be possible to promote the rule of law and better implementation of the Constitution for the prosperity of Kenya. Arguably, training of

⁵¹ Through research, advocacy programmes, research, public education exercises through the media etc. See Public Education on Human Rights <http://www.knchr.org/OurWork/Publiceducationonhumanrights.aspx> (accessed 6 September 2016).

⁵² KICD is established in terms of the Kenya Institute of Curriculum Development Act 4 of 2013 to advise the government on matters pertaining to curriculum development.

⁵³ Interview with KNCHR Commissioner Ms. Jedidah Waruhiu and Mr Koome Human Rights Officer, Economic Social and Cultural Rights Department at the KNCHR. See also KNCHR *Strategic Plan 2015-2018*.

ordinary citizens and government officials should be tailored to cater for different audiences.

The Commission has a duty to monitor the observance of human rights in all spheres including the national and county governments, businesses and private entities.⁵⁴ Human rights monitoring involves the collection of information on the human rights situation in a country with the aim of improving that situation if it is found human rights are not being fully enjoyed.⁵⁵ Human rights monitoring has its origins in international human rights law, with many of the human rights treaties requiring states to report on their compliance with their treaty obligations. According to the OHCHR, monitoring human rights increases the protection of human rights as it reinforces the state's responsibility to protect human rights.⁵⁶ The country can therefore benefit from the domestic monitoring of the human rights situation by the Commission against standards set in Plan of Action on Human Rights⁵⁷, international human rights treaties, SDGs⁵⁸, or those set up by the NGECC in due course. This would in turn be useful in promoting and protecting SERs for the benefit of those in the country.

In carrying out its monitoring function, the KNCHR should engage in a permanent and continuous dialogue with all the relevant stakeholders within the state, while cooperating strategically with similar institutions around the world (this would include other NHRIs that have membership in the network of NHRIs) to identify ways by which to monitor the fulfilment of human rights obligations. The information obtained from the monitoring should be publicised and recommendations made to the parties concerned, in most instances the various organs of state and or business on how to improve the human rights situation in the country. Monitoring of SERs is important because of the progressive nature of realising these rights. Ideally, these rights

⁵⁴ Section 8 (c) provides that the KNCHR should monitor, investigate and report on the observance of human rights in all spheres of life in the Republic;

⁵⁵ See Office of the High Commissioner on Human Rights (OHCHR) *Training Manual on Human Rights Monitoring* (2001) 9 on the definition of human rights monitoring.

⁵⁶ OHCHR *Manual on Human Rights Monitoring* 4.

⁵⁷ National Policy and Action Plan for Human Rights 2014.

⁵⁸ Sustainable Development Goals, 17 Goals to transform our World <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 6 September 2016).

should be realised in an incremental fashion over time with goals and benchmarks being revised with changing socio-economic circumstances.

As part of its monitoring mandate, the KNCHR has published a report monitoring the state's compliance with the Convention on the Rights of Persons with Disabilities (CPRD) in recognition of its role of ensuring Kenya's compliance with its international and regional human rights treaties obligations.⁵⁹ The compilation of the report shows the KNCHR's willingness to take up on some of the roles it can play domestically such as being the county's independent mechanism for monitoring the implementation of the CPRD.⁶⁰ Additionally, the giving of the mandate to monitor the implementation of this treaty by the office of the Attorney General is an indication of awareness of the role the KNCHR can play as the principal organ of state ensuring compliance with international human rights treaties.⁶¹ However, it should be mentioned that the assignment of this role to the KNCHR by the Attorney General raises two questions. Firstly, it might give the impression that the KNCHR is not independent as it would be taking directions from the Attorney General (a member of the executive) on what to do. Secondly, it points towards a duplication of roles between the KNCHR and NGEAC since in terms of section 8(f) the NGEAC is tasked with gender and equality issues and should have performed the function. On the other hand, it could be that the KNCHR has more experience compared to the NGEAC in compiling reports to UN treaty bodies. Article 33 of the CPRD in general provides for the national implementation and monitoring of the treaty with article 33(2) specifically recommending that

"States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties

⁵⁹ See KNCHR *From Norm to Practice: A Status Report on Implementation of the Rights of Persons with Disabilities in Kenya* (2014) <http://www.knchr.org/Portals/0/Reports/Disability%20Report.pdf> (accessed 6 October 2014).

⁶⁰ See United Nations Human Rights Council *Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities* A/HRC/13/29 (22 December 2009) para 18.

⁶¹ See article 59 (2) (g) Constitution of Kenya 2010 read together with Section 8 (f) KNCHR Act.

shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."⁶²

Thus, the assignment of this monitoring role to the KNCHR, though questionable, was in keeping with the spirit article 33 of the CPRD.

As the principal organ of state ensuring compliance with international human rights treaties the influence of international human rights treaties on the work of the Commission is bound to be significant due to articles 2(5) and 2(6) of the Constitution that make international human rights treaties duly ratified part of Kenyan law. The KNCHR should also play an active role in the domestication of all treaties ratified by Kenya, recommending the review of legislation to bring it in line with the Constitution and where necessary offering support to organs of state on the compilation of reports due to treaty monitoring bodies.⁶³ Such assistance should be in the form of advice and general guidance on what information to include in these reports, together with the necessity of handing reports on time. Where possible, the KNCHR should compile alternative reports on its own or with NGOs with an assessment of the measures undertaken by the government to fulfil its treaty obligations. Information obtained during monitoring can be used to highlight areas that need improvement to promote greater enjoyment of human rights while at the same time holding the state responsible to its human rights obligations.

In terms of section 8 (d) of the KNCHR Act, the Commission has the power to receive and investigate complaints from everyone (individuals, groups and juristic persons) about alleged human rights abuses.⁶⁴ After conducting investigations and establishing the violation of human rights, the Commission is expected to take steps to secure appropriate redress. The Act does not state what appropriate redress might be, which means the KNCHR, should conceptualise redress and ways of achieving it within the parameters of the Constitution. The KNCHR can issue recommendations on what should be done to address the complaints raised. These recommendations should be capable of being implemented and in instances where

⁶² Article 33(2) CPRD.

⁶³ Treaty bodies such as the CESCR, Human Rights Committee, African Human Rights Commission, South Africa courts especially the Constitutional Court.

⁶⁴ The Constitution also has a similar provision in article 59 (2) (e).

there is laxity in abiding by the recommendations; the Commission should make an effort to follow up on the implementation of such recommendations.⁶⁵ It should be noted that enforcing and following up on recommendations might prove to be a challenge given the fact that in the past recommendations made to parliament and the executive by constitutional Commissions and past commissions of inquiry have not normally been followed thus giving a strong indication that the Commission's recommendations are likely to suffer the same fate.⁶⁶ For instance, recommendations by the Truth Justice and Reconciliation Commission to the legislature have been ignored⁶⁷ and the TJRC Act amended giving powers to the legislature to change the contents of the report.⁶⁸

The failure of relevant stakeholders to execute the recommendations of the Commission means that the KNCHR should have recourse to other redress measures on offer such as approaching the courts to get a binding ruling on the matter. Recourse to the courts is always a time consuming and costly process not to mention an adversarial one that is likely to lead to non-compliance with court orders, which undermines the rule of law, and is likely to sour the relationship between the KNCHR and state organs taken to court. It should therefore be used as a last resort to get compliance with the recommendations. Naming and shaming those complicit in human rights violations is another avenue the KNCHR can use to obtain compliance with its recommendations. Alternatively, where the situation allows the Commission should refer matters to other authorities that are in a better position to

⁶⁵ Compare with the situation in South Africa when the SAHRC makes recommendations as discussed in 5.6.

⁶⁶ Interview with Ms. Catherine Mumma who revealed that the government is not always willing to act on recommendations issued by Constitutional Commissions and simply ignores them. See also African Centre for Open Governance (Africog) *Commissions of Inquiry in Kenya: Seekers of Truth or Safety Valves* (2008) 4-5 <http://africog.org/new/wp-content/uploads/Commissions%20of%20Inquiry%20Full%20Report.pdf> (accessed 10 November 2015).

⁶⁷ G Lynch "Bring the Audience back in: Kenya's Truth, Justice and Reconciliation Commission and the Efficacy of Public Hearings" in SM Rai & J Reinelt (eds) *The Grammar of Politics and Performance* (2015) 162**

⁶⁸ The Truth, Justice And Reconciliation (Amendment) Act No. 44 of 2013. See also Felix Olick "Civil society faults State over TJRC report" *Standard Digital* Friday 23 May 2014 <http://www.standardmedia.co.ke/article/2000122104/civil-society-faults-state-over-tjrc-report> (accessed 6 September 2016).

resolve the issue, for example, the NGEC or CAJ or entity/person alleged to have violated human rights.⁶⁹

The KNCHR is supposed to co-operate with the NGEC and CAJ to promote complementarity in their activities.⁷⁰ The NGEC was formed to deal with specific aspects of inequality and discrimination.⁷¹ In section 8 (k) of the NGEC Act, the NGEC is called upon to work together with the KNCHR and CAJ “to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination.” On its part, the CAJ was created to tackle maladministration concerns⁷² and is called upon to work together with KNCHR “to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.”⁷³ As alluded to earlier⁷⁴, the establishment of three institutions to deal with interconnected human rights matters has led to an overlap in mandates. This state of affairs has necessitating collaboration between them.

Factoring in the pre-2010 period, the KNCHR as an institution has been in existence for longer than its sister Commissions and enjoys greater goodwill. Its existence for a longer period and goodwill have led to a situation in which most of the complaints that would be the preserve of the NGEC or CAJ being first lodged with the KNCHR, which in turn forwards them to the relevant commission.⁷⁵ Investigating complaints received can be helpful in the promotion and protection of SERs given that it is not everyone who can access courts to vindicate their SERs that are not widely known by those who do not enjoy them (mostly the poor). This is compounded by the fact that in many instances poor or no knowledge of human rights results in human rights

⁶⁹ The KNCHR has in place a referral system Integrated Public Complaints Referral Mechanism (IPCRM). See KNCHR 11th Annual Report 2013-2014 23, 27.

⁷⁰ Section 8 (h) KNCHR Act.

⁷¹ See generally Section 8 of the NGEC Act for the functions of the NGEC.

⁷² See generally Section 8 of the CAJ Act for the functions of the CAJ.

⁷³ Section 8 (l) of the CAJ Act

⁷⁴ Also discussed below in 4.4.5.

⁷⁵ Interview with Ms. Jedidah Waruhiu, KNCHR Commissioner.

breaches going unnoticed or even being further violated.⁷⁶ It is contended that cordial working relations between Article 59 Commissions would present an opportunity for collaborative efforts that would avoid duplications and subsequent wastage of funds. Additionally, collaboration would allow for a joint public awareness programme on human rights matters and the different roles played by the Commissions to further the implementation of the Constitution and enjoyment of human rights.

From the discussion on the KNCHR's mandate, the following observations are made. First, the Commission has a broad mandate as provided for in the Constitution and KNCHR Act, to promote and protect human rights. When compared to the Paris Principles recommendations for NHRIs, the KNCHR has indeed been "vested with competence to promote and protect human rights".⁷⁷ The broad nature of the mandate shows a willingness by the drafters of the KNCHR Act to be guided by international best practice on the kind of mandate an NHRI should have if it is to fulfil the core dual functions of promoting and protecting human rights. Secondly, the inclusion of the Commission's mandate in national legislation is an important mechanism that promotes the independence and autonomy of the KNCHR. This inclusion of a clear mandate in law means that the KNCHR should only be held accountable in terms of what is contained in the KNCHR Act and the Constitution. It should thus not be influenced to act in a manner that goes against what is provided for in law. In addition, any interaction with any of the arms of government especially parliament ought to be guided by law and political goodwill, characterised by support for the work of the Commission especially acting on the KNCHR's recommendations.⁷⁸

⁷⁶ See generally See UN Human Right Council National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 (22 February 2010) A/HRC/WG.6/8/KEN/1 11 (accessed 13 April 2015).

⁷⁷ See Paris Principles Principle 1.

⁷⁸ Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, Serbia 22-23 February 2012) paras 20-40. <http://nhri.ohchr.org/EN/ICC/GeneralMeeting/27/Theme%203%20The%20relationship%20between%20NHRIs%20and%20Parliam/Belgrade%20Principles%20ENGLISH.pdf> (accessed 12 September 2016).

It is necessary to analyse the structure and composition of the Commission, as it influences how the KNCHR can carry out its mandate. This analysis follows below.

4.3.2 Structure and Composition of the Commission

The day-to-day functions and overall performance of any NHRI is guided by its leadership structure, which should provide for a clear chain of command and levels of responsibility. In terms of section 9 of the KNCHR Act 2011, the Commission is to be made up of five commissioners appointed by the President after their approval by parliament.⁷⁹ Out of the five nominated Commissioners, the president appoints one of them to serve as the chairperson. In terms of section 13 (1), within seven days of appointment, the chairperson shall convene a meeting from where a vice-chairperson shall be elected from the other four commissioners. There are only four Commissioners in office - as opposed to the required five.⁸⁰ The current commissioners are: Ms. Kagwiria Mbogori as chairperson, assisted by Mr. George Morara Monyoncho as Vice Chairperson with Ms. Jedidah Wakonyo Waruhiu and Ms. Suzanne Shatikha Chivusia as Commissioners.⁸¹

The role of the Commissioners is to provide strategic leadership to the Commission and to develop policies on the promotion and protection of human rights, and interaction with various stakeholders involved in human rights such as government, business and civil society.⁸² Commissioners are thus at the helm of the Commission and their work is made possible by the Secretariat, headed by the Chief Executive/Secretary who answers to the Commission⁸³, which handles the day-to-day activities of the KNCHR. The KNCHR Chief Executive is appointed in terms section 21 of the KNCHR Act 2011 read together with article 250 (12) of the Constitution of Kenya, 2010. To qualify for the position of Secretary of the Commission one must be a citizen of Kenya, have a degree from a university recognized in Kenya with at least ten years proven experience at management

⁷⁹ See discussion on the appointment process in section 4.3.3 below.

⁸⁰ See discussion below on the appointment of Commissioners for an explanation.

⁸¹ See "Current Commissioners" <http://www.knchr.org/Aboutus/Structure/Commissioners/CurrentCommissioners.aspx> (accessed 6 October 2014).

⁸² Interview with Ms Jedida Waruhiu, KNCHR Commissioner.

⁸³ Section 21 (3) KNCHR Act.

level.⁸⁴ Additionally, such an individual must meet the requirements of chapter six of the Constitution.⁸⁵ Chapter six of the Constitution provides the minimum requirements for the integrity expected of public officials and leaders. In the case of the KNCHR leadership (Commissioners and CEO), their selection should be based on their personal integrity, competence and suitability to hold office.⁸⁶ In terms of this section, leaders should be guided by objectivity and impartiality while performing their duties in a professional and accountable manner.⁸⁷ Furthermore, they should declare any personal interest in a matter they are dealing with that might conflict with their official duties while serving honestly.⁸⁸ The KNCHR Act and Constitution thus expect the holder of this office to be a highly qualified individual capable of performing the functions of the office of the Secretary.

A staff complement of 95 in seven departments and several regional offices carries out the Commission's work.⁸⁹ In addition to the above-mentioned departments, the Commission has five regional offices established to bring their services closer to the people. These are North Rift Regional Office in Kitale town, Western Regional Office in Kisumu, Northern Kenya Regional Office in Wajir, Laikipia University - Center for Human Rights collaboration between the Commission and Laikipia University) and the Coast Regional Office in Mombasa.⁹⁰ The regional offices are supposed to serve a determined number of counties that are close to these offices in an effort to give the Commission a national outlook. A Senior Human Rights Officer who doubles as a Regional co-ordinator heads each KNCHR Regional office. Interaction between the regional officers and the head office are encouraged with employees at the regional offices carrying out functions pre-determined at the head office in Nairobi. The Commissioners and other head office staff frequent the regional offices from time to time to address human rights issues.

⁸⁴ See Section 21 (2) KNCHR Act.

⁸⁵ Section 21 (2) KNCHR Act.

⁸⁶ Article 73 (2) (a) Constitution of Kenya 2010.

⁸⁷ See generally Article 73 (2) (a) – (e) Constitution of Kenya 2010.

⁸⁸ See article 73 (2) (c) (i)-(ii) Constitution of Kenya 2010.

⁸⁹ As at the end of 2014/2015 financial year. See KNCHR 12th Annual Report 2015/2016 13.

⁹⁰ KNCHR *Human Rights Baseline Survey Report* 82.

The KNCHR departments include: *Complaints and Investigation* that receives complaints of alleged violations of human rights, investigates them and advises the Commission on possible options for redress. The department investigates human rights violations and endeavours to resolve the matters before it by conciliation, mediation and negotiation. The department also holds quarterly human rights clinics countrywide where they interact with members of the public, educating them on their various rights. The clinics provide an opportunity for the public to air complaints as well as receive legal advice on issues such as land, succession, rights of arrested persons and people undergoing criminal trials, among other issues.⁹¹

Research and Compliance: The department conducts research on various human rights issues with the objective of informing the Commission's interventions in relation to legislation, policy and implementation. The department's focus areas include: Review of Bills and Legislation; Treaty Body monitoring and Disability focal point.⁹²

Economic Social and Cultural Rights: This department works to enhance the respect, protection, and realization of economic, social and cultural rights for all Kenyans. It addresses systemic human rights violation such as poverty and marginalization and seeks to promote transparency and accountability in the management of public affairs in the country. The focus of the department is on protection and promotion of the rights of vulnerable groups, enhancing compliance with human rights among business entities, enhancing awareness on SERs in the Constitution.⁹³ The department has 4 members of staff headed by a Senior Human Rights Officer who work on different topics allocated to them. Most of the time they work in collaboration with officers from the other departments especially those from Research and Compliance, and Public Education and Training.⁹⁴

⁹¹ Complaints and Investigations <http://www.knchr.org/Departments/ComplaintsInvestigation.aspx> (accessed 10 April 2017).

⁹² Research and Compliance <http://www.knchr.org/Departments/ResearchCompliance.aspx> (accessed 10 April 2017).

⁹³ Economic, Social and Cultural Rights Department <http://www.knchr.org/Departments/Economicsocialandculturalrights.aspx> (accessed 10 April 2017).

⁹⁴ Interview with Mr. Koome, Human Rights Officer, ECOSOC Department, KNCHR.

Redress Public Affairs and Communication department: Coordinates the Commission's redress mechanisms for established human rights violations such as human rights litigation, coordinating public inquiries and conducting alternative dispute resolution. In addition, the Redress department undertakes Legal Services for the Commission, such as providing general legal counsel, drawing of contracts and handling court matters on behalf of the Commission to ensure it meets its objectives as an efficient and effective institution.⁹⁵

Reforms and Accountability: contributes towards reduction of systemic human rights violations such as poverty and discrimination, which is currently a key strategic focus for the Commission. Due to their nature, these violations affect an immense section of the Kenyan population especially the vulnerable groups. The Department has four main programmes: Security Sector Reforms Programme, Transitional Justice Programme; Peace building and National Integration Programme; and the Judicial and Penal Reforms Programme. The programme also works around political accountability.⁹⁶

Public Education and Training: works towards informing, educating and sensitizing the public, state and non-state actors on human rights for the purposes of enhancing respect of such rights. To fulfil these functions, the department employs various strategies, among them, undertaking workshops and sensitization forums for the Public, development and dissemination of information, education, and communication (IEC) and training materials on thematic human rights areas.⁹⁷

Under the Support department are several other departments that work towards making the KNCHR functional. Departments in this area include those responsible for Monitoring and Evaluation; Finance; Human resources and Administration; Information and Communication and Technology; Internal Audit; and Procurement.⁹⁸

⁹⁵ Redress Department <http://www.knchr.org/Departments/Redress/AboutRedress.aspx> (accessed 10 April 2017).

⁹⁶ Reforms and Accountability Department <http://www.knchr.org/Departments/ReformsandAccountability.aspx> (accessed 10 April 2017).

⁹⁷ Planning and Training Department <http://www.knchr.org/Departments/PublicEducationTraining.aspx> (accessed 10 April 2017).

⁹⁸ Support Department <http://www.knchr.org/Departments/Support/MonitoringEvaluation.aspx> (accessed 10 April 2017).

4.3.3 Qualifications and Appointment Procedure of Commissioners

The process followed in the appointment of commissioners to guide any NHRI, and the minimum qualifications they should possess, are important. In most instances, the appointment mechanism has a bearing on the perceived and often the real independence of the NHRI.⁹⁹ The selection process of the KNCHR Commissioners is a key ingredient in maintaining its independence. In *Communications Commission of Kenya (CCK) and 5 Others v Royal Media Service*, the Supreme Court noted how the selection process of Commissioners to the CCK, is an important factor in maintaining the independence of the institution. The court expressed itself as follows:¹⁰⁰

How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. *Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body.* However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.

The court's opinion is equally applicable to the KNCHR as a constitutional commission and an NHRI. This is because even though they are to be independent of the government they are accountable to the legislature (an arm of government) where they submit reports on their work; two factors that can influence their effectiveness.¹⁰¹ It is for that reason that it is important to assess the appointment procedure set out in the KNCHR Act.

In terms of section 10 (1) of the Act, the criteria for appointment as chairperson of the Commission include having a degree and at least fifteen years' experience in

⁹⁹ See discussion in 2.4.2.

¹⁰⁰ *Communications Commission of Kenya [CCK] and 5 Others v. Royal Media Services and 5 Others, Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014*; [2014] eKLR para 170. See also *National Land Commission v Attorney-General & 7 others* [2015] eKLR para 184.

¹⁰¹ See generally Smith 2006 *Human Rights Quarterly* 908-911 on the unique position of these institutions and how they grapple with public legitimacy (independence and accountability) amid the challenges they face. See also discussion in section 5.3.6 on Accountability to government.

matters relating to law and human rights.¹⁰² Lastly, such an individual has to meet the integrity requirements of chapter six of the Constitution.¹⁰³ By requiring the chairperson to meet the above-mentioned requirements on qualifications and expertise, the leadership of the KNCHR should be in the hands of an expert in human rights matters. I would argue that although not restricted to individuals with a legal background such a background would seem to be an ideal requirement for the Chairperson given the minimum requirements and the kind of work the Commission does. Past KNCHR chairpersons have all had a legal background and this trend seems to have been maintained up to now.¹⁰⁴ An understanding of legal matters would help the chairperson to provide leadership especially when dealing with quasi-judicial matters.¹⁰⁵

The Act also lays out the requirements for the rest of the commissioners of the KNCHR. These requirements are not very different from those of the chairperson. A commissioner has to hold a degree recognised in the republic with at least 10 years' experience in one of the following disciplines; law; (ii) public administration; (iii) economics or finance; (iv) gender and social development; (v) human rights; (vi) management; or (vii) social sciences.¹⁰⁶ The qualifications of Commissioners of the KNCHR should be of the highest quality and one that renders them capable of fulfilling the task of promoting and protecting human rights within the local jurisdiction.¹⁰⁷ The qualifications required are such that chances of hiring incompetent members are lessened. Ideally, the minimum levels (set at 15 and 10 years for the Chairperson and Commissioners respectively) of expertise and experience ought to decrease the chances of undue influence by the executive and legislature on the members of the commission while carrying out their mandate by allowing the selected commissioners to exercise their discretion based on their qualifications, expertise and experience. With human rights being an inter-

¹⁰² The practice has been to require all applicants to attach comprehensive Curriculum Vitae and certificates of their degrees to their application documents.

¹⁰³ See section 10 (1) (a) to (c) KNCHR Act.

¹⁰⁴ The KNCHR's past chairpersons and the current one have all have a legal background. Prior to the KNCHR 2011 Act, Chairpersons had to have similar qualifications to high court judges.

¹⁰⁵ See K Mechlem "Treaty Bodies and the Interpretation of Human Rights" (2009) 42 *Vanderbilt Journal of International Law* 905 at 917-918.

¹⁰⁶ See Section 10 (2) (a) to (c).

¹⁰⁷ Qualifications of Commissioners should be scrutinised by the Council for Higher Education as genuine and obtained from properly accredited institutions.

disciplinary field, the Commission is likely to benefit from the expertise of Commissioners from different disciplines.

To safeguard the integrity of the KNCHR and its Commissioners, and avoid conflicts of interests, section 10 (3) (a) to (d) of the Act lists categories of people who are not qualified for appointment as chairperson or member. These include a serving member of parliament (MP) or County Assembly (MCA), a member of a local authority, an undischarged bankrupt or any person removed from office for contravening the Constitution or other law in the country.¹⁰⁸ The exclusion of undischarged bankrupt individuals and those removed from office for contravening the law is important, as constitutional Commissions should be led by individuals with no tainted records of public service that can be trusted with public office and win over the confidence of the nation. Barring of serving MPs and MCA is also necessary to avoid a situation whereby such individuals would be holding two public offices that are likely to compromise their independence.

The appointment process starts with the President who convenes a selection panel to handle the selection of suitable candidates for the position of chairperson and commissioners.¹⁰⁹ In terms of section 11 (2) of the KNCHR Act, the panel consists of nine people, made up of one member each representing the president, the Law Society, the cabinet secretary responsible for justice, the National Council of Persons with Disabilities, cabinet secretary in charge of gender issues and two persons nominated by the Association of Professional Societies in East Africa and two representatives of the Public Service Commission. From the composition of the panel, it seems the idea is to have a broad representation of different human rights interests within the country. The executive interests though represented in the panel are countered by majority representation from non-executive ranks represented in the panel. Ideally, the executive is not supposed to influence the selections process because the panel is empowered to determine its procedure.¹¹⁰ The ability to determine its own procedure increase the chances of the panel conducting a competitive yet transparent recruitment process devoid of nepotism, corruption or

¹⁰⁸ Section 10 (3) KNCHR Act.

¹⁰⁹ Section 11 (1) KNCHR Act.

¹¹⁰ Section 11 (3) KNCHR Act.

any other form of favouritism witnessed in past public appointments. This break with the past was noted in *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others*, that¹¹¹

The selection panel provides an independent process to evaluate the competence, integrity and suitability of applicants. This selection panel is intended to insulate the appointment process from the effect of political patronage, nepotism and corruption. The selection panel is entitled to regulate its own process which must meet the constitutional standards of transparency, accountability and public participation.

There are timelines for filling the vacancies to avoid a leadership vacuum that might affect the ability of the KNCHR to execute its mandate. The president must convene a selection panel within 14 days of a vacancy arising.¹¹² In practice, these timelines have not been adhered to. In some instances, the provisions on the appointment of Commissioners have been disregarded, with the selection panel not being appointment immediately after a vacancy has arisen and in other instances the appointing authority not making any appointments despite being given a list of successful interview candidates by the selection panel.¹¹³ This failure to adhere to timelines and fill vacancies as required by law is not new when it comes to the KNCHR; its predecessor faced the same challenges after four vacancies arising out of the expiry of Commissioners' terms of office were finalised three months later.¹¹⁴ This worrying trend shows disregard for laws put in place to ensure that the KNCHR performs at full capacity and is inimical to the promotion of national values in the Constitution.

In terms of section 11 (4), the selection panel must within 7 days of its convening, invite applications and publish the names and qualifications of all applicants in the *Gazette* and two national daily newspapers. The requirement to publish the advertisements in the daily newspapers fails to take into consideration the fact that not everyone can afford to buy a newspaper and this can have the effect of qualified

¹¹¹ *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR para 84.

¹¹² Section 11 (1) KNCHR Act.

¹¹³ See *Brian Weke & another v Attorney General & another* [2014] eKLR paras 24-30.

¹¹⁴ See comments of Njoki Ndungu, MP (as she was then) proposing the recommendation of new Commissioners of the KNCHR in Kenya National Assembly Official Record (Hansard) 2 Nov 2006 3385.

individuals not being able to apply because they do not have access to the news. For a wider reach, the selection panel should consider making use of radio, television and social media in addition to the methods stated in the Act, when inviting applications for the posts of Commissioner. After receiving applications, successfully shortlisted applicants are invited for interviews for the position of chairperson and commissioners respectively. As part of making the process transparent the list of shortlisted candidates is publicised in the same manner as the vacancy adverts, stating the times, venue and supporting documents the interviewees are expected to bring to the interview.¹¹⁵ At the end of the interviews, at least three names for the chairperson and eight names for the position of four commissioners must be¹¹⁶ sent to the president to choose whom to nominate.¹¹⁷ The Presidency then forwards the names of the nominees to the National Assembly for approval or rejection – a process commonly referred to as vetting.¹¹⁸ Once approved by the National Assembly, the names of appointees are to be published in the Government Gazette by the President.¹¹⁹ Where one or two of the nominees are rejected, the President must submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under section 11 (5).¹²⁰

Approval (vetting) by Parliament is a new feature in constitutional and statutory appointments governed by article 250 of the Constitution and the Public Appointments (Parliamentary Approval) Act.¹²¹ Vetting is a process whereby nominees for public office are examined to determine their suitability to hold office.¹²² It is to ensure that appropriately qualified commissioners with dedication to human rights representative of the Kenyan population are appointed to steer the KNCHR in fulfilling its mandate. The vetting process is conducted in public to allow interested parties to make presentations on the suitability of nominees to hold office for which

¹¹⁵ In practice this have been several clearances from different institutions in the country such as the Ethics and Anti-Corruption Commission, the Higher Education Loans Boards, A Certificate of Good Conduct from the Criminal Investigations Department and Clearance from a Credit Reference Bureau.

¹¹⁶ See section 11 (4) KNCHR Act.

¹¹⁷ See Section 11 (5) KNCHR Act.

¹¹⁸ See section 11 (7) KNCHR Act.

¹¹⁹ Section 11 (9) KNCHR Act.

¹²⁰ See section 11 (11) of KNCHR Act.

¹²¹ Public Appointments (Parliamentary Approval) Act No. 33 of 2011.

¹²² According to the South African Concise Oxford dictionary, vetting is to make a careful and critical examination of (someone especially of a person prior to employment),

they have been nominated. This allows for public participation¹²³ and if properly conducted can be a good form of participatory democracy.¹²⁴ Vetting of nominees to serve as Commissioners is a shift from the previous appointment practices of the executive that could not be questioned and in most instances were considered political appointments made to win the support of a community or as part of cronyism.¹²⁵ The Departmental Committee on Justice and Legal Affairs of the National Assembly conducts the vetting as the representative of the people of Kenya and involves the consideration of several factors. Firstly, the Committee is expected to consider whether the appointing authority complied with the provisions of the KNCHR Act read in conjunction with section 7 of the Public Appointments Act which are: -

- a) the procedure used to arrive at the nominee;
- b) any constitutional or statutory requirements relating to the office in question; and
- c) the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.

After considering the above-mentioned issues, the Committee prepares a report with recommendations that is tabled in parliament for MPs to debate. In approving the president's nominees for the KNCHR and NGEC, MPs give their views on the nominees and register their support or lack thereof.¹²⁶

There are also other factors to be considered when selecting Commissioners to ensure pluralism as recommended by the Paris Principles.¹²⁷ One of these factors is that the diversity and representativeness of the country is considered during the appointment process. Section 11 (13) the KNCHR Act¹²⁸ requires that:

[i]n short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of

¹²³ See sections 6(4) and (5) Public Appointments (Parliamentary Approval) Act.

¹²⁴ Article 73(2) Constitution of Kenya 2010 on leadership and integrity.

¹²⁵ See generally J Kwaka, 'Vetting and Social Audit of Leaders', in J Kwaka, O Okombo *et al* (eds) *Challenging the Rulers: A Model for Good Governance* (2011) 236–258.

¹²⁶ See generally Kenya National Assembly Official Record (Hansard) Tuesday 4th March 2014.

¹²⁷ See discussion in 2.4.2.

¹²⁸ This provision should be read together with article 250 (4) Constitution of Kenya 2010.

gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.¹²⁹

This provision seeks to address the general trend in appointments to public offices that have resulted in one tribe having more occupants in appointive positions compared to others.¹³⁰ It also seems to be a refinement of the KNCHR 2002 Act and the general trend of appointments at the time that left room for regional balancing by appointing nine Commissioners each representing the former provinces.¹³¹ The over-representation of certain tribes in statutory and constitutional offices has resulted in “negative ethnicity.” Negative ethnicity has been defined as a “mind-set that claims some ethnic communities are superior and deserve more resources, while others are inferior and deserve less.”¹³² Negative ethnicity has become a big challenge to peace and security,¹³³ which directly influences the enjoyment of human rights in the country, and as such, it is necessary that all threats to peace be minimised.

In a country as diverse, politically charged and influenced by negative ethnicity as Kenya, the interpretation and practical application of this provision requires great thought and a delicate balancing process since only five individuals can serve as commissioners of the KNCHR. To this end, article 250(4) of the Constitution offers guidance on the selection of Commissioners by directing that:

¹²⁹ See section 11 (13) KNCHR Act read together with articles 10 and 250 (4). See also B Lindsnaes and L Lindholt, 'National Human Rights Institutions: Standard-setting and Achievements' in B. Lindsnaes, L Lindholt and K Yigen (eds), *National Human Rights Institutions. Articles and Working Papers: Input into the Discussions on the Establishment and Development of the Functions of National Human Rights Institutions* (2000) 20.

¹³⁰ Justus Wanga “Central MPs to Uhuru: We want more money, jobs and real power” *Daily Nation* July 11, 2015 <http://www.nation.co.ke/news/politics/Central-MPs-Uhuru-Kenyatta-Public-Appointments/-/1064/2784276/-/10bq2enz/-/index.html> (accessed 10 November 2015). See also CIC *Public Advisory by the Commission for the Implementation of the Constitution on Appointments to Public Offices* 14 January 2014. Samwel Born Maina “Revealed: How ethnic groups share public jobs” *Daily Nation* 7 January 2015 <http://www.nation.co.ke/news/Revealed-How-ethnic-groups-share-public-jobs/-/1056/2581834/-/to0s7bz/-/index.html> (accessed 10 November 2015); O Okumbo, J Kwaka & B Muluka (eds) et al *Challenging the Rulers: A Leadership Model for Good Governance* (2011)143.

¹³¹ The KNCHR 2002 Act provided for the appointment of nine Commissioners to lead the Commission. This was a big enough number for the appointing authority to select at least one Commissioner originally from each of the eight provinces that existed at the time. See also KNCHR *It is Hard to be Good* (2012) para 29.

¹³² Koigi Wa Wamwere “Negative ethnicity is the dragon that Kenyans must slay or perish” *Network Alshahid* September 27, 2010 <http://english.alshahid.net/archives/13275> (accessed 30 March 2016). See also PLO Lumumba “The Trial of Integrity in Kenya,” *Katiba Institute* <http://www.katibainstitute.org/index.php/the-trial-of-integrity-in-kenya> (accessed 24 March 2016). G Mwakikagile *Ethnic Politics in Kenya and Nigeria* (2001) 136-140.

¹³³ See K Wa Wamwere *Negative Ethnicity: From Bias to Genocide* (2003) for an in-depth discussion on negative ethnicity in Kenya and how it has and still affects how the state is viewed.

Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.¹³⁴

In the *Consortium for Empowerment and Development of Marginalized Communities* case, dealing with a petition challenging the ethnic composition of shortlisted candidates to serve as Commissioners for the KNCHR, Mumbi Ngugi J asserted that in reading article 250 of the Constitution and section 11 of the KNHCR:

one cannot take a single constitutional commission or independent office and argue that, because a particular region or ethnic group has not been represented, or the appointee(s) are not from particular ethnic groups or regions, then there has been a breach of the Constitution. To hold otherwise is to lead to an absurdity, and to make the composition of any commission or appointment to an office well-nigh impossible.¹³⁵

Based on the court's interpretation, the appointing authority had to take into consideration several factors such as gender, ethnicity regional balance and special interests (marginalised communities, youth and people with disabilities), with the result being the broad representation of the country across all state and constitutional office appointments. To promote regional balance and gender equity, the appointment of KNCHR Commissioners and by extension the hiring of staff should be illustrative of the Kenyan society with no single ethnic community dominating. The institution should be, and seen to be, ready to work with all communities in the country to address their human rights concerns. An inclusive Commission characterised by a broad representation of the Kenyan society would increase the public legitimacy of the KNCHR. Nevertheless, what is important is that the issue of negative ethnicity should be rejected and Kenyans encouraged to utilise the institutions put in place to work towards the realisation of the hope and dreams contained in the Constitution.¹³⁶ The KNCHR can work together with the National

¹³⁴ This provision should be read together with articles 73 (2) [on leadership and integrity] and 232 [on the Values and Principles of Public Service] of the Constitution of Kenya, 2010.

¹³⁵ *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others* para 38. See also *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR paras 9

¹³⁶ See dicta of Judge Mumbi Ngugi in *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of*

Cohesion and Integration Commission (NCIC) and NGEC to promote cohesion amongst Kenyans.

The appointment of KNCHR Commissioners since the promulgation of the 2010 Constitution has been fraught with challenges. During the selection process of the current Commissioners in 2013, the complete list of nominated members seems to have changed with the result that the list given to the parliamentary committee for vetting was not the same as the one that originated from the President's office.¹³⁷ The president sent a list of five nominees for the position of KNCHR Commissioner¹³⁸ including Mr. Vincent Suyianka Lempaa (to represent the marginalised communities) who was among those interviewed by the selection panel only for the Department Committee on Justice and Constitutional Affairs and parliament to reject his nomination because he was not among the nominees list forwarded to parliament.¹³⁹ This has had the effect of denying the Commission a full complement of Commissioners, since only four Commissioners were ultimately appointed and the last one was rejected on a technical basis and not on his unsuitability to serve as a KNCHR Commissioner.¹⁴⁰

The vetting process has proved controversial especially with the vetting of cabinet secretaries where despite a few of them being unsuitable to hold office, there appointments have been approved because of the majority enjoyed in parliament by the ruling party.¹⁴¹ Whereas, this has not been the case with appointments to constitutional Commissions, the vetting of Mr. Lempaa as a KNCHR nominee subjected him to unnecessary criticism and ridicule at the hands of hostile MPs not to mention attacks on NGOs following his appearance in a case challenging the

Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others [2013] eKLR para 45.

¹³⁷ Kenya National Assembly Official Record (Hansard) 4th March 2014 24.

¹³⁸ Notice by the Clerk of the National Assembly in Daily Nation Friday, February 14, 2014 20.

¹³⁹ Kenya National Assembly Official Record (Hansard) 4th March 2014 24.

¹⁴⁰ The nomination of Mr. Lempaa was rejected on the basis of his name not featuring among the shortlisted candidates submitted to the President.

¹⁴¹ See Edwin Mutai "Vetting committee deadlocked over Kandie Chirchir" *Business Daily* Monday, May 13, 2013. <http://www.businessdailyafrica.com/Vetting-committee-deadlocked-over-Kandie-and-Chirchir/-/539546/1851330/-/fg5va3z/-/index.html> (accessed 30 March 2016). Edwin Mutai "Kenya Cabinet secretary nominees now set for appointment" *Business Daily* Tuesday, May 14, 2013. <http://www.businessdailyafrica.com/Parliament-approves-all-16-Cabinet-secretary-nominees/-/539546/1852736/-/bicqg2/-/index.html> (accessed 30 March 2016).

constitutionality of the Constituencies Development Fund (CDF).¹⁴² This way of thinking by MPs shows the self-interest that at times drives their thinking and threatens the objectivity of the vetting process. However, as argued above, vetting has generally allowed for public participation and an open scrutiny process of the suitability of nominees to hold office.

Considering the qualifications in the KNCHR Act and the Constitution together with the vetting requirement, one of the questions would be whether the Commissioners are suitably qualified. To start, the chairperson, Ms Mbogori holds two degrees (A Master of Laws and Bachelor of Laws) and has experience in the human rights having worked for several UN agencies and leading the Kenyan chapter of the ICJ for five years. The Vice Chairperson, Mr George Morara, on his part has extensive advocacy experience in the human rights sector having worked for the NGO, Kenya Human Rights Commission (KHRC) that has been a champion of human rights in the country. Commissioner Chivusia holds LLB and MA degrees. In addition to this, she has experience having served as a Human Rights Officer in the KNCHR prior to its re-establishment as a constitutional commission. Ms. Jedidah Waruhiu is equally qualified (with an LLB and LLM) and experienced in the human rights field having worked for the UN and in the NGO sector involved in aid and advocacy work.¹⁴³ Matched against the criteria in the KNCHR Act, the current cohort of Commissioners based on their individual work experience can be said to be qualified experts. They possess the necessary academic qualifications and human rights experience to advance the human rights agenda in Kenya through the KNCHR. Three of the four Commissioners are women, which mean to meet the constitutional threshold, the appointing authority should select a male commissioner so that the Commission does not have more than two thirds of its members of the same gender.

¹⁴² During the approval of Commissioners in Parliament, Adan Duale, MP and Leader of the Majority Party was on record saying that the Katiba Institute had sneaked in Mr. Lempaa's name. See Kenya National Assembly Official Record (Hansard) 4th March 2014 26-27.

¹⁴³ For details on the Commissioners' qualifications and experience see <http://www.knchr.org/Aboutus/Structure/Commissioners/CurrentCommissioners.aspx> (accessed 30 March 2016).

The tenure of the chairperson and commissioners is limited to a single term of six years.¹⁴⁴ This provision is different from the repealed Act that provided for the continuity and the preservation of institutional memory by rotating the membership of the Commissioners. According to the repealed KNCHR Act 2002, the Commissioners were supposed to elect among themselves four Commissioners whose terms would expire at the end of three years and another four whose terms of office would expire at the end of four years from the date of appointment.¹⁴⁵ This resulted in experienced Commissioners working with new ones. The Commissioners' terms of office were also renewable for a further term.¹⁴⁶ There is no explanation for the change in the maximum term a Commissioner can serve under the current Act. It could be that the drafters of the Act thought it wise to limit the tenure to a once off six-year term which is long enough for Commissioners to settle down and get the ball rolling on human right matters.

To ensure that they are fully committed to the KNCHR, the commissioners are appointed on a full-time basis¹⁴⁷ The Sub-Committee on Accreditation has noted the advantages of hiring NHRIs leadership on a full-time basis to include promoting “stability, an appropriate degree of management and direction, and limits the risk of members being exposed to conflicts of interest upon taking office.”¹⁴⁸ However, it is my view that, the appointment of some of the Commissioners on a part-time basis would have the effect of getting the same expertise at a fraction of the cost incurred for full time members.¹⁴⁹ To enable them carry out their duties without fear of persecution, Commissioners and staff of the KNCHR are protected from prosecution for actions undertaken in good faith while executing their official functions.¹⁵⁰ Immunity from prosecution for duties undertaken is a doctrine of international law and its interpretation equally applies to the KNCHR and other independent

¹⁴⁴ See section 14 (1) KNCHR Act.

¹⁴⁵ Section 9 (a) & (b) KNCHR Act 2002.

¹⁴⁶ Section 9 KNCHR Act 2002.

¹⁴⁷ See Section 14 (2) KNCHR Act.

¹⁴⁸ See *SCA General Observations* para 2.2 42.

¹⁴⁹ The remuneration of Commissioners has been subject of debate in Kenya given the amount of money they earn which has been termed as high compared to other government jobs.

¹⁵⁰ Section 25 of the Act reads: No matter or thing done by a member of the Commission or any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith while executing the functions, powers or duties of the Commission, render the member, officer, employee or agent personally liable for any action, claim or demand whatsoever. See also *SCA General Observations* para 2.3.

Commission.¹⁵¹ The type of immunity envisioned is an immunity *ratione persona* (personal immunity) that is extended to KNCHR staff only if the actions undertaken are while performing the functions of the KNCHR.¹⁵² In the absence of this protection, the KNCHR would be prevented from taking on powerful individuals and organs of state that might be violating human rights. Such immunity promotes the independence needed by the Commission to carry out its mandate without fear or favour.

4.3.4 Powers of Court

The Paris Principles propose that NHRIs be granted some powers of courts to function effectively. Such powers include the powers to summon and question individuals before the Commission to gather information on human rights. These powers are useful in holding human rights duty bearers accountable and obtaining information necessary in assessing the human rights situation in a domestic jurisdiction.¹⁵³ The KNCHR has such powers in terms of section 27 of the KNCHR Act and articles 252(1) and (3) of the Constitution. Therefore, the Commission may investigate complaints on human rights issues, engage in mediation and conciliation to resolve human rights complaints and where necessary, order the attendance of, or production of relevant information to aid in resolving a human rights complaint/investigation. Additionally, the KNCHR has the power to conduct human rights audits on any public or private entity to determine human rights compliance. The Commission is yet to come up with regulations to guide the exercise of its quasi-judicial functions together with the modalities of holding public inquiries into human rights.¹⁵⁴ The absence of rules was occasioned by court action as explained below.

The Commission had powers under section 22 of the 2002 KNCHR Act, and the (Complaints Procedures) Regulations 2005 Legal Notice 115/05, section 27 and 33), to establish tribunals to resolve matters brought to it by way of complaints. Having made a couple of rulings on human rights complaints received, the constitutionality

¹⁵¹ D Akande & S Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21 *European Journal of International Law* 815 at 818.

¹⁵² D Akande & S Shah 2010 *European Journal of International Law* 818.

¹⁵³ See Paris Principals 'Additional principles concerning the status of commissions with quasi jurisdictional competence'. See also discussion in 2.4.4. SCA General Observations para 2.10.

¹⁵⁴ See KNCHR Strategic Plan 2015-2018.

of these tribunals was challenged in *Kenya Commercial Bank Ltd (KCB) v KNCHR*,¹⁵⁵ a labour dispute in which a tribunal set up by the KNCHR had ruled in favour of a former employee of KCB who had complained of his labour rights being infringed by the bank. Unhappy with the decision of the tribunal, KCB approached the court where it was ruled that the regulations were *ultra vires* the Act because there was no provision in the KNCHR Act for the creation of a hearing panel to settle human rights complaints. The court also found that rule 14 of the regulations offended the rules of natural justice. In the end, the court quashed several regulations dealing with complaints handling, rendering the regulations ineffective.¹⁵⁶ The ramifications of this ruling still linger on with the result that the KNCHR has yet to make use of these powers since then as it tries to draft regulations that are in line with Constitution. According to Commissioner Waruhiu¹⁵⁷

“The KNCHR is currently developing rules and regulations to make ensure lessons learnt in the past and realities of the day are taken into consideration. We are also developing ADR mechanisms because people are tired and weary of the court because it is slow, at times, you are not sure of the kind of decision you will get..., and there are few users of ADR.”

These powers of court are indispensable if the KNCHR is to fulfil its mandate in a comprehensive manner; especially in instances where they require information necessary to check on the measures put in place by government and business to promote and protect SERs within Kenya. Where organs of state and or business requested for information do not oblige, the KNCHR should make use of these powers as a last resort to avoid souring relations with these stakeholders. However, it is important in making use of these powers for the KNCHR to collaborate with the courts in drafting rules that are within the law. To avoid acrimony that might arise from being summoned, state departments and entities should be encouraged to provide information on the measures put in place to promote and protect the human rights to the Commission. Such encouragement should come from the three arms of government but more specifically the office of the President as the head of the executive where most of government’s policies and programmes are drafted and

¹⁵⁵ *Kenya Commercial Bank Ltd v. KNCHR, Misc. Application* No. 688 OF 2006.

¹⁵⁶ *Kenya Commercial Bank Ltd v. KNCHR, Misc. Application* No. 688 OF 2006.

¹⁵⁷ Interview with Ms. Jedidah Waruhiu KNCHR Commissioner. See also KNCHR *It is hard to Be Good* (2012) 36.

executed. On their part, the National Assembly and County Assemblies should encourage members of the executive to furnish the KNCHR with information when requested.

To utilise their powers of court, it is essential that the KNCHR with the help of the AG's office, draft regulations to guide the complaints hearing procedure envisioned in the KNCHR Act. Such regulations should consider the constitutional provisions in chapter 10 on the powers of courts and the different courts that exist to avoid legal challenges to the powers of the KNCHR. The powers to summon individuals and compel furnishing of information should be set out with the penalties for failure to heed summons issues by the KNCHR. Collaborative mechanisms between the courts and law enforcement (such as the proper execution of court orders and following up on such by the courts) should also be included to make the process meaningful in resolving human rights concerns. Since the aim is to amicably resolve human rights concerns and foster constructive dialogue likely to influence change, the guidelines should also indicate the process of mediation and conciliation in resolving complaints and instances where the KNCHR can hold a hearing without encroaching on the powers of the courts. These guidelines, it is recommended should be widely publicised for Kenyans to know what kind of relief they can seek from the KNCHR.

The 2011 Act introduces some changes that seem to weaken the court-type-powers of the KNCHR. It repeals section 19 (4) – (6), which inter alia allowed for an interested party, on application, to get the KNCHR's recommendations made an order of court if such application was uncontested.¹⁵⁸ Moreover, the 2002 Act made provision for a penalty for failure to attend a KNCHR's summons or giving false information to the Commission. The current Act does not have this provision meaning that the KNCHR cannot issue penalties for non-compliance with its summons. It would be prudent to replicate section 19 in the 2011 Act that in turn would allow for another avenue of interaction between the KNCHR and the judiciary thus allowing these institutions to work together while at the same time giving weight to the recommendations of the KNCHR.

¹⁵⁸ There is no record of this power being used perhaps explaining its exclusion from the 2011 Act.

4.3.5 Complaints handling

Complaints handling will be a significant cog in the wheel of promoting and protecting SERs. The KNCHR is empowered to receive complaints in terms of section 32 of the KNCHR Act. The Act allows for lodging of complaints orally or in writing and encourages a speedy investigation and resolution process.¹⁵⁹ The complaints handling process should also take into consideration the rules of natural justice by allowing adversely mentioned parties an opportunity to make presentations before the KNCHR issues recommendations.¹⁶⁰ The complaint handling provisions seem adequate and has been utilised by the Commission in execution of its mandate.

In its 2013/2014 Annual Report the Commission noted an increase in the number of SERs related complaints. In the 2012/2013 reporting period, the Commission received 1,797 complaints with SERs related complaints accounting for the majority 1,163 (64.33%), CPRs were 474 (26.22 %) and group rights constituted 171 (9.46 %) of the received complaints.¹⁶¹ In its 2015/2016 report the Commission received 2,749 (58.9%) SER related complaints compared to 1,360 (29.1%) CPRs and 558 (12%) group rights¹⁶² There is a slight increase in the number of complaints received in total and SERs in particular, a situation which suggests two things. Firstly, it could be attributed to an increased knowledge of SERs. Secondly it suggests that majority of the complaints are received from poor individuals, highlighting the need to focus on the promotion, protection of these rights. The Commission seems aware of the need to focus on these rights and the need to work with county governments that influence the realisation of human rights.¹⁶³ Unlike the 2013/2014 report which did not engage in an analysis of complaints by rights other than giving the percentages,¹⁶⁴ the 2015/2016 reports is an improvement as it provides details of the

¹⁵⁹ See section 33 KNCHR Act. See discussion in 2.4.4 on quasi-judicial powers.

¹⁶⁰ Sections 35, 36 and 39 KNCHR Act. See also SCA General Observations para 2.10 56-57.

¹⁶¹ KNCHR 11th Annual Report 2013/2014 22.

¹⁶² See KNCHR 12th Annual Report 2015/2016 30. <http://www.knchr.org/Portals/0/AnnualReports/Annual%20English%20FINALE%20COPY.compressed.pdf?ver=2016-05-31-172234-997> (accessed 30 November 2016).

¹⁶³ KNCHR 12th Annual Report 2015/2016 30.

¹⁶⁴ See KNCHR 11th Annual Report 2013/2014 22. See also KNCHR Annual Report 2012/2013 17 where a bulk of the complaints cover the same issues as far as SERs are concerned with no detailed information of the specific rights complained of mentioned.

number of complaints in terms of the rights affected such as the rights to education, social security, housing among others.¹⁶⁵

A gender analysis of the complaints received show that most of the complainants are male (71.6% in 2013/2014 and 69.2% 2015/2016) compared to female complainants (28.4% in 2013/2014 and 30.8% 2015/2016). In an effort to make the complaints lodging process accessible to many, the Commission accepts complaints through various means that include walk ins to KNCHR offices, by phone, email, post, fax, website and through referrals from the Integrated Public Complaints Referral Mechanism (IPCRM) in 2014.¹⁶⁶ In its recent report, the KNCHR reports receiving complaints through the additional means of public forums and the Huduma Centre¹⁶⁷ in Eastleigh.¹⁶⁸ Still, the statistics on the complaints received in the past two reporting cycles¹⁶⁹ reveal that majority of the complaints handled originated from the urban areas with majority of the complaints received at the Nairobi office.¹⁷⁰ The KNCHR has attributed this variance to the proximity of the KNCHR offices to the general population and the fact that awareness of human rights is still lacking among majority of Kenyans.¹⁷¹ These are challenges that need to be addressed and the KNCHR should consider means of being accessible to all, especially those not in areas close to its regional offices.

Even though complaints handling and the resulting resolution of the matters are reactive, like the court processes, their value is in their often cheap and speedy nature compared to the court process. Once a complaint is lodged with the Commission, it must decide whether to admit such a complaint for investigations, refer it to one of its referral partners or offer legal advice. Depending on the nature (urgent, substantial number of complaints etc.) of the complaint, the Commission

¹⁶⁵ KNCHR 12th Annual Report 2015/2016 31-33.

¹⁶⁶ KNCHR 11th Annual Report 2013/2014 21. KNCHR 12th Annual Report 2015/2016 30.

¹⁶⁷ These are centres established by the national government to provide one-stop shop for government services.

¹⁶⁸ KNCHR 12th Annual Report 2015/2016 30.

¹⁶⁹ In 2013/2014 Nairobi Office 820 (45.63%), North Rift Regional Office 451 (25.10%), North Eastern Regional Office 133 (7.40%), Coast Regional Office 340 (18.92%) and Kisumu Regional Office 53 (2.95%). In 2015/2016 Nairobi Office 1,855 (35.9%), North Rift Regional Office 1,750 (32.7%), North Eastern Regional Office 285 (6.4%), Coast Regional Office 743 (14.4%) and Kisumu Regional Office 319 (10.6%).

¹⁷⁰ See KNCHR 11th Annual Report 2013/2014 21.

¹⁷¹ KNCHR Annual Report 2012/2013 17.

decides on whether to write letters or conduct investigations. It is the outcome of these investigations that influence the kind of action taken by the KNCHR to provide redress.¹⁷² Additionally, from the complaints received the KNCHR can get an idea of recurring human rights concerns and seek ways to address them on a large scale such as deciding to hold public hearings. So far, the Commission is conducting a public inquiry on insecurity and its impact on human rights.¹⁷³ Public inquiries should facilitate engaging in dialogue with affected individuals/communities together with those alleged to have caused the matter being complained of. The KNCHR should strive to improve the complaints handling process to allow for the acceptance of many complaints and their quick resolution.

4.3.6 Funding of the commission

In terms of article 249 (3) of the Constitution, it is a constitutional imperative that the KNCHR, as an independent commission be adequately funded as a means of ensuring it enjoys financial independence. Article 249 (3) provides that:

Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

Adequate funding enhances financial independence¹⁷⁴ that is important for the optimal functioning of the KNCHR. Ideally, the funds given to the Commission by the government should be adequate to enable it carry out its mandate without being compromised. Such funds should be enable the KNCHR to hire and retain qualified employees and most importantly to carry out its mandate.¹⁷⁵ From the wording of the Constitution, it seems it is up to parliament to determine what amounts to adequate funding.

The High Court in *Judicial Service Commission v Speaker of the National Assembly & 8 Others* highlighted the importance of allocating the Judicial Service Commission (JSC) enough funds to enable it to perform its mandate without undue influence. The

¹⁷² See KNCHR Annual Report 2012/2013 18.

¹⁷³ KNCHR Public National Inquiry on Security and Human Rights in North Rift, Kenya <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PUBLIC%20INQUIRY%20HEARING%20RULES.pdf?ver=2016-06-20-122052-350> (accessed 15 November 2016).

¹⁷⁴ See discussion in 2.4.2 on financial independence.

¹⁷⁵ SCA General Observations para 1.10 34.

court's approach to the financial independence of the JSC is equally applicable to the KNCHR.¹⁷⁶

According to the KNCHR Act, the funds of the Commission may consist of monies allocated by Parliament, monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions, and all monies from any other source provided, donated or lent to the Commission.¹⁷⁷ Section 45 (b) seems to suggest that the KNCHR may charge a fee to provide its services to people. Charging fees for services carried out in furtherance of its mandate would be inimical to the idea of the KNCHR being an easy to access institution for the promotion and protection of the rights of poor Kenyans.

Since the KNCHR is better placed than Parliament and the Cabinet Secretary in charge of Finance to know its financial requirements, such funding should be that which is requested by the KNCHR through its annual budget estimates¹⁷⁸ and allocated to it through the national budget. The KNCHR has its own budget vote tabled before parliament.¹⁷⁹ However, the situation with the KNCHR, like other NHRIs, has been that it has not always been allocated the funds requested in its budget estimates.¹⁸⁰ In the 2013/2014 budget estimates, the funds allocated to the Commission (Kshs 302,090,000) was much less than what the KNCHR had requested (Kshs 703,920,000).¹⁸¹ The reduction in funding will have a significant impact on the ability of the Commission to perform its mandate and is not in keeping

¹⁷⁶ *Judicial Service Commission v Speaker of the National Assembly & 8 Others* [2014] eKLR para 213.

¹⁷⁷ Section 45 KNCHR Act 2011.

¹⁷⁸ Section KNCHR Act 2011.

¹⁷⁹ See GOK *Programme Based Budget of the National Government of Kenya for the year ending 30th June 2016* 521 <http://www.treasury.go.ke/component/jdownloads/send/27-related-documents/13-pogram-based-budget-final-2015-2016.html> (accessed November 2016). *Programme Based Budget of the national Government of Kenya for the year ending 30th June, 2017* 637-643.

¹⁸⁰ See discussion in 5.7.1 on the funding challenges of the SAHRC.

¹⁸¹ From an initial request for Kshs 703, 920, 000 the KNCHR was granted 302, 090,000. See 72 – 73. Republic of Kenya Governance, Justice, Law and Order Sector (GJLOS) Report for Medium Term Expenditure Framework (MTEF) Period 2013/14–2015/16 October 2012 http://www.treasury.go.ke/index.php/resource-center/doc_download/521-governance-justice-law-a-order-report (accessed 12 June 2014).

with the requirements of the ICC¹⁸² and the Constitution on the need for financial independence for such institutions.

The issue of funding is fraught with many considerations some of which, it could be argued, have nothing to do with the ability of the KNCHR and other constitutional commissions to carry out their mandate. While speculative, it is possible that the issue of financing is viewed as a means of controlling the kind of work constitutional commissions can perform that threatens the arms of government especially parliament and the executive, that tend to frown upon criticism and fearlessly independent institutions. On the other hand, it could be that, in the view of most of the parliamentarians, and to an extent the executive, these institutions do not add value to good governance and the proper implementation of the Constitution. A cause for concern has been MPs reducing the amounts allocated to constitutional commissions, which have been viewed by the legislature and executive as drawing many resources from the taxpayers.¹⁸³

Financial independence is likely to be achieved through the adequate funding of NHRIs in such a manner that they can carry out their activities.¹⁸⁴ Whereas inadequate funding upsets the working of the Commission, the reality of the matter is that it is hard for the Commission to get exactly what it requests given the fact that the estimates in the budget should cater for many other activities. It is therefore necessary that the KNCHR use the budget allocated to it to the best of its ability by carefully choosing which activities to pursue in each financial year.¹⁸⁵ The downside of inadequate funding is that in most instances this leads to the KNCHR depending on donor funds to make up for the deficit in the funds allocated to it to carry out its

¹⁸² See Paris Principles B.2. SCA *General Observations* para 1.10 on 'Adequate funding of NHRIs'. ICC SCA *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)* Geneva, 27-31 October 2014, 15, 19-20. <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf> (accessed 15 December 2015).

¹⁸³ Alphonse Shiundu "Kenyan MPs hit back in fight over pay" *The East African* Thursday, May 30 2013 <http://www.theeastafrican.co.ke/news/Kenyan-MPs-hit-back-in-fight-over-pay/-/2558/1867678/-/88257o/-/index.html> (accessed 30 October 2014).

¹⁸⁴ SCA *General Observations* para 1.10 on 'Adequate funding of NHRIs'. See discussion in 2.4.2 on the need for financial independence of NHRIs as recommended by the Paris Principles. See also B Burdekin *National Human Rights Institutions in the Asia Pacific Region* (2007) 47-48.

¹⁸⁵ According to Ms. Cathy Mumma, the KNCHR should show what it has done with what it is given to motivate further resource allocation from the government/donors.

activities. In its financial reports for the year ending June 2014 the KNCHR had Kshs 63,242,000 from donors.¹⁸⁶ If the Commission is critical of the government, it is difficult to fight accusations that the KNCHR is working to promote the agenda of the donor countries and not for the good of the country. This assertion is made because of some of the utterances by MPs about the KNCHR's involvement in the indictment of the President and Deputy President by the International Criminal Court where the Commission was accused of working for foreign governments by coaching witnesses to lie in court.¹⁸⁷

On the other hand, to the extent that the KNCHR receives government funding, the Commission may be reluctant to criticise the government for fear of having the funding reduced. NHRIs are faced with this dilemma in asserting their independence with the notion that any institution getting money from the government should be wary not to bite the hand that feeds it. Resolving this dilemma calls for a better understanding of the KNCHR's independence and how this should be protected always. With regards, to funding it ought to be adequate not leave the KNCHR open to undue influence from the government or donors on how to carry out its mandate. The issue of funding will always be a challenging one given the limited resources available for allocation by parliament. However, parliament should strive to provide adequate core funding¹⁸⁸ and should not be guided by political inclinations that do not serve to promote the status of human rights in the country; MPs should be made aware of their obligation to support the KNCHR and other similar institutions to make the rights in the Constitution a reality.

On its part, the KNCHR should abide by the set systems of financial accountability in terms of the law. Thus, every financial year, the Commission must submit its books

¹⁸⁶ See KNCHR *Reports and Financial Statements for the Financial Year ended June 30th, 2014* 62 attached in the KNCHR 11th Annual Report 2013/2014. <http://www.knchr.org/Portals/0/AnnualReports/KNCHR%20%20Annual%20Report%202013-2014.pdf> (accessed 6 July 2015).

¹⁸⁷ See comments of Hon Aden Duale, leader of the Majority Party in parliament, during the debate on the approval of KNCHR Commissioners nominees.

¹⁸⁸ SCA *General Observations* para 1.10 34-35. See also Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, Serbia 22-23 February 2012) paras 6-9 <http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf> (accessed 6 July 2015).

to the Auditor General to show how funds allocated were spent to justify the allocations made.¹⁸⁹

4.3.7 Accountability to and relationship with parliament

As much as NHRIs are to be independent institutions, they must be held accountable and their performance constantly reviewed. Lines of accountability should be clearly laid out in the instrument establishing the institution.¹⁹⁰ KNCHR's accountability and that of any other NHRI should be to parliament and most importantly the citizens of the country. It is important that the KNCHR is held accountable for several reasons. Firstly, it provides an opportunity for parliament to confirm that the KNCHR is fulfilling its mandate. It ensures that the institution formed is performing the functions that it was created to perform in an independent and unbiased manner that ensures the promotion and protection of human rights. Secondly, that the funds allocated to it are properly utilised and where there are challenges in the workings of the KNCHR, then parliament can be informed to provide the necessary means through legislative amendments or necessary budgetary adjustments.

Furthermore, efforts to hold NHRIs accountable are an indicator that the quest to promote and protect human rights involves different institutions with parliament being the key link between the KNCHR and the executive. Where parliament and the executive are aware of the programmes the KNCHR is carrying out as part of its mandate, they can offer meaningful support or make use of the expertise of the Commission in fulfilling their human rights obligations. The accountability of the KNCHR to parliament should be restricted to its performance and not the merits of their recommendations as this would affect their independence. Additionally, such accountability measures should take place after performance of certain functions and not before.¹⁹¹ For this to happen it is essential that the two institutions create a framework to guide their interaction without compromising the independence of the KNCHR.¹⁹²

¹⁸⁹ See discussion in 4.3.7 on Accountability to Parliament.

¹⁹⁰ SCA General Observations para 1.1.

¹⁹¹ See R Murray *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (2007) 71-72.

¹⁹² See Belgrade Principles para 17.

To promote accountability, the KNCHR has to compile a report of its activities at the end of each financial year to be submitted to parliament and the president.¹⁹³ The contents of the report submitted to parliament and the president must contain the financial statements of the Commission, a description of its activities, recommendations on specific actions and on legal and administrative measures taken to address concerns identified by the Commission.¹⁹⁴ It is through such reports that the KNCHR can appraise the president as head of the executive on the state of human rights in the country and seek to get the executive involved in fulfilling its human rights obligations. The Commission must publish the report in the *Gazette* and in at least one newspaper with national circulation to allow members of the public access to it.¹⁹⁵ Whereas this is a step in the right direction towards making the work of the Commission known, not everyone can afford to buy a newspaper or get access to the government Gazette. The KNCHR should therefore employ other means to publicize its work and reports in general such as appearing on television, radio shows, use of social media and having human rights clinics.

The submission of reports is a meaningful way to interact with the branches of government and a chance for interested stakeholders to be aware of the workings of the KNCHR. The Act is silent on parliamentary debate on the reports submitted by the Commission. It could be argued the absence of a clear framework in legislation and parliamentary procedures on how parliament should engage with or even debate the reports are some of the reasons why KNCHR reports and those of other constitutional Commissions are hardly debated in parliament thus making it difficult for KNCHR recommendations to be implemented.

According to the KNCHR Act, whenever it is necessary the President, the National Assembly or the Senate may require the Commission to submit a report on a particular issue at any time.¹⁹⁶ This avenue is yet to be exploited since the re-establishment of the Commission with KNCHR rarely called upon to offer advice on

¹⁹³ In terms of section 53(1) of the KNCHR Act read together with article 254 of the Constitution of Kenya, 2010.

¹⁹⁴ See article 254 (a) to (e) Constitution of Kenya, 2010.

¹⁹⁵ Section 53 (2) KNCHR Act.

¹⁹⁶ See Section 53 (3) of the KNCHR Act.

human rights issues to Parliament.¹⁹⁷ The only interaction evident between the KNCHR and the Executive has been through the President's State of the Nation Address on the fulfilment of national values in terms of articles 132. Article 132(1)(c)(i) of the Constitution requires the President to once every year report in an address to the nation, on all measures taken and progress achieved in the realisation of national values and principles of governance referred to in Article 10. Normally this has been through the attachment of "The Report on measures taken and progress achieved in the realization of National Values and Principles of Governance," which contains excerpts from KNCHR reports highlighting the number of complaints received and resolved and their disaggregation in terms of counties.¹⁹⁸

I contend that presenting quarterly reports to parliament by the KNCHR would enable a frank discussion between the Commission and members of parliament thus creating a mutual working relationship involving meaningful engagement, constructive criticism and mutual support that are necessary for the overall promotion, protection and monitoring of human rights in the country. This would allow parliament to be apprised of the human rights situation in the country by the KNCHR. Additionally, the legislature would be made aware of the challenges facing the realisation of human rights in the country and ways through which, it can help in lessening the challenges. A close working relationship between the legislature and the KNCHR, guided by an understanding of the different roles both institutions play in the realisation of human rights, is advisable for a number of reasons. Firstly, it will provide opportunities for engagement between the two institutions, which can be mutually beneficial. For example, the KNCHR can seek Parliament's involvement in the implementation of human rights through their oversight role on the executive. The KNCHR can also alert parliament of the human rights situation in the country given their mandate as the human rights protector in the country. Accountability to Parliament as the people's representative is necessary, as it is important for NHRIs

¹⁹⁷ Interview with Ms. Jedidah Waruhiu KNCHR Commissioner.

¹⁹⁸ See *The Kenya Gazette* Vol. CXVII—No. 33 Nairobi, 31st March, 2015 Gazette Notice No. 2117 paras 89 and 252. Republic of Kenya, The Executive Office of the President, State House 3rd Annual Report, 2015 On Measures Taken and Progress Achieved in The Realisation of National Values and Principles of Governance March, 2016 *The Kenya Gazette* Vol. CXVIII—No. 36 NAIROBI, 8th April, 2016 Gazette Notice No. 2477 Paras 370 and 377.

to demonstrate that they exist for a reason and that the finances given to them are properly utilised.¹⁹⁹

Despite the provisions of section 53 of the KNCHR Act, the Commission's relations with the National Assembly and the executive remain poor. Engagement with and working relations with parliament and the executive have been restricted to comments on national legislation with human rights impact that are only received together with other submissions to parliamentary committees.²⁰⁰ Participation at the Committee stage has been under the auspices of the public participation requirement in passing legislation, a process that is provided for in legislation. It has not been because of an invitation by any of the committees involved for the KNCHR specifically to give their views thus affecting the amount of time allocated to make presentations before such Committees.²⁰¹ Despite the KNCHR making presentations to parliamentary committees, the National Assembly has on some occasions not taken up the recommendations leading to the passage of unconstitutional laws that disregard human rights concerns as was the case with the Security Laws Amendment Act (SLAA).²⁰² In *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya*, the KNCHR challenged the constitutionality of the SLAA in court with the court ruling in its favour. It could be argued that the decision of the court should be seen by parliament as an indication of the importance of KNCHR's recommendations on legislature and other matters that should not be brushed aside.

Another area that needs improvement is parliament's engagement with KNCHR's reports on human rights matters including its annual reports. The KNCHR reports have not been debated in parliament despite being forwarded on time to the clerk of the National Assembly and the Attorney General's Office.²⁰³ No record is available in the parliament's official records of debate on the contents of KNCHR reports after

¹⁹⁹ See Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments (Belgrade, Serbia 22-23 February 2012).

²⁰⁰ Interview with Ms. Jedidah Waruhiu KNCHR Commissioner.

²⁰¹ See KNCHR Annual Report 2013/2014 39.

²⁰² See *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR paras 55 and 196.

²⁰³ Interview with Ms. Waruhiu, KNCHR Commissioner.

the 2013 elections. Relations with the Senate are no different but a bit more promising with the KNCHR working with Senator Hassan Omar, former member and Vice-Chairperson of the KNCHR to draft the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015.²⁰⁴ This important bill is meant to spell out the SER obligations of the national and county governments.²⁰⁵

To enable better relations between the KNCHR and the National Assembly, the Commission encouraged the establishment of the Kenya Parliamentary Human Rights Association (KEPHRA)²⁰⁶ to spearhead the human rights agenda in parliament.²⁰⁷ Even though this is a step in the right direction, in my view, it is not set up as part of a formal framework between the KNCHR and parliament with the KEPHRA being registered under the Societies Act. This makes KEPHRA a lobby group of MPs with similar ideas on human rights and is unlikely to have the necessary gravitas to nurture a strong working relationship with parliament's Committee on Justice and Constitutional Affairs that would be desirable.²⁰⁸

The KNCHR Act has an interesting provision in section 54. This section provides that the Cabinet Secretary (identified as the Attorney General under whose docket the KNCHR falls) shall prepare an annual report on the implementation of human rights and shall submit the report to Parliament in accordance with Article 153(4) (b) of the Constitution. At first glance, this provision seems confusing when the independence of the KNCHR is considered because the Commission should be independent and only accountable to the National Assembly. However, one could read this provision as an administrative arrangement meant for parliament to hold the executive accountable on its human rights obligations, without any impact on the independence of the Commission. In my view, the responsibility of reporting on the implementation of human rights would best be vested in the KNCHR rather than in

²⁰⁴ The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015 http://www.parliament.go.ke/the-senate/house-business/senate-bills/item/download/1215_bf5556faff734fa9246abcb0ac110b52 (accessed 30 March 2016).

²⁰⁵ Interview with Ms. Jedidah Waruhiu, KNCHR Commissioner.

²⁰⁶ See KPHRA website <http://www.humanrightsmps.org/about-us/>. See also KEPHRA Strategic Plan 2015-2018 <http://www.humanrightsmps.org/wp-content/uploads/2015/04/KEPHRA-STRATEGIC-PLAN-MARCH31.pdf> (accessed 30 March 2016).

²⁰⁷ Interview with Ms. Jedidah Waruhiu KNCHR Commissioner.

²⁰⁸ See Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments 3-4.

the Attorney General, even if only as an administrative conduit. The KNCHR should handle this responsibility because it has the necessary legitimacy, independence, objectivity and expertise to give an authoritative account of the state of human rights in the country to the legislature and president.²⁰⁹ Further, I recommend that parliament should debate the KNCHR reports and where necessary invite the Commission to make presentations on the contents of these reports for better understanding to inform its position and the legislative agenda in relation to human rights.

Section 55 of the KNCHR Act makes provision for the review of the Commission's mandate. Per this provision, after being in existence after 5 years, parliament is to review the possibility of amalgamating the KNCHR with the commission responsible for the administrative justice.²¹⁰ This provision should be used by the Commission as a motivation to stay relevant by fulfilling its mandate for the benefit of Kenyans. Conversely, it is suggested that a review after five years of existence is unlikely to be a clear indicator of the impact the KNCHR has had on the human rights given the challenges it has faced with the appointment of Commissioners. Nonetheless, with the prospect of a review hanging over its head, the Commission should fulfil its mandate to the best of its ability to justify its existence as a constitutional commission and to ensure that when the review occurs, it gets the necessary support from parliament.²¹¹ For this to happen, the KNCHR must be seen to belong to all Kenyans without favouritism towards the government or civil society.

The KNCHR must work with the government (particularly parliament and the executive) without being compromised.²¹² The Commission must also forge a meaningful working relationship with the civil society and business to advance human rights in the country. Working with government is necessary as the executive

²⁰⁹ See *SCA General Observations* para 1.11 37.

²¹⁰ See section 55 of the KNCHR Act.

²¹¹ The 5 year timeline has passed with no indication from parliament on a review of the KNCHR and sister commissions.

²¹² Belgrade Principles paras 20-26. See also 'What Parliaments and Parliamentarians can do to support the work of a national human rights institution' The Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions (NHRIs) 23-26 March 2004 Abuja, Nigeria. http://www.agora-parl.org/sites/default/files/guidelines_abujaworkshop.pdf (accessed 30 March 2016). Belgrade Principles paras 20-26.

oversees implementation of policies that affect the realisation of rights. A meaningful relationship should ideally entail receiving information on measures taken to fulfil human rights obligations and implementing recommendations made by the KNCHR to the executive on ways to improve human rights conditions in the country. The influence of business on the overall enjoyment of SERs cannot be ignored.

On the face of it, the KNCHR Act is compliant with the provisions of the Paris Principles²¹³ and this is important as it shows a willingness of the legislature and executive to be guided by internationally accepted minimum standards for the establishment of an NHRI capable of performing its mandate. It should be noted though that this is the first step in what would make the KNCHR effective in carrying out its mandate. The KNCHR appeared before the Sub-Accreditation Committee in October 2014 for re-accreditation pursuant to article 15 of the Statute of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights²¹⁴ where it was re-accredited with A-status.²¹⁵ Re-accreditation with A-status thus provides an opportunity to assess the effectiveness of the KNCHR to focus on SERs taking into account the shortcomings of the judicial enforcement of these rights and the central role given to the Commission in the NAPA.

4.4 KNCHR and socio-economic rights

The KNCHR has no explicit mandate to deal with SERs compared to the SAHRC, which is tasked with promoting, protecting and monitoring these rights in the South African Constitution. However, the KNCHR has a broad mandate to promote and protect human rights that calls for an expansive and purposive interpretation to include SERs. The term “human rights” in the Act thus refers to all the rights contained in the 2010 Kenyan Constitution that include civil, political, social,

²¹³ The KNCHR enjoys an A-status rating from the ICC, which means that it is fully compliant with the Paris Principles.

²¹⁴ Pursuant to article 15 of the ICC Statute, the KNCHR, which is an NHRI with A-Status, is subject to re-accreditation on a five-year cyclical basis.

²¹⁵ See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 27-31 October 2014* 19-20. <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf> (accessed 31 March 2015). See also discussion in 2.5 on the relevance of the Paris Principles.

economic and cultural rights.²¹⁶ Furthermore, in promoting and protecting the human rights in the Constitution in terms of the KNCHR Act, the Commission should also take into consideration the international and regional human rights treaties that Kenya is party to as they form part of the laws of Kenya. Additionally, considering the transformative role of the Constitution, there is need for the KNCHR to focus on this group of rights taking into consideration the poverty situation in the country.²¹⁷ If the Kenya Vision 2030 development goals are to be achieved in a manner that respects human rights, then it is vital that the bill of rights is implemented with a special focus on the promotion and protection of SERs.²¹⁸

The implementation of the bill of rights and eventual enjoyment of the rights enshrined therein requires the KNCHR to play a leading role given its constitutional mandate as the country's human rights watchdog. Theoretically, the bill of rights and government policies on human rights as discussed in the preceding chapter hold a lot of promise for Kenyans but these should be turned into reality. What this means is that these rights should not only be legal entitlements to access to these rights protected in the Constitution but should be enjoyed by all. Thus, to aid the state in reducing poverty and inequality in a manner that promotes the dignity of all Kenyans, the KNCHR should be at the forefront of clarifying the government's obligations flowing from the SERs enshrined in the Constitution. Given the central role the KNCHR has in the implementation of the NAPA, it should work with the government (national and county in this case), parliament, organs of state, business and the civil society should come up with a human rights monitoring system.

Monitoring the progressive realisation of SERs in a methodical manner is important for the following reasons. Firstly, it shows if the state has made any progress in fulfilling its obligations. Conversely, it also shows where the state has not made progress and how it has not made such progress. Thirdly, it can identify priorities for

²¹⁶ See chapter Four (4) on the Bill of rights Constitution of Kenya, 2010.

²¹⁷ See discussion in 3.2 on the poverty situation in Kenya. According to the World Bank, Kenya is one of the ten most unequal societies in the world, with the richest tenth of households controlling more than 42 percent of the country's income while the poorest tenth survives on less than one per cent. Poverty remains a major impediment to both the fulfilment of basic needs and the realization of the full potential of many Kenyans, particularly women and children.

²¹⁸ See discussion of the NAPA in 3.5.2.

action which can then be used to suggest the allocation of resources in government plans not to mention suggest the drafting of policy and legislative measures to foster the fulfilment of SERs. To this end, the formulation and use of human rights indicators is highly recommended. In any event, because of NHRIs unique position, between government and civil society, the KNCHR as an NHRI should champion the development of human rights in a manner that is sensitive of the Kenyan society. This would be in keeping with the view held by De Feyter that “[h]uman rights need to develop in light of the lessons learned from attempts to put them into practice at the local level.”²¹⁹ Given its human rights mandate and the corollary powers granted to it, the KNCHR having the benefit of international best practice has a great potential to be at the forefront of the implementation of the bill of rights in a manner that takes into account the realities obtaining in Kenya.²²⁰

Whether the KNCHR is aware of its mandate and capability to promote, protect and monitor SERs can be assessed based on its achievements and plans as guided by its strategic plan.

4.4.1 The KNCHR Strategic Plan 2015-2018

As an important aspect of the operational independence the KNCHR enjoys is the freedom to determine the activities it undertakes to fulfil its mandate. In the case of working effectively in the promoting and protection human rights in general, it is important that the commission and its staff have a comprehensive understanding of the international and domestic legal framework dealing in human rights. Most importantly, it should have a plan of action to guide its activities. The practice has been to draft a strategic plan to guide the Commission for a period of five years in consultation with various stakeholders.²²¹ The KNCHR drafted the 2013-2018 strategic plan to align its activities with the provisions of the Constitution. The re-alignment was informed by the realities present in the country such as a fledgling

²¹⁹ K De Feyter, “Localising human rights” in W Benedek, K De Feyter and F Marrella (eds) *Economic Globalisation and Human Rights* (2007) 76.

²²⁰ See Pegram *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2012) 49

²²¹ The KNCHR has had Strategic Plans for the following periods 2004-2009; 2009-2013, 2013-2018, 2015-2018.

human rights culture, rampant corruption, increasing poverty and a very politically charged environment.²²²

The KNCHR redrafted the 2013-2018 Strategic Plan to accommodate several changes brought about after the 2013 elections. The changes included the appointment of four commissioners to the KNCHR in March 2014, the restructuring of government in terms of the 2010 Constitution and the need to re-align the Commission's plans with those of the government in terms of Vision 2030's second Medium Term Plan.²²³ Although at the outset this might seem to go against the independence of the Commission, the reason behind such a re-alignment is informed by the government development priorities spelt out in MTP II 2013-2017, which are likely to influence the realisation of human rights.

The Commission is now guided by the 2015-2018 Strategic Plan launched on June 30th, 2015 whose objectives include:

- a) To promote the respect and observance of human rights standards by public and private actors.
- b) To increase the application of human rights principles and standards in institutions and alternative mechanisms of justice.
- c) To enhance the realization of economic and social rights in Kenya.
- d) To enhance the efficiency and effectiveness of the Commission.²²⁴

The Strategic Plan is commendable, it assesses some of the weaknesses of the KNCHR in the past such as "inadequate provision of feedback to clients; inadequate focus on ECOSOC issues by the Commission, inadequate use of powers vested by the statute e.g. powers to summon and public interest litigation and limited regional outreach."²²⁵ It also takes into account the fact that global, regional and national contexts will influence the realisation of human rights in the country.²²⁶ To this end, the objectives identified speak to the interconnected, interrelatedness and indivisibility of human rights. They also are mutually reinforcing objectives that are

²²² See *KNCHR Strategic Plan 2* for the reasons influencing the drafting of the strategic plan.

²²³ See *KNCHR Strategic Plan 2015-2018* 13-14. See 3.5.1.1 for a discussion of MTP II and its likely influence on the realisation of human rights in Kenya.

²²⁴ See *KNCHR Strategic Plan 2015-2018* 22.

²²⁵ Some of these challenges are discussed below in 4.5

²²⁶ *KNCHR Strategic Plan 2015-2018* 15-18.

bound to benefit from each other. Accordingly, the measures taken by the KNCHR in terms of strategic objective (c) to enhance the realisation of SERs, ought to influence the realisation of these rights.

The strategic plan notes the challenges to the realisation of SERs as follows:²²⁷

lack of conceptual clarity on the rights themselves, weak linkages with policy processes, a poor understanding on the nature of violations, and limited constitutional interpretation on how to fully realize these rights, among others.

To achieve the realisation of SERs, the Commission must overcome the above challenges some of which are external to them. The challenges are stated without the KNCHR giving details on how each one of the challenges affects its capacity to promote SERs. Limited constitutional interpretation could be attributed to the judiciary given the shortcomings of judicial enforcement of SERs as earlier discussed.²²⁸ The interpretation offered by judiciary should be the starting point in increasing “the application of human rights principles and standards in institutions and alternative mechanisms of justice”²²⁹ with concrete legislative and policy measures put in place to make the SERs a reality to many Kenyans living in poverty.

The case for the promotion, protection and monitoring of human rights in Kenya cannot be over-emphasised given the socio-economic conditions of many Kenyans characterised by a large population of Kenyans not enjoying their rights.²³⁰ It is noteworthy that despite mentioning poverty, the KNCHR does not identify the close link between its prevalence and the non-enjoyment of SERs as it sets out its intended outcomes and the strategies to be used.²³¹ Nonetheless, the strategic plan is good starting point and illustrates the KNCHR’s understanding of the various role players in the realisation of human rights such as the growing influence of business on the enjoyment of human rights.²³²

²²⁷ *KNCHR Strategic Plan 2015-2018* 26.

²²⁸ See discussion in chapter 3.4 on limitations to the judicial enforcement of socio-economic rights in Kenya.

²²⁹ See *KNCHR Strategic Plan 2015-2018* 22.

²³⁰ Poverty and inequality are impediments to the enjoyment of all human rights in general and need to be addressed.

²³¹ *KNCHR Strategic Plan 2015-2018* 6, 22.

²³² *KNCHR Strategic Plan 2015-2018* 26.

For the KNCHR to effectively promote and protect SERs as it intends to in its Strategic Plan, it is necessary that it demonstrate an all-inclusive understanding of SERs. Given Kenya's history of human rights, this would involve several things. Primarily, the KNCHR would have to have a comprehensive understanding of the international and domestic legal frameworks for SERs applicable in Kenya. This understanding would address the challenges of lack of conceptual clarity, poor understanding on the nature of violations and limited constitutional interpretation on how to realise these rights. Secondly, it should be aware of the issues affecting these rights in the country, which include but are not limited to a general lack of awareness of what SERs are and what they mean for people living in poverty on the one hand and government officials on the other. Thirdly, it should be aware of the environment it is working in and the opportunities and constraints that exist because of this environment. This would include the work of other constitutional commissions, the judiciary, legislature, executive; business and the civil society. Lastly, the Commission should be aware of its powers/mandate and how to use them to achieve its goals given the environment it is operating in.²³³

In creating a culture of human rights, it is suggested that the KNCHR should strive to have human rights standards, emanating from the Constitution and international human rights treaties ratified, accepted by the state and internalised to an extent that they become part of the fabric binding Kenyans together and governing the citizen-state and business-citizen relationships. Creating SER standards to monitor progressive realisation of these rights is a task assigned to the NGEC²³⁴ yet it could be argued that it is a task better suited for the KNCHR given its mandate and relatively more experience and exposure in dealing with SERs. Already there are efforts underway to formulate these standards with the NGEC co-operating with the KNCHR.²³⁵ The formulation of standards will necessitate the integration of human rights principles and norms in the practices and processes of various public and private actors. In other words, the human rights mainstreaming will be necessary. This will be the bulk of the KNCHR's promotional mandate. A culture of human rights

²³³ OHCHR *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions* (2005) 44.

²³⁴ Section 8 (g) of the NGEC Act.

²³⁵ E-mail correspondence with Jill Cottrell Ghai, expert tasked by the NGEC to formulate SER indicators in terms of section 8(g) NGEC Act.

would thus mean that every aspect of life is guided by the human rights values enshrined in the Constitution. Particularly, it would mean making the government, citizens, civil society and business aware of their human rights obligations that should guide their interactions all the time.

The promotion of human rights is important as it creates awareness of human rights. It is only when individuals, the state and its machinery and business have knowledge about human rights and their obligations that they can better be fulfilled and by extension enjoyed. Additionally, the promotion of human rights influences the protection and monitoring of human rights. In Kenya's case, the time to implant a human rights culture is now, especially since the Constitution was promulgated in 2010 and the country is still in a transitional period. It is fair to say that the SERs in the Constitution are still new. Naturally, creating a culture of human rights will take time and effort as it will involve the replacement of previous notions of an all-powerful president with a weak system of checks and balances with little to no respect of human rights and widespread corruption.²³⁶ The Constitution itself provides the basis for reforms in all aspects necessary for the fulfilment of human rights in the country. There must be a paradigm shift that recognizes the supremacy of the Constitution, respect for the rule of law, a system of separation of powers with appropriate checks and balances and the integral role of human rights in the country.

4.4.2 Activities undertaken by the KNCHR to promote, protect and monitor socio-economic rights

So far, the Commission has made significant strides towards enhancing awareness on SERs and giving effect to Article 43 of the Constitution of Kenya 2010. In its 2013/2014 Annual Report, the Commission states some of the measures it has undertaken to promote a better understanding of these rights. Furthermore, in line with the Constitution, the KNCHR has prioritised the SERs in article 43 vis a vis their enjoyment by special interest groups identified as women, children, the elderly,

²³⁶ See Economic and Social Council *Adequate housing as a component of the right to an adequate standard of living Report by the Special Rapporteur, Miloon Kothari Addendum Mission to Kenya* (9-22 February 2004) E/CN.4/2005/48/Add.2 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement> (accessed 6 April 2015).

persons with disabilities and minorities.²³⁷ As a Commission, the KNCHR has noted the need to sensitise national and county governments of their human rights obligations if the rights in the Constitution are to become a reality.²³⁸ The Commission has made use of different methodologies in dealing with these rights such as holding workshops for state and non-state actors,²³⁹ conducting investigations into human rights issues (such as the human rights abuses in the crackdown against terrorism)²⁴⁰ and publishing its findings with recommendations on what to do to promote human rights.²⁴¹

The KNCHR has compiled a report on how to operationalise the bill of rights in the Kenyan Constitution by advocating the indivisibility, interrelatedness of human rights in Kenya.²⁴² Moreover, through strategic collaborative efforts with NGOs such as with the Center for Economic and Social Rights (CESR), the Commission has embarked on a training programme for its staff on the content of SERs and monitoring, as part of an eighteen-month project '*Enhancing the Capacity of National Human Rights Institutions to Monitor Economic, Social and Cultural Rights*'.²⁴³ The training of staff on the nature and content of SERs is urgent and necessary. It is only when staff and it is argued Commissioners are aware of these rights and the obligations they place on organs of State that the KNCHR can fulfil its mandate. The training is relevant and much needed given the fact that the SERs in the Constitution are recent and the KNCHR does not have adequate experience in dealing with such rights.

²³⁷ KNCHR *Strategic Plan 2015-2018* 26. Interview with Ms. Jedidah Waruhiu, Commissioner KNCHR.

²³⁸ KNCHR 11th Annual Report 2013/2014 51.

²³⁹ The Commission has held several workshops with Speakers of County Assemblies, Community Based Organisations in the area of HIV/AIDS. The KNCHR has also conducted HRBA training to prisons officers and police officers in various stations across the country.

²⁴⁰ KNCHR *The Error of Fighting Terror with Terror: Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism* September 2015 <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> (accessed 30 October 2015).

²⁴¹ Interview with Dr. Bernard Mogesa, Head of Research KNCHR.

²⁴² KNCHR *Making the Bill of rights Operational: Policy, Legal and Administrative Priorities and Considerations* (2011) http://www.knchr.org/Portals/0/OccasionalReports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf (accessed 10 November 2015).

²⁴³ See KNCHR and CESR *Rights-Based Policy Monitoring: KNCHR Primer on Assessing Compliance with Economic and Social Rights Obligations* <http://www.cesr.org/downloads/knchr.esr.primer> (accessed 31 March 2015).

Another step in the right direction is the KNCHR's collaboration with the private entity, Healthstrat Kenya²⁴⁴ and University of Maryland, to assist county governments in understanding their role in the implementation of the right to health protected in article 43 of the Constitution in 2014. This strategic partnership was informed by the devolution of health services to county governments and the KNCHR's mandate and strategic plan of promoting SERs.²⁴⁵ The county government of Busia was chosen as a pilot project to infuse the human rights component in delivering health services with the aim of rolling out the lessons learnt to all the other counties.²⁴⁶ The project involved conducting of a county health capacity assessment, to provide indicators for measuring the status of progressive realization of the right to health.²⁴⁷ At the end of the study, information that could be used as a baseline for the provision for the right to health in Busia was determined and recommendations for further engagement with the Ministry of Health on how to ensure greater access to the right to health made.²⁴⁸ The same tools used to gather information on the enjoyment of the right to health in Busia could be replicated across all the other counties.

Encouragingly, before the promulgation of the Constitution in 2010, the Commission in its third State of Human Rights Report primarily dealt with the human rights implications of Vision 2030, which greatly relied on economic growth as the key driver for development without taking into consideration the human rights impact of aggressive economic development.²⁴⁹ It thus undertook a human rights based analysis of the country's economic blue print, while stressing the need for all development plans to be based on human rights principles. This approach is indeed, what is needed now that the country has a Constitution that calls for the promotion and protection of human rights. The other means that the KNCHR has employed in

²⁴⁴ For more information, see Healthstrat Kenya <http://healthstrat.co.ke/>

²⁴⁵ Towards a Healthy Nation <http://www.knchr.org/Towards-a-Healthy-Nation.aspx> (accessed 31 March 2015). Interview with Dr Bernard Mogesa, Head of Research KNCHR.

²⁴⁶ Interview with Mr. Koome Human Rights Officer, ECOSOC Department, KNCHR.

²⁴⁷ KNCHR and Healthstrat Report on the Pilot 3600 Assessment of Health as a Human Right in Busia County June 2014 2 <http://healthstrat.co.ke/images/Vacancies/Busia.pdf> (accessed 30 March 2016).

²⁴⁸ KNCHR and Healthstrat Report on the Pilot 3600 Assessment of Health as a Human Right in Busia County June 2014 28.

²⁴⁹ KNCHR 3rd Human Rights State Report (2010). See also UNDP *Mainstreaming Human Rights in Development: Stories from the Field Kenya* 4.

promoting and protecting SERs is through conducting investigations and writing thematic reports on these rights.²⁵⁰ Until now, the Commission has released several thematic documents focussed on the right of expectant mothers to health²⁵¹ the rights of Internally Displaced Persons²⁵²; and Making the Bill of Rights Operational.²⁵³ Research on SERs is necessary if the Commission is to make a meaningful contribution in their realisation in the country. Such research is important as it provides accurate information, which can be shared with other stakeholders to influence the choice and location of development programmes meant to better the lives of Kenyans. Although efforts are a step in the right direction, more must be done to promote, protect and monitor SERs in the country. To this end, research on all SERs should be conducted to establish baseline information that can be used by different stakeholders to hold government accountable, in planning and where relevant in litigation.

The KNCHR has held a public inquiry into Violations of Sexual and Reproductive Health Rights in Kenya as part of the right to health recognised in article 43 of the Constitution.²⁵⁴ This inquiry was held following a complaint filed in 2009.²⁵⁵ It is disconcerting that it took two years to conduct and conclude an inquiry after filing of the complaint although reasons for this delay are not apparent. When handling individual complaints, access to the KNCHR should be easy and remedial measures taken by the Commission should be swift to allow for quick resolution of such

²⁵⁰ See the Economic, Social and Cultural Rights page on the KNCHR website for a complete list of reports on this group of rights at <http://www.knchr.org/ReportsPublications/ThematicReports/EconomicSocialandCultural.aspx>

²⁵¹ KNCHR Implementing Free Maternal Health Care in Kenya: Challenges, Strategies and Recommendations (2013) <http://www.knchr.org/Portals/0/EcosocReports/Implementing%20Free%20Maternal%20Health%20Care%20in%20Kenya.pdf> (accessed 10 June 2014).

²⁵² KNCHR & UNHRC *Homeless at Home: A Human Rights Assessment of Situation of Internally Displaced Persons in Kenya* 2011 <http://www.knchr.org/Portals/0/HOMELESS%20AT%20HOME%20A%20HUMAN%20RIGHTS%20ASSESSMENT%20OF%20SITUATION%20OF%20INTERNALLY%20DISPLACED%20PERSONS%20IN.pdf> (accessed 10 June 2014).

²⁵³ KNCHR *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* Occasional Report 2011 http://www.knchr.org/Portals/0/OccasionalReports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf (accessed 10 June 2014).

²⁵⁴ See KNCHR *Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya* April 2012 http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf (accessed 9 April 2015)

²⁵⁵ KNCHR *Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality?* 1.

complaints. The idea behind holding the public inquiry is a welcome move that the Commission should utilise going forward to engage with the different stakeholders (such as victims of human rights violations, civil society, government offices) on human rights issues. As a way of gathering information on the enjoyment of SERs, the Commission should consider conducting public inquiries for all the other SERs protected in the Constitution. By making use of the human rights based approach to reproductive health the KNCHR mapped out the content of the right to health and what the government's obligations are. At the end of the public inquiry, to the Commission made recommendations on what should be done for the right to be enjoyed by all in the country.²⁵⁶ Monitoring the implementation of these recommendations would be necessary to determine the impact of the KNCHR's recommendations on ways to improve the realisation of human rights.

The implementation of the Constitution as envisioned, with true commitment from the state, will allow for a stable environment in which KNCHR can thrive and fulfil its mandate with the help of other relevant stakeholders. While the role of the KNCHR in the implementation of the Constitution is not given much attention in the political arena and in efforts to re-align the legislation with the Constitution, it is submitted that its role in the implementation/realisation of the human rights enshrined in the Constitution is pivotal. To this end, it should contribute to efforts put in place to implement the Constitution taking into consideration that the absence of a full complement of Commissioners for a few years meant that the Commission was not able to play an active role in the drafting of the laws in schedules 4 and 5 of the Constitution. Galligan and Sandler recognise the sort of effort required to protect and promote human rights in the domestic jurisdiction when they opine:²⁵⁷

.... human rights do not take effect quietly and effortlessly; nor do they apply automatically upon being agreed or enacted. On the contrary, they need the positive aid of the government and administration, of corporations and organisations. They need the commitment of officials whose natural instincts are often to the contrary; they also need the persistent advocacy and vigilance of the institutions of civil society.

²⁵⁶ See KNCHR *Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality?*

²⁵⁷ See D Galligan & D Sandler "Implementing Human Rights" in S Haliday & PD Schmidt (eds) *Human Rights Brought Home: Socio-legal perspectives on Human Rights in the National Context* (2004) 24 - 25.

The KNCHR can thus play an important role like other NHRIs and become the main interlocutor for human rights issues at the national level,²⁵⁸ in the face of the expiry of the CIC's term of office with many measures meant to operationalise the Constitution yet to be implemented.

It is manifest from the provisions of the Constitution such as Article 10 (2) (b) which champions human rights, human dignity, equality and inclusiveness as some of the national values and principles of governance that human rights form an integral part of Kenya. As rightly noted by Kumar, and applicable to Kenya and similar other countries with human rights in their constitutions, "[w]hen societies recognize human rights and formulate legal, judicial, and institutional frameworks to protect and promote human rights, they commit to ensure that states provide the victims of human rights violations with justice."²⁵⁹ The KNCHR is one of the institutional measures put in place to promote and protect human rights. One of the ways it can do this is by being actively involved in the formulation and drafting of human rights policies of the national and county governments.²⁶⁰ In this way, the KNCHR will address some of the human rights concerns that might have been missed by organs of states. The involvement of the KNCHR in formulating and drafting of policies/legislation will of necessity require that organs of state²⁶¹ understand the unique role of the Commission in the overall implementation of human rights and the added value this can bring.

The wide mandate, powers and functions given to the KNCHR are sufficient for it to carry out its role without fear or favour and in line with the Paris Principles thus justifying the 'A' status granted to the KNCHR during the re-accreditation process in 2015. Naturally, the government and other stakeholders relevant to the protection and promotion of human right should fully support the efforts of the KNCHR. Where

²⁵⁸ G De Beco *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Unpublished LLD Thesis Universite Catholique de Louvain 2009) 59.

²⁵⁹ C Kumar "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19 *American University International Law Review* 260 at 277.

²⁶⁰ Kumar 2003 *American University International Law Review* 276. See also recommendations in 6.3.3.

²⁶¹ These include Cabinet Secretaries, Attorney General, Parliament, and the Kenya Law Reform Commission among others.

necessary they should offer constructive criticism so that the enjoyment of human rights by all Kenyans is not sacrificed. There is need to elaborate the content of the rights contained in article 43 of the Constitution, with the court's interpretation as a starting point, in a manner that can be understood by state officials, business, the civil society and most importantly those directly affected by poverty.

As part of its mandate, the KNCHR should come up with means to protect against the violation of SERs in the country. Of course, any action undertaken to protect human rights should be on the understanding that the KNCHR can supplement the work of the judiciary, which adjudicates on all matters dealing with human rights. The point here is that the KNCHR should be considered as complementary institution alongside the judiciary in the promotion and protection of human rights. Using its investigatory powers, research capacity and complaints handling mechanisms, the Commission should be able to identify cases of human rights violation and resolve them. Where necessary the KNCHR can appear in cases dealing with these rights as friends of the court. Moreover, after decisions made by the judiciary the KNCHR can monitor the fulfilment of court orders and brief the courts on progress in addressing human rights matters it has ruled on. The KNCHR has been involved in a few cases dealing with human rights in general, the most recent case being the matter dealing with the constitutionality of security laws passed to address the threat posed by terrorism in the country.²⁶²

4.5 Challenges in executing its mandate

Since its initial establishment as the Human Rights Standing Committee to what it is now, the KNCHR has faced several challenges that have affected its ability to carry out its mandate. Moreover, in promoting and protecting SERs, it is likely to face new challenges. Some of these challenges as discussed below.

4.5.1 Delay in appointing Commissioners

The first challenge faced by the KNCHR after its re-establishment in terms of the 2010 Constitution was the absence of proper leadership. From the year 2012 to the

²⁶² See *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR para 36-54.

early months of 2014, the Commission was without proper leadership to guide it in executing its mandate.²⁶³ After the expiry of several commissioners' terms of services a series of court cases²⁶⁴ halted the selection process thus leaving the Commission without proper leadership. Even after the resolution of the court cases, the situation is such that the KNCHR does not have a full complement of Commissioners (it has four as opposed to five) as envisioned by the KNCHR Act.

Most recently, parliament's Departmental Committee on Justice and Legal Affairs yet again rejected the president's nominee to fill the vacant Commissioner's post because of the failure by the president to follow the procedure in section 11(5) of the KNCHR Act. In this case, the name of the nominee Dr. Samuel Njuguna Kabue was not on the list of nominees sent to the President by the Selection Panel despite the fact that he was qualified, and his appointment as Commissioner would have resulted in the representation of people with disabilities in the leadership of the Commission.²⁶⁵ The failure by the executive to follow the right procedure is inimical to the work of the KNCHR as it results in the Commission working with fewer Commissioners than is supposed to be the case, which means it does not have at its disposal the full complement of Commissioners to give strategic leadership.

Furthermore, working with one less Commissioner opens the door for challenging the legality of some of the work done by the Commission in the absence of all five Commissioners as expected by the law. The legality of cases instituted against suspended cabinet secretaries by the EACC has been challenged in court after the resignation of all Commissioners and this has dealt a blow to the fight against

²⁶³ For more on the leadership crisis and its effects on the proper functioning of the KNCHR, see F Khayundi "The need for proper leadership to guide the Kenya National Commission on Human Rights in Promoting and Protecting Human Rights in Kenya" <http://africlaw.com/2013/11/11/the-need-for-proper-leadership-to-guide-the-kenya-national-commission-on-human-rights-in-promoting-and-protecting-human-rights-in-kenya/#more-646> (accessed 15 February 2014).

²⁶⁴ See *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others* [2013] eKLR and *Brian Weke & another v Attorney General & another* [2014] eKLR. See also, Maureen Kakah "Court stops interviews for KNCHR Commissioners" *Daily Nation Online* October 24, 2014 <http://www.nation.co.ke/news/Court-stops-interviews-for-KNCHR-commissioners/-/1056/2045536/-/xrhfmb/-/index.html> (accessed 24 October 2013).

²⁶⁵ See Hansard, March 10, 2015 13–24.

corruption.²⁶⁶ Four Commissioners in office instead of the five stipulated by legislation leaves room to challenge the constitutionality and legality of the work done by the KNCHR. If this were to occur, it is likely to distract the KNCHR from its core functions of promoting and protecting human rights to defend the legitimacy of its work.

4.5.2 Inadequate institutional capacity to deal with socio-economic rights

Another challenge is the capacity of the KNCHR to deal with SERs – the question that needs to be answered here would be; does the KNCHR have the institutional capacity to promote and protect SERS? Five years after the promulgation of the Constitution, the understanding of the content of SERs is still a developing process for the KNCHR staff. Given its history, the KNCHR has more experience in dealing with civil and political rights given Kenya’s human rights history, which did not include SERs until 2010. With no domestic framework on SERs, the KNCHR has been directed by international law, specifically the ICESCR and the General Comments by the CESCR as entry points in determining the content of these rights. A decision has been taken by the Commission to focus on the rights to health and water together with a specific focus on business and human rights. The decision to focus on the right to health care services was informed by the devolution of this function to the county governments. However, as an institution, the Commission is yet to develop standards to guide its work on these rights because of the technical nature of SERs and staff capacity constraints in the department in charge of SERs which has four members.²⁶⁷ Considering the Kenyan population estimated at 45 million, having a staff complement of 95 against the required of 205 as a Commission²⁶⁸ and four people to deal with matters affecting SERs in the ECOSOC department points to an institution that does not have adequate staff capacity to deal with these rights.

There is thus a need to increase the KNCHR’s institutional capacity to deal with all human rights. The necessity to increase its institutional capacity is curtailed by the

²⁶⁶ *Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 3 others* [2015] eKLR para 3.

²⁶⁷ Interview with Mr. Koome, Human Rights Officer, ECOSOC Department, KNCHR.

²⁶⁸ KNCHR *Human Rights Baseline Survey Report* 80.

challenge of inadequate financial resources as it costs to train, recruit and retain experts in human rights matters.²⁶⁹

4.5.3 Inadequate funding

The KNCHR is inadequately funded.²⁷⁰ The challenge of funding is compounded by the fact that, there has been an increasing shortfall in core funding received from the state.²⁷¹ In addition, the challenge of funding has a multiplier effect whereby it leads to the occurrence of other challenges that curtail the performance of the KNCHR.²⁷² The financial independence of the KNCHR has been curtailed since 2003 with its funding allocation falling under the Ministry of Justice budgetary allocation instead of being a direct charge on the consolidated fund.²⁷³ Although an ideal form of funding, the practicality of having the KNCHR's budget from the consolidated fund is challenging given the fund is managed by the Treasury, which is under the executive's control.²⁷⁴

Despite an increasing budgetary allocation over the years, the amount allocated has always been less than what was request by the KNCHR.²⁷⁵ Besides, in the recent past, parliament has threatened to reduce the composition of Commissions to three members to stem a rising government wage bill²⁷⁶ or reduced the allocations made to institutions seen as being unfriendly to parliament.²⁷⁷ Even though this has yet to affect the Commission, it creates the apprehension that in the event parliament is

²⁶⁹ Interview with Ms Waruhiu KNCHR Commissioner.

²⁷⁰ See discussion in 4.3.6 above.

²⁷¹ KNCHR *Strategic Plan 2015-2018*. Interview with Ms. Waruhiu KNCHR Commissioner

²⁷² See discussion in 4.5.4 below.

²⁷³ KNCHR *It is hard to be Good* (2012) para 51.

²⁷⁴ Article 255 Constitution of Kenya, 2010.

²⁷⁵ See KNCHR *It is hard to be Good* (2012) para 52. See discussion in 4.3.6 on funding of the KNCHR.

²⁷⁶ See Lillian Aluanga-Delvaux "It's mixed reactions to proposals to cut down on commissioners" Standard Digital 16 March 2014 <http://www.standardmedia.co.ke/sports/article/2000106892/it-s-mixed-reactions-to-proposals-to-cut-down-on-commissioners?pageNo=3><http://www.standardmedia.co.ke/sports/article/2000106892/it-s-mixed-reactions-to-proposals-to-cut-down-on-commissioners?pageNo=3> (accessed 9 April 2015).

²⁷⁷ E Mutai "House frees Sh1.3bn after slashing commission budgets" *Business Daily* Sunday June 2013 <http://www.businessdailyafrica.com/House-frees-Sh1bn-after-slashing-commission-budgets/-/539546/1877206/-/11ckim8z/-/index.html> (accessed 7 July 2015). A Shiundu and R Obala "Kenyan MPs cut Senate, SRC and Judiciary budgets to fund counties" *Standard Digital* Thursday 4 July 2015 http://www.standardmedia.co.ke/article/2000164515/mps-cut-senate-src-and-judiciary-budgets-to-fund-counties?articleID=2000164515&story_title=kenyan-mps-cut-senate-src-and-judiciary-budgets-to-fund-counties&pageNo=1 (accessed 6 June 2015).

unhappy with the Commission, it can arbitrarily decrease the funds allocated to the KNCHR as a way of reducing the public wage bill or punishing it.

In a bid to save costs, the government has put a freeze on all recruitment of staff that has directly affected the KNCHR,²⁷⁸ robbing it of an opportunity to hire the necessary skills to champion the promotion and protection of SERs. This freeze on recruitment is likely to impede the KNCHR's operational independence, as it curtails the KNCHR's ability to hire staff without any outside influence. With a shortfall in its budget, the KNCHR has had to make do with what it has been allocated in terms of funding.²⁷⁹ This has dictated the strategic choice of what programmes to pursue in each planning/reporting cycle and where to establish regional offices. This has meant that not all the functions in section 8 of the KNCHR Act and programmes under its strategic plan have been carried out since the re-establishment of the Commission. Moreover, this has curtailed the expansion of the Commission to all the 47 counties where it is desirable that it has presence if it is to execute its mandate.

4.5.4 Limited accessibility

KNCHR should be a visible and easy to access institution to ordinary Kenyans who would seek its help in vindicating their rights. Physical accessibility and visibility can be ensured by putting offices at strategic geographic locations where it would be easy to locate and gain access to KNCHR offices. To be reachable to all, the Commission has four regional offices: in Mombasa (Coast Regional Office), Kisumu, Wajir (Northern Kenya Regional Office) and Kitale North Rift Regional Office) with the Nairobi Head Office meant to serve all 47 counties in the republic. This makes it difficult for Kenyans in areas far removed from the four regional offices to access the KNCHR. Granted this is not intentional because the Commission can only give its services to Kenyans in terms of its budget, which has limited it to the number of offices it has. The head office's location far from the city centre makes it inaccessible to people with unfamiliar with the location.²⁸⁰

²⁷⁸ *KNCHR Strategic Plan 2015-2018* 19.

²⁷⁹ Interview with Ms. Waruhiu KNCHR Commissioner.

²⁸⁰ On my way to conduct interviews at the KNCHR I got lost a couple of times and those I asked for directions were equally confused about the Commission's location.

The Commission largely publishes its reports/pamphlets in English with few of them in Swahili. The result of this is that those without reading knowledge of these languages are unable to understand most of these publications. Moreover, the language of communication for most of the employees of the Commission is limited to English and Swahili making it hard for them to interact with community members whose local language they do not understand. The circulation of these publications is also limited to those with access to the internet, newspapers, and the mass media, effectively locking out those without access to these mediums.

4.5.5 Difficult working relations with fellow article 59 Commissions

The decision by parliament to split the KNHREC into three commissions has led to the existence of three Commissions with conflicting and at times overlapping mandates. An overlap in mandate exists in the roles of the KNCHR and the NGEC, with gender and equality issues manifesting themselves in most matters dealing with SERs. The restructuring of the KNHREC by the legislature resulted in the NGEC being given a mandate that would be better suited for the KNCHR as the country's NHRI. According to section 8(g) of the NGEC Act, the NGEC should

work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws.

Naturally, one would expect these Commissions to collaborate and establish close working relations to promote human rights in the country as provided for in the section 8 (h) of the KNCHR, section 8 (h) of the CAJ, and section 8 (k) of the NGEC Acts²⁸¹, but this has not been the case. Instances of supremacy battles between the three Commissions and attempts to work out modalities on how to work together have not yielded fruit. In September 2014, a technical working group (the group comprises chairpersons and chief executives of the commissions and other officials) meeting organised by the Office of the Attorney General was aborted due to

²⁸¹ Section 8 (k) of these Acts are similar and provide that each of the article 59 Commission will “work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination.”

differences of opinion.²⁸² Nevertheless, through the help of the UNDP together with the Swedish and Finnish governments, some constitutional commissions²⁸³ and an NGO²⁸⁴ have sought to come up with a referral mechanism, the Integrated Public Complaints Referral Mechanism (IPCRM) to facilitate better collaborative efforts.²⁸⁵ Unfortunately, according to Commissioner Waruhiu, the NGEIC is not part of the referral mechanism yet gender matters and human rights intersect.²⁸⁶ Collaboration between the KNCHR and NGEIC is necessary for the development of standards for the realisation of SERs in the country.

4.5.6 Deficient political goodwill and support from the political branches

The KNCHR falls under the oversight of the office of the Attorney General who is the government's chief legal advisor. There has been poor support from the office of the AG necessary to promote the human rights agenda in the country. The slow pace exhibited in the drafting of the national human rights policy that was ready by 2010 left most organs of state with no direction on human rights matters affecting them. This was noted by the KNCHR its recent report²⁸⁷.

The Human Rights Policy and Action Plan has been pending since its completion in 2010, despite the fact that the development of the action plan was a joint initiative between the state and non-state actors there has been delay on the part of the state to enact it. The effect of the HRPAP has had a negative effect in that whereas there is a blue print for development there is no blue print that would set out the human rights priorities for state with the aim of making Kenya a human rights state.

²⁸² See Wahome Thuku 'Kenya's three human rights agencies in clash over mandates' *Standard Digital* 14 September 2014 http://www.standardmedia.co.ke/article/2000136461/kenya-s-three-human-rights-agencies-in-clash-over-mandates?articleID=2000136461&story_title=kenya-s-three-human-rights-agencies-in-clash-over-mandates&pageNo=1 (accessed 10 November 2015). Interview with Ms Waruhiu KNCHR Commissioner.

²⁸³ Ethics and Anti-Corruption Commission (EACC), Kenya National Commission on Human Rights, National Cohesion and Integration Commission (NCIC), Commission on Administrative Justice and the National Anti-Corruption Campaign Steering Committee (NACCSC).

²⁸⁴ Transparency International Kenya (TI-Kenya).

²⁸⁵ Interview with Ms. Waruhiu KNCHR Commissioner. See also UNDP *Support to the Realization of Human Rights and Access to Justice in Kenya* Updated Project Document (2014) 12. http://www.ke.undp.org/content/kenya/en/home/operations/projects/democratic_governance/suppourt.html (accessed 10 November 2015).

²⁸⁶ Interview with Ms. Jedidah Waruhiu, Commissioner KNCHR.

²⁸⁷ KNCHR *The Fourth State of Human Rights Report Post Promulgation 2010–2014; Human Rights the Elusive Mirage* (2015) 90.

Furthermore, failure by parliament to debate the reports of the KNCHR indicates a lack of political will to support the Commission's mandate. According to Commissioner Waruhiu, despite the timely submission of reports to the clerk of the National Assembly, there is no onwards transmission of the same to parliamentary committees and the whole house for the necessary debate. In fact, the KNCHR is rarely afforded an opportunity to present its reports or explain its budgetary requirements to parliament. When it comes to KNCHR's contributions to bills in parliament, they have had to make these submissions like all other Kenyans and in most instances, these are not always considered.²⁸⁸

4.5.7 Other challenges

Whereas the challenges mentioned above are internal, those that emanate from the KNCHR and its set up, it is likely to face external factors that are likely to hinder its activities aimed at the protection and promotion of SERs. The first challenge is the absence of a conducive environment that is supportive to KNCHR's efforts. The volatile and ethnically charged Kenyan political scene is a challenge that the Commission must traverse carefully so as not to be entangled in political battles. Often, important human rights concerns have been reduced to political issues if they will win political mileage for those concerned. A recent example affecting the KNCHR is the issue dealing with the ICC and the prosecution of those alleged to have been involved in the 2007 post-election violence. Because of its involvement in the aftermath of the post-election violence, the KNCHR came under attack from a section of Kenyan MPs who accused the Commission of coaching witnesses to implicate those accused. The matter even came up during a parliamentary session to approve the president's nominees to the KNCHR.²⁸⁹ The KNCHR has been subject to a campaign by some legislators to have it dissolved. However, the threshold for repealing constitutional amendment protects it from arbitrary actions by a partisan minority.²⁹⁰ Increased cases of hate speech by influential politicians²⁹¹

²⁸⁸ Interview with Commissioner Jedidah Waruhiu. Ms. Cathy Mumma while commenting on her time as KNCHR Commissioner between 2003-2008 echoed these sentiments.

²⁸⁹ See contribution of Hon Adan Duale, MP and the Leader of the Majority in Parliament, Hansard March 4 2014 26.

²⁹⁰ This would require a majority together with a referendum in terms of article 255(1) (e) and 255 (2) of the Constitution of Kenya 2010.

threaten to incite people to violence also threatens the enjoyment of the rights of groups exposed to such acts. Since it does not work in a vacuum, KNCHR should be aware of the country's prevailing socio-economic conditions that are bound to pose challenges such as the rising cost of living, rampant corruption, a highly charged political atmosphere among others; that are likely to influence its work.

A recent challenge has been the effects of terrorism on the country and measures put in place to address this disruption to peace, which in turn have had a telling impact on the rights of many.²⁹² Acts of terrorism often lead to death, injuries, destruction of property and generally affect the progress made in improving human conditions. The effect on human rights and the work of the Commission is that efforts to deal with terrorism have so far led to disregard for the constitutionally protected rights of those suspected of terrorism. This has been in the form of unlawful detention and racial profiling of innocent Kenyans of Somali origin, the passing of security laws that violate the constitution²⁹³ and very recently a blatant disregard for the rule of law by the president who defied a court order annulling a corrupt police recruitment process.²⁹⁴ The KNCHR on its part has been vocal in its criticism of the state's response to the terror threat by releasing a report documenting cases of extra-judicial killings.²⁹⁵ It is argued that despite the threat of terror, the country should seek to maintain human rights standards enshrined in the Constitution. Despite these challenges, the KNCHR must carry out its mandate. Such violations of human rights by the state only mean that the Commissions' work on promoting

²⁹¹ See Jeremiah Kiplang'at "President warns politicians against making inciting remarks" *Daily Nation* 20 October 2015 <http://www.nation.co.ke/news/politics/Stop-inciting-Kenyans-Uhuru-warns-politicians/-/1064/2923232/-/ov3vmyz/-/index.html> (accessed 10 November 2015). See also Nanjira Sambuli "Politicians who incite have allies, but what happens to their audience?" *Daily Nation* 26 October 2015 <http://www.nation.co.ke/oped/blogs/ethnic-hate-speech-audience/-/620/2930850/-/a1iyu1z/-/index.html> (accessed 10 November 2015).

²⁹² See generally J Fitzpatrick "Speaking Law to Power: The War against Terrorism and Human Rights" (2003) 14 *European Journal of International Law* 241-264.

²⁹³ Security Laws (Amendment) Bill, 2014. The court intervened and declared certain provisions of the Act to be unlawful and suspended their operation in *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR

²⁹⁴ Nzau Musau 'Fury, confusion over President Uhuru Kenyatta's executive order on police' *Standard Digital News* Sunday April 12, 2015 <http://www.standardmedia.co.ke/article/2000158037/fury-confusion-over-uhuru-s-executive-order-on-police-recruits> (7 April 2015).

²⁹⁵ See KNCHR *Error of Fighting Terror with Terror: Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism* (2015) <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> (accessed 10 November 2015).

human rights is hampered and where progressed has been made the gains nullified. New challenges will arise and the Commission must come up with ways to address them in a manner that will enable it to carry out its mandate to the best of its ability. The Commission will face many challenges in the fulfilment of its mandate and should come up with innovative ways to ensure that the gains made are not lost.

4.6 Conclusion

The evolution of the KNCHR to what it is today has been influenced by the political and constitutional changes taking place in Kenya. With each stage of evolution, the role of the KNCHR has become important for the overall enjoyment of human rights. By performing its role of promoting and protecting human rights, the KNCHR would complement efforts by other institutions such as the judiciary, the legislature and civil society that are likely to influence the realisation of human rights. Even if we do not consider the role of other institutions, it is important for the Commission to carry out its mandate as it can serve as good example to other institutions to play their role in promoting human rights realisation. The Commission has a broad mandate that includes the promotion and protection of SERs. It has powers necessary to fulfil its mandate under the leadership of a qualified team. It complies with the Paris Principles, which should be viewed to mean that it is set up to be an effective institution.

Since 2010, the KNCHR has shown an awareness of its mandate and powers and its willingness to engage in the promotion and protection of SERs through research and advocacy. It has made efforts to work collaborate with other stakeholders such as NGOs, organs of state and article 59 Commissions. However, in fulfilling its mandate, the Commission has encountered several challenges both internal and external, which make it difficult to fulfil its mandate. The work of the Commission should be such that it leads to greater access and enjoyment of human rights by Kenyans and to this end, the Commission has set out its plans in a strategic plan.

The proposed programmes in the strategic plan though ambitious require knowledge and commitment on the part of the KNCHR on how to implement them. In my view, the KNCHR could benefit from the experiences of other similar institutions in other

jurisdictions on how to promote SERs while navigating the challenges identified and likely to arise. South Africa that has a justiciable bill of rights with SERs, a robust human rights jurisprudence and a NHRIs that has more experience than the KNCHR. The next chapter will be a discussion of the South African Human Rights Commission and how it has gone about its role of promoting and protecting SERs.

CHAPTER FIVE

LESSONS FROM THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

5.1 Introduction

In the pursuit of societal transformation, and the achievement of equality, human rights have been given prominence in South Africa's Constitution.¹ The 1996 South African Constitution has received much praise and a great deal has been written about its ground-breaking characteristics.² At the time of its drafting, that Constitution was unique in including the whole corpus of human rights covering civil, political, economic, social and cultural rights.³ To strengthen democracy the drafters put in place institutions that would safeguard the spirit and purpose of the Constitution in addition to the traditional three arms of government. These institutions are found in Chapter 9 of the South African Constitution entitled "state institutions supporting constitutional democracy" are the Public Protector, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, the Electoral Commission and the Broadcasting Authority.⁴

Amongst the Chapter 9 Institutions, the South African Human Rights Commission (SAHRC) is tasked with the mandate of promoting and protecting human rights in the

¹ In Section 1 (a) of the Constitution of RSA, The Republic of South Africa is one, sovereign, democratic state founded on the following values: "Human dignity, the achievement of equality and the advancement of human rights and freedoms." This is also reaffirmed in section 36(1) 'The rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...'

² See CR Sunstein, *Designing Democracy: What Constitutions Do* (2001) 261 where Sunstein comments that the South African Constitution is "the most admirable constitution in the history of the world." See also MS Kende "The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics" (2003 – 2004) *Connecticut Journal of International Law* 617.

³ See EC Christiansen 'Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321 at 322-324; CE Dugger "Rights Waiting for Change: Socio-economic Rights in the New South Africa" (2007) 19 *Florida Journal of International Law* 195 at 197-198; M Pieterse "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26 *Human Rights Quarterly* 882-883; E Wiles "Aspirational Principles or Enforceable Rights? The Future for Socio-economic Rights in National Law" (2006) 22 *American University International Law Review* 35 at 37 on their views about the inclusion of socio-economic rights in the South African Constitution.

⁴ See sections 181-192 Constitution of the Republic of South Africa, 1996.

country.⁵ The Commission is also unambiguously tasked with monitoring the government's efforts in implementing SERs.⁶ Having been in existence since 1995 and dealing with the promotion, protection and monitoring of SERs for a longer period than similar institutions in other African countries, the SAHRC provides a good reference point. Other African NHRIs, and particularly that of Kenya in this instance, can look to the South African example to learn from its experiences in relation to the promotion and protection of SERs. Of particular significance is the fact that despite having constitutionally guaranteed SERs for over 20 years, a sizeable portion of the South African population are living in poverty, pointing to the lack of impact of these rights in people's lives.⁷ For instance, the right to basic education although guaranteed in the Constitution is not widely enjoyed, because most rural and predominantly black schools inadequately provided for.⁸ Additionally, poverty, maladministration and corruption pose enormous challenges to the overall enjoyment of rights in the country.⁹ In this quite similar context, it is thus useful to consider how the SAHRC has gone about fulfilling its mandate of promoting, protection and monitoring these rights in order to learn from its experiences.

This chapter identifies the SERs in the South African Constitution and briefly looks at how the courts have interpreted the state's obligations because it has informed the SAHRCs interpretation of government's obligations related to these rights. It then briefly looks at the establishment of the SAHRC after the promulgation of the 1993 interim Constitution together with the mandate and powers of the Commission flowing from the Constitution and legislation. It then interrogates the different

⁵ Section 184 Constitution of the Republic of South Africa, 1996. Although other Commissions such as the GCE deal with gender matters while the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) deals with cultural and religious matters.

⁶ Section 184 (3) Constitution of the Republic of South Africa, 1996.

⁷ See Statistic South Africa Poverty Trends in South Africa 2011-2014 <http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf> (accessed 18 April 2015); C Nicholson 'South Africa: Where 12 million live in extreme poverty' Daily Maverick 7 February 2015 <http://www.dailymaverick.co.za/article/2015-02-03-south-africa-where-12-million-live-in-extreme-poverty/#.VTI96SGqpBc> (accessed 18 April 2015).

⁸ See E Berger "The Right to Education under South African Constitution" (2003) 103 *Columbia Law Review* 614.

⁹ See "The Impact of Corruption on Governance and Socio-Economic Rights" http://www.casac.org.za/?wpfb_dl=71 (accessed 8 August 2016). S Pillay "Corruption – the challenge to good governance: A South African Perspective" (2004) 17 *International Journal of Public Sector Management* 586-605.

strategies the Commission has utilised in fulfilling its mandate, with a specific focus on SERs together with the challenges it has faced in interacting with other stakeholders involved in the making of these rights a reality.

5.2 Socio-economic rights in the South African Constitution

The South African Constitution contains civil, political, economic, social and cultural rights based on the democratic values of human dignity, equality and freedom embodied in the bill of rights.¹⁰ SERs are contained in section 26 (1) provides that everyone has the right to access to adequate housing and section 27(1) of the Constitution that provides that everyone has the right to have access to

1. health care services, including reproductive health care;
2. sufficient food and water; and
3. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Section 29 of the Constitution provides for everyone's right to basic education including adult basic education. It further provides that everyone has a right "to further education, which the state, through reasonable measures, must make progressively available and accessible."¹¹ The SERs of children are protected under section 28 (1) (c), including the rights of the child to basic nutrition, shelter, basic health care services and social services.

Several observations can be made about how differently these rights are drafted compared to those in the Kenyan Constitution. Firstly, no right in the South African Constitution is termed as a socio-economic right¹² unlike in the Kenyan Constitution where SERs are clearly marked as such in article 43. Secondly, section 29(1) is the only instance where an SER is afforded without internal restrictions such as reasonable legislative measures by the state. Despite the absence of an internal limitation like that in section 27, it remains subject to the general limitation clause in

¹⁰ Human dignity, equality and freedom are cornerstones of the South African Constitution as recognised in the Preamble of the Constitution of the Republic of South Africa, 1996. See NMI Goolam "Human Dignity-Our Supreme Constitutional Value" (2001) 4 *Potchefstroom Electronic Law Journal* 1. See also *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) where the court dealt with the issue of human dignity while dealing with issue of the death penalty.

¹¹ Section 29 (1) (b) Constitution of the Republic of South Africa, 1996.

¹² Section 27 is headed "Health care, food, water and social security" while section 26 is called "Housing" and section 29 "Education".

section 36.¹³ The courts in South Africa have emphasised the nature of the right to basic education as one that requires immediate fulfilment by the state subject to available resources and the limitation clause.¹⁴ Thirdly, sections 26 and 27, which contain the bulk of SERs, include the obligation to take reasonable legislative and other measures in addition to the general obligation for human rights stated in section 7 (2) of the Constitution to respect, protect, promote and fulfil the rights in the bill of rights.¹⁵

McLean has identified a further category of SERs that are 'not SERs proper'. Rather they are procedural provisions meant to give effect to some of the SERs thus having an implication on the enjoyment of these rights.¹⁶ A good example of such a provision is section 26 (3) of the Constitution which prohibits the unlawful eviction of people from their homes without an order of court after considering all the relevant circumstances. There are other rights in the South African Constitution that can be categorised as SERs based on the monitoring mandate of the SAHRC, contained in section 184(3), such as the right an environment that is not harmful to their health or well-being in section 24. Section 184 (3) of the SA Constitution provides that

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

There are some similarities in SERs in both the Kenyan and South African constitutions. Firstly, in both instances the SERs are subject to progressive realisation except the right to basic education and emergency health care. The Constitution places an obligation on the state to take reasonable legislative and other

¹³ This section provides that 'everyone has the right to a basic education, including adult basic education. The courts in South Africa have emphasised on the nature of this right as one that requires immediate fulfilment by the state.

¹⁴ See *Governing Body of Juma Masjid Primary School and another v Essay N.O* 2011 (8) BCLR 761 (CC) para 37; See also E Berger "The Right to Education under South African Constitution" (2003) 103 *Columbia Law Review* 614.

¹⁵ See K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 18 discussing the nature of internal limitations imposed by some rights in the South African Constitution. See section 26(2) and 27(2) Constitution of the Republic of South Africa which provide that, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

¹⁶ See McLean *Constitutional Deference, Courts and Socio-Economic Rights in South* 21.

measures, within its available resources, to achieve the progressive realisation of each of these rights.¹⁷ This obligation should be read together with the overall obligation of the state to respect, protect, promote and fulfil the rights in the bill of rights.¹⁸ Secondly, these rights are justiciable Section 38 of the South African Constitution gives standing to any one whose rights are threatened or violated to approach the courts for the enforcement of their rights in the Constitution.¹⁹

The apex court, the Constitutional Court of South Africa, has had an opportunity to give content and meaning to some of the SERs. Through several cases, the courts have elaborated the state's human rights obligations and developed the reasonableness criteria to assess the measures put in place to achieve human rights.²⁰ In *Grootboom*, the Constitutional Court stated the reasonableness test as follows:²¹

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

Despite the constitutional guarantee for human rights since 1996, poverty and inequality in South Africa are still high with most of the poverty cases having a historical basis often attributed to the apartheid policy. Over 20 years since the

¹⁷ Section 27 (2) Constitution of the Republic of South Africa, 1996. To this end, legislative and policy frameworks have been drafted to aid in the realisation of these rights in the country. These include Basic Education Act, Social Assistance Act 13 of 2004, and the National Water Act 36 of 1998 among others.

¹⁸ See section 7(2) Constitution of the Republic of South Africa, 1996.

¹⁹ Section 38 provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

²⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). *Khosa and others v Minister of Social Development and Another* 2004 (6) BCLR 569 (CC). *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

²¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 41.

attainment of independence and introduction of democracy, access to health services, housing and quality education are not enjoyed as envisioned in the Constitution. There has been an increase in service delivery protests related to lack of basic services related to the overall enjoyment of SERS.²² Several challenges to the fight against poverty include high levels of unemployment and the HIV/AIDs and tuberculosis pandemic.²³ Inequality in the country stands at a Gini coefficient of 0.69 compared to Kenya's at 0.445, making South Africa one of the most unequal countries in the world.²⁴ Over half of South Africans live below the national poverty line (about the same in Kenya) and more than 10% live in extreme poverty, on less than \$1.25 (R15.85) per day.²⁵

Efforts to address poverty should be assessed using the reasonableness criteria elaborated above. This test has influenced the monitoring role of the SAHRC as it has given the Commission a domestic basis for holding the government and organs of state to account for their human rights obligations.²⁶ Having established this, the discussion will now turn to a brief history and motivation for the establishment of the SAHRC.

²² Richard Pithouse "The rainbow is dead - beware the fire, SA" *Mail & Guardian* 4 March 2016 <http://mg.co.za/article/2016-03-03-the-rainbow-is-dead-beware-the-fire-sa> (accessed 30 March 2016). Johnny Masilela "More to Brits protests than meets the eye" *Mail & Guardian* 19 March 2015 <http://mg.co.za/article/2015-03-19-more-to-brits-protests-than-meets-the-eye> (accessed 30 March 2016).

²³ South African Poverty and Inequality Assessment Discussion Note 1 <http://ccs.ukzn.ac.za/files/World-Bank-South-Africa-CN-Discussion-Note-28-Jan-2016.pdf> (accessed 30 March 2016).

²⁴ G Keeton "Inequality in South Africa" (2014) 74 *The Journal of the Helen Suzman Foundation* 26.

²⁵ For more on poverty and inequality in South Africa see M Cole *Is South Africa Operating in a Safe and Just Space? Using the doughnut model to explore environmental sustainability and social justice Oxfam Research Reports* May 2015; H Bhorat et al *Fighting Poverty: Labour Markets and Inequality in South Africa* (2001); Julian May *Poverty and inequality in South Africa: meeting the challenge* (2000); H Bhorat & SM Kanbur (eds) *Poverty and Policy in Post-apartheid South Africa* (2006). Statistics South Africa *The South African MPI: Creating a Multi-dimensional poverty index using census data* (2014) 55.

²⁶ SAHRC 8th Section 184 (3) Report on Economic and Social Rights (2011) 14 and 20.

5.3 Establishment and mandate of the SAHRC

Considering South Africa's history of apartheid and the denial of human rights witnessed at the time, the establishment 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.²⁷ It is argued that the constitutional entrenchment of the Commission exhibits the desire of the constitutional drafters to ensure that there was an institution specifically tasked with the promotion and protection of human rights in the republic something that was not enjoyed by the majority during apartheid. According to De Vos, among the reasons for the establishment of the chapter nine institutions was the belief that they would restore democracy and inculcate a human rights culture and the values associated with them in the republic after 1994,²⁸ thus giving meaning to the Constitution. It could be argued that the SAHRC's structure in terms of independence were influenced by the Constitutional Principles²⁹ that guided the drafting of the Constitution, especially the one calling on the drafters to ensure that the independence and impartiality of the public protector.³⁰ The establishment of this institution also coincided with the widespread calls for states to establish Paris Principles compliant NHRIs in the early 1990's after the Vienna World Conference on Human Rights.³¹

The SAHRC was established in 1994 with the enactment of the Human Rights Commission Act 54 of 1994. The immediate concern after this was the selection of the first crop of Commissioners who would set the agenda for the Commission's work.³² The formal inauguration of the Commission took place on 2 October 1995

²⁷ See generally J Matshekga "Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence" (2002) 2 *African Human Rights Law Journal* 68 at 69. See Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001) 293.

²⁸ P De Vos "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" in DM Chirwa & L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) 160 – 161.

²⁹ See Constitutional principle XXIX Schedule 4 Interim Constitution of the Republic of South Africa, Act 200 of 1993.

³⁰ This is argument is made based on Pityana's assertion in B Pityana "National Institutions at Work: The Case of the South African Human Rights Commission" in Hossain et al (eds) *Human Rights Commissions and Ombudsman Offices* (2001)

³¹ See A Smith "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" (2006) 28 *Human Rights Quarterly* 904 at 905.

³² B Pityana "National Institutions at Work: The Case of the South African Human Rights Commission" in K Hossein et al (eds) *Human Rights Commissions and Ombudsman Offices* (2001) 628.

with the swearing in of the first commissioners to lead the way in developing a culture of human rights in the new South African democracy as none existed before this.

The constitutional mandate of the Commission is contained in Section 184 of the Constitution of the Republic of South Africa, 1996 and provides as follows:

1. The South African Human Rights Commission must
 - a) promote respect for human rights and a culture of human rights;
 - b) promote the protection, development and attainment of human rights; and
 - c) monitor and assess the observance of human rights in the Republic.
2. The Commission has the powers, as regulated by the national legislation, necessary to perform its functions, including the power -
 - a) investigate and report on the observance of human rights;
 - b) take steps and secure appropriate redress where human rights have been violated;
 - c) carry out research; and
 - d) educate.
3. Each year, the Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
4. The Commission has the additional powers and functions prescribed by national legislation.

To give effect to section 184 (4) of the Constitution, parliament promulgated the Human Rights Commission Act³³ (with several amendments over the years), which was recently replaced by the South African Human Rights Commission Act, 40 of 2013.³⁴ The Human Rights Commission Act, among other things sought to address diverse matters such as the appointment and dismissal of the Commissioners, hiring of support staff, the Commission's powers and additional functions among others as will be illustrated below.³⁵ The question that then follows is whether the Commission has been given the necessary powers and support (through financial endowment

³³ Act 54 of 1994.

³⁴ This Act was promulgated on 22 January 2014. The Act will hereinafter be referred to as the SAHRC Act to distinguish it from the repealed Human Rights Act.

³⁵ Reference will be made to the HRC Act and the South African Human Rights Act in some instances to compare some of the provisions that have changed given the recent nature of the latter Act.

and support from other institutions and government) to carry out its mandate as envisioned by the Constitution and legislation.

The Commission's additional powers and functions are contained in section 13 (a) (i) to (iii) of the SAHRC Act. Flowing from its overall mandate of creating a culture of human rights in the republic, the Commission is empowered to make recommendations to organs of state on the adoption of measures for the promotion of human rights in the country.³⁶ Given the country's system of devolved government, with government at the national, provincial and local spheres each with exclusive or concurrent legislative competence in certain aspects affecting the delivery of services to the country's population³⁷, the reasonableness of measures to provide access to SERs is affected by the different policies put in place at these various levels of government.³⁸ Hence, it is important that the SAHRC monitor and give recommendations to these organs on how to comply with their human rights obligations. Furthermore, the Commission is empowered to conduct studies to enable it to report on human rights and in the furtherance of its mandate.³⁹ In addition, the Commission has the power to request information from any organ of state on the measures it has adopted relating to human rights. The Commission has made use of these powers at different times in the performance of its mandate as will be illustrated further below.⁴⁰

The competence to request information is essential in determining the adequacy or lack thereof of measures put in place to achieve SERs in the republic. As has been continuously argued in this thesis, knowledge on human rights is important because

³⁶ Section 13 (a) (i) of the SAHRC Act the Commission is competent and obliged to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights;

³⁷ These are contained in schedule 4 dealing with Functional Areas of Concurrent National and Provincial Legislative Competence and Schedule 5 dealing with Functional Areas of Exclusive Provincial Legislative Competence.

³⁸ See *Government of RSA v Grootboom* paras 39-40.

³⁹ This is in terms of section 13(a) (ii) of the SAHRC Act, which provides that the Commission is empowered to undertake such studies for reporting on, or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission.

⁴⁰ According section 13 (a) (iii) the Commission is empowered to request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights...

it is the starting point towards making these rights into reality. In the case of SAHRC and its work, the information obtained is a strong indicator of what each organ of state is doing to fulfil its obligations. It is also a pointer to the kind of challenges organs of state are facing in their efforts to fulfil their human rights obligations and of what more needs to be done to make these rights a reality for those living in poverty.

Additional functions and responsibilities that are indispensable for the fulfilment of its mandate are allocated to the Commission in terms of section 13(b) of the SAHRC Act. The Commission is called upon to develop, conduct and manage awareness programmes to the public to raise their awareness of the human rights in the Constitution together with the role and activities of the Commission itself.⁴¹ Awareness of what the SAHRC does and how one can approach the Commission for help for redress is important for the public because as has been argued elsewhere, awareness of human rights and this instance what the SAHRC does and where it can be accessed, are very important factors that can lead to greater enjoyment of human rights in general.

Mindful of the overlap between the SAHRC and other chapter 9 institutions, section 13 (b) (ii) provides for collaborative efforts between the Commission, other chapter 9 institutions and authorities to avoid duplication of functions. Because of this provision and an awareness that the promotion, protection and monitoring of human rights in the republic is a joint effort, the SAHRC has actively engaged with the civil society and other institutions dealing with human rights in the country and internationally.⁴² With the implementation of human rights obligations being carried out through legislative and policy programmes of the government, the Commission has a duty to “review government policies relating to human rights and may make recommendations.”⁴³ This provision should be seen as a measure meant to ensure the compliance of these policies with the human rights provisions in the Constitution

⁴¹ Section 13 (b) (i) SAHRC Act 2013.

⁴² Active engagement with academia through institutions such as the Centre for Human Rights of the University of Pretoria and Community Law Centre of the University of the Western Cape. Co-operation with the NGOs umbrella body SANGOCO to conduct public hearings on poverty. As illustrated further below.

⁴³ Section 13 (b) (v) SAHRC Act 2013.

and where this is not the case; the necessary recommendations can be made to ensure such compliance takes place.

The Commission's recommendations have infused human rights elements in bills before parliament, which would not have been there, but for the SAHRC's participation. It has made submissions on Education Laws Amendment Bill 2004⁴⁴, Draft Regulations for the Exemption of Parents from Payment of School Fees, 2005.⁴⁵ It should be noted that most of SAHRC's submissions to parliament have been on CPRs on the Criminal Law (Sexual Offences) and Related Matters Amendment Bill on the need to be sensitive to human rights were taken into considered and included in the final Act.⁴⁶ In 2012, the Commission made submissions to parliament on the Protection of State Information⁴⁷ and Traditional Courts Bills.⁴⁸ It would thus seem that the Commission has been willing to make recommendations on legislation and policies dealing with SERs.⁴⁹

Another function bestowed upon the Commission is to monitor the compliance of the government with its international human rights obligations flowing from the treaties it has ratified. Section 13 (b) (vi) thus provides that the SAHRC:

...must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission.

In instances where the government has not complied with these provisions, it is incumbent on the SAHRC to remind it of these obligations in order to facilitate

⁴⁴ Education Laws Amendment Bill 2004

<http://www.sahrc.org.za/home/21/files/20%20SAHRC%20Comment%20on%20School%20Fees%20&%20Expulsion%20%28Dept%29%20Nov%202004.pdf> (accessed 30 March 2016).

⁴⁵ Draft Regulations for the Exemption of Parents from Payment of School Fees, 2005 <http://www.sahrc.org.za/home/21/files/27%20SAHRC%20Submission%20on%20Education%20Laws%20Amendment%20Bill%20Discipline%20Funding%20Fee%20%28Parl.%29s%20Aug%202005.pdf> (accessed 30 March 2016).

⁴⁶ See SAHRC Annual Report, April 2006-March 2007, 10.

⁴⁷ SAHRC Submission to the Ad Hoc Committee on Protection of State Information Bill (National Council of Provinces) On the Protection of State Information Bill [B6B-2010] 10 February 2012 <http://www.sahrc.org.za/home/21/files/POIB.NCOP%20Sub.16.212.pdf> (accessed 30 March 2016).

⁴⁸ Traditional Courts Bill [B1 – 2012] SAHRC Submission to the National Council of Provinces, 15 February 2012 <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202%2012.pdf> (accessed 30 March 2016).

⁴⁹ See discussion in section 5.6.8 below.

greater enjoyment of human rights by all those within the borders of South Africa.⁵⁰ This function is closely linked to the one that requires the Commission to prepare and submit reports to the National Assembly on any treaties relating to the objects of the Commission.⁵¹ In other words, the Commission has the power to submit reports on all human rights treaties that South Africa is a party to. So far, it has assisted the government or sent alternative reports to the Human Rights Committee⁵², a shadow report to Committee on the Elimination of Racial Discrimination (CERD)⁵³ and the OHCHR on “the right to participate in public affairs,”⁵⁴ which have assisted the treaty bodies in getting a clearer picture of the human rights situation in the republic. The work done by bodies such as the CDESCR and special rapporteurs, and conferences that have produced documents such as the Limburg Principles and the Maastricht Guidelines is very instructive in the interpretation of the human rights obligations the country has undertaken through ratification of treaties, and in the Constitution.

The Commission has additional mandates that flow from other legislative Acts that influence its work on SERs. These include the Promotion of Access to Information Act (PAIA)⁵⁵ under which the SAHRC compiles an annual report on the compliance of government and business in terms of sections 83 and 84 of the Act. In terms of section 28(2) of Promotion of Equality and Prevention of Unfair Discrimination Act

⁵⁰ 'SAHRC reminds government of its obligations on World Refugee Day' Times Live 20 June 2016, <http://www.timeslive.co.za/local/2016/06/20/SAHRC-reminds-government-of-its-obligations-on-World-Refugee-Day> (accessed 15 September 2016).

⁵¹ Section 13 (b) (vii) SAHRC Act 2013.

⁵² SAHRC List of Issues Report to the Human Rights Committee on South Africa's Implementation of the ICCPR http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_ICO_ZAF_20239_E.pdf (accessed 30 March 2016). See also SAHRC raises human rights concerns with UNHRC 7th March 2016 <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/367-sahrc-raises-human-rights-concerns-with-unhrc> (accessed 30 March 2016).

⁵³ SAHRC Shadow Report on South Africa's Compliance with the Provisions of the International Convention Against All Forms of Racial Discrimination <http://www.sahrc.org.za/home/21/files/Reports/Compliance%20with%20the%20provision%20of%20the%20international%20conventio.pdf> (accessed 6 September 2016).

⁵⁴ SAHRC The Right to Participate in Public Affairs, Submission to the Office of the High Commissioner for Human Rights, February 2015. www.ohchr.org/Documents/Issues/EqualParticipation/.../SouthAfricanSAHRC.doc (accessed 30 March 2016). See also, 'SAHRC raises human rights concerns with UNHRC' <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/367-sahrc-raises-human-rights-concerns-with-unhrc> (accessed 30 March 2016).

⁵⁵ No 2 of 2000.

(PEPUDA)⁵⁶, the Commission should assess, report on the extent to which the unfair discrimination on the grounds of race, gender and disability persists in the republic, and make recommendations on how to deal with the effects of such discrimination.

In addition to the above-mentioned mandate and powers, the SAHRC has the power to take a number of steps in relation to the information that it obtains. Of relevance are its powers to investigate, and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated.⁵⁷ This power has been utilised by the Commission to offer remedies for various human rights violations, mostly through issuing recommendations meant to address human rights concerns. Examples include a national hearing on the impact of protests on the right to basic education⁵⁸, access to housing, local governance, and service delivery⁵⁹, and access to water and decent sanitation⁶⁰ among others.

Using its quasi-judicial powers, the SAHRC has summoned individuals and organs of state to appear before it to answer questions on issues of human rights.⁶¹ Where need be it has not been hesitant to call the executive to account, summoning, for example, cabinet ministers and director generals.⁶² The above exposition of the Commission's mandate shows that it has a broad human rights mandate as recommended by the Paris Principles. An openly appointed team of qualified commissioners should execute this broad human rights mandate. The appointment process of Commissioners is thus important and is discussed next.

⁵⁶ Act 4 of 2000.

⁵⁷ N Ntlama "Monitoring the implementation of socio-economic rights in South Africa: Some lessons from the international" (2004) 8 *Law Democracy and Development* 207 at 208.

⁵⁸ SAHRC REPORT National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa <http://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf> (accessed 6 September 2016).

⁵⁹ The South African Human Rights Commission Investigative Hearing Report Access to Housing, Local Governance and Service Delivery 23 – 25 February 2015 <http://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf> (accessed 6 September 2016).

⁶⁰ Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014 <http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20%282%29.pdf> (accessed 6 September 2016).

⁶¹ Used to subpoena newspaper editors during the hearings into racism in the media. See G Berger "Problematizing Race for Journalists: Critical Reflections on the South African Human Rights Commission Inquiry into Media Racism" (2004) 11 *Race, Gender & Class* 11 at 14.

⁶² See OC Okafor "The South African Human Rights Commission: A Holistic Assessment" in T Maluwa (ed) *Law, Politics and Rights: Essays in Memory of Kader Asmal* (2014) 164.

5.4 Appointment of SAHRC commissioners

NHRIs organisational and operational structures are strong indicators of their independence and pluralism, which in turn can influence the work of these institutions. It is therefore crucial that a process that is not open to manipulation and likely to call into question the individuals tasked with promoting human rights guides the appointment of individuals to lead and work at the Commission.

Appointment of the SAHRC Commissioners is governed by section 193(1) of the Constitution and involves Parliament and the President as head of the executive. All commissioners must be “fit and proper” South African citizens and must comply with all other requirements set out in support legislation.⁶³ The notion of a fit and proper individual has its origins in the legal profession⁶⁴ and has been elaborated upon by South African courts when looking at the conduct of members of the legal profession.⁶⁵ Although not defined in the Constitution or SAHRC Act, it has been accepted that “a fit and proper” individual is one who exhibits “integrity, reliability and honesty...”⁶⁶ Without any other interpretation, I argue that this is the same test that should be applied to individuals seeking to be SAHRC Commissioners. But as will be illustrated later, the criteria are not strictly followed judged by the conduct of MPs when interviewing potential Commissioners as discussed below.

The support legislation referred to in Section 193 (1) of the Constitution is the South African Human Rights Act, particularly section 5 (1) (a) and (b).⁶⁷ All Commissioners of the SAHRC must be South African citizens with a record of commitment to the promotion of respect for human rights and a culture of human rights.⁶⁸ These requirement is similar to the requirements of being a commissioner for the KNCHR with the only difference being that the KNCHR requirements leave room for the

⁶³ Section 193 (1) Constitution of the Republic of South Africa 1996.

⁶⁴ In terms of section 24 of the Legal Practice Act No 28 of 2014, one may only practice law if s/he is a fit and proper person to be so admitted.

⁶⁵ *KwaZulu-Natal Law Society v Singh* (1526/2010) [2011] ZAKZPHC 12 (25 March 2011). *In re Chikweche* 1995 4 SA 284. *Vassen v Law Society of the Cape of Good Hope* 1998(4) SA 532 (SCA).

⁶⁶ See M Slabbert “The Requirement of Being A “Fit and Proper” Person for the Legal Profession” (2011) 14 PER/PELJ 209 at 212.

⁶⁷ At the time of writing, the sitting commissioners were appointed using the procedure in the repealed 1995 Act whose provisions were similar to those in the present SAHRC Act.

⁶⁸ Section 5 (1) (a) (ii) SAHRC Act.

involvement of other professions and not only the human rights field.⁶⁹ Individuals seeking to be SAHRC Commissioners must also be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission.⁷⁰ These two requirements are central as they ensure that a team that is aware of and has expertise in human rights and what their promotion, protection and monitoring entail, leads the Commission. Consequently, in the selection process it is necessary to look at the candidates' qualifications and demonstrable experience on matters to do with human rights. In my view, a Commission led by experts in human rights and their respective fields is desirable and on this, both Kenya and South Africa have similar requirements on the kind of leadership qualities desired of the Commissioners.

In the appointment of Commissioners, the need to reflect broadly the gender and race composition of South Africa should be considered. This is so that citizens are represented in and by the Commission, which in turn promotes the legitimacy of the institution.⁷¹ The requirement that the SAHRC should reflect the gender and race composition of the country is in congruence with the Paris Principles, which recommends that the selection process should guarantee "pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights."⁷² To make the Commission pluralist, the legislature made provision for a Commission consisting of eight members.⁷³ Section 5 (2) SAHRC Act further provides that of the eight members at least six must serve on a full-time basis and no more than two Commissioners on a part-time basis. This provision has brought about certainty as to the number of Commissioners that can be appointed by the president unlike in the past where it was not clear whether the maximum of eleven members with at least seven of the Commissioners serving on a full-time basis had to be adhered to.⁷⁴

⁶⁹ See discussion in 4.3.3 on the appointment of KNCHR Commissioners. See also 2.4.2 discussing the Paris Principles guidelines on recruitment of NHRIs leadership.

⁷⁰ Section 5 (1) (a) (iii) SAHRC Act.

⁷¹ Section 193 (2) Constitution of the Republic of South Africa, 1996.

⁷² Paris Principles 'Composition and Guarantees of Independence and Pluralism', Article 1.

⁷³ Section 5 (1) (a) of the South African Human Rights Commission Act. This could be based on one of the recommendations by the Ad Hoc Committee that the Commission have a minimum of 8 Commissioners. See Report of the Ad Hoc Committee 177.

⁷⁴ Section 5 South African Human Rights Commission Act.

The president's role in the appointment process is to 'rubber stamp' the National Assembly's nominees. This is because the president appoints commissioners on the recommendation of the National Assembly in terms of s193 (4) of the Constitution.⁷⁵ Thus, whenever the National Assembly forwards a list of nominees to the president, he or she has no option but to appoint all those in the list. There has been inconsistency in the number of commissioners appointed after the first cohort, and this has affected the work of the Commission. Especially after the expiry of the terms of the founding cohort of Commissioners, out of the recommended 11, the President appointed only seven Commissioners without giving reasons for his decision, with the result that the capacity of the Commission to fulfil its mandate was reduced.⁷⁶

The Commissioners serve for a term that may not exceed 7 years, but which may be renewed once by the President on the recommendation of the National Assembly. The National Assembly decides the length of the term of office of Commissioners as provided by section 5 (2), that:

The Commissioners... may, on the recommendation of the National Assembly, be appointed as full-time or part-time commissioners and hold office for such fixed terms as the National Assembly may determine at the time of such appointment, but not exceeding seven years.

The implications of this provision are two-fold; one is problematic in the sense that the Commissioners' terms are not certain with parliament having the leeway to decide a term between 1-7 years. Secondly, it means that the President in making the final appointments must make them in terms of the recommendations of the National Assembly. Unlike the appointment process in Kenya (where parliament approves the president's nominees)⁷⁷, the SAHRC Act seems to grant a bigger role to the National Assembly in the appointment process, with the President approving parliament's nominees and choosing who will act as the Chairperson and deputy. However, the reality, as illustrated below, is different given the political system in South Africa where the President is also the leader of the ruling party party. It should be noted that, the 2013 Act has done away with a very important provision that was contained in the 1994 Act. Section 5 (2) (b) of the repealed Human Rights Act promoted continuity and institutional memory of the SAHRC by stipulating that the

⁷⁵ Section 193(4) reads 'The President, on the recommendation of the National Assembly, must appoint the ... members of (a) the South African Human Rights Commission.'

⁷⁶ Report of the Ad Hoc Committee on the Review of Chapter 9 Institutions 177.

⁷⁷ See 4.3.3 on the appointment of KNCHR Commissioners.

term of all the 7 full time Commissioners may not expire at the same time.⁷⁸ While the SAHRC Act is not clear about continuity and institutional memory, this can be addressed by the renewal of some of the Commissioners' term of office by the President.

The appointment process is spearheaded by the National Assembly (NA) through an Ad Hoc Committee of the Assembly proportionally composed of members of all parties represented in the Assembly.⁷⁹ This Ad Hoc Committee through the OISD invites nominations from the public and civil society, draws up a shortlist and calls applicants on the shortlist for interviews.⁸⁰ The Committee then submits its recommendations to the National Assembly for approval by a simple majority.⁸¹ In reality and given the voting patterns in South Africa since 1994, the ANC has won the majority in past elections and has often used this to its advantage in getting the number of votes necessary for the approval certain nominees as outlined below.⁸² Thus, while the minimum requirements are clear as to what expertise and experience the Commissioners should have, the reality has been different.

Expectedly, in a system where politics plays a dominant role in the appointment of individuals to constitutional offices, coupled with the ANC's dominance in the National Assembly, the appointment of SAHRC commissioners never escaped political horse-trading.⁸³ The issue is compounded by the fact that in some instances the appointment of some of the Commissioners has also been viewed as an opportunity for political parties to select individuals who will further their political

⁷⁸ Section 5 (2) (b) Human Rights Commission Act.

⁷⁹ Section 193 (5) Constitution of the Republic of South Africa, 1996.

⁸⁰ Most of this is done with the assistance of the OISD, which acts as a Secretariat for purposes of filling Commissioner vacancies in Chapter 9 Institutions. See discussion on the establishment of the OISD in 5.5 below.

⁸¹ Section 193 (5) (b) (ii) Constitution of the Republic of South Africa, 1996.

⁸² See A Gouws and P Mitchell "South Africa: One Party Dominance Despite Perfect Proportionality" in M Gallagher and P Mitchell (eds) *The Politics of Electoral System* (2005) 353 - 372.

⁸³ J Sarkin 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587 at 596; Matshekga 2002 *African Human Rights Law Journal* 81. "SAHRC a dumping ground for ANC cadres – Zille" <http://www.moneyweb.co.za/archive/sahrc-a-dumping-ground-for-anc-cadres-zille/> (accessed 30 October 2015).

interests.⁸⁴ In some instances, it has also, influenced the selection of Commissioners whose suitability to hold office is questionable. For example, the suitability of the current chairperson to hold office has been called into question after his tenure as public protector was marked by claims of helping his comrades in the ruling party.⁸⁵ The conduct of some MPs during the interviews for Commissioners (such as falling asleep, being busy on their phones, asking no questions, or walking out) have also brought into question their commitment to and objectivity in the recruitment process.⁸⁶

While it would be admirable for parliament and the president to appoint individuals with no clouds hanging over them, it seems that has not been possible with parliament voting overwhelmingly for the current cohort of Commissioners. During the parliamentary vote for the appointment of the SAHRC Commissioners, 217 MPs supported the recommendations while 62-members of the Democratic Alliance abstained, protesting Mushwana's nomination.⁸⁷ Despite murmurings on the suitability or lack thereof of some of the Commissioners⁸⁸, no one has challenged their suitability to hold office in court. It would thus seem, after their appointment, the only other way to assess the capabilities of Commissioners is through their performance while in office and on the evidence, the Commissioners have done a decent job.

⁸⁴ See discussion on the challenges faced by the SAHRC in executing its mandate. See also Sarkin 1999 *SAJHR* 596. C Murray "The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?" (2006) *Potchefstroom Electronic Law Journal* 1 at 13.

⁸⁵ Pierre De Vos 'Human Rights Commission appointments not up to scratch' 28th September 2009 <http://constitutionallyspeaking.co.za/human-rights-commission-appointments-not-up-to-scratch/> (accessed 21 April 2015). See also No fear, favour or prejudice *Mail & Guardian* 6 November 2009 <http://mg.co.za/article/2009-11-06-no-fear-favour-or-prejudice> (accessed 21 April 2015). Dissent over SAHRC appointees <http://www.news24.com/SouthAfrica/Politics/Dissent-over-SAHRC-appointees-20090819> (accessed 21 April 2015).

⁸⁶ For an in-depth analysis of the suitability of Commissioners to hold office see Abongile Sipondo, "An Analysis of the Appointment Process of the South African Human Rights Commissioners" <http://www.publiclaw.uct.ac.za/news/sahrc-new-appointments> (accessed 30 October 2015).

⁸⁷ Consideration of Recommendation of Persons for Appointment to the South African Human Rights Commission Parliament of the Republic of South Africa National Assembly Hansard 22 September 2009 77-90

⁸⁸ See Consideration of Recommendation of Persons for Appointment to the South African Human Rights Commission Parliament of the Republic of South Africa National Assembly Hansard 22 September 2009 77-90. Wilson Johwa "SAHRC adds Mushwana to list of commissioners" *Business Day BD Live* September 29, 2009 <http://www.bdlive.co.za/articles/2009/09/23/sahrc-adds-mushwana-to-list-of-commissioners> (accessed 30 October 2015).

The participation of civil society in the appointment process is included in article 193(6) and this should be done in terms of section 59 (1) (a) of the Constitution which provides for the participation of the public in the legislative and other processes of the National Assembly and its committees but in practice this rarely happens.⁸⁹ In terms of section 6 (1), the president must designate two of the full-time members as Chairperson and Deputy Chairperson of the Commission, respectively, who must be fit and proper persons to hold such office.⁹⁰ The qualifications and experiences of the Commissioners determine their suitability to hold office. Currently the SAHRC Commissioners include Advocate Lawrence Mushwana (Chairperson), Ms Pregs Govender (deputy Chairperson), Adv Bokankatla Joseph Malatji, Ms Lindiwe Faith Mokate, Mr. Mohamed Shafie Ameerma, Ms Janet Love (part-time Commissioner) and Dr. Danny Titus (part-time Commissioner).⁹¹

5.4.1 Removal from office

Commissioners of the SAHRC should carry out their functions without any outside influence and in a manner that respects the law. They can thus not be removed from office for any reason but those contained in section 194 (1) of the Constitution read together with section 3 (1) (a) and (b) of the SAHRC Act, namely misconduct, incapacity or incompetence.⁹² A Commissioner can be removed from office if found guilty of misconduct, incapacity or incompetence by a Committee of the National Assembly,⁹³ after which, a resolution must be taken by the Committee for the removal of such a Commissioner.⁹⁴ The resolution must be adopted with a supporting vote of a majority of the members of the Assembly.⁹⁵ When proceedings to remove a commissioner from office have commenced, the President may suspend such a commissioner and in the event of a resolution being passed for such a Commissioner's removal in terms of section 194 (2), must remove such a

⁸⁹ See Matshegka (2002) *African Human Rights Law Journal* 82.

⁹⁰ See Section 6 South African Human Rights Commission Act.

⁹¹ At the time of writing there as an appointment process for new Commissioners to take office. Interviews for South African Human Rights Commission get underway http://www.parliament.gov.za/live/content.php?Item_ID=9638&Revision=en/0&SearchStart=0 (accessed 26 November 2016).

⁹² See section 194 (1) (a) Constitution of Republic of South Africa, 1996.

⁹³ Section 194 (1) (b) Constitution of Republic of South Africa, 1996.

⁹⁴ Section 194 (1) (c) Constitution of Republic of South Africa, 1996.

⁹⁵ Section 194 (2) (b) Constitution of Republic of South Africa, 1996.

commissioner from the SAHRC.⁹⁶ The removal process has yet to be used, with departures from the Commission, up to now, occurring through the resignation or death of Commissioners. This elaborate removable process, like the removal of KNCHR Commissioners,⁹⁷ is commendable, as it has secured independence of the SAHRC by allowing the Commissioners to carry out their functions without prejudice, fear or favour.

5.4.2 Independence and impartiality

The independence and impartiality of the SAHRC are required in section 181(2) of the Constitution⁹⁸ as well as section 4 the SAHRC Act. These sections provide that the members and staff of the SAHRC should act independently, impartially and in good faith while performing their functions as accorded to them by the law while promoting and protecting human rights in the republic. The SAHRC's independence is likely to influence the work it has done or can do in fulfilment of its mandate.⁹⁹ It should be noted that the exercise of impartiality is a matter of one's individual frame of mind and cannot be guaranteed by legislation but through personal choices, which makes it important to hire fit and proper persons based on their record of accomplishment.

To support the Commission and promote its ability to function independently, the SAHRC Act provides that no organ of state and no member or employee of an organ of state nor any other person should hinder the SAHRC or its employees from performing their tasks in an independent manner.¹⁰⁰ The Act also calls on all organs of state to provide assistance as may be necessary to preserve and promote the independence of the Commission.¹⁰¹ The courts have weighed in on the nature of

⁹⁶ See section 194 (3) Constitution of Republic of South Africa, 1996.

⁹⁷ See 4.3.3 on the removal of KNCHR Commissioners.

⁹⁸ According to this section, chapter 9 institutions "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

⁹⁹ See Paris Principles Composition and guarantees of Independence and Pluralism; See also United Nations *National human rights institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) 10. See discussion in chapter 2 on the importance of independence.

¹⁰⁰ Section 4 (2) SAHRC Act.

¹⁰¹ See section 4 (3) South African Human Rights Commission Act 2013. The wording of this provision is similar to that of section 181 (3) of the Constitution of the Republic of South Africa, 1996 which requires other organs of state to "assist and protect these institutions" to ensure their "independence, impartiality, dignity and effectiveness."

independence to be accorded to chapter 9 institutions and the kind of support organs of state should extend to these institutions.¹⁰²

To avoid conflict of interest, the Act prohibits the involvement of Commissioners and or staff of the commission in matters which they have a pecuniary interest or those that would affect their independence and impartiality.¹⁰³ Furthermore, in the interests of transparency and accountability, the Commissioners are required to disclose annually their financial interests and any other interests determined by the Commission and such information must be accessible to the public.¹⁰⁴ It cannot be gainsaid that it is important that staff and Commissioners of the SAHRC avoid instances where they are susceptible to influence from outside by corrupt means or undue influence while fulfilling their duties.

Despite the clear provisions on independence, in a system with checks and balances and separation of powers it has not been easy to determine what independence entails in practice. For instance, Prof. Barney Pitso, the founding chairperson of the SAHRC bemoaned the fact that the interpretation of the nature of the Commission's independence has always varied depending on who was asked to comment on the issue.¹⁰⁵ At the start of its work, members of parliament expected Commissioners to represent their views, whereas the executive saw the SAHRC as an extension of the government.¹⁰⁶ It has been observed that the first source of conflict over the issue of independence emanates from the Constitution itself, which while guaranteeing the independence of the Commission, expects the Commission to be accountable to the executive it is supposed to hold accountable for human rights in the republic.¹⁰⁷ The tension over independence of chapter nine institutions

¹⁰² See *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 and *Independent Electoral Commission v Langerberg Municipality* 2001 (9) BCLR 883 (CC) discussed below.

¹⁰³ Section 4 (4) SAHRC Act 2013.

¹⁰⁴ See Section 4 (6) SAHRC Act 2013.

¹⁰⁵ Justice And Constitutional Development Portfolio Committee 8 June 2001 South African Human Rights Commission: Annual Report <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2001/minutes/010608pcjustice.htm> (accessed 6 September 2016).

¹⁰⁶ See Matshekga 2002 *African Human Rights Law Journal* 75.

¹⁰⁷ De Vos "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" 162. See also J Matshekga "Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence" (2002) 2 *African Human Rights Law Journal* 71-72 on the relative nature of the independence of

vis-à-vis the state/government was one of the issues to be considered by the *Ad Hoc* Committee of the National Assembly to review the existence of these institutions and relevance to South Africa's constitutional democracy.¹⁰⁸

What does the SAHRC's independence entail? The Ad Hoc Committee adopted the general test of independence put forward by the court in *Van Rooyen and Others v S and Others*,¹⁰⁹ namely that "from an objective standpoint, bearing in mind the realities of the South African society, there is a perception that an institution enjoys the essential conditions of independence."¹¹⁰ This included looking at factors such as the "financial independence, institutional and operational independence and control over administrative matters that bear on the institutions' mandates together with the appointments procedures and security of tenure."¹¹¹ The Committee also took the time to emphasise what independence meant in terms of the relationship between chapter nine institutions and the executive arm of government. The Ad Hoc Committee relied on the court's decision in *Independent Electoral Commission v Langeberg Municipality*¹¹² where the court held that the electoral commission and other chapter nine institutions were state institutions and not part of the government and thus there was need for them to be "manifestly seen to be outside government."¹¹³

Financial independence is necessary as it allows the Commission to carry out its mandate in an independent manner without fear, favour or prejudice.¹¹⁴ The Ad Hoc Committee took the view that financial independence meant that Parliament would provide what amount it thought was reasonable for the SAHRC to perform its

NHRIs given the traditional classification of governance into three arms of government name the executive, legislature and judiciary.

¹⁰⁸ Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions. See also De Vos "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" 162; K Govender "The reappraisal and restructuring of chapter 9 institutions" (2007) 22 *South Africa Public Law* 190.

¹⁰⁹ 2002 (8) BCLR 810.

¹¹⁰ Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 9.

¹¹¹ Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 9-10.

¹¹² 2001 (9) BCLR 883 (CC).

¹¹³ 2001 (9) BCLR 883 (CC) para 31.

¹¹⁴ See Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 11.

functions.¹¹⁵ This however, has not been the case in reality with the SAHRC in most instances reporting underfunding from the government, which in turn has affected its capacity to fulfil its broad mandate.¹¹⁶ A cause for concern has been the allocation of funds to the SAHRC through the Ministry of Justice as opposed to a budget vote as recommended in the Paris Principles.¹¹⁷ It could be argued that this form of allocation of funds makes it difficult for the SAHRC to acquire the funds it has sought from parliament because the Ministry of Justice is not better positioned to argue for increased funding to the Commission and might seek to control the Commission by withholding funds.¹¹⁸ The way to go would be to allow the SAHRC to draw its funding as part of a budget vote directly from parliament. This would require a legislative amendment to the SAHRC Act, stating that Parliament shall be involved in allocating funds to the Commission. This system of funding is different from the KNCHR's that has its own budget vote.¹¹⁹ Despite the problematic funding model, in practice it seems this arrangement has worked largely because organs of state are called upon, in section 181 of the Constitution, to uphold the independence of the SAHRC. I argue withholding such funds due to the SAHRC to enable it to carry out its functions would be in contravention of the Constitution and could be challenged in court or raised in parliament for action to be taken.

In addition, the Ad Hoc Committee noted that the SAHRC should enjoy administrative independence that would allow it to carry out its mandate in an independent fashion without fear, favour or prejudice as provided for in the Constitution and the SAHRC Act. The Committee also reiterated the view of the Court in the *New National Party v Government of the Republic of South Africa and Others*¹²⁰ on administrative independence, with the court explaining the importance of chapter nine institutions having control over those matters that are directly

¹¹⁵ The Committee relied on the Constitutional Court's decision in *New National Party v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489 para 98.

¹¹⁶ See SAHRC South African Human Rights Commission (Report) Review of Chapter 9 and Associated Institutions: Response to Questionnaire 15. <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070309sahrc.pdf> (access 23 March 2015).

¹¹⁷ Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 19-20.

¹¹⁸ See Matsheka 2002 *African Human Rights Law Journal* 84-86.

¹¹⁹ On the funding modalities of the KNCHR, see discussion in 4.3.6.

¹²⁰ 1999 (5) BCLR 489.

connected with their functions under the Constitution and the relevant legislation.¹²¹ This was to be viewed in line with the tenets espoused in section 181 (3) of the Constitution, with the court directing that the executive should engage with chapter nine institutions in a manner that did not hamper their mandates.¹²²

The SAHRC does not enjoy independence as set out by the Ad Hoc Committee, however as noted earlier, the independence of NHRIs is a relative concept. Just like the SAHRC, the KNCHR enjoys a certain level of independence, which allows it to carry out its mandate while at the same time providing clear channels of accountability.

5.5 Accountability to and relationship with parliament

It is essential that NHRIs be held accountable in the performance of their duties because of the kind of work they do (promoting human rights in the state and holding the government accountable to its human rights obligations) and also because of the funding they receive from the state.¹²³ Accountability in this instance means what Scott has defined as the “the duty to give account of one’s actions to some other person or body.”¹²⁴ In terms of section 181 (5) of the Constitution of the Republic of South Africa, 1996 the SAHRC has to submit an annual report to parliament.¹²⁵ This provision is further reiterated and expanded upon in section 18 of the SAHRC Act which provides that “[t]he Commission must report to the National Assembly at least once every year on its activities, the performance of its functions and the achievement of its objectives.”¹²⁶ By dint of these provisions, the SAHRC is accountable to parliament for all activities it has undertaken in the fulfilment of its mandate through the expenditure of finances allocated to it. As such, the

¹²¹ Ad hoc Committee Report 11-12.

¹²² *New national party v Government RSA* paras 96-99.

¹²³ See generally FL Seidensticker “Independence and Accountability of NHRs: A European Perspective” in The Danish Institute of Human Rights *NHRIS’ Independence and Accountability* http://www.humanrights.dk/files/media/dokumenter/udgivelser/nhris_independence_and_accountability_publication.docx.pdf (accessed 15 May 2015).

¹²⁴ See C Scott “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38 at 40.

¹²⁵ Section 181(5) provides “These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”

¹²⁶ Section 18 (1) The Commission must report to the National Assembly at least once every year on its activities, the performance of its functions and the achievement of its objectives.

Commission is also obliged to spend the money allocated to it in terms of regulations governing the use of public funds; in this case the Public Finance Management Act.¹²⁷

In practice, the SAHRC has submitted annual reports to parliament and appeared before the Portfolio Committee on Justice and Correctional Affairs under which it falls in terms of parliament's oversight role to engage on the content of these reports. It has also appeared before other parliamentary committees when there has been a need to do.¹²⁸ Such appearances are co-ordinated by the Office on Institutions Supporting Democracy (OISD), which falls under the office of the Speaker of the National Assembly. During such appearances, the SAHRC has presented before parliament its annual reports, reports on specific human rights matters for example appearing before other Committees to give their views on human rights matters such as xenophobia¹²⁹; status on the ratification of international treaties¹³⁰ and submissions on different bills.¹³¹ These appearances have also been an opportunity for the SAHRC to present its budget and annual performance plans.¹³² Appearance before parliament's committees has also presented the Commission with a chance to respond to questions posed by MPs while at the same time elaborating on the general state of human rights in the republic.

The relationship between parliament and the SAHRC has been cordial in general although there have been instances where the SAHRC felt both institutions would benefit from extended interaction. For example, in its Fourth Annual Report, the Commission lamented that it did not receive any meaningful attention from

¹²⁷ Act 1 of 1999.

¹²⁸ See SAHRC 5th ESR Report Right to Education ii-iii where the SAHRC appeared before several parliamentary committees to discuss the contents of the fourth ESR Report.

¹²⁹ Submission to the Portfolio Committee on Justice 29 April 2015.

¹³⁰ In 2015 Presentation on South Africa's international and regional human rights obligations to the portfolio committee on justice and correctional services;

¹³¹ In 2015 the SAHRC made present their comments on Criminal Matters (Sexual Offences and Related Matters) Amendment Bill; Protected Disclosure Amendment Act submitted to the Department of Justice and Correctional Services; Submission to the Department of Higher Education and Training on the social inclusion policy framework;

¹³² At its recent appearance before the Portfolio Committee (29 April 2015), the SAHRC presented its Strategic Plan, 2015/2016 Annual Performance Plan and budget allocations.

parliament.¹³³ The time allocated to the SAHRC and other chapter 9 institutions to appear before parliamentary committees has been inadequate to fully canvass critical human rights issues affecting South Africans as observed by the Commission. For instance, during the hearings of the Ad Hoc Committee on the review of Chapter Nine Institutions, it was revealed that the SAHRC only got 2 hours to present on its Annual Report.¹³⁴

At the end of the review process, the Ad Hoc committee made several recommendations such as the merger of some institutions to avoid overlap, review of legislation and increased in funding among others. Regrettably, it has been more than 10 years since the report was released but it has not been debated in parliament or its recommendations implemented in their entirety,¹³⁵ bringing into question the sincerity of the National Assembly to strengthen these institutions.¹³⁶ The approach taken by the National Assembly and executive on the implementation of the Ad Hoc Committees recommendations has been selective with the result that the promotion of human rights by the SAHRC still faces some challenges. For example, a review of the SAHRC legislation only materialised in 2013 with the promulgation of the SAHRC Act meant to bring the enabling Act in line with the Constitution.¹³⁷

Upon the recommendation of the Ad Hoc Committee, the National Assembly adopted a resolution for the establishment of the OISD to strengthen its capacity to perform its function of oversight and accountability relating to chapter 9 institutions and to co-ordinate all activities between those Institutions and the National

¹³³ See South African Human Rights Commission 4th Annual Report December 1998 December 1999 5

http://www.sahrc.org.za/home/21/files/Reports/Annual%20Reports/4th%20annual_report98_99.pdf (accessed 9 February 2015).

¹³⁴ Report of the Ad Hoc Committee on the Review of Chapter 9 Institutions 179.

¹³⁵ Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21: Justice and Constitutional Development, dated 14 April 2016 para 16.1 <https://pmg.org.za/tables-committee-report/2712/> (accessed 6 September 2016).

¹³⁶ M Mataboge "Asmal takes on Parliament" *Mail and Guardian* 20 JULY 2009 06:00 <http://mg.co.za/article/2009-07-20-asmal-takes-on-parliament> (accessed 15 May 2015).

¹³⁷ The Human Rights Commission Act was promulgated before the Constitution of RSA, 1996 (at times referred to as the final Constitution).

Assembly.¹³⁸ The broad purpose of the OISD is to coordinate interaction between the NA and the Institutions Supporting Democracy and to provide support to Parliament's Presiding Officers and committees, concerned with the work of the Institutions.¹³⁹ The establishment of this office is commendable and a genuine attempt at coordinating interactions between the SAHRC and parliament through a common office. In many instances, the OISD has also assisted in the administrative matters dealing with the appointment of Commissioners to several chapter nine institutions. In practice, little has changed with parliament being unable to engage with the SAHRC in a critical and robust manner and the role of the OISD being questioned by some of the chapter 9 institutions.¹⁴⁰

Whilst the appointment and removal of commissioners together with the independence of the SAHRC are important aspects that have a direct bearing on its mandate, how it goes about fulfilling this mandate is equally significant as this is the actual promotion, protection and monitoring of human rights that is meant to have an impact on the lives of citizens. It is the programmes pursued and methodologies employed by the SAHRC that determine its relevance in the South African constitutional architecture and for purposes of this research, that can offer valuable lessons to the KNCHR on how best it can fulfil its socio-economic rights mandate in Kenya. The discussion will now centre on some of the strategies employed by the SAHRC to promote, protect, and monitor socio-economic rights in light of the powers it has from the SAHRC Act and the Constitution in South Africa.

5.6 Promotion, protection and monitoring of socio-economic rights in practice

In practice, the promotion, protection and monitoring of SERs, overlap and build on each other. The discussion below will therefore focus on some of the activities that have been undertaken specifically to promote, protect and monitor SERs together with their effectiveness and what lessons the KNCHR can learn. These activities

¹³⁸ Office on Institutions Supporting Democracy (OISD) http://www.parliament.gov.za/live/content.php?Category_ID=320 (accessed 10 March 2015). See also Address by Deputy Speaker Hon. Nomandla Mfeketo MP at the Launch of the Umtata Regional Office of the Public Protector (PP) 01 October 2010 http://www.pprotect.org/media_gallery/2010/01102010_2sp.asp (accessed 10 March 2015).

¹³⁹ More info on OISD can be found here http://www.parliament.gov.za/live/content.php?Item_ID=5894 (accessed 10 March 2015).

¹⁴⁰ See discussion below on the challenges faced by the SAHRC.

include public hearings on socio-economic rights, thematic work on selected SERs, litigation, complaints handling, compiling Economic and Social Rights (ESR) reports and public awareness creating campaigns. This section also looks at the SAHRC's engagement with parliament and the executive who are important role players in the realisation of SERs in the domestic sphere.

5.6.1 Public hearings on socio- economic rights

The SAHRC has held a few public hearings as a response to the challenges plaguing the enjoyment of socio-economic rights protected in the South African Constitution. Public hearings serve as a means of shedding light on the state of human rights fulfilment or lack thereof experienced by vulnerable and disadvantaged groups. Moreover, they serve as a means of measuring government's commitments to respect, protect and fulfil human rights, especially SERs. In essence, they serve as a means of promoting government accountability as they provide an opportunity for government officials who participate, to interact with and respond to the public on measures put in place to realise these rights.¹⁴¹ These hearings have offered an opportunity for the SAHRC to educate attendees at such hearings on the content of the human rights under scrutiny and the role the SAHRC plays.¹⁴² As a means of promoting and protecting human rights, it is submitted this is a simple yet very effective means of gathering concrete information on the ground from people affected by government policies meant to afford them their rights as protected in the Constitution based on the participation of different stakeholders such as NGO's, government and provincial ministries, academics and mostly importantly ordinary South Africans.

¹⁴¹ SAHRC Public Hearing on Water and Sanitation: A call for State Accountability (2013) <http://peopletoparliament.org.za/focus-areas/socio-economic-rights/news/WaterAndSanitationPublicHearings> (accessed 6 January 2014). SAHRC Report on the Public Hearing on Housing, Evictions and Repossessions (2008) http://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf (accessed 15 May 2015).

¹⁴² See SAHRC Report on the Public Hearing on Housing, Evictions and Repossessions (2008) 10.

These public hearings have been on rights such as the right to water and public sanitation¹⁴³, housing¹⁴⁴, the right to health¹⁴⁵ and food, basic education¹⁴⁶ among others. In organising some of the public hearings, the SAHRC has engaged in collaborative efforts with academia and the civil society to gather information on the impact of poverty on the enjoyment of human rights. Moreover, in some of its public hearings the Commission has involved several government departments together with the previously mentioned stakeholders all in a bid to get them involved in the promotion of SERs. By holding public hearings, the SAHRC managed at the time to be visible to most South Africans especially those who are in need of their services.

In the first ever poverty hearings held in 1998, the SAHRC came together with the umbrella body of NGOs in the country the South African NGO Coalition (SANGOCO) and the CGE to organise this event. These hearings were conducted across South Africa and lasted about 35 days to enable the Commission and its partners to obtain as much information from those affected by poverty and other stakeholders involved in the fight against poverty. At the end of the hearings, 600 oral submissions were made with about 10000 people taking part.¹⁴⁷ In June 2009, the Commission held public hearings on the progressive realisation of various rights SERs, including the right to food and these hearings were attended by government and civil society.¹⁴⁸ The information gathered from such hearings has been used by the SAHRC to monitor government's fulfilment of its human rights obligations as seen through the impact of its policies and legislation.

¹⁴³ See SAHRC Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014 [http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf) (accessed 11 May 2015).

¹⁴⁴ See SAHRC Report on the Public Hearing on Housing, Evictions and Repossessions http://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf (accessed 11 May 2015).

¹⁴⁵ See SAHRC Public Inquiry: Access to Health Care Services <http://www.sahrc.org.za/home/21/files/Health%20Report.pdf> (accessed 11 May 2015).

¹⁴⁶ SAHRC Report of the Public Hearing on the Right to Basic Education <http://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf> (accessed 11 May 2015).

¹⁴⁷ See Ten Years after First Hearings, It's Time to Let Voices of the Poor Be Heard Once More - *Cape Times* <http://www.blacksash.org.za/index.php/media-and-publications/black-sash-in-the-media/759-ten-years-after-first-hearings-its-time-to-let-voices-of-the-poor-be-heard-once-more-cape-times> (accessed 15 May 2015).

¹⁴⁸ SAHRC Right to Food Concept Paper 7.

During the public hearings on evictions, it became known that despite laws that regulated the eviction of people from property, these were not followed coupled with collusion between local government and law enforcement officers resulting in unlawful evictions that infringed on the right to access to housing among others. Views from the different role players involved in acquiring housing were sought and thus a better picture of the situation.¹⁴⁹ The SAHRC was thus able to offer recommendations to the various role players on how to promote access to housing while at the same time showing the magnitude of the housing problem in the country at the time.¹⁵⁰

In carrying out its monitoring function, the SAHRC also utilised public hearings as the primary methodology of gathering information for the compilation of the seventh ESR Report.¹⁵¹ This involved holding a series of public hearings on each of the rights mentioned in section 184(3) and their relation to the achievement of MDGs.¹⁵² The theme of the hearings was “The MDGs and the Realisation of Economic and Social Rights in South Africa.” The SAHRC produced a working paper¹⁵³ that was sent to the relevant organs of state. In addition, it made the paper available on the commission’s website to stimulate thinking by respondents around the rights identified in addition to providing stakeholders with the Commission’s position on the progressive realisation of economic and social rights.¹⁵⁴ After written submissions were received, the Commission invited a sample of the respondents to make oral submissions at the public hearings.¹⁵⁵

¹⁴⁹ Among the role players included Banks, Courts, Sheriffs, SAPS, Estate Agents and the Government. See SAHRC Report on the Public Hearing on Housing, Evictions and Repossessions 34-41.

¹⁵⁰ See SAHRC Report on the Public Hearing on Housing, Evictions and Repossessions 43-47.

¹⁵¹ SAHRC The 7th Economic and Social Rights Report: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa v.

¹⁵² Housing, health care, food, water, social security, education and the environment.

¹⁵³ SAHRC MDGs and the Realisation of Economic and Social Rights in South Africa: A Review (2008)

<http://www.sahrc.org.za/home/21/files/1/ESR%20Working%20Paper%20for%20Public%20Hearings%202009.pdf> (accessed 11 February 2015).

¹⁵⁴ See SAHRC 7th Report on Economic and Social Rights 2006 - 2009 4

<http://www.sahrc.org.za/home/21/files/7th%20ESR%20chapter%201%20to%203.pdf> (accessed 11 February 2015).

¹⁵⁵ SAHRC 7th Report on Economic and Social Rights 2006 – 2009 5.

To accommodate different communities, the public hearings were held in three languages (English, Zulu and Sesotho) and translators provided for the participants over five days. In addition, the Commission held public hearings in June 2009 on the progressive realisation of the right to food. Government and civil society attended the hearings thus allowing for meaningful engagement between the SAHRC and these parties. The hearings revealed some of the weaknesses of government programmes meant to address hunger, such as the temporary and uncoordinated nature of feeding programmes, and poor coordination between government departments.¹⁵⁶ On its part, the SAHRC has done at a minimum what would be expected of it as an institution in terms of its mandate; other organs of state should also play their role in the overall realisation of SERs.

The use of public hearings has opened avenues for the Commission to collaborate actively with other human rights stakeholders within South Africa, especially NGOs. Collaborative efforts with NGOs are important in the overall promotion and protection of SERs. The realisation that the state and its organs on their own cannot promote and protect human rights means that NGO's and other institutions can readily assist in filling the gaps that exist. The SAHRC has actively engaged with the NGO's and even collaborated on several agenda setting ventures such as the poverty hearings which were public hearings specifically tailored to gather information on the poverty situation in the republic.

The poverty hearings were ground breaking as they sought to obtain information on the state of SERs in the country a few years into constitutional democracy. To show their importance, these hearings been referred to in some quarters as the socio-economic rights version of the truth and reconciliation process that took place in the country to hear of the civil and political rights violations carried out during the Apartheid regime.¹⁵⁷ This comparison is not far-fetched because the public hearings have been equally meaningful in a number of ways; firstly, they have brought the

¹⁵⁶ SAHRC Right to Food Concept Paper 7-8. [http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20(2).pdf) (accessed 11 February 2015).

¹⁵⁷ See SANGOCO's Report on Poverty and Human Rights (1998) 4 <http://www.sahrc.org.za/home/21/files/Reports/ESR%20Sangogo%20Report%20on%20Poverty%20and%20Human%20Rights1997-1998.pdf> (accessed 4 February 2015).

Commission closer to the people thus making it a visible institution to which individual can turn to fight for the rights. Additionally, the hearings have provided an opportunity for the SAHRC to collect comprehensive information on the measures put in place to realise human rights and where there have been, the different challenges plaguing the enjoyment of rights in the country from the different participants in the public hearings.

The information gathered during such hearings is crucial for the implementation of policies necessary for the realisation of rights. McClain has noted the importance of these hearings as a means for the poor and marginalized to get their complaints about deprivation of SERs heard and acted upon where this would not ordinarily be possible through the normal complaints channels.¹⁵⁸ On her part, Liebenberg posits that public hearings allow dialogue to take place between all SERs stakeholders thus allowing for specific measures to be put in place to realise these rights.¹⁵⁹ Given the benefits of public hearings in South Africa, the KNCHR should consider holding such hearings for SERs. Already the KNCHR has shown a willing to make use of Public hearings to determine the state of insecurity in the country.¹⁶⁰ Taking lessons from the SAHRC, the KNCHR should consider the need to involve organs of state, local communities, civil society and academics in a bid to come up with recommendations that can be acted upon to lead to better realisation of human rights.¹⁶¹

Over the years, the SAHRC has slowed down in making use of public hearings as a means of gathering information on SERs. The frequency and magnitude of public hearings on SERs have reduced and by extension lessened the SAHRC's visibility and reputation as the champion of public participation. Although not immediately clear why the Commission has reduced its reliance on public hearings as a means of executing its mandate, a few reasons can explain this. This could be attributed to a

¹⁵⁸ CV McClain "The South African Human Rights Commission and Socio-Economic Rights: Facing the Challenges" (2002) 3 *ESR Review* 8.

¹⁵⁹ S Liebenberg "The South African Human Rights Commission releases its fourth annual Economic Social Rights Report" (2003) 4 *ESR Review* 15-16.

¹⁶⁰ KNCHR Press Statement on the Public Inquiry on Insecurity in the Coast Region and its Impact on the Enjoyment of Human Rights and Freedoms <http://www.knchr.org/Portals/0/PressStatements/Press%20Statement%20Media%20Coast%20Public%20Inquiry.pdf?ver=2016-10-25-105321-487> (accessed 25 October 2016).

¹⁶¹ See Recommendation 6.3.3.

change in strategy in the various strategic plans of the Commission, challenges (financial and others) in organising public hearings and fewer cases of human rights concerns that would have necessitated the utilisation of public hearings.¹⁶² Nonetheless, public hearings remain a useful tool for carrying out its mandate especially concerning SERs.

5.6.2 Thematic work on specific SERs

From time to time, the Commission engages on programmes related to specific rights, which they refer to as thematic work. The Commission identifies a theme or strategic focus area annually. These annual themes are arrived at after taking into consideration: the nature of complaints being received (using trends analysis reports); topical issues of national concern and provincial demographics, such as language.¹⁶³

Thus, the SAHRC has focused on rights such as the rights to food and water that speak to most of vulnerable South Africans who have no had access to these rights/services. The choice of which right to focus on has been informed by developments that have drawn the attention to issues that touch on the SAHRC mandate. For instance, the decision to focus on the right to food in 2014 was informed by the tragic death of four siblings because of lack of food in one of the provinces in the country coupled with numerous complaints received by the Commission about the widespread non-enjoyment of this right.¹⁶⁴ The decision to focus on the right to water and by extension sanitation was also motivated by the unfortunate death of a school-going child, while using a pit latrine at school.¹⁶⁵

¹⁶² See SAHRC Strategic Plan 2014 – 2017 and Annual Performance Plan 2014/2015 12-13. SAHRC Strategic Plan 2015 – 2020 16-18.

¹⁶³ See Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21: Para 13.7 <https://pmg.org.za/taled-committee-report/2394/> (accessed 6 September 2016).

¹⁶⁴ SAHRC Concept Paper on The Strategic Focus Area; The Right to Food 6-7 [http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20(2).pdf) (accessed 25 March 2015).

¹⁶⁵ See Foreword of SAHRC Chairperson Advocate Mushwana in the Commission's 2014 Annual Report. See South African Human Rights Commission Annual Report 2014 2–3 http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf (accessed 3 March 2015).

In dealing with these rights, the Commission engaged in campaigns in all the provinces to sensitise the public and organs of state on the nature and content of these rights. During the 2014/2015 reporting period, the Commission chose “Business and Human Rights” as its annual theme. The SAHRC set up programmes to understand the impacts of business on the enjoyment of human rights in South Africa. These programmes included round-table discussions in each of the provincial offices to ‘establish common understanding of the United Nations guidelines for business and human rights.’¹⁶⁶

The SERs are many and not equally enjoyed across the country; however, there are certain rights that are not widely enjoyed compared to others that would call for immediate attention while others would have to wait. This is the reality that NHRIs must deal with in carrying out their mandates, choosing which rights to focus on because given their funding and the socio-economic situation at the time, it is not possible to focus on all the rights. At the same time, focusing on a single right at a time allows the Commission to gather enough information that reflects a true picture of the level of enjoyment of that right thus being able to offer recommendations that can be acted upon. Additionally, it might prove prudent to focus on the enjoyment of a particular right within a specific community considering issues such as the frequency of complaints, severity of deprivation of a particular right, among others.

The KNCHR plans to focus on specific SERs in its strategic plan¹⁶⁷ and would benefit from the experience of the SAHRC on what to consider before focusing on a specific right.

5.6.3 Litigation

In terms of Section 13 (3) (b) of the SAHRC Act, the SAHRC is competent to institute proceedings in court or a competent tribunal in its own name, or on behalf of a person or group of persons. It is with this power that the SAHRC has been involved in a few landmark socio-economic rights court proceedings as a party or *amicus curiae*. In matter of *Government of Republic of South Africa v Grootboom*, the

¹⁶⁶ SAHRC Annual Report 2015 28.

¹⁶⁷ See discussion in 4.4.1.

SAHRC with the Community Law Centre made extensive submissions as *amici curiae* on several SERs. At the end of the case dealing with the right to access to adequate housing, the SAHRC was appointed by the Constitutional Court to monitor and report on efforts made by the state to comply with its right to adequate housing obligations as ruled by the court.¹⁶⁸ This appointment by the courts was in recognition of the Commission's mandate to monitor the implementation of SERs as established in section 183(4) of the Constitution. Moreover, it illustrated one of the ways in which the SAHRC can complement the role of the judiciary by monitoring and reporting back on the progress made towards compliance with court orders.

The SAHRC thus made site visits to the Grootboom community and held meetings with officials of the local administration and the provincial administration after which it compiled a report on the progress made by the respondents as directed by the court.¹⁶⁹ It is however disappointing that the Constitutional Court did not respond to the report filed by the SAHRC, thus letting go of a chance to ensure full compliance with the court's order to the benefit of the Grootboom community.¹⁷⁰ Given the SAHRC's mandate, the direction by the court to monitor the progress of housing rights by the government is not far removed from its mandate and area of expertise. The submissions made to court were also instructive in the court getting a different approach to how the SERs in the Constitution could be interpreted and the obligations of the state over the rights.

The SAHRC was also involved in the case of *Bhe and Others v Khayelitsha Magistrate and Others*¹⁷¹ dealing with the constitutionality of section 23 of the Black Administration Act¹⁷² that was found to discriminate unfairly against women inheriting. The involvement of the SAHRC was in the public interest as the effect of the Act was deny equality to many women married under customary law.¹⁷³ The

¹⁶⁸ *Government of the Republic of South Africa & Others v Grootboom* 2000 (11) BCLR 1169. (CC) para 97.

¹⁶⁹ Letter from SAHRC addressed to the Constitutional Court in the matter of *Government of South Africa and Others v Grootboom and Others*, 14 November 2001.

¹⁷⁰ See K Pillay "Implementation of Grootboom: Implications for the enforcement of socio-economic Rights" (2002) 6 *Law, Development and Democracy* 273-274.

¹⁷¹ 2005 (1) SA 580 (CC).

¹⁷² Black Administration Act 38 of 1927.

¹⁷³ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) Para 29-31.

SAHRC has recorded its participation in other cases dealing with discrimination¹⁷⁴ and the right to housing¹⁷⁵ in its Annual Reports.

It should be noted that the SAHRC has sought to use litigation as a last resort and instead has pursued alternative dispute resolution (ADR) methods to deal with the complaints it has received on matters dealing with SERs. It seems to have chosen to take part in litigation where it has felt that its involvement would add value especially if it were to appear as a friend of the court. This was the case in the matter of *Minister of Health v Treatment Action Campaign (TAC)*¹⁷⁶ where the government's proposal on the rolling out of *nevirapine* was contested in court. At the start of the case, the SAHRC was involved but later withdrew from the case after it was decided that its involvement would not add any value to the hearing.¹⁷⁷ Considering the costly nature of constitutional litigation, this approach cannot be faulted but at the same time, the SAHRC should be ready and willing to approach the courts for the enforcement of SERs if there is need for it to do so. In my view, it would be desirable if the SAHRC was involved in more constitutional cases with socio-economic rights implications as *amicus curiae* or as an interested party. This is something the SAHRC has recently undertaken in a case dealing with the delivery of school textbooks to learners and the unconstitutional detention of immigrants at the Lindela Repatriation Centre.¹⁷⁸ Involvement in litigation in this way has enabled the Commission to provide relevant information to the courts and bring to the fore the plight of those whose SERs have been affected. At the same time, it would mean that the SAHRC is at the forefront of SER litigation in the country thus shaping the interpretation of the state's obligations where these rights are involved.

¹⁷⁴ SAHRC Annual Report 2004/2005 25.

¹⁷⁵ See SAHRC Annual Report 2006/2007 41.

¹⁷⁶ 2002 (5) SA 703; 2002 (10) BCLR 1075.

¹⁷⁷ See J Matlou "HRC shifts focus under new leadership" *Mail and Guardian* 12 October 2012 <http://mg.co.za/article/2002-10-12-hrc-shifts-focus-under-new-leadership> (accessed 15 May 2015).

¹⁷⁸ *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* 2014 (11) BCLR 1352 (GJ). See also SAHRC Strategic Plan 2015-2020 15.

The Courts in South Africa continue to issue structural interdicts, which have meant that courts have had to exercise supervision over some of its orders.¹⁷⁹ Where such orders are made against organs of state the SAHRC as an independent institution can take up the role of supervising the implementation of these court decisions and reporting to the courts. This would ensure honest implementation of court decisions. This would also not be outside its monitoring mandate where the Commission has considerable experience having been involved in supervising the court's judgment *Grootboom*.

Thus, the KNCHR can learn from the SAHRC's involvement in the above-mentioned cases. That as an NHRI, the KNCHR should seek to be involved in matters dealing with human rights. I would argue that NHRI's should be at the forefront of all if not most human rights litigation as either an interested party or *amicus curiae*. Where this is not possible, it should seek other ways of being involved such as offering advice to litigants or keeping a close eye on human rights litigation and supervising state organs' compliance with judicial decisions on SERs.

5.6.4 Complaints handling

The SAHRC is empowered to receive complaints in terms of section 13(3) of the SAHRC Act. The SAHRC, unlike the KNCHR, has an elaborate complaint handling procedure that is captured in the Complaints Handling Manual published in the Government Gazette and available on its website.¹⁸⁰ The Commission receives complaints from individuals, individuals acting on behalf of others, in the interest of a group, in public interest or an association acting in the interest of its members. This is in keeping with the provisions of section 38 of the Constitution that accords standing to a wide range of people. It has also strived to make the complaints lodging process as simple and speedy as possible by accepting complaints in all the 11 official SA languages. This would be a tall order for the KNCHR given the number of languages spoken in the country, which stands at over 30. Nonetheless, just like

¹⁷⁹ See for instance the ruling in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC).

¹⁸⁰ SAHRC Complaints Handling Procedures <http://www.sahrc.org.za/home/21/files/Revised%20Complaints%20Handling%20Procedures%20of%20the%20SAHRC%20240212.pdf> (accessed 17 February 2015).

the KNCHR, the SAHRC accepts complaints in different forms including, phone calls, e-mail, fax, walk ins and referrals from other chapter nine institutions. Furthermore, those able to can file a complaint online using the online complaint registration interface.¹⁸¹

The availability of different complaints reporting avenues makes it possible for the Commission to accept as many complaints are possible. However, methods such as phone calls, e-mails or faxes or even to travelling to SAHRC offices to lodge complaints might prove to be out of the reach of the rural poor members of society. It is therefore crucial that the Commission looks for ways to be accessible to everyone. The SAHRC seems proud of its success in resolving the complaints received (the SAHRC exceeded its 85% resolution target set in the 2013/2014 year)¹⁸², but more should be done to make the Commission accessible to ordinary people while at the same time quickly resolving the complaints to avoid backlogs. It is noteworthy that the SAHRC directs its staff to resolve complaints as soon as possible and has in place strict timelines that ought to be followed when dealing with complaints.¹⁸³ Although this is good on paper, in reality some complaints have taken long to resolve leaving complainants disappointed with the Commission.

The process starts off with the SAHRC receiving a complaint, which should be reduced to writing, through any of its offices which should have a complaint about the violation of a fundamental right.¹⁸⁴ The complaint can be made by any person on their behalf or on behalf of others, a replication of the standing rights in section 38 of the Constitution. The complainant should identify themselves and give contact details to enable communication.¹⁸⁵ The SAHRC should ensure the confidentiality of the complainant when this is requested. Once a complaint has been filed, an acknowledgement receipt with a reference number is issued to the complainant and

¹⁸¹ This is available on the SAHRC's website <http://www.sahrc.org.za>

¹⁸² See SAHRC Annual Report 2015 33
<http://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202015.pdf> (accessed 14 March 2016).

¹⁸³ See SAHRC Complaints Handling Procedures.

¹⁸⁴ Details of the place, date, and time the violation took place and any other details including but not limited to particulars of persons, names and addresses, and any other relevant information.

¹⁸⁵ Sections 6 and 7 of the Complaints Handling Procedures

the matter forwarded to the Provincial Manager for assessment.¹⁸⁶ At the assessment stage the Provincial Manager decides whether the complaint warrants further investigation with strict adherence to the timelines (set at 7 days). If accepted the Provincial Manager must appoint someone to investigate the complaint.¹⁸⁷ Investigations ought to lead to the quick resolution of the complaint which can take many forms including negotiation, conciliation, mediation, hearing, or litigation processes.¹⁸⁸

Among the notable complaints heard and resolved involving SERs was the *Makhaza Finding*. In this matter, the SAHRC received a complaint alleging that the installation of open toilets in the Makhaza area was a violation of the rights to dignity and privacy of the affected community members.¹⁸⁹ The Commission also considered other rights violated that included the rights to adequate housing,¹⁹⁰ health, food and water.¹⁹¹ Based on the frequency and magnitude of complaints received, the SAHRC has been alerted to serious human rights concerns that have necessitated further action. An example is the case of numerous complaints about access to the right to basic education in 2006, which spurred the Commission to hold a public hearing on the right to education – with the resultant findings, published in a document titled “Report of the Public Hearing on the Right to Basic Education.”¹⁹² In handling these complaints, the Commission used a number of ways to resolve them including research, ADR, referral to relevant institutions depending on the circumstances with a very high success rate.¹⁹³

The Commission has also published a Trends Analysis of its complaints as a means of better understanding the SAHRC’s impact on society. According to the

¹⁸⁶ Section 12 Complaints Handling Procedures

¹⁸⁷ Section 13 Complaints Handling Procedures.

¹⁸⁸ See chapter 6, Complaints Handling Procedures.

¹⁸⁹ African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza residents and City of Cape Town South African Human Rights Commission Report Case Reference no WC/2010/0029 <http://www.sahrc.org.za/home/21/files/Makhaza%20Finding%202010.pdf> (accessed 15 May 2015).

¹⁹⁰ Section 26 Constitution of the Republic of South Africa, 1996.

¹⁹¹ Section 27 Constitution of the Republic of South Africa, 1996.

¹⁹² SAHRC Report of the Public Hearing on the Right to Basic Education 2006.

¹⁹³ For instance, in 2013-2014 the Commission had a 93% completion rate of the complaints received, translating to 8,550 cases finalised out of 9,217 that were received. See SAHRC 2013/2014 Annual Report 18.

Commission “Analysing these complaints through statistics provides one means to ensure that the Commission adopts a more targeted approach in addressing these complaints, thus ensuring that victims of rights violations obtain access to remedial mechanisms provided for in the Constitution, both in terms of form and substance.”¹⁹⁴ Complaints have been analysed in terms of group of rights, gender and origin among others. For example in the Trends Analysis report the Western Cape and Gauteng Provinces emerged with the most complaints whereas, the statistics indicated that complaints relating to the rights to Equality, Labour, Just Administrative Action, and Arrested, Detained and Accused Persons, continue to occur in the Commission's “Top 5.”¹⁹⁵ The disaggregation of complaints statistics thus enables the Commission to respond accordingly and where necessary refer matters out of its jurisdiction to the appropriate authorities. In other instances, it has been used as a measure of the impact the Commission has had where increased complaints in some areas or rights have been attributed to the work of the Commission.¹⁹⁶

The SAHRC like the KNCHR has engaged in an analysis of complaints to get a better picture of human rights in the country. In 2012, due to the increased number of complaints associated with provincial legislatures and municipalities, the Commission decided to promote greater engagement with these institutions given their involvement in the fulfilment of human rights.¹⁹⁷ Engagement with all levels of government is important for the realisation of human rights and the KNCHR should consider making similar engagements with county governments after an analysis of human rights complaints based on county origin.

5.6.5 Economic and Social Reports (ESR Reports)

Section 184 (3) of the Constitution gives the SAHRC a specific mandate to monitor the rights to housing, health care, food, water, social security, education and the environment (referred to as socio-economic rights).¹⁹⁸ This is by way of obtaining

¹⁹⁴ SAHRC Trends Analysis Report 5.

¹⁹⁵ SAHRC Trends Analysis Report 5-6.

¹⁹⁶ See SAHRC Trends Analysis Report 20-21.

¹⁹⁷ See SAHRC Annual Report 2012 34.

¹⁹⁸ Section 184 (3) reads “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards

information from organs of state on what they have done to promote, protect and realise these rights. Such monitoring of SERs is notable for several reasons considering the poverty and inequality situation highlighted earlier in the chapter. Firstly, it is to measure the government's progress in fulfilling its SER obligations. This process has been likened to the ICESCR reporting procedure that calls upon states to report on its implementation of SERs in the treaty.¹⁹⁹ Secondly, such information is useful to the Commission, parliament, civil society among others as a measure of government's understanding of its human rights obligations. Lastly, it provides an opportunity to advise and recommend to the government areas that need immediate attention together with areas that could use improvement in the fulfilment of SERs for the benefit of those deprived of these rights.²⁰⁰ The SAHRC has published nine ESR reports so far and thus has considerable experience when it comes to monitoring SERs and some of the challenges when carrying out this mandate when compared to the KNCHR. This section thus takes a broad look at these reports to identify the approach, methods used and challenges faced in the monitoring of SERs.

The publication of the first ESR Report by the SAHRC in 1998 marked the start of a process that has evolved. At the time of compiling the report, the Commission did not have an equivalent domestic reporting procedure from which it could draw lessons on how to put together such a report. Therefore, the Commission had to come up with a way to monitor the progress of SERs in the country. The development of the process itself took some time. The Commission's methodology and capacity in compiling the first two reports was criticised by members of the academy/civil society as being inadequate. For instance, the Commission was viewed as engaging in an information collecting exercise without giving an evaluation of the state's fulfilment of its human rights obligations.²⁰¹ This criticism though valid does not take into

the realisation of the rights in the Bill of rights, concerning housing, health care, food, water, social security, education and the environment."

¹⁹⁹ C Heyns "Taking socio-economic rights seriously: The 'reporting procedure' and the role of South African Human Rights Commission in terms of the new constitution" (1999) 30 *De Jure* 195 at 207.

²⁰⁰ See S Liebenberg "The protection of economic and social rights in domestic legal systems" in A Eide *et al* (eds) *Economic, Social and Cultural Rights* (2001) 53 at 83.

²⁰¹ D Brand "Assessing the South African Human Rights Commission's assessment of socio-economic rights implementation: the first Economic and Social Rights Report" http://www.chr.up.ac.za/chr_old/centre_projects/socio/research.html (accessed 15 May 2015).

consideration the fact that the SAHRC was still establishing a system of monitoring human rights, a process that would have some weaknesses. Still, it is reassuring that from the outset the Commission sought to engage with organs of state to obtain crucial information on the progress made in making the SERs in the South African Constitution a reality. It is submitted that this approach is advantageous as it allowed for meaningful engagement between the SAHRC and most organs of State, which like the Commission were also coming to terms with what role they were expected to play in terms of section 184(3).

Given South Africa's system of government, which has a three-tier system of government (the national, provincial and local government levels); it has not always been easy to determine what organs of state to request information from for purposes of monitoring SERs.²⁰² This is compounded by the fact that all three levels of government share the responsibility to fulfil the SERs enshrined in the Constitution as laid out in schedules four and five.²⁰³ For example, housing, basic education and health services are functional areas of concurrent national and provincial legislative competence with municipalities being allocated some of the functions in schedule 4 and 5 as may be appropriate.²⁰⁴ Some of the functions given to municipalities that speak to SERS include the provision of clean water and proper sanitation. This being the case, the progress made in fulfilment of these functions at the various levels of government and different municipalities is not always the same.

A plain reading of section 184(3) of the Constitution, suggests that the information from the organs of state must be requested by the SAHRC and is not required to be automatically submitted by the organs of state. However, at the same time section 181 (3) the Constitution calls upon organs of state to support the work of the SAHRC

²⁰² See Section 239 of the Constitution which defines an organ of state as:

- (a) Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution -
 - (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) Exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer."

²⁰³ Schedule 4 deals with the Functional Areas of Concurrent National and Provincial Legislative Competence while Schedule 5 deals with the Functional Areas of Exclusive Provincial Legislative Competence

²⁰⁴ See Sections 156 (1) and 156 (4) Constitution of RSA, 1996.

and it is argued this would include furnishing the SAHRC with information requested in protocols. It is submitted, better co-operation by organs of state and the monitoring of SERs would be made less complicated if section 184(3) placed a mandatory requirement on organs of state to furnish the SAHRC with such information. This assertion is made based on the challenges the SAHRC has faced in obtaining information from organs of state on the implementation of SERs. In some instances, the SAHRC has had to utilise its subpoena powers to get information from uncooperative organs of state.²⁰⁵ Failure to provide information by organs of state has meant that the Commission has compiled ESR reports without having all the relevant information thus bringing into doubt the accuracy of the reports as a fair assessment of the human rights situation in the republic.²⁰⁶

In its first report, the Commission identified organs of state to include national departments that are relevant to the listed SERs in section 184(3), all provincial governments and the South African Local Government Association (SALGA).²⁰⁷ It was necessary to determine organs of state with human rights obligations, which then enabled the Commission to gather information from them on what they had done to realise SERs. The information obtained from institutions of state by the Commission while compiling the ESR reports should be looked at as “part of the Commission’s continuing efforts and contribution to a meaningful realisation of economic and social rights in South Africa.”²⁰⁸

The process of obtaining information for the compilation of ESR reports starts with the drawing up protocols. Protocols are questionnaires prepared by the SAHRC on each of the socio-economic rights identified in section 184(3) of the Constitution and sent to relevant organs of state at the national, provincial and local spheres of government. The SAHRC has strived to make the protocols easy to respond to by providing an explanatory memorandum to guide organs of state in providing answers

²⁰⁵ More on this discussed further below in 5.7.2. See also Newman “Institutional monitoring of social and economic rights: A South African case study and a new research agenda” (2003) 19 *South African Journal on Human Rights* 189 at 195.

²⁰⁶ Implicit in the SAHRC’s on admission on the challenges it has faced in compiling ESR Reports.

²⁰⁷ See K Pillay “An Interpretation of ‘relevant organs of state’ in section 184 (3) of the Constitution and their duty to provide information on socio-economic rights to the South African Human Rights Commission” (1998) *Law, Democracy and Development* 179 at 181.

²⁰⁸ See SAHRC Second ESR Report Executive Summary.

to questions asked. At the onset of the monitoring system in 1995 the SAHRC benefited from the help of NGOs and academics²⁰⁹ in coming up with the protocols²¹⁰ as the task of domestically monitoring SERs was then novel. Some of the questions in a protocol sent to the Department of Social Welfare included:²¹¹

- a) What does your department understand it is obliged to do to (a) respect, (b) protect (c) promote: and (d) fulfil the social security rights in section 27 of the Constitution and the right of children to social services in section 28?
- b) What is your department's official interpretation of the words "access to" in section 27?
- c) What is your department's official interpretation of the words "social security"?
- d) What is your department's official interpretation of the words "unable to support themselves"?
- e) What is your department's official interpretation of the words "appropriate social assistance"?
- f) What is your department's official interpretation of the words "progressive realisation of (this) right"?
- g) What is your department's official interpretation of the words "social services" in section 28?

From the above sample, it is evident that the questions are straightforward and explanatory memoranda normally accompany questionnaires. The explanatory memoranda were necessary as at the time, these rights were novel and many employees in the organs of state were not aware of them. In my view, this is still a concern for many government functionaries who do not think of monitoring in terms of human rights. The idea behind the explanatory memorandum and straight forward questions is to enable organs of state to provide as much information as is necessary to allow to SAHRC to evaluate what each department has done to realise SERs.

²⁰⁹ The Community Law Centre of the University of the Western Cape; the Centre for Human Rights at the University of Pretoria [CHR] and the Community Centre for Social Enquiry [CASE].

²¹⁰ See J Kollapen "Monitoring Socio-Economic Rights. What has the South African Human Rights Commission Done?" (1999) 1 *ESR Review* 30 at 31.

²¹¹ SAHRC Economic & Social Rights Report Protocols Vol II 1997-1998 7-10 <http://www.sahrc.org.za/home/21/files/Reports/Economic%20and%20Social%20Rights%20Report%20Protocols%20VII.pdf> (accessed 15 May 2015). See also SAHRC 8th ESR Report (2011) 20 <http://www.sahrc.org.za/home/21/files/Section%20184%283%29%20Report.pdf> (accessed 15 May 2016).

The protocols cover questions on policy, legislation, budget, monitoring and outcome measures that were instituted by state organs during the applicable reporting cycle (which in practice has always been April to March and covering the government's financial year).²¹² Each right, as listed in section 184(3), has its own protocol, which includes questions on measures that were instituted towards the realisation of economic and social rights for socially and economically vulnerable groups. The protocols also require any additional information that is not covered by the protocols but pertinent to the realisation of economic and social rights.²¹³ The information obtained from the protocols is then analysed by the Commission to assess the department's efforts in meeting its obligations in terms of section 7(2) and where applicable section 26(2) and 27(2) of the Constitution. Moreover, it has sought to establish the reasonableness of measures taken to ensure the realisation of these rights, as underlined by the Constitution Court.²¹⁴ The SAHRC has also made use of applicable international human rights standards especially the ICESCR and the General Comments of the CESCR on the different SERs under review to assess these measures. From the analyses of the protocols, the Commission then makes recommendations to the various departments on what can be done to improve the enjoyment of SERs.

Over the years, the SAHRC has fine-tuned the protocols to provide comprehensive information on policy, legislative, budgetary and other measures adopted by the organ of state during the reporting cycle toward realising SERs. For example, to independently verify information and make its reports current and accurate, the Commission introduced fieldwork to supplement information it receives from the organs of the State through protocols.²¹⁵ The Commission has also reduced the number of organs of state it seeks information from to include national and provincial departments responsible SERs. Where necessary the Commission has sent

²¹² The only break from this was during the fourth and fifth ESR reports, which covered two years as an attempt of the SAHRC to 'catch up'. See SAHRC 4th Economic and Social Rights Report 2002/2003 13.

²¹³ See SAHRC Second Economic and Social Rights Report 1998-199 Executive Summary 2. http://www.sahrc.org.za/home/21/files/Reports/2nd%20esr%20report%20executive_summary.pdf (25 May 2015).

²¹⁴ See SAHRC 7th Economic and Social Rights Report v.

²¹⁵ See SAHRC 9th Annual Report 9. http://www.sahrc.org.za/home/21/files/Reports/Annual%20Reports/9th%20Annual%20report%20SectionTwo2004_2005.pdf (accessed 6 September 2016).

protocols to other organs of state and institutions it has felt have a role to play in the realisation of SERs. For instance, during the compilation of the Fourth ESR Report, the SAHRC also sent out protocols to metropolitan councils and parastatals dealing with SERs, which were different from those sent to national and provincial governments. According to the SAHRC, “[t]he questions posed to Metros and Parastatals required information on their broad understanding of their Constitutional obligations in terms of section 7(2) and Schedules 4 and 5 of the Constitution respectively.”²¹⁶

The Commission has also developed the practice of building on its previous recommendations. It does this by asking the various state organs what has been done to address the recommendations made in the preceding ESR reports. Thus, it monitors what the various organs of state have done with the recommendations given to them in the preceding ESR Report. In the ninth ESR Report, the SAHRC noted that the Departments of Basic Education (DBE), Health (DHE) and Agriculture, Forestry and Fisheries (DAFF) did not respond to the Commission’s 2011-2012 ESR questionnaires.²¹⁷ Failure by these departments means that the report was not a true reflection of the human rights situation in the country. The response from organs of state has not always been satisfactory as will be discussed later under the challenges facing the SAHRC in the execution of its mandate.²¹⁸ What is crucial is that in providing information to the SAHRC for purposes of compiling ESR Reports, organs of state must take their tasks seriously while at the same time remaining aware of the provisions of the Constitution, especially the provisions of the bill of rights and the obligations it places on them. They should be aware of the extent of their legitimate authority in a constitutional democracy and the importance and relevance of the roles to be played by other institutions in the Constitution.²¹⁹

SERs monitoring has not been without its challenges especially non-cooperation by organs of state at the reporting and implementation stages, as expressed in several

²¹⁶ SAHRC 4th Economic and Social Rights Report 2002/2003 http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_1.pdf (accessed 25 May 2015).

²¹⁷ See SAHRC 9th ESR Report 19, 32 and 37.

²¹⁸ See discussion in 5.7.2 below.

²¹⁹ See D Feldman "Confrontation and Co-operation between Institutions in the Protection of Human Rights" in F Butler (ed) *Human Rights Protection: Methods and Effectiveness* (2002) 5.

reports published by the SAHRC.²²⁰ Additionally, there have been reservations about the whole process as conducted by the Commission and its utility. The process used to collate information raises a number of issues given the fact that unlike the International human rights monitoring system, alternative sources of information on human rights implementation are not utilised. NGOs and Academics, who would provide alternative information on the fulfilment of SERs by the government, do not participate. That the information comes from state departments has led to questions about the credibility of the whole section 184 (3) process accuracy and reliability of the information submitted.²²¹

The SAHRC has also not been consistent in the frequency of releasing the section 184 (3) reports. Whereas, at the start of the SAHRC mandate there was an effort to release the reports on an annual basis²²² as required by the Constitution, there has been a deviation from this without much explanation and in contravention of the supreme law.²²³ This would be suggestive of difficulties in compiling these reports on an annual basis. Whatever, the reasons, the failure to release the reports annually as required by the Constitution does not do much for the SAHRC as one of the institutions meant to promote accountability. It should lead by example when it comes to adhering to the Constitution.

Nonetheless, the Commission should be applauded for the work done in compiling these reports amidst the challenges faced. The SAHRC has taken constructive criticism and sought to better the monitoring process as evidenced in the evolving nature of the content of, and protocols used for the ESR reports. Thus, from a Commission seen as engaging in a compiling process, the SAHRC has developed the practice of using policy indicators and statistical data obtained from the organs of state and evaluating organs of state efforts to realise SERs. This seems to have

²²⁰ SAHRC 9th ESR Report 10, SAHRC 8th ESR Report 15-16, 21-22; SAHRC 4th Economic and Social Rights Report, SAHRC Second Economic and Social Rights Report. See discussion in 5.7.2 below.

²²¹ J Kollapen "Not only the business of the state but also a business of all: State Reporting in South Africa and Popular Participation" (2011) 15 *Law and Development* 414 at 522. D Brand "South African Human Rights Commission" (1998) 2 *Economic and Social Rights Review* 11. See also Klaaren 2005 *Human Rights Quarterly* 550.

²²² The first five reports were released on an annual basis.

²²³ The 6th and 7th reports were released after 3 years.

come because the Commission narrowed its field of inquiry in order to produce quality information, collaboration and maximising its available resources.²²⁴ The Commission has analysed the government's policies and measures and offered recommendations on how best to realise SERs.

In my view, despite the challenges the SAHRC faces in compiling the reports, the section 184(3) process remains crucial in tracking government's progress in realising SERs. It should be viewed as one of the most important ways of NHRIs fulfilling their SERs mandate that has far-reaching consequences such as providing an independent and authoritative assessment of the state's fulfilment of its human rights obligations. The SAHRC should seek ways to ensure compliance with its requests for information from state organs. As for its recommendations, the Commission should not be afraid to name and shame involved departments or where necessary use its subpoena powers or institute court action. Publicising information gathered through the monitoring process will allow interested stakeholders in the human rights arena to be aware of what the government is doing to realise SERs and seek to engage with organs of state and even the SAHRC on how to improve the realisation of human rights. Additionally, parliament must use these reports to hold the executive accountable for the measures they have put in place or where possible question cabinet ministers on their failure to furnish the Commission with information as stipulated by the Constitution.

5.6.6 Charter on Children's Basic Education Rights

The Charter on Children's Basic Education Rights²²⁵ was developed and launched at the end of 2012 after the failure of the Limpopo provincial department of education to deliver free textbooks to school-going children on time. The delivery of basic education is SA a functional area of concurrent national and provincial legislative competence meaning both spheres of government have a role to play in providing

²²⁴ D Brand *Assessing the South African Human Rights Commission's assessment of socio-economic rights implementation: the first Economic and Social Rights Report*. C Heyns "Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission in Terms of the New Constitution" (1999) 32 *De Jure* 195 at 210-223.

²²⁵ SAHRC Charter on Children's Basic Education Rights; The Right of Children to Basic Education 2012 http://www.unicef.org/southafrica/SAF_resources_childrightsbasiceduc.pdf (accessed 15 May 2015).

basic education.²²⁶ At the time the Charter was developed, a series of court cases spearheaded by the Legal Resources Centre (LRC) and Equal Education (EE) to enforce the right to basic education of a number of learners affected by inadequate teachers and suitable learning facilities in the Eastern Cape Province was also ongoing.²²⁷ The Charter thus was developed at a time when there were several challenges, across the country, affecting the enjoyment of the right to basic education. This I argue, is a strong indication of a Commission that seeks to be relevant by responding to matters affecting all those in South Africa by providing information that helps in providing solutions to such issues. It is also important to note that prior to the publication of the charter and while the textbook shortage was going on, the SAHRC played a significant role by investigating the cause of this shortage.²²⁸

The compilation of the Charter on Basic Education built on previous efforts by the SAHRC to promote the right to education such as the Public Hearing on the Right to Education that took place in 2006. The publication of the Charter 6 years after the Public Hearing on Education could also mean several things. Firstly, it points to the evolving nature of challenges that might plague the full enjoyment SERs protected in the Constitution. Secondly, it could be an indication of the DBE's inadequacy or unwillingness to implement the SAHRC's recommendations after the conclusion of the Public Hearing on the Right to Education. The Constitution is clear on the assistance that should be accorded to the SAHRC in carrying out its mandate. Whereas, the SAHRC has no powers to enforce its recommendations, I argue that in the spirit of promoting the rule of law and a genuine commitment to the achievement of SERs, the Executive should give reasons for not taking up the recommendations of the SAHRC and other chapter 9 institutions. Failure or unwillingness to act on the

²²⁶ See Schedule 4 Functional Areas of Concurrent National and Provincial Legislative Competence, Part A, Constitution of the Republic of South Africa, 1996.

²²⁷ Equal Education Basic Infrastructure for every School, Court papers <http://www.equaleducation.org.za/campaigns/minimum-norms-and-standards/court-papers> (accessed 15 May 2015); Legal Resources Centre Notice of Motion in the Matter of *Child Law Centre and others v Government of RSA and others* http://www.lrc.org.za/images/resources/mud_schools/pdf_downloads/founding_affidavit/Notice_of_Motion_pages_1-6a.pdf (accessed 15 May 2015).

²²⁸ See South African Human Rights Commission *Final Report of SAHRC Investigative Hearing Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide* <http://www.sahrc.org.za/home/21/files/Delivery%20of%20Learning%20Material%20Report%20Final.pdf> (accessed 3 March 2015).

recommendations of the SAHRC would be inimical to the realisation of the rights in the Constitution not to mention a violation of the obligations captured in the Constitution.

Could the failure to follow the SAHRC's recommendations be challenged in court given the Constitutional Court's judgment in *Economic Freedom Fighters v Speaker of the National Assembly*?²²⁹ After carrying out investigations involving the amount of money spent on security upgrades at the President's private home, the Public Protector recommended that the president pay a portion of the costs of the upgrade. The Public Protector's report was handed to the Office of the President and Parliament to facilitate compliance but her findings and recommendations were not acted upon. Instead, there were efforts to absolve the President through a ministerial task force and Ad Hoc Committees in parliament.²³⁰ The court held that the recommendations of the Public Protector are binding and that these should be fulfilled as soon as possible, and that they are only subject to judicial review.²³¹ In my view, this is a major win for the Public Protector and could be of significance to the SAHRC where it can convince the executive to implement its recommendations in upholding the Constitution.

Although not directly linked to the work of the SAHRC, the failure to deliver textbooks on time shows some of the teething problems that a devolved system of government faces in light of service delivery to the people, with poor co-ordination existing between the national and provincial government on some issues. Whereas the national government develops educational policies, the provincial governments implement these policies.²³² In this case, the policy on the distribution of textbooks was clear that the provinces oversaw textbooks delivery. However, the province of Limpopo faced several difficulties which meant that the students in the province did not have access to textbooks like their compatriots in other provinces. I contend that without proper co-ordination between the national and county government, the

²²⁹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC).

²³⁰ *Economic Freedom Fighters v Speaker of the National Assembly and Others* para 5-14.

²³¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others* paras 74-76,100, 105.

²³² See Department of Basic Education RSA Strategic Plan 2010-2013 6.

realisation of SERs (such as health and water which are devolved functions)²³³ in Kenya might face these challenges that might lead to different levels of access to rights that should be enjoyed by all.

Nonetheless, the Charter on Basic Education was ground breaking in the South African context as it provided comprehensive list of the government's obligations to ensure the realisation of the right to basic education.²³⁴ By the SAHRC's own admission, the Charter was meant to be used a monitoring framework on the progress made in the fulfilment of the right to basic education in the republic given the challenges faced in the provision of this right. While borrowing heavily from the international human rights law, the charter also took into consideration South Africa's unique circumstances thus allowing for the obligations set therein to be interpreted in a manner that considered all this.²³⁵ The Charter takes into consideration all the obligations the government should make the right to basic education achievable. It breaks down these obligations after an analysis of the constitutional, regional and international human rights instruments dealing with education together with the widely accepted interpretation of this right across the world (the 4As and CESCR's General Comment on Education).²³⁶

The Charter is indeed a step in the right direction towards the realisation of SERs and shows how organs of state dealing with these rights could benefit if such charters were made for each of the rights concerned. For instance, the DBE has adopted the Charter on Basic Education as the monitoring basis of its progress towards meeting its right to basic education obligations. NGOs involved in the field of education²³⁷ have lauded the publication of the Charter and expressed their intent on using it, in their work to promote access to the right to education.²³⁸ It is suggested

²³³ See discussion in chapter 3.

²³⁴ SAHRC Annual Report 2012/2013 9.

²³⁵ See SAHRC Charter on Children's Basic Education Rights 10-11.

²³⁶ See SAHRC *Charter on Children's Basic Education Rights* 11-12.

²³⁷ Equal Education (www.equaleducation.org.za), Legal Resources Centre (www.lrc.org.za) and Section 27 (www.section27.org.za) are examples of NGOs in South Africa involved in litigation the right to basic education.

²³⁸ See Bongani Nkosi "New SAHRC charter encourages the right to basic education" *Mail and Guardian* 31 January 2013 <http://mg.co.za/article/2013-01-31-south-african-human-rights-commissions-landmark-charter> (accessed 15 May 2015).

that the SAHRC should consider developing similar Charters for the other SERs in the SA Constitution.

5.6.7 Public awareness campaigns

As part of its mandate to create public awareness, the Commission has engaged in public awareness activities for two broad reasons. Firstly, to raise awareness on human rights issues and secondly, to make itself known to the South African public. This is important as it serves several purposes. First, activities conducted to raise awareness are likely to result in members of the public are made aware of their rights and obligations. Secondly, it gives the people an opportunity of knowing how the SAHRC can help them in claiming their constitutionally guaranteed human rights.²³⁹ In the same breath, it would allow the Commission to advertise itself and its role in society. The SAHRC has sought to achieve this by publishing in the 11 official languages and distributing a pamphlet entitled “What is the SAHRC?”²⁴⁰ The pamphlet contains useful information such as what the Commission does, contact details of the different offices and a brief description of human rights.

In its bid to create awareness on human rights issues through education, the SAHRC established the National Centre for Human Rights Education and Training (NACHRET) to provide accredited human rights education across the country. Unfortunately, this proved to be unsuccessful and the Centre was disbanded because of what has been described as a tedious accreditation process.²⁴¹ Given this failure, perhaps the best way to go for the SAHRC would be to collaborate with institutions of higher learning and NGOs to come up with relevant human rights education programmes. Despite the failure of the NACHRET, the SAHRC has made use of other public awareness raising avenues, especially conducting workshops on human rights issues with various stakeholders, seminars, roundtable discussions

²³⁹ See SAHRC What is the SAHRC?
http://www.sahrc.org.za/home/21/files/What%20is%20SAHRC_Eng.pdf%202012.pdf (accessed 15 May 2015).

²⁴⁰ What is the SAHRC?
http://www.sahrc.org.za/home/21/files/What%20is%20SAHRC_Eng.pdf%202012.pdf (accessed 6 September 2016).

²⁴¹ See SAHRC Critically Reflecting on an Institutional Journey 2002–2009 97
http://www.gov.za/sites/www.gov.za/files/critically_reflecting_report.pdf (accessed 24 March 2015).

and conferences.²⁴² It has also published and distributed pamphlets and posters on the right to water and sanitation, children's rights, human rights and disability, HIV and aids and a Fact Sheet on the right to food. It has also prepared "My Rights My Responsibilities", a booklet in Afrikaans and English.²⁴³

The SAHRC has strived to publish most of these posters and pamphlets in all the official 11 South African languages to make it possible for people to read and understand. Furthermore, it has sought to have human rights education included in the school curriculum to increase early awareness of these rights.²⁴⁴ Even though dissemination of reading materials on human rights is important, there reach is limited to those who can read meaning the SAHRC has also had to use media (radio, TV and social media) to raise public awareness. Commissioners and SAHRC employees have appeared on TV, given radio and other interviews on topical human rights issues across the country thus raising the Commission's profile and public awareness on different human rights issues.²⁴⁵ The SAHRC has been criticised for focusing most of its public awareness efforts in the urban areas at the expense of rural areas.²⁴⁶ This area will need improvement, with the SAHRC creating public awareness programmes focused on those living in rural areas.

The utilisation of different public awareness raising methods is to be applauded as different methods must be brought bear in efforts meant to fulfil the Commission's mandate. In creating a culture of human rights, the Commission has made use of different strategies mentioned above. It is argued that all the other activities discussed above include an element of creating public awareness through research and publication of information on human rights that is consumed by different stakeholders in the republic, which in turn should contribute to creating a culture of human rights. Compared to the SAHRC, the KNCHR has made use of similar public awareness methods used by the SAHRC with varying outcomes given the target

²⁴² See SAHRC Annual Report 2012 6-7, 31.

²⁴³ See SAHRC *My Rights My Responsibilities Rights, Responsibilities and the SAHRC English* <http://www.sahrc.org.za/home/21/files/Reports/My%20rights%20...%20Eng%20booklet.pdf> (accessed 15 May 2015).

²⁴⁴ See Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 178. See also SAHRC 11th Annual Report 2006/2007 29.

²⁴⁵ See SAHRC 9th Annual Report 2004 21-22. SAHRC 11th Annual Report 2006/2007 25.

²⁴⁶ See Report by the Ad Hoc Committee on the Review of Chapter 9 Institutions 177-178.

audience. However, it can use other methods such as translating its publications into other Kenyan languages for better understanding and hiring translators who can assist in communicating with inhabitants of rural areas.²⁴⁷

5.6.8 Submissions on legislation and policy

The SAHRC has made several submissions to draft legislation and policies that are likely to influence the realisation of human rights. Most of these policies and pieces of legislation have dealt with CPRs with a couple dealing with SERs. In 2011, some of the Commission's submissions to the National Assembly on the Basic Education Laws Amendment Bill were incorporated in the final Act.²⁴⁸ In 2015, the Commission made submissions to the DHET on the social inclusion policy framework,²⁴⁹ presented a report to the portfolio committee on social development,²⁵⁰ and made a presentation on South Africa's international and regional human rights obligations to the portfolio committee on Justice and Correctional Services.²⁵¹

It is not always that the submissions made by the SAHRC have been accepted and this is a challenge when it comes to infusing human rights principles in legislation and policy. This is not unique to the SAHRC submissions and suggests that those with legislative powers will only accept suggestions when it makes sense to them.²⁵² Ideally, legislators and policy makers should be loath to ignore the SAHRC's submissions as in most cases these submissions infuse human rights matters that are likely to be ignored during the legislative or policy formulation processes. The Commission has also sought to engage with provincial legislatures to advocate support of human rights based approaches through meetings with speakers of

²⁴⁷ See Recommendations in Chapter 6.

²⁴⁸ SAHRC 16th Annual Report 2012 34.

²⁴⁹ SAHRC Annual Report 2015 17. See also Draft Social Inclusion Policy Framework of the Department of Higher Education and Training for Public Comment August 2014 <http://www.dhet.gov.za/Gazette/Gazette%20no%2037928,Notice%20681%20of%202014,Department%20of%20Higher%20Education%20and%20Training.pdf> (accessed 6 February 2016).

²⁵⁰ Poverty traps and social exclusion among children in South Africa 2014 <http://www.sahrc.org.za/home/21/files/Poverty%20Traps%20Report.pdf> (accessed 6 February 2016).

²⁵¹ See SAHRC Annual Report 2015 17, 25-26.

²⁵² See discussion in section 4.3.7 on KNCHR Submissions to Parliament being ignored.

Northern Cape & Eastern Cape Provincial legislatures.²⁵³ On the part of the Commission, making submissions means they are aware of the expertise they can bring to bear in the legislative drafting process and as such should constantly monitor all new bills and policies to give their views on these.

5.6.9 Committees of experts

Section 11 of the SAHRC Act empowers the SAHRC to establish a committee of experts led by a Commissioner of the SAHRC to advise it on a human rights concern.²⁵⁴ According to the SAHRC's Annual Report 2015, Section 11 Committees are "mainly related to expert advisory roles and sharing of experiences to assist and advise the Commission in the development of strategies, implementation of actions, making recommendations, monitoring and evaluation to determine effectiveness and impact."²⁵⁵

Section 11 of the SAHRC Act puts at the SAHRC's disposal expert knowledge on important human rights that would otherwise not be available from within the Commission. To this end, the Commission has utilised expert committees in the following areas; business and human rights; right to health and health care; human rights, gender and macro-economic policy among other human rights concerns.²⁵⁶ Using such experts the SAHRC has been able to address issues that would come with having inadequate institutional capacity to deal with certain human rights matters. Moreover, the SAHRC has sought to include NGOs in this Committees thus allowing for collaborative efforts instead of competition given the similarity between the activities undertaken by the two institutions.²⁵⁷ Co-operation between NGOs and NHRIs is to be encouraged for the benefit of human rights promotion and protection.

The discussion will now focus on the challenges the SAHRC has faced in carrying out its SER mandate.

²⁵³ SAHRC Annual Report 2015 25-26.

²⁵⁴ This section is similar to section 5 of the replaced Human Rights Commission Act.

²⁵⁵ SAHRC Annual Report 2015 26.

²⁵⁶ SAHRC Annual Report 2015 26.

²⁵⁷ See Okafor "The South African Human Rights Commission: A Holistic Assessment" 168.

5.7 Challenges faced by the SAHRC

Over its 20-year history the SAHRC has faced many challenges and is likely to face more challenges in future with a growing population in the midst of a globalised world which means that the enjoyment of SERs is likely to be affected by a few things. These challenges are not unique to the SAHRC and mirror some of the challenges the KNCHR faces or is likely to face in fulfilling its mandate, are discussed below.

5.7.1 Funding challenges

Of the challenges observed, the first challenge to the effective functioning of the SAHRC has been inadequate funding from the government.²⁵⁸ This has impacted on the Commission's institutional performance and the realisation of intended outcomes leading to the shelving some of its programmes such as the filling vacant positions.²⁵⁹ It has thus led to a situation whereby not all rights are catered for equally with the SAHRC having to prioritise which rights to focus on at the expense of others. The effects of underfunding are far-reaching and curtail the optimum fulfilment of the Commission's plans. For example, in its 2013 Annual Report, the SAHRC noted that inadequate funding had hindered the Commission's ability to

- (a) Appoint 100% of the Secretariat required for the new organisational structure;
- (b) Thoroughly investigate matters, particularly in rural areas and districts that are located far from the Commission's provincial offices;
- (c) Effectively reach a wider audience through outreach programmes;
- (d) Harness technology to increase capacity and organisational performance; and
- (e) Improve accessibility to cater for the needs of people with disabilities.²⁶⁰

It is trite that financial independence is a key factor affecting the effectiveness of NHRIs, thus its inclusion in the Paris Principle and the emphasis by the SCA that this be upheld all the time.²⁶¹ Underfunding of the Commission is not a recent thing and

²⁵⁸ SAHRC Strategic Plan 2014–2017 and Annual Performance Plan 2014–2015 10.

²⁵⁹ See SAHRC *Annual Report 2011* 11
<http://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%20Programme%20Information.pdf> (accessed 26 January 2015). SAHRC Annual Report 2013 77
<http://www.sahrc.org.za/home/21/files/Annual%20Report%202012-13.pdf%20October.pdf> (accessed 26 January 2015).

²⁶⁰ South African Human Rights Commission Annual Report 2013 10
<http://www.sahrc.org.za/home/21/files/Annual%20Report%202012-13.pdf%20October.pdf> (accessed 26 January 2015).

²⁶¹ See discussion on financial independence in 2.4.2.

seems to have started when the Commission was first established in 1995. The Commission in its 2014 /2015 Strategic Plan noted this as follows

“...it should be noted that the Commission has historically been under-funded. The National Treasury in the 2013 Medium Term Expenditure Framework already indicated that there will be no increment to allocations during the next 3 year cycle despite the fact that the Commission’s baseline was never adequately provided for during its establishment in 1995.”²⁶²

A broad mandate that has increased over the years (new mandates introduced after promulgation of PAIA and PEPUDA) without a matching increase to its budget has curtailed the work of the Commission.²⁶³ A direct effect of inadequate funding is a limited reach for the SAHRC in urban areas.²⁶⁴ Concerning for the fulfilment of the Commission’s SERs mandate is the fact that most of the people in the rural areas are the ones who are unable to enjoy the SERs guaranteed in the Constitution. What this means then is that, most of the people in the rural areas endure the denial of their human rights without anyone to go to and if they are to do so, it is always after having walked a long distance. It is imperative that the SAHRC establish more offices closer to the people to enable them access help in claiming their human rights in general. Individuals with knowledge of the local language and human rights should staff such offices facilitate better communication and capturing of human rights concerns.²⁶⁵

The establishment of new offices and an increasing workload as more people become aware of their human rights would require sufficient financial resources to hire and retain staff.²⁶⁶ It would also enable the SAHRC to train and improve the skills of its employees thus enabling them to address SERs issues. In a society where government has limited resources, the SAHRC like the KNCHR has been forced to find alternative funding from donors, which on its own poses several

²⁶² SAHRC Strategic Plan 2014–2017 and Annual Performance Plan 2014–2015 <http://www.sahrc.org.za/home/21/files/SAHRC%20Strategic%20Plan%202014-17%20and%20APP%202014-15.pdf> (accessed 26 January 2015).

²⁶³ SAHRC 5th Annual Report 2000/2001 6. http://www.gov.za/sites/www.gov.za/files/sahrc_annual_report_2000_2001.pdf (accessed 6 February 2016).

²⁶⁴ See South African Human Rights Commission Strategic Plan 2014-2017 Annual Performance Plan 2014/2015 12 <http://www.sahrc.org.za/home/21/files/SAHRC%20Strategic%20Plan%202014-17%20and%20APP%202014-15.pdf> (accessed 19 February 2015).

²⁶⁵ See UN OHCHR *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions* (2005) 37-38.

²⁶⁶ See SAHRC 11th Annual Report 2006/2007 2.

challenges to the Commission's independence.²⁶⁷ The issue of funding has thus forced the Commission to engage in constant dialogue with parliament for increased funding.

Although not a challenge but linked to funding is the allocation of the SAHRC budget across its activities. A big percentage of the Commission's budget is spent on salaries leaving little to be used on human rights programmes. During the 2015/2016 budget vote, it was revealed that 64% of the budget was spent on personnel costs, 28% to corporate services thus leaving a meagre 8% of the total allocation to carry out the Commission's operational activities.²⁶⁸ This is not unique to the KNCHR, but seems to apply to the KNCHR as well whose biggest expenditure is on personnel costs.²⁶⁹ In my view, with increased funding from the legislature, this situation needs to change with a huge chunk of the budget going towards costs meant to fulfil the commission's mandates and not personnel costs. One way of remedying this is through increased funding to the Commission.

5.7.2 Poor cooperation from organs of state and the executive

The SAHRC has faced two challenges in compiling its ESR reports. These challenges are the unwillingness of the various state organs to provide information requested in a timely manner and secondly, the failure of the executive arm of the government to implement recommendations made by the SAHRC in these reports.²⁷⁰ These challenges have made it difficult for the Commission to fulfil its mandate in a manner that influences the lives of many who do not enjoy SERs. As revealed in several ESR reports, some organs of state have not always provided the information asked of them within the timeframes allocated. For example, during the 2009 monitoring period, the Eastern Cape, Northern Cape, Kwazulu Natal and the Free State provinces, failed to make submissions to the SAHRC-without giving reasons.²⁷¹ In compiling the 2012-2013 report, the Commission had to threaten legal

²⁶⁷ See SAHRC Strategic Plan 2014/2017 and Annual Performance Plan 2014/2015 10.

²⁶⁸ Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 21 13.10.

²⁶⁹ See discussion in 4.3.6 on the KNCHR's funding.

²⁷⁰ While appearing before parliament's portfolio Committee, it was noted that the government has failed to act on the recommendations of the SAHRC on issues such as xenophobia. See South African Human Rights Commission on its 2015/16 Annual Performance & Strategic Plans 8.

²⁷¹ SAHRC Economic and Social Rights Report 2012 15.

action against two departments (Social Development and Agriculture, Forestry and Fisheries) before getting any response to the protocols sent to them.²⁷²

In 2005/2006 period, numerous delays by organs of state to provide information as required impacted on the timeframes needed to compile the 6th ESR report,²⁷³ which instead of being released in 2003/2004 was only released in 2006. These delays have lessened the time the SAHRC has had to engage with the information obtained to provide an accurate account of the steps taken to realise SERs.²⁷⁴ In some instances, the information provided has been of such a poor quality as to offer no help to the Commission. The actions of some of these organs of state and the executive leaves a lot to be desired and goes against the spirit of the Constitution which calls on all organs to support the SAHRC in fulfilling its mandate.

Failure of organs of state to act on the SAHRC's recommendations in ESR reports, is another challenge. With no enforcement powers in the Act or Constitution, the implementation of SAHRC recommendations seems to rely on the goodwill of the organs of state and parliament. Given the provisions of the SAHRC Act and the Constitution that all organs of state should support the SAHRC in performing its functions, it is my view that the SAHRC and other chapter 9 institutions would benefit from the CC's interpretation on what should happen to the recommendations of these institutions.

5.7.3 Brief engagements with parliament

As much as the SAHRC has cordial working relations with parliament, the time it has been allocated to appear before some of parliament's committees has not been sufficient to fully discuss matters. What this has meant is that in most instances important matters have been glossed over and the true picture of important SERs matters not discussed before parliament.²⁷⁵ Closely linked to this challenge is the

²⁷² SAHRC Economic and Social Rights Report 2012-2013.

²⁷³ See SAHRC 10th Annual Report 8. http://www.sahrc.org.za/home/21/files/Reports/Annual%20Reports/10th%20Annual%20ReportProgramme%20Performance_Intro.pdf2005_2006.pdf (accessed 6 September 2016).

²⁷⁴ See SAHRC 10th Annual Report 8. SAHRC 11th Annual Report 9.

²⁷⁵ See comments of Mr Swart during SAHRC's appearance before the portfolio committee in South African Human Rights Commission on its 2015/16 Annual Performance & Strategic Plans 8.

poor dissemination of information between the SAHRC and the OISD under the speaker's office.²⁷⁶ This has resulted in a situation whereby reports submitted to the speaker's office have not been forwarded to MPs for perusal and in most instances leaves MPs under the impression that the SAHRC has not submitted its reports as required by law.²⁷⁷ The channels of communication between parliament and the SAHRC should be open at all times. Reports submitted to the office of the speaker should be forwarded to MPs as soon as possible to allow them to familiarise themselves with the contents of these reports to facilitate meaningful engagement between parliamentarians and the SAHRC. Moreover, enough time should be set aside for parliament and the Commission to discuss pressing human rights matters to come up with solutions such as increasing budget allocations to realise SERs. The SAHRC through the right channels should push for meetings with the portfolio committee on justice and where necessary request to address parliament on pressing human rights matters.

A different challenge faced by the Commission has been the failure of parliament to implement all the recommendations of the Ad Hoc Committee such as the merger of the CGE and the SAHRC, with no reasons being given meaning that the promotion and protection of human rights is affected with two or more bodies having overlapping mandates and not working closely.

5.7.4 The mandate problem

At its establishment, the SAHRC was to focus on the functions laid out in section 184 of the Constitution read together with the repealed HRC Act. However, with the promulgation of several pieces of legislation to give effect to the rights in the Constitution, the mandate of the SAHRC was expanded to include the supervision of the rights in PAIA and PEPUDA. These additional functions were conferred without the expected increase in its funding which meant that the Commission had to stretch its budget to cover them. This has affected the effectiveness of the SAHRC and its ability to focus on its mandate as originally contained in the Constitution.²⁷⁸ This state of affairs was recognised by the Ad Hoc Committee, which recommended that

²⁷⁶ SAHRC 2015/16 Annual Performance & Strategic Plans 8.

²⁷⁷ SAHRC 2015/16 Annual Performance & Strategic Plans 8.

²⁷⁸ See SAHRC Annual Report 2011 10.

the functions of the SAHRC in terms of PAIA be allocated to an independent office. This is yet to happen with plans to establish an information regulator having stalled somewhere between parliament and the executive.

Another 'mandate problem' is the fact that the existence of other chapter 9 institutions has created a situation whereby there is an overlap in mandates between the SAHRC, the CGE and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, touching on human rights issues. This has led to a waste of scarce resources with two or more institutions dealing with the same matter such as the issue of public education on gender related dimensions of realising human rights, which can be handled, by both the SAHRC and CGE. This was noted succinctly by the chairperson of the Ad Hoc Committee in his letter to the NA while submitting his report.

Arguably the most far-reaching and dramatic findings and recommendations of the Committee centre around the Committee's realisation that the proliferation of bodies promoting and protecting human rights diminishes, rather than enhances, the effectiveness of these bodies.²⁷⁹ In fact, one of the recommendations of the Ad Hoc Committee on the mandate of chapter nine institutions recommended the merging of the SAHRC with the CGE, as there was a great overlap in their mandate, which in turn would save on costs and lead to efficiency in terms of promoting and protecting human rights.²⁸⁰

It is argued, the merging of these institutions would result in more financial capabilities for the merged human rights body, which in turn would enable it to achieve its operational goals that would include its focus on SERs not to mention a greater reach in the country.

5.8 Conclusion

This chapter set out to look at the SAHRC with the intention of picking lessons that can benefit the KNCHR in fulfilling its SER mandates. Like the KNCHR, the SAHRC enjoys a wide mandate and has been accredited with A status. Of interest has been

²⁷⁹ Remarks by Professor Kader Asmal M.P., Chairperson of the Ad Hoc Committee at the launch of the *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated institutions* at the Good Hope Building, Parliament, on Tuesday, 21 August 2007 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/070821asmal.pdf> (accessed 15 May 2015).

²⁸⁰ *Report of Ad Hoc Committee on the Review of Chapter and Associated Institutions* 37-40; See also Remarks of Prof Kader Asmal at the launch of the Report of the ad hoc Committee 4.

the way it has sought to execute its SER mandate, which is explicitly provided for in the South African Constitution unlike the KNCHR's, which is implicit in the Kenyan Constitution. The poverty situation in South Africa is a cause of concern that the SAHRC has sought to address through the fulfilment of its mandate in various ways.

Amongst, the lessons the KNCHR can learn from the SAHRC include, making use of public hearings on SERs, monitoring the realisation of SERs, engaging in strategic litigation on these rights. The KNCHR should also strive for speedy resolution of complaints guided by a clear procedure that does not fall foul of the law. Most importantly, the SAHRC has contributed to the debates on the content and nature of SERs by conducting and publishing research on these rights that have been used as tools to assist the government and civil society in developing a critical understanding about these rights and their implementation. What is notable is that the Commission has made these positive strides while dealing with the challenges it has faced. The KNCHR is likely to face some of these challenges such as poor co-operation from organs of state when required to furnish information to the Commission during the monitoring process and how to deal with this.

The SAHRC has not shied away from stating the challenges it has faced when presented with an opportunity to do so, especially before parliament and in its reports. It has also taken criticism from NGOs, academics and others, in its stride, while maintaining its independence, and sought to better the different mechanisms it has deployed to fulfil its mandate. For this, the SAHRC must be commended as it has sought to remain a relevant institution by fulfilling its mandate.

The SAHRC's achievements and contribution to the achievement of the rights in the Constitution) that the Commission is a relevant institution within constitutional framework in South Africa, and a model institution that can influence similar institutions in other jurisdictions. Therefore, the lessons from the SAHRC can be instructive for the KNCHR on how to execute its SER mandate in the best way possible while learning from the missteps of the SAHRC. Some of these lessons, are discussed in greater detail in the next chapter.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The constitutional changes brought about by the 2010 Constitution of Kenya indicated a willingness to make human rights an integral part of the governance framework. To this end, several institutions such as the KNCHR were put in place to ensure that human rights are upheld. The context of this study is Kenya, with its main objective being to assess the role of the KNCHR in promoting, protecting and monitoring the entrenched SERs in the 2010 Kenyan Constitution and recommend ways in which this role can be strengthened. The research had the following additional objectives; (a) to highlight the challenges faced by the KNCHR in fulfilling its constitutional mandate of promoting and protecting human rights; (b) interrogate the sufficiency of the constitutional protection and judicial enforcement of SERs as a means of creating a culture of human rights in the country; and (c) to use the SAHRC as a case study on how to promote, protect and monitor SERs with the intention of getting lessons for the KNCHR.

Up to this point, the thesis has five chapters. Chapter One was a general introductory chapter that set out the problem statement, research questions, objectives of the study and methodology to be used in this research thus setting the background for the thesis.

From the chapters that followed (2-5) the following findings were made.

6.2 Research Findings

6.2.1 The Paris Principles provide minimum guidelines for the establishment of NHRIs

Chapter Two of the study dealt with NHRIs as significant institutions for the promotion and protection of human rights in the domestic sphere. In this chapter, the origin of this institution after World War II was traced, with the development and spread of NHRIs being spearheaded by the UN and a few European countries. The stand out period of NHRIs was in the 1990s with many states establishing these institutions, most after the 1993 Vienna Conference for various reasons using the Paris Principles as minimum guidelines. The thesis argued that as guidelines, the

Paris Principles have been criticised for many reasons but this did not mean they had lost their relevance. In fact, it argued that these criticisms failed to take into consideration the complexities involved in negotiating international agreements. Nevertheless, where the Paris Principles lacked, the ICC SCA had offered guidance through its concluding observations on how NHRIs could improve their effectiveness domestically. Whereas the idea behind the establishment of these institutions was to promote and protect human rights, the reality of the matter was different with most of them focussing on CPRs at the expense of SERs.¹ This was mostly because most NHRIs did not feel they had the power to deal with these rights as they were not protected domestically in constitutions or were specifically excluded from doing so with a limited mandate. With less attention being paid to SERs, NHRIs were encouraged by the UN CESCR and other bodies to focus on these rights in the same manner as they focused on CPRs taking into consideration their wide mandate. However, it was highlighted that NHRIs work in dealing with SERs was influenced by the human rights legal system in the domestic jurisdiction. This set the background for the research to focus on the provision of SERs in Kenya.

6.2.2 The constitutional entrenchment of SERs in Kenya provides an opportunity for the promotion, protection and monitoring of these rights

Chapter three dealt with the general protection and promotion of human rights in Kenya with a focus on SERs. The 2010 Constitution introduced major changes in the human rights dispensation of the country as it introduced a comprehensive bill of rights with the entire corpus of human rights, namely CPRs and SERs. The constitutional protection of SERs is a marked improvement from the independence constitution, which had a limited bill of rights. At the same time, the Constitution was found to be transformative in nature as it makes human rights and human dignity national values intended to guide the governance of the state. Despite the progress on paper through the entrenchment of these rights, there are high poverty and inequality levels in the country, which calls for the need to translate these human rights into reality. The best way to do this was through the deliberate focus on the promotion of SERs as they speak to daily necessities of life. To this end, this chapter discussed the human rights obligations on the state and all those within the state,

¹ See discussion in 2.8.

with the primary duty bearer being the state. With Kenya having a devolved system of government, county governments were slowly emerging as focal points for the delivery of basic services given their proximity to majority of Kenyans. What this means for most Kenyans is that they look up to county governments as their first port of call when it comes to service delivery in areas such as health, water and sanitation, and education among others. Quintessentially, as more services are devolved to counties it is imperative that the human rights dimension be infused into these devolved functions such as health, education, agriculture and the provision of water and sewerage services that speak towards the enjoyment of SERs. Thus, in terms of the Constitution and policies, both levels of government had a responsibility to observe, protect, promote and fulfil the SERs.²

The thesis also outlined the significance of the Vision 2030 blueprint in all aspects of development planning in the country. The implementation of Vision 2030, currently at its second stage, is bound to have ramifications for the enjoyment of SERs. Yet it was purely a development plan with little human rights considerations.³ All this notwithstanding, the second MTP drafted under Vision 2030 provided a development framework that is being infused with a human rights based approach through policies such as the health policy amongst others, as envisioned in the NAPA would lead to wider enjoyment of SERs in the country. At the time of writing the chapter, a national human rights policy had been approved by the National Assembly, albeit after a draft had been in existence since 2010. This meant the country has a coherent human rights policy to guide both levels of government. Crucially, the implementation of the National Action Plan on Human Rights was to be monitored by the KNCHR thus giving it central role in the realisation of human rights.

The chapter also discussed the judicial enforcement of SERs in the country. The revelation here was that despite the courts having dealt with a number of cases touching on these rights, they were yet to develop meaningful SERs jurisprudence in the country comparable to South Africa. At the same time, the courts approach to SERs litigation revealed several shortcomings that largely had to do with the

² See discussion in 3.3 on the Constitutional Protection of SERs in Kenya.

³ See discussion in 3.5.1 on the Kenya Vision 2030.

judiciary's limited exposure to these rights and other external factors. These challenges meant that the judicial enforcement of SERs alone would not guarantee the advancement and enjoyment of these rights by the many Kenyans afflicted by poverty. In fact, it was revealed that despite better access to courts in terms of rules of procedure, access to justice was still an expensive and time costly venture that curtailed the use of courts as an avenue for the vindication of these rights.⁴ There was thus a need for other institutions to complement the role of the judiciary by addressing human rights concerns through other means. Bearing in mind the role of NHRIs to promote and protect human rights, and given the leading role the KNCHR had been given in the NAPA, it became necessary to consider the KNCHR as one of the institutions to complement the judicial enforcement of human rights.

6.2.3 The KNCHR should promote, protect and monitor SERs in the country

Chapter Four dealt with the KNCHR. As a constitutional commission, the KNCHR is tasked to promote, protect and monitor human rights in the country. This role was important given the Commission's inclusion in the chapter dealing with human rights. The origins of the KNCHR to what it has become today were traced as this had an influence on the perception of the Commission and the public legitimacy it enjoys in the country. Moreover, it was evident that some of the challenges the KNCHR currently faced were not new but have been in existence since the days of the Standing Committee on Human Rights. An analysis of the legislative framework of the Commission revealed that it indeed complied with the minimum requirements of the Paris Principles. The Commission enjoyed a wide mandate to deal with human rights, had provisions in law to ensure its independence in all its forms (operational, functional and financial independence). Although the independence was guaranteed in law, several factors threatening the Commission's independence presented themselves. Firstly, failure to appoint all five Commissioners meant that the KNCHR was operating without the requisite number of Commissioners, which in turn meant that it could not function optimally.⁵ Whereas this had not led to its legitimacy being publicly questioned, it raised the apprehension that it would be difficult to deflect such claims if raised. Secondly, the Commission was not allocated the funds it had

⁴ See discussion in 3.4 on the limitations to the Judicial Enforcement of Socio-Economic Rights.

⁵ See discussion in 4.3.3 and 4.5.1.

requested based on its budget which in turn threatened its financial independence and greatly hindered its ability to fulfil its mandate. Nonetheless, it was evident that qualified Commissioners with experience in human rights matters necessary to lead the KNCHR initiatives hold office.

The Commission, it was revealed, recognised the need to promote SERs as part of its strategy. This was evident in the Commission's Strategic Plan 2013-2018 and the revised 2015-2018 that aimed to increase the country's understanding of these rights. Thus, guided by the strategic plan, the KNCHR has carried out a few projects to raise awareness of these rights as part of its mandate. The choice of projects undertaken was largely informed by the financial resources at the disposal of the Commission. Notable examples included the KNCHR's pilot study in the county government of Busia on how to promote the right to health in counties through the provision of health services. This was done with the aim of spreading the lessons learnt from Busia to all the other 46 county governments and as such improving the right to health across the country. Other measures had been initialised and though not complete indicated a growing effort by the KNCHR to address SERs issues such as the influence of the extractive industry, expected to drive Kenya's economy, on the enjoyment of human rights.⁶

Overall, the KNCHR's work in the area of SERs is promising given the challenges (internal and external) it faces.⁷ Internal challenges affecting the work of the KNCHR include the incomplete composition of Commissioners to spearhead the KNCHR's mandate. Efforts to fill the remaining vacant position have been marred by a failure of the appointing authority to follow the laid down requirements that has led to the rejection of the nominee selected. This in turn has affected the capability of the KNCHR as it means the work of five Commissioners must be done by four.⁸ It also meant that the leadership of the KNCHR is not representative of the country's demographics as envisioned in the KNCHR Act and the Constitution. On its part, the KNCHR has been silent on this incomplete state of affairs, which goes against the spirit of the Constitution and the rule of law. Another internal challenge affecting the

⁶ See discussion in 4.4 on the KNCHR and socio-economic rights.

⁷ See Discussion in 4.5 on the challenges the KNCHR faces in executing its mandate.

⁸ See discussion in 4.5.1 on the delay on appointing KNCHR Commissioners.

capability of the Commission to execute its mandate has been the inadequate institutional capacity to deal with SERs exhibited in the small cohort of staff members in the department dealing with these rights. This in turn means that the KNCHR is curtailed in carrying out its mandate.⁹

Challenges external to the KNCHR were also evident, among them, the absence of goodwill from the executive and legislative arms of government. There has been little or no meaningful interaction between parliament and the KNCHR. Additionally, there was no political goodwill from the elected branches of government, an inimical situation to the overall promotion of human rights given that parliament is a key institution in the realisation of human rights. Parliament did not discuss reports of the KNCHR; neither did they invite the Commissioners to discuss their work with parliament. This in turn meant that the best the KNCHR could do was publish reports and hope for the legislature to engage with them at their own pleasure. As a matter of concern, there was animosity exhibited by certain sections of the legislature to the KNCHR as an institution for work done in the past and thus this affected parliamentary debates on matters affecting the Commission.¹⁰

A cause for concern was the inadequate funding accorded to the KNCHR, which had a domino effect on the capability of the Commission to execute its mandate. Inadequate funding meant that the KNCHR could not hire or retain qualified staff. In addition, the Commission's accessibility was limited by the fact that it did not have enough money to establish its presence across the country.¹¹ Challenges being a fact in the work of ensuring greater enjoyment of human rights, the KNCHR would still need to execute its mandate to the best of its ability. From interviews with KNCHR staff, it was revealed that it was true the KNCHR could engage in more activities to promote SERs such as resolving complaints, holding public awareness workshops, engaging with parliament and working closely with NGOs, but its hands were tied because of challenges such as inadequate funding and lack of political goodwill from the executive and legislature, among others.

⁹ See discussion in 4.5.2 on KNCHR's inadequate institutional capacity to deal with SERs.

¹⁰ See 4.3.3 on the animosity towards the KNCHR for its role in the indictment of individuals accused of being responsible for the 2007 post-election violence.

¹¹ See discussion in 4.5.3 on KNCHR's funding challenges

6.2.4 The SAHRC provides lessons that can be beneficial to the KNCHR in executing its SERs mandate.

To take the discussion forward, the SAHRC was used as a case study on what an NHRI can do to promote the realisation of SERs in its domestic jurisdiction. The choice of South Africa was informed by the similarities with Kenya on several issues. These included the challenge of poverty despite the constitutional protection of SERs in South Africa. Secondly, was the fact that SERs similar to those in the Kenyan Constitution were enshrined in the South African Constitution. Third, the SAHRC has a mandate comparable to the KNCHR with both institutions enjoying A status accreditation, meaning they are fully compliant with the Paris Principles. The SAHRC has been in existence since 1997 and has more experience in dealing with SERs compared to the KNCHR. The SAHRC had a similar leadership structure to the KNCHR with Commissioners of both institutions hired through a competitive process that involved the executive and legislative branches of government. Commissioners of the SAHRC like those of the KNCHR were expected to be experts in their fields with the preference seeming to be on individuals with a legal background. Despite, inconsistencies in the appointment of SAHRC Commissioners, the effectiveness of the Commission was assessed based on its achievements.

Using its broad mandate and powers in terms of legislation, it was discovered that the SAHRC had made a significant contribution to the realisation of SERs in the country by employing different strategies that could inform the work of the KNCHR in Kenya. The SAHRC has made use of public hearings, conducted and published research, engaged in strategic partnerships with NGOs and institutions of higher learning to further its mandate. It has had mixed results with successes in some areas and not much in others. For instance, in monitoring SERs, the SAHRC had taken on this role at a time when these rights were still new with no guidance from other comparable jurisdictions. With the help of NGOs and academics, and with the Constitutional Court's interpretation on the state's obligations, the Commission had created protocols to obtain information from organs of state. In carrying out its mandate, the Commission had made use of its quasi-judicial powers by summoning uncooperative members of cabinet to appear before it. To make its recommendations meaningful the SAHRC has constantly sought audience with

parliament with a cordial relationship existing between these two institutions. At times parliament has called on the SAHRC to appraise it on the state of human rights.

The SAHRC was not actively involved in initiating SER litigation and instead had a policy of engaging in strategic litigation where it could offer help to the courts in interpreting human rights. This strategy though understandable had resulted in the Commission not being involved in some of the ground-breaking SER litigation. However, through its role in the *Grootboom* case, the Commission illustrated the important role of supervising court decisions on behalf of the judiciary in an independent matter. Still, the Commission had sought to respond to widespread human rights deprivations as informed by trends from the complaints received.¹² In areas where the SAHRC did not have expertise, it has made use of committees of experts who have assisted the Commission in understanding complex human rights challenges such as the effect of business on the enjoyment of human rights. The successes of the Commission had come through a long and deliberate process that involved experimentation with different ways to promote and protect human rights. The SAHRC has strove to distinguish itself as an independent national institution ready to carry out its mandate despite facing challenges such as inadequate funding, limited accessibility, short engagements with parliament and others.

In my view, the KNCHR can take a few lessons from the SAHRC on how to promote SERs by considering some of the methods used such as conducting public inquiries on SERs, monitoring these rights, robust and meaningful engagement with parliament, the executive, academia and civil society, and research and publication on human rights matters. The KNCHR should appropriately adopt these strategies to the Kenyan situation with the caveat that solutions to problems the KNCHR faces in performing its SERs mandate will not come from above but from local experimentation.

¹² See 5.6.9 on committee of experts.

6.3 Recommendations

From the above conclusions, several recommendations flow. The recommendations speak directly to what the KNCHR can immediately do as part of its mandate, whereas other recommendations are directed to the relevant stakeholders in government. These recommendations are made with the understanding that the promotion, protection and monitoring of SERs is a complex process that involves many stakeholders. The stakeholders these recommendations are addressed to include the KNCHR itself which it is argued should be at the forefront of suggesting ways in which it can be empowered to carry out its mandate. Critically, a self-evaluation of the Commission to note its weaknesses and strengths should be a regular process to better inform its activities in promoting human rights. The recommendations below are also made with the understanding that the contemporary struggle of human rights is primarily about narrowing the distance between ideals and realities. The KNCHR with its wide mandate can lead the way in this endeavour and most importantly to convince all the other stakeholders to play their part for the speedy improvement of the human rights situation in the country.

6.3.1 Recommendations to the KNCHR

6.3.1.1 Increase the KNCHR's institutional capacity and understanding of SERs.

It is important that the KNCHR have a proper understanding and appreciation of what human rights are and in particular the unique nature of SERs. To use its advisory capacity and undertake other promotional activities effectively, it is recommended that the KNCHR build its internal capacity and acquire or develop certain skills, including legislative analysis, negotiation, report writing and oral presentation when dealing with SERs. With several challenges to the overall enjoyment of human rights, training and skills development should be an ongoing process to increase the expertise of the KNCHR on SERs matters.¹³ To this end, the first step would be to look at the role and needs of its own members and staff. Since one of the challenges revealed was the inadequate institutional capacity and expertise to deal with SERs, increasing the KNCHR's staff understanding on these rights would make them better equipped to spearhead the process of promoting,

¹³ See discussion in 4.5 on the challenges facing the KNCHR.

protecting and monitoring these rights. It is argued the KNCHR should consider auditing its staff to establish its capacity to deal with SERs. The Commission's organisational capacity should be assessed against the capacity that would be required to discharge the Commission's legal mandate.¹⁴ The number of staff members in the SERs department at the Head Office should be increased not to mention having at least one Human Rights Officer specifically tasked with SER matters in each of the regional offices to allow for better handling of these matters.¹⁵

It is recommended that all KNCHR Commissioners and staff members should be continuously trained on the various aspects of SERs i.e. the normative content, obligations, monitoring these rights and the use of indicators, benchmarks etc. Naturally, this would require further education and training which require time and resources. To this end, to get the process rolling collaboration will be necessary and the KNCHR should take into consideration the expertise and understanding of personnel from potential partners in programmes aimed at promoting these rights. The KNCHR should look to take advantage of training opportunities offered to NHRIs staff across the globe by the OHCHR. Locally, collaborating with institutions of higher education to design and offer specialist courses on the content of SERs is advisable. Moreover, the KNCHR should also look to others with particular expertise, including specialist trainers, facilitators, resource persons, expert consultants and other external partners, who can provide useful assistance in the development, delivery and sponsorship of promotional activities.¹⁶

The SAHRC has made use of committees of experts as a means of dealing with specialised human rights matters such as business and human rights, climate change among others.¹⁷ This would be possible in terms of section 18 of the KNCHR Act, which is similar to section 11 of the SAHRC Act. The use of experts would thus put at the KNCHR's disposal expertise it does not have while at the same time allowing for impartation on expert knowledge on KNCHR staff. While this would be a temporary measure, it would mean that the KNCHR can still carry out its functions as

¹⁴ See discussion in 4.5.2.

¹⁵ See discussion in 4.5.2.

¹⁶ See *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions* 78.

¹⁷ See discussion in 5.6.9 on SAHRC Committees of Experts.

opposed to not working on certain matters because of lack of expertise. It should be noted though that increasing the Commission's institutional capacity would require an increase in funding to enable the training, attraction and retention of experts in human rights.

6.3.1.2 Increasing public awareness of human rights and the work of the KNCHR

The KNCHR is tasked with creating a culture of human rights in the country.¹⁸ This culture has barely taking root in Kenya with all the focus on politics, devolution, and, combating terrorism and corruption, which are viewed, by many Kenyans and the government as immediate challenges to be addressed. This focus has diverted attention away from human rights, which are a cornerstone of the new constitutional dispensation. Establishing a culture of human rights would require a greater knowledge about human rights across all sectors in the country. Creating public awareness on SERs is recommended for several reasons. Firstly, by sensitising Kenyans on the bill of rights, it will be possible to hold the government to account on their human rights obligations. Secondly, the same government (in this instance both the nation and county governments) would be aware of its human rights obligations and moreover, would be encouraged to consider human rights in all its plans, i.e. infusing the human rights based approached to development.

Given the diversity of the country, public awareness drives should be taken on all fronts and modified to suit different audiences. This is what the OHCHR has termed as audience specificity.¹⁹ The nature and content of a promotional programme should be based on the identified target audience and its needs, learning goals and objectives, and on the time and resources available.²⁰ This is necessary because human rights obligations differ depending on who is involved. For example, the human rights obligations organs of state and county government departments dealing with SERs would all not be same when considering the different SERs and the daily interaction between these departments and citizens. To this end, the

¹⁸ See discussion on creating a culture of human rights in 4.3.1.

¹⁹ See *Human Rights Training: A Manual on Human Rights Training Methodology* (2000)1

²⁰ Possible differences in understanding and awareness among the public, government officials and even the judiciary about the specific nature of SERs and the State's obligation to respect, protect and fulfil these rights must also be taken into account.

recommendation here is that the KNCHR should play the lead role in creating this awareness. In creating awareness on human rights, the Commission should consider this in developing materials meant to promote public awareness of these rights in English, Swahili and braille, at a minimum to enable wide readership. Still taking government officials as an example, the KNCHR should not only teach them of their SER obligations but also how to do their job effectively within the confines of those rules in a manner that promotes human rights as envisioned in the Human Rights Policy and Plan of Action.

At the same time, the KNCHR must make strategic decisions on which audience to start with, given its capacity. While the ideal situation would be to reach all audiences at the same time, a comprehensive and complete outreach programme will take time and resources. It is recommended as a start, government departments at the national and county levels should be sensitised on human rights. Tools such as ‘readers on SERs’ should be developed to help these departments understand their human rights obligations that flow from the Constitution. Making use of the SAHRC examples, the KNCHR can develop fact sheets²¹ and charters²² on SERs in the official languages and where possible in local languages. It is important that preparation and dissemination of tools to promote better understanding of human rights be done as a matter of urgency. This is because most government employees are still guided by outdated guidelines and in the case of county governments that have new guidelines, do not consider human rights. Such training offered to government officials will also be helpful in the monitoring of the progressive realisation of SERs in the country.

Furthermore, in creating awareness on human rights among different audiences the KNCHR should strive to make human rights resonate with everyone – i.e. show its relevance for all Kenyans. To this end, while engaging in public awareness programmes the Commission should focus on things such as letting their audience know what human rights are, the obligations and where and how to claim them. With SERs the guiding principle should be to strive to interpret SERs within a given

²¹ See discussion in 5.6.7 on the different Public Awareness initiatives undertaken by the SAHRC.

²² See discussion in 5.6.6 on the Charter on Basic Education which can be used as a template by the KNCHR to elaborate the content of SERs in the Kenyan Constitution.

context such as the SERs of women, the old, children, minority groups and other considerations. Organs of state should be made aware of the obligations to respect, promote, and fulfil these rights with a specific focus on their area of influence.²³ SERs should not be presented as theoretical entitlements that do not resonate with the day to day life of Kenyans.

It is further recommended that the KNCHR should utilise every opportunity to make people aware of that its role as an institution is. This should include information on what the KNCHR is, what it does and does not do as an NHRI in the country. Such information on what the KNCHR does should take advantage of the different platforms of disseminating information. By way of example, I recommend that the KNCHR publish pamphlets titled “What is the KNCHR?”²⁴ Moreover, the KNCHR should use the same opportunity to share its successes and challenges through the various reports it has published. Increased awareness of KNCHR’s role, where and how to engage with the Commission will in turn make it accessible to the public, civil society (that can result in collaboration on common human rights endeavours) and where necessary organs of state for the benefit of human rights in the country.

As part of increasing inculcating a culture of human rights, the KNCHR should also be involved in the re-structuring and drafting of the education curriculum in the country to include Human Rights Education (HRE). This should be introduced as a subject in schools, preferably when students are in their early teens. At the moment, pupils in high school are being taught human rights as a topic in an optional Subject-History and Government.²⁵ This means that those students who choose not to take this subject are not taught of human rights. With the government conducting a curriculum review, the KNCHR should be involved in this process to ensure the infusion of human rights. It is noteworthy that a few pilot studies on human rights as a compulsory course are being conducted in two universities in the country.²⁶ These

²³ See discussion in 3.3.2 on human rights obligations.

²⁴ See discussion in 5.6.7.

²⁵ Kenya Secondary School Curriculum History and Government http://www.elimu.net/Secondary/Kenya/KCSE_Student/History/Intro.htm (accessed 30 March 2016).

²⁶ See The study of human rights becomes a core subject in Kenyan universities <http://www.ohchr.org/EN/NewsEvents/Pages/GradStudents.aspx> (accessed 27 October 2015).

studies should be rolled out to all universities in the country.²⁷ The idea of introducing Human Rights as a common university course should be replicated across all institutions of higher learning because most of the students at these institutions can use this knowledge in future to the benefit of human rights. To promote the inclusion of HRE in the school's curriculum in the country, the KNCHR should forge close working relations with the Education Ministry and other stakeholders in the education sector. This will require great tact and diplomacy to overcome any resistance from the government and education stakeholders towards the involvement of the KNCHR. A good working relationship with the intention of establishing a curriculum that reflects the current state of affairs will allow for the Commission's involvement in the development and implementation of teaching tools for schools that will lead to better understanding and eventual realisation of human rights. The KNCHR together with stakeholders in the education sector should monitor the implementation of such programmes to determine their effectiveness and the need for review over time.

One of the limitations to the judicial enforcement of SERs in the country was found to be the inadequate knowledge of some members of the judiciary about SERs and their application. In creating public awareness programmes, it is recommended that the KNCHR should focus on increasing the understanding of SERs by the judiciary given its role in the general adjudication of human rights. This can be done through the Commission working together with the Judiciary Training Institute to strengthen the existing training programmes for members of the judiciary branch on how to adjudicate SERs matters. A specific programme should also be created for lawyers with the help of the Law Society of Kenya and the Council of Legal Education given the fact that most of the lawyers in the country are not trained on human rights issues.²⁸

In general, public awareness programmes should also include a rural perspective for the following reasons. Firstly, minority groups often live in remote rural areas where their living conditions are far below those of urban dwellers. Secondly, incidents of human rights violations occur in remote areas away from the gaze of human rights

²⁷ See discussion on raising human rights awareness in 4.3.1.

²⁸ See discussion in 3.4 on the limitations to judicial enforcement of SERs.

monitors and the media. Thirdly, in some rural areas cultural practices that perpetuate human rights violations like Female Genital Mutilation (FGM), child marriages and wife inheritance still exist and these issues need to be addressed.²⁹ To decrease the occurrence of such violations, people in these areas need to know their rights to be able to exercise them. The KNCHR should thus focus its attention towards the rural areas while making every effort to communicate human rights entitlements in the Constitution in a manner that these people can understand. Promotional activities that take into consideration the real-life experiences of Kenyans in accessing and enjoying SERs are likely to be more effective and more significant, rather than merely abstract concepts or legal texts. Promotional activities are of greatest benefit when they are participatory, progressive, creative and flexible in reaching and meeting the needs of varying audiences³⁰

The advantage in focusing on increasing public awareness in human rights is that it is likely to lead to complaints being brought forward to the KNCHR, courts or organs of state responsible for implementing these rights depending on the situation. The more complaints the KNCHR receives, the likelihood of addressing systemic SERs problems across the country through engagement with the relevant stakeholders.

6.3.1.3 Robust engagement with parliament and the executive

Involvement of the KNCHR in the drafting of policies and legislation was found to be wanting.³¹ A lot of progress in the realisation of SERs can be made through legislation and policies, which, it is argued are the starting point in creating awareness and assigning responsibilities to organs of state and other stakeholders. The KNCHR's involvement in the drafting of law necessary to give meaning to the bill of rights cannot be over-emphasised. Given the pervasive nature of human rights in all aspects of life, the KNCHR should be ready and willing to highlight the human rights implication of the bills before parliament or any other policy documents drafted by the executive at both the national and county levels of government

²⁹ See articles 53 (1) (d) and 55 (d) Constitution of Kenya, 2010.

³⁰ See "Education for empowerment: some reflections" (Module 20), Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource.

³¹ See discussion in 4.3.6.

The drafting of bills is a process that involves many offices from parliament, the AG to the parent ministry in the cabinet, all with different views on the contents of the bill. The KNCHR has been involved in the drafting of some bills and policies where they have offered their expertise. The Commission should keep this up and be involved in more bills and policies while at the same time navigating the incidents of hostility it has faced from some MPs. Human rights breaches can be prevented from occurring, if bills are examined to make sure they comply with human rights before they are passed. The Commission should continue using its human rights expertise in examining bills for their human rights compatibility and making necessary submissions. Ideally, any law giving the KNCHR power to scrutinise bills should require the tabling of the Commission's findings, and the government response, within a specified period.

I argue that such clear provisions in law and practice would allow for the introduction of human rights matters that would have been ignored or thought of as irrelevant. In the absence of such clear provisions, the KNCHR should seek to be involved in the drafting process and should closely monitor the bills published. As a matter of practice, the KNCHR should seek to be involved in the committee stages of the drafting process where they can present memoranda on aspects of human rights likely to be affected by bills. Such an approach would reduce incidents whereby the constitutionality of Acts of parliament or the processes followed are challenged in court. On their part, organs of state and parliament should be loath to ignore the advice given by the KNCHR. Instead, sufficient time³² should be set aside to allow for constructive and meaningful engagement between parliamentary committees and the KNCHR together with other interested stakeholders when scrutinising the human rights implications of bills and policies.

Parliament through the Portfolio Committee on Justice has not taken the time to discuss reports issued by the KNCHR and there seems to be no existing mechanism that has guided parliament's interaction with the Commission. Where engagement mechanisms existed, little effort was made by the relevant parliamentary committee

³² See discussion in 4.3.7 on KNCHR's accountability to and relations with parliament.

to engage with the KNCHR.³³ To remedy this, parliament should be reminded through press releases, advocacy and lobbying, of the importance of engaging with KNCHR reports on human rights issues together with any other reports submitted to parliament in terms of the law. Parliament's engagement with these reports, it is contended, is likely to increase MPs understanding of the human rights situation in the country. With MPs being aware of the human rights situation in the country they can then, as the people's representatives agitate for measures to bring about change. In the case of SERs, parliament can be sensitised to the many issues around the importance of giving sufficient amounts towards the realisation of these rights. Some members of parliament have established Kenya Parliamentary Human Rights Association (KEPHRA) to champion human rights issues in parliament.³⁴ Engagement between the KNCHR and KEPHRA would facilitate the infusion of human rights matters in parliamentary debates. However, engagement likely to result in the implementation of the KNCHR recommendations should be at Committee level where the KNCHR is invited to make presentations on the content of its report and field questions.

Both parliament and the executive should take a keen interest in the work of the KNCHR. This should be done with an honest intention to keep the Commission accountable and not to manipulate it. Time should be made to debate reports and the budget of the KNCHR to ensure that they are adequately funded. In future to facilitate better engagement the KNCHR should submit to the parliamentary committee an Annual Programme of activities when parliament is discussing budget proposals to ensure financial independence of the institution. Parliaments should receive, review and respond to NHRI reports and ensure that they debate the priorities of the NHRI and should seek opportunities to debate the most significant reports of the NHRI promptly. Parliaments should develop a principled framework for debating the activities of NHRIs consistent with respect for their independence.³⁵ Moving forward parliament should consider the merger of the KNCHR and the NGEC as recommended below.

³³ See discussion in 4.3.7 and 4.5.6.

³⁴ See Kenya Parliamentary Human Rights Association (KEPHRA) <http://www.humanrightsmembers.org/about-us/>

³⁵ Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, Serbia 22-23 February 2012) paras 14-19.

6.3.1.4 Drafting public inquiry guidelines

It is recommended that the KNCHR draft a set of public inquiry guidelines as a matter of urgency. Drafting such guidelines would provide a framework to determine engagement with stakeholders and the considerations taken before conducting an inquiry either through their own initiative or after receiving a complaint. The SAHRC has a comprehensive set of public inquiry guidelines contained in its Complaints Handling Procedures³⁶ that the KNCHR can utilise as a template in developing its guidelines.³⁷ The guidelines should be widely circulated to NGOs and other stakeholders so that they are aware of the ways in which they can participate. These guidelines should be written in an easy to understand language and where possible in other local languages in addition to English, Swahili and braille for easy understanding. It is argued that it is only after drafting public inquiry guidelines that the KNCHR will be able to engage in public inquiries on the level of enjoyment of SERs in the country. Immediately after the drafting of such guidelines it is recommended that as part of increasing public awareness of human rights, the KNCHR should also consider holding national inquiries finding systemic human rights breaches.

Crucial information can be gathered from these inquiries and based on this information; the KNCHR can decide which SER to focus on. Borrowing from the SAHRC experience on the benefits of holding public inquiries³⁸ and based on the poverty situation in the country³⁹ the KNCHR should consider holding a public hearing on poverty. Such a hearing it is argued would at once allow for the gathering of views from the different stakeholders whose work influence the realisation of SERs in the country. Furthermore, during such inquiries the Commission can contact individuals who would not have heard of, or would not have approached the Commission on their own accord mainly because they live in extremely

³⁶ SAHRC Complaints Handling Procedures <http://www.stellenbosch.gov.za/documents/general/780-complaints-handling-procedures-human-rights-commission-27-jan-2012/file> (accessed 6 September 2016).

³⁷ See discussion on SAHRC Public Hearings on SERs in 5.6.1.

³⁸ See discussion in chapter 5.

³⁹ See discussion on the poverty situation in Kenya in 3.2 and the powers/mandate of the KNCHR in 4.3.

disadvantaged circumstances.⁴⁰ It is argued from conducting public hearings the KNCHR will be able to understand the concerns of the many Kenyans living in poverty and what their expectations are of the commission and government (both county and national) at large. On their part, the KNCHR can then put the information gathered to use in establishing its programmes and setting thematic areas of focus. It would also provide an opportunity for the KNCHR to engage with different stakeholders on ways in which to make the SERs a reality for Kenyans.

6.3.1.5 Monitoring SERS in the country

It is hereby recommended that the KNCHR should effectively monitor SERs in the country.⁴¹ This is within its mandate as provided for in the KNCHR Act and necessary as part of the greater project of promoting and protecting these rights and the NAPA.⁴² The monitoring of rights is important as it reveals crucial information on the progressive realisation of SERs that could be useful to the different organs of states, academics and others. On the part of the KNCHR, it affords the Commission an opportunity to analyse critically the measures put in place by organs of state and business to realise SERs and to make recommendations that ideally should lead to better fulfilment of SERs. How then should the KNCHR go about monitoring these rights in Kenya? Importantly the KNCHR should first come up with a structured human rights monitoring framework. This framework will act as a guide not only to SERs but also to all other human rights that need to be monitored. Such a framework should be contextualised and rooted within a framework of benchmarks and indicators. To this end, it is recommended that the KNCHR should work closely with the NGEC to develop the standards envisioned in the NGEC Act even though it is not clear what these standards are from the wording in the Act – a purposive interpretation of this section is advisable, as it would mean coming up with indicators. If this should fail, the only other option would be for the KNCHR to start the process and hope for the involvement of the NGEC. Already the KNCHR has the necessary experience and expertise in monitoring human rights in the country in addition to the goodwill it enjoys across the country from NGOs.

⁴⁰ See CV McClain "The SA Human Rights Commission and socio-economic rights Facing the challenges" (2002) 3 *ESR Review* 8-9.

⁴¹ See discussion on the mandate of the KNCHR in 4.3.1.

⁴² See discussion 3.5.2 of the national human rights policy and national action plan.

In the process of developing human rights indicators, the KNCHR can be guided by the different attributes of SERs as elaborated by the CESCR in its General Comments. The CESCR is a natural fit for the KNCHR given the availability of such information that can then be infused with the information gathered from research conducted locally to given them context. The development of such indicators should take into consideration the realities on the ground. Realities on the ground may be diverse but others could be crosscutting. To this end, the crosscutting human rights concerns such as non-discrimination, equality, public participation on human rights matters, indivisibility and empowerment.⁴³ As a starting point, it is recommended that the KNCHR use the Second MTP development targets and those in the NAPA in the development of human rights indicators.⁴⁴

The KNCHR should determine what information to gather and how to go about gathering this information. Learning from the SAHRC, it can require organs of state dealing with the rights identified in article 43 furnish it with information on programmes undertaken to realise SERs, using protocols (i.e. questionnaires with specific questions on measures put in place to realise SERs). To obtain reliable data, it should work closely with organs of state, county and national governments, NGOs, learning institutions and other stakeholders who would be able to provide relevant information. At the same time, the KNCHR should conduct its own independent research to verify the information provided by organs of state during the monitoring exercise. The protocols⁴⁵ utilised by the SAHRC provide a good template that can be adopted to suit the Kenyan scenario.

The formulation of SER indicators should be a participatory process involving government and other stakeholders preferably facilitated by the KNCHR. They should be matched against the existing or proposed benchmarks such as those in the NAPA considering the available resources and the general expectations of Kenyans.⁴⁶ The KNCHR can also collaborate with NGOs monitoring SERs to

⁴³ Report on Indicators for Promoting and Monitoring the Implementation of Human Rights HRI/MC/2008/3 6 June 2008 Para 10-13.

⁴⁴ See discussion on the Second MTP in 3.5.1.1.

⁴⁵ See example provided in 5.6.5 and the discussion therein.

⁴⁶ See UN ECOSOC *Report of the United Nations High Commissioner for Human Rights E/2011/90 26 April 2011* para 4. E/2007/82 paras 53-54. See also Office of the Attorney General and

provided further information on the realisation of these rights in the country to add to its own research. Such information should then be amalgamated, analysed and the necessary conclusions and recommendations made. Other data required in the monitoring of these rights should be sourced from other sources such as the National Bureau of Statistics to enable the disaggregation of information into different categories such as age, sex, ethnic or religious background, disability etc. To further increase disaggregation and widen the monitoring process, with increased funding the KNCHR should also monitor the realisation of SERs by county governments.

A thorough analysis of the obligations of the State, the actual legal and policy frameworks and the situation of specific individuals or groups should be undertaken to determine whether a violation has taken place or not. Apart from monitoring progress over time, indicators also serve to identify disparities in the enjoyment of human rights among different population groups and to draw parallels between legal or policy reforms and the realization of a particular right. Indicators help to make policy and human rights planning and monitoring more efficient and transparent.⁴⁷ Monitoring reports should be circulated to organs of state, parliament and the executive for debate, implementation and follow up on the progress of implementation to identify any impediments. Advocacy by the KNCHR and robust engagement with stakeholders will be necessary to garner the necessary reaction to reports published by the KNCHR.

It is recommended that the reporting cycle for such ESRs should be set at two years as a start because of the amount of information required. Based on the SAHRC's experience, the initial monitoring of SERs is a long process that should be undertaken with the help of other stakeholders, especially human rights NGOs and institutions of higher learning. Depending on its capacity, the KNCHR should also consider monitoring one of the SERs, in this case the right to health given the fact that it is a devolved function. Information gathered from this monitoring can then be replicated to all other rights with the necessary modifications.

Department of Justice Sessional Paper No 3 Of 2014 *National Human Rights Policy and Action Plan* 39.

⁴⁷ See OHCHR *Manual on Human Rights Monitoring* 9
<http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf> (accessed 8 January 2016).

The monitoring of SERs is likely to encounter challenges such as those faced by the SAHRC including failure to respond to protocols, poor responses to protocols and delaying tactics from organs of state and other stakeholders monitored by the KNCHR. To avoid this, it is recommended that SER monitoring guidelines be gazetted with the help of the AG's office with clear provision for sanctions in the event of non-cooperation in furnishing information for SERs monitoring purposes. The KNCHR has the requisite powers of court to obtain information that is necessary for the performance of its mandate.⁴⁸ With Kenya's ambitious development plans rooted in extracting minerals and expanding business, it is recommended that as part of monitoring SERs, the KNCHR should conduct or commission a relevant institution to conduct a study to examine to what extent national laws, regulations and practices comply with each of the pillars of the UN Protect, Respect and Remedy Framework.

Lastly, a decision should be made on whether to monitor both levels of government. Another decision to be undertaken by the KNCHR in consultation with relevant stakeholders will be the monitoring cycle such that enough information will be gathered, critically evaluated and recommendations that can be acted on issued. It is recommended that the monitoring of SERs based on the capacity of the KNCHR and the need to address poverty should start at the county government level. This is because county governments are in direct contact with many Kenyans facing poverty compared to the national government. Moreover, county governments focus on development has always left no time to consider the human rights implications of their development initiatives.

6.3.1.6 Increase KNCHR's accessibility and visibility

Not all Kenyans know the KNCHR or what exactly its role is. One of the challenges to its work is that fact that it does not enjoy a large footprint across the country.⁴⁹ This has meant that the Commission is not easily accessible to many especially those in areas far flung from their offices. Therefore, it is important that the KNCHR strive to make itself an accessible institution.

⁴⁸ See discussion in 4.3.4 above on the KNCHR's powers of court.

⁴⁹ See discussion in part 4.5.4 on the limited accessibility of the KNCHR.

The recommendation here is that the KNCHR should seek to make its offices accessible to all. These offices should be easy to find and well known by members of the community. The head office in Nairobi is far from the city centre and hidden from the main road, making it difficult to access.⁵⁰ At the same time, especially for regional offices, KNCHR staff should be able to communicate in the local languages of the area for ease of communication. Where this is not possible, it is strongly recommended that the Commission should seek to employ translators to help with communication. Importantly, these offices should be physically accessible to persons with disability. Improving accessibility will of necessity require funds, in the absence of which it will continue being a challenge. Thus, the fulfilment of this recommendation will require that parliament be implored to increase the Commission's funding. Where not possible the KNCHR should seek donor funding for purposes of making it more accessible.

Considering likely funding difficulties, I further recommend that the KNCHR should consider strategic co-operation with fellow article 59 Commissions and NGOs. Co-operation with article 59 Commissions could be through the housing of desks in each other's regional offices that would allow for receptions of complaints and the necessary referral. Ideally, article 59 Commissions should not have regional offices in the same areas but give each other a complaints desk in regions where they have no presence. The implementation of the IPCRM is encouraging as it allows for complaints referral. However, its utility is curtailed given that the NGEIC is not part of the system.⁵¹ Taking lessons from the SAHRC, the KNCHR should seek to work closely with NGOs to publicise the Commission and raise awareness on human rights issues.

Another way of making itself and its work accessible is by publishing its reports widely and in the official languages of the nation. Most of the reports of the KNCHR are written in English, which means those who do not understand this language cannot engage with the reports. Publishing some of these reports in Swahili and with resources allowing local languages in their regional offices, information can be

⁵⁰ See discussion in 4.5.4 on KNCHR's limited accessibility.

⁵¹ See discussion in 4.5.5 on difficult working relations with article 59 Commissions.

widely circulated. It is further recommended that the KNCHR should strive to have its pulse on all human rights matters. They should be quick to speak in public on the human rights challenges to show the country that they are aware of these issues and propose solutions on how best to tackle them. The leadership shown in condemning extra-judicial killings⁵² by security forces should be replicated with all other human rights issues especially the unacceptably high levels of poverty that challenges the enjoyment of SERs in the country. Making use of public media will make the Commission reach a bigger target faster.

In cases where it cannot force compliance given the limitations to its powers it should not be afraid to resort to naming and shaming organs of state and business violating human rights or not showing cooperation. This should be used as a last resort, with the best method being constructive engagements with all stakeholders to remedy the situation.

6.3.2 Recommendations to other stakeholders

6.3.2.1 Merging the KNCHR and NGEC to establish the KNHREC

The merger of the KNCHR and NGEC to create a human rights and equality commission similar to the one originally envisioned in the article 59 is recommended. The study revealed the intricacies involved during the drafting of legislation to give effect to article 59. The decision to establish separate bodies to deal with human rights in general and equality have only resulted in the duplication of and what can best be termed as misallocation of mandates.⁵³ The delay by the NGEC to come up with standards on SERs has only meant that there is no coherent framework for the monitoring progress of these rights. A strained working relationship between the two Commissions has been counter-productive to human rights promotion and protection.⁵⁴ Since the KNCHR and CAJ Acts provide for a review of the two with the aim of considering a merger, this recommendation is practical as 2016 marks five years of existence of these Commissions after their re-establishment.

⁵² In the follow up to the release of the Error of Terror report, the KNCHR Commissioners held a press conference with several commissioners appearing on TV to give interviews on the contents of the report.

⁵³ See discussion in chapter four section 4.2. The overlap of mandates is also present in the South African context – see discussion in 5.5.

⁵⁴ See discussion in 4.5.5.

The two commissions through their work have made some inroads in popularising human rights, but more can still be done. The level of impunity and disregard for human rights calls for a robust agenda to advance human rights. The merging of the two will also mean the merging of resources that can be utilised in promoting human rights. Such a merger it is argued would allow for the application of a unified and coherent human rights strategy from a single body to disparate human rights violation cases. Moreover, it would be economical compared to having several bodies dealing with different human rights matter that are interconnected and interrelated. The recommendation to merge is also informed by the South African experience, where the Asmal Committee recommended the merger of the SAHRC with the CGE given the overlap in their mandates. Such a merger it was thought would be for the benefit of human rights promotion and protection.⁵⁵

To accommodate the existing staff of the two Commissions, modalities can be worked on how to absorb them or to re-assign them to other government departments. This can be done through a legislative amendment as it is envisioned in section 55 of the CAJ Act⁵⁶ read together with article 59 (4) of the Constitution which gives parliament the power to restructure the KNHREC. This should be done within the shortest time possible to allow for little disruption to the work of these two commissions. A skills audit should be conducted to determine the skills and staff capacity of the two institutions to determine what would be needed for the proposed KNHREC. As matter of importance, there should be dedicated funds, capacity and plans for staff development. The proposed KNHREC would thus be able to deal with all aspects of human rights, with a chairperson and deputy who have expertise in human rights matters and specific commissioners to deal with matters of gender and equality; disability and minority communities; maladministration, children and the aged; and socio-economic rights. This will naturally allow for the application of a gender perspective in the design and implementation of promotional activities. It will recognize and address the different impact economic, social and cultural rights have for women, men, children, people with disabilities and minority groups and their different experiences about these rights. Taking into consideration that human rights

⁵⁵ Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions 37-40.

⁵⁶ Section 55 of the KNCHR Act, has the same provision.

are interdependent and indivisible and rights cannot be easily compartmentalised, the proposed KNHREC would also be easily accessible to the public as it would lessen chances of referral often caused by instances where individuals are not aware of which of the article 59 Commission to approach for assistance.

6.4 Concluding remarks

This study aimed at looking at the role of the KNCHR in promoting SERs in Kenya as a means of fighting poverty. Efforts by the KNCHR of themselves cannot lead to the enjoyment of SERs. The effectiveness of efforts by the KNCHR is by making duty bearers aware of their obligations and encouraging them to fulfil these obligations. As for rights holders, increased knowledge on human rights means they will be able to claim these rights, thus holding the state accountable. The human rights landscape in Kenya is still developing albeit in a slow manner in a country plagued by many challenges as it tries to fully implement its Constitution. Now, the focus of government and politicians is on devolution, thought by many to be the only way to bring the country to prosperity and the upcoming 2017 elections which means human rights is likely to take a backseat. However, it also provides an opportunity for the KNCHR to make its mark.

With the end of the term of the CIC, the KNCHR should take a leadership role in developing a human rights culture. Admittedly, it will be faced with challenges but should strive to rise above these challenges and carry out its mandate to the best of its ability. Whereas, it could be argued that the Commission has only been in existence for a few years since the promulgation of the Constitution and as such should be given time to settle in office and make a meaningful contribution to human rights in the country; they do not have the luxury of time. Continued denial of human rights entitlements of Kenyans despite the entrenchment of a bill of rights only means that the KNCHR should work over and above its call of duty to fulfil its constitutional mandate. In the face of executive seeking to make the country a middle-income country through economic development, the KNCHR should strengthen its resolve to promote SERs in the country.

The KNCHR involving itself in the promotion and protection of SERs would thus be complementary and serve as a push for the executive and legislative arms of government to remedy situations whereby such rights are not enjoyed or to determine ways such rights can be enjoyed. Their work would be to point out areas of weakness and how to improve these weaknesses without necessarily being seen to be usurping anyone's powers.

BIBLIOGRAPHY AND REFERENCES

Legislation

Kenya

Commission on Administrative Justice Act 23 of 2011

The Kenya National Commission on Human Rights Act 9 of 2002.

Kenya National Commission on Human Rights Act 14 of 2011.

National Gender and Equality Commission Act 15 of 2011.

Kenya Gazette Supplement No. 45, 28th June 2013 Legislative Supplement no. 47.

Legal Notice No. 117 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

The Treaty Making and Ratification Act 45 of 2012.

South Africa

Human Rights Commission Act 54 of 1994.

Promotion of Access to Information Act 2 of 2000 (PAIA).

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

South African Human Rights Commission Act 40 of 2013.

Court Cases

Kenya

Attorney General & another v Randu Nzai Ruwa & 2 others [2016] eKLR Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

Beatrice Wanjiku & Another v The Attorney-General & another Petition 190 of 2011.

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR.

Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others [2013] eKLR.

Consumer Confederation of Kenya (COFEK) v Attorney General & 4 others [2012] eKLR.

Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 others [2011] eKLR.

In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR (principle of separation of powers).

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Supreme Court of Kenya, Advisory Opinion Application 2 of 2012.

Isaac Ngugi v Nairobi Hospital & 3 Others [2013] eKLR.

John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others [2011] eKLR.

Kenya Commercial Bank Ltd v. KNCHR, MISC. APPLICATION NO. 688 OF 2006.

Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and 5 others [2012] eKLR.

Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR.

Matthew Okwanda v The Minister of Health and Medical Services and 3 others [2013] eKLR.

Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its Members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others [2014] eKLR.

Mitu-Bell Welfare Society v Hon. Attorney General & 2 others [2012] eKLR.

Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR.

Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR (Petition 19 of 2015).

Patricia Asero Ochieng & Others v The Attorney General, High Court of Kenya, Petition No. 409 of 2009.

Pattni and Another v Republic [2001] 2 KLR 264 of 2012).

Randu Nzai Ruwa & 2 Others v Internal Security Minister & another [2012] eKLR.

Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 others [2011] eKLR.

Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2014] eKLR.

Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR

South Africa

De Reuck v Director of Public Prosecution 2002 12 BCLR 1285 (CC).

Glenister v President of the Republic of South Africa 2011 7 BCLR 651.

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

Independent Electoral Commission v Langerberg Municipality 2001 (9) BCLR 883 (CC).

Khosa and others v Minister of Social Development and Another 2004 (6) BCLR 569 (CC), para 46-53.

New National Party v Government of the Republic of South Africa and Others 1999 (5) BCLR 489

Minister of Health v Treatment Action Campaign (2002) 5 SA 721.

Soobramoney v Minister of Health (KwaZulu-Natal) (1998) (1) SA 765 (CC).

S v Makwanyane and Another 1995 (6) BCLR 665 (CC)

United Nations General Assembly Resolutions and Declarations

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RES/53/144.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Document E/CN.4/1987/17

Principles Relating to the Status of National Institutions (The Paris Principles). UN Doc. A/RES/48/134 (1993) Adopted by General Assembly resolution 48/134 of 20 December 1993.

UN General Assembly Resolution of 18 December 2008, UN GA Res 63/172.

UN General Assembly Resolution of 12 March 2010, UN GA Res 64/161.

Economic and Social Council Resolutions 772B (XXX) 25 July 1960

United Nations General Assembly Resolution 33/46 National Institutions for the Protection and Promotion of Human Rights 14 December 1978

United Nations General Assembly Resolutions 34/49 of 23 November 1979.

United Nations General Assembly Resolutions 36/134 of 14 December 1981.

United Nations General Assembly Resolutions 38/123 of 16 December 1983.

United Nations General Assembly Resolutions 39/144 of 14 December 1984.

UN General Assembly Resolution 40/123 of 13 December 1985.

United Nations General Assembly Resolution 48/134 of 20 December 1993

UN Commission on Human Rights Resolution 1992/54.

United Nations Commission on Human Rights, National institutions in the field of human rights, 8 March 1978, E/CN.4/RES/23(XXXIV).

United Nations General Assembly (1977) *A/RES/123(XXXII)*, 16 December 1977.

UN General Assembly Resolution 63/169 The Role of the Ombudsman, Mediator and other National Human Rights institutions in the Promotion and Protection of Human Rights *A/RES/63/169*.

United General Assembly Resolution 63/172 National Institutions for the Promotion and Protection of Human Rights *A/RES/172*.

Vienna Declaration and Programme of Action (12 July 1993) *A/CONF 157/23*.

CESCR General Comments

CESCR General Comment No. 3 (1990) *The Nature of States Parties Obligations* (article 2, paragraph 1) UN Doc. E/1991/23, Annex III.

CESCR General Comment No. 9 (1998) *Domestic Application of the Covenant* UN Doc. E/1999/22, Annex 1v.

CESCR General Comment 10 *the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* E/C.12/1998/25.

Books and Chapters in Books

M Akech "Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya" in EW Gachenga & LG Franceschi (eds) et al *Governance Institutions and the Human Condition* (2009) Strathmore University Press: Nairobi.

D Brand "Socio-economic Rights in south Africa" in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) PULP: Pretoria.

B Burdekin and J Naum *National Human Rights Institutions in the Asia Pacific Region* (2007) Martinus Nijhoff Publishers: Leiden.

B Byrne "Qualitative interviewing" in C Seale (ed) *Researching Society and Culture*

3rd edition (2012) SAGE:London 207-222.

S Cardenas *Chains of Justice: The Global Rise of State Institutions for Human Rights* (2014) University of Pennsylvania Press: USA

S Cardenas "Sovereignty Transformed? The Role of National Human Rights Institutions" in N Shawki and M Cox (eds) (2009) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* Ashgate: England.

R Carver and P Hunt "National Human Rights Institutions in Africa" in K Hossain, LSM Besselink, HSG Selassie and E Volker (eds) *Human rights commissions and Ombudsman Offices: National Experiences Throughout the World* (2000) Kluwer Law International: Netherlands.

DF Chambliss and RK Schutt *Making sense of the social world: Methods of investigation* 2nd edition (2006) Pine Forge Press: Thousand Oaks.

MH Cheadle "Limitation of Rights" in MH Cheadle, DM Davis & NRL Haysom (eds) et al *South African Constitutional Law: Bill of Rights* 2nd Edition (2005) Lexis Nexis Butterworths: South Africa

P Chynoweth "Legal Research" in A Knight and L Ruddock (eds) *Advanced Research Methods in Built Science* (2008) Wiley-Blackwell: Oxford.

A Clapham "Defining the Role of the Non-Governmental Organizations with Regard to the UN Human Rights Treaty Bodies" in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21st Century* (2000) Kluwer Law International: The Hague.

KM Clarke & M Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (2010) Cambridge University Press: New York.

Commonwealth Secretariat *Comparative Study on Mandates of National Human*

Rights Institutions in the Commonwealth (2007) Commonwealth Secretariat: London.

Commonwealth Secretariat *National Human Rights Institutions Best Practice* (2001) Commonwealth Secretariat: London.

S Deva & D Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) Cambridge University Press: Cambridge.

P De Vos "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" in DM Chirwa & L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) United Nations University Press: Tokyo.

J Dugard *International Law: A South African Perspective* 4th edition (2011) Juta law: Cape Town.

KC Esom "The Role of National Human Rights Institutions in Promoting International Law in Domestic Legal Systems: Case study of the Uganda Human Rights Commission" in Killander M (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) PULP: Pretoria.

D Feldman "Confrontation and Co-operation between Institutions in the Protection of Human Rights" in F Butler (ed) *Human Rights Protection: Methods and Effectiveness* (2002) Kluwer Law International: Netherlands.

K De Feyter, "Localising human rights" in W Benedek, K De Feyter and F Marrella (eds) *Economic Globalisation and Human Rights* (2007) Cambridge University Press: Cambridge.

D Galligan & D Sandler "Implementing Human Rights" in S Haliday & PD Schmidt (eds) *Human Rights Brought Home: Socio-legal perspectives on Human Rights in the National Context* (2004) Hart Publishing: Oregon.

Y Ghai "Re-designing the State for 'Right Development'" in BA Andreassen & SP

Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* 2nd Edition (2010) Intersentia: Antwerp.

Y Ghai and J Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) Interights: UK.

S Gloppen “Courts and Social Transformation: An Analytical Framework” in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (2006) Ashgate Publishing: UK.

BK Goldewijk, AC Baspineiro & PC Carbonari (eds) *Dignity and human rights: The Implementation of Economic, Social and Cultural rights* (2002) Intersentia: Antwerp.

R Goodman and T Pegram (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2011) Cambridge University Press: UK.

A Gouws and P Mitchell “South Africa: One Party Dominance Despite Perfect Proportionality” in Michael Gallagher and Paul Mitchell (eds) *The Politics of Electoral System* (2005) Oxford University Press: UK.

J Hatchard “Legal Techniques & Agencies of Accountability: Human Rights Commissions in Commonwealth Africa” in Ndulo, M (ed) *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation* (2006) James Currey Publishers: UK.

S Humphreys (ed) *Human Rights and Climate Change* (2010) Cambridge University Press:UK.

B Nowrojee & Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001) Human Rights Watch: New York.

ICHRP *Performance and Legitimacy: National Human Rights Institutions* 2nd edition (2004) International Council on Human Rights Policy, Versoix: Switzerland.

ICHRP *Assessing the Effectiveness of National Human Rights Institutions* (2005) International Council on Human Rights Policy, Versoix: Switzerland.

M Kjaerum "State Reports" in G Alfredsson J Grimheden & BG Ramcharan (eds) et al *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller* (2009) Martinus Nijhoff Publishers: Leiden.

M Langford (eds) et al *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) Cambridge University Press: Cambridge.

R Legard, J Keegan & K Ward "In-depth interviews" J Ritchie & J Lewis (eds.) *Qualitative research practice: A guide for social science students and researchers* (2003) 141 SAGE: London

D Lewis "Non-Governmental Organizations, Definition and History" in HK Anheier & S Toepler (eds) *International Encyclopaedia of Civil Society* (2010) Springer: USA.

B Lindsnaes, L Lindholt & K Yigen (eds) *National Human Rights Institutions Articles and working papers* (2000) Danish Centre for Human Rights: Denmark.

L Lindholt "National Human Rights Institutions as Independent Actors in Relation to Economic, Social and Cultural Rights" in E Brems, G de Beco & W Vandenhole (eds) *National Human Rights Institutions and Economic, Social and Cultural Rights* (2013) Intersentia: Antwerp

PLO Lumumba, MK Mbondenyi & SO Odero (eds) *The Constitution of Kenya: Contemporary Readings* (2013) Law Africa Publishing: Nairobi.

K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) PULP: Pretoria.

JA Mertus *Human Rights Matters: Local Politics and National Human Rights Institutions* (2009) Stanford University Press: Stanford.

C Mbazira *Litigating Socio-economic Rights in Southern Africa; A Choice between Corrective and Distributive Justice* (2009) PULP: Pretoria.

R Murray *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (2007) Hart Publications: Portland.

JP Mutonyi "Fighting Corruption: Is Kenya on the Right Track" in R Sarre, DK Das & I Albrecht (eds) *Policing Corruption: International Perspectives* (2005) Lexington Books: Oxford.

G Mwakikagile *Ethnic Politics in Kenya and Nigeria* (2001) Nova Science Publishers: New York.

O Nowosad "National Institutions and the Protection of Economic, Social and Cultural Rights" in BG Ramcharan (ed) *The Protection Role of National Human Rights Institutions* (2005) Martinus Nijhoff Publishers: Leiden.

OC Okafor "The South African Human Rights Commission: A Holistic Assessment" in T Maluwa (ed) *Law, Politics and Rights: Essays in Memory of Kader Asmal* (2014) Martinus Nijhoff Publishers: Leiden.

O Okumbo, J Kwaka, B Muluka & B Sungura-Nyabeto (eds) *Challenging the Rulers: A Leadership Model for Good Governance* (2011) East African Educational Publishers: Nairobi.

NW Orago 'Socio-Economic Rights and the Potential for Structural Reforms: A Comparative Perspective on the Interpretation of the Socio-economic Rights in the Constitution of Kenya, 2010' in MW Kiwinda, EO Asaala & T Kabau (eds) et al *Human rights and Democratic Governance in Kenya: A post-2007 Appraisal* (2015) PULP: Pretoria.

CM Peter “Human Rights Commissions in Africa—Lessons and Challenges” in A Bösl and J Diescho (eds) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) Macmillan: Windhoek.

AE Pohjolainen *Evolution of NHRIs: The Role of the United Nations* (2006) The Danish Institute of Human Rights: Copenhagen.

BG Ramcharan (ed) *The Protection Role of National Human Rights Institutions* (2005) Martinus Nijhoff Publishers: Leiden.

LC Reif *The Ombudsman, Good Governance and the International Human Rights System* (2004) Martinus Nijhoff Publishers: Leiden.

A Sachs “The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case” in P Jones & K Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) Martinus Nijhoff Publishers: Leiden.

G Sayer *Kenya: Promised Land?* (1998) Oxfam GB: Oxford.

HP Schmitz “Transnational activism and political change in Kenya and Uganda” in T Risse-Kappen, SC Ropp & K Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge University Press: Cambridge.

N Shawki “A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions” in N Shawki and M Cox (eds) *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (2009) Ashgate: Surrey.

M Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) Intersentia: Antwerp.

D Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the*

International Legal System (2000) Oxford University Press:Oxford.

D Silverman *Interpreting qualitative data: Methods for analysing talk, text and interaction* 3rd edition (2006) SAGE: London.

D Snape and L Spencer “The foundations of qualitative research”. J Ritchie and J Lewis (eds.) *Qualitative research practice: A guide for social science students and researchers* (2003) SAGE: London.

RKM Smith *Texts and Materials on International Human Rights* 2nd Edition (2009) Routledge – Cavendish: Oxfordshire.

JM Smits “Redefining Normative Legal Science: Towards an Argumentative Discipline” in F Coomans, F Grunfeld and MT Kamminga (eds) *Methods of Human Rights Research* (2009) Intersentia: Antwerp.

HJ Steiner and P Alston *International Human Rights in Context: Law, Politics, Morals* (2000) OUP: Oxford.

CR Sunstein *Designing Democracy: What Constitutions Do* (2001) Oxford University Press: Oxford.

J Symonides (ed) *Human rights: Concepts and Standards* (2000) Ashgate Publishing: Michigan

F Viljoen “The Justiciability of Socio-economic and Cultural Rights: Experience and Problems” in Y Donders & V Volodin (eds) *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (2007) Ashgate Publishing: Michigan

K Wa Wamwere *Negative Ethnicity: From Bias to Genocide* (2003) Seven Stories Press: New York.

DJ Whelan *Indivisible Human Rights: A History* (2010) University of Pennsylvania Press: Philadelphia.

Journal Articles

P Alston and G Quinn "Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, The Symposium: The Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156-229.

JO Arwa "Litigating socio-economic rights in domestic courts: The Kenyan experience" in (2013) 17 *Law, Democracy and Development* 419-443.

D Beetham "What Future for Economic and Social Rights?" (1995) XLIII *Political Studies* 41.

S Cardenas "Emerging Global Actors: The United Nations and National Human Rights Institutions" (2003) 9 *Global Governance* 23-42.

S Cardenas and A Flibbert "National Human Rights Institutions in the Middle East" (2005) 59 *Middle East Journal* 411-436.

S Cardenas 'Constructing Rights? Human Rights Education and the State' (2005) 26 *International Political Science Review* 363-379.

RE Case "Friends or Foes? The Commonwealth and the Human Rights and Equal Opportunity Commission in the Courts" (2009) 44 *Australian Journal of Political Science* 57.

R Carver "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10 *Human Rights Law Review* 1-32.

EC Christiansen "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" (2007) 38 *Columbia Human Rights Review* 321-386.

RJ Daniels & M Trebilcock "The Political Economy of Rule of Law Reform in Developing Countries" (2004) 26 *Michigan Journal of International Law* 99-140.

G De Beco "Article 33.2 of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?" (2011) 29 *Netherlands Quarterly of Human Rights* 84-106.

G De Beco "National Human Rights Institutions in Europe" (2007) 7 *Human Rights Law Review* 1-40.

E Berger "The Right to Education under South African Constitution" (2003) 103 *Columbia Law Review* 614-661.

D Bilchitz "Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence" (2003) 4 *ESR Review* 2-4.

D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 119 *SALJ* 484-501.

M Brodie "Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights" 2011 (80) *Nordic Journal of International Law* 143-192.

FB Cross "*The Error of Positive Rights*" (2001) 48 *UCLA Law Review* 857-924.

MJ Dennis & DP Steward "Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 *American Journal of International Law* 462-515.

P De Vos "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal on Human Rights* 67-101.

CE Dugger "Rights Waiting for Change: Socio-economic Rights in the New South Africa" (2007) 19 *Florida Journal of International Law* 195-287.

CS Elmendorf "Advisory Counterparts to Constitutional Courts" (2007) 56 *Duke Law Journal* 953-1045.

OLM Ferraz "Poverty and Human Rights" (2008) 28 *Oxford Journal of Legal Studies* 585-603.

JY Gotanda "Regional Institutions in East Asia and the Pacific: Is the Time Ripe?" (1995) *American Society of International Law Proceedings* 471-475.

S Gloppen "Litigation as a Strategy to Hold the government Accountable for implementing the Right to Health" (2008) 10 *Health Human Rights* 21-36.

M Gomez "Social Economic Rights and Human Rights Commissions" (1995) 17 *Human Rights Quarterly* 155-169.

NMI Goolam "Human Dignity-Our Supreme Constitutional Value" (2001) 4 *Potchefstroom Electronic Law Journal* 1-10.

K Govender "The reappraisal and restructuring of chapter 9 institutions" (2007) 22 *SA Public Law* 190-209.

SBO Gutto 'Beyond Justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79-102.

C Heyns "Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission in Terms of the New Constitution" (1999) 32 *De Jure* 195-226.

R Hirschl "The Rise of Comparative Constitutional Law: Thoughts on Substance and Method" (2008) 2 *Indian Journal of Constitutional Law* 11-37.

D Horsten "The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa" (2006) 2 *Potchefstroom Electronic Law Journal* 1.

A Kein "Judging As Nudging: New Governance Approaches for The Enforcement of Constitutional Social and Economic Rights" (2007-2008) 39 *Columbia Human Rights Review* 351-422.

MS Kende "The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics" (2003–2004) 19 *Connecticut Journal of International Law* 617-630.

S Khoza 'Reducing Mother-to-Child Transmission of HIV: The Nevirapine Case' (2002) 3 *ESR Review* 2-6.

J Klaaren "A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights" (2005) 27 *Human Rights Quarterly* 539-561.

J Kollapen "Monitoring Socio-Economic Rights. What has the South African Human Rights Commission Done?" (1999) 1 *ESR Review* 30-33.

J Koo & FO Ramirez "National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004" (2009) 87 *Social Forces* 1321-1354.

T Lodge "How the South African Electoral System was Negotiated" (2003) 2 *Journal of African Elections* 71-76.

N Ntlama "Monitoring the implementation of socio-economic rights in South Africa: Some lessons from the International Community" (2004) 8 *Law Democracy and Development* 207-220.

JK Mapulanga-Hulston "Examining the Justiciability of Economic, Social and Cultural

Rights" (2002) 6 *The International Journal of Human Rights* 29-48.

J Matshekga "Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence" (2002) 2 *African Human Rights Law Journal* 68-91.

CV McClain "The SA Human Rights Commission and socio-economic rights Facing the challenges" (2002) 3 *ESR Review* 8-9.

FI Michelman "The Constitution, Social Rights, and Liberal Political justification" (2003) 1 *International Journal of Constitutional Law* 13-34.

L Minkler & S Sweeney "On the Indivisibility and Interdependence of Basic Rights in Developing Countries" (2011) 33 *Human Rights Quarterly* 351-396.

A Neier 'Socio-economic Rights. A critique' (2006) *Human Rights Brief* 1-3.

DG Newman "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda" (2003) 19 *South African Journal on Human Rights* 189-216.

OC Okafor and SC Agbakwa "On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission" (2002) 24 *Human Rights Quarterly* 662-720.

NW Orago "Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes" (2013) 16 *Potchefstroom Electronic Law Journal* 169-219.

T Pegram "Diffusion across Political Systems: The Global Spread of National Human Rights Institutions" (2010) 32 *Human Rights Quarterly* 729-760.

MJ Perry "Protecting Human Rights in a Democracy: What Role for the Courts Judicial Review: Blessing or Curse - or Both - A Symposium in Commemoration of the Bicentennial of Marbury V. Madison" (2003) 38 *Wake Forest Law Review* 635-696.

M Pieterse "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26 *Human Rights Quarterly* 882-905.

M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to healthcare services' (2006) 22 *South African Journal on Human Rights* 473-502.

M Pieterse "Legislative and Executive Translation of the Right to Health Care Services" (2014) 13 *Law Democracy and Development* 1-25.

K Pillay "An Interpretation of 'relevant organs of state' in section 184 (3) of the Constitution and their duty to provide information on socio-economic rights to the South African Human Rights Commission" (1998) 2 *Law, Democracy and Development* 179-196.

C Raj Kumar "National Human Rights Institutions: Good governance perspectives on Institutionalization of Human Rights" (2003) 19 *American University International Law Review* 259-300.

C Raj Kumar "National Human Rights Institutions and Economic, Social, and Cultural Rights: Towards the Institutionalization and Developmentalization of Human Rights" (2006) 28 *Human Rights Quarterly* 755-779.

LC Reif "Building Democratic Institutions; The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 1-70.

C Renshaw, A Byrnes and A Durbach "Implementing Human Rights in the Pacific

through National Human Rights Institutions: The Experience of Fiji” (2009) 40 *Victoria University Wellington Law Review* 251-278.

C Renshaw, A Byrnes and A Durbach “Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia” (2011) 1 *Asian Journal of International Law* 165-198.

RE Robertson ‘Measuring state compliance with the obligation to devote the “maximum available resources” to realising economic, social and cultural rights’ (1994) 16 *Human Rights Quarterly* 693-714.

J Rowley “Using Case Studies in Research” (2002) 25 *Management Research News*.

J Sarkin 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587-615.

M Ssenyonjo “Reflections on State Obligations with Respect to Economic, Social and Cultural rights in international human rights law” (2011) 15 *The International Journal of Human Rights* 969-1012.

C Scott “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38-60.

AK Singhal and I Malik “Doctrinal and socio-legal methods of research: merits and demerits” (2012) 2 *Educational Research Journal* 252–256.

A Smith “The Unique Position of National Human Rights Institutions: A Mixed Blessing?” (2006) 28 *Human Rights Quarterly* 904-946.

V Sripathi “India's National Human Rights Commission: A Shackled Commission?” (2000) 18 *Boston University International Law Journal* 1-46.

L Thio “Panacea, Placebo, or Pawn - The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)” (2009) 49 *George Washington International Law Review* 1271-1342.

S Turner, J Cilliers & B Hughes 'Reasonable Goals for Reducing Poverty in Africa-Targets for Post 2015 MDGs and Agenda 2063' (2014) 10 *African Futures Paper* 1-15. https://issafrica.s3.amazonaws.com/site/uploads/AF_Paper13.pdf (accessed 19 March 2015).

P Uvin 'On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise' (2002) XVII *The Fletcher Journal of Development Studies* 1-11.

SG Verhulst and ME Price "Comparative Media Law Research and its Impact on Policy" (2008) 2 *International Journal of Communication* 406-420.

A Whiting "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission" (2003) 39 *Stanford Journal of International Law* 59-98.

E Wiles "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law" (2006-7) 22 *American University International Law Review* 35-64.

KG Young 'A typology of economic and social rights adjudication:Exploring the catalytic function of judicial review' (2010) 8 *International Journal of Constitutional Law* 385-420.

K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113-176.

Other sources

African Commission on Human and People's Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 15 March 2014).

African Centre for Open Governance (Africog) *Commissions of Inquiry in Kenya: Seekers of Truth or Safety Valves* (2008) <http://africog.org/new/wp->

content/uploads/Commissions%20Of%20Inquiry%20Full%20Report.pdf (accessed 10 November 2015).

JO Ambani *Oval Slides in Triangular Spaces? Anchoring National Human Rights Institutions in 'tripartite' Commonwealth Africa* (LLM Thesis, University of Pretoria 2006).

K Annan *Strengthening of the United Nations: An Agenda for Further Change* Report of the Secretary-General, 9 September 2002

D Brand "Assessing the South African Human Rights Commission's assessment of socio-economic rights implementation: the first Economic and Social Rights Report" http://www.chr.up.ac.za/chr_old/centre_projects/socio/research.html (accessed 15 May 2015).

PE Chabane *Enforcement Powers of National Human Rights Institutions: A Case Study of Ghana, South Africa and Uganda* (LLM Thesis, University of Pretoria 2007).

Commission for the Implementation of the Constitution *Second Quarterly Report on the Implementation of the Constitution* June 2011 http://www.cickenya.org/index.php/reports/item/download/12_a1d9ca5bba80878e7fa27ad78128e781 (accessed 2 April 2015).

Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights <http://nhri.ohchr.org/EN/News/Lists/News/Attachments/104/Chart%20of%20the%20Status%20of%20NHRIs%20%2811%20Feb%202013%29.pdf> (accessed 19 March 2013).

A Corkery "National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights" Centre for Economic and Social Rights, Social Justice through Human Rights <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf> (accessed 19 March 2013).

P Danchin "A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case" EJIL Talk <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/> (accessed 12 February 2014).

'Delayed implementation could lead to flawed laws' *Celebrating the Constitution - Reject* 46 <http://www.mdcafrica.org/index.php/rejects-online/celebrating-the-constitution-reject-issue-46/110-delayed-implementation-could-lead-to-flawed-laws> (accessed 9 April 2015).

Pierre De Vos 'Human Rights Commission appointments not up to scratch' 28th September 2009 <http://constitutionallyspeaking.co.za/human-rights-commission-appointments-not-up-to-scratch/> (accessed 21 April 2015).

Dissent over SAHRC appointees
<http://www.news24.com/SouthAfrica/Politics/Dissent-over-SAHRC-appointees-20090819> (accessed 21 April 2015).

Repealed Constitution of Kenya 1963
http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution/Constitution_of_Kenya%28Repealed%29.pdf (accessed 19 March 2013).

East African Law Society (EALS): Appoint Human Rights Commissioners
<http://www.isk.or.ke/index.php/component/content/article/1-latest-news/337-eals-appoint-human-rights-commissioners> (accessed 7 April 2015).

Enhancing the Participation of National Human Rights Institutions in the work of the Commission on Human Rights and its Subsidiary Bodies Report of the Secretary-General E/CN.4/2005/107

European Union Agency for Fundamental Rights *National Human Rights Institutions in the EU Member States Strengthening the fundamental rights architecture in the EU I* (2010) http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf (accessed 19 March 2014).

L Hantrais “Comparative Research Methods” (1995) 13 *Social Research Update*
<http://sru.soc.surrey.ac.uk/SRU13.html> (accessed 4 March 2013).

Human Rights Committee, Paper on the Relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012) CCPR/C/106/
http://nhri.ohchr.org/EN/News/Lists/News/Attachments/90/FINAL%20HRCpaperNHR_L_en.pdf (accessed 19 March 2013).

“Judiciary and electoral agency must reclaim shrinking confidence” *Standard Digital*
March 29, 2016 <http://www.standardmedia.co.ke/article/2000196407/judiciary-and-electoral-agency-must-reclaim-shrinking-confidence/> (accessed 29 March 2016).

FB Khan NHRIs and the Challenges of Independence in a Kenyan Context
(Unpublished LLM Thesis – Lund University 2010).

M Kjærum “National Human Rights Institutions Implementing Human Rights” (2003)
Danish Institute of Human Rights
http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/n_h_r_i_h_fte_eng.pdf
(accessed 19 March 2013).

KNCHR *From Norm to Practice: A Status Report on Implementation of the Rights of Persons with Disabilities in Kenya* (2014)
<http://www.knchr.org/Portals/0/Reports/Disability%20Report.pdf> (accessed 6 October 2014).

Maastricht Guidelines on Violations of Economic Social and Cultural Rights
Guidelines January 22-26, 1997.

Samwel Born Maina “Revealed: How ethnic groups share public jobs” *Daily Nation* 7
January 2015 <http://www.nation.co.ke/news/Revealed-How-ethnic-groups-share-public-jobs/-/1056/2581834/-/to0s7bz/-/index.html> (accessed 10 November 2015).

C Musuva "Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa South Africa's Public Protector and Human Rights Commission" (2009) EISA Research Report No 41, 30 <http://www.eisa.org.za/PDF/rr41.pdf> (accessed 14 February 2013).

M Mataboge "Asmal takes on Parliament" *Mail and Guardian* 20 JULY 2009 06:00 <http://mg.co.za/article/2009-07-20-asmal-takes-on-parliament> (accessed 15 May 2015).

J Matlou "HRC shifts focus under new leadership" *Mail and Guardian* 12 October 2012 <http://mg.co.za/article/2002-10-12-hrc-shifts-focus-under-new-leadership> (accessed 15 May 2015).

Miguna Miguna "No arm of government is above the law" *The Star* 01 March 2014 http://www.the-star.co.ke/news/2014/03/01/no-arm-of-government-is-above-the-law_c900857 (accessed 6 September 2016).

Billy Muiruri "Judiciary, poll body struggle to win public trust" *Daily Nation* March 26, 2016 <http://www.nation.co.ke/news/Judiciary-and-poll-body-struggle-to-win-public-trust/-/1056/3134142/-/123xl5/-/index.html> (accessed 29 March 2016).

No fear, favour or prejudice *Mail & Guardian* 6 November 2009 <http://mg.co.za/article/2009-11-06-no-fear-favour-or-prejudice> (accessed 21 April 2015).

Office on Institutions Supporting Democracy (OISD) http://www.parliament.gov.za/live/content.php?Category_ID=320 (accessed 10 March 2015).

AA Razak *Understanding Legal Research* 21. <http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf> (accessed 5 February 2013).

Faith Ronoh "Muturi defiant as Judiciary, House war rages" *Standard Digital* Saturday, November 1st, 2014

<http://www.standardmedia.co.ke/m/article/2000140093/muturi-defiant-as-judiciary-house-war-rages/?pageNo=1> (accessed 6 September 2016).

Victoria Rubadiri 'Debate rages over splitting rights commission' Capital News 22 July 2011 <http://www.capitalfm.co.ke/news/2011/07/debate-rages-over-splitting-rights-commission/> (accessed 9 April 2015).

SAHRC *Report of the Public Hearing on the Right to Basic Education* 2006 <http://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf> (accessed 17 February 2015).

SAHRC *Public Hearing on Water and Sanitation: A call for State Accountability* (2013) <http://peopletoparliament.org.za/focus-areas/socio-economic-rights/news/WaterAndSanitationPublicHearings> (accessed 6 January 2014).

SAHRC *Report on the Public Hearing on Housing, Evictions and Repossessions* (2008) http://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf (accessed 15 May 2015).

SAHRC Public Inquiry: Access to Health Care Services <http://www.sahrc.org.za/home/21/files/Health%20Report.pdf> (accessed 11 May 2015).

SAHRC *Commission Complaints Handling Procedures* <http://www.sahrc.org.za/home/21/files/Revised%20Complaints%20Handling%20Procedures%20of%20the%20SAHRC%20240212.pdf> (accessed 17 February 2015).

SAHRC *Economic & Social Rights Report Baseline Information 1997-1998* <http://www.sahrc.org.za/home/21/files/Reports/ESR%20Baseline%20Information1997-1998.pdf> (accessed 11 February 2015).

SAHRC *Strategic Plan 2014 – 2017 and Annual Performance Plan 2014-2015*
<http://www.sahrc.org.za/home/21/files/SAHRC%20Strategic%20Plan%202014-17%20and%20APP%202014-15.pdf> (accessed 26 January 2015).

SAHRC *4th Economic and Social Rights Report 2002/2003*
http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_1.pdf (accessed 25 May 2015).

SAHRC *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014*
[http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf) (accessed 11 May 2015).

SAHRC *MDGs and the Realisation of Economic and Social Rights in South Africa: A Review* (2008)
<http://www.sahrc.org.za/home/21/files/1/ESR%20Working%20Paper%20for%20Public%20Hearings%202009.pdf> (accessed 11 February 2015).

SAHRC *7th Report on Economic and Social Rights 2006-2009*
<http://www.sahrc.org.za/home/21/files/7th%20ESR%20chapter%201%20to%203.pdf> (accessed 11 February 2015).

SAHRC *Concept Paper on The Strategic Focus Area; The Right to Food*
[http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20(2).pdf) (accessed 25 March 2015).

South African Human Rights Commission *Annual Report 2014*
http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf (accessed 3 March 2015).

SANGOCO's *Report on Poverty and Human Rights* (1998)
<http://www.sahrc.org.za/home/21/files/Reports/ESR%20Sangogo%20Report%20on>

%20Poverty%20and%20Human%20Rights1997-1998.pdf (accessed 4 February 2015).

FL Seidensticker "Independence and Accountability of NHRs: A European Perspective" in The Danish Institute of Human Rights *NHRIS' Independence and Accountability*

http://www.humanrights.dk/files/media/dokumenter/udgivelser/nhris_independence_and_accountability_publication.docx.pdf (accessed 15 May 2015).

Ten Years after First Hearings, It's Time to Let Voices of the Poor Be Heard Once More- *Cape Times* <http://www.blacksash.org.za/index.php/media-and-publications/black-sash-in-the-media/759-ten-years-after-first-hearings-its-time-to-let-voices-of-the-poor-be-heard-once-more-cape-times> (accessed 15 May 2015).

United Nations Office of the Commissioner for Human Rights *National Human Rights institutions History, Principles, Roles and Responsibilities* (2010). http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf (accessed 24 February 2013).

United Nations Office of the High Commissioner on Human Rights (OHCHR) *Training Manual on Human Rights Monitoring* (2001) <http://www.ohchr.org/Documents/Publications/training7Introen.pdf> (accessed 24 February 2013).

United Nations Human Rights Council *Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities A/HRC/13/29* (22 December 2009).

Office of the United Nations High Commissioner for Human Rights Frequently Asked Questions on Economic Social and Cultural Rights Fact Sheet 33 11. <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf> (accessed 4 June 2014).

Justus Wanga “Central MPs to Uhuru: We want more money, jobs and real power”
Daily Nation July 11, 2015<http://www.nation.co.ke/news/politics/Central-MPs-Uhuru-Kenyatta-Public-Appointments/-/1064/2784276/-/10bq2enz/-/index.html> (accessed 10 November 2015).