

Compendium of documents on National Human Rights Institutions in eastern and southern Africa

Charles M Fombad (Editor)

Licence en Droit (Yaounde), LL.M PhD (University of London),

Diploma Conflict Resolution (Upsalla)

Professor of Law, Institute for International and Comparative Law in Africa,
Faculty of Law, University of Pretoria

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Compendium of documents on National Human Rights Institutions in eastern and southern Africa

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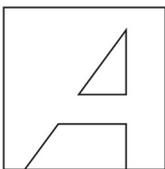
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TABLE OF CONTENTS

| | | |
|----|--|-----|
| | PREFACE | v |
| 1 | INTRODUCTION | 1 |
| 2 | AN OVERVIEW OF NHRIS IN EASTERN AND SOUTHERN AFRICA | 5 |
| 3 | THE OMBUDSMAN OF ANGOLA | 20 |
| 4 | THE OFFICE OF THE OMBUDSMAN IN BOTSWANA | 36 |
| 5 | THE BURUNDIAN INDEPENDENT NATIONAL HUMAN RIGHTS COMMISSION | 56 |
| 6 | THE DEMOCRATIC REPUBLIC OF THE CONGO'S NATIONAL COMMISSION ON HUMAN RIGHTS | 101 |
| 7 | THE SWAZILAND COMMISSION ON HUMAN RIGHTS AND PUBLIC ADMINISTRATION INTEGRITY | 266 |
| 8 | THE ETHIOPIAN HUMAN RIGHTS COMMISSION | 293 |
| 9 | THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS | 331 |
| 10 | THE LESOTHO HUMAN RIGHTS COMMISSION | 456 |
| 11 | THE MALAWI HUMAN RIGHTS COMMISSION | 494 |
| 12 | THE NATIONAL HUMAN RIGHTS COMMISSION OF MAURITIUS | 536 |
| 13 | THE RWANDAN NATIONAL COMMISSION FOR HUMAN RIGHTS | 572 |
| 14 | THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION | 646 |

| | | |
|----|--|-----|
| 15 | THE TANZANIAN COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE | 713 |
| 16 | THE ZAMBIAN HUMAN RIGHTS COMMISSION | 778 |
| 17 | THE ZIMBABWE HUMAN RIGHTS COMMISSION | 813 |
| 18 | NATIONAL HUMAN RIGHTS INSTITUTIONS IN EASTERN AND SOUTHERN AFRICA: LESSONS AND PROSPECTS FOR THE FUTURE | 890 |

PREFACE

When the Rule of Law Program for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung organised its first meeting of the national human rights institutions (NHRIs) of the SADC region in Lusaka, Zambia, no one suspected the workshop would be the starting-point and model for further meetings of this kind. Inspired by my meetings with the CEOs of NHRIs in Malawi and Zambia in the previous year, the idea for this event was born – providing their representatives with a platform on which to exchange ideas and get to know each other better.

Unlike other state institutions, NHRIs often lack the financial means to hold such meetings. Indeed, the challenges facing these guardians of fundamental human rights are remarkably similar. In addition to imperfect legal frameworks, there is often a lack of human and financial resources for coping with the diverse tasks they have to perform. Added to this is the lack of political will on the part of many governments and politicians to support the work of NHRIs. Despite the fact that some are constitutionally protected, this does not mean that NHRIs enjoy support in fulfilling their mandates. For certain governments, they are a thorn in their side, so it works in their favour if the NHRIs' activities are barely noticeable and do not get the attention they deserve.

The aim of the workshop held in 2018 – establishing a platform for dialogue among the NHRIs of the SADC region – has been successfully achieved. Not only did the workshop provide a platform for exchange and getting to know one another better, but new contacts were made and networks created. As the problems in the various countries are often similar, the participants could also provide mutual advice and learn from each other's experiences. In addition, the director a non-governmental Kenyan human rights organisations, Mr. George Kegoro, and the Vice President of the European Court of Human Rights, Prof Dr Angelika Nußberger, spoke about their respective roles and duties.

The workshop drew participants from 12 of the 15 SADC member countries; among them was Prof Charles Fombad of the Institute for International and Comparative Law at the University of Pretoria. The creation of this compendium is due to his dedicated involvement. It was he who came up with the idea of publishing a book that not only presents and explains the work of NHRIs in 15 states of southern and eastern Africa, but also contains a collection of the legal frameworks on which their activities and organisation are based.

In this respect, the book you are about to read is unique in its approach. Given, too, that it refers to so many examples of best practice, it is also highly instructive. This is an excellent and indispensable reference work for all those who deal with the subject of human rights in southern and eastern Africa professionally or personally.

The Rule of Law Program for Sub-Saharan Africa of the Konrad-Adenauer-Foundation thanks Prof Fombad and all the authors involved for their willingness and commitment in producing this book. Both at a

theoretical and practical level, it will assist national and international institutions, scientists, students, lawyers, politicians and other persons and organisations concerned with the protection of human rights. I am sure the book will find broad readership and thus make an invaluable contribution to better protecting human rights, which are under constant pressure.

Dr Arne Wulff

August 2019

Director of the Rule of Law Program for Sub-Saharan Africa

Konrad-Adenauer-Stiftung



1

INTRODUCTION

*Charles M Fombad**

1 Introduction

In the last three decades, the recognition and protection of fundamental human rights have become as commonplace in Africa as in the rest of the world. The primary responsibility for ensuring that these rights are respected lies with states. They negotiate and ratify international human rights instruments and are required to create mechanisms to safeguard the rights. It is at the level of implementing these commitments effectively that serious challenges remain.

Generally, enforcing human rights has never been easy. Apart from the government, numerous entities are involved in their enforcement, ranging from the judiciary, law enforcement agencies and legislature to educational institutions providing human rights programmes, civil society organisations (CSOs), international non-governmental organisations (INGOs), donor institutions, and national human rights institutions (NHRIs). Among these institutions and organisations, NHRIs play a unique role and are the cornerstone of any effective national human rights protection system.

Africa's increasing recognition and protection of human rights have been accompanied by a surge in the number of NHRIs established with broad mandates to promote and protect human rights. The mandates and

* Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria.

powers of the NHRIs vary from country to country, as does their ability to deliver on these mandates. Indeed, the rapid increase in the number of NHRIs in Africa has come with a variety of substantive and operational challenges. In the face of such challenges, those who work in NHRIs need to understand the broader regional and global context in which the institutions operate and the changing nature of human rights issues.

This compendium provides an overview of NHRIs in eastern and southern Africa. It is guided to a large extent by the internationally agreed-upon Principles Relating to the Status of National Institutions, referred to as the Paris Principles. These Principles are broadly accepted as the benchmark against which the legitimacy and credibility of NHRIs can be assessed.¹ Endorsed by the United Nations General Assembly in 1993, the Paris Principles provide NHRIs with guidelines as to their competence and responsibilities, their composition and guarantees of independence and pluralism, and their methods of operation; additional principles relate to the status of commissions with quasi-jurisdictional competence.

In spite of the common minimum international standard against which most of Africa's NHRIs purport to have been established, there are wide variations in their level of performance. This is reflected in their different levels of accreditation by the International Committee of National Institutions for the Promotion and Protection of Human Rights, which uses the Paris Principles as one of its main assessment instruments.²

In focusing on the NHRIs in some of the countries in eastern and southern Africa, the objectives of this compendium are to:

- provide a unique compilation of important legal instruments regulating the NHRIs in each country, ranging from the national constitution and other pieces of legislation to important internal instruments and codes of conduct;
- serve as reference material for legal professionals and policy-makers to increase awareness and understanding as well as practical knowledge of best practices;
- serve as a source of information for promoting exchanges of views on best practices and a means of creating new good practices;
- assist scholars, researchers, students, lawyers, judges and other professionals interested in NHRIs; and

1 See United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993), available at <https://bit.ly/2WckyGL> (accessed in April 2019).

2 Global Alliance of National Human Rights Institutions, *Chart of the Status of National Institutions*, available at <https://bit.ly/30368Lb> (accessed in April 2019).

- identify gaps and challenges that NHRIs face and see what key lessons can be drawn to inform strategies for addressing them.

The compendium covers the following 15 countries: Angola, Botswana, Burundi, the Democratic Republic of the Congo, Eswatini (formerly Swaziland), Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Rwanda, South Africa, Tanzania, Zambia, and Zimbabwe.

The next chapter is a general overview of the NHRIs of these countries, after which individual chapters are devoted to each country. Each chapter is divided into two parts. The first, part A, provides an introductory commentary on the NHRI of the country in question; the second, part B, contains some selected human rights documents and materials from that country.

The introductory commentary on each country covers four areas:

- First, it looks at the way in which each NHRI was set up and how it has evolved over time.
- Secondly, it examines the nature of the institution, particularly its legal framework. This encompasses issues such as the manner in which staff are appointed, the scope of their independence, the level of human capacity and professional skills, the relationship between the institutions and other actors that play a role in promoting human rights, the extent of financial autonomy, and the level of access to the institution by victims of human rights abuses.
- Thirdly, the introductory commentary examines the mandate of the NHRI, taking note of how elaborate it is and how it conforms to the Paris Principles.
- Finally, the commentary assesses the level of public accountability of the institutions. The critical questions in each instance is to see to what extent these institutions are able to discharge their mandate of promoting and protecting human rights in the country; in this regard, the good practices as well as gaps and challenges for each country are identified.

A crucial feature of a credible, legitimate and effective human rights protection system is the legal framework on which it is based. In this respect, part B of each chapter provides selected human rights documents for each country. These documents cover three key areas:

- The first section deals with the constitutional provisions setting up the NHRI and similar institutions with a human rights mandate.
- The second section provides some of the key legislative and regulatory instruments relating to the NHRI. These may consist of primary legislation and other regulatory instruments such as statutory instruments, presidential proclamations, orders or directives, and ministerial orders or decrees.

- The third section contains some of the important internal rules and regulations designed to enhance the performance and efficiency of the institution, such as staff codes of ethics or conduct, quality standards and procedural handbooks, Memoranda of Understanding (MOUs) with government departments, non-governmental organisations, and other state institutions.

The selection of eastern and southern African countries in this compendium takes account of the region's diversity of legal and constitutional traditions (the English Common law in Anglophone countries and the civil law in Francophone and Lusophone countries) as well as the diversity of the languages spoken in the regions (English, French and Portuguese).

Highlighting the human rights documents and instruments is a critical aspect of this compendium. Although the Paris Principles serve as a uniform benchmark to guide states, the national legal frameworks regulating each of the NHRIs differ considerably from one another. The differences certainly have an impact on the NHRI's ability to discharge its mandate. What lessons can be learnt, then, from the approach adopted by the different countries in regulating their NHRIs?

Due to the challenges of translation, it was not possible to include a full range of human rights documents and instruments from every country. What is more, the decisions as to which materials to include was also dictated by the nature of the lessons, both positive and negative, that could be drawn from the national legal framework and its impact on the quality of human rights protection in the country.

The compendium ends with a conclusion that seeks to draw some overarching lessons from the country case studies and assess prospects for the future. It is clear that the fate of human rights protection is inextricably linked to how much progress each country has made in regard to democracy; conversely, when threats to democracy begin to mount through a resurgence of authoritarianism, one of the first signs of this is an increase in human rights violations. What emerges from the case studies is that more needs to be done to strengthen NHRIs in Africa.

References

- Global Alliance of National Human Rights Institutions, *Chart Of the Status Of National Institutions*, available at <https://bit.ly/2WckyGL> (accessed in April 2019)
- United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly Resolution 48/134 of 20 December 1993, available at <https://bit.ly/2WckyGL> (accessed in April 2019)



2

AN OVERVIEW OF NHRIS IN EASTERN AND SOUTHERN AFRICA *Charles M Fombad**

1 Introduction

Although national human rights institutions (NHRIs) are now an integral part of the human rights protection system in Africa,¹ the forms they take, the nature of their mandates, and numerous other features that are crucial for them to work effectively differ from one country to another. The factors responsible for these differences of approach include the country's legal tradition, its political and human rights history, and the role that each country believes such an institution can play in protecting and promoting respect for human rights within its territory.

This compendium covers 15 countries in two regions – eastern and southern Africa – that combine many similarities as well as differences. For example, until the 1990s South Africa was governed by apartheid, which was undoubtedly one of the most inhumane systems ever contrived by man against man and led to massive, systemic and institutionalised violations of the fundamental human rights of the black majority. Just over a decade earlier, Angola and Zimbabwe succeeded in gaining independence after dismantling similar systems of white minority rule.

In terms of legal tradition, there is remarkable diversity in the legal systems of the 15 countries. For example, the Roman-Dutch legal tradition underlies the law in Botswana, Eswatini, Lesotho, South Africa and

* Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria.

1 See UNDP, *Study on the State of National Human Rights Institutions (NHRIs) in Africa*, available at <https://bit.ly/2fHKhG2> (accessed in May 2019), p 12.

Zimbabwe. The English common law is the foundation of the legal systems in Kenya, Malawi, Tanzania, and Zambia. There is a mixed common law and civil law system in Mauritius, whilst the civil law legal tradition prevails in Angola, Burundi and the Democratic Republic of the Congo (DRC). Unlike the others, the Ethiopian legal system is largely indigenous.

The 15 countries also vary considerably in their state of democracy and good governance. At one extreme, Botswana, Mauritius, Namibia and South Africa stand out as having made reasonable progress towards democratic consolidation; at the other extreme are Angola, Eswatini (an absolute monarchy), Rwanda and Zimbabwe, where the democratic transition has stalled and there are signs of a resurgence of authoritarianism. Given the inextricable link between democracy and respect for human rights, how are these differences reflected in the way that NHRIs in these countries implement their human rights mandate?

This chapter provides a broad overview of the NHRIs in these countries against their different legal and historical backgrounds. It looks at a number of issues. Following this introduction, section 2 briefly examines NHRIs in general and identifies the different models that operate in the countries under review. Section 3 sets out the analytical framework used in the study. The legal framework used for establishing the different NHRIs is discussed in section 4. Other issues examined are the independence of these institutions (section 5), the appointment of staff (section 6), their mandates (section 7), and their accessibility to members of the public (section 8). The final section offers some concluding remarks.

2 The diversity of NHRIs

NHRIs are state bodies with a constitutional and/or legislative mandate to protect and promote human rights. Although they are referred to as NHRIs, there is no universally accepted standard form or model to which they adhere. In fact, their names, practices and functions vary widely.

The names of NHRIs differ depending on the region, the legal tradition, and common usage. The common names used are, “civil rights protector”, “commissioner”, “human rights commission”, “institute” or “centre”, “ombudsman”, “parliamentary ombudsman” or “commissioner for human rights”, “public defender/protector”, and “parliamentary advocate”. As we shall see in subsequent chapters, countries in eastern and southern Africa have adopted one or other of these names or a variation of it.

As noted, no standard model exists. Although the Paris Principles,² which are discussed below, set out some minimum international standards for the roles and responsibilities of NHRIs, they do not dictate what particular model or structure states should adopt. There are five different NHRI models:

- human rights commissions;
- ombudsman institutions;
- hybrid institutions;
- consultative/advisory institutions; and
- institutes and centres.³

All but two of the countries in this study have human rights commissions. The exceptions are Botswana and Tanzania, which have hybrid institutions known, in the case of Botswana, as the Office of the Ombudsman and, in the case of Tanzania, the Commission for Human Rights and Good Governance. They are classifiable as hybrid institutions because their primary functions are to deal with maladministration and other aspects of administrative malfeasance rather than to protect and promote human rights.

One may add the Ombudsman of Lesotho here. Although the Sixth Amendment to the Lesotho Constitution in 2011 provided for the Lesotho Human Rights Commission, it has not been established yet. As a result, the Lesotho Ombudsman – whose broad mandate includes dealing with human rights violations – continues to act as the NHRI in the country.

The NHRIs that are the focus of this compendium must be distinguished from other national institutions or special commissions that are occasionally given a mandate, sometimes exclusive, to deal with certain specific aspects of promoting and protecting human rights. There are many examples of these in the countries studied. For instance, the DRC has, in addition to its National Commission on Human Rights, other institutions, such as the National Agency for the Fight against Violence against Women, Young Girls and Children, the National Commission for Refugees, and the High Council of Audio-visual and other Communication. In South Africa, Chapter 9 of the 1996 Constitution provides not only for the South African Human Rights Commission but the Commission for the Promotion and Protection of the Rights of

2 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

3 See Commonwealth Secretariat, *National Human Rights Institutions. Best Practices*, London, Commonwealth Secretariat (2001).

Cultural, Religious and Linguistic Communities as well as the Commission for Gender Equality.

It should also be noted that NHRIs are separate and distinct from civil society organisations (CSOs), including non-governmental organisations (NGOs), that are involved in human rights issues. What is hence important is not the nomenclature of the institution but rather the mandate it has been established to discharge – this and a number of other factors have determined the framework of analysis adopted in this study, a matter to which we now turn.

3 Analytical framework

The analytical framework used for preparing the introductory commentary on each of the 15 NHRIs discussed in this compendium is the Paris Principles. As already noted, these principles are now universally accepted as setting the minimum standards that such institutions must meet to be considered as legitimate and credible by their peers as well as within the international community, especially the UN system. They provide benchmarks against which proposed, new and existing NHRIs can be assessed.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights is the international and independent body set up to promote the establishment of NHRIs in conformity with the Paris Principles. It uses these principles as a basis for accrediting states in accordance with the extent of their conformity to the Paris Principles.

The Paris Principles set out the six main elements that a fully functioning NHRI should have to be effective:

- mandate and competence: this is required to be broad and based on universally recognised human rights standards;
- autonomy from government: institutions are required to be protected from manipulation by the government;
- independence: this has to be guaranteed by statute and/or the constitution;
- pluralism: This is supposed to be reflected in the diversity of membership and procedures that enable effective cooperation with all the diverse social and political forces in the country;
- adequate resources; and
- adequate powers of investigations.

The Principles are broad and general in their formulation and should therefore apply to any NHRI regardless of its structure or type. They do not require that NHRIs should have a quasi-judicial function that enables them to handle complaints or petitions from people whose human rights are alleged to have been violated. However, where such functions are conferred on them, then NHRIs are required to:

- seek an amicable settlement through conciliation, binding decision or on the basis of confidentiality;
- inform petitioners of their rights and available remedies, and promote access to them;
- hear complaints and transmit them to competent authorities; and
- make recommendations to competent authorities.

Although the Paris Principles are not legally binding under international law as treaties are,⁴ and despite the criticisms levelled against them,⁵ the fact that they have been endorsed by both the United Nations (UN) Commission on Human Rights⁶ and UN General Assembly⁷ has legitimised the Principles as the normative standard for the establishment and strengthening of NHRIs.⁸ In general, NHRIs are said to be more effective when they:

- enjoy public legitimacy by standing up for the powerless against powerful interests in society;
- are accessible to all in society;
- have an open organisational culture;
- ensure the integrity and quality of their members;
- have diverse membership and staff;
- consult with civil society;
- have a broad mandate;

4 See J Dugard, *International Law: A South African Perspective* (2011), p 33; D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000).

5 The principles have been criticised for being general and broad; for failing to state the optimum conditions requisite within the local jurisdiction before the establishment of an NHRI; and for being non-mandatory. For some of these criticisms, see, for example, M O'Sullivan, "National Human Rights Institutions Effectively Protecting Human Rights?" 25 *Alternative Law Journal* (2000), p 236.

6 See Commission on Human Rights Resolution 1992/54.

7 See General Assembly Resolution 48/134 of 20 December 1993.

8 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", 80 (143) *Nordic Journal of International Law* (2011), p 151.

- have an all-encompassing jurisdiction;
- have the power to monitor compliance with their recommendations;
- treat human rights issues systematically;
- have adequate budgetary resources;
- develop effective international links; and
- handle complaints speedily and effectively.⁹

As mentioned, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights subjects NHRIs to an accreditation process in which their alignment with the Paris Principles is assessed. One of three classifications is assigned at the end of the process. The first, “A” status, is reserved for a voting member who complies fully with the Paris Principles. The second is “B” status, where the observer member does not fully comply with the Principles or has not yet submitted sufficient documentation to make that determination. The third, “C” status, is for non-members who do not comply with the Paris Principles.

The latest accreditations of the Global Alliance of National Human Rights Institutions cover only 11 of the 15 countries in this study.¹⁰ As at 4 March 2019, nine of those 11 have “A” status¹¹ and two, “B” status.¹² Absent from the list are Angola, Botswana, Eswatini and Lesotho. If this assessment is taken not just as a measure of compliance with the Paris standards but an indication that the relevant NHRI is able to discharge its mandate to promote and protect human rights effectively, does it truly reflect the reality on the ground? Put differently, does compliance with the Paris Principles necessarily mean an acceptable standard of human rights promotion and protection?

The question is particularly important when one takes into account the year when some of the accreditations were carried out. Of interest in this respect are when the NHRIs in countries such as the DRC, Rwanda, Zambia and Zimbabwe were given their “A” status.

9 See, generally, International Council on Human Rights Policy and OHCHR, “Assessing the Effectiveness of National Human Rights Institutions”, available at <https://www.ohchr.org/Documents/Publications/NHRIen.pdf> (accessed in May 2019), pp 7-9.

10 See GANHRI, *Chart of the Status of Institutions Accredited by the Global Alliance of National Human Rights Institutions*, available at <https://bit.ly/2LudOCh> (accessed in May 2019).

11 These are the DRC (May 2018), Kenya (October 2014), Malawi (November 2016), Mauritius (October 2014), Rwanda (October 2018), South Africa (November 2012), Tanzania (November 2017), Zambia (October 2018) and Zimbabwe (May 2016).

12 The two countries in this category are Burundi (November 2017) and Ethiopia (November 2013).

The overview below considers the general legal framework as well as a few key issues, albeit that it only touches on them – they are discussed more fully in the individual country studies.

4 Legal framework

The Paris Principles require that the mandate of the NHRI should be “clearly set forth in a constitutional text or legislative text”. The Sub-Committee on Accreditation has indicated that this requirement is not complied with if the mandate is contained only in executive instruments, such as presidential or ministerial decrees and orders, or similar subsidiary instruments.

In most of the countries, the requirements for setting up the NHRI are provided for both in the constitution and in other legislative texts. It is only in Botswana, Burundi, the DRC, Mauritius and Rwanda that this is provided for in legislative texts. It is clearly advantageous for an NHRI to be established in a constitution – depending on how detailed the provisions are, constitutional entrenchment affords a greater safeguard against arbitrary change to the NHRI’s mandate or structure to suit the convenience of the government.

Such certainty is not provided for where, as in the case of Ethiopia, the Constitution merely authorises the House of Peoples’ Representative (HOPR) to establish a NHRI. The NHRI is then the same as an institution whose creation depends on ordinary legislation and whose mandate or structure can be changed with a simple parliamentary majority.¹³ It must be pointed out, though, that where, as is the case in the DRC, the NHRI is a creature of an organic law, there is indeed some measure of security, given that these laws, whilst inferior to the constitution, are superior to ordinary legislation and usually require a super-majority to be amended.

Finally, it is worth noting that although an NHRI based solely on an executive instrument is not compliant with the Paris Principles – for the obvious reason that such an instrument is even more susceptible than ordinary legislation to being changed at any time at the whim of the executive – it is nonetheless the case that executive instruments are necessary for the purposes of providing detailed rules and regulations as to how the NHRI operates.

13 The same is true of the Commission for Human Rights and Good Governance of Tanzania, since Article 242 reserves to Parliament the power to make legislation determining, inter alia, the functions, composition, tenure and manner of appointing members of this commission.

5 **Autonomy**

The requirement that NHRIs be independent and autonomous is the most important of the Paris Principles, but also arguably the most controversial as well as the most difficult to implement. It is clear that an institution which is not independent of the government is unlikely to function properly, given that the government is often not only the primary actor responsible for promoting and protecting human rights but also their primary violator. The fact that NHRIs are created by and funded by the government suggests that the independence and autonomy required here are relative and not absolute. In other words, what is required is a degree of structural, procedural and functional independence to ensure they can function without undue interference impairing their ability to operate effectively in accomplishing their mandate.

Important elements of institutional autonomy and independence include legal autonomy, operational autonomy, financial autonomy and independence in appointment and dismissal procedures. The countries vary considerably in how they have each implemented this. What emerges from the case studies is that there is not only wide variation in the manner in which the principles of autonomy and independence are expressed in the legal frameworks, but even wider variation in the disparity between what the texts provide for and what happens in practice. A few examples will suffice.

Legal autonomy requires that an NHRI is granted a distinct legal personality to allow it to make decisions and act independently. In most of the countries, legal autonomy, particularly the legal personality of the institution, is stated either implicitly or explicitly (as it is, for example, in Burundi, the DRC and Lesotho). In practice, this is seldom respected. For instance, in Malawi, the institution operates like a government department, whilst in Eswatini and Tanzania, it operates as an office or unit within the Ministry of Justice and Constitutional Affairs.

As the case studies will show, operational autonomy is also a major challenge. It relates to the ability of the NHRI to conduct its day-to-day affairs – such as deciding on what investigations to carry out, preparing reports, and making recommendations – without external interference. An extreme example of such interference occurs in Ethiopia where the institution often submits some of its reports to Parliament, the HOPR, for prior review before publication. Certain of these sensitive reports are then never released, presumably thanks to parliamentary embargo.

Financial autonomy is critically important for the effectiveness and sustainability of an NHRI. Without control over its resources and how they are to be used, the institution cannot discharge its mandate independently and effectively. With the possible exception of Eswatini, most of the legal frameworks provide for financial autonomy in way or another. However, in almost all cases – with the exception of Kenya, where there is direct parliamentary allocation to the institution – the funds are usually allocated based on proposals submitted to intermediary ministries.

It is thus no surprise that all the NHRIs in the region are in dire financial crisis, some to the extent that they are unable to pay for suitable accommodation or recruit enough qualified staff, given the low salaries they offer. All these institutions now depend heavily on donor funding, which is not only limited in practice but controversial in principle.

6 Independence of appointment and dismissal procedures

The manner of appointment, and conditions for dismissal, of members of NHRIs is one of the most important ways of guaranteeing their independence. The Paris Principles require that the manner of appointment should be specified in an official Act that indicates the duration of appointments and ensures pluralism in the institution's membership. This raises issues regarding the method of appointment, criteria for appointment, duration of appointment and possibility of reappointment, manner and grounds for dismissal, and privileges and immunities. Best practice requires broad consultation and the involvement of all stakeholders, particularly CSOs, in the process.

Generally, in spite of purported adherence to the Paris Principles, the appointment processes vary from country to country. The practices fall into five categories.

First, in some countries such as Lesotho, Mauritius and Zambia, appointments are made exclusively by the executive. In a second category, for example, Angola, they are made by the legislature. In a third, with Burundi and South Africa being examples, they are made by both the legislature and executive. In a fourth category, with Ethiopia an example, appointments are made by the legislature with the involvement of various actors. In the fifth category, appointments are made by the executive in a process bringing in other actors. Such is the case in Eswatini, Malawi and Tanzania. Finally, in the DRC, Kenya, Rwanda and Zimbabwe, the

appointment process involves the intervention of the executive, the legislature and various CSO actors. Tenure varies from three years (for example, Malawi, Tanzania and Zambia), to five (for example, Ethiopia and Zimbabwe), to seven (as in South Africa). In Mauritius, the tenure of members of the National Human Rights Commission is unclear.

In some countries, the commissioners who are appointed to the NHRI work only part-time, as in Eswatini, or the institution is required to have both full-time and part-time members. An example of the latter is South Africa, where the law states that the South African Human Rights Commission must have not less than six full-time commissioners and not more than two part-time commissioners. Whilst the legal framework in countries such as the DRC, Tanzania and Zimbabwe provide elaborate provisions to ensure that there pluralism, in some other countries, there is silence.

At the end of the day, the critical question is whether the process of appointment is fair and ensures the appointment of qualified people with integrity, skill and competence. From this perspective, the evidence from the country case studies points to numerous problems. These are often caused by the extensive scope for political manipulation of the appointment processes, obscure criteria for appointments, lengthy delays in making appointments, and weak and obscure conditions for the removal of commissioners. For example, in Angola, the Ombudsman was appointed 13 years after the office was established and the incumbent then stayed in office for four years after his term expired.

7 Mandate and competence

The Paris Principles provide that an NHRI should be given “as broad a mandate as possible”. The requirement reflects an acknowledgement of the diversity of institutional models that exist. The need for clarity in defining the mandate of an NHRI is particularly important given that, as we saw, many countries have similar institutions that co-exist with NHRIs and exercise some limited but overlapping human rights functions. For example, South Africa has, in addition to the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

Two main roles have been assigned to NHRIs, namely the promotion and protection of human rights.¹⁴ Accordingly, the case studies examine the various ways in which these two functions have been performed and the legal framework provided for this. Human rights promotion involves activities such as public education and awareness campaigns, training CSOs and others such as police, prison officials and the armed forces, issuing publications, holding seminars and workshops, conducting community-based initiatives and organising media events.

Protection, on the other hand, involves ensuring respect for the rule of law by ensuring the administration of justice and combating impunity. Key activities in human rights protection include investigation, alternative dispute resolution, seeking redress or remedies through courts and other tribunals, receiving individual complaints, holding public inquiries, and conducting monitoring activities. The primary focus is on the prevention of human rights abuses such as torture, arbitrary detention and disappearances and on acting as a watchdog that monitors and reviews certain activities, for example by visiting detention centres.

A number of further responsibilities and functions flow from these two major roles. They include:

- advising government departments and parliaments;
- cooperating with national stakeholders, CSOs, NHRIs from other countries, and regional bodies;
- protecting and promoting the rights of specific groups, particularly those who are vulnerable due to their age, gender, disability, sexual orientation, or status as migrants or minorities of other kinds; and
- linking human rights to developmental initiatives through rights-based approaches and especially through economic, social and cultural rights.

Countries whose constitutions do not recognise socio-economic rights, such as Mauritius, or where they are recognised only as directive principles of state policy, such as Zambia, hardly give their NHRIs the mandate to deal with such rights. By contrast, the South African Human Rights Commission has an elaborate programme for protecting socio-economic rights; in turn, cultural rights are promoted by its fellow Chapter 9 institution, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

14 For a full discussion of these roles, see Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, available at https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf (accessed in May 2019), pp 21-28.

In countries where there is internal conflict (such as the DRC), or in countries emerging from conflict (as was the case in Burundi and Rwanda just over a decade ago), NHRIs are often given the additional responsibility of supporting or managing peacebuilding and transitional justice. In Burundi, the Truth and Reconciliation Commission (TRC) was created to deal with human rights abuses and violations of international humanitarian law committed from 1885 to December 2008. In Rwanda, the National Commission for Human Rights was given the powers to monitor the traditionally inspired *gacaca* courts launched in 2002 as a transitional measure to deal with genocide cases.

NHRIs are also beginning to play a role in working with and monitoring businesses in the private sector, this in recognition of the role of the sector plays in national, regional and multinational human rights issues. So far, it is only the South African Human Rights Commission that has done so, having undertaken initiatives in the past six years to raise awareness of the impact businesses have on human rights.

8 Accessibility

In the interests of having it carry out its mandate effectively, the Paris Principles require that an NHRI should be easily accessible to all the inhabitants of a country, especially those living in rural areas. This means it should have a broad presence and, ideally, establish local offices in all the country's provinces and districts.

However, due largely to insufficient funds and inadequate human and material resources, limited accessibility is a serious problem in almost all the countries under study. For example, Zimbabwe has only two offices to serve the entire country, whilst Angola's NHRI is present in only six of the country's 18 provinces. In Malawi, the Human Rights Commission is present in two of the country's three regions, but has no permanent presence in any of its 28 districts.

Barriers to accessibility restrict the avenues of recourse open to those whose human rights have been violated and who wish to lodge complaints; even where they do lodge complaints, the same barriers make it difficult for the NHRI to investigate these complaints, particularly when they involve violations in remote parts of the country. Barriers to accessibility are also among the reasons that NHRIs are still not well-known in many countries, especially in large countries such as the DRC, South Africa and Zimbabwe.

The case studies illustrate the enormity of the problem as well as the measures that some NHRIs are taking to decentralise themselves and make their services more accessible, particularly to those in rural areas.

9 Pluralism

With a view to enhancing effectiveness through collaboration, the Paris Principles require that an NHRI's composition should ensure a pluralist representation of social forces in a country through the presence of representatives of CSOs and professional associations. The composition should also reflect trends in philosophical or religious thought, and include qualified experts and members of universities, legislatures and government departments.

The Sub-Committee on Accreditation of the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights notes that pluralism in composition could be ensured in a number of ways. For example:

- members of the governing body come from and represent different segments of society;
- diverse groups take part in suggesting or recommending members of the NHRI;
- the NHRI promotes cooperation and collaboration with diverse groups, especially CSOs involved in human rights issues;
- the NHRI's staff represents a diversity of groups in society; and
- steps are taken to be inclusive, especially of marginalised groups and minorities.¹⁵

These elements are evident to varying degrees in the country studies. The Kenyan Constitution has probably gone the furthest to provide a solid basis for pluralism in public institutions. In addition to Articles 100 and 197 (which strive to promote diversity), Article 27(8) places an obligation on the legislature to “implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. Article 250 goes further to provide that appointments to commissions and independent offices must reflect the regional and ethnic diversity of the country. The principle of pluralism is also promoted in other ways by the DRC, Lesotho and Zimbabwe.

Ensuring that the diversity of social forces in a country is reflected in an NHRI's membership and staff can be extremely difficult if the country

15 *Ibid*, p 37.

has a wide range of ethnic, religious and linguistic minorities. However, since pluralism is not a static principle, it can be realised progressively over time.

10 Concluding remarks

The Paris Principles set out the minimum standards expected of institutions that deal with the complex task of promoting and protecting human rights. The NHRIs of nine of the 15 countries in this study – or 60 per cent of them – are accredited with “A” status. However, the test of the effectiveness of a NHRI is the extent to which it is able to ensure that the human rights of all citizens are respected, protected and fulfilled. This it can do in a wide variety of ways. Should “A” status be taken, then, to mean that the institution is also highly effective?

The case studies that follow will enable us to draw our own conclusions. More than that, the constitutional and other legal documents that accompany each of them may go a long way in explaining the state of human rights promotion and protection in the country. Combined, the case studies and documentation give rise to many questions. For example, was there an appropriate constitutional and legal framework to enable the NHRI to operate efficiently? What lessons could the country in question learn from the way other countries have regulated their NHRIs?

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3

THE OMBUDSMAN OF ANGOLA *Nelson Domingos António**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Angola became independent in 1975. However, the new government failed to establish a state founded on democracy and the rule of law owing to its political ideology and the civil war that broke out after independence and continued until 2002.¹ Numerous human rights violations took place in this period.²

During the civil war, one waged between the government and the National Union for the Total Independence of Angola (UNITA), several agreements were signed to promote peace and democratise the country. The Bicesse Agreement, signed in 1991, was the most important of them since it ended the one-party system and paved the way for the drafting of a new constitutional law – Law No 12/91 – that enshrined a set of rights and freedoms. It was revised in 1992 (via Law No 23/92),³ and in this review, the Ombudsman and Ombudsman’s Office were created and given the responsibility to defend citizens’ guaranteed rights and freedoms.

* Faculty of Political Science, Agostinho Neto University, Angola.

1 AN Domingos, *Transição Pela Transação: Uma Análise da Democratização em Angola*, Rio de Janeiro, PoloBooks (2015), p 227.

2 In May 1977, for example, the Angolan government executed more than 20,000 citizens accused of an attempted *coup d’état*. See DC Mateus, A Mateus, *Purga em Angola: O 27 De Maio De 1977*, 8th ed, Alfragide, Texto Editores (2013), p 151.

3 See note 1, p 128.

This chapter examines the contribution the Ombudsman has made to human rights in Angola and the challenges faced in this regard. Section 2 deals with the evolution of this institution; section 3 analyses the legal framework for the Ombudsman and Ombudsman's Office; section 4 concerns the Ombudsman's tenure, and section 5, his or her public accountability.

2 Establishment and evolution of the Ombudsman

2.1 The model of the institution

The Angolan constitution creates the Ombudsman as an institution designed to promote justice. Article 192(1) of the Constitution defines him or her as “[an] independent public entity whose object is the defense of the rights, freedoms and guarantees of citizens, ensuring, through informal means, the justice and legality of the activity of the public administration”.

Angola's Ombudsman is a figure inspired by the Ombudsman created in Sweden in 1809 and given responsibility for ensuring the legality and regularity of the performance of the public administration.⁴ The office is an independent public institution whose purpose is to strengthen the democratic state and respect for the rule of law by public officials in their relationship with citizens.⁵ In the Angolan legal system, the Ombudsman plays the important role of interceding with the state in favour of citizens. He or she is, indeed, an independent public figure who acts as a peacemaker mediating between citizens and the organs of public administration, with the aim of safeguarding citizens' rights and freedoms.

2.2 The evolution of the institution

The Ombudsman was enshrined in Articles 142-144 of the Constitutional Revision Law of 1992 (Law No 23/92 of 16 September). The functions of this institution were initially assigned to the Attorney-General of the Republic, as provided for in Article 9 of Law No 23/92. It was only on 19 April 2005, 13 years later, that the National Assembly elected the Ombudsman. In 2006, the Statute of the Ombudsman (Law No 4/06 of 28 April) and the Organic Law of the Ombudsman's Office (Law No 5/06 of 28 April) were approved.

4 MJ Machado, *et al*, *Direito Constitucional Angolano*, 2nd ed, Coimbra, Coimbra Editora (2013), p 277.

5 RCV Araújo, *Direito Constitucional Angolano*, Luanda, CEDP/UAN (2018), pp 291-292.

In terms of the Constitutional Law of 1992 (Law No 23/92) and Articles 6 and 143(2) of the Statute of the Ombudsman, the Ombudsman's tenure was four years, renewable once. In 2010, this was extended to five years, renewable once (the CRA/2010, Article 192(3) of the Constitution).

The term of the Ombudsman elected in 2005 was supposed to expire in 2013 (that is, after two terms of four years), but it was only on 18 December 2017 that the National Assembly elected another Ombudsman. It meant that the person heading the institution responsible for promoting democracy and human rights exceeded the term limits of his mandate by four years. This was in flagrant violation of the Constitution and the law, and discredited the institution's actions.⁶

The new Ombudsman took office on 19 January 2018 before the President of the National Assembly. Since the introduction of this office in the Constitution in 1992 and its effective establishment in 2005, Angola has known only two ombudsmen. The act of having left the Ombudsman to operate for four years after his term had expired reveals the limited importance attached to institutions for the defence and promotion of human rights.

2.3 The nature of the Ombudsman's mandate

Whereas the Ombudsman is an independent public organ, the Ombudsman's Office is a public law institution the purpose of which is to provide the technical and administrative support necessary for carrying out the Ombudsman's tasks. Under Article 18 of the Statute of the Ombudsman (Law No 4/06 of 28 April), the Ombudsman has the responsibility to:

- issue recommendations to the competent organs for the correction of illegal acts of the organs and agents of the public administration or the improvement of their services;
- issue an opinion at the request of the National Assembly on any matters related to its activity;
- promote and disseminate information about each of the fundamental rights and freedoms, as well as information about the purpose of the Ombudsman as an institution, the forms of action he or she takes, and how citizens can submit complaints to the Ombudsman;

6 In 2016, in the programme "The great interview" on the Public Television of Angola, the Ombudsman, Dr Paulo Tjipilica, was questioned about the illegality of his mandate. He replied that his election and mandate did not depend on him, but on the National Assembly.

- intervene, under the terms of the applicable law, in the protection of collective or individual interests when these are threatened by organs or agents of the public administration;
- visit prisons to monitor prisoners' living conditions and, where these violate human rights, inform the superior institutions in the hierarchy of the situation and recommend to the visited institution that it change these conditions;
- investigate complaints raised by citizens concerning the acts of public officials; and
- monitor compliance with the recommendations issued.

Citizens and legal persons may complain to the Ombudsman about actions or omissions of public authorities. The Ombudsman analyses the complaints, but does not have any decision-making powers. However, he or she can make recommendations to the relevant institutions to take action to remedy any injustices.

Complaints can be made in person, by telephone, by email or by letter. These are analysed by the Ombudsman and recommendations are made to government institutions that have violated citizens' rights. The fact that compliance with the Ombudsman's recommendations is not compulsory certainly contributes to non-compliance with them and to continued violation of citizens' rights.

3 Legal framework governing the Ombudsman

3.1 The legal basis for the institution

The existence of the Ombudsman is based legally on Article 192 of the Constitution of the Republic of Angola, as well as on the other rules that form part of the legal framework, namely Law 4/06 of 28 April (the Statute of the Ombudsman) and Law No 5/06 of 28 April (the Organic Law of the Ombudsman), which establish the functioning and structure of this institution.

Article 230(2)(e) of the Constitution gives the Ombudsman the *locus standi* to challenge the constitutionality of any law before the Constitutional Court. However, at no point in its existence has this institution sought to do so, which has reinforced the perception that it is ineffective in addressing Angola's many constitutionally questionable norms and practices.

3.2 Independence of the Ombudsman

Article 8 of the Statute of the Ombudsman stipulates that the Ombudsman shall be independent and irremovable and that his or her duties may not be terminated before the expiration of the term of office for which he or she was elected, save in the cases provided for in this law. The Ombudsman is thus protected against arbitrary dismissal and is subject only to the Constitution and the law.

However, the likelihood of the Ombudsman's acting independently is limited by the manner in which he or she is elected: he or she is elected by the party that has an absolute majority in the parliament, and for this reason is likely to feel indebted to it. Since gaining independence, Angola has been governed solely by the Movimento Popular de Libertação de Angola (MPLA), a party which controls almost all spheres of society. Under the circumstances, it is difficult to see how the Ombudsman could act against the interests of the party-state.

This may help explain the reason for the Ombudsman's inertia in the face of frequent violations of human rights. Arguably, as long as the MPLA continues to dominate the state and society, the Ombudsman will remain a merely decorative, formalistic element of the legal system.

3.3 Procedure for the appointment of the Ombudsman

Article 192(2) states that the Ombudsman and Deputy Ombudsman shall be elected by a two-thirds majority of the National Assembly. Ever since Angola held its first multi-party elections in 1992, the MPLA has always ruled with a majority.⁷ It has therefore always determined who is elected as Ombudsman.

3.4 Financial autonomy

The Ombudsman's Office has an annual budget managed by an Administrative Council. This budget is contained in the Budget of the National Assembly and forms part of the State Budget. The budget must be audited by the Court of Auditors in accordance with Articles 15 and 40 of the Statute of the Ombudsman.

7 In 1992 the MPLA had 129 of the 223 members of the National Assembly; in 2008 it had 191 of 220; in 2012 it had 175 of the 220; and in 2017 it had 150 of the 220.

The budget for the Ombudsman's Office has been attached to the National Assembly. For the 2014 fiscal year, the amount of AOA 1,995,000 was assigned to the Ombudsman. For the 2015 fiscal year, the National Assembly allocated AOA 1,995,474,543 to the Ombudsman's Office. In 2016, the Ombudsman's budget was AOA 977,414,138; in 2017, AOA 2,050,000; in 2018, AOA 2,275,347,669; and in 2019, AOA 1,170,008. Beginning in 2019, the Ombudsman's Office became an independent budget unit. Be that as it may, it is clear that since 2014, the budget allocation for the Ombudsman's Office has fluctuated significantly from year to year.

3.5 Professional skills and knowledge

The first Ombudsman of Angola, Dr Paulo Tjipilica, graduated in law in the 1970s. He was legal advisor and advisor to the Council of Ministers in Portugal between 1977 and 1992. A member of the UNITA party in opposition, he became a founding member in 1991 of the party *Tendência de Reflexão Democrática* (TRD). He held the position of Minister of Justice between 1993 and 2005 during the Government of Unity and National Reconciliation. In 2005, Dr Tjipilica was elected Ombudsman. His election was seen as at the outcome of political negotiation, given that he was not historically connected to the ruling party.

The current Ombudsman, Dr Carlos Alberto Ferreira Pinto, graduated in law in 2004. He served as Deputy to the National Assembly from 1980-1991, and again from 2008-2012 and headed the Constitutional Affairs Committee of the National Assembly. From 1994-1996 he served as the Prime Minister's advisor on internal policy. His election in 2017 as Ombudsman was not by consensus: it received 130 votes in favour, 15 against, and 47 abstentions, in a parliament composed of 220 members.

Article 5(2) and (3) of the Ombudsman's Act stipulates that the Ombudsman has to be "an Angolan citizen who meets the eligibility requirements for the National Assembly and who has a proven reputation, integrity, independence and civil and political rights". In his or her inauguration, the Ombudsman takes the following oath:

I swear by my honor to perform faithfully the office of Ombudsman in which I am invested, promoting and defending the rights, freedoms, guarantees and legitimate interests of citizens, in the strict respect for the Constitution and other laws of the Republic.

3.6 Relations with civil society

To promote his role, the Ombudsman has sought to meet, albeit timidly, with provincial governments, the judiciary, traditional authorities, religious and civil society organisations, teachers and university students. As such, there has been a degree of interaction with civil society. However, some remain skeptical about the Ombudsman's actions. Activists have suggested that the Ombudsman should be more closely involved with civil society, in that engagement with organised citizenry would help to publicise the role of the Ombudsman's Office and can make it easier for complaints to reach the Ombudsman.

3.7 Accessibility of the Ombudsman

The Ombudsman has representation in the provinces of Luanda, Bengo, Huambo, Cuanza-Sul, Cabinda and Cunene. The institution, that is to say, is present in only six of the 18 provinces that make up the Angolan state. This shows that the Ombudsman's Office is not yet properly decentralised – since it is not present throughout the national territory, there are many citizens who unable to access its services and defend their rights.

Although the Ombudsman receives complaints from all 18 provinces, his report of 2015 indicates that, of the 460 complaints filed with the Ombudsman's Office, 400 originated in Luanda, a province which is home to the capital city and, with about 6 million inhabitants, the most populous in Angola. Luanda city is where the headquarters of the Ombudsman's Office are located, as are the main institutions of public administration; similarly, the country's key media outlets are found in Luanda, which also has the largest number of tertiary education institutions in the country. These factors may explain why complaints emanate mostly from Luanda. The Ombudsman's report of 2017 shows that Luanda province continued to lead numerically in terms of the origin of complaints. Of the 360 complaints received that year, 243 came from Luanda – however, compared to previous years, the number from Luanda dropped by almost half.

The ease with which citizens can access the Ombudsman's Office is critical for any effective and efficient human rights strategy. Many of the activists who were interviewed for this study pointed out that too many people are unaware either of the existence of the Ombudsman, or, if so aware, of the role he plays. Although statistics point to a considerable number of telephone calls, most of them go unanswered. Messages sent to the Ombudsman's email account are answered only after long delays. As

for his website, this is not updated. For example, at the time of writing, the most current information on it was a report from 2011.

4 Mandate of the Ombudsman

4.1 Overview

The legislation establishing and regulating the activity of the Ombudsman and Ombudsman's Office is in line with much of the human rights law in force in other states. However, aspects of it could be improved.

A fundamental point in this regard is that the recommendations made by the Ombudsman should be binding. That is to say, the institutions complained against should be obliged to cease the infringement and repair the damage caused once the Ombudsman has verified matters and made his or her recommendations. Under these circumstances, the work of the Ombudsman would meet the needs of citizens.

The Ministry of Justice and Human Rights has, for the first time, adopted a draft Medium-term National Strategy for Human Rights 2019-2022. Its objectives are, among other things, to strengthen the human rights system at provincial level; reinforce collaboration and partnership with civil society; provide training and education in human rights; undertake programmes and initiatives to promote a culture of human rights; and strengthen the fight against trafficking in human beings. The implementation of this programme can contribute to ensuring the protection and promotion of human rights in Angola.

4.2 Monitoring domestic human rights situations

The Ombudsman's reports for the years 2008-2017 show that the main complaints lodged with and monitored by him relate to land, labour and property issues, the administration of justice, and the Public Prosecutor's Office.⁸ Labour disputes tend to be frequent in countries that are marked by long histories of slavery, colonialism and segregation and where promoting respect for citizens' rights is thus not common practice. In these contexts, employers tend not to respect workers' rights. This may be the reason for the high number of workers' complaints.

8 The item "others" commonly occurs in the report, but there is no description of the types of complaints it includes. For that reason it is not included in the analysis as being the item with the highest incidence.

Similarly, fundamental rights, including land and property rights, are commonly violated in states with a weak democratic culture. Despite Angola's transition to democracy in 1991, many citizens holding public office and economic power retained the authoritarian values of the past. Invasions of land and buildings and arbitrarily detention of citizens are some of the violations that are frequently perpetrated.

The Ombudsman's report for 2017 identifies the organs of public administration to which he sent letters and indicates whether or not they acted diligently on those letters. The Ministry of Justice and Human Rights leads in the number of recommendations sent to it, with ten cases, followed by the Attorney-General's Office, with eight cases. As regards the institutions that responded promptly to the recommendations, the General Command of the National Police, the Ministry of Education and the Supreme Court are at the top of the list, with 100 per cent response-rates to the Ombudsman's reports.

Among the institutions that have not responded to any of the Ombudsman's reports are the National Assembly, the Civil Cabinet of the President of the Republic, the Ministry of Finance, Ministry of Planning, Ministry of Transport, the provincial governments of Luanda and Cabinda, the Criminal Investigation Service, and the Migration and Border Service. The lack of response from these institutions results in impunity for human rights violations.

4.3 Monitoring compliance with international standards

From a formal point of view, the Ombudsman acts according to the guidelines laid down in the Paris Principles. The Office of the Ombudsman can freely investigate complaints made to it or act on its own initiative. However, there are many violations of human rights about which it remains silent. One notorious example relates to the so-called "15 + 2" case, in which 15 young men and two women were arbitrarily arrested on suspicion of plotting a *coup d'état*.⁹ When asked about his position, the then Ombudsman argued that the matter was not within his competence.

Although the Ombudsman may hear any person, and obtain any information and documents, necessary for investigating situations within his competence, the demand for his services is manifestly low, as is the

9 L. Beirão, *Sou Mais Livre, Então: Diário De Um Preso Político Angolano*, Lisboa, Tinta da China (2016), p 19.

response rate of organs to which his recommendations are sent. The table below shows the number of complaints received annually.¹⁰

Table 1: Number of complaints received by the Ombudsman of Angola, 2007-2017

| Year | Complaints |
|------|------------|
| 2008 | 186 |
| 2009 | 334 |
| 2010 | 292 |
| 2011 | 295 |
| 2012 | 673 |
| 2013 | 593 |
| 2014 | 612 |
| 2015 | 460 |
| 2016 | 368 |
| 2017 | 301 |

Summaries of the Ombudsman's reports are occasionally published in print and digital news media, but generally they are not easily accessible and the Ombudsman himself seldom makes media appearances. However, he has indeed participated in regional and international events for institutions that defend and promote human rights.

4.4 Education and information

In May 2017, the Ombudsman held briefings to discuss his role, mandate and relevance. This was followed in July 2017 by a seminar on the duty of cooperation between the Ombudsman and other state organs and stakeholders. Similarly, in 2018 the new Ombudsman held a series of lectures in Angolan universities on the theme, "Citizen our occupation, citizen our concern", to inform citizens about the role of the Ombudsman.

In spite of these efforts, many citizens know little about this institution. Numerous interviewees said that they are not aware of major activities carried out by the Ombudsman. The implication is that this office should devise more effective strategies to disseminate information, especially among the most disadvantaged, who tend to be the main victims of human rights violations.

10 The table contains data compiled from annual reports covering the first ten years of the Ombudsman's existence.

4.5 Receiving and handling complaints and petitions

The Ombudsman receives complaints about actions or omissions of the public authorities, investigates them, and sends reports with recommendations to the competent organs to remedy the injustices, pursuant to Article 92(4) of the Constitution.

Complaints can be submitted orally or in writing, by telephone or electronically. They must include the identity and address of the complainant and, if possible, his or her signature. When complaints are presented orally, the Ombudsman registers them in writing and the complainant signs the relevant document if this is possible. Complaints should not contain terms offensive to the good name and honour of the persons or institutions concerned. When the complaint is not presented in proper terms, the complainant is given a maximum of 30 days to rectify this. To submit complaints to the Ombudsman it is not necessary to appoint a lawyer for the purpose, nor to pay costs and seals, provided that complainant sign and identify themselves and their physical addresses.

Complaints are reviewed to assess their admissibility, timeliness and reasonableness. Complaints which are anonymous, in bad faith, without foundation, which do not fall within his competence, whose illegality has already been repaired, or whose proceedings result in the loss of the legitimate rights of third parties are rejected by the Ombudsman in terms of Articles 23 and 24 of the Law on the Statute of the Ombudsman.

4.6 Monitoring government compliance with recommendations

The Ombudsman's reports show that in the period 2014-2017 the number of recommendations to organs violating citizens' rights decreased substantially from 142 to 18. From 2014 onwards, the complaints reaching the Ombudsman's Office decreased from 616 to 301 – a reduction of 50 per cent. So, if there are fewer complaints, then there also are fewer recommendations.

The reduction of complaints to the Ombudsman's Office may be a reflection of citizens' lack of awareness of it or even suggest that citizens have a negative impression of it. Indeed, civic activists who were interviewed about the Ombudsman's recommendations, for example, were not very positive in their appraisals.

The evidence from the Ombudsman's reports indicates, however, that numerous cases were referred to the competent organs and that some were

resolved. Nonetheless, in a country like Angola, one with about 26 million inhabitants and fraught with social conflict, the number of complaints and cases solved is manifestly low.

5 Public accountability

5.1 The Ombudsman's annual reports

Article 192(7) of the Angolan Constitution requires the Ombudsman to prepare an annual report containing the main complaints received and recommendations made. The report must be sent to the National Assembly as well as other organs of state. However, Article 21(1) of the Statute of the Ombudsman provides that, in addition to the annual report, the Ombudsman must send a report of his activity to the National Assembly every six months. The report shall likewise set out the initiatives taken, the complaints received, the steps taken, and the results achieved.

The Ombudsman's annual report for 2017 presents the number of complaints made during the period 2008-2017. The data show that the peak of complaints occurred in 2012. This coincides both with the adoption of a new constitutional framework formalising certain rights and freedoms and with the outbreak of demonstrations led by young activists inspired by the Arab Spring.¹¹

Despite the advent of the rights, freedoms and guarantees in Angola's Constitution of 2010, and notwithstanding that the number of complaints submitted to the Ombudsman declined from 673 in 2012 to 301 in 2017, the period 2011-2017 was one of great government repression. During these years, stage agents took countless legal actions against journalists; demonstrators were arbitrarily arrested and beaten; Cassule and Camulingue, former military officers who wanted to organise a demonstration to demand payment of their pensions, were executed; land was arbitrarily expropriated and houses arbitrarily demolished; Rufino, a man who tried to prevent the demolition of his house, was executed; and, as mentioned, in the "15 + 2" case, a number of young people were arrested and convicted for allegedly plotting a coup.

The reduction of complaints to the Ombudsman during this period may be linked to increased repression and the discrediting of institutions for the defence and promotion of human rights. In contexts where there is a high level of government repression and where citizens do not have faith

11 See note 1, p 188.

in human rights institutions, recourse to these institutions tends to diminish.

5.2 Regular consultations with stakeholders

The Ombudsman often holds consultations with the parties concerned in order to find amicable solutions. However, as already noted, the number of complaints is very low, as is the level of response from the organs of state to whom the recommendations are addressed.

In the exercise of his powers to investigate cases and resolve disputes in which the entity is a public administration organ, the Ombudsman interacts with various public entities by way of letters and requests for information to legal experts working with the organ, the intention being to find solutions or, at any rate, clarify the case at hand.

6 Conclusion

The preceding discussion has underscored both the importance of the Ombudsman and the Ombudsman's Office as well as challenges they face. Although it is an essential institution that promotes democracy and the rule of law, the Ombudsman of Angola is not represented across the country but only in six of 18 provinces, with the result that most of the complaints received emanate from these provinces, especially so from Luanda, the capital of the country. It is not surprising that people are unaware of this institution's existence and the role it plays, a situation in which millions of citizens are left deprived of protection of their human rights.

In the course of the ten years from 2008-2017, the Ombudsman's Office received only 3,813 complaints in a country with a population of about 26 million and where there are frequent human rights violations, numerous incidents of illegal expropriation of land and demolition of houses, arbitrary arrests and detentions, and abuses of the rights of workers as well as the rights to freedom of expression, assembly, association and demonstration.

The Ombudsman may approach victims on his own initiative and then make recommendations to the law-breaking organs. Examples include visits to prisons to monitor the situation of the prison population, as well as visits to courts and sites of land expropriation and home demolition in order to witness what was happening and submit the necessary recommendations. However, the weakness of the Ombudsman's position

was illustrated in a case in which he was prevented from visiting the spot where soldiers in the Angolan army had killed a boy who tried to prevent the demolition of his residence.

The Ombudsman's limitations are also notably apparent in the lack of obligatory compliance with his recommendations, the repercussion of which is that state organs pay little heed to them. Furthermore, the fact that the Ombudsman is elected via the party-political system in a highly partisan country makes him vulnerable to political control. More effective arrangements could be found to avoid political interference in the appointment of office-holders, for instance a competitive and transparent process overseen by the judiciary or other independent entities.

Political interference allowed the first Ombudsman to exceed the limit of his mandate by four years, in flagrant violation of the Constitution and the law. The National Assembly, which is responsible for electing a new Ombudsman, remained inert during this time, since the governing party wished to maintain the status quo. Similarly, institutions such as the Attorney-General's Office, the Constitutional Court and the Bar Association also kept a strange silence.

The budget for the Ombudsman's Office seems insufficient, since it is unable to operate nationwide or hire properly qualified professionals to carry out the work of defending and promoting human rights. This is work that requires financial investment and specialist human resources, for without them the state will continue to be a Saturn devouring its own children.

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Presidential Decree No 74/15 of 24 March. Approves the Regulation of Non-Governmental Organizations

Law No 4/06 of 28 April. Approves the Statute of the Ombudsman

Law No 5/06 of 28 April. Approves the Organic Law of the Ombudsman

Law No 23/92 of 16 September. Constitutional Review Law

PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

Constitution of Angola of 2010

Section IV: Essential Justice Institutions

Article 192 (Ombudsman)

1. The Ombudsman shall be an independent public body whose purpose shall be to defend the rights, freedoms and guarantees of citizens ensuring, by informal means, the justice and legality of the public administration.
2. The Ombudsman and Deputy Ombudsman shall be elected by the National Assembly on the decision of two thirds of Members in full exercise of their office.
3. The Ombudsman and Deputy Ombudsman shall be sworn in by the President of the National Assembly for a five-year term of office which may be renewed once.
4. Citizens and corporate bodies may present the Ombudsman with complaints concerning acts or omissions by public authorities which they shall consider, with no powers of decision, submitting the necessary recommendations for the prevention and remedying of injustices to the appropriate bodies.
5. The activity of the Ombudsman shall be independent of the means for ruling on appeals or disputes provided for in the Constitution and the law.
6. It shall be the duty of public administration bodies and agents, citizens and other public collective bodies to cooperate with the work of the Ombudsman.
7. A report on the main complaints received and the recommendations made shall be drawn up each year, submitted to the Assembly and forwarded to the other bodies that exercise sovereign power.
8. The law shall establish the remaining functions and statutes of the Ombudsman and Deputy Ombudsman, in addition to the entire support structure known as the Ombudsman's Office.



4

THE OFFICE OF THE OMBUDSMAN IN BOTSWANA

*Bonolo Ramadi Dinokopila**
*Tshiamo Rantao***

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Botswana is one of the few African countries that is yet to establish a fully-fledged national human rights commission specifically mandated to deal with human rights issues in accordance with the United Nations' Principles Relating to the Status of National Institutions (The Paris Principles). At present, Botswana's Office of the Ombudsman is said to be responsible for issues concerning the promotion and protection of human rights. A weak argument has been made in this regard that the Office has the mandate to perform the functions of a human rights institution established in accordance with the Paris Principles and that it does in fact do so.

However, the absence of a national human rights commission remains both surprising and yet unsurprising. It is surprising because one would have imagined that Botswana, a country of good standing in Africa for its record of human rights protection, would long have seen the necessity of establishing such an institution. It is unsurprising, however, for much the same reason: the presumption appears to have been that, given the country's relatively good human rights record, there is little need for a national human rights commission.

* Department of Law, University of Botswana, Gaborone.

** Rantao Attorneys, Gaborone.

Many have lamented the absence of such an institution in Botswana and the changes it would be likely to bring to the protection of human rights. Indeed, it is safe to conclude that consensus has been reached by all stakeholders (i.e. civil society and government) on the need to establish at least one such institution: in an effort to address the lacuna in the promotion and protection of human rights in the country, the government took a decision to enhance the human rights mandate of the Office of the Ombudsman.

In his State of the Nation (SONA) address during the First Session of the 11th Parliament of Botswana on 14 November 2014, then President, His Excellency Lieutenant-General Seretse Khama Ian Khama, said:

Madam Speaker, Government is committed to implementing its obligations under the international human rights instruments it is party to, and the promotion of the rights of its citizens. We have taken the decision to establish an institution that will address issues of human rights. In this connection legislation amending the Ombudsman Act and establishing a hybrid institution that will address issues of maladministration and human rights will in the near future be brought to the National Assembly.¹

While great dissatisfaction has been voiced about the government's decision merely to augment the mandate of the Office of the Ombudsman rather than set up an independent human rights commission, it seems that plans are nevertheless under way to implement the decision.²

This chapter thus looks at the role the Office of the Ombudsman plays promoting and protecting human rights in Botswana and at the factors that enhance or impede its effectiveness in doing so. After this introduction, section 2 discusses the history of the Office's establishment, while section 3 examines its legal nature and mandate. This examination also considers the extent to which the establishment of the Office is in compliance with the Paris Principles, given that it is touted as a human rights institution. Section 4 makes some concluding remarks.

1 State of the Nation Address by His Excellency Lt Gen Seretse Khama, available at <https://bit.ly/2xl9cpF>, paragraphs 169-17.

2 A National Human Rights Symposium was convened by the government from 20-21 November 2018 at which where this government decision was made known to stakeholders. It was also announced that the Ombudsman's Act was being reviewed in line with this decision. See Botswana Daily News, "Botswana to Establish a Human Rights Body", available at <http://www.dailynews.gov.bw/news-details.php?nid=46166> (accessed 10 May 2019).

2 Establishment of the Office of the Ombudsman

Regarding the history of the establishment of the Office of the Ombudsman, Nsereko notes that:

[a]s far back as 1982 a Presidential Commission on Economic Opportunities recommended the establishment of an Office of “Public Commissioner” to address public complaints of “inefficiency, delay malpractice on the part of the Government officialdom” ... As was originally envisaged by the Commission, [the] primary function is to investigate citizen complaints against any injustice sustained at the hand of public officials.³

The Ombudsman Act of Botswana came into force on 1 December 1997, its main purpose being “to make provision for the appointment and functions of an ombudsman for the investigation of administrative action taken on behalf of the government, and for purposes connected therewith”.⁴ The Office of the Ombudsman was thus established as an institution responsible for dealing with issues of maladministration in the context of any administrative action taken by or on behalf of the government.⁵ Once the actions of a public official occasion an injustice of any sort, the Office of the Ombudsman is mandated to investigate such an act with a view to resolving the dispute or complaint that is brought to the Ombudsman.⁶ As Fombad and Sebudubudu explain, the jurisdiction of the Office of the Ombudsman is based on the “existence of an injustice in consequence of maladministration”.⁷ The Office is said to be modelled on “the Swedish institution of *Justitieombudsman* that was created in 1809 ... [and] refined in Denmark where an Office of the Ombudsman was established in 1953”.⁸

It is therefore apposite to point out that the Office of the Ombudsman was never explicitly mandated to deal with issues of human rights

3 DDN Nsereko, *Constitutional Law in Botswana*, 2nd ed, Gaborone, Pula Press (2010), p 211; further see generally EK Quansah, “The Ombudsman Arrives in Botswana: A Note on the Ombudsman Act, 1995”, 39 *Journal of African Law* (1995), p 222; CM Fombad, “The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995”, 27:1 *Journal of Southern African Studies* (2001), pp 57-77.

4 Ombudsman Act, preamble.

5 Ombudsman Act, section 3(1).

6 Ombudsman Act, section 3(1)(a)-(b).

7 CM Fombad and D Sebudubudu, “The Framework for Curbing Corruption, Enhancing Accountability and Promoting Good Governance in Botswana”, in CM Fombad (ed), *Essays on the Law of Botswana*, Cape Town, Juta Publishers (2007), pp 86-96.

8 See note 3, p 211.

violations in Botswana. The *raison d'être* for the establishment of the Office was to address issues relating to injustice occasioned by public officials when carrying out their administrative functions.⁹ This notwithstanding, the Office of the Ombudsman is portrayed as performing the functions of a national human rights institution (NHRI). Accordingly, it should perhaps be assessed in the light of the Paris Principles, though it cannot be claimed that the Office was established in accordance with these principles, given the nature of its mandate as mentioned above (and discussed more fully below).

3 The nature of the Office of the Ombudsman

As noted, the Office of the Ombudsman was created for the purpose of addressing issues of maladministration; however, it is also described as an institution responsible for the promotion and protection of human rights in Botswana. Before assessing the basis of this conclusion, it is necessary to deal briefly with the provisions of the Ombudsman's Act that concern the powers and functions of the Office. In particular, sections 3(1) and (2) of the Act establish the following key functions of the Office of the Ombudsman:

- the Office of the Ombudsman may investigate any act taken by or on behalf of a government department or other authority to which the Act applies, such as local authorities;
- such an action shall be one taken by an official in the exercise of administrative functions of that department or authority; and
- the Office of the Ombudsman may investigate any complaint made by a member of the public who claims to have sustained injustice in consequence of maladministration.

The Office of the Ombudsman is precluded from investigating certain matters that are listed by the Act as falling outside its investigative mandate. Accordingly, it is precluded from dealing with or investigating complaints if, *inter alia*, the following circumstances apply to them:

- the aggrieved person has a right of appeal, reference or review to or before any lawfully established tribunal;¹⁰
- a person may approach the courts to seek resolution of the dispute in issue;¹¹
- the complaint concerns diplomatic matters;¹²

9 *Ibid*, p 210.

10 Ombudsman Act, section 3(2)(a).

11 *Ibid*, section 3(2)(b).

12 *Ibid*, section 4(a).

- the complaint concerns action taken for the purposes of protecting the security of the state or investigating crime, including action taken with respect to passports for either of those purposes.¹³

From these provisions, one can make three observations about the powers and functions of the Office of the Ombudsman. First, the Office is conferred with investigative powers as per the provisions of the Act. The Act has no further provisions that characterise the Office as anything more than an investigative body.

Secondly, the mandate of the Office is limited in that sections 3 and 4 of the Act provide for instances where the Office is precluded from investigating or is at liberty not to investigate a matter that has been reported. These limitations fall into three categories.

In the first are instances where the Ombudsman can refuse to investigate a matter because it is trivial, vexatious or was not reported on time.¹⁴ This is sound, and appears to ensure that the Office is not inundated with minor matters or matters that could not be resolved due to the passage of time.

In the second category are instances where the person alleging to have suffered an injustice arising from an administrative act has the option of approaching any tribunal or court for redress. The Ombudsman's Act hereby achieves two things: it indicates that judicial and quasi-judicial mechanisms (tribunals) should be given priority in issues of maladministration; and it ensures that the Office remains an administrative body as it is not called upon to make decisions involving issues of law, decisions that may otherwise be referred to the courts for further resolution, appeal or review – in other words, the decisions of the Ombudsman remain purely administrative and are seldom reviewed on the basis that they were wrong.

In the third category of limitations are matters that concern the executive's exclusive functions regarding national security and diplomatic relations – limitations that, on the face of it, are appropriate in that they prevent the Ombudsman from interfering in matters of high-level policy.

The third observation is that the Ombudsman may initiate an investigation in situations even where limitations of the second type above are present.¹⁵ An investigation, that is to say, can be initiated despite the

13 *Ibid*, section 4(b).

14 *Ibid*, section 3(5).

15 *Ibid*, section 3(3)(a).

availability of a remedy to an aggrieved citizen and where it is unreasonable to expect that the individual should or would resort to that remedy. Furthermore, the fact that it is open to an individual to approach the High Court for redress under section 18 of the Constitution (which relates to redress for contraventions of the provisions protecting fundamental rights and freedoms) does not preclude the Ombudsman from initiating an investigation.¹⁶ The latter qualification is dealt with in detail below.

From the above, it is clear that the functions of the Botswana Ombudsman are limited to investigating maladministration on behalf of a government department or other authority to which the Act applies. This is in consonance with the purpose for which the Act was promulgated by Parliament, and was confirmed as the position of the law by the High Court in *Ofentse Lepodisi & Another v Attorney-General & Another*:

The typical duties of an Ombudsman are to investigate complaints and referrals and make recommendations for remedying the injustice caused if he or she considers it necessary to do so ... As will have been noted from the above provisions, the thrust of the provisions concern remedies which are not available to those who complain that they had suffered from wrongful acts by a public body or official, which may be best described as “non-legal” remedies.¹⁷

The next issue to consider is the context within which the Office of the Ombudsman is said to be empowered to investigate and deal with complaints regarding human rights. First, there are scholars who assert that the traditional role of ombudsmen has widened over time to include the promotion and protection of human rights.¹⁸ Ayemi, for instance, argues that it does not matter how the institution was established and that ombudsmen “are as much human rights bodies as they are institutions for the advancement of administrative justice”.¹⁹

Secondly, the fact that the Office of the Ombudsman is allowed to investigate matters even in instances where an individual, pursuant to section 18 of the Constitution, can approach the High Court for redress

16 *Ibid*, section 3(3)(b).

17 Case No MAHLB-000234-11 (unreported), p 23.

18 BV Tigerstrom, “The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights” (1998), p 2; M Stephen and L Fallberg (eds), “Protecting Patients’ Rights: A Comparative Study of the Ombudsman in Healthcare”, *The International Ombudsman Yearbook* (2004), pp 3-56.

19 VO Ayeni, “Ombudsmen as Human Rights Institutions”, 13(4) *Journal of Human Rights* (2014), pp 498-511.

has been interpreted as giving it the mandate to deal with human rights issues.²⁰ Though not manifestly wrong, this is an extremely broad interpretation of section 3(3)(b) of the Act. As previously noted, an ordinary interpretation of this provision is simply that the Ombudsman is not precluded from investigating a matter because of the fact that an aggrieved person can approach the High Court for redress. The provision merely acknowledges the overlap between injustice occasioned by an administrative action and a violation of an individual's constitutional rights. In any case, it was clearly not the lawmaker's intention that the provision be interpreted so broadly.

3.1 The mandate of the Ombudsman

It is worth reiterating that the Office is mandated to investigate allegations of acts of injustices occasioned by maladministration; connected to that investigative mandate is a promotional mandate that allows it to engage in educational activities. It is not clear to what extent the Office deals with human rights reports and cases or what their nature is, given that it was never specifically mandated to handle such matters. If one were to go by the Office's interpretation of its mandate, one would conclude that it does indeed have a protective and promotional mandate as envisaged by the Paris Principles; however, the Office does not receive and preside over petitions, as is the case with other NHRIs established pursuant to these principles.

Such an understanding of the mandate of the Office of the Ombudsman is derived from a consideration of the totality of the Act's provisions. Specifically, section 8 of the Act provides that upon concluding his or her investigation and making a finding as to the commission of any injustice, the Ombudsman shall send a report of these findings and the recommendations thereto to the principal officer of the department or authority concerned.²¹ From a reading of section 8 of the Act, it appears that the injustice should be in consequence of maladministration.

20 Generally, human rights in Botswana are actionable in terms of section 18 of the Constitution of Botswana as read with sections 3-16 of the Constitution. Section 18(1) of the Constitution of Botswana provides: "If any person alleges that any of the provisions of section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress".

21 Section 8 of the Act provides: "(1) After conducting an investigation under this Act, the Ombudsman shall send a report of the results of the investigation to the principal officer of the department or authority concerned and if he is of opinion that injustice

What is clear from the foregoing is that the Ombudsman, after conducting an investigation, makes a recommendation as to what he or she thinks is fit for remedying the injustice caused. In the event that the recommendation is not acted upon, all the Ombudsman does is submit a special report to the National Assembly. Neither the Act nor any other law prescribes how the National Assembly should deal with this report. In other words, it is under no obligation to implement and/or enforce the Ombudsman's recommendations; the department or authority concerned is also under no such obligation.

The provision in section 8 is not couched, for example, in a similar way to comparable provisions in the Constitution of South Africa, which were interpreted by the Constitutional Court in *Economic Freedom Fighters & Others v Speaker of the National Assembly & Others*.²² In that matter, the Court held that the failure by President Jacob Zuma to comply with the remedial action taken against him by the Public Protector in her report was inconsistent with section 83(b) of the Constitution as read with sections 181(3) and 182(1)(c) of the Constitution and was consequently invalid. Section 182(1)(c) of the Constitution of South Africa gives the Public Protector the power, as regulated by national legislation, "to take appropriate remedial action" in the exercise of her powers. In Botswana, there is no such provision, or a provision to the same effect, in either the Constitution or the Ombudsman's Act.

3.2 The independence of the Ombudsman

The Office of the Ombudsman is envisaged as an independent entity that monitors the acts of public servants and other authorities in the discharge of their functions. The expectation that it should be an independent institution is borne of the fact that similar institutions the world over are deemed free of government or executive influence. Unfortunately, this is not necessarily so. As is the case with many such institutions, the independence of the Office of Ombudsman is undermined by weaknesses in its framework of enabling legislation and a lack of political will to ensure the success of the institution. Furthermore, the practice of incumbent

has been caused to the person aggrieved in consequence of maladministration, he shall make such recommendations as he thinks fit for remedying the injustice caused. (2) Where the Ombudsman has made a recommendation under subsection (1) and within a reasonable time thereafter no action has been taken which appears to him adequately to remedy the injustice, he may lay before the National Assembly a special report".

22 2017 (3) 580 CC.

office-holders itself sometimes erodes the independence and effectiveness of the institution.

On the face of it, section 9(1) of the Ombudsman's Act guarantees the independence of the Office by explicitly providing that "[i]n the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called in question in any court of law". The Act's guarantee of independence includes, by necessary extension, independence when exercising the self-imposed human rights mandate. Save for the fact that the Ombudsman shall submit annual reports to the President about the discharge of his or her functions,²³ there is no expectation that he or she is to be given direction or orders by any government official. This provision, in short, would give one the impression that the Office of the Ombudsman is indeed independent.

However, its independence may be undermined by the substantive application of section 7(5) of the Act.²⁴ This provision gives the Attorney-General the power to stop the Ombudsman from conducting investigations by issuing a notice that in his or her opinion, the disclosure of documents or information by the Ombudsman would be contrary to the public interest in relation to military defence, foreign affairs and internal security. In the event that the Attorney-General does this, the Ombudsman may not communicate any such information or document in the exercise of his or her duties. In section 7(4) the same applies to the proceedings of cabinet or any of its committees. All these provisions demonstrate the limitations that exist on the ability of the Office of the Ombudsman to conduct its investigations in terms of the Act.

Furthermore, the Ombudsman is designated as a Public Officer under the Public Service Act (PSA). A reading of the provisions of the PSA and Ombudsman's Act brings to light that the Office is subject to the supervision of the Permanent Secretary to the Office of the President, given that the Ombudsman is listed in the schedule as one of the offices to which the PSA applies. Section 8(1) and (2) make it clear that the Permanent Secretary to the President, who is the head of the public service, is

23 Ombudsman Act, section 9(2).

24 Section 7(5) reads: "The Attorney-General may give notice to the Ombudsman, with respect to any document or information specified in the notice, that in his opinion the disclosure of that document or information would be contrary to the public interest in relation to defence, external relations or internal security; and where such a notice is given nothing in this section shall be construed as authorising or requiring the Ombudsman or any member of his staff to communicate to any person for any purpose any document or information specified in the notice".

“[r]esponsible for the administration of the public service”, which includes the Office of the Ombudsman.

There thus seems to be tension between section 9(1) of the Ombudsman’s Act and section 8 of the PSA, which gives the Permanent Secretary to the President administrative powers over the entire public service, including the Ombudsman. Employees of the Office of the Ombudsman are hence subject to the PSA and its regulations and, by implication, to the administrative control of the Permanent Secretary to the President. Because the Ombudsman is not a direct creature of the Constitution, he or she lacks specific protection under the Constitution of Botswana. Both statutorily and practically, the Ombudsman is not as independent as one would have assumed and as section 9 of the Act would purport to be the case.

Thus, on a plain reading of the PSA and with due regard to the Ombudsman Act, the Ombudsman is not fully independent since he or she is subject to the control of the Permanent Secretary to the President, who, as a member of the executive, is a subordinate to the President in terms of section 47 of the Constitution.

3.3 The appointment and tenure of the Ombudsman

The independence of the Ombudsman is undermined significantly by the position of the law regarding the appointment of persons to this position. In terms of section 2 of the Ombudsman’s Act, the Ombudsman is appointed by the President after consultation with the Leader of Opposition (LOO) in the National Assembly. “Consultation” implies that the President is not compelled to heed the opinion of the Leader of Opposition, as such opinion is not binding on the President.

In contrast, section 193(4) of the South African Constitution provides that “[t]he President, on the recommendation of the National Assembly, must appoint the Public Protector ...”. Section 2 of the Ombudsman’s Act also differs from the constitutional provision dealing with the appointment of judges in Botswana. This stipulates that “[t]he other judges of the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission”.²⁵

25 Constitution of Botswana, section 96(2); the courts of Botswana recently grappled with the question whether or not the President is bound by the advice of the Judicial Service Commission (JSC) in the *Law Society of Botswana & Another v the President of Botswana &*

Unlike the case in these constitutional provisions, the appointment of the Ombudsman is a matter for the President alone, which flies in the face of the purported independence of the Ombudsman. There is thus no known process for the appointment of an Ombudsman other than the usual one in which the Office of the President simply announces a new appointment.

This clearly falls short of the requirements set out by the Paris Principles on the composition of national institutions dealing with human rights. Such institutions are expected to comply with principles of pluralism that apply to “the instances in society that are involved in human rights work at the national level”.²⁶ The Ombudsman was not created on the thinking that it would be required to comply with such standard, since it was not established in the first place as a human rights institution; nevertheless, the standard is applicable because the Office has assumed the mandate of dealing with human rights issues in Botswana.

As regards qualifications for appointment to the position of Ombudsman, the Act does not set out any. Instead, it sets several grounds that disqualify someone from being appointed as Ombudsman. Section 2(3) of the Act provides that members of the National Assembly, members of local authorities, candidates for election as a member of the National Assembly or local authority, and specially elected members to those bodies are disqualified from being appointed as Ombudsman.

The absence of clear qualification requirements is clearly contrary to the Paris Principles as well as to the principles of ensuring transparency and accountability during the process of appointing persons to such institutions. In the end, the absence of such clear qualifications allows the President to appoint whomsoever he or she wants to appoint to that office and irrespective of considerations of merit.

With regard to tenure, the Act provides that a person shall hold an office for a term of four years,²⁷ but it appears that in practice the Ombudsman can be appointed for more than one four-year term of office. A person’s removal from office is regulated by section 2(6) of the Ombudsman’s Act, which provides that the provisions of the Constitution

Others CACGB-031-16 (unreported), in which the court held that the President was not entitled to turn down the recommendation of the JSC and must follow its advice at all times.

26 Paris Principles.

27 Ombudsman Act, section 2(5).

as regards the removal of judges are equally applicable to the removal of the Ombudsman.

Section 2(6) does not go further to indicate how the Ombudsman is to be removed, considering that the provisions of the Constitution are tailor-made to suit the removal of judges from office. To the extent that there is lack of clarity as regards the removal of the Ombudsman from office, the security of tenure of the Ombudsman is potentially problematic. It is also necessary to point out that, to date, the provisions of section 2(6) of the Act have not been brought to life as there has never been an instance where the Ombudsman had to be removed from office.

3.4 The human and financial resources of the Office of the Ombudsman

One of the key indicators of the autonomy of institutions like the Ombudsman their financial independence. This is also a requirement under the Paris Principles in that they provide that an NHRI is expected to be financially independent. The reason for this, clearly, is to ensure that the institution is free from executive influence by way of control of finances. However, limited financial resources have greatly affected the overall effectiveness of the Office of the Ombudsman.

As far as financial autonomy is concerned, section 13 of the Act provides that:

[t]he administrative expenses of the [O]ffice of the Ombudsman, including such expenses and allowances as are authorized by the provisions of this Act shall, to such amount as may be sanctioned by Parliament, be paid out of the Consolidated Fund.

This provision presupposes that the Ombudsman is in control of his or her budget and able to allocate the finances availed by the state in a manner he or she considers appropriate. However, budget proposals for the Office of the Ombudsman are presented before the National Assembly by a minister who is a member of the executive branch of government. The National Assembly then decides how much the Ombudsman is to be granted for administrative expenses.

The Ombudsman's operational effectiveness may be further diluted, in part, by the fact that, insofar as human resource matters are concerned, the decision-maker is the Permanent Secretary, who is the head of the Public Service. As mentioned, the Office of the Ombudsman falls within the category of institutions under the direction and supervision of the

Permanent Secretary of the Office of the President. The Ombudsman's Act does not provide for human resource issues. In other words, it does not have a provision that governs the Ombudsman and his or her staff insofar as employment and/or labour issues are concerned. For example, it does not provide for the qualifications that are needed for people to be engaged by the Office of the Ombudsman. Necessarily, the staff contingent would have to be made up of people from varied backgrounds who possess the complementary skills that are required for the Office to function effectively.

In particular, as already noted, the Act does not also make provision for the qualifications of the Ombudsman. It sets out the grounds for disqualification,²⁸ but does not make stipulate what professional skills and knowledge appointees need to have. The inaugural Ombudsman was a lawyer by training, as was his successor, but not so with the third Ombudsman. She was a not a lawyer, although her successor in turn – the current Ombudsman – is, again, a lawyer.

The lack of a requirement that the Ombudsman be a trained legal professional was a subject of dispute in the *Ofentse Lepodise* case,²⁹ in which it was argued that the core duties of the Ombudsman and the director of management and legal services did not involve the exercise of technical expertise and skills in the discharge of their duties. Although they both possessed legal qualifications, it was argued that were excluded from being paid a scarce-skills allowance as they were not performing the duties of the skill in question, as required by the Public Service Management Directive No 2 of 2008 on Attraction and Retention Policy.

This policy introduced a scarce-skills allowance for certain groups in the public service. Lawyers, judges “and other legal professionals” on a specified salary scale were listed as eligible and initially enjoyed the scarce-skills allowance, but that was discontinued by Public Service Management Directive No 5 of 2010, which sought to exclude those officers whose core duties did not involve the daily usage of the skill acquired during their training.

Representatives of the affected group took this directive to the High Court on review and succeeded. Judge Mothobi observed that the practice

28 In terms of section 2(3)3 of the Act, “[a] person shall not be qualified to be appointed as Ombudsman if he is a member of the National Assembly, a member of any local authority, a candidate for election as a member of the National Assembly or a local authority nominated as such with his consent”.

29 See note 17.

of appointing an Ombudsman with a legal background should be encouraged even though it is not a statutory requirement. He stressed that this would obviate the need for the Ombudsman to approach the Attorney-General, who, as the government's principal legal advisor, may be well acting for or advising the government department under investigation.³⁰ Judge Mothobi noted furthermore that the appointment of lawyers to the Office of the Ombudsman is appropriate, given that officials in this institution have the same powers – as regards disclosure of evidence, summoning of witnesses, examining witnesses, administration of oaths and production of documents – as judges of the High Court.³¹

Judge Mothobi proceeded to conclude that, from his reading of the Act, the work carried out by the Ombudsman was “professional work requiring special knowledge to be understood”.³² While the President is entitled to appoint a non-lawyer as Ombudsman, Mothobi J correctly points out that such an appointment is not conducive to the proper implementation of the Ombudsman's Act. The fact that it remains an open possibility for a non-lawyer to be appointed is therefore one of the several weaknesses in the Act.

Furthermore, section 15 of the Act provides that “the Minister may make regulations for the purpose of carrying into effect the provisions of this Act and for prescribing anything which is required to be prescribed under this Act”. It is not clear who the envisaged minister is because the Act has no definition clause, nor does it state anywhere else who this minister is. Since the coming into force of the Act in 1997, there has never been any regulation which would apply to staff within the Ombudsman's office. The conditions of service of the staff in the Office of the Ombudsman are as set out under the Public Service Act and related documents.

At the time of writing, the Office of the Ombudsman is said to have a staff complement of about 100 people. They are based in Gaborone – which serves as the headquarters and is located in the southern part of the country – as well as in Francistown, in the north-central parts, and in Maun, in the north-western. It is also reported that the Office has about 25 investigators. In a context where this overall staff complement has to serve a population of a little more than two million, there is no indication that deliberate efforts are made to engage experts thoroughly trained in human

30 *Ibid*, pp 31-32.

31 *Ibid*, pp 31-32.

32 *Ibid*, pp 37-38.

rights law. However, the fact that the Office engages a substantial number of lawyers does alleviate this possible shortage to some degree.

3.5 Accessibility and relations with civil society

As mentioned, the Ombudsman has offices in Gaborone, Francistown and Maun. These are cities and towns which could be said to be points of convergence for citizens living in the wider regions adjacent to them. There is evidence to suggest that the Office is accessible, seeing as many complaints have been lodged with it over the years. The Office also travels across the country to disseminate information to the populace, in addition to which it has a Facebook page entitled *Ombudsman – Botswana*. On this page, the Office informs the public of, inter alia, the results of its investigations.

These efforts have increased the visibility of the Office and made people aware that it can offer redress for injustices they have suffered. Furthermore, it has a cordial relationship with civil society in general but particularly so with the Law Society of Botswana.

3.6 Public accountability

The Paris Principles require that, to be effective, an NHRI should be independent yet exhibit a certain degree of accountability.³³ In essence this means that the Office of the Ombudsman should not only hold other institutions accountable but be accountable itself with regard to its operations, financial dealings and adherence to the rules in its establishing law and documents related thereto. The Office, that is to say, is not exempt from complying with the various standards the government has set.

It has been rightly pointed out that “[b]esides legal financial accountability to the government and/or parliament, a NHRI also needs to find ways to be accountable to the public; in particular to those groups and individuals in society who are most vulnerable”.³⁴ Consistent with this principle and the fact that the Office of the Ombudsman is governed by the provisions of the PSA, section 6 of this Act speaks to the issue of accountability.

33 M Mehyar, “NHRIs’ Independence and Accountability: The Eighth Arab-European Human Rights Dialogue” (2013), available at <https://bit.ly/2XiMutb> (accessed 4 May 2019), p 7.

34 *Ibid*, p 8.

In setting out general principles and standards of public service, section 6(1)(b) provides, *inter alia*, that the employees of the Ombudsman shall “utilize Government resources at their disposal in an efficient, responsible and accountable manner”. Similar expectations are set out by the National Vision, the Public Service Charter, and codes of conduct for public officers. Section 7 of the PSA goes on to provide for the applicable human resource management standards; accordingly, among other things, any recruitment by the Ombudsman shall not be discriminatory in any manner or fashion.

For the Office of the Ombudsman to be accountable to the public, its processes and procedures have to be visible, transparent, consistent and rational. As such, the Office publishes annual reports of its financial position as well achievements for the year. The report is made available to the public and represents an attempt to ensure that the Office is accountable to the public. It is unfortunate that, over and above the minimal attention that the media and other government departments give these reports, the Ombudsman is not more proactive in publicising them.

By contrast, the Ombudsman’s special reports are not made available to the public at all as they may amount to a naming-and-shaming of non-compliant government departments. As noted, special reports come about as a result of a government or relevant authority’s failure to take remedial action as suggested by the Ombudsman.³⁵ The absence of public dissemination in such cases is a great shortcoming as it is inconsistent with the principles of transparency and accountability to which the Office of the Ombudsman is expected to adhere. The special reports should be made available to the public as they speak to the issue of compliance with the recommendations of the Office of the Ombudsman. Indeed, it is on the basis of the statistics and other information in the special reports that the public could glean whether or not the Ombudsman is indeed as effective as he or she purports to be.

4 Conclusion

Botswana’s political leadership seems to think that the Ombudsman has the mandate to handle disputes or matters related to human rights, whereas this is not the case, as this chapter has demonstrated. Clearly, its mandate is instead the narrower one of enhancing good governance in the delivery of government services. The Ombudsman has neither the broad mandate nor competence to deal with human rights issues; his or her

35 See generally Ombudsman’s Act, section 8(2).

independence from the government is suspect; and the institution lacks adequate investigative and remedial powers. It thus fails on most, if not all, of the criteria that the Paris Principles require an entity to meet so as to qualify as a human rights institution. It is just as well the government has decided to revise the Office's mandate and equip it with powers more appropriate for dealing with human rights violations.

However, numerous local actors are not in favour of this approach of enhancing the human rights mandate of the Office of the Ombudsman, and have called instead for the establishment of a separate, independent body with a clear mandate to promote and protect human rights in Botswana. The need for such an institution is not based on the presence of colossal violations of human rights, as might be the case in other parts of Africa. It arises rather from the fact that Botswana simply has no institution mandated to perform the functions of a national human rights commission established in accordance with the Paris Principles. On the whole, there is no reason why the country should not establish one, since this would very probably improve the protection of human rights.³⁶

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

The only institution that plays the role of an NHRI in Botswana is the Office of the Ombudsman. Even so, this is on the basis only of a very generous interpretation of the powers of the Ombudsman contained in section 3 of Chapter 2 of the Ombudsman Act. It states as follows:

- 3(1) Subject to the provisions of this section, the Ombudsman may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where –
 - (a) a complaint is made to the Ombudsman by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken;
 - (b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by the President, a Minister or any member of the National Assembly with a request to conduct an investigation thereon; and
 - (c) in any other circumstances in which the Ombudsman on his own motion considers it necessary to investigate the action on the ground that some person has or may have sustained such injustice.
- (2) Except as provided in this Act, the Ombudsman shall not conduct an investigation into any action in respect of which the person aggrieved has or had –
 - (a) a right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana; or
 - (b) a remedy by way of proceedings in any court of law.
- (3) Notwithstanding the provisions of subsection (2), the Ombudsman –
 - (a) may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if he is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or to have resorted to it; and
 - (b) shall not in any case be precluded from conducting an investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution (which relates to redress for contraventions of the provisions for the protection of fundamental rights and freedoms).
- (4) In determining whether to initiate, continue or discontinue an investigation under this Act, the Ombudsman shall, subject to the proceeding provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this Act shall be determined by the Ombudsman.
- (5) Without prejudice to the provisions of subsection (4), the Ombudsman may refuse to initiate, or may discontinue, any investigation if it appears to him that –
 - (a) the complaint is frivolous or vexatious or is not made in good faith;

- (b) the subject matter of the complaint is trivial;
 - (c) the person aggrieved has no sufficient interest in the subject matter of the complaint; or
 - (d) the making of the complaint has, without reasonable cause, been delayed for more than 12 months.
- (6) The authorities other than departments of Government to which this Act applies are –
- (a) any authority empowered to determine the person with whom any contract or class of contracts shall be entered into or on behalf of the Government of Botswana; and
 - (b) such other authorities as may be prescribed.
- (7) For the purposes of this Act, the Judicial Service Commission and the Public Service Commission shall not be regarded as departments of Government.
- (8) Where any person by whom a complaint might have been made under this Act has died or is for any reason unable to act for himself, the complainant may be made by his personal representatives or by a member of his family or other individual suitable to represent him.
- (9) Except as provided in subsection (8) a complaint shall not be entertained unless it is made by the person aggrieved himself.
- (10) Where a complaint or request for an investigation is duly made in accordance with the provisions of this Act and the Ombudsman decides not to investigate the action to which the complaint or request relates or to discontinue an investigation of that action, he shall inform the person or body of persons who made the complaint or request of his decision.



5

THE BURUNDIAN INDEPENDENT NATIONAL HUMAN RIGHTS COMMISSION *Pacifique Manirakiza**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Throughout its history, Burundi has faced political crises characterised by gross and massive human rights violations, among them the worst of crimes in international law, such as genocide, war crimes and crimes against humanity.¹ One of the most infamous episodes took place when a *coup d'état* in 1993 claimed the lives of Melchior Ndadaye, the country's first democratically elected president of Hutu ethnicity, and those of the Speaker of Parliament, senior ministers, and Members of Parliament;

* University of Ottawa, Faculty of Law/Common Law Section.

1 During the peace negotiations, which were concluded by the signing of the Arusha Peace Agreement, Burundian politicians agreed that “acts of genocide, war crimes and other crimes against humanity have been perpetrated since independence against Tutsi and Hutu ethnic communities in Burundi”; see Arusha Peace and Reconciliation Agreement (APRA), Protocol I, Article 10(a)-(c). The APRA has been adopted and domesticated as such by Parliament: see Law No 1/017 of 1 December 2000 on the Adoption of the Arusha Peace and Reconciliation Agreement for Burundi. See also R Lemarchand, *Burundi: Ethnic Conflict and Genocide*, London, Cambridge University Press (1994); C Scherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence, and Regional War*, Santa Barbara, Praeger Publishers (2001).

thereafter, civilians of Hutu and Tutsi ethnicity alike were massacred when a decade-long civil war erupted between the then Tutsi-dominated Burundian Armed Forces² and the Hutu-dominated rebel groups, the Forces for the Defence of Democracy (FDD) and the National Liberation Forces.³

In a bid to end the war, the international community, represented by sub-regional powers,⁴ helped to craft the Arusha Peace and Reconciliation Agreement (APRA), which was signed by the major political players in 2000 in Arusha, Tanzania. The agreement was later supplemented by other accords signed by warring parties that had been left out of the Arusha peace process.⁵

Both the APRA and its supplemental documents provided for a political and legal framework for peace and reconciliation, transitional justice and the promotion and protection of human rights. For instance, the APRA provides for reforms of political, judicial, and economic and security institutions. As far as rights are concerned, it advocated for far-reaching reforms to ensure the promotion and protection of human rights of Burundians and others in the country.

Inter alia, these reforms targeted the judiciary,⁶ which is constitutionally mandated to be the main guardian and guarantor of respect for human rights. They also envisaged the creation of institutions such as the Office of the Ombudsman,⁷ a TRC,⁸ and, eventually, an International Criminal Tribunal for Burundi.⁹ No mention was made of a national human rights institution as such, contrary to other peace agreements.¹⁰

2 Frequently referred to by the acronym FAB for Forces Armées Burundaises.

3 Frequently referred with the acronym FNL for Forces nationales de libération.

4 Regional Initiative for Peace in Burundi, headed by President Yoweri Kaguta Museveni of Uganda.

5 Global Cease-Fire Agreement between the Government of Burundi and the CNDD-FDD, 16 November 2003, and the Comprehensive Cease-Fire Agreement between the Government of Burundi and the Party for the Liberation of Hutu People – National Liberation Forces (PALIPEHUTU-FNL), 7 September 2006.

6 APRA, Protocol II, Article 17.

7 APRA, Protocol II, Article 10(7).

8 APRA, Protocol I, Article 8.

9 APRA, Protocol I, Article 6(11).

10 See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (7 July 1999) (accessed 1 December 1999) [http://www.sierra-leone.gov.sl/peace agreement.htm](http://www.sierra-leone.gov.sl/peace%20agreement.htm); Agreement Reached in the Multi-Party Negotiations (The Northern Ireland Peace Agreement), 37 I.L.M 751, 767-68 (1998).

However, given the human rights focus of the agreement and the trend in international human rights law, the post-war government took the decision to establish the Independent National Human Rights Commission (hereafter CNIDH¹¹ or the Commission). National human rights institutions (NHRIs) are particularly important in post-conflict situations, “as they provide a viable forum for the investigation and resolution of human rights complaints in countries where the judicial system is weak, politicised, slow or otherwise incapacitated”.¹²

This chapter examines the contribution the CNIDH has made to addressing human rights issues in Burundi and the challenges it faces in this regard. Section 2 looks at its establishment, section 3, at its legal nature, and section 4, at its mandate; finally, section 5 considers its accountability to Burundians and Burundian institutions.

2 Establishment and evolution of the Commission

The CNIDH is a relatively new institution in the human rights landscape in Burundi. Its first members were elected in May 2011 and took oath of office on 7 June 2011 before the President of the Republic and all other high-level state institutions.¹³ The Commission was launched officially on 16 December 2011 during commemoration activities marking the sixty-third anniversary of the Universal Declaration of Human Rights. The first vice president of Burundi officiated at the ceremony, signalling the government’s strong support of the new institution.¹⁴

The law creating the Commission is generous as it grants it jurisdiction to deal with all human rights issues, including the rights of woman, children, and vulnerable people such as the indigenous Batwa minority and persons with disabilities.¹⁵ However, land and other property rights, divorce-related rights, and the rights of the victims of past atrocities are

11 The commonly used acronym CNIDH stands for the *Commission nationale indépendante des droits de l’homme* which is the official name of the national human rights institution in Burundi.

12 LC Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection”, 13 *Harvard Human Rights Journal* (2000), p 2.

13 Independent National Commission on Human Rights, *Annual Report, Edition 2012*, Bujumbura (May 2013), p 6 (hereafter CNIDH Annual Report 2012).

14 In his address, the vice president reiterates the government commitment to provide assistance and all the necessary support in order to ensure CNIDH’s independence and efficiency, see Independent National Commission on Human Rights, *Annual Report, Edition 2011*, Bujumbura (2012), p 55 (hereafter CNIDH Annual Report 2011).

15 *Ibid.*

excluded from the CNIDH's mandate because specialised institutions already exist for their protection.

3 The nature of the CNIDH

Although the amended Constitution of 2018 and its predecessor provide for entities competent to deal with human rights – among them the judiciary¹⁶ and Office of the Ombudsman¹⁷ – the CNIDH is not a constitutionally mandated human rights institution. Instead it is provided for in Law No 1/04 of 5 January 2011 on the Creation of the Independent National Human Rights Commission.¹⁸ In this regard, Smith observes that:

the statutory basis is the most secure way of guaranteeing various safeguards of an institution's independence, as well as giving it powers that can be defended in legal proceedings if challenged. By creating and setting out the powers and mandates of a NHRI constitutionally or legislatively, the institution is given a degree of formal independence and is less easily abolished and less vulnerable to influence from government than if it were established by an executive order or decree.¹⁹

Despite its legislative nature and lack of constitutional basis, the Commission has a special status. It is granted a legal personality and enjoys financial and administrative autonomy.²⁰ In addition, members of the Commission exercise their duties in their personal capacity and independently from the legislative, executive and judicial branches of state as well political parties and interest groups.²¹ The law creating the CNIDH is crafted in such a way that it grants the newly established institution extraordinary powers to carry out its mission. For instance, the CNIDH is a quasi-judicial mechanism also tasked with promotional and consultative mandates.²² So, all the guarantees of the independence of the Commission are provided for in the enabling text. The independence of an NHRI from

16 Constitution of the Republic of Burundi, Bujumbura (2018), Article 60.

17 *Ibid.*, Article 243.

18 Law No 1/04 of 5 January 2011 on the Creation and Functioning of the Independent National Human Rights Commission (hereafter CNIDH Law).

19 A Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing", 28 *Human Rights Quarterly* (2006), p 913.

20 CNIDH Law, Article 33.

21 *Ibid.*

22 CNIDH Law, Articles 4, 5 and 6.

government control is, needless to say, a factor crucial to its effectiveness.²³

Regarding the appointment procedure, which is supposed to “be transparent and politically neutral”,²⁴ membership to the Commission is an elective position. A call for applications is widely publicised. Although the application process is open to anybody who qualifies,²⁵ the law requires that candidate commissioners identify themselves as hailing from one of six categories: human rights non-governmental organisations (NGOs); woman’s rights organisations; children’s rights organisations; academia; experts in human rights; and religious denominations.²⁶

Moreover, the National Assembly shall ensure that the Commission is representative of particular characteristics of Burundian society,²⁷ which is divided along ethnic, political, regional and gender lines. The reason is that, “without diversity, there is a danger that the NHRI and its work will not be viewed with public confidence, therefore damaging its credibility and legitimacy”.²⁸ Nevertheless, Nowrojee is correct to note that “care must be taken to ensure that the effort to address diversity does not become tokenism that weakens the work of the commission by the presence of political appointees who know nothing about human rights”.²⁹

The National Assembly sets up an ad hoc commission that screens the candidates.³⁰ This body comprises representatives of all political parties in Parliament, along with a representative of the indigenous Batwa community. The ad hoc commission presents a shortlist of candidates to the full National Assembly for election. The shortlist comprises three candidates from each category. The National Assembly, through secret ballot, elects only seven commissioners, with one from each category, except in the case of religious denominations, which are represented by two commissioners, and that of women, of whom there should be at least

23 See United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No 4 (1995), UN Doc HR/P/PT/4, paragraph 3 (hereafter *National Human Rights Handbook*); see also note 12, p 24.

24 See Smith, note 19, p 923.

25 CNIDH Law, Articles 8 and 12.

26 CNIDH Law, Article 7.

27 CNIDH Law, Article 8.

28 See Smith, note 19, p 928.

29 B Nowrojee, *Human Rights Watch, Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001), available at <http://www.hrw.org/reports/2001/africa/overview/factors.html> (accessed 10 March 2019).

30 CNIDH Law, Article 9.

three. Moreover, the number of commissioners should be balanced carefully on the basis of ethnic, regional and gender considerations.³¹ The National Assembly also elects the bureau of the Commission, which is composed of the President, Vice President and Secretary-General.³²

The Speaker of the National Assembly then submits the list of elected commissioners and bureau members to the President for appointment.³³ The appointment from the President is simply formalistic: at this juncture in the process, he or she cannot modify the composition of either the Commission nor the bureau.

The overall process is conceived in the way it is to ensure that only the best are screened and eventually elected. This is a guarantee of quality of the membership of the Commission. However, although the process seems very open, it should be noted that it is not free from political manipulation and considerations. For instance, in 2015 the Commission's membership was due for renewal, but despite the fact that the first members of the Commission did an excellent job of protecting and promoting human rights – to the extent that the Commission was recognised internationally and awarded “A” status – most of those who sought re-election, including the first president and vice president, were not re-elected. In addition, it is the case that more and more candidates without relevant experience in human rights are being elected to the Commission, a trend which clearly is linked to political factors. Since the eruption of the third-term-related demonstrations orchestrated by civil society organisations and opposition political parties and followed by an attempted *coup d'état*, the government and Parliament are increasingly suspicious of human rights institutions and reluctant to elect people who demonstrate independence of viewpoint.³⁴

3.1 Financial autonomy

The CNIDH Law envisages an institution that enjoys financial and administrative autonomy.³⁵ The Commission is not a department of any

31 CNIDH Law, Article 8.

32 CNIDH Law, Article 10.

33 CNIDH Law, Article 11.

34 The political and human rights crisis that began in Burundi in April 2015, when incumbent president, Pierre Nkurunziza, put pressure on the Constitutional Court to interpret the Constitution in a manner that allowed him to run for a third consecutive term as president and later alter the constitution in a manner that allows him to stay in power until 2034.

35 CNIDH Law, Article 33.

ministry, though in the main it is funded directly from the national budget.³⁶ For the first five years of its existence, its operational budget ranged between BIF 863.6 million BIF (\$473,639,915) and BIF 912.2 million (\$500,251,083).³⁷ In 2015, the budget was fixed at BIF 949,559,339 (\$520,430,589), along with an additional sum of BIF 21,297,154 (\$11,679,474) for infrastructure.³⁸ Due to a reduction in cooperation with EU countries and international organisations, the ordinary budget in 2016 was only BIF 784.462,324 (\$430,114,396).³⁹

Needless to say, the allocated operational budget is insufficient for the Commission to cover all the expenses required by its mandate. The Commission acknowledges that this is one of the constraints it faces in executing its mandate fully.⁴⁰ For instance, the budget covers less than a third of the Commission's staff salary bill.⁴¹

As a result, the Commission turns to external partners to fund its activities and enable it to acquire office or transportation equipment.⁴² The terms of the external funding depend on the nature of each project, as individual Memoranda of Understanding (MOUs) are signed between the Commission and its funding partners. External funding comes from a wide range of sources: foreign embassies, United Nations (UN) agencies, and other international organisations and international NGOs.⁴³ For instance, in 2015 the Commission was assisted financially and technically by the UNDP, UNICEF, UN Peacebuilding Fund, OHCHR, USAID, the Dutch Embassy, US Embassy, French Embassy, the EU, Swiss Cooperation and Oxfam Novib.⁴⁴ In essence, external funding covers project-based activities, not the functioning per se of the Commission.

So, although the law requires financial autonomy, Burundi's national budget cannot by itself finance all the activities related to the broad mandate of the Commission. As has been shown, the allocated budget is

36 *Ibid.*

37 Independent National Commission on Human Rights, Annual Report, Edition 2015, Bujumbura (2016), p 17 (hereafter CNIDH Annual Report 2015).

38 *Ibid.*, p 39.

39 *Ibid.*, p 17.

40 *Ibid.*

41 Independent National Commission on Human Rights, Annual Report, Edition 2013, Bujumbura (2014), p 11 (hereafter CNIDH Annual Report 2013).

42 See note 36, p 17.

43 For instance, the UN Bureau for Burundi gave USD 158 000, the Embassy of the Netherlands EU 150 000, Swiss Cooperation 75 004 Swiss francs, and the Embassy of France EU 20 000. This financial assistance helped to cover expenses for the last quarter of 2011 and the beginning of 2012.

44 See note 36, p 19.

too small, leaving the Commission with no alternative but to look for external funding. This situation is not ideal, as it could jeopardise the Commission's financial autonomy and thereby its overall independence.

3.2 Professional skills and knowledge

The CNIDH Law does not explicitly require any specific level of education, whether in general or specifically in human rights, with the exception that one member of the Commission must have expertise in human rights. However, even here the law does not define the level of expertise or stipulate how the National Assembly is to assess that expertise during the screening or elections of candidates. Does it require a law degree, diploma or certificate alone, or does it also require professional experience in human rights law and/or litigation? The law is silent.

Looking both at those who have been elected in that capacity or merely pre-selected by the ad hoc commission but not elected, they have had professional experience in human rights as judges⁴⁵ or as leaders of human rights NGOs.⁴⁶ However, the extent to which the NGO people could reasonably claim to be experts in human rights is debatable. The last calls for applications (2015 and 2019), for instance, mention general conditions to do with nationality, age, political affiliation, criminal records, language skills, and the like. Supplementary conditions require candidates to demonstrate morality, integrity, responsibility, listening skills, a commitment to human rights, dynamism, independence, and impartiality in decision-making.⁴⁷ These conditions mirror the provisions of Articles 8 and 12 of the CNIDH Law.

However, although neither condition specifically addresses candidates' skills in or knowledge of human rights, the law implicitly alludes to this in its requirement that commissioners come from one six different categories, categories which include human rights experts, human rights NGOs and women's rights organisations. For instance, the current chairperson of the CNIDH is an expert in human rights law,⁴⁸

45 Gamaliel Nkurunziza (2014-2018).

46 Mr Jean-Marie Vianney Kavumbagu (2011-2014) and Gilbert-Becaud Njangwa (2018-present). In the 2014 elections, Joseph Ndayizeye, also former chairman of Ligue Iteka, was a candidate under the category of human rights experts.

47 "Avis d'appel a candidature No. 001-2005," http://www.assemblee.bi/IMG/pdf/Avis_d_appel_a_candidatureCNIDH.pdf.

48 Mr Jean-Baptiste Baribonekeza, a graduate of the world-class Centre of Human Rights of the University of Pretoria, has also occupied human rights-related positions within different UN peace-keeping/building missions in Cote d'Ivoire and Sierra Leone.

albeit that he was elected on the basis of representing the category of human rights NGOs.

For commissioners who do not have any formal academic training or professional experience in human rights, the Commission, mindful of their limited expertise, regularly organises capacity-building sessions for them as well as for support staff such as the chiefs of regional offices. As part of this capacity-building, commissioners and support staff are encouraged to participate in online training seminars and workshops or ones offered *in situ* outside the country. Most of the time, it is the Network of African National Human Rights Institutions (NANHRI) that organises the training.⁴⁹

3.3 Relations between the CNIDH and civil society

The creation of the CNIDH was welcomed by civil society. From a human rights perspective, the Commission is an important addition to the existing human rights architecture, one composed mainly of civil society organisations. The work of the CNIDH thus stands to complement that of civil society in the promotion and protection of human rights. Indeed, since the CNIDH's inception, its statements and policies have insisted on the need for collaboration between partners with similar mandates or who are otherwise interested in or duty-bound to promote and protect human rights.

To further the relationship, the Commission has signed MOUs with various civil society organisations, with the memoranda highlighting areas of possible collaboration with the media, the Bar and human rights NGOs.⁵⁰ The CNIDH also regularly invites civil society organisations to its promotional activities, such as seminars or workshops on human rights.

The CNIDH thus plays a critical role in facilitating working relations between the government and civil society. This is particularly important since, as Smith puts, “the two sets of actors, governments and NGOs, are often viewed as the two opposite ends of the spectrum”.⁵¹ In Burundi, as elsewhere, NGOs are not necessarily on good terms with the government, given that adopting a critical stance towards its work, especially its human

49 For instance, two focal points followed that training online and on-site in Nairobi in October-November 2015; see note 36, p 39.

50 CNIDH, *Mémoires D'entente Entre la CNIDH et Ses Partenaires des Droits de l'Homme: Fiches Individuelles*, 2012, p 25-26.

51 Smith, note 19, p 910.

rights record, is central to their *modus operandi*. The relationship between the two supposed partners is thus usually of a confrontational nature.

The CNIDH seeks to bridge that gap and ensure that it, government and civil society work in tandem to better protect and promote the rights of Burundians and foreigners living in Burundi. To this effect, the Commission portrays itself as the interface between state institutions and other human rights partners, including civil society.⁵² Therefore, like other commissions, the CNIDH can be “a constructive interlocutor between the government and civil society on human rights issues, and provide an umbrella of protection and support to the NGO movement”.⁵³

However, since 2015 relations between civil society and the CNIDH have been under strain thanks to the third-term-related political crisis.⁵⁴ Concerns about the commissioners’ perceived lack of independence from the government have mounted to the extent that most civil society organisations regard the current CNIDH as an arm of the government tasked with a special mission to justify human rights abuses committed by state institutions.

While this is more of a political claim than a statement of fact, the Commission does indeed face numerous challenges that inhibit it from delivering on its promises. Also, there have been instances where statements and positions taken by the CNIDH were seen to be supportive or sympathetic to the government. For instance, the CNIDH opposed the decision of the International Criminal Court Prosecutor to launch an investigation into the allegations of crimes against humanity perpetrated during the third-term-related political crisis. It contended that the Burundian judiciary was capable of adjudicating on the allegations, even though it is common knowledge among anyone privy to Burundian affairs that the judiciary, as it stands today, cannot do a proper job in this area without any judicial assistance.

The peak of this crisis of confidence in the CNIDH came when civil society organisations actively lobbied for it to be demoted from its “A” status by the International Coordinating Committee of National

52 Nowrojee, note 29, p 16.

53 *Ibid.*

54 Even before 2015, there were fears that the CNIDH would pose a threat to their funding. With its early outreach activities, some CSOs foresaw the possibility of competition for funding between themselves and the Commission. However, this is moot given that the main funding for the Commission is to be borne by the government, not by foreign partners.

Institutions for the Promotion and Protection of Human Rights.⁵⁵ The Commission was subsequently stripped of its “A” status in 2017, meaning that it is no longer recognised as compliant with the Paris Principles. Civil society organisations celebrated when the decision to demote CNIDH to “B” status was announced.

Nevertheless, the CNIDH still manages to retain a good and cordial working relations with civil society organisations, probably because most of its members are drawn from civil society. As a result, the CNIDH benefits from its access to the expertise of civil society organisations. However, Smith cautions that:

in establishing a close relationship with NGOs, NHRIs should be conscious that NGOs are not representative of the public, they are not appointed by the people or parliament, and as such may be perceived as lacking some form of the legitimacy that a NHRI may have.⁵⁶

3.4 Accessibility of the CNIDH

The accessibility of a human rights institution is another criterion for its effectiveness. This “requires the national human rights institution to be accessible to the population that the office is designed to protect”.⁵⁷ The CNIDH is headquartered in Bujumbura, the capital of Burundi. While the city is generally accessible, people may encounter challenges in accessing the CNIDH, given the poor living conditions of those who would usually need its services.

Mindful of this, the CNIDH has adopted a proactive strategy to make itself more accessible to prospective clients. First, it is gradually decentralising its services by creating regional offices. So far, offices have been opened in Ngozi,⁵⁸ Gitega,⁵⁹ Makamba⁶⁰ and Bujumbura.⁶¹ The heads of these offices are important: they not only represent the

55 Independent National Commission on Human Rights, Annual Report, Edition 2016, Bujumbura, 2017, p 6 (hereafter CNIDH Annual Report 2016).

56 *Ibid.*

57 See note 12, p 25; note 23, paragraph 13.

58 The Ngozi office covers the entire area of the northern country provinces of Ngozi, Kayanza, Muyinga and Kirundo; see note, p 11.

59 The office of Gitega covers the central and eastern provinces of Karusi, Mwaro, Gitega, Ruyigi and Cankuzo; *ibid.*

60 The Makamba office covers the southern provinces of Bururi, Rutana, Rumonge and Makamba, *ibid.*

61 The Bujumbura office covers the western country provinces of Bubanza, Bujumbura, Cibitoke and Muramvya; see note 36, p 39.

Commission, but also receive human rights complaints and sit on the panels that investigate or examine them.

Secondly, the CNIDH has set up a toll-free number⁶² which can be dialled from anywhere in the country to lodge a complaint or report an incident of a human rights violation. Calls are received and dealt with by a call centre; when made after hours, the calls are forwarded to the telephone numbers of designated CNIDH staff members. The toll-free number has been highly effective in making the CNIDH more accessible, given that nowadays most people, including those in rural areas, own or can access a mobile phone. The challenge is then in effect to ensure that people are aware of the number and that all mobile companies offer that toll-free service to their customers.⁶³

Thirdly, the CNIDH has been innovative in creating focal points in most of the provinces, utilising partner funding, including that from the UN, for this purpose. This helps to ensure that it has a widened physical presence on the ground. Focal points carry out promotional and protective work under the supervision of the heads of regional offices.⁶⁴ In his foreword to the 2015 report, the chairperson of the Commission stated that “the deployment [of focal points] allows the CNIDH to relay the human rights message up to the local communities and to ensure that their human rights related concerns are properly channelled to decision-making authorities”.⁶⁵ However, the focal-points system is entirely dependent on external funding and hence its sustainability is not guaranteed. In fact, in 2016, some focal points’ contracts were terminated due the lack of funding.⁶⁶ This is likely to recur in coming years.

Lastly, the Commission’s complaints seizure system also facilitates accessibility. Victims or their kin can lodge, free of charge, formal human rights violations complaints through written or oral submissions. Written complaints are directed to the General Secretary of the Commission, who forwards them to the protection sub-committee in charge of examining them.⁶⁷ Oral complaints are filed with commissioners during interviews or with the chiefs of regional offices. They can also be filed by telephone, using the toll-free number. These methods of engaging the Commission

62 The toll free number is: + 257 22 27 71 21.

63 The service is available only for customers of the state corporation ONATEL. At the time of writing, service has been suspended.

64 Rules of procedure, Article 52.

65 See note 36, p 11.

66 See note 54, p 6.

67 CINDH Law, Article 44.

take into account the circumstances of most Burundians, who are basically uneducated, illiterate and still bound to the oral tradition.

In a nutshell, in its eight years of existence, the Commission has adopted a variety of means to enhance its accessibility. It is, needless to say, unrealistic to expect it to cover every corner of the country and deal with every human rights issue that occurs, given its numerous challenges in terms of funding, equipment and human resources.

4 Mandate of the CNIDH

The CNIDH Law seeks to position the Commission in effect as a one-stop-shop institution for promoting and protecting human rights. As such, it entrusts it with a broad triple mandate.

4.1 The mandate and its conformity with the Paris Principles

The mandate of the CNIDH is broad enough to contribute to the creation of a culture respectful of human rights. First, the Commission has the mandate to protect human rights. Accordingly, it is a quasi-judicial body that receives, examines and investigates human rights cases filed before it and makes a determination as to whether there has been violation or not. To this end, the Commission is vested with the powers of a proper investigative body. For instance, it can demand the production of documents from any public or private service;⁶⁸ it can subpoena anybody to appear before it,⁶⁹ with failure to comply constituting an indictable offense;⁷⁰ and it can request the full assistance of other institutions and services, such as the police.⁷¹ The ability to undertake investigations autonomously is an important indicator of operational independence.⁷²

The Commission assumes a supervisory role with regard to prison conditions. Commissioners regularly visit detention centres, whether on notice or not, and make recommendations on how to improve the living and detention conditions of those deprived of liberty. Moreover, the CNIDH is tasked with the prevention of human rights violations, including torture, rape and other forms of sexual and gender-based violence, in accordance with national and international standards.

68 CNIDH Law, Article 39.

69 CNIDH Law, Article 38.

70 CNIDH Law, Article 40.

71 CNIDH Law, Article 37.

72 See note 19, p 914.

Similarly, the Commission plays a role in human rights litigation. It can lodge human rights complaints with the office of the Public Prosecutor, and it ensures legal assistance to victims of human rights violations, especially women, children and other vulnerable persons.

Moreover, the Commission draws the attention of the government to human rights violations no matter where they occur, and suggests measures to ensure proper protection.⁷³ Through its protective mandate, the CNIDH also complements the role of the courts in protecting human rights norms.⁷⁴ In this regard, although they are not binding and not made public, the decisions of the CNIDH can contribute to the development of human rights jurisprudence in Burundi.

Secondly, the CNIDH Law grants the Commission a promotional mandate. As far as this is concerned, the Commission carries out a variety of activities. For instance, it organises training seminars or workshops on human rights; it conducts information and awareness-raising campaigns nationwide; it takes part in the development and implementation of human rights education programmes; it popularises national and international instruments on the promotion and protection of human rights, with a particular focus on civil and political rights, socio-economic and cultural rights, and the rights of women and children; and it conducts research on human rights issues.⁷⁵

Pursuant to Article 5 of the enabling law, the Commission also plays a consultative role. It provides advice and recommendations to the government or Parliament, either upon request or *proprio motu*, on issues related to the promotion and protection of human rights, in particular on human-rights-related bills. It can also contribute to the harmonisation of national laws, by-laws and practices with international and regional human rights instruments duly ratified by Burundi and help to ensure the implementation thereof. Moreover, it encourages competent state organs to ratify international human rights treaties and to ensure the domestication thereof. From time to time, it encourages competent state authorities to submit the periodic reports which Burundi is duty-bound to present to international or regional human rights mechanisms and to contribute to drafting these reports, with due regard to the respect of its independence.

73 CNIDH Law, Article 4.

74 S Cardenas, "Emerging Global Actors: The United States and National Human Rights Institutions", 9(23) *Global Governance* (2003), p 25.

75 CNIDH Law, Article 5.

The broad mandate and prescribed functioning of the CNIDH are in consonance with the Paris Principles.⁷⁶ Indeed, as noted, for its observance of the Paris Principles, the CNIDH was awarded “A” status by the International Coordinating Committee of National Institutions for the Promotion and the Protection of Human Rights.⁷⁷ The Commission enjoyed this accreditation for six years from 2012-2017 before it was demoted to “B” status.⁷⁸

4.2 Institutions with competing mandates with the CNIDH

Before the creation of the CNIDH, the judiciary⁷⁹ and other government institutions⁸⁰ could deal with human rights issues in Burundi in terms of the APRA regime. The Office of the Ombudsman,⁸¹ for instance, has a broad mandate to investigate complaints of managerial misdeeds and human rights violations perpetrated by state agents from the public service, judiciary, local governments, state corporations and any other state entity tasked with public service.⁸² Similarly, the TRC, which also has jurisdiction over human rights violations, was established in 2014.⁸³ The TRC differs in scope from CNIDH inasmuch as it deals only with past

76 Principles Relating to the Status of National Institutions (The Paris Principles), UN Doc Resolution 48/134 (20 December 1993).

77 A copy of the certificate of accreditation is annexed to the 2012 Report, p 124.

78 Global Alliance of National Human Rights Institutions (GANHRI), *Chart of the Status of National Institutions – Accreditation status as of 8 August 2018*, available at <https://bit.ly/2Lo1XDL>, p 10.

79 According to the 2005 Constitution of the Republic of Burundi, the judiciary is the guardian of human rights.

80 In 1992, the Centre des Droits de l’Homme (Human Rights Centre) was set up replaced by the now Centre de Promotion des Droits de la Personne Humaine et de Prévention du Génocide (Centre for the Promotion of Human Rights and the Prevention of Genocide); see Decree 100/081 of 29 May 1998 Creating the Centre for the Promotion of Human Rights and the Prevention of Genocide. The Ministry of Human Rights was established since 1993 and a human rights governmental commission has been created within it.

81 Law No 1/03 of 25 January on the Organisation and Functioning of the Ombudsman, Article 6.

82 *Ibid.* For an analysis of the institution of the Ombudsman, see P Manirakiza, “La Nouvelle Institution de l’Ombudsman au Burundi: Potentialités et Défis”, 4(66) *Revue juridique et politique* (2012), pp 481-504.

83 Law No 1/22 of 6 November 2018 Modifying Law No 1/18 of 5 May 2014 on the Creation, Mandate, Composition, Organization and Functioning of the Truth and Reconciliation Commission (hereafter TRC Law).

human rights abuses and serious violations of international humanitarian law committed in Burundi from 1885 to December 2008.⁸⁴

Finally, there is also the National Lands and Other Properties Commission,⁸⁵ which was created to deal with land and other property-related disputes between injured parties, on the one hand, and, on the other, individuals or organisations in the private or public sector.⁸⁶ In fact, the Land Commission is the only entity with competence to deal with violations of the right to property, particularly land rights.⁸⁷ This in itself limits the CNIDH's competence to entertain land and property-related claims. In practice, whenever the CNIDH receives a complaint of that nature, it simply direct the complainants to the Land Commission.

The relationship between those institutions and the CNIDH is not provided for in either the Constitution or their respective establishing laws. For example, the risk of an overlap between the CNIDH and the Office of the Ombudsman is a real concern often raised in promotional and outreach events carried out by the CNIDH. To avoid overlap and ensure synergy with other partners in human rights protection, the CNIDH has taken the lead and adopted a strategy focusing on cooperation rather than competition between the different institutions. Accordingly, it has developed MOUs which are to be negotiated with relevant partners⁸⁸ and made to serve eventually as the basis for cooperation and complementarity.

4.3 Activities for carrying out the CNIDH's mission

In carrying out its mandate, the CNIDH performs a great number of tasks. For instance, it comments on draft laws. This has been the case with regard to a draft law on the press, where the Commission's comments drew the

84 TRC Law, Article 6. The law was amended in October 2018 to extend the temporal mandate of the TRC to include the colonial era; the original mandate ran from the independence of Burundi in 1962 to 2008.

85 Frequently referred to with the acronym CNTB for Commission Nationale des Terres et autres Biens.

86 Law No 1/31 of 31 December 2013 on the Revision of Law No 1/01 of 4 January 2011 on the Missions, Composition, Organisation and Functioning of the National Commission on Lands and other Properties (hereafter Land Commission Law), Article 5.

87 Land Commission Law, Article 3.

88 See note 14, p 16. Memoranda of understanding and collaboration have been signed with different partners in the government (National Intelligence Service; Ministry of Justice), civil society (Burundian Bar), State institutions (Office of the Ombudsman) and international partners.

attention of Parliament to the need for the press law to conform to the Constitution and the International Covenant on Civil and Political Rights (ICCPR) in order to ensure better protection of the freedom of the press.⁸⁹ The Commission can also suggest new laws or areas where there is a need for new laws or legislative harmonisation.⁹⁰

Furthermore, it monitors government compliance with its recommendations and advice. However, although the Commission is granted extraordinary powers, it is toothless. It cannot by itself enforce its own recommendations. A two-pillar strategy is in place in this regard. First, the Commission chooses to use its annual reports to ensure follow-up of its recommendations and advice. Annual reports are meant to be presented before the National Assembly, which, theoretically, controls governmental action. From there, the Assembly can put pressure on the government, particularly through oral questions to ministers.⁹¹ Secondly, the Commission follows up with the state departments concerned in order to ensure speedy compliance.

4.4 Receiving and dealing with complaints and petitions

As noted, the CNIDH is a quasi-judicial institution. Victims or their kin, NGOs or groups of individuals, can lodge, free of charge, formal complaints of human rights violations complaints with it. The table below presents data on the complaints received annually.⁹²

89 See note 13, p 40.

90 This is part of the memorandum of understanding between CNIDH and the National Assembly; see Fiche No 1: Mémorandum d'entente entre le Parlement et la CNIDH, p 8.

91 *Ibid.*

92 The table contains data compiled from annual reports for the first six years of the Commission.

Table 2: Number of complaints received annually by the CNIDH, 2011-2016

| Year | Complaints |
|------|--------------------|
| 2011 | 106 |
| 2012 | 327 |
| 2013 | 251 |
| 2014 | Data not available |
| 2015 | 747 |
| 2016 | 2,303 |

As also noted, the Commission receives both written and oral complaints. Oral complaints vastly outnumber written ones. For instance, in 2016 the Commission received only 217 written complaints out of a total of 2,303 complaints.⁹³ This also shows that the toll-free number that has been made available is helpful.

Not all complaints received are admissible. In some instances, the Commission may not be the appropriate authority to address them given that people do not necessarily know enough about its jurisdictional reach. In that case, the Commission may advise and guide the complainant to the relevant institutions. When complaints are declared admissible within the provisions of Article 46 of the rules of procedure, the Commission will make a determination as to whether the violation occurred or not. The implementation of the decisions lies with the Commission itself as well as with Parliament.

5 Public accountability

Public accountability is another factor vital for the success and relevance of NHRIs. Like any other public institution, the Commission is accountable to the Burundian people for its work. As mentioned, it is duty-bound to present annual reports to the National Assembly.⁹⁴ The reports describe various activities it has carried out in relation to each aspect of its mandate. They also report on the human rights situation in Burundi by highlighting the progress the CNIDH has made, as well as the challenges and constraints it has faced, in executing its mandate. To that end, each report formulates recommendations to all stakeholders in order to improve the human rights situation in Burundi.

93 See note 54, p 10.

94 CNIDH Law, Article 35.

Article 35 of the CNIDH Law requires that the annual reports be made public. They can be found on the website of the Commission⁹⁵ and in libraries. At the time of writing, only a few reports had been made public and accessible – those of 2015 and the years pre-dating the third-term political crisis. The post-third-term-crisis reports of 2016, 2017 and 2018 have not yet been published on the Commission’s website. A source within the CNIDH told the author that the 2016 report’s content was “very contentious” and that the National Assembly decided to embargo it for publication.⁹⁶ Although the reports are supposed to be public, the Commission systematically refuses or ignores requests for soft or hard copies, for no apparent reason.⁹⁷ The lack of transparency by such an important public institution is concerning because, as Smith puts it, transparency is “an important element in helping a NHRI establish its independence and allow[ing] the public to ascertain the independence of the body”.⁹⁸

Apart from the “formal accountability”⁹⁹ referred to above, the CNIDH faces another layer of accountability – “broader accountability”¹⁰⁰ – in the sense that it interacts with stakeholders from state institutions, civil society, and international or regional organisations. Indeed, its enabling law emphasises the need to “ensure and nurture cooperation relations with national human rights organisations, human rights networks at the regional and international level, [and] regional and international human rights organisations”.¹⁰¹ In so doing, the law takes cognisance of the fact that the CNIDH’s mission overlaps with that of other institutions and organisations.

To avoid competition, the CNIDH has concluded MOUs that emphasise complementarity with other role-players. Moreover, it adopted an open-arms policy. For instance, it has convened meetings to discuss areas of mutual interest and cooperation or simply to discuss or validate memoranda of understanding and cooperation. Similarly, the CNIDH invites organisations to attend its outreach or promotional activities. It also

95 At the time of writing, only a few reports are public and accessible. The post-third-term crisis reports of 2016, 2017 and 2018 have not yet been published. A source at the CNIDH told the author that the 2016 report’s content was “very contentious” and that the National Assembly had decided to embargo it for publication.

96 A request for hard copies was denied for no apparent reason.

97 The author was told either to go through official channels or that they are internal documents.

98 See note 19, p 915.

99 *Ibid.*

100 *Ibid.*

101 CNIDH Law, Article 6.

regularly organises open-house events to which everybody is welcome, and takes part in activities organised by stakeholders, for instance in campaigns against rape and other forms of gender-based violence.¹⁰² To cement the working relationship, the Commission pays courtesy or working visits to, or gets them from, international or regional partners.¹⁰³

Finally, the CNIDH organises, alone or jointly with partners,¹⁰⁴ training seminars and workshops on human rights for capacity-building and empowerment of various other partners, such as political parties and members of the security forces.¹⁰⁵ At the regional and international level, the CNIDH enjoys affiliate status at the African Commission on Human and Peoples' Rights,¹⁰⁶ and used to have "A" status at the UN Human Rights Council,¹⁰⁷ which allowed it to make statements and other submissions. These relationships with other partners provide them with an opportunity to scrutinise the NHRI's performance.

6 Conclusion

Post-war Burundi adopted a number of laws to protect and promote human rights. This was understandable in view of the political crises that had culminated in massive violations of human rights, some of which constituted international crimes. These laws created institutions specifically tasked with the promotion and the protection of human rights.

As part and parcel of this system, the CNIDH is inserting itself in a field previously dominated by human rights NGOs. It occupies "a unique space between government and civil society", which places it "in a position to influence policy and engage with government officials" and enables it "to negotiate with nongovernmental actors and act as an umbrella for human rights NGOs".¹⁰⁸ More and more people seek its services, and it has been equipped with powers and jurisdiction broad enough to enable it to accomplish its mandate effectively.

102 See note 13, p 25.

103 See note 40, pp 13-14.

104 Training of leaders of political parties, Ngozi, 28-30 August, 2012. The purpose of the training was to teach political parties how to develop human-rights-based political programmes (see note 13, p 31); sensitisation workshops on human rights were jointly organised with BINUB and OHCHR (see note 40, p 36).

105 See note 13, pp 30-32.

106 Final Communiqué of the 53rd Ordinary Session of the African Commission on Human and Peoples' Rights Held in Banjul, The Gambia, 9-23 April 2013, paragraph 28.

107 See note 77.

108 See note 19, p 944.

However, its work and effectiveness are seriously hampered by the country's low level of democratic governance; funding issues; the fact that numerous commissioners lack expertise in handling human rights cases; and the political hostility towards those who dare to display a certain level of independence and whose tenure is subsequently not renewed. Nevertheless, the CNIDH was never conceived in such a way that it would be a panacea for all the human rights issues in Burundi. That is why other institutions, regardless of whether they are of the state or civil society, are also important potential contributors.

In the interests of better human rights protection, civil society, the CNIDH and state institutions should work in complementarity with each other, because together they form a tripartite system tasked with the collective responsibility of ensuring respect for the human rights of Burundians and foreigners alike. Good working relations between them are hence vital if they are to rise to this challenge in a difficult political environment.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The 2018 Constitution of Burundi does not provide for an Independent National Human Rights Commission. Although it provides for an Ombudsman in articles 243-245, he does not strictly have a human rights mandate.

B.2 Legislative and regulatory instruments

B.2.1 The Independent National Human Rights Commission

LOI N° 1/04 du 05 JANVIER 2011 PORTANT CREATION DE LA COMMISSION NATIONALE INDEPENDANTE DES DROITS DE L'HOMME. (B.O.B., 2011, N°1 bis, p.18)

(...)

DES MISSIONS

Article 4

Dans le cadre de la protection et de la défense des droits de l'homme, la Commission a notamment pour missions de :

- recevoir des plaintes et enquêter sur les cas de violation des droits de l'homme ;
- effectuer des visites régulières, notifiées ou inopinées dans tous les lieux de détention et formuler des recommandations à l'endroit des autorités compétentes à l'effet d'améliorer le traitement et la situation des personnes privées de liberté ;
- prévenir la torture et autres peines ou traitements cruels, inhumains ou dégradants, conformément aux normes universelles, régionales ou nationales pertinentes ;
- lutter contre les viols et les violences basées sur le genre ;
- saisir le Ministère Public des cas de violation des droits de l'homme ;
- apporter ou faciliter l'assistance judiciaire aux victimes des violations des droits de l'homme, en particulier les femmes, les enfants et autres personnes vulnérables ;

- attirer l'attention du Gouvernement sur tous les cas de violation des droits de l'homme quel que soit le lieu où ils se produisent et proposer toutes mesures de nature à favoriser la protection de ces droits.

Article 5

Dans le cadre de la promotion des droits de l'homme, la Commission a notamment pour mission de :

- organiser des séminaires et ateliers de formation sur les droits de l'homme ;
- assurer la promotion des droits de la femme et de l'enfant à travers notamment : l'éducation, l'information et la communication ;
- effectuer des campagnes d'information et de sensibilisation sur les droits de l'homme sur tout le territoire national ;
- participer à l'élaboration et à la mise en œuvre des programmes d'éducation aux droits de l'homme ;
- vulgariser les instruments nationaux et internationaux de promotion et de protection des droits de l'homme en mettant l'accent sur les droits civils et politiques, les droits économiques et socioculturels, les droits de la femme et de l'enfant ;
- contribuer à la promotion des principes d'égalité et de non-discrimination tels que garantis par la Constitution ;
- effectuer des études et des recherches sur les droits de l'homme ;
- donner des avis et recommandations aux pouvoirs publics sur des questions touchant les droits de l'homme.

Article 6

La Commission a également pour mission de :

- fournir à titre consultatif au Gouvernement, au Parlement, soit à la demande des autorités concernées, soit en usant de sa faculté d'auto-saisine, des avis, recommandations et propositions concernant toutes questions relatives à la promotion et à la protection des droits de l'homme en particulier sur les projets et propositions de lois relatifs aux droits de l'homme ;
- contribuer à l'harmonisation des lois, règlements et pratiques en vigueur sur le plan national avec les instruments internationaux et régionaux relatifs aux droits de l'homme ratifiés par le Burundi et s'assurer de leur mise en œuvre effective ;
- encourager les organes compétents de l'Etat à ratifier les Conventions internationales relatives aux droits de l'homme et veiller à leur mise en œuvre dans l'ordre juridique interne ;
- inciter les organes compétents de l'Etat à soumettre à temps les rapports que le Burundi doit présenter aux organes conventionnels et comités des Nations Unies, ainsi qu'aux mécanismes régionaux des droits de l'homme,

en application de ses obligations conventionnelles et contribuer à l'élaboration desdits rapports dans le respect de l'indépendance de la commission ;

- entretenir des relations de coopération avec les organisations nationales des droits de l'homme des autres pays, les réseaux des institutions nationales des droits de l'homme au niveau régional et international, les organisations régionales et internationales s'intéressant à la promotion et à la protection des droits de l'homme ;
- élaborer un rapport annuel sur la situation des droits de l'homme, sur ses activités ainsi que sur des questions plus spécifiques notamment les droits des femmes et des enfants.

B.2.2 Truth and Reconciliation Commission

LOI N°1/ 18 DU 15 MAI 2014 PORTANT CREATION, MANDAT, COMPOSITION, ORGANISATION ET FONCTIONNEMENT DE LA COMMISSION VERITE ET RECONCILIATION

(...)

Section 3 : Des missions

Article 6 : Les missions de la Commission sont les suivantes :

1. Enquêter et établir la vérité sur les violations graves des droits de l'homme et du droit international humanitaire commises durant la période allant de la date de l'indépendance le 1er juillet 1962 au 4 décembre 2008, date de la fin de la belligérance. La Commission prend en compte la gravité et le caractère systématique et collectif des violations.

Les enquêtes visent notamment à :

- a) élucider les violations des droits politiques, civils, économiques et sociaux majeurs ;
- b) établir les responsabilités individuelles et celles des institutions étatiques, des personnes morales et des groupes privés ;
- c) déterminer la nature, les causes et l'étendue des violations précitées, y compris les antécédents, circonstances, facteurs, contexte, motifs et perspectives qui ont conduit à ces violations ;
- d) identifier et cartographier les fosses communes et tout autre endroit d'enterrement non reconnu par la loi, prendre les mesures nécessaires à leur protection, procéder à l'exhumation éventuelle des corps aux fins d'un enterrement digne.

2. Qualifier toutes les violations indiquées au point 1 du présent article.

3. Publier :

- a) la liste des personnes disparues, assassinées et celles des victimes et des témoins qui renoncent à l'anonymat ;
- b) la liste des personnes, autant burundaises qu'étrangères, qui se sont distinguées dans la protection des vies humaines pendant les différentes crises.
- c) la liste des victimes qui ont accordé le pardon ainsi que celle des auteurs, ayant bénéficié du pardon.

4. Proposer :

- a) Un programme de réparations comportant à la fois des mesures individuelles et collectives, tant matérielles que morales et symboliques ;
- b) la mise en place d'un programme d'actions visant à promouvoir le pardon et la réconciliation ;
- c) une date de la Journée nationale de commémoration des victimes des violations des droits de la personne humaine ;
- d) l'érection, sur des sites identifiés, de monuments de la réconciliation et de la mémoire aux niveaux national, provincial et local ;
- e) la conception et la réalisation d'autres ouvrages et œuvres symboliques ;
- f) les réformes des institutions pour garantir la non répétition des événements du passé, afin de bâtir une société burundaise juste et démocratique ;
- g) la réécriture d'une histoire la plus partagée par tous.

5. Contribuer, notamment par une recherche documentaire, à la réécriture de l'histoire du Burundi pendant la période couverte par le mandat, afin de permettre aux Burundais une version largement partagée et acceptée des événements.

Section 3 : Des prérogatives

Article 7 : La Commission a les prérogatives de :

- a) convoquer et écouter toute personne et exploiter tout témoignage ;
- b) accéder aux archives, documents, rapports et autres informations détenus par les institutions et/ou les personnes publiques ou privées ;
- c) requérir l'intervention des pouvoirs publics, du Ministère Public et des Forces de l'ordre si besoin pour donner effet aux pouvoirs de coercition et de sanction lui reconnus par la présente loi.

Un agent de l'Etat qui détruit ou refuse de communiquer les documents demandés encourt les sanctions pénales et administratives prévues par la loi.

Conformément aux articles 248, 249 et 250 du Code pénal, le secret professionnel et le secret des correspondances ne sont pas opposables à la Commission.

- d) faire prêter serment aux témoins et experts qui font des déclarations dans le cadre des enquêtes et des auditions ;

Tout faux témoignage ou tout faux serment est puni conformément aux dispositions du Code pénal en ses articles 399 et 400.

Article 8 : Au terme d'une procédure équitable et transparente au cours de laquelle les personnes concernées ont fait prévaloir leurs moyens de défense auprès de la Commission, cette dernière peut diffuser par tous les moyens nécessaires la liste des personnes qui font obstruction à ses travaux.

Article 9 : Nul ne peut se prévaloir de sa fonction, de ses privilèges et immunités, de l'amnistie ou de la prescription ou de tout autre motif pour refuser de collaborer avec la Commission.

(...)

B.3 Internal rules and regulations

Règlement d'ordre intérieur de la Commission Nationale Indépendante des Droits de l'homme (CNIDH)

DISPOSITIONS GENERALES

Dispositions générales

Article 1

Le présent règlement d'ordre intérieur est établi conformément à l'article 25 de la loi N°1/04 du 05 janvier 2011 portant création de la Commission Nationale Indépendante des Droits de l'Homme (CNIDH). Il précise les modalités d'application de ladite loi.

Article 2

Dans le texte dont la teneur suit, il faut entendre par :

- Commission : la Commission Nationale Indépendante des Droits de l'Homme ;

- Commissaire : le membre de la Commission Nationale Indépendante des Droits de l'Homme ;
- Président : le Président de la Commission Nationale Indépendante des Droits de l'Homme ;
- Rapporteur : Commissaire désigné conformément à l'article 45 de la loi ;
- Loi : la loi N°1/04 du 05 janvier 2011 portant création de la Commission Nationale Indépendante des Droits de l'Homme ;
- Audience : Séance d'examen des plaintes devant la commission conformément à l'article 5 » de la loi.

Article 3

La Commission est une Institution de la République, indépendante et dotée de la personnalité morale.

Les locaux de la Commission sont inviolables.

Son siège est fixé à Bujumbura. L'immeuble qui abrite le siège de la Commission doit être doté de matériels de sécurisation adéquats et constamment gardé par des agents de sécurité.

Ce siège peut être transféré à tout autre endroit du territoire national conformément à l'article 3 de la loi.

TITRE I : DES MEMBRES DE LA COMMISSION

Chapitre 1 De la qualité de membre et le mandat

Article 4

Seuls, sont membres de la Commission les sept (07) personnalités élues conformément aux dispositions des articles 7 et suivants de la loi.

La durée du mandat des membres de la Commission est de quatre ans renouvelable une fois sous réserve des dispositions des articles 13 al 3 et 4 et 16 de la loi.

Ce mandat court à compter de la date de prestation de serment des nouveaux membres conformément aux dispositions de l'article 22 de la loi.

Au cas où, à la fin du mandat légal, le processus du renouvellement n'aurait pas été achevé, les membres de la Commission restent en fonction jusqu'à la prestation de serment des nouveaux membres.

Article 5

Chaque membre de la Commission siège à titre personnel et individuel.

Aucun membre ne peut se faire représenter.

De même chaque membre de la Commission perçoit une rémunération mensuelle ainsi que des indemnités, des frais et autres avantages liés au mandat, tels que prévus dans le décret d'application de la loi.

Les membres de la Commission bénéficient des mesures de protection de leur intégrité physique et de leur lieu de résidence.

Article 6

Six (06) mois avant le terme du mandat, le Président de la Commission saisit le Président de l'Assemblée Nationale aux fins de procéder à la sélection des commissaires conformément aux dispositions des articles 9 et suivants de la loi.

Article 7

Les incompatibilités de la qualité de membre sont celles prévues à l'article 14 de loi.

Tout membre qui se retrouverait dans une situation d'incompatibilité doit donner sa démission de la Commission par lettre adressée au Bureau Exécutif.

Le Président de la Commission saisit l'Assemblée Nationale aux fins de pourvoir à son remplacement dans les formes prescrites par la loi.

A défaut, la Commission constate la situation d'incompatibilité du membre et le Président de la Commission saisit l'Assemblée Nationale pour les mêmes fins.

La décision par laquelle la Commission saisit l'Assemblée Nationale aux fins du remplacement d'un membre en application des articles 7 et 17 de la loi, est prise à la majorité des 2/3 de la Commission.

En cas de décès, de démission ou d'absence prolongée non justifiée pendant un (1) an d'un membre, la Commission constate la vacance du siège et le Président de la Commission saisit l'Assemblée Nationale pour les fins ci-dessus.

Article 8

Les immunités dont jouissent les membres de la Commission ainsi que les exceptions y relatives, sont celles prévues aux dispositions de l'article 19 de la loi

Chapitre II De la discipline

Article 9

Tout membre de la Commission doit avoir un comportement exemplaire.

Article 10

Nul n'a le droit de prendre des engagements au nom de la Commission sans y avoir été dûment autorisé par le Président.

Article 11

Toute pression politique, syndicale ou religieuse est interdite au sein de la Commission dont les membres doivent agir en toute probité et en toute impartialité.

Article 12

Tout membre de la Commission qui se sera fait remarquer par des absences répétées et injustifiées au service, sera passible d'avertissements prononcés par le Bureau Exécutif et adressés par écrit à l'intéressé. En cas de persistance des absences malgré trois (3) avertissements, une suspension de quinze (15) jours à un (1) mois du membre sera décidée par 2/3 des membres de la Commission qui en informe le Président de l'Assemblée Nationale.

La suspension peut-être de trois (3) à six (6) mois en cas de défaillances ou de manquements graves.

Les indemnités et autres avantages correspondants ne sont pas dus pendant la durée de la suspension.

Article 13

Sont considérés comme des cas de défaillances ou de manquements à porter à l'encontre des commissaires notamment:

- Non exécution ou mauvaise exécution des tâches et missions confiées aux commissaires ;
- Des comportements moraux ou éthiques de nature à compromettre l'image de la Commission ;
- Etc...

Article 14

Lorsque les sanctions concernent le Président, la décision est prise par les autres membres de la commission à la majorité simple en cas d'avertissement et de 2/3 en cas de suspension.

- La réunion est convoquée par le vice-président ou sur l'initiative des 2/3 des membres restants.

Article 15

Peut être exclu de la Commission tout membre :

- qui a fait l'objet d'une condamnation pénale définitive ;
- qui s'est rendu coupable d'atteinte grave aux droits de l'homme ;
- dont le comportement est de nature à porter atteinte à la confidentialité des travaux de la Commission ;
- Qui a déjà fait objet de sanction prévu par l'article 12 et qui persiste.

L'exclusion est prononcée par l'Assemblée générale sur proposition de la Commission. La décision par laquelle la Commission propose l'exclusion d'un membre en application des dispositions ci-dessus est prise à la majorité des 2/3 des membres de la Commission .

Chapitre III De la prestance

Article 16

La préséance est due entre les membres de la Commission :

- d'abord aux membres du Bureau Exécutif dans l'ordre ci-après ;
- Président ;
- Vice-président ;
- Secrétaire ;
- Les présidents des sous commissions en fonction de leur âge ;
- Ensuite aux autres membres, en fonction de leur ancienneté au sein de la Commission, et en cas d'ancienneté égale en fonction de leur âge.

TITRE IV : DES REUNIONS DE LA COMMISSION

Chapitre 1 Des modalités des travaux et de prise des décisions

Article 17

La Commission se réunit en plénière ordinaire deux (2) fois par mois à son siège. Elle peut se réunir en tout autre lieu du territoire national sur décision ordinaire de la Commission.

Toutefois, la commission peut tenir des réunions informelles et d'information sans obligation d'ordre du jour, au moins une fois par semaine.

La Commission se réunit une fois par semaine pour examiner les plaintes et analyser les rapports d'investigation conformément aux dispositions des articles 42 et suivants de la loi.

La Commission peut se réunir aussi à tout moment en plénière extraordinaire sur convocation de son Président ou à la demande du tiers (1/3) de ses membres.

Article 18

Le Bureau Exécutif fixe les modalités des travaux de la Commission. Il détermine, en cas de réunion ordinaire ou extraordinaire, notamment :

- l'ordre du jour de chaque séance ;
- la durée des interventions ;
- la constitution de groupes de travail ou de sous-commissions ad hoc, s'il y a lieu.

Le Président convoque aux séances les membres de la Commission par lettres individuelles et/ou par tout autre moyen utile.

L'ordre du jour de chaque séance est notifié ensemble avec copies des documents y afférents aux membres de la Commission au moins quarante-huit (48) heures avant l'ouverture.

Tout membre de la Commission peut proposer l'inscription d'un point supplémentaire à l'ordre du jour à charge toutefois de le faire avant son adoption.

Article 19

La Commission ne peut délibérer sur les saisines, les rapports d'investigations, les avis, les propositions et les recommandations que si au moins les 2/3 des membres sont présents. Les décisions sont prises à main levée ou au scrutin secret si 1/3 des membres le demandent.

Les décisions portant sur les avis, les propositions et les recommandations sont prises par consensus ou à défaut à la majorité des 2/3 des membres de la Commission.

Pour les décisions portant sur les matières autres que celles mentionnées dans les deux paragraphes précédents, la majorité absolue des membres présents est requise.

Quand il ya saisine, la Commission désigne un rapporteur ou un groupe de rapporteurs à l'occasion des séances hebdomadaire ad hoc.

Le rapporteur ou groupe de rapporteurs dispose de 15 jours pour produire son rapport.

Chaque membre de la Commission dispose d'une voix. En cas de partage des voix au cours des votes, la voix du Président est prépondérante.

Article 20

La présidence des audiences est rotative. Le Bureau en établit le calendrier.

Article 21

Les décisions de la Commission sont ordinaires, ou extraordinaires.

1°) Les décisions ordinaires sont celles concernant le fonctionnement courant de la Commission. Elles sont prises à la majorité absolue au premier tour et à la majorité simple au deuxième tour.

2°) Les décisions extraordinaires sont celles qui affectent les dispositions du présent Règlement d'ordre intérieur ou celles qui sont spécialement qualifiées telles. Elles sont prises à la majorité des 2/3 des voix des membres votants aux deux premiers tours, et à la majorité simple aux tours suivants.

Les décisions peuvent cependant être prises par voie de consensus avant tout recours au vote sous réserve que la recherche de ce consensus n'ait pas pour effet de retarder inutilement les travaux de la Commission.

La décision par laquelle la Commission saisit l'Assemblée Nationale aux fins du remplacement d'un membre en application des articles 7 et 17 de la loi, rentre dans la catégorie des décisions ordinaires.

L'exclusion est prononcée par l'Assemblée Nationale sur proposition de la Commission. La décision par laquelle la Commission propose l'exclusion d'un membre en application des dispositions ci-dessus, rentre dans la catégorie des décisions extraordinaires prévues à l'article 21-2 du présent règlement.

Chapitre II De la conduite des débats

Article 22

Le Président prononce l'ouverture et la clôture de chaque séance de la Commission ; il dirige les débats, assure l'application du présent Règlement d'ordre intérieur, donne et retire la parole, met les questions aux voix et proclame les décisions.

Sous réserve des dispositions du présent Règlement d'ordre intérieur, le Président dirige les débats de la Commission et assure la police des séances. Il a aussi le pouvoir de proposer l'ajournement ou la clôture du débat ainsi que la levée ou la suspension d'une séance.

Article 23

Au cours de la discussion de toute question, un membre peut, à tout moment, présenter une motion d'ordre sur laquelle le Président prend immédiatement une décision conformément au Règlement d'ordre intérieur. S'il en est appelé à la décision du Président, l'appel est immédiatement mis aux voix et la décision du Président, si elle n'est pas annulée par la majorité simple des membres présents, est maintenue.

Un membre qui présente une motion de procédure ne peut, dans son intervention, traiter du fond de la question en discussion.

Article 24

Au cours de la discussion de toute question, si un membre demande l'ajournement du débat, la motion est immédiatement mise aux voix. La décision est prise à la majorité simple des membres présents.

Article 25

Le Président peut limiter le temps de parole de chaque orateur sur toute question. Lorsque les débats sont limités et qu'un orateur dépasse le temps qui lui a été accordé, le Président le rappelle immédiatement à l'ordre puis lui retire la parole s'il y a lieu.

Nul ne peut prendre la parole à la Commission sans avoir, au préalable, obtenu l'autorisation du Président. Le Président donne la parole aux orateurs dans l'ordre où ils l'ont demandée.

Article 26

Au cours d'un débat, le Président peut donner lecture de la liste des orateurs et, avec l'assentiment des membres de la Commission, déclarer cette liste close. Lorsqu'il n'y a plus d'orateurs, le Président, avec l'assentiment des membres de la Commission prononce la clôture du débat.

Article 27

Sous réserve des dispositions de l'article 20 du présent Règlement d'ordre intérieur, toute motion présentée par un membre tendant à ce que la Commission statue sur sa compétence pour adopter une proposition dont elle est saisie est mise aux voix immédiatement avant le vote sur la proposition en cause.

Article 28

Sous réserve des dispositions de l'article 20 du présent Règlement d'ordre intérieur, les motions suivantes ont dans l'ordre indiqué ci-après, priorité sur toutes les autres propositions ou motions présentées :

- suspension de la séance ;
- ajournement de débat sur le point en discussion ;
- levée de la séance ;
- clôture de débat sur le point en discussion.

TITRE IV : DU BUREAU EXECUTIF

Article 29

Les membres du Bureau Exécutif dont la composition est prévue à l'article 20 de la loi sont élus conformément aux dispositions dudit article.

Article 30

Le Bureau Exécutif se réunit deux (2) fois par mois avant les réunions ordinaires ou extraordinaires ou chaque fois qu'il en est besoin sur convocation du Président.

Il ne délibère que si deux (2) des trois (3) membres sont présents, dont nécessairement le Président ou le Vice-Président. Il prend ses décisions par consensus ou par vote, au scrutin secret à la majorité simple. En cas de partage des voix, celle du Président est prépondérante.

Article 31

Les attributions du Bureau Exécutif prévues aux articles 27 de la loi, ainsi que dans le présent règlement intérieur, sont exercées collégalement par ses membres sous réserve des délégations de pouvoir au profit du Président.

Toutes les décisions en rapport avec l'administration sont prises par le Bureau et signés par le Président. Il apprécie l'opportunité d'en informer les autres membres de la Commission. Il assure l'exécution des décisions prises par la Commission.

Sont exclus des prérogatives du Bureau les actes d'aliénation qui grèvent de charge le patrimoine de la Commission

Les décisions sont prises à la majorité absolue au premier tour et à la majorité simple au second tour.

Les membres du Bureau Exécutif exercent les attributions suivantes :

1°) Le Président

Ses attributions sont celles prévues aux articles 23 et suivants de la loi et dans le présent Règlement d'ordre intérieur.

En outre, il convoque et préside les réunions de la Commission et du Bureau Exécutif. Il ordonnance les dépenses.

En cas de vacance du poste de Président pour les causes prévues aux articles 16 et 17 du présent Règlement d'ordre intérieur, il doit être pourvu à son remplacement dans un délai de trois (3) mois.

Pendant la période de vacance, l'intérim est assuré par le Vice-président.

2°) Le Vice-président

Il supplée le Président en cas d'absence ou d'empêchement. Il exerce ses fonctions et ses attributions telles que prévues par la loi et le présent règlement d'ordre intérieur.

En cas de vacance, les fonctions de Vice-président seront assumées par le secrétaire jusqu'à ce qu'il soit pourvu à son remplacement par l'Assemblée Nationale.

Le Vice-Président coordonne les groupes de travail

Il supervise la gestion et l'évaluation du personnel. Il évalue en premier degré le Secrétaire général et évalue en second degré les autres membres du personnel.

3°) Le Secrétaire

- Il est le porte parole de la Commission ;
- Il présente les rapports de synthèse des travaux de la Commission ;
- Il cosigne avec le Président les décisions de la Commission.
- Il coordonne les activités du secrétariat permanent.

En cas de vacance, les fonctions de secrétaire sont exercées par le membre le plus ancien en âge ou à défaut en vertu de l'ancienneté dans la commission, jusqu'à ce qu'il soit pourvu à son remplacement par l'Assemblée Nationale.

TITRE V : DES SOUS-COMMISSIONS

Article 32

Il est créé au sein de la Commission les sous-commissions suivantes :

- sous-commission protection des droits de l'Homme ;
- sous-commission promotion des droits de l'Homme et de l'information.

Chaque Sous-commission est composée de trois membres dont un président, un rapporteur.

La composition des sous-commissions et la désignation des présidents et des rapporteurs se font en plénière dans les conditions de prise de décision prévues par le présent Règlement d'ordre intérieur.

Le rapporteur de chaque sous-commission travaille avec le secrétariat permanent dans l'élaboration des rapports annuels de la commission.

Le Président et le Rapporteur des Sous-commissions sont élus pour toute la durée de leurs mandats.

L'appartenance à une sous-commission ne dispense pas un membre de participer aux activités d'une autre sous-commission sur des questions où son expertise est établie.

Les Présidents des sous-commissions peuvent prendre part aux réunions du Bureau Exécutif pour les nécessités du fonctionnement de la Commission sur convocation du Président après avis du Bureau Exécutif.

Le Secrétariat permanent assure le secrétariat des sous commissions.

Article 33

La sous-commission Protection des Droits de l'Homme est chargée de la mission de protection des droits de l'homme telle que prévue par les dispositions des articles 4 et 6 de la loi notamment :

- La surveillance de la situation des droits de l'homme ;
- La conduite des études et des recherches sur des questions générales et spécifiques des droits de l'homme ;
- La planification ou la programmation des actions tendant à renforcer le dispositif de la protection des droits de l'homme ;
- Les enquêtes publiques sur les questions des droits de l'homme ;
- Le suivi de la mise en œuvre des décisions prises par la commission lors de l'étude des requêtes portant sur des allégations de violations des droits de l'homme ainsi que des investigations ;
- Les questions liées aux groupes vulnérables ;

Elle est en charge du suivi de la mise en œuvre des Conventions et Traités internationaux ou régionaux signés ou ratifiés par le Burundi.

Elle propose aussi à la Commission les programmes de prévention de violations des Droits de l'Homme, de visites dans les prisons et autres lieux de détention ou toutes activités tendant à une meilleure protection des Droits de l'Homme.

Article 34

La Sous- commission Promotion des Droits de l'Homme et de l'information est chargée, ainsi qu'il est prévu par les dispositions de l'article 5 de la loi, notamment :

- de l'éducation aux droits de l'homme ;
- des campagnes de sensibilisation ;
- des émissions sur les radios et télévisions ou tout activité d'information et d'éducation aux droits de l'homme.
- des relations avec la société civile, les médias d'Etat ou privés, les autres institutions s'occupant des mêmes questions ou les autres institutions de la République ;
- des études et des recherches sur les droits de l'homme dans le pays
- de la rédaction et de la publication d'une Revue ou bulletin périodique, sur les activités de la Commission et les questions liées aux droits de l'homme ;
- la création et la gestion du site internet de la Commission ;
- de l'organisation des conférences, séminaires, ateliers, colloques, réunions ou rencontres d'échanges, journées de réflexion, causeries-débats, publications d'articles ou de communiqués ;
- de la célébration des journées des droits de l'homme ;
- de la vulgarisation des textes et documents sur les droits de l'Homme ;
- de l'élaboration des stratégies et de méthodologie de promotion des Droits de l'Homme ;
- donner des avis et recommandations sur des questions touchant les droits de l'homme ;

Article 35

Des groupes de travail thématiques ou des commissions ad' hoc ou spéciales peuvent être créées par le Bureau Exécutif en cas de nécessité.

TITRE VI : DU SECRETARIAT PERMANENT

Article 36

La Commission est dotée d'un Secrétariat Permanent dirigé par un Secrétaire Général

Article 37

Le Secrétaire Général est responsable de l'activité du Secrétariat Permanent sous la direction du Président.

Il assiste avec voix consultative aux réunions et assure l'exécution des tâches lui confiées par le Président dans le cadre de la mise en œuvre des décisions prises par la Commission.

Article 38

Une décision du Bureau Exécutif fixe l'organisation et le fonctionnement du Secrétariat Permanent.

La commission peut créer d'autres services en cas de nécessité.

Article 39

Tout le personnel du Secrétariat Permanent est tenu par l'obligation de réserve. Son statut sera fixé dans un texte portant statut particulier du personnel voté par la Commission et les délégués du personnel.

TITRE VII : DE L'AUTONOMIE FINANCIERE ET ADMINISTRATIVE

Article 39

La Commission jouit d'une autonomie de gestion financière et administrative en vertu des dispositions des articles 31 et 33 al 3 de la loi.

Article 40

Les fonds mis à la disposition de la Commission pour son fonctionnement, les salaires, les déplacements et autres dépenses sont gérés selon une réglementation découlant de son statut d'Institution de la République.

Un manuel de procédures administratives et financières adopté par la Commission fixe les modalités pratiques de mise en œuvre des dispositions du présent article.

TITRE VIII : DES INDEMNITES, DES FRAIS DE MISSIONS, DES DROITS AU CONGE

Article 41

Les frais de mission, à l'occasion des déplacements à l'intérieur ou à l'extérieur du pays sont fixés par décision de la Commission.

Ils sont conformes aux barèmes pratiqués pour les agents de l'Etat en tenant compte du statut particulier de la Commission.

Une décision de la Commission fixe les salaires et indemnités du personnel.

Les autres avantages liés au statut des membres de la Commission sont ceux prévus dans le Décret établissant leur statut. Toutefois, la Commission peut accorder d'autres avantages dument justifiés en fonctions de la disponibilité des fonds autres que ceux provenant du budget de l'Etat.

Article 42

Les membres de la Commission jouissent d'un congé annuel de trente (30) jours.

Le Bureau Exécutif de la Commission établit en accord avec les commissaires ainsi que le secrétaire général le calendrier de départ et de retour des congés en tenant compte des nécessités du service.

TITRE XIX : DE LA PROCEDURE A SUIVRE EN CAS DE SAISINE

Article 43

Les modalités d'introduction des requêtes pour violation des droits de l'Homme sont régies par les articles 42 et suivants de la loi. Un manuel de procédure des plaintes en précisera les modalités d'application.

Lorsque la requête est présentée par une organisation non gouvernementale ou par un groupe de particuliers, elle est signée par la ou les personnes habilitées à représenter l'organisation ou le groupe.

Le requérant doit informer la Commission de tout changement de son adresse et de tout fait nouveau utile a l'examen de sa requête.

Article 44

L'auto saisine est initiée par tout commissaire qui en informe la Commission. La décision d'auto saisine est prise conformément aux dispositions de l'article 19 du présent règlement. L'initiateur de l'auto saisine soumet sa proposition accompagnée d'un dossier comportant des éléments d'information et de preuve nécessaires pour asseoir la conviction de la Commission.

Article 45

La Commission établit avec les institutions et services les modalités d'application des dispositions des articles 37, 41 et 61 de la loi.

Article 46

Les délais requis pour l'exécution des avis et recommandations de la Commission sont de :

- 3 jours pour les violations a la sureté de la personne ;
- 15 jours tous les autres cas de violation.

En cas de violations ayant trait a l'intégrité de la personne et toute autre situation d'urgence, la Commission intervient sans délais.

Article 46 : La Commission déclare irrecevable notamment

- des requêtes fondées uniquement sur des rumeurs ;
- des requêtes ne relevant pas de sa compétence ;
- des affaires pendantes devant les juridictions, sauf en cas de paralysie de la justice, notamment quant il y a déni de Justice, en cas de violation des règles de procédures, en cas d'inexécution ou de mauvaise exécution des décisions de Justice.

Article 47 : Lorsqu'elle estime qu'il y a paralysie de justice, la Commission saisit le Conseil Supérieur de la Magistrature ou toute instance compétente aux fins de faire cesser la violation après avis et recommandations a l'auteur et restes infructue

TITRE X : DES RESSOURCES DE LA COMMISSION

Article 48

Les ressources de la Commission sont celles visées aux articles 31, 32, et 33 de la loi. Les fonds mis à la disposition de la Commission sont déposés

sur des comptes ouverts dans les institutions bancaires de la place au nom de la Commission, sous la signature de deux (02) membres du Bureau Exécutif : le Président ou le Vice-président et le Secrétaire.

Toutes les opérations de retrait de fonds sont soumises à deux signatures : celles du Secrétaire et du Président. La signature du Vice-président n'est requise qu'en cas d'empêchement ou d'absence du Président ou du Secrétaire.

Une caisse est constituée auprès du service de comptabilité et son mode de fonctionnement est précisé dans le manuel des procédures administratives et financières.

Le montant limite des disponibilités en caisse est fixé par décision du Bureau Exécutif.

TITRE XI : INFORMATION – COMMUNICATION

Article 49

Dans le cadre de ses activités, la Commission peut publier des revues ou des bulletins.

Les médias d'Etat servent de support à la Commission pour ses activités d'information, d'éducation et de communication.

TITRE XII : DE LA CARTE DE MEMBRE

Article 50

Une carte d'identité sera délivrée aux membres de la Commission. Les dimensions, la couleur, le contenu et les autres caractéristiques de la carte seront fixés par décision du Bureau Exécutif. La carte est signée par le Président.

Des badges et des autocollants peuvent également être mis à la disposition des membres de la Commission.

La carte et s'il y a lieu, les badges et les autocollants sont retirés sans délai à tout membre de la Commission démissionnaire ou exclu.

TITRE XIII : DES REPRESENTATIONS REGIONALES ET LOCALES

DE LA COMMISSION

Chapitre 1 Des antennes regionale de la commission

Il est créé dans chaque région du pays une antenne régionale de la CNIDH.

Article 51

Au sens du présent Règlement d'Ordre intérieur, une région est un regroupement de trois à quatre provinces.

Le siège de l'antenne régionale est situé au chef lieu de province qui sera déterminé par la Commission.

Article 52

Les antennes régionales sont placées sous la supervision administrative du Vice-Président. Ce dernier rend compte à la Commission des activités des antennes régionales.

Chaque antenne régionale dispose d'un point focal placé sous sa supervision technique et administrative. Ce même point focal mène des tâches de protection et de promotion lui confiées par l'antenne régionale de son ressort.

Les rapports spécifiques à la promotion et à la protection des droits de l'homme produits par les antennes régionales sont acheminés dans les sous-commissions concernées pour traitement et suivi.

Article 53

L'Antenne régionale reçoit les requêtes de son ressort territorial, à charge pour le Chef d'Antenne régionale de les transmettre sans délai à la Commission. Toutefois, en cas d'urgence le chef d'antenne peut effectuer les démarches nécessaires et doit rendre compte sans délai et par écrit circonstancié au Président de la Sous-Commission Protection pour recevoir les instructions.

Article 54

Les dépenses de fonctionnement de l'antenne régionale sont intégrées au budget de la Commission.

Une caisse peut être constituée auprès de l'antenne. Le montant et les modalités de gestion de cette caisse sont fixés par décision du Bureau Exécutif.

Article 55

Tout le personnel des antennes régionales est tenu par l'obligation de réserve.

TITRE XIV : ANNEXES

Article 56

La Commission coopère avec les institutions nationales et internationales œuvrant pour les mêmes objectifs.

Article 57

Les décisions devant faire l'objet d'annexes seront prises à la majorité requise pour les décisions extraordinaires et feront partie intégrante du présent Règlement d'ordre intérieur.

Article 58

Le présent règlement d'ordre intérieur peut être modifié ou complété par la Commission à la majorité des 2/3 des membres de la Commission.

Fait à Bujumbura, le Pour la Commission,

Le Secrétaire

Le Président



6

THE DEMOCRATIC REPUBLIC OF THE CONGO'S NATIONAL COMMISSION ON HUMAN RIGHTS

*Balingene Kahombo**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The creation of the National Commission on Human Rights (*Commission Nationale des Droits de l'Homme*, CNDH) in 2013 has provided an important opportunity for human rights to be promoted and protected in the Democratic Republic of the Congo (DRC).¹ It is an event in keeping with a general trend in Africa in which national human rights institutions (NHRIs)² have been established in accordance with the recommendation made by the World Conference on Human Rights in 1993.³

The CNDH is complementary to other state institutions, and designed to contribute to democratic governance in the DRC based on a culture of respect for human rights, this after decades of dictatorship, armed conflict and the scourge of impunity – hence its classification as an institution of

1 Organic Law No 13/011 on the Creation, Organisation and Functioning of the National Commission on Human Rights (21 March 2013).

2 See 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*, Windhoek, Macmillan Education Namibia (2009), pp 352-353.

3 Vienna Declaration and Programme of Action (A/CONF.157/23, excerpted from DPI/1394/Rev.1/HR-95-93241, April 1995, on the World Conference on Human Rights, 14-25 June 1993), paragraph 83.

support to democracy.⁴ In this regard, the CNDH occupies a central position in the Congolese legal order because of its mandate to monitor compliance with human rights obligations, including by the legislature, the government, the judiciary, the citizens and other private persons.

This chapter examines the CNDH's effectiveness. It assesses the extent to which the CNDH conforms to the Principles Relating to the Status of National Institutions (The Paris Principles),⁵ and assesses its capacity to exercise the functions conferred on it. The analysis relies on a variety of materials, ranging from the legal instruments that govern the Commission to its annual reports, investigative reports, and the advisory opinions and recommendations it has made to the government and other Congolese institutions. These materials are enriched by scholarly commentaries as well as information from semi-structured interviews conducted with former and incumbent high-ranking employees of the CNDH.

The main conclusion is that the CNDH's legal design is largely consistent with the Paris Principles. However, there is a wide gap between what it is mandated to do and what it is actually doing. In reality, the CNDH is not in compliance with the Paris Principles. Despite some achievements, it lacks the means to carry out its mission: it needs suitable offices, sufficient staff and financial resources. It also suffers from dependency on the government, weakness in its relationship with other state institutions, and problems of inaccessibility. To support this thesis, this chapter examines the establishment of the Commission, its legal nature and mandate, as well as its public accountability.

2 Establishment and evolution of the Commission

2.1 Model

There are many kinds of NHRI.⁶ The DRC has chosen to establish a human rights commission. In terms of its characteristics, the latter is a multi-member institution with a broad mandate to deal with all types of human rights. However, these are only rights which are based on Title II

4 JL Esambo Kangashe, *Traité de Droit Constitutionnel Congolais*, Paris, L'Harmattan (2017), pp 262-267.

5 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

6 Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, New York/Geneva, United Nations (2010), p 22.

of the 2006 Constitution and international human rights treaties ratified by the DRC.⁷

The CNDH comprises nine members, who are called National Commissioners for Human Rights.⁸ It has three main organs: a plenary assembly, bureau and permanent sub-commissions. The nine commissioners are members of the plenary assembly. They elect among themselves four members of the bureau, which is the organ responsible for the general administration of the Commission and the coordination of its activities. These four officials are a president and his deputy, a rapporteur and his assistant. The other members each chair one of the permanent sub-commissions, which are the technical organs in charge of specific human rights issues within the jurisdiction of the CNDH: civil and political rights; social, economic and cultural rights; collective rights; the rights of women and children; and the rights of people with disabilities as well as of other vulnerable groups, such as those infected with HIV/AIDS.

The CNDH is also required to have a workforce.⁹ This consists of 230 personnel working for the commissioners; 26 provincial coordinators; numerous representatives of the Commission in each Congolese city and region; and many other workers for its technical secretariat, which comprises a single division and 13 departments.¹⁰ This large workforce is certainly justified by the size of the country, which has an area of about 2.3 million km². The size of the workforce also indicates that there are high expectations on the CNDH to foster a culture of human rights in the DRC. To enhance its efficacy, the Commission is required to cooperate with other state institutions or governmental services that likewise promote and protect human rights.

2.2 Relations with other human rights institutions

The CNDH co-exists with several other human rights institutions in the DRC. These are pre-existing bodies that were established by the government after the promulgation of the 2006 Constitution to address the country's lack of an independent agency promoting and protecting human rights. One such institution is the Liaison Entity for Human Rights (*Entité de Liaison des Droits de l'Homme*) of the Ministry of Human Rights. It was created in 2009 as a framework for dialogue between political institutions, ministries, public services and organisations working on issues of human

7 See note 1, Article 2.

8 Rules of the National Commission on Human Rights (24 April 2015), Article 11(3).

9 *Ibid*, Articles 24-25.

10 Rules of the National Commission on Human Rights, Article 104.

rights promotion and protection in the DRC.¹¹ However, it has the broad mandate, inter alia, to examine factors causing human rights violations and suggest solutions, to ensure that everyone fulfils their human rights obligations, and to participate in the drafting of initial and periodic human rights reports on behalf of the government.¹²

Another institution is the National Agency for the Fight against Violence against Women, Young Girls and Children (*Agence Nationale de lutte contre les Violences faites à la Femme, à la Jeune et Petite fille*, AVIFEM). Created in 2009 in the ministry in charge of the family, gender and the child,¹³ its mission is to facilitate the implementation of the national strategy for combating all forms of gender-based violence, in particular violence against women and girls.¹⁴ This includes an ambiguous mandate to contribute to the prevention of and protection against gender-based violence, responding to the needs of victims, supporting the reform of the justice and security sectors, sensitising people about the law, and participating in the fight against impunity.¹⁵

A further institution is the National Commission for Refugees (*Commission Nationale pour les Réfugiés*), located within the ministry of interior affairs.¹⁶ It deals with the rights of refugees in DRC. Other institutions – such as the Independent National Electoral Commission (*Commission Nationale Electorale Indépendante*, CENI) and the High Council of Audio-visual and Communication (*Conseil Supérieur de l'Audiovisuel et de la Communication*, CSAC) – may also intervene in the promotion and the protection of human rights. The CENI organises elections, guarantees their regularity, and promotes and protects political rights. The CSAC, which regulates the media, protects the right to information, the freedom of media, and political pluralism through equal access to public media.¹⁷

11 Decree No 09/35 on the Creation, Organisation and Functioning of the Liaison Entity for Human Rights in the Democratic Republic of Congo (12 August 2009), Articles 1, 2 and 5.

12 *Ibid*, Article 3.

13 Decree No 09/38 on the Creation, Organisation et Functioning of the National Agency for the Fight against Violence against the Woman, Young and Little Girl (10 October 2009).

14 *Ibid*, Article 3.

15 *Ibid*.

16 Decree No 03/014 on the Organisation and Functioning of the National Commission for Refugees and Application Commission (5 August 2003), Article 2.

17 B Kahombo and MWK Koso, *Le Pari du Respect de la Vérité des Urnes en Afrique. Analyse des Elections Présidentielles et Législatives du 28 Novembre 2011 en République Démocratique du Congo*, 11th ed, Bruxelles, Combattons l'Injustice (2014), pp 57-65.

The relationship between the CNDH and these institutions is shaped by various laws and regulations. However, one may argue that at least two principles prevail. The first concerns the distinctive role and independence of the CNDH. The latter's rules specify that it acts independently from other state institutions, including those that support democracy.¹⁸ The second is the principle of collaboration. This entails that, on the one hand, the CNDH can make recommendations to these institutions on issues of human rights and even international humanitarian law; on the other, it can use other institutions for the performance of its functions. This is the case when it needs information from their services. Conversely, other institutions can collaborate with the CNDH. This is the case with the AVIFEM.¹⁹ The CNDH also works closely with the CENI in accordance with a cooperation agreement of 29 September 2015;²⁰ in terms of this agreement it deployed more than 5,000 observers, largely in Kinshasa, during the 2018 elections.²¹

The problem with the human rights institutions established as governmental services is that their mandates overlaps with that of the CNDH. Given the limited financial resources at the disposal of the government, there is a need for rationalisation. This entails the elimination of certain services, such as the Liaison Entity for Human Rights, so that budgetary resources can be directed to financing the CNDH to improve its efficacy.²² It is also the case that prolonging the existence of institutions that were established to compensate for the absence of a body promoting and protecting human rights is no longer justifiable now that the CNDH has been created. The pursuit of rationalisation should not be impaired by a desire to preserve jobs in governmental ministries.

2.3 Evolution

The CNDH can be appreciated both by considering the advance it represents on previous human rights mechanisms in the DRC and by considering the contribution it potentially stands to make in the future.

18 Rules of the National Commission on Human Rights, Article 180(1).

19 See note 13, Article 4.

20 National Commission on Human Rights, Activity Report: 2015-2016 (September 2016), p 66.

21 National Commission on Human Rights, *Rapport Ponctuel sur l'Observation de l'Environnement Electoral Lié à la Situation des Droits de l'Homme en République Démocratique du Congo (Elections Combinées Présidentielles, Législatives Nationales et Provinciales du 30 Décembre 2018)* (31 Janvier 2019), p 17.

22 Interview with Sylvain Lumu, former deputy technical secretary of the CNDH (27 December 2018).

Looking at the past helps one understand the historical specificity of the CNDH. The DRC is accustomed to establishing human rights institutions as services or branches of the government rather than creating independent agencies. The most important of these institutions was the Department for the Rights and Freedoms of the Citizens, created in 1986²³ but now defunct and the predecessor of the current Ministry of Human Rights. The former, unlike the latter, was not simply a department of the government but had a quasi-jurisdictional mandate, in addition to the general mission to promote human rights. The Department for the Rights and Freedoms of the Citizens could nullify any judicial decision in favour of a victim of human rights violation and order any reparation measure if the victim continued to suffer from an injustice that the court had failed to redress.²⁴ This interfered with the independence of the judiciary and justified the claim that the Department was a super-Supreme Court of Justice despite the fact that it was part of the government.²⁵

It was only in 2001 that the will emerged to put in place an independent body for human rights promotion and protection. This came as no surprise in the light of the 1998 armed conflict, which was characterised by massacres, ethnic cleansing, and other serious and widespread human rights violations.²⁶ The Ministry of Human Rights convened the National Conference on Human Rights from 23-30 June 2001. As a result, the Conference not only adopted the Congolese Charter on Human and People's Rights, which was expected to become a law, but also created the National Commission on Human and People's Rights.²⁷ This institution can be considered as the CNDH's ancestor. It had the status of an autonomous, independent and permanent public agency, enjoying full legal personality, for the promotion and protection of human rights.²⁸ However, it did not come into operation. This is probably because of the fact that a year later the Congolese agreed to establish a transitional

23 Ordonnance No 87-034 Modifying Ordonnance No 86-268 of 31 October 1986 on the Creation of a Department for the Rights and Freedoms of the Citizens (22 January 1987), 4 *Official Journal of the Republic of Zaïre* (14 February 1987), p 21.

24 N Nkoy-ea-Loongya, *Droit Congolais des Droits de l'Homme*, Brussels, Academia/Bruylant (2004), pp 375, 387.

25 *Ibid*, p 390. See also B Kahombo, "Rapport-Synthèse de la Conférence Internationale de Lubumbashi sur l'Efficacité et l'Indépendance de la Justice en République Démocratique du Congo, au Rwanda et au Burundi du 18 au 21 août 2015", 18 *Recht in Afrika – Law in Africa – Droit en Afrique* (2015), p 261.

26 United Nations Security Council, Report of the Secretary-General on the United Nations Preliminary Deployment in the Democratic Republic of the Congo (15 July 1999), UN Doc S/1999/790, paragraph 13.

27 See note 24, p 407.

28 *Ibid*.

government and put in place, under the Constitution of 4 April 2003, the National Human Rights Observatory (*Observatoire National des Droits de l'Homme*, ONDH) as one of the institutions to support democracy.²⁹

The CNDH replaced the ONDH, which was abolished by the 2006 Constitution. Its creation in March 2013 is to be seen as the result of persistent pressure by civil society organisations since 2008.³⁰ However, there was another competing governmental initiative to establish a mixed special court of human rights, which was finally rejected by the Senate on 22 August 2011 to avoid a unnecessary jurisdictional overlap with other courts and tribunals.³¹

There have been two stages in the CNDH's evolution since 2013. The first related to its operationalisation. This process took more than two years as the CNDH began its activities only in July 2015 due to delays between September 2013 and April 2015 in the National Assembly's appointment of the nine Commissioners for Human Rights. In fact, civil society's selection of candidates for proposal to the National Assembly was completed only in November 2014 owing to difficulties in reaching consensus.³² Politicians were understood to be reluctant to welcome the CNDH as an independent body until they had the guarantee that they could appoint, from the list of the proposed candidates, persons with strong ties to the regime in power.³³ Moreover, there were disputes after the vote of the National Assembly, and the Constitutional Court delivered its final judgement only on 21 July 2015.³⁴ This allowed those members whose appointment was challenged to take their oath on 23 July 2015. It also allowed the CNDH's president to submit the body's rules to the Constitutional Court for the purpose of prior constitutional review. This

29 Constitution of Transition (4 April 2003), Article 154; Law No 04/019 on the Organisation, Attributions and Functioning of the National Observatory of Human Rights (30 July 2004).

30 See note 20, pp 7-8.

31 JM Kumbu, "National Courts: The Situation in the Democratic Republic of the Congo", in H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge, Cambridge University Press (2015), p 246.

32 See note 20, pp 8-10.

33 See note 22.

34 Constitutional Court, 21 July 2015, R. Const. 0001/Bis, Request for Unconstitutionality of the Resolution No 001/CAB/P/AN/AM/2015 of 1 April 2015 on the Designation of Members of the National Commission on Human Rights (unpublished).

followed the rejection of his initial application for the same purpose on the ground that he had no *locus standi* as he was not yet sworn in.³⁵

The second stage was the commencement of the CNDH's activities. The period 2015-2016 was devoted largely to institutional development, including the adoption of legal instruments governing the CNDH, namely the Administrative Rules and the Manual of Procedures. The former regulates the CNDH's personnel and therefore complements the provisions of the Commission's rules, which the plenary assembly adopted in April 2015 to complement the law. The latter lays down the procedures applicable for the treatment of complaints of victims of human rights violations (issues of admissibility, administration of evidence, possible outcomes, and the like), as well as the conduct of investigations. The CNDH also adopted its strategic plan (2015-2020) and proceeded to recruit its personnel. This allowed it to begin the implementation of its mandate, notably by receiving a number of victims' complaints and monitoring prisons and detention facilities as well as demonstrations organised by the country's opposition party.

The period 2016-2017 was marked by a series of activities of the same nature. These include the recruitment of further personnel and the adoption of the Financial Rules that govern the management of the CNDH's budgetary resources. Of particular importance was the issuing of a number of inquiry reports on human rights violations, along with advisory opinions and recommendations that were made to the state institutions concerned. These investigative activities continued during 2017-2018.³⁶

3 Nature of the Commission

3.1 Legal framework

Unlike the ONDH, which is created by the 2003 Constitution, the CNDH is established by a legislative act, namely the Organic Law of 21 March

35 Constitutional Court, R Const. 0015, 29 May 2015, Request for the Assessment of the Consistency with the Constitution of the Rules of the National Commission on Human Rights, p 3 (unpublished); AK Kadulu, "Arrêt R Const. 0015 du 29 Mai 2015 de la Cour Constitutionnelle et Investiture des Autorités Administratives", 1 *Annuaire Congolais de Justice Constitutionnelle* (2016), pp 187-197.

36 National Assembly, La CNDH Présente le Rapport Annuel de la CNDH à l'Assemblée Nationale (10 May 2018), available at <http://www.assemblee-nationale.cd/?p=6759> (accessed 27 October 2018).

2013.³⁷ In this regard, the CNDH differs from the CENI and the CSAC, two other institutions established to support democracy and based directly on the 2006 Constitution. The differences arise from the fact that the framers of the Constitution left Parliament with the discretion to create any other institution to support democracy, depending on the circumstances and available resources.³⁸ The decision to proceed by way of an organic rather than ordinary law provides some safeguard against arbitrary changes. This is because an organic law is superior to any ordinary law in that it can be adopted or amended only upon approval by a qualified majority vote by Parliament and its promulgation as law is subject to a prior review by the Constitutional Court.³⁹ Nevertheless, the existence of the CNDH remains dependent on the will of Parliament, which, having created it, can also abolish it.

3.2 Independence

The independence of the CNDH can be assessed on the basis of the Paris Principles, which stipulate that such an institution needs to be representatively diverse in its composition, possess adequate infrastructure and funding, and clearly spell out the length of its members' terms of office.⁴⁰ These provisions are, however, below the standards the African Court on Human and Peoples' Rights defined in a landmark case on the independence and impartiality of the Ivory Coast's electoral commission.⁴¹ The Court declared that the concept of independence entails "the fact of a person or an entity not depending on any other authority than its own or at least not depending on the state in which he exercises his functions".⁴²

This general definition distinguishes between independence relating to administrative and financial autonomy and other aspects of independence.⁴³ These aspects relate to the mode of appointment and the duration of the terms assigned to the members of the institution concerned, the existence of guarantees against external pressure, and the perception in

37 See note 1.

38 Constitution (18 February 2006), Article 222(3).

39 *Ibid*, Article 124.

40 See note 5.

41 *The Matter of Actions pour la Protection des Droits de l'Homme (APDH) v The Republic of Côte d'Ivoire*, African Court on Human and Peoples' Rights, Application 001/2014, Judgment of 18 November 2018.

42 *Ibid*, paragraph 117.

43 *Ibid*, paragraph 118.

the eyes of all that such an institution is independent.⁴⁴ The latter aspect is subjective in nature. Thus, the CNDH may conform to the Paris Principles in many respects, but it can still be regarded as not independent if it does not meet the other complementary standards developed by the African Court.

The principles concerning the CNDH's independence are set out in Article 1 of the Organic Law of March 2013. The Commission has a legal personality. This implies that it is a legal entity distinct both from the state and its organs and from other public persons, and enjoying full administrative and financial autonomy. Financial autonomy is examined below. As regards administrative autonomy, the basis of this is that the CNDH comprises three main organs and can appoint its own personnel.

However, in practice there is no genuine administrative autonomy. Although all nine commissioners have been appointed and have assumed office, the CNDH lacks the staffing resources necessary for the fulfilment of its mandate. At the commencement of its activities, it was allowed to recruit 33 persons.⁴⁵ This number was negotiated with the government due to financial constraints.⁴⁶ As a result, only 19 of the required 230 personnel were appointed to assist the commissioners.⁴⁷ One may assume that the technical secretariat (a division with 13 departments) has not functioned effectively as it had to rely on only four persons.⁴⁸ While the DRC has 25 provinces and Kinshasa as its capital city, the CNDH was able to appoint provincial coordinators to only ten provinces.⁴⁹

The situation has not changed significantly since 2016. Parliament authorised the increase of the CNDH's personnel to 210 employees.⁵⁰ However, during the 2016/2017 financial year, the CNDH had only 73 employees (47 of which were based at the headquarters in Kinshasa): nine commissioners, four members of the technical secretariat, 34 staff, and 26 provincial coordinators.⁵¹ Even though the number of paid personnel

44 *Ibid*, paragraph 123. See also Individual Opinion of Judge Fatsah Ouguergouz, *The Matter of Actions pour la Protection des Droits de l'Homme (APDH) v The Republic of Côte d'Ivoire*, African Court on Human and Peoples' Rights, Application 001/2014, Judgment of 18 November 2018, paragraph 117.

45 See note 20, p 19.

46 *Ibid*.

47 *Ibid*, p 20.

48 *Ibid*, p 22.

49 *Ibid*, p 23.

50 See Revised Financial Law No 16/006 of 29 June 2016 for the Year 2016, Annexe XIV; Financial Law No 2017/05 of 23 June 2017 for the Year 2017, Annexe XIV.

51 National Commission on Human Rights, Activity Report: 2016-2017 (September 2017), p 21.

increased to 79 in 2018,⁵² this was still below the needs of the CNDH. The Commission then appointed new workers and exceeded its 210 authorised employments. Its current personnel includes 55 employees at the headquarters in Kinshasa, 104 in the provinces, 32 in the cities, and 20 in other administrative territories.⁵³ Although it was permitted to appoint some 133 staff in 2019,⁵⁴ the CNDH has no employees in most of the DRC's 96 cities and 145 administrative territories. The reasons are mainly financial.

The composition of the CNDH is reasonably diverse. All its nine members originate from civil society, being drawn from human rights organisations, professional associations, trade unions, universities and churches, and including among them persons with disabilities, persons from women's rights organisations, and persons affected by HIV/AIDS.⁵⁵ This is a higher standard than required by the Paris Principles, which provide for a mixture of civil society representation and representation from parliament and government.

The CNDH is, moreover, protected against external pressure. Its premises are inviolable.⁵⁶ Its nine members enjoy a five-year term, renewable once,⁵⁷ and are subject to a strict regime of non-cumulation of functions.⁵⁸ The Commissioners for Human Rights are entitled to social benefits such as sufficient salary to preserve their independence,⁵⁹ and are immune from prosecution for everything they do in discharging their mandate.⁶⁰ The Commission is, in the discharge of its mission, subject only to the law.⁶¹

Some of these guarantees are largely theoretical, however. The CNDH is under external pressure, first, because it lacks its own premises for housing its central administration and provincial representation. Originally, it had its headquarters within a law firm and, for its various services, rented premises from private landlords in Kinshasa.⁶² Resources

52 Financial Law No 17/014 of 24 December 2017 for the Year 2018, Annexe XIV.

53 National Commission on Human Rights, Third Annual Activity Report (January-December 2018) (March 2019), pp 15-16.

54 *Ibid*, p 16.

55 See note 1, Article 14.

56 *Ibid*, Article 3(2).

57 *Ibid*, Article 19(1).

58 *Ibid*, Article 18.

59 *Ibid*, Article 23.

60 *Ibid*, Articles 34-35.

61 *Ibid*, Article 4(2).

62 See note 20, p 31; note 51, p 22.

such as vehicles, office supplies and telecommunications are lacking. The same applies to its provincial representation.⁶³

Another issue is that employees other than the commissioners receive poor salaries. For example, the highest salary amounts to USD 630 and the lowest to USD 200 per month.⁶⁴ These salaries are less than those at other institutions that support democracy, such as the electoral commission. This state of affairs has the potential to discourage CNDH employees from devoting their time to the work of the Commission.⁶⁵

Under the circumstances, the CNDH cannot be regarded as an independent institution. Despite the fact that it regularly reports that the situation undermines its operation, the government has failed to respond to its material needs, apart from providing two vehicles at the end of 2016.⁶⁶ The CNDH has also received premises for the offices of its representation in four provinces (Central Kasai, Tshuapa, Kwango and Tshopo).⁶⁷ These efforts have been made by provincial governments.

3.3 Appointment procedure

The appointment of the nine members of the CNDH is political in nature. Four principles govern the procedure in this regard. First, each civil society grouping represented by a member of the Commission proposes a list of two candidates, whereas the churches propose a list of four candidates, given that they are represented by two members.⁶⁸ Secondly, half of the candidates from each group must be female in order to comply with the requirement of gender parity.⁶⁹ Thirdly, the National Assembly chooses the Commissioners for Human Rights by vote. Fourthly, the Commissioners must be appointed by the President of the Republic,⁷⁰ and can assume office only on being sworn in by the Constitutional Court.

Because the qualifying criteria for membership of the CNDH are vague, it is not assured that only the best and most competent persons are appointed. In terms of education, a candidate is required to have at least a

63 Interview with Charles Basekayi, the CNDH's coordinator in the province of Central Kasai (25 January 2019); interview with Patience Bengheya, the CNDH's coordinator in the province of South Kivu (8 February 2019).

64 See note 22.

65 *Ibid.*

66 See note 51, p 23.

67 *Ibid.*, p 22.

68 See note 1, Article 16.

69 *Ibid.*

70 *Ibid.*, Article 17(2).

bachelor's degree, and not necessarily in law or a related field.⁷¹ Five years of professional experience is also required in any field which may be relevant for the work of the Commission.⁷² In addition, the candidate is required only to demonstrate interest in and knowledge of the field of human rights.⁷³ Such a requirement does not guarantee the appointment of persons capable of fulfilling the Commission's mandate to promote and protect human rights, work which is likely to involve dealing with complex legal issues, such as investigating human rights violations and examining the merits of victims' complaints on the basis of applicable law.

The CNDH is also supposed to be apolitical in that its members come from civil society. However, there seems to be a legal contradiction between this requirement and the fact that candidates are merely required not to hold a position within an organ of a political party.⁷⁴ In other words, a candidate who is a politician can be chosen if he does not participate actively in the administration of a political party. This raises the question of how such a candidate could simultaneously belong to civil society.

In practice, politicians have indeed been appointed to the Commission. This is the case with its president, who was the president of the political and legal commission of the Senate on behalf of the ruling coalition. This has adversely affected the effectiveness of the CNDH because the president's tenure seems largely dependent on the goodwill of the President of the National Assembly and the secretary-general of the ruling coalition.⁷⁵ This explains why the Commission has failed to investigate a number of sensitive situations, such as the murders that took place in the region of Beni (North Kivu) and in which several state officials were suspected to have been involved,⁷⁶ and why it has failed to refer certain cases to the courts as required by law.⁷⁷ Some commissioners have been dissatisfied with their president's political inclinations, but despite thus having lost interest in carrying out their mandate, have stayed in office merely to retain the financial benefits associated with their positions.⁷⁸

The same politicisation applies in the appointment of the CNDH's personnel. This is largely due to the fact that the power to appoint the

71 *Ibid.*, Article 15(3).

72 *Ibid.*

73 *Ibid.*, Article 15(5).

74 *Ibid.*, Article 15(4).

75 See note 22.

76 Congo Research Group, *Mass Killings in Beni Territory: Political Violence, Cover Ups, and Cooptation – Investigative Report No 2 (September 2017)*, pp 2-4.

77 See note 1, Article 6(2).

78 See note 22.

CNDH's employees is centralised in the hands of the President of the Commission.⁷⁹ With the exception of a period in 2015 in which employees were recruited on a competitive basis at the commencement of the CNDH's activities, all subsequent appointments have been made by the president alone. The CNDH has justified this by saying that these were urgent appointments to deal with an emergency.⁸⁰ At the provincial levels, there have been similar party-political appointments, which have enabled political leaders to have their representative, such as the provincial coordinator in Eastern Kasai, within the CNDH.⁸¹

Given such a high politicisation of the appointment procedure, the contestation before the Constitutional Court of the election of the first nine commissioners has come as no surprise. The petitioner was seemingly excluded by an untransparent selection process, whereas the candidates thus shortlisted were elected in the National Assembly by a show of hands. According to the relevant rules, this should have been preceded by a secret ballot.⁸² Finally, the petition was declared inadmissible on the ground that the petitioner had no *locus standi* as he was not among the candidates who were on the list submitted to the National Assembly for election.⁸³

3.4 Financial autonomy

On paper, the CNDH enjoys financial autonomy.⁸⁴ Its budget is supposed to be funded by the state national budget as approved by a vote in Parliament; it can also receive donations, which must be reflected in its annual budget.

It is the case, however, that in 2015 the CNDH had no specific budget – because it went operational in the middle of that year, it was not included among the institutions to be funded by the state budget. Therefore, it had to rely on credits negotiated with and provided by the government.⁸⁵ In 2016, it drafted its own budget, of about USD 352 million, but this was reduced by Parliament to only about USD 7 million.⁸⁶ In 2017, the budget voted to it by Parliament was reduced to some USD 388,016.⁸⁷

79 Rules of the National Commission on Human Rights, Articles 68(e), 88, 95, 102, 110, 116, 119 and 125(2).

80 See note 51, p 20.

81 See note 22; see note 63.

82 Constitution (18 February 2006), Article 121(5).

83 See note 34, p 16.

84 See note 1, Article 26.

85 See note 20, p 32.

86 *Ibid*, p 34.

87 See note 51, p 25.

Even so, these amounts remained theoretical: the total amount of money approved has never reached the CNDH's account. For the year 2016, this could be explained by the fact that the government faced a serious deterioration of prices of goods in the international market and consequently obtained a reduction of the state budget from Parliament.⁸⁸ In the case of 2017, it is probable that the government, lacking foreign assistance, prioritised the financing of the country's elections – in this regard, USD 400 million was spent on the establishment of the voters' register in 2017.⁸⁹ In 2018, the CNDH continued to report that it lacked the financial means to implement its mandate.⁹⁰ This is to be explained by the same prioritisation of the electoral process, as the CENI needed USD 560 million to hold three elections at the same time on 30 December 2018.⁹¹

Thanks to its financial constraints, the CNDH has a limited capacity for action. This is a further reason – over and above its political dependency – for its lack of initiative in engaging with a number of situations in which serious violations of human rights have occurred.⁹² Its repeated requests that the state improve its financial capacity have yielded no positive result so far. To carry out some of its activities, such as visiting detention premises and conducting capacity-building, the CNDH has had to rely on donors, such as the European Union, the UN and various embassies in Kinshasa. Their funding is put on the account of the United Nations Joint Office for Human Rights (*Bureau Conjoint des Nations Unies aux Droits de l'Homme*, BCNUDH), which subsequently provides assistance to the CNDH, as the latter does not seem to inspire confidence in its self-management of financial resources.⁹³

An exception is that the Open Society Initiative for Southern Africa (OSISA) directly financed the CNDH's monitoring of the situation of

88 See note 50.

89 Independent National Electoral Commission, Activity Report: June 2016-May 2017 (2017), p 99.

90 See note 36.

91 See note 86, p 99. See also B Kahombo, *et al*, "Elections du 23 Décembre 2018: Vers Une Enième Rendez-Vous Manqué Pour le Peuple Congolais ? – 8^{ème} Rapport du Groupe de Travail sur le Processus de Paix en République Démocratique du Congo" (November 2018), p 32.

92 JK Bira'Mbovote, "La Commission Nationale des Droits de l'Homme – Un Job ou Un Organe de Promotion et de Protection des Droits de l'Homme ?", 2(20) *Cahiers Africains des Droits de l'Homme et de la Démocratie* (2016), pp 110-111.

93 See note 22.

human rights defenders in the DRC for one year (December 2016 - December 2017).⁹⁴ In 2018, the Commission also directly received USD 55,650 and €9,885 from the BCNUDH, the French Embassy and the Konrad Adenauer Foundation.⁹⁵

Overall, donors do not provide sufficient support to the CNDH's annual budget but prefer to finance some specific activities or needs. They have not therefore made up for the failure of the DRC to fund its own institution and make it more effective on the ground.

3.5 Professional skill and knowledge

It has been shown that the criteria for selecting commissioners does not allow for appointment of the best and most competent persons. Now, it is necessary to examine the profiles of those who were appointed to serve from 2015-2020.

Of the nine commissioners,⁹⁶ two are medical doctors with no specific background in human rights issues. There are also three human rights defenders with some specific training in human rights but no academic education in law. In total, the CNDH comprises four lawyers. One of them specialised in economic law but has experience in the protection of persons with disabilities; two are practising lawyers of the High Court, including the CNDH's president, who was also a member of the defunct ONDH. The other lawyer practises at the Court of Cassation and is the most qualified member. A professor of private law at the University of Kinshasa, she served as deputy director-general at the Ministry of Justice and Human Rights.

These profiles, variously of lawyers and non-lawyers, demonstrate the diversity of the CNDH's composition. The majority of members are lawyers and seem to have some experience in the field of human rights. However, none of the nine members has any knowledge of the law of armed conflict, whereas the CNDH is mandated, beyond dealing with human rights issues, to advise the government and other institutions on questions of international humanitarian law and humanitarian actions.⁹⁷

94 *Ibid.* See also National Commission on Human Rights, *Rapport sur la Situation des Droits de l'Homme et des Défenseurs des Droits de l'Homme en République Démocratique du Congo – Mois de Décembre 2017 (February 2018)*, p 5.

95 See note 53, p 18.

96 See note 20, pp 14-16.

97 See note 1, Article 6(18).

One may conclude nevertheless that the CNDH has commissioners who are reasonably qualified to enable it to carry out its mission. The qualifications of the majority of its members are, of course, higher than what the law requires. This good practice should prevail, but there is a need for greater specialisation. One may suggest that, given the prevailing situation in the DRC, the CNDH's members should have expertise in constitutional law as well as in international law in general, especially so in the law of armed conflict.

3.6 Relations with civil society

The CNDH has a clear, direct relationship with civil society in that most of its commissioners are drawn from it. Moreover, among its functions, the CNDH is required to strengthen the capacity of human rights organisations.⁹⁸ The law does not specify how this is to be done, nor, in particular, does it address the issue of whether such support could include financial support, given that, worldwide, states are generally increasingly reluctant to allow foreign funding of human rights organisations established in their territory.⁹⁹ In practice and despite its limited budget, the CNDH has modestly funded the activities of several Congolese NGOs.¹⁰⁰

Some NGOs in turn have funded the activities of the CNDH, such as (as mentioned) its monitoring of the situation of human rights defenders (OSISA); they have also funded airline travel for its missions abroad and for the training of personnel (USAID).¹⁰¹ The CNDH is regularly invited to participate in the activities of human rights organisations. Rather than strengthening the latter's capacity, the CNDH appears, all in all, to be the principal beneficiary of these relationships. This is understandable given its lack of financial resources and the recency of its creation.

3.7 Accessibility

In principle, the CNDH could be said to be readily accessible. It is decentralised in such a manner that it has, besides its headquarters in Kinshasa, 26 provincial representations, along with offices in each town

98 *Ibid*, Article 6(9).

99 O Oleinikova, "Foreign-Funded NGOs in Russia, Belarus and Ukraine: Recent Restrictions and Implications", 9(3) *Cosmopolitan Civil Societies Journal* (2017), pp 86-94.

100 See note 20, pp 67-68.

101 *Ibid*, pp 43-44.

and territorial entity of the Republic.¹⁰² All these offices are meant to be permanent. However, as already shown, the CNDH has no personnel in most of these towns and territorial entities. As to its headquarters and provincial representation, the current staff is insufficient. This is due to financial constraints, as demonstrated above. As a result, in practice the CNDH is less visible on the ground than it is in theory, and many ordinary Congolese do not utilise its mechanisms because they are unaware of its existence.

4 Mandate of the Commission

The CNDH's mandate is provided for in Article 6 of the Organic Law of March 2013, which includes a list of some 20 human rights issues.¹⁰³ In general, these issues relate to the promotion and protection of human rights. Consequently, the mandate is largely consistent with the Paris Principles. Indeed, the CNDH exceeds the standards of the Paris Principles, given that it has quasi-judicial competence to settle certain cases of human rights violations.¹⁰⁴ The subsections below examine several important aspects of this mandate.

4.1 Commenting on existing and draft laws

The competence to comment on existing and draft law is based on Article 6(16) and (18) of the Organic Law of March 2013. The CNDH can examine national legislation relating to human rights with a view to ensuring its coherence and advising the government and other state institutions on issues of human rights promotion and protection.

The CNDH has exercised this power in different ways since 2015. First, concerning its commentary on draft laws, it has tried to intervene in the parliamentary process with respect to the adoption of the draft law on the status and protection of human rights defenders in the DRC. It did so after the Senate and National Assembly failed to adopt the draft law in line with the Constitution. The CNDH prepared a harmonised draft law and recommended its adoption by the joint committee of the Senate and the National Assembly.¹⁰⁵ The CNDH's proposal is still on the table of

102 See note 1, Articles 3(1) and 8(3).

103 *Ibid*, Article 6.

104 *Ibid*, Article 6(11).

105 See National Commission on Human Rights, *Proposition de Loi Relative à la Protection et à la Responsabilité du Défenseur des Droits Humains – Rapport Synthèse de l'Atelier*

discussion in Parliament,¹⁰⁶ and at the time of writing seemed likely to be among the areas to be dealt with after the 2018 elections.

Secondly, the CNDH has commented on the application of the laws on water and electricity consumption. It has noted several violations of the socio-economic rights of Congolese people, mainly those of the rights to water and electricity.¹⁰⁷ The violations arose due to poor quality of service by the Company for the Distribution of Water (REGIDESO) and the National Electricity Company (SNEL). The Commission has also noted the issuing of overestimated all-in invoices, sometimes with no water or electricity having been provided, in violation of Law No 15/026 of 31 December 2015, regulating water, and Law No 14/011 of 17 June 2014, regulating electricity.¹⁰⁸ Hence, recommendations were made to the government to ensure that these state companies comply with the law.¹⁰⁹

Still with regard to socio-economic rights, the CNDH has delivered an opinion on the social responsibility of companies in the mining and forest sectors with respect to four provinces (Haut-Lomami, Eastern Kasai, Lualaba and Tshopo).¹¹⁰ The main finding is that – with the complicity of state officials, mainly political authorities in Kinshasa – the companies not only fail sometimes to pay taxes but also fail to meet their legal obligations regarding the development of socio-economic infrastructure (such as hospitals, schools, water supplies, and roads) for the benefit of the local communities where they deploy their activities.¹¹¹ It has been

d'Harmonisation des Textes Adoptés en Termes Non-Identiques par le Sénat et l'Assemblée Nationale (November 2017); National Commission on Human Rights, *Proposition de la Commission Nationale des Droits de l'Homme Après Analyse de Deux Textes Votés en des Termes Non-Identiques par l'Assemblée Nationale et le Sénat – Proposition de Loi Relative à la Protection et à la Responsabilité du Défenseur des Droits Humains* (April 2018).

106 Digital Congo, “*Minaku et Kengo Décident D'Accélérer le Rythme du Travail au Parlement*” (16 November 2018), available at <https://digitalcongo.net/article/5bee98cd95b2ed0004f0666a/> (accessed 19 January 2019).

107 Constitution (18 February 2006), Article 48.

108 National Commission on Human Rights, *Avis No 002/AP/CNDH – RDC/2017 – Avis et Propositions de la Commission Nationale des Droits de l'Homme (CNDH) sur la Facturation de la Consommation de l'Energie Electrique en République Démocratique du Congo* (14 September 2017), p 3; National Commission on Human Rights, *Avis No 003/AP/CNDH – RDC/2017 – Avis et Propositions de la Commission National des Droits de l'Homme (CNDH) sur la Facturation de la Consommation d'Eau en République Démocratique du Congo* (14 September 2017), p 3.

109 *Ibid.*

110 National Commission on Human Rights, *Avis No 005/AP/CNDH – RDC/2019 – Avis et Propositions de la Commission Nationale des Droits de l'Homme (CNDH) sur la Responsabilité Sociétale des Entreprises d'Exploitation Forestière et Minière en République Démocratique du Congo* (15 April 2019), p 2.

111 *Ibid.*, p 6.

recommended, *inter alia*, that the government strengthen its supervision of these two sectors.¹¹² Justice should also be served through the prosecution of fiscal offences.¹¹³

Thirdly, in October 2017 the CNDH issued an opinion on gender representation.¹¹⁴ It examined the 2006 Constitution and the Law of 1 August 2015 on the Modalities of Application of the Rights of Women and Parity. The CNDH observed that gender representation is still below the required standard of 50-per-cent representation of women in political institutions and public and private companies. Accordingly, it recommended that Parliament amend the electoral law by imposing an obligation on political parties to ensure that 50 per cent of the candidates on their lists are women.

However, when the electoral law was adopted in December 2017, Parliament ignored the CNDH's opinion. In fact, the electoral law provides instead that the non-representation of women is not a ground for a list of candidates to be declared inadmissible for elections.¹¹⁵ This provision is one of the reasons that the law was then submitted to the Constitutional Court for review. In its judgment of 30 March 2018, the Court held that there was no violation of the Constitution because, for the purpose of elections, gender equality could not be quantified in arithmetical terms¹¹⁶ since political participation is free and therefore the number of female candidates may vary from one party to another.¹¹⁷ The Court ruled that it could not support the declaration of a list as inadmissible on those grounds alone.¹¹⁸

112 *Ibid*, p 7.

113 *Ibid*.

114 National Commission on Human Rights, *Avis No 004/AP/CNDH – RDC/2017 – Avis et Propositions de la Commission National des Droits de l'Homme Relatif à la Représentation des Femmes dans les Institutions Politiques et Entreprises Publiques et Privées en République Démocratique du Congo* (21 October 2017).

115 Law No 17/013 Modifying and Complementing Law No 06/006 of 9 March 2006 on the Organisation of Presidential, Legislative, Provincial, Urban, Municipal and Local Elections as Revised to Date (24 December 2017), Article 13(3).

116 Constitutional Court, 30 March 2018, R. Const. 264/630/631, Request for Unconstitutionality of Some Provisions of Law No 17/013 of 24 December 2017 Modifying and Complementing Law No 06/006 of 9 March 2006 on the Organisation of Presidential, Legislative, Provincial, Urban, Municipal and Local Elections as Modified and Complemented to Date (unpublished), pp 11-12.

117 *Ibid*.

118 *Ibid*.

4.2 Monitoring domestic human rights situations

The competence to monitor domestic human rights situation reposes on Article 6(1) and (3) of the Organic Law of March 2013, which empowers the CNDH to investigate all human rights violations and to visit prisons and other detention premises. The CNDH has exercised this competence on several occasions, but its engagements are limited to particular geographical areas. For example, it monitored public demonstrations held in Kinshasa in January 2018 and December 2017 against delays in presidential and legislative elections,¹¹⁹ but did nothing in regard to human rights violations during demonstrations in other parts of the DRC. Likewise, in 2017 it investigated violations of the right to a salary only in the public administration in Kinshasa.¹²⁰

That being said, in the provinces the CNDH investigated the situation in the Kasai region between 2016 and 2017, the focus of enquiry falling on the insurrection of Kamwena Sampu, a traditional chief whose death at the hands of government forces led to violence and widespread human rights violations.¹²¹ It also visited prisons and detention premises across the country between May and July 2017.¹²² Another important investigation dealt with the social responsibility of companies in the mining and forest sectors in four provinces (Haut-Lomami, Eastern Kasai, Lualaba and Tshopo).¹²³

However, there seems to be a lack of monitoring of other areas of infringement, such as the numerous arbitrary detentions of human rights and democracy activists by the police and intelligence services; also neglected are the regular killings, massacres, and other human rights

119 National Commission on Human Rights, *Rapport Ponctuel d'Enquêtes sur la Situation des Droits de l'Homme Consécutive à la Marche du 31 Décembre 2017 dans la Ville de Kinshasa en République Démocratique du Congo* (2 February 2018); National Commission on Human Rights, *Rapport Ponctuel d'Enquêtes sur la Situation des Droits de l'Homme Consécutive à la Marche du 21 Janvier 2018 dans la Ville de Kinshasa en République Démocratique du Congo* (3 February 2018).

120 National Commission on Human Rights, *Enquête sur les Violations du Droit au Salaire Dans la Fonction Publique – Cas de l'Enseignement Primaire, Secondaire et Professionnel* (October 2017).

121 National Commission on Human Rights, *Rapport Ponctuel d'Enquêtes Préliminaires sur la Situation « Kamuina Nsapu » au Kasai Central 2016-2017* (July 2017).

122 National Commission on Human Rights, *Rapport Synthèse de Visite des Prisons Dans les Dix Anciennes Provinces de la République Démocratique du Congo: Mai -Juillet 2017* (24 July 2017).

123 National Commission on Human Rights, *Rapport Ponctuel d'Enquêtes sur la Responsabilité Sociétale des Entreprises d'Exploitation Forestière et Minière en République Démocratique du Congo* (15 April 2019).

violations connected to the exploitation of Congolese natural resources in the Kivu and Ituri regions. The territorial limitations of the CNDH's work can be explained by its lack of independence and sufficient human and financial resources.

There are other problems that also deserve to be addressed. The most important of these is the partiality of the CNDH's reports, which seek to obscure the responsibility of high-ranking state officials. This is the case with the killings of civilians, property damage and other human rights violations that occurred during public demonstrations in Kinshasa. The CNDH attributed these violations, without any legal analysis, to unidentified members of the police and army, as well as to protesters and organisers of the demonstrations.¹²⁴ Nothing was said about the command responsibility of those in control of the police and army. Concerning the insurrection of Kamwena Sampu in the Kasai region, the CNDH echoes the official position that the government is combating terrorists.¹²⁵ It does not discuss the responsibility of state officials who are suspected of being involved in the violence. Instead, it attributes violations to rogue members of the police and army, as well as to terrorists and other criminals.¹²⁶

All of this raises serious doubts about the credibility and quality of the Commission's reports. The CNDH needs to strengthen its capacity for legal analysis and assessing situations where widespread human rights violations occur; in particular, it needs to demonstrate independence in the execution of its mission.

4.3 Monitoring and advising on compliance with international standards

The CNDH exercises this competence on the basis of Article 6(10) and (12)-(15) of the Organic Law of March 2013. The competence includes contributing to the drafting of the DRC's reports to international treaty bodies. This was the case in 2017 with the DRC's combined periodic reports to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights (2008-2015) and with regard to the Maputo Protocol on the rights of women (2005-2015).

The CNDH can also monitor the application of human rights instruments, recommend the ratification of necessary human rights

124 See note 119, pp 8, 9, 16 and 19.

125 See note 121, p 8.

126 *Ibid*, p 16.

treaties, and promote the harmonisation of national legislation with international human rights instruments. A striking example comes from its opinion of September 2017 on the restoration of the moratorium on the death penalty in the DRC.¹²⁷ This issue relates to the debate about whether the death penalty conforms to the 2006 Constitution, especially so to Article 61(1), which states that the right to life is not subject to derogation in any circumstances, even in the event of a state of siege or emergency.

In the *Mukonkole* case, the Supreme Court of Justice, acting as Constitutional Court, found that the application of the death penalty was still consistent with the 2006 Constitution.¹²⁸ It held that Article 61(1) does not abolish the death penalty and that the prohibition on departing from the right to life simply means that, outside those situations provided for by the law, the right to life is protected in all circumstances and cannot be violated arbitrarily.¹²⁹

The ruling followed the rejection of the draft law abolishing the death penalty in 2010.¹³⁰ In this regard, the CNDH is of the view that executing the death penalty would be incompatible with the promise made by the government at different international fora to abolish the death penalty.¹³¹ It argues that this abolition is warranted by the fact that the death penalty no longer has any constitutional basis in the DRC as the 2006 Constitution does not explicitly provide for it,¹³² contrary to the previous Constitution of 4 April 2003.¹³³

The CNDH concludes that, as a result, the DRC should restore the moratorium on the execution of the death penalty, which was initially established in December 1999 before being suspended in March 2002

127 National Commission on Human Rights, *Avis No 001/AP/CNDH – RDC/2017 – Avis et Propositions de la Commission National des Droits de l'Homme Relatif à la Réhabilitation du Moratoire sur les Exécutions de la Peine de Mort en République Démocratique du Congo* (14 September 2017).

128 Supreme Court of Justice, R. Const. 128/TSR, Motion of Unconstitutionality Submitted at the Public Hearing of 26 May 2010 by the Accused Honorable Martin Mukonkole and Mr Norbert Muteba in the Case Opposing them to the Public Prosecutor under RP. 003/CR (28 January 2011) (unpublished).

129 B Kahombo, "The Principle of Complementarity in Practice: A Survey of Congolese Legislation Implementing the Rome Statute of the International Criminal Court", in B Van der Merwe and G Kemp (eds), *International Criminal Justice in Africa, 2016*, Nairobi, Strathmore University Press (2017), p 235.

130 *Ibid*, p 234. See also A Mbata and B Mangu, *Abolition de la Peine de Mort et Constitutionnalisme en Afrique*, Paris, L'Harmattan (2011), pp 67-105.

131 See note 127, p 6.

132 *Ibid*, p 7.

133 Constitution of Transition (4 April 2003), Article 15(4).

pending the adoption of national legislation.¹³⁴ This restoration should include the adoption of a law authorising the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989, which is aimed at the abolition of the death penalty.¹³⁵

4.4 Educating and informing

Normally it falls to the government to ensure the promotion of human rights through teaching, education and dissemination of relevant information across the country.¹³⁶ The CNDH is a mechanism complementary to this. However, it has the potential to become the main promoter of human rights and may be used by the government for the fulfilment of its own constitutional obligation. The CNDH's competence in this regard rests on Article 6(7) and (8) of the Organic Law of March 2013. It is mandated to make citizens aware of their fundamental rights and to organise campaigns of civic education in order to create a culture of respect for human rights.

Since 2015, the CNDH has undertaken three kinds of activities: holding conferences and workshops on human rights; promoting the institution, its legal framework and procedures through the media; and presenting its vision of human rights promotion and protection to civil society organisations.¹³⁷

These activities are insufficient, however. As noted, few Congolese are even aware of the CNDH's existence;¹³⁸ some also confuse its status with that of an NGO.¹³⁹ These problems are indicative of the CNDH's limited accessibility to the public and, conversely, the need for it to be deployed throughout the country.

4.5 Receiving and dealing with complaints and petitions

The CNDH can receive and examine complaints of victims of human rights violations. This is a quasi-jurisdictional competence. It includes an extraterritorial dimension. In fact, the CNDH can deal with human rights violations committed by Congolese or against them abroad, regardless of

134 See note 127, p 7.

135 *Ibid.*

136 Constitution (18 February 2006), Article 45(5)-(7).

137 See note 20, p 56.

138 *Ibid.*, p 76.

139 See note 22.

whether the author is a natural person or a legal entity.¹⁴⁰ However, one may argue that, as a matter of general law, international rules on immunities of foreign states and officials should be observed.

The procedures applicable before the CNDH lead to three main observations. The first concerns those who have *locus standi* before the Commission.¹⁴¹ In the first place this is the victim, or group of victims, of a human rights violation. Of course, a victim can mandate her counsel to submit an application in her name. If in detention, the victim can equally submit his petition through a member of his family or the administrative authority in charge of the management of the prison or detention premises.¹⁴² Cases may also be brought by human rights organisations acting on behalf of victims, and by third parties. All complaints submitted to the CNDH's provincial or external offices are forwarded to the headquarters in Kinshasa for assessment. Moreover, the CNDH can deal with any human rights violation *proprio motu* on the initiative of any Commissioner for Human Rights.

The second observation is that the treatment of cases of human rights violations is made by a commissioner in charge of a permanent or ad hoc sub-commission. He or she has 25 days in which to hear the parties and close his or her investigation. This delay can be extended but not beyond three months. The Manual of Procedure does not specify what happens if the commissioner is still not ready. One may argue that this would amount to a grave violation of procedural rules that could justify the CNDH president's convening a meeting of the bureau to take appropriate measures on the issue, such as conferring the case to another commissioner. The procedure is confidential and the principle of free administration of evidence applies.¹⁴³ In the end, the commissioner must submit his or her report to the plenary assembly with appropriate recommendations.

Thirdly, there are different possible outcomes to cases that are investigated. The main ones are the following: helping victims to lodge their applications or acting on their behalf before the courts; settling cases by reconciling the parties; taking measures to stop human rights violations (for example, by contacting the superior of the perpetrator of the violation,

140 See note 1, Article 5.

141 *Ibid*, Article 28.

142 Manual of Procedure before the National Commission on Human Rights (18 February 2016), Article 13.

143 *Ibid*, Articles 3, 7 and 32. See also note 1, Article 33.

or by making a recommendation to the institution concerned); and closing the case file.¹⁴⁴

In this context, the CNDH receives numerous complaints of human rights violations and examines a few cases *proprio motu*.¹⁴⁵ For example, between March and June 2017, 1,218 complaints were submitted to it.¹⁴⁶ The majority of these complaints came from Kinshasa, and were submitted by NGOs or defence counsels on behalf of victims.¹⁴⁷ This is due to the concentration in the capital city of state institutions and services that perpetrate these violations, and to lack of knowledge about the CNDH in the provinces.¹⁴⁸ In general, between 2015 and 2017 many of these complaints concerned violations of civil and political rights, such as the right to life and physical integrity, the right to freedom of movement, the right to peaceful assembly, and the right to fair trial.¹⁴⁹ The likely reason is the fact that this period coincided with demonstrations held in protest at the delay of presidential and legislative elections until December 2018.

It is hard to know exactly which outcome was reserved for each case. This is because a large number of cases are not documented by the Commission and its procedures are confidential. The CNDH is not under obligation to make its reports public after its investigation of complaints. From the available sources, it is known that there have been a number of successful cases of conciliation, such as the recovery by a Congolese in the village of Lumbwe (High Katanga Province) of land of his that was illegally expropriated by a traditional chief.¹⁵⁰ In other cases, the CNDH recommends what it deems necessary for the improvement of human rights protection in the country. Its recommendations, which are included in its activity reports, may well derive from the treatment of individual cases as well as the investigation of more complex situations of human rights violations. In general, they are addressed to different state institutions (Parliament, government and the judiciary).

Unfortunately, the CNDH has done nothing so far to monitor the implementation of its recommendations. The general trend is that many of them are not complied with. Thus, during the presentation of its activity report for the year 2016-2017 to the National Assembly in May 2018, the

144 Rules of the National Commission on Human Rights, Article 153; Manual of Procedure before the National Commission on Human Rights, Article 41.

145 See note 20, p 82.

146 See note 51, p 52.

147 See note 20, p 76.

148 *Ibid.*

149 See note 51, pp 52-57.

150 *Ibid.*, p 69.

CNDH pointed out that, of the 229 recommendations it made over the year, only 20 were carried out.¹⁵¹ This is a negative outcome which may well affect the credibility of the CNDH as an institution for protecting human rights. There is a need for consistent follow-up of its recommendations and for ensuring that they are implemented.

5 Public accountability

5.1 Reporting annually on all aspects of its work

The CNDH is obligated to report annually on all aspects of its work.¹⁵² Its annual report must be transmitted to other state institutions: the President of the Republic, National Assembly, Senate, government, Constitutional Court, Court of Cassation, State Council, High Military Court, and the public prosecution services. The general reports on the situation of human rights in the DRC are presented to the National Assembly.¹⁵³ The purpose for these reporting procedures is to keep other institutions aware of the work of the CNDH and, more importantly, to draw their attention to its recommendations for improving human rights protection.

Three activity reports have been presented, for the years 2015-2016, 2016-2017 and 2017-2018. There is no delay in this regard, although, at the time of writing, the third report had not been yet published on the CNDH's website.

5.2 Regular consultations with stakeholders

The CNDH does not work in isolation. It attends international meetings dedicated to human rights issues, shares experience with other national human rights institutions, and seeks to strengthen its capacity through these external relations. For example, it is connected to the Network of African National Human Rights Institutions and the Francophone Association of National Human Rights Institutions.¹⁵⁴ Alongside the BCNUDH and the Office of the United Nations High Commissioner for Human Rights, these organisations contributed, in April 2016, to strengthening the capacity of CNDH personnel with regard to handling

151 National Commission on Human Rights, *Présentation du Rapport d'Activités de la CNDH à l'Assemblée Nationale* (10 May 2018), available at <http://www.cndhrdc.cd/g?post=109> (accessed 27 October 2018).

152 See note 1, Article 7(1).

153 *Ibid*, Article 7(2).

154 See note 20, p 51.

complaints of human rights violations, to methods of investigation and to conciliating parties.¹⁵⁵ The CNDH has in turned shared its experience with its counterparts in Burundi and Morocco.¹⁵⁶

A problem concerning the relationship with the BCNUDH is that the latter is perceived as undermining the CNDH by performing the same functions of human rights promotion and protection in the DRC.¹⁵⁷ The BCNUDH is a provisional office of the United Nations and should start transferring all its expertise to the CNDH, which is a permanent body, pending the completion of its mandate, rather than consolidating its presence in the DRC. This would strengthen the CNDH and improve its moral authority on Congolese human rights issues.

Internally within the DRC, the CNDH should keep in touch with other stakeholders. This is the case, first, with the judiciary, which is the guarantor of the individual freedoms and fundamental rights of citizens.¹⁵⁸ In this regard, consultations between the parties can be made in two ways. On the one hand, during its investigations the CNDH is entitled to resort to judicial services for the purpose of discharging its mandate. For example, during the 2017 visits to prisons and detention premises, it was accompanied by an officer of the public prosecution who would release detainees or take any other appropriate measure in cases of irregular or arbitrary detention.¹⁵⁹ It is an obligation for judicial authorities or others whose assistance is requested by the CNDH to assist it, and their failure to do so may constitute the offence of criminal abstention under the Penal Code.¹⁶⁰

However, there is still a problem of harmonisation of activities. It stems from the fact that the CNDH does not seem to take into account the case law of the Constitutional Court in its work, particularly in regard to the issuance of legal opinions. Likewise, the Constitutional Court does not pay attention to the work done by the CNDH. As a consequence, there is a risk of contradictory interpretation of the Constitution and applicable laws, as one may see in regard to the previously mentioned issues the death penalty, on the one hand, and, on the other, gender representation in political institutions and public- and private-sector companies. In the former case, it is important to recall that the CNDH had taken a position

155 *Ibid*, p 28.

156 *Ibid*, p 51.

157 See note 22.

158 Constitution (18 February 2006), Article 150(1).

159 See note 122, p 6.

160 See note 1, Article 30; Rules of the National Commission on Human Rights, Article 181(2).

that Article 61(1) of the 2006 Constitution offers a basis for the abolition of the death penalty, contrary to the interpretation given by the Constitutional Court. This is a violation of Article 168 of the Constitution which states that the judgements of the Constitutional Court are binding on everyone.

Finally, the relationship with the Ministry of Justice and Human Rights raises a number of issues. The CNDH is regularly invited to participate in its activities. This has been the case with the participation of its experts in the development of the national policy on the reform of the judicial sector in 2016 and 2017. More recently, the CNDH contributed to the investigative report of a joint government and civil society commission set up to examine human rights violations that occurred during public demonstrations in December 2017 and January 2018 against the delay of presidential and legislative elections.¹⁶¹ The CNDH's own reports on these events served as working documents.

This kind of collaboration is valuable, but it seems to diminish the CNDH's authority on human rights issues and imply that its contribution is of the same status as that of another state service, whereas such an investigation should indeed be led by it as an independent body specialising in these very issues. Making better use of the CNDH can reduce the government's total costs on activities for promoting and protecting human rights.

6 Conclusion

The CNDH is a legal entity which enjoys financial and administrative autonomy. It is a multi-member institution, technical and apolitical in nature, reflective of diversity, and made up entirely of representatives of civil society. It has close relationships with many other institutions, national and international, and sometimes works together with them. In some respects, its mandate is broader than the standards provided for by the Paris Principles. In this regard, the legal design of the CNDH under the Organic Law of March 2013 is largely consistent with the Paris Principles.

The CNDH is also effective on the ground. It has been performing its functions since 2015, and in the four years in which it has been operational, has recorded a number of achievements. This chapter has highlighted several investigations of human rights violations (demonstrations in

161 Ministry of Human Rights, *Rapport Synthèse de la Commission d'Enquête Mixte-312: Enquête sur les Violations et Atteintes Relatives aux Droits de l'Homme en Lien avec les Manifestations du 31 Décembre 2017 et 21 Janvier 2018 à Kinshasa* (10 March 2018).

Kinshasa; the violation of the right to salary in the public administration; the crisis in Kasai; and visits to prisons and detention premises).

The CNDH has also issued a number of legal opinions, including ones on the consumption of water and electricity, the social responsibility of companies in the mining and forest sectors, the moratorium on the enforcement of the death penalty, and the representation of women in political, public and private organisations. In addition, the CNDH has exercised its quasi-jurisdictional competence to deal with complaints lodged by victims of human rights violations.

All this shows how important its mandate is for the promotion and protection of human rights in the DRC. However, the CNDH has faced numerous difficulties in carrying out its mandate.

The main one is the lack of sufficient financial, infrastructural and logistical means. The CNDH does not have premises of its own for its headquarters but rents private houses for its offices. It has limited financial autonomy because it has never received the budget it requested from the National Assembly. Even the small budget approved for it is not always fully allocated by the government. Donor funding does not fully compensate for such governmental failure. As a result, the CNDH suffers from a lack of sufficient personnel that makes it impossible for it to cover the whole country. Its limited capacity for action forces it to concentrate itself in the capital city Kinshasa, whereas within provinces and other territorial entities many Congolese do not know of its existence.

In terms of the qualification of its members, the requirements are not high. The CNDH comprises both lawyers and non-lawyers, with or without specialist legal expertise. Since the CNDH deals with complex human rights and humanitarian issues, the lack of the best and most competent persons in its composition undermines its ability to carry out its mandate effectively. Another problem is the politicisation of the institution through the appointment of commissioners who are politically connected to the regime in power and of other employees recommended by politicians. This impairs the CNDH's independence and has had an adverse effect on the credibility of its investigative reports. Its conduct gives the impression of being biased – for instance, the tendency is to hide the responsibility of high-ranking state officials, whose involvement in violations is not underscored and legally assessed.

In spite of the strengths of its legal framework, the CNDH's numerous challenges cause it to fall below the standards laid down in the Paris Principles. However, in 2018, it celebrated its accreditation with "A"

status by the Global Alliance of National Human Rights Institutions (GANHRI); attaining this status means that it is recognised as conforming fully to the Paris Principles. This recognition allow, among other things, for its participation in the meetings of the United Nations Human Rights Council and other international human rights fora. Obtaining such surprising recognition is likely to spur it on to improve the quality of its work in the next five years before a new evaluation is carried out.

For this purpose, it is necessary to amend the Organic Law of March 2013. The latter should require that, to be appointed as a commissioner, every candidate must have specialist expertise in human rights, constitutional law, and the law of armed conflict. Such an expertise should combine professional experience with the possession of a law degree, preferably in advanced studies or a doctorate. Furthermore, there is a need to strengthen the capacity of the current CNDH's personnel in legal analysis and assessment of human rights violations. Its members should also demonstrate more independence from the regime in power in the execution of their mission.

As to its relationships with other institutions, there is need to avoid contradictory interpretations of the Constitution with the Constitutional Court and to eliminate overlapping agencies and services, such as the Liaison Entity for Human Rights established within the Ministry of Human Rights. The BCNUDH, which is a provisional office of the United Nations for human rights promotion and protection in the DRC, should transfer all its expertise to the CNDH, which is permanent, and be progressively closed.

Finally, the government should provide the necessary funding to the institution and, most importantly, construct premises for its national and provincial headquarters.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The institutional framework for promoting and protecting human rights in the DRC is laid down in an organic law.

B.2 Legislative and regulatory instruments

PRESIDENCE DE LA REPUBLIQUE

LOI ORGANIQUE N° 13/011 DU 21 MARS 2013 PORTANT INSTITUTION, ORGANISATION ET FONCTIONNEMENT DE LA COMMISSION NATIONALE DES DROITS DE L'HOMME

Exposé des motifs

Le respect de la dignité et de la valeur humaine constitue la substance des Droits de l'Homme. Ces derniers jouissent, sur le plan international, d'une légitimité qui leur confère un poids moral incontestable et qui conduit les Etats et Gouvernements membres des Nations Unies à ratifier des traités et à se soumettre librement aux obligations contraignantes en la matière.

Ce même effort a prévalu en République

Démocratique du Congo, à travers la mise en place de plusieurs structures, notamment celle du Ministère des Droits et Libertés des Citoyens, diversement dénommé selon les époques, ainsi que celle de l'Observatoire National des Droits de l'Homme, institué par le Parlement de Transition en application de la résolution n° 8/DIC/CHSC du Dialogue Intercongolais.

Par ailleurs, il est important de souligner la détermination dont la société civile congolaise a fait montre dans ce domaine ces vingt dernières années.

En dépit de ces multiples entreprises pour la promotion et la protection des Droits de l'Homme, la République Démocratique du Congo accuse, dans ce secteur, un déficit qui impose des innovations induites par le processus démocratique, cristallisé dans la Constitution du 18 février 2006 telle que modifiée par la Loi n° 11/002 du 20 janvier 2011 portant révision de certains articles.

En effet, pour réaffirmer son attachement au respect des Droits de l'Homme et aux libertés fondamentales, la Constitution s'appesantit largement sur les droits civils et politiques, les droits économiques, sociaux et culturels, ainsi que sur les droits collectifs garantis par l'Etat.

Pour confirmer cette volonté politique, elle offre, dans son article 222, alinéa 3, la possibilité de créer une institution d'appui à la démocratie.

Cette institution, en l'occurrence la Commission Nationale des Droits de l'Homme, est un mécanisme mis en place par la présente Loi qui s'assigne comme objectif d'aider les pouvoirs publics à assumer correctement leurs obligations constitutionnelles en la matière.

La Commission Nationale des Droits de l'Homme, CNDH en sigle, est un organisme technique, consultatif, indépendant, pluraliste, apolitique, doté de la personnalité juridique et émergeant au budget de l'Etat.

En vue de préserver son indépendance et sa crédibilité, aucun organe national, étranger ou international ne peut lui donner injonction.

Sa mission, ses attributions, son organisation, sa composition et son fonctionnement sont déterminés par la présente Loi qui s'articule de la manière suivante :

Titre I^{er} : Des dispositions générales

Titre II : De la mission et des attributions

Titre III : De l'organisation, de la composition et du fonctionnement

Titre IV : Des ressources

Titre V : De la procédure devant la CNDH

Titre VI : Des Immunités et du privilège de juridiction

Titre VII : Des dispositions finales

Telle est l'économie générale de la présente Loi.

Loi

L'Assemblée Nationale et le Sénat ont adopté;

La Cour Suprême de Justice a statué;

Le Président de la République promulgue la Loi dont la teneur suit:

TITRE I^{er} : DES DISPOSITIONS GENERALES

Article 1^{er} :

Conformément à l'article 222, alinéa 3, de la Constitution, il est institué, en République Démocratique du Congo, une Commission Nationale des Droits de l'Homme.

La Commission Nationale des Droits de l'Homme, ci-après CNDH, est une institution d'appui à la démocratie. Elle est indépendante, pluraliste, apolitique et dotée de la personnalité juridique.

Elle jouit de l'autonomie administrative, financière et technique.

Article 2 :

Au sens de la présente Loi, il faut entendre par droits de l'homme, les droits inaliénables et inhérents aux êtres humains tels que définis par les dispositions du Titre II de la Constitution et par les instruments juridiques internationaux y relatifs, dûment ratifiés et dont le respect et l'exercice, garantis par l'Etat, permettent l'épanouissement intégral de l'homme.

Article 3 :

La CNDH a son siège à Kinshasa, Capitale de la République Démocratique du Congo.

Ce siège, de même que les bureaux de représentation provinciale et locale, sont inviolables.

En cas de circonstances exceptionnelles empêchant la CNDH de se réunir à son siège habituel, son Bureau peut décider du lieu qui abritera provisoirement ses travaux.

TITRE II : DE LA MISSION ET DES ATTRIBUTIONS

Chapitre 1^{er} : De la mission

Article 4 :

La CNDH est un organisme technique et consultatif chargé de la promotion et de la protection des droits de l'homme. Elle veille au respect

des droits de l'homme et des mécanismes de garantie des libertés fondamentales.

Dans l'accomplissement de sa mission, la CNDH n'est soumise qu'à l'autorité de la Loi.

Article 5 :

La CNDH exerce son action à l'égard des personnes physiques ou morales tant publiques que privées se trouvant sur le territoire national ou à l'étranger.

Elle exerce son action à l'égard des personnes physiques, victimes ou auteurs, et des personnes morales auteurs des violations des droits de l'homme en République Démocratique du Congo.

Elle exerce également son action à l'égard des personnes physiques de nationalité congolaise se trouvant à l'étranger, victimes ou auteurs des violations des droits de l'homme.

Chapitre 2 : Des attributions

Article 6 :

La CNDH a pour attributions de :

- 1 enquêter sur tous les cas de violations des droits de l'homme ;
- 2 orienter les plaignants et victimes et les aider à ester en justice sur toutes les violations avérées des droits de l'homme ;
- 3 procéder à des visites périodiques des centres pénitentiaires et de détention sur toute l'étendue de la République Démocratique du Congo ;
- 4 veiller au respect des droits de la femme et de l'enfant ;
- 5 veiller au respect des droits des personnes avec handicap ;
- 6 veiller au respect des droits des personnes du troisième âge, des personnes avec VIH/Sida, des prisonniers, des réfugiés, des déplacés de guerre, des personnes victimes des calamités de tout genre et des autres groupes vulnérables ;
- 7 faire connaître aux citoyens leurs droits fondamentaux ;
- 8 concourir à la promotion de l'éducation civique et de la culture des droits de l'homme pour une meilleure conscience citoyenne ;
- 9 renforcer les capacités d'intervention des associations de défense des droits de l'homme :

- 10 veiller à l'application des normes juridiques nationales et des instruments juridiques régionaux et internationaux relatifs aux droits de l'homme dûment ratifiés par la République Démocratique du Congo ;
- 11 régler certains cas de violation des droits de l'homme par la conciliation ;
- 12 formuler des recommandations pour la ratification des instruments juridiques régionaux et
- 13 internationaux des droits de l'homme ;
- 14 promouvoir et veiller à l'harmonisation de la législation, des règlements et des pratiques nationaux avec les instruments internationaux relatifs aux droits de l'homme dûment ratifiés par la République Démocratique du Congo ;
- 15 dresser des rapports sur l'état d'application des normes nationales et des instruments juridiques internationaux en matière des droits de l'homme ;
- 16 contribuer à la préparation des rapports que la République Démocratique du Congo présente devant les organisations internationales, en application de ses obligations conventionnelles dans le domaine des droits de l'homme ;
- 17 examiner la législation interne relative aux droits de l'homme et faire des recommandations pour son ordonnancement législatif ;
- 18 formuler des suggestions susceptibles de susciter le sens des devoirs indispensable à la promotion collective des droits de l'homme ;
- 19 émettre des avis et faire des propositions au Parlement, au Gouvernement et aux autres institutions concernant les questions relatives à la promotion et à la protection des droits de l'homme ainsi qu'au droit international humanitaire et à l'action humanitaire ;
- 20 développer des réseaux et des relations de coopération avec les institutions de la République, les organisations locales, nationales et internationales poursuivant les mêmes objectifs ;
- 21 exercer toute autre attribution ou activité rentrant dans le cadre de sa mission.

Article 7 :

La CNDH publie le rapport annuel sur ses activités et le transmet au Président de la République, à l'Assemblée Nationale, au Sénat, au Gouvernement, à la Cour Constitutionnelle, à la Cour de Cassation, au Conseil d'Etat, à la Haute Cour Militaire et aux Parquets près ces juridictions. Ce rapport fait l'objet d'un débat à l'Assemblée Nationale.

Elle publie et leur adresse, en outre, des rapports semestriels sur la situation générale des droits de l'homme en République Démocratique du Congo et des rapports ponctuels chaque fois que la situation l'exige.

Ces rapports sont publiés dans un site Internet.

TITRE III : DE L'ORGANISATION, DE LA COMPOSITION ET DU FONCTIONNEMENT

Chapitre I^{er} : De l'organisation

Article 8 :

La CNDH comprend les organes ci-après :

- 1) l'Assemblée Plénière ;
- 2) le Bureau ;
- 3) les Sous-commissions Permanentes.

La CNDH dispose d'un Secrétariat technique chargé des questions administratives, juridiques et financières.

Elle a un bureau de représentation au chef-lieu de Province, une Antenne dans chaque ville et au chef-lieu de Territoire.

Article 9 :

L'Assemblée Plénière comprend l'ensemble des membres de la CNDH.

Elle est l'organe de conception, d'orientation, de décision et de contrôle de la CNDH.

Ses décisions sont prises par consensus ou, à défaut, par vote majoritaire.

Le Président de la CNDH a rang de Ministre et les autres membres ont rang de Vice-ministre.

Article 10 :

L'Assemblée Plénière adopte, avant la mise en place du Bureau, son Règlement Intérieur.

Ce Règlement ne peut être mis en application que si la Cour Constitutionnelle le déclare conforme à la Constitution dans les quinze jours de sa saisine. Passé ce délai, le Règlement est réputé conforme.

Article 11 :

Le Bureau est l'organe de gestion et de coordination de la CNDH.

Il est composé de 4 membres:

- 1) un Président ;
- 2) un Vice-président ;
- 3) un Rapporteur ;
- 4) un Rapporteur adjoint.

Article 12 :

Les Sous-commissions Permanentes sont des organes techniques chargés de traiter des questions spécifiques ayant trait à la mission de la CNDH.

Elles sont organisées par le Règlement Intérieur.

Article 13 :

La CNDH comprend cinq Sous-commissions

Permanentes:

- 1) la Sous-commission des droits civils et politiques;
- 2) la Sous-commission des droits sociaux, économiques et culturels;
- 3) la Sous-commission des droits collectifs;
- 4) la Sous-commission des droits de la femme et de l'enfant;
- 5) la Sous-commission des droits des personnes avec handicap et autres personnes vulnérables dont les personnes vivant avec le VIH/Sida et les personnes du 3^{ème} âge.

La CNDH peut créer des Sous-commissions ad hoc chargées d'examiner des questions particulières.

Chapitre 2 : De la composition

Article 14 :

La CNDH est représentative des forces sociales engagées dans la promotion et la protection des droits de l'homme.

Elle est composée de neuf membres, chaque genre étant représenté par au moins trente pour cent des membres.

Il s'agit de :

- 1) représentant des organisations non gouvernementales des droits de l'homme;
- 2) un représentant des ordres professionnels;
- 3) un représentant des syndicats;
- 4) un représentant des universitaires;
- 5) deux représentants des confessions religieuses;
- 6) un représentant des personnes avec handicap;
- 7) un représentant des organisations non gouvernementales des droits spécifiques de la femme;
- 8) un représentant des personnes vivant avec le VIH/Sida.

Article 15 :

Nul ne peut devenir membre de la CNDH s'il ne remplit les conditions ci-après:

- 1) être de nationalité congolaise;
- 2) être âgé de 30 ans au moins;
- 3) être titulaire d'un diplôme de graduat au moins ou d'un titre équivalent et justifier d'une expérience professionnelle de 5 ans au plus dans un domaine pouvant présenter un intérêt pour la Commission;
- 4) ne pas appartenir à un organe dirigeant d'une quelconque formation politique;
- 5) faire preuve d'intérêt et de maîtrise dans le domaine des droits de l'homme;
- 6) faire preuve de compétence, de probité morale et intellectuelle;
- 7) produire un extrait de casier judiciaire vierge.

Article 16 :

Les membres de la CNDH sont choisis par l'Assemblée Nationale sur une liste de 2 personnalités par groupe, dont une femme, désignées par leurs pairs.

Les représentants des confessions religieuses sont choisis par l'Assemblée Nationale sur une liste de 4 personnalités, dont deux femmes, désignées par leurs pairs.

Article 17 :

Les membres de la CNDH siègent à temps plein.

Ils sont investis par Ordonnance du Président de la République.

Article 18 :

La qualité de membre de la CNDH est incompatible avec les fonctions de:

- 1) membre du Gouvernement;
- 2) membres d'autres institutions de la République et de celles d'appui à la démocratie;
- 3) membre des Forces Armées, de la Police Nationale et des services de sécurité;
- 4) magistrat;
- 5) agent de carrière des services publics de l'Etat;
- 6) cadre de la Territoriale;
- 7) mandataire public;
- 8) membre des cabinets des institutions politiques et des autres institutions d'appui à la démocratie;
- 9) employé dans une entreprise publique.

La qualité de membre de la CNDH est également incompatible avec l'exercice des fonctions rémunérées conférées par un Etat étranger ou un organisme international.

Article 19 :

Les membres de la CNDH sont désignés pour un mandat de 5 ans renouvelable une seule fois.

Sans préjudice de l'alinéa précédent, leurs fonctions prennent fin pour cause de :

- 1) démission;
- 2) empêchement définitif;
- 3) condamnation irrévocable à une peine de servitude pénale principale pour infraction internationale;
- 4) déchéance du mandat sur proposition des deux tiers des membres pour manquement grave sans préjudice de l'action judiciaire qui peut être engagée contre lui;
- 5) décès.

Aux termes du présent article, constitue un manquement grave, tout acte ou tout comportement susceptible de compromettre la mission de la CNDH.

Article 20 :

En cas de vacance, il y sera pourvu conformément aux dispositions des articles 15 et 16 relatives aux modalités de désignation des membres de la CNDH.

Les membres de la CNDH désignés en remplacement de ceux dont les fonctions ont pris fin avant leur terme normal, achèvent le mandat de ceux qu'ils remplacent.

Article 21 :

La CNDH se réunit de plein droit au plus tard le cinquième jour qui suit son investiture par le Président de la République.

La séance d'ouverture est présidée par le doyen d'âge, assisté de deux membres les moins âgés et porte sur l'élection des membres du Bureau et des coordonnateurs des Sous-commissions.

Chapitre 3 : Du fonctionnement

Article 22 :

Avant leur entrée en fonction, les membres de la CNDH prêtent, devant la Cour Constitutionnelle, le serment ci-après:

« Moi,, je jure sur l'honneur, de respecter la Constitution et les Loix de la République Démocratique du Congo, de remplir loyalement et fidèlement les fonctions de membre de la Commission Nationale des Droits de l'Homme.

Je prends l'engagement solennel de n'exercer aucune activité susceptible de nuire à l'indépendance et à la transparence de la Commission Nationale des Droits de l'Homme, de m'en tenir à l'obligation de confidentialité, même après la cessation de mes fonctions ».

Article 23 :

Les membres de la CNDH bénéficient des indemnités et avantages qui leur assurent l'indépendance nécessaire à l'accomplissement de leur mission.

A leur entrée en fonction, ils ont droit aux frais d'installation équivalant à six mois de leurs émoluments.

A la fin de leurs fonctions, ils bénéficient d'une indemnité de sortie équivalant à six mois de leurs émoluments.

Article 24 :

Les représentants de la CNDH dans les structures provinciales et locales sont nommés par le Bureau après avis conforme de l'Assemblée Plénière.

Article 25 :

La CNDH se dote du personnel nécessaire à son fonctionnement selon les modalités définies par le Règlement Intérieur.

TITRE IV : DES RESSOURCES

Article 26 :

Les ressources de la CNDH sont constituées principalement de la dotation émergeant au budget de l'Etat.

La CNDH élabore, conformément à la Loi n° 10/010 du 27 avril 2010 relative aux finances publiques, ses prévisions budgétaires portant exclusivement sur la rémunération et le fonctionnement.

Elle les transmet au Gouvernement.

Article 27 :

La CNDH peut obtenir des dons et legs conformément aux Lois et Règlements en vigueur.

Leurs valeurs sont inscrites dans les prévisions budgétaires de l'année qui suit leur libération.

TITRE V: DE LA PROCEDURE DEVANT LA CNDH

Article 28 :

Toute personne physique victime de violation des droits de l'homme peut saisir la CNDH. De même, un groupe de personnes peut collectivement saisir la CNDH.

Les organisations légalement constituées, ayant la défense et la promotion des droits de l'homme dans leurs missions, peuvent aussi saisir la CNDH en lieu et place des victimes.

La CNDH peut également se saisir d'office.

Article 29 :

Toute personne physique ou toute organisation ayant saisi la CNDH ne peut être inquiétée. Les autorités tant civiles que militaires assurent sa protection.

Cette protection s'étend aux proches de la victime, aux membres de l'organisation ainsi qu'aux témoins.

Article 30 :

La CNDH peut, dans l'accomplissement de sa mission, solliciter la collaboration de toute autorité publique, notamment les forces de l'ordre, les autorités administratives et judiciaires ou autre personne physique ou morale.

Les autorités et les personnes saisies à cet effet sont tenues de lui apporter leur concours.

Article 31 :

Sous réserve du respect des droits et libertés garanties par la Constitution, la CNDH a le pouvoir d'accéder à tout lieu pour vérifier les allégations relatives aux violations des droits de l'homme.

Article 32 :

L'anonymat est accordé à toute personne qui le requiert pour son témoignage devant la CNDH.

Article 33 :

La procédure devant la CNDH est confidentielle.

La violation de la confidentialité est punie des peines prévues pour la violation du secret professionnel.

TITRE VI : DES IMMUNITÉS ET DU PRIVILEGE DE JURIDICTION

Article 34 :

Les membres, les cadres et agents de la CNDH jouissent de la liberté de mouvement et de la sécurité sur toute l'étendue de la République.

Article 35 :

Les membres de la CNDH ne peuvent être recherchés, poursuivis, arrêtés, détenus ou jugés en raison de leurs opinions aussi bien durant l'exercice de leur mandat qu'après, pour les opinions émises dans l'exercice de leurs fonctions.

Ils sont justiciables de la Cour de Cassation.

TITRE VII: DES DISPOSITIONS FINALES

Article 36 :

Le Règlement Intérieur détermine les autres modalités pratiques relatives à l'organisation et au fonctionnement des organes ainsi que des structures provinciales et locales de la CNDH.

Articles 31 :

La présente Loi entre en vigueur à la date de sa promulgation.

Fait à Kinshasa, le 21 mars 2013

Joseph KABILA KABANGE

B.3 INTERNAL RULES AND REGULATIONS

B.3.1 Manual on proceedings before the CNDH



TABLES DES MATIÈRES

PRÉAMBULE.....

CHAPITRE I : DES DISPOSITIONS GÉNÉRALES

CHAPITRE II : DES DEFINITIONS DES CONCEPTS.....

CHAPITRE III : DES COMPÉTENCES ET ATTRIBUTIONS

Section I : De la compétence matérielle.....

Section II : De la compétence personnelle et territoriale.....

Section III : Des moyens d'actions.....

CHAPITRE IV : DE LA RECEPTION DES PLAINTES ET DE LA SAISINE DE LA CNDH.....

CHAPITRE V : DU TRAITEMENT DES PLAINTES

CHAPITRE VI : DES ENQUETES, INVESTIGATIONS, MONITORING ET ADMINISTRATION DES PREUVES

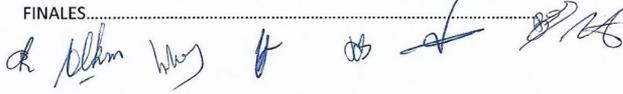
CHAPITRE VII : DE LA CONCILIATION.....

CHAPITRE VIII: DE LA PROTECTION DES CADRES ET AGENTS DE LA CNDH.....

CHAPITRE IX: DE LA PROTECTION DES VICTIMES ET DES TEMOINS

CHAPITRE X : DES MODES DE CLÔTURE DES PROCÉDURES.....

CHAPITRE XI : DE LA RÉVISION DU PRÉSENT MANUEL ET DES DISPOSITIONS FINALES.....



PRÉAMBULE

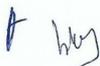
L'Assemblée Plénière de la Commission Nationale des Droits de l'Homme ;

Vu la Constitution de la République Démocratique du Congo du 18 février 2006 telle que modifiée par la Loi n° 11/02 du 20 janvier 2011 portant révision de certains articles de la Constitution spécialement en son article 222 alinéa 3 ;

Vu la Loi organique n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme ;

Vu le Règlement Intérieur de la Commission Nationale des Droits de l'Homme du 24 avril 2015, spécialement en son article 154 ;

Adopte le présent Manuel des Procédures devant la Commission Nationale des Droits de l'Homme dont la teneur suit :

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CHAPITRE I : DES DISPOSITIONS GENERALES

Article 1 :

Le présent manuel définit les compétences, les attributions relatives au traitement des plaintes et les modalités de saisine de la CNDH ; en fixe les procédures d'enquêtes, d'investigations, de récusation, d'administration de preuves ainsi que les mécanismes de clôture.

Article 2 :

Il est principalement destiné aux Membres, Cadres, Agents de la CNDH ainsi qu'aux Enquêteurs, Experts, Victimes, Témoins et Auteurs présumés de Violations des Droits de l'Homme.

Article 3 :

Les procédures devant la CNDH sont essentiellement gratuites et confidentielles.

CHAPITRE II : DES DEFINITIONS DES CONCEPTS

Article 4. : Au terme du présent Manuel des procédures, on entend par :

- **Enquête et investigation**

Enquête : Mesure d'instruction consistant à recueillir des témoignages ou autres éléments permettant à la CNDH de parvenir à la manifestation de la vérité.

Investigation : Recherche attentive et suivi des éléments de conviction pour établir la commission d'une violation des droits de l'homme.

Article 5. : Récusation et Déport

Récusation : Acte par lequel un plaignant ou un dénonciateur ayant saisi la CNDH refuse d'être entendu par ou en présence d'un enquêteur de la CNDH dont il conteste la partialité.

Déport : Fait pour un enquêteur avant même d'être récusé mais avec l'autorisation du Bureau de se déporter pour motif de conscience ou parce qu'il estime se trouver dans une situation qui peut l'empêcher de rester impartial.



Article 6 : Plainte, Dénonciation, saisine et auto saisine

Plainte : Acte par lequel la victime d'une violation des droits de l'homme ou son représentant porte ce fait à la connaissance de la CNDH ;

Dénonciation : Déclaration écrite ou orale par laquelle une personne informe la CNDH de la commission d'un acte de violation des droits de l'homme.

Saisine : Action de porter devant la CNDH une question ayant trait aux violations des droits de l'homme et sur laquelle celle-ci est appelée à statuer.

Auto saisine : Action par laquelle la CNDH se saisit d'office d'une question ayant trait aux violations des droits de l'homme.

Article 7 : principe de la liberté de preuve

Faculté laissée à toute personne appelée à donner sa version des faits devant la CNDH de recourir à tous moyens susceptibles de prouver les faits allégués.

- **principe de l'opportunité d'appréciation de la pertinence et de l'admissibilité des preuves**

Faculté laissée à tout instructeur d'apprécier la valeur et l'admissibilité des moyens de preuves qui lui sont présentés.

- **principe de témoignage par procédé des nouvelles technologies de l'information et de la communication**

Fait de présenter une déposition orale par liaison audio ou vidéo ou par tout autre procédé des nouvelles technologie de l'information et de la communication pour autant que la technique utilisée permette à l'instructeur d'interroger le témoin pendant qu'il dépose.

Le lieu choisi pour témoigner par utilisation de ces procédés doit se prêter à une déposition franche et sincère, dans le strict respect de la sécurité, du bien-être physique et psychologique, de la dignité et de la vie privée de la personne.

- **principe de témoignage préalablement enregistré**

Possibilité reconnue ou laissée à l'instructeur de recueillir des témoignages déjà enregistrés sur support audio ou vidéo, ainsi que des transcriptions ou d'autres preuves écrites de ce témoignage, pour autant que :

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le témoin dont le témoignage a été enregistré ne comparait pas en personne ;

le témoin dont le témoignage a été enregistré comparait et ne s'oppose pas à son témoignage préenregistré

principe de/du témoignage incriminant leurs auteurs

Fait de donner des garanties à certains témoins dans les cas ci-après :

- un témoin peut refuser de faire toute déclaration qui risquerait de l'incriminer ;
- lorsqu'un témoin comparait après avoir reçu des garanties qu'il ne risque pas d'être poursuivi, l'instructeur ou la CNDH peut lui enjoindre de répondre à la question ou aux questions ;
- lorsqu'un témoin a reçu des garanties que les éléments de preuves contenus dans sa déposition resteront confidentiels et ne seront pas révélés au public ou à un Etat et ne seront pas utilisés directement ou indirectement contre lui dans le cadre d'une poursuite ultérieure.

• **principe de l'expertise**

Fait pour l'instructeur de recourir à une expertise, aux hommes de l'art ou aux scientifiques.

• **principe d'administration de la preuve admise pour des cas spécifiques de violations des droits de l'homme**

Fait pour l'instructeur de recourir aux preuves admises pour des cas spécifiques des violations des droits de l'Homme.

CHAPITRE III : DES COMPÉTENCES ET DES ATTRIBUTIONS

Section I : De la compétence matérielle

Article 8 :

La CNDH est un organisme apolitique, indépendant, technique et consultatif chargé de la promotion et de la protection des droits de l'homme ; ceux-ci compris comme étant des droits inaliénables et inhérents aux êtres humains tels que définis par les dispositions du Titre II de la Constitution du 18 février 2006 et par les instruments juridiques internationaux y relatifs, dûment ratifiés par la République Démocratique du Congo.



Article 9 :

La CNDH veille au respect des droits de l'homme et des mécanismes de garantie des libertés fondamentales.

Section II : De la compétence personnelle et territoriale

Article 10:

La CNDH exerce son action à l'égard des personnes physiques ou morales, victimes ou auteurs des violations des droits de l'Homme se trouvant sur le territoire national et des personnes physiques ou morales de nationalité congolaise, victimes ou auteurs des violations des droits de l'homme se trouvant à l'étranger.

Section III : Des attributions relatives au traitement des plaintes

Article 11 :

La CNDH a comme attributions :

- enquêter sur tous les cas de violations des droits de l'homme ;
- orienter les plaignants et victimes et les aider à ester en justice sur toutes les violations avérées des droits de l'homme ;
- régler certains cas de violation des droits de l'homme par la conciliation.

CHAPITRE IV : DE LA RECEPTION DES PLAINTES ET DE LA SAISINE DE LA CNDH

Article 12:

Toute personne ou groupe de personnes qui s'estime victime d'une violation des droits de l'homme peut saisir la CNDH.

La CNDH peut être aussi saisie par :

- Un tiers
- Un groupe des personnes agissant collectivement
- Les ONG de défense des droits de l'homme.

Article 13 :

Les personnes privées de liberté peuvent saisir la CNDH soit par le biais des autorités publiques en charge de leur lieu de détention, soit par le biais de leurs Conseils ou d'un membre de famille.

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La confidentialité de leur plainte doit être strictement respectée par ces autorités ainsi que les autres personnes énumérées ci-dessus.

Article 14 :

La CNDH peut s'autosaisir.

L'auto saisine de la CNDH est initiée par tout Commissaire National des Droits de l'Homme qui en informe le Bureau.

Cette disposition s'applique mutatis mutandis aux Coordonnateurs Provinciaux et aux Chefs d'Antennes Urbaines ou Territoriales.

Article 15 :

La plainte peut être écrite ou verbale. Elle peut aussi être faite par tout moyen de communication

L'expression « Tout moyen de communication » comprend : l'envoi de message électronique, le fax, le support audiovisuel ou tout autre procédé de nouvelles technologies de l'information et de la communication.

Article 16 :

Toute plainte écrite ou verbale est adressée au Président de la CNDH qui l'oriente, dès réception, aux services compétents.

S'agissant des plaintes émanant des Provinces et/ou de l'extérieur du pays, leur transmission au Bureau de la CNDH peut s'effectuer soit par voie électronique ou postale, soit par toute autre voie, pourvu que le courrier et éventuellement ses annexes soient sécurisés et garde son caractère strictement confidentiel vis-à-vis des tiers.

Article 17 :

Lorsqu'elle est verbale, la plainte est suivant les cas, actée par un préposé :

- du Secrétariat Technique ;
- du bureau de Représentation Provinciale ;
- d'une Antenne Urbaine ;
- ou d'une Antenne Territoriale.

Toutefois, une plainte verbale réceptionnée par un préposé du Cabinet est transférée au Secrétariat Technique pour y être enregistrée et numérotée.

Article 18 :

Sous peine d'irrecevabilité, la plainte ne doit pas :

- être anonyme ;



- contenir des propos injurieux ou outrageants ;
- porter atteinte aux bonnes vies et mœurs ;
- porter sur des faits pour lesquels la Justice est déjà saisie, sauf en cas de déni de justice.

CHAPITRE V : DU TRAITEMENT DES PLAINTES

Article 19 :

Le Secrétariat Technique, le bureau de représentation provinciale, le bureau d'antenne urbaine ou le bureau d'antenne territoriale, procède à l'examen préalable des plaintes afin de s'assurer de leur recevabilité au regard des conditions de forme.

Suivant les cas, ils peuvent :

- réorienter le requérant lorsque les faits relèvent de la compétence d'une autre institution et en informer le Président ;
- inviter le requérant à corriger sa plainte lorsque les irrégularités de forme sont mineures.

Article 20 :

Lorsqu'elle est jugée recevable, la requête est affectée par le Président à une sous-commission permanente ou ad hoc compétente pour investigations et traitement. Cette dernière dispose d'un délai de 25 jours, à compter de la date de sa désignation, pour soumettre à l'Assemblée plénière, son rapport sur les diligences effectuées, assorties d'avis et recommandations.

Le Président peut, cependant, en cas de violation grave, manifeste ou continue, convoquer le Bureau qui se réunit sans délai pour prendre toute mesure urgente.

Article 21 :

Au cas où, passé le délai des 25 jours prévu à l'article précédent, la sous-commission permanente ou ad hoc concernée, est dans l'incapacité de produire son rapport, il en informe le Bureau, qui peut lui accorder un délai supplémentaire en fonction des actes à accomplir.

Le bureau peut dans ces circonstances lui apporter son assistance.

En tout état de cause, tout dossier doit être clos dans les trois mois suivant la saisine de la CNDH.

Toutefois, tout Membre, Cadre, Agent administratif ou Agent technique de la CNDH peut être récusé par une ou un plaignant, suivant une procédure organisée aux articles 148 à 152 du Règlement Intérieur de la CNDH

Article 22:

Dans le cadre de l'instruction, la sous-commission permanente ou ad hoc concernée communique la requête par le biais du Président de la CNDH à l'administration mise en cause pour ses éléments de réponse. Celle-ci dispose d'un délai de 72 heures à compter de la date de sa notification pour y procéder.

La CNDH peut également inviter l'autorité publique concernée à se présenter devant elle.

Article 23:

La CNDH peut recourir également au témoignage ou à tout sachant.

Toute personne appelée à se présenter devant la CNDH dans le cadre d'une plainte, soit pour confirmer ses allégations ou apporter son témoignage, soit pour donner sa version des faits, est tenue de répondre à l'invitation.

Les invitations sont signées par le Président de la CNDH ou son Vice-Président.

En Province, elles sont signées par le Coordonnateur Provincial et le Chef d'Antenne ou leurs Adjoints respectifs.

Article 24 :

Les instances habilitées pour l'instruction des requêtes font preuve de neutralité et d'impartialité dans l'exercice de leurs tâches et les cas de violation examinés dans le cadre de la procédure définie dans le présent Chapitre, sont gardés confidentiels.

CHAPITRE VI : DES ENQUETES, INVESTIGATIONS, MONITORING ET ADMINISTRATION DES PREUVES

Article 25 :

La CNDH peut, dans l'accomplissement de sa mission, solliciter la collaboration de toute autorité publique, notamment les forces de l'ordre, les autorités administratives et judiciaires ou autre personne physique ou morale.

Article 26 :

Les autorités et les personnes saisies à cet effet sont tenues de lui apporter leur concours.

Article 27 :

A l'occasion des enquêtes ou investigations, en sus de l'ordre de mission, la seule présentation de la Carte de Légitimation ou de la Carte de Service de la CNDH suffit à tout Membre, Agent ou Cadre technique de cette Institution pour accéder à tout lieu en vue d'accomplir, en tout temps, ce devoir.

Article 28 :

La CNDH a le pouvoir d'accéder à tout lieu pour vérifier les allégations relatives aux violations des droits de l'homme, sous réserve du respect des droits et libertés garantis par la Constitution.

Article 29 :

Pendant ses investigations, tout Membre, Cadre, Agent ou Enquêteur de la CNDH peut recourir à tout matériel ou procédé susceptible de lui permettre d'accéder aux informations recherchées.

Article 30 :

Tout Membre, Agent ou Enquêteur de la CNDH peut procéder, soit individuellement soit en équipe, à des visites périodiques des centres pénitentiaires et de détention sur toute l'étendue de la République Démocratique du Congo en vue de s'assurer du respect ou non des conditions carcérales des prisonniers ou détenus qui s'y trouvent.

Article 31 :

Un Manuel des procédures du Monitoring fixe les modalités d'application.

Article 32 :

Les règles d'administration des preuves devant la CNDH obéissent aux principes et modes suivants :

- la liberté de preuves ;
- l'opportunité d'appréciation de la pertinence et de l'admissibilité des preuves ;

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- l'admission du témoignage ;
- l'engagement solennel ;
- le témoignage par procédé des nouvelles technologies de l'information et de la communication notamment liaison audio ou vidéo, vidéo conférence, etc. ;
- le témoignage préalablement enregistré ;
- le témoignage admis pour des cas spécifiques de violations des droits de l'homme ;
- le témoignage incriminant leurs auteurs ;
- les témoignages des proches incriminant l'auteur de violation des droits de l'homme ;
- l'expertise.

CHAPITRE VII : DE LA CONCILIATION

Article 33 :

La CNDH peut régler certains cas de violation de Droits de l'Homme par la conciliation.

Toutefois, il ne saurait y avoir de conciliation pour des faits susceptibles de poursuites pénales ou d'autres faits spécifiquement proscrits par la loi.

Article 34 :

La procédure de conciliation peut être initiée soit à la demande des parties ou de l'une d'entre elles, soit par la CNDH.

Dans tous les cas, le consentement des parties est obligatoire.

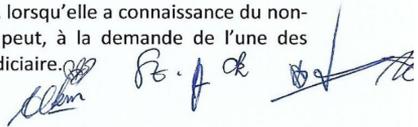
Article 35 :

La CNDH propose aux parties une Convention de conciliation assortie de recommandations mutuellement acceptables, qui satisfait les intérêts des parties ainsi que l'intérêt public.

Une fois que la convention est librement signée par les parties, la CNDH ou la partie la plus diligente saisit le juge compétent pour obtenir un jugement d'expédient.

Article 36 :

Sans préjudice pour les parties, la CNDH, lorsqu'elle a connaissance du non-respect des termes de la Convention, peut, à la demande de l'une des parties, déferer l'affaire à l'institution judiciaire.



CHAPITRE VIII : DE LA PROTECTION DES CADRES ET AGENTS DE LA CNDH

Article 37 :

Les Cadres et Agents de la CNDH, dans l'exercice de leurs fonctions, ne peuvent être poursuivis ni arrêtés qu'avec l'autorisation du Président de la CNDH, sauf en cas de flagrance.

La décision de poursuites des personnes citées à l'alinéa précédent est réservée au Procureur Général près la Cour d'Appel conformément aux articles 10 et 13 du Code de Procédure Pénale congolais.

CHAPITRE IX : DE LA PROTECTION DES VICTIMES ET TÉMOINS

Article 38 :

Toute personne physique ou morale ayant saisi la CNDH ne peut, en aucun cas, être inquiétée.

Cette protection s'étend aux témoins.

Article 39 :

Le Bureau de la CNDH peut prendre toute mesure exceptionnelle pour la protection des victimes et des témoins.

Article 40:

L'anonymat est accordé à toute personne physique ou morale qui le requiert.

CHAPITRE X : DES MODES DE CLÔTURE DES PROCÉDURES

Article 41 :

Le rapport établi par l'instructeur est soumis à l'Assemblée plénière pour adoption après débat.

L'Assemblée plénière peut, suivant les cas :

- prendre toutes les mesures nécessaires pour faire cesser la violation. Elle peut notamment saisir le supérieur hiérarchique de l'auteur de la violation, le chef de l'Exécutif, le Président de l'Assemblée nationale ou l'autorité judiciaire ;
- orienter les victimes vers les juridictions compétentes et leur apporter l'assistance judiciaire en cas de nécessité ;
- Ester en justice pour compte des victimes
- classer sans suite le dossier si les faits ne sont pas fondés.

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CHAPITRE XI: DE LA REVISION DU PRESENT MANUEL ET DES DISPOSITIONS FINALES

Article 42 :

Le présent manuel des procédures peut être modifié à l'initiative du Bureau de la CNDH ou à la demande de 2/3 des membres de l'Assemblée Plénière de la CNDH.

Article 43:

La décision portant révision ou modification d'une ou de plusieurs dispositions du présent Manuel des procédures est prise par l'Assemblée Plénière par consensus ou, à défaut, par vote majoritaire de 2/3 des Membres de la CNDH.

Article 44 :

Les plaintes ainsi que toutes autres archives sont gardées et conservées suivant une procédure strictement confidentielle définie par la CNDH.

Article 45 :

La CNDH dispose de différentes fiches adaptées aux spécificités de cas de violations des droits de l'homme.

Article 46 :

Le présent Manuel des procédures entre en vigueur à la date de son adoption par l'Assemblée Plénière.

Fait à Kinshasa, le 18 Février 2016

LES MEMBRES DE LA PLENIERE,

MWAMBA MUSHIKONKE Mwamus : Président

AMURI LUMUMBA WA MAYEMBE : Vice-Président

LUNTADILA NZUZI Belinda : Rapporteur

NEMBUNZU TINDANE Chantal : Rapporteur Adjoint

MURHOLA Fernandez : Commissaire

EMBUSA ENDOLE Ghislain: Commissaire

KENGE NGOMBA TSHILOMBAYI Marie-Thérèse: Commissaire

WALA - WALA NGALA Olivier: Commissaire

BILONDA MAKENGA Astrid : Commissaire

B.3.2 Administrative rules of the CNDH

REGLEMENT ADMINISTRATIF

Kinshasa, mars 2016

PREAMBULE

L'Assemblée Plénière de la Commission Nationale des Droits de l'Homme ;

Vu la Constitution de la République Démocratique du Congo telle que modifiée par la loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la constitution de la République Démocratique du Congo du 18 février 2006, spécialement en son article 222, alinéa 3 ;

Vu la Loi organique n°13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme ;

Vu le Règlement Intérieur de la Commission Nationale des Droits de l'Homme du 24 avril 2015, spécialement en ses articles 84, 105, 128 et 154 ;

Adopte le présent Règlement Administratif dont la teneur suit :

CHAPITRE I : DE L'OBJET

Article 1 :

Le présent Règlement Administratif détermine, précise et complète les règles contenues dans le Règlement intérieur de la Commission Nationale des Droits de l'Homme.

Il régit le personnel politique et d'appoint des membres de la CNDH, les experts des groupes de travail des Sous-Commissions Permanentes, le personnel du Secrétariat Technique, le personnel des Bureaux de Représentation en provinces et le personnel des Antennes des villes et chefs-lieux des Territoires, y compris les agents de carrière des services publics de l'Etat ou d'autres collectivités publiques placés en détachement auprès de la CNDH.

CHAPITRE II : DE L'ORGANISATION ET DES ATTRIBUTIONS DU PERSONNEL DE LA CNDH

Section 1 : Du Cabinet

Article 2 :

La CNDH est dotée d'un Cabinet unique sous l'autorité directe du Président.

Les Membres de la CNDH sont assistés, dans l'accomplissement de leurs tâches, d'un personnel politique et d'appoint.

Sous-section I : Structure administrative du Cabinet

Article 3 :

Le Cabinet unique, placé sous l'autorité du Président, bénéficie de la collaboration d'un personnel politique et d'appoint qui peut être puisé dans le personnel administratif et technique de la CNDH ou en dehors.

Article 4 :

Le personnel politique du Cabinet est composé de :

- 1) Un Directeur de Cabinet ;
- 2) Un Directeur de Cabinet adjoint ;
- 3) Chefs des cabinets ;
- 4) Conseillers ;
- 5) Chargés de Missions ;
- 6) Chargés d'Etudes ;
- 7) Secrétaires Particuliers ;
- 8) Assistants ;
- 9) Secrétaires administratifs ;
- 10) Secrétaire du Directeur de cabinet ;
- 11) Chef de protocole ;
- 12) Chef de protocole adjoint ;
- 13) Intendant ;
- 14) Intendant adjoint ;
- 15) Attaché de presse ;

- 16) Assistant de l'Attaché de presse ;
- 17) Un webmaster (administrateur du site internet) ;
- 18) Un Contrôleur du budget affecté ;
- 19) Un Sous-gestionnaire des crédits ;
- 20) Un Comptable public ;
- 21) Un Comptable subordonné ;
- 22) Opérateurs de saisie ;
- 23) Préposés des courriers ;
- 24) Hôtesse ;
- 25) Attachés de sécurité ;
- 26) Chauffeurs ;
- 27) Huissiers.

Sous-Section 2 : Répartition du personnel du Cabinet entre les membres de la CNDH

Article 5 :

Le personnel du Cabinet est reparti entre les Membres du Bureau et les Coordonnateurs des Sous-Commissions permanentes de la CNDH.

Paragraphe I : Le personnel rattaché aux membres du Bureau de la CNDH

Article 6 :

Le personnel politique et d'appoint près le Président est composé de :

- 1) Un Directeur de Cabinet ;
- 2) Un Directeur de Cabinet adjoint ;
- 3) Neuf Conseillers ;
- 4) Deux Chargés de Missions ;
- 5) Deux Chargés d'Etudes ;
- 6) Un Secrétaire Particulier du Président ;
- 7) Un Assistant du Président ;
- 8) Deux Secrétaires administratifs ;
- 9) Un Secrétaire du Directeur de cabinet ;
- 10) Un Chef de protocole ;
- 11) Un chef de protocole adjoint ;
- 12) Un Intendant ;

- 13) Un Intendant adjoint ;
- 14) Un Attaché de presse ;
- 15) Un Assistant de l'Attaché de presse ;
- 16) Un webmaster (administrateur du site internet) ;
- 17) Un Contrôleur du budget affecté ;
- 18) Un Sous-gestionnaire des crédits ;
- 19) Un Comptable public ;
- 20) Un Comptable subordonné ;
- 21) Quatre opérateurs de saisie ;
- 22) Deux préposés des courriers ;
- 23) Trois hôteses ;
- 24) Neuf attachés de sécurité ;
- 25) Trois chauffeurs ;
- 26) Deux huissiers.

Article 7 :

Le personnel politique et d'appoint près le Vice-Président est composé de :

- 1) Un Chef de Cabinet ;
- 2) Six Conseillers ;
- 3) Un Chargé des Missions ;
- 4) Un Chargé d'études ;
- 5) Un Assistant ;
- 6) Un Secrétaire particulier ;
- 7) Un Secrétaire de Cabinet ;
- 8) Un Secrétaire de cabinet adjoint ;
- 9) Un Rédacteur ;
- 10) Deux Opérateurs de saisie ;
- 11) Un Préposé aux indicateurs d'entrée et de sortie ;
- 12) Deux Hôteses ;
- 13) Six Attachés de sécurité ;
- 14) Un Agent de protocole ;
- 15) Un huissier ;
- 16) Un chauffeur.

Article 8 :

Le personnel politique et d'appoint près le Rapporteur est composé de :

- 1) Un Chef de Cabinet ;
- 2) Quatre Conseillers ;
- 3) Un Chargé de missions ;
- 4) Un Assistant ;
- 5) Un Secrétaire particulier ;
- 6) Un Chargé d'Etudes ;
- 7) Un Secrétaire de Cabinet ;
- 8) Un Secrétaire de Cabinet Adjoint ;
- 9) Un Rédacteur ;
- 10) Un Rédacteur adjoint ;
- 11) Deux Opérateurs de saisie ;
- 12) Un Préposé aux indicateurs d'entrée et de sortie ;
- 13) Deux Hôtesses ;
- 14) Six Attachés de sécurité ;
- 15) Un Agent de protocole ;
- 16) Un Chauffeur ;
- 17) Un Huissier.

La Cellule de communication rattachée au Rapporteur est composée des experts en communication et journalistes accrédités auprès de la CNDH.

Article 9 :

Le personnel politique et d'appoint près le Rapporteur adjoint est composé de :

- 1) Un Chef de Cabinet ;
- 2) Quatre Conseillers ;
- 3) Un chargé de missions ;
- 4) Un Assistant ;
- 5) Un Secrétaire particulier ;
- 6) Un Secrétaire de Cabinet ;
- 7) Un Secrétaire de Cabinet adjoint ;
- 8) Un Intendant ;
- 9) Un Rédacteur ;
- 10) Deux Opérateurs de saisie ;
- 11) Un Préposé aux indicateurs d'entrée et de sortie ;
- 12) Deux Hôtesses ;
- 13) Un Agent du protocole ;
- 14) Six Attachés de sécurité ;

- 15) Un Chauffeur ;
- 16) Un Huissier.

Paragraphe 2 : Le personnel rattaché aux Coordonnateurs des Sous-Commissions Permanentes

Article 10 :

Le personnel politique et d'appoint qui assiste les cinq Coordonnateurs des Sous-Commissions Permanentes dans l'accomplissement de leurs tâches est composé, pour chacun d'eux, en ce qui le concerne, de :

- 1) Un Chef de Cabinet ;
- 2) Trois Conseillers ;
- 3) Un Chargé de Missions ;
- 4) Un Assistant ;
- 5) Un Secrétaire particulier ;
- 6) Six Attachés de sécurité ;
- 7) Un Opérateur de saisie ;
- 8) Un Chargé des courriers ;
- 9) Deux Hôteses ;
- 10) Un Huissier ;
- 11) Un Chauffeur.

Article 11:

Les personnes visées aux articles 6 à 10 sont nommées et, le cas échéant, relevées de leurs fonctions par le Président de la CNDH sur proposition respective des membres auxquels elles sont rattachées.

Sous-Section 3 : Des attributions des membres du Cabinet

Article 12 :

Sous l'autorité du Président de la CNDH, le Directeur de Cabinet est chargé de :

- 1) Assurer la coordination et la supervision du personnel et des activités du cabinet ;
- 2) Assurer le suivi et le traitement des dossiers, des décisions et des directives du Bureau ;
- 3) Veiller au maintien de l'ordre et à la bonne marche des activités au sein du Cabinet ;

- 4) Attribuer, pour traitement, les dossiers aux conseillers et en assurer la coordination ;
- 5) Conseiller le Président au sujet des implications opérationnelles, juridiques, administratives et financières des différentes décisions du Bureau ;
- 6) Faciliter la concertation et la collaboration entre le Cabinet unique de la CNDH et ses autres structures administratives et techniques ;
- 7) Réunir, au moins une fois par semaine et chaque fois que de besoin, le directeur de cabinet adjoint, les chefs de cabinet, les conseillers et le personnel d'appoint du Cabinet, notamment pour procéder à l'évaluation des dossiers en cours de traitement au Cabinet et formuler toutes propositions susceptibles d'aider les membres du Bureau ou de la Plénière à mieux assurer la conduite et la gestion des matières sectorielles relevant de leurs attributions ;
- 8) Assurer l'exécution de toute autre tâche lui confiée par le Bureau.

Le Directeur de Cabinet peut participer aux réunions des Membres du Bureau, sans voix délibérative.

Article 13 :

Le Directeur de Cabinet est remplacé, en cas d'absence ou d'empêchement, par le Directeur de Cabinet Adjoint, les Chefs des Cabinets et les Conseillers selon le rang de préséance tel que repris à l'article 4 du présent Règlement administratif.

Article 14 :

Le Directeur de Cabinet adjoint assiste le Directeur de cabinet dans l'exercice de ses fonctions. Il le remplace en cas d'absence ou d'empêchement.

Article 15 :

Le Chef de cabinet coordonne les activités du membre de la CNDH auquel il est attaché.

Sous l'autorité des membres du Bureau et des Coordonnateurs des Sous-Commissions permanentes, il est chargé de :

- 1) Assurer la coordination et la supervision du personnel et des activités du membre de Bureau et de la Sous-Commission permanente ;
- 2) Assurer le suivi et le traitement des dossiers, des décisions et des directives du membre du Bureau et de la Sous-Commission permanente ;
- 3) Veiller au maintien de l'ordre et à la bonne marche des activités au sein des Cabinets des membres du Bureau et des Coordonnateurs ;

- 4) Attribuer, pour traitement, les dossiers aux conseillers et en assurer la coordination ;
- 5) Conseiller le membre du Bureau et le Coordonnateur au sujet des implications opérationnelles, juridiques, administratives et financières des différentes propositions de la Sous-Commission permanente ;
- 6) Faciliter la concertation et la collaboration entre le Bureau et la Sous-commission permanente et les autres structures administratives et techniques ;
- 7) Assurer l'exécution de toute autre tâche lui confiée par le Bureau.

Article 16:

Les Conseillers sont chargés de :

- 1) Donner des avis sur les dossiers qui leur sont soumis ;
- 2) Assister le membre du Bureau ou du Coordonnateur de la Sous-Commission permanente dont il relève dans le traitement des matières qui relatives de ses attributions ;
- 3) Faire des propositions de nature à améliorer le rendement du travail de la CNDH dans les matières relevant de ses missions.

Article 17:

L'Assistant assiste le membre du Bureau ou du Coordonnateur de la Sous-Commission permanente dont il relève dans toutes les tâches que ce dernier lui confie.

Article 18 :

Le Chargé des missions a pour tâches de:

- 1) Assister le membre du Bureau ou du Coordonnateur de la Sous-Commission permanente dont il relève ;
- 2) Exécuter toute autre tâche à la demande du membre du Bureau ou du Coordonnateur de la Sous-commission permanente dont il relève.

Article 19 :

Le Secrétaire particulier est chargé de :

- 1) La tenue et le traitement de la correspondance personnelle du membre du Bureau ou du Coordonnateur de la Sous-commission permanente dont il relève ainsi que de toute autre tâche qui lui est confiée ;
- 2) L'organisation et la gestion du Secrétariat particulier ;
- 3) La réception, l'expédition et le classement du courrier confidentiel, y compris le courrier électronique ;

- 4) La tenue de l'agenda des audiences du membre du Bureau ou de l'Assemblée Plénière dont il relève.

Article 20 :

Le Secrétaire de Cabinet est chargé de :

- 1) Assister au quotidien le Directeur de Cabinet ;
- 2) Organiser et gérer le secrétariat du Cabinet ;
- 3) Réceptionner, expédier et classer le courrier, y compris le courrier électronique du Cabinet ;
- 4) Assurer les autres tâches appropriées selon les circonstances et les besoins du Cabinet.

Article 21 :

Le Secrétaire du cabinet adjoint est chargé de :

- 1) Assister le Secrétaire du Cabinet, et le cas échéant, le remplacer en cas d'empêchement ou d'absence ;
- 2) Assurer la tenue et le classement des documents du Cabinet ;
- 3) Assurer la rédaction des documents nécessaires au bon fonctionnement du Cabinet et la mise en forme des instructions du Directeur de Cabinet.

Article 22 :

Le Chef du protocole gère les questions protocolaires :

- 1) Gérer les questions d'étiquette, de préséance, d'ordonnance et d'organisation des cérémonies et réceptions officielles ;
- 2) Organiser les voyages et missions officielles ;
- 3) Accomplir d'autres tâches liées à ses fonctions ;
- 4) Assurer la tenue de l'agenda des audiences du membre du Bureau dont il relève. Il est assisté d'un Chef de protocole adjoint.

Article 23 :

L'attaché de presse coordonne toutes les activités en rapport avec la presse : points de presse, communiqués de presse, interviews des membres et cadres de la CNDH, organisation des émissions et contrôle des messages à diffuser dans les médias. Il est assisté par son adjoint..

Article 24 :

Les opérateurs de saisie travaillent sous la supervision du Secrétaire de cabinet et sont chargés d'assurer la saisie et le traitement des documents qui leur sont confiés.

Article 25 :

Le Chargé du courrier travaille sous la supervision du secrétaire de Cabinet et a pour tâches:

- 1) Collecter, distribuer et expédier le courrier, les revues, les journaux, les documents entre les différents locaux de la CNDH et en dehors de ceux-ci;
- 2) Réceptionner les documents de la CNDH.

Article 26 :

Les hôtesse travaillent sous la supervision du chargé du protocole et assistent ce dernier dans les tâches ayant trait à l'accueil des visiteurs et à l'exécution de toutes tâches leur confiées.

Article 27 :

L'attaché de sécurité assure la sécurité du membre ou du cadre de la CNDH auquel il est rattaché.

Article 28 :

Les chauffeurs de la CNDH travaillent sous la supervision du Directeur de Cabinet et ont pour tâches :

- 1) Assurer le déplacement des Membres et du personnel de la CNDH ;
- 2) Informer le service responsable des besoins en carburant, en entretien ou en réparation des véhicules du Cabinet.

Article 29 :

Sous la supervision du Directeur de Cabinet, l'intendant général accomplit toutes les tâches d'intendance du Cabinet, notamment l'approvisionnement en fourniture de bureau et autres.

Sous-Section 4 : De la fin du mandat du personnel du Cabinet

Article 30 :

Les fonctions du personnel de Cabinet prennent fin par :

- 1) L'arrivée du terme du mandat du membre de la Commission dont il relève;
- 2) La révocation ;
- 3) La démission ;
- 4) Le décès.

Sous-Section 5 : Des droits et avantages du personnel du Cabinet

Article 31 :

Le personnel politique et le personnel d'appoint du Cabinet, bénéficient des droits et avantages fixés par décision du Président, le Bureau entendu.

Toutefois, les avantages ci-après leur sont reconnus d'office :

- 1) Une carte de service;
- 2) Un passeport diplomatique pour le Directeur de Cabinet et son adjoint ;
- 3) Un passeport de service pour les autres membres du cabinet ;
- 4) Des soins de santé ;
- 5) Des indemnités kilométriques.

Article 32 :

Au terme du mandat des membres de la CNDH, le personnel visé par l'article 30 précédent a droit à une indemnité de sortie équivalant à six mois de leur dernier traitement.

Sous-Section 6 : Des obligations

Article 33 :

Le personnel politique et le personnel d'appoint du Cabinet, sont tenus, en toutes circonstances, de préserver l'honneur et la dignité de leurs fonctions et de veiller, lors de l'examen des dossiers qui leur sont soumis, aux intérêts de la CNDH et au respect du secret professionnel.

Ils sont tenus au devoir de loyauté envers la CNDH.

Ils doivent entretenir un climat de franche collaboration entre eux et avec tout autre personnel de la CNDH.

Ils sont tenus, en public comme en privé, au devoir de réserve et de discrétion, quant aux faits et informations dont ils ont eu connaissance dans l'exercice de leurs fonctions et même après l'exercice de celles-ci.

Article 34 :

Le personnel politique et le personnel d'appoint du Cabinet doivent par ailleurs:

- 1) Respecter, en toutes circonstances, la Constitution , la Loi organique de la CNDH, les lois de la République Démocratique du Congo, le Règlement intérieur, le Règlement Administratif, le Manuel de procédure d'examen et de traitement des plaintes, le code de bonne conduite de l'agent public de l'Etat ainsi que tout autre instrument juridique adopté par la Commission ;
- 2) S'abstenir de toute initiative susceptible de nuire à la dignité de leurs fonctions ;
- 3) Se conformer aux ordres légaux reçus dans l'exécution du travail ;
- 4) Respecter, en toutes circonstances, les règles édictées pour la bonne marche du service ;
- 5) Respecter les convenances et les bonnes mœurs dans l'exercice de leurs fonctions ; 6. Se soumettre à l'évaluation du Directeur ou de Chef de Cabinet.

Article 35 :

Les membres du personnel du Cabinet qui ont un intérêt personnel dans une affaire qui leur est soumise doivent s'abstenir de la traiter ou de prendre part aux délibérations y afférentes.

Ils sont tenus d'en faire part au Directeur ou au Chef de cabinet.

Section 2. Des Groupes de travail des Sous-Commissions Permanentes

Sous-Section 1 : Composition

Article 36 :

Les cinq Sous-Commissions Permanentes sont constituées chacune de deux Groupes de Travail chargés de la promotion et de la protection des droits de l'homme.

Chaque groupe de Travail est constitué d'au moins 104 Experts dont 52 chargés de la promotion et 52 chargés de la protection, et ce, par Sous-Commission Permanente.

Article 37 :

Les Experts membres des Groupes de Travail sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau, après avis de l'Assemblée plénière.

Sous-section 2 : Attributions

Article 38 :

Sous l'autorité du Coordonnateur de la Sous-Commission Permanente concernée, les Experts chargés de la promotion des droits de l'homme sont chargés de :

- 1) Promouvoir l'éducation civique ;
- 2) Promouvoir la formation en droits de l'homme et en droit international humanitaire;
- 3) Promouvoir la vulgarisation des droits de l'homme et des instruments juridiques internationaux;
- 4) Assurer l'exécution de toute autre tâche lui confiée par le membre du Bureau ou le Coordonnateur de la Sous-Commission Permanente;
- 5) Faire le suivi de toutes les formations en droits de l'homme et en faire rapport ;
- 6) Identifier les besoins en matière de promotion des droits de l'homme.

Article 39 :

Sous l'autorité du Coordonnateur de la Sous-Commission Permanente concernée, les Experts chargés de la protection des droits de l'homme sont chargés notamment de :

- 1) Mener des enquêtes sur les violations des droits de l'homme;
- 2) Faire le suivi des plaintes en cas des violations des droits de l'homme ;
- 3) Assurer l'exécution de toute autre tâche lui confiée par le membre du Bureau ou le Coordonnateur de la Sous-Commission Permanente ;
- 4) Faire des propositions de nature à améliorer le rendement du travail de la CNDH dans les matières relevant de ses missions.

Sous-Section 3 : Des droits et avantages

Article 40 :

Les Experts bénéficient des droits et avantages fixés par décision du Président, le Bureau entendu.

Toutefois, les avantages ci-après leur sont reconnus d'office :

- 1) Une carte de service;
- 2) Un passeport de service ;
- 3) Des soins de santé ;
- 4) Des indemnités kilométriques.

Sous-Section 4 : Des obligations

Article 41 :

Les Experts sont tenus, en toutes circonstances, de préserver l'honneur et la dignité de sa fonction et de veiller lors de l'examen des dossiers ou tâches qui leur sont confiés, aux intérêts de la CNDH et au respect du secret professionnel.

Ils sont tenus au devoir de loyauté envers la CNDH.

Ils doivent entretenir un climat de franche collaboration entre eux et avec les autres membres du personnel de la CNDH.

Ils sont tenus, en public comme en privé, au devoir de réserve et de discrétion, quant aux faits et informations dont ils ont eu connaissance dans l'exercice de leurs fonctions et même après l'exercice de celles-ci.

Article 42 :

Les Experts doivent par ailleurs :

- 1) Respecter, en toutes circonstances, la Constitution , la Loi organique de la CNDH, les lois de la République Démocratique du Congo, le Règlement intérieur, le Règlement Administratif, le Manuel des procédures devant la CNDH, le code de bonne conduite de l'agent public de l'Etat ainsi que tout autre instrument juridique adopté par la Commission ;
- 2) S'abstenir de toute initiative susceptible de nuire à la dignité de leurs fonctions ;
- 3) Se conformer aux ordres légaux reçus dans l'exécution du travail ;

- 4) Respecter, en toutes circonstances, les règles édictées pour la bonne marche du service ;
- 5) Respecter les convenances et les bonnes mœurs dans l'exercice de leurs fonctions.

Article 43 :

Les Experts chargés de la protection qui ont un intérêt personnel dans une affaire qui leur est soumise doivent s'abstenir d'enquêter sur celle-ci.

Section 3 : Du Secrétariat Technique

Sous-section I : Des dispositions générales

Article 44 :

Le Secrétariat Technique est un service administratif et technique permanent qui assure l'administration quotidienne de la CNDH et exécute les tâches techniques lui assignées par le Bureau.

Il est dirigé par un Secrétaire Technique qui a rang de Secrétaire Général de l'Administration publique.

Le Secrétaire Technique est assisté de trois Secrétaires Techniques adjoints chargés respectivement des questions administratives, juridiques et financières.

Les Secrétaires Techniques adjoints ont rang de Directeurs Généraux de l'Administration Publique.

Article 45 :

Le Secrétaire Technique et les Secrétaires Techniques adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH, sur décision du Bureau, après avis de l'Assemblée Plénière.

Le Secrétaire Technique et les Secrétaires Techniques adjoints bénéficient des droits et avantages fixés par décision du Président, le Bureau entendu.

Toutefois, les avantages ci-après leur sont reconnus d'office :

- 1) Une carte de service;
- 2) Un passeport de service ;

- 3) Des soins de santé ;
- 4) Des indemnités kilométriques.

Article 46 :

Le Secrétariat Technique comprend treize Départements auxquels il est confié l'accomplissement des tâches spécifiques en rapport avec les missions de la CNDH.

Ces Départements sont les suivants :

- 1) Monitoring, enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) Communication et Médias ;
- 5) Etudes et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales des droits de l'Homme et la Société Civile Congolaise ;
- 7) Suivi des Mécanismes nationaux, régionaux et internationaux de promotion et de protection des droits de l'homme;
- 8) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 9) Responsabilité Sociale des Entreprises ;
- 10) Centre National de documentation en droits de l'Homme et en droit international humanitaire ;
- 11) Social et médical ;
- 12) Ressources humaines ;
- 13) Logistique et Patrimoine.

D'autres Départements/Directions peuvent être créés, chaque fois que de besoin, sur décision de l'Assemblée Plénière.

Chaque Département est organisé en un ou plusieurs services.

Le Département est dirigé par un Chef de Département qui a rang de Directeur Chef de Service.

Article 47 :

Le Secrétariat Technique dispose, par ailleurs, d'une Division unique dotée d'un personnel technique.

Sous-section II : Des attributions du Secrétaire Technique et des Secrétaires Techniques Adjoints

Paragraphe I : Attributions du Secrétaire Technique ;

Article 48 :

Le Secrétaire Technique gère, sous l'impulsion du Bureau, les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein du Secrétariat Technique.

Il prépare le budget sous la supervision du Bureau de la CNDH.

Il assure la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH.

Il prépare les dossiers juridiques et judiciaires à soumettre au Bureau de la CNDH.

Il prépare et exécute les plans, programmes et activités en rapports avec les missions de la CNDH. Il rend compte et cela par écrit au Bureau de la mise en œuvre des décisions du Bureau.

Il peut être invité à assister, sans voix délibérative, aux réunions de l'Assemblée Plénière et du Bureau. Il peut être remplacé en cas d'absence ou d'empêchement par l'un de ses adjoints.

Paragraphe 2 : Attributions des Secrétaires Techniques adjoints

Article 49 :

Le Secrétaire Technique adjoint chargé des questions administratives supervise le travail des départements à caractère administratif, à savoir :

- 1) Communication et Médias ;
- 2) Direction des Ressources humaines ;
- 3) Partenariat et encadrement des ONG nationales et internationales des droits de l'Homme et la Société Civile Congolaise ;
- 4) Centre National de documentation en droits de l'Homme et en droit international humanitaire ;
- 5) Département social et médical.

Article 50 :

Le Secrétaire Technique adjoint chargé de questions juridiques supervise le travail des départements à caractère technique, à savoir :

- 1) Monitoring, enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) Suivi des mécanismes nationaux, régionaux et internationaux de promotion et de protection des droits de l'Homme ;
- 5) Droit international humanitaire actions, question et urgences humanitaires.

Article 51 :

Le Secrétaire Technique adjoint chargé des questions financières assiste le Secrétaire Technique dans l'exécution des ressources financières qui lui est confiée. Il assure, en outre, la supervision du travail des départements ci-après :

- 1) Département d'études et planification ;
- 2) Responsabilité sociale des entreprises ;
- 3) Direction logistique et du Patrimoine.

**Sous-section III : Des attributions et de la structure des
Départements**

Article 52 :

Les Départements/Directions exercent des attributions/tâches qui cadrent avec la mission générale de la CNDH ainsi que ses attributions et compétences telles que définies par la loi organique n°13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la CNDH et le Règlement Intérieur de cette dernière.

Article 53 : Département Communication et Médias

Le Département Communication et Médias a pour mission d'assurer les tâches suivantes :

- 1) La visibilité de la CNDH ;
- 2) Toute sorte de plaidoyer en rapport avec les missions de la CNDH ;

- 3) La conception et l'élaboration des plans opérationnels d'archivage et de documentation ;
- 4) La formation des agents de la CNDH sur la conservation et la préservation des archives ;
- 5) La conception et la supervision de la collecte, le traitement et la conservation des dossiers et pièces au niveau national.

Ce Département comprend deux services : le Service Presse et le Service de Nouvelles Technologies de l'Information et de la communication.

Article 54 : Département Partenariat et encadrement des ONG nationales et internationales des droits de l'homme et de la société civile congolaise :

Le Département Partenariat et encadrement des ONG nationales et internationales des droits de l'homme et de la société civile congolaise a pour mission de :

- 1) Préparer des cadres de concertation avec les défenseurs des droits humains et les ONG nationales et internationales des droits de l'homme et la Société civile ;
- 2) Initier des projets de développement des réseaux et relations de coopération avec les institutions de la République, les organisations locales, nationales et internationales poursuivant les mêmes objectifs que la CNDH ;
- 3) Identifier et recenser les ONG nationales et internationales en règle avec la législation en vigueur.

Il est subdivisé en deux services : service de partenariat avec les ONG locales et service de partenariat avec les ONG internationales.

Article 55 : Département Responsabilité sociale des entreprises :

Le Département Responsabilité sociale des entreprises a pour mission de veiller au respect des droits de l'homme et à l'amélioration des conditions de vie et de travail des nationaux employés au sein des entreprises privées ainsi que le respect des règles de l'environnement.

Il dispose d'un seul service : le service de la responsabilité sociale des entreprises.

Article 56 : Centre National de documentation en droits de l'Homme et en droit international humanitaire :

Le Centre National de documentation en droits de l'Homme et en droit international humanitaire assure les tâches suivantes:

- 1) L'organisation de la documentation de la CNDH ;

- 2) La collecte de toute documentation relative aux droits de l'homme et au droit international humanitaire ;
- 3) La mise à la disposition des chercheurs du fond documentaire disponible en droits de l'Homme et droit international humanitaire.

Ce Département comprend un seul service : le service de documentation et archives.

Article 57 : Direction des Ressources humaines :

La Direction des Ressources humaines assure les taches suivantes :

- 1) La gestion administrative et la carrière des cadres et agents ;
- 2) La conception des supports de recrutement du personnel de la CNDH ;
- 3) L'élaboration des termes de référence de recrutement ;
- 4) La gestion des affaires sociales ;
- 5) La prise en compte de la dimension genre dans l'exécution des activités de la CNDH et le recrutement du personnel ;
- 6) La formation du personnel ;
- 7) La préparation, l'élaboration et l'exécution du cadre barémique et salarial du personnel nonpolitique de la CNDH ;
- 8) La discipline au sein du personnel non-politique de la CNDH ;
- 9) La préparation des listes de paie sur base des contrats et prestations fournies ;
- 10) Le suivi de l'évolution de la réglementation et des procédures relatives aux emplois et statut du personnel.

La Direction des Ressources humaines comprend deux services : service du personnel et service de la paie.

Article 58 : Département social et médical :

Le Département médico-social s'occupe de la prise en charge médicale et sociale des cadres et agents de la CNDH.

Il dispose de deux services : service social et service médical.

Article 59 : Département Monitoring, enquêtes et investigations

Le Département monitoring, enquête et investigation assure les tâches suivantes :

- 1) Préparation du suivi des lieux propices à la violation des droits humains ;
- 2) Préparation des enquêtes et investigations en rapport avec les dossiers de violation des droits de l'homme soumis à la CNDH ;

- 3) Conception et préparation des manuels de formation sur la procédure d'enquête, le monitoring, et le suivi des dossiers relatifs aux violations des droits humains ;
- 4) Formation et encadrement des enquêteurs et agents d'investigations ;
- 5) Supervision des opérations d'enquêtes sur terrain ;
- 6) Elaboration des aires de compétence pour la supervision des opérations d'enquête ;
- 7) Analyse et exploitation des données statistiques ;
- 8) Suivi du déroulement des activités opérationnelles et monitoring des opérations sur terrain ;
- 9) Suivi du déroulement des enquêtes.

Il dispose d'un seul service : monitoring, enquêtes et investigations.

Article 60 : Département Protection et assistance aux victimes

Le Département Protection et assistance aux victimes s'occupe de la protection et l'assistance en faveur des victimes et témoins ou de toute personne ayant porté plainte devant la CNDH.

Il est organisé en un seul service : service de conseil et orientation des victimes/témoins/plaignants.

Article 61 : Département Formation et vulgarisation des droits de l'Homme et du droit international humanitaire

Le Département de la Formation et vulgarisation des droits de l'Homme et du droit international humanitaire s'occupe de :

- 1) La conception du plan et des programmes de formation, éducation et sensibilisation ;
- 2) La conception des messages et des supports de formation/sensibilisation aux droits ;
- 3) La préparation des activités de formation, vulgarisation ou sensibilisation en droit de l'Homme et en droit international humanitaire.

Il comprend un seul service : le service formation, vulgarisation et sensibilisation.

Article 62 : Département Suivi des mécanismes nationaux, régionaux et internationaux de promotion et de protection des droits de l'Homme.

Le Département Suivi des mécanismes nationaux, régionaux et internationaux de promotion et de protection des droits de l'Homme s'occupe :

- 1) Du suivi de la mise en œuvre des instruments juridiques relatifs aux droits de l'Homme au niveau national ;
- 2) De la préparation des réponses aux questions spécifiques posées par les mécanismes des Nations Unies en rapport avec les missions de la CNDH ;
- 3) De la préparation des rapports sur les droits de l'Homme destinés à l'Examen Périodique Universel et autres mécanismes d'évaluation.

Il est organisé en deux services : service de suivi des mécanismes nationaux des droits de l'Homme et service de suivi des mécanismes régionaux et internationaux des droits de l'Homme.

Article 63 : Département Droit international humanitaire, actions, questions et urgences humanitaires

Le Département Droit international humanitaire, actions, questions et urgences humanitaires s'occupe :

- 1) De la vulgarisation du droit international humanitaire aux groupes spécifiques ;
- 2) De la préparation et du déploiement d'actions urgentes en cas de nécessité.

Il est organisé en un seul service : le Service de droit international humanitaires, actions, questions et urgences humanitaires.

Article 64 : Département Etudes et Planification

Le Département Etudes et Planification s'occupe de :

- 1) La conception, préparation et le suivi des projets ;
- 2) La préparation des rapports financiers ;
- 3) L'identification des besoins opérationnels du Secrétariat Technique, départements/directions.

Il dispose d'un seul service : le service d'études et planification.

Article 65 : Direction Logistique et du Patrimoine

La Direction logistique et du Patrimoine s'occupe de :

- 1) La gestion des inventaires des matériels ;
- 2) La conception des plans logistiques de déploiement et le ravitaillement ;
- 3) La gestion du charroi automobile, des entrepôts et des infrastructures ; 4. La gestion des biens meubles et immeubles de la CNDH ;
- 4) 5. La gestion et la maintenance des infrastructures.

Il dispose d'un seul service : le service logistique et gestion du patrimoine.

Sous-section IV : De la Division Unique du Secrétariat Technique

Paragraphe 1 : De l'organisation et de la composition

Article 66 :

La Division Unique est un Service attaché au Secrétariat Technique et placé sous l'autorité du Secrétaire Technique.

Elle est placée sous la supervision d'un Assistant principal/Chef de Division, et est constituée du personnel ci-après :

- 1) Un Chef de Division unique;
- 2) Trois secrétaires administratifs /Chef de Bureau ;
- 3) Quatre rédacteurs ;
- 4) Quatre opérateurs de saisie ;
- 5) Quatre chargés du courrier ;
- 6) Quatre hôtesses ;
- 7) Quatre chauffeurs ;
- 8) Quatre huissiers ;
- 9) Quatre attachés de sécurité.

Paragraphe 2 : Répartition du personnel administratif de la Division Unique

Article 67 :

Le personnel administratif de la Division Unique est réparti entre le Secrétaire Technique et ses adjoints de la manière suivante :

Personnel près le Secrétaire Technique :

- 1) Un Chef de Division unique;
- 2) Un secrétaire administratif /Chef de Bureau ;
- 3) Un rédacteur ;
- 4) Un opérateur de saisie ;
- 5) Un chargé du courrier ;
- 6) Une hôtesse ;
- 7) Un chauffeur ;

- 8) Un huissier ;
- 9) Un attaché de sécurité.

Personnel près le Secrétaire Technique Adjoint chargé des questions administratives :

- 1) Un secrétaire administratif /Chef de Bureau ;
- 2) Un rédacteur ;
- 3) Un opérateur de saisie ;
- 4) Un chargé du courrier ;
- 5) Une hôtesse ;
- 6) Un chauffeur ;
- 7) Un huissier ;
- 8) Un attaché de sécurité.

Personnel près le Secrétaire Technique Adjoint chargé des questions juridiques :

- 1) Un secrétaire administratif /Chef de Bureau ;
- 2) Un rédacteur ;
- 3) Un opérateur de saisie ;
- 4) Un chargé du courrier ;
- 5) Une hôtesse ;
- 6) Un chauffeur ;
- 7) Un huissier ;
- 8) Un attaché de sécurité.

Personnel près le Secrétaire Technique Adjoint chargé des questions financières :

- 1) Un secrétaire administratif /Chef de Bureau ;
- 2) Un rédacteur ;
- 3) Un opérateur de saisie ;
- 4) Un chargé du courrier ;
- 5) Une hôtesse ;
- 6) Un chauffeur ;
- 7) Un huissier ;
- 8) Un attaché de sécurité.

Article 68 :

Les fonctions du personnel de la Division Unique prennent fin par :

- 1) 1. La révocation ;
- 2) La démission ;
- 3) Le décès.

Article 69 :

Le personnel de la Division Unique bénéficie des droits et avantages fixés par décision du Président, le Bureau entendu.

Toutefois, les avantages ci-après leur sont reconnus d'office :

- 1) Une carte de service;
- 2) Un passeport de service ;
- 3) Des soins de santé ;
- 4) Des indemnités kilométriques.

Article 70 :

Le personnel de la Division Unique est tenu, en toutes circonstances, de préserver l'honneur et la dignité de leurs fonctions et de veiller lors de l'examen des dossiers qui leur sont soumis, aux intérêts de la CNDH et au respect du secret professionnel.

Ils sont tenus au devoir de loyauté envers la CNDH.

Ils doivent entretenir un climat de franche collaboration entre eux et avec tout autre personnel de la CNDH.

Ils sont tenus, en public comme en privé, au devoir de réserve et de discrétion, quant aux faits et informations dont ils ont eu connaissance dans l'exercice de leurs fonctions et même après l'exercice de celles-ci.

Article 71 :

Le personnel de la Division Unique doit par ailleurs :

- 1) Respecter, en toutes circonstances, la Constitution , la Loi organique de la CNDH, les lois de la République Démocratique du Congo, le Règlement intérieur, le Règlement Administratif, le Manuel des procédures devant la CNDH , le code de bonne conduite de l'agent public de l'Etat ainsi que tout autre instrument juridique adopté par la Commission ;
- 2) S'abstenir de toute initiative susceptible de nuire à la dignité de leurs fonctions ;
- 3) Se conformer aux ordres légaux reçus dans l'exécution du travail ;

- 4) Respecter, en toutes circonstances, les règles édictées pour la bonne marche du service ;
- 5) Respecter les convenances et les bonnes mœurs dans l'exercice de leurs fonctions ;
- 6) Se soumettre à l'évaluation du Secrétaire Technique.

Section 4 : Des Bureaux de Représentation aux chefs-lieux des provinces (BRP)

Article 72 :

La CNDH dispose d'un Bureau de représentation provinciale au chef-lieu de chaque Province de la République Démocratique du Congo.

Article 73 :

Chaque Bureau de Représentation provinciale de la CNDH est dirigé par un Coordonnateur provincial assisté de trois Coordonnateurs provinciaux adjoints chargés respectivement des questions administratives, juridiques et financières.

Le Coordonnateur provincial dispose d'un personnel administratif composé de :

- 1) Un Secrétaire administratif ;
- 2) Un Rédacteur ;
- 3) Un Opérateur de saisie ;
- 4) Un Préposé des indicateurs d'entrées et de sortie ;
- 5) Une Hôtesse ;
- 6) Un Huissier.

Article 74 :

Le Coordonnateur Provincial gère, sous l'impulsion du Bureau, les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein du Bureau de représentation provinciale. Il fait mensuellement rapport au Bureau et en informe le Secrétariat technique.

Il prépare l'état de besoin du Bureau de Représentation provinciale et le transmet au bureau de la CNDH.

Il est également chargé de la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH en province.

Il prépare les dossiers juridiques et judiciaires à soumettre au bureau de la CNDH.

Article 75 :

Le Coordonnateur Provincial et ses Adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau.

Article 76 :

Le Bureau de représentation provinciale dispose des services suivants :

- 1) Monitoring, Enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) Communication et, Médias ;
- 5) Etudes et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales installées en province des droits de l'Homme et des Organisations de la Société Civile Congolaise ;
- 7) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 8) Responsabilité Sociale des Entreprises ;
- 9) Centre Provincial de documentation en droits de l'Homme et en droit international humanitaire ;
- 10) Social et médical ;
- 11) Ressources humaines ;
- 12) Logistique et Patrimoine.

Article 77 :

Le Bureau de Représentation Provinciale veille au bon fonctionnement des services au niveau provincial.

Il travaille sous la supervision du Bureau de la CNDH. En cas de besoin, il peut être invité à assister, sans voix délibérative, aux séances et réunions du Bureau et de l'Assemblée Plénière.

Article 78 :

Le Bureau de la CNDH peut, pour le compte de la province, décider de l'opportunité de recourir aux Experts tant nationaux qu'internationaux ainsi qu'aux Avocats. Dans ce cas, il fixe les conditions de leur recrutement.

Leurs honoraires sont à charge du Trésor Public et, le cas échéant, des Partenaires de la CNDH.

Article 79 :

Les agents et cadres des Bureaux de Représentation Provinciale sont recrutés dans leurs Provinces respectives, nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH.

Ils travaillent à temps plein et sous la supervision permanente du Coordonnateur Provincial de la CNDH.

Article 80 :

Les Bureaux de représentation en Province de la CNDH sont chargés de la promotion et de la protection des droits de l'homme.

A ce titre, ils sont chargés de:

- 1) Suivre la situation des droits de l'homme en Provinces et en faire rapport au Bureau de la CNDH ;
- 2) Recevoir les plaintes individuelles et collectives ou se saisir d'office des cas des violations des droits de l'homme et en faire rapport au Bureau de la CNDH ;
- 3) Exécuter en Provinces, sur instructions et directives expresses du Bureau de la CNDH, certaines tâches relatives aux attributions de la CNDH telles que déterminées à l'article 6 de la loi organique instituant la CNDH ;
- 4) Procéder à des visites périodiques des centres pénitentiaires et de détention sur toute l'étendue de la Province ;
- 5) Procéder à toutes sortes d'investigations nécessaires pour documenter les cas des violations des droits de l'homme et collaborer à toutes fins utiles avec les Organisations de la société civile, les autorités politico-administratives, judiciaires, militaires, policières et sécuritaires en Provinces ;
- 6) Collaborer avec les Antennes de représentations Urbaines ainsi que des Antennes de représentations Territoriales de la CNDH dans les différentes entités décentralisées et déconcentrées ;

- 7) Réaliser avec accord formel du Bureau toute action jugée utile pour promouvoir la mission ainsi que les attributions de la CNDH ;
- 8) Collaborer étroitement avec toutes les institutions provinciales et Services Publics de l'Etat en provinces, dans l'optique de la promotion et de la protection des droits de l'Homme.

Section 5 : Des Antennes urbaines et des Antennes territoriales de Représentation de la CNDH

Article 81 :

La CNDH dispose d'une Antenne de représentation dans chaque ville et chef-lieu de chaque Territoire de la République Démocratique du Congo.

Chaque Antenne de représentation de la CNDH dans chaque ville et chaque Territoire est dirigée par un Chef d'Antenne urbaine ou territoriale assisté de trois Chefs d'Antennes urbaines ou territoriales Adjoints chargés respectivement des questions administratives, techniques et financières.

Article 82 :

Le Chef d'Antenne urbaine ou territoriale et ses Adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau.

Article 83 :

Le Chef d'Antenne urbaine ou territoriale dispose d'un personnel d'appoint suivant :

- 1) Un Secrétaire Administratif ;
- 2) Un Rédacteur ;
- 3) Un Opérateur de saisie ;
- 4) Un Préposé des indicateurs d'entrées et de sortie ;
- 5) Une Hôtesse ;
- 6) Un Huissier.

Article 84 :

Le Chef d'Antenne urbaine ou territoriale gère sous l'impulsion du bureau les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein de l'Antenne urbaine ou territoriale.

Il prépare l'état de besoin de l'antenne urbaine ou territoriale de la CNDH et le transmet au bureau de la CNDH.

Il est également chargé de la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH en ville ou dans les territoires.

Il prépare les dossiers juridiques et judiciaires à soumettre au bureau de la CNDH.

Article 85 :

L'Antenne urbaine ou territoriale de la CNDH est composée des services suivants :

- 1) Monitoring, Enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) Communication et Médias ;
- 5) Etudes et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales installées en villes et dans les territoires ;
- 7) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 8) Responsabilité Sociale des Entreprises ;
- 9) Centre urbain ou du territoire de documentation en droits de l'Homme et en droit international humanitaire ;
- 10) Social et médical ;
- 11) Ressources humaines;
- 12) Logistique et Patrimoine.

L'Antenne urbaine ou territoriale veille au bon fonctionnement des services au niveau urbain et territorial.

Article 86 :

Le Chef d'Antenne urbaine ou territoriale de la CNDH travaille sous la supervision du Bureau de la CNDH. En cas de besoin, il peut être invité à assister, sans voix délibérative, aux séances et réunions du Bureau et de l'Assemblée Plénière.

Article 87 :

Le Bureau de la CNDH peut, pour le compte de la ville ou du territoire, décider de l'opportunité de recourir aux Experts tant nationaux qu'internationaux ainsi qu'aux Avocats.

Dans ce cas, il fixe les conditions de leur recrutement.

Leurs honoraires sont à charge du Trésor Public et, le cas échéant, des Partenaires de la CNDH.

Article 88 :

Les Agents des antennes urbaines ou territoriales de la CNDH relèvent du personnel administratif et technique du Secrétariat Technique.

Ils sont recrutés dans leurs villes ou territoires respectifs, nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau.

Ils travaillent à temps plein et sous la supervision permanente du Chef d'Antenne urbaine ou territoriale de la CNDH.

Article 89 :

Les Antennes urbaines ou territoriales de la CNDH sont chargées de la promotion et de la protection des droits de l'homme.

A ce titre, ils sont chargés de :

- 1) Suivre la situation des droits de l'homme en villes et aux chefs lieux des territoires et en faire rapport au Bureau de la CNDH ;
- 2) Recevoir les plaintes individuelles et collectives ou se saisir d'office des cas des violations des droits de l'homme et en faire rapport au Bureau de la CNDH ;
- 3) Exécuter en villes ou en territoires, sur instructions et directives expresses du Bureau de la CNDH, certaines tâches relatives aux attributions de la CNDH telles que déterminées à l'article 6 de la loi organique instituant la CNDH ;
- 4) Procéder à des visites périodiques des centres pénitentiaires et de détention dans les villes ou territoires ;
- 5) Procéder à toutes sortes d'investigations nécessaires pour documenter les cas des violations des droits de l'homme et collaborer à toutes fins utiles avec les Organisations de la Société Civile et les Autorités policières, militaires, judiciaires, sécuritaires et politico administrative en ville ou territoire ;

- 6) Collaborer avec les Bureaux de représentation provinciale ainsi que des Antennes urbaines ou territoriales de la CNDH ;
- 7) Réaliser avec accord formel du Bureau toute action jugée utile pour promouvoir la mission ainsi que les attributions de la CNDH ;
- 8) Collaborer étroitement avec toutes les institutions urbaines et Services Publics de l'Etat en villes ou en territoires, dans l'optique de la promotion et de la protection des droits de l'Homme.

Article 90 :

Chaque Antenne de représentation de la CNDH en Ville ou dans chaque Territoire dispose d'une équipe d'agents composée comme suit :

- 1) Deux Enquêteurs ;
- 2) Un Assistant Chargé d'Administration et de Finances;
- 3) Un logisticien ;
- 4) Un informaticien ;
- 5) Un opérateur de saisie ;
- 6) Un préposé aux indicateurs d'entrée et de sortie ;
- 7) Un Attaché de Sécurité ;
- 8) Un huissier ;
- 9) Un chauffeur.

Chapitre III : DES RAPPORTS FONCTIONNELS ET HIERARCHIQUES

Section 1 : Des rapports entre le Secrétariat Technique et le Bureau

Article 91 :

Le Secrétariat Technique travaille sous la supervision du Bureau. Il prépare et exécute les plans, programmes et activités de promotion et de protection des droits de l'Homme au niveau national.

Section 2 : Des rapports entre le Secrétaire Technique et les Départements/Directions

Article 92 :

Le Secrétaire Technique contrôle et coordonne les activités de tous les Départements/Directions.

Section 3 : Des rapports entre le Secrétaire Technique et les Coordonnateurs des Bureaux de

Représentation Provinciale

Article 93 :

Le Secrétaire Technique exécute les tâches lui assignées par le Bureau de la CNDH relatives aux activités des Bureaux des Représentations Provinciales.

Section 4 : Des rapports entre les Coordonnateurs des Bureaux de Représentation Provinciale et les

Chefs d'Antennes urbaines et territoriales

Article 94 :

Le Coordonnateur des Bureaux de Représentation Provinciale exécute les tâches lui assignées par le Bureau de la CNDH relatives aux activités des Antennes urbaines et territoriales.

CHAPITRE IV : DU STATUT DU PERSONNEL ADMINISTRATIF ET TECHNIQUE

Section 1 : Du recrutement

Article 95 :

Nul ne peut faire partie du personnel administratif et technique de la CNDH s'il ne remplit les conditions suivantes :

- 1) Etre de nationalité congolaise ;
- 2) Etre majeur ;
- 3) Savoir lire, écrire et compter ;
- 4) N'avoir jamais été condamné à une peine privative de liberté pour une infraction intentionnelle punissable de plus de six mois de servitude pénale principale ;
- 5) Jouir de la plénitude des droits civiques et politiques.

Article 96 :

Sans préjudice des dispositions prévues par la loi organique de la CNDH et le Règlement intérieur, tout recrutement est effectué à l'initiative du Bureau et, selon le cas, avec avis de l'Assemblée Plénière. Les concours de recrutement sont annoncés par tous les moyens de publicité dont il est possible de disposer.

Pour chaque poste à pourvoir, l'avis d'appel à candidatures indique :

- 1) La description du ou des poste(s) à pourvoir ;
- 2) La durée du contrat ;
- 3) Le profil du candidat ;
- 4) Le lieu d'exécution du travail ;
- 5) Les termes de référence pour chaque poste à pourvoir;
- 6) Les pièces constitutives du dossier;
- 7) Les dates d'ouverture et de clôture du dépôt des candidatures.

Article 97 :

La composition des jurys de sélection est fixée par décision du Président, le Bureau entendu.

La sélection s'effectue sur concours pouvant donner lieu à des épreuves écrites et/ou orales.

Ne sont retenus, à l'issue du concours, que les candidats qui ont obtenu la moyenne fixée par le Bureau et placés en ordre utile, au regard des postes à pourvoir.

Toutefois, le recrutement peut se faire aussi sur titre lorsque le nombre des candidats ne dépasse pas celui des postes à pourvoir.

Article 98 :

Lorsqu'au terme d'une procédure de sélection deux candidats arrivent à égalité, ils sont départagés en tenant compte du genre et de la représentativité nationale.

Section 2 : Des incompatibilités

Article 99 :

Les fonctions du personnel administratif et technique de la CNDH sont incompatibles avec les fonctions ci-dessous :

- 1) Agent de carrière des services publics de l'Etat ;
- 2) Cadre politico-administratif de la territoriale ;
- 3) Mandataire public ;
- 4) Employé dans une entreprise privée, publique ou d'économie mixte ;
- 5) Membre d'un organe exécutif ou délibérant d'un parti politique ou d'un regroupement politique ;
- 6) Membre du Gouvernement central ou provincial ;
- 7) Toute fonction rémunérée conférée par un Etat étranger ou un organisme international ; 8. Magistrat ;
- 8) Membre des cabinets des autorités publiques ;
- 9) Membre des forces armées, de la police nationale congolaise et des services de sécurité.

Article 100 :

Tout membre du personnel administratif et technique qui se trouve dans un des cas prévus à l'article précédent est tenu, sans délai, de renoncer expressément à ses anciennes fonctions incompatibles avec sa qualité au sein de la CNDH.

A défaut, il est censé avoir renoncé à sa qualité d'agent au sein de la CNDH.

CHAPITRE V : DU CONTRAT DE TRAVAIL

Section 1 : Des types de contrat de travail

Article 101 :

Le personnel retenu, après concours ou sur titre, signe individuellement un contrat d'engagement avec la CNDH représentée par le Président ou son délégué dûment mandaté.

Le contrat d'engagement peut être à durée déterminée ou à durée indéterminée.

Article 102 :

Est à durée déterminée, le contrat d'engagement qui est conclu soit pour un temps déterminé, soit pour un ouvrage déterminé, soit pour des tâches bien précises, soit pour le remplacement d'un cadre ou agent technique temporairement indisponible.

A l'exception des contrats pour des tâches bien précises ou pour un ouvrage déterminé, ce contrat ne peut être renouvelé qu'une seule fois. Il ne peut non plus excéder deux ans.

Est à durée indéterminée, le contrat d'engagement conclu pour occuper un emploi permanent au sein de la CNDH. Ce genre de contrat peut être assorti d'une clause d'essai, constatée par écrit et dont la durée est d'un mois pour les agents et de six mois pour les cadres.

Section 2 : De l'horaire du travail

Article 103 :

La durée hebdomadaire du travail est de 45 heures, soit 8 heures par jour de 07 heures 30' à 15 heures avec une pause de 12 heures à 12 heures 30'.

Le travail de nuit est celui exécuté entre 22 heures et 5 heures 00 du matin.

A leur arrivée au poste de travail ainsi qu'au cours de la journée, au passage des agents chargés de contrôle, ils apposent leurs signatures en regard de leurs noms sur la liste des présences établie à cet effet.

Article 104 :

Toute sortie pendant les heures de service doit faire l'objet d'une autorisation écrite préalable du Chef hiérarchique direct ou du Directeur des Ressources humaines.

Section 3 : Des positions statutaires

Article 105 :

- 1) Tout cadre et agent technique de la CNDH est placé dans l'une des positions ci-après :
- 2) L'activité de service ;
- 3) Le détachement ;

- 4) La disponibilité ;
- 5) La suspension.

Paragraphe 1 : Activité de service

Article 106 :

L'activité est la position de l'agent qui exerce effectivement les attributions inhérentes à sa fonction. Sont assimilés à l'activité de service, les missions officielles et les stages de formations professionnels.

Paragraphe 2 : Détachement

Article 107 :

Le détachement est la position de l'agent qui est autorisé à interrompre temporairement ses fonctions pour prêter ses services au sein de l'administration, des institutions, des services publics ou des établissements publics autres que la CNDH.

Il est accordé par le Président de la CNDH.

Paragraphe 3 : Disponibilité

Article 108 :

La disponibilité est la position de l'agent qui interrompt ses services pour convenances personnelles ou pour une cause indépendante de sa volonté ou qui est autorisé à les interrompre dans l'intérêt du service.

Paragraphe 4 : Suspension

Article 109 :

La suspension est la situation dans laquelle les deux conditions essentielles du contrat de travail, à savoir la fourniture d'un travail par le salarié et le paiement du salaire correspondant par l'employeur, cessent de manière temporaire sans pour autant occasionner la rupture du contrat de travail.

Article 110 :

Sont suspensifs du contrat de travail :

- 1) L'incapacité de travail résultant d'une maladie ou d'un accident, de la grossesse ou de l'accouchement et de ses suites ;
- 2) L'appel ou le rappel sous le drapeau et l'engagement volontaire en temps de guerre dans les forces armées congolaises ou d'un Etat allié ;
- 3) Les services prestés en exécution des mesures de réquisition militaire ou d'intérêt public prises par le Gouvernement;
- 4) L'exercice des mandats publics ou d'obligations civiques ;
- 5) Jusqu'à concurrence de deux fois quinze jours par an, la mesure disciplinaire de mise à pied lorsque cette mesure est prévue soit par le contrat de travail, soit par l'incarcération du travailleur ;
- 6) L'incarcération de l'agent ;
- 7) La force majeure, lorsqu'elle a pour effet d'empêcher de façon temporaire, l'une des parties à remplir ses obligations.

Article 111 :

Pendant la durée de la suspension, la rémunération est due dans les cas suivants :

- 1) A concurrence de 2/3 à l'agent malade ou accidenté pendant 6 mois ;
- 2) La totalité de sa rémunération pour la femme pendant le congé de maternité.

Pendant la suspension, l'agent et les membres de sa famille conservent tous les droits et avantages sociaux notamment les soins médicaux.

Article 112 :

Il ne peut être mis fin au contrat de travail pendant qu'il est suspendu, sous les réserves suivantes :

- 1) En cas de maladie ou d'accident, hormis le cas d'accident du travail ou de maladie professionnelle, la CNDH peut notifier à l'agent la résiliation du contrat après six mois ininterrompus d'incapacité d'exécuter celui-ci, moyennant paiement d'une indemnité de résiliation correspondant au préavis dû en cas de contrat à durée indéterminée ;
- 2) En cas d'exercice de mandats publics ou d'obligations civiques, la CNDH peut mettre fin au contrat sans indemnité, après 6 mois de suspension ;
- 3) En cas de force majeure, la CNDH peut résilier le contrat, sans indemnité, après deux mois de suspension ;
- 4) En cas d'incarcération de l'agent, la CNDH peut résilier le contrat sans indemnité après trois mois de suspension ou si l'agent est condamné par la suite à une servitude pénale principale supérieure à deux mois, ce, en vertu d'une décision coulée en force de chose jugée.

Section 5 : De la fin du contrat de travail

Article 113 :

Le contrat à durée déterminée prend fin de plein droit soit à l'expiration du terme fixé par les parties, soit à la fin de l'ouvrage ou des tâches convenues, soit au retour du cadre ou de l'agent remplacé.

Article 114 :

Le contrat à durée indéterminée cesse d'exister par :

- 1) La résiliation de commun accord ou par consentement mutuel ;
- 2) La résiliation à l'initiative de l'employeur ou du travailleur pour faute lourde ou pour juste motif ;
- 3) Le décès ; 4. La démission.

Article 115 :

Le licenciement avec préavis s'opère pour des motifs valables liés à l'aptitude ou à la conduite de l'agent sur les lieux de travail dans l'exercice de ses fonctions ou fondé sur les nécessités de fonctionnement de l'institution ou lorsque la faute n'est pas lourde.

Pendant la durée du préavis, l'agent est tenu au respect de toutes les obligations qui lui incombent, tout en bénéficiant d'un jour de liberté par semaine pris à son choix ou par demi-journée et payé à plein salaire.

S'il justifie avoir trouvé un nouvel emploi, il peut quitter dans un délai moindre fixé de commun accord et, dans ce cas, il perd le droit à la rémunération de la période de préavis restant à courir.

Article 116 :

Sauf durée plus longue fixée entre parties, la durée du préavis de résiliation ne peut être inférieure à quatorze jours ouvrables à dater du lendemain de la notification, lorsque le préavis est donné par la CNDH. Ce délai est augmenté de quinze jours ouvrables par année entière de services continus, comptée de date à date.

La durée du préavis de résiliation à donner par l'agent est égale à la moitié de celui qu'aurait dû donner la CNDH si elle avait pris l'initiative de la résiliation. Elle ne peut en aucun cas excéder cette limite.

Article 117 :

Le licenciement sans préavis intervient lorsque l'agent commet une faute lourde.

Article 118 :

L'agent désireux de mettre fin à ses fonctions adresse sa démission au Président de la CNDH qui en prend acte.

Article 119 :

Est considéré comme démissionnaire d'office:

- 1) L'agent en congé qui, après quinze jours ouvrables à dater de l'expiration de son congé, n'aurait pas repris ses fonctions sans justification valable ;
- 2) L'agent en disponibilité qui, après quinze jours ouvrables méconnaîtrait l'ordre qui lui serait donné pour la reprise de ses fonctions.

La démission est constatée par une notification du président de la CNDH.

CHAPITRE VI : DES DROITS, AVANTAGES ET OBLIGATIONS

Section 1 : Des droits

Article 120 :

Le personnel administratif et technique de la CNDH ainsi que les membres de groupes de travail des Sous-Commissions permanentes ont droit à une rémunération équitable de nature à lui permettre de bien s'acquitter de ses obligations professionnelles ainsi qu'à conforter sa dignité et son indépendance. Cette rémunération fixée par décision du Président, le Bureau entendu, est due pour le temps où l'agent a effectivement fourni ses services. Elle est payée mensuellement.

Sur demande expresse et écrite d'un agent adressée au Secrétaire Technique, une avance sur salaire peut lui être accordée et défalquée de la rémunération du mois en cours sur décision du Bureau.

Article 121 :

Sur demande expresse et écrite de l'agent adressée au Secrétaire Technique, un prêt peut lui être accordé sur décision du Bureau.

Le remboursement est fait mensuellement à concurrence d'une quotité équivalente à un cinquième du salaire.

En cas de démission, de rupture du contrat ou de décès de l'agent survenant avant le remboursement intégral du prêt, le solde restant dû est immédiatement exigible et déduit du décompte final.

Article 122 :

Le personnel administratif et technique ainsi que les membres de groupes de travail des SousCommissions Permanentes ont droit :

- 1) A un congé annuel de reconstitution ;
- 2) A un congé de maladie dûment constatée par un certificat médical ;
- 3) Aux congés de circonstance suivants qui ne peuvent être pris qu'au moment des événements qui les justifient :
 - a Mariage de l'agent : sept jours ouvrables ;
 - b Mariage d'un enfant : deux jours ouvrables ;
 - c Accouchement de l'épouse : quatre jours ouvrables ;
 - d Décès du (de la) conjoint(e) ou d'un parent allié au 1^{er} degré : quatre jours ouvrables ;
 - e Décès d'un parent allié au second degré : deux jours ouvrables ;
 - f Décès du père ou de la mère du (de la) conjoint(e) : trois jours ;
 - g Congé de maternité, sur présentation d'un certificat médical indiquant la date probable de l'accouchement : quatorze semaines dont six semaines avant l'accouchement et huit semaines après ;
 - h Déménagement : 2 jours ouvrables.

Les congés de circonstance sont pris dans les 24 heures de l'avènement des circonstances qui les justifient et ne peuvent être fractionnés.

L'agent de sexe féminin qui a bénéficié d'un congé de maternité ne peut plus, au cours de la même année, faire valoir son droit au congé de reconstitution.

Le congé de reconstitution est cumulable si, à l'exercice précédent, l'agent en a été privé pour des raisons de service. Dans tous les cas, le report de congé de reconstitution ne peut excéder deux ans consécutifs.

Article 123 :

La durée du congé annuel est de 30 jours ouvrables, augmentée d'un jour ouvrable par tranche de trois années d'ancienneté à la CNDH.

Article 124 :

Le personnel administratif et technique de la CNDH ainsi que les membres de groupes de travail des Sous-Commissions permanentes bénéficient des moyens de transport pour les courses de service.

Article 125 :

La CNDH prend en charge les soins médicaux, chirurgicaux, les frais pharmaceutiques et d'hospitalisation de son personnel administratif et technique ainsi que des membres de leurs familles respectives à charge dans les limites prévues par les présentes dispositions.

Elle organise en son sein un service médical minimum qui assure la gestion des crises et inconforts pendant les heures de service et sur le lieu de travail et transfère, en cas de nécessité, les malades vers une formation médicale spécialisée ayant signé une convention avec la CNDH.

Dans les Bureaux de Représentation Provinciale et les Antennes, le personnel de la CNDH et les membres de leur famille à charge sont soignés dans les formations médicales ayant signé une convention avec la CNDH.

Le transfert à l'étranger pour tout cas est envisageable lorsque tous les moyens locaux de traitement ont été exploités, sans succès, et ce, sur la foi d'un rapport médical signé par au moins trois médecins.

Article 126 :

Le personnel administratif et technique ainsi que les membres de groupes de travail des Sous-Commissions permanentes peuvent, en outre, bénéficier des avantages ci-dessous énumérés dont le taux est fixé par décision du Président, le Bureau entendu :

- 1) Prime de fonction ;
- 2) Collation ;
- 3) Indemnité de communication ;
- 4) Indemnité de logement ;
- 5) Allocations familiales ;
- 6) Frais funéraires : construction et aménagement d'un caveau, cercueil, linceuls, corbillard, frais de la morgue, rafraîchissement, rapatriement du corps.

En cas de décès d'un membre du personnel administratif et technique ainsi que des membres de groupes de travail des Sous-Commissions

permanentes de la CNDH, le conjoint survivant et les orphelins ont droit à la totalité du salaire du disparu pendant les six mois qui suivent le décès ainsi qu'au décompte final.

Section 2 : Des avantages

Article 127 :

A la fin de chaque activité d'envergure en rapport avec les missions de la CNDH, le Bureau peut accorder au personnel administratif et technique ainsi qu'aux membres de groupes de travail des Sous-Commissions permanentes une prime dont il détermine la hauteur.

Article 128 :

A l'occasion des fêtes de fin d'année, sur proposition de la Direction des ressources humaines, le personnel administratif et technique ainsi que les membres de groupes de travail des Sous-Commissions permanentes peuvent bénéficier des cadeaux dont la nature et la quantité sont déterminées par le Bureau de la CNDH.

Section 3 : Des obligations

Article 129 :

Le personnel administratif et technique ainsi que les membres de groupes de travail des Sous-Commissions permanentes sont tenus d'honorer leurs engagements vis-à-vis de la CNDH.

A cet effet, ils doivent notamment :

- 1) Exécuter individuellement ou collectivement, consciencieusement et loyalement le travail, dans les conditions, aux temps et lieu convenus ;
- 2) Respecter le secret professionnel, pendant et après la cessation définitive du contrat ;
- 3) Etre en permanence à la disposition de la CNDH;
- 4) S'abstenir d'user de leur qualité pour d'autres motifs que l'exercice de leur fonction, de faire des déclarations publiques au nom de la CNDH s'ils ne sont dûment mandatés par le Président et de faire des déclarations publiques ou privées de nature à porter atteinte au bon fonctionnement et à l'indépendance de la CNDH ;
- 5) Faire preuve, en toute occasion, de courtoisie, de politesse et de respect, tant dans leurs rapports que dans leurs propos, entre eux et à l'égard de leur hiérarchie et des tiers ;

- 6) Faire montre de compétence, de professionnalisme, de droiture, de probité, d'assiduité dans le travail, de discipline en toutes circonstances, ferme mais juste avec leurs subordonnés ;
- 7) Agir conformément aux ordres qui leur sont donnés en vue de l'exécution de leur fonction ;
- 8) Se comporter, tant dans sa vie publique que privée, de manière à préserver et à renforcer la confiance du public envers la CNDH et à améliorer son image de marque ;
- 9) Eviter les pratiques de tribalisme, de népotisme et de favoritisme et des grossièretés sur le lieu de travail et de manière générale tout acte qui pourrait porter atteinte à la moralité, notamment l'ivresse sur le lieu de travail, prostitution dans le milieu de travail, médisance, harcèlement sexuel ou moral et autres formes de violence ;
- 10) Veiller, à toute occasion, à sauvegarder les intérêts de la CNDH ;
- 11) Respecter tous les instruments administratifs et juridiques édictés par la CNDH, notamment le Règlement Administratif, le Règlement Financier, le Manuel des procédures d'examen et traitement des plaintes de la CNDH, le code de bonne conduite de l'agent public de l'Etat.

Article 130 :

Il est interdit au personnel administratif et technique ainsi qu'aux membres de groupes de travail des Sous-Commissions Permanentes de la CNDH de :

- 1) User du trafic d'influence ;
- 2) Etre soumissionnaire aux marchés et adjudications des marchés de fournitures ou de services passés pour le compte de la CNDH, même par personnes interposées ou prête-nom ;
- 3) S'engager dans une démarche ou toute entreprise incompatible avec les missions de la CNDH;
- 4) Faire usage abusif des ressources matérielles et financières de la CNDH;
5. Détruire ou subtiliser les documents, dossiers et archives de la CNDH.

CHAPITRE VII : DE LA CLASSIFICATION FONCTIONNELLE.

Article 131 :

Le personnel de la CNDH est classifié de la manière suivante :

Catégorie 1^{ère} : Cadres de commandement

- 1.1) Le Secrétaire Technique/Secrétaire Général ;

- 1.2) Les Secrétaires Techniques Adjointes/Directeurs Généraux;
- 1.3) Les chefs des Départements et les Coordonnateurs des Bureaux de Représentation Provinciale /Directeur ;
- 1.4) Les membres de groupes de travail/ Chef de Division ;
- 1.5) Les Coordonnateurs adjoints des Bureaux de Représentation Provinciale /Chef de Division ;
- 1.6) Les chefs d'Antenne /Chef de Division;
- 1.7) Les Chef des Services provinciaux/Chef de Bureau;
- 1.8) 1.8. Les Chef des Services des Antennes/ Chef de Bureau ;
- 1.9) Secrétaire administratif/ Chef de Bureau.

Catégorie 2:- Agents de collaboration

- 2.1) Les rédacteurs/ Attachés de bureau de première classe ;
- 2.2) Les Opérateurs de Saisie/ Attachés de bureau de première classe ;
- 2.3) Les chargés de courrier/ Attachés de bureau de deuxième classe ;
- 2.4) Les Hôtesse/ Agents de bureau de première classe.

Catégorie 3 :Agents d'exécution

- 3.1) Les Chauffeurs/ Agents de bureau de deuxième classe ;
- 3.2) Les Agents d'entretien /Agents auxiliaires de première classe ;
- 3.3) Les Huissiers/ Agents auxiliaires de première classe.

Article 132 :

La promotion en grade a pour objet de pourvoir à la vacance des postes organiquement et budgétairement prévus.

CHAPITRE VIII : DU SIGNALEMENT ET DE L'AVANCEMENT EN GRADE

Article 133 :

A la fin de chaque année, le personnel administratif et technique de la CNDH fait l'objet d'un signalement de la part de son chef hiérarchique suivant une fiche dont le modèle figure dans le statut des Agents de carrière des services publics de l'Etat.

Article 134 :

L'appréciation du mérite est synthétisée par l'une des mentions suivantes : Elite, Très Bon, Bon, Assez Bon, Médiocre.

Article 135 :

Le dossier de l'agent, accompagné des avis de ses supérieurs hiérarchiques, est transmis avec la fiche de cotation à l'autorité compétente pour attribution définitive des appréciations.

CHAPITRE IX : DU REGIME DISCIPLINAIRE ET DES SANCTIONS

Section 1 : Du personnel du Cabinet du Président et du personnel rattaché aux autres membres de la CNDH et ainsi que des membres de groupes de travail des Sous-Commissions Permanentes de la CNDH

Article 136 :

En cas de manquement aux devoirs de leurs charges, les membres du Cabinet sont, suivant la gravité des faits, passibles des sanctions disciplinaires ci-après :

- 1) Avertissement ;
- 2) Blâme ;
- 3) Exclusion temporaire ;
- 4) Révocation.

Article 137:

Les sanctions disciplinaires relèvent de la compétence des autorités ci-dessous :

Pour le Personnel d'appoint : l'avertissement et le blâme relèvent des prérogatives du Directeur de Cabinet ou du Chef de cabinet, la suspension et la révocation relèvent du Président, le Bureau entendu, le Membre de la CNDH auquel la personne concernée est rattachée informé.

Pour le personnel politique : seul l'avertissement relève des prérogatives du Directeur de Cabinet ou du Chef de cabinet, le blâme, la suspension et la révocation sont du ressort du Président, le Bureau entendu, le Membre de la CNDH auquel la personne concernée est rattachée informé.

Pour le Directeur de Cabinet, le Directeur de Cabinet adjoint, les Chefs des cabinets : l'avertissement, le blâme, la suspension et la révocation sont les prérogatives du Président, le Bureau entendu, le Membre de la CNDH auquel la personne concernée est rattachée informé.

Section 2 : Du personnel administratif et technique

Article 138 :

Tout manquement par un agent à ses devoirs, à l'honneur et à la dignité de ses fonctions constitue une faute disciplinaire.

Article 139 :

Sont notamment constitutifs de faute lourde :

- 1) La non observance des instructions et consignes particulières de travail ;
- 2) Le non-respect des convenances et des bonnes mœurs sur le lieu de travail ;
- 3) La commission des actes d'improbité ;
- 4) Le fait de se rendre coupable des voies de fait ou d'injures graves à l'égard des autres membres du personnel, de ses supérieurs ou des visiteurs ;
- 5) Tout fait immoral pendant l'exécution ou à l'occasion de l'exécution du travail ;
- 6) Le fait de proférer des injures à l'endroit d'un membre du personnel ou des obscénités, d'être trouvé en état d'ébriété ou sous l'effet de drogue sur le lieu ou à l'occasion du travail ;
- 7) La violation du Code de bonne conduite de l'agent public de l'Etat.

Article 140 :

En cas de manquement aux obligations de ses charges, tout membre du personnel administratif et technique de la CNDH est passible, suivant la gravité des faits commis, leur répétition et leur répercussion sur la marche de l'Institution, de l'une des sanctions disciplinaires suivantes :

- 1) Avertissement ;
- 2) Blâme ;
- 3) Exclusion temporaire ;
- 4) Le licenciement avec préavis ;
- 5) Le licenciement sans préavis.
- 6) Révocation.

Article 141 :

Les cadres de commandement sont soumis à l'autorité disciplinaire du Bureau.

Les agents de collaboration et les agents d'exécution sont, quant à eux, soumis à l'autorité disciplinaire du Bureau sur proposition du Secrétaire Technique.

Article 142 :

La décision d'exclusion temporaire, de licenciement ou de révocation relève de la compétence du Bureau.

La décision de blâme relève respectivement des prérogatives du Secrétaire Technique, du Coordonnateur Provincial et du Chef d'Antenne pour les agents mis à leur disposition.

Article 143 :

Toute décision prise doit être motivée et notifiée au cadre ou à l'agent incriminé.

Article 144 :

Tout membre du personnel administratif et technique de la CNDH qui, d'après des indices suffisamment graves, est présumé avoir commis une faute, peut être suspendu immédiatement de ses fonctions. Dans ce cas, la suspension de fonctions n'est pas une peine, mais une mesure préventive dans l'intérêt du service.

La décision de suspension comme mesure préventive est prise par le Président, le Bureau entendu.

Elle est, dans l'intérêt du service et besoin d'enquête, notifiée à l'agent dans les sept jours ouvrables au moins après la connaissance des faits invoqués.

Article 145 :

La suspension doit être accompagnée de l'ouverture d'une action disciplinaire.

Sa durée ne peut excéder quatre-vingt-dix jours. Un délai supplémentaire de quinze jours est accordé si le lieu d'exécution du contrat de l'agent présumé fautif n'est pas le même que celui du siège.

La période de suspension des fonctions de l'agent pour besoin d'enquête est considérée comme temps de service.

Article 146 :

Les modalités de la procédure disciplinaire sont définies comme suit :

La procédure est écrite et contradictoire en ce sens que le cadre ou l'agent technique incriminé doit recevoir notification préalable des faits qui lui sont reprochés, qu'aucune pièce ne peut être utilisée contre lui sans qu'il n'en ait eu connaissance et qu'il ait été mis en mesure de faire valoir des justifications ou moyens de défense.

Toute demande d'explications écrite à adresser à l'agent peut être précédée d'une simple interpellation verbale.

Si les explications verbales de l'agent sont satisfaisantes, une mise en garde verbale peut suffire à clôturer le dossier.

Cependant, si la gravité du manquement est susceptible d'entraîner une sanction d'avertissement, de blâme, d'exclusion temporaire ou de licenciement du contrat de travail, une action disciplinaire est ouverte. L'agent reçoit alors une demande d'explications à fournir dans les 20 jours.

Il ne peut être infligé à l'agent deux sanctions pour la même faute. Toutefois, il est entendu que ni le remboursement des espèces dissipées, ni la restitution des biens détournés, ni même la réparation des dégâts, ni tout ce qui relève de la responsabilité de l'agent n'excluent l'application d'une sanction disciplinaire à l'endroit de celui-ci.

Article 147 :

Tout agent sanctionné dispose d'un droit de recours gracieux et d'un recours hiérarchique.

Si aucune suite n'est réservée au recours hiérarchique, la sanction est considérée comme définitive et ouvre la voie à un recours juridictionnel.

Article 148 :

L'action disciplinaire demeure distincte et indépendante de l'action répressive à laquelle peuvent donner lieu les mêmes faits.

L'action judiciaire n'est pas suspensive de l'action disciplinaire.

Article 149 :

Toute action disciplinaire se termine par la clôture du dossier.

CHAPITRE IX : DE LA REVISION DU PRESENT REGLEMENT

Article 150 :

Le présent Règlement Administratif peut être modifié à l'initiative du Bureau de la CNDH ou à la demande de 2/3 des membres de l'Assemblée Plénière de la CNDH.

La décision d'amender l'une ou plusieurs dispositions du présent Règlement Administratif est prise à la majorité de 2/3 des membres de l'Assemblée Plénière de la CNDH.

CHAPITRE XI : DES DISPOSITIONS FINALES

Article 151 :

Le Bureau est chargé de l'exécution du présent Règlement Administratif qui entre en vigueur à la date de son adoption.

Adopté à Kinshasa, le 03 mars 2016

POUR L'ASSEMBLEE PLENIERE DE LA CNDH,

- 1) MWAMBA MUSHIKONKE Mwamus : Président
- 2) AMURI LUMUMBA WA MAYEMBE : Vice-Président
- 3) LUNTADILA NZUZI Belinda : Rapporteur
- 4) NEMBUNZU TINDANE Chantal : Rapporteur Adjoint
- 5) MURHOLA Fernandez : Commissaire
- 6) EMBUSA ENDOLE Ghislain : Commissaire
- 7) KENGE NGOMBA TSHILOMBAYI Marie-Thérèse : Commissaire

- 8) WALA - WALA NGALA Olivier : Commissaire
- 9) BILONDA MAKENGA Astrid : Commissaire

B.3.3 Internal rules of the CNDH

L'Assemblée Plénière de la Commission Nationale des Droits de l'Homme ;

Vu la Constitution de la République Démocratique du Congo, spécialement en son article 222 alinéa 3 ;

Vu la Loi organique N°13/011 du 21 mars 2013 portant Institution, Organisation et Fonctionnement de la Commission

Nationale des Droits de l'Homme ;

Adopte le présent Règlement Intérieur dont la teneur suit :

TITRE I : DES DISPOSITIONS GENERALES

Article 1^{er} :

Le présent Règlement Intérieur fixe les modalités d'application des dispositions de la Loi N°13/011 du 21 mars 2013 portant Institution, Organisation et Fonctionnement de la Commission Nationale des Droits de l'Homme.

Il régit l'organisation et le fonctionnement des organes de la Commission Nationale des Droits de l'Homme.

Il détermine également la procédure en cas de violation des Droits de l'Homme garantis par les instruments tant nationaux, régionaux, qu'internationaux ainsi que les droits et devoirs des membres de la Commission Nationale des Droits de l'Homme.

TITRE II : DE LA NATURE, DE LA MISSION ET DU SIEGE DE LA CNDH

Article 2 :

La Commission Nationale des Droits de l'Homme ci-après la CNDH est une Institution Nationale d'Appui à la Démocratie chargée de la promotion et de la protection des droits de l'homme.

Elle est un organisme technique et consultatif de droit public congolais, neutre, indépendant, pluraliste, apolitique, doté de la

personnalité juridique, émergeant au budget de l'Etat et jouissant de l'autonomie administrative, financière et technique.

Elle jouit également de l'indépendance d'actions par rapport aux Institutions classiques de l'Etat et aux autres Institutions d'Appui à la Démocratie.

Dans l'accomplissement de sa mission, la CNDH n'est soumise qu'à l'autorité de la Loi.

Toute pression politique, sociale et internationale sur la CNDH est interdite, dont les membres, cadres et agents, doivent agir en toute probité et en toute impartialité.

Article 3 :

La CNDH a pour mission de veiller à la promotion et à la protection des droits de l'homme.

Elle veille au respect des droits de l'homme et des mécanismes de garantie des libertés fondamentales.

Article 4 :

La CNDH exerce son action à l'égard des personnes physiques ou morales tant publiques que privées se trouvant sur l'ensemble du territoire national ou à l'étranger.

Elle exerce son action à l'égard des personnes physiques, victimes ou auteurs, et des personnes morales victimes ou auteurs des violations des droits de l'homme en République Démocratique du Congo. Elle exerce également son action à l'égard des personnes physiques de nationalité congolaise se trouvant à l'étranger, victimes ou auteurs des violations des droits de l'homme.

Article 5 :

Le siège de la CNDH est établi à Kinshasa, capitale de la République Démocratique du Congo.

La CNDH dispose des Bureaux de représentation aux chefs-lieux des provinces, et d'une antenne dans chaque ville ainsi qu'aux chefs-lieux de chaque territoire de la République Démocratique du Congo.

Article 6 :

Le siège de la CNDH ainsi que ses Bureaux de représentation provinciale, antennes urbaines et territoriales sont inviolables :

- a) Ses locaux, leurs ameublements et les autres objets qui s'y trouvent ainsi que les moyens de transport ne peuvent faire l'objet d'aucune perquisition, réquisition, saisie ou mesure d'exécution;
- b) Ses archives et documents sont inviolables en quelque lieu qu'ils se trouvent ;
- c) Nul ne peut pénétrer ni se maintenir dans les locaux de la CNDH sans l'autorisation du Président de celle-ci ;
- d) Les éléments des forces armées, de la police, des services de sécurité ainsi que d'autres agents des services publics de l'Etat ne peuvent entrer dans l'enceinte de la CNDH pour accomplir leur mission qu'avec l'autorisation du Président, après avis préalable du Bureau;
- e) En cas d'incendie, de menaces graves contre la sécurité de l'Etat, contre la sécurité des occupants des lieux et/ou de la population, ou de tout autre cas fortuit, plaçant le Bureau de la CNDH dans l'impossibilité de décider, les forces armées ou la police, les services de sécurité ainsi que les services de protection civile interviennent promptement, chacun en ce qui le concerne, et font rapport au Bureau de l'Assemblée
- f) Nationale et du Sénat ;
- g) Sans préjudice des autres dispositions du présent Règlement Intérieur, le Bureau de la CNDH prend toutes les mesures que requiert la considération due à son siège, ses bureaux de représentation et ses antennes.

**TITRE III : DES ATTRIBUTIONS ET DES COMPETENCES
DE LA CNDH**

Article 7 :

La CNDH a pour attributions de :

- 1) Enquêter sur tous les cas de violations des droits de l'homme;
- 2) Orienter les plaignants et victimes et les aider à ester en justice sur toutes les violations avérées des droits de l'homme ;
- 3) Procéder à des visites périodiques des centres pénitentiaires et de détention sur toute l'étendue de la République Démocratique du Congo ;
- 4) Procéder à toutes sortes d'investigations nécessaires pour documenter les cas des violations des droits de l'homme et collaborer à toutes fins utiles avec les Organisations de la société civile et les autorités policières, militaires, judiciaires, sécuritaires et politico-administratives en République démocratique du Congo;
- 5) Veiller au respect des droits de la femme et de l'enfant ;

- 6) Veiller au respect des droits des personnes avec handicap ;
- 7) Veiller au respect des droits des personnes du troisième âge, des personnes avec VIH/SIDA, des prisonniers, des réfugiés, des déplacés de guerre, des personnes victimes des calamités de tout genre et des autres groupes vulnérables ;
- 8) Faire connaître aux citoyens leurs droits fondamentaux ;
- 9) Concourir à la promotion de l'éducation civique, et de la culture des droits de l'homme pour une meilleure conscience citoyenne ;
- 10) Renforcer les capacités d'intervention des associations de défense des droits de l'homme ;
- 11) Veiller à l'application des normes juridiques nationales et des instruments juridiques régionaux et internationaux relatifs aux droits de l'homme dûment ratifiés par la République Démocratique du Congo ;
- 12) Régler certains cas de violation des droits de l'homme par la conciliation ;
- 13) Formuler des recommandations pour la ratification des instruments juridiques régionaux et internationaux des droits de l'homme ;
- 14) Promouvoir et veiller à l'harmonisation de la législation, des règlements et des pratiques nationaux avec les instruments internationaux relatifs aux droits de l'homme dûment ratifiés par la République Démocratique du Congo ;
- 15) Dresser des rapports sur l'état d'application des normes nationales et des instruments juridiques internationaux en matière des droits de l'homme ;
- 16) Contribuer à la préparation des rapports que la République Démocratique du Congo présente devant les organisations internationales, en application de ses obligations conventionnelles dans le domaine des droits de l'homme ;
- 17) Examiner la législation interne relative aux droits de l'homme et faire des recommandations pour son ordonnancement législatif ;
- 18) Formuler des suggestions susceptibles de susciter le sens des devoirs indispensables à la promotion collective des droits de l'homme ;
- 19) Emettre des avis et faire des propositions au Parlement, au Gouvernement et aux autres Institutions concernant les questions relatives à la promotion et à la protection des droits de l'homme ainsi qu'au droit international humanitaire et à l'action humanitaire ;
- 20) Développer des réseaux et des relations de coopération avec les Institutions de la République, les Organisations locales, nationales et internationales poursuivant les mêmes objectifs ;
- 21) Exercer toute autre attribution ou activité rentrant dans le cadre de sa mission.

Article 8 :

Dans l'accomplissement de son mandat, la réalisation de ses enquêtes ainsi que dans la conception et la mise en œuvre de ses projets, ses programmes

et ses plans d'action, la CNDH doit promouvoir et protéger tous les droits de l'homme contenus dans les catégories suivantes :

- 1) Les droits civils et politiques ;
- 2) Les droits sociaux, économiques et culturels ;
- 3) Les droits collectifs ;
- 4) Les droits spécifiques tels que droits de la femme et de l'enfant, droits des personnes vivant avec VIH et autres personnes vulnérables ;
- 5) Les droits particuliers en rapport avec la mission de la CNDH et des instruments juridiques internationaux ratifiés par la République Démocratique du Congo.

Article 9 :

Toute personne de nationalité étrangère, se trouvant à l'étranger, auteur des violations des droits de l'homme sur des citoyens congolais, est sujet à l'enquête et à la dénonciation par la CNDH à travers son Ministère des affaires Etrangères et/ou la représentation diplomatique de son pays en République Démocratique du Congo.

**TITRE IV : DE L'ORGANISATION ET DE LA
COMPOSITION**

CHAPITRE I^{er} : DE L'ORGANISATION

Article 10 :

La CNDH comprend les organes ci-après :

- 1) L'Assemblée Plénière ;
- 2) Le Bureau ;
- 3) Les Sous-Commissions Permanentes.

Outre ces trois organes, la CNDH dispose d'un Secrétariat Technique chargé des questions administratives, juridiques et financières ainsi que des bureaux de représentation en provinces, des antennes dans chaque ville et au chef-lieu des territoires.

Elle dispose aussi d'un Cabinet rattaché au Bureau et aux SousCommissions permanentes.

Article 11 :

L'Assemblée Plénière est l'organe de conception, d'orientation, de décision et de contrôle de la CNDH. Ses décisions sont prises par consensus ou, à défaut, par vote majoritaire.

L'Assemblée Plénière est composée de neuf (9) membres désignés conformément aux articles 14, 15, 16 et 17 de la Loi Organique N° 13/011 du 21 mars 2013 portant Institution, Organisation et Fonctionnement de la Commission Nationale des Droits de l'Homme.

Les membres de la CNDH portent le titre de « Commissaire National des droits de l'homme » selon les principes de Paris. Ils sont appelés « Excellences ».

Article 12 :

L'Assemblée Plénière adopte, avant la mise en place du Bureau définitif, son Règlement Intérieur.

Ce Règlement ne peut être mis en application que si la Cour Constitutionnelle le déclare conforme à la Constitution dans les quinze jours de sa saisine. Passé ce délai, il est réputé conforme.

Article 13 :

Le Bureau est l'organe de gestion et de coordination de la CNDH.

Il est composé de 04 membres :

- 1) Un Président ;
- 2) Un Vice-Président ;
- 3) Un Rapporteur ;
- 4) Un Rapporteur Adjoint.

Article 14 :

Les Sous-commissions Permanentes sont des organes techniques chargés de traiter des questions spécifiques ayant trait à la mission de la CNDH.

Article 15 :

La CNDH comprend cinq Sous - Commissions Permanentes suivantes :

- 1) La Sous-commission des droits civils et politiques ;
- 2) La Sous-commission des droits sociaux, économiques et culturels ;
- 3) La Sous-commission des droits collectifs ;
- 4) La Sous-commission des droits de la femme et de l'enfant ;
- 5) La Sous-commission des droits des personnes avec handicap et autres personnes vulnérables dont les personnes vivant avec le VIH/SIDA et les personnes du 3^e âge.

La CNDH peut créer des Sous-Commissions ad hoc chargées d'examiner des questions particulières.

CHAPITRE II : DE LA COMPOSITION DE LA CNDH

Article 16 :

La CNDH est représentative des forces sociales engagées dans la promotion et la protection des droits de l'homme.

Elle est composée de neuf (9) membres, chaque genre étant représenté par au moins trente pour cent des membres. Il s'agit de :

- 1) Un représentant des organisations non gouvernementales des droits de l'homme ;
- 2) Un représentant des ordres professionnels ;
- 3) Un représentant des syndicats ;
- 4) Un représentant des universitaires ;
- 5) Deux représentants des confessions religieuses ;
- 6) Un représentant des personnes avec handicap ;
- 7) Un représentant des organisations non gouvernementales des droits spécifiques de la femme;
- 8) Un représentant des personnes vivant avec le VIH/SIDA.

Article 17 :

Nul ne peut devenir membre de la CNDH s'il ne remplit les conditions ci-après :

- 1) Etre de nationalité congolaise ;
- 2) Etre âgé de 30 ans au moins ;
- 3) Etre titulaire d'un diplôme de graduat au moins ou d'un titre équivalent et justifier d'une expérience professionnelle de 5 ans ou plus dans un domaine pouvant présenter un intérêt pour la Commission ;

- 4) Ne pas appartenir à un organe dirigeant d'une quelconque formation politique ;
- 5) 5. Faire preuve d'intérêt et de maîtrise dans le domaine des droits de l'homme ;
- 6) Faire preuve de compétence, de probité morale et intellectuelle ;
- 7) Produire un extrait de casier judiciaire vierge.

Article 18 :

Les membres de la CNDH sont choisis par l'Assemblée Nationale sur une liste de 2 personnalités par groupe, dont une femme désignée par leurs pairs.

Les représentants des confessions religieuses sont choisis par l'Assemblée Nationale sur une liste de quatre personnalités, dont deux femmes désignées par leurs pairs.

Article 19 :

Les membres de la CNDH siègent à temps plein.

Ils sont investis par Ordonnance du Président de la République.

Article 20 :

Les membres de la CNDH sont désignés pour un mandat de 5 ans renouvelable une seule fois.

Sans préjudice de l'alinéa précédent, leurs fonctions prennent fin pour cause de :

- 1) Démission ;
- 2) Empêchement définitif ;
- 3) Condamnation irrévocable à une peine de servitude principale pour infraction intentionnelle ;
- 4) Déchéance du mandat sur proposition des deux tiers des membres pour manquement grave sans préjudice de l'action judiciaire qui peut être engagée contre lui ;
- 5) Décès.

Aux termes du présent article, constitue un manquement grave, tout acte ou tout comportement susceptible de compromettre la mission de la CNDH.

Article 21 :

En cas de vacance, le remplacement s'effectue selon la procédure qui a présidé à la désignation du membre concerné.

Article 22 :

L'Assemblée Nationale réunit en session ordinaire ou extraordinaire, entérine le remplacement dans les 15 jours. Passé ce délai, l'entérinement est acquis d'office.

Article 23 :

Les membres de la CNDH désignés en remplacement de ceux dont les fonctions ont pris fin avant leur terme normal, achèvent le mandat de ceux qu'ils remplacent.

Article 24 :

Les membres de la CNDH sont désignés sur base des critères de compétence, d'expérience ainsi que de probité morale et intellectuelle.

Article 25 :

La CNDH se réunit de plein droit au plus tard le cinquième jour qui suit son investiture par le Président de la République.

La séance d'ouverture est présidée par le doyen d'âge, assisté de deux membres les moins âgés et porte préalablement sur l'adoption de son règlement intérieur puis sur l'élection des membres du Bureau et des coordonnateurs des SousCommissions permanentes.

TITRE V : DU FONCTIONNEMENT DE LA CNDH

CHAPITRE I : DES MEMBRES

Article 26 :

Avant leur entrée en fonction, les membres de la CNDH prêtent, devant la Cour Constitutionnelle, le serment ci-après :

« Moi,..., je jure sur l'honneur, de respecter la Constitution et les Lois de la République Démocratique du Congo, de remplir loyalement et fidèlement les fonctions de membre de la Commission Nationale des Droits de l'Homme. Je

prends l'engagement solennel de n'exercer aucune activité susceptible de nuire à l'indépendance et à la transparence de la Commission Nationale des Droits de l'Homme, de m'en tenir à l'obligation de confidentialité, même après la cessation de mes fonctions ».

Article 27 :

Les membres de la CNDH bénéficient des indemnités et avantages qui leur assurent l'indépendance nécessaire à l'accomplissement de leur mission.

A leur entrée en fonction, ils ont droit aux frais d'installation équivalant à six mois de leurs émoluments.

A la fin de leurs fonctions, ils bénéficient d'une indemnité de sortie équivalant à six mois de leurs émoluments.

Article 28 :

Les représentants de la CNDH dans les structures provinciales et locales sont recrutés et nommés par le Bureau, après avis conforme de l'Assemblée Plénière.

Article 29 :

La CNDH se dote du personnel nécessaire à son fonctionnement.

Le personnel administratif, juridique et financier est recruté par voie de concours, organisé sous l'égide du Bureau et après l'avis de l'Assemblée Plénière.

CHAPITRE II : DE L'ASSEMBLEE PLENIERE

Article 30 :

L'Assemblée Plénière détermine la politique générale de la CNDH.

Elle est compétente pour délibérer sur toutes les questions relevant des attributions de la CNDH notamment:

- a) Adopter l'ordre du jour des sessions ;
- b) Elaborer et adopter le Règlement Intérieur de la CNDH ;
- c) Adopter le calendrier de ses travaux ;
- d) Créer les Sous-commissions ad hoc ;
- e) Créer des Départements Techniques et/ou des Directions ;

- f) Approuver le plan d'actions de la CNDH ;
- g) Adopter le Rapport annuel d'activités de la CNDH ;
- h) Entériner les Rapports spécifiques et contextuels sur la situation des droits de l'Homme en RDC ;
- i) Se prononcer sur le remplacement d'un Membre de la CNDH;
- j) Adopter les prévisions budgétaires de la CNDH ;
- k) Adopter le Règlement régissant le Personnel de la CNDH.

Article 31 :

L'Assemblée Plénière se réunit deux fois par an en session ordinaire :

- a) La première session s'ouvre au mois de Février ;
- b) La deuxième session s'ouvre au mois d'Aout.

La durée de chaque session ne peut dépasser 1 mois.

Article 32 :

L'Assemblée Plénière peut en outre être convoquée en session extraordinaire chaque fois que de besoin sur un ordre du jour bien déterminé.

Les sessions extraordinaires sont closes aussitôt que l'ordre du jour est épuisé.

Elles ne peuvent excéder quinze jours.

Article 33 :

L'Assemblée Plénière est convoquée par le Président de la CNDH sur décision du Bureau.

L'initiative de sa convocation appartient concurremment au Président, à la moitié des membres du Bureau et aux 2/3 des membres de l'Assemblée Plénière.

Article 34 :

L'Assemblée Plénière ne siège valablement qu'à la majorité de 2/3 de ses membres.

Dans le cas où ce quorum n'est pas atteint, un procès-verbal de carence est dressé et signé par tous les membres présents.

Le Président de la CNDH convoque à nouveau l'Assemblée Plénière qui siège endéans 10 jours à dater du procès-verbal de carence.

A cette convocation subséquente, l'Assemblée Plénière ne siège valablement qu'à la majorité absolue.

Article 35 :

L'Assemblée Plénière prend ses décisions à la majorité absolue des membres de la CNDH.

En cas d'égalité des voix, celle du Président est prépondérante. Les séances de l'Assemblée Plénière se tiennent à huis clos, à moins qu'elle en décide autrement.

Le vote se fait à main levée ou au scrutin secret.

Le scrutin secret est réservé aux matières relatives aux personnes.

Article 36 :

La convocation de l'Assemblée Plénière est adressée à l'ensemble des membres au moins quinze jours à l'avance, avec indication du projet d'ordre du jour établi par le Bureau.

En cas d'urgence, le délai de convocation peut être ramené à cinq jours ouvrables.

Tout membre qui souhaite inscrire une question particulière à l'ordre du jour doit la porter à la connaissance du Bureau cinq jours au moins avant la tenue de l'Assemblée Plénière.

En cas d'urgence telle que prévue à l'alinéa 2 du présent article, ledit délai peut être ramené à trois jours.

Article 37 :

Les sessions de l'Assemblée Plénière peuvent se tenir en tout lieu de la République Démocratique du Congo, déterminé par le Bureau de la CNDH.

Article 38 :

L'organisation des travaux et l'élaboration du calendrier et de l'ordre du jour sont faites par le Bureau qui les soumet à l'adoption de l'Assemblée Plénière.

Article 39 :

Les documents de travail à examiner en Assemblée Plénière sont transmis aux membres au même moment que les convocations.

En cas d'urgence, et à titre exceptionnel, ce document peuvent être distribués séance tenante.

Les convocations et les documents sont adressés aux membres de la CNDH par le rapporteur, en mains propres ou par courrier électronique.

Article 40 :

Les membres signent à chaque séance, une feuille de présence, nominative présentée par les soins du Rapporteur.

Sont adjointes aussi sur la feuille de présence, les indications d'absence ou d'excuse.

Les absences non justifiées aux séances de l'Assemblée Plénière sont sanctionnées conformément au régime disciplinaire.

Article 41 :

Lorsqu'un texte est soumis à l'adoption de l'Assemblée Plénière, il peut donner lieu à des propositions d'amendements ou de sous amendements.

Ces amendements sont proposés par écrit par les membres de l'Assemblée Plénière et transmis au Bureau.

Ils doivent parvenir au Bureau au moins quarante-huit heures avant la tenue de la séance à laquelle sera examinée la question.

En cas d'urgence, ils peuvent être présentés en début de séance.

Ne peuvent être proposés en séance que des amendements ou sous-amendements de pure forme.

Article 42 :

En Assemblée Plénière, le rapporteur présente le projet de texte arrêté par le Bureau ainsi que les amendements apportés par les autres membres.

Lorsqu'il s'agit d'un rapport à présenter par une Sous-Commission ad hoc, la parole est accordée successivement au Président et au Rapporteur de ladite Sous-Commission.

Article 43 :

Toute mission effectuée à l'intérieur ou à l'extérieur du pays par un membre pour le compte de la CNDH fait l'objet d'un rapport endéans dix jours.

Il en est de même des engagements pris pour le compte de la CNDH. Ce rapport donne lieu à un débat, si besoin se fait sentir.

Article 44 :

L'Assemblée Plénière peut décider d'entendre ou de consulter toute personne ayant une compétence en relation avec les points à traiter.

Article 45 :

Le Président veille à ce que tout membre de la CNDH qui désire, puisse s'exprimer et que le temps de parole soit équitablement réparti.

L'orateur ne peut s'adresser qu'au Président ou à l'Assemblée.

Tous les orateurs sont entendus alternativement un ou deux pour et un ou deux contre sur les propositions en discussion.

Article 46 :

Les procès-verbaux des séances sont dressés par le Rapporteur. Ils sont transmis aux membres une semaine avant la séance prévue pour leur adoption et soumis à leur approbation au début de la séance.

Article 47 :

L'Assemblée Plénière statue par voie de décisions, résolutions ou recommandations.

Article 48 :

Tout membre peut présenter un amendement sur un sujet en discussion.

L'amendement est une proposition qui ajoute à la proposition initiale, en retranche ou en modifie quelques parties.

Tout amendement doit être soumis aux voix avant la motion à laquelle il se rapporte.

Si une motion ou une décision fait l'objet de plusieurs amendements, l'on vote d'abord celui qui s'éloigne le plus quant au fond de la proposition initiale.

L'ordre de priorité des amendements est ensuite déterminé de telle manière que tous les amendements soient mis aux voix.

Si aucun amendement n'est adopté, la proposition initiale est mise aux voix.

Tout amendement peut être retiré par son auteur, à moins qu'un sous-amendement ne soit en discussion ou n'ait été adopté.

Dans le cas où une motion suscite des débats, le Président de séance demande à un intervenant de se prononcer pour et à un autre de se prononcer contre avant de la soumettre aux voix.

Tout amendement doit être écrit, signé et déposé au Bureau de l'Assemblée Plénière.

Article 49 :

Lors de la lecture d'un procès-verbal, tout membre a le droit de lever une réclamation contre une mauvaise rédaction d'une intervention.

Lorsque la réclamation est fondée, le Président de séance ordonne la rectification du procès-verbal. En conséquence, le texte ainsi modifié est adopté.

Si la séance se déroule sans réclamation, le procès-verbal est adopté.

Les procès-verbaux ainsi que les comptes rendus des séances plénières sont revêtus des signatures du Président et du Rapporteur.

Ils sont conservés dans les archives de la CNDH.

Article 50 :

Nul ne peut intervenir sans avoir demandé et obtenu la parole du Président.

Durant les séances de l'Assemblée Plénière, les intervenants s'abstiennent de toute imputation dommageable, toute attaque personnelle, toute manifestation ou interruption troublant l'ordre.

Article 51 :

Nul n'est interrompu lorsqu'il parle, si ce n'est pour un rappel à l'ordre.

Si un orateur, après avoir été appelé deux fois à l'ordre au cours d'une même intervention, continue à s'écarter de la question soumise aux débats, la parole lui est retirée par le Président sur cette question pour le reste de la séance.

Il en est de même de l'orateur qui, après avoir reçu un avertissement du Président, persiste à répéter ses propres arguments ou ceux produits par un membre dans le débat.

S'il persiste à conserver la parole après que le Président la lui ait retirée et sans préjudice de l'application des dispositions relatives à la discipline, le Président peut décider que ses propos ne figurent ni au procès-verbal ni au compte-rendu.

Article 52 :

Pour les séances de l'Assemblée Plénière, la langue de travail est le français.

Article 53 :

Dans la salle des séances, les membres du Bureau prennent place devant, face aux autres membres qui sont disposés selon leur convenance personnelle.

Article 54 :

Tout membre de l'Assemblée Plénière peut, avant ou au cours d'un débat, demander la parole par motion d'ordre, motion de procédure, motion d'information, motion préjudicielle ou par motion incidente.

- a) La motion d'ordre est celle qui concerne l'ordre à établir dans la série des questions à discuter, la clôture des débats sur un point en discussion, la suspension ou la levée de la séance ;
- b) La motion de procédure concerne un point du Règlement Intérieur ou la manière dont la réunion est conduite ;
- c) La motion d'information concerne un complément d'information essentielle pour l'orientation des débats ;
- d) La motion préjudicielle est celle qui est soulevée à l'occasion de l'examen d'une matière et dont la solution relève d'un organe extérieur à l'Assemblée Plénière ;
- e) La motion incidentielle est celle qui intervient au début ou au cours des débats et sur laquelle l'Assemblée doit se prononcer ou poursuivre les débats sur une question.

Article 55 :

Le membre qui a demandé et obtenu la parole du Président ne peut être interrompu jusqu'à la fin de son exposé par une motion autre que la motion d'ordre.

Celui qui intervient par motion d'ordre ne peut aborder le fond de la matière débattue.

Article 56 :

La motion a priorité sur la question principale. Elle en suspend la discussion.

La parole est retirée à l'auteur d'une motion si celle-ci est manifestement étrangère à la nature d'une motion.

La motion est soumise aux voix, soit immédiatement soit après sa discussion, par main levée.

Article 57 :

En vertu de son pouvoir de police de séance, le Président de l'Assemblée Plénière propose la limitation du temps de parole à accorder à chaque membre qui désire intervenir.

De même, il peut limiter le nombre d'interventions sur un point précis du débat.

Article 58 :

Aucune intervention, même par motion, ne sera acceptée lorsque le Président de séance fait la synthèse, avec l'accord de l'Assemblée, pour clore le débat ou lorsque la procédure de vote est déjà enclenchée.

Article 59 :

Le vote est obligatoire. A ce titre, le fait pour un membre de l'Assemblée Plénière d'éviter délibérément de participer au vote est assimilé à une absence injustifiée à la séance à laquelle le vote est engagé.

CHAPITRE II : DU BUREAU

Article 60 :

Le bureau est l'organe de gestion et de coordination de la CNDH.

Il est composé de 4 membres :

- a) Un Président;
- b) Un Vice-président ;
- c) Un Rapporteur ;
- d) Un Rapporteur Adjoint.

Article 61 :

Le Bureau est l'organe d'exécution des décisions de l'Assemblée Plénière et de gestion quotidienne des activités de la CNDH.

Il statue par voie de décision, avis ou recommandation.

Il élabore les projets et programmes d'actions ainsi que les prévisions budgétaires de la CNDH qu'il soumet à l'approbation de l'Assemblée plénière.

Article 62 :

Le Bureau se réunit au moins une fois par semaine ou chaque fois que de besoin, sur convocation et sous la direction du Président de la CNDH.

Le Bureau se réunit valablement à la majorité absolue des membres et ses décisions sont prises par consensus ou, à défaut, par vote.

Les votes sont acquis à la majorité simple des suffrages exprimés par les membres présents.

En cas d'égalité des voix, celle du Président est prépondérante.

Article 63 :

Tout membre du Bureau assume une responsabilité collective au travers les décisions et recommandations prises dans les réunions régulièrement tenues par le Bureau.

Chaque membre du Bureau assume également une responsabilité spécifique de la gestion politicoadministrative de la CNDH.

Le travail des membres du Bureau se fait dans un esprit de collaboration afin d'assurer la complémentarité entre les différents domaines d'activités de la CNDH.

Tout membre qui a traité un dossier est tenu de le présenter au Bureau, seul organe habilité à le rendre public, exécutoire ou à le présenter à l'Assemblée Plénière.

Article 64 :

Les membres du bureau sont élus par ordre de préséance et en séance publique et au scrutin uninominal secret à la majorité absolue de suffrage exprimé.

Article 65 :

Faute de majorité absolue au premier tour, il est procédé au deuxième tour pour lequel la majorité relative suffit.

A ce tour, se présente les 2 candidats qui ont obtenu le plus grand nombre des voix.

Lorsqu'il y a égalité des voix au second tour du scrutin, le candidat le plus âgé est élu.

En cas de candidature unique, le Président du Bureau provisoire proclame élu l'unique candidat en présence.

Séance tenante, les scrutateurs tirés au sort parmi les membres de la CNDH, dépouillent les bulletins devant l'Assemblée Plénière et le président du Bureau provisoire en proclame les résultats.

SECTION 1 : DU PRÉSIDENT

Article 66 :

Le Président de la CNDH est désigné pour une durée de cinq ans renouvelable une seule fois.

Il a rang de Ministre.

Les autres membres ont rang de vice-ministre.

A ce titre, ils bénéficient des avantages et privilèges dus à ce rang conformément aux lois et règlements en vigueur.

Article 67 :

Le Président assure la mission générale de direction, de coordination des activités et de représentation de la CNDH.

- a) A ce titre :
- b) Il veille au bon fonctionnement de la CNDH et rend compte au bureau et à l'Assemblée plénière ;
- c) Il convoque et préside les réunions et les séances de l'Assemblée Plénière et du Bureau ;
- d) Il a mandat de représenter la CNDH en justice tant en demandeur qu'en défendeur ;
- e) Il est le représentant légal ainsi que le mandataire juridique, administratif et financier de la CNDH;
- f) Il engage la CNDH auprès des institutions publiques et privées, nationales et internationales ainsi qu'auprès des tiers, et ce, dans les limites des pouvoirs qui lui sont délégués soit par la Plénière, soit par le Bureau ;
- g) Il signe au profit de la CNDH des conventions de partenariat et contrats de collaboration avec les partenaires bilatéraux et multilatéraux, financiers et techniques.

Article 68 :

Le Président assume entre autres les pouvoirs suivants :

- a) Exécuter le budget de la CNDH en tant que Gestionnaire des crédits, conformément au Règlement financier adopté par le Bureau ;
- b) Présenter au Bureau et à la session ordinaire d'Août de l'Assemblée Plénière, les prévisions budgétaires de la CNDH ;
- c) Présenter trimestriellement au Bureau et à chaque session ordinaire de l'Assemblée Plénière, l'état d'exécution du budget de la CNDH ;
- d) Disposer d'agents de la police pour le maintien de l'ordre dans les installations de la CNDH ;

- e) Signer les décisions, avis, résolutions et recommandations du Bureau et de l'Assemblée Plénière ;
- f) Assurer les relations entre la CNDH et les autres Institutions et Services de l'Etat ;
- g) Maintenir l'ordre au sein de la CNDH ;
- h) Réunir le Bureau au moins une fois par semaine et autant des fois que de besoin.

Article 69 :

Le Président de la CNDH assure la police des séances aussi bien de la Plénière que du Bureau. A cet égard, il exerce notamment les pouvoirs ci-après :

- a) Prononcer l'ouverture, la suspension, la reprise ou la clôture des séances ;
- b) Accorder ou retirer la parole ;
- c) Limiter le temps de parole ;
- d) Poser des questions, susciter des discussions avant de les soumettre au vote ;
- e) Proclamer les résultats de vote ;
- f) Faire observer le Règlement Intérieur ;
- g) Intervenir au cours des débats pour présenter l'état de la question et y ramener ceux qui s'en écartent.

Article 70 :

Le Président de la CNDH transmet, suivant le cas, au Président de la République, à l'Assemblée Nationale, au Sénat, au Gouvernement, aux Cours et Tribunaux ainsi qu'aux autres Institutions et Services Publics de l'Etat, les décisions, avis et recommandations de la CNDH et les saisit de tout problème qui se pose pour le bon fonctionnement et l'exécution des décisions de la CNDH.

Article 71 :

Le Président de la CNDH tient pleinement informé le Bureau des messages et lettres qui concernent l'Institution.

Article 72 :

Le Président de la CNDH peut déléguer par écrit certaines de ces attributions aux autres membres du Bureau.

SECTION 2 : DU VICE-PRESIDENT

Article 73 :

Le Vice-Président de la CNDH assiste le Président dans l'exercice de ses fonctions telles que définies dans le présent Règlement Intérieur.

Il est chargé des questions juridiques de la CNDH.

Article 74 :

Le Vice-Président de la CNDH remplace le Président en cas d'absence ou d'empêchement.

SECTION 3 : DU RAPPORTEUR

Article 75 :

Le Rapporteur de la CNDH est le gestionnaire principal des archives administratives de la CNDH et est chargé de la gestion des ressources humaines.

Il est chargé des relations avec la presse.

Il est le porte- parole du Bureau.

Il s'occupe de l'organisation technique des séances plénières du Bureau et de l'Assemblée Plénière.

Il supervise la rédaction des rapports, revues, décisions, avis, résolutions et recommandations de la CNDH.

Il signe conjointement avec le Président de la CNDH les procèsverbaux des réunions du Bureau et des séances de l'Assemblée Plénière.

Il s'occupe également du suivi des missions programmées par le Bureau.

Il s'occupe enfin du suivi de l'exécution des décisions prises par le Bureau et l'Assemblée Plénière.

SECTION 4 : DU RAPPORTEUR ADJOINT

Article 76 :

Le Rapporteur Adjoint de la CNDH assiste le Rapporteur dans l'exercice de ses attributions.

Il assiste le bureau dans l'élaboration et l'exécution du budget de la CNDH.

Sous la direction du bureau, il supervise les services financiers et sociaux de la CNDH.

Il s'occupe également des questions logistiques ainsi que du patrimoine de la CNDH.

Il assure également la supervision des services des relations publiques, du protocole et de voyage.

Il rend régulièrement compte au Bureau.

Article 77 :

Le Rapporteur Adjoint de la CNDH remplace le Rapporteur en cas d'absence ou d'empêchement.

CHAPITRE III : DES SOUS-COMMISSIONS PERMANENTES

Article 78 :

La CNDH comprend cinq Sous-Commissions Permanentes :

- 1) La Sous-Commission des droits civils et politiques ;
- 2) La Sous-Commission des droits sociaux, économiques et culturels ;
- 3) La Sous-Commission des droits collectifs ;
- 4) La Sous-Commission des droits de la femme et de l'enfant ;
- 5) La Sous-Commission des droits des personnes vivant avec handicap et autres personnes vulnérables dont les personnes vivant avec le VIH / SIDA et les personnes de 3^e âge.

Article 79 :

Les cinq Sous-Commissions Permanentes de la CNDH sont animées par les membres de l'Assemblée Plénière autres que ceux du Bureau.

Article 80 :

Les articles 65 et 66 s'appliquent mutatis mutandis à la désignation des coordonnateurs des sous commissions.

Article 81 :

Les cinq Sous commissions permanentes sont constituées chacune de deux Groupes de Travail chargé de la promotion et de la protection des droits l'homme.

Chaque groupe de Travail est constitué d'au moins 104 Experts dont 52 chargés de la promotion et 52 chargés de la protection, et ce, par sous-commission permanente.

Article 82 :

Le Groupe de Travail chargé de la promotion des droits de l'homme est composé des experts chargés de l'éducation civique, formation et de la vulgarisation.

Article 83 :

Le groupe de travail chargé de la protection des droits de l'homme est composé des experts chargés des enquêtes et de suivi sur les cas des violations des droits de l'homme.

Article 84 :

Les attributions et la composition des groupes de travail sont déterminées par le Règlement administratif.

CHAPITRE IV : DE L'ADMINISTRATION DE LA CNDH

Article 85 :

L'administration de la CNDH comprend :

- a) Un Cabinet rattaché au Bureau et aux Sous-Commissions Permanentes ;
- b) Un Secrétariat Technique ;
- c) Des Bureaux de représentation en provinces ;
- d) Des Antennes dans chaque ville et aux chefs-lieux des Territoires.

Article 86 :

Le Cabinet du Bureau de la CNDH est constitué d'un personnel politique et d'un personnel administratif d'appoint qui assiste le Bureau dans l'accomplissement de ses fonctions.

Article 87 :

Chaque membre de la CNDH dispose d'un personnel politique et d'un personnel d'appoint qui est attaché au Cabinet du Bureau.

Article 88 :

Tout membre de Cabinet du Bureau de la CNDH est nommé et, le cas échéant, relevé de ses fonctions par le Président de la CNDH sur proposition du membre de la CNDH à qui il est attaché.

**SECTION I : DE LA REPARTITION DU
PERSONNEL POLITIQUE ET D'APPOINT DU
BUREAU ET DES COORDONATEURS DES SOUS
COMMISSIONS PERMANENTES DE LA CNDH.**

Article 89 :

Le Cabinet du Président de la CNDH est composé du Personnel politique et d'Appoint suivant :

Le personnel spécialisé est composé de(s) ou d' :

Un Directeur de Cabinet ;

- Un Directeur de Cabinet Adjoint ;
- Neuf Conseillers ;
- Deux Chargés des Missions ;
- Deux Chargés d'Etudes ;
- Un Secrétaire Particulier du Président ;
- Un assistant du Président ;

- Deux secrétaires administratifs ;
- Un secrétaire du directeur de cabinet ;
- Un chef de protocole ;
- Un chef de protocole adjoint ;
- Un Intendant ;
- Un Intendant adjoint ;
- Un attaché de presse ;
- Un assistant de l'attache de presse ;
- Un Webmaster (Administrateur du Site Internet) ; - Un Contrôleur de Budget affecté ;
- Un Sous-Gestionnaire des crédits ;
- Un Comptable Public ;
- Un Comptable subordonné ;
- Quatre Opérateurs de saisie ;
- Deux Préposés des courriers ;
- Trois Hôtesses ;
- Neuf Attachés de sécurité ;
- Trois Chauffeurs ;
- Deux Huissiers.

Article 90 :

Les autres cabinets des membres du bureau et des coordonnateurs des sous-commissions permanentes sont coordonnés par des Chefs de cabinet.

Article 91 :

Le Cabinet du Vice-Président comprend les animateurs suivants:

- Un Chef de Cabinet ;
- Six Conseillers ;
- Un Chargé de Missions ;
- Un chargé d'études ;
- Un Assistant ;
- Un Secrétaire Particulier ;
- Un Secrétaire de Cabinet ;
- Un Secrétaire de Cabinet Adjoint ;
- Un Rédacteur ;
- Deux Opérateurs de saisie ;
- Un Préposé aux indicateurs d'entrée et de sortie ;

- Deux Hôtesse ;
- Six Attachés de sécurité -Un Agent de protocole ;
- Un Huissier ;
- Un Chauffeur.

Article 92 :

Le Cabinet du Rapporteur comprend les animateurs suivants :

- Un Chef de Cabinet ;
- Quatre Conseillers ;
- Un Chargé de Missions ;
- Un Assistant ;
- Un Secrétaire Particulier ;
- Un chargé d'études ;
- Un Secrétaire de Cabinet ;
- Un Secrétaire de Cabinet Adjoint ;
- Un Rédacteur ;
- Un Rédacteur Adjoint ;
- Deux Opérateurs de saisie ;
- Un Préposé aux indicateurs d'entrée et de sortie ;
- Deux Hôtesse ;
- Six attachés de sécurité
- Un agent du protocole ;
- Un Chauffeur ;
- Un huissier.
- Une Cellule de Communication est rattachée au Rapporteur.

Article 93 :

Le Cabinet du Rapporteur Adjoint comprend :

- Un Chef de Cabinet ;
- Quatre Conseillers ;
- Un Chargé de Missions ;
- Un Assistant ;
- Un Secrétaire Particulier ;
- Un Secrétaire de Cabinet ;
- Un Secrétaire de Cabinet Adjoint ;
- Un intendant ;

- Un rédacteur ;
- Deux Opérateurs de saisie ;
- Un préposé aux indicateurs d'entrée et de sortie ;
- Deux Hôtesse ;
- Un agent du protocole ;
- Six attachés de sécurité :
- Un chauffeur.
- Un huissier

Article 94 :

Les cabinets des Coordonnateurs des sous-commissions permanentes sont constitués du personnel politique et d'appoint suivant :

- Un Chef de Cabinet;
- Trois Conseillers ;
- Un Chargé de Mission ;
- Un Assistant ;
- Un Secrétaire Particulier ;
- Six Attachés de Sécurité ;
- Un Opérateur de saisie ;
- Un Chargé des courriers ;
- Deux Hôtesse ;
- Un Huissier ;
- Un Chauffeur.

Article 95 :

Les membres du personnel politique, administratif et d'appoint sont choisis librement au sein ou en dehors des services publics de l'Etat sur approbation du Président de la CNDH.

Article 96 :

Lorsque les personnes nommées sont agents de carrière des Services publics de l'Etat, elles sont placées en position de détachement aux dispositions statutaires.

Article 97 :

L'Assemblée plénière sur proposition du bureau adopte le règlement administratif et financier fixant l'organisation et le fonctionnement du Cabinet.

Article 98 :

Les fonctions des membres du Cabinet du Bureau et des sous commissions permanentes de la CNDH prennent fin par :

- a) Décès ;
- b) Cessation des fonctions du Membre de la CNDH ;
- c) Révocation ;
- d) Démission.

Article 99 :

Lors de la cessation des fonctions par fin mandat, les membres du Cabinet ont droit à une indemnité de sortie équivalente à 6 mois de leur dernier traitement.

SECTION II : DU SECRETARIAT TECHNIQUE DE LA CNDH

Article 100 :

Le Secrétariat Technique de la CNDH est un service administratif et technique qui assure l'administration quotidienne de la CNDH et exécute les tâches techniques lui assignées par le Bureau.

Il dispose d'une Division unique dotée d'un personnel d'appoint.

Article 101 :

Le Secrétariat Technique de la CNDH est dirigé par un Secrétaire Technique qui a rang de secrétaire général de l'administration publique.

Il est assisté de trois secrétaires techniques adjoints, avec rang des directeurs généraux de l'administration publique.

Les secrétaires techniques adjoints sont chargés respectivement des questions administratives, juridiques et financières.

Article 102 :

Le Secrétaire Technique de la CNDH et ses Adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH, sur décision du Bureau, après avis de l'Assemblée Plénière.

Article 103 :

Le Secrétaire Technique gère sous l'impulsion du Bureau les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein du Secrétariat Technique.

Il prépare le budget sous la supervision du bureau de la CNDH.

Il est également chargé de la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH.

Il prépare les dossiers juridiques et judiciaires à soumettre au bureau de la CNDH.

Article 104 :

Le Secrétariat Technique de la CNDH est composé de 14 départements. Toutefois, il peut créer d'autres chaque fois que de besoin, sur décision de l'Assemblée Plénière.

Ces Départements sont les suivants :

- 1) Monitoring, enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) 4. Communication et Médias ;
- 5) Départements d'études et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales des droits de l'Homme et la Société Civile Congolaise ;
- 7) Suivi des Mécanismes nationaux, régionaux et internationaux de promotion et de protection des droits de l'homme;
- 8) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 9) Responsabilité Sociale des Entreprises ;

- 10) Centre National de documentation en droits de l'Homme et en droit international humanitaire ;
- 11) Département social et médical ;
- 12) Directions des ressources humaines ;
- 13) Direction logistique et du Patrimoine.

Chaque Département est constitué d'un ou plusieurs services.

Article 105 :

Un règlement administratif de la CNDH détermine l'organisation et le fonctionnement des départements.

Article 106 :

Le secrétaire Technique travaille sous la supervision du Bureau. En cas de besoin, il peut être invité à assister aux séances et réunions du Bureau et de l'Assemblée Plénière sans voix délibérative.

Article 107 :

Le Bureau de la CNDH décide de l'opportunité de recourir aux Experts tant nationaux qu'internationaux ainsi qu'aux Avocats.

Il fixe les conditions de leur recrutement.

Leurs honoraires sont à charge du Trésor Public et, le cas échéant, des Partenaires de la CNDH.

SECTION III : DES BUREAUX DE REPRESENTATION AUX CHEFS - LIEUX DES PROVINCES

Article 108 :

La CNDH dispose d'un Bureau de représentation provinciale au chef-lieu de chaque Province de la République Démocratique du Congo.

Article 109 :

Chaque Bureau de représentation provinciale de la CNDH est dirigé par 4 membres dont: Un Coordonnateur Provincial et 3 Coordonnateurs

Provinciaux Adjoints chargés respectivement des questions administratives, techniques et financières

Il dispose d'un personnel d'appoint suivant :

- Un Secrétaire administratif ;
- Un Rédacteur ;
- Un Opérateur de saisie ;
- Un Préposé des indicateurs d'entrées et de sortie ;
- Une Hôtesse ;
- Un Huissier.

Article 110 :

Le Coordonnateur Provincial et ses Adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau.

Article 111 :

Le Coordonnateur Provincial gère sous l'impulsion du bureau les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein du Bureau de représentation provinciale.

Il prépare l'état de besoin du bureau de représentation provinciale et le transmet au bureau de la CNDH.

Il est également chargé de la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH en province.

Il prépare les dossiers juridiques et judiciaires à soumettre au bureau de la CNDH.

Article 112 :

Le Bureau de représentation provinciale de la CNDH est composé de services suivants :

- 1) Monitoring, Enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;

- 4) Communication et, Médias ;
- 5) Départements d'études et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales installées en province des droits de l'Homme et des organisations de la Société Civile Congolaise ;
- 7) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 8) Responsabilité Sociale des Entreprises ;
- 9) Centre provincial de documentation en droits de l'Homme et en droit international humanitaire ;
- 10) Service social et médical ;
- 11) Service des ressources humaines ;
- 12) Service logistique et du Patrimoine.

Article 113 :

Le Bureau de représentation provinciale veille au bon fonctionnement des services au niveau provincial.

Article 114 :

Le Bureau de représentation provinciale travaille sous la supervision du Bureau de la CNDH. En cas de besoin, il peut être invité à assister aux séances et réunions du Bureau et de l'Assemblée Plénière sans voix délibérative.

Article 115 :

Le Bureau de la CNDH peut, pour le compte de la province, décider de l'opportunité de recourir aux Experts tant nationaux qu'internationaux ainsi qu'aux Avocats.

Dans ce cas, il fixe les conditions de leur recrutement.

Leurs honoraires sont à charge du Trésor Public et, le cas échéant, des Partenaires de la CNDH.

Article 116 :

Les agents et cadres des bureaux de représentation provinciale sont recrutés dans leurs Provinces respectives, nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH.

Ils travaillent à temps pleins et sous la supervision permanente du Coordonnateur Provincial de la CNDH.

Article 117 :

Les Bureaux de représentation en Province de la CNDH sont chargés de la promotion et de la protection des droits de l'homme.

A ce titre, ils sont chargés de:

- 1) Suivre la situation des droits de l'homme en Provinces et en faire rapport au Bureau de la CNDH ;
- 2) Recevoir les plaintes individuelles et collectives ou se saisir d'office des cas des violations des droits de
- 3) l'homme et en faire rapport au Bureau de la CNDH ;
- 4) Exécuter en Provinces, sur instructions et directives expresses du Bureau de la CNDH, certaines tâches relatives aux attributions de la CNDH telles que déterminées à l'article 6 de la loi organique instituant la CNDH;
- 5) Procéder à des visites périodiques des centres pénitentiaires et de détention sur toute l'étendue de la Province ;
- 6) Procéder à toutes sortes d'investigations nécessaires pour documenter les cas des violations des droits de l'homme et collaborer à toutes fins utiles avec les Organisations de la société civile et les autorités policières, militaires, judiciaires, sécuritaires et politico-administratives en Provinces ;
- 7) Collaborer avec les Antennes de représentations Urbaines ainsi que des Antennes de représentations Territoriales de la CNDH dans les différentes entités décentralisées ;
- 8) Réaliser avec accord formel du Bureau toute action jugée utile pour promouvoir la mission ainsi que les attributions de la CNDH ;
- 9) Collaborer étroitement avec toutes les institutions provinciales et Services Publics de l'Etat en provinces, dans l'optique de la promotion et de la protection des droits de l'Homme.

SECTION IV : DES ANTENNES URBAINES ET DES ANTENNES TERRITORIALES DE REPRESENTATION DE LA CNDH

Article 118 :

La CNDH dispose d'une Antenne de représentation dans chaque ville et chef-lieu de chaque Territoire de la République Démocratique du Congo.

Chaque Antenne de représentation de la CNDH dans chaque ville et chaque Territoire est dirigée par 4 membres dont : Un Chef d'Antenne Urbaine ou territoriale et 3 Chefs d'Antennes urbains ou territoriaux Adjoints chargés respectivement des questions administratives, techniques et financières.

Le Chef d'Antenne Urbain ou Territorial dispose d'un personnel d'appoint suivant :

- Un Secrétaire Administratif ;
- Un Rédacteur ;
- Un Opérateur de saisie ;
- Un Préposé des indicateurs d'entrées et de sortie ;
- Une Hôtesse ;
- Un Huissier.

Article 119 :

Le Chef d'Antenne urbaine ou territoriale et ses Adjoints sont recrutés et nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du Bureau.

Article 120 :

Le Chef d'Antenne urbaine ou territoriale gère sous l'impulsion du bureau les cadres et agents mis à sa disposition.

Il gère aussi les ressources matérielles et s'occupe de l'organisation du travail au sein de l'Antenne urbaine ou territoriale.

Il prépare l'état de besoin de l'antenne urbaine ou territoriale de la CNDH et le transmet au bureau de la CNDH.

Il est également chargé de la promotion du développement structurel ainsi que du marketing institutionnel de la CNDH en ville ou dans les territoires.

Il prépare les dossiers juridiques et judiciaires à soumettre au bureau de la CNDH.

Article 121 :

L'Antenne Urbaine ou Territoriale de la CNDH est composée de services suivants :

- 1) Monitoring, Enquêtes et investigations ;
- 2) Protection et assistance aux victimes ;
- 3) Formation et vulgarisation des droits de l'Homme et du droit international humanitaire ;
- 4) Communication et Médias ;
- 5) Services d'études et planification;
- 6) Partenariat et encadrement des ONGs nationales et internationales installées en villes et dans les territoires;
- 7) Droit International Humanitaire, Actions, Questions et Urgences Humanitaires ;
- 8) Responsabilité Sociale des Entreprises ;
- 9) Centre urbain ou du territoire de documentation en droits de l'Homme et en droit international humanitaire ;
- 10) Service social et médical ;
- 11) Service des ressources humaines; 12. Service logistique et du Patrimoine.

Article 122 :

L'Antenne Urbaine ou Territoriale veille au bon fonctionnement des services au niveau urbain et territorial.

Article 123 :

Le Chef d'Antenne urbaine ou territoriale de la CNDH travaille sous la supervision du Bureau de la CNDH. En cas de besoin, il peut être invité à assister aux séances et réunions du Bureau et de l'Assemblée Plénière sans voix délibérative.

Article 124 :

Le Bureau de la CNDH peut pour le compte de la ville ou du territoire, décidé de l'opportunité de recourir aux Experts tant nationaux qu'internationaux ainsi qu'aux Avocats.

Dans ce cas, il fixe les conditions de leur recrutement.

Leurs honoraires sont à charge du Trésor Public et, le cas échéant, des Partenaires de la CNDH.

Article 125 :

Les Agents des antennes urbaines ou territoriales de la CNDH relèvent du personnel administratif et technique du Secrétariat Technique.

Ils sont recrutés dans leurs villes ou territoires respectifs, nommés et, le cas échéant, relevés de leurs fonctions par le Président de la CNDH sur décision du bureau.

Ils travaillent à temps pleins et sous la supervision permanente du Chef d'Antenne urbaine ou territoriale de la CNDH.

Article 126 :

Les Antennes urbaines ou territoriales de la CNDH sont chargées de la promotion et de la protection des droits de l'homme. A ce titre, ils sont chargés de:

- 1) Suivre la situation des droits de l'homme en villes et aux chefs lieux des territoires et en faire rapport au Bureau de la CNDH ;
- 2) Recevoir les plaintes individuelles et collectives ou se saisir d'office des cas des violations des droits de l'homme et en faire rapport au Bureau de la CNDH ;
- 3) Exécuter en villes ou en territoires, sur instructions et directives expresses du Bureau de la CNDH, certaines tâches relatives aux attributions de la CNDH telles que déterminées à l'article 6 de la loi organique instituant la CNDH ;
- 4) Procéder à des visites périodiques des centres pénitentiaires et de détention dans les villes ou territoires ;
- 5) Procéder à toutes sortes d'investigations nécessaires pour documenter les cas des violations des droits de l'homme et collaborer à toutes fins utiles avec les Organisations de la Société Civile et les Autorités policières, militaires, judiciaires, sécuritaires et politico administrative en ville ou territoire ;
- 6) Collaborer avec les Bureaux de représentation provinciale ainsi que des Antennes urbaines ou territoriales de la CNDH ;
- 7) Réaliser avec accord formel du Bureau toute action jugée utile pour promouvoir la mission ainsi que les attributions de la CNDH ;
- 8) Collaborer étroitement avec toutes les institutions urbaines et Services Publics de l'Etat en villes ou en territoires, dans l'optique de la promotion et de la protection des droits de l'Homme.

Article 127 :

Chaque Antenne de représentation de la CNDH en Ville ou dans de chaque Territoire comprend neuf agents comme suit :

- a) Un Chef d'Antenne ;
- b) Un Chef d'Antenne Adjoint ;
- c) Deux Enquêteurs ;
- d) Un Assistant Chargé d'Administration et de Finances ;

- e) Un logisticien
- f) Un informaticien,
- g) Un opérateur de saisie ;
- h) Un préposé aux indicateurs d'entrée et de sortie ;
- i) Un Attaché de Sécurité ;
- j) Un Huissier.
- k) Un chauffeur.

Article 128 :

Un règlement administratif de la CNDH détermine l'organisation et le fonctionnement des Départements du Secrétariat Technique et des services des bureaux de représentation en province et des antennes en ville et des chefs-lieux des territoires.

TITRE VI : DE LA PROCEDURE DEVANT LA CNDH

CHAPITRE I : DE LA SAISINE DE LA CNDH

Article 129 :

Toute personne physique, victime des violations des droits de l'homme peut saisir la CNDH ; de même, un groupe des personnes peut collectivement saisir la CNDH.

Article 130 :

Les organisations légalement constituées, ayant la défense et la promotion des droits de l'homme dans leurs missions, peuvent aussi saisir la CNDH en lieu et place des victimes.

La CNDH peut également se saisir d'office.

L'auto saisine est initiée par tout Commissaire National des Droits de l'Homme qui en informe le Bureau.

L'initiateur de l'auto saisine soumet sa proposition accompagnée d'un dossier comportant des éléments d'informations et des preuves pour avoir la conviction de la CNDH.

Article 131 :

Toute personne physique ou toute organisation ayant saisi la CNDH ne peut être inquiétée. Les autorités tant civiles que militaires assurent sa protection.

Cette protection s'étend aux proches de la victime, aux membres de l'organisation ainsi qu'aux témoins.

Article 132 :

La CNDH peut, dans l'accomplissement de sa mission, solliciter la collaboration de toute autorité publique, notamment les forces de l'ordre, les autorités administratives et judiciaires ou autre personne physique ou morale.

Les autorités et les personnes saisies à cet effet sont tenues de lui apporter leur concours.

CHAPITRE II : DE LA CONFIDENTIALITE A LA CNDH

Article 133 :

Sous réserve du respect des droits et libertés garanties par la Constitution de la République Démocratique du Congo, la CNDH a le pouvoir d'accéder à tout lieu pour vérifier les allégations relatives aux violations des droits de l'homme.

Article 134 :

L'anonymat est accordé à toute personne qui le requiert pour son témoignage devant la CNDH.

Article 135 :

La procédure devant la CNDH est strictement confidentielle jusqu'à la publication du rapport y relatif.

La violation de la confidentialité est punie des peines prévues pour violation du secret professionnel.

CHAPITRE III : DE LA GESTION DES PLAINTES A LA CNDH

Article 136 :

La plainte peut être portée pour le compte d'une victime ou d'un groupe des victimes, par un organisme ayant la personnalité juridique voué à la défense des droits de la personne ou au bien-être d'une entité locale décentralisée.

Article 137 :

La plainte peut être écrite ou verbale.

Lorsqu'elle est verbale, la plainte est actée par un préposé du Secrétariat Technique ou du bureau de représentation provinciale ou encore un préposé d'une Antenne urbaine ou d'une Antenne territoriale.

Article 138 :

Toute plainte écrite ou verbale doit être enregistrée et numérotée au Secrétariat Technique ou au bureau de représentation provinciale ou encore aux Antennes Urbaines ou Territoriales.

Article 139 :

Toute plainte traitée à la CNDH doit faire l'objet d'une décision motivée de l'Assemblée Plénière ou du Bureau de la CNDH.

Elle doit être traitée avec diligence.

Article 140 :

La plainte est traitée par la Sous - commission Permanente compétente qui en fait rapport à l'Assemblée Plénière par le biais du Bureau pour décision.

Article 141 :

Dans le traitement des dossiers, la CNDH peut faire appel à toute personne physique ou morale, publique ou privée, plaignante ou mise en cause pour l'entendre sur sa version des faits.

Il peut recourir également au témoignage de toute personne censée connaître des faits.

Article 142 :

Toute personne appelée à se présenter ou à donner son témoignage devant la CNDH, est tenue de répondre à l'invitation.

En cas de refus, la CNDH, peut recourir à l'autorité judiciaire compétente qui use de toutes voies de contrainte toute affaire cessante.

Article 143 :

Les informations concernant les autorités publiques sont, avant leur publication, transmises à celles-ci en vue d'obtenir leurs versions des faits.

Article 144 :

La CNDH, peut également inviter l'autorité publique concernée à se présenter devant elle.

Si celle-ci ne répond pas dans les quinze jours à dater de l'invitation, la version de la CNDH, est réputée fondée.

Article 145 :

Toute victime d'une violation des droits de l'homme peut se faire représenter par ses ayants droit ou par toute personne physique ou morale habilitée à cet effet par la victime ou ses ayants droit.

Les autorités publiques doivent faciliter la transmission à la CNDH des communications émanant de toute personne privée de liberté.

La confidentialité de la communication doit être garantie et protégée par ces autorités publiques.

Article 146 :

Aucune personne physique ou morale ayant saisi la CNDH ne peut être inquiétée du fait de cette saisine. Les autorités tant civiles que militaires doivent, le cas échéant, assurer sa protection.

Article 147 :

La CNDH a, dans l'exercice de sa mission et sous réserve des droits garantis aux particuliers par la Constitution, le pouvoir d'accéder à tout lieu en vue de vérifier toute allégation des violations des droits de l'homme.

A cet effet, la seule présentation de la Carte de Service de la CNDH suffit à tout Membre, Agent ou Cadre technique de cette Institution pour accomplir en tout temps ce devoir.

Article 148 :

La CNDH peut également se saisir d'office de toute allégation des violations des droits de l'homme.

Tout Membre, Cadre, Agent administratif ou Agent technique de la CNDH peut être récusé par une ou un plaignant dont le dossier est en traitement par la CNDH s'il se trouve dans l'une des hypothèses suivantes :

- a) Lui-même ou son conjoint, a un intérêt personnel quelconque dans le dossier traité ;
- b) Lui-même, son conjoint ou un de ses parents ou alliés en ligne directe ou collatérale jusqu'au troisième degré, est mis en cause dans la plainte.

Article 149 :

Tout plaignant ou victime qui veut récuser un Membre, un Cadre ou un Agent technique de la CNDH doit, dès qu'il a connaissance de la cause de récusation et au plus tard avant la clôture de l'examen de son dossier, en faire part par lettre motivée au Président de la CNDH.

Article 150 :

Une Sous-Commission ad hoc sera mise en place par le Bureau de la CNDH, qui sera chargée d'entendre sur procès-verbal le membre, le Cadre ou l'Agent technique de la CNDH récusé, et de statuer toutes affaires cessantes sur le bien fondé de cette récusation.

La procédure de récusation est suspensive de l'examen de la plainte.

Article 151 :

Tout Membre, Cadre ou Agent de la CNDH, se trouvant dans l'une des hypothèses de la récusation prévues ci-haut dans le présent Règlement Intérieur, est tenu de se déporter volontairement sous peine des poursuites disciplinaires.

Article 152 :

Tout Membre, Cadre ou Agent de la CNDH qui désire se déporter, en informe le Président qui est appelé à prendre des mesures conséquentes quant à son remplacement éventuel dans l'examen du dossier concerné.

Article 153 :

Toute plainte introduite à la CNDH aboutit à :

- 1) Un classement sans suite en cas d'absence des preuves de violations des droits de l'homme ;
- 2) La dénonciation de la violation et, au besoin, la saisine des Instances compétentes. A cet égard, la CNDH peut soit :
 - a) Dénoncer directement le ou les auteurs des violations auprès des instances judiciaires ;
 - b) S'adresser par voie d'avis et recommandations aux chefs hiérarchiques des auteurs desdites violations en vue de leurs poursuites disciplinaires et/ou judiciaires ;
 - c) Ester en justice pour le compte des victimes.
- 4) L'orientation des victimes vers les juridictions compétentes et l'assistance judiciaire en cas de nécessité ;
- 5) Un arrangement à l'amiable ;
- 6) Des avis et des recommandations au Gouvernement en cas des violations des droits de l'homme afin de mettre fin à cet état des choses et améliorer la situation des droits de l'homme dans le pays ;
- 7) Au transfert du cas à une autre institution compétente ;
- 8) Une information à l'auteur de la requête sur ses droits, notamment les voies de recours, tout en lui en facilitant l'accès.

Article 154 :

Les modalités d'introduction des requêtes pour violation des droits de l'homme sont régies par un manuel de procédures des plaintes portant les modalités d'application.

Article 155 :

La CNDH se réserve le droit de faire une large diffusion d'une violation avérée des droits de l'homme avec ou sans délai de grâce.

TITRE VII : DES IMMUNITES, DES PRIVILEGES, DES DROITS ET DEVOIRS DES MEMBRES DE LA CNDH

CHAPITRE I : DES IMMUNITES ET DES PRIVILEGES DES MEMBRES

Article 156 :

Les membres de la CNDH ne peuvent être recherchés, poursuivis, arrêtés, détenus ou jugés en raison de leurs opinions aussi bien durant l'exercice de leur mandat qu'après, pour les opinions émises dans l'exercice de leurs fonctions.

Ils sont justiciables de la Cour de Cassation.

Article 157 :

Les membres de la CNDH, dans l'exercice de leur mandat, ne peuvent être poursuivis ni arrêtés en matière pénale qu'avec l'autorisation du Bureau de la CNDH, sauf en cas de flagrant délit.

Article 158 :

En tout état de cause, les Membres de la CNDH, ne peuvent être poursuivis avant la levée de l'immunité judiciaire dont ils jouissent.

Article 159 :

Toute instance judiciaire saisie d'une plainte à l'endroit d'un Membre de la CNDH, est tenue d'en informer le Bureau de la CNDH et de solliciter de ce dernier la levée de l'immunité judiciaire dont jouit le concerné.

Article 160 :

Il est constitué une Sous-commission ad hoc désignée par le Bureau de la CNDH pour l'examen de toute demande de levée d'immunité judiciaire à l'encontre d'un membre de la CNDH.

La Sous-Commission ad hoc entend le Membre ou l'agent concerné qui peut se faire assister par un Conseil et/ou deux de ses Collègues.

Les conclusions de la Sous-Commission ad hoc font l'objet d'un rapport écrit soumis au Bureau de la CNDH qui délibère à huis clos pour toutes fins utiles.

CHAPITRE II : DES DROITS ET DEVOIRS DES MEMBRES, CADRES ET AGENTS DE LA CNDH

Article 161 :

Les Membres, les Cadres et Agents de la CNDH jouissent de la liberté de mouvement et de la sécurité sur toute l'étendue de la République.

Article 162 :

Les membres de la CNDH ont droit à une indemnité mensuelle qui leur assure l'indépendance et une sortie honorable au terme de leur mandat.

L'indemnité des Membres de la CNDH est conforme aux émoluments alloués aux autres membres des Institutions Citoyennes d'appui à la Démocratie en République Démocratique du Congo.

Il leur est alloué une indemnité d'installation après leur prestation de serment devant la cour constitutionnelle.

Dans l'exercice de leurs fonctions, tous les Membres de la CNDH ont droit au transport ou à une indemnité kilométrique équivalente.

Article 163 :

Les Membres de la CNDH jouissent des avantages dus à leur rang.

Les avantages sociaux accordés aux Membres de la CNDH sont notamment :

Prime de fonction spéciale ;

- a) Frais ou moyens de transport ;
- b) Les soins de santé pour les Membres et leurs familles;
- c) L'indemnité de logement ;
- d) L'indemnité de consolation ;
- e) La collation ;
- f) Les allocations familiales ;

- g) Les frais funéraires.

Article 164 :

Les soins de santé et les frais funéraires sont accordés pour le conjoint et les enfants à charge.

En cas de décès, sauf avis contraire de sa famille, le corps d'un Membre de la CNDH est transféré dans sa Province d'origine.

Le conjoint et les orphelins bénéficient d'une rente de survie équivalente à six mois de l'indemnité mensuelle et aux deux tiers de cette indemnité jusqu'à la fin du mandat du défunt.

A la fin du mandat, il est alloué aux Membres de la CNDH une indemnité de sortie correspondant à six mois de leur dernier traitement mensuel.

Les Membres de la CNDH ont droit à une carte de légitimation, un insigne à la boutonnière, un fanion et un Passeport diplomatique. Pour ce dernier, il en est de même pour leurs conjoints et leurs enfants à charge.

Article 165 :

Lorsque les Membres de la CNDH sont appelés à participer aux réunions de l'Assemblée Plénière en dehors de la ville de Kinshasa, les titres de voyage aller – retour et les frais de séjour sont à charge du Trésor Public et, le cas échéant, à charge des Partenaires de la CNDH.

Article 166 :

Les Membres de la CNDH bénéficient, en raison de la spécificité et de la délicatesse de leurs missions, d'une protection spéciale des forces de maintien de l'ordre public.

Article 167 :

Les Membres de la CNDH ont droit à une prime de risque. Cette prime est fixée par une Commission paritaire CNDH – Gouvernement.

Article 168 :

Les titres de voyage et les frais relatifs aux missions des Membres, Cadres, Agents et Experts de la CNDH à l'intérieur et à l'extérieur du pays, sont à

charge du Trésor Public et, le cas échéant, à charge des Partenaires de la CNDH.

Article 169 :

Les Membres de la CNDH et ceux du Cabinet ainsi que les Cadres et agents techniques du Secrétariat Technique ont droit à un jeton de présence pour les travaux en Sous-commissions spéciales ad hoc dont la hauteur est fixée par le Bureau.

Article 170 :

Sans préjudice d'autres obligations que lui incombe la Constitution, la Loi et le présent Règlement Intérieur, les membres de la CNDH sont tenus de participer activement aux séances de l'Assemblée plénière, aux réunions du Bureau et des Sous-commissions.

Ils ont l'obligation de sauvegarder en tout temps l'honneur et la dignité de leurs fonctions ainsi que l'image de marque de la CNDH.

Ils sont tenus au respect des lois de la République et à l'observance du Code de bonne conduite de l'agent public de l'Etat

Les membres de la CNDH se doivent respect mutuel, courtoisie et solidarité.

TITRE VIII : DES INCOMPATIBILITES ET DU REGIME DISCIPLINAIRE

CHAPITRE I : DES INCOMPATIBILITES

Article 171 :

La qualité de Membre de la CNDH est incompatible avec les fonctions de :

- 1) Membre du Gouvernement ;
- 2) Membres d'autres institutions de la République et de celles d'appui à la démocratie ;
- 3) Membre des forces armées, de la Police Nationale et des services de sécurité ;
- 4) Magistrat ;
- 5) Agent de carrière des Services Publics de l'Etat ;
- 6) Cadre de la Territoriale ;

- 7) Mandataire public ;
- 8) Membre des cabinets des institutions politiques et des autres institutions d'appui à la démocratie ;
- 9) Employé dans une entreprise publique.

La qualité de membre de la CNDH est également incompatible avec l'exercice des fonctions rémunérées conférées par un Etat étranger ou un organisme International.

CHAPITRE II : DU REGIME DISCIPLINAIRE

Article 172 :

Tout Membre de la CNDH qui commet un manquement, soit en violant les dispositions de la Loi Organique N°13/011 du 21 mars 2013 ou le présent Règlement Intérieur, soit en ayant une attitude qui entame la réputation ou entrave le bon fonctionnement de la CNDH fait l'objet d'une procédure disciplinaire devant le Bureau, siégeant en tant qu'organe disciplinaire.

Cette procédure commence par un procès-verbal de constat de faute en vue de l'ouverture de l'action disciplinaire.

Article 173 :

Le Membre de la CNDH faisant l'objet d'une action disciplinaire est invité à fournir soit par écrit, soit oralement, ses justifications ou moyens de défense.

Dans le premier cas, une lettre recommandée et/ou lettre missive avec accusé de réception doit lui être adressée et sa réponse doit parvenir au Bureau de la CNDH endéans sept jours à dater de la réception.

Dans le second cas, un procès-verbal d'audition doit être établi et signé par le membre du Bureau verbalisant, le Membre de la CNDH faisant l'objet de l'action et les autres Membres du Bureau de la CNDH présents à la séance.

Le membre concerné peut se faire assister par un Conseil.

Si les justifications fournies ne sont pas convaincantes, le Membre fautif est traduit devant le Conseil de discipline qui statue sur les faits lui reprochés en premier et dernier ressort.

Le Conseil de discipline comprend un Président et deux membres, désignés sur décision du Bureau.

Article 174 :

Sans préjudice des autres dispositions de la Loi Organique N°13/011 du 21 mars 2013 et du présent Règlement Intérieur, les sanctions disciplinaires applicables aux Membres de la CNDH sont :

- a) Le blâme ;
- b) La suspension.

Article 175 :

Le blâme constitue une reproche ou une réprimande écrite adressée à un Membre de la CNDH pour tout manquement commis.

Ce manquement peut être :

La défaillance de présenter un rapport sans motif valable ;

- a) Les propos et comportements outrageants ;
- b) Les menaces ou voies de fait à l'égard d'un Collègue ou sur tout agent ou cadre de la CNDH;
- c) Le refus de se déporter dans l'une des hypothèses telles que, prévues dans le présent Règlement Intérieur ;
- d) La destruction volontaire des données, documents ou la rétention volontaire d'informations ;
- e) L'utilisation abusive du personnel, du matériel ou de tout autre bien de la CNDH ;
- f) La négligence dans l'exercice de ses fonctions ;
- g) La divulgation de l'information couverte par le sceau de la confidentialité ;
- h) Les absences sans justifications aux séances de l'Assemblée Plénière, aux réunions du Bureau ou des Sous-Commissions Permanentes ou au lieu de travail ;
- i) Les manifestations bruyantes entravant la bonne marche des séances ou des réunions ou contraire aux bonnes mœurs.

Article 176 :

La suspension consiste en l'interdiction pour une durée déterminée faite à un Membre de la CNDH de prendre part aux réunions et autres activités, à la suite d'un manquement grave ou de la répétition, au cours d'une même session, d'un manquement ayant fait l'objet d'un blâme.

Le membre suspendu ne peut se prévaloir de la qualité de Membre de la CNDH au cours de cette période. La mesure de suspension ne peut

dépasser deux mois. Elle entraîne la retenue à la source d'un tiers des émoluments.

Article 177 :

A l'issue de la procédure disciplinaire, la lettre de blâme ou de suspension est adressée par le Président de la CNDH au membre sanctionné.

Article 178 :

Lorsqu'un Membre s'estime lésé par la décision prise à son endroit, il peut introduire, endéans huit jours à dater de sa notification, un recours gracieux par écrit auprès du Bureau.

Le Bureau est tenu d'examiner, dans les dix jours à dater de la réception, le recours introduit par le membre sanctionné et de lui réserver une suite sous peine de rendre nulle sa première décision.

Les décisions rendues par le Bureau sont susceptibles d'appel. L'appel est porté, par lettre missive avec accusé de réception, devant l'Assemblée Plénière à travers le Bureau de la CNDH dans un délai de 30 jours à dater de la notification de la décision attaquée.

L'appel n'est pas suspensif de la sanction.

L'Assemblée Plénière examine l'appel à sa plus prochaine session.

Si l'appel interjeté est fondé et sanctionné par la mesure de levée de la décision, la victime est réhabilitée dans ses droits

Article 179 :

Tout autre manquement non prévu par le présent Règlement Intérieur et dont un Membre de la CNDH se serait rendu coupable, est apprécié par le Bureau et porté à la connaissance de l'Assemblée Plénière pour sanction.

**TITRE IX : DES RAPPORTS ENTRE LA CNDH ET LES
AUTRES INSTITUTIONS**

Article 180 :

La CNDH jouit de l'indépendance d'action par rapport aux Institutions classiques de l'Etat et aux autres Institutions d'Appui à la Démocratie.

Elle entretient des rapports de collaboration avec l'ensemble de ces Institutions, auprès desquelles elle formule et soumet des avis et recommandations sur toutes les questions relatives aux droits de l'homme, au droit international humanitaire et à l'action humanitaire.

Article 181 :

La CNDH peut, dans l'accomplissement harmonieux de sa mission, solliciter la collaboration de toute autorité publique, notamment les forces de l'ordre, les autorités politicoadministratives et judiciaires ainsi que toute personne physique ou morale.

Les autorités et personnes requises à cet effet sont tenues d'apporter leur concours à la CNDH toutes affaires cessantes, sous peine de tomber sous le coup des dispositions pertinentes du Code Pénal Livre II pour abstention coupable.

Les Autorités judiciaires saisies statuent sur le cas toutes affaires cessantes.

Article 182 :

La CNDH publie le rapport annuel sur ses activités et le transmet au Président de la République, à l'Assemblée Nationale, au Sénat, au Gouvernement, à la Cour Constitutionnelle, à la Cour de Cassation, au Conseil d'Etat, à la Haute Cour Militaire et aux Parquets près ces juridictions.

Ce rapport fait l'objet d'un débat à l'Assemblée Nationale.

Elle publie et leur adresse, en outre, des rapports semestriels sur la situation générale des droits de l'homme en République Démocratique du Congo et des rapports ponctuels chaque fois que la situation l'exige.

Ces rapports sont publiés dans un site Internet.

Article 183 :

Eu égard à sa mission de promotion et de protection des droits de l'homme, la CNDH entretient avec les Cours et Tribunaux des relations particulières.

A cet effet, la CNDH peut orienter les victimes à ester en justice sur toutes les violations avérées des droits de l'homme, les orienter vers les juridictions compétentes et leur apporter l'assistance judiciaire nécessaire.

TITRE X : DES DISPOSITIONS FINALES

Article 184 :

Dans le cadre de ses activités, la CNDH peut publier des revues ou des bulletins.

Les médias d'Etat servent de support à la CNDH pour ses activités d'information, d'éducation et de communication.

Article 185 :

Le présent Règlement Intérieur peut être modifié à l'initiative du Bureau de la CNDH ou à la demande de 2/3 des membres de l'Assemblée Plénière de la CNDH.

La décision d'amender l'une ou plusieurs dispositions du présent Règlement Intérieur est prise conformément à la majorité de 2/3 des membres de l'Assemblée Plénière de la CNDH.

Article 186 :

Le mandat des Membres de la CNDH expire avec la prestation de serment devant la Cour Constitutionnelle de nouveaux Membres de la CNDH.

Article 187 :

Toute question relevant de la compétence de la CNDH, mais non prévue dans le Présent Règlement intérieur, fera l'objet pour compétence d'une décision de l'Assemblée Plénière de la CNDH.

Article 188 :

Le présent Règlement Intérieur adopté par l'Assemblée Plénière de la CNDH est mise en application après Avis Conforme de la Cour Constitutionnelle.

Fait à Kinshasa, le 24 Avril 2015

POUR L'ASSEMBLEE PLENIERE DE LA CNDH LE BUREAU
PROVISOIRE :

- 1) Sé/Me Belinda LUNTADILA NZUZI Co Rapporteur
- 2) Sé/Astrid BILONDA MAKENGA Co Rapporteur

- 3) Sé/Prof. KENGE NGOMBA TSHILOMBAYI Marie-Thérèse
Présidente du Bureau Provisoire

LES MEMBRES :

- 4) Sé/Monsieur Fernandez MURHOLA
- 5) Sé/Dr. Chantal NEMBUNZU
- 6) Sé/Monsieur Ghislain EMBUSA ENDOLE
- 7) Sé/Monsieur AMURI LUMUMBA WA MAYEMBE
- 8) Sé/Me MWAMBA MUSHIKONKE Mwamus
- 9) Sé Dr Olivier WALA-WALA NGALA



7

**THE SWAZILAND
COMMISSION ON HUMAN
RIGHTS AND PUBLIC
ADMINISTRATION INTEGRITY**
*Sabelo Gumedze**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The Swaziland Commission on Human Rights and Public Administration Integrity (SCHR) is based on the Constitution of the Kingdom of Swaziland Act of 2005 (Constitution).¹ Despite its establishment in 2005, the SCHR remains a nascent institution that has not had significant impact in promoting and protecting human rights in Eswatini (formerly Swaziland). It is yet to achieve its vision of being a “relevant and effective commission in a just society in which the principles of human rights and good governance are observed and preserved”.² This could be a result of, among other things, the fact that the SCHR commenced its operations in 2009, which was four years after the Constitution came into effect.

* Director, Pro-Intellect Research and Consulting, Centurion, Pretoria, South Africa.

1 According to section 2 of the Declaration of Change of Swaziland Name Notice (Legal Notice No 80 of 2018), which came into effect on 19 April 2018, “[t]he name the Kingdom of Swaziland is changed to Kingdom of Eswatini”. Section 3 of the Declaration provides that reference in any written law or international agreement or legal document to Swaziland shall be read and construed as reference to Eswatini. The change of name was a unilateral action by King Mswati III.

2 See vision of the SCHR, available at <https://bit.ly/2FUaj4u> (accessed 1 December 2018).

The SCHR must be understood within the context of the Eswatini political system, which has been described as “a very different political experiment, [with] a medieval absolute monarch trying to survive alongside a modern democracy”.³ Eswatini arguably represents one of the most confused systems of government in human history, or at any rate as seen from perspective of an ideal of democracy.

The Constitution states that it (as a constitution) arose from a need “to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social and cultural development of our Nation”.⁴ However, the system of government remains undemocratic and generally devoid of human rights principles. The reference to “an open and democratic society” and the promotion of “transparency” is misplaced in the context of Eswatini, since these ideals are constantly violated by the authorities: indeed, the Eswatini political system is intrinsically opposed to these human rights ideals. The SCHR is, nevertheless, mandated to promote and protect human rights within this context.

This chapter describes the system of government in the Kingdom of Eswatini, after which it examines the establishment and evolution of the SCHR. It goes on to discuss the nature of the Commission, its context, its mandate and its public accountability.

2 Eswatini’s system of government

According to the Constitution, Eswatini’s system of government a “democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office”.⁵ The Constitution provides that “Swaziland is a unitary, sovereign, democratic Kingdom”,⁶ and that it “shall be a democratic country dedicated to principles which empower and encourage active participation of all citizens at all levels in their own governance”.⁷

3 P Fabricius, “Shrugging off an Imported Democracy: Distressing Signs of Return to Authoritarian Roots”, *The Star* (27 April 2001), p 8.

4 Paragraph 5 of the Preamble to the Constitution.

5 Section 79 of the Constitution.

6 Section 1(1) of the Constitution.

7 Section 58(1) of the Constitution. Proclamation 12 of the King’s Proclamation to the Nation, Decree No 12 of 1973 (1973 Decree). For more information on Swaziland, see S Gumedze, “Swaziland”, in C Heyns (ed) *Human Rights in Africa* (2004), p 1580.

In practice, though, the Kingdom of Eswatini remains a non-party state. As a result, the legitimacy and credibility of elections are hampered by the electoral mechanism, which does not permit political parties, and the design of the constitutional powers, which gives the King greater power than the electorate.

It has been argued that “[t]he absence of effective participation of political parties in the political field indicates that political parties in Swaziland remain outsiders in so far as governing the country is concerned”.⁸ This limits space for political inclusion, participation and plurality of opinion.⁹ It has been argued, too, that “[t]he *Tinkhundla* system of government which is devoid of fundamental tenets of democracy remains intact”.¹⁰ The situation will continue as long as the Constitution stays in force. This makes the context within which the SCHR functions one that is hostile to the promotion and protection of human rights. This is particularly difficult because the Constitution does not only provide for a governance system based on a monarch who is above the Constitution but the overriding culture is anti-democracy, anti-rule of law, and anti-human rights.

The Eswatini human rights record remains poor. For example, restrictions on freedom of association and assembly continue. Human Rights Watch reported that in 2018 a protest by the Trade Union Congress of Swaziland (TUCOSWA) about salaries was met by a heavy-handed police force and resulted in serious injuries.¹¹ The Royal Swaziland Police (RSP) violated human rights notwithstanding that the Police Service Act 22 of 2018 makes it a disciplinary offence for officers to use unnecessary force.

Eswatini has recently seen the courts sanction forced evictions that left citizens homeless. It was reported by Human Rights Watch that in April 2018, 61 people in Malkerns were evicted from their homes after 57 years

8 *Ibid.*

9 See the 2010-2015 UNDP Draft country programme document for Swaziland (2011-2015), DP/DCP/SWZ/2, paragraph 7.

10 T Maseko, “Constitution-Making in Swaziland: The Cattle-Byre Constitution Act 001 of 2005”, draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi April 2007. See also T Maseko, *The Writing of a Democratic Constitution in Africa with Reference to Swaziland and Uganda* (unpublished LLM thesis, Faculty of Law, Peace and Human Rights Centre, Makerere University, 31 October 2005).

11 See Human Rights Watch, “Eswatini (formerly Swaziland) Events of 2018”, available at <https://www.hrw.org/world-report/2019/country-chapters/swaziland#2cb927> (accessed 6 March 2019).

of occupation. In July 2018, 150 other long-term residents were also evicted from a Malkerns' farming settlement. Of concern was the fact that these evictions were carried out without consideration of compensation or the provision of alternative accommodation or other support for the evicted residents.¹² These are but a few examples of the kind of human rights violations which the SCHR is required to address.

3 Establishment and evolution of the SCHR

The SCHR consists of “a Commissioner for Human Rights and Public Administration” and “at least two Deputy Commissioners for Human Rights and Public Administration as may be necessary for the effective discharge of the functions of the Commission”.¹³ According to section 163(1) of the Constitution, the SCHR must have been established “within a year of the first meeting of Parliament after the commencement of this Constitution”. The SCHR was only appointed into office in September 2009, through Legal Notice 143 of 2009.

The unexplained delay in its establishment raises questions about how serious the authorities are in protecting and promoting fundamental human rights in Eswatini. First, the delay was in and of itself a violation of the Constitution; secondly, the delay could not even be challenged, as the SCHR must be appointed by the King, who is immune from any legal process (discussed below).

The SCHR is based in Mbabane, the capital city of the Kingdom of Eswatini.¹⁴ Currently, it does not have any offices in the regions or districts, which makes it inaccessible to the indigent population who live in the Kingdom's remote areas. The offices of the SCHR were initially at eNkhanini, one of the royal places and a place where the wearing of pants by women is strictly forbidden; indeed, Eswatini custom and tradition also prohibit access to women in mourning attire. This basically meant that women in trousers or mourning attire could not enter the premises of the SCHR to lodge a grievance about a human rights infringement; as such, it could be viewed as a direct violation of section 26(1) of the Constitution, which provides that “[a] person shall not be deprived of the freedom of movement, that is, the right to move freely throughout Swaziland”.

12 *Ibid.*

13 Section 163(2) of the Constitution.

14 Mbabane Office Park, Sibeketelo Building.

4 The nature of the SCHR

The SCHR has three concerns: with human rights, with public administration and with integrity. Put differently, it is a human rights commission, a public administration commission and an integrity commission. As a three-in-one entity, the SCHR's mandate on human rights is heavily compromised. Regarding the function relating to human rights, the SCHR is, among other things, empowered to investigate complaints concerning alleged violations of fundamental rights and freedoms under the Constitution.¹⁵ Regarding public administration, it is, among other things, empowered to investigate complaints of injustice, corruption, abuse of power in office, and unfair treatment of any public officer in the exercise of official duties.¹⁶ As regards integrity, the SCHR must receive and consider written declarations by persons holding public office concerning their property, assets or any benefit gained or liability owed by them directly or indirectly.¹⁷

In practice, the Commission operates under the Ministry of Justice and Constitutional Affairs as one of the latter's departments or units.¹⁸ On the reporting lines of the SCHR, in practice it does not have direct access to Parliament, but instead submits its reports to Parliament by way of the

15 Section 164(1)(a) of the Constitution.

16 Section 164(1)(b) of the Constitution.

17 Section 241(1) of the Constitution. The public officers include the following: Prime Minister, Deputy Prime Minister and Minister; member of the King's Advisory Council; Member of Parliament including the Presiding Officers; Chairman and Member of a Service Commission or Board; Army Commander and Deputy Army Commander; Commissioner of Customs; Commissioner of Police and Deputy Commissioner of Police; Commissioner of Labour; Commissioner of Correctional Services and Deputy Commissioner of Correctional Services; Commissioner of Taxes; Justice of the Superior Court of Judicature and all judicial officers; Ambassador, High Commissioner, and Head of Diplomatic or Consular Mission; Secretary to the Cabinet; Commissioner and Deputy Commissioner of the Integrity Commission; Member of the Elections and Boundaries Commission; Attorney-General and Deputy Attorney-General; Head of Ministry of government or department; Director of Public Prosecutions and Deputy Director of Public Prosecutions; Managing Director, general manager and departmental head of a public corporation or company in which the Government has a controlling interest; and in the public service and any other public institution as Parliament may prescribe.

18 The SCHR does not have an independent website and is found only under the website of the Ministry of Justice and Constitutional Affairs.

Ministry of Justice and Constitutional Affairs.¹⁹ This further compromises its independence,²⁰ a point which is discussed in further detail later in this chapter.

The SCHR's mandate on corruption has seemingly been duplicated by the Eswatini Anti-Corruption Commission. Section 164(1)(b) of the Constitution provides that the SCHR shall "investigate complaints of ... corruption ... by any public officer in the exercise of official duties". As if this provision were not sufficient, section 164(1)(e) of the Constitution provides that the SCHR shall "investigate instances of alleged or suspected corruption ... by officials and ... take or recommend appropriate steps, including reports to the ... Director of Public Prosecution". Section 10(b) of the Prevention of Corruption Act of 2006 provides that the Anti-Corruption Unit shall "receive and investigate complaints of alleged or suspected corrupt practices made against any person, and refer appropriate cases to the Director of Public Prosecution". Clearly, these provisions expose the public to forum-shopping, but, thus far, no pronouncement by the courts has been made on this duplication.

The SCHR is supported by a secretariat headed by an executive secretary or chief executive officer, a position currently occupied by Ms Linda Nxumalo, a lawyer. The secretariat is composed of a staff complement of not more than ten. Of these, only four staff members could be considered to be technical staff (including lawyers) who are critical in investigating human rights violations. This falls far short of a secretariat capable of providing effective support to the SCHR, the mandate of which goes beyond the subject of human rights.

4.1 Legal framework

As mentioned, the SCHR is a creature of the Constitution, established in terms of section 163 of the Eswatini Constitution. It is important to note that the Constitution provides that "a person shall not qualify for appointment as Commissioner unless that person qualifies for

19 According to the Ministry of Justice and Constitutional Affairs' website, "The Commission produces an annual report to parliament on the performance of the commission which includes statistics in such form and such details as may be prescribed of the complains received by the Commission and results of any investigations." Available at <http://www.gov.sz/index.php/ministries-departments/ministry-of-justice/human-rights> (accessed 14 December 2018).

20 See paragraph 16 of Report of the Joint Promotion Mission to the Kingdom of Swaziland by Commissioner Pansy Tlakula and Commissioner Solomon Dersso, 7-11 March 2016. Adopted during the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, held 8-22 May 2017 in Niamey, Republic of Niger.

appointment as judge of the superior courts".²¹ The process of appointing the members of the SCHR is, arguably, not competitive, transparent and open. In practice, the suitability of the commissioners, including their competence and relevant professional experience, is not a consideration. Furthermore, their appointment is not subject to open and transparent scrutiny by Parliament or even the general public. This speaks volumes when one considers the fundamental rights and freedoms to be promoted and protected by the Commission.

The Constitution provides for the protection and promotion of fundamental rights and freedoms.²² Section 14(2) provides that:

[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, the legislative and the judiciary and other organs or agencies of government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by courts as provided in this Constitution.

The Constitution enshrines the following human rights: the fundamental rights and freedoms of the individual;²³ protection of right to life;²⁴ protection of right to personal liberty;²⁵ protection from slavery and forced labour;²⁶ protection from inhuman or degrading treatment;²⁷ protection from deprivation of property;²⁸ equality before the law;²⁹ right to fair hearing;³⁰ protection against arbitrary search and entry;³¹ protection of freedom of conscience or religion;³² protection of freedom of expression;³³ protection of freedom of assembly and association;³⁴ protection of freedom of movement;³⁵ rights and protection of the family;³⁶ rights and freedoms of women;³⁷ rights of the child;³⁸ rights of persons with

21 Section 163(4) of the Constitution.

22 Chapter III.

23 Section 14 of the Constitution.

24 *Ibid*, section 15.

25 *Ibid*, section 16.

26 *Ibid*, section 17.

27 *Ibid*, section 18.

28 *Ibid*, section 19.

29 *Ibid*, section 20.

30 *Ibid*, section 21.

31 *Ibid*, section 22.

32 *Ibid*, section 23.

33 *Ibid*, section 24.

34 *Ibid*, section 25.

35 *Ibid*, section 26.

36 *Ibid*, section 27.

37 *Ibid*, section 28.

38 *Ibid*, section 29. See also section 31 on the abolition of the status of illegitimacy.

disabilities;³⁹ rights of workers;⁴⁰ right to administrative justice;⁴¹ and property rights for spouses.⁴²

4.2 The independence of the SCHR

The question of the independence of the SCHR must be understood in the context of Eswatini's political landscape. Suffice it to say that, although not yet in force, the Human Rights and Public Administration Bill of 2011 (the Bill) seeks to provide for the independence of the Commission, and states that it "shall be independent in its performance of its functions and shall not be subject to the direction or control of any person or authority".⁴³

The appointment of the members of the SCHR by the King (on the advice of the Judicial Service Commission) in terms of section 163(3) of the Constitution presents a challenge for three reasons. First, the independence of the SCHR is compromised inasmuch as the Judicial Service Commission, upon whose advice it is appointed (by the King), is appointed by the King.⁴⁴ Secondly, the fact that the SCHR is itself appointed by the King presents yet another challenge as it cannot exercise its independence, in the true sense of the word.

Thirdly, Eswatini's governance is characterised by a culture of interference by the country's leadership. The African Commission on Human and Peoples' Rights noted that the Government of Eswatini has a history of interference in oversight bodies and that for the SCHR to function appropriately, its enabling law should be enacted.⁴⁵ This law is currently in a form of a bill, namely the Human Rights and Public

39 *Ibid*, section 30.

40 *Ibid*, section 32.

41 *Ibid*, section 33.

42 *Ibid*, section 34.

43 Clause 24 of the Human Rights and Public Administration Commission Bill, 2011.

44 The Chief Justice (the Chairman of the JSE) is appointed by the King in terms of section 153(1) of the Constitution; the two legal practitioners of not less than seven years' practice and in good standing are appointed by the King in terms of section 159(2)(b) of the Constitution; the chairman of the Civil Service Commission (who is a member of the service commission) is, in terms of section 173(3) of the Constitution, "appointed by the King on the recommendation of a line Minister or any other authority as may be provided in this Constitution or any other law"; the two persons are appointed by the King in terms of section 159(2)(d).

45 See paragraph 174 of the Report of the Joint Promotion Mission to the Kingdom of Swaziland by Commissioner Pansy Tlakula and Commissioner Solomon Dersso, 7-11 March 2016. Adopted during the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, held 8-22 May 2017 in Niamey, Republic of Niger.

Administration Commission Bill of 2011. It is submitted that the promulgation of the Bill will not necessarily address the challenges associated with the independence of the SCHR.

4.3 Appointment procedure

As previously stated, the Constitution provides that members of the SCHR shall be appointed by the King on the advice of the Judicial Service Commission.⁴⁶ The SCHR consists of six members, that is, the commissioner and at least two deputy commissioners “as may be necessary for the effective discharge of the functions of the Commission”.⁴⁷ As noted too, the King also appoints all the members of the Judicial Service Commission.

The qualification for a deputy commissioner of the SCHR is that he or she must be of high moral character and proven integrity, and must possess considerable experience and demonstrated competence in the conduct of public affairs, or be of high calibre in the conduct of public affairs.⁴⁸ Currently, there are five deputy commissioners. The first Chairperson of the Commission was a former Minister of Justice and attorney-at-law, Reverend David Matse, who was previously appointed to the Eswatini cabinet and later relieved of his duties after he failed to adhere to instructions to fire a former High Court judge. The current Chairperson, Sabelo Masuku, is a practising attorney and does not work for the Commission on a full-time basis.⁴⁹

The current deputy commissioners are Princess Sidvumolesihle,⁵⁰ Chief Mawandla Gamedze,⁵¹ and Pastor Phumelele Thwala. They are all part-time commissioners. A prominent traditional healer-turned-pastor of

46 Section 163(3) of the Constitution.

47 Section 163(2) of the Constitution.

48 Section 163(5) of the Constitution.

49 Masuku is the son of a former Deputy Prime Minister and now a regional administrator for the Shiselweni district of Eswatini. See B Dlamini, “DPM Declares His Assets ... to His Son”, *Times of Swaziland* (10 February 2012), available at <http://www.times.co.sz/News/72366.html> (accessed 5 December 2018).

50 This is a daughter of the late King Sobhuza II and a half-sister of reigning King Mswati III.

51 The only known credentials of Chief Mawandla are that he is a chief of Phonjwane area in the Lubombo region.

the Church of Nazarene, Reverend Grace Masilela, was also a deputy commissioner but later resigned.⁵²

It is important to note that none of these commissioners underwent a public interview for his or her appointment. The process of appointing these individuals to the SCHR was not transparent, competitive and equitable, which raises serious concerns about the body's integrity and competency. Indeed, a scan through the credentials of the commissioners shows that they are individuals who are generally loyal to the monarchy and hence uncritical of the status quo. It is also in serious doubt if they have a thorough knowledge of human rights. In fact, only the current chairperson, Mr Masuku, and Pastor Thwala are known to be lawyers. The sole justification the then Minister of Justice and Constitutional Affairs, Ndumiso Mamba, gave for the composition of the initial members of the SCHR was that "the other individuals represent[ed] a cross-section of local society including gender".⁵³

Clause 25 of the Human Rights and Public Administration Commission Bill of 2011 provides that the SCHR:

shall be competent in every respect to protect and promote human rights in Swaziland in the broadest sense possible and to investigate human rights violations on its own motion or upon complaints received from any person, class of persons or body.

The presence of a traditional leader on the SCHR presents a challenge, in that in some instances Eswatini law and custom are in conflict with human rights norms. The same is true of the presence of religious ministers, whose beliefs may not necessarily be in agreement with some (if not all) human rights norms and standards. On the face of it, the SCHR is an entity which in its composition is arguably not comprised of competent individuals.

4.4 Financial autonomy

The SCHR has not been effective over the years due to capacity and

52 Rev. Masilela only had a qualification in theology. See Nhlanhla, "Amazing 28-Year-Old Writes St 5 Exam", *Times of Swaziland* (1 July 2012), available at <http://www.times.co.sz/News/77103.html> (accessed 23 December 2018).

53 S Magagula, "Human Rights Commission Launched", *Swazi Observer* (5 September 2009), available at <https://bit.ly/2NqkvYO> (accessed 18 December 2018). The requirement of "representation from a cross-section of local society" is not a constitutional requirement for the composition of the SCHR.

financial constraints. It was previously referred to as a “white elephant”.⁵⁴ By the end of 2011, more than two years after the appointment of the commissioner, it was still in the process of recruiting its secretariat.⁵⁵ The Commission pleaded poverty in undertaking a less-than-thorough study for a poorly drafted report seeking to cover the period 2007-2010, which was prepared for the Office of the High Commission for Human Rights’ Summary of Stakeholders Information.⁵⁶ In this report, the role that the Commission played in ensuring promotion and respect for human rights in Swaziland was non-existent. Instead, the report was largely descriptive and relied heavily on secondary sources.⁵⁷

Although not yet in force, the Human Rights and Public Administration Commission Bill of 2011 provides for the funding of the SCHR. Article 21(1) of the Bill stipulates that the funds of the Commission shall consist, first, money appropriated from the Consolidated Fund;⁵⁸ secondly, any donations, grants, bequests or loans made by any person or organisation or any government of any country to the Commission;⁵⁹ and, thirdly, any other monies that may vest in or accrue to the Commission, whether in terms of this Act or otherwise. Currently, the SCHR does not have a budget, at least officially. It is still under the Ministry of Justice and Constitutional Affairs.

5 Mandate of the SCHR

The mandate of the SCHR is two-pronged. The first part of the mandate is mandatory and the second is non-obligatory.

5.1 Obligatory mandate

First, the SCHR shall “investigate complaints concerning alleged violations of fundamental rights and freedom under the Constitution”.

54 See The Nation, “Human Rights Body Turning into a White Elephant” (February 2012), available at <http://www.theswazination.com/Interview-February-2012.html> (accessed 12 December 2018).

55 See Submissions for OHCHR’s Summary of Stakeholders Information Presented by the Swaziland Commission on Human Rights and Public Administration/Integrity – Swaziland, October 2011, available at <https://bit.ly/2J319EK> (accessed 12 December 2018).

56 *Ibid.*

57 The Commission acknowledged that this was due largely to financial constraints.

58 This money is earmarked for the salaries and allowances payable to members of the Commission and the recurrent administrative expenses of the Commission.

59 These can only be received with the approval of the minister.

Secondly, it shall “investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties”. Thirdly, the SCHR shall:

investigate complaints concerning the functioning of any public service, service commission, administrative organ of the government, [or] the Armed Forces in so far as the complaints relate to the failure to achieve acceptable delivery of services or equitable access by all in the recruitment to those services or fair administration by those services.

Fourthly, the SCHR shall “take appropriate action for the remedying, correction or reversal of instances specified [above] through such means as are fair, proper and effective”. Fifthly, it shall “investigate instances of alleged or suspected corruption and the misappropriation of public monies or property by officials and to take or recommend appropriate steps, including reports to the Attorney-General or the Director of Public Prosecutions or the Auditor-General”. Sixthly, the SCHR shall “eliminate or foster the elimination of corruption, abuse of authority or public office”. Finally, the SCHR shall “promote and foster strict adherence to the rule of law and principles of natural justice in public administration”.

5.2 Non-obligatory mandate

The SCHR may investigate any matter that falls under its obligatory mandate as follows: first, where a complaint is duly made to the Commission by any person alleging that the complainant has sustained an injustice as a result of a fault in administration; secondly, where a Member of Parliament requests that the Commission investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained an injustice; and thirdly, in any other circumstances in which the commissioner, in good faith, considers that the Commission ought to investigate the matter on the ground that some person or body of persons has or may have sustained an injustice.

5.3 Compliance with the Paris Principles

Since its establishment, the SCHR has arguably been a lame duck insofar as the promotion and protection of human rights in Swaziland is concerned. The Commission is still not accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), which raises the question of its compliance with the Paris Principles. Only those Human Rights Institutions that comply with the Paris Principles may apply for accreditation to the ICC. The Paris Principles list the requirements for

independence and the broad mandate of National Human Rights Institutions (NHRIs).⁶⁰ In terms of the Paris Principles, the key elements of the composition of a national institution are its independence and pluralism.

The SCHR falls short of these key requirements for several reasons. Currently, it operates in the absence of an enabling statutory law.⁶¹ Eswatini drafted the Human Rights and Public Administration Commission Bill in 2011, which is aimed at operationalising the constitutional provisions establishing the Integrity Commission. According to Langwenya, once the Bill is finalised by Parliament, it will ensure that the Commission can meet all its strategic objectives.⁶² This argument is yet to be tested.

5.4 Monitoring domestic human rights violations

While the SCHR is obliged to “investigate complaints concerning alleged violations of fundamental rights and freedoms under this Constitution”,⁶³ it is, however, barred from investigating a “matter relating to the exercise of any royal prerogative by the Crown”.⁶⁴ This means, therefore, that if a matter relates to a violation of human rights associated with the exercise of any royal prerogative by the Crown, the Commission cannot undertake any investigation relating to it. This is so despite the fact that the Commission is, at least on paper, “independent in the performance of its functions and ... [not] subject to the direction or control of any person or authority”.⁶⁵

Even though the independence of the SCHR is guaranteed by the Constitution, it remains a myth. The Constitution does not provide for any

60 National Institutions for the Promotion and Protection of Human Rights, 20 December 1993. A/RES/48/134, available at <http://www.un.org/documents/ga/res/48/a48r134.htm> (accessed 18 December 2018).

61 This is in contradistinction to the South African Human Rights Commission (SAHRC), which is established by section 181(1)(b) of the Constitution of South Africa, Act 108 of 1996, as one of the state institutions mandated to strengthen constitutional democracy. Section 184(1) of the Act provides that “[t]he 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”.

62 M Langwenya, *Swaziland Justice and the Rule of Law: A Review by AfriMap and the Open Society Initiative for Southern Africa*, Open Society Foundations (March 2013), p 73.

63 Section 164(1) of the Constitution.

64 Section 165(3)(c) of the Constitution.

65 Section 166 of the Constitution.

oversight mechanism for the functioning of the Commission. In other words, the Constitution is silent on the question of which authority the Commission is supposed to report to regarding its functions. The fact that it is appointed by the King suggests that the only authority to which it is implicitly obliged to report is none other than the appointing authority, that is, the King.⁶⁶

5.5 Receiving and dealing with complaints and petitions

The SCHR has a standard form in which a complainant can detail a complaint or petition. In the form, the complainant sets out the rights in the Constitution which are or were violated. The complainant also states the relief sought for the violation. The matter is then handled by the SCHR accordingly. It must be noted that the absence of a dedicated website for the SCHR deprives the general public of an understanding of the process it follows in handling complaints or petitions. The complaint mechanism should be clear and allow the public to monitor complaints submitted to the SCHR.

As part of its mandate, the SCHR has been involved in court proceedings for the purposes of protecting human rights. In *The Commissioner on Human Rights and Public Administration/Integrity & Another v Umbane Limited and 2 Others*,⁶⁷ the SCHR brought an interlocutory application on behalf of Sofi Dlamini and Others (second applicants) for the stay of execution of an order of the Supreme Court that directed their eviction of the second applicants from a farm in the Manzini district. The eviction order was granted in favour of the first respondent, Umbane Limited. The SCHR approached the Court on the ground that the eviction order was executed in an inhuman and degrading manner. The SCHR argued that this constituted a violation of fundamental human rights and freedoms. A counter-argument was made that the SCHR was seeking a remedy that was fundamentally an alteration of a Supreme Court judgement, which rendered the proceedings vexatious.

The Court ruled against the SCHR. It held that it had wrongly interpreted section 18 of the Constitution, dealing with the protection from inhuman and degrading treatment; this section, the Court maintained, was crafted with reference to the protection against torture or punishment in a

66 Section 163(3) of the Constitution. This is in contradistinction to the SAHRC, which is accountable to the National Assembly and obliged to report to it its activities and performance of its functions at least once a year. See section 181(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.

67 (902/2011) [2017] SZHC 211 (4 April 2017).

cruel and degrading manner, and was not applicable to an execution of an eviction order.⁶⁸ Despite this decision, the Court established that the Commission had *locus standi* in the matter and could sue in its name when challenging the validity of a legislation or regulation. The Court further held that the SCHR could institute proceedings through the office of the Director of Public Prosecutions or the Attorney-General.

The SCHR also intervened in response to media reports of violence at polling stations on election day on 21 September 2018. Vehicles of the Elections and Border Commission (EBC) were forced to turn back from polling stations for safety after roads leading to counting centres were barricaded by protesting crowds. After the general elections, the SCHR called upon the EBC to investigate the causes of violence and take the necessary action.⁶⁹ It is not clear, however, why the SCHR could not investigate these matters itself since they concerned alleged violations of human rights.

5.6 The Human Rights and Public Administration Commission Bill of 2011

For purposes of operationalising the SCHR, the Human Rights and Public Administration Commission Bill of 2011⁷⁰ was drafted with the aim of setting out the Commission's powers, functions and responsibilities. It further sets out the procedure to be followed by the SCHR when conducting investigations, and provides remedies available to complainants. The delay in adopting this bill remains a cause for concern. In terms of Article 15(2) of the Bill, decisions of the SCHR would be enforced by the High Court.

The Bill provides for the appointment of an executive secretary of the Commission whose office shall be a public office and whose responsibility involves the day-to-day administration of the SCHR.⁷¹ Of importance is the fact that the Bill provides that "the office of the Executive Secretary shall be held by a person who has experience and shown capacity in a profession or in activities devoted or relevant to public administration and the protection of human rights".⁷²

68 Judgement was delivered on 4 April 2017.

69 See report at <https://allafrica.com/stories/201809300087.html> (accessed 4 December 2018).

70 On file with author.

71 Clause 17(2) of the Human Rights and Public Administration Commission Bill 2011.

72 *Ibid*, clause 17(3).

The Bill also provides that one of the responsibilities of the SCHR is to “promote ratification by [Eswatini] of any international human rights instrument”.⁷³ Eswatini has ratified a plethora of international instruments that have a bearing on human rights.⁷⁴

6 Public accountability

The importance of the public accountability of the SCHR cannot be overemphasised. The public must know the workings of the Commission and appreciate its role with regard to human rights. In terms of section 168(8) of the Constitution, the SCHR:

shall make annual reports to Parliament on the performance of the Commission which reports shall include statistics in such form and in such detail as may be prescribed of the complaints received by the Commission and the results of any investigation.

6.1 Reporting mechanism

Despite the fact that the SCHR was appointed by King Mswati III on 11 September 2009, there is no report that exists as to how it has exercised its functions in terms of section 164 of the Constitution, at least none that is available to the public. This is not only a violation of the Constitution but a serious indictment of the Eswatini government, which is a proponent of good governance, at least on paper.

It is ironic that the SCHR would find it appropriate to submit a report to the Human Rights Council Working Group on the Universal Periodic Review rather than to the general Eswatini population (as the Constitution provides), whose rights it was established to protect and promote. The National Report (covering the period 2007-2010) submitted in accordance

73 *Ibid*, clause 32(e).

74 These include regional instruments such as the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights; the African Charter on Democracy, Elections and Governance; and the African Union Convention on Preventing and Combating Corruption. The international instruments include the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Protection of all Persons from Enforced Disappearance; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

with paragraph 15(1) of the annex to Human Rights Council resolution 5/1 on Swaziland is also silent on how the Commission has performed since its inception in 2009.⁷⁵ This is cause for concern, particularly due to the fact that human rights violations continue unabated in the Kingdom. According to Langwenya, the reasons for this include:

[t]he absence of an [effective and] operational oversight body on human rights; a lack of awareness on the part of citizens; the fact that pre-constitutional legislation is not in line with the Constitution; the Bill of Rights not yet being fully absorbed into the practices of the public administration; judicial proceedings not always meeting all standards for an independent and fair judiciary; Swazi law and custom, as well as its procedures, not always being constitutional in every aspect; and the absence of a legal aid system.⁷⁶

Among other things, the United Nations Country Team recommended that the capacity of the Commission be strengthened to enable it to deliver on its mandate.⁷⁷ This recommendation is yet to be fulfilled.

6.2 Regular consultation

The SCHR regularly consults with civil society organisations. In particular, it has a good relationship with the Co-ordinating Assembly of Non-Governmental Organisations (CANGO), a membership-based non-governmental organisation (NGO) operating in the Kingdom of Eswatini with a membership base of more than 70 NGOs. This partnership should be enhanced to enable the SCHR to join forces with civil society in combating human rights violations in the country.

7 Conclusion

At the top of the list of functions to be performed by the SCHR is the investigation of violations of fundamental human rights and freedoms under the Constitution. On the question of whether it has carried out this function effectively in the time since its establishment, the answer is no. The Commission is yet to prove itself as a force to be reckoned with in the promotion and protection of human rights in Eswatini. This is largely because of the political landscape within which it operates, one inhospitable to the respect for human rights. A consideration of the call for

75 Human Rights Council Working Group on the Universal Periodic Review 12th Session, Geneva, 3-14 October 2011. A/HRC/WG.6/12/SWZ/1.

76 See note 63, p 73.

77 See Human Rights Council Working Group on the Universal Periodic Review Twelfth Session, Geneva, 3-14 October 2011, p 3. A/HRC/WG.6/12/SWZ/1.

a complete overhaul of Eswatini's political system is beyond the scope of this contribution, yet the matter is an important issue which has been raised in many quarters.

It is recommended that the mandate of the SCHR be focused strictly on human rights. After all, it is a national human rights institution. Bringing in the other focus areas – of public administration and integrity – simply muddies the waters as far as its human rights mandate is concerned. It is also recommended that there should be thorough reform of the appointment procedure, which renders the Commission ineffective due to the general lack of competence of its appointed members. The fact that the Commission lacks financial autonomy makes it very difficult for it to be effective in meeting its mandate on human rights.

The question of the accessibility of the Commission must be addressed as a matter of urgency. The general public must be made aware of the role of the SCHR as well as of the processes involved in its complaints or petition mechanism. Some of the shortcomings of the Commission would be addressed by the promulgation of the Human Rights and Public Administration Commission Bill. This would also entail implementing a reporting process and, in so doing, improving the SCHR's accountability. Its regular consultations with civil society should be enhanced, which would serve to increase its visibility in the Kingdom.

The need for a functional, effective, independent, accountable, credible and professional national human rights institution in Eswatini cannot be doubted. The SCHR has an extremely difficult path to follow in fulfilling its mandate on human rights, but that path is viable if some of the concerns raised in this chapter can be addressed. The guiding principle should be article 1 of the Universal Declaration of Human Rights of 1948, which underscores the notion that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Molding a national human rights commission that gives expression to this overarching principle would be a first step in the right direction.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The basic framework for the Eswatini Commission on Human Rights and Public Administration Integrity is laid down in the 2005 Constitution. The relevant provisions are set out as follows:

Part 2: Commission on Human Rights and Public Administration

163.(1) There shall be established within a year of the first meeting of Parliament after the commencement of this Constitution, a Commission on Human Rights and Public Administration in this Chapter referred to as “the Commission”.

(2) The Commission shall consist of –

(a) a Commissioner for Human Rights and Public Administration; and

(b) at least two Deputy Commissioners for Human Rights and Public Administration as may be necessary for the effective discharge of the functions of the Commission.

(3) The members of the Commission shall be appointed by the King on the advice of the Judicial Service Commission.

(4) Subject to subsection (5)(a), a person shall not qualify for appointment as Commissioner unless that person qualifies for appointment as judge of the superior courts.

(5) A person shall not be eligible for appointment as Deputy Commissioner unless that person –

(a) is of high moral character and proven integrity; and

(b) possesses considerable experience and demonstrated competence in the conduct of public affairs; or

(c) is of high calibre in the conduct of public affairs.

(6) The first persons to be appointed Commissioner and Deputy Commissioner shall hold office for a term not exceeding seven years and five years respectively and may be reappointed for a single term of five years each.

(7) A person appointed subsequent to the first appointment as Commissioner or Deputy Commissioner respectively shall hold office for a term not exceeding five years and may be re-appointed for a single term.

Functions of the Commission

164.(1) The Commission shall perform the following functions –

- (a) investigate complaints concerning alleged violations of fundamental rights and freedoms under this Constitution;
 - (b) investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties;
 - (c) investigate complaints concerning the functioning of any public service, service commission, administrative organ of the Government, the Armed Forces in so far as the complaints relate to the failure to achieve acceptable delivery of services or equitable access by all in the recruitment to those services or fair administration by those services;
 - (d) take appropriate action for the remedying, correction or reversal of instances specified in paragraphs (a), (b) and (c) through such means as are fair, proper and effective, including –
 - (i) publicising the findings and recommendations of the Commission;
 - (ii) negotiation and compromise between the parties concerned;
 - (iii) causing the complaint and the findings of the Commission on that complaint to be reported to the superior of an offending person or institution;
 - (iv) referring matters to the Director of Public Prosecutions or the Attorney General for appropriate action to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures; and
 - (v) bringing proceedings to restrain the enforcement of any legislation or regulation by challenging the validity of that legislation or regulation where the offending action or conduct is sought to be justified by reference to that legislation or regulation.
 - (e) investigate instances of alleged or suspected corruption and the misappropriation of public moneys or property by officials and to take or recommend appropriate steps, including reports to the Attorney-General or the Director of Public Prosecutions or the Auditor General;
 - (f) eliminate or foster the elimination of corruption, abuse of authority or public office;
 - (g) promote and foster strict adherence to the rule of law and principles of natural justice in public administration;
 - (h) promote fair, efficient and good governance in public affairs;
 - (i) take such other measures incidental to the above as may be prescribed by Parliament.
- (2) The Commission may investigate any matter referred to in subsection (1) in any of the following circumstances –
- (a) where a complaint is duly made to the Commission by any person alleging that the complainant has sustained an injustice as a result of a fault in administration;
 - (b) where a member of Parliament requests the Commission to investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained an injustice;

- (c) in any other circumstances in which the Commissioner, in good faith, considers that the Commission ought to investigate the matter on the ground that some person or body of persons has or may have sustained an injustice.

Powers of the Commission

165.(1) The powers of the Commission shall include the following –

- (a) to issue subpoenas requiring the attendance of any person before the Commission and the production of any document, record or thing required for the investigation by the Commission;
 - (b) to fine any person for contempt of any subpoena or order, or cause that person to be brought by a competent court for the enforcement of the subpoena or order of the Commission;
 - (c) to question any person in respect of any subject matter under investigation before the Commission;
 - (d) to require any person to disclose truthfully and frankly any information within the knowledge of that person relevant to any investigation by the Commission.
- (2) The Commission may during the course of its proceedings or as a consequence of its findings, make such orders and give such directions as are necessary and appropriate in the circumstances.
- (3) The Commission shall not investigate –
- (a) a matter which is pending before a court;
 - (b) a matter involving the relations or dealings between the Government and any other Government or an international organisation; or
 - (c) a matter relating to the exercise of any royal prerogative by the Crown.
- (4) Subject to the provisions of subsection (3) the Commission may investigate an authority that has been established to investigate a matter where in the opinion of the Commissioner the authority is failing to carry out its mandate with due speed.

Independence of the Commission

166. The Commission shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

Discretion of Commissioner

167. In determining whether to initiate, continue or discontinue an investigation, the Commissioner shall exercise discretion and in particular and without prejudice to the generality of that discretion, the Commissioner may refuse to initiate or continue an investigation where it appears that –

- (a) the complaint relates to action of which the complainant had knowledge for more than twelve months before the complaint was received by the Commission;
- (b) the subject matter of the complaint is trivial, frivolous, vexatious or is not made in good faith; or
- (c) the complainant has not a sufficient interest in the subject matter of the complaint, unless justified in terms of section 164 (2) (c).

Report of investigation

168.(1) Where a complaint, or request for an investigation, is duly made and the Commissioner decides not to investigate the matter or where the Commissioner decides to discontinue an investigation of the matter, the Commissioner shall inform the person who made the complaint or request of the reasons for not investigating or for discontinuing the investigation.

(2) The Commission may, where necessary, issue an interim report containing such recommendations as it may deem appropriate in the circumstances.

(3) The Commission shall, upon completion of an investigation inform the public officer, person, private enterprise or institution of the findings in writing.

(4) Upon the completion of an investigation the Commissioner shall inform the department of Government or the authority concerned of the results of the investigation and where the Commissioner is of the opinion that any person has sustained an injustice in consequence of a fault in administration, the Commissioner shall inform the department of Government or the authority of the reasons for the opinion and make such recommendations as the Commissioner thinks fit.

(5) The Commission may in the interim report, or in the final report, specify the time within which the injustice should be remedied.

(6) Where the investigation is undertaken as a result of a complaint or request, the Commissioner shall inform the person who made the complaint or request of the findings.

(7) Where the matter in the opinion of the Commissioner is of sufficient public importance or where the Commissioner has made a recommendation under subsection (4) or (5) and within the time specified by the Commissioner no sufficient action has been taken to remedy the injustice, or terminate the offensive conduct then, subject to such provision as may be made by Parliament, the Commission shall lay a special report on the case before Parliament.

(8) The Commissioner shall make annual reports to Parliament on the performance of the Commission which reports shall include statistics in such form and in such detail as may be prescribed of the complaints received by the Commission and the results of any investigation.

Restrictions on matters for investigation

169. The Commission shall not, in investigating any matter leading to, resulting from or connected with the decision of a Minister, inquire into or question the policy of the Government in accordance with which the decision was made.

Vacation of office and immunity of Commissioners

170.(1) The provision of this Constitution relating to the removal of judges of the superior courts from office shall, subject to any necessary modifications and adaptations, apply to the removal from office of the Commissioner or Deputy Commissioner.

(2) A member of the Commission shall have such and like protection and privilege in the case of any action or suit brought against the Commission for any act done or omitted to be done in the honest execution of the duties of the Commission as is by law given to acts done or words spoken by a judge of the superior courts in exercise of the judicial office.

Staff and expenses of the Commission

171.(1) The Commission shall have such staff as shall be appropriate for the effective discharge of the functions of the Commission.

(2) Administrative expenses of the Commission including salaries, allowances and pensions payable to, or in respect of, persons serving with the Commission, shall be charged on the Consolidated Fund.

B.2 Legislative and regulatory instruments

There is presently only the Human Rights and Public Administration Commission Bill of 2011, which is designed to operationalise the Commission established under section 163 of the Constitution.

B.3 Internal rules and regulations

What follows below is a typical form for submitting complaints to the Commission.

COMPLAINT FORM

SWAZILAND HUMAN RIGHTS COMMISSION COMPLAINT FORM

| |
|-----------------------------------|
| REGION: |
| CITY/TOWN: |
| REFERENCE NO: HR/PA/A1 / /2018 |

PART A. PERSONAL DETAILS

Full name(s) and Surnames:

Nick name(s) if any:

Gender:.....

ID number:

Date of birth:

Age:

| |
|-------------------------|
| Postal address: |
| |
| Residential address: |
| |
| Contact numbers: (Work) |
| (Home) |
| |

DETAILS OF ASSOCIATION, ORGANISATION OR ORGAN OF STATE

Full name:

Registration number:

What does it do?.....

Person in charge to talk to.....

Designation of person above.....

| |
|-------------------|
| Postal address |
| Telephone number: |
| Cell number: |
| Fax number: |
| E-mail address: |
| |

PART B. THE COMPLAINT

1. Date it happened
2. Is it still happening? YES.....N
3. Where did it happen?
 - (a) Place
 - (b) Town/City
 - (c) Region
4. If you know, which right(s) in the Constitution was/were violated or is/are being violated?
.....
.....
5. If you know, the full name(s) and surname(s) of person(s), association(s), organisation(s) or organ(s) of state who violated these rights, please tell us
.....
.....
6. Where can we contact them?
.....
.....
7. If you do not know his/her/its/their names, please tell us anything you do know about him/her/it/them?
.....
.....
8. Did anybody else see or hear what happened?.....
If YES, Full Name(s) and Surname(s).....

How and where can we get in touch with them?.....

.....
.....

(only persons who saw or heard what happened, not those who heard about it from someone else)

9. In your own words tell us exactly what happened (include all information but be as brief as possible)

10. Have you reported the matter to anyone else?.....YES.....NO
If YES, to who? (E.g. police, lawyer).....

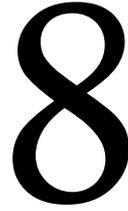
11. What outcome do you propose or expect from this complaint? (tell us what you would like to achieve and the relief sought)
.....
.....

12. Do you need an interpreter when attending any proceedings, investigations or hearings at our offices?.....YES.....NO
If YES, the language you speak

13. Please tell us how you heard about the Swaziland Human Rights Commission? (e.g radio advert, newspaper, friend etc)
.....

DATE:

COMPLAINANT



**THE ETHIOPIAN HUMAN
RIGHTS COMMISSION**
*Getahun Kassa**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Abuses of power and violations of human rights have a long history in Ethiopia and continue to the present day. In recent decades, the country underwent three transitional periods, two of which resulted in regime change and the third in the incumbent's remaining in power. Even so, reforms prompted by popular demands led to changes that affected the *modus operandi* of the ruling group.

Upheaval in the late 1960s and early 1970s brought Ethiopia's age-old imperial rule to an end and saw it replaced by a military regime called the Provisional Military Administration Council of Ethiopia (PMACE) and known also as the Derg. Widespread human rights violations were a part of the history of this period. The military regime was known for its brutal repression. Torture, summary execution and deprivation of liberty were mainstays of its *modus operandi*, with the result that freedom of expression and association and rights to political participation were severely curtailed.

* Center for Human Rights, Addis Ababa University.

During this period (the mid-1970s to mid-1980s), violence was used routinely to eliminate political opponents. The PMACE launched an offensive, known as the Red Terror, against those whom it labeled “counter-revolutionary”, “anti-people” and “feudal remnants”. One of the opposition groups, the Ethiopian Peoples’ Revolutionary Party (EPRP), retaliated with its “White Terror” offensive.¹ Thousands died in the conflict, while thousands more sustained physical harm and trauma.²

After a protracted bloody conflict, the military regime was overthrown by force of arms. A Transition Period Charter adopted in 1991 promised that “individual human rights shall be respected fully, and without any limitation whatsoever,”³ and affirmed “the rights of nations, nationalities and peoples to self-determination”.⁴ The Charter transformed the political landscape into a multi-party system, and set out to deal with human rights violations committed under the military regime. In 1992, the transitional government decided to adopt a criminal prosecution model for doing so. A Special Prosecutor Office (SPO)⁵ was established to investigate and institute criminal proceedings against persons suspected of perpetrating violations through the abuse of their positions in the party, the government or any mass organisations under the Derg-WPE regime.⁶ The SPO was mandated accordingly to investigate human rights violations, prosecute alleged perpetrators, document the violations, and educate the public so as to prevent a recurrence of such violations.⁷ About 5,200 suspects⁸ were charged for one or more crimes of genocide, crimes against humanity, murder, rape, injury to physical and mental health, unlawful detention,

1 TB Bouwknegt, “Eshetu Alemu: The Black Sheep of the Dergue – Ethiopian War Crimes and Universal Jurisdiction in the Netherlands”, 12 *International Journal of Transitional Justice* (2018), p 554.

2 The senior prosecutor of the SPO, who participated in the process from investigation to prosecution and appeal, pointed that one major challenge for the prosecution office was that victims who sustained physical and psychological harm did not want to remember about it and were thus unwilling to cooperate in the investigation and appear as witnesses in court.

3 Proclamation No 1/1991, Transitional Period Charter of Ethiopia, Article 1.

4 *Ibid*, Article 2.

5 Proclamation No 22/1992, Proclamation Establishing the Office of Special Prosecutor (8 August 1992).

6 *Ibid*, Article 6.

7 *Ibid*.

8 Persons accused of these crimes were charged in three categories: high-ranking politicians and military commanders of the Dergue regime; military officers and civilians who implemented orders; and individual perpetrators who executed the decisions. See “Report of the Special Prosecutor Office” (2010), pp 135-141.

and confiscating private property.⁹ It is worth noting that only members of the outgoing regime were charged with these crimes, which raised questions about the impartiality of the process.

A new constitution – the Constitution of the Federal Democratic Republic of Ethiopia (the 1995 Constitution) – was adopted in 1995, formally ending the transition period and paving the way for multi-party politics, the recognition of individual and group rights, and establishment of a national human rights institution. Nevertheless, human rights violations have continued unabated to this day. Restrictive laws and controversial national elections, coupled with a repressive law enforcement tradition, have severely undermined fundamental human rights that are recognised as “emanating from the nature of mankind, inviolable and inalienable”.¹⁰ The implementation of these laws has stifled dissent, curtailed freedom of expression, constrained the space for an independent civil society, and led to Ethiopia’s being identified as “the second-worst jailer of journalists in sub-Saharan Africa”.¹¹

Since 2015, the country has been mired in a political crisis triggered by anti-government protests and violent conflict in which government forces and protesters alike committed human rights violations with impunity. Developments between 2015 and 2018 took diverse forms – on the one hand, there was hope for political reform (which began with the release from prison of journalists and opposition political party leaders)¹² and, on the other, states of emergency were proclaimed, putting fundamental rights under threat.¹³ These measures compounded the already troubled state of human rights in the country in that the state of emergency proclamations and implementation directives contained highly restrictive provisions that prohibited basic freedoms. Widespread human rights

9 Some commentators call the trial the “African Nuremberg”. See J Ryle, “An African Nuremberg”, *The New Yorker* (2 October 1995), available at <https://www.newyorker.com/magazines/1995/10/02/an-african-nuremberg> (accessed in May 2018).

10 The Constitution of the Federal Democratic Republic of Ethiopia, Article 10.

11 Freedom House, “Freedom of the Press 2017”, *Ethiopia Profile*.

12 The release of opposition politicians and journalists in February 2018 was followed few days’ later by the declaration of a state of emergency.

13 The first state of emergency was declared in October 2016 and lifted in August 2017. In February 2018, a state of emergency was declared for a second time, raising concerns alongside hopes for reform. It was lifted in June 2018 after five months.

violations were reported during a state-of-emergency period that spanned a total of 16 months between 2016 and 2018.¹⁴

Conversely, the promise of reform raised hopes for a democratic transition and the protection of human rights. Prominent developments in this respect were Prime Minister Abiy Ahmed's official admission that the government had committed human rights violations in the past¹⁵ and his promise of genuine electoral democracy. However, despite the current leadership's explicit promises, violations of human rights have continued, often with impunity.

This is the context in which the Ethiopian Human Rights Commission (EHRC) implements its mandate.¹⁶ Ongoing political reform and popular demands for it present opportunities as well as challenges to the Commission's efforts to carry out its mission. This chapter seeks to assess the extent to which the EHRC has been able to exercise its mandate and the difficulties it faces in doing so. Following this introduction, sections 2-5 below discuss issues related to the establishment of the Commission, its mandate and selection procedures, and its organisation and staffing. Thereafter, sections 6-10 examine the activities of the EHRC, its accessibility, financial autonomy and relationship with civil society. The final section draws conclusions from the analysis in the preceding sections.

2 Establishment and evolution of the EHRC

The first indication of the desire to establish a national human rights institution was reflected in the 1974 draft constitution. The early 1970s were years when various sectors of Ethiopian society staged protests against absolutist monarchical rule. Prompted by the demands for political

14 Human Rights Watch, "Ethiopia: New State of Emergency Risks Renewed Abuses Overbroad, Vague Provisions Undercut Rights", available at <https://www.hrw.org/news/2018/02/23/ethiopia-new-state-of-emergency-risks-renewed-abuses> (accessed 5 March 2019).

15 Addis Standard, "Ethiopia: The Government's Approach to Past Human Rights Violations Needs to be Transparent" (25 January 2019). Prime Minister Abiy Ahmed's Speech in Parliament, available at <https://www.youtube.com/watch?v=wJnC2aX4jp8> (accessed 24 April 2019).

16 Proclamation 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 5. The objective of the Commission shall be to educate the public be aware of human rights to see to it that human rights are protected, respected and fully enforced as well as to have the necessary measures taken where they are found to have been violated.

reform and democratisation, a draft constitution¹⁷ (which proposed a transition to a constitutional monarchy) was tabled for discussion on 6 August 1974. The draft proposed an independent ombudsman answerable to the National Assembly. Articles 143-144 of the draft sought to vest this institution with the power to investigate administrative malpractice and issues subpoenas in the course of investigations. Nevertheless, the proposal did not materialise as the emperor was overthrown before the draft could be entered into force.¹⁸

The 1987 Constitution of the Peoples' Democratic Republic of Ethiopia, which was adopted after 13 years of rule without a constitution,¹⁹ was silent on this matter. The 1995 Constitution was more explicit. It provided for the House of Peoples' Representatives (HOPR) to establish a Human Rights Commission and determine by law its powers and functions.²⁰ To this end the House adopted the founding law, which came into effect on 4 July 2000.²¹ Nevertheless, the Commission commenced operation only in 2004 after the appointment of the Chief Commissioner. The Council of Commissioners²² was constituted and became operational upon appointment in July 2005 of the Chief Commissioner and Commissioner for Women and Children Affairs. The Council of Commissioners is composed of the Chief Commissioner, Deputy Chief Commissioner and other commissioners.²³ It has the power to adopt directives and by-laws necessary for the implementation of the founding law,²⁴ discuss the budget of the Commission,²⁵ appoint department heads,²⁶ appoint heads of children and women affairs departments,²⁷ and hear disciplinary cases relating to department heads.²⁸

17 Constitutional Commission, Draft Constitution of Ethiopia, Articles 143-146 (6 August 1974).

18 The draft constitution was tabled for discussion on 6 August 1974, and the military removed the emperor from power on September 1974.

19 The Provisional Military Administration Council of Ethiopia (PMACE) took power in 1974, suspended the 1955 Constitution, ruled the country for 13 years without a constitution, and finally adopted the 1987 Constitution.

20 Proclamation 1/1995, Constitution of the Federal Democratic Republic of Ethiopia, Article 55(14).

21 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation.

22 *Ibid*, Article 30.

23 *Ibid*.

24 *Ibid*, Article 31(1).

25 *Ibid*, Article 31(2).

26 *Ibid*, Article 31(4).

27 *Ibid*, Article 31(6).

28 *Ibid*, Article 31(7).

Currently, the EHRC conducts its activities from a head office in Addis Ababa and has eight branch offices²⁹ situated in eight of the nine regional states of the Ethiopian federation. The establishment of branches was a step forward in making the Commission accessible to the population. The functions of the Commission are allocated among 13 directorates at the head office and eight regional branch offices. Each regional office has five directorates. These include directorates dealing with awareness-raising, monitoring, investigation, research, and women and children. The regional branch offices were established pursuant to Article 9 of the founding law, which provides that “the Commission ... may have branch offices at any place as may be determined by the House”.

Initially, neither the House nor the Commission showed any interest in establishing branch offices. This was prompted instead by the recommendation of the first cycle of the Universal Periodic Review.³⁰ The first six branch offices were established in 2011, with a further two added in 2014. While the founding law grants the Commission a broad mandate, it required parliamentary approval for the simple matter of opening a branch office.³¹

3 Selection, appointment and composition of commissioners

The procedure for the appointment of commissioners is specified in Articles 10-12 of Proclamation No 210/2000. According to it, for nominations to be conducted, a nomination committee must be convened and composed of the Speaker of the HOPR, the Speaker of the House of Federation (HOF), seven members of the HOPR, two members of opposition parties with seats in the HOPR, the President of the Federal Supreme Court, and a representative of the Ethiopian Orthodox Church, Ethiopian Islamic Council, Ethiopian Evangelical Church and Ethiopian Catholic Church.³²

In the last three of the Commission’s five-year terms, nominations were conducted based on a public call open for individuals as well as organisations. The committee proposes nominees selected from names

29 Assosa, Bahirdar, Gambella, Hawassa, Jigjiga, Jima, Mekelle and Semera branch offices.

30 Addis Ababa University and UPR INFO, “Post-UPR Conference on Ethiopia Accepted Recommendations” (January 2015), p 18.

31 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 9.

32 *Ibid*, Article 11.

obtained in response to the public call. In doing so, the committee uses criteria stipulated under Article 12 of the Proclamation. The qualification criteria require a person who has acquired extensive knowledge of and experience in law or other relevant disciplines;³³ is “loyal” to the constitution;³⁴ is an Ethiopian national;³⁵ is reputed for his or her honesty and good conduct;³⁶ upholds respect for human rights;³⁷ has not been convicted for a criminal offence other than a petty offence;³⁸ and is above 35 years old.³⁹ Nominees supported by a two-thirds majority vote of the nomination committee are presented to the HOPR. The House, by a two-thirds majority vote, appoints commissioners from among nominees recommended by the committee.⁴⁰ The term of office of commissioners is five years.⁴¹ They are engaged on a full-time basis and are not allowed to engage in any gainful employment.⁴² Commissioners can be re-appointed.⁴³

The normative criteria and practice regarding the appointment of commissioners is, by and large, open and participatory, yet it also has limitations. Three issues are particularly important. First, the nomination process does not provide space for the participation of certain groups. For example, it does not allow civil society participation. Secondly, while the founding law sets criteria for appointment, it fails to stipulate which persons do not qualify for appointment. A review of the profile and political affiliation of previous appointees is instructive in regard to the importance of such a clause. It is therefore necessary to include an additional criterion to enhance efforts to guarantee the independence of the Commission. Thirdly, while in practice the nomination process is open to wide participation, it is not guided by clear rules of procedure, which are necessary for a transparent appointment process.

The NHRI in Ethiopia only became operational for the first time in 2004/5. The necessary policy, legal and institutional frameworks are in place. As regards policy, the 1995 Constitution proclaims the goal of building a political community founded on the rule of law, democratic

33 *Ibid*, Article 12(3).

34 *Ibid*, Article 12(1).

35 *Ibid*, Article 12(6).

36 *Ibid*, Article 12(4).

37 *Ibid*, Article 12(2).

38 *Ibid*, Article 12(5).

39 *Ibid*, Article 12(8).

40 *Ibid*, Article 10(2)(d).

41 *Ibid*, Article 14(1).

42 *Ibid*, Article 18(1).

43 *Ibid*, Article 14(2).

order and respect for freedoms and rights.⁴⁴ Similarly, the EHRC founding law declares the goal of building a unified political community by ensuring the protection of fundamental rights and freedoms.⁴⁵ The founding law goes further to state that the objective of the Commission is to educate the public about human rights; to see that human rights are respected, protected and enforced; and to ensure that necessary measures are taken when rights are violated.⁴⁶

The Commission is required to receive all complaints of human rights violations, except for cases brought to the HOPR, HOF and courts of law at any level.⁴⁷ Gebreselassie and Volker have underscored both the importance of national human rights institutions (NHRIs) for the protection of human rights in Ethiopia and the complementary role of NHRIs and judicial organs, noting that:

these semi-judicial safeguards (human rights commission and [the] institution of ombudsman) should not replace the mechanisms inherent in the legal structures. Instead, their activities must go hand in hand to complement the work of existing legal and other institutions in order to make them more effective institutions of human rights protection.⁴⁸

This issue was debated at a meeting convened by the EHRC to propose an amendment to the founding law.⁴⁹ Some participants argued that the Commission should have the power to investigate cases that have exhausted the judicial process; experts from the Commission counterargued that this would amount to interference in the jurisdiction of the judiciary, maintaining that the objective of the Commission is not to compete with but complement the efforts of the judiciary.

4 Mandate of the EHRC

The records of the Constitutional Assembly (which was convened in 1994 to approve the present constitution) show that it envisioned an independent NHRI answerable to the HOPR. Seeing as reference was

44 Proclamation No 1/1995, Constitution of the Federal Democratic Republic of Ethiopia, preamble paragraph 1.

45 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, preamble.

46 *Ibid*, Article 5.

47 *Ibid*, Article 7.

48 G Haileselassie and E Volker, "Contextualizing the Establishment of the Institutions of Human Rights Protection in Ethiopia", *Human Rights Symposium Addis Ababa* (1998), p 61.

49 Interview, expert at the Ethiopian Human Rights Commission (27 March 2019).

made to experience of the Scandinavian countries, the discussion initially suggested support for the introduction of an ombudsman institution.⁵⁰ Minutes of the Constitutional Assembly indicated that the mandate of the EHRC and the Institution of the Ombudsman would focus on ensuring the protection of human rights and upholding the rule of law.⁵¹ Though some members of the Assembly expressed concern that establishing two institutions could cause an overlap of mandate, the Assembly agreed to maintain the idea of having both institutions.⁵² That decision led to Article 55(14) and (15) of the FDRE Constitution which instruct the Federal House of Peoples' Representatives to establish NHRIs and determine their power and function by law. To address concerns about potentially overlapping mandates, Article 29 of the EHRC Proclamation provides guidance. It requires that, in the event of conflict between them, the Ombudsman and EHRC determine by mutual consultation which one of them will investigate the complaint at issue. This measure notwithstanding, conflicts in mandates continue to be a problem.

The mandate of the EHRC, as stipulated in Article 6, is structured in a manner that allows it to play a role in the promotion and protection of human rights. The EHRC can contribute to the protection of human rights only when it is able to implement this mandate and function as an independent and effective human rights organ.

Viewed from the perspective of the Paris Principles, the EHRC is vested with the mandate to promote and protect human rights. The process followed during the establishment of the Commission and the appointment of commissioners⁵³ complies by and large with the Principles. The EHRC is vested with the powers to ensure that human rights and freedoms are respected by citizens, organs of state, political organisations and other associations;⁵⁴ ensure that laws, regulations and directives as well as government decisions do not contravene human

50 Minutes of the Constitutional Assembly, Vol 4, Addis Ababa, Ethiopia (November 1994), pp 129-131.

51 *Ibid.*

52 *Ibid.*

53 In May 1998 the HOPR held an international human rights symposium to consider the experience of other countries and draw lessons for drafting the founding law. Academics and delegates from NHRIs from about 70 countries participated in the symposium. The founding law was drafted in a consultative process between 1998-2000. Some organizations expressed concern that the consultations excluded national and international human rights NGOs.

54 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 6(1).

rights;⁵⁵ educate the public about human rights;⁵⁶ investigate human rights violations on its own initiative or upon complaint;⁵⁷ make recommendations for the revision of existing laws, enactment of new laws and formulation of policies;⁵⁸ provide consultancy services on human rights;⁵⁹ forward its opinion on human rights reports to be submitted to international organs;⁶⁰ translate into local vernaculars and disseminate international human rights treaties ratified by Ethiopia;⁶¹ and perform such other activities as may be necessary to attain its objectives.⁶²

5 Organisation and staffing

The organisational capacity of the EHRC has been growing slowly. When it commenced operation in 2004/5, following appointment of the commissioners, its staff was less than 20. Until the opening of branch offices in 2011, it had only the head office in Addis Ababa. The staff size grew to 59 in 2007/8. Currently, the EHRC (head office and branch offices) has 432 staff (239 male and 193 female).

Table 3: Staff composition of the EHRC

| Location | Female | Male | Total |
|---------------------------|--------|------|-------|
| Head office (Addis Ababa) | 84 | 74 | 158 |
| Assosa | 8 | 24 | 32 |
| Bahirdar | 14 | 23 | 37 |
| Gambella | 12 | 21 | 33 |
| Hawassa | 17 | 20 | 37 |
| Jigjiga | 9 | 19 | 28 |
| Jima | 14 | 26 | 40 |
| Mekelle | 17 | 19 | 36 |
| Semera | 17 | 14 | 31 |
| Total | | | 432 |

55 *Ibid*, Article 6(2).

56 *Ibid*, Article 6(3).

57 *Ibid*, Article 6(4).

58 *Ibid*, Article 6(5).

59 *Ibid*, Article 6(6).

60 *Ibid*, Article 6(7).

61 *Ibid*, Article 6(8).

62 *Ibid*, Article 6(11).

Of the 432 staff, 11 are commissioners based in the head and branch offices (three and eight, respectively); 63.8 per cent of the staff are holders of BA degree or above. The Commission has two PhD, 10 LL.M, 28 MA, 68 LL.B and 168 BA degree-holders. The remaining staff comprise 45 diploma holders, 12 holders of vocational training diplomas, and 99 persons with secondary-school-level education.

The key challenge in the Commission's efforts to fulfil its need for a qualified workforce is the high rate of staff attrition, which is caused both by internal and external factors. Over the past five years, 213 staff have left the Commission, mostly for reasons of remuneration or due to issues related the work environment. In interviews with staff, it emerged that the problem stems largely from the commissioners' lack of political neutrality, as a result of which commissioners and experts take differing views on the role and mandate of the Commission.⁶³ In addition, low salaries and inadequate remuneration are an impediment to retaining highly qualified staff.

6 Financial autonomy

Adequate funding that guarantees independence from government is crucial for an NHRI's ability to operate effectively. In this respect, Proclamation No 210/2000 provides that a quarterly portion of the Commission's budget shall be deposited in advance at the National Bank.⁶⁴ It also provides that the Commission's account shall be audited by an organ designated by the HOPR.⁶⁵

Nevertheless, the Commission has to present its budgetary request to the Ministry of Finance and Economic Development every financial year, with the latter determining the total amount to be allocated at its absolute discretion. The total amount of funds made available to the Commission is only made available in instalments and often, the Commission has to request for funds after spending the first installment. This has now become accepted practice, as a result of which the EHRC and other organs, such as the Supreme Court, have lost their financial autonomy. The Ministry of Finance and Economic Development exercises discretionary authority not only over budget allocations stage of the process but also the spending of the allocated amounts.

63 Interview with former employee of the EHRC (29 March 2019).

64 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 36(2).

65 *Ibid*, Article 37(2).

One part of the EHRC's budget is allocated by the government treasury, while the other part is made up of financial support received from partner organisations. Financial grants in the form of technical support come from the UNDP, UNOHCHR, UNWOMEN, WHO, DFID, the government of Austria, and Irish Aid. The Commission's annual budget for the years 2014-2018 was approximately USD 2 million, 2.7 million, 2.8 million, 2.6 million and 2.5 million for each of these years, respectively.⁶⁶

Each fiscal year a sizeable portion of the budget is spent on salaries and other basic expenses. The Commission's reports show that in the last five years it has faced serious financial problems and consequently has had to cancel certain of its planned activities. On average, 65-70 per cent of its funding comes from the government treasury. The remaining part, as mentioned, is obtained from assistance and grants. For example, a multi-donor project – the Democratic Institutions Project – provided the Commission with critical support in its early years (2008-2012). While the Commission kept expanding its physical presence by opening branch offices, the annual increase in the budget allocated from government treasury was on average only 10-12 per cent.

As noted in the General Observations of the ICC Sub-Committee on Accreditation, adequate and appropriate funding is essential for an NHRI's independent, effective operation.⁶⁷ However, the funds allocated have never matched the Commission's demand. For instance, its Human Rights Protection and Monitoring Directorate was designed to engage 18 experts, but currently has only eight experts and one director, which covers half of the approved plan. Due to its low salary-scale, the directorate could not fill the vacant positions. This problem is aggravated by the high attrition rate the directorate is experiencing: the director noted that 40 experts have left it over the last four years.⁶⁸

Nonetheless, the directorate remains responsible for several of the Commission's key activities, such as monitoring the state of human rights in the country, lobbying for the ratification of international treaties, submitting alternative reports, and monitoring government compliance

66 Ethiopian Human Rights Commission, Annual Reports (2014, 2015, 2016, 2017, 2018).

67 International Coordinating Committee for the Promotion and Protection of Human Rights, Sub-Committee on Accreditation General Observation (May 2013), available at <https://bit.ly/2XcOe6V> (accessed in March 2019).

68 Interview, Adham Duri, Director Human Rights Protection and Monitoring Directorate (27 March 2019).

with the recommendation or concluding observations of treaty bodies.⁶⁹ It is evident that the principle of adequate and appropriate funding has not been observed and that this adversely affects the Commission's ability to execute its mandate effectively.

7 Relations with civil society

The EHRC's founding law does not make clear provision for partnership with civil society. In practice, few activities have been carried out in collaboration with the civil society. Despite the wide range of possibilities for collaboration with civil society in general, this has happened rarely and has not extended beyond organising joint initiatives such as celebrations of Human Rights Day,⁷⁰ 16 days of activism campaigns,⁷¹ consultative workshops⁷² and training programmes.

The Commission has also provided financial support to enable some civil society organisations (CSOs) to conduct legal aid programmes. These were important interventions made at a time when local CSOs faced serious problems due to restrictions on funding that were imposed by the Charities and Societies Law. Despite their importance, though, these initiatives were not sustainable as they were dependent on the availability of donor support and did not last long.

Other than that, the Commission has done little to support CSOs, and almost no platform has been established for it to coordinate its human rights engagements with those of civil society. This shortcoming has weakened the Commission's credibility, with certain CSOs alleging that it avoids collaboration with CSOs that are critical of the government's human rights record. Amnesty International, for instance, remarked that:

HRCO is an outspoken organization with strong record of monitoring and documenting human rights violations. As a result, it has been the target of government hostility throughout its existence. Amnesty International believes

69 Ethiopian Human Rights Commission, "Head Office Directorates", available at www.ehrc.org.et/web/guest/human-rights-monitoring-directorate (accessed in March 2019).

70 The National Committee for the Commemoration of the 60th Anniversary of the Universal Declaration of Human Rights (UDHR), which comprises the EHRC and local CSOs (APAP, JFA-PFE, OSJE, EHRCO, ACPF), conducted a series of activities for the Commemoration of the 60th Anniversary of the UDH (November-December 2008).

71 16 Days of Activism to End Violence, Poverty, Exploitation and Discrimination in Ethiopia (25 November - 10 December 2006).

72 National Consultative Workshop on the Prohibition of Torture (26 June 2008).

that in denying HRCO one of the only sources of funding available to human rights organizations after the passing of the Charities and Societies Proclamation, the EHRC is acquiescing in the government's attempts to silence this organization.⁷³

Human Rights Watch's senior researcher for East Africa contended that the EHRC issued an inaccurate report in that it concluded that the extent of force used by security forces in dispersing protests in Oromia, Amhara and SNNPRS regions⁷⁴ was "proportionate ... in most cases".⁷⁵ The researcher held that the report lent credence to the doubts many have about the Commission's independence, a view that other informants in this study shared as well.⁷⁶ If the Commission is to meet the expectations and goals set by its founding law and the principles governing national human rights institutions, it needs to rectify the perception that it is covering up governmental abuses of human rights.

8 Accessibility

The establishment of branch offices was a major step forward for accessibility. Since then, the volume of cases received by the Commission has increased significantly. It has also made other efforts to enhance accessibility. One of such effort was the adoption in 2018 of the Human Rights Complaint Handling and Investigation Directive pursuant to the authority bestowed upon the EHRC by the founding law.⁷⁷

The directive provides that investigation shall be guided by the principles of independence, non-discrimination, transparency, accountability, accessibility, effectiveness and the prioritisation of complaints by vulnerable members of society.⁷⁸ The directive outline the duties and responsibilities of commissioners and the units of the

73 Amnesty International, "Review of Ethiopian Human Rights Commission's Accreditation Request"; letter to Sisi Shahidzadeh, Deputy Chief National Institutions and Regional Mechanisms Section, Office of the UN High Commissioner for Human Rights, Ref: TIGO IOR 40/2012. 175 (31 October 2012).

74 F Horne, "State of Emergency Ends in Ethiopia: Government Should Use Reform, Not Force, to Avoid More Protests" (August 2017), available at <https://www.hrw.org/news/2017/08/07/state-emergency-ends-ethiopia> (accessed March 2019).

75 *Ibid.*

76 Discussion with two directors and a board chairman of three Ethiopian human rights CSOs (28 March 2019).

77 Proclamation 201/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 31(1).

78 Ethiopian Human Rights Commission, Human Rights Complaint Handling and Investigation Directive No 7/2018, Article 5.

Commission; the responsibilities of investigation officers and mediators; the procedure for filing and handling complaints; the mediation procedure; the rights and duties of complainants; the enforcement and follow up of recommendations; and the procedure for referral to the prosecutor of persons unwilling to comply with request or recommendation of the Commission.

The directive provides, furthermore, that complaints can be filed in oral, written or any other form.⁷⁹ Though the phrase “any other form” is not defined, the directive diversifies the modes of filing complaints. This could be considered as the strength of the directive, as it makes the system more accessible. In addition, in cases of serious human rights violation, the complainant’s name can be kept secret at his or her request.⁸⁰

Investigations can be initiated on a complaint or on the Commission’s initiative. The directive requires the Commission to initiate investigations when it learns about a pattern of human rights violation from frequently filed complaints or other sources.⁸¹ The Commission has made a hotline service available which is used mostly to give advice to the public or refer complaints for investigation. Three experts are assigned to this service.⁸²

9 Accountability

The founding law’s stipulations regarding the accountability of the EHRC lack clarity. General stipulations were incorporated according to which the Chief Commissioner is accountable to the HOPR and other commissioners, to the Chief Commissioner.⁸³ The institution submits its reports to Parliament on a regular basis. Parliament’s appointment of the commissioners is another process that links the EHRC to the legislature. Nevertheless, the provisions of the law are vague as to the nature and scope of Commission’s accountability, and over the years this has opened room at an unofficial level for the HOPR to intrude unduly into the functions of the Commission.⁸⁴ For example, in several instances the Commission has sent drafts of its reports to members of the Parliamentary Standing

79 *Ibid*, Article 14.

80 *Ibid*, Article 17.

81 *Ibid*, Article 21.

82 Interview with an investigator at the HRC’s investigation directorate (27 March 2019).

83 See note 77, Article 3(2).

84 In some cases, the Commissioners share draft reports to members of the parliamentary standing committee for legal and administrative affairs. According to sources at the Commission, such reports often go unpublished or, if they are, see significant changes to their content.

Committee for Legislative and Administrative Affairs,⁸⁵ thereby abdicating its independence and setting a bad precedent: the fact that the Commission is accountable to the Parliament does not mean it should seek the latter's approval for every step it takes.

The Belgrade Principles⁸⁶ on the relationship between NHRIs and Parliament could offer guidance in this regard. These require parliaments to develop a framework for debating on the activities of NHRIs without undermining their independence;⁸⁷ to conduct open discussion on the recommendations of NHRIs;⁸⁸ to seek information from public authorities on the extent of compliance with the recommendations of NHRIs;⁸⁹ to develop a framework for mutual cooperation;⁹⁰ and to seek the expert advice of NHRIs in parliamentary proceedings that concern human rights.⁹¹

By contrast, the relationship between the EHRC and HOPR is not articulated in detail and with any clarity. Moreover, little is known about how Parliament debates the reports and findings of the Commission. The reporting practice, though, has been much the same as in the routine examination of performance reports submitted by government agencies. The only exception to this was in regard to the Commission's 2016 report on human rights violations during protests in the Oromia and Amhara regional states. Surprisingly, even in this case the HOPR ended up doing nothing other than adopting a resolution stating that it accepts "the free and independent commission's investigative report" and requesting that "the relevant bodies ... implement the recommendation provided in the report".⁹² Nevertheless, since the publication of the report no single known measure has been taken to apply its recommendations through concrete action.

85 Interview with present and former members of staff of the EHRC (25 March 2019).

86 Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (22-23 February 2012).

87 *Ibid*, Principle I, D, 17.

88 *Ibid*, Principle I, D, 18.

89 *Ibid*, Principle I, D, 19.

90 *Ibid*, Principle II, 20.

91 *Ibid*, Principle II, 24.

92 Report on the findings of the Ethiopian Human Rights Commission's investigation into the human rights situation during the disturbances in parts of Oromia regional State and the dispute related to issues of identity and self-administration raised by the Qemant nationality in Amhara regional state and the resolution passed by the Federal Democratic Republic of Ethiopia House of Peoples' Representatives (June 2016), p xii.

With the exception of its inaugural report in 2011,⁹³ the Commission essentially just reports on its own routine activities rather than on the human rights situation in the country.⁹⁴ Even so, the 2011 report tends to paint a rosy picture that does not reflect the reality on the ground. The following extract offers a good illustration of this:

It is only recently, and after much sacrifice by the people led by the EPRDF, that a new era capable of enabling an all-round respect and enforcement of the human rights of the people dawned. Thus, it is only as of 1991 that genuine, pro-people democratisation was initiated in Ethiopia under the stewardship of the current political leadership. The series of political and structural decisions taken by the government as integral parts of democratisation – in the form of the establishment of the enabling legal and institutional frameworks – have, furthermore, introduced significant changes in the nation's socio-political environment conducive to the genuine promotion and protection of human rights and freedoms.⁹⁵

Paradoxically, the report was issued at a time when Ethiopia was implementing controversial laws⁹⁶ that threatened fundamental human rights. Both during and after the period covered in the report, the country was imposing severe restriction on freedom of expression and stood accused of “frequent breach” of protection against torture.⁹⁷

Furthermore, senior government officials who participated in a televised discussion on good governance identified internal and external challenges facing Ethiopia's NHRIs, concluding that the performance of these institutions was unsatisfactory and that government support of them was poor.⁹⁸ In the same discussion, the Chief Ombudsperson commented that government organs are often unwilling to respond to the requests of her institution, sometimes to the extent of threatening investigators and complainants.⁹⁹

93 Inaugural Report of the Ethiopian Human Rights Commission (February 2011).

94 Annual reports of the EHRC for 2014-2018 and broadcast discussion by senior government officials on Ethiopian state television (2 May 2013). None of these reports describe the situation of human rights in the country, identify perpetrators of violations, or note redress measures taken to correct wrongs or remedial measures that were requested.

95 See note 93.

96 See Proclamation No 621/2009, Proclamation to Provide for the Registration and Regulation of Charities and Societies, Proclamation No 652/2009, Anti-Terrorism Proclamation.

97 CAT/c/ETH/CO/1/, Concluding Observations of Committee against Torture, Ethiopia (20 January 2011).

98 Discussion on good governance among senior federal government officials, Ethiopia Radio and Television Enterprise (12 October 2012), ERTV Ref. No ESR 641 A.

99 *Ibid.*

These manifestations of political interference in the mandate of the Commission underline the fact that the challenges affecting the credibility of the Commission are not entirely external. To be, and be seen as, independent, the EHRC needs to undertake principled engagement. Adopting and applying some of the principles discussed above would undoubtedly improve its independence and effectiveness. Equally relevant is its accountability to the general public: so far, little that is known has been done in this regard. The Commission can draw lessons from the customs of similar institutions in other countries. Some NHRIs, for instance, issue a public accountability statement¹⁰⁰ in which they state their accomplishments and challenges. NHRIs in Ethiopia should do the same thing, over and above reporting to Parliament.

10 The Commission's major activities

Over the past 15 years, the Commission has carried out a number of useful activities. These have focused on raising awareness of human rights through print and broadcast media; short-term training; publications; hosting and sponsoring human rights discussion forums; and supporting legal aid programmes to provide free legal assistance to indigent persons.¹⁰¹

Human rights training was delivered to Members of Parliament, media professionals, government officials, police officers, prison officers, schoolteachers and persons with disabilities. Since the establishment of branch offices, the EHRC's training programmes have extended their geographical reach and reached larger audiences.

Moreover, the monitoring department has carried out frequent visits to prisons and police stations. In 2012 it visited 170 police stations across the country and issued reports on the human rights situation of persons in police custody.¹⁰² In the same year, a report entitled *Human Rights Protection Monitoring in Ethiopian Prisons* was published.¹⁰³ The Commission observed the 2010 national election and published a report on it;¹⁰⁴ it also

100 Kenya Human Rights Commission, Public Accountability Statement: Statement of Success and Challenges 2003-2008 (31 July 2008).

101 See note 93. See also annual reports of the EHRC (2014, 2015, 2016, 2017, 2018).

102 Ethiopian Human Rights Commission, Report on the Situation of Human Rights of Persons in Police Custody (May 2012).

103 Ethiopian Human Rights Commission, Human Rights Monitoring in Ethiopian Prisons Primary Report (June 2012).

104 Ethiopian Human Rights Commission, Monitoring Report of the Fourth Round General Election of the Federal Democratic Republic of Ethiopia (September 2011).

observed the 2015 national election, but the whereabouts of the accompanying report are unknown.

Investigating human rights violations is a key component of the Commission's mandate. The adoption of the Human Rights Complaint Handling and Investigation Directive, the provision of a hotline service, and the introduction of mediation and legal advice services have contributed to better implementation, with the number of complaints filed increasing every year. A total of 7,551 complaints were filed in five years: 1,124 in 2014; 1,437 in 2015; 1,419 in 2016; 2,013 in 2017; and 1,558 in 2018. Each year at least 50-60 per cent of complaints filed are rejected for lack of mandate.¹⁰⁵ A maximum of 18 per cent¹⁰⁶ and minimum of 10.8 per cent¹⁰⁷ of the complaints filed are referred for investigation.

A notable development in the Commission's experience in human rights investigation was the report issued in 2016. It showed that serious human rights violations were committed in the territories of Oromia and Amhara regional states.¹⁰⁸ The EHRC's investigation and reporting of these situations was a positive step towards implementing its mandate. However, the way the process ended raise serious concerns about the role of the EHRC. The report concludes that the measures taken by security forces following the protests in the Oromia region "to save lives ... to save government investment and public property, to preserve the constitutional order and to prevent further destruction were necessary and proportional to contain the disturbances".¹⁰⁹

Given the scale of the violations that occurred, the Commission ought to have focused on the plight of the countless victims rather than on rushing to give a verdict on the proportionality of the measures taken. This is a matter worth serious consideration as it raises questions about its independence and impartiality. To play its role in protecting human rights, the Commission needs to exercise maximum caution to ensure that its work is not manipulated in the service of partisan agendas aiming to perpetuate impunity. Other investigations by the Commission (for example into alleged human rights violations in conflicts in Gedeo, Hawassa and Woklite) are yet to be made public. The founding law envisages public reporting by the EHRC on the state of human rights in the

105 Seventy-five per cent, 52 per cent, 56 per cent, 53 per cent, and 61 per cent of complaints filed in 2014, 2015, 2016, 2017 and 2018, respectively, were rejected for lack of mandate.

106 Ethiopian Human Rights Commission, Annual Report (2015).

107 Ethiopian Human Rights Commission, Annual Report (2016).

108 See note 92.

109 *Ibid*, p 57.

country. The EHRC should discharge this mandate and the HOPR should ensure that it does so.

The EHRC has undertaken a joint project with the Ministry of Foreign Affairs to enable the government of Ethiopia to comply with its treaty obligations in the African and UN human rights systems. Supporting treaty reporting is hence a field of activity where the Commission has made a significant contribution. Prior to 2008, Ethiopia complied with its reporting obligations in the case of only two treaties, namely the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), having submitted periodic reports to the committees concerned.¹¹⁰ The Ministry of Foreign Affairs was able to implement a treaty-reporting project with the support of the EHRC and the OHCHR East Africa Regional Office. The Ethiopian government was, as a result, able to submit several overdue reports to the African Commission on Human and Peoples Rights, the Committee against Torture, the Committee on Economic Social Cultural Rights, and the UN Human Rights Council. These reports, except for the one submitted to the Human Rights Council, were all overdue reports submitted for the first time after more than a decade.¹¹¹

The ratification of human rights treaties is one mechanism for upholding accountability and protecting human rights. The EHRC could have contributed in this regard by encouraging the government to ratify the various human rights treaties and optional protocols to which it is not a party. For instance, Ethiopia has not ratified the Protocol of the African Court on Human and Peoples' Rights, nor is it a party to any optional protocol. Although the Commission has the power to recommend the revision of existing laws or enactment of new laws or policies, there is no evidence that it has exercised this power with regard to international treaties.

110 E Brems, "Ethiopia before the United Nations Treaty Monitoring Bodies", 20(1-2) *Afrika Focus* (2007), p 53.

111 Ethiopia's human rights reports were examined by the African Commission on Human and Peoples' Rights, the UN Human Rights Council, Committee against Torture, Committee on Economic, Social and Cultural Rights. Concluding Observations of the African Commission on Human and Peoples Rights: Ethiopia, 47th Ordinary Session (11-26 May 2010); Universal Periodic Review Conclusions and/or Recommendations: Ethiopia, A/HRC/13/17 (4 January 2010); Concluding Observations of the Committee against Torture: Ethiopia, CAT/C/ETH/CO/1 (20 January 2011); and Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ethiopia, E/c.12/ETH/Co/1-3 (18 May 2012).

11 Conclusion

The EHRC's founding law vested it with powers that, by and large, are compliant with the Paris Principles. Indeed, the Commission has carried out activities that are of relevance to protecting human rights and upholding the rule of law. It has conducted extensive education programmes. Its translation of the core international human rights treaties into local languages and its support to the government in treaty reporting were commendable endeavours. Efforts were also made to systematise investigations, and prison monitoring is conducted regularly.

For all that, the Commission faces internal and external challenges that undermine its ability to function as an independent and effective NHRI. Several factors contribute to this situation. From the outset, the process that led to the establishment of the Commission was sluggish and the process of opening branch offices took even longer. In view of these delays, it is not inappropriate to question the commitment of the legislature. The founding law recognises the autonomous status of the Commission but requires it to seek the approval of the HOPR for the simple administrative activity of opening branch offices.

Furthermore, parliamentary deliberation on the state of human rights in Ethiopia is a rare occurrence. The EHRC seldom submits investigation and monitoring reports, while Parliament for its part has never requested them. Instead, a dubious precedent was set when the Commission began seeking the agreement of the Parliamentary Committee for Legal and Administrative Affairs before finalising certain of its investigative findings. It would appear that the Committee and EHRC have a tacit understanding in terms of which the latter abdicates its mandate to issue public reports. Moreover, although the Commission has persistently highlighted its budgetary challenges, the legislature has done little for it other than promulgate its founding law and appoint its leadership. The Commission's budget is determined at the discretion of the Ministry of Finance and Economic Development, with its outreach capacity continuing to be handicapped by financial constraints.¹¹²

The Commission was less active in finding remedy to human rights violations. While the number of complaints received increases every year, only a small percentage of them are investigated, in addition to which no mechanism is in place to follow up on the investigations. The

112 Annual reports, Ethiopian Human Rights Commission (2014, 2015, 2016, 2017, 2018).

Commission's investigative work in general suffers from various limitations. Its inability to publish regular reports on the state of human rights in the country is but one example of them. The few reports that are published lack consistency and suffer from a credibility deficit.

Moreover, the EHRC has never exercised its power to make recommendations for the revision of existing laws or enactment of new ones. It is yet to enter into meaningful partnership with civil society. The limited relationship it has is based on mutual mistrust. Correspondence between the Commission and Human Rights Watch offers a good example to this. A letter by the executive director of Human Rights Watch pointed that the Commission was silent in a number of "worrying situations" where it "should have been gravely concerned", and "show[ed] no evidence of independence". The letter concluded by stating that "most helpful would be a description of the number and type of individual complaints EHRC has received, the investigations and remedies it has sought, and any public statements and reports that it has produced".¹¹³

The UN Committee against Torture in 2011 observed that while police and prison officers made "routine use of torture,"¹¹⁴ the Commission did not report on it. The Committee requested that the government support the EHRC in conducting unannounced visits to places detention,¹¹⁵ given that the Prison Administration Commissions allows visits only if the Commission announces them in advance.¹¹⁶ These recommendations stemmed from the Committee's assessment that the EHRC needed to do more to be compliant with the Paris Principles. The recommendation that the government take measures to strengthen the NHRIs is one it also accepted during the Universal Periodic Review.¹¹⁷ It should be noted that senior government officials too have come to the view that the

113 Human Rights Watch, Letter to Chief Commissioner Tiruneh Zena, RE: EHRC Letter to Human Rights Watch (16 February 2011).

114 CAT/c/ETH/CO/1, Concluding Observations of the Committee against Torture (20 January 2011).

115 See, for instance, the Concluding Observations of the Committee against Torture, where concern is expressed about "credible reports" of the frequent occurrence of torture.

116 Interview with a human rights expert at the Ethiopian Human Rights Commission (2 April 2019).

117 Universal Periodic Review Conclusions and/or Recommendations Ethiopia, A/HRC/13/7 (4 January 2010). See also African Commission on Human and Peoples Rights, Concluding Observations and Recommendations on the initial, 1st, 2nd, 3rd, and 4th Periodic Reports of the Federal Democratic Republic of Ethiopia, available at <http://www.achpr.org/files/sessions/47th/conc-obs/1st-4th> (12-26 May 2010).

performance of the EHRC is unsatisfactory and that government support for it is weak.¹¹⁸

As Zimble has observed, one of the key challenges to NHRIs in Africa is that oftentimes they are seen as complicit in government human rights abuses.¹¹⁹ He remarks that “taking history as a guide, accusations of this kind are appropriate, and even desirable, in the African context”.¹²⁰ The past 15 years’ experience of the EHRC does not seem an exception to this. It is thus remains for it to earn credibility through independent and effective performance. The way forward would lie, inter alia, in publishing independent human rights reports; seeking, or at least advocating for, redress where violations are identified; and taking steps to guarantee pluralism in its composition and the accessibility of its services to the people of Ethiopia.

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118 Ethiopia Radio and Television Enterprise, “Discussion on Good Governance among Senior Federal Government Officials”, ERTV Ref. No ESR 641 A (12 October 2012).

119 DS Zimble, “Towards an Effective Human Rights Architecture in Africa”, in Akokpatri and Zimble (eds), *Africa’s Human Rights Architecture*, Cape Town, Jacana Media (2008), p 289.

120 *Ibid.*

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The Ethiopian Constitution of 1995 merely confers powers to the House of Peoples' Representative (HOPR) to create a NHRI. It states as follows:

Article 55

Powers and Functions of the House of Peoples' Representatives

1. The House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction.

....

14. It shall establish a Human Rights Commission and determine by law its powers and functions.

B.2 Legislative and regulatory instruments

There are two main pieces of regulation that set up the Ethiopian Human Rights Commission.

Ethiopian Human Rights Commission Establishment Proclamation

PROCLAMATION No 210/2000

A PROCLAMATION TO PROVIDE FOR THE ESTABLISHMENT OF THE HUMAN RIGHTS COMMISSION

WHEREAS, the goal to jointly build one political community founded on the rule of law, as one of the basic objectives of the nations/nationalities and peoples, of Ethiopia, is to be achieved by guaranteeing respect for the fundamental rights and freedoms of the individual and of nations/nationalities and peoples;

WHEREAS, the immense sacrifices paid by the people of Ethiopia, in the protracted struggle they waged with a view to bringing about democratic order and to enhancing their socio-economic development, calls for paving the way for the unfettered protection of human rights;

WHEREAS, the Constitution of the Federal Democratic Republic of Ethiopia guarantees respect for peoples' rights and freedoms and provides that Federal and Regional government organs, at all levels, and their respective officials shall have the responsibility and duty to respect and enforce said rights and freedoms;

WHEREAS, it is found necessary to establish a Human Rights Commission, as one of the organs that play a major role in enforcing such rights and freedoms, and to determine its powers and functions, by law, in conformity with the provisions of the Constitution;

NOW, THEREFORE, in accordance with sub-Articles (1) and (14) of Article 55 of the Constitution, of the Federal Democratic Republic of Ethiopia, it is hereby proclaimed as follows:

PART ONE: General Provisions

1. Short Title

This Proclamation may be cited as the “Ethiopian Human Rights Commission Establishment Proclamation No 210/2000.”

2. Definitions

Unless the context requires otherwise, in this Proclamation:

- 1) “Appointee” means the Chief Commissioner for Human Rights, the Deputy Chief Commissioner or Commissioner heading the children and women affairs, and commissioners at the level of branch offices, appointed by the House, in accordance with this Proclamation;
- 2) “Staff” includes department heads, professionals and other support staff of the Commission;
- 3) “Family Member” means a person of relation by consanguinity or affinity, in accordance with the Civil Code of Ethiopia;
- 4) “House” means the House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia;
- 5) “Human Right” includes fundamental rights and freedoms recognized under the Constitution of the Federal Democratic Republic of Ethiopia and those enshrined in the international agreement ratified by the country;
- 6) “Person” means any natural or juridical person;
- 7) “Region” means any of those specified under Article 47(1) of the Constitution of the Federal Democratic Republic of Ethiopia and, for the purposes of this Proclamation, includes the Addis Ababa City Administration and the Dire Dawa Administration;

- 8) "Government" means the Federal, or a Regional Government;
- 9) "Third Party" means a deputy, an association or a non-governmental organization representing an individual or a group;
- 10) "Investigator" means a staff assigned, by the Chief Commissioner, to conduct investigation.

3. Establishment

- 1) The Human Rights Commission of Ethiopia (hereinafter referred to as "the Commission") is hereby established as an autonomous organ of the Federal Government having its own juridical personality.
- 2) The Commission shall be accountable to the House.

4. Scope

- 1) This Proclamation shall also apply to violation of human rights committed in any Region.
- 2) Provisions of this Proclamation set out in the masculine gender shall also apply to the feminine gender.

5. Objective

The objective of the Commission shall be to educate the public be aware of human rights see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated.

6. Powers and Duties

The Commission shall have the powers and duties to:

- 1) ensure that the human rights and freedoms provided for under the Constitution of the Federal Democratic Republic of Ethiopia are respected by all citizens, organs of state, political organizations and other associations as well as by their respective officials;
- 2) ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution;
- 3) educate the public, using the mass media and other means, with a view to enhancing its tradition of respect for, and demand for enforcement of, rights upon acquiring sufficient awareness regarding human rights;
- 4) undertake investigation, upon complaint or its own initiation, in respect of human rights violations;
- 5) make recommendations for the revision of existing laws, enactment of new laws and formulation of policies.

- 6) provide consultancy services on matters of human rights;
- 7) forward its opinion on human rights reports to be submitted to international organs;
- 8) translate into local vernaculars, international human rights instruments adopted by Ethiopia and disperse same;
- 9) participate in international human rights meeting, conferences or symposia;
- 10) own property, enter into contracts, sue and be sued in its own name;
- 11) perform such other activities as may be necessary to attain its objective.

7. Limitation of Power

The Commission shall have full powers to receive and investigate all complaints on human rights violations made against any person, save cases brought before the House, the House of the Federation, Regional Council or before the courts of law, at any level.

8. Organization of the Commission

The Commission shall have:

- 1) a Council of Commissioners;
- 2) (a) a Chief Commissioner;
(b) a Deputy Chief Commissioner;
(c) a Commissioner heading the Children and Women affairs,
(d) Others Commissioners and
(e) the necessary staff.

11. Head Office

The Commission shall have its Head Office in Addis Ababa and it may have branch offices at any place as may be determined by the House.

Appointment

- 1) The Chief Commissioner, the Deputy Chief Commissioner and other Commissioners shall be appointed by the House.
- 2) The appointment of the Chief Commissioner, the Deputy Chief Commissioner and of other Commissioners shall be made as under the following selection procedure:
 - (a) the appointees shall be recruited by a Nomination Committee to be formed pursuant to Article 11 hereunder;
 - (b) the nominees shall have to receive the support of a two-thirds vote of the members of the Committee;
 - (c) the list of nominees shall be presented to the House, by the Speaker, for it to vote upon;

- (d) the nominees shall be appointed upon receipt of the support of a two-thirds vote of the House.

Composition of the Nomination Committee

The Nomination Committee shall have the following members:

- 1) the Speaker of the House Chairperson
- 2) the Speaker of the House of the Federation Member(s)
- 3) seven members to be elected from Members among members of the House the Federation
- 4) two members of the House to be elected by joint agreement of opposition parties having seats in the House
- 5) The President of the Federal Supreme Court
- 6) a representative of the Ethiopian Orthodox Church
- 7) a representative of the Ethiopian Islamic Council
- 8) a representative of the Ethiopian Evangelical Church
- 9) a representative of the Ethiopian Catholic Church

12. Criteria for Appointment

Any person who:

- 1) is loyal to the Constitution of the Federal Democratic Republic of Ethiopia;
- 2) upholds respect for human rights;
- 3) is trained in law or other relevant discipline or has acquired extensive knowledge through experience;
- 4) is reputed for his diligence, honesty and good conduct;
- 5) has not been convicted for a criminal offence;
- 6) is an Ethiopian national;
- 7) is of enough good health to assume the post;
- 8) is above thirty-five years of age may be an appointee.

13. Accountability

- 1) The Chief Commissioner shall be accountable to the House.
- 2) The Deputy Chief Commissioner and other Commissioners shall be accountable to the Chief Commissioner.

14. Term of the Office

- 1) The term of office of an appointee shall be five years.

- 2) Upon expiry of the term of office specified Under Sub-Article(1) of this Article, the appointee may be re-appointed.
- 3) a person discharged from responsibility or removed from office, as under Article 15, shall not, unless re-appointed, assume a seat in legislative, executive and judicial organs for about six months thereafter.

15. Grounds for Removal of an Appointee

- 1) An appointee may be removed from office or discharged from responsibility upon the faring circumstances:
 - (a) upon resignation subject to a three-month prior written notice;
 - (b) where it is ascertained that he is incapable of properly discharging his duties, due to illness;
 - (c) where he is found to have committed an act of human rights Violation;
 - (d) where he is found to be corrupt or to have committed other unlawful act;
 - (e) where it is ascertained that he is of manifest incompetence;
 - (f) upon termination of his term of office.
- 2) Within six months of the removal or discharge of an appointee, as under Sub-Article (1) of this Article, another appointee shall be made to replace him.

16. Procedure for Removal of an Appointee

- 1) An appointee shall be removed from office, upon the grounds specified under Article 15(1)(b-e) hereof, subsequent to investigation of the matter by a Special Inquiry Tribunal to be formed pursuant to Article 17.
- 2) an appointee shall be removed from office, where the House finds that the recommendation submitted to it, as supported by the majority vote of the Special Inquiry Tribunal, is correct and where it upholds same by a two-thirds majority vote.

17. Composition of the Special Inquiry Tribunal

The Special Inquiry Tribunal shall have the following members:

- 1) the Deputy Speaker of the House Chairperson
- 2) the Deputy Speaker of the House of the Federation Member(s)
- 3) three members to be elected by the House
- 4) a member of the House to be elected by joint agreement of opposition parties having seats in the House
- 5) the Vice-President of the Federal Supreme Court

18. Prohibition to Engage in Other Employment

- 1) An appointee shall not be allowed to engage in other gainful, public or private employment during his term of office.
- 2) Notwithstanding the provisions of sub-Article (1) of this Article, the House may allow otherwise in consideration of the particular profession in which the appointee is required to make contribution.

PART TWO: Powers and Duties of Appointees

19. Powers and Duties of the Chief Commissioner

- 1) The Chief Commissioner shall be the top executive of the Commission and, as such, shall exercise the powers and duties of the Commission provided for herein.
- 2) Without prejudice to the generality stated under Sub-Article (1) of this Article, the Chief Commissioner shall:
 - (a) employ and administer the staff, in accordance with directive to be adopted by the Council of Commissioners.
 - (b) prepare and submit to the House, the budget of the Commission dealt upon by the Council of Commissioners; and implement same upon approval;
 - (c) transfer a case where he has sufficient grounds, from one investigation section or investigator to another; or investigate, himself, a case of human right violation committed anywhere;
 - (d) undertake study of recurrent cases of human right violations and forward together with remedial proposals to the House;
 - (e) give his opinion on reports prepared by the Federal Government in respect of human rights protection;
 - (f) prepare, and submit to the House, draft legislation on human rights; give his opinion on those prepared otherwise;
 - (g) submit a report, to the House, on matters of human rights and on the activities of the Commission;
 - (h) take part in meetings by way of representing the Commission, establish working relations with Federal and Regional government organs as well as with non- governmental organizations;
 - (i) Organize, Coordinate and follow up branch offices;
 - (j) perform such other activities as may be assigned to him by the House.
- 3) The Chief Commissioner may, to the extent necessary for the efficient performance of the Commission, delegate part of his powers and duties, other than those specified under sub-Article 2(b), (f) and (g) of this Article and Article 35(2), to Commissioners or other officials of the Commission.
- 4) assist the Chief Commissioner in planning, organizing, directing and coordinating the activities of the head office of the Commission;
- 5) undertake the activities of the Chief Commissioner, in the absence of the latter;

- 6) carry out such other activities as may be assigned to him by the Chief Commissioner.

Powers and Duties of the Commissioners of Branch Offices

In addition to exercising, within the local jurisdiction of a branch office, the powers and duties vested in the Commission, other than those specified under Sub-Articles (7) and (9) of Article 6 of this Proclamation; the Commissioner shall, as the superior head of a branch office, have the following powers and duties:

- 1) to transfer a case from one investigation section or investigator to another or to conduct investigation himself, where it has a good cause;
- 2) to submit, to the Chief Commissioner, a detailed report on matters of human rights;
- 3) to direct and organize the branch office as well to administer its professionals and support staff, in accordance with directive issued by the Commission;
- 4) to effect payments in accordance with the budget allocated to the branch office;
- 5) to establish working relations, as a representative of the branch office, with Regional government organs and non-governmental organizations operating within the Region;
- 6) to perform such other activities as may be assigned to him by the Chief Commissioner.

PART THREE: Rules of Procedure of the Commission

The Right to Lodge Complaints

- 1) A complaint may be lodged by a person claiming that his rights are violated or, by his Spouse, family member, representative or by a third party.
- 2) The Commission may, in consideration of the gravity of the human right violation committed, receive anonymous complaints.
- 3) Without prejudice to provisions of Article 7 of this proclamation, the right to lodge complaints, as under this Proclamation, shall be no bar to the institution of criminal or civil proceedings over the same case.
- 4) The Commission shall receive and investigate complaints, free of any charge.

23. Lodging Complaints

- 1) A complaint may be lodged, with the Commission, orally, in writing or in any other manner.

- 2) Complaints shall, to the extent possible, be submitted together with supporting evidence.
- 3) Complaints may be made in Amharic or in the working language of a Region

24. Investigation

- 1) The Commission may conduct investigation on the basis of complaints submitted to it.
- 2) The Commission shall have the power to conduct investigation, on its own initiation, where it so finds necessary.

25. Ordering the Production of Evidence

In order to undertake necessary examination, within a reasonable time, the Commission may order that:

- 1) those complained against appear, for questioning or that they submit their defence.
- 2) witness appear, and give their testimony;
- 3) any person in possession of evidence, relevant to the case, produce same,

26. Remedies

- 1) The Commission shall make all the effort it can summon to settle, amicably, a complaint brought before it.
- 2) It shall notify, in writing, the findings of its investigation, and its opinion thereon, to the superior head of the concerned organ and to the complainant.
- 3) The remedy proposed by the Commission, pursuant to this Article, shall expressly state that the act having caused the grievance be discontinued, that the directive having caused the grievance be rendered inapplicable and that the injustice committed be redressed or that any other appropriate measure be taken.
- 4) Complaints submitted to the Commission shall be accorded with due response, within a short period of time.

27. The Right to Object

- 1) Any complainant or accused shall have the right to object to the official, next in hierarchy, where he is aggrieved by a remedy proposed by a subordinate appointee or official of the Commission, within one month from the time he is notified, in writing, of such proposed remedy.
- 2) An appointee or official who receives an objection, pursuant to Sub-Article (1) of this Article, may modify, stay the execution of, reverse or confirm the remedy having been proposed.

- 3) The decision to be rendered by the chief commissioner shall be final.

28. Duty to Notify of Fault

Where the Commission, in the process of conducting investigations, believes that a crime or an administrative fault is committed, it shall have the duty to, forth with, notify in writing immediately to the concerned organ or official.

29. Overlap of Jurisdiction

- 1) Where cases falling both under the jurisdiction of the Commission and of the Institution of the Ombudsman materialize, the question of which of them would investigate shall be determined upon their mutual consultation.
- 2) Failing determination of the matter, as under Sub-Article (1) of this Article, the organ before which the case is lodged shall undertake the investigation.

PART FOUR: Administration of the Council of Commissioners and Staff of the Commission Council of the Commissioners

- 1) Council of the Commissioners (hereinafter referred to a “the Council”) is hereby established.
- 2) The Council shall have the following members:
 - (a) the Chief Commissioner Chairperson
 - (b) the Deputy Chief Commissioner Deputy Chairperson
 - (c) other Commissioners Members
- 3) The Council shall elect its secretly from among its members.
- 4) The Council may draw-up its own rules of procedure.

31. Powers and Duties of the Council

The Council shall have the following powers and duties:

- 1) to adopt directives and by-laws necessary for the implementation of this Proclamation;
- 2) to discuss on the draft budget of the Commission;
- 3) to adopt staff regulations in conformity with the basic principles of federal civil service laws;
- 4) to appoint department heads of the Commission and branch offices of same;
- 5) to examine, and decide on, cases, petitions or complaints submitted to it in relation to staff administration, within short period of time;

- 6) to appoint heads, at the level of branch offices, of the children and women affairs department;
- 7) to hear disciplinary cases, relating to department heads.

32. The Right to Appeal

- 1) Any department head of the Commission aggrieved by administrative decisions rendered by the Council may appeal to the Speaker of the House within one month from the date such decision has been made.
- 2) the decision rendered pursuant to Sub-Article (1) of this Article shall be final.

33. Utilization of Outside Professionals

The Commission may utilize, for a specific task and for a definite duration, outside professionals necessary for its functions, subject to making appropriate remunerations.

34. Observance of Secrecy

Unless ordered by a court or otherwise permitted by the Chief Commissioner, any appointee or staff of the Commission or any professional employed pursuant to Article 33 of this Proclamation, shall have the obligation not to disclose, at all times, any secret known to him in connection with his duty.

35. Immunity

No:

- 1) appointee, or
- 2) investigator

of the Commission may be arrested or detained without the permission of the House or the Chief Commissioner, respectively, except when caught in *Flagrante delicto*, for a serious offence.

PART FIVE: Miscellaneous Provisions

36. Budget

- 1) The budget of the Commission shall be drawn from the following sources:
 - (a) budgetary subsidy to be allocated by the government;
 - (b) assistance, grant and any other source.

- 2) Of the monies obtained from the sources mentioned under sub-Article (1) of this Article, an amount equivalent to a quarterly portion, shall, in advance, be deposited at the National Bank of Ethiopia, or at another bank designated by the Bank, and shall be utilized, in accordance with financial regulations of the government, for purposes of implementing the objectives of the Commission.

37. Books of Accounts

- 1) The Commission shall keep complete and accurate books of accounts.
- 2) The accounts of the Commission shall be audited, annually, by an organ to be designated by the House.

38. Duty to Cooperate

Any person shall provide the necessary assistance, with a view to helping the Commission exercise its powers and duties.

39. Reporting

- 1) The Commission shall issue an official report, as may be necessary.
- 2) The Commission shall exercise transparency in respect of its mode of operation, including issuance of regular reports.
- 3) Notwithstanding the provisions of sub-Article (2) of this Article, the Commission shall have the duty to exercise caution in respect of matters to be kept secret, with a view to not endangering national security and well-being or to protecting individual lives.

40. Non-Answerability for Defamation

- 1) No complaint lodged pursuant to this Proclamation, shall, entail liability for defamation.
- 2) No report of the Commission submitted to the House, on the findings of an investigation under- taken, nor any other correspondence of the Commission, relating to its activities, shall entail liability for defamation.

41. Penalty

- 1) Any person who, having received summons from the Commission, or been called upon by it otherwise, does not appear or respond, without good cause, within the time fixed or is not willing to produce a document or to have same examined, shall be punishable with imprisonment from one month to six months or with a fine from two hundred to one thousand Birr or with both.
- 2) Any person who causes harm to witnesses before the Commission or to persons having produced a document before it or who, without good cause, fails to take measures within three months from receipt of reports,

recommendations and suggestions of the Commission or does not state the reasons for such failure shall be punishable with imprisonment from three to five years or with a fine from six thousand to ten thousand Birr or with both; unless punishable with more severe penalty under the penal law.

42. Transitory Provisions

Complaints on violation of human rights that are under investigation by the House, prior to the enactment of this Proclamation, shall be investigated by this Commission.

43. Inapplicable Laws

No law or practice, inconsistent with this Proclamation, shall be applicable in respect of matters provided for in this Proclamation.

44. Effective Date

This Proclamation shall enter into force as of the 4th day of July, 2000

Done at Addis Ababa, this 4th day of July, 2000.

NEGASO GIDADA (DR.)

PRESIDENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF
ETHIOPIA



9

**THE KENYA
NATIONAL COMMISSION ON
HUMAN RIGHTS**
*Ken Obura**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

This chapter examines the framework and operation of the Kenya National Commission on Human Rights (KNCHR) with a view to evaluating its effectiveness in promoting and protecting human rights in Kenya. The discussion is divided into four parts that focus in turn on the KNCHR's history, structure, mandate and public accountability. The analysis reveals that despite its firm constitutional and legislative foundation, the KNCHR faces a number of challenges that hamper its effectiveness in the promotion and protection of human rights. These challenges range from the legal to the political and operational.

2 Establishment and evolution of the KNCHR

2.1 Establishment

The KNCHR was established in 2011 as a constitutional commission pursuant to Article 59(4) of the Constitution. Article 59(4) gave Parliament the power to restructure the Kenya National Human Rights and Equality Commission (KNHREC), created under Article 59(1) of the Constitution, into two or more separate commissions. In line with this power, Parliament split the KNHREC to form the Kenya National Commission

* School of Law, University of Nairobi, Kenya.

on Human Rights (KNCHR),¹ the Commission on Administrative Justice (CAJ),² and the National Gender and Equality Commission (NGEC).³ The KNCHR is given the mandate of promoting and protecting human rights, while the CAJ is to deal with malpractices in the governance and administration of public institutions, and the NGEC is to promote gender equality and non-discrimination.⁴ However, despite the split, the KNCHR remains the recognised human rights institution in Kenya and enjoys “A” status accreditation by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (renamed the Global Alliance of National Human Rights Institutions in 2016).⁵

The KNCHR was established as a national human rights institution (NHRI).⁶ That is to say, it is not part of the traditional executive, legislative and judicial organs of the state, but is created as an independent constitutional commission with the role of promoting and protecting human rights.⁷ As noted by the Supreme Court in *In the Matter of the National Land Commission*,⁸ constitutional commissions are “not a branch of government,”⁹ because, as the Court put it:

[t]hey do not have Governmental power. Unlike the courts, they cannot conclusively declare Government action to be unconstitutional or illegal. Unlike Parliament they cannot require the Executive to resign. Unlike the Executive, they cannot control the legal system by choosing our top judges or control the implementation of policy by managing the budget. They cannot order the Executive to act in a certain way and they cannot penalize unconstitutional behaviour.¹⁰

The KNCHR’s role is thus to complement (not to replace) the state’s legislative, executive and judicial measures taken to fulfil its human rights

1 KNCHR Act 14 of 2011.

2 CAJ Act 23 of 2011.

3 NGEC Act 15 of 2011.

4 See section 8 of KNCHR Act 2011, CAJ Act 2011, and NGEC Act 2011.

5 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, E/CN.4/1994/45 (23 December 1993), paragraphs 60-64.

6 KNCHR Act 14 of 2011.

7 Constitution of Kenya, Articles 59(4), 248 and 249.

8 [2015] eKLR.

9 *Ibid*, paragraph 172.

10 *Ibid*, citing with approval Prof. Christina Murray [in “The Human Rights Commission *et al*: What is the Role of South Africa’s Chapter 9 Institutions?”, in *Potchefstroom Electronic Journal* 2006(2), pp 9-10], in distinguishing the South African Chapter 9 independent commissions and offices (which have similar features to the 2010 Constitution commissions).

obligations.¹¹ Article 59 of the Constitution, which creates the KNCHR, is found in the same chapter as the Bill of Rights, signalling the expectation that the KNCHR is to play the role of guardian of human rights. In addition to the constitutional framework, the KNCHR has enabling legislation, namely the Kenya National Commission on Human Rights Act.¹² The Act confirms the KNCHR as a constitutional commission with a mandate to promote and protect human rights.¹³

2.2 Evolution

The establishment and development of the constitutionally grounded KNCHR took place over three distinct periods in Kenya's constitutional evolution. The first period (1995-2002) saw the initial establishment of the Standing Committee on Human Rights by presidential appointment. During the second period (2002-2010), the KNCHR was established through legislation. The third period ensued after the promulgation of the 2010 Constitution, by virtue of which the KNCHR was re-established as a constitutional commission with a constitutionally entrenched mandate to protect, promote and monitor human rights.

2.2.1 The Standing Committee on Human Rights, 1995-2002

The idea of promoting and protecting of human rights in Kenya by means a specialised body was first actualised in 1995 when the Standing Committee on Human Rights was formed by presidential decree.¹⁴ The creation of the Standing Committee was the culmination of both a relentless push by the opposition for democratic space and the imposition of conditions by the international community following decades of oppression under a one-party state.¹⁵

Initially, the Committee was created as an extension of the ruling party, Kenya African National Union (KANU).¹⁶ However, after human rights advocates criticised its independence and legitimacy, the President

11 For comparison, see C Murray, "The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?" (2006) 2 *PER*, p 5.

12 Kenya National Commission on Human Rights Act 2011.

13 KNCHR Act 2011, section 4.

14 Republic of Kenya, Gazette Notice No 3842 of 1996, Government Printers, Nairobi.

15 See HP Schmitz, "Transnational Activism and Political Change in Kenya and Uganda," in T Risse-Kappen, SC Ropp and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999), p 64.

16 *Ibid*, p 64.

sought to make it a national governmental body on human rights,¹⁷ doing so by way of a Gazette Notice issued on 21 June 1996, almost a year after the appointment of the Committee's members.¹⁸ The Gazette Notice also attempted to legitimise the Committee by indicating that it (the Notice) was issued under section 23 of the Constitution, which vested executive powers in the President and was interpreted as including the power to make such appointments.¹⁹

The Committee consisted of ten members drawn from academia, law, social work, farming, and the clergy.²⁰ Its functions were listed as:

- investigating complaints of alleged violation of fundamental rights and freedoms;
- investigating complaints of alleged injustice, abuse of power and unfair treatment of any person by a public officer in the exercise of his or her official duties; and
- educating the public about human rights and freedoms by such means as the Committee deems fit, including by publication, lectures and symposia.²¹

However, like many bodies created by presidential decree, the Committee lacked the attributes of an effective NHRI.²² It lacked adequate independence to check on the government – it was formed at the discretion of the President, its members were appointed and removed by him at his pleasure, and its reports were made to him and published only with his authorisation.²³ Furthermore, the Committee's members worked on a part-time basis, lacked security of tenure and depended on the executive for funding, which in most cases was inadequate.²⁴

The Committee also lacked the powers necessary for executing its mandate effectively – it could neither order the production of documents nor summon witnesses for the purposes of its investigations. Further curtailing its operational capability was the 1996 Regulation on

17 Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, USA, Human Rights Watch (2001), available at <https://www.hrw.org/reports/2001/africa/kenya/kenya.html> (accessed 9 February 2019), pp 168-187.

18 Republic of Kenya, Gazette Notice No 3842 of 1996, Government Printers, Nairobi.

19 The Parliament of Kenya, the National Assembly, Hansard Report (5 November 1998).

20 KNCHR, "It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights, July 2003-August 2011", Nairobi KNCHR (2012).

21 See Gazette Notice 3482 of 1996.

22 See SCA General Observations, paragraph 1.1 12.

23 Republic of Kenya, Gazette Notice 2128 of 2000, Government Printers; and Republic of Kenya, Gazette Notice 4148 of 2000.

24 See note 20, p 9.

Organization and Procedures, which was purportedly promulgated by the Committee, and which, among other provisions, limited public statements by the members.²⁵ Even though the legality of the regulation was challenged in Parliament as being beyond the powers of the Committee,²⁶ its promulgation lent credence to the common belief that the Committee was not a genuine effort by the government to address human rights issues but a ruse to appease donors and the opposition.²⁷

Despite the inadequate framework and challenging environment, the Committee was able to contribute towards the improvement of prison conditions, the sensitisation of the public on human rights, the documentation of human rights violations, and the drafting of the Kenya National Commission on Human Rights Bill of 1998.²⁸ The latter Bill heralded the second stage in the journey towards the establishment of a constitutionally protected, specialised and independent human rights body. The Bill was eventually passed by Parliament in 2002 after four years of debate and pressure from the international community.²⁹ The resultant Kenya National Commission on Human Rights Act created the Kenya National Commission on Human Rights as a statutory human rights body.³⁰

2.2.2 *The Kenya National Commission on Human Rights, 2002-2010*

The Commission started operating formally in 2003, shortly after a change in political leadership following the 2002 general elections. It was a vast improvement on the Standing Committee in terms of composition, mandate and practice.³¹ The Commission was composed of a chairperson and eight commissioners, all with knowledge and experience in matters relating to human rights.³² Both Parliament and the President were given a mandate in the recruitment process, with Parliament shortlisting 12

25 Republic of Kenya, Standing Committee on Human Rights (Organization and Procedures) (1996).

26 See note 17.

27 Parliament of Kenya, the National Assembly, Hansard Report (5 November 1998).

28 C Ideke, "Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus", 1 *Essex Human Rights Review* (2004) 40, p 49.

29 See note 17, pp 175-176.

30 KNCHR Act 9 of 2002.

31 See generally K Kindiki, "On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment" 2 *East African Journal of Human Rights and Democracy* (2004), p 122.

32 KNCHR Act 2002, section 4.

nominees from whom the President would appoint nine commissioners.³³ Given the wave of change in the country at the time, many in the first cohort of commissioners were appointed from the ranks of those in civil society with credible human rights records.³⁴ To ensure the independence of the commissioners, the Act provided security of tenure of five years;³⁵ in addition, it specified grounds for removal in a process that was removed from the control of politicians by virtue of the requirement that the Chief Justice be responsible for appointing the investigating tribunal.³⁶

The mandate of the Commission was broadened to include investigation of human rights violations, awareness-raising, monitoring compliance with international obligations on human rights, and cooperation with other institutions working on human rights issues.³⁷ To facilitate its work, the Commission was endowed with powers enabling it to order the production of documents and summon witnesses for purposes of its investigations.³⁸ The Commission also had the power to order the release of any unlawfully detained or restricted person, order compensation, or order any other lawful and appropriate remedy.³⁹ Such orders could be registered and enforced as High Court orders.⁴⁰

Significantly, the Commission was made an independent body separate from the government, with the attendant powers including those to own property and to sue and be sued.⁴¹ In respect of finances, the Act provided that the Commission's funding be secured through appropriations by Parliament and any other grants or donations.⁴² The Commission was also made accountable to Parliament, with its reports on human rights matters to be made public.⁴³ The reports were required to document an overall assessment of the performance of the government in the field of human rights during the period under review and make recommendations for improvement.⁴⁴

Perhaps because of the activist background of its members, or perhaps because of its secure and enabling framework, the Commission was more

33 *Ibid*, section 6.

34 See note 20.

35 KNCHR Act 2002, section 9.

36 KNCHR Act 2002, section 11.

37 *Ibid*, section 16.

38 *Ibid*, section 19(1) and section 20.

39 *Ibid*, section 19(2).

40 *Ibid*, section 19(4).

41 *Ibid*, section 18.

42 *Ibid*, section 26.

43 *Ibid*, section 21.

44 *Ibid*, section 21.

visible and impactful than its predecessor.⁴⁵ The success of its efforts in monitoring compliance and observance of human rights by the government apparatus was evidenced by the government's effort to curtail its work by going as far as seeking an opinion from the Attorney-General as to whether the Commission had the powers to summon information from government departments.⁴⁶

Some have argued that the Commission's *modus operandi* of monitoring government operation was not appropriate as it led to unnecessary confrontation with government functionaries at the expense of cooperation in the promotion of human rights.⁴⁷ This friction was, however, to be expected given the country's history of rights violations by government institutions, particularly the police, and the protective mandate of the Commission, which required it to demand accountability from the government. Still, the fear that a government constantly in the cross-hairs of the Commission could feel cornered and sway Parliament to repeal the enabling statute was real and a significant factor in the push for the constitutionalisation of the human rights commission.⁴⁸

2.2.3 *Re-establishing the KNCHR as a constitutional commission*

A new constitution was promulgated in 2010 following a decade-long process of constitution-making. Among its progressive provisions was the establishment of the Kenya National Human Rights and Equality Commission (KNHREC) as a constitutional human rights body.⁴⁹ This was in line with the view of the majority of Kenyans, who had consistently indicated their dissatisfaction with a history of commissions that lacked independence and were susceptible to political interference.⁵⁰ Their desire for functionally, operationally and financially independent commissions was finally realised in the 2010 Constitution through the introduction of several constitutional commissions to assist in the implementation of the Constitution, including the KNHREC.⁵¹ Significantly, the Constitution provided that these constitutional bodies and their members were to be

45 See note 20, p 34.

46 LM Mute, "Infusing Human Rights in Policy and Legislation: Experiences from Kenya National Commission on Human Rights", in KC Katiba and CP Maina (eds), *The Protectors: Human Rights Commissions and Accountability in East Africa*, Kampala, Fountain Publishers (2008), pp 34-35.

47 See note 20, p 34.

48 *Ibid.*

49 Constitution of Kenya, 2010, Articles 59 and 248.

50 Republic of Kenya, Constitution of Kenya Review Commission Final Report (2005), pp 111-112.

51 Constitution of Kenya, Article 248(2).

subject only to the Constitution and the law and were not subject to direction from any person or authority.⁵²

In respect of the KNHREC, there were competing claims as to its most desirable architecture, with some advocating for a single entity to deal with human rights issues and others advocating for human rights functions to be split among two or more entities.⁵³ For example, the Bomas draft of the constitution suggested the creation of a single entity, the Commission for Human Rights and Administrative Justice,⁵⁴ while the Wako draft advocated for two commissions, namely a Gender Commission and a Commission on Human Rights and Administrative Justice.⁵⁵ In an attempt to find a compromise between these divergent views, the Constitution gave Parliament the leeway to restructure the KNHREC into two or more entities that could perform thematic human rights functions.⁵⁶ Parliament responded, as already noted, by restructuring the KNHREC into the three bodies (KNCHR, CAJ and NGEC) and assigning each with a distinct thematic focus.⁵⁷

Splitting the KNHREC has, however, introduced some challenges to the overall protection and promotion of human rights. For example, although the various pieces of legislation establishing the three human rights commissions require close working relationships between them to ensure effectiveness,⁵⁸ their current relationship seems strained.⁵⁹ Similarly, even though the task of promoting gender equality and non-discrimination was reserved for the NGEC, the NGEC has not been vigorous in enforcing its mandate, thereby “forcing” the KNCHR to take the lead, at the expense of its core mandate, in a number of important

52 *Ibid*, Article 249(2)(b).

53 The Commission for the Implementation of the Constitution, Second Quarterly Report on the Implementation of the Constitution (June 2011), pp 17-18.

54 The 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. Available at https://katibaculturalrights.files.wordpress.com/2016/04/kenya_4_draft_constitution_bomas_draft_2004.pdf (accessed 2 February 2019).

55 Articles 76 and 77 of the Draft Constitution of Kenya (Wako Draft), named after the Attorney-General, Amos Wako. Available at <http://katibainstitute.org/Archives/images/2-2005-Referendum-Wako-Draft.pdf> (accessed 2 April 2015).

56 Constitution of Kenya, Article 59(4) and (5).

57 *Ibid*, section 2.1.

58 Section 8 of the KNCHR Act 2011; NGEC Act 2011; CAJ Act 2011.

59 See the Senate, Hansard Report, 18 July 2018. See also D Ayega, “Human Rights Bodies Differ on Proposed Merger”, *Capital News* (8 May 2018), available at <https://www.capitalfm.co.ke/news/2018/05/human-rights-bodies-differ-proposed-merger/> (accessed 11 February 2019).

gender-related cases.⁶⁰ Fortunately, Parliament had included, in the three statutes creating each of the three bodies, a proviso allowing for the bodies to be reviewed and restructured after five years to assure their effectiveness. It remains to be seen what the review process, which is long overdue, will determine, given that the three commissions have already expressed divergent views about the way forward, with the KNCHR supporting a merger and the CAJ and NGEC opposing it.⁶¹ This chapter focuses on the KNCHR, which continues to be the internationally recognised human rights institution in Kenya.

3 The institutional framework of the KNCHR

The KNCHR is made up of five commissioners, who are assisted by a professional secretariat.⁶² Article 250(1) of the Constitution provides that a constitutional commission shall consist of “at least three, but not more than nine, members”. Pursuant to this provision, Parliament enacted that the KNCHR commissioners shall be five in number and consist of a chairperson and four commissioners.⁶³ The commissioners’ role is to provide strategic leadership to the KNCHR, develop policies on the promotion and protection of human rights, build strategic partnership with stakeholders involved in human rights, and generally oversee the implementation of the KNCHR mandate.⁶⁴ Commissioners are thus at the helm of the KNCHR, with their work being made possible by a secretariat led by a chief executive or secretary who is accountable to the commissioners.⁶⁵ The secretariat handles the day-to-day operations of the KNCHR and is structured into departments aligned to the specific mandates of the Commission.⁶⁶

60 For example, when Parliament failed to pass legislation that would give effect to the two-thirds gender rule as required by the Constitution, it was the KNCHR, and not NGEC, that joined with civil society groups to petition the courts to force Parliament to act; the NGEC was content to appear as an *amicus curiae* after the filing of the case. See *Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others* [2017] eKLR.

61 See the Senate, Hansard Report, 18 July 2018.

62 Constitution of Kenya, Article 250(1) read together with Article 250(12).

63 KNCHR Act 2011, section 9.

64 KNCHR, Kenya National Human Rights Commission Strategic Plan 2018-2023, Nairobi, KNHCR (2018), p 62.

65 KNCHR Act 2011, section 21(3).

66 The current departments are: Complaints and Investigation; Research and Compliance; Economic Social and Cultural Rights; Redress; Public Affairs and Communication; Reforms and Accountability; and Support.

3.1 Independence

The entrenchment of the KNCHR in the Constitution clothes it with durability and security given that constitutions by their nature are not easy to amend.⁶⁷ The elaborate procedure for amending the Constitution also serves to bolster the KNCHR's independence in instances where the performance of its functions vexes the government.⁶⁸ In addition, the Constitution gives the KNCHR legally separate existence and endows it with the power to own property and to sue and be sued.⁶⁹ It also specifically provides that, inasmuch as it is a constitutional commission, the KNCHR, along with its commissioners, is subject only to the Constitution and the law and not to the direction of any person or authority.⁷⁰ The commissioners are also granted immunity "for anything done in good faith in the performance of a function of office".⁷¹

As noted, these constitutional provisions have been buttressed by the KNCHR Act, which, in addition to confirming the constitutional status of the KNCHR, gives it a separate existence from the government, with the attendant powers including those to own property and to sue and be sued.⁷² The Act extends immunity from prosecution not only to the commissioners but to the secretariat and agents of the Commission.⁷³ The Constitution⁷⁴ and the Act⁷⁵ further secure the tenure of the Commissioners for six years,⁷⁶ and delineate specific grounds for their removal in a process removed from the exclusive control of the executive by virtue of the requirement that Parliament be involved in debating the merits of any petition and approving it before the appointment of an investigating tribunal.⁷⁷

To ensure that they are fully committed to the KNCHR, the commissioners are appointed on a full-time basis.⁷⁸ Their remuneration is

67 See Constitution of Kenya, Articles 255-257.

68 See Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, p 32.

69 Constitution of Kenya, Article 53.

70 *Ibid*, Article 249(2)(b).

71 *Ibid*, Article 250(9).

72 KNCHR Act 2011, section 5. See also Constitution of Kenya, Article 253.

73 Constitution of Kenya, Article 250(9); KNCHR Act 2011, section 25.

74 *Ibid*, Article 251.

75 KNCHR Act 2011, section 16.

76 *Ibid*, section 14.

77 Constitution of Kenya, Article 251.

78 KNCHR Act, section 14(2).

also charged to the Consolidated Funds,⁷⁹ with the Constitution prohibiting downward variation of their remuneration while in office.⁸⁰ These provisions help “[promote] stability, an appropriate degree of management and direction, and limit [...] the risk of members being exposed to conflicts of interest upon taking office”.⁸¹ Commenting on the independence provisions of the constitutional commissions, the Supreme Court held in *Communications Commission of Kenya (CCK) and 5 Others v Royal Media Service*,⁸² that “[o]nce 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”.⁸³

3.2 Appointment procedure

The appointment procedures of the KNCHR are provided for in the founding legislation, the KNCHR Act.⁸⁴ The procedures are clear and can be used to ascertain compliance.⁸⁵ The Act also ensures transparency and accountability by unambiguously delineating the minimum qualifications of the members, the process for their appointment, including publication of vacancies and shortlisted names, the timelines for each appointment process, and the responsible body for each stage of the appointment process.⁸⁶ The Act further attempts to shield the appointment process from undue influence by providing for an independent selection panel made up of eight members drawn from diverse sectors of society,⁸⁷ and by involving Parliament in the vetting and approval of the nominated names.⁸⁸ Commenting on the appointment process set out in the Act, the High Court noted in *Brian Weke & Another v Attorney-General & Another*,⁸⁹ that the process was elaborately set out, with a clear delineation of duties, to ensure that “none falters and none delays the appointment process”.⁹⁰

79 Constitution of Kenya, Article 250(7).

80 Constitution of Kenya, Article 250(8). This was informed by past experiences where the government used to cut the benefits and remuneration due to officers of independent commissions as a way of punishing them for failing to follow government directives.

81 SCA General Observations, paragraph 2.2 42.

82 [2014] eKLR.

83 *Ibid*, paragraph 170.

84 KNCHR Act 2011, section 11.

85 SCA General Observations 2013, paragraph 1.8, p 29.

86 *Ibid*, section 11.

87 *Ibid*, section 11(1).

88 *Ibid*, section 11(7).

89 [2014] eKLR.

90 *Ibid*, paragraph 30.

In a nutshell, the process is invoked when a vacancy is declared.⁹¹ It starts with the President, who is required to convene within 14 days a selection panel to handle the selection of suitable candidates for the vacant position.⁹² The selection panel is to be made up of eight members nominated by diverse sectors of society.⁹³ Once established, it is considered an independent body and is required to set down its own procedures; the executive's role is only to facilitate the panel's work by providing it with the necessary facilities.⁹⁴ This independence was confirmed in the case of *Community Advocacy and Awareness Trust & 8 Others v Attorney-General & 6 Others*,⁹⁵ where the court held as follows:

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.⁹⁶

The selection panel is required, within seven days of being convened, to invite applications and publish the names and qualifications of all applicants in the Gazette and two national daily newspapers.⁹⁷ After receiving applications, successfully shortlisted applicants are invited for interviews, which must be concluded with seven days after the closing date for receiving applications.⁹⁸ As part and parcel of making the process transparent, the list of shortlisted candidates is publicised in the same manner as the vacancy advert, stating the times, venue and supporting documents the interviewees are expected to bring to the interview. At the end of the interviews, at least three names for the chairperson and two names for each commissioner's post⁹⁹ should be forwarded to the President as the list from which to make his or her choices.¹⁰⁰ Within seven days, the Presidency then forwards the names of the nominees to the National Assembly for approval or rejection.¹⁰¹ The National Assembly has 21 days to vet the nominees.¹⁰²

91 KNCHR Act 2011, section 11(1).

92 *Ibid*, section 11(1).

93 *Ibid*, section 11(2).

94 *Ibid*, section 11(3).

95 [2012] eKLR.

96 *Ibid*, paragraph 84.

97 KNCHR Act 2011, section 11(4).

98 *Ibid*, section 11(5).

99 *Ibid*, section 11(4).

100 *Ibid*, section 11(5).

101 *Ibid*, section 11(6).

102 *Ibid*, section 11(7).

If approved, the names of appointees are to be published in the Government Gazette by the President within seven days after receiving the approved list.¹⁰³ Where one or more of the nominees are rejected, the Speaker of the Assembly must communicate the same to the President within three days. Upon receiving the communication, the President must submit to the National Assembly a fresh nomination within seven days from amongst the persons appearing in the original shortlist forwarded by the selection panel.¹⁰⁴

This last requirement of fresh nomination from amongst the persons originally shortlisted was upheld in the case of *Brian Weke & Another v Attorney-General & Another*,¹⁰⁵ where the President's attempt to reconstitute the selection panel for fresh interviews after his nominee was rejected by the National Assembly was successfully challenged. It is only when the National Assembly rejects the second list forwarded by the President that the *same* selection panel will be required to carry out new interviews.¹⁰⁶

In spite of the clear and elaborate appointment procedure set out by the Act, a number of challenges have been noted in its operationalisation. First, despite the clear timelines for appointment, in practice these timelines have not been adhered to. In some instances, the selection panel has not been empanelled immediately after a vacancy has arisen;¹⁰⁷ in other instances the appointing authority has not made appointments despite being given a list of successful interview candidates by the selection panel,¹⁰⁸ or has substituted the names in the list with those not shortlisted by the selection panel.¹⁰⁹ Secondly, the vetting process, which was a new feature added to ensure that the appointment process is not hijacked by political interests of the executive¹¹⁰ and that appropriately qualified and representative commissioners with dedication to human rights are appointed,¹¹¹ has been hijacked in some instances by the political interests

103 *Ibid*, section 11(9).

104 *Ibid*, section 11(11).

105 [2014] eKLR.

106 KNCHR Act 2011, section 11(12).

107 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.

108 See *Brian Weke & Another v Attorney-General & Another* [2014] eKLR.

109 In 2015 the National Assembly rejected the name of the nominee Dr Samuel Njuguna Kabue as it was not on the list of nominees the selection committee sent to the President. See Panel Hansard, 10 March 2015, pp 13-24.

110 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), pp 236-258.

111 See Public Appointments (Parliamentary Approval) Act 33 of 2011.

of members of the National Assembly. For example, during the selection process of the current commissioners in 2013, the name of one of the shortlisted commissioners,¹¹² which was forwarded to Parliament by the President, was rejected by a number parliamentarians on the ground that he had appeared in a case challenging the constitutionality of the Constituencies Development Fund, a fund controlled by Members of Parliament (MPs).¹¹³

While some of these infractions have been thwarted in Parliament¹¹⁴ and in the courts,¹¹⁵ the delays that occur as a result are inimical to the work of the KNCHR as they deny it the full complement of commissioners required to give it strategic leadership. They also open the door for challenges to the legality of the KNCHR's work. As the High Court held in *Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 3 Others*,¹¹⁶ a constitutional commission is not properly constituted if its composition does not meet the number set in law.¹¹⁷

3.3 Financial autonomy

The KNCHR's source of funding is clearly stated in both the Constitution and the KNCHR Act. This assists in binding the responsible authorities and dispels doubt and confusion over sources of funding.¹¹⁸ The Constitution recognises the imperative for the KNCHR, as an independent commission, to be adequately funded as a means of ensuring it enjoys financial independence.¹¹⁹ In this respect, the Constitution 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".¹²⁰ The High

112 Vincent Suyianka Lempaa (who was to represent the marginalised communities). See Kenya National Assembly Official Record (Hansard) (4 March 2014), pp 26-27.

113 See Kenya National Assembly Official Record (Hansard) (4 March 2014), pp 26-27.

114 See Hansard (10 March 2015), pp 13-24.

115 See, for example, *Brian Weke & Another v Attorney-General & Another* [2014] eKLR. In the case the issue revolved around the failure or refusal of the President to forward the names of the shortlisted candidates to the National Assembly for nomination and his action to reconstitute a Selection Panel to restart the shortlisting of candidates afresh. The court held that the President's action was illegal and a clear attempt to exert his influence on the Commission through its Constitution.

116 [2015] eKLR.

117 *Ibid*, paragraph 3.

118 See UN Handbook on the Establishment of NHRIs, paragraphs 73-78; Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, pp 40-41.

119 Constitution of Kenya, Article 249(3).

120 *Ibid*, Article 249(3).

Court, in the case of *Judicial Service Commission v Speaker of the National Assembly & 8 Others*,¹²¹ has echoed the importance of allocating sufficient funds to constitutional commissions to enable them to perform their mandate without undue influence.¹²²

From the wording of the Constitution, it is Parliament that has the primary responsibility to determine what counts as adequate government funding for the KNCHR. However, the government is not the only source of funding for the Commission. 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.¹²³ with regard to government funding, the KNCHR is required to prepare an annual estimate of its financial requirements and forward it to Parliament, through the cabinet secretary in charge of finance, for approval.¹²⁴ This is a complete departure from the 2002 Act, which invested the minister with the powers to approve its budget. This departure must have been intended to avoid executive control of the Commission through fund allocation.

However, the KNCHR has not always been allocated the funds requested in its budget estimates.¹²⁵ The amount allocated has also decreased over the years despite increasing inflation and increases in government budget allocation.¹²⁶ This could be explained partly by the growing trend for parliamentarians to reduce the amounts allocated to constitutional commissions, which are seen as adding no value to good governance.¹²⁷ While the role of the KNCHR in enhancing open and accountable governance is acknowledged, the fact that it is a constitutional commission could mean that it is lumped together with the other constitutional commissions. For example, in 2014 Parliament threatened

121 [2014] eKLR.

122 *Ibid*, paragraph 213.

123 *Ibid*, section 45.

124 *Ibid*, section 46.

125 Republic of Kenya Governance, Justice, Law and Order Sector (GJLOS), Report for Medium-Term Expenditure Framework (MTEF) Period 2013/14-2015/16 (October 2012), available at <https://bit.ly/2J1wJTf> (accessed 12 June 2014).

126 For example, in 2007/2008, the Commission received 32 per cent of the funds it had sought; in 2008/2009, 28 per cent; in 2009/2010, 37 per cent; in 2010/2011, 24 per cent; in 2011/2012, 71 per cent; in 2013/2014, 68 per cent; in 2015/2016, 67 per cent; in 2017/2018, 68 per cent; and in 2018/2019, 63 per cent in terms of its estimated approved budget. See the respective annual reports, available at the KNCHR website (accessed 20 January 2019).

127 A Shiundu, "Kenyan MPs Hit Back in Fight over Pay", *The East African* (30 May 2013), available at <https://bit.ly/2KSFnpE> (accessed 5 February 2019).

to reduce the composition of all commissions, including the KNCHR, to three members to stem a rising government wage bill.¹²⁸ Moreover, the protective mandate of KNCHR, which requires that it sometimes challenges government action, can provide a further incentive for the government to use financing to emasculate its work.¹²⁹

At any event, the consistent inadequacy of funding has had a negative impact on the ability of KNCHR to perform its mandate and has posed a threat to its independence. The challenge to performance has been seen, for example, in its inability to open enough branches across the country¹³⁰ and to employ enough staff to carry out its mandate.¹³¹ The threat to independence arises from the likelihood that the KNCHR will be reluctant to criticise the government for fear of having its funding further reduced or being forced to rely extensively on donor funding, with all the conditions that are usually attached to it.¹³²

3.4 Professional skill and knowledge

As already noted,¹³³ the KNCHR is made up of commissioners (a chairperson and four commissioners) and a secretariat headed by the chief executive or secretary. To qualify for the position of Secretary of the Commission, one must be a citizen of Kenya, have a degree from a university recognised in Kenya and have at least ten years' proven experience at management level.¹³⁴ Additionally, such an individual must meet the requirements of Chapter 6 of the Constitution.¹³⁵ Chapter 6 provides the minimum requirements for the integrity expected of public officials and leaders. The KNCHR Act and Constitution thus expect the incumbent to be a highly qualified individual capable of performing the functions of the office of the secretary. The secretary is assisted by staff recruited on the basis of their competence to handle any of the various

128 See L Aluanga-Delvaux, "It's Mixed Reactions To Proposals To Cut down on Commissioners", *Standard Digital* (16 March 2014), available at <https://bit.ly/2xy6PQN> (accessed 9 February 2019).

129 E Mutai, "House Frees Sh1.3bn after Slashing Commission Budgets", *Business Daily* (June 2013), available at <https://bit.ly/2JJvLt> (accessed 15 January 2019).

130 See the discussion on accessibility in section 3.7.

131 See the discussion on accessibility in section 3.7.

132 See Paris Principles B.2; SCA General Observations, paragraph 1.10 on "Adequate funding of NHRIs".

133 *Ibid*, section 3.

134 *Ibid*, section 21(2).

135 *Ibid*, section 21(2).

aspects of the KNCHR's work, including research, advocacy, lobbying, training, outreach, and investigations.¹³⁶

The criteria for appointment as chairperson of the Commission include having a degree and at least 15 years' experience in matters relating to law and human rights.¹³⁷ Such an individual also has to meet the integrity requirements of Chapter 6 of the Constitution.¹³⁸ While the requirement of expertise in law does not restrict the chairperson to persons with a legal background, the trend in appointment of KNCHR chairpersons, including the current one, is that all have had a legal background. This trend seems to be informed by the fact that most of Commission's work involves the law, including its mandate in quasi-judicial matters, which necessitates that the persons who lead the KNCHR have the requisite legal expertise to be effective in this regard.¹³⁹

The Act also lays out the requirements for the rest of the commissioners of the KNCHR. These requirements are not very different from those pertaining to the chairperson, except that the experience is reduced to ten years and the fields in which the experience is required is expanded to include law, public administration, economics or finance, gender and social development, human rights, management, or social sciences.¹⁴⁰ The qualifications required show a trend towards professionalisation of the KNCHR – they are such that the chances of hiring incompetent members are lessened. The long years of experience required also decreases the risk of undue influence, in that such a firm foundation would tend to endow the commissioners with the skill to deal with the pressures that come with the job. The expansion of the fields of expertise for commissioners is also beneficial given that the field of human rights is an interdisciplinary one. The flipside of these rigorous academic requirements, however, is that they lock out potential candidates who might not have the papers but who possess important areas of expertise required in human rights work, such as ability in grassroots mobilisation.

To safeguard the integrity of the KNCHR, the Act lists categories of people who are not qualified for appointment as chairperson or members. These include serving members of Parliament (MPs) or County Assemblies (MCAs), an undischarged bankrupt, or any person removed from office for contravening the Constitution or other law in the

136 *Ibid*, section 23.

137 *Ibid*, section 6(1).

138 *Ibid*, section 10(1)(a)-(c).

139 See K Mechlem, "Treaty Bodies and the Interpretation of Human Rights", 42 *Vanderbilt Journal of International Law* (2009), pp 917-918.

140 KNCHR, section 10(2)(a)-(c).

country.¹⁴¹ Excluding serving MPs and MCAs is necessary to avoid conflicts of interest, especially given that the KNCHR is ultimately accountable to the people through the latter's representatives. Barring undischarged bankrupt individuals and those removed from office for contravening the law is also important as appointing such individuals might engender distrust and lack of confidence in the KNCHR among members of the public, a situation which would be inimical to the effective functioning of KNCHR.

An evaluation of the practice followed in appointments in the light of the legal requirements reveals that, since the inception of the institution, the qualifications of KNCHR members and staff has been faithful by and large to the legal requirements.¹⁴² Matched against the criteria in the KNCHR Act, the current cohort of commissioners and secretary can be said to be qualified experts.¹⁴³

3.5 Relations with civil society

Unlike the 2002 Act, which expressly required the KNCHR “to encourage the efforts of other institutions working in the field of human rights and cooperate with such other institutions for the purpose of promoting and protecting human rights in Kenya”, the 2011 Act is silent on the relationship between the KNCHR and civil society. The Act provides only that the Commission shall “work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration”.¹⁴⁴ This notwithstanding, the KNCHR has continued to collaborate with civil society organisations (CSOs) to pursue its objectives.¹⁴⁵

So far, these relations have had mixed results. The CSOs were instrumental in ensuring that KNCHR legislation was passed as the basis for forming the KNCHR. However, following the KNCHR's formation, they began worrying that the KNCHR would impinge on turf which until then was wholly dominated by human rights CSOs. Their concerns were that the development funding traditionally disbursed to them would now be invested in the Commission.¹⁴⁶ Because of the civil society's

141 *Ibid*, section 10(3).

142 See the profiles of the chairperson, commissioners and secretary at knchr.org (accessed 20 February 2019).

143 *Ibid*.

144 KNCHR Act 2011, section 8(h).

145 See, for example, KNCHR, Annual Report 2015/2016, Nairobi, KNCHR (2016).

146 See note 20, p viii.

instrumental role in the formation of the KNCHR, there has also been a perception or expectation that the KNCHR should in every instance articulate the agenda of the CSOs where there is a conflict between CSOs and the government.¹⁴⁷ These expectations have threatened to derail the relationship between the KNCHR and civil society. How the KNCHR manages them will determine how successful its relations are with this important partner in the protection and promotion of human rights.

3.6 Accessibility

To address the issue of accessibility, the Constitution and KNCHR require that diversity and representivity be considered during the appointment process.¹⁴⁸ The link between diversity in composition and accessibility is that diversity fosters a sense of involvement and engenders acceptance and support across all segments of society, which is necessary if these segments are to entrust the Commission with their human rights problems.¹⁴⁹ The Constitution specifically provides that appointments should reflect ethnic diversity and regional balance and at the same time ensure that no more than two-thirds of the appointees are persons of the same gender.¹⁵⁰

The constitutional provision of diversity in appointment has been the subject of litigation in a number of cases. For example, in the *Consortium for Empowerment and Development of Marginalized Communities* case,¹⁵¹ which dealt with a petition challenging the ethnic composition of candidates shortlisted to serve as commissioners of the KNCHR, the court held 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, there has been a breach of the Constitution. To hold so would lead to an absurdity, given the high number of ethnic groups in the country and the few number of posts (five) in the KNCHR.¹⁵² Similarly, in the case of *Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others*,¹⁵³ the court held that pursuant to Articles 81 and 27 of the Constitution – which provide, respectively, for a two-thirds gender rule in the electoral process and affirmative action in correcting historical disadvantages – the

147 *Ibid.*

148 Constitution of Kenya, Article 250(4); KNCHR Act 2011, section 11(13).

149 See SCA General Observations, 20-21.

150 Constitution of Kenya, section 250(4); see also KNCHR Act 2011, section 7.

151 [2013] eKLR.

152 *Ibid.*, paragraph 38. See also *Community Advocacy and Awareness Trust & 8 Others v Attorney-General & 6 Others* [2012] eKLR paragraphs 9.

153 [2017] eKLR.

government “is required to develop policies and laws to ensure that not more than two-thirds of *elective or appointive* bodies shall be of the same sex”.¹⁵⁴

Based on the courts’ interpretation, the appointing authority has to take into consideration several factors, such as gender, ethnicity, regional balance and special interests (marginalised communities, youth and people with disabilities), and ensure broad representation of the country across all state and constitutional office appointments. In the interests of accessibility, the appointment of KNCHR commissioners, and by extension the hiring of staff, should be illustrative of Kenyan society, with no single community or segment dominating. As at the end of 2018, the KNCHR had not disaggregated its staff in terms of regional or ethnic background. It had a total of 113 employees, 67 of whom were male and 44, female. Of the 113, 79 were based at the headquarters and the remaining 24 were shared among the five regional offices. Two of the employees (male) were persons with a disability.¹⁵⁵ In addition, the Commission had three female and two male commissioners.¹⁵⁶ This complement, while meeting the two-thirds gender rule, was still inadequate in serving the country’s human rights’ needs.¹⁵⁷

In addition to representivity in composition, accessibility requires that the KNCHR be visible and physically available to citizens who need its help in vindicating their rights. Visibility and physical availability can be ensured by putting offices at strategic geographic locations where it is easy to gain access to the KNCHR’s offices. The Constitution entrenches devolution and requires access to services at both the county and national level.¹⁵⁸ In terms of this constitutional requirement, the KNCHR Act mandates the Commission to devolve its services by establishing branches at any place in Kenya.¹⁵⁹ So far, however, the KNCHR has opened only six offices (five regional offices and its headquarters in Nairobi) to serve all

154 *Ibid.*

155 KNCHR, Kenya National Commission on Human Rights: Annual Report for the 2017/2018 Financial Year, KNCHR (2018).

156 *Ibid.*

157 *Ibid.*

158 Constitution of Kenya 2010, section 6.

159 KNCHR Act 2011, section 6.

47 of the counties in the republic.¹⁶⁰ This limits the accessibility of the KNCHR to merely the few regions where it has a presence. To make matters worse, the offices are all situated in major towns, thus disadvantaging those from rural areas.

The KNCHR has tried to address its problems of accessibility by holding quarterly human rights clinics countrywide to interact with members of the public and educate them about their rights.¹⁶¹ The seasonal nature of these clinics, however, does little to mitigate the problem. More significantly, the KNCHR has introduced mobile-telephony short message and bulk message services by means of which petitioners can report complaints and receive status updates on them. This has enabled the public, especially in areas where the Commission does not have physical offices, to lodge complaints without having to incur the expense of travelling to the Commission's premises.¹⁶²

Another important factor in accessibility is language. The KNCHR publishes its reports or pamphlets mainly in English, along with a few in Swahili. The implication is that people who do not have a reading knowledge of these languages will be unable to understand them. Moreover, the language of communication for most of the employees of the Commission is restricted 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 and newspapers, effectively locking out those without access to these media of communication.

4 The functional framework of the KNCHR

According to Burdekin, an effective and well-functioning NHRI should have, at a minimum, "a clearly defined, broad-based human rights mandate, incorporated in legislation or (preferably) constitutionally entrenched".¹⁶³ The entrenchment of its mandate in legislation helps safeguard the independence and autonomy of the NHRI; it also ensures

160 The five regional offices are found in Kitale (to serve North Rift region); Mombasa (to serve Coastal region); Kisumu (to serve Western region); and Nyahururu (to serve Central region).

161 Complaints and Investigations, available at <http://www.knchr.org/Departments/ComplaintsInvestigation.aspx> (accessed 10 February 2019).

162 KNHCR, Annual Report for the 2015/2016 Financial Year (2016), KNCHR, p 50.

163 B Burdekin and J Naum, *National Human Rights Institutions in the Asia Pacific Region*, Martinus Nijhoff Publishers, Leiden (2007).

that it is held accountable in terms of what is prescribed in law.¹⁶⁴ The need for a defined mandate stems from the possibility that some of the functions of an NHRI could be carried out by other institutions, thereby creating overlapping mandates.¹⁶⁵ Addressing this is especially important in jurisdictions, such as Kenya, that have an NHRI as well as other specialised institutions dealing with specific rights and maladministration.

Both the Constitution and the KNCHR Act endow the KNCHR with a human rights mandate, which hinges on two mutually inclusive roles: human rights protection (watchdog roles) and human rights promotion (advisory roles).¹⁶⁶ Consequently, the KNCHR has the required legitimacy, in terms of the Constitution and legislation, to be at the forefront of promoting and protecting the human rights of all within the borders of Kenya.¹⁶⁷ Within this broad mandate, the KNCHR has specific functions, including monitoring, advising, reviewing laws, investigating, and raising public awareness. These functions are explained below.

4.1 Commenting on existing and draft laws

To ensure that legislation is aligned with human rights principles, the KNCHR is mandated to review proposed or existing legislation and, through the relevant parliamentary committees, issue advice to Parliament on the constitutionality and appropriateness of such legislation and its impact on human rights. By end of 2018, it had reviewed eight bills, three laws, six policies and two administrative decision¹⁶⁸ and submitted an equal number of advisories to relevant policy-makers and focal points of legislation and policy.¹⁶⁹ An audit of the uptake of its recommendations showed that 44 per cent of the proposals the Commission made to Parliament were accepted and incorporated in the ensuing legislation.¹⁷⁰

The KNCHR also uses public interest litigation (PIL) to influence policy direction and interpretation of the Constitution through the judicial process. It participates in PIL either by originating petitions in its own

164 Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, Serbia, 22-23 February 2012), available at <https://bit.ly/2NFaCXp> (accessed 12 January 2019), paragraphs 20-40.

165 See UN Handbook on the Establishment of NHRIs, paragraphs 86-94.

166 Constitution of Kenya, Article 59(4) read together with KNCHR Act 2011, section 8.

167 See LC Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", 13 *Harvard Human Rights Journal* (2000), p 19.

168 Presidential Proclamation on Fresh Vetting of Public Office.

169 KNCHR, Sub-sector Report, Governance Justice Law and Order Sector (September 2018).

170 *Ibid.*

name or by joining existing petitions which have been filed by other parties and that have a major public interest component, doing so either as an *amicus curiae* or an interested party. This power to engage in public interest litigation was initially opposed by the state, which argued that the KNCHR is a part of the government. However, the court rejected the pleading in *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*,¹⁷¹ by holding that the Commission “is entitled to lodge a petition seeking interpretation of legislation that is deemed to violate or threaten violation of the human rights and fundamental freedoms of individuals which it is constitutionally mandated to safeguard”.¹⁷² By end of 2018, the KNCHR had participated in 45 PIL cases,¹⁷³ a number of which led to policy and legal changes.¹⁷⁴

Nonetheless, the KNCHR faces capacity challenges in reviewing legislation from Kenya’s bicameral national legislature and 47 county assemblies; by end of 2018 it had only 20 lawyers in its permanent employ.¹⁷⁵ There is also no structured framework in place for engagement between the KNCHR and Parliament. Furthermore, even though its mandate extends to auditing existing laws to advise the relevant government departments on their compliance with human rights provisions, so far it has focused only on reviewing draft bills, which attests to the lack of an independent human rights audit of the laws since the enactment of the Constitution in 2010.

171 *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR.

172 *Ibid.*

173 KNCHR, Programme Performance-Based Budget (PBB) (September 2018).

174 See, for example, *Baby “A” (Suing through the Mother EA) and Another v Attorney-General and 6 Others* [2016] eKLR (where the court upheld the right of intersexual children); *KNCHR & Kituo cha Sheria v the Hon. Attorney-General & Others* [2016] eKLR (the court held that the directive of government closing a number of refugee camps was unconstitutional); *Kenya National Commission on Human Rights v Attorney-General & Another* [2015] eKLR (the court declared unconstitutional the Presidential Retirement Benefits (Amendment) Act 9 of 2013); *Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another* [2015] eKLR (the court declared unconstitutional the Security Laws (Amendment Act) 2014 for infringing a wide range of human rights); *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR (the Supreme Court held that the mandatory death sentence infringes the right to fair trial); and *LNW v Attorney-General & 3 Others* [2016] eKLR (where the court declared unconstitutional section 12 of the Registration of Births and Deaths Act, which contains the requirement of the consent of a father of a child born out of wedlock to have his name entered in the births register and the child’s birth certificate).

175 KNCHR, Annual Report 2017/2018, Nairobi (2019).

4.2 Monitoring domestic human rights situations

The KNCHR has a mandate under the Constitution¹⁷⁶ and the KNCHR Act¹⁷⁷ to monitor the observance of human rights in all spheres, including within national and county governments, businesses and private entities.¹⁷⁸ It uses a number of strategies to realise its monitoring mandate. One of them is conducting visits to targeted institutions. For example, by end of 2018, the KNCHR had visited 99 detention centres (police cells, borstal institutions and prisons) to assess the compliance of the targeted centres with human rights principles relating to places of detention.¹⁷⁹ Information obtained in these monitoring visits is usually compiled in a report and used to highlight areas that need to be improved to promote greater enjoyment of human rights.

The Commission also sends its representatives to form part of the task forces appointed by the government on human rights issues. For example, it is part of the task force on the death penalty appointed by the Attorney-General to advise the government on a framework for implementing a Supreme Court decision on the constitutionality of the sentence. It is also part of a task force advising the government on the implementation of a decision of the African Court on Human and Peoples' Rights in respect of the land and cultural rights of a minority community in Kenya, as well as a task force on policy and legal reforms regarding intersex persons.¹⁸⁰

In some cases, the courts have appointed the KNCHR to monitor human rights compliance in cases before them. For example, in *Miguna Miguna v Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 Others*, involving the forceful deportation of a Kenyan political activist whose citizenship the government contested, the High Court appointed the Commission to monitor the safe passage of the petitioner back into the country.¹⁸¹

The focus of the KNCHR's monitoring has been on government agencies.¹⁸² Its monitoring of the private sector, conducted through its business and human rights portfolio, has remained largely *ad hoc* and

176 Constitution of Kenya, Article 59(2)(d).

177 KNCHR Act 2011, section 8(c).

178 *Ibid*, section 8(c).

179 See note 173.

180 See note 175.

181 [2018] eKLR.

182 See note 175.

entailed giving awards for human rights compliance.¹⁸³ Such work has also involved mapping the country's hotspots for violence and monitoring human rights compliance in these areas – this was the approach the Commission adopted during the 2013 general elections.¹⁸⁴ Most recently it monitored the general election of 2017, producing three reports detailing the human rights situation before and after the election.¹⁸⁵ Monitoring elections is a carry-over from the practice of its predecessor, whose report of the 2007/2008 election – detailing widespread and systematic killings of more than 1,500 people and the displacement of more than 300,000¹⁸⁶ – formed part of the material on which the International Criminal Court prosecutor relied in investigating the Kenyan situation.

Apart from being presented in individual reports, the findings of these monitoring efforts are published in an annual independent alternative report alongside the presidential address on Kenya's compliance with the values and principles of good governance. The alternative report aims at giving an independent assessment of governmental compliance with human rights.

4.3 Monitoring and advising on compliance with international standards

The KNCHR is mandated to monitor state compliance with human rights treaties. This mandate involves recommending the review of legislation to bring it in line with international standards and where necessary offering support to organs of state on the compilation of reports due to treaty monitoring bodies. Such assistance is usually in the form of advice and general guidance on what information to include in the reports. Where possible, the KNCHR compiles alternative reports, on its own or with NGOs, that assess the measures taken by the government to fulfil its treaty obligations. The alternative reports are aimed at providing “information in

183 S Muhindi, “KNCHR Awards Wells Fargo, KK Security for Good Working Terms”, *The Star* (12 September 2017).

184 KNCHR, 2013 Elections: Safeguarding Rights: An Account of Hotspots, Elections 2013, Nairobi, KNCHR (2013).

185 KNCHR, *Fallacious Vote – A Human Rights Account of the 2017 Party Primaries*, Nairobi, KNCHR (2018); KNHRC, *The Mirage at Dusk: A Human Rights Account of the 2017 General Election*; and “Still Mirage: A Human Rights Account of the Fresh Presidential Polls, Nairobi, KNCHR (2018).

186 KNCHR, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi, KNCHR (2008).

relation to the Kenyan government's efforts towards meeting its obligations" and "to guide the work of the treaty bodies".¹⁸⁷

In fulfilment of this mandate, by end of 2018 the Commission had prepared a report on the International Covenant on Civil and Political Rights (ICCPR) and a response to a list of issues under the Convention against Torture (CAT) to be submitted to the relevant treaty bodies. The two documents received input from CSOs and independent commissions. During Kenya's review by the Committee on the Elimination of Racial Discrimination (CERD), the Commission also engaged the CERD committee in a side event and briefed them on the human rights situation in Kenya.¹⁸⁸

4.4 Educating and informing

The KNCHR has been tasked with promoting respect for human rights and developing a culture of human rights.¹⁸⁹ A human rights culture refers to the totality of beliefs, principles and values underlying human rights.¹⁹⁰ Promoting respect for human rights and developing a human rights culture entail creating awareness of the rights and obligations underpinning human rights.¹⁹¹ As such, the KNCHR's mandate to publicise and provide education on human rights is significant.

This mandate is entrenched in the Constitution and KNCHR Act.¹⁹² It requires the KNCHR to formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the Constitution.¹⁹³ Public awareness programmes undertaken by the Commission should therefore focus on reaching all within the country by taking into consideration, among other things, the variety of languages spoken in the country, levels of education, and levels of economic empowerment.

187 KNCHR, *Alternative Report to the Committee on Elimination of all Forms of Racial Discrimination* (2016); *Report to the Committee against Torture on the Review of Kenya's Second Periodic Report on Implementation of the Provisions of the International Covenant against Torture and Other Cruel, Inhuman and Degrading Treatment and/or Punishment* (2013).

188 *Ibid.*

189 KNCHR Act 2011, section 8(a).

190 See D Irina, "A Culture of Human Rights and the Right to Culture", 1 *Journal for Communication and Culture* (2011), p 37.

191 See *Public Education on Human Rights*, available at <https://bit.ly/2J3hgCo> (accessed 6 January 2019).

192 Constitution of Kenya, Article 59(2); KNCHR Act 2011, section 8(g).

193 KNCHR Act 2011, section 8(g).

The KNCHR, in accordance with its mandate, has been conducting targeted training on human rights standards and principles. By end of 2018, it had trained a total of 326 public officers and sensitised more than 10,700 members of the public. The public officers were trained on human rights standards and principles, with the objective of improving their application of these standards and principles in organisational processes. The sensitisation of the public, on the other hand, was aimed at empowering communities to claim their rights and know where to report if their rights are violated. In addition to hosting workshops and providing general sensitisation, the KNCHR develops and disseminates training and other materials on thematic human rights areas for the public to use as reference guides.¹⁹⁴

To expand its outreach within its limited means, the KNCHR has been collaborating with education institutions to assist them in mainstreaming human rights issues in their curricula. 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. In its current strategic plan, KNCHR intends to expand the collaboration to include, among other institutions, the Kenya School of Government, which is responsible for training senior government officials, and the Kenya Institute of Curriculum Development, which is responsible for developing curricula for primary and secondary schools.¹⁹⁵

4.5 Receiving and dealing with complaints and petitions

The KNCHR is empowered to receive complaints in terms of section 32 of the KNCHR Act. The Act allows for the lodging of complaints orally or in writing, and encourages a speedy process of investigation and resolution.¹⁹⁶ The KNCHR is also empowered to initiate investigations on its own motion or through referrals from other bodies.¹⁹⁷ However, it cannot deal with complaints or matters pending before courts or judicial tribunals; any matter under investigation by any other person or commission established under the Constitution or any other written law; any matter relating to foreign affairs; any matter relating to the exercise of the prerogative power of mercy; or any matter in respect of which there is a right of appeal or where another legal remedy exists.¹⁹⁸

194 Planning and Training Department, available at <https://bit.ly/2J0NQoh> (accessed 10 April 2017).

195 KNCHR Strategic Plan 2015-2018.

196 KNCHR Act 2011, section 33.

197 *Ibid.*

198 *Ibid.*

The KNCHR has the discretion to accept or decline the investigation of complaints.¹⁹⁹ However, the court held in *Isaac Aluoch Polo Aluochier v Kenya National Commission on Human Rights & 4 Others*,²⁰⁰ that the discretion to admit complaints is an administrative function amenable to judicial review and should ordinarily fall within the prescribed grounds set out under section 34 of the KNCHR Act.²⁰¹ The complaints-handling process is also required take into consideration the rules of natural justice by allowing adversely mentioned parties an opportunity to make presentations before the KNCHR issues recommendations.²⁰² To facilitate its investigation of the reported complaints, the KNCHR has been endowed with quasi-judicial powers under the KNCHR Act²⁰³ and the Constitution.²⁰⁴ These powers include the powers to order the production of documents and to summon witnesses for purposes of its investigations.²⁰⁵

The KNCHR is, however, yet to devise regulations to guide the exercise of these powers.²⁰⁶ This delay in prescribing regulations can be attributed partly to the High Court judgment in *Kenya Commercial Bank Ltd (KCB) v KNCHR*,²⁰⁷ in which the court declared the Complaints Procedures Regulation, promulgated in 2005 by the first KNCHR, as *ultra vires* because there was no provision in the KNCHR Act of 2002 for the creation of a hearing panel to settle human rights complaints.²⁰⁸ Fear of a similar ruling has caused the current KNCHR to refrain from using these powers until it has drafted regulations that are in line with Act and the Constitution.

The KNCHR does not have prosecutorial powers and instead forwards its cases to the Director of Public Prosecution (DPP) with a recommendation for prosecution. This handicap poses a challenge to the Commission in instances where its summonses to appear or produce documents are ignored. Although the Act provides for a penalty of a fine not exceeding one million shillings or a penalty of imprisonment for a term

199 KNCHR Act 2011, section 34.

200 [2016] eLKR.

201 The two grounds are (1) existence of adequate remedies under any written law or administrative practice; or (2) if the complaint is trivial, frivolous, vexatious or is not made in good faith.

202 *Ibid*, sections 35, 36 and 39.

203 *Ibid*, section 27.

204 Constitution of Kenya, Article 252(1) and (3).

205 *Ibid*, Article 252(1) and (3).

206 KNCHR Strategic Plan 2015-2018.

207 Misc. Application No 688 of 2006.

208 *Ibid*.

not exceeding two years, or both, the enforcement of the provision depends on the DPP. This challenge has led some detractors, such as the police, to deride the Commission as “a meaningless busybody out to accuse the police force falsely with baseless claims”.²⁰⁹ To compound the problem, section 19(4)-(6) of the 2002 Act was repealed – it had allowed, for example, for an interested party, on application, to get the KNCHR’s recommendations made an order of court if such application was uncontested.²¹⁰ The effect of this repeal by the 2011 Act was to weaken the court-type powers of the KNCHR.

Despite some of the inherent weaknesses in its enabling laws, the KNCHR has been utilising the complaints-handling provisions in the execution of its mandate. According to its annual reports, the number of complaints received is increasing exponentially,²¹¹ most of them relate to socio-economic rights,²¹² and more complaints are reported by men than by women.²¹³

Statistics from the past two reporting cycles²¹⁴ reveal that most of the complaints originated in urban areas, with the majority of them received at the Nairobi office.²¹⁵ The KNCHR attributes this to the proximity of its offices to the urban population and the fact that awareness of human rights is still lacking among the majority of Kenyans.²¹⁶ In an effort to make the complaints- lodging process more widely accessible, the Commission accepts complaints through various means, including through walk-ins to KNCHR offices and by phone, email, short message service (SMS), post, fax and online submission; it also receives referrals from the Integrated Public Complaints Referral Mechanism (IPCRM) established in 2014.²¹⁷

209 KNCHR, Annual Report for the 2015/2016 Financial Year (2016), KNCHR, p 50.

210 There is no record of this power having been used, perhaps explaining its exclusion from the 2011 Act.

211 The statistics are: 1,797 in 2013/2014 and 2,749 in 2015/2016.

212 The statistics are: 64.3 per cent compared to 26.2 per cent of civil political rights and 9.46 per cent of group right in 2013/2014; 58.9 per cent compared to 29.1 per cent of civil political rights and 12 per cent of group rights in 2015/2016.

213 The statistics are: 71.6 per cent in 2013/2014 and 69.2 per cent 2015/2016 compared to female complainants of 28.4 per cent in 2013/2014 and 30.8 per cent 2015/2016.

214 For 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%). For 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%).

215 KNCHR, 11th Annual Report 2013/2014 (2014), p 21.

216 KNCHR, Annual Report 2012/2013 (2014), p 17.

217 See note 215; KNCHR, 12th Annual Report 2015/2016 (2106), p 30.

In its most recent report, the KNCHR points out that it is starting to receive an increasing number of complaints through the additional means of Huduma Centres²¹⁸ and public forums.²¹⁹

4.6 Monitoring government compliance with advice and recommendations

Once a complaint is lodged with the KNCHR, it must decide whether to admit such a complaint for investigation, refer it to one of its referral partners, or offer legal advice. Additionally, from the complaints received, the KNCHR can get an idea of what are recurring human rights concerns and seek ways to address them on a large scale, such as by holding public hearings. Public hearings are aimed at facilitating dialogue between the affected individuals and those alleged to have caused the matter complained of.²²⁰ Examples of public inquiries by the KNCHR include those on alleged human rights violations arising from mining and salt manufacturing activities in the country's coastal region²²¹ and from security operations in the northern parts of Kenya.²²²

Where the KNCHR opts for an investigation, it is the outcome of these investigations that determines the nature of the action the KNCHR takes to provide redress.²²³ However, the Act does not state what appropriate redress might be, which means that the KNCHR is left to decide on the redress and ways of achieving it within the parameters of the Constitution. The KNCHR does not have the power to make binding decisions: it can only issue recommendations on what should be done to address the complaints raised. The courts have confirmed that the findings and recommendations of the Commission do not have legal force akin to that of court judgments and thus cannot be enforced against a state institution. For example, in *Republic v Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah*,²²⁴ the court noted, in interpreting similar provisions under the Commission on Administrative Justice Act, that:

218 These are centres established by the national government to provide one-stop shop for government services.

219 See note 217.

220 KNCHR Act 2011, section 38.

221 KNCHR, Public Inquiry Report on Mining Activities in Taita-Taveta County, available at <https://bit.ly/2Jh5pzw> (accessed 15 February 2019).

222 KNCHR, Public National Inquiry on Security and Human Rights in North Rift, Kenya, available at <https://bit.ly/2YtHCmc> (accessed 15 February 2019).

223 See KNCHR, Annual Report 2012/2013 (2013), p 18.

224 *Republic v Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah* [2015] eKLR.

the court(s) cannot compel a government agency to implement such recommendations. Government agencies have no statutory duty to implement the recommendations of the Commission. They cannot therefore be compelled by way of *mandamus* to implement those recommendations.²²⁵

The recommendations are to be framed in a way capable of being implemented, and in instances where there is laxity in abiding by them, the KNCHR is expected to make an effort to follow up on the implementation of such recommendations. The implementation of recommendations is, however, not guaranteed. This view is reinforced by the history of non-compliance with past recommendations made to Parliament and the executive by constitutional commissions and past commissions of inquiry.²²⁶

Where there is failure of compliance, the KNCHR can have recourse to other redress measures, such as approaching the courts to get a binding ruling on the matter. The latter is problematic, though, since it consumes time and resources and, being adversarial in nature, is likely to sour relationships between the KNCHR and the state organs taken to court. It also raises the risk of undermining the rule of law, especially where the court's order is disobeyed. It is therefore used as a last resort. 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 could refer matters to other authorities in a better position to resolve them. In this regard, the KNCHR has put a referral system in place, the Integrated Public Complaints Referral Mechanism (IPCRM), to guide referrals.²²⁷

5 Public accountability

The KNCHR's independence is not absolute, as it must be held accountable and its performance constantly reviewed. As noted by the Supreme Court in the matter of the National Land Commission, the independence of constitutional commissions "does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions ... [is] prescribed in the Constitution and the law..."²²⁸

The public accountability of the KNCHR is provided for both in the Constitution and the KNCHR Act.²²⁹ The KNCHR is required to compile

225 *Ibid.*

226 See the Truth, Justice and Reconciliation (Amendment) Act 44 of 2013.

227 See KNCHR 11th Annual Report 2013-2014, pp 23, 27.

228 In the Matter of the National Land Commission [2015] eKLR.

a report of its activities at the end of each financial year and submit it to Parliament and the President.²³⁰ It must contain the financial statements of the KNCHR, a description of its activities, the legal and administrative measures taken to address concerns it has identified, and recommendations on specific actions.²³¹ The KNCHR must publish the report in the Gazette and in at least one newspaper with national circulation to allow members of the public to access it.²³²

The submission of reports provides a meaningful way for the KNCHR to interact with the branches of government and make interested stakeholders aware of its workings. The Act is silent, however, on parliamentary debate on the reports submitted. This absence of a clear framework in legislation and parliamentary procedure regarding how Parliament should engage with the KNCHR's reports is partly responsible for the dearth of debate on them, which in turn makes it difficult for the KNCHR's recommendations to be implemented.

Moreover, restricting the publication of reports to the Kenya Gazette and newspapers reduces their accessibility by confining their exposure to the relatively few persons who can afford the two media. The KNCHR should hence employ other means of dissemination, such as appearing on television or radio shows and utilising social media. This would be in line with the Constitution's edict that the reports should be "published and publicised".²³³

6 Conclusion

The KNCHR has a stable and secure foundational framework, which should be taken to mean that it is equipped and intended to be an effective institution. However, some impediments remain to its operational effectiveness. These include inadequate funding; limited accessibility; inadequate quasi-judicial powers; difficult working relations with CSOs and fellow Article 59 commissioners; and deficient political will and support from the political class. Such challenges should be addressed to enable the KNCHR to carry out its crucial human rights mandate to the fullest. Given its constitutional entrenchment, the KNCHR should feel confident in engaging proactively with the authorities and other stakeholders to find amicable solutions to problems it has identified.

229 Constitution of Kenya, Article 254; KNCHR Act 2011, section 53.

230 KNCHR Act 2011, section 53(1); Constitution of Kenya, Article 254.

231 KNCHR Act 2011, section 53(1)(a)-(e).

232 KNCHR Act 2011, section 53(2); Constitution of Kenya, section 254(3).

233 Constitution of Kenya, section 254(3) (emphasis added).

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The constitutional framework for the Kenya National Commission on Human Rights is laid down in the 2010 constitution as follows:

CHAPTER FOUR: BILL OF RIGHTS

Part 5: Kenya National Human Rights and Equality Commission

59.(1) There is established the Kenya National Human Rights and Equality Commission.

(2) The functions of the Commission are –

- (a) to promote respect for human rights and develop a culture of human rights in the Republic;
 - (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
 - (c) to promote the protection, and observance of human rights in public and private institutions;
 - (d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
 - (e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
 - (f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;
 - (g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
 - (h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
 - (i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
 - (j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and (k) to perform any other functions prescribed by legislation.
- (3) Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(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.

(5) If Parliament enacts legislation restructuring the Commission under clause (4) –

- (a) that legislation shall assign each function of the Commission mentioned in this Article to one or the other of the successor commissions;
- (b) each of the successor commissions shall have powers equivalent to the powers of the Commission under this Article; and
- (c) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter.

CHAPTER FIFTEEN – COMMISSIONS AND INDEPENDENT OFFICES

248.(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

(2) The commissions are –

- (a) the Kenya National Human Rights and Equality Commission;
- (b) the National Land Commission;
- (c) the Independent Electoral and Boundaries Commission;
- (d) the Parliamentary Service Commission;
- (e) the Judicial Service Commission;
- (f) the Commission on Revenue Allocation;
- (g) the Public Service Commission;
- (h) the Salaries and Remuneration Commission;
- (i) the Teachers Service Commission; and
- (j) the National Police Service Commission.

(3) The independent offices are –

- (a) the Auditor-General; and
- (b) the Controller of Budget.

249.(1) The objects of the commissions and the independent offices are to –

- (a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles; and
- (c) promote constitutionalism.

- (2) The commissions and the holders of independent offices –
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
- (3) 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.

250.(1) Each commission shall consist of at least three, but not more than nine, members.

- (2) The chairperson and each member of a commission, and the holder of an independent office, shall be –
 - (a) identified and recommended for appointment in a manner prescribed by national legislation;
 - (b) approved by the National Assembly; and
 - (c) appointed by the President.
- (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
- (4) 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.
- (5) A member of a commission may serve on a part-time basis.
- (6) A member of a commission, or the holder of an independent office –
 - (a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and
 - (b) unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.
- (7) The remuneration and benefits payable to or in respect of a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.
- (8) The remuneration and benefits payable to, or in respect of, a commissioner or the holder of an independent office shall not be varied to the disadvantage of that commissioner or holder of an independent office. Composition, appointment and terms of office.
- (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
- (10) The members of a commission shall elect a vice-chairperson from among themselves –

- (a) at the first sitting of the commission; and
 - (b) whenever it is necessary to fill a vacancy in the office of the vice-chairperson.
- (11) The chairperson and vice-chairperson of a commission shall not be of the same gender.
- (12) There shall be a Secretary to each commission who shall be –
- (a) appointed by the commission; and
 - (b) the chief executive officer of the commission.

251.(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for –

- (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
- (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
- (c) physical or mental incapacity to perform the functions of office;
- (d) incompetence; or
- (e) bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

(4) On receiving a petition under clause (3), the President –

- (a) may suspend the member or office holder pending the outcome of the complaint; and
- (b) shall appoint a tribunal in accordance with clause (5).

(5) The tribunal shall consist of –

- (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
- (b) at least two persons who are qualified to be appointed as High Court judges; and
- (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.

(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.

(7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.

252.(1) Each commission, and each holder of an independent office—

- (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
- (b) has the powers necessary for conciliation, mediation and negotiation;
- (c) shall recruit its own staff; and
- (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2). General functions and powers.

(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations –

- (a) the Kenya National Human Rights and Equality Commission;
- (b) the Judicial Service Commission;
- (c) the National Land Commission; and
- (d) the Auditor-General.

253. Each commission and each independent office –

- (a) is a body corporate with perpetual succession and a seal; and
- (b) is capable of suing and being sued in its corporate name.

254.(1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.

(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.

B.2 Legislative and regulatory instruments

Acting under article 59(4) of the Constitution, Parliament split the National Human Rights and Equality Commission to form three Commissions namely, the Kenya National Commission on Human

Rights, the Commission on Administrative Justice and the National Gender and Equality Commission, all of which deal with specified aspects of human rights. In addition to specific legislation regulated each of these Commissions, Parliament also enacted the Commission of Administrative Justice Act Subsidiary Legislation No 23 of 2011, which regulates the lodging and handling procedure of a complaint before the Commission.

B.2.1 Kenya Commission on Human Rights Act No 14 of 2011 (Revised Edition 2012)

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.
- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
- 18) Committees of the Commission.
- 19) Procedures of the Commission.
- 20) Terms and conditions of service.
- 21) Appointment of secretary.

- 22) Removal of secretary.

Section

- 23) Appointment of staff.
- 24) The common seal of the Commission.
- 25) Protection from personal liability.
- 26) General powers of the Commission.
- 27) Powers of a court.

PART III – INVESTIGATIONS BY THE COMMISSION

- 28) Powers relating to investigations.
- 29) Jurisdiction in investigations.
- 30) Limitation of jurisdiction.
- 31) Power not limited by other provisions.
- 32) Complaints.
- 33) Form of complaint.
- 34) Discretion not to investigate.
- 35) Notice if complaint not investigated.
- 36) Representations if adverse findings, etc.
- 37) Notice of investigation to organization.
- 38) Hearings of Commission.
- 39) Persons likely to be prejudiced or affected to be heard.
- 40) Statements made by persons to the Commission.
- 41) Action after inquiry.

PART IV – REPORT AND RECOMMENDATIONS

- 42) Report to organization.
- 43) Report to the complaint.
- 44) Report of misconduct to appropriate authority.

PART V – FINANCIAL PROVISIONS

Section

- 45) Funds of the Commission.
- 46) Financial year.
- 47) Annual estimates.
- 48) Accounts and audit.

- 49) Bank accounts.

PART VI – MISCELLANEOUS PROVISIONS

- 50) Management of information.
- 51) Correspondence from persons in custody, etc.
- 52) Offences.
- 53) Report of the Commission.
- 54) Report to Parliament on the implementation of report.
- 55) Review of mandate.
- 56) Regulations.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

- 57) Transfer of complaints to the Commission.
- 58) Contracts.
- 59) Savings.
- 60) Repeal of Act No 9 of 2002.

SCHEDULE

FIRST SCHEDULE – OATH/AFFIRMATION OF CHAIRPERSON/ A MEMBER/SECRETARY

SECOND SCHEDULE – MEETINGS AND PROCEDURE OF THE COMMISSION

No 14 of 2011

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ACT

[Date of assent: 27th August, 2011.]

[Date of commencement: 30th August, 2011.]

An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Kenya National Commission on Human Rights pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Kenya National Commission on Human Rights, and for connected purposes

[Corr. No 18/2012, Act No 12 of 2012.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Kenya National Commission on Human Rights Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to human rights; “chairperson” means the chairperson of the Commission appointed under section 11;

“**Commission**” means the Kenya National Commission on Human Rights established under section 3;

“**Disciplined Service**” includes –

- (a) the National Youth Service;
- (b) the Kenya Wildlife Service; or
- (c) any other Disciplined Service established by any written law;

“**former Kenya National Commission on Human Rights**” means the Commission established under the Kenya National Commission on Human Rights Act, (No 9 of 2002);]

“**human rights**” means the fundamental rights and freedoms protected under the Constitution, and the Laws of Kenya;

“**National Security Organs**” means the national security organs established under Article 239(1) of the Constitution;

“**public officer**” has the meaning assigned to it under Article 260 of the Constitution;

“**secretary**” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 21.;

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the Kenya National Commission on Human Rights.

(2) The Commission is established as a successor Commission pursuant to the provisions of Article 59(4) of the Constitution.

4. Status of successor Commission

For the avoidance of doubt, the Commission shall, pursuant to Article 59(5)(c) of the Constitution, be a commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the Laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) all treaties and conventions which have been ratified in Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (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;
- (d) receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated;
- (e) on its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs;
- (f) 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;
- (g) formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the Constitution;
- (h) work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration;
- (i) perform such other functions as the Commission may consider necessary for the promotion and protection of human rights; and
- (j) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and four other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

- (1) A person shall be qualified for appointment as the chairperson of the Commission if the person –
- (a) has knowledge and at least fifteen years experience in matters relating to law and human rights;
 - (b) holds a degree from a university recognized in Kenya; and
 - (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics or finance;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) management; or
 - (vii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of a local authority;
- (c) is an undischarged bankrupt; or
- (d) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

(1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of –

- (a) one person nominated by each of the following bodies –
 - (i) the Office of the President;
 - (ii) the Office of the Prime Minister;
 - (iii) the Ministry responsible for matters relating to justice;
 - (iv) the Ministry responsible for matters relating to gender and social development;
 - (v) the Public Service Commission;
 - (vi) the Law Society of Kenya; and
 - (vii) the National Council for Persons with Disabilities; and
- (b) two persons nominated by the Association of Professional Societies in East Africa.

(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as members of the Commission and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, 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 gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and
- (c) supervise and direct the work of the Commission.

(3) If the office of chairperson becomes vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

(1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.

(2) The chairperson and members of the Commission shall serve on a fulltime basis.

15. Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder –

- (a) dies;
- (b) by notice in writing addressed to the President resigns from office;

- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution.

17. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 15 or 16 the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for re-appointment.

18. Committees of the Commission

(1) The Commission may, from time to time establish, committees for the better carrying out of its functions.

(2) The Commission may –

- (a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;
- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

(1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

(1) The appointment of the secretary to the Commission, under Article 250(12) of the Constitution shall be through a competitive recruitment process.

(2) A person shall be qualified for appointment as a secretary to the Commission if the person –

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has had at least ten years proven experience at management level; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.

(4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

(1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –

- (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or neglect of duty;
- (d) violation of the Constitution; or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission may determine.

(3) The Government may, upon request by the Commission second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The Common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

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.

26. General powers of the Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfillment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to human rights;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;

- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;
- (h) conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations;
- (i) require any public or private institution to provide any special report on matters relating to the institution's implementation of the principle of equality and equity including gender equity.

[Corr. No 18/2012.]

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law, requisition any public record or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are

employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

[Corr. No 18/2012.]

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter relating to human rights in –

- (a) a public office or a private institution; or
- (b) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that there is discrimination carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) a matter pending before any court or judicial tribunal;
- (b) deleted by Sch. to Act No 12 of 2012;
- (c) a matter relating to relations between the State and any foreign State or international organization recognized as such under any international law;
- (d) a matter relating to the exercise of the prerogative of mercy;
- (e) a matter relating to equality and freedom from discrimination;
- (f) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (g) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

[Act No 12 of 2012, Sch.]

31. Power not limited by other provisions

The Commission may investigate or carry out an inquiry into any matter despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a), is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint alleging violation of human rights may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission;
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection (4)(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters

complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or
- (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry shall be open to the public, except where the Commission otherwise decides.

39. Persons likely to be prejudiced or affected to be heard

(1) Subject to subsection (2), if at any stage of an inquiry the Commission –

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to

appear before the Commission by himself or by an advocate to give evidence in his own defence.

(2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act take any of the following steps –

- (a) where the inquiry into a violation of human rights or negligence discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation of human rights other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfilment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission to which the investigation relates.

(2) The report shall i shall make a report to the state organ, public office or organization include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendations the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission shall prepare and submit to the National Assembly a report, detailing the failure or refusal to implement its recommendations, and the National Assembly shall take appropriate action.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;
- (b) such 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 under this Act; and
- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
 - (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
 - (c) maintenance of the buildings and grounds of the Commission;
 - (d) funding of training, research and development of activities of the Commission;
 - (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.
- (3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in National Assembly.
- (4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

- (1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.
- (2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –
- (a) statement of the income and expenditure of the Commission during that year; and
 - (b) statement of the assets and liabilities of the Commission on the last day of that financial year.
- (3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of the Constitution and the Public Audit Act, 2003 (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs, hinders or threatens the Commission or a member of staff acting under this Act;
- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities of the Commission;

- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
 - (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
 - (e) any other information relating to its functions that the Commission considers relevant.
- (2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.
- (3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

- (1) The Cabinet Secretary 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.
- (2) Where any of the recommendations contained in the report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to the National Assembly the reasons therefor.

55. Review of mandate

Parliament shall, upon expiry of five years from the date of commencement of this Act, and pursuant to Article 59(4) of the Constitution, review the mandate of the Commission with a view to amalgamating the Commission with the commission responsible for administrative justice.

56. Regulations

The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

57. Transfer of complaints to the Commission

- (1) All complaints, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights at the commencement of this Act, shall be deemed to have been made to the Commission.
- (2) The Commission shall transfer complaints relating to the mandate of the National Gender and Equality Commission and the Commission on

Administrative Justice to these commissions unless the investigation or inquiry relating to the complaint is at such a stage that such transfer may result in a delay of justice for those involved.

58. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Kenya National Human Rights and Equality Commission was party.

59. Savings

(1) Notwithstanding section 60 –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights during the transition period shall be deemed to have been carried out under this Act;
- (c) all assets and liabilities which immediately before the commencement of this Act were vested in the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall vest in the Commission;
- (d) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Kenya National Human Rights and Equality Commission shall be transferred to, vested, imposed on, or be enforceable by or against the Commission;
- (e) all actions, suits or legal proceedings by or against the Kenya National Human Rights and Equality Commission shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act. (2)

Notwithstanding section 9, the persons who were members of the former Kenya National Commission on Human Rights and who became members of the Kenya National Human Rights and Equality Commission pursuant to section 26 of the Sixth Schedule to the Constitution shall become members of the Commission upon the commencement of this Act for their unexpired term. Provided that the process of appointing new Commissioners under section 11 of this Act shall be commenced at least four months before the expiry of that term.

[Act No 12 of 2012, Sch.]

60. Repeal of Act No 9 of 2002

The Kenya National Commission on Human Rights Act, 2002 (No 9 of 2002) is repealed.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

I having been appointed (the chairperson/ member of/Secretary to) the Kenya National Commission on Human Rights do solemnly (swear/ declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD). Sworn/ Declared by the said.....
Before me thisday of
..... Chief Justice.

SECOND SCHEDULE [Section 20.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

- (1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.
- (2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.
- (3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.
- (4) A meeting shall be presided over by the chairperson or in his or her absence by the vice-chairperson. (5) The members of the Commission shall elect a vice-chairperson from among themselves –
 - (a) at the first sitting of the Commission; and
 - (b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.
- (6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under sub-paragraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission.

3. Quorum

(1) Subject to sub-paragraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two thirds of the members present.

5. Rules of procedure and minutes

The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

***B. 2.2 National Gender and Equality Commission Act No 15 of 2011
(Revised Edition 2012)***

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.
- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
- 18) Committees of the Commission.
- 19) Procedures of the Commission.
- 20) Terms and conditions of service.
- 21) Appointment of secretary.
- 22) Removal of secretary.
- 23) Appointment of staff.
- 24) The common seal of the Commission.
- 25) Protection from personal liability.
- 26) General powers of the Commission.
- 27) Powers of a court.

PART III – INVESTIGATIONS BY THE COMMISSION

- 28) Powers relating to investigations.
- 29) Jurisdiction in investigations.
- 30) Limitation of jurisdiction.
- 31) Power not limited by other provisions.
- 32) Complaints.
- 33) Form of complaint.⁴

Section

- 34) Discretion not to investigate.
- 35) Notice if complaint not investigated.
- 36) Representations if adverse findings, etc.
- 37) Notice of investigation to organization.
- 38) Hearings of Commission.
- 39) Persons likely to be prejudiced or affected to be heard.
- 40) Statements made by persons to the Commission.
- 41) Action after inquiry.

PART IV – REPORT AND RECOMMENDATIONS

- 42) Report of organization.
- 43) Report to the complainant.
- 44) Report of misconduct to appropriate authority.

PART V – FINANCIAL PROVISIONS

- 45) Funds of the Commission.
- 46) Financial year.
- 47) Annual estimates.
- 48) Accounts and audit.
- 49) Bank accounts.

PART VI – MISCELLANEOUS PROVISIONS

- 50) Management of information.
- 51) Correspondence from persons in custody, etc.
- 52) Offences.
- 53) Report of the Commission.
- 54) Report to Parliament on the implementation of report.

55) Regulations.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

56) Transfer of complaints to the Commission.

57) Contracts.

58) Savings.

59) Repeal of Act No 13 of 2003.

SCHEDULES

FIRST SCHEDULE – OATH/AFFIRMATION OF CHAIRPERSON/
A MEMBER/SECRETARY

SECOND SCHEDULE –MEETINGS AND PROCEDURE OF THE
COMMISSION

NATIONAL GENDER AND EQUALITY COMMISSION ACT

[Date of assent: 27th August, 2011.]

[Date of commencement: 30th August, 2011.]

An Act of Parliament to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission, and for connected purposes

1. Short title

This Act may be cited as the National Gender and Equality Commission Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to gender;

“**chairperson**” means the chairperson of the Commission appointed under section 11;

“**Commission**” means the National Gender and Equality Commission established under section 3;

“**former National Commission on Gender and Development**” means the Commission established under the National Commission on Gender and Development Act, 2003 (No 13 of 2003);

“gender” means the social definition of women and men among different communities and cultures, classes, ages and during different periods in history;

“gender mainstreaming” means ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres, so as to ensure that women and men benefit equally, and that inequality is not perpetuated;

“marginalised group” means a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4) of the Constitution;

“person with disability” means any person with any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have a substantial or long term effect on an individual’s ability to carry out ordinary day to day activities;

“public officer” has the meaning assigned to it under Article 260 of the Constitution;

“secretary” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 21;

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the National Gender and Equality Commission.

(2) The Commission shall be a successor in title to the Kenya National Human Rights and Equality Commission established by Article 59 of the Constitution, pursuant to clauses (4) and (5) of that Article.

4. Status of successor Commission

For the avoidance of doubt, the Commission as a successor Commission shall, pursuant to Article 59(5)(c) of the Constitution, be a Commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a successor Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality, gender equality and gender equity;
- (c) inclusiveness, non-discrimination and protection of the marginalized groups;
- (d) all treaties and conventions which have been ratified in Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- (c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children;

- (d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
- (e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- (f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- (g) 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;
- (h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- (i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;
- (j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;
- (k) 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;
- (l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;
- (m) conduct audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;
- (n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
- (o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
- (p) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and four other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

(1) A person shall be qualified for appointment as the chairperson of the Commission if the person –

- (a) has knowledge and at least fifteen years experience in matters relating to human rights and gender;
- (b) holds a degree from a university recognized in Kenya; and
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) management; or
 - (vii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of the governing body of a political party;
- (c) is a member of a local authority;
- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

(1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection

panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively –

- (a) Office of the President;
- (b) Office of the Prime Minister;
- (c) Ministry responsible for matters relating to justice;
- (d) Ministry responsible for matters relating to gender and social development;
- (e) Public Service Commission;
- (f) the Association of Professional Societies in East Africa;
- (g) the Kenya Private Sector Alliance; and
- (h) the National Council for Persons with Disabilities.

(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as members of the Commission and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, 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 regional and ethnic balance and shall have due regard to the principle of fair representation for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and

(c) supervise and direct the work of the Commission.

(3) If the office of chairperson becomes vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

(1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.

(2) The chairperson and members of the Commission shall serve on a full-time basis.

15. Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder –

(a) dies;

(b) by notice in writing addressed to the President, resigns from office;

(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution.

17. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 15 or 16, the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for re-appointment.

18. Committees of the Commission

(1) The Commission may, from time to time, establish, committees for the better carrying out of its functions.

(2) The Commission may –

- (a) co-opt into the membership of a committee established under subsection (1) other persons whose knowledge and skills are necessary for the functions of the Commission;
- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

- (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
- (2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of, the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

- (1) The appointment of the secretary to the Commission under Article 250 (12) of the Constitution shall be through a competitive recruitment process.
- (2) A person shall be qualified for appointment as a secretary to the Commission if the person –
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a university recognized in Kenya;
 - (c) has had at least ten years proven experience at management level;
 - (d) has extensive experience in public administration; and
 - (e) meets the requirements of Chapter Six of the Constitution.
- (3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.
- (4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

- (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –
 - (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
 - (b) gross misconduct or misbehaviour;

- (c) incompetence or neglect of duty;
- (d) violation of the Constitution; or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the Secretary is removed under subsection (1), the Secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission may determine.

(3) The Government may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

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.

26. General powers of Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfilment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to equality and freedom from discrimination;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;
- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;
- (h) conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations; and
- (i) require any public or private institution to provide any special report on matters relating to the institution's implementation of the principle of equality and equity including gender equity.

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law, requisition any public record or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter relating to equality and freedom from discrimination in –

- (a) relation to any person,
- (b) a public office or a private institution; or
- (c) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that there is discrimination carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) a matter pending before any court or judicial tribunal;
- (b) a criminal offence;
- (c) a matter relating to relations between the State and any foreign state or international organization recognized as such under any international law;
- (d) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (e) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

31. Power not limited by other provisions

The Commission may investigate or carry out an inquiry into any matter despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a) is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint alleging discrimination may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection (4)(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or
- (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the

State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry may be open to the public.

39. Persons likely to be prejudiced or affected to be heard

- (1) Subject to subsection (2), if at any stage of an inquiry the Commission –
- (a) considers it necessary to inquire into the conduct of any person; or
 - (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.
- (2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act, take any of the following steps –

- (a) where the inquiry into a complaint of discrimination discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged discrimination, other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfillment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If the recommendations of the Commission are not implemented within the specified time, the Commission may submit the report to Parliament as the Commission thinks fit.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;
- (b) such 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 under this Act; and

- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for the –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
- (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
- (c) maintenance of the buildings and grounds of the Commission;
- (d) funding of training, research and development of activities of the Commission;
- (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in National Assembly.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –

- (a) statement of the income and expenditure of the Commission during that year; and
- (b) statement of the assets and liabilities of the Commission on the last day of that financial year.

(3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs, hinders, threatens the Commission or a member of staff acting under this Act;

- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities of the Commission;
- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
- (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
- (e) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

(1) The Cabinet Secretary 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.

(2) Where any of the recommendations contained in a report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to the National Assembly the reasons therefor.

55. Regulations

The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

56. Transfer of complaints to the Commission

All complaints, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former National Commission on Gender and Development shall at the commencement of this Act, be deemed to have been made to the Commission.

57. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Kenya National Human Rights and Equality Commission was party to.

58. Savings

(1) Notwithstanding section 60 –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights during the transition period shall be deemed to have been carried out under this Act;
- (c) all assets and liabilities which immediately before the commencement of this Act were vested in the Kenya National Human Rights and Equality Commission shall vest in the Commission;
- (d) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Kenya National Human Rights and Equality Commission shall be transferred to, vested, imposed on, or be enforceable by or against the Commission;
- (e) all actions, suits or legal proceedings by or against the Kenya National Human Rights and Equality Commission shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act.

(2) Notwithstanding section 9, the persons who were members of the former National Commission on Gender and Development who became members of the Kenya National Human Rights and Equality Commission pursuant to section 26 of the Sixth Schedule to the Constitution shall

become members of the Commission upon the commencement of this Act for their unexpired term.

59. Repeal of Act No 13 of 2003

The National Commission on Gender and Development Act, 2003 (No 13 of 2003), is repealed.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

SECOND SCHEDULE [Section 20.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

(1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.

(2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.

(4) A meeting shall be presided over by the chairperson or in his or her absence, by the vice-chairperson.

(5) The members of the Commission shall elect a vice-chairperson from among themselves –

(a) at the first sitting of the Commission; and

(b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.

(6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission.

3. Quorum

(1) Subject to subparagraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two-thirds of the members present.

5. Rules of procedure and minutes

The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

B.2.3 Commission on Administrative Justice Act No 23 of 2011 (Revised Edition 2012)

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.

- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
- 18) Committees of the Commission.
- 19) Procedures of the Commission.
- 20) Terms and conditions of service.
- 21) Appointment of secretary.
- 22) Removal of secretary.
- 23) Appointment of staff.
- 24) The common seal of the Commission.
- 25) Protection from personal liability.
- 26) General powers of Commission.
- 27) Powers of a court.

PART III – INVESTIGATIONS BY THE COMMISSION

- 28) Powers relating to investigation.
- 29) Jurisdiction in investigations.
- 30) Limitation of jurisdiction.
- 31) Power not limited by other provisions.
- 32) Complaint.
- 33) Form of complaint.
- 34) Discretion not to investigate.
- 35) Notice if complaint not investigated.

Section

- 36) Representations if adverse findings, etc.
- 37) Notice of investigation to organization.

- 38) Hearings of Commission.
- 39) Persons likely to be prejudiced or affected to be heard.
- 40) Statements made by persons to the commission.
- 41) Action after inquiry.

PART IV – REPORT AND RECOMMENDATIONS

- 42) Report of organization.
- 43) Report to the complainant.
- 44) Report of misconduct to appropriate authority.

PART V – FINANCIAL PROVISIONS

- 45) Funds of the Commission.
- 46) Financial year.
- 47) Annual estimates.
- 48) Accounts and audit.
- 49) Bank accounts.

PART VI – MISCELLANEOUS PROVISIONS

- 50) Management of information.
- 51) Correspondence from persons in custody, etc.
- 52) Offences.
- 53) Report of the Commission.
- 54) Report to Parliament on the implementation of report.
- 55) Review of mandate.
- 56) Regulations.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

- 57) Transfer of complaints to the Commission.
- 58) Contracts.
- 59) Savings.

SCHEDULES

FIRST SCHEDULE – OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/A MEMBER/SECRETARY
SECOND SCHEDULE – MEETINGS AND PROCEDURE OF THE
COMMISSION

COMMISSION ON ADMINISTRATIVE JUSTICE ACT No 23 OF 2011

[Date of assent: 27th August, 2011.]

[Date of commencement: 5th September, 2011.]

An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Commission on Administrative Justice Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**administrative action**” means any action relating to matters of administration and includes – (a) a decision made or an act carried out in the public service; (b) a failure to act in discharge of a public duty required of an officer in public service; (c) the making of a recommendation to a Cabinet Secretary; or (d) an action taken pursuant to a recommendation made to a Cabinet Secretary;

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to public service;

“**chairperson**” means the chairperson appointed in accordance with section 11;

“**Commission**” means the Commission on Administrative Justice established under section 3;

“**Public Complaints Standing Committee**” means the public Complaints Standing Committee established by Gazette Notice No 5826 of 29th June 2007;

“**public office**” has the meaning assigned to it under Article 260 of the Constitution;

“**public officer**” has the meaning assigned to it under Article 260 of the Constitution;

“**secretary**” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 22.

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the Commission on Administrative Justice.

(2) The Commission shall be the successor to the Public Complaints Standing Committee existing immediately before the coming into force of this Act.

4. Status of successor Commission

For the avoidance of doubt, the Commission shall be a Commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city, but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;

- (c) all treaties and conventions which have been ratified by Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;
- (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;
- (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;
- (d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;
- (e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;
- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;
- (i) publish periodic reports on the status of administrative justice in Kenya;
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and two other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

(1) A person shall be qualified for appointment as the chairperson of the Commission if the person –

- (a) has knowledge and at least fifteen years experience in matters relating to human rights, law, conflict resolution, arbitration or administrative justice;
- (b) holds a degree from a university recognized in Kenya; and
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics or finance;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) conflict resolution;
 - (vii) management; or
 - (viii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member of the Commission if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of the governing body of a political party;
- (c) is a member of a local authority;
- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

- (1) The President shall, within fourteen days of the commencement of this Act convene a selection panel for the purpose of selecting suitable

candidates for appointment as the chairperson or member of the Commission.

- (2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively –
 - (a) Office of the President;
 - (b) Office of the Prime Minister;
 - (c) Ministry responsible for matters relating to justice;
 - (d) Public Service Commission;
 - (e) the Association of Professional Societies in East Africa; and
 - (f) the National Council for Persons with Disabilities.
- (3) The selection panel shall, subject to this section, determine its own procedure and the Ministry responsible for Public Service shall provide it with such facilities and other support as it may require for the discharge of its functions.
- (4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.
- (5) The selection panel shall, within seven days of receipt of applications under subsection (4), consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and five persons qualified for appointment as members of the Commission, and shall forward the names of the selected candidates to the President for nomination.
- (6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and two persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.
- (7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and approve or reject any nomination.
- (8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.
- (9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, 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 gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel specified under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and
- (c) supervise and direct the work of the Commission.

(3) If the office of chairperson become vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to

absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

- (1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.
- (2) The chairperson and members of the Commission shall serve on a fulltime basis.

15. Vacancy of office of chairperson and members

- (1) The office of the chairperson or a member of the Commission shall become vacant if the holder –
 - (a) dies;
 - (b) by notice in writing addressed to the President resigns from office;
 - (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.
- (2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution

17. Filling of vacancy

- (1) Where a vacancy occurs in the membership of the Commission under section 15 or 16, the appointment procedure provided for under this Act shall apply.
- (2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for reappointment.

18. Committees of the Commission

- (1) The Commission may, from time to time establish, committees for the better carrying out of its functions.
- (2) The Commission may –
 - (a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;

- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

- (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
- (2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

- (1) The appointment of the secretary to the Commission under Article 250(12) of the Constitution shall be through a competitive recruitment process.
- (2) A person shall be qualified for appointment as a secretary to the Commission if the person –
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a university recognized in Kenya;
 - (c) has had at least ten years proven experience at management level; and
 - (d) meets the requirements of Chapter Six of the Constitution.
- (3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.
- (4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

- (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –
 - (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
 - (b) gross misconduct or misbehaviour;
 - (c) incompetence or neglect of duty;
 - (d) violation of the Constitution; or

- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission, may determine.

(3) The Government may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The Common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

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.

26. General powers of Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfilment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to administrative justice;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfilment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;
- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing.

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within the person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or

investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law requisition any public records or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter arising from the carrying out of an administrative action of –

- (a) a public office;
- (b) a state corporation within the meaning of the State Corporations Act (Cap. 446); or
- (c) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that the administrative action was carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) proceedings or a decision of the Cabinet or a committee of the Cabinet;

- (b) a criminal offence;
- (c) a matter pending before any court or judicial tribunal;
- (d) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;
- (e) the grant of Honours or Awards by the President;
- (f) a matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;
- (g) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (h) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

31. Power not limited by other provisions

The Commission may investigate an administrative action despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a), is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint under this Act may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection 4(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry shall be open to the public, except where the Commission otherwise decides.

39. Persons likely to be prejudiced or affected to be heard

(1) Subject to subsection (2), if at any stage of an inquiry the Commission –

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.

(2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act take any of the following steps –

- (a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfilment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;

- (b) such 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 under this Act; and
- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for the –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
- (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
- (c) maintenance of the buildings and grounds of the Commission;
- (d) funding of training, research and development of activities of the Commission;
- (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in the National Assembly.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –

- (a) statement of the income and expenditure of the Commission during that year; and
- (b) statement of the assets and liabilities of the Commission on the last day of that financial year. (3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, 2003 (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs, hinders or threatens the Commission or a member of staff acting under this Act;
- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities the Commission;
- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
- (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
- (e) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

(1) The Cabinet Secretary shall, prepare an annual report and submit the report to Parliament in accordance with Article 153(4)(b) of the Constitution.

(2) Where any of the recommendations contained in a report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to Parliament the reasons therefor.

55. Review of mandate

Parliament shall, upon expiry of five years from the date of commencement of this Act, and pursuant to Article 59(4) of the Constitution, review the mandate of the Commission with a view to amalgamating the Commission with the commission responsible for

human rights. 56. Regulations The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

57. Transfer of complaints to the Commission

All complaints relating to maladministration, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee at the commencement of this Act, shall be deemed to have been made to the Commission.

58. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Public Complaints Standing Committee was party.

59. Savings

(1) Notwithstanding the provisions of this Act –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee during the transition period shall be deemed to have been carried out under this Act;
- (c) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Public Complaints Standing Committee shall be transferred to, vested imposed on, or be enforceable by or against the Commission;
- (d) all actions, suits or legal proceedings by or against the Public Complaints Standing Committee shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act; and
- (e) all assets and liabilities which immediately before the commencement of this Act were vested in, or enforced against, the Public Complaints Standing Committee shall, by virtue of this paragraph, vest in the Commission.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/ A MEMBER/SECRETARY

I having been appointed (the chairperson/member of/ Secretary to) the Commission on Administrative Justice, do solemnly (swear/declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD). Sworn/Declared by the said Before me this day of
..... Chief

SECOND SCHEDULE [Section 19.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

(1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.

(2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.

(4) A meeting shall be presided over by the chairperson or in his or her absence by the vice-chairperson.

(5) The members of the Commission shall elect a vice-chairperson from among themselves –

(a) at the first sitting of the Commission; and

(b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.

(6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting,

declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under sub-paragraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission directly or indirectly.

3. Quorum

(1) Subject to sub-paragraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two-thirds of the members present. 5. Rules of procedure and minutes The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

B.2.4 Commission on Administrative Justice Act Subsidiary Legislation No 23 of 2011

ARRANGEMENT OF REGULATIONS

PART I – PRELIMINARY

Section

- 1) Citation.
- 2) Interpretation.

PART II – LODGING AND HANDLING PROCEDURE OF A COMPLAINT

- 3) Lodging of complaints.
- 4) Parties to a complaint.

- 5) Form of a complaint.
- 6) Principles of natural justice.
- 7) Fees.
- 8) Service of process.
- 9) Screening of complaints.
- 10) Discontinuation of a complaint.
- 11) Appeal.
- 12) Withdrawal and lapse of complaint.
- 13) Joint consideration of complaint.
- 14) Judicial notice.
- 15) Language.
- 16) Register of complaints.

PART III – ADMISSION AND RESOLUTION OF A COMPLAINT

- 17) Action on complaint.
- 18) Failure to respond to summon.
- 19) Resolution of complaint.
- 20) Action against respondent.
- 21) Determination of complaint.

PART IV - INVESTIGATIONS

- 22) Investigations.

PART V – MEDIATION, CONCILIATION AND NEGOTIATION

- 23) Procedure.
- 24) Procedures at conciliation meeting.
- 25) Conciliation agreement.

PART VI – COMMISSION HEARING

- 26) Hearings.
- 27) Hearing procedure.
- 28) Default in appearances.

Section

- 29) Procedure at hearing.
- 30) Change of advocate.

- 31) Panel decisions.
- 32) Orders.
- 33) Copies of proceedings.

PART VII - MISCELLANEOUS

- 34) Amicus curiae.
- 35) Forms.
- 36) Cases not covered by these regulations.

SCHEDULES

FIRST SCHEDULE – FORMS

SECOND SCHEDULE – SUMMONS TO ATTEND THE COMMISSION

PART I – PRELIMINARY

1. Citation

These Regulations may be cited as the Commission on Administrative Justice Regulations, 2013.

2. Interpretation

In these Regulations, unless the context otherwise requires –

“**Act**” means the Commission on Administrative Justice Act, 2013 (Cap. 102A);

“**admission**” means the process by which the eligibility of a complaint to determination by the Commission is done;

“**Chairperson**” means the Chairperson of, the Commission appointed in accordance with section 11 of the Act;

“**Commission**” means the Commission on Administrative Justice established under section 3 of the Act;

“**Commissioner**” means a member of the Commission appointed under section 11 of the Act;

“**Complainant**” means a person or institution alleging breach of any matter under the mandate of the Commission;

“**Complaint**” means an oral, written or any other communication made or addressed to the Commission or taken up by the Commission against a State Office or State Officer or Public Officer or Public Office;

“**hearing**” means a sitting of a hearing panel for the purpose of enabling it to reach or announce a decision on a complaint under adjudication;

“investigation” includes the formal process following a preliminary inquiry or on the Commission’s own motion of establishing the facts in a matter, by an investigator, upon a decision of the Commission;

“mediation” means the process by which the Commission assists a complainant and the respondent to reach a fair settlement regarding the complaint and may include, the process of conciliation or negotiation;

“respondent” means a person or institution against whom or who the complaint is made;

“State office” has the meaning assigned to it under Article 260 of the Constitution; and

“State officer” has the meaning assigned to it under Article 260 of the Constitution.

PART II – LODGING AND HANDLING PROCEDURE OF A COMPLAINT

3. Lodging of complaints

A complaint may be lodged at the offices of the Commission or at such place or places and in such form as the Commission may from time to time determine.

4. Parties to a complaint

A complaint may be lodged by the complainant in person or by a person acting on behalf of the complainant or by any other person authorized by law to act for the complainant, provided that the Commission may admit anonymous complaints.

5. Form of a complaint

(1) Where the complaint is made orally, or otherwise, or the complainant cannot read or write, the complaint may be reduced to writing by a designated officer of the Commission.

(2) A written complaint shall be in such form as the Commission may determine and shall include -

- (a) the name and contact details of the complainant;
- (b) the particulars of the respondent;
- (c) the substance of the complaint in sufficient detail to enable the Commission to act.

(3) The complainant may attach or provide any documents necessary to support the complaint.

(4) Despite the foregoing, a complaint may be made anonymously, or treated in such a manner as to protect the identity of, or particulars of, the complainant where necessary, as may be directed by the Chairperson.

6. Principles of natural justice

In the determination of complaints under these Regulations, the Commission shall have due regard to the principles of natural justice and shall not be bound by any legal or technical rules of evidence applicable to proceedings before a court of law.

7. Fees

The Commission shall not charge any fee in the lodging and determination of complaints.

8. Service of process

(1) Any document required or authorized to be served under these Regulations shall, where practicable, be served personally on the person by delivering or tendering the document to that person.

(2) Where it is not possible to effect personal service, the document may be served in such manner as the Commission may determine.

(3) Any document requiring service under these Regulations shall be served by an officer of the Commission or any other person authorized to do so by the Commission.

9. Screening of complaints

(1) A complaint shall, upon being entered into the register under regulation 16, be forwarded to the appropriate Department in the Commission for screening.

(2) The Commission, upon screening the complaint, may –

- (a) admit the complaint;
- (b) where appropriate, advise the complainant in writing that the matter is not within the mandate of the Commission; or
- (c) advise the complainant that the matter lies for determination by another body or institution and refer the same to the said body or institution.

10. Discontinuation of a complaint

Where, in the opinion of the Commission, a complaint does not merit further consideration, it may discontinue further proceedings on the complaint, record its reasons and notify the complainant accordingly.

11. Appeal

(1) Where a complaint has been discontinued under regulation 10, the complainant may, in writing, appeal to the Chairperson against the discontinuation.

(2) Where an appeal is disallowed, the complaint shall be closed and the appellant notified appropriately.

(3) For purposes of this regulation, a letter under the hand of the Chairperson notifying the complainant of the decision of the Commission shall be considered as notice for the purposes of this regulation.

12. Withdrawal and lapse of complaint

(1) A complainant may, in writing, withdraw a complaint pending before the Commission at any stage during its consideration.

(2) Where a complainant unjustifiably fails or neglects to respond to communication from the Commission within three months from the date of the last communication, the Commission may deem the complaint to have lapsed.

(3) Despite the provisions of paragraphs (1) and (2), the Commission may, in its discretion, proceed to deal with a complaint in the public interest.

(4) Where a complaint has lapsed, the complainant may apply to the Chairperson for readmission of the complaint and give reasons in support of the application for re-admission to the satisfaction of the Chairperson.

13. Joint consideration of complaint

(1) Where two or more complaints are lodged in which the same or similar allegations are raised against a respondent or respondents, the Commission may

- (a) consolidate the complaints; or
- (b) treat one complaint as a test complaint and stay further action on the other complaints pending resolution of the test complaint.

(2) The decision on a test complaint shall apply, *mutatis mutandis*, to all other complaints with which the test complaint was consolidated.

14. Judicial notice

The Commission may take judicial notice of facts that are publicly known.

15. Language

(1) Proceedings before the Commission shall be conducted in the English or Swahili languages.

(2) The Commission shall endeavour to ensure that a party who cannot speak or understand the language of proceedings is entitled to the services of an interpreter to be provided by the Commission.

(3) For purposes of paragraph (2), interpretation shall include interpretation for braille, sign-language or such other interpretation as may be deemed necessary.

16. Register of Complaints

The Commission shall keep a register of complaints in which all complaints shall, upon receipt, be entered.

PART III – ADMISSION AND RESOLUTION OF A COMPLAINT

17. Action on complaint

(1) Upon admission of a complaint, the Commission shall draft a communication in form CAJ 1-1 or CAJ 2-1, as applicable, set out in the First Schedule, to the respondent.

(2) Upon the expiry of fourteen working days, if there is no response after receipt, a reminder giving seven days to comply in form CAJ 3-1 set out in the Second Schedule shall be communicated to the respondent.

(3) If there is still no response under paragraph (2), a further and final reminder giving seven days to comply in form CAJ 3-1 set out in the Second Schedule, shall be send to the respondent.

(4) If upon the expiry of twenty-eight days there is still no response, the Commission shall issue summons or make such other orders to attend to the respondent in a form to be determined by the Commission.

18. Failure to respond to summon

If a respondent fails to respond to the summonses or other orders referred to in regulation 17, the Commission may proceed to –

- (a) determine the complaint in the absence of the respondent;

- (b) institute legal proceedings against the respondent under to section 52(c) of the Act;
- (c) cite the respondent as an unresponsive State or Public Office or Officer or declare such State or Public Officer to be unfit to serve in the Public Service;
- (d) take appropriate action against the unresponsive State or Public Office or Officer through Performance Contracting; or
- (e) report the respondent in the Commission's Statutory Reports.

19. Resolution of complaint

In resolving a complaint, the Commission may –

- (a) conduct investigations;
- (b) requisite and obtain information or documents;
- (c) conduct an inquiry;
- (d) undertake mediation, negotiation and conciliation;
- (e) constitute a hearing panel;
- (f) invite or summon any person or persons to attend to the Commission;
- (g) obtain warrants of arrest for breach of any summons or orders of the Commission; or
- (h) obtain orders from court authorizing search or seizure.

20. Action against respondent

After adopting any of the options stated in regulation 19, the Commission may determine the complaint and –

- (a) make a formal determination that the respondent is in breach of the Constitution, the Act or any other legislation;
- (b) declare the respondent to be a person ineligible to hold a state or public office;
- (c) enter the name of the respondent in the Commission's Citation Register which shall be signed and sealed by the Chairperson and which shall include the nature of the complaint and the determination made; or
- (d) make any other adverse finding against the respondent.

21. Determination of complaint

In determining the complaint, the Commission may

- (a) recommend an appropriate remedy;
- (b) award appropriate compensation to the complainant;
- (c) recommend the removal of the respondent from State or Public office;
- (d) issue a formal caution or warning to the respondent; or

- (e) publish the action taken in the Commission's Statutory Report.

PART IV – INVESTIGATIONS

22. Investigations

- (1) Where the complaint has been admitted, or where the commission has taken up a matter on its own initiative, the Chairperson may commission an investigation by an officer of the Commission or any public office or investigation agency.
- (2) The investigator may, subject to the direction and control of the Commission –
 - (a) issue summonses or requisition information in form to be determined by the Commission;
 - (b) administer an Oath or Affirmation;
 - (c) requisite any document or information from any person or institution; and
 - (d) by order of court, enter into any establishment or premises, conduct inspections or collect documents.
- (3) Upon completion of the investigation, the investigator shall prepare a report and submit it to the Chairperson of the Commission.
- (4) Upon review of the report, the Commission may –
 - (a) conduct a formal hearing;
 - (b) undertake a mediation or a conciliation;
 - (c) refer the complaint to the appropriate public body for further-action; or
 - (d) determine the complaint appropriately.
- (5) The Commission shall keep a record of each investigation and may publish the findings and recommendations, pursuant to an investigation, and may include these in its Statutory Report.

PART V – MEDIATION, CONCILIATION AND NEGOTIATION

23. Procedure

- (1) The Commission may, in writing, advise the parties to a complaint that the dispute may be best resolved through mediation and conciliation.
- (2) Where both parties to a complaint consent to mediation and conciliation, the Commission shall, in consultation with the parties, fix an appropriate date for a meeting.
- (3) The Commission shall issue a mediation notice which shall include –
 - (a) the names of the parties to the complaint; and

(b) the date, time and venue of the mediation meeting.

(4) Upon the issuance of a mediation notice, but before the date of the meeting, the Chairperson shall constitute a mediation panel consisting of at least one Commissioner and such number of other persons as the Chairperson may consider necessary.

24. Procedures at conciliation meeting

During the mediation or meeting, the panel appointed under regulation 23(4) may apply such procedures as it may, in the interests of the parties, deem appropriate in the circumstances.

25. Conciliation agreement

(1) At the conclusion of the mediation process, both parties shall sign a mediation and conciliation agreement bearing the common seal of the Commission and signed by the designated Commissioner.

(2) A mediation or conciliation agreement signed under this regulation, shall be deemed to be a determination of the Commission, and shall be enforceable as such.

(3) Despite provisions of this regulation, the Commission may make awards for compensation under this Part.

PART VI – COMMISSION HEARINGS

26. Hearings

(1) The Commission may conduct a hearing on any complaint or matter under its jurisdiction where it considers desirable or appropriate to do so.

(2) A hearing panel shall consist of such persons as the Chairperson may appoint.

(3) Unless the circumstances otherwise require, for reasons stated, the Commission shall conduct its hearings in public.

27. Hearing procedure

(1) Upon determination that a complaint should be addressed through a hearing, the Commission shall issue a notice to the concerned parties on the constitution of a hearing panel and require them to enter appearance.

(2) The notice referred to in paragraph (1) shall be in the form to be determined by the Commission and shall include –

(a) the names of the parties;

(b) the date, place and time of the hearing;

- (c) the penalty for non-compliance;
- (d) the duration within which appearance is required; and
- (e) a notice that a party may appear in person or with an advocate, representative or intermediary.

(3) An appearance before the hearing panel shall be made within fourteen days from the date of service of the notice to the parties under paragraph (2).

(4) Where a party has entered appearance under to paragraph (3), the Commission shall give directions and fix a hearing date.

(5) For purpose of this regulation, a letter or any other sufficient indication in writing, by a party, informing the Commission that the party shall appear on the date and place of hearing, shall be considered as notice of appearance by that party.

(6) Upon fixing a hearing date, a hearing notice in form to be determined by the Commission, shall be served on all the parties.

28. Default in appearance

(1) Where a party to a complaint has been duly served and fails to appear as required, the hearing panel may proceed to hear the respondent and make orders in default of appearance as it may deem fit.

(2) If, on the day fixed for the hearing of a complaint, the respondent appears in answer to the summons but the complainant does not appear, or vice-versa, the hearing panel may, if satisfied that a hearing notice was duly served, proceed to dispense with the complaint on the basis of the evidence before it.

(3) Where a complaint is determined under paragraphs (1) and (2), the party in default may move the Commission to set aside the decision and reinstate the complaint subject to satisfying the Commission that there were satisfactory grounds and reasons for nonattendance at the hearing.

(4) The hearing panel may, upon consideration of the motion under paragraph (3), set aside the decision and fix a new date for the hearing of the complaint with notice to both parties, and upon such terms and conditions as it deems fit.

29. Procedure at hearing

(1) Despite the provisions of this regulation, a hearing panel may adopt a suitable procedure for the purpose of resolving the matter while avoiding unnecessary legal technicalities and formalities.

(2) The parties shall be heard in such order as the hearing panel shall determine and shall be entitled to give evidence, call witnesses, question

any witnesses and address the hearing panel both on the evidence and generally on the subject matter of the complaint.

(3) The hearing panel may, at any time, put questions to either party or any witnesses and may, at its discretion, call such additional evidence or expert testimony as it considers necessary.

(4) The hearing panel shall enter an appropriate decision on part or all of the complaint.

(5) The hearing panel may, for sufficient reason, at any time before or after the beginning of the hearing, adjourn the proceedings and in every such case the Commission shall fix a date for further hearing of the complaint.

(6) In the course of the proceedings, the hearing panel may make such preservatory or interim orders, as it may deem fit and just in the circumstances.

(7) Evidence before the hearing panel may be given orally, or if the hearing panel so orders, by affidavit or written statement, but the hearing panel may at any stage require the personal attendance of any witness, deponent or author of a written statement or document.

(8) At any hearing, the hearing panel may, if it is satisfied that it is just and reasonable to do so with no resulting prejudice to the respondent, permit a party to rely on grounds not stated in his complaint, or as the case may be, his reply, and adduce any evidence not initially presented to the Commission.

(9) Evidence before the hearing panel shall be given on oath or affirmation and for that purpose, the hearing panel shall administer such oath or affirmation.

(10) The evidence of the parties and that of each witness shall be recorded by the hearing panel or by any person authorized to do so by the Commission.

30. Change of Advocate

An advocate who appears for a party at any stage shall be deemed to be that party's advocate throughout the proceedings unless –

- (a) the party to the complaint files a written revocation of the advocate's authority with the Commission;
- (b) the advocate files a written notice of withdrawal from the matter with the Commission.

31. Panel decisions

(1) After concluding the hearing of the matter, the hearing panel shall render a decision reflecting substantive justice.

(2) A decision under paragraph (1) shall be in writing and shall state –

- (a) the nature of the complaint;
- (b) a summary of the relevant facts and evidence adduced before the panel;
- (c) the determination and reasons supporting the panel's decision;
- (d) the remedy to which the complaint is entitled; and
- (e) the order of the panel necessary to enforce the remedy.

(3) Where the decision of the hearing panel is not given immediately after the hearing of the complaint, the panel shall deliver the decision on notice.

(4) After the decision is rendered, the Commission may correct typographical errors without prejudice to the substance of its findings.

32. Orders

(1) The orders made in a decision of the hearing panel shall be extracted, sealed and authenticated as orders of the Commission and shall be signed by the Chairperson.

(2) Orders of the Commission shall be enforced in similar manner as Orders of Court.

33. Copies of proceedings

Parties may obtain a copy of the Commission's decision free of charge.

PART VII – MISCELLANEOUS

34. Amicus curiae

(1) The Commission may, on its own motion or upon invitation, seek to join legal proceedings in a court of law or judicial tribunal as interested party, interveners or amicus curiae, provided that when the Commission is requested to do so it may, upon giving written reasons, decline to be enjoined in such proceedings.

(2) In determining whether to join proceedings as interested parties, interveners or amicus curiae, the Commission shall satisfy itself that the issues before the court –

- (a) are matters of broad public interest;
- (b) are matters raising substantial policy implications;
- (c) are matters affecting public administration;
- (d) are matters relating to administrative justice;
- (e) are matters concerning leadership and integrity; or
- (f) are matters of interest to the Commission in light of its mandate.

35. Forms

The Commission may from time to time determine any other forms for the better carrying out of the provisions of the Act and these Regulations.

36. Cases not covered by these Regulations

Any case not covered by these Regulations shall be dealt with in accordance with such instructions as the Commission may issue from time to time.



10

**THE LESOTHO HUMAN
RIGHTS COMMISSION**
*Itumeleng Shale**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The Kingdom of Lesotho is a former British protectorate which gained independence from Britain in 1966. Since then, it has had a bumpy political landscape. From 1970-1986, Lesotho was under one-party rule and its Constitution was suspended; then, from 1986-1993 it was under military rule, after which it returned to democracy in 1993.¹

Although the Lesotho Human Rights Commission (LHRC) was formed in 2011 with the enactment of the Sixth Amendment to the Constitution Act, a cabinet decision for its establishment was taken as far back as 1995.² The mandate of the LHRC is to oversee the promotion and protection of human rights in Lesotho.³ The LHRC has been long awaited, and its establishment presents an opportunity to reform Lesotho's human

* Lecturer, Faculty of Law, National University of Lesotho.

1 K Matlosa and N Pule, "Civil-Military Relations in Lesotho, 1966-1998: Problems and Prospects", 10(2) *African Security Review* (2001), p 43.

2 CAB/DEC/11/1995 (records in the human rights unit of the Ministry of Law, Constitutional Affairs and Human Rights).

3 Sixth Amendment to the Constitution Act 2011.

rights culture.⁴ Since independence, the country has been known for its discrimination against women,⁵ as well as for police brutality and torture committed with impunity.⁶ The LHRC could serve to help address Lesotho's failure to domesticate ratified treaties⁷ and submit, timeously or at all, its periodic and other state reports to the relevant treaty bodies.⁸ The establishment of the LHRC also supplements pre-existing institutions that advance human rights and democracy, such as the Office of the Ombudsman, the Police Complaints Authority (PCA) and the Directorate of Corruption and Economic Offences (DCEO), whose limited mandates have made it difficult for them to protect human rights fully in Lesotho.⁹

When it was adopted in 1993, the Constitution of Lesotho did provide for the establishment of a human rights commission but it vested this human rights mandate in the Office of the Ombudsman. The formation of the LHRC is thus to be seen as a direct result of the call made by the 1993

4 For instance, in its report on a promotion mission to Lesotho in 2006, the African Commission on Human and Peoples' Rights recommended that Lesotho must establish a national human rights institution in order to bolster the work of the other institutions.

5 I Shale, "Women and Succession To Chieftainship in Lesotho: The Evolution of Customary Law and the 1993 Constitution", 21 *Lesotho Law Journal* (2014), pp 87-105; L Juma, "Chieftainship and Gender Equality in Lesotho: Negotiating the Right To Equality in a Jungle of Pluralism", 22 *Texas Journal of Women and Law* (2012), p 157; KA Acheampong, "The Ramifications of Lesotho's Ratification of the Convention on Elimination of All Forms of Discrimination Against Women", 9(1) *Lesotho Law Journal* (1993), p 71; KA Maope, "A Note on Discrimination and Section 18 of the Constitution of Lesotho", 14(2) *Lesotho Law Journal* (2001), p 395.

6 Amnesty International "Lesotho: Authorities Must Ensure An Independent Investigation into Torture Allegations and Death" (22 February 2019), available at <https://www.amnesty.org/en/documents/afr33/9896/2019/en/> (accessed 22 February 2019); FJ Likoti, "The Implications of Executive Influence on the Police Service: A Study of the Lesotho Mounted Police Since Independence", 2(2) *Lesotho Law Journal* (1999), p 201.

7 Lesotho is a state party to the core UN human rights instruments. It acceded to both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1992, acceded to the International Convention on Elimination of Racial Discrimination (CERD) in 1971, ratified the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) in 1995, acceded to the Convention Against Torture (CAT) in 2001, ratified the Convention on the Rights of the Child (CRC) in 1992, ratified the International Convention on the rights of Migrant Workers and Members of their Families (CMW) in 2005, and acceded to the Convention on the Rights of Persons with Disabilities (CRPD) in 2008.

8 For instance, Lesotho ratified the CAT in 2001 but to date has not submitted its initial state party report. The African Charter was ratified in 1991, its initial report submitted in 2001, and second periodic report only submitted in 2018.

9 Limitations of the Ombudsman and the PCA are illustrated in section 2.2 of this chapter.

World Conference of Human Rights for the establishment of national human rights institutions (NHRIs).¹⁰ Since then, the United Nations, through organs such as the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Development Programme (UNDP), have supported the establishment of NHRIs mandated to protect and promote human rights at the national level.¹¹ In Lesotho, the Constitution was amended in 2011 to provide for the establishment of the LHRC, and in 2016 the Human Rights Commission Act was passed to operationalise the latter.

Despite the existence of a legal framework for an NHRI in Lesotho, to date the Commission has not been operationalised: that is, the commissioners have not been appointed and no other operational steps, including the choice of office space, have been taken. Since there is no practice yet, the analysis of the LHRC in this Chapter will be limited to assessing the LHRC's challenges and opportunities as reflected in the legal framework. The main argument here is that the composition of the Commission is unlikely to ensure pluralism and that the manner in which members are appointed to it undermines its ability to act independently. In developing this argument, the chapter analyses the LHRC's establishment, its conformity with the Paris Principles, its mandate, and its accountability to the public as reflected in both the Sixth Amendment to the Constitution Act of 2011 and the Human Rights Commission Act of 2016.

2 Establishment and evolution of the LHRC

2.1 The model of the LHRC

There are different models of human rights institutions. Lesotho has chosen a human rights commission with a broad mandate to promote, protect, monitor and sustain human rights in the country.¹² The Commission is expected to carry out this broad mandate by performing the following functions:

- (a) Monitor the state of human rights throughout Lesotho;
- (b) Monitor the human right situation of detainees;

10 Vienna Declaration and Programme of Action (A/CONF.157/23) April 1995, on the World Conference on Human Rights, 14-25 June 1993.

11 Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, UN Doc HR/P/PT/4/Rev.1. (2010), p 2.

12 Human Rights Commission Act 2016, section 3.

- (c) Investigate violations of human rights, and if necessary, be responsible for instituting proceedings against such violations in the courts of law ...
- (g) Advocate for ratification, recommend domestication, of international and regional human rights instruments;
- (h) Promote and monitor the harmonisation of national laws and practices with international and regional instruments to which Lesotho is a State Party ...¹³

While the LHRC has a broad mandate as envisaged in the Paris Principles, its ability to deal with socio-economic rights may be limited by the specific mention in the Act that it shall perform its mandate in accordance with the Constitution. This is a challenge because, in its Chapter 2, the Constitution does not recognise socio-economic rights as human rights; these are instead treated, in Chapter 3, as non-justiciable directive principles of state policy.¹⁴

The other challenge in the model is that the LHRC is composed of only three members, namely the chairperson, deputy chairperson and a commissioner. Restricting the Commission to three members may limit its ability to execute a broad mandate that includes investigation, mediation, litigation, inspection of places of detention, and advocating for the ratification and domestication of international instruments. The members may also be inundated with complaints and ultimately fail to discharge these functions properly.

This challenge could be overcome, however, by virtue of the fact that the general management and administration of the Commission are vested in its director-general, who shall be appointed by the Commission in consultation with the minister.¹⁵ Another factor that may alleviate the burden on the commissioners is that the Act provides for the appointment of other members of staff, the number and qualifications of whom depend on the needs of the Commission.¹⁶ Where necessary, the Act also makes provision for secondment of public officers to perform functions for the Commission when the commission so requests.¹⁷ The Commission is at liberty, too, to engage the services of advisors or consultants.¹⁸

So, depending on their number, expertise and the mandate the Commission assigns to them, support staff – whether provisioned by way

13 Human Rights Commission Act 2016, section 7.

14 Constitution of Lesotho 1993, section 25; see also *Khathang-Tema Baits'okoli & Another v Maseru City Council & Others Court of Appeal of Lesotho CA (Civ) 4/2005*.

15 Human Rights Commission Act 2016, section 29.

16 Human Rights Commission Act 2016, section 33(2).

17 Human Rights Commission Act 2016, section 34(1) and (2).

18 Human Rights Commission Act 2016, section 34(3).

of direct employment, secondment or consultancy – could thus assist the Commission to fulfilling its broad mandate.

2.2 Relations with other human rights institutions

When the Constitution was amended in 2011 to establish the LHRC, institutions and units were already in existence within government to oversee the promotion and protection of human rights in Lesotho. For instance, the 1993 Constitution provided for the Office of the Ombudsman.¹⁹ The first Ombudsman was appointed in 1993, a time when Lesotho had recently returned to democratic rule after 16 years of one-party rule (1970-1986) and seven of military rule (1986-1993). Hence, the Ombudsman was seen as an institution that would “strengthen democracy and the democratic process in Lesotho by providing checks and balances in support of good governance”.²⁰ The mandate of the Ombudsman includes investigation or inquiry and recommendation of remedial or preventive action in several areas: injustice, maladministration and unlawfulness in public entities; violation of human rights; corruption; and protection of the environment.²¹

In a 2009 study on the effectiveness of the Ombudsman, Kapa concludes that despite resource constraints, the Office has done fairly well in protecting human rights and combating injustice and maladministration in the public service.²² However, the Office has faced a number of challenges that prevent it from fully protecting human rights in Lesotho. First, the mandate conferred on the Ombudsman is limited in that section 19(1) of the Ombudsman Act excludes the King, Parliament, cabinet, courts of law and the Public Service Commission from the Ombudsman’s scope of investigation.²³ Secondly, the Ombudsman lacks the authority to investigate allegations of human rights violations in the private sector.²⁴ That is, victims of human rights violations committed in the private sector or by any of the abovementioned public offices cannot be investigated by

19 Constitution of Lesotho, 1993 sections 134-135.

20 P Mosisili, “Preparing the Lesotho Ombudsman for the New Millennium”, in V Ayeni (ed) *The Ombudsman and Good Governance in the Kingdom of Lesotho* (2000), p 12.

21 Ombudsman Act 1996, section 7.

22 MA Kapa, “Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The office of the Ombudsman in Lesotho”, 39 *EISA Research Report* (2009), p 34.

23 Ombudsman Act 1996, section 19.

24 Section 135(2) of the Constitution sets out the scope of operation for Office of the Ombudsman to investigate all departments of government and their members; any local government authority and its members or officers; and any statutory corporations, their members and officers.

the Office of the Ombudsman. Thirdly, the Ombudsman does not have the power to enforce his or her decisions.

Another pre-existing institution is a human rights unit that was established in 1995 through a cabinet decision as an organ of government responsible for promoting, protecting and monitoring human rights in Lesotho.²⁵ At the time of its establishment, the unit was part of the Ministry of Justice, and is currently located in the Ministry of Law, Constitutional Affairs and Human Rights.²⁶ Since its establishment, the unit has acted as a bridge between government and civil society organisations (CSOs) in matters of human rights. It has been responsible for the preparation and submission of state party reports, educating law enforcement officers and the general public on human rights, and acting as a focal point for regional and international organisations such as the OHCHR, African Commission and other human rights mechanisms. Among the challenges the human rights unit faces are financial and human resource constraints. It is currently staffed by only two people, a chief legal officer and a legal officer. These challenges have hindered its performance in carrying out its mandate.²⁷ Another challenge is that, inasmuch as it is an arm of government, the unit lacks the independence necessary for fulfilling its mandate without interference.

Other oversight bodies whose mandates have a bearing on human rights are the PCA and the DCEO. The PCA is a statutory body that was established in terms of section 22 of the Police Service Act of 1998 and became operational in 2003.²⁸ It is a civilian body with the mandate to oversee policing by investigating complaints by the public about the conduct of members of the Lesotho Mounted Police Service (LMPS) and reporting its findings to the police authority, which in terms of the Act is the Minister.²⁹

Two major challenges that the PCA faces are inaccessibility and lack of powers beyond the investigation of allegations and recommendation of remedial action. In terms of accessibility, the PCA is, first and foremost, unknown to the public in Lesotho. Secondly, the public has no direct access to it. In terms of the Act, complaints can be lodged with the PCA only through the commissioner of police and the police authority. Lodging complaints through the commissioner of police involves navigating a lot of

25 See note 2.

26 *Ibid.*

27 Interview with the Chief Legal Officer, Human Rights Unit (25 February 2019).

28 Police Service Act 7 of 1998, section 22.

29 *Ibid.*, section 22(3).

bureaucracy in that they have to go through the station commander of the police officer/s alleged to have committed the misconduct; the station commander then escalates the matter to the officer in charge of the district concerned, who, if the matter is not resolved, takes it to the officer responsible for the region and thereafter the Inspectorate, Complaints and Discipline (IC&D) office. It is only if the IC&D is unable to resolve the matter that the commissioner of police refers it to the PCA.³⁰

Owing to this cumbersome procedure, victims of police misconduct opt for litigation for damages against the government rather than reporting to the PCA. For the few who do opt to report, cases get sifted through the procedure above, with very few reaching the PCA. This process has also been criticised for lacking transparency and leading to abuses of power and unnecessary delays.³¹

The DCEO was established in 2005 through the Prevention of Corruption and Economic Offences Act of 1999. The mandate of the DCEO is to fight corruption through a three-pronged approach combining public education, prevention and investigation. To date, the DCEO has investigated and initiated the prosecution of cases involving public officials, private individuals and companies. One of the challenges the DCEO faces is that it has limited capacity in terms of staffing and office space; as a result, it operates only from the capital city of Maseru and lacks offices in the country's other nine districts.

Both the Sixth Amendment to the Constitution Act and the Human Rights Commission Act are silent on the relationship between the Commission and those pre-existing oversight bodies that to one degree or another have a human rights mandate. This silence leads to a conclusion that the LHRC is meant to exist side by side with them. The problem with this, however, is that it can lead to overlap, duplication and unhealthy competition between institutions.

Despite the legal framework's silence on the matter, it is clear that, once it becomes operational, the Commission will take over some of the functions initially performed by these bodies. For instance, while the inspection of detention facilities is, in terms of the Ombudsman Act, one of the functions of the Ombudsman, section 7(b) of the Human Rights Commission Act tasks the Commission with this function. Similarly, for a

30 This procedure is not contained in the Police Service Act, but forms part of the standard procedures adopted by the LMPS throughout the country.

31 Lesotho's Initial Report to the Committee on Migrant Workers, UN Doc CMW/C/LSO/1 (13 April 2016), paragraph 38.

long time the human rights unit has been responsible for promoting human rights and acting as a link between the state, CSOs and the international community. The same powers are now also vested in the Commission. The Police Service Act establishes the PCA as an oversight body with the mandate to investigate human rights violations and abuse of power by the police. This function may be transferred the Commission given that under section 7(c) of the Human Rights Commission Act, the Commission is empowered, inter alia, “[to] investigate violations of human rights”.

To avoid overlap and duplication of functions among these oversight bodies, the best approach would be for the Commission to foster good relations with them with a view to having them complement one another and work collaboratively towards a shared goal. For instance, the Ombudsman could continue with its mandate of dealing with maladministration, while human rights issues, including the inspection of detention facilities, are reserved for the Commission. Similarly, the cases of police brutality investigated by the PCA could be taken over by the Commission for purposes of litigation, given that the PCA is limited to investigation and recommendation and does not have the power to take further steps.

The relationship between, and applicable modes of operation among, the Commission and each of these bodies should be determined in the regulations the Commission adopts once it becomes operational. Clarification of this kind would help to avoid a multiplication of functions, a situation which, as EISA has noted with respect to South Africa, “[can] create overlapping jurisdictions, which is very confusing for the public ... costly to the taxpayer, and ... creates [the] possibility of unhealthy competition”³²

2.3 Evolution of the Human Rights Commission

Although the Commission has not yet commenced operations, its evolution may be traced as far back as 1995, when a cabinet decision for its establishment was taken.³³ The decision was clear that two separate entities were to be formed – the human rights unit, as an arm of government, and the human rights commission, as an independent entity.³⁴

32 Electoral Institute for the Sustainability of Democracy in Africa (EISA) 2009; see also C Musuva, “Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa’s Public Protector and Human Rights Commission”, 41 *EISA Research Report* (2009).

33 See note 2.

The human rights unit was established and operationalised immediately. However, it took 16 years and enormous pressure from CSOs and the international community for the Sixth Amendment to the Constitution, establishing the Commission, to be adopted by Parliament. It took a further five years for an enabling law to be enacted, and three years hence the LHRC has not commenced operations – that is to say, 24 years after the notion was conceived of setting up a human rights commission in Lesotho, this institution is still not up and running.

The state of affairs can be attributed to several factors, chiefly so to resource constraints and the government's lack of political will to support the functions of the Commission. With regard to political will, the fear may well be, when it goes operational, the Commission will expose the human rights violations that take place in Lesotho. Institutions, such as the DCEO, with no power to make binding decisions, have succeeded in investigating and initiating prosecutions of government officials, including ministers, a former deputy prime minister, and other high-ranking officials. Given that the Commission is independent from government and indeed has the power to make binding decisions, there are presumably concerns that it would investigate and prosecute government officials implicated in human rights violations such as murder and torture.³⁵ Another factor that may have hindered the Commission's operationalisation is consideration of the resources that would be needed for the salary packages of the three commissioners, the director-general and the support staff.

A further key aspect of the LHRC's evolution is a case that challenged the manner in which the Human Rights Commission Act was adopted. Immediately after the Act was adopted, two CSOs that were at the forefront of advocacy for establishing an NHRI in Lesotho, Development for Peace Education (DPE) and the Transformation Resource Centre (TRC), lodged a case in the Constitutional Court challenging the manner in which the Act was passed. The basis of the case was that, in view of the Commission's importance in the protection of human rights, there ought to have been broad public participation before the Act was made law. The organisations claimed they had been denied an opportunity to present proposals on sections of the Human Rights Commission Bill of 2015.³⁶

Among the arguments raised in this case was that there had been no public participation in the enactment of the Human Rights Commission

34 *Ibid.*

35 See note 6.

36 *DPE & TRC v Speaker of National Assembly & Others* Constitutional Case No 5 of 2016.

Act, contrary to section 20 of the Constitution and to National Assembly Standing Orders 54 and 79. The Human Rights Commission Bill was first tabled before the National Assembly on 2 November 2015. Although the Chairperson of the Portfolio Committee to the National Assembly said there had been wide consultation with all interested stakeholders, including a United Nations team,³⁷ the two CSOs disputed this. The latter had drafted proposed amendments to the Bill, but these were not considered because the Bill had been sent to the Senate already on 9 December 2015. In April 2016, the Clerk of the National Assembly, acting pursuant to section 80(3) of the Constitution and National Assembly Standing Order No 64(7), recalled the Bill to the National Assembly since the time for the Senate to debate the Bill had lapsed. This recall of the Bill was labelled a violation of the right to participate in public affairs, as contained in section 20 of the Constitution, since the applicant parties had not had any other opportunity to present the proposed amendments which they had prepared.

The Court held, however, that unlike the South African Constitution, which specifically guarantees “public access and involvement” in the parliamentary legislative process, the Constitution of Lesotho does not do so. It held that section 20 of the Constitution provides for the right to participate in public affairs through freely chosen representatives, namely Members of Parliament, and that “anyone else including the citizens, are strangers and have no right of audience in the National Assembly”.³⁸ The Court held, furthermore, that although National Assembly Standing Orders 76 and 54 provide for public participation, the extent of such is at the discretion of Parliament.³⁹

While the Court acknowledged the need for public participation in the enactment of the Human Rights Commission Act, it stated that such participation remained at the discretion of the National Assembly portfolio committee and would have best taken place in 2011 during the enactment of the Sixth Amendment to the Constitution Bill of 2011.⁴⁰ Accordingly, the case was dismissed. The Human Rights Commission Act consequently remains with provisions that are not compliant with the Paris Principles as far as the composition, appointment and independence of the LHRC are concerned.

37 *Ibid*, paragraph 14.

38 *Ibid*, paragraphs 24 and 43.

39 *Ibid*, paragraphs 25-27 and 53.

40 *Ibid*, paragraphs 56-57.

3 The nature of the Human Rights Commission

3.1 Legal framework

The Human Rights Commission of Lesotho is a creature of the Constitution. It was established by the Sixth Amendment to the Constitution Act 2011 which amends the Constitution by creating a new chapter referred to as Chapter XIA. Section 133A of the Constitution, as amended, provides that “[t]here is established a Human Rights Commission (in this Chapter referred to as the Commission) which shall be independent and free from interference and subject only to this Constitution and any other law”.

The administration and regulation of the Human Rights Commission and other matters related to it are governed by the Human Rights Commission Act of 2016.⁴¹ The Act contains provisions relating to the Commission’s objectives, status, headquarters and functions, as well as to qualification for appointment to the Commission, tenure, and removal from office. The Act also provides guidance on the jurisdiction of the Commission and procedures for filing complaints, conducting enquiries and investigations, and making decisions.

3.2 Independence

The independence of an NHRI can be assessed from the conformity of its legal framework with the Paris Principles. The indicators of independence set out in the Paris Principles include pluralism in composition of the commission, adequacy of resources and funding, and clearly defined tenure of office for the members of the commission.⁴² It is with reference to these indicators that the LHRC’s independence is assessed in this section.

As far as the law is concerned, section 133A of the Sixth Amendment Act provides that the Commission “shall be independent and free from interference and subject only to this Constitution and any other law”. Its independence from government is reinforced in section 4 of the Human Rights Commission Act, which provides that, in terms of status, the Commission shall be a body corporate with perpetual succession and a common seal, with the capacity to sue or be sued in its own name and to enter into financial contracts and other undertakings. This implies that the

41 Preamble of the Human Rights Commission Act 2016.

42 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

Commission is entirely distinct from government and as such has the autonomy to perform its functions free from governmental interference.

This apparent independence is threatened, however, by the procedures for appointment of the members of the Commission (as discussed in more detail in the next section). The fact that the commissioners are, in terms of section 8 of the Human Rights Commission Act, appointed by the King on the advice of the Prime Minister would seem to imply that the Commission is but one of the organs of government and therefore not truly independent.

With regard to pluralism, the challenge is that the commission is composed of only three members. It is hence unlikely that they could ensure pluralistic representation of all the social forces in Lesotho, as required by the Paris Principles. This is therefore one of the bases on which the LHRC could fail to pass the test of independence.

The other indicator of independence relates to provisions concerning the tenure of office of members of an NHRI. The Human Rights Commission Act specifies that the period of tenure is seven years for the chairperson and five years for the other two commissioners.⁴³ This specification ensures a degree of independence in that members of the Commission will know that their period of service is not dependant on their pleasing the government of the day and that they are in a position to perform their functions without fear or favour.

Security of tenure is reinforced in section 10 of the Human Rights Commission Act, which stipulates procedures for removal of commissioners from office. It provides that “a member of the commission may be removed from office only for inability to exercise the functions of his office, whether arising from infirmity of body or mind, or any other cause ... or misbehaviour”. While this section protects members of the Commission from being removed arbitrarily, the problem is that the term “misbehaviour” is not defined – as such, it is subjective in meaning and creates the possibility for commissioners to be removed for acts that do not concern their ability to perform their mandate, as has been the case with the removal of leaders of the judiciary in Lesotho.⁴⁴

This problem could be overcome by virtue of the fact that, unlike the removal of the president of the court of appeal and the Chief Justice under

43 Human Rights Commission Act 2016, section 9.

44 I Shale, “Independence and Accountability of the Judiciary in Lesotho: The Need for Reform of the Constitutional Process for Appointment, Discipline and Removal of Judges” 26(1) *Lesotho Law Journal* (2018), p 165.

the Constitution, the determination of conduct that warrants investigation is made not by the Prime Minister but Judicial Service Commission (JSC).⁴⁵ Nevertheless, the JSC arguably lacks full independence due to its composition: in terms of section 132 of the Constitution, it is made up of the Prime Minister's appointees, namely the Chief Justice,⁴⁶ the Attorney-General,⁴⁷ the chairperson of the Public Service Commission,⁴⁸ and a serving or former judge.⁴⁹

3.3 Appointment procedure

Section 133B of the Sixth Amendment provides for the King to appoint, in accordance with the advice of the Prime Minister, a three-member commission consisting of a chairperson and two other members.⁵⁰ The same procedure is set out in section 8 of the Human Rights Commission Act, which governs the qualification for appointment as a commissioner. The exclusive discretion given to the Prime Minister to appoint members of the Commission creates the risk of an executively controlled Commission that is unlikely to be able to act independently. This system of appointment is also used in making judicial appointments and has exposed the judiciary to political manipulation.⁵¹ It thus presents a real risk that commissioners will be appointed on the basis of political inclinations and without regard to their competence in the protection and promotion of human rights.

3.4 Financial autonomy

The Human Rights Commission Act creates room for the Commission's financial autonomy by stating that the government shall provide the Commission with adequate funds annually to enable it to discharge its functions.⁵² The Act also gives the Commission the right to receive funds or gifts, whether movable or immovable property, without any conditions,

45 Human Rights Commission Act 2016, section 10(3).

46 The Chief Justice is appointed by the King on the advice of the Prime Minister in terms of section 120 of the Constitution of Lesotho 1993.

47 The Attorney-General is appointed by the King on the advice of the Prime Minister in terms of section 140 of the Constitution of Lesotho 1993.

48 The Chairperson is appointed by the King on the advice of the JSC in terms of section 136 of the Constitution of Lesotho 1993.

49 Judges are appointed by the King on the advice of the JSC in terms of section 120 of the Constitution of Lesotho 1993.

50 Sixth Amendment to the Constitution Act 2011, section 133B.

51 See note 45.

52 Human Rights Commission Act 2016, section 35(1).

as long as they are from lawful sources and used only for the purposes of promoting awareness and providing education in relation to human rights or carrying out other institutional operations as approved by the Commission.⁵³ If it is duly implemented, this section ensures that, apart from providing funds, the government shall not have a say in the financial dealings of the Commission and hence not interfere with its financial autonomy.

3.5 Professional skills and knowledge

Due to its limited composition of only three members, the Commission, when it finally commences, is likely to have a fairly limited base of professional skills and knowledge. Furthermore, limiting it to three members will not ensure a pluralist representation of society. The minimum standard in the Paris Principles as far as pluralism is concerned is that an NHRI must have representation from CSOs and religions and also represent academics and experts.⁵⁴ Such diversity certainly cannot be achieved with only three members. The LHRC's limited composition thus creates the risk of confining representation to academics with no practical experience, or to practitioners with no expertise in human rights.

3.6 Relations with civil society organisations

The Human Rights Commission Act provides that the LHRC shall, *inter alia*, develop and maintain working relations with organisations and representatives of civil society in Lesotho.⁵⁵ The extent of the pressure CSOs have exerted on the government to initiate the Commission is an indication of how eager they are to forge relationships with the Commission. This is also reflected in their proposal of amendments to the laws regulating the Commission, as was the case in the DPE and TRC case discussed earlier.⁵⁶

53 *Ibid*, section 35(2).

54 Paris Principles, principle 1 on Composition and guarantees of independence and pluralism.

55 Human Rights Commission Act, section 7(i).

56 See note 36.

Many of Lesotho's CSOs engage in the field of human rights, some in human rights in general⁵⁷ and others with a focus on specific themes or the rights of specific groups.⁵⁸ The work of these organisations includes human rights education, advocacy for legislative reform, and holding government accountable for human rights violations, for example by litigating to obtain redress for the victims of such violations.⁵⁹ As such, collaboration between the Commission and CSOs would go a long way in addressing the human rights challenges in Lesotho.

Because most of these organisations have direct connection with the public at grass-roots level through chiefs, councillors, teachers and other stakeholders, they could be an entry-point for the Commission's decentralisation of its functions.⁶⁰ The Commission could also draw on pre-existing research conducted by various organisations and thereby enhance its understanding of human rights trends in Lesotho.⁶¹

3.7 Accessibility

The Human Rights Commission Act provides that the headquarters of the Commission shall be in Maseru, which is the capital city of Lesotho.⁶² The Act also mandates the Commission to ensure that its activities are decentralised throughout the country. For obvious reasons, a concrete analysis of the Commission's accessibility cannot be made at the moment. However, it should be noted that decentralisation is a major challenge in Lesotho. Many institutions which protect human rights, such as Legal Aid

57 For instance, Transformation Resource Centre, Development for Peace Education, and Catholic Commission for Justice and Peace.

58 For instance, Federation of Women Lawyers (FIDA), Women and Law in Southern Africa (WILSA), Gender Links and others focus on women, while the Lesotho National Federation of Organisations of the Disabled (LNFOD) and other organisations under it work in the field of the human rights of persons with disabilities.

59 For instance, LNFOD joined as an applicant in the case of *Koali Moshoeshe & Other v Director of Public Prosecutions and Others High Court of Lesotho Constitutional Case No 14 of 2017*, which challenged the denial of legal capacity to persons with intellectual disability on the basis of their mental capacity. FIDA and WILSA joined as *amicii curiae* in the case of *Senate Gabasheane Masupha v Senior Resident Magistrate for the district of Berea and Others C of A (CIV) 29/2013 [2014] LSCA*, which challenged the exclusion of female children in succession to chieftainship.

60 S Shale, "Can Civil Society Organizations Make the Human Rights Commission Effective and Relevant?", 30(2) *Work for Justice* (2012), p 17.

61 For instance, the TRC has published a documentary on torture, WILSA has published research on human trafficking, and the Lesotho National Council of Non-Governmental Organisations (LCN) has published research on the status of women in the country.

62 Human Rights Commission Act 2016, section 5.

Counsel, the Master of the High Court, DCEO and PCA are present only in the capital city and absent in the other nine districts. It would be imperative for CSOs to collaborate with the Commission to ensure that it extends its services to rural areas in order to advance the full promotion and protection of human rights in Lesotho.

4 The mandate of the Commission

The LHRC has a broad mandate, ranging from monitoring the rights of detainees, investigation and litigation of human rights violations, and education and training on human rights to advocating for the ratification and domestication of human rights treaties and developing working relations with national and international organisations in the field of human rights.⁶³ The list is not exhaustive as the Commission is mandated too to “undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights”.⁶⁴ The Commission also has a mandate to receive, investigate and make decisions on allegations of human rights violations, with its decisions being binding.⁶⁵

As far as the law on paper is concerned, the Commission’s broad mandate is in line with the Paris Principles and addresses challenges that face the other human rights oversight bodies, such as the PCA and Ombudsman, whose recommendations are not binding. The only problem is that the Commission is mandated to perform its functions in line with the Constitution, and the Constitution renders socio-economic rights unjusticiable.

5 Public accountability

The Human Rights Commission Act seeks to ensure that the Commission is accountable to the public in relation to its finances as well as the cases, investigations and complaints it handles. Section 37 requires the Commission to submit to Parliament, at the end of each financial year, an annual report of its activities that provides accurate and transparent information on its financial affairs, complaints, findings and interventions, promotional activities, cases lodged in courts, and any other matters relating to human rights which the Commission believes warrant discussion and are of interest to Parliament and the public.⁶⁶ The

63 Human Rights Commission Act 2016, section 7(a)-(j).

64 Human Rights Commission Act 2016, section 7(k).

65 Human Rights Commission Act 2016 sections 16-22.

Commission is also given leave to submit a special report where necessary; in turn, Parliament has the power to request that the Commission furnish it with a relevant report at any time,⁶⁷ that is, should the Commission not perform its duty as mandated, as might be reflected in the annual report or a report requested by Parliament. The Act thus keeps the Commission accountable to the public through annual and special reports that are filed by the Commission or requested by Parliament.

6 Conclusion

In view of the limitations of existing human rights institutions such as the Ombudsman, PCA and DCEO, there is an urgent need to speed up the launch of a fully-fledged NHRI in Lesotho. Nevertheless, various weaknesses in the LHRC's legal framework, in particular the failure to comply with minimum standards in the Paris Principles regarding pluralism and appointment procedures, raise serious doubts about the ability of the Commission to function independently. Restricting the Commission to three members also risks limiting its pool of expertise and making its commissioners more susceptible to intimidation and political manipulation than they would be if they were greater in number.

The model of NHRI that Lesotho has opted for will complement the already existing oversight bodies in that their mandates are limited to investigation and they lack the power to take legal action against persons or entities alleged to have violated human rights. By enabling the Commission to have a broad spectrum of support staff by way of direct employment, secondment or consultancy, the Act presents an opportunity for addressing the challenges of limited expertise which the Commission is likely to encounter. Vested with the power to receive and decide on complaints, the Commission also offer hope for victims of human rights violations whose cases before the High Court are stuck in a backlog.

As noted, then, it is necessary that the government speed up the process of operationalising the Commission. In the meantime, the sections of the Human Rights Commission Act governing appointment procedures and the composition of the Commission need to be revised to ensure that Commission is recognised at both the national and international level as a credible human rights institution. This may assuage concerns among the public that the Commission is nothing more than one of those government

66 Human Rights Commission Act 2016, section 37(1) and (2).

67 Human Rights Commission Act 2016, section 37(3) and (4).

agencies in whose presence human rights violations will continue with impunity.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The amended 1993 Constitution of Lesotho provides for both a Human Rights Commission and an Ombudsman, both of whom have powers to deal with human rights issues. The relevant provisions state as follows:

CHAPTER XIA: HUMAN RIGHTS COMMISSION

133A. Establishment of the Human Rights Commission

There is established a Human Rights Commission (in this Chapter referred to as “the Commission”) which shall be independent and free from interference and subject only to this Constitution and any other law.

133B. Composition

The Commission shall consist of the chairman and two other members who shall be appointed by the King acting in accordance with the advice of the Prime Minister.

133C. Qualification for appointment

A person shall not be qualified to be appointed a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless he or she is satisfied that the person –

- (a) has extensive experience in human rights and related disciplines;
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free from bias or prejudice; and
- (c) does not take an active part in, or has retired from, the party politics or political party activity.

133D. Tenure of office

Subject to the provisions of this section, the office of a member of the Commission shall become vacant –

- (a) at the expiration of seven years, in the case of the chairman and five years in the case of other commissioners, from the date of his appointment; or
- (b) if he becomes a public officer; or

- (c) if he becomes a member of either House of Parliament, a local authority, a candidate for election to Parliament or a local authority, or an officer of a political party.

133E. Removal from office

1. A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) incompetence in the performance of the functions of his office or misbehaviour (including failure to discharge his duties in a fair manner free from prejudice) and shall not be removed except in accordance with this section.

2. A member of the Commission shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the King that he ought to be removed from office for inability, incompetence or misbehaviour.

3. If the Judicial Service Commission, in the case of either the Chairman of the Commission or any other member, represents to the King that the question of removing a member of the Commission under this section ought to be investigated, then –

- (a) the King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Prime Minister from among persons who hold or have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts of the enquiry to the King and recommend to him whether the member ought to be removed under this section.

4. If the question of removing a member of the Commission has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend that member from the exercise of the functions of his office and any such suspension may, at any time, be revoked by the King, acting in accordance with such advice as Prime Minister and shall in any case cease to have effect in the tribunal recommends to the King that the member should not be removed.

133F. Functions of the Commission

The Commission shall perform the following functions –

- (a) monitor the state of human rights throughout Lesotho;
- (b) monitor the human rights situation of detainees;
- (c) investigate violations of human rights and, if necessary, be responsible for instituting proceedings against such violation in the courts of law;
- (d) sensitise the public on its work, the nature and meaning of human rights;

- (e) develop and deliver education and training programmes as necessary to the general public;
- (f) submit opinions, recommendations, propositions and reports to public institutions on human rights issues, using the media and other means;
- (g) advocate for ratification, and recommend the domestication of international and regional human rights instruments;
- (h) promote and monitor the harmonisation of national laws and practices with international and regional human rights instruments ratified by Lesotho;
- (i) develop and maintain working relations with organisations and representatives of civil society in Lesotho;
- (j) work in cooperation with the United Nations, regional mechanisms, national human rights institutions of other countries, in the areas of the promotion and protection of human rights, and
- (k) undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights.

133G. Assistance to the Commission

The Government shall accord such assistance as the Commission may require to enable it to protect its independence, dignity and effectiveness, subject to this Constitution and any other law.

133H. Annual report of the Commission

1. The Commission shall prepare, submit and present an annual report of its activities to Parliament.
2. If it considers it necessary, in case of an urgent and specific issue, the Commission may submit a special report to Parliament at any time, which will be treated by Parliament in the same manner as an annual report.

B.2 Legislative and regulatory instruments

The legislation regulating the Human Rights Commission is Act No 2 of 2016, the Human Rights Commission Act, 2016. It states as follows:

Arrangement of Sections

Section

PART 1 – PRELIMINARY

- 1) Short title and commencement

- 2) Interpretation

PART II – THE HUMAN RIGHTS COMMISSION

- 3) Objectives of the Commission
- 4) Status of the Commission
- 5) The headquarters of the Commission
- 6) Composition of the Commission
- 7) Functions of the Commission
- 8) Qualification for appointment
- 9) Tenure of office
- 10) Removal from office
- 11) Meeting of the Commission
- 12) Remuneration and allowances of members of the Commission
- 13) Oath of office
- 14) Assistance to and cooperation with the Commission
- 15) Duty to disclose

PART III – INVESTIGATIONS

- 16) Jurisdiction of the Commission
- 17) Procedures for filing a complaint
- 18) Complaints process
- 19) Enquiries by the Commission
- 20) Duty to investigate
- 21) Entering and searching of premises and attachment and removal of articles
- 22) Decisions of the Commission
- 23) Protection against obstruction
- 24) Mediation, conciliation and negotiation
- 25) Institution of legal proceedings by Commission
- 26) Communication of decision or finding
- 27) Human Rights Court

PART IV – SPECIAL POWERS FOR INSPECTING PLACES OF DETENTION

- 28) Inspection of places of detention

PART V – ADMINISTRATIVE PROVISIONS

- 29) The director general
- 30) Tenure of office
- 31) Qualification for appointment of director general
- 32) Removal of staff of the Commission
- 33) Appointment of the Commission
- 34) Secondment of staff

PART VI – FINANCIAL PROVISIONS

- 35) Funds and gifts received by the Commission
- 36) Accounts, funds and audit

PART VII – GENERAL PROVISIONS

- 37) Annual report
- 38) Regulations

SCHEDULE – OATH

ACT No2 OF 2016

Human Rights Commission Act, 2016

An Act to provide for the administration and regulation of the Human Rights Commission of Lesotho as established by the Constitution and for related matters.

Enacted by the Parliament of Lesotho.

PART I – PRELIMINARY

Short title and commencement

1. This Act may be cited as the Human Rights Commission Act, 2016 and shall come into operation on the date of its publication in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires –
“Commission” means the Human Rights Commission established under section 133A of the Constitution;

“human rights” includes all rights guaranteed in the Constitution, and in the international and regional human rights instruments to which Lesotho is a State Party;

“Chairperson” means the Chairperson of the Commission appointed under section 133B of the Constitution;

“Deputy Chairperson” means the Deputy Chairperson of the Commission appointed under section 133B of the Constitution;

“member” means a member of the Commission appointed under section 133B of the Constitution;

“Minister” means the minister responsible for human rights;

“prescribed” means prescribed by regulations made under section 38(1).

PART II – THE HUMAN RIGHTS COMMISSION

Objectives of the Commission

3. The main objectives of the Commission are to promote, protect, monitor and sustain human rights in Lesotho in accordance with –

- (a) the Constitution and other laws of Lesotho; and
- (b) regional and international human rights instruments to which Lesotho is a State Party

Status of the Commission

4(1) The Commission –

- (a) subject to the Constitution and this Act, shall be independent, and impartial in the performance of its functions and exercise of its powers;
- (b) shall be a body corporate with perpetual succession and a common seal;
- (c) may sue or be sued in its own name;
- (d) may, subject to and for the purposes of this Act –
 - (i) enter into contracts, acquire, purchase, take hold of and own movable property of every description;
 - (i) convey, assign, surrender, yield, charge, mortgage, demise, re-assign, transfer or otherwise dispose of, or deal with any movable or immovable property or any interest in the property vested in the Commission upon such terms as it considers necessary; and
 - (iii) make any other undertakings it considers necessary.

(2) The common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

The headquarters of the Commission

5(1) The offices of the Commission shall be situated at Maseru, the capital city of Lesotho, which shall be its headquarters.

(2) The Commission shall, in the exercise of its mandate, make its services accessible to the entire population and may open district offices as and when such a need arises

Composition of the Commission

6. Subject to section 133B of the Constitution, the Commission shall consist of the following members whose appointment shall be gender sensitive –

- (a) Chairperson;
- (b) Deputy Chairperson who shall act in the absence of the Chairperson; and
- (c) Commissioner.

and shall, in accordance with the Constitution, be appointed by the King acting on the advice of the Prime Minister.

Functions of the Commission

7. The Commission shall perform the following functions –

- (a) monitor the state of human rights throughout Lesotho;
- (b) monitor the human rights situation of detainees;
- (c) investigate violations of human rights and, if necessary, be responsible for instituting proceedings against such violations in the courts of law;
- (d) sensitise the public on its work, the nature and meaning of human rights;
- (e) develop and deliver education and training programmes as necessary to the general public;
- (f) Submit opinions, recommendations, propositions and reports to public institutions on human rights issues, using the media and other means;
- (g) advocate for ratification, and recommend the domestication, of international and regional human rights instruments;
- (h) Promote and monitor the harmonisation of national laws and practices with international and regional human rights instruments to which Lesotho is a State party;
- (i) develop and maintain working relations with organizations and representatives of civil society in Lesotho;
- (j) work in cooperation with the United Nations, regional mechanisms, national rights institutions of other countries in the areas of the promotion and protection of human rights; and

- (k) undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights

Qualification for appointment

8. A person shall not be qualified to be appointed as a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless the Prime Minister is satisfied that the person –

- (a) has extensive experience in human rights and related disciplines;
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free bias or prejudice; and
- (c) does not take an active part in party politics or has since retired from active party politics.

Tenure of office

9. Subject to the provisions of this section, the office of a member of the Commission shall become vacant –

- (a) at the expiration of seven years, in the case of the chairman and five years in the case of other commissioners from the date of his appointment; or
- (b) if he becomes a public officer or resigns from office; or
- (c) if he becomes a member of either House of Parliament or a local authority, or an officer of a political party;
- (d) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified to be appointed as such under section 8.

Removal from office

10(1) A member of the Commission may be removed from office only for inability to exercise the functions of his office, (whether arising from infirmity of body or mind or any other cause) incompetence in the performance of the functions of his office or misbehaviour, (including failure to discharge his duties in a fair manner free from prejudice) and shall not be removed in accordance with this section.

(2) A member of the Commission shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the King that he ought to be removed from office for inability, incompetence or misbehaviour.

(3) If the Judicial Service Commission represents to the King that the question of removing a member of the Commission under this section

ought to be investigated, the King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Prime Minister from among persons who hold or have held high judicial office, and the tribunal shall enquire into the matter and report on the facts of the enquiry to the King and recommend to him whether or not the member ought to be removed under this section.

(4) If the question of removing a member of the Commission has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend that member from the exercise of the functions of his office and any such suspension may, at any time, be revoked by the King, acting in accordance with the advice of the Prime Minister, and shall in any case cease to have effect if the tribunal recommends to the King that the member should not be removed from office.

Meetings of the Commission

11(1) The Commission shall meet, at least, every month or when it is necessary and shall keep minutes of all its meetings.

(2) The meetings of the Commission shall be attended by all commissioners and any senior staff that the Commission may instruct to attend.

(3) The quorum for the meetings shall be two Commissioners.

(4) The meetings of the Commission shall be chaired by the Chairperson or Deputy Chairperson in the absence of the Chairperson.

(5) The Commission shall regulate its own rules of procedure.

Remuneration and allowances of members of the Commission

12. A member of the Commission may be paid such a salary and allowances as may be prescribed under the Statutory Salaries Act, 1972

Oath of office

13(1) A member shall, before assuming the duties of his office, take and subscribe to an oath of office before the Chief Justice as set out in the Schedule.

(2) A member of staff of the Commission shall maintain secrecy as stipulated in the terms and conditions of service in respect of matter that come to their knowledge in the exercise of their functions.

Assistance to and cooperation with the Commission

14(1) The Government shall accord such assistance as the Commission may require to enable it to protect its independence, dignity and effectiveness, subject to the Constitution, this Act and any other law.

(2) State organs, civil societies and private entities shall, when so requested by the Commission, assist and cooperate fully with the Commission in its investigations.

Duty to disclose

15(1) A member shall not, in any way, directly or indirectly, be involved in a matter which he has financial or any other personal interest.

(2) Where a member has an interest, the member shall declare the nature and extent of the interest to other Commissioners in accordance with subsection (3).

(3) The declaration shall be made –

- (a) in a meeting of the Commissioners; or
- (b) by notice, in writing, to the Chairperson

PART III – INVESTIGATIONS

Jurisdiction of the Commission

16(1) The Commission shall have jurisdiction on all citizens of Lesotho, including those living outside Lesotho, and non-citizens of Lesotho living in Lesotho who use services offered by an embassy or a consular of Lesotho

(2) The Commission shall have jurisdiction over any act or omission in violation of a human right

Procedures for filing a complaint

17. The procedure and form for filing a complaint in a violation of human rights shall be as prescribed

Complaints process

18(1) The Commission shall upon receipt of a complaint filed under section 17 and subject to its jurisdiction, determine the admissibility of the complaint

(2) In all cases in which the Commission decides not to intervene or end an intervene, or end an intervention, the Commission shall, within 30 days

of making the decision, notify a complainant of its decision and advise the complainant of other potential remedies available and of how may be accessed.

(3) Where in its judgment the Commission finds it necessary, appropriate and potentially beneficial, it may decide to use mediation or conciliation to seek amicable solution between the parties to a complaint or potential complaint

Enquiries by the Commission

19(1) The Commission may, on its own motion or on a complaint to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of a person or group of persons.

(2) The Commission shall not inquire into any complaint relating to any allegation of the infringement of human rights which –

- (a) is the subject matter of any proceedings pending in any court, including any appeals;
- (b) has been finally determined by any court; or
- (c) is a matter involving the relations or dealings between the Government of Lesotho and any other Government or an international organisation or an organisation granted immunity under any law.

(3) If the Commission inquires into an allegation under subsection (1) and during the pendency of the allegation becomes the subject matter of any proceedings in any court, the Commission shall immediately cease to do the inquiry.

(4) The Commission may refuse to commence or discontinue an enquiry which has commenced if, in the opinion of the Commission –

- (a) the matter is trivial or vexatious or the alleged violation of human rights is manifestly unfounded;
- (b) the person making the request has insufficient interest in the matter.

and that matter may be more appropriately dealt with by a tribunal or other person vested with powers to award redress or grant relief in respect of the matter.

(5) The Commission shall prescribe the procedures for conducting an enquiry under this section

Duty to investigate

20(1) The Commission shall investigate complaints against any person, group of persons, public or private authority or agent of that agency determined admissible under section 19(1) and filed with the Commission, if the alleged violation occurred after the coming into operation of this Act.

(2) Without limiting the generality of subsection (1), the Commission shall not handle a complaint that has been decided upon by or is being considered in a court of law.

Entering and searching of premises and attachment and removal of articles

21(1) Any member of the Commission or any member of the staff of the Commission or a law enforcement officer authorised to do so by the Commission in consultation with the Commissioner of Police, shall, subject to the provisions of subsection (2) and the Criminal Procedure and Evidence Act 1981 for the purpose of an investigation, enter any premises on or in which anything connected with that investigation, is or is suspected to be

(2) The entry and search of any premises under this section shall be conducted with strict regard to decency and order, which shall include regard to –

- (a) a person's right to respect for and protection of his dignity;
- (b) the right to freedom and security of the person; and
- (c) the right to his personal privacy.

Decisions of the Commission

22(1) The Commission shall make binding decisions.

(2) The Commission may, based on the facts and evidence presented before it, make decisions to a relevant public authority and the authority shall –

- (a) within 30 days of receiving the decision and in writing, inform the Commission of the steps taken to effect the decision; and
- (b) thereafter keep the Commission so informed quarterly until the decision is fully effected.

Protection against obstruction

23(1) A person who, by his act, omission or any other means hinders or obstructs or attempts to obstruct the Commission in the performance of its duties and functions or exercise of its powers, in particular, its investigation responsibilities, commits an offence and shall, upon conviction, be liable to a fine not exceeding M10,000.00 or 1 year imprisonment or both

(2) The following acts of an administrative authority or agent of public administration constitutes obstruction –

- (a) to knowingly not provide, within a fixed time period, a document, information, a register or any other specific evidence requested by the Commission;
- (b) to refuse to cooperate in any investigation;
- (c) to provide testimony in bad faith;
- (d) to refuse to provide articles, objects or documents requested by the Commission
- (e) to make a false or deliberately misleading declaration to the Commission.

Mediation, conciliation and negotiation

24. The Commission may, when it considers it necessary, endeavour to –
- (a) resolve a complaint amicably through mediation, conciliation or negotiation in a manner established by regulations;
 - (b) rectify any act or omission, emanating from or constituting a violation of or threat to any fundamental right

Institution of legal proceedings by Commission

- 25(1) The Commission may institute proceedings in the High Court for the purpose of obtaining a relief in respect of –
- (a) any matter concerning the human rights of a person or class of persons;
 - (b) enforcement of its decisions.

(2) The relief the Commission may seek to obtain in such proceedings may include a relief by way of a declaration that a statute or a provision of the statute is invalid having regard to the provisions of the Constitution.

Communication of decision or finding

26. Without limiting possible actions, the following actions, insofar as they relate to improvements in the human rights situated or the prevention of violations, may be include in a recommendation by the Commission –
- (a) an improvement judged useful for the better functioning of the Public Service or private enterprises implicated in the violation;
 - (b) an amendment to a law, regulation, policy or procedure;
 - (c) an action that should be taken to prevent further abuse of human rights;
 - (d) a disciplinary procedure against a manager who directed or ignored violations or who refused to take corrective action once he became aware of or should have known that an abuse had occurred;
 - (e) criminal proceedings against a perpetrator if necessary given the nature and severity of the violation;

- (f) monetary or other reparations against the damages suffered by a victim;
- (g) any other action that the Commission considers necessary and appropriate in the circumstances.

Human Rights Court

27. The High Court shall sit as a Human Rights Court and shall handle matters of violations of human rights as may be referred to it by the Commission.

PART IV – SPECIAL POWERS FOR INSPECTING PLACES OF DETENTION

Inspection of places of detention

28. In discharging its responsibility of monitoring human rights situated of detainees and investigating violations of human rights under section 7(1)(a) and (c) by inspecting places of detention, the Commission shall have the powers to –

- (a) enter a place of detention freely and without advance notice;
- (b) examine all documents necessary to establish the actual situation in the place of detention, including prison registries;
- (c) see all detainees freely, if necessary in private;
- (d) require that a detainee be produced.

PART V – ADMINISTRATIVE PROVISIONS

The Director General

29(1) There shall be a Director General of the Commission who shall be appointed by the Commission in consultation with the minister, and who –

- (a) shall be the chief accounting officer responsible for the general management of and administrative control over the staff, the monies received or paid out of the account of the Commission and business of the Commission;
- (b) shall be responsible for the implementation of the determinations of the Commission;
- (c) shall cause the necessary accounting and other records to be properly kept;
- (d) shall be answerable to the Commission in the performance of his functions and the implementation of the policies of the Commission, and may exercise the powers and shall perform such functions and duties as may be conferred upon or assigned to him by the Commission in order to achieve the objects of the Commission;

- (e) shall provide to the Commission such information in relation to the performance of his functions, including information on the performance of those functions insofar as they relate to the financial affairs of the Commission, as the Commission may require;
- (f) may, from time to time, with the consent of the Commission, authorise one or more of the staff of the Commission to perform a specified function of the Director General and such a member who is or members who are so authorised may perform that function accordingly.

(2) The Director General shall be the secretary to the Commission.

(3) The functions of the Director General may be performed, during his absence or when the position of the Director General is vacant, by a member of the staff of the Commission as may, from time to time, be designated for that purpose by the Commission

Tenure of office

30. The Director General shall hold office for a period of 3 years.

Qualification for appointment of Director General

31. A person shall be qualified to be appointed for the position of Director General if the person –

- (a) is a citizen of Lesotho;
- (b) holds a recognised degree in law;
- (c) has at least 5 years at managerial level;
- (d) is of proven integrity and leadership

Removal of Director General

32. The Director General may be removed from office by the Commission in accordance with the terms and conditions of service, for –

- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or negligence of duty;
- (d) any other ground that would justify removal from office under the terms and conditions of service.

Appointment of staff of the Commission

33(1) The Commission shall, in consultation with the Minister, appoint an appointments committee the appointment of which shall be gender sensitive –

- (a) the Director General who shall be the chairperson;
 - (b) a person with recognised qualifications in law;
 - (c) a person with recognised qualifications in finance or economics;
 - (d) a person with recognised qualifications in human resource management, wage and salary administration.
- (2) The appointments committee shall be responsible for the appointment of such other members of staff of the Commission as are necessary for the proper and effective performance of the functions of the Commission.
- (3) A member of the committee may be paid such an allowance as may be determined by the Director General in consultation with the Commission.
- (4) The terms and conditions of service remuneration, allowances and other service benefits to be paid by the Commission and received by a member of staff of the Commission including a grade at which a member of staff serves shall be determined by the Commission with the consent of the Minister in consultation with the Minister responsible for public service.
- (5) The Commission, in determining the remuneration or allowances for expenses to be paid to members of its staff or the other terms or conditions subject to which such members hold or are to hold their employment, shall have regard to Government or nationally agreed guidelines which are for the time being extant and to Government policy concerning remuneration and conditions or employment which is so extant and, in addition to the foregoing, the Commission shall comply with any directives with regard to such remuneration, allowances, terms or conditions which the Minister may give to the Commission with the consent of the Minister responsible for finance.

Secondment of staff

- 34(1) In addition to the staff appointed by the Commission, the Government may upon the request by the Commission, second to the Commission such number of public officers as may be necessary for the purpose of functions of the Commission, or direct public officers to give assistance to the Commission.
- (2) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the directions of the Commission.
- (3) The Commission may engage the services of advisers or consultants.

PART VI – FINANCIAL PROVISIONS

Funds and gifts received by the Commission

35(1) The Government shall provide the Commission with adequate funds annually to enable it to discharge its functions under this Act.

(2) The Commission may receive funds or gifts, movable or immovable property without any conditions from any lawful source only for the purpose of promoting awareness of and providing education in relation to human rights and any other institutional operations as may be approved by the Commission

(3) The Director General shall not, in the performance of his duties under this section, question or express an opinion on the merits of any policy of the Government or a Minister or on the merits of the objectives of such a policy,

Accounts, funds and audit

36(1) The financial year of the Commission shall be a period of 12 months from the 1st day of April to the 31st day of March.

(2) The Director General shall keep proper books of accounts and other records relating to accounts of the Commission which shall be annually audited by the Auditor General and submitted to Parliament in accordance with the Audit Act 1973 or any subsequent Audit Act.

(3) The Commission shall be responsible for the preparation and submission of its annual budget to the Minister for presentation in Parliament and shall also be responsible for the transparent and effective management of its finances.

(4) Any expenses incurred by the Commission in any action or proceeding, civil or criminal, brought by or against the Commission before any court shall be paid out of the funds of the Commission.

(5) Any expenses incurred by any member, officer or servant of the Commission, in any civil action or proceedings, brought against him in any court in respect of anything which is done or purported to be done by him under this Act or on direction of the Commission shall be paid out of funds of the Commission, unless such expenses are recovered by him in such civil action or proceeding.

PART VII – GENERAL PROVISIONS

Annual report

37(1) The Commission shall, subject to subsection (2), prepare and produce an annual report of its activities which provides accurate and transparent information on –

- (a) financial affairs of the Commission including audited balance sheets and statements of income and expenditure;
- (b) complaints filed with the Commission
- (c) the findings and interventions taken by the Commission in support of individuals or entities;
- (d) the findings and recommendations made by the Commission to any authority to whom the findings and recommendations are made;
- (e) the feed-back obtained from the authority to whom the recommendations were made;
- (f) the obstacles encountered in investigation or in the implementation of recommendation proposed;
- (g) the situations where the Commission was obliged to go before the courts in pursuance of a resolution to a complaint, and the reasons why it considered that such an intervention was necessary;
- (h) the financial cost for carrying out the responsibilities referred to in the report;
- (i) the promotional activities undertaken during the year;
- (j) observations, findings and recommendations on the general situation and nature of human rights in the country;
- (k) observations and recommendations on the general situation of detainees in the country;
- (l) any other matter relating to human rights that the Commission thinks warrants a discussion and that would be of interest to Parliament and the public.

(2) Subject to section 133H of the Commission, the annual report of the Commission shall be submitted to Parliament within three months of the end of the financial year under review, and shall be made public at the time it is tabled in Parliament, or within 15 days of its transmittal, which occurs first.

(3) The Commission may, if it considers necessary, submit a special report to Parliament at any time, which shall be treated by Parliament in the same manner as an annual report.

(4) The Parliament may request the Commission to give relevant report at any time.

Regulations

38(1) The Minister may, by notice published in the Gazette, make regulations for the efficient implementation of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for the following –

- (a) rules of procedure for the conduct of an enquiry;
- (b) administrative and financial structures of the Commission;
- (c) management modalities and the exercise of responsibilities;
- (d) schedules of meetings
- (e) rules and procedures for, and the conditions under which, specialised sub-committees of the Commission may be appointed;
- (f) modalities and procedures for the selection, promotion, discipline and suspension of employees and conditions of service.

SCHEDULE

OATH

(section 13)

This Oath shall be administered to a Commissioner by the Chief Justice.

“I.....swear to fulfil my obligations as Commissioner as set out in the Constitution and the Human Rights Commission of Lesotho Act, and to carry out duties assigned me by the Commission to the best of my ability, to do so in complete independence and impartiality, and to respect the confidentiality accorded information and deliberations of the Commission”.

NOTE

1. Constitution of Lesotho as amended by Act No 13 of 2011
2. Act No 8 of 1972 as amended by Act No 3 of 1994
3. Act No 9 of 1981 as amended by Act No 10 of 1991
4. Act No 12 of 1973



11

THE MALAWI HUMAN RIGHTS COMMISSION

*Mwiza Jo Nkhata**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The adoption of the Constitution of the Republic of Malawi (the Constitution) in 1994 heralded massive legal changes in the country, both at the normative as well as institutional level. At the normative level, Malawi's new constitution formally committed it to observing such principles as the rule of law, separation of powers, checks and balances, and judicial independence. At the institutional level, the Constitution established various institutions designed to support the fulfilment of the ideals on which it was founded. The Malawi Human Rights Commission (MHRC) is one of the several oversight institutions established by the Constitution. This chapter conducts an analysis of the MHRC from the time it was established until the present. Among other things, the chapter traces the establishment of the MHRC, explores its nature and analyses its mandate, before concluding with a discussion of its public accountability.

2 Establishment and evolution of the MHRC

The adoption of the Constitution simultaneously marked Malawi's break with its autocratic past and ushered in a new democratic dispensation. As mentioned, the MHRC is one of the institutions borne of the constitutional changes Malawi underwent between 1993 and 1994.

* Extraordinary Professor, Free State Centre for Human Rights, University of the Free State, Bloemfontein, South Africa.

The MHRC is established under section 129 of the Constitution. In terms of this section, its primary functions are the “protection and investigation of violations of the rights accorded by this Constitution or any other law”. These functions are supplemented by section 12 of the Human Rights Commission Act (HRC Act),¹ which provides that the MHRC:

[shall be] competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.

One notable fact about the provisions establishing the competence of the MHRC is that section 12 of the HRC Act seemingly confers on the MHRC a broader mandate than that conferred by the Constitution. The inclusion of “in the broadest sense possible”, which is absent from section 129 of the Constitution, conveys the impression of a far broader mandate than the strict terms of the Constitution. However, considering that the HRC Act is legislation designed to implement the constitutional provisions establishing the MHRC, it is clear that “the Constitution and the HRC Act must be read together as conferring a broad mandate on the MHRC to execute a broad range of functions related to the protection and promotion of human rights”.²

2.1 The model of the MHRC

Across the globe, national human rights institutions (NHRIs) take different forms and perform varied functions.³ According to the United Nations Development Programme (UNDP), five major models of NHRIs exist: human rights commissions, ombudsman institutions, hybrid institutions, consultative/advisory institutions, and institutes and centres.⁴ In Africa, only three of the models are in existence: the human rights commission, the ombudsman institution, and the hybrid institution.⁵ As Gondwe correctly notes, however, the name by which an NHRI goes by is

1 Cap. 3:08, Laws of Malawi.

2 DM Chirwa and RE Kapindu, p 147.

3 M Gondwe, p 19.

4 UNDP, *UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions* (2010), available at <https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> (Accessed 24 February 2019), pp 21-27.

5 UNDP, *Study on the State of National Human Rights Institutions (NHRIs) in Africa* (2016), available at <https://bit.ly/300q8hB> (accessed 24 February 2019), p 15.

not conclusive of its nature.⁶ Only a careful analysis of its enabling law, especially with regard to its mandate, will reveal its true nature.

The MHRC is established along the model of the Commonwealth Commission. Section 130 of the Constitution delineates the boundaries of the powers vested in the MHRC. Under this provision, the powers of the MHRC do not extend to the “exercise of a judicial or legislative function”. Owing to section 130 of the Constitution, the MHRC cannot sit as a court, nor discharge any legislative functions. In matters requiring judicial intervention, its role is limited to commencing action before the courts to seek appropriate relief or intervening as *amicus curiae*; in matters requiring legislative intervention, the MHRC makes proposals for legislative change.⁷

The only institution with a mandate similar to the MHRC is the Office of the Ombudsman, which is established under section 120 of the Constitution. Under section 123(1) of the Constitution, the Ombudsman:

may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.

While the Ombudsman’s mandate may seem similar to that of the MHRC, it is clear that there are some fundamental distinctions between them. For example, the mandate of the Ombudsman relates to the investigation of injustices where no practicable remedy seems readily available within the ordinary judicial processes, while that of the MHRC relates to the general protection and promotion of human rights. Nevertheless, since the mandates of both institutions entail resolving human rights violations, in practice it has not always been clear where the Ombudsman’s jurisdiction ends and where the MHRC’s begins.⁸

The confusion about the jurisdictional limits of the Ombudsman has eluded not only lay people but the institutions themselves, as was evident in the Supreme Court’s decision in *Air Malawi v Ombudsman*.⁹ In this case,

6 See note 3.

7 Arguably, the most prominent *amicus curiae* intervention by the MHRC relates to its work in the litigation surrounding the adoption of two Malawian children by the pop star Madonna. See *Re Adoption of David Banda* Adoption Cause No 2 of 2006 and *Re Adoption of CJ (A Female Infant)* Adoption Cause No 1 of 2009. However, for the clearest statement of the relevance of the MHRC acting as *amicus curiae* in matters with human rights implications, see *R v Cheuka et al* Criminal Case No 73 of 2008.

8 See note 2, p 230.

9 MSCA Civil Appeal No 1 of 2000.

the Court emphatically advised the Ombudsman not to overstretch the jurisdiction of his office, especially on matters where the law had created other institutions to deal with the same issues. The message from the Supreme Court, therefore, is that while the Constitution may, seemingly, give the Ombudsman a wide remit, the Ombudsman must be more circumspect in exercising his or her jurisdiction since its focus is on investigating bureaucratic unfairness committed by public or private officials and agencies. As such, the Ombudsman does not have an unrestricted power to investigate all and any claims of human rights abuses.¹⁰

It is also important to note that under section 131(1)(a) of the Constitution, the Ombudsman is automatically a member of the MHRC, and that under section 4 of the HRC Act, the Ombudsman, together with the Law Commissioner, are centrally involved in the recruitment of the appointed commissioners of the MHRC. Furthermore, from an operational perspective, under section 15(f) of the HRC Act, the MHRC is directed to maintain consultation:

[with] other independent national institutions or bodies, such as the Law Commission, the Ombudsman and the Inspectorate of Prisons, in order to foster common policies, practices and approaches and to promote cooperation in relation to the handling of matters in cases of overlapping jurisdiction.

The foundation for inter-agency cooperation between the MHRC and other institutions is thus laid in its founding law. It is under the aegis of section 15(f) that, for example, the MHRC is currently in discussion with the Ombudsman about an investigation into the alleged illegal removal of women's uteruses in some public hospitals in Malawi.¹¹

10 See note 2, p 230.

11 Key Informant Interview 2. It is important to note that this investigation also reveals the confusing boundaries between the mandate of the Ombudsman and that of the MHRC, since although the MHRC is engaging the Ombudsman on its investigation, media reports suggest that the Ombudsman also commissioned her own investigation into the same issue. See G Kakhombwe, "Uterus Removal Report out in March", *Zodiak Online*, available at <https://zodiakmalawi.com/malawi-national-news/uterus-removal-report-out-in-march> (accessed 13 March 2019).

2.2 The evolution of the MHRC

As noted, the MHRC is an institution borne of the constitutional changes Malawi underwent between 1993 and 1994.¹² The Constitution, like other Third Wave constitutions, pays a great deal of attention to limiting the authority of the government. One of the ways in which this is achieved is by establishing oversight institutions like the MHRC and the Ombudsman. Indeed, these institutions were entirely novel in Malawi at the time of the Constitution's adoption: since gaining independence from Britain in 1964, and especially after becoming a republic in 1966, Malawi had been a one-party dictatorship where there were no formal checks on the authority of the government.¹³

It must be pointed out, however, that since legitimate questions have been raised about the autochthony of the Constitution, the MHRC and other new institutions established by the Constitution – that is, the Ombudsman and Law Commission – can also be questioned for their lack of autochthony.¹⁴ It has been argued that the reason the MHRC suffers from neglect and underfunding by the government is that it is perceived as a foreign institution imposed by donors on the nation during the constitutional negotiations.¹⁵

3 The nature of the MHRC

As noted, the MHRC is established by the Constitution but its powers, functions and structures are elaborated in the HRC Act. Although the Constitution came into operation in mid-1994, the HRC Act was adopted only in 1998 and the institution itself became operational in 1999. Between 1996 and 1999, the *ex officio* members of the MHRC, namely the Ombudsman and the Law Commissioner, functioned *de facto* as the

12 Regarding the adoption of the Constitution, see J Banda, "The Constitutional Change Debate of 1993-1995", in KM Phiri and KR Ross (eds), *Democratisation in Malawi: A Stocktaking*, Blantyre CLAIM (1998), pp 316-333.

13 See JO Ihonvbere, "From Despotism to Democracy: The Rise of Multiparty Politics in Malawi", 18(2) *Third World Quarterly* (1997), pp 225-247.

14 For a discussion of the Constitution's lack of autochthony, see FE Kanyongolo, "The Limits of Liberal Democratic Constitutionalism in Malawi", in KM Phiri and KR Ross, pp 353-376, and K Bampton in J Lewis *et al* (eds), *Human Rights and the Making of Constitutions: Malawi, Kenya, Uganda*, Cambridge, African Studies Centre (1995), pp 57-58. The major argument here is that the Constitution is ideologically a liberal democratic institution which was superimposed on a political and social order where liberalism is not and has never been the dominant organising political theory.

15 Key Informant Interview 1.

MHRC.¹⁶ Chirwa and Kapindu note that permitting the Ombudsman and Law Commissioner to carry out the functions of the MHRC pending its operationalisation was a “pragmatic move” but one of debatable legality.¹⁷ notwithstanding the pragmatism that permitted the Ombudsman and the Law Commissioner to discharge the functions of the MHRC, one cannot find any legal basis on which this course of action can be justified.

In terms of the relationship between the constitutional provisions establishing the MHRC and the HRC Act, it is arguable that the High Court, in *Malawi Human Rights Commission v Attorney-General*,¹⁸ helped to clarify the relationship between the two. At issue in this case was the question whether the MHRC had the power to litigate before the courts on its own motion or only upon receiving a complaint. In arguments before the Court, the MHRC relied on sections 10-15 and 22 of the HRC Act to support the position that it had power to initiate litigation before the courts even without receiving a complaint. The Attorney-General argued that the only powers of the MHRC were to be found in sections 129 and 130 of the Constitution and that sections 10-15 and 22 of the HRC Act were *ultra vires* since they conferred more powers on the MHRC than envisaged by the Constitution.

In the High Court’s view, the provisions of section 129 and 130 of the Constitution were drafted in broad terms, making it necessary for enabling legislation to expound on those broad terms. In holding that the MHRC has the power to commence litigation in its own name and at its own instance or in pursuance of a complaint, the High Court confirmed that the provisions of the HRC Act were not *ultra vires* the Constitution. As this case demonstrates, the legal framework that establishes the MHRC has not adversely affected its operations.

3.1 The independence of the MHRC

The MHRC is established as an independent and autonomous institution. However, unlike the case with the Office of the Ombudsman for example, the Constitution does not explicitly speak to the independence of the MHRC.¹⁹ Ideally, the foundational premises of the independence of the MHRC should have been given constitutional imprimatur. For this reason,

16 See note 2, p146.

17 *Ibid.*

18 Miscellaneous Cause No 119 of 2000.

19 In the case of the Ombudsman, section 121 of the Constitution provides: “In the exercise of his or her powers, functions and duties the Ombudsman shall be completely independent of the interference or direction of any other person or authority, but shall otherwise be answerable to Parliament.” As for the Law Commission, section 136 of

the absence of a constitutional provision on the independence of the MHRC is regrettable but perhaps not fatal, especially considering, among other things, the judicial pronouncement in *Malawi Human Rights Commission v Attorney-General*.

The independence of the MHRC is affirmed in sections 11 and 34 of the HRC Act.²⁰ Rather strangely, section 13(2) of the HRC Act requires the MHRC to “keep the President fully informed on matters concerning the general conduct of the affairs of the Commission”. There is a latent danger in this provision since it could be interpreted to mean that the MHRC is accountable to the President.²¹ An example of the danger posed by section 13(2) can be seen in the directive given by the then President of Malawi, Bakili Muluzi, when he directed the MHRC not to release its investigative report into the death of the musician Evison Matafale until the President’s own commission of inquiry released its report.²² The MHRC ended up acquiescing to this request, thereby compromising its independence.

Generally, the MHRC enjoys functional independence.²³ Operationally, it is also bestowed with independence by law, but this is practically compromised since the MHRC relies on government funding to sustain its operations. As is the case with many state institutions in Malawi, the MHRC is perennially underfunded by the government. It relies on government funding to pay for its fixed costs, but its funding pattern reveals that what it receives is barely enough to cover them. Additionally, the government rarely funds the MHRC’s programmes. The result, as is shown later in this chapter, is that the MHRC relies on donors to fund them.

the Constitution provides: “The Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority”. There is no similar provision in the Constitution addressing the independence of the MHRC.

20 Section 11 provides: “All authorities (including all organs of Government) bodies and persons shall recognise the status of the Commission as a national institution independent of the authority or direction of any other body or person”, while section 34(1) provides: “Every member of the Commission, of a committee of the Commission or of the staff of the Commission shall serve independently and impartially and exercise his powers or perform his duties and functions in good faith and without fear or favour”.

21 See note 2, p 149.

22 *Ibid.*

23 Key Informant Interview 1.

It must also be noted that in practice the operational independence of the MHRC is routinely compromised.²⁴ Although given the power to conduct investigations relating to human rights violations, the MHRC typically finds that securing the cooperation of other government agencies in its investigations is not easy. By way of illustration, in October 2018 it received a complaint alleging police brutality at Kasungu Police Station in central Malawi. When officers of the MHRC visited the police station to conduct their investigation, all the police officers refused to cooperate with the MHRC, allegedly because the officer in charge of the police station and his station officer were out of the duty station at the time. This impasse was resolved only when the executive secretary of the MHRC wrote to the inspector-general of the Malawi Police Service (MPS) seeking clearance to proceed with the investigation.

In another case, in June 2018 an investigation team from the MHRC was sent back from Mtakataka Police Training School where it had gone to investigate anomalies in the recruitment of police officers. The team was turned back supposedly because it had not sought prior authorisation from the inspector-general of police to conduct the investigation. Notably in this regard, the legislation creating the MHRC does not require that it seek permission or notify any person or institution before embarking on its investigations. In this case, therefore, the administrative requirement of seeking permission from the inspector-general of police was raised “illegally” to bar the investigation.

Against this background, it is important to recall that section 34(3) of the HRC Act makes it an offence to “interfere with, hinder or obstruct the Commission”, any of its committees or any member of its committees, and makes contravention of the provision an offence liable to a fine of MWK 20,000 and imprisonment for five years. Nonetheless, there is no record of anyone having been prosecuted and sentenced under this provision, which perhaps emboldens other entities to give the MHRC short shrift in their dealings with it.²⁵

While the law has guaranteed the MHRC its independence, it is clear that in practice the MHRC faces challenges in asserting it. It is now manifest that this independence hinges on the “integrity of the commissioners and the willingness of the MHRC itself to defend its own space, mandate and decisions”.²⁶ Insofar as the integrity and willingness of commissioners to act independently is concerned, there is always a risk

24 Key Informant Interview 2.

25 *Ibid.*

26 See note 2, p 150.

that independent-minded commissioners who are critical of the government of the day may end up being victimised as a result. For example, in 2012, John Kapito, the then chairperson of the MHRC, was arrested on what were clearly trumped-up charges following his persistent harassment and intimidation by the government.²⁷ Notwithstanding the reasons given by the government, it was clear that Kapito had been arrested for being a vocal critic of the government and its human rights record.²⁸

3.2 Appointment procedures

The MHRC has two types of commissioners: the *ex officio* commissioners and the appointed commissioners. The Ombudsman and the Law Commissioner are the *ex officio* commissioners. As for the appointed commissioners, who must not exceed seven at any time, they are appointed by the President on the recommendation of the Ombudsman and Law Commissioner.²⁹ The appointed commissioners serve for a three-year term and are eligible for re-appointment.

The selection of commissioners commences with the issuing of a public advertisement by the Law Commissioner and Ombudsman calling for the submission of nominees by organisations that the Law Commissioner and Ombudsman consider, at their discretion, to be “reputable organisations representative of Malawian society and ... wholly or largely concerned with the promotion of the rights and freedoms guaranteed by [the] Constitution”.³⁰ Subsequently, the Law Commissioner and Ombudsman jointly assess the nominees and the “reputation of the nominating organisations” before recommending names for appointment to the President.³¹ In practice, the Law Commissioner and Ombudsman publicly “interview” the nominees before shortlisting the names to be forwarded to the President.³²

27 Nyasa Times, “Malawi Top Rights Activist Kapito Arrested over Forex”, available at <https://www.nyasatimes.com/malawi-top-rights-activist-kapito-arrested-over-forex/> (accessed 13 March 2019).

28 “Malawi” in A Dissel and C Frank (eds), *Policing and Human Rights: Assessing Southern African Countries’ Compliance with SARPCCO Code of Conduct for Police Officials Somerset West*, African Minds (2012), p 59.

29 Section 131(2) of the Constitution.

30 Section 131(1)(d) of the Constitution.

31 Section 4(3) of the HRC Act.

32 It is open to debate whether what happens is strictly speaking an “interview”. What happens is that the nominees are asked to make a brief presentation before the Ombudsman and Law Commissioner and also in the presence of the other nominees

The procedure for appointing commissioners has been hailed as “attractive” for its deliberate involvement of key elements of civil society.³³ While the attempt to involve civil society is commendable, questions remain about various aspects of the process. First, the value-add of involving the Law Commissioner and Ombudsman in making recommendation(s) for the appointment of commissioners is not apparent. There is nothing so far, either in law and practice, to suggest they are uniquely positioned to recommend the appointment of the commissioners.³⁴ Furthermore, both are public servants in charge of institutions of comparable legal status to the MHRC. In some instances this could create a conflict of interest in their mediation of the appointment of commissioners and result in competent and qualified nominees being rejected simply because they are deemed too critical of the government.³⁵

Secondly, the law somewhat oddly requires the nominating organisations, and not the individuals, to be representative of Malawian society.³⁶ One would have expected that the focus might fall equally on both the organisations and individuals. The singular focus on the nominating organisation ignores the personal attributes of the nominees.

Thirdly, the attempt to involve civil society notwithstanding, the process remains cloaked in opacity. For example, it is only after the President has made the appointments that the full list of nominating organisations, names of nominees and names of appointed commissioners is required by law to be published in the government gazette.³⁷ Even at this point, no one knows who was on the original list recommended to the President, and for that reason it is impossible to tell if the President appointed the people from the list submitted to him.

Lastly, and relatedly, the nomination process is not structured in such a way as to ensure that the best candidates are nominated and appointed as commissioners. Because nominees are supplied by civil society

There is no personal feedback on a nominee’s performance during this “interview” and no public disclosure of the names recommended to the President for appointment (author experience).

33 J Hatchard, “The Human Rights Commission Act 1998 (Malawi)”, 43(2) *Journal of African Law* (1999), pp 253-257.

34 Admittedly, the 2016 amendment to section 26 of the Human Rights Commission Act may have worked to neuter the influence of the Law Commissioner and the Ombudsman by removing their voting powers in all MHRC proceedings. See Act 21 of 2016.

35 Key Informant Interview 1.

36 Section 4(1) of the HRC Act.

37 Section 4(4) of the HRC Act.

organisations (CSOs), the Law Commissioner and Ombudsman have no control over the quality of the nominees they receive. Additionally, experience has shown that many CSOs, especially those still run by their founders, routinely submit nominations of their founders irrespective of their qualifications. These factors, taken together, show that the appointment process for commissioners is not designed to ensure that the most competent persons are eventually appointed.

Once appointed, the commissioners are not subject to control or influence by the government or any other authority. However, as pointed out earlier, the MHRC's ability to discharge its mandate effectively depends largely on the quality of the commissioners who are appointed. Indeed, the Commission's effectiveness has varied considerably according to the character and personality of the chairperson at any given point in time; the dynamism of the MHRC, in other words, has often been reflective of the dynamism of its chairperson. It is also important to note that, notwithstanding the detailed procedure for appointing commissioners, commissioners are often treated as akin to board members of other government parastatals. The result is that – barring the fact that nominations are originated by civil society – the appointments sometimes betray evidence of patrimonial loyalty.³⁸

3.3 Financial autonomy

Section 32(1) of the HRC Act provides that “the Government shall adequately fund the Commission to enable it to exercise its powers and perform its duties and functions so as to ensure its independence and impartiality”. As mentioned, the MHRC relies principally on the government to fund its operations, but the latter routinely underfunds the MHRC, thus severely constraining its operations. As a result, the MHRC has relied traditionally on donors to fund its programmes, key among them being the UNDP and European Union. The major challenge with relying on donor funding, however, is that it has been attached to particular thematic projects supported by the donors but not necessarily serving the priorities of the MHRC.³⁹

38 See D Kashoti, “Public Appointments Should be on Merit”, *Times*, available at <https://www.times.mw/public-appointments-should-be-on-merit/> (accessed 13 March 2019). As to political influence in appointments to parastatal boards, the case of the Malawi Communications Regulatory Authority is revealing. See GR Clarke *et al*, *Telecommunications Reform in Malawi*, World Bank, Policy Research Working Paper 3036, p 42.

39 Key Informant Interview 1.

The lack of adequate government funding has had various consequences.⁴⁰ For example, the MHRC has serious human resource constraints, as evident in its failure to fill established positions and a resultant vacancy rate of more than 50 per cent. It has a very high staff turnover, which is attributable largely to its inability to offer competitive remuneration to its staff. The MHRC has also found itself incapable of mounting comprehensive investigations into systemic human rights violations.⁴¹ The bulk of its work has thus focused on individual grievances.

Moreover, and as pointed out earlier, due to funding constraints the MHRC has been incapable of developing and implementing its own programming agenda. Its inability to control its programming agenda has meant that at times it has contributed to making itself irrelevant by focusing on issues that are not immediately relevant to the populace at large. Overall, it is fair to conclude that the MHRC has yet to work out a way of remaining financially autonomous in a context where it relies on donor funding for almost all its programmes.

3.4 Professional skills and knowledge

Generally, staff at the MHRC have skill in and knowledge of human rights.⁴² The MHRC continually facilitates staff training in various aspects of human rights.⁴³ Some of the training that staff have attended has been organised by the Network of African National Human Rights Institutions as well as other international partners of the MHRC. Qualified members of staff have also been sent to pursue postgraduate studies under funding secured from either donors or, sometimes, the government.

In principle, then, there is adequate provision for the professional development of staff. The perennial challenge, however, is that many of the people trained by the MHRC will subsequently leave the organisation.

40 *Ibid.*

41 This is not to suggest that the MHRC has never carried out investigations targeted at systemic violations; however, this has been invariably at the behest of donors. See MHRC, *Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi*, available at http://www.mwfountainoflife.org/files/4413/9395/3331/cultural_practices_report.pdf (accessed 14 March 2019). This study was made possible by support from NORAD through the UNDP and UNICEF.

42 Key Informant Interview 2.

43 For example, a list of staff that were sent for training in 2017 is included in the 2017 Annual Report. See MHRC, 2017 Annual Report, Lilongwe, Government Print, pp 51-52.

As noted, the MHRC struggles to retain staff generally, with the problem being more acute in the case of staff with advanced training in human rights or other fields.⁴⁴ Given the high staff turnover, training does not of itself contribute to the retention of skills within the institution.

3.5 Relations with civil society

Under section 15(e) of the HRC Act, the MHRC is directed to:

[d]evelop work relationships with non-governmental organisations devoted to protecting and promoting human rights, including those organisations which promote economic and social development or which protect and promote the interest of vulnerable groups such as children, illiterate persons, persons with disabilities and the elderly.

Although section 15(e) speaks of “non-governmental organisations”, it is clear that in practice the provision has been interpreted to authorise the MHRC’s work with civil society at large. For example, certain of its thematic committees draw their members from civil society. Recently, the MHRC also facilitated the formation of a Human Rights Coordination Forum, which is a platform for CSOs to engage with each other and discuss issues of common concern.

Although the MHRC works with CSOs, the interaction is not always smooth. For instance, it has been criticised by some of them for being slow and timid in reacting to emerging human rights issues. An example is its position on the rights of Malawi’s lesbian, gay, bisexual, transsexual and intersex (LGBTI) community. The MHRC has been accused of favouring a status quo that includes the criminalisation of same-sex relationships, notwithstanding the Constitution’s proscription of all forms of discrimination. The MHRC’s refusal to participate in litigation interrogating the constitutionality of Penal Code provisions that proscribe same-sex relations, in spite of an open invitation to do so by the High Court, can be cited as an illustration of its alleged timidity.⁴⁵ This in turn has led various CSOs to shun partnership with the MHRC, which is perceived as lacking in independence from the government.

44 MHRC, 2016 Annual Report, Lilongwe, Government Print (2017), p 111.

45 In September 2012, the High Court gave notice that in considering the confirmation of sentences in three cases – to wit, *The Republic v Mussa Chiwisi*, Confirmation Case No 22 of 2011; *The Republic v Mathew Bello*, Confirmation Case No 411 of 2011; and *The Republic v Amon Champyuni* Confirmation Case No 662 of 2011 – it would also consider the constitutionality of the Penal Code provisions that proscribe same-sex relations. The High Court, furthermore, invited interested parties, specifically including the MHRC, to make submissions on the matter. The MHRC opted neither to file submissions nor be involved in any way in the litigation.

The relationship between the MHRC and CSOs has also been strained by a competition for resources.⁴⁶ Inasmuch as the MHRC has to rely on donor funding, many CSOs rely on the same donors to fund their projects. At times this has led to unhealthy rivalry and diminished the potential for collaborative partnerships.

3.6 Accessibility.

By law, the MHRC is enjoined to “progressively operate at the national, regional, district and other levels so as to enhance its outreach in the Republic”.⁴⁷ Malawi is, administratively and politically, divided into three regions – the Northern Region, Central Region and Southern Region – and thereafter into 28 districts. At the moment, however, the MHRC has offices only in Lilongwe (the Central Region), where its head office is based, and Blantyre (the Southern Region), where its regional office is based. It has no permanent presence in any of the districts.

As is apparent, then, the MHRC is not sufficiently decentralised as to have a permanent presence in all the regions of the country. This has repercussions for its accessibility to the populace, especially for purposes of lodging complaints. It also compromises its investigation of human rights violations, particularly so when a claim originates from an area remote from its established offices. With its thin resource base, the MHRC has limited capacity to conduct sustained investigations into human rights violations in areas far away from its offices.

To its credit, it does periodically undertake activities, such as providing human rights clinics, away from its offices in a bid to reach Malawians who cannot access them.⁴⁸ These are, nevertheless, only ad hoc measures and thus cannot solve the problem of the MHRC’s limited accessibility to the populace. Unless the funding trends change drastically, it is unlikely that the MHRC will be able to establish any more offices than the ones it currently has. To fulfil its constitutional mandate, it needs a permanent presence in at least three administrative regions.

As of 2019, the MHRC’s relative inaccessibility was aggravated by the fact that it did not even have enough motor vehicles to conduct outreach work beyond its headquarters in Lilongwe.⁴⁹ According to an internal assessment, the MHRC had only two vehicles that were certified as

46 Key Informant Interview 1.

47 Section 15(g), HRC Act.

48 Key Informant Interview 2.

49 MHRC, 2017 Annual Report, Lilongwe, Government Print, p 58.

capable of travelling outside Lilongwe. For an institution whose national footprint is limited to begin with, lack of mobility puts its services even further out of reach of the general populace.

4 Mandate of the MHRC

The MHRC has a comprehensive and elaborate mandate which is fully developed in the HRC Act. That mandate is also in full compliance with the Paris Principles. It is unsurprising, therefore, that the MHRC has, for a long time, been rated as an “A” status NHRI by the Global Alliance of National Human Rights Institutions (GANHRI).⁵⁰ As noted earlier, it is only the Office of the Ombudsman which has a mandate similar to the MHRC’s, but this mandate cannot be said to be in competition with it. The sections below explore certain aspects of the mandate of the MHRC in detail.

4.1 Commenting on existing and draft laws

The MHRC’s power to comment on existing and draft laws is founded in sections 13(e) and 14(b) of the HRC Act. Under section 13(e), the functions of the MHRC include:

[the duty to] study the status and effect of legislation, judicial decisions and administrative provisions for the protection and promotion of human rights and to prepare reports on such matters and submit the reports, with such recommendations or observations as the Commission considers appropriate, to the authorities concerned or to any other appropriate authorities.

Section 14(b) stipulates that the responsibilities of the MHRC include the duty:

[t]o examine any legislation, judicial decisions or administrative provisions in force as well as Bills and administrative proposals and make recommendations as it considers appropriate in order to ensure that such legislation, judicial decisions, administrative provisions, Bills and administrative proposal conform to the fundamental principles of human rights.

The MHRC has consistently utilised the mandate under sections 13(e) and 14(b) to submit its observations and recommendations on bills and other proposals, especially in relation to their compliance with human rights standards. For example, between 2014 and 2015 it was part of the national

50 See GANHRI, “Accreditation Status as of 21 February 2018”, available at <https://bit.ly/2REkUsc> (accessed 28 February 2019).

task force that reviewed the country's electoral laws and made recommendations for improving the electoral framework.⁵¹

More recently, the MHRC has reviewed and commented on the Access to Information Bill of 2016 (now the Access to Information Act); the HIV and AIDS (Prevention and Management) Bill of 2018; the National Children's Commission Bill of 2018; and the Persons with Disabilities Bill of 2018.⁵² It has also proposed that the Ministry of Justice and Constitutional Affairs amend sections 139 and 155A of the Penal Code, which refer to persons with intellectual disabilities as "idiots" and "imbeciles". At present, the MHRC is involved in a review of the Penal Code and other penal laws for the purposes of identifying petty offences that should be decriminalised.

The major challenge the MHRC faces in carrying out its review function relates to its capacity, given that it needs a sufficient number of well-trained lawyers to conduct reviews. Due to funding constraints, it has been unable to recruit and retain adequate numbers of lawyers to perform this function effectively. At present, it has only one lawyer and paralegal in its entire staff complement.

It also bears noting that in recent times the MHRC has been given added responsibilities under the Gender Equality Act⁵³ and the Access to Information Act.⁵⁴ Under the Gender Equality Act, the MHRC has, among other things, the power to monitor and evaluate the policies and practices of the government and private sector in respect of gender equality and to carry out investigations on any gender issues either upon receipt of a complaint or of its own accord.⁵⁵ In relation to the Access to Information Act, the MHRC has the general duty of overseeing the implementation of the Act. This includes raising awareness on the right of in question and advising the government and other agencies on matters to which the Act applies.⁵⁶

While the government may have seen the MHRC as the natural institution to oversee the Gender Equality Act and Access to Information Act, it is clear that it is already overburdened and under-resourced – the added responsibilities will simply complicate its mandate. The challenges to do with the MHRC's role in regard to the Access to Information Act

51 See note 44, p 47.

52 Key Informant Interview 2.

53 Act 49 of 2012.

54 Act 13 of 2017.

55 Section 9 of the Gender Equality Act.

56 Section 7 of the Access to Information Act.

give a foretaste of the problems these added responsibilities will create.⁵⁷ One of the key problems is that the government has not coupled the allocation of extra responsibilities with a commensurate increase in resource allocation to the MHRC. Given the latter's perennial funding challenges, it is hard to imagine it being capable of carrying out its additional responsibilities without a substantial increase in funding.

4.2 Monitoring domestic human rights situations

The MHRC remains active in monitoring the domestic human rights situation. Internally, it is organised into thematic directorates focussing on specific issues. Currently, there are six such directorates: civil and political rights; economic, social and cultural rights; children's rights; elderly and disability rights; gender and women's rights; and corporate services.⁵⁸ The MHRC uses the directorates to monitor domestic human rights situations in line with the mandate of the directorates.

For example, in 2012 it conducted a monitoring exercise of all mental health facilities in the country for the purposes of, among other things, determining how their management complied with human rights standards.⁵⁹ In 2015, with funding from the European Union, the MHRC, through its directorate for elderly and disability rights, conducted a monitoring exercise in all district councils across the country on the implementation and operationalisation of the Disability Act and the Child Care, Protection and Justice Act. During this process, the MHRC assessed the level of knowledge among district executive committees in respect of the two Acts of Parliament and also made recommendations regarding the implementation of these laws.⁶⁰

The MHRC also conducts inspections and site visits to monitor the domestic human rights situation. For example, it routinely conducts inspections of prisons and police holding cells and other places of detention. These inspections have been extended to cover refugee camps. In 2017, the MHRC conducted prison inspections with a focus on

57 O Khamula, "Malawi Human Rights Commission Presses for Speedy Implementation of Access to Information Act", *Nyasa Times*, available at <https://bit.ly/2ZYYTnJ> (accessed 15 March 2019).

58 Previously the MHRC was organised into five departments: education; information and training; investigations; legal services; research and documentation; and administration and finance.

59 A-M Robb, "National Human Rights Institutions and Advocacy for People with Psychosocial Disabilities in Africa", available at <https://bit.ly/2x1VZgq> (accessed 15 March 2019).

60 See note 44, pp 69-70.

assessing compliance with the rights of the elderly and persons with disabilities.⁶¹ The inspections revealed that prisons in Malawi fail to provide the elderly and persons with disabilities with services meeting the minimum international requirements. Indeed, over the years the MHRC's prison inspections have consistently revealed that the standards in prisons and other places of detention remain far below the internationally recommended standards.⁶²

In 2017, as part of monitoring the domestic human rights situation, the MHRC conducted a study on access to services by persons with disabilities.⁶³ This study, which was supported financially by the United Nations, focused on access to social services (health and education), financial services and judicial services.⁶⁴ Other studies conducted in 2017 included an assessment of traditional leaders' views on capital punishment, which was jointly conducted with the Cornell Centre on the Death Penalty Worldwide, and research into the sexual and physical abuse of secondary-school pupils.⁶⁵

Another mechanism the MHRC uses to monitor the domestic human rights situation is holding public inquiries on topical issues. For example, in 2015 it held a public inquiry into the status of the human rights of persons living with albinism, following an increase in the incidence of violence against such persons.⁶⁶ One of the more controversial such inquiries concerned the status of LGBTI rights in Malawi.⁶⁷ Public views on the necessity of this inquiry, as well as on how it was to be conducted,

61 See note 49, pp 26-28.

62 US Department of State, *Malawi 2017 Human Rights Report*, available at <https://www.state.gov/documents/organization/277263.pdf> (accessed 17 March 19).

63 See note 49, p 24.

64 The study's results have yet to be released publicly, but its stated intention was to generate information that could be used in developing programmes and interventions for persons with disabilities.

65 See note 49, pp 24-26.

66 For violence against person living with albinism in Malawi, see Amnesty International, "Violence and Discrimination against People Living with Albinism in Malawi", available at <https://bit.ly/2JhXDoX> (accessed 15 March 2019).

67 See "Malawi Human Rights Commission to Conduct Public Inquiry on LGBTI's Status Quo", *Maravi Post*, available at <https://bit.ly/322UO3I> (accessed 15 March 2019).

were intense and varied.⁶⁸ In the end, the MHRC resolved to “postpone” the inquiry and instead conduct a national study on LGBTI rights.⁶⁹

4.3 Monitoring and advising on compliance with international standards

The MHRC monitors the government’s compliance with international human rights standards and advises on steps to be taken to improve it. One of the ways it does so is by participating in treaty-body reporting processes.⁷⁰ The MHRC has often produced shadow or alternative reports to those the state officially submits to the treaty bodies concerned. In these reports, it usually outlines its proposals for reforming laws or government procedures to make them compliant with Malawi’s international human rights obligations.

By way of illustration, in 2016 the MHRC held a national stakeholders’ workshop on the implementation of the concluding observations on Malawi’s seventh periodic report to the Committee on the Elimination of Discrimination against Women (CEDAW).⁷¹ During the workshop, it also distributed copies of the concluding observations to the participants – in a separate process, the concluding observations were translated into local languages. In 2017 the MHRC produced and presented shadow reports to the Committee on the Rights of Persons with Disabilities as well as the Committee of Experts on the Rights and Welfare of the Child.⁷² It has also engaged with the Government of Malawi to follow up on its implementation of various concluding observations made in regard to state reports.⁷³

In addition, the MHRC participated in the Universal Periodic Review (UPR) Mechanism for Malawi, a process in which it was an active stakeholder responsible for, inter alia, coordinating the inter-institutional task force on the UPR in conjunction with the Ministry of Justice and Constitutional Affairs, and conducting research that contributed to the

68 For example, see A Msosa, “Issues that Malawi Human Rights Commission Must Consider in its National Inquiry on LGBTI Rights”, available at <https://hrcesssex.wordpress.com/2017/06/28/issues-that-malawi-human-rights-commission-must-consider-in-its-national-inquiry-on-lgbt-rights/> (accessed 15 March 2019).

69 See note 49, p 47.

70 For a full discussion of how an NHRI may contribute to protecting and promoting international human rights standards, see V Haasz, *National Human Rights Institutions in the UN Human Rights Framework*, Norderstedt, GRIN Verlag GmbH (2013), p 24.

71 See note 44, pp 91-93.

72 See note 49, pp 30-31.

73 *Ibid*, pp 42-43.

UPR report.⁷⁴ The MHRC also attended the UPR processes at the United Nations as part of the delegation from Malawi; thereafter, it developed a programme for the dissemination and monitoring of the UPR recommendations, which entailed working with government ministries and departments.⁷⁵

4.4 Educating and informing

Though it is not easy to estimate the extent of it, there is general public awareness of the MHRC, albeit that many think it is a non-governmental organisation (NGO).⁷⁶ The MHRC is sometimes confused with the Centre for Human Rights and Rehabilitation (CHRR), the Human Rights Consultative Council (HRCC), and the Malawi Human Rights Resource Centre (MHRRC), all of which are NGOs in Malawi.

Since its establishment, the MHRC has conducted sensitisation campaigns aimed at informing Malawians of its existence and functions. For example, in 2017 it undertook advocacy work targeting selected television stations and the Malawi Communications Regulatory Authority with a view to encouraging them to use sign language. The MHRC also engaged with the Ministry of Education, Science and Technology in an effort to eradicate corporal punishment in schools, as it did with traditional leaders in a bid to end child marriage.⁷⁷

4.5 Receiving and dealing with complaints and petitions

Receiving and dealing with complaints or petitions is, arguably, the MHRC's most important mandate. This mandate is based on section 129 of the Constitution. The MHRC investigates human rights complaints either upon receipt of a complaint or on its own initiative; furthermore, it can investigate a single violation or a series of systematic abuses. Chirwa and Kapindu regard the MHRC's mandate to conduct investigations into human rights abuses and violations as "a powerful tool" at its disposal.⁷⁸

74 Network of African National Human Rights Institutions, "Malawi", available at <https://www.nanhri.org/wp-content/uploads/2016/04/MALAWI.pdf> (accessed 28 February 2019).

75 *Ibid.*

76 Key Informant Interview 1.

77 See note 49, pp 41-42.

78 See note 2, p 152.

Investigations take many forms, including hearings, inquiries, interviews, and monitoring visits.⁷⁹ Upon completing its investigations, the MHRC facilitates the resolution of the complaints through the use of an alternative dispute resolution mechanism or, in certain cases, by instituting litigation. If the investigation suggests there is another institution that can better resolve the issue in dispute, the MHRC will refer the complaint to it. Otherwise, upon the conclusion of its investigation, the MHRC makes recommendations for the resolution of the complaint. Since the MHRC does not have a judicial mandate, its recommendations are also not clothed with judicial authority; as such, compliance with these recommendations depends on the goodwill of the implementing authority. In some instances the recommendations are complied with, but cases abound where this is not so.⁸⁰

Although receiving and dealing with complaints is a core function of the MHRC, it remains an area where its performance has been less than stellar. Several factors have contributed to its failures on this score.⁸¹ First, the lack of material and human resources has meant that the MHRC has been constrained in conducting investigations, in holding public inquiries or even in instituting litigation vindicating human rights. Secondly, the MHRC is limited to investigating violations and recommending solutions. Owing to the non-binding nature of its recommendations, complainants must automatically envisage further steps in the event that the MHRC's recommendations are not complied with. These steps could be private prosecution of perpetrators of human rights violations or commencing litigation to claim compensation for rights violations. These options are often unhelpful to indigent complainants. Thirdly, the MHRC lacks the internal professional capacity to address complaints as legal disputes. Due to the shortage of staff, the MHRC sometimes uses non-legal and paralegal officers to handle legal disputes, which compromises the quality of its investigations.

In spite of these shortcomings in the MHRC's handling of complaints, it is arguable that the public still has confidence in the institution. Its annual reports, for example, reveal that every year the MHRC receives a multitude of complaints.⁸² However, it does not have systematic procedures for following up on its recommendations and advice to government.⁸³ This means that in many instances the MHRC's

79 Key Informant Interview 2.

80 *Ibid.*

81 Key Informant Interview 1.

82 For example, see note 44, p 32.

83 Key Informant Interview 2.

involvement in a particular investigation ends when it has made its recommendations. Additionally, given its limited geographical reach, it faces challenges in registering complaints from areas where it has no permanent presence. It thus remains important that it strengthen its network for the registration of complaints and thereby ensure access for those who live in areas remote from its two offices.⁸⁴

5 Public accountability

Section 37 of the HRC Act directs that the MHRC must, within three months of the end of every calendar year, submit “a report to Parliament on the activities it has carried out during that calendar year”. Over the years, the MHRC has consistently submitted its annual reports to Parliament. However, there has been no significant outcome to this process seeing as Parliament has never deliberated on these reports. Although the MHRC continues to honour its statutory mandate by submitting them, it clear that, beyond complying with the law, the reporting does not achieve much.

In terms of structure and content, the reports cover all aspects of the work of the MHRC, and in this regard include clear summaries of all the activities undertaken in the applicable year. These annual reports, poignantly, have always highlighted the challenges the MHRC faces, so it is fair to surmise that the government is fully apprised of these difficulties or at any rates has the means at its disposal to find out what they are.

The MHRC does hold consultations with stakeholders, but this is not through preordained mechanisms. Consultations tend to be issue-specific and respond to the exigencies of the moment; moreover, the MHRC seems to hold more consultations with its donors than with the general public.⁸⁵ This, however, is probably due to the necessitous position it routinely finds itself in, one that leaves it with no choice but to court donors so as to implement programmes.

6 Conclusion

The MHRC is supported by a fairly robust constitutional and legislative framework. However, since it operates almost like a government department, it is perpetually afflicted by the same resource constraints that affect most such departments in Malawi. Due to resource constraints, the

84 See note 44, p 32.

85 Key Informant Interview 1.

MHRC is unable to, among other things, recruit and retain competent personnel to assist it in executing its mandate and conducting outreach activities with the desired intensity. These limitations entail that the MHRC constantly fails to fulfil its legal mandate. It is important to note that at the normative level it has sufficient guarantees for its independence and autonomy. Nevertheless, looking at what the MHRC has accomplished since its establishment, it is fair to say it is like the proverbial lion that roars loudly but seldom catches any game.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The basis for the establishment of the Malawi Human Rights Commission is laid down in the 1994 Constitution, which provides as follows:

CHAPTER XI: HUMAN RIGHTS COMMISSION

129. Establishment of the Human Rights Commission

There shall be a Human Rights Commission the primary functions of which shall be the protection and investigation of violations of the rights accorded by this Constitution or any other law.

130. Powers

13 of 2001 The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this Constitution, or any other written law but shall not exercise a judicial or legislative function and shall not be given powers so to do.

131. Composition

13 of 2001(1) The Human Rights Commission shall consist of –

- (a) the person for the time being holding the office of Law Commissioner;
- (b) the person for the time being holding the position of Ombudsman;
- (c) Provided that, save as prescribed by this section, no other member of the Human Rights Commission shall be a person in any public office or the President or Vice-President, a Minister or Deputy Minister or a member of Parliament.
- (d) such persons as shall be nominated from time to time in that behalf by those organizations that are considered in the absolute discretion of both the Law Commissioner and the Ombudsman to be reputable organizations representative of Malawian Society and that are wholly or largely concerned with the promotion of the rights and freedoms guaranteed by this Constitution or any other written law.

(2) The Law Commissioner and the Ombudsman shall jointly refer the names of persons nominated under paragraph (c) of subsection (1) to the

President who shall formally appoint such persons as members of the Human Rights Commission.

(3) A member of the Human Rights Commission, other than a member by virtue of paragraph (a) or (b) of subsection (1), shall, save as otherwise provided by an Act of Parliament, continue to be a member of the Commission until such time as he or she is removed from office on the grounds of –

- (a) incompetence;
- (b) incapacity; or
- (c) in circumstances where the member is compromised to the extent that his or her ability to impartially exercise the duties of his or her office is seriously in question.

B.2 Legislative and regulatory instruments

CHAPTER 3:08

HUMAN RIGHTS COMMISSION ACT

ARRANGEMENT OF SECTIONS

SECTION

PART I: PRELIMINARY

- 1) Short title
- 2) Interpretation

PART II: MEMBERSHIP OF THE COMMISSION

- 3) Number of appointed members
- 4) Procedure for nominating appointed members
- 5) Tenure of appointed members
- 6) Chairman of the Commission
- 7) Remuneration
- 8) Committees
- 9) Co-opted persons

PART III: COMPETENCE AND RESPONSIBILITIES OF THE COMMISSION

- 10) Provisions in furtherance of the Constitution

- 11) Commission, an independent national institution
- 12) Competence and powers
- 13) Duties and functions
- 14) Responsibilities
- 15) Methods of operation

PART IV: HEARINGS, INVESTIGATIONS AND REMEDIES

- 16) Hearings
- 17) Procedure for hearings
- 18) Conduct of investigations
- 19) Entry and search of premises and attachment or removal of articles
- 20) Entry and search warrant
- 21) Order of attachment and removal
- 22) Remedies

PART V: MEETINGS

- 23) Meetings
- 24) Chairmen of committee
- 25) Minutes
- 26) Decisions

PART VI: ADMINISTRATION

- 27) Regular supervision
- 28) Executive Secretary
- 29) Duties of the Executive Secretary
- 30) Other staff
- 31) Attendance of meetings by staff

PART VII: FINANCE

- 32) Funding of the Commission
- 33) Accounting and audit

PART VIII: MISCELLANEOUS

- 34) Impartiality and independence
- 35) Disclosure of interest
- 36) Oath of office

37) Annual reports to Parliament

38) Regulations

Schedule 27 of 1998

An Act to make provision relating to the status and functioning of the Human Rights Commission established under Chapter XI of the Constitution and to provide for matters ancillary thereto or connected therewith

[11TH AUGUST 1998]

PART I: PRELIMINARY

1. Short title

This Act may be cited as the Human Rights Commission Act.

2. Interpretation

In this Act, unless the context otherwise requires –

“appointed members” means members of the Commission appointed under section 131 (1) (c) of the Constitution, being those other than the Law Commissioner and the Ombudsman;

“Commission” means the Human Rights Commission established under Chapter XI of the Constitution;

“Executive Secretary” means the officer of the Commission appointed under section 28;

“human rights” means human rights guaranteed by or under the Constitution or any other law in force in Malawi, including international law;

“premises” includes land, any building or structure, any vehicle, conveyance, ship, boat, vessel, aircraft or container;

PART II: MEMBERSHIP OF THE COMMISSION

3. Number of appointed members

The number of other members of the Commission appointed under section 131(1)(c) of the Constitution (in this Act referred to as “appointed members”) shall not exceed five at any one time unless the President, on the recommendation of the Commission, by Order published in the Gazette, prescribes a greater number of appointed members.

[Ch0308s4]4. Procedure for nominating appointed members

(1) The procedure for nominating appointed members shall involve first the issuing of a public advertisement, signed jointly by the Law Commissioner and the Ombudsman, directed to the organizations described in section 131(1)(c) of the Constitution, being those which both the Law Commissioner and the Ombudsman, in their absolute discretion, consider to be reputable organizations representative of Malawian society and that are wholly or largely concerned with the promotion of rights and fundamental freedoms guaranteed by the Constitution.

(2) The advertisement under subsection (1) shall invite all appropriate organizations to nominate up to two persons who are independent, non-partisan and of high integrity and standing from within or outside the organization for appointment as member or members of the Commission, and to do so within thirty days of the date of the publication of the advertisement and in writing addressed to the Commission, giving the full name and address of any person so nominated and his curriculum vitae.

(3) The Law Commissioner and the Ombudsman shall –

- (a) jointly assess the reputation of the nominating organizations and may, for that purpose, seek other or further information pertaining to any nominated person from the person himself or any other person or source before recommending who among the nominated persons shall be formally appointed by the President as members of the Commission;
- (b) according to their assessment under paragraph (a), keep a list of reserved names of nominated persons to be appointed to fill any casual vacancy for the remainder of the term of a member who vacates office before the expiry of the term prescribed in section 5(1).

(4) A list of the names of nominating organizations, the names of the persons nominated and the names of the persons formally appointed by the President and the resultant membership of the Commission shall be published in the Gazette.

5. Tenure of appointed members

(1) Appointed members of the Commission shall hold office for a term of three years, and shall be eligible for re-appointment.

(2) When making recommendations for appointment after the expiry of the three-year term, the Law Commissioner and the Ombudsman shall have regard to the need to maintain a reasonable degree of continuity on the membership of the Commission, so that at least half of the appointed members shall be reappointed for the next term of office.

(3) A casual vacancy in the office of an appointed member shall occur if the member –

- (a) is removed from office under section 131(3) of the Constitution;

- (b) dies; or
- (c) resigns his office in accordance with subsection (4).

(4) An appointed member may at any time resign his office by giving one month notice addressed to the Law Commissioner and the Ombudsman who shall jointly transmit such notice to the President.

(5) A casual vacancy on the membership of the Commission shall be filled by the appointment of a person on the list of reserved names of nominated persons kept pursuant to section 4(4).

(6) A person appointed to fill a casual vacancy shall serve for the remainder of the term of office but no person shall be so appointed where the remainder of the term of office is a period of less than six months.

[Ch0308s6]6. Chairman of the Commission

(1) There shall be a Chairman of the Commission who shall be elected by the Commission from among the appointed members at a meeting of the Commission attended by all members.

(2) Subject to subsection (3), the Chairman shall hold office as such until the expiry of his term of office as member of the Commission.

(3) The Chairman may be removed from office as such by the Commission for good cause and upon the unanimous decision of the rest of the members of the Commission.

7. Remuneration

Members of the Commission shall be paid such honorarium for membership and such allowances when discharging their duties as the Commission shall reasonably determine, subject to the approval of the Public Appointments Committee of Parliament.

8. Committees

(1) The Commission may establish such number of its own committees as it considers necessary for the performance of its functions and may assign to such committees any of its functions without prejudice to the power of the Commission itself to perform the function.

(2) The composition of every committee of the Commission shall include one or more members of the Commission and may include persons who are not members of the Commission but shall not include members of staff of the Commission.

(3) Subject to any general or special directions of the Commission, every committee shall have power to determine its own procedure.

[Ch0308s9]9. Co-opted persons

- (1) The Commission may invite or engage any person or persons to assist with the conduct of any inquiry or investigation before the Commission.
- (2) The Commission or a committee of the Commission may invite any person, on account of his special knowledge or expertise, for any duration of time to take part in its deliberations at any meeting but such person shall not be entitled to vote at such meetings.

PART III: COMPETENCE AND RESPONSIBILITIES OF THE COMMISSION

10. Provisions in furtherance of the Constitution

The provisions of this Part are in furtherance of, and without prejudice to, the generality of the mandate, powers and functions of the Commission conferred by the Constitution.

11. Commission, an independent national institution

All authorities (including all organs of the Government) bodies and persons shall recognize the status of the Commission as a national institution independent of the authority or direction of any other body or person.

12. Competence and powers

The Commission shall be competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.

13. Duties and functions

- (1) The duties and functions of the Commission shall be –
 - (a) to act as a source of human rights information for the Government and the people of Malawi;
 - (b) to assist in educating the public on, and promoting awareness and respect for, human rights;
 - (c) to promote more particularly the human rights of vulnerable groups, such as children, illiterate persons, persons with disabilities and the elderly;
 - (d) to consider, deliberate upon, and make recommendations regarding any human rights issues, on its own volition or as may be referred to it by the Government;

- (e) to study the status and effect of legislation, judicial decisions and administrative provisions for the protection and promotion of human rights and to prepare reports on such matters and submit the reports, with such recommendations or observations as the Commission considers appropriate, to the authorities concerned or to any other appropriate authorities;
 - (f) to perform any other function which the Government may assign to the Commission in connection with the duties of Malawi under those international agreements in the field of human rights to which Malawi is a party, without derogation from the fact that the Government shall remain primarily responsible for performing such functions.
- (2) The Commission shall keep the President fully informed on matters concerning the general conduct of the affairs of the Commission.

14. Responsibilities

The Commission shall have the following responsibilities –

- (a) to submit to the President, Parliament or any other competent authority, on an advisory basis, either at the request of the President, Parliament or such other authority or on its own volition, its opinions, recommendations, proposals or reports on any matters concerning the protection and promotion of human rights;
- (b) to examine any legislation, judicial decisions or administrative provisions in force as well as Bills and administrative proposals and make recommendations as it considers appropriate in order to ensure that such legislation, judicial decisions, administrative provisions, Bills and administrative proposals conform to the fundamental principles of human rights;
- (c) where necessary, to recommend the adoption of new legislation or administrative provisions, or the repeal, replacement or amendment of legislation or administrative provisions in force and relating to human rights;
- (d) to comment publicly or as it sees fit on any general or specific situation of violation of human rights and to recommend initiatives or measures to put an end to such situation;
- (e) to promote ratification by Malawi of any international human rights instruments;
- (f) to promote the harmonization of national legislation and practices with international human rights instruments to which Malawi is a party and to promote and monitor their effective implementation;
- (g) to contribute to the reports which Malawi is required to submit pursuant to treaty obligations and, where necessary, express its opinions on the subject matter but always with due regard to its status as an independent national institution;
- (h) to cooperate with agencies of the United Nations, the Organization of African Unity, the Commonwealth and other multilateral or regional

institutions and national institutions of other countries which are competent in the area of protection and promotion of human rights;

- (i) to assist in the formulation of programmes for the teaching of, and research in, human rights and, where appropriate, to take part in their execution in institutions and other bodies, including in schools, universities and professional circles; and
- (j) to publicize human rights with the aim of increasing public awareness.

15. Methods of operation

The Commission shall –

- (a) freely and without any hindrance whatsoever consider any questions falling within its competence;
- (b) hear any person and obtain any information or any other evidence necessary for assessing situations falling within its competence;
- (c) subject to the provisions of Part IV, carry out investigations and conduct searches in connection with matters that are before it or generally in connection with its powers, duties and functions;
- (d) exercise unhindered authority to visit prisons or any place of detention of persons including police cells, with or without notice;
- (e) develop work relationships with non-governmental organizations devoted to protecting and promoting human rights, including those organizations which promote economic and social development or which protect and promote the interest of vulnerable groups such as children, illiterate persons, persons with disabilities and the elderly;
- (f) maintain consultation with other independent national institutions or bodies, such as the Law Commission, the Ombudsman and the Inspectorate of Prisons, in order to foster common policies, practices and approaches and to promote cooperation in relation to the handling of matters in cases of overlapping jurisdiction;
- (g) progressively operate at the national, regional, district and other levels so as to enhance its outreach in the Republic; and
- (h) to do or perform such other acts or things as are reasonably required for the exercise of its powers and the performance of its duties and functions.

PART IV: HEARINGS, INVESTIGATIONS AND REMEDIES

16. Hearings

(1) The Commission may hear and consider complaints and petitions within its competence brought before it by individuals or groups of individuals.

(2) Complaints may be brought before the Commission on behalf of individuals or groups of individuals by the individuals themselves, legal practitioners, their representatives, third parties, non-governmental

organizations, professional associations or any other representative organizations having an appropriate interest in the matter.

17. Procedure for hearings

The Commission shall have power to determine its own procedure for the conduct of hearings of matters brought before it but may otherwise be guided by such procedures as may be prescribed by regulations made under this Act

18. Conduct of investigations

(1) For the purposes of conducting investigations necessary for the exercise of its powers and performance of its duties and functions, the Commission shall have powers –

- (a) through a member of the Commission or any member of its staff designated in writing by a member of the Commission or by the Commission either generally or specially to require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
- (b) to require any person by notice in writing under the hand of a member of the Commission to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that –
 - (i) such notice shall contain the reasons why the presence of such person is required and why any such article or document should be produced;
 - (ii) when appearing and being examined before the Commission, such person may be assisted by a legal practitioner and shall be entitled to peruse or examine the articles and documents to refresh his memory;
- (c) through a member of the Commission, to administer an oath to, or take an affirmation from, any person referred to in paragraph (b), or any person present at the place referred to in paragraph (b), irrespective of whether or not such person has been required under that paragraph to appear before it, and question him under such oath or affirmation in connection with any matter which may be necessary in connection with that investigation.

(2) A notice under subsection (1) shall not be effectively served unless it is delivered by –

- (a) a member of the Commission;
- (b) a member of the staff of the Commission;
- (c) a police officer or any other person, authorized in that behalf by the Commission in relation to an investigation.

(3) Any person questioned under subsection (1) shall –

- (a) be competent and compellable to answer all questions put to him regarding any fact or matter connected with the investigation;
- (b) be competent and compellable to produce to the Commission any article or document in his possession or custody or under his control which may be necessary in connection with that investigation.

(4) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person under subsection (1).

(5) If it appears to the Commission during the course of an investigation that any person is being implicated in the matter being investigated, the Commission shall afford such person an opportunity to be heard in connection therewith by way of the giving of evidence or the making of submissions and such person or his legal representative shall be entitled, through the Commission, to question other witnesses, determined by the Commission, who have appeared before the Commission pursuant to this section.

(6) The Commission may direct that any person or category of persons or all persons the presence of whom, in the opinion of the Commission, is not desirable shall not be present at the proceedings or any part thereof during, or in the course of, an investigation.

(7) The Commission may in its sole discretion conduct open or closed hearings during its investigation of any matter.

[Ch0308s19]19. Entry and search of premises and attachment or removal of articles

(1) Any –

- (a) member of the Commission;
- (b) member of the staff of the Commission;
- (c) police officer or other person, authorized in that behalf by the Commission
- (d) may, subject to the provisions of this section, for the purposes of an investigation, enter any premises on or in which anything connected with that investigation is or is reasonably suspected to be.

(2) The entry and search of any premises under this section shall be conducted with strict regard to decency and order, which shall include regard to –

- (a) a person's right to respect for and protection of his dignity;
- (b) the right to freedom and security of the person; and
- (c) the right to his personal privacy.

(3) A person authorized under subsection (1) may, subject to the provisions of this section –

- (a) inspect and search the premises and there make such enquiries as he may deem necessary;
- (b) examine any article or document found on or in the premises;
- (c) request from the owner or person in control of the premises or from any person in whose possession or control an article or document is information regarding the article or document;
- (d) make copies of or take extracts from any book or document found on or in the premises;
- (e) request from any person who has, or whom he has reason to believe has, the necessary information, an explanation regarding that article or document;
- (f) attach anything on or in the premises which in his opinion has a bearing on the investigation concerned;
- (g) remove from the premises, against issue of a receipt, the article or document for further examination or for safe custody, but any article or document so removed, shall be returned as soon as possible after the purpose for such removal has been accomplished.

20. Entry and search warrant

(1) Entry and search of any premises under this Act shall only be upon a warrant issued by a magistrate if it appears to the magistrate from information on oath that there are reasonable grounds for believing that any article or document, which has a bearing on the investigation concerned, is on such premises.

(2) A warrant issued under this section may be issued on any day and shall be of force until –

- (a) it is executed; or
- (b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
- (c) the expiry of one month from the day of its issue; or
- (d) the purpose for the issuing of the warrant has lapsed, whichever occurs first.

(3) A person executing a warrant under this section shall, at the commencement of such execution, hand the person referred to in the warrant or the person who is the owner or in control of the premises a copy of the warrant and identify himself, if such person is present or, if such person is not present, affix a copy of the warrant to the premises at a prominent visible place.

21. Order of attachment and removal

If during the execution of a warrant under this Part a person claims that an article or document found on or in the premises concerned contains

privileged information and refuses the inspection or removal of such article or document, the person executing the warrant shall, if he is of the opinion that the article or document contains information that has a bearing on the investigation and that such information is necessary for the investigation, request the Registrar or an Assistant Registrar of the High Court to issue an order to attach and remove that article or document for safe custody until a court has made a ruling on the question whether the information concerned is privileged or not, but such an order shall lapse if after thirty days from the date of its issue no court has made such ruling.

[Ch0308s22]22. Remedies

Upon hearing complaints brought before it or based upon any investigations it has carried out or at any stage, the Commission –

- (a) shall seek an amicable settlement through conciliation and, where appropriate, on the basis of confidentiality;
- (b) shall inform the complainant and the respondent of their respective rights, remedies or obligations and the Commission shall promote a party's access to the remedies;
- (c) may, as provided by sections 15(2) and 46(2)(b) of the Constitution, render such assistance or advice as the party that brought the complaint or petition may reasonably require;
- (d) may transmit a complaint, petition or any other matter to any other competent authority as prescribed by the law or as otherwise the Commission thinks fit; or
- (e) make recommendations to the competent authority, proposing amendments or reforms of the laws, regulations or administrative provisions or practices if the Commission has identified such laws, regulations or administrative provisions to have created the difficulties or hardships encountered by the persons who brought the complaints or petitions; and
- (f) may recommend to the relevant authority the prosecution of any person found to have violated human rights or the taking of any other action and any such authority shall consider the recommendation and take such action as it deems appropriate.

PART V: MEETINGS

23. Meetings

- (1) The Commission shall meet as often as its business requires and in any event not less than once every two months.
- (2) Meetings of the Commission shall be held at such places and times as the Commission shall determine:

Provided that the first meeting and any meeting at which the Chairman of the Commission is to be elected shall be convened by the Law Commissioner in consultation with the Ombudsman and shall be presided over by the Law Commissioner until the Chairman is elected.

(3) A meeting of the Commission shall be convened at the direction of the Chairman by written notice of not less than seven days, but such period of notice may be dispensed with if in the opinion of the Chairman the urgency of any business or matter to be brought before the meeting so requires.

(4) The quorum for any meeting of the Commission or a committee of the Commission shall be formed by the presence of more than half of the members of the Commission or committee.

(5) Save as otherwise provided in subsection (2), meetings of the Commission shall be presided over by the Chairman of the Commission and, in the absence of the Chairman, members present may elect one of their number from among appointed members to preside.

24. Chairmen of committees

(1) The chairman of every committee of the Commission shall be such member of the committee who is also a member of the Commission as the Commission shall designate.

(2) The chairman of a committee of the Commission shall preside over meetings of the committee and in his absence the members present may elect one of their number to preside.

25. Minutes

The Commission, and every committee of the Commission, shall cause minutes of its meetings to be recorded and kept.

26. Decisions

Save as provided in section 6(3) in relation to the removal from office of the Chairman of the Commission, the decision of the Commission or of a committee of the Commission at any meeting shall be that of the majority of the members present and voting and in the event of a tie the person presiding shall have a casting vote in addition to his deliberative vote.

PART VI: ADMINISTRATION

27. Regular supervision

The Commission shall exercise regular supervision of the work of the Commission and over the members of staff of the Commission in the performance of their duties.

28. Executive Secretary

(1) There shall be the office of Executive Secretary of the Commission which shall be a public office.

(2) The Executive Secretary shall be appointed by the Commission on such terms and conditions as the Commission shall determine.

(3) The office of the Executive Secretary shall be held by a person who has had experience and shown capacity in a profession or in activities devoted or relevant to the protection and promotion of human rights.

29. Duties of the Executive Secretary

Subject to the general and special directions of the Commission, the Executive Secretary shall be responsible for the day to day management of the Commission and the administrative control of the other members of staff of the Commission and, in that regard, shall be answerable and accountable to the Commission.

30. Other staff

(1) There shall be employed in the service of the Commission, subordinate to the Executive Secretary, such other management, professional, research, technical, administrative and other support staff as the Commission shall consider necessary for the exercise of its powers and the performance of its duties and functions and who shall be officers in the public service.

(2) The staff of the Commission under subsection (1) shall be appointed by the Commission on such terms and conditions as the Commission shall determine:

Provided that the Commission may by directions in writing delegate to the Executive Secretary the appointment of its staff in such junior ranks as it shall specify and the Executive Secretary shall report to the Commission every appointment he has made pursuant to this subsection.

31. Attendance of meetings by staff

(1) The Executive Secretary, or any other officer of the Commission as the Executive Secretary shall designate with the approval of the Commission, shall attend meetings of the Commission or any committee of the Commission to record the minutes of the meetings and to take part in the deliberations thereof subject to the directions of the Commission or committee but shall not be entitled to vote.

(2) Where in any meeting the deliberations of the Commission or of a committee of the Commission concerns the Executive Secretary or any officer of the Commission designated to attend the meeting, the Commission or the committee, as the case may be, may exclude the Executive Secretary or such officer from the meeting.

PART VII: FINANCE

32. Funding of the Commission

(1) The Government shall adequately fund the Commission to enable it to exercise its powers and perform its duties and functions and so as to ensure its independence and impartiality.

(2) The Commission may receive any donations of funds, materials and any other form of assistance for the purposes of its duties and functions:

Provided that no such donation shall jeopardize or compromise the independence and impartiality of the Commission.

33. Accounting and audit

The Commission shall be liable to account to Parliament for its funds in the manner applicable to Government departments and the accounts of the Commission shall be liable to audit by the Auditor General.

PART VIII: MISCELLANEOUS

34. Impartiality and independence

(1) Every member of the Commission, of a committee of the Commission or of the staff of the Commission shall serve independently and impartially and exercise his powers or perform his duties and functions in good faith and without fear or favour.

(2) No organ of the Government and no member or employee of an organ of the Government nor any other person or body of persons, shall interfere with, hinder or obstruct the Commission, any committee of the

Commission, any member of the Commission or of such committee or of the staff of the Commission or any person duly authorized to act in the service of the Commission in the exercise of its or his or her powers or the performance of its or his duties and functions.

(3) Any person who contravenes subsection (2) shall be guilty of an offence and liable to a fine of K20,000 and to imprisonment for five years.

(4) All organs of the Government shall accord the Commission such assistance and cooperation as may be reasonably required for the exercise of its powers and performance of its duties and functions and for the protection of the independence, impartiality and the due dignity of the Commission.

[Ch0308s35]35. Disclosure of interest

No person shall conduct an investigation on behalf of the Commission or render assistance with regard to such investigation in respect of a matter in which he has any material or other interest which might preclude him from exercising his powers or performing his duties or functions in a fair, unbiased and proper manner; and where any person fails to disclose such interest or conducts an investigation or renders assistance with regard thereto in contravention of this section, the Commission may take such steps as it considers necessary to ensure a fair, unbiased and proper investigation.

36. Oath of office

Every member of the Commission (including the Law Commissioner and the Ombudsman) shall, as such member, as soon as practicable –

- (a) after the commencement of this Act, in the case of a member holding office at the commencement of this Act;
- (b) after his appointment, in the case of a member holding office subsequent to the commencement of this Act, take an oath or make an affirmation for the due execution of his office before the President in the form set out in the Schedule to this Act:

Provided that in the case of an affirmation the form shall be modified so as to substitute the word “affirm” for the word “swear” and by omitting the last sentence in the form.

37. Annual reports to Parliament

In addition to any specific report which the Commission may at any other time submit to any authority under this Act, the Commission shall within three months after the end of every calendar year submit a report to Parliament on the activities it has carried out during that calendar year.

38. Regulations

The Minister may, on the advice of the Commission, make regulations for the better carrying out of the provisions of this Act.

SCHEDULE s. 36

OATH OF OFFICE OF MEMBER OF THE COMMISSION

I , being a member of the Human Rights Commission, do swear that I will well and truly perform the functions of that office according to the Constitution and the laws of the Republic of Malawi without fear, favour, affection or ill will. So help me God.



12

**THE NATIONAL HUMAN
RIGHTS COMMISSION OF
MAURITIUS**
*Roopanand Mahadew**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The Republic of Mauritius, an island state in the Indian Ocean, lies off the south-eastern African Coast and east of Madagascar. The French Island of Réunion is its nearest neighbour. The Constitution of Mauritius (the Constitution) declares that Mauritius consists of the islands of Mauritius, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including Diego Garcia¹ and any other island within the State of Mauritius.² Mauritius has a population of about 1.3 million inhabitants. According to the First Schedule of the Constitution, the population is regarded as including a Hindu, Muslim and Sino-Mauritian community; people not belonging to these categories are classified as part of the “General Population”. Arguably, the population has been categorised in this way to serve the purposes of the electoral system and minority representation, albeit that these arrangements have been criticised as an obstacle to nation-building and unity.³

* Department of Law, Faculty of Law and Management, University of Mauritius.

1 Mauritius has always maintained that it has sovereignty over Diego Garcia but has not been able to exercise it so far. See R Mahadew and D Raumnauth, “Assessing the Responsibilities of the United Kingdom and Mauritius Towards the Chagossians under International Law”, 29 *Afrika Focus* (2016), p 40.

2 Constitution of the Republic of Mauritius, Port Louis, Article 111.

3 See in general R Mahadew, “The Best-Loser System in Mauritius: An Essential Electoral Tool for Representing Political Minorities”, in E Durojaye *et al* (eds) *Constitution-Building in Africa* (2015), p 160.

Since gaining independence in 1968, Mauritius has had free and fair elections under a multi-party democracy reposing on constitutional foundations such as the rule of law and separation of powers – these have been the basis of its social, economic and political success. It has been lauded as a country with a decent record of human rights and one which is doing relatively well in the fight against corruption.⁴ The Constitution provides for a Bill of Rights which, inspired by the European Convention on Human Rights, protects civil and political rights. Though most of the important first-generation rights are recognised and protected, the Supreme Court’s interpretation of some of them, such as the right to privacy, has been regarded as narrow and conservative.⁵ Another matter of concern is the absence of socio-economic rights and third-generation rights such as environmental rights and the right to development.

Numerous legislative acts confer protection of human rights, and such protection is, arguably, guaranteed by virtue of Mauritius’s ratification of international human rights instruments at the level of both the United Nations and African Union. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples’ Rights. Mauritius is also a state party to all the major global and regional conventions on women’s rights, the rights of minorities and children’s rights.⁶

Despite the limitations of its domestic system of human rights, Mauritius is still hailed as a country where basic human rights, fundamental freedoms and liberties prevail. This relative success can be attributed to the culture of democracy and respect for the rule of law that exists in the country and the strong will of various stakeholders to uphold this culture. Parliament, the executive, the judiciary and institutions such as the Office of the Ombudsman, the National Human Rights Commission (NHRC), the Equal Opportunities Commission and civil society organisations (CSOs) have made notable contributions in this respect. This chapter focuses, though, on the role, evolution and contribution of the NHRC, since it remains the institution in Mauritius with the most direct, substantial mandate in regard to the promotion and protection of human

4 Republic of Mauritius, “Mo Ibrahim Index 2018: Mauritius Consolidates Top Rank in Overall Governance in Africa”, available at <https://bit.ly/2XiVUoe> (accessed 9 January 2019).

5 R Mahadew, “The Role of the Mauritian Supreme Court in Upholding Democracy and the Constitution”, 5 *African Journal of Democracy and Governance* (2018), p 61.

6 For a full list of conventions to which Mauritius is a state party, see Republic of Mauritius, “Human Rights Conventions”, available at <https://bit.ly/2RQWgBp> (accessed 9 January 2019).

rights. Accordingly, the chapter provides a critical assessment of the NHRC by way of an examination of its establishment, mandate and functions.

2 Establishment and evolution of the NHRC

The NHRC was established in 2001 in terms of the Protection of Human Rights Act of 1998.⁷ Initially its mandate was to deal with violations of the civil and political rights entrenched in Chapter 2 of the Constitution and to review complaints filed by members of the public against police officers for actions of theirs in the course of duty. In 2002, a Sex Discrimination Division was also attached to the NHRC to deal with complaints from girls and women about gender discrimination and sexual harassment, but with the creation of the Equal Opportunities Commission in 2008, the mandate of this division was transferred to the latter.⁸ The NHRC was also mandated at first to deal with children's rights, but this mandate was transferred to the Ombudsperson for Children upon its establishment.⁹

In 2005, the NHRC established another division, the National Preventive Mechanism, with the mandate of dealing with complaints from detainees and conducting inspections of places of detention such as police detention centres, cells in police stations, prisons, youth rehabilitation centres, youth correctional centres, and mental hospitals.¹⁰ This development came as a result of Mauritius's ratification in 2005 of the Optional Protocol to the Convention against Torture.¹¹ It has to be noted that the Board of Visitors under the Reform Institutions Act discontinued its operations after the establishment of the National Preventive Mechanism as a division of the NHRC. In 2014, there were major amendments to the Act establishing it; in addition, the NHRC was restructured into three divisions; the Human Rights Division, the Police Complaints Division (PCD) and the National Preventive Mechanism Division. In 2016 the Independent Police Complaints Commission Act was adopted, creating the Independent Police Complaints Commission

7 Protection of Human Rights Act 1998, section 3.

8 Equal Opportunities Act 2008, section 27(3).

9 See Ombudsperson for Children's Office, "The Role, Powers and Functions of the Ombudsperson for Children", available at <https://bit.ly/325o2Pu> (accessed 10 January 2018).

10 National Human Rights Commission, Annual Report 2017 (2017), available at <https://bit.ly/2JaIRQE> (accessed 10 January 2019), p 1 (hereafter NHRC Report 2017).

11 See note 6.

(IPCC) as a successor to the PCD. This new statutory body came into operation in 2018 and took over all the cases of the former PCD.¹²

The mandate of the NHRC underwent further changes in 2013 with the conferring, by law, of the responsibility of referral to the Supreme Court of the review of criminal convictions in cases where fresh and compelling evidences discovered by the NHRC in the course of its investigations, could be used to challenge an earlier conviction. The NHRC was given the opportunity to exercise this mandate in the case of *Amicale* in which four persons were convicted to penal servitude for life in 2000 after being found guilty of arson leading to the death of seven persons.¹³ The NHRC found that there was no fresh and compelling evidence to warrant referring the case to the Supreme Court.¹⁴ It has to be underlined that only criminal convictions from the Supreme Court, and not intermediate courts and district courts, can be referred.

In summary, the NHRC has evolved from an institution focused primarily on civil and political rights to one which has been restructured through several important amendments. In addition, its mandate and powers have been revisited time and again to include more functions.

3 The nature of the NHRC

3.1 An overview of the legal framework establishing the NHRC

As mentioned, the NHRC is set up by the Protection of Human Rights Act of 1998. Section 3 provides that it is a body corporate which shall not be subject to the direction or control of any other authority. It also provides that the Commission shall be headed by a chairperson assisted by as many deputy chairpersons as there are divisions within the NHRC. Each division in turn consists of two members with knowledge and experience in the relevant field.

The way the Chairperson and the deputy chairpersons are appointed is noteworthy. Section 3(8) provides that they are appointed by the

12 Republic of Mauritius Portal, "Independent Police Complaints Commission", available at <http://ipcc.govmu.org/English/Pages/default.aspx> (accessed 10 January 2019).

13 See note 10, p 2.

14 National Human Rights Commission, Annual Report 2015 (2015), available at <http://nhrc.govmu.org/English/Documents/annrep2015.pdf> (accessed 10 January 2019), p 25.

President, acting on the advice of the Prime Minister. The Prime Minister is also required by the law to consult the leader of the opposition before advising the President on who to appoint as chairperson and deputy chairpersons.

The Constitution does not refer either directly or indirectly to the NHRC. This stands in sharp contrast to the South African Constitution's provisions regarding the South African Human Rights Commission (SAHRC) and, it is argued, is a major lacuna in the Mauritian context. The fact that the establishment of the NHRC is provided for exclusively in an Act of Parliament does not confer the same degree of protection as does constitutional entrenchment. In other words, the powers, mandates and other critical aspects of the NHRC can be amended easily by a simple majority in Parliament to suit the agenda of the government in power. Be that as it may, it should however be noted that section 17 of the Constitution provides that the Supreme Court has original jurisdiction to hear and determine complaints made by any persons in relation to the violations of any rights in sections 3-16 of the Constitution, that is to say, the Bill of Rights.

3.2 The independence of the NHRC

The independence of human rights institutions is vital, albeit that this does not imply they should not have any connection at all with the government.¹⁵ While there is a perception that the NHRC has been working independently so far without interference or intervention by the government, there is no provision in the Protection of Human Rights Act specifically dedicated to its independence and impartiality. The chairperson, deputy chairpersons and other members of the Commission have an obligation to perform their duties independently and impartially only from a moral point of view or as part of their scheme of duties. However, the question of independence is relevant not only to how members of the NHRC perform their duties – it is also critical that other organs of the state prohibited from interfering in the work of the NHRC. The Protection of Human Rights Act has no provisions that define the relationship between the NHRC and such other organs to ensure its impartiality and independence.

15 G Triggs, "The Independence of Human Rights Institutions", *Human Rights*, (2016), p 54.

3.3 Appointment procedure

In practice, it is the Prime Minister who chooses persons for these posts, while the President, who is only a ceremonial figure despite being the head of the executive, only procedurally carries out the exercise of appointment. This method of appointment implies that the Prime Minister will tend to appoint people whom he or she knows will not cause trouble. For instance, a staunch defender of human rights probably would not be the ideal candidate as he or she might not agree with what the government of the day is doing on the national human rights front and thus demand that it be answerable and accountable.

In fact, the United Nations Human Rights Committee (UNHRC) in 2017 was critical about the process for the selection and appointment of the members of the NHRC, describing it as not “sufficiently transparent and participative”.¹⁶ A Mauritian delegation responded simply by stating that the appointment is made by the President.¹⁷ Indeed, it is argued that the appointment of the members of the NHRC is merely a political exercise, with a high probability that only those in the government’s good books will be appointed. This impacts negatively on the independence of the NHRC as there is then always the possibility that it will be reluctant to investigate or report on human rights situations that affect the image of the government. The selection and appointment of these high-level posts at the NHRC are not conducted by way of open and public advertisement and a democratic selection exercise.

As regards the qualifications of the chairpersons and deputy chairpersons, section 3 of the Protection of Human Rights Act provides that the chairperson should have been a judge, a magistrate or a legal practitioner for not less than ten years. The deputy chairpersons is also required to have been a law practitioner, in this case for not less than five years. However, whilst it is important that persons appointed at that level have a good legal background, human rights issues are not necessarily understood only by persons who have practised law. There is, furthermore, no logical reason why both the chairperson and deputy chairpersons should need to have a legal background. The qualification criteria, especially for deputy chairpersons, ought to have been made more flexible to accommodate persons from other backgrounds, such as social work, sociology and related fields. This would have given the NHRC a

16 UN HRC, Concluding Observations on the Fifth Periodic Report of Mauritius, UN Doc CCPR/C/MUS/CO/5 (9 November 2017), paragraph 7.

17 See UN OHCHR, Human Rights Committee Considers the Report of Mauritius (24 October 2017), available at <https://bit.ly/2LuGACU> (accessed 10 January 2019).

multidisciplinary orientation, leading ultimately to better, more effective results.

The UNHRC also raised concerns about the lack of clarity regarding the guarantee of tenure of mandate-holders and the absence of conflict-of-interest provisions in the legislation.¹⁸ The absence of these provisions means that members of the NHRC can be removed without due process and for political reasons, or could be in a position of conflict of interests and thus not discharge their responsibilities effectively. These are areas where changes in law are urgently required.

3.4 Financial autonomy

The salaries and wages of the chairperson, deputy chairpersons and members of the NHRC as well as its staff are catered for by the government. As far as the funding of the activities of the NHRC is concerned, reliance is made on donor funds. For instance, in 2017 the NHRC entered into an agreement in terms of which the European Union would finance a three-year campaign to educate the public on human rights.¹⁹ Similarly, through the United Nations Development Program (UNDP) in Mauritius, the Office of the High Commissioner for Human Rights financed the publication in the same year of a compendium of concluding observations of treaty bodies, the African Commission on Human and Peoples' Rights, and the Universal Periodic Review of Mauritius by the UNHRC.

3.4 Relations with civil society

The NHRC does work in collaboration with civil society in Mauritius. For instance, workshops are regularly conducted in citizen advice bureaus across the country for the benefit of members of CSOs and the public in general. Non-governmental organisations (NGOs) also have the opportunity to comment on the national reports on human rights that the NHRC prepares and submits to United Nations' treaty bodies, the UNHRC and the regional organisations on human rights.²⁰

However, relations between the NHRC and NGOs have not been good. The UNHRC has noted a lack of participation or involvement of

18 UNHRC, Concluding Observations on the Fifth Periodic Report of Mauritius, UN Doc CCPR/C/MUS/CO/5 (9 November 2017), paragraph 7.

19 See note 10, p 4.

20 National Human Rights Commission, Annual Report, Edition 2008, Port Louis (2008), p 15.

NGOs in human rights matters in Mauritius.²¹ For instance, there have not been any joint reports or publications by the NHRC and NGOs on any topic concerning human rights in Mauritius. Arguably, the political nature of the NHRC does not allow it to join forces with NGOs and deal with human rights situations in Mauritius.

3.5 Accessibility

The NHRC is accessible to all Mauritians as well as to foreigners who find themselves on Mauritian territory. Physical access to the Commission is very easy due to the island's small geographical size: there is no part of Mauritius that can be qualified as a remote area with limited access to the NHRC.

Complaints forms are readily available its website, and the procedures to be followed in submitting a complaint are clearly elaborated upon therein.²² For persons who are illiterate or have a disability, complaints can be submitted by proxy or on their behalf. The complaint can be drafted in any language (French, English or Creole) in which the complainant is at ease and conversant. The complaint can also be directly recorded by the officers of the NHRC if complainants are incapable of doing so themselves. As for persons from Rodrigues, complaint forms may be collected at the office of the island chief executive and forwarded to the NHRC when completed.

Although accessing the NHRC is not difficult at all, many people might not be aware of its complaints procedure or the possibility of availing themselves of it. Similarly, few would be aware that the NHRC publishes an annual report with important information on the situation of human rights in the country and Mauritius's international commitments in this regard. There is hence a need for the work of the NHRC to be popularised to enable greater engagement with all stakeholders.

4 Mandate of the NHRC

The mandate of the NHRC is provided for in section 3A of the Protection of Human Rights Act. Its primary responsibility is to promote and protect human rights as per section 3A(a) of the Act. It is mandated to review the safeguard provided by any enactment for the protection of human rights.

21 See note 17.

22 See Republic of Mauritius Portal, "National Human Rights Commission – Procedures", available at <http://nhrc.govmu.org/English/Procedures/Pages/default.aspx> (accessed 10 January 2019).

As a commission, it is also entrusted with the duty to review factors that inhibit and the enjoyment of human rights. It is mandated to submit to any minister any opinion, recommendation or proposal related to the promotion and protection of human rights. Its responsibilities extend as well to the preparation of reports on the national human rights situation in general and specific matters in particular.

Another important mandate concerns the harmonisation of national legislation on human rights with the international human rights instruments to which Mauritius is a state party. It is also responsible for assessing the effective implementation of these instruments at the national level. It is the duty of the NHRC to encourage the country's ratification of or accession to relevant international human rights instruments. The NHRC is required to assist the government in the drafting and submission of state reports to the various regional and international human rights bodies to which Mauritius is state party.

There is also a duty of cooperation with the United Nations and other regional bodies to achieve the overall objective of promoting and protecting human rights. The NHRC has the duty, furthermore, to assist in the formulation of programmes for teaching and research on human rights and ensure their execution in schools, universities and professional circles.²³

The Paris Principles clearly stipulate that the NHRC must be given a mandate which is as broad as possible and clearly set forth in a constitutional or legislative text.²⁴ Arguably, the functions and mandate of the NHRC as set out in the Protection of Human Rights Act are in line with what the Principles require: the Commission does indeed have a very broad mandate, one which is given legislative effect through the Act. The broadness of the mandate is evident in section 3A(m), which provides that the NHRC can exercise such other functions it considers conducive to the promotion and protection of human rights.

In addition, the Protection of Human Rights Act aligns with provisions of the Paris Principles that concern the responsibilities human rights institutions have in preparing state reports, harmonising domestic laws with international ones, advising the state on human rights matters, and commenting on draft laws, bills and policies. Section 3A of the Act, which provides for the NHRC's mandate, is similar in letter and spirit to

23 Protection of Human Rights Act 1998, section 3A(b)-(m).

24 Paragraph 2 of the Paris Principles.

the Paris Principles.²⁵ (The more trenchant question of whether the NHRC has been effective in carrying out this mandate is discussed later in this Chapter).

It should be added that the NHRC's mandate is unique in the Mauritian context and that, as such, there are no other institutions with competing mandates. For instance, the Equal Opportunities Commission and Office of the Ombudsperson for Children are required to investigate cases of discrimination and violation of children's rights, respectively, as well as conduct research and educational programmes relating to the matters in which they specialise.²⁶ However, the NHRC remains the institution with the mandate in preparing state reports, advising the state or relevant ministers, and cooperating with other international institutions on various aspects of human rights.

The NHRC also has specific mandates in the case of its two specialised divisions, the Human Rights Division and the National Preventive Mechanism Division. According to section 4 of the Protection of Human Rights Act, the Human Rights Division:

may enquire into any written complaint from any person alleging that any of his human rights has been, is being or is likely to be violated by the act or omission of any other person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public body without prejudice to the jurisdiction of the Courts or powers conferred on the Director of Public Prosecutions.

It has to be pointed out that Mauritians often prefer to approach the court in cases of violations of their human rights rather than the NHRC. This is explained by the fact that the NHRC's recommendations are not binding in nature.

4.1 Commenting on existing and draft laws

According to section 3A(b) of the Protection of Human Rights Act, the NHRC has the legal obligation to review the safeguard provided by or under any enactment for the protection of human rights. By implication, the Commission has the right to comment on existing and draft laws. This is in line with paragraph 3(a)(i) of the Paris Principles, which requires NHRIs to ensure that the laws are in conformity with human rights principles. For example, in its 2017 annual report the NHRC reports on newly adopted or amended laws, including the Land Drainage Authority

25 Paragraphs 3(a)-(g) of the Paris Principles.

26 Equal Opportunities Act 2008, section 27(3).

Act; the Constitution with respect to the right to liberty; the Finance (Miscellaneous Provisions) Act amending the National Identity Card; the Equal Opportunities (Amendment) Act; the Data Protection Act of 2017 regarding the right to privacy; and the National Employment Act regarding the right to work.²⁷

Some critical observations should be made. First, previous annual reports, such as those for 2015 and 2016, lack similar coverage despite the enactment of many important laws during these years. This suggests that the NHRC has not been consistent in reviewing existing or new laws with a bearing on human rights in Mauritius even though it has the mandate to do so. In general, the NHRC very rarely takes a critical position, either in press releases or public appearances, on any legislation affecting human rights. Secondly, the list of laws cited above from the 2017 annual report are dealt with in a purely descriptive way: the NHRC notes those laws which have been amended or adopted, but not does not undertake a critical discussion of their impact on the promotion and protection of human rights.

For example, the 2017 annual report reports factually and without critical comment on how the amendment of the Data Protection Act relates to the right to privacy. Yet this issue turns around the inclusion of citizens' biometric data in their national identity cards – a hotly contested matter in Mauritius in 2015/2016. It was even the subject of a Supreme Court case, the decision of which was appealed against before the Judicial Committee of the Privy Council.²⁸ The NHRC, however, remained silent on the human rights implications of including biometric data in national identity cards. Indeed, it has been unwilling to declare its position on many a law. The impression given is that it often opts to refrain from commenting on laws that are politically sensitive or where its views might be seen as critical of the performance of the government.

Nonetheless, there are a few notable exceptions where the NHRC has been vocal. One such instance is the subject of provisional charges, on the basis of which police may arrest a person without any investigation but based on a *prima facie* case. The NHRC dealt extensively with this matter in its annual report of 2015, which pointed out that since there is no piece of legislation in the statute books on which a provisional charge may be

27 See note 10, pp 123-129.

28 R Mahadew, "Does the Mauritian Constitution Protect the Right to Privacy? An Insight From *Madhewoo v the State of Mauritius*", 18 *African Human Rights Law Journal* (2018), pp 189-204.

grounded, the concept is in direct violation of the right to liberty.²⁹ The NHRC's annual report states:

In the past, the National Human Rights Commission has already raised the issue of police arresting people on mere allegations or suspicion and then conducting an enquiry, but no solution has yet been prescribed to that effect. The problem comes to the fore from time to time in high profile cases but is ignored when ordinary citizens are victimised. On the mere allegation of sexual misconduct, the practice of the police is to arrest immediately without making a serious enquiry, even if the incident has occurred a number of years before.³⁰

The NHRC made specific recommendations about the concept of provisional charges:

It is proposed to introduce legislation on the lines of the UK Police and Criminal Evidence Act 1984 (PACE) in Mauritius. Section 37(2) of PACE provides that where a person is arrested without a warrant and the custody officer does not have sufficient evidence to charge him, the person arrested must be released either with or without bail “unless the custody officer, has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him”.

The above makes no provision for a “provisional charge” but allows for continued detention which would be under judicial control. For this to work in Mauritius it is essential that the powers and responsibility of the Police Station Enquiring Officer which are defined in the Police Standing Orders be carefully reinforced and defined.

4.2 Monitoring domestic human rights situations

The NHRC is mandated under the section 3A(e) of the Protection of Human Rights Act to prepare reports on the national human rights situation in Mauritius. It has reported on issues such as economic measures, drugs, food security, the right to water, lesbian, gay, bisexual and transsexual (LGBT) rights, the digital revolution, domestic violence, sexual harassment, migrants workers, persons with disabilities, and children's rights.³¹ It is only since 2017 that the NHRC has adopted the approach of monitoring the domestic human rights situation in respect of specific issues. Previous reports show that no such exercise was done in the

29 National Human Rights Commission, Annual Report, Edition 2016, Port Louis (2016) (hereafter NHRC Report 2016), p 16.

30 *Ibid*, pp 18-19.

31 See note 10, pp 25-44.

past and that the focus instead was on the activities of the various divisions of the NHRC.³²

The NHRC's over-cautious approach is again evident in its annual report of 2017, which does not raise concern over human rights issues and situations but offers a merely descriptive report on matters in which the government has taken positive steps – indeed, the reporting strikes one as almost a tribute to the government's achievements. There is also a tendency for the NHRC to avoid getting to the heart of the issues, assigning responsibilities to particular role-players and demanding answers from relevant authorities. For example, the LGBT issue was reported in vague and generalised terms.³³ It did not touch on the fact that the Mauritian Criminal Code still criminalises sodomy and that animosity and prejudice against the LGBT community remains so prevalent that a gay pride march in 2018 was cancelled for fear of violence following threats made against the organisers.³⁴ As for the right to water, the report simply notes the policy measures the state has adopted in regard to water supply, but fails to mention serious cases where water supply was interrupted for days in some parts of Mauritius and triggered protests by concerned inhabitants.³⁵

The law gives the NHRC a clear mandate to monitor human rights situations with the aim of investigating and documenting issues and advocating for solutions to them. However, it has not conducted any independent study or drafted any report that deals with pressing issues, but instead has merely referred to some issues in its annual reports in a descriptive and pro-government manner.

4.3 Monitoring and advising on compliance with international standards

The NHRC has adopted a timid approach to monitoring and advising on state compliance with international standards – compliance in this context

32 See annual reports from 2013-2016.

33 See note 10, p 30 on the issue of LGBT rights in Mauritius. There is still a need to inform and educate the public at large about LGBT rights. Mauritian society has come to accept foreigners who are same-sex couples and even tolerate homosexual tendencies among well-known figures. Moreover, Mauritius has an annual Gay Pride Parade, which is publicised in newspapers. While same-sex marriages have not yet become an issue, there is general tolerance of LGBT persons.

34 See "Mauritius Church Condemns Blocking of Gay Rights March", *Daily Mail* (6 June 2018), available at <https://dailym.ai/2ZXi2Gu> (accessed 10 January 2019).

35 See A Macky, "Water Shortage: A Long Due Problem that Needs to Be Solved", available at <https://www.lexpress.mu/idee/274611/water-shortage-long-due-problem-needs-be-solved> (accessed 10 January 2019).

includes signing and ratifying essential international human rights instruments. It has also failed to develop a clear strategy for inducing the government to domesticate human rights instruments such as the ICCPR, the ICESCR and even the African Charter on Human and Peoples' Rights. This is of utmost importance, given that Mauritius is a dualist country – that is to say, the provisions of international instruments have legal effect at the national level and before national courts only if they are domesticated.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) can be used to illustrate the point. Mauritius signed it in 2005 but ratified it only in 2017, and then with reservations to Article 6(b) which prohibits the marriage of a girl under the age of 18.³⁶ Between 2005-2017 the NHRC did not take any steps to advise the government on the importance of ratifying the Maputo Protocol. Moreover, since the latter's ratification, the Commission has not issued any comment on the reservation concerning child marriages. It has also been silent on the next essential step after ratification, namely the domestication of the provisions of the Maputo Protocol.

4.4 Educating and informing

In its 2017 annual report, the NHRC highlighted the need for human rights education at schools to include both the teaching of rights and moral education. It stated that “education in morals must give children a sense of values and inculcate the notion that rights are accompanied by duties to society and the respect of others”.³⁷ The NHRC has conducted regular talks on human rights in citizens' advice bureaus and social welfare centres. Educational campaigns have also been conducted to enable police officers to know their own rights, the rights of suspects and the rights of the members of the public.³⁸

While such projects are no doubt laudable, it is critical to ensure that they are carried out in a sustainable way and that monitoring and evaluation is undertaken to assess their impact. In addition, other stakeholders, such as parliamentarians, NGOs and tertiary institutions, should be included in the list of audiences the NHRC targets for its campaigns on rights-education.

36 A Budoo, “Mauritius: It's Time Mauritius Took Decisive Steps to Outlaw Child Marriages”, *AllAfrica*, available at <https://allafrica.com/stories/201807040496.html> (accessed 10 January 2019).

37 See note 10, p 121.

38 *Ibid*, p 122.

4.5 Receiving and dealing with complaints and petitions

The NHRC has procedures for receiving and dealing with complaints and petitions. Upon receiving a complaint, it examines all information submitted, summons the complainant, the respondent and witnesses for examination under oath or solemn affirmation. It also requests that documents or exhibits be produced, and it visits the locus if the need arises.³⁹

The NHRC has an obligation under the Protection of Human Rights Act to attempt to resolve the complaint by a conciliatory procedure. If such an attempt fails, it has the obligation to (1) refer the matter to the Director of Public Prosecutions if the investigation reveals the commission of criminal offences; (2) refer the matter to the appropriate service commission for possible disciplinary action; and (3) refer the case to the officer in charge of a parastatal body or government for disciplinary action.

At the end of an enquiry, the NHRC can send its recommendations to the minister responsible for human rights for appropriate action and recommend appropriate relief to the complainant and any other person.⁴⁰ A complainant has the possibility of calling in person to the office of the NHRC and filling in a complaint form. There is also the possibility of sending a letter to the NHRC setting out the complaint.

The Human Rights Division of the NHRC has received several complaints from individuals. However, it has noted that many of the complaints are related to labour disputes, relations between employer and employee, cases of harassment at work, disputes between neighbours, and protests against action or inaction by local authorities.⁴¹ Some complaints are also related to the right to a safe environment, as when someone raises a complaint against a neighbour who is blocking a canal or drain, or when a poultry farm is accused of polluting a waterway. None of these complaints fall strictly within the ambit of the NHRC. As such, often all it can do is refer complainants to the appropriate authority. It is quite evident that citizens are not fully aware of the specific mandate of the NHRC. There is hence a critical need to educate the public on the nature of the NHRC's work and services.

In addition, there are some major limitations to its complaint mechanism. For instance, it is not mandated to deal with complaints

39 See note 22.

40 *Ibid.*

41 National Human Rights Commission, Annual Report 2016 (2016), p 11.

regarding economic, social and cultural rights. This is indeed a major constraint, particularly given that the Constitution does not provide for socio-economic rights and that the Supreme Court therefore cannot entertain related cases. Albeit that it is not a judicial body, it would have been beneficial to citizens if the NHRC could investigate complaints related to socio-economic rights. In addition, the NHRC is not mandated to hear cases that date back more than one year.⁴² Such a time restriction can inhibit the protection of human rights, particularly in sensitive cases where a complainant might take some time to decide to submit a complaint on any alleged violation.

5 Consultation with stakeholders

The NHRC has been particularly weak in its consultation with stakeholders. No doubt it has collaborated with NGOs and tertiary institutions, but the extent of this collaboration has been superficial and ineffective. For example, it has collaborated with NGOs merely for training and workshop purposes. It is a similar situation with the University of Mauritius, where seldom happens that the NHRC will bring guests for talks and engagements on human rights issues.

More trenchantly, there are no consultation agreements or memoranda of understanding between the NHRC and stakeholders on long-term, ground-breaking research studies, investigations or monitoring campaigns regarding compliance with key human rights instruments. Conducting consultation of this kind in a sustained, fruitful manner is essential if the NHRC is to fulfill its mandate and be effective in promoting and protecting human rights.

6 Conclusion

The NHRC of Mauritius is provided for by the law, as prescribed by the Paris Principles. It has a mandate which is progressive enough to ensure the promotion and protection of human rights. However, the political approach that it adopts all too often in discharging its duties and obligations under the law undermines its authority and efficacy in practice.

This may be explained by the fact that the chairperson, deputy chairperson and members of the Commission are appointed upon the advice of the Prime Minister. They thus lack the liberty, possibly even the

42 National Human Rights Commission, "Limitations", available at <https://bit.ly/2XEvC41> (accessed 10 January 2019).

inclination, to be critical of the government on certain pressing human rights issues. For instance, in its annual reports it is apparent that the NHRC has been timid and vague in carrying out essential components of its mandate such as commenting on laws, monitoring the human rights situation in the country, and monitoring compliance with international human rights instruments to which Mauritius is a state party. There is also a pressing need for the NHRC to revisit the way in which it collaborates and consults with other stakeholders.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.2.1 Legislative and regulatory instruments

The Protection of Human Rights Act 19 of 1998

Proclaimed by [Proclamation No 2 of 1999] w. e. f. 23 February 1999

ARRANGEMENT OF SECTIONS

Section

- 1) Short title
- 2) Interpretation
- 3) Establishment of Commission and setting up of Divisions
- 4) Functions of the Human Rights Division
- 5) Staff of the Commission and Divisions
- 6) Powers and duties of the Human Rights Division
- 7) Investigation
- 8) Protection of witnesses
- 9) Persons likely to be prejudicially affected
- 10) Protection of action taken in good faith
- 11) Reports of the Commission
- 12) Finance
- 13) Offences
- 14) Jurisdiction
- 15) Regulations
- 16) Consequential amendment
- 17) Commencement

An Act

To provide for the setting up of a National Human Rights Commission, for the better protection of human rights, for the better investigation of

**complaints against members of the police force, and for matters
ENACTED by the Parliament of Mauritius, as follows –**

1. Short title

This Act may be cited as the Protection of Human Rights Act 1998.

2. Interpretation

In this Act –

“Chairperson” means the Chairperson of the Commission;

“Commission” means the National Human Rights Commission established under section 3;

“Deputy Chairperson” means a Deputy Chairperson of the Commission who is assigned to the Human Rights Division, National Preventive Mechanism Division or Police Complaints Division, as the case may be;

“Division” means the Human Rights Division, the Police Complaints Division or the National Preventive Mechanism Division, as the case may be;

“human rights” means any right or freedom referred to in Chapter II of the Constitution; “Human Rights Division” means the Human Rights Division referred to in section 3B; “Minister” means the Minister to whom responsibility for the subject of human rights is assigned;

“National Preventive Mechanism Division” means the National Preventive Mechanism Division referred to in section 3 and in the National Preventive Mechanism Act 2012;

“Police Complaints Division” means the Police Complaints Division referred to in section 3 and in the Police Complaints Act 2012; “public body” means –

- (a) a Ministry or Government department;
- (b) a local authority;
- (c) a statutory corporation;
- (d) any other company, partnership or other entity of which the Government or an agency of the Government is, by the holding of shares or some other financial input or in any other manner, in a position to influence the policy or decisions;

Amended by [Act No 19 of 2012]

3. Establishment of Commission and setting up of Divisions

- 1) There is established for the purposes of this Act a National Human Rights Commission, which shall be a body corporate.

- 2) The Commission shall not, in the exercise of its functions, be subject to the direction or control of any other person or authority.
- 3) There shall be within the Commission –
 - (a) a Human Rights Division;
 - (b) a Police Complaints Division;
 - (c) a National Preventive Mechanism Division.
- 4) The Commission shall consist of –
 - (a) a Chairperson, who shall be the head of every Division; and
 - (b) 3 Deputy Chairpersons, each of whom shall be assigned to a Division.
- 5)(a) The Chairperson shall be a person who has been –
 - (i) a Judge;
 - (ii) a Magistrate for not less than 10 years;
 - (iii) a law practitioner for not less than 10 years; or
 - (iv) a Magistrate and a law practitioner for an aggregate period of not less than 10 years.
 - (c) The Deputy Chairpersons shall be persons who have been law practitioners for not less than 5 years.
 - (d) In this subsection –

“law practitioner” has the same meaning as in the Law Practitioners Act.
- 6) The Commission shall regulate its meetings and proceedings in such manner as it thinks fit and 3 persons shall constitute a quorum.
- 7) Every Division shall consist of -
 - (a) the Chairperson, as its head;
 - (b) a Deputy Chairperson who shall be assigned to it; and
 - (c) 2 members with knowledge and experience in the relevant field.
- 8)(a) The Chairperson, the Deputy Chairperson and the members of every Division shall be appointed by the President, acting on the advice of the Prime Minister, on such terms and conditions as the President thinks fit.
- (b) Before tendering advice to the President under paragraph (a), the Prime Minister shall consult the Leader of the Opposition.
- 9) Subject to subsection (10), the Chairperson, the Deputy Chairpersons and the members of every Division shall hold office for a term of 4 years and be eligible for reappointment.
- 10) The President may, on the advice of the Prime Minister, remove the Chairperson, any Deputy Chairperson or any member of a Division from office for inability to perform the functions of his office, whether arising from infirmity of body or mind, or for misbehaviour.
- 11) Subject to subsection (12) -
 - (a) where any vacancy occurs in the office of the Chairperson by reason of death, resignation or any other cause, the Deputy Chairperson of the Human Rights Division shall act as Chairperson until the vacancy is filled;

- (b) where the Chairperson is absent or on leave, the Deputy Chairperson of the Human Rights Division shall act as Chairperson until the date on which the Chairperson resumes his office.
- 12) Where the Deputy Chairperson of the Human Rights Division is unable to act as Chairperson, the President may authorise the Deputy Chairperson of the Police Complaints Division or the Deputy Chairperson of the National Preventive Mechanism Division to act as Chairperson.
- 13) The Chairperson, any Deputy Chairperson or any member of a Division shall not enter upon the duties of his office unless he has taken and subscribed before the President the oath set out in the Schedule.

Amended by [Act No 19 of 2012]

3A. Functions of the Commission

The Commission shall –

- (a) promote and protect human rights;
- (b) review the safeguard provided by or under any enactment for the protection of human rights;
- (c) review the factors or difficulties that inhibit the enjoyment of human rights;
- (d) submit to the Minister any opinion, recommendation, proposal or report on any matter concerning the promotion and protection of human rights;
- (e) prepare reports on the national situation with regard to human rights in general, and on more specific matters;
- (f) inform the Minister of situations of violation of human rights and advise on ways in which such situations can be ended;
- (g) promote and ensure the harmonisation of national legislation and practices with the international human rights instruments to which Mauritius is a party, and their effective implementation;
- (h) encourage ratification or accession to the instruments referred to in paragraph (g), and ensure their implementation;
- (i) contribute to the reports which Mauritius is required to submit to United Nations bodies and committees, and to regional institutions, pursuant to its treaty obligations and, where necessary, to express an opinion on the subject, with due respect for its independence;
- (j) cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;
- (k) assist in the formulation of programmes for the teaching of, and research into, human rights and take part in their execution in schools, universities and professional circles;

- (l) publicise human rights and efforts to combat all forms of discrimination by increasing public awareness, especially through information and education and by making use of all press organs;
- (m) exercise such other functions as it may consider to be conducive to the promotion and protection of human rights.

3B. Human Rights Division

- 1) There shall be for the purposes of this Act a Human Rights Division, which shall be a Division of the Commission.
- 2) The Division shall consist of –
 - (a) the Chairperson of the Commission as its head;
 - (b) a Deputy Chairperson who shall be assigned to the Division; and
 - (c) 2 members.
- 3) The members referred to in subsection (2)(c) shall be persons having knowledge and experience in the field of human rights, law, employment, industrial relations, business administration, education, sociology, policing, social work, psychology, psychiatry, medicine or prison management.
- 4) The Division shall regulate its meetings and proceedings in such manner as it thinks fit.
- 5) Three persons, including the Chairperson or Deputy Chairperson, shall constitute a quorum:

Amended by [Act No 43 of 2002]; [Act No 19 of 2012]

4. Functions of the Human Rights Division Amended by [Act No 19 of 2012]

- 1) Subject to subsection (2), the Human Rights Division may, without prejudice to the jurisdiction of the Courts or the powers conferred on the Director of Public Prosecutions or the appropriate Service Commission –
 - (a) enquire into any written complaint from any person alleging that any if his human rights has been, is being or is likely to be violated by the act or omission of any other person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public body;
 - (b) Repealed by [Act No 19 of 2012]
 - (c) where it has reason to believe that an act or omission such as is referred to in paragraph (a) has occurred, is occurring or is likely to occur, of its own motion enquire into the matter.
 - (d) - (g) Repealed by [Act No 19 of 2012]
- 2)(a) The Human Rights Division shall not enquire into any matter after the expiry of 2 years from the date on which the act or omission which is the subject of a complaint is alleged to have occurred.

- (b) The Human Rights Division shall not exercise its functions and powers in relation to any of the officers and authorities specified in the proviso to section 97(2) of the Constitution.
- (c) In the exercise of its functions under subsection (1) (a) or (c), the Human Rights Division may, where appropriate, refer the matter to one of the 2 other Divisions of the Commission to enquire into the case.
- 3) The Human Rights Division shall, in the first place, attempt to resolve any complaint, or any matter which is the subject of an enquiry pursuant to subsection (1)(c), by a conciliatory procedure.
- 4) Where the Human Rights Division has not been able to resolve a matter through conciliation, it shall, on the completion of its enquiry –
 - (a) where the enquiry discloses a violation of human rights or negligence in the prevention of such violation, refer the matter to –
 - (i) the Director of Public Prosecutions where it appears that an offence may have been committed;
 - (ii) the appropriate Service Commission where it appears that disciplinary procedures may be warranted;
 - (iii) to the chief executive officer of the appropriate public body where it appears that disciplinary action is warranted against an employee of a public body who is not within the jurisdiction of a Service Commission;
 - (b) recommend the grant of such relief to the complainant or to such other person as the Human Rights Division thinks fit;
 - (c) inform the complainant, if any, of any action taken under this subsection.
- 5) The Human Rights Division shall, on the completion of its enquiry, send a written communication setting out its conclusion and any recommendation to the Minister who shall, as soon as practicable, report to the Human Rights Division the action taken or proposed to be taken.
- 6) Repealed by [Act No 19 of 2012]

Amended by [Act No 19 of 2012]

4A. Application by convicted person for reference to Court under Criminal Appeal Act

- 1) Notwithstanding this Act, a convicted person, or his representative, may apply to the Human Rights Division, in such form as may be prescribed, for an enquiry to be conducted as to whether there exists sufficient fresh and compelling evidence that may satisfy the Human Rights Division that a reference should be made under section 1 9A(4) of the Criminal Appeal Act.
- 2) On receipt of an application under subsection (1), the Human Rights Division shall –
 - (a) conduct such preliminary investigation as it considers necessary;
 - (b) determine, within a period of 30 days from receipt of the application, whether it will conduct an enquiry into the matter; and

- (c) inform the convicted person, or his representative, accordingly.
- 3) The Human Rights Division shall, without prejudice to its other powers under this Act, conduct the enquiry in such manner as it considers appropriate and shall, as far as practicable, complete its enquiry within 6 months from receipt of the complaint.
- 4) On completion of the enquiry, the Human Rights Division may –
 - (a) grant the application and refer the conviction to the Court of Criminal Appeal in accordance with section 1 9A(4) of the Criminal Appeal Act; or
 - (b) reject the application, and shall forthwith inform the convicted person or his representative of its decision.

Amended by [Act No 20 of 2013]

5. Staff of the Commission and Divisions Amended by [Act No 19 of 2012]

- 1) The Secretary to the Cabinet shall make available to the Commission an officer of the rank of Principal Assistant Secretary who shall be the Secretary of the Commission and such other administrative and other staff as the Commission and any Division may require.
- 2) The Secretary of the Commission shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such administrative functions as the Commission may delegate to him.
- 3) The appropriate Service Commission may approve the transfer, promotion or secondment of any officer in the public service to any office within the Commission or any Division and any public officer so transferred, promoted or seconded shall, in relation to any gratuity, pension or other allowance, be treated as continuing in the public service.
- 4) The Commission may, on such terms and conditions as it thinks fit, engage on contract such suitably qualified person or body as may be necessary for the proper discharge of the specific functions of each Division.

Amended by [Act No 19 of 2012]

6. Powers of the Human Rights Division Amended by [Act No 19 of 2012]

- 1) The Human Rights Division may, for the purposes of this Act –
 - (a) summon witnesses and examine them on oath;
 - (b) call for the production of any Court Record or a certified copy thereof, document or other exhibit;
 - (c) obtain such information, file or other record, if necessary by an order from the Judge in Chambers, as may be necessary for the exercise of its functions.

- 2) Any officer of the Human Rights Division specially authorised in that behalf by the Chairman may, on a warrant issued by the Human Rights Division, enter any building or place where the Human Rights Division has reason to believe that any document or other exhibit relating to the subject matter of an enquiry may be found and may seize any such document or other exhibit or take extracts or copies therefrom.
- 3) Every order, authorisation, warrant or decision of the Human Rights Division shall be authenticated by the Secretary of the Commission or any other officer of the Commission duly authorised by the Chairman in that behalf.
- 4) **Repealed by [Act No 19 of 2012]**

Amended by [Act No 19 of 2012]; [Act No 20 of 2013]

7. Investigation

- 1) The Human Rights Division may, for the purposes of conducting any investigation pertaining to an enquiry, utilise the services of any police officer or other public officer designated for the purpose by the Commissioner of Police or the Secretary to the Cabinet, as the case may be.
- 2) The officer whose services are utilised under subsection (1) shall investigate any matter pertaining to an enquiry held by the Human Rights Division and submit a report thereon to the Human Rights Division within such time as may be specified by the Human Rights Division.

Amended by [Act No 19 of 2012]

8. Protection of witnesses

Notwithstanding any enactment but subject to section 13, no statement made by any person in the course of giving evidence before the Human Rights Division or made by or to any person whose services are utilised under section 7(1) shall, where it is –

- (a) made in reply to a question which he is required by the Human Rights Division to answer; or
 - (b) relevant to the subject-matter of the inquiry,
- subject the maker of the statement to, or be used against him in, any civil or criminal proceedings, unless he has given false evidence in the statement.

Amended by [Act No 19 of 2012]

9. Persons likely to be prejudicially affected

- 1) Subject to subsection (2), where at any stage of an enquiry, the Human Rights Division –
 - (a) considers it necessary to enquire into the conduct of any person; or
 - (b) is of the opinion that the reputation of any such person is likely to be prejudicially affected by the enquiry,

it shall give to that person a reasonable opportunity of being heard in the enquiry and of producing such relevant evidence as that person deems appropriate.

- 2) Subsection (1) shall not apply where only the credibility of a witness is being impeached.

Amended by [Act No 19 of 2012]

10. Protection of action taken in good faith

No suit or other legal proceeding shall lie against the Commission or the Human Rights Division or any member or any person acting under the direction of the Commission or the Human Rights Division in respect of anything which is done or purported to be done in good faith in pursuance of this Act or in respect of the publication by or under the authority of the Commission or the Human Rights Division or of any report, proceedings or other matter under this Act.

Amended by [Act No 19 of 2012]

11. Reports of the Commission

- 1) The Commission shall, not later than 31 March in each year, submit a report on its activities and those of its Divisions during the preceding year to the President and may, at any other time, submit a special report on any matter which, in its opinion, is of such urgency or importance that it should not be deferred until submission of the annual report.
- 2) The President shall cause every report of the Commission to be laid before the Assembly within one month of its submission.

Amended by [Act No 19 of 2012]

12. Finance

- 1) The Commission shall, not less than 3 months before the commencement of every financial year, submit to the Minister an estimate of its expenditure.
- 2) The accounts of the Commission shall be audited by the Director of Audit and any expenditure incurred in connection with such audit shall be payable by the Commission to the Director of Audit.
- 3) The accounts of the Commission, as certified by the Director of Audit, together with the audit report thereon shall be forwarded annually to the Minister by the Commission and the Minister shall cause the audit report to be laid, as soon as may be after it is received, on the table of the Assembly.

13. Offences

Any person who –

- (a) fails to attend the Human Rights Division after having been required to do so;
- (b) refuses to take an oath before the Human Rights Division or to answer fully and satisfactorily to the best of his knowledge and belief any question lawfully put to him in any proceedings before the Human Rights Division or to produce any document or other exhibit when required to do so by the Human Rights Division;
- (c) knowingly gives false evidence, or evidence which he knows to be misleading, before the Human Rights Division;
- (d) conceals, destroys, alters, tampers with, or otherwise disposes of, any article, or book, record, accounts, report or data, stored electronically or otherwise, or other document, which he has been summoned or required to produce;
- (e) procures the false testimony of a witness, or interferes with a witness on account of his testimony, before the Human Rights Division;
- (f) knowingly makes or causes to be made a false complaint before the Human Rights Division;
- (g) at any sitting of the Human Rights Division -
 - (i) insults a member; or
 - (ii) interrupts the proceedings;
- (h) obstructs or assaults a member or an officer of the Human Rights Division in the exercise of his functions and powers;
- (i) impersonates a member or an officer of the Human Rights Division;
- (j) commits a contempt of the Commission,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years.

Amended by [Act No 19 of 2012]

14. Jurisdiction

Notwithstanding –

- (a) section 114 of the Courts Act; and
- (b) section 72 of the District and Intermediate Courts (Criminal Jurisdiction) Act,

a Magistrate shall have jurisdiction to try any offence against this Act and may impose any penalty provided by this Act.

15. Regulations

- 1) The Minister may make such regulations as he thinks fit for the purposes of this Act.
- 2) Any regulations made under subsection (1) may provide that any person who contravenes them shall commit an offence, and shall on conviction be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding one year.

Amended by [Act No 19 of 2012]

16. Consequential amendment

The Statutory Bodies (Accounts and Audit) Act is amended in Part H of the Schedule by adding in its appropriate alphabetical order the following –

National Human Rights Commission

17. Commencement

Proclaimed by [Proclamation No 2 of 1999] w. e. f. 23 February 1999

SCHEDULE

[Section 3]

**OATH OF OFFICE FOR CHAIRPERSON AND DEPUTY
CHAIRPERSONS OF COMMISSION AND MEMBERS OF
DIVISIONS**

Ihaving been appointed as Chairperson*/Deputy Chairperson*/member of the Division*, of the National Human Rights Commission under the Protection of Human Rights Act, do swear/solemnly affirm* that I shall faithfully, impartially and to the best of my ability discharge the trust and perform the duties devolving upon me by such appointment and that I shall not without reasonable cause disclose any information imparted to me in the performance of such duties.

(s)..... Before me, Date:

* Delete as appropriate

(s)..... President of the Republic

Amended by [Act No 19 of 2012]

**B.2.2THE NATIONAL PREVENTIVE
MECHANISM ACT 2012**

Act No 21 of 2012

Proclaimed by [Proclamation No 32 of 2013] w.e.f. 1 July 2013

ARRANGEMENT OF SECTIONS

Section

- 1) Short title
- 2) Interpretation
- 3) National Preventive Mechanism Division
- 4) Functions of Division
- 5) Powers of Division

- 6) Meetings of Division
- 7) Staff of Division
- 8) Confidentiality of information
- 9) Protection from liability
10. Offences
- 10) Regulations
- 11) Consequential amendments
- 12) Commencement

An Act

To give effect in Mauritius to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to provide for the setting up of a National Preventive Mechanism Division within the National Human Rights Commission

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the National Preventive Mechanism Act 2012.

2. Interpretation

In this Act –

“Chairperson” means the Chairperson of the Commission;

“Commission” means the National Human Rights Commission established under the Protection of Human Rights Act;

“Deputy Chairperson” means the Deputy Chairperson of the Commission who is assigned to the Division;

“Division” means the National Preventive Mechanism Division referred to in section 3;

“Minister” means the Minister to whom responsibility for the subject of human rights is assigned;

“Optional Protocol” means the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 18 December 2002 and acceded to by the Government of Mauritius on 21 June 2005;

“place of detention” –

- (a) means any place where a person is or may be deprived of his liberty by virtue of an order given by a public authority or at its instigation or with its acquiescence;

- (b) includes a police cell, a prison, a Correctional Youth Centre, a Rehabilitation Youth Centre and a mental health care centre;

“Subcommittee” means the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, established under the Optional Protocol.

3. National Preventive Mechanism Division

- 1) There shall be for the purposes of this Act a National Preventive Mechanism Division which shall be a Division of the Commission.
- 2) The National Preventive Mechanism Division shall for the purposes of Part IV of the Optional Protocol be the National Preventive Mechanism.
- 3) Section 3 of the Protection of Human Rights Act shall apply to the Division.
- 4) The Division shall consist of –
 - (a) the Chairperson of the Commission as its head;
 - (b) a Deputy Chairperson; and
 - (c) 2 members.
- 5) Of the 2 members referred to in subsection (4)(c) –
 - (a) one member shall be selected from a list submitted by non-governmental organisations involved in social work in prisons; and
 - (b) the other member shall be a person having knowledge and experience in the field of human rights, law, employment, industrial relations, business administration, education, sociology, policing, social work, psychology, psychiatry, medicine or prison management.
- 6) The Division may, where it considers necessary, co-opt any expert with the relevant professional expertise, experience and knowledge, to assist it in the discharge of its functions under this Act.

4. Functions of Division

The functions of the Division shall be –

- (a) to visit places of detention on a regular basis so as to examine the treatment of persons deprived of their liberty with a view to ensuring their protection against torture and inhuman or degrading treatment or punishment;
- (b) to investigate any complaint which may be made by a detainee and, where the detainee so requests, investigate the complaint privately;
- (c) to make to the Minister recommendations regarding the improvement of the treatment and conditions of persons deprived of their liberty in places of detention, taking into consideration the relevant norms of the United Nations;

- (d) to submit to the Minister and other relevant authorities proposals and observations concerning legislation relating to places of detention and the treatment of persons deprived of their liberty;
- (e) to work, where appropriate, in co-operation or consultation with any person or body, whether public or private, in connection with the discharge of any of its functions under this Act and the Optional Protocol.

5. Powers of Division

- 1) The Division shall have such powers as may be necessary to effectively discharge its functions under this Act and the Optional Protocol.
- 2) Without prejudice to the generality of its powers under subsection (1), the Division shall, notwithstanding any other enactment, be given –
 - (a) full access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location;
 - (b) access to all information referring to the treatment of those persons as well as their conditions of detention;
 - (c) access to any place of detention and its installations and facilities;
 - (d) the opportunity to have private interviews with persons deprived of their liberty, personally or with a translator where necessary, as well as with any other person whom they have reason to believe may supply relevant information;
 - (e) the freedom to choose the places they want to visit and the persons they want to interview;
 - (f) the freedom to determine its own procedures, including its programmes of visits;
 - (g) the freedom for its members to be accompanied, if needed, by such expert with the relevant professional expertise, experience and knowledge as the Chairperson may determine, on visits to detention centres;
 - (h) the right to have contacts with the Subcommittee and to exchange information with it.

6. Meetings of Division

- 1) Subject to subsection (2), the Division shall regulate its meetings in such manner as it thinks fit.
- 2) Three members of the Division, including the Chairperson or Deputy Chairperson, shall constitute a quorum.

7. Staff of Division

The Commission shall provide the Division with adequate staff and facilities for the proper discharge of its functions.

8. Confidentiality of information

- 1) Notwithstanding section 300 of the Criminal Code or any other enactment providing for the confidentiality of information, any person who is in possession, or is otherwise aware, of any information relating to the detention of a person in a place of detention shall disclose that information to the Division or the Subcommittee on being required to do so by the Division or the Subcommittee.
- 2) Any confidential information obtained by the Division shall be privileged.
- 3) The Division shall not publish personal data relating to any person without that person's express consent.

9. Protection from liability

- 1) No criminal, disciplinary or administrative sanction shall be taken against any person for having communicated, in good faith, any information to the Division or the Subcommittee.
- 2) No action, suit or other legal proceedings shall lie against the Division or a member or officer of the Division in respect of anything done, or purported to be done, in good faith, and in pursuance of the functions and powers conferred under this Act or in respect of any publication by or under the authority of the Division of any report, proceedings or any other matter under this Act.

10. Offences

Any person who –

- (a) conceals, destroys, alters, tampers with, or otherwise disposes of, any article, or book, record, accounts, report or data, stored electronically or otherwise, or other document, which he has been summoned or required to produce;
- (b) obstructs or assaults a member or an officer of the Division in the exercise of his functions and powers under this Act;
- (c) impersonates a member or an officer of the Division;
- (d) without lawful justification or reasonable excuse -
 - (i) hinders or resists the Division or any other person in the discharge of its or his functions and powers under this Act; or
 - (ii) fails to comply with any lawful requirement of the Division or any other person under this Act;
- (e) knowingly misleads the Division or a member or an officer of the Division by giving false information, shall commit an offence and shall, on conviction, be liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years.

11. Regulations

The Minister may, after consultation with the Commission, make such regulations as he thinks fit for the purposes of this Act.

12. Consequential amendments

The Reform Institutions Act is amended -

- (a) (a) in section 54(1), by repealing paragraph (c);
- (b) (b) by inserting, after section 60, the following new section –

60A. Visit by National Preventive Mechanism Division

60A. Visit by National Preventive Mechanism Division and Subcommittee on Prevention of Torture

- 1) The National Preventive Mechanism Division of the National Human Rights Commission and the Subcommittee on Prevention of Torture may visit any institution or exercise any power for the purposes of discharging their functions under the National Preventive Mechanism Act or the Optional Protocol, as the case may be.

- 2) In this section –

“Optional Protocol” means the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 and acceded to by the Government of Mauritius on 21 June 2005;

“Subcommittee on Prevention of Torture” means the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, established under the Optional Protocol.

13. Commencement

Proclaimed by [Proclamation No 32 of 2013] w.e.f. 1 July 2013

- 1) Subject to subsection (2), this Act shall come into operation on a date to be fixed by Proclamation.
- 2) Different dates may be fixed for the coming into operation of different sections of this Act.

Passed by the National Assembly on the twenty fourth day of July two thousand and twelve.

Ram Ranjit Dowlutta
Clerk of the National Assembly

B.3 Internal rules and regulations

FORM

Complaints to Human Rights Commission

(Section 4 – The Protection of Human Rights Act 1998)

Note: The form may be filled in English, French or Creole and shall be forwarded to the

Secretary, Human Rights Commission, 2nd Floor, Renganaden Seeneevassen Building, Jules Koenig Street, Port Louis, Tel No: 208-2856/57.

FULL NAME:.....

ADDRESS:.....

.....

TELEPHONE No:.....

NATIONAL IDENTITY No:.....

Nature of Complaint (If it is a breach of a Fundamental Right, please state which right has been breached)

.....

.....

Institution complained against:.....

Details

Please give date, time, place, etc. (Additional sheets may be attached to this form)

.....

.....

Please specify if this complaint has already been submitted to the Ombudsman and/or to the Complaints Investigation Bureau of Police Department and give the date of submission.

.....

Date:.....

Signature:.....



13

**THE RWANDAN
NATIONAL COMMISSION FOR
HUMAN RIGHTS**
*Serugo Jean Baptiste**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Post-colonial Rwanda has known massive violations of human rights and a culture of impunity, one that culminated in the mid-1990s in the genocide of Tutsis and other atrocities. The country also endured a civil war between the state's armed forces and the military wing of the Rwandan Patriotic Front (RPF), the Rwanda Patriotic Army (RPA). The creation of the National Commission for Human Rights (NCHR) was hence one of the mechanisms Rwanda believed would help change the status quo and promote and protect human rights.

The NCHR was provided for under the Arusha Peace Agreement,¹ but it was not until 1999 that it was officially established in terms of Law No 04/99 of 12 March 1999 (hereafter 1999 Law).² It commenced operations on 24 May 1999 following the election of its president and six commissioners by the Transitional National Assembly. The year of this writing, 2019, thus marks the NCHR's twentieth anniversary, which coincides with its re-accreditation with an "A" status for its compliance

* School of Law, University of Rwanda.

1 Peace Agreement between the Government of the Republic of Rwanda and the Rwanda Patriotic Front (hereafter RPF) signed in Arusha on 4 August 1993.

2 Law No 04/99 of 12 March 1999 Establishing the National Human Rights Commission.

with the Paris Principles governing national human rights institutions (NHRIs).³

The NCHR has done an excellent job of protecting and promoting human rights, and its twentieth anniversary is an apt occasion for assessing its effectiveness in observing the Paris Principles, which are the principal source of the normative standards for NHRIs.⁴ This chapter sets out, then, to examine the NCHR's performance over two decades, doing so by focusing on its establishment, its legal nature, its mandate, and its public accountability.

2 Establishment and evolution of the NCHR

The decision to establish a national human rights commission in Rwanda was made, for the first time, during the negotiations held in Arusha, Tanzania, to find a political solution to the civil war that had raged between the government of Rwanda and the RPA since 1 October 1990. Part of the Arusha Peace Agreement was the Protocol of Agreement between the Government of the Republic of Rwanda and the RPF on the Rule of Law,⁵ signed in 1992. Under its Article 15, the two parties agreed to establish a permanent National Commission on Human Rights with the mandate to sensitise and educate the population about human rights and to institute legal proceedings where necessary. The Protocol empowered the Commission with the mean necessary means to accomplish its mission.

It is worth noting that the amended Arusha Peace Agreement – together with the amended Constitution of 10 June 1991, the Declaration of the RPF of 17 July 1994 (after its triumph over the then government forces),⁶ and the Protocol Agreement, signed on 24 November 1994

3 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993); for more detail on the Paris Principles, see G De Beco and R Murray, *A Commentary on the Paris Principles on National Human Rights Institutions*, Cambridge, Cambridge University Press (2015).

4 International Council on Human Rights Policy and Office of the United Nations High Commissioner for Human Rights, *Assessing the Effectiveness of National Human Rights Institutions*, ATAR Roto Press SA, Vernier (2005), p 6.

5 Protocol Agreement between the Government of the Republic of Rwanda and the RPF on the Rule of Law (18 August 1992).

6 *Declaration du FPR Relative à la Mise en Place des Institutions*, signed in Kigali on 17 July 1994 by the chairman of the RPF, Colonel Alexis Kanyarengwe.

among political parties,⁷ relating to the establishment of national institutions – constituted the Fundamental Law of the Republic of Rwanda governing the post-genocide transitional period (1994-2003).

As mentioned, the undertaking to put in place a national human rights commission came to fruition only in 1999 with the enactment of the 1999 Law. Article 18 of the latter created a permanent commission⁸ with financial autonomy,⁹ and granted immunity from prosecution to commissioners for opinions expressed while exercising their duties.¹⁰ Nonetheless, it fell short of the Paris Principles in some respects. The 1999 Law provided for the general competence and responsibilities to be exercised by the Commission,¹¹ and conferred a clear mandate to alert the different branches of the government to detected cases of violations of human rights¹² and submit annual activity reports, but it failed to provide for detailed monitoring procedures or methods of operations to be used by the Commission. The same law also had a critical flaw in relation to the selection and appointment of commissioners, as this process, as set out, was rudimentary and did not guarantee the independence and pluralism of the Commission.¹³

Three years later, the 1999 Law was modified and supplemented by Law No 37/2002 of 31 December 2002¹⁴ (hereafter 2002 Law). In addition to altering the name of the institution from “National Human Rights Commission” to “Rwanda National Commission for Human

7 Mouvement Démocratique Républicain (MDR), Parti Démocrate Chrétien (PDC), Parti Démocratique Islamique (PDI), Parti Libéral (PL), Parti Social Démocrate (PSD), Parti Socialiste Rwandais (PSR) and Union Démocratique du Peuple Rwandais (UDPR), respectively.

8 The 1999 Law, Article 2.

9 *Ibid*, Law, Article 13.

10 *Ibid*, Article 10.

11 Article 3 states: “In general, the Commission has as an objective to investigate and follow-up on human rights violations committed by anyone on the Rwandan territory, especially State organs and individuals under the cover of the State organs as well as any national organisation working in Rwanda”. Article 4 states: “In particular, the functions of the Commission are to sensitise and train the Rwandese population in matters of Human Rights; on informing relevant authorities to eventually initiate judicial proceedings in case of Human Rights violations by anyone”.

12 The 1999 Law, Article 5.

13 Article 8 states: “The Commission consists of 7 members of Rwandese nationality known for their morality, integrity and competence. The members of the Commission are chosen by the National Assembly out of 10 candidates nominated by the Government. They serve a three (3) year renewable term. Members of the Commission are appointed by a Presidential Decree”.

14 Law No 37/2002 of 31 December 2002 Modifying and Supplementing Law No 04/99 of 12 March 1999 Establishing the National Human Rights Commission.

Rights”,¹⁵ it introduced some important substantive changes. It increased the responsibilities of the Commission by expanding its original competence and responsibilities to include the functions of advising on bills in relation to human rights at the request of public authorities concerned or upon its own initiative; persuading government institutions to ratify international human rights legal instruments and following up on their incorporation in the domestic legal system; and hearing and examining complaints of human rights violations and receiving the testimony of witnesses.

The Commission also had the responsibility to conduct inquiries in any place where human rights violations were reported to have been committed; to inspect prisons to ensure detainees’ rights are respected; to make recommendations to the relevant public authorities about actions to be taken to end and punish human rights violations; to request the prosecution of persons responsible for human rights violations; and to cooperate with other NHRIs, non-governmental organisations (NGOs) in the country and international organisations in activities relating to the promotion and protection of human rights.¹⁶

The 2002 Law also conferred specific powers to the Commission to enable it to achieve its objectives.¹⁷ In this respect, the Commission was given the powers to access evidence and information on human rights violations either by questioning persons, suspects, and experts or by collecting them through reading official and other available written documents. To this were added powers to conduct unlimited on-site investigations in any place where human rights violations are alleged and to request the relevant authorities to respect the rights of victims, where any violations have taken place. To enable it to achieve its mandate to promote human rights, the Commission was given the power to conduct research on relevant issues and publish its findings. Lastly, members of the Commission were given the competence of judicial police officers, with a jurisdiction covering the entire territory of the country. This power could be extended to any employee designated by the commission chairperson.¹⁸

Although these were significant developments that enhanced compliance with the Paris Principles by broadening the Commission’s mandate, the 2002 Law failed to address the issue of independence and pluralism in the composition of the Commission, in addition to which it

15 The 2002 Law, Article 1.

16 *Ibid*, Article 4.

17 *Ibid*, Article 4.

18 *Ibid*, Article 4.

removed the immunity previously accorded to commissioners. In 2003, with the adoption of a new constitution¹⁹ that ended Rwanda's nine-year transitional period, the NCHR was reaffirmed in the 2003 Constitution's chapter on special commissions and organs. Article 177 of the Constitution provided for the broadened mandate of NCHR as follows: "The National Commission for Human Rights is an independent national Commission especially in charge of the promotion and protection of human rights A Law shall determine responsibilities, organization and functioning of this Commission".

To give effect to the new constitutional order, Law No 30/2007 of 06/07/2007 Determining the Organisation and Functioning of the National Commission for Human Rights (hereafter 2007 Law) was adopted, repealing the 1999 Law and its 2002 amendments. The 2007 Law did not bring about major changes in the responsibilities of the Commission, but it did at least involve the newly constituted institutions, in particular the Senate, in the approval of draft presidential orders appointing commissioners,²⁰ and upheld the new constitutional requirement of equality between men and women by providing that at least 30 per cent of commissioners shall be women.²¹ Furthermore, it restored commissioners' immunity from prosecution for views expressed in the exercise of their duties,²² and limited their term of office to four years, renewable only once. The 2007 Law had the merit of elaborating on the organs of the Commission and their functions,²³ but much like its predecessors, it failed to design the commissioners' selection processes in such a way as to guarantee their independence – a matter on which the Law thus contravenes the Paris Principles.

In a bid to adopt provisions that would ensure full compliance with the Paris Principles, Law No 19/2013 of 25/03/2013 Determining the Mission, Organisation and Functioning of the National Commission for Human Rights (hereafter 2013 Law) was enacted, repealing the 2007 Law and creating an independent mechanism for selecting candidate commissioners. The 2013 Law was amended slightly by Law No 61/2018 of 24 August 2018.²⁴

19 The Constitution of the Republic of Rwanda of 4 June 2003 (hereafter 2003 Constitution).

20 The 2007 Law, Article 12.

21 *Ibid*, Article 12.

22 *Ibid*, Article 14.

23 *Ibid*, Articles 19-24.

24 Law No 61/2018 of 24/08/2018 Modifying Law No 19/2013 of 25 March 2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights.

3 The nature of the NCHR

As mentioned, the NCHR is a constitutionally mandated institution. In fact, it is one of the institutions created by the Peace Agreement signed by the Government of Rwanda and the RPF in Arusha on 4 August 1993. Under Article 3 of the agreement, parties had agreed to elevate the Peace Agreement and its protocols to the level of a fundamental law that, along with the Constitution of 10 June 1991, would govern the country during the transitional period. The 2003 Constitution ending the transition period in Rwanda also provided for the NCHR and stated its mandate.²⁵ The Revised Constitution of 2015,²⁶ without restating its mandate, listed the NCHR under the category of national commissions entrusted with the responsibility to help in resolving important issues facing the country, and provided that a specific law would determine its mission, organisation and functioning.²⁷

The NCHR is a permanent and independent commission endowed with legal personality and enjoying administrative and financial autonomy.²⁸ Commissioners discharge their duties in a personal capacity²⁹ without being subject to any instructions from the legislative, executive or judicial power or any other organisation,³⁰ and enjoy immunity from prosecution for views and acts committed in the course of their duties.³¹

Acting through its chairperson and members, the NCHR participates in the decision-making organs of certain justice-sector institutions, as the chairperson of the NCHR is a member of the High Council of the Judiciary³² and the High Council of the National Public Prosecution

25 The 2003 Constitution, Article 177.

26 The Constitution of the Republic of Rwanda of 2003 revised in 2015 (hereafter Revised Constitution of 2015).

27 The Revised Constitution of 2015, Article 139.

28 Law No 19/2013 of 25/03/2013 Determining Missions, Organization and Functioning of the National Commission for Human Rights (hereafter 2013 Law), Article 3.

29 Law No 61/2018 of 24/08/2018 Modifying Law No 19/2013 of 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights (hereafter Law No 61/2018), Article 5.

30 The 2013 Law, Article 3.

31 The 2013 Law, Article 24.

32 Law No 012/2018 of 04/04/2018 Determining the Organization and Functioning of the Judiciary, Article 6.

Authority.³³ The NCHR is also represented at the disciplinary committee of the Rwanda Bar Association.³⁴

The appointment procedure of members of the Commission has been improved to ensure their independence. Indeed, candidates for the post of commissioner are selected by an independent selection committee whose members are appointed by a presidential order.³⁵ The mission, organisation and functioning of this committee are established by Presidential Order No 72/01 of 12 March 2014³⁶ (hereafter Presidential Order No 72/01).

Presidential Order No 72/01 specifies that the committee is to be composed of five members³⁷ with demonstrated experience in the field of human rights.³⁸ The appointment of members of the selection committee by a presidential order may raise questions about their independence; however, the 2013 Law and Presidential Order No 72/01 have limited the appointment powers of the President of the Republic by diversifying the composition of the committee. Accordingly, its composition must include one member from a national human rights organisations, one member from the Public Service Commission, two members from civil society at large, and one human rights expert from academia.³⁹

Nonetheless, the procedure used in selecting the members of the selection committee who are to be appointed by the President remains uncertain in the law. A practical solution to this gap in the law was found while appointing the first members of the selection committee: they were appointed by the President on the advice of the Minister of Justice⁴⁰ The appointees were, therefore, persons delegated by their institutions upon request of the Minister of Justice in his capacity as the authority entrusted

33 Law No 013/2018 of 04/04/2018 Determining the Organization, Powers and Functioning of the High Council of the National Public Prosecution Authority, Article 3.

34 Law No 83/2013 of 11/09/2013 Establishing the Bar Association in Rwanda and Determining Its Organization and Functioning, Article 29.

35 The 2013 Law, Articles 19 and 20.

36 Presidential Order No 72/01 of 12/03/2014 Establishing the Candidate Selection Committee to the Post of Commissioner of the National Commission for Human Rights and Determining Its Mission, Organisation and Functioning (hereafter Presidential Order No 72/01).

37 Presidential Order No 72/01, Article 4.

38 *Ibid*, Article 5.

39 The 2013 Law, Article 19, and Presidential Order No 72/01, Article 4.

40 Presidential Order No 01/01 of 19/01/2015 Appointing Members of the Candidate Selection Committee to the Post of Commissioner of the National Commission for Human Rights.

with implementation of Presidential Order No 72/01,⁴¹ a practical procedure which was not provided for in the law but which ensures the independence of the members of the committee.

Members of the selection committee are appointed for a five-year term, which is renewable,⁴² and are expected to be transparent and objective in the process of selecting candidates.⁴³ Vacancies in posts for commissioners are widely advertised by the selection committee in newspapers, by radio and television, and on the NCHR's website.⁴⁴ The committee must ensure that candidates for the post of commissioner come one from one of four groups: human rights organisations, academia, the public service, civil society organisations (CSOs), and the private sector.⁴⁵ Equality between men and women must be upheld in that 30 per cent of the commissioners have to be female.⁴⁶ Candidates are selected on the basis of their leadership experience⁴⁷ after an interview conducted according to rules established by the selection committee.⁴⁸ The selection report, containing, inter alia, the list of selected candidates, is submitted to the government,⁴⁹ which sends it to the Senate for approval before the candidates are appointed by a presidential order.⁵⁰

This selection process undoubtedly represents a major improvement in Rwanda's compliance with the Paris Principles as it significantly reduces the role of political actors in the appointment of commissioners, limiting it to the promulgation of the list of selected candidates drawn up by an independent election committee.

3.1 Financial autonomy

The NCHR enjoys financial autonomy;⁵¹ it prepares and submits its budget proposal to the Minister in Charge of Finance; and it is allowed to

41 Presidential Order No 72/01, Article 24.

42 *Ibid*, Article 6.

43 *Ibid*, Article 4.

44 *Ibid*, Article 3.

45 The 2013 Law, Article 18.

46 NCHR Law, Article 18.

47 *Ibid*, Article 17.

48 Presidential Order No 72/01, Article 11.

49 *Ibid*, Article 21.

50 The 2013 Law, Article 21.

51 *Ibid*, Article 3; for more details on the link between the financial autonomy and independence of national human rights commissions, see AE Pohjola, *The Evolution of National Human Rights Institutions: The Role of the United Nations*,

defend it before Parliament.⁵²

The secretary-general of the Commission⁵³ undertakes the technical work involved in planning the NCHR's activities and preparing the draft budget proposal, after which they are presented for approval by the Council of Commissioners.⁵⁴

The NCHR receives funds mainly from the state budget and is also allowed to receive monies from partners.⁵⁵ Its initial state funding of RWF 205,667,127⁵⁶ (\$604,903.31)⁵⁷ covered the costs of its first six months of existence from June-December 1999.⁵⁸ Thereafter, state budget allocations to the NHCR have constantly increased over the years, reaching the amount of RWF 1,186,209,312 (\$1,393,491.11)⁵⁹ for the 2018/2019 fiscal year, according to Law No 38/2018 of 29 June 2018.⁶⁰

The NCHR places little reliance on external partners to fund its activities. Its financial reports⁶¹ from 1999-2018 reveal that donors' funds contributed 0-20 per cent of its total annual budget. Similarly, there was a decrease in external support via the state budget, with the state's share in the NCHR's budget declining from 23.7 per cent in the 2014/2015 fiscal year to 17 per cent in 2017/2018.⁶² This is essentially due to various self-reliance policies the state has adopted in its efforts to mobilise domestic resources to accelerate socio-economic development.

However, there is often a discrepancy between the budget year of the NCHR's partners, which generally begins in January and ends in December, and the state budget year, which begins in June. This makes it

Copenhagen, Danish Institute for Human Rights (2006), p 6.

52 The 2013 Law, Article 41.

53 *Ibid*, Article 37.

54 *Ibid* Article 16.

55 *Ibid*, Article 16.

56 Rwandan Francs.

57 As of the National Bank of Rwanda exchange rate on 1 June 1999, available at <https://bit.ly/302UbVP>.

58 NCHR, Report June-December 1999 (1009), p 8.

59 As of the National Bank of Rwanda exchange rate on 29 June 2018, available at <https://bit.ly/302UbVP>.

60 See Law No 38/2018 of 29/06/2018 Determining the State Finances for the 2018/2019 Fiscal Year, Annex II-1: 2018-2019 Detailed Expenditure by Budget Agency.

61 Financial reports are published in the NHCR's annual reports, available at <http://cndp.org.rw> (the Commission's website).

62 UNICEF, *National Budget Brief: Investing in children in Rwanda 2017/2018* (November 2017), available at https://www.unicef.org/rwanda/RWA_resources_budgetbrief_natn.pdf (accessed 1 March 2019), p 3.

difficult to plan activities that depend on external funding which may be available only in the third quarter of the fiscal year.⁶³

The financial records of the NCHR are audited by the Office of the Auditor-General of State Finances⁶⁴ to ensure that its funds are properly managed. The NHRC has appeared only once⁶⁵ in the Auditor-General's annual reports from 2002-2017.⁶⁶ In this instance it was blamed for having used inappropriate procurement methods in awarding tenders⁶⁷ and for being reckless in managing its fixed assets.⁶⁸ The NCHR's involvement in the preparation of its budget, its receipt of regular allocations of state funds, and – barring the instance above – its relatively good management thereof, demonstrate that the NCHR enjoys financial autonomy and is able to carry out its activities by making efficient use of limited available resources.

3.2 Professional skills and knowledge of human rights

For an NHRI to work effectively, its members and staff need to have adequate professional skills and knowledge of human rights.⁶⁹ Nonetheless, except in the case of the chairperson, who must have a university degree,⁷⁰ the law governing the NCHR is silent on the specific educational qualifications the remaining commissioners need to possess. Proven experience in a position of leadership in any organisation suffices for them to qualify for the job.⁷¹

The law does not provide job profiles regarding the positions of NCHR chairperson and commissioners: the Prime Minister's Order determining the job profiles of employees of the NCHR indicates only that the office-holders are "political appointees".⁷² The term "political appointees" in this context does not mean commissioners are appointed without regard to any prior modalities of recruitment. As previously noted, there are stipulated procedures concerning application and selection, and the

63 See NCHR, Annual Report 2016-2017 (2017), available online at <https://bit.ly/2YnDiuV> (accessed 10 March 2019), p 136.

64 The 2013 Law, Article 42.

65 Report of the Auditor General of State Finances for the year ended 30 June 2012.

66 Available online at <http://www.oag.gov.rw/index.php?id=173>.

67 Report of the Auditor General of State Finances for the year ended 30 June 2012, p 41.

68 *Ibid*, p 45.

69 See note 3, p 6.

70 The 2013 Law, Article 17. Again, there is no requirement of a degree in human rights law or a related field.

71 *Ibid*, Article 17.

72 See Annex II of the Prime Minister's Order No 53/03 of 27/2/2015 Determining the Organizational Structure, the Salaries and the Fringe Benefits of Employees in the NHCR.

process is carried out by an independent selection committee. The selection committee should thus be able to assess candidates' knowledge of or exposure to human rights by scrutinising their application files and interviewing them.⁷³

Looking at the current composition of the NCHR, three out of six commissioners⁷⁴ hold postgraduate degrees in fields related to human rights law.⁷⁵ Among these law graduates, one is the current chairperson of the NCHR, who previously served as the legal advisor of the Senate. One of the other two was legal advisor to the National Consultative Forum of Political Organisations before becoming its director of communication and committees affairs, whilst the other was a legal officer in the National Gacaca Courts Service.

As regards the commissioners who are not jurists, each of them holds a university degree in fields related to social sciences. One of these commissioners is the NCHR's newly appointed deputy chairperson: prior to joining the Commission, she was the vice mayor of social affairs for the City of Kigali, an elective position in the country's decentralised administrative entities. Of the two remaining commissioners, one has been a Member of Parliament and the other, the executive secretary of the Eastern Province.

The profiles of the current commissioners demonstrate a mixture of persons trained in law and persons of experience who have been exposed to human rights issues in the course of their previous careers. In addition, the NCHR organises regular training to empower commissioners and staff with human rights knowledge and other skills necessary for carrying out their tasks. As part of capacity-building, commissioners and staff are encouraged to enrol in programmes aimed at enhancing their knowledge and skills in human rights matters. The annual reports of the NCHR indicate that scholarships have been awarded to commissioners and support staff in a bid to enhance their knowledge and skills on human rights promotion and protection through participation in training, workshops, short courses, and Master's and postgraduate-diploma programmes offered inside and outside the country.

73 Presidential Order No 72/01, Article 11.

74 At the time of writing, the seventh commissioner had resigned and not yet been replaced.

75 LLM in Human Rights and Democratization in Africa, LLM in International Criminal Justice and Law of Human Rights, and LLM in International Law.

Other NCHR staff, especially those in the Human Rights Promotion Research and Planning Unit and the Human Rights Legislation Protection and Monitoring Unit, are recruited on the basis of well-elaborated job profiles linked to their positions in accordance with the Prime Minister's Order Determining the Organizational Structure of the NCHR. Thus, in addition to their holding university degrees, NCHR members of staff are required to demonstrate a good understanding of human rights norms at national and international levels, have a wide knowledge and understanding of the Rwandan legal system in general and criminal procedure law in particular, knowledge of investigative and evidence-gathering techniques, and knowledge of court processes and procedures in general.⁷⁶

3.3 Accessibility of the NCHR

The head office of the NCHR is located in Rwanda's capital city, Kigali.⁷⁷ In 2001, the NCHR opened branches in almost all the provinces of the country. This was motivated by the need to make its services more accessible to the populace.⁷⁸ It opened one office per province made up of two staff members, the one acting as the head of the branch and the other as his or her deputy. They were tasked mainly to act as liaison officers for the Commission, and had the duty, *inter alia*, to receive the complaints of victims of human rights violations and conduct the necessary investigations to assess the relevance of these complaints before referring them to the Commission. They were also involved in different human rights promotion activities. Their physical presence in the provinces has helped the NCHR attract many cases from all corners of the country.⁷⁹

However, reforms to the public service in 2005 impacted negatively on the capacity of the NCHR in terms of human resources.⁸⁰ As a result of these reforms, 61⁸¹ of the 107 employees recruited in 2001⁸² were retrenched. Following the decrease in the number of staff, the NCHR had

76 Annex II of the Prime Minister's Order Mo. 53/03 of 27/2/2015 Determining the Organizational Structure, the Salaries and the Fringe Benefits for Employees in the NHCR.

77 The 2013 Law, Article 2.

78 Foreword of the President of NCHR Gasana Ndobwa in the NCHR Annual Report (2000), available at http://cndp.org.rw/fileadmin/user_upload/reports/Annual%20report%202000.pdf, p 3.

79 National Human Rights Commission, Annual Report 2001, available at <https://bit.ly/2NrykWN>, p 8.

80 NCHR, Annual Report 2005, p 97.

81 NCHR, Annual Report 2005, p 93.

82 NCHR, Annual Report 2001, p 8.

to close down its branches in the provinces and consequently adopt a new *modus operandi* whereby commissioners and staff work in provinces from the head office.⁸³ This obviously makes the services of the NCHR less accessible to citizens who live in provinces with limited financial resources.

In practical terms, complaints from around the country and follow-up thereof have to be dealt with by a newly established organ at the head office called the commissariat.⁸⁴ This organ is headed by a commissioner who is assisted by NCHR personnel charged with the promotion and protection of human rights.⁸⁵ The council of commissioners assigns to each commissariat a number of districts in which it is supposed to intervene. As such, when a complaint from the district is lodged with the NCHR, the complaint is sent to the respective commissariat for consideration; the commissariat has the duty to receive, examine and follow up on the complaint. The commissariat is also required to monitor respect for human rights in detention facilities within the districts under its supervision.⁸⁶ As regards the promotion of human rights, the commissariat prepares, organises and conducts, in its respective districts, education and sensitisation campaigns on human rights topics approved by the NCHR.⁸⁷

Another challenge regarding the accessibility of the services of the NCHR is caused by frequent changes of its permanent headquarters. For the last 20 years of its existence the NCHR has been unable to acquire its own premises and has had to change its location in Kigali about four times. This has sometimes caused it to move to remote and exclusive upmarket parts of Kigali, such as Nyarutarama, which are not easily accessible to the ordinary people. The situation presents genuine challenges, particularly so to people from the rural areas, who have to struggle not only to find their way to Kigali but, once there, to locate the NCHR head office.

Various strategies have been adopted to make the NCHR's services more accessible, especially to those in the provinces. One of these has involved the increasing use of the toll-free telephone line⁸⁸ of the NCHR. This has been very effective in Rwanda, where statistics indicate a

83 NCHR, Annual Report 2005, p 97.

84 Internal Rules and Regulations of the National Commission for Human rights adopted by the Council of Commissioner of 29/12/2009 (hereafter NHCR internal Rules and Regulations) (published in Official Gazette No special of 14/10/2010), Article 34.

85 NHCR internal Rules and Regulations, Articles 34-35.

86 NHCR internal Rules and Regulations, Articles 36.

87 NHCR internal Rules and Regulations, Articles 36.

88 The toll-free number is 3430 (see <http://cndp.org.rw/index.php?id=195>).

widespread and continuous increase in mobile telephone subscribers.⁸⁹ The NCHR advertises its toll-free number on radio stations and in other accessible media outlets to encourage the population to report human rights violations via the toll-free number.

The NCHR has also set up a user-friendly electronic complaint-filing system⁹⁰ on its website. This can be used even by victims of violations of human rights who are outside Rwanda while lodging complaints; once the complaints are lodged, users receive electronic updates on follow-up by commissioners and/or staff.

Establishing the Observatory of the Rights of the Child is another important mechanism that has made the NCHR's services more accessible at local level. Indeed, since 2006 the NCHR, together with different institutions and organisations intervening in the protection of the child, created the Observatory of the Rights of the Child, a body in charge of monitoring children's rights through committees of volunteers at sectoral, district and national levels.⁹¹ Members of sector children's rights observatory committees receive complaints or collect information about violations of children's rights taking place in the sector and submit reports about this to the district committees. The latter analyses them to identify the causes and strategise on possible remedies to be proposed before submitting a report to the national committee. After considering this report, a submission is made to the NCHR for it to follow up on the situation in accordance with its mandate of protecting human rights.⁹²

These volunteers' committees have contributed to making the NCHR more accessible because, through their complaint mechanism, ordinary citizens in remote parts of the country are able to reach the Commission without requiring its physical presence on the ground.

Another indicator of the accessibility of the Commission's services is the simplicity of the complaints-lodging procedures established by the law – these do not require formalities to be fulfilled or preconditions met before recourse is made to the NCHR. Complaints may therefore be brought by the victims themselves – or by any other person on their behalf in case of

89 According to statistics of the Rwanda Utilities Regulatory Authority (RURA), the mobile-telephony penetration rate at the end of June 2018 was 78.1 per cent; for more details, see RURA, Annual Report 2017-2018, available at <https://rura.rw/index.php?id=23>.

90 For detail on how this electronic system works, see <http://cndp.org.rw/index.php?id=87>.

91 NCHR, Annual report 2006 (2006), pp 150-151.

92 NCHR, Annual Report 2006, pp 150-151.

their incapacity to do so personally⁹³ – be it in verbal or written form.⁹⁴ The same applies to NGOs, which may file cases in their respective names and on behalf of their members, on behalf of victims or in acting in the public interest, or in case of generalised violations of human rights based on discrimination.⁹⁵

In summary, these various accessibility strategies have proven effective in ensuring that the population has relatively satisfactory access to the services of the Commission.

4 The mandate of the NCHR

The 2013 Law has given a broad and unrestricted mandate to the Commission. Its mandate revolves around three set of activities, which are the protection and promotion of human rights, playing an advisory role in the preparation of bills, and contributing to policies to advance human rights.

The NCHR has the mandate to protect victims of human rights. It is a well-established quasi-judicial mechanism utilising a complaints procedure well entrenched in the law.⁹⁶ It receives complaints from victims, examines facts, and determines whether there have been violations of human rights. Where violations of human rights are ascertained, the NCHR requests the concerned institutions to restore the rights of complainants. It may also carry out mediation and conciliation in human rights litigation in cases where these mechanisms do not conflict with the law.⁹⁷ In cases where human rights violations have occasioned the commission of offenses, the NCHR can request that the competent organs take legal action against offenders.⁹⁸

The Commission monitors compliance with human rights, with an emphasis on the rights of specific vulnerable members of the society, such as children, women, persons with disabilities, HIV/AIDS-infected persons, refugees, the elderly, and migrant workers and their families. It also monitors respect for human rights during elections, and produces reports on this. Its members regularly visit detention facilities to ensure that detainees' rights are respected, and in case of violation, request that

93 NHCR internal Rules and Regulations, Article 57.

94 *Ibid*, Article 61.

95 *Ibid*, Article 57.

96 Law No 61/2018, Article 1, and the 2013 Law, Article 7.

97 The 2013 Law, Article 7.

98 *Ibid*.

the concerned authorities remedy the situation. The commissioners and any other staff designated by the chairperson of the Commission have been vested with the powers of judicial police officers.⁹⁹ Equally, the NCHR has been given standing to file legal actions in any matter for violation of human rights.¹⁰⁰

In a recent development, the NCHR was given an additional mandate to act as a National Preventive Mechanism (NPM). The designation and establishment of an NPM is an obligation of states parties to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰¹ For the NCHR to perform this new role, special additional responsibilities¹⁰² and powers¹⁰³ were accorded to its members by the law.

Another mandate of the NCHR is to promote human rights.¹⁰⁴ This is an educational role that involves conducting activities such as educating and sensitising people on human rights matters through workshops, seminars and training; preparing educational programmes and promotional materials; working with other organs to develop strategies for preventing violations of human rights; and preparing and publishing reports on the situation of human rights in the country.

The NCHR also has the mandate to advise state organs on a variety of human rights matters.¹⁰⁵ It is required to give advice to state organs, particularly on bills, to ensure they comply with human rights protection and promotion. Furthermore, it makes recommendations towards the harmonisation of domestic laws with international or regional human rights instruments, and encourages state organs to ratify international instruments and ensure their incorporation in domestic laws.¹⁰⁶

99 *Ibid*, Article 8.

100 *Ibid*, Article 9.

101 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution A/RES/57/199 on 18 December 2002, Articles 3, and 17-23. Rwanda ratified it through Presidential Order 60/01 of 12/02/2014.

102 Law No 61/2018, Article 2.

103 *Ibid*, Article 3.

104 The 2013 Law, Article 5.

105 *Ibid*, Article 5.

106 The word “incorporation” rather than “domestication” is used because Rwanda is considered a monist state; for more detail on the mandates of NHRIs in monist and dualist states, see R Carver, “A New Answer to an Old Question: National Human Rights Institutions and the Domestication of international Law”, 10(1) *Human Rights Law Review* (2010), pp 9-11.

The NCHR's annual reports, dating from its inception in 1999 to the present day, indicate the activities it carries out in furtherance of its mandate, the recommendations it makes to concerned public institutions, and the actions they have taken in response. In respect of its protective mandate, the NCHR has been able to receive and/or investigate a diverse range of complaints. In its first five years of operation, the bulk of complaints were cases relating to arbitrary arrests, illegal and prolonged detentions, and property-related claims, which were investigated and attended to accordingly.

In addition, the NCHR was involved in monitoring the traditionally inspired *gacaca* courts launched in 2002.¹⁰⁷ The *gacaca* courts were created as a transitional measure to deal with genocide cases. Judges in the *gacaca* courts were lay persons called *inyangamugayo*, meaning "people of integrity", and were elected from the local community.¹⁰⁸

Throughout the *gacaca* courts' complex trials, the NCHR intervened to ensure that the rights of survivors of genocide, witnesses and accused parties, as well those of *inyangamugayo*, were respected during and after trials. With regard to survivors, witnesses and *inyangamugayo*, the NCHR received and/or investigated complaints about various kinds of harassment, mistreatment, intimidation and homicidal injury to which they were subjected.¹⁰⁹ The NCHR also investigated claims that some public authorities were interfering improperly in *gacaca* court proceedings, usually in an attempt to avoid having relatives charged with crimes.¹¹⁰

With regard to the rights of the accused before *gacaca courts*, the NCHR monitored the conduct of proceedings to assess the respect of the accused persons' rights; the respect of such rights as the right to be informed of charges against them, the right to refute allegations; the right to appeal against convictions; the right not to be imprisoned contrary to the law; the right to be tried within a reasonable time; and the right to be informed of the decision of the *gacaca court*.¹¹¹ From 2003, the NCHR had to submit, to the National Gacaca Courts Service, a trimestral report that contained

107 Although created by the Organic Law No 40/2000 of 26 January 2001, the *gacaca* courts officially started to operate on 18 June 2002 following elections and training of "*Inyangamugayo*" judges.

108 See Presidential Order No 12/01 of 26 June 2001 Establishing Modalities for Organizing Elections of Members of Gacaca Courts; for more detail on *gacaca* courts, see also AM de Brouwer and E Ruvebana, "The Legacy of the Gacaca Courts in Rwanda: Survivors' Views" 13 *International Criminal Law Review* (2013), pp 937-976.

109 See NCHR annual reports 2002-2012.

110 See NCHR, Annual Report 2005 (2005), p 75.

111 See NCHR, Annual Report 2007 (2007), p 76.

recommendations on the respect of human rights in the *gacaca* courts.¹¹² Along the same lines, it provided regular training to *inyangamugayo* on human rights and specific procedures in *gacaca* courts.¹¹³ The monitoring of *gacaca* courts continued until their closure in 2012.¹¹⁴

Both during and after its monitoring of the *gacaca* courts, the NCHR continued to receive, investigate and handle human rights complaints commonly related to access to justice and the right to property. These include complaints to do with court delays in trying cases, non-enforcement of court decisions, land-sharing issues, expropriation of land in the public interest issues, and land-succession matters.

The NCHR's effort in protecting human rights were not without criticism. For example, some observers, such as the United Nations Special Rapporteur Maina Kiai, questioned its ability to investigate rights to freedom of peaceful assembly and of association.¹¹⁵ While acknowledging the work of the NCHR, the Rapporteur recommended in the report on his mission to Rwanda in 2014 that the Commission should be more robust in monitoring everyone's effective enjoyment of the rights to freedom of association and peaceful assembly.¹¹⁶ These statements form part of other similar allegations that the NCHR does not publicly take a critical stand on matters pertaining to these rights.¹¹⁷

In furtherance of its promotional mandate, the NCHR undertook various activities, including educating the Rwandan population on a variety of human rights topics; urging state institutions to ratify international human instruments; and providing views on bills in relation to human rights promotion and protection. With respect to human rights education, the NCHR's annual reports indicate that it regularly organises training sessions, workshops, public lectures, and sensitisation campaigns on various human rights issues and that it targets different categories of people in both the public and private sectors. These include staff from the

112 See NCHR, Annual Report 2003 (2003), p 64; NCHR, Annual Report 2005 (2005), p 67; NCHR, Annual Report 2007 (2007), p 93.

113 See NCHR, Annual report 2002 (2002), p 60; see also NCHR, Annual Report 2004 (2004), p 24.

114 *Gacaca* courts were officially closed by Organic Law No 04/2012/OL of 15/06/2012 Terminating *Gacaca* Courts and Determining Mechanisms for Solving Issues Which Were under Their Jurisdiction.

115 See Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on his mission to Rwanda (20-27 January 2014), available at <https://bit.ly/2FLcQOx>, pp 17-18.

116 *Ibid*, p 18.

117 *Ibid*, p 18.

judiciary, the prosecution, correctional services, the police, local government and health centres, as well as representatives of people with disabilities, people infected with HIV/AIDS, historically marginalised persons, and others.

As for urging state institutions to ratify international human rights instruments, it is thanks largely to the NCHR's advocacy that Rwanda is now party to eight of the nine core human rights conventions at the universal level.¹¹⁸ In its discussion and correspondence with competent state institutions, the Commission also continues to advocate for the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance.¹¹⁹ Rwanda has not yet ratified this convention even though this was one of the commitments it made in January 2011 during the first Universal Periodic Review.¹²⁰

The NCHR never took any official position on the heated debate around the Rwandan withdrawal of its Article 34(6) declaration in the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereafter African Court),¹²¹ a move that some observers considered as a significant setback for the realisation of human rights in Rwanda.¹²² In fact, by withdrawing its declaration, Rwanda has barred individuals and NGOs from directly filing cases before the African Court. Even though state officials have defended the withdrawal as a legitimate necessity to avoid the declaration's being exploited by convicted genocide fugitives to secure a right to be heard by the African Court, hence using the court as

118 NCHR, Submission by the National Commission for Human Rights of Rwanda to the United Nations Human Rights Council under the Universal Periodic Review of the Republic of Rwanda, 23rd Session – November 2015, available at <https://bit.ly/2XkHcBZ>, p 5.

119 See Letter No CNDP/FEB/450/14.15 of 23 February 2015 requesting the Minister of the Minister of Foreign Affairs and Cooperation to do his utmost so that the International Convention for the Protection of All Persons from Enforced Disappearance be ratified, in NCHR, Annual Report 2014-2015 (2015), p 48; see also the NCHR letter No CNDP/APR/580/15-16 of 13 April 2016 reminding the Minister of Justice that this convention was yet to be ratified, in NCHR Annual Report 2016-2017 (2017), pp 116-117.

120 See UPR, Rwanda Review in the Working Group of 24 January 2011 adopted in the Plenary of 7 June 2011, available at <https://bit.ly/2FM4eXT>.

121 Rwanda deposited the withdrawal with the African Union on 29 February 2016; the African Court was officially communicated of the withdrawal by the African Union on 3 March 2016.

122 See Joint Civil Society Statement on Rwanda's Withdrawal of its Article 34(6) Declaration from the Protocol on the African Court on Human and Peoples' Rights of 17 March 2016, available at <https://bit.ly/2KQVeEK>.

a platform to promote their agenda,¹²³ the NCHR has not made public its position on this crucial human rights issue.

Another important task that the NCHR undertakes in relation to international human rights instruments is to monitor the timely submission of periodic reports to treaty-monitoring bodies. The NCHR does not contribute to state reports; it has taken the approach of behaving as an independent institution and, as such, its role is limited to assessing if the state reports on time – an approach adopted by many other NHRIs.¹²⁴ Accordingly, the NCHR prepares a document on the status of reports,¹²⁵ conducts an assessment of the extent to which the concluding observations issued by monitoring bodies have been adhered to, and submits its findings to the concerned state institutions.¹²⁶ The NCHR also issues shadow reports expressing its views on the state report.¹²⁷

The NCHR often expresses its views on bills from the perspective of human rights promotion and protection. For example, it played a very active role in the debate that began in 2006 on the abolition of the death penalty¹²⁸ and that culminated, a year later in 2007, in the abolition of the penalty by Organic Law No 31/2007 of 25 July 2007.

The broad and unrestricted mandate bestowed on the NCHR is in line with what the Paris Principles expect of any NHRI. The NCHR has tried discharge its functions as effectively and efficiently as it can within the financial and human resource resources made available to it.

123 See Ministry of Justice, “Clarification”, available at <https://bit.ly/2YrCVcz>; see also E Kwibuka, “Why Rwanda Withdrew From AU Rights Court Declaration”, *The New Times* (13 October 2017), available at <https://www.newtimes.co.rw/section/read/221701>.

124 For a debate on the ambiguous role of NHRIs in state reporting, see F Viljoen, *International Human Rights Law in Africa*, 2nd edition, Oxford, Oxford University Press (2012), p 351.

125 See NCHR, Annual Report 2016-2017 (2017), P 117.

126 See NCHR, Annual Report 2015-2016 (2016), P 55.

127 See note 125, p 117; the same was also done by the NCHR when it submitted a report to the Human Rights Council during the 2nd Universal Periodic Review of the Republic of Rwanda in 2015; see note 118. For more detail on opportunities for NHRIs to provide valuable information when a country is reviewed through the UPR, see ED Redondo, “Role of the UN in the Promotion and Protection of Human Rights”, in AR Chowdhury and M Bhuiyan (eds), *An Introduction to International Human Rights Law*, Leiden, Brill (2010), p 141.

128 See NCHR letter No CRDH/2042/06 of 25 December 2006 sent to the Minister of justice outlining key points supporting the abolition the death penalty in NCHR, Annual Report 2006 (2006), pp 43-44.

5 Public accountability

The NCHR is accountable to the public through the issuance of its regular annual activity reports, special reports, public statements and regular consultation with stakeholders. According to Article 13 of the 2013 Law, the NCHR is under an obligation to present annual reports to both chambers of Parliament. These reports cover the various activities undertaken in line with its mandate.

The following aspects are highlighted in different sections: the state of affairs of human rights in the country; the state of examination and follow-up of complaints; achievements with regard to human rights promotion; recommendations made to state institutions to improve the human rights situation in Rwanda; and, in the financial report, how the budget was executed. The 2013 Law requires too that a copy of the annual report be submitted to other state institutions, such as the President of the Republic, the cabinet and the Supreme Court.¹²⁹ As the law requires that the annual reports should be made public,¹³⁰ the NCHR has diligently published almost all of them on its official website¹³¹ in the three official languages.¹³²

In addition to its annual reports, the NCHR also submits special reports to the abovementioned state institutions. The reports usually highlight the findings of investigations into specific kinds of rights violations.¹³³ The special reports make recommendations and purposely raise the concerned institution's awareness of them. There is no explicit obligation to publish these special reports, and the NCHR has made them public only on very few occasions. One example is the report on its investigation in Rutsiro and Rubavu districts on allegations in a Human Rights Watch report of July 2017 entitled *All Thieves must be Killed*.¹³⁴ Another example is the NCHR's investigation in Kiziba Refugee Camp

129 The 2013 Law, Article 13, paragraph 1.

130 The 2013 Law, Article 14.

131 At the time of writing, all annual reports in Kinyarwanda were available on the NCHR's website; for the English version, only three annual reports (namely, 2008, 2009-2010 and 2017-2018 reports) could not be found on the NCHR website, whereas for the French version, six reports (namely, 2009-2010, 2011-2012, 2012-2013, 2013-2014, 2016-2017, 2017-2018 reports) were not published on the website.

132 Under the Constitution, *Ikinyarwanda*, English and French are the official languages of Rwanda (Article 8).

133 The 2013 Law, Article 13 paragraph 2.

134 Report on Investigations Carried Out by the National Commission for Human Rights in Rutsiro and Rubavu Districts on the Human Rights Watch's Report of July 2017, available at <https://bit.ly/2XfCdxH>.

after several refugees were killed by the police force during protests against cuts in food assistance.¹³⁵ From time to time, the NCHR also issues public statements on events in which it participated in its role as a human rights monitor¹³⁶ or on its concerns about human rights violations reported in the media.¹³⁷

The NCHR has the duty to cooperate with various stakeholders, including human rights organisations at the national and international levels, to develop strategies for dealing with human rights matters.¹³⁸ One of the main outcomes of such collaboration was, as mentioned, the establishment in 2006 of the Children's Rights Observatory committees, which have proven to be highly effective mechanisms for reporting on child-rights violations. Since 2006, the NCHR, together with national human rights NGOs and international organisations operating in Rwanda, established a forum called the Consultative Meeting. Members of the forum convene regularly in meetings either of the executive committee or general assembly to strategise on how to promote human rights, how to work together on shared activities promoting human rights, and how to build the capacity of members.¹³⁹ The NCHR is also a member of a number of associations of NHRIs – these include the Network of African National Human Rights Institutions, whose current chairperson is the NCHR's chairperson.

6 Conclusion

A culture centred on the promotion and protection of human rights is one that needs to be nurtured into existence over time: no one institution can boast to have established it by itself overnight. In the case of an institution like the NCHR, created in the most difficult of times at a point when the country was dealing with the still-fresh consequences of one of the worst genocides of the 20th century, the expectations of it could not have been high, albeit that complacency would not have been an option. Nevertheless, various laws were enacted with a view to making it more effective than it was, with each new development marking a step forward in the effort to meet the standards of the Paris Principles. The result is that,

135 Summary of the NCHR Report on Kiziba Refugee Camp Incident, available at <https://bit.ly/2J2JIEd>.

136 See Press Release of the National Commission for Human Rights on Parliamentary Elections Held on 2-4 September 2018, available at <https://bit.ly/2J2KjWt>.

137 Press Release on Mugesera's Human Rights Concerns, available at <https://bit.ly/2RQ0wkL>.

138 The 2013 Law, Articles 5, 20 and 32, 30.

139 NHCR, Annual Report 2006 (2006), pp 156-157.

from its humble beginnings 20 years ago, the NCHR has taken shape slowly but surely in becoming what it is today. A legal entity with administrative and financial autonomy, it has a broad and unrestricted mandate, its commissioners are selected by an independent committee, and they enjoy immunity from prosecution for their views in the exercise of their duties.

Despite the evident progress made in its legal and institutional frameworks, the NCHR is not without its challenges. Although they are not insurmountable, problems such as insufficient numbers of staff and the lack of premises are very real. The key to resolving the challenges would seem to lie in greater collaboration with CSOs and state actors, as this would reduce the NCHR's workload and thus make it more efficient in carrying out its functions of promoting and protecting human rights in Rwanda.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The constitutional framework is laid down in the 2003 Rwandan Constitution (revised in 2015).

The constitution of the Republic of Rwanda of 2003 revised in 2015 (Official Gazette no Special of 24/12/2015)

Article 42: Promotion of human rights

The promotion of human rights is a responsibility of the State. This responsibility is particularly exercised by the National Commission for Human Rights. This Commission is independent.

Article 139: National commissions, specialised organs, national councils and public institutions

The national commissions, specialised organs and national councils entrusted with the responsibility to help in resolving important issues facing the country are the following:

- 1) national commissions:
 - (a) National Commission for Human Rights;
 -

Specific laws determine the mission, organisation and functioning of these institutions.

A law may establish other national commissions, specialised organs and national councils when necessary. That law also determines their mission, organisation and functioning.

When deemed necessary, a law may also remove national commissions, specialised organs or national councils.

An organic law establishes general provisions governing public institutions

B.2 Legislative and regulatory instruments

The main instrument is Law No 61/2018, which modifies Law No 19/3013.

B.2.1 LAW No 61/2018 OF 24/08/2018 MODIFYING LAW No 19/2013 OF 25/03/2013 DETERMINING MISSIONS, ORGANISATION AND FUNCTIONING OF THE NATIONAL COMMISSION FOR HUMAN RIGHTS (Official Gazette no 38 of 17/09/2018)

Article 1: Special responsibilities of the Commission as regards to the protection of Human Rights

Article 6 of Law no 19/2013 of 25/03/2013 determining missions, organization and functioning of the National Commission for Human Rights is modified as follows:

Regarding the protection of human rights, the Commission has the following special responsibilities:

- 1) to monitor the compliance with the human rights, in particular with the rights of child, woman, persons with disabilities, people living with HIV/AIDS, refugees, migrant workers and members of their families and elderly's rights;
- 2) to receive, examine and investigate complaints relating to human rights violations;
- 3) to examine human rights violations in Rwanda committed by public or private organs, associations, non-governmental organizations, persons abusing their powers, a group of persons or individuals;
- 4) to visit premises of detention with a view to monitor respect for the rights of detainees and to request the relevant institutions to solve identified problems with regard to the violations of the rights of detainees;
- 5) to monitor the respect for human rights throughout elections process and submit reports to relevant organs."

Article 2: Special responsibilities of the Commission as regards to the prevention of torture and other cruel, inhuman or degrading treatment or punishment

In Law no 19/2013 of 25/03/2013 determining missions, organization and functioning of the National Commission for Human Rights is inserted Article 6 bis worded as follows:

Article 6 bis: Special responsibilities of the Commission as regards to the prevention of torture and other cruel, inhuman or degrading treatment or punishment

Regarding prevention of torture and other cruel, inhuman or degrading treatment or punishment, the Commission has the following special responsibilities:

- 1) to carry out, with or without notice, regular visits at any time when deemed necessary to the following places:
 - (a) prisons;
 - (b) places of detention investigation measures;
 - (c) rehabilitation and transit centres;
 - (d) centres for mentally handicapped and psychiatric hospitals;
 - (e) elderly centres;
 - (f) transit centres for immigrants with problems;
 - (g) vehicles or any other means of detainees' transport;
 - (h) any other place where persons are or may be deprived of their liberty.
- 2) to regularly monitor the conditions of detention of persons deprived of their liberty and other rights with a view to their protection against torture or other cruel, inhuman or degrading treatment or punishment;
- 3) to issue recommendations to relevant authorities with the aim to improve the conditions of detention of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment based on international, regional and national laws and ask them to solve identified problems;
- 4)° to follow up the implementation of its recommendations that the Commission submitted to other institutions;
- 5)° to provide views on existing laws and draft laws relating to the prevention and control of torture and other cruel inhuman or degrading treatment or punishment in place of detention;
- 6)° to receive complaints relating to detention, well-being and other rights of persons deprived of their liberty;
- 7) to carry out research and studies on detention, well-being and other rights of detainees with the aim of preventing or combating torture and other cruel, inhuman or degrading treatment or punishment;
- 8)° to promote good relationship and collaboration with other institutions with the same responsibilities as the Commission.

Article 3: Special powers of the Commission as regards to the prevention of torture and other cruel, inhuman or degrading treatment or punishment

In Law no 19/2013 of 25/03/2013 determining missions, organization and functioning of the National Commission for Human Rights is inserted Article 7 *bis* worded as follows:

Article 7 *bis*: Powers as regards to the prevention of torture and other cruel, inhuman or degrading treatment or punishment

Regarding prevention of torture and other cruel, inhuman or degrading treatment or punishment, the Commission has the following powers:

- 1) unrestricted access to all documents and all information owned by relevant institutions, relating to the number of persons deprived of their liberty, the number of detention places and their location;
- 2) unrestricted access to all information referring to the treatment of persons deprived of their liberty as well as their conditions of detention;
- 3) unrestricted access to all places of detention and their premises and facilities;
- 4) conduct talk in private at any time with persons deprived of their liberty or with any other person likely to provide useful information;
- 5) to make audio recording and take photos that can help the Commission in fulfilling its responsibilities and respecting the privacy of the person.

Article 4: Composition of the Council of Commissioners and requirements for the position

Article 17 of Law no 19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

The Council of Commissioners is composed of seven (7) Commissioners including the Chairperson and the Vice Chairperson.

For a person to be a Commissioner, he/she must fulfil the following conditions:

- 1) to be a Rwandan national;
- 2) to be a person of integrity;
- 3) not to have been convicted of the crime of genocide, the crime of genocide ideology or crimes against humanity in a final judgment;
- 4) not to have been sentenced to imprisonment for a term equal to or exceeding six (6) months in a final judgment;

- 5) to have an experience in leadership positions in public or private institution.

Article 5: Origin of Commissioners

Article 18 of Law no 19/2013 of 25/03/2013 determining missions, organization and functioning of the National Commission for Human Rights is modified as follows:

Commissioners come from:

- 1) civil society including non-governmental organizations for the promotion and protection of human rights;
- 2) public and private universities and institutions of higher learning;
- 3) public institutions;
- 4) private sector.

At least thirty per cent (30%) of Commissioners selected from those bodies must be women.

Considering the independence of the Commission as provided for in Article 3 of this Law, Commissioners are selected on individual basis and do not represent their institutions of origin.

Article 6: Requirements for selection of candidate Commissioners

Article 20 of Law no 19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

The Committee in charge of selecting candidate Commissioners is independent in the exercise of its duties.

“In selecting candidates, the Committee must consider at least the following:

- 1) comply with the principles of transparency and independence;
- 2) widely announce vacancies for Commissioners.

After selecting the candidates, the Committee submits to the Government a list of selected candidates, and the President of the Republic appoints the Chairperson and the Vice Chairperson if those posts are vacant.

At least thirty per cent (30%) of candidates selected by the Committee in charge of selecting candidate Commissioners must be women.

A Presidential Order establishes the Committee in charge of selecting candidate Commissioners and determines its responsibilities, organization and functioning.”

Article 7: Approval of Commissioners by the Senate

Article 21 of Law no 19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

“The Cabinet submits to the Senate for approval candidate Commissioners before their appointment by a Presidential Order.

If the Senate does not approve one or several candidate Commissioners, the President of the Senate informs the Government within fifteen (15) days, and requests for the submission of another candidate to replace the candidate who was not approved.

The selection of a candidate to replace the one who was not approved is carried out by the Committee in charge of selecting candidate Commissioners in accordance with the provisions of Article 20 of this Law.

The Cabinet submits to the Senate other candidate Commissioners whose number is equivalent to the number of those not approved by the Senate.”

Article 8: Term of office for the Commissioners

Article 23 of Law no19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

“The term of office for the Commissioners is five (5) years renewable only once. During that term, Commissioners hold office on a full-time basis.”

Article 9: Replacement of a Commissioner

Article 27 of Law no 19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

“In case a Commissioner ceases to carry out his/her functions due to any reason, the Chairperson of the Commission or his/her replacement in case of his/her absence notifies the President of the Republic, with copy to the President of the Senate and the Prime Minister within thirty (30) days.

The replacement of a Commissioner is carried out in accordance with Articles 19, 20 and 21 of this Law.”

Article 10: Term of office of incumbent Commissioners

Article 43 of Law no 19/2013 of 25/03/2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows:

“Incumbent Commissioners complete the term of office for which they were appointed.

For Commissioners whose term may be renewed, Article 23 of this Law applies.”

Article 11: Drafting, consideration and adoption of this Law

This Law was drafted, considered and adopted in Ikiyarwanda.

Article 12: Repealing provision

All prior legal provisions contrary to this Law are repealed.

Article 13: Commencement

This Law comes into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Kigali, on 24/08/2018

KAGAME Paul

President of the Republic

B.2.2 LAW No19/2013 OF 25/03/2013 DETERMINING MISSIONS, ORGANISATION AND FUNCTIONING OF THE NATIONAL COMMISSION FOR HUMAN RIGHTS (Official Gazette no14bis of 08/04/2013)

CHAPTER ONE: GENERAL PROVISIONS

Article One: Purpose of this Law

This Law determines the mission, organisation and functioning of the National Commission for Human Rights, hereinafter referred to as the “Commission”.

Article 2: Head office and territorial jurisdiction of the Commission

The head office of the Commission shall be located in Kigali City, the Capital city of the Republic of Rwanda. It may be transferred elsewhere in Rwanda if deemed necessary.

The Commission shall operate throughout the country and may establish branches anywhere in the country.

Article 3: Independence and autonomy of the Commission

The Commission shall be independent and permanent. In fulfilling its mission, the Commission shall not be subject to any instructions from any other organ.

The Commission shall have legal personality and autonomy in administrative and financial matters.

CHAPTER II: MISSION AND POWERS OF THE COMMISSION

Section One: Missions of the Commission

Article 4: Overall mission of the Commission

The overall mission of the Commission shall be to promote and protect Human Rights.

Article 5: Special mission of the Commission regarding Human Rights promotion

The special mission of the Commission regarding Human Rights promotion shall be the following:

- 1) to educate and sensitize the population on matters relating to human rights and participate in the development of Human Rights educational programmes;
- 2) to collaborate with other organs in designing strategies to prevent violations of Human Rights;
- 3) to prepare and disseminate reports on the situation of Human Rights in Rwanda, annually and whenever necessary;
- 4) to provide views, upon request or at its own initiative on laws, regulations of public organs in force in the country and bills so as to ensure their conformity to fundamental principles of Human Rights;
- 5) to urge relevant government institutions to ratify international treaties related to Human Rights and incorporate them in the existing domestic laws;
- 6) to urge relevant government institutions to submit on time the reports related to international treaties on Human Rights conventions ratified by Rwanda;
- 7) to propose to relevant government authorities measures to be taken to address and punish in accordance with law any violation of Human Rights;
- 8) to collaborate with other foreign national Human Rights institutions, and international organisations in Human Rights promotion and protection activities.

Article 6: Special mission of the Commission as regards to the protection of Human Rights

Regarding the protection of Human Rights, the special mission of the Commission shall be the following:

Commission sont les suivantes:

- 1) to receive, examine and investigate complaints relating to Human Rights violations;
- 2) to examine Human Rights violations in Rwanda committed by State organs, those who work in the public service abusing their powers, associations and individuals;
- 3) to carry out visits to custodial places with the purpose of inspecting whether the rights of detainees are respected and urge relevant authorities to address identified cases of violation of the rights of detainees;

- 4) to particularly monitor respect for the rights of the child, women, persons with disabilities, people living with HIV/AIDS, refugees, migrant workers and members of their families and elderly;
- 5) to monitor respect for Human Rights throughout elections process and submit report to relevant organs.

Section 2: Powers of the Commission

Article 7: Ordinary powers of the

In order to fulfil its mission provided under Articles 4 to 6 of this Law, the Commission shall have the following powers:

- 1) to receive and consider testimonies on Human Rights violations;
- 2) to have access to any place where human rights violations are alleged or reported including places of detention for the purpose of investigations;
- 3) to contact, interrogate and seek explanations from any person likely to have testimony, information, responsibility and expertise deemed to enlighten the Commission on scrutinising and collecting Human Rights violation evidence;
- 4) to have access to documents, consult them on the spot or get their copies as well as any other document required by the Commission to be able to analyze and collect Human Rights violation evidence. Documents or items given to the Commission shall be returned to owners or organs of origin in a period not exceeding three (3) months;
- 5) to conduct mediation and conciliation between parties with Human Rights litigations where the mediation or conciliation does not contravene the law;
- 6) to request relevant organs to unconditionally restore the rights of any person where it appears that his/her rights have been violated;
- 7) to request relevant organs to bring to justice any person having committed offences related to the violation of Human Rights;
- 8) to carry out research on thematic issues and publish findings with the purpose of Human Rights.

Article 8: Judicial Police powers

Commissioners shall have permanent judicial police powers throughout the territory of Rwanda while discharging their duties.

If deemed necessary, a member of staff of the Commission may be given judicial police powers by competent authority upon request by the Chairperson of the Commission.

Persons summoned by the Commission must appear, failure of which they shall be prosecuted in accordance with law.

Article 9: Power to file legal actions

The Commission shall have powers to file legal proceedings in civil, commercial, labour and administrative matters for violation of human rights provided by the Constitution, international treaties ratified by Rwanda and other laws. In that regard, the Commission may be represented in courts by its employees authorized by relevant authority on the request of the Chairperson of the Commission. The Commission may also be represented by a council of its choice.

Article 10: Exercice de la qualité d'Officier

While exercising judicial police powers and power to file legal action, the Commission shall respect the national laws without prejudice to other organs' responsibilities, and apply such powers in case of violation of public, individual interests, or if other relevant organs fail to carry out their legal duties.

Article 11: Power to adopt the internal rules and regulations

Without prejudice to the provisions of this Law, the Commission shall establish its internal rules and regulations which shall be published in the Official Gazette of the Republic of Rwanda.

CHAPTER III: PROGRAM OF ACTIVITIES AND REPORT OF THE COMMISSION

Article 12: Commission's program of activities and organs to which it is submitted

The Commission shall submit to the Parliament, both Chambers, its program of activities within a period not exceeding three (3) months from the commencement of the fiscal year and reserve a copy thereof to the President of the Republic, the Cabinet and the Supreme Court.

Article 13: Commission's reports and organs to which they are submitted

The Commission shall submit to the Parliament, both Chambers, its activity report within a period not exceeding three (3) months from the end of the fiscal year, and reserve a copy thereof to the President of the Republic, the Cabinet and the Supreme Court.

The Commission shall also submit to the President of the Republic, the Parliament, both Chambers, the Cabinet and the Supreme Court thematic reports acknowledged through its investigations or researches on Human Rights violations and those with negative impact on such rights.

Article 14: Dissemination of the Commission's report Commission

The Commission shall disseminate its annual report subsequent to its submission to the Parliament.

CHAPTER IV: ORGANS OF THE COMMISSION

Article 15: Administrative organs

The administrative organs of the Commission shall be the following:

- 1) the Council of Commissioners;
- 2) the Bureau of the Commission;
- 3) the General Secretariat of the Commission.

Section One: Council of Commissioners

Article 16: Responsibilities of the Council of Commissioners

The Council of Commissioners shall be the following:

- 4) to adopt the agenda of its meeting;
- 5) to take all decisions related to the promotion and protection of Human Rights;
- 6) to approve the planning and the action plan of the Commission;
- 7) to approve the annual draft budget of the Commission before submitting it to relevant organs;
- 8) to approve the annual activity report of the Commission;
- 9) to approve thematic reports on acts acknowledged by the Commission on Human Rights violations;
- 10) to approve the internal rules and regulations of the Commission;
- 11) to approve subsidies, donations and bequests;
- 12) to prepare the organizational structure of the Commission;
- 13) to recruit and appoint the personnel of the Commission;
- 14) to take all decisions that could improve the effective functioning of the Commission.

Ingingo ya 17: Abagize Inama y'Abakomiseri n'ibyo bagomba kuba bujuje

Article 17: Composition of the Council of Commissioners and requirements for the position

The Council of Commissioners shall be composed of seven (7) Commissioners including the Chairperson and the Vice Chairperson.

For a person to be a Commissioner, he/she shall fulfil the following conditions:

- 1) to be a Rwandan;
- 2) to be a person of integrity;
- 3) not to have been convicted of the crime of genocide, crimes against humanity and crime of genocide ideology;
- 4) not to have been convicted to a sentence equal to or exceeding six (6) months of imprisonment;

In particular, the Chairperson of the Commission must hold a degree from an institution of higher learning and have experience and sufficient knowledge in the Human Rights field.

Article 18: Provenance of Commissioners

Commissioners shall come from the following:

- 1) non-governmental organisations for the promotion and protection of Human Rights;
- 2) public and private Universities and institutions of higher learning;
- 3) Civil Society;
- 4) public institutions;
- 5) private sector.

At least thirty per cent (30%) of Commissioners selected from those bodies must be females.

Considering the independence of the Commission as provided for in Article 3 of this Law, Commissioners shall be elected on individual basis and they do not represent their institutions of origin.

Article 19: Members of the Committee in charge of selecting candidate Commissioners and modalities for their appointment

The Committee in charge of selecting Candidate Commissioners shall be comprised of five (5) members from:

- 1) non-governmental organizations for the promotion and protection of human rights;
- 2) Public Service Commission;
- 3) Civil Society;
- 4) other relevant experts with expertise and skills in Human Rights issues.

A Presidential Order shall appoint members of the Committee in charge of selecting Candidate Commissioners.

Article 20: Requirements for selection of candidate Commissioners

The Committee in charge of selecting Candidate Commissioners shall function independently. In selecting the candidates, the Committee shall:

- 1) comply with the principles of transparency and independence;
- 2) widely announce vacancies for Commissioners;
- 3) submit to the Government a list of seven (7) selected candidates comprising the Chairperson and the Vice Chairperson.

At least thirty per cent (30%) of candidates selected by the Committee in charge of selecting Candidate Commissioners must be females.

A Presidential Order shall determine the establishment, responsibilities, organisation and functioning of the Committee in charge of selecting Candidate Commissioners.

Article 21: Approval of Commissioners

The Cabinet shall submit to the Senate for approval seven (7) candidate Commissioners before their appointment by a Presidential Order.

In case the Senate does not approve one or several candidate Commissioners, the President of the Senate shall inform the Government within a period not exceeding fifteen (15) days, and request for the submission of other candidates to replace those who are not approved.

The selection of candidates to replace those the Committee in charge of selecting Candidate Commissioners in accordance with the provisions of Article 20 of this Law.

The Cabinet shall submit to the Senate other candidate Commissioners whose number shall be equivalent to the number of those who are not approved by the Senate.

Article 22: Taking oath of the Commissioners

Before assuming their duties, Commissioners shall take oath before the Supreme Court as provided for by the Constitution.

Article 23: Term of office for the Article

The term of office for the Commissioners shall be four (4) years which may be renewable only once. Commissioners shall hold office on a full-time basis.

Article 24: Immunity of the Commissioners

During and after his/her term of office, a Commissioner shall not be prosecuted, wanted or arrested, detained or sentenced due to his/her views expressed or other acts committed in carrying out his/her duties.

A Commissioner shall not be provisionally detained unless he/she is caught red-handed committing an offence punishable by a penalty exceeding five (5) years of imprisonment. Such immunity shall cover only offences committed while carrying out his/her duties or those related to such duties.

Article 25: Incompatibilities with being a Commissioner

An appointed Commissioner shall not be allowed to perform any other remunerated work; he/she shall immediately resign from his/her previous post. However, he/she may perform research activities relating to his/her duties, literature and art provided they are not incompatible with the mission of the Commission and upon approval by the Council of Commissioners.

Article 26: Removal from office of a Commissioner

A Commissioner may be removed from office if:

- 1) his/her term of office expires;
- 2) he/she resigns through a written notice;
- 3) he/she is no longer able to perform his/her duties due to illness or disability certified by a panel of medical doctors nominated by the Minister in charge of health upon the request of the la Commission;
- 4) he/she demonstrates behavior contrary to his/her duties;
- 5) he/she abuses Human Rights;
- 6) he/she jeopardizes the interests of the Commission;

- 7) he/she has been definitively sentenced to at least six (6) months of imprisonment without suspension of sentence;
- 8) he/she dies.

The resignation of a Commissioner shall be submitted to the President of the Republic through a registered mail or hand-delivery letter with acknowledgment of receipt, with a copy to the Senate and the Commission's authorities. If a period of thirty (30) days elapses without a response, the resignation shall be considered approved.

A Presidential Order shall approve the removal of a Commissioner from his/her office in the circumstances provided for in Paragraph One of this Article.

Article 27: Replacement of a Commissioner Article

In case a Commissioner ceases to carry out his/her functions due to any reason, the Chairperson of the Commission or his/her representative in case of his/her absence shall notify the President of the Republic, the Senate and the Cabinet in a period not exceeding eight (8) days.

The replacement of a Commissioner shall be conducted in accordance with Articles 19, 20 and 21 of this Law.

The new Commissioner shall have a four- (4) year term of office renewable only once.

Article 28: Convening and holding meetings

The Council of Commissioners shall be convened in writing by the Chairperson of the Commission or his/her representative in case of his/her absence.

The Council of Commissioners shall meet if at least four (4) of its members are present. Its decisions shall be taken by consensus. Failure to obtain such consensus, the decisions shall be taken on the absolute majority vote of its

In case the absolute majority is not reached and in case of a tie, the Chairperson or his/her representative shall have a casting vote.

However, decisions relating to reports of the Commission and other decisions to be submitted to other institutions shall be taken by consensus.

The Secretary General shall attend the meetings of the Council of Commissioners and serve as the Rapporteur but shall not have the right to vote during the decision-making process.

Article 29: Functioning of the Council of Commissioners

Without prejudice to Article 28 of this Law, the functioning of the Council of Commissioners shall be determined by the internal rules and regulations of the Commission.

Article 30: Benefits granted to Commissaires

A Presidential Order shall determine the benefits entitled to Commissioners in office and those whose term of office has expired.

Section 2: Bureau of the Commission

Article 31: Members of the Bureau of the Commission

The Bureau of the Commission shall be composed of the Chairperson and the Vice Chairperson.

In absence of the Chairperson and the Vice Chairperson or if they are no longer able to perform their functions and are not yet replaced in accordance with this Law, the senior Commissioner shall convene a meeting of the Council of Commissioners to elect among them their representative. If the senior Commissioner fails to do so, at least three (3) Commissioners shall meet and elect the chair to preside over the meeting. Such meeting shall discuss only the item related to the acting bureau.

The Bureau of the Commission shall have the following responsibilities:

- 1) to ensure the execution of the programme of the Commission and its budget;
- 2) to monitor activities of the Commission General Secretariat;
- 3) to promote cooperation with stakeholders, national or international non-governmental organizations for the promotion and protection of Human Rights.

Article 33: Responsibilities of the Chairperson of the Commission

The Chairperson of the Commission shall have the following responsibilities:

- 1) to lead the Commission and coordinate its activities;

- 2) to convene and chair the meeting of Commissioners;
- 3) to represent the Commission inside and outside the country;
- 4) to serve as the spokesperson of the Commission;
- 5) to submit reports of the Commission to relevant institutions;
- 6) to communicate to Commissioners relevant decisions and information;
- 7) to perform any other duties related to the mission of the Commission as may be assigned to him/her by the Council of Commissioners.

Article 34: Responsibilities of the Vice Chairperson of the Commission

The Vice Chairperson of the Commission shall have the following responsibilities:

- 1) to assist and deputize the Chairperson in case of his/her absence;
- 2) to supervise the implementation of decisions of the Council of Commissioners;
- 3) to supervise the activities of the General Secretariat;
- 4) to supervise in particular the smooth running of overall activities of promotion and protection of Human Rights;
- 5) to supervise administrative and financial activities;
- 6) to perform any other duties related to the missions of the Commission as may be assigned to him/her by the Council of Commissioners.

Section 3: General Secretariat of the Commission

Article 35: Head of the General Secretariat of the Commission

The General Secretariat of the Commission shall be headed by the Secretary General.

Article 36: Appointment of the Secretary General

A Presidential Order shall appoint the Secretary General upon request by the Commission.

In his/her duties, the Secretary General shall be under the supervision of the Bureau to which he/she shall submit the report of activities.

Article 37: Responsibilities of the Secretary General

The Secretary General shall have the following responsibilities:

- 1) to attend meetings of the Council of Commissioners and serve as rapporteur;

- 2) to coordinate and supervise the technical activities; property and finances of the Commission;
- 3) to submit to the Bureau of the Commission a report on implementation of the decisions of the Council of Commissioners;
- 4) to prepare the plan of action of the Commission, to submit it to the Bureau of the Commission and to supervise its implementation;
- 5) to prepare the programme of activities and the draft budget proposal of the Commission;
- 6) to perform any other duties related to the missions of the Commission as may be assigned to him/her by the Bureau of the Commission or the Council of Commissioners.

Article 38: Recruitment of the staff of the Commission

The Commission shall have autonomy in recruiting its staff. The recruitment shall be made on a competitive basis.

Article 39: Statute governing the personnel of the Commission

The personnel of the Commission shall be governed by the General Statute for Rwanda Public Service.

Regarding their daily management of the staff, the internal rules and regulations of Commission shall apply.

CHAPTER VI: PROPERTY OF THE COMMISSION

Article 40: Source and management of the property of the Commission

The property of the Commission shall comprise of movable and immovable assets.

The main source of the property of the Commission shall be the State budget.

It may also come from partners? grants, donations and bequests.

The Commission shall have autonomy in managing its property. The use, management and audit of the property of the Commission shall be carried out in accordance with relevant legal provisions.

Article 41: Preparation of the budget proposal of the Commission

The Commission shall prepare its budget proposal and submit it to the Minister in charge of finance.

The Commission shall table its budget proposal to the relevant Committee of the Parliament, Chamber of Deputies, before the adoption of the State budget.

Article 42: Audit du patrimoine de la Commission

The property of the Commission shall be subjected to the audit by the Auditor General of State Finances at the end of the fiscal year and whenever necessary.

CHAPTER VII: TRANSITIONAL AND FINAL PROVISIONS

Article 43: Term of office of incumbent Commissioners

The term of office of incumbent Commissioners shall run from the date mentioned in the Presidential Order appointing every Commissioner in conformity with Law no30/2007 of 30/2007 of 16/07/2007 that was determining the organization and functioning of the National Commission for Human Rights.

Article 44: Drafting, consideration and adoption of this Law

This Law was drafted, considered and adopted in Kinyarwanda

Article 45: Repealing provision

Law no 30/2007 of 06/07/2007 determining the organization and functioning of the National Commission for Human Rights as well as all other prior legal provisions contrary to this Law, are hereby repealed.

Article 46: Commencement

This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Kigali, on 25/03/2013

(sé)

KAGAME Paul

President of the Republic

**B.3.3 PRESIDENTIAL ORDER No72/01 OF 12/03/2014
ESTABLISHING THE CANDIDATE SELECTION
COMMITTEE TO THE POST OF COMMISSIONER OF
THE NATIONAL COMMISSION FOR HUMAN
RIGHTS AND DETERMINING ITS MISSION,
ORGANISATION AND FUNCTIONING (Official
Gazette no 13 of 31/03/2014)**

CHAPTER ONE: GENERAL PROVISIONS

Article 1: Purpose of this Order

This Order establishes the selection Committee of candidates to the post of Commissioner of the National Commission for Human Rights hereinafter referred to as “Committee” and determines its mission, organisation and functioning.

Article 2: Independence of the Committee

The Committee shall function independently. In selecting the candidates to the post of Commissioners, the Committee shall comply with the principles of transparency and objectivity.

CHAPTER II: MISSION OF THE COMMITTEE

Article 3: Mission of the Committee

The Committee shall have the mission of selecting candidates to the post of Commissioner and submit to the Government the list of seven (7) selected candidates through the Minister in charge of Justice.

In case there is a vacancy of a Commissioner, the Committee shall widely advertise by means of newspapers, radio, television, internet on the

National Commission for Human Rights? website and at least two (2) other websites recognised as better in publishing job opportunities.

The advertisement shall highlight the core requirements to the vacant post, the content of the application file and the deadline for submission of applications to the Committee.

CHAPTER III: ORGANISATION OF THE COMMITTEE AND ITS ORGANS

Section One: Organisation of the Committee

Article 4: Members of the Committee

The Committee shall be comprised of five (5) members as follows:

- 1) one (1) member from national non-governmental organizations for the promotion and protection of human rights;
- 2) one (1) member from the Public Service Commission;
- 3) two (2) members from the Civil Society except those mentioned under item 1° of this Paragraph;
- 4) one (1) member from experts of the University of Rwanda and the private Universities and the Higher Institutes with expertise and skills in human rights issues.

Article 5: Requirements for a person to be a member of the Committee

To be a member of the Committee, a person shall fulfil the following conditions:

- 1) to be a Rwandan;
- 2) to be a person of integrity;
- 3) to have experience in human rights matters;
- 4) not to have been convicted by a final decision of the crime of genocide, crimes against humanity and crime of genocide ideology;
- 5) not to have been convicted to a sentence of at least six (6) months of imprisonment;

Article 6: Term of office for members of the Committee

The term of office for members of the Committee shall be five (5) years renewable.

A member of the Committee who leaves his/her post shall be replaced within a period not exceeding one (1) month of the occurrence of the vacancy.

Article 7: Cessation of the duty of one member of the Committee

A person ceases to be a member of the Committee due to the following reasons:

- 1) his/her term of office expires;

- 2) he/she resigns through a written notice;
- 3) he/she is no longer able to perform his/her duties due to illness or disability certified by a physician approved by the State;
- 4) he/she demonstrates behaviour contrary to his/her duties;
- 5) he/she abuses human rights;
- 6) he/she is definitively sentenced to an imprisonment of a period equal to six (6) months or above;
- 7) he/she dies.

The resignation of a member of the Committee shall be submitted to the President of the Republic through a registered letter or hand-delivery with acknowledgment of receipt. If a period of thirty (30) days elapses without a response, the resignation shall be considered approved.

Article 8: Replacement of a member of the Committee

If a person ceases to be a member of the Committee, the Chairperson of the Committee or his/her substitutes when he/she is absent shall inform the Government through the Minister in charge of justice within a period not exceeding eight (8) working days.

Replacement of a member of the Committee shall comply with the provisions of Articles 4, 5 and 6 of this Order.

The new member freshly appointed shall have a five (5) year-term renewable.

Section 2: Organization and responsibilities of organs of the Committee

Article 9: Organs of the Committee

The Committee shall be composed by the following organs:

- 1) the Council of the Committee;
- 2) the Bureau of the Committee.

Article 10: Members of the Council of the Committee

The Council of the Committee shall be composed by all members of the Committee and is the supreme decision-making organ.

Article 11: Responsibilities of the Council of the Committee

The Council of the Committee shall have the following responsibilities:

- 1) approve the action plan of the Committee as prepared by the Bureau;
- 2) approve the draft budget proposal prepared by the Bureau;
- 3) approve all required documents related to the Commissioner's replacement and announcements calling individuals who meet requirements to submit their applications;
- 4) approve rules governing interviews aiming at selecting candidates to the post of Commissioner;
- 5) widely advertise vacant posts;
- 6) approve documents informing especially institutions of Commissioners' provenience of vacant posts;
- 7) analyse candidates' files;
- 8) draw up a list of candidates that meet requirements for the post of Commissioner and take into consideration gender principle;
- 9) conduct interview aiming at selecting candidates to the post of Commissioner;
- 10) make a report of interviews and draw up a list of seven (7) selected candidates and submit both to the Government through the Ministry in charge of Justice;
- 11) approve internal rules and regulations of the Committee.

Article 12: Members of the Bureau of the Committee

The Bureau of the Committee shall be comprised of the Chairperson and the Rapporteur who shall be elected by their fellows in the first meeting of the Committee.

Article 13: Responsibilities of the Bureau of the Committee

The Bureau of the Committee shall have the following responsibilities:

- 1) prepare the action plan of the Committee and submit it to the Council of the Committee;
- 2) prepare a draft budget proposal and submit it to the Council of the Committee;
- 3) prepare rules governing the conduct of interviews aiming at selecting candidates to the post of Commissioner and submit it to the Council of the Committee;
- 4) prepare draft internal rules and regulations of the Committee;
- 5) follow up implementation of decisions of the Council of the Committee.

Article 14: Responsibilities of the Chairperson

The Chairperson of the Committee shall have the following attributions:

- 1) to lead the Committee and coordinate its activities; in case of absence he/she shall be replaced by the eldest member of the Committee;
- 2) to submit to the Minister in charge of justice the Committee's action plan for submission to the Government;
- 3) to submit to the Chairperson of the National Commission for Human Rights a draft budget proposal for its incorporation in the budget of the Commission;
- 4) to inform institutions of Commissioners' provenience of vacant post for a Commissioner;
- 5) to convene the meetings within the time provided for by law and chair them;
- 6) to serve as spokesperson of the Committee;
- 7) to provide the reports of the Committee to relevant institutions;
- 8) to communicate to members of the Committee relevant decisions and information.

Article 15: Responsibilities of the Rapporteur of the Committee

The Rapporteur of the Committee shall have the following attributions:

- 1) to prepare the Committee meetings documents and transmit them to members of the Committee;
- 2) to be the Rapporteur of the Committee Council meetings;
- 3) to prepare all required document in relation with the replacement of a Commissioner and announcements calling individuals who meet requirements to submit their applications;
- 4) to perform all activities related to the wide publication of vacant posts;
- 5) to receive applications of candidates to the post of Commissioner and transmit them to the Committee;
- 6) to perform any other duty as may be assigned to him/her by the Committee.

CHAPTER IV: FUNCTIONING OF THE COMMITTEE

Article 16: Functioning of the Committee

The Committee is not permanent. The members of the Committee shall continue performing their ordinary activities. They only meet when they assume their responsibilities.

Article 17: Working place of the Committee, means and office equipment

The National Commission for Human Rights shall provide to the Committee a working place and a place where to keep files.

It also provides to the Committee all necessary needed means and office equipment so as to perform its responsibilities.

Article 18: Budget of the Committee

The budget of the Committee shall be provided for in the budget of the National Commission for Human Rights.

Article 19: Convening and chairing of the meetings of the Committee

The Council of the Committee shall be convened in writing and chaired by the Chairperson of the Committee or the eldest member of the Committee in case of absence.

The invitation letters shall be submitted to members of the Committee at least eight (8) working days before the meeting is held.

The support documents related to the agenda of the meeting shall be submitted at least three (3) working days before the meeting is held.

In case there is a vacant post for a Commissioner, the Committee shall meet in a period not exceeding fifteen (15) working days starting when this vacancy was announced so as to select the candidate who shall replace a Commissioner removed from office.

Article 20: Holding meetings of the Council of the Committee

The Council of the Committee shall hold its meetings if at least three-fifth (3/5) of members of the Committee are present.

If the quorum is not reached, the meeting is postponed; it is convened for the second time within eight (8) days from the day of its postponement.

Article 21: Decision-making of the Council of the Committee

The decisions of the Council of the Committee shall be taken by consensus. Failure to obtain such consensus, the decisions shall be taken on the absolute majority of the members present.

In case the absolute majority is not reached once again and in case of a tie, the Chairperson or his/her representative shall have a casting vote.

Article 22: Submission of the report of the selection of candidates

After interviewing the candidate to the post of Commissioner, the Committee shall submit to the Government through the Ministry in charge of Justice a detailed report comprising the following elements:

- 1) a list of posts announced and the number of applicants;
- 2) a list of candidates who were selected, those who were not selected and the motivation as to the non selection;
- 3) names of interviewed candidates;
- 4) names and signatures of persons who conducted interviews;
- 5) minutes of the Committee members confirming that they have approved selected candidate to the post of Commissioners.

The report mentioned in Paragraph One of this Article shall be submitted in a period not exceeding five (5) working days as from the day following the closing of interview.

Article 23: Sitting allowance for members of the Committee

Members of the Committee present in the meetings of the Committee shall be entitled to the same amount of sitting allowance allocated to members of Boards of National Commissions.

CHAPTER V: FINAL PROVISIONS

Article 24: Authorities responsible for the implementation of this Order

The Prime Minister, the Minister of Justice/Attorney General and the Minister of Finance and Economic Planning are entrusted with the implementation of this Order.

Article 25: Repealing provision

All prior provisions contrary to this Order are hereby repealed.

Article 26: Commencement

This Order shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Kigali, on 12/03/2014

KAGAME Paul

President of the Republic

B.3 Internal rules and regulations

B.3.1 INTERNAL RULES AND REGULATIONS OF THE NATIONAL COMMISSION FOR HUMAN RIGHTS (Official Gazette no special of 14/10/2010)

PART ONE: ORGANIZATION AND FUNCTIONING OF THE NATIONAL COMMISSION FOR HUMAN RIGHTS

CHAPTER ONE: GENERAL PROVISIONS

Article One: Scope of this law

These internal rules and regulations of the National Commission for Human Rights determine the organisation and functioning of the Commission and its directives relating to the procedure of human rights complaints management.

Article 2: Establishment of the Commission

The National Commission for Human Rights, hereinafter referred to as “Commission” is provided by the Constitution of the Republic of Rwanda of 4 June 2003 as amended to date.

The Commission began its activities in 1999, it was established by the Law no 04/99 of 12 March 1999 as modified and complemented by Law no 37/2002 of 31/12/2002. This law was replaced by Law no 30/2007 of 06/07/2007 determining the organisation and functioning of the National Commission for Human Rights.

Article 3: Components of the Logo of the Commission

The Commission has the Seal consisting of the following:

- 1) A ring which is white on the bottom and blue on the top;
- 2) On the bottom of the ring are the prints “CNDP – NCHR”, on the top are the prints “Komisiyo y’Igihugu y’Ubugenzira bwa Muntu” or National Commission for Human Rights” in English;
- 3) In the middle of the ring is the weighing scale comprising two plates coloured green on the bottom and white on the top; between the plates of the balance is a candle with a yellow flame; on the bottom of the scale is a broken chain.

Article 4: Definitions of the components of the Commission's Logo

- 1) The circle with white and blue colours symbolises the unity of the Rwandan population;
- 2) The set of weighing scale with green and white colours symbolises justice, giving hope to the Rwandan population;
- 3) The broken chain symbolises the protection of victims of human rights violations;
- 4) The candle lighting yellow colour symbolises the light for all people on the way of human rights.

Article 5: Independence and Autonomy of the Commission

The Commission is an independent institution as provided for by Article 177 of the Constitution of the Republic of Rwanda of 4 June 2003 as amended to date.

The Commission has the autonomy in the management of its budget and its financial support from donors.

The Commission is independent in its operation and works without interference for government bodies towards promotion and protection.

CHAPTER II: RESPONSIBILITIES AND POWERS OF THE COMMISSION

Section One: Responsibilities of the Commission

Article 6: Responsibilities provided by Law no30/2007 of 06/07/2007 determining the organisation and functioning of the Commission

The responsibilities entrusted to the Commission by Law no 30/2007 of 06/07/2007 determining its organisation and functioning under Article 4 are as follows:

- 1) Educating and sensitizing the population on matters relating to human rights;
- 2) Examining the violations of human rights committed within the territory of the Republic of Rwanda by State organs, public officials abusing their powers, organisations and individuals;
- 3) Carrying out investigations of human rights abuses in Rwanda and filing cases with competent courts;
- 4) Collaborating with other organs in designing strategies to prevent violations of human rights;
- 5) Reacting to reports on human rights in Rwanda with out compromising the independence of the Commission;

- 6) Preparing and disseminating reports on human rights conditions in Rwanda on a yearly basis and any time as deemed necessary;
- 7) Providing views on bills relating to human rights upon request or at its own initiative;
- 8) Sensitizing relevant Government Institutions in regards with ratification of International Conventions relating to human rights and integrating them in existing internal laws;
- 9) Carrying out visits to places of detention to check whether the rights of detainees are being respected;
- 10) Providing relevant Government Institutions with suggestions as to action which may be taken in case of human rights violations for their rectification and punishment in accordance with the law;
- 11) Collaborating with Human Rights Commissions of other countries, national associations and International Organisations as regards activities aiming at respecting and promoting human rights;
- 12) Sensitizing relevant Government Institutions as regards submission on time the reports relating to International Conventions on human rights ratified by Rwanda.

Article 7: Responsibilities endowed with the Commission by other laws

The Commission is endowed with additional responsibilities by the following laws:

- 1) The Law no 27/2007 of 28 April 2001 relating to the rights and protection of the child against violence, under its Article 24, provides that the National Commission for Human Rights shall set up specifications on how to follow up the protection of the rights of the child;
- 2) The Law no 38/2006 of 25/09/2006 establishing and determining the organisation of the National Prisons Service, under its Article 58, provides that the National Commission for Human Rights shall carry out inspection and visit to places of detention to check whether the rights of detainees are being respected;
- 3) The Law no 01/2007 of 20/10/2007 relating to the protection of disabled persons in general, under its Article 10, stipulates that the National Commission for Human Rights shall provide special procedures of monitoring how rights of a disabled person are respected.

Section 2: Powers of the Commission

Article 8: Power of carrying out investigation on human rights violations

The National Commission for Human Rights has the following powers:

- 1) To receive and analyse testimonies relating to human rights violations;

- 2) To get to any place where human rights violations are reported and alleged including detention premises for investigations;
- 3) To reach, question and seek explanations from anybody likely to have testimony, information, responsibility and technicality likely to enlighten the Commission in analysing and collecting human rights violation acts;
- 4) To carry out research on extraordinary issues and disseminate the finding for the promotion of human rights.

CHAPTER III: MEMBERS OF THE COMMISSION

Section One: General Provisions

Article 9: Taking oath

Before assuming their duties, Commissioners shall, before the Supreme Court, take oath which is prescribed by Article 61 of the Constitution of the Republic of Rwanda of 4 June 2003 as amended to date.

Article 10: Incompatibilities

Commissioners are not allowed to perform any other remunerated work. However, they may perform research activities, literature and art provided they are not incompatible with the activities of the Commission and upon approval by the Council of Commissioners.

Article 11: Benefits granted to Commissioners

A Presidential Order shall determine the benefits to be given to the Commissioners who are on duty and those who have completed their term of office.

Commissioners shall be remunerated in accordance with the law determining the remunerations of the persons who are in the same scale.

Article 12: Appointment, Replacement and removal of a Commissioner

Appointment, replacement and removal of a Commissioner are provided by the Law determining the organisation and functioning of the National Commission for Human Rights.

Section 2: Powers of Commissioners

Article 13: Powers of the Judicial Police

Powers of the judicial police of Commissioners shall be determined by the law. Members of staff of the Commission shall be given judicial police powers by the Minister having Justice in his/her attributions upon request of by the Chairperson of the Commission

Article 14: Functions of Judicial Police Officer

The Commissioners and members of staff of the Commission who are granted the judicial police powers shall exercise the following duties of Judicial Police Officers provided for by Law no13/2004 of 17/5/2004 relating to the Code of Criminal procedure as modified and complemented to date.

These functions are:

- 1) Carrying out preliminary investigations;
- 2) Visiting the scene of the crime and searching for material evidences;
- 3) Collecting evidences or clues for prosecution or defence;
- 4) Identification of criminals, their accomplices and accessories so that they are brought before the prosecution for the compilation of their case file;
- 5) Interrogating the suspects who can give essential information;
- 6) Interrogating the suspects so that they explain themselves;
- 7) Issuing the summons bounding the suspects to appear;
- 8) Recording in a statement the nature and circumstances under which offences were committed;
- 9) Enlisting the assistance of the expert qualified on a given matter if deemed necessary to carry out investigation on issues requiring special technical or scientific expertise;
- 10) Compiling and submitting the case file to the Prosecution Service after the preliminary investigation;
- 11) Requesting the Prosecution Service to take legal action against any person accused of human rights violations.

Article 15: Cases investigated

While fulfilling their judicial police duties, Commissioners and members of staff of the Commission who were given judicial police powers, shall only exercise this duty on cases relating to human rights violations committed within the territory of the Republic of Rwanda.

While exercising this duty, particularly they should be bound by laws governing the functions of Police Officer.

Article 16: Card of the Judicial Police Officer

Commissioners and Members of staff of the Commission who were granted Judicial Police powers shall have a card of Judicial Police Officer signed by the Commission's Chairperson.

Article 17: Immunity of the Commissioners

Commissioners shall have immunity. They shall not be prosecuted before courts due to their views expressed or published on the basis of their responsibilities.

Commissioners shall not be provisionally detained, unless they are caught red handed committing an offence whose penalty exceeds a five (5) year imprisonment, or under other serious causes upon approval by a competent court.

They shall have immunity card bearing the signature of the Chairperson of the Commission.

CHAPTER IV: ORGANS AND SERVICES OF THE COMMISSION

Section One: The Council of Commissioners

Article 18: Members of the Council of Commissioners

The Council of Commissioners is the supreme Organ of the Commission, composes of seven (7) Commissioners including the Chairperson and the Vice Chairperson of the Commission.

Article 19: The Meetings of the Council of the Commissioners

The Council of Commissioners shall meet in ordinary session once a week to approve the minutes of the previous meeting, after that, it shall examine the agenda of the meeting. The Commissioners shall meet in an extraordinary session at any time deemed necessary.

Article 20: Preparation of the agenda of the Commissioners' meetings

The Chairperson of the Commission prepares the agenda of the meeting of the Commissioners' Council. The Commissioners shall submit to the

Chairperson of the Commission the items for the agenda of the meeting at least 3 working days before the meeting of Commissioners; this does not concern matters with the utmost urgency.

Article 21: Convening of the meeting of the Council of the Commissioners

The meeting of the Council of the Commissioners shall be convened by the Chairperson of the Commission by letter forwarded to Commissioners at least 2 working days before the meeting. They shall be convened by the Vice Chairperson in the absence of the Chairperson.

In case of absence of both the Chairperson and the Vice Chairperson, the most senior member shall invite a meeting of the Council of Commissioners to elect among themselves their provisional acting.

The invitation letter shall include the agenda of the meeting.

Article 22: Procedure by which the Council of Commissioners holds meetings

The Council of Commissioners shall only meet in the presence of at least four (4) out of its seven (7) members. In case of absence of one of the

Commissioners in a meeting, he or she shall notify the Chairperson of the Commission or the Vice Chairperson about it before the meeting commences.

In case of urgent or unforeseen reason, if a Commissioner fails to notify the Chairperson of the Commission or the Vice Chairperson, he or she shall immediately inform another member of the Commission about it, who in turn informs the Chair of the meeting. What is said in the present paragraph doesn't concern a member of the Commission who is in a mission or another task entrusted to him/her by the Commission.

Article 23: Presiding over the meeting of the Council of Commissioners

The meeting of Council of Commissioners shall be chaired by the Chairperson of the Commission. In case of his/her absence it shall be chaired by the Vice Chairperson.

In the absence of both the Chairperson and the Vice Chairperson or if they fail to avail themselves at the same time, the eldest Commissioner shall convene the meeting of Council of Commissioners to elect among them the person to chair the meeting and the rapporteur.

Article 24: Agenda of the meeting

Members of the Commission shall examine the agenda transmitted to them by the Chairperson of the Commission.

Without prejudice to provision of the first paragraph of this Article, given the urgency and significance of the items to be examined, an other item can be included on the agenda and communicated to participants of the meeting.

The miscellaneous items shall be put on the agenda and approved by the Council of the Commission before the examination of the items on the agenda.

The items on the agenda which are not exhausted shall be postponed for the following meeting.

The Chairperson of the meeting shall read the items on the agenda, members of the Commission shall approve them before the beginning of the meeting.

Article 25: Smooth running of the Meeting of the Council of Commissioners

The chairperson of the meeting of Council of Commissioners shall ensure its smooth running. He/she shall allow taking the floor upon request.

Irrelevant and controversial interventions, interruptions and other behaviour that can affect the smooth running of the meeting of the Council are prohibited.

The chairperson of the meeting has powers not to allow taking the floor to anyone who may affect the smooth running of the meeting of the Commissioners? Council.

When is the Chairperson of the meeting who affects its smooth running, the Council shall ask him or her to focus on the agenda and to continue meeting

Article 26: Rapporteur of meetings

The Vice Chairperson of the Commission shall serve as the Rapporteur for the meetings of the Council of Commissioners. In the absence of the Vice-Chairperson, the most junior member of the Commission shall be the rapporteur for the meeting. In his/her duties of rapporteur, the Vice Chairperson or his/her substitute, shall be assisted by the Commission's

officer appointed to the post of rapporteur for the meeting of the Council of Commissioners.

Article 27: Persons invited to the meetings of the Council

Members of the Council of Commissioners can decide to invite to their meetings one or several staff members of the Commission or an expert. Guests shall not participate in decision-making.

Article 28: Decisions of the Council

The Decisions of Council of Commissioners shall be taken by consensus. Failure to this, the decisions shall be taken by the majority vote of members.

However; where the decision to be taken concerns the approval of the Commission's report or the decisions to be submitted to other organs, these shall be taken by total consensus.

Article 29: Follow-up of the implementation of decisions

The follow-up on the implementation of the Commission's decisions shall be ensured by the Chairperson of the Commission.

Where a decision taken particularly concerns a Commissariat or another Unit, then the Commissioner supervising the Commissariat or that particular Unit Director, shall guarantee its implementation. In case there is a reason of failure to its implementation, they shall inform the Chairperson of the Commission about that.

The decisions of the Commission shall be implemented in agreed timeframe. Where there is no determined deadline, the Chairperson of the Commission shall do everything possible to ensure the implementation of the decision.

The causes of not implementing of the Council's decisions shall be presented to the Council of Commissioners by the Chairperson of the Commission or one of those mentioned in Article 30, paragraph 2.

Section 2: The Bureau of the Commission

Article 30: Members of the Bureau

The Bureau of the Commission is made up of the Chairperson of the Commission and the Vice Chairperson; both shall be chosen by the

Cabinet among the members of the Commission and approved by the Senate.

Article 31: Duties of the Bureau

Duties of the bureau are as the following:

- 1) Ensuring the smooth execution of the Commission's programme and its budget;
- 2) Following up the implementation of recommendations made on evaluation and auditing;
- 3) Presenting to the Council of Commissioners the plan of action's proposal, semester and annual activity plans as well as the budget thereon;
- 4) Following up the elaboration of annual activity reports, reports on the situation of human rights in Rwanda, financial reports of the Commission before the submission to relevant institutions provided by law;
- 5) Ensuring that different reports, particularly internal and external auditing reports are regularly well elaborated;
- 6) Initiate all required reforms for the smooth running of the Commission and submit them for Council's Commissioners for approval;
- 7) Ensuring the respect for laws, orders and other rules which have an impact on human rights and good function of the Commission issued by relevant organs;
- 8) Ensuring the implementation of any other decision taken by the Council of Commissioners;
- 9) Close cooperation with stakeholders.

Article 32: The Chairperson's duties

The Chairperson of the Commission shall execute the following tasks:

- 1) Heading the Commission and coordinating its activities;
- 2) Convening and presiding over the Commission's meetings;
- 3) Representing the Commission inside and outside the country as well as representing it before any other national or international institutions;
- 4) Serving as the spokesperson of the Commission;
- 5) Submitting the Commission's reports to the relevant institutions.
- 6) Making the evaluation in the second degree of the Unit's Directors and the staff under her supervision.

Article 33: The Vice Chairperson's duties

The Vice Chairperson of the Commission is responsible for:

- 1) Assisting and acting on behalf of the Chairperson in case he/she is absent;
- 2) Serving as the Rapporteur for the Council of Commissioners' meeting;
- 3) Carrying out follow-up on daily basis particularly on administrative and financial matters;
- 4) Making the evaluation in the first degree of Unit's Directors and staff under his supervision and those under the Chairperson's supervision; making evaluation in second degree of staff of the Commissariat as well as those of other units of the Commission.

Section 3: Commissariat

Article 34: Duties of Commissioners

A Commissioner heads the Commissariat and coordinates all activities of the Commissariat. He or she can be appointed as a supervisor for activities relating to the monitoring of the rights of specific categories of people as well as all other activities determined by the Council of Commissioners.

Making the evaluation in the first degree of staff of the Commissariat under his/her supervision.

Article 35: Structure of a Commissariat

The Commissariat is an organ of the Commission, made up of a Commissioner and the Commission's staff members charged with the promotion and protection of human rights.

The Council of Commissioners shall determine the Districts in which the Commissariat shall conduct the follow-up of promotion and protection of human rights.

Article 36: Duties of the Commissariat

The Commissariat shall have the following duties:

- 1) Contributing to the preparation of the Commission's plan of action;
- 2) Developing a Commissariat's programme of activities basing on the Commission's plan of actions;
- 3) Receiving, examining and following up reported cases from respective Districts and Kigali City depending on the number of Districts under the Commissariat's supervision;
- 4) Conduct investigations on complaints;
- 5) Educating and rise awareness of the population on human rights matters upon the Commission's approval;
- 6) Monitoring the rights of detainees in prisons and cells;

- 7) Carrying out all essential activities relating to received complaints upon the Commission has decided to be filed with courts and monitoring related their court's trials;
- 8) Preparing the activity report of the Commissariat to be included in the annual activity report of the Commission;
- 9) Monitoring the respect for human rights in all activities determined by the Commission (courts proceeding , elections, community services,...);
- 10) Assuming all duties provided by laws or determined by Council of Commissioners.

Article 37: Functioning of the Commissariat

The Commissariat functions under strict observance of the programme and decisions of the Commission.

Article 38: Report of the Commissariat

The Commissariat shall submit its reports to the Council of Commissioners so as to make appropriate recommendations or for approval.

Section IV: Support Services of the Commission

Article 39: Administration and Finance Unit

Duties of that Unit are as the follow:

- 1) Putting in place systems and mechanisms of efficient organisation of services;
- 2) Following up the management of the organic structure and preparing a plan for the capacity building of the Commission's personnel;
- 3) Following up the administrative and financial files of the Commission's personnel;
- 4) Establishing working relations with the Ministry having the management of human resources in its attributions;
- 5) Making the evaluation in the first degree of the personnel of the Unit;
- 6) Coordinating the assessment of performances of the Commission's personnel;
- 7) Supervising the activities of the Central Secretariat of the Commission;
- 8) Coordinating the activities of procurement's officer of the Commission;
- 9) Supervising the management of human and material resources of the Commission;
- 10) Coordinating the activities relating to the preparation of the Commission's Budget and its implementation;

- 11) Following up the management of funds and ensuring the submission of timely report on their expenditure.

Article 40: Education, Sensitization of the population on Human Rights, Research, Publication and Planning Unit

The attributions of that Unit are as the follow:

- 1) Analysing the needs, planning and coordinating the activities relating to the follow:
 - a) Promotion of human rights;
 - b) Research on human rights which are the most violated;
 - c) Following up publication activities of the Commission;
 - d) Preparing the necessary Projects for the implementation of policies and programmes of the Commission;
- 2) Preparing projects proposal to be submitted to donars and make follow up and evaluating the projects under execution;
- 3) Preparing programmes of the activities of the Commission and participate to the preparation of the Commission's Budget;
- 4) Preparing and coordinating the activities relating to the commemoration of International days of human rights conventions;
- 5) Coordinating and following up the activities of the Commission's Consultative Meeting with Associations for the promotion and protection of human rights;
- 6) Ensuing the submission of timely narrative and financial projet?s reports and submitted to the donors;
- 7) Follow-up and evaluation of activities of the Unit;
- 8) Making the evaluation in the first degree of staff of the Unit;
- 9) Preparing the evaluation of the activities of the Commission.

Article 41: Service of legislation

The activities of that service are as the follow:

- 1) Providing views and ideas which the Commission uses in fulfilling its responsibility of giving views on bills relating to the promotion and protection of human rights;
- 2) Following up the examination of bills relating to human rights and their voting within the Parliament;
- 3) Monitoring the compliance of national laws with the International Conventions relating to human rights;
- 4) Analysing and giving views on judgements falsely rendered or executed violated human rights;
- 5) Providing views and ideas which the Commission uses in fulfilling its responsibility of sensitizing relevant Government Institutions as regards

ratification of International Conventions relating to human rights and integrating them in internal laws;

- 6) Providing views and ideas which the Commission uses in fulfilling its responsibility of sensitizing relevant Government Institutions as regards submission on time the reports relating to International Conventions on Human Rights ratified by Rwanda
- 7) Collaborating with organs responsible to prepare reports provided by International Conventions relating to Human Rights;
- 8) Preparing the annual activity report of the service to be integrated in the draft annual activity report of the Commission;
- 9) Performing any other activity determined by the Council of Commissioners.

Section V: Specific activities of the Commission

Article 42: Specific activities of Commissioners

The Commission can entrust one of its Commissioners with the coordination and supervision of the following specific activities:

- 1) Activities relating to the follow-up of children's rights respect;
- 2) Activities relating to the follow-up of the respect for rights of persons with disability;
- 3) Activities relating to the follow-up of the respect for the rights of persons living with HIV/AIDS;
- 4) Activities relating to the follow-up of the respect for the rights of women and gender;
- 5) Other activities approved by the council of the Commissioners.

Article 43: Specific activities of the personnel

The Commission can entrust one of its staff with activities enumerated on Article 43, 1, 2, 3, 4, 5.°

Article 44: Activities relating to the follow-up of the respect for children's rights

These activities are as follows:

- 1) Monitoring the respect for children's rights;
- 2) Giving views on strategies towards better respect for children's rights;
- 3) Contributing to activities relating to children's rights promotion;
- 4) Ensuring good functions of Observatory of children's rights;
- 5) Preparing report on the respect of children's rights in Rwanda for submission to the Commission

Article 45: Activities relating to the follow-up of the respect for the rights of persons with disability

These activities are as follows:

- 1) Monitoring the respect for the rights of persons with disability as provided in national laws and International Conventions ratified by Rwanda;
- 2) Giving views on strategies towards better respect for the rights of persons with disability;
- 3) Contributing to the activities relating to the promotion of the rights of persons with disability;
- 4) Ensuring good functions of monitoring mechanism of the rights of persons with disability;
- 5) Preparing report on the respect of persons with disability's rights in Rwanda for submission to the Commission

Article 46: Activities relating to respect for the rights of persons living with HIV/AIDS

These activities are as follows:

- 1) Monitoring with particular attention the respect for the rights of children living with HIV/AIDS;
- 2) Giving views on strategies towards better respect for the rights of persons living with HIV/AIDS;
- 3) Contributing to the activities relating to the promotion of the rights of persons living with HIV/AIDS;
- 4) Ensuring good function of monitoring mechanism of the rights of persons living with HIV/AIDS;
- 5) Preparing report on the respect for the rights of persons living with HIV/AIDS in Rwanda for submission to the Commission

Article 47: Activities relating to the follow-up of the rights of women and gender

These activities are as follows:

- 1) Monitoring the respect for the rights of women and gender;
- 2) Giving views on strategies towards better respect for the rights of women and gender;
- 3) Taking part in activities relating to the promotion of the rights of women and gender;
- 4) Ensuring good function of monitoring mechanism of the rights of women and gender;
- 5) Preparing report on the respect of the rights of women and gender in Rwanda for submission to the Commission.

CHAPTER VI: REPORT OF THE COMMISSION AND ITS DISSEMINATION

Article 48: Organs to which the Commission submits the report

The Commission shall submit its activity report in a period not exceeding the first three (3) months of the following year and reserve a copy to the President of the Republic, the Cabinet and the Supreme Court.

The Commission presents its report before the Parliament, two Chambers together and answers to questions asked to this effect.

Article 49: Special reports

The Commission shall also submit to the President of the Republic, the Parliament, the Cabinet and the Supreme Court special reports and/or thematic reports on specific human rights violation after investigations and /or research relating to the promotion or protection of human rights.

Article 50: Publication of the report of the Commission

The Commission shall disseminate its reports through different media channels including the internet after presenting them to organs provided by the law. A press conference can be envisaged to make the report public.

CHAPTER VII: Patrimony of the Commission

Article 51: Patrimony of the Commission and its source

The patrimony of the Commission shall comprise movables and immovables.

It shall come from the following sources:

- 1) State budget;
- 2) Government or donor grants;
- 3) Proceeds from its services;
- 4) Interest from its investment;
- 5) Donation and bequest.

Article 52: Preparation of the draft budget

The Commission shall elaborate its draft budget proposal to be transmitted to the Minister in charge of finance for its approval by a Cabinet meeting.

The Commission shall follow up the examination of budget proposal at the level of the Committee of Parliament, the Chamber of Deputies charged with its examination and provide explanations thereon.

Article 53: Management of the Commission's budget

The management of the budget of the Commission shall be carried out in accordance with laws and on the management of State budget.

The specific activities related to the management of the Commission's budget must respect the instructions contained in the Manual of Administrative and Financial Procedures of the Commission.

CHAPTER VIII: PROGRAMME OF ACTIVITIES OF THE COMMISSION

Article 54: Plan of action and programme of activities

The Commission prepares and approves the long term plan of action. It prepares an annual programme of activities. Every year, the Commission presents to the Parliament its programme of activities before the session meant for examination of the budget begins and reserves a copy thereof to the President of the Republic, the Cabinet and the Supreme Court.

Article 55: Evaluation of the Commission's programme of activities

The Commission carries out at least once a year an evaluation of its programme of activities.

PART II: DIRECTIVES OF THE NATIONAL COMMISSION FOR HUMAN RIGHTS RELATING TO THE PROCEDURE OF HUMAN RIGHTS COMPLAINTS MANAGEMENT

Article 56: Complaints which are investigated

The Commission examines and pursues acts and other aspects, which violated or may violate human rights on the territory of Rwanda so as to let the truth prevail and, in accordance with the law, punish those who have violated human rights either in past or present time and pay compensation to the victims of these violations.

Article 57: Persons who can lodge complaints with the Commission

The persons who can lodge complaints with the Commission are as follows:

- (a) Any person who is victim of human rights violation;
- (b) Any other person who is acting for the public interest or on behalf of the victim of an alleged human rights violation if he or she cannot personally make the complaint, or who is the recognised legal counsel of the alleged victim;
- (c) A Non governmental organisation in case the victim of an alleged human rights violation cannot personally make the complaint;
- (d) A person or a non governmental organisation when there is a violation of rights of a cross section of people based on discrimination;
- (e) Any person who is victim of human rights violation complaining on his/her behalf or on behalf of others who are similarly affected by the violation of human rights;
- (f) An Organisation or Association in their respective names or on behalf of one of their representatives.

Article 58: Admissible Complaints

The Commission receives all complaints relating to human rights free of charges.

The following complaints are admissible:

- (a) Complaints which were presented to competent authorities so as to resolve them but these have not been resolved or were not resolved within the period provided by law;
- (b) Judgements which were definitely delivered by judicial authorities, but it is obvious that the principles of human rights were not adhered to;
- (c) Complaints which were resolved by competent organs, but whose decisions were not executed.

Article 59: Complaints on which investigation is carried out immediately

The Commission, being seized or not, carries out investigation on the following complaints relating to human rights:

- (a) Right to life;
- (b) Freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (c) Freedom from slavery, servitude or forced labour;

- (d) Right not to be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international laws, at the time when it was committed;
- (e) Right to recognition everywhere as a person before law;
- (f) Freedom of thought, conscience and religion;
- (g) Right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation;
- (h) Rights of the child;
- (i) Right not to be raped or sexually abused;
- (j) Right to the protection from domestic violence.

The Commission neither replaces other government institutions nor revises court decisions; but where it is clear that there has been violation of human rights or where these decisions contravene with the principles of human rights, the Commission analyses them and makes recommendations to concerned organs.

Article 60: Complaints which are rejected by the Commission

The complaints which are rejected by the Commission are as follows:

- (a) The complaints which don't constitute violation of human rights;
- (b) The complaints based on insults, hearsay, rumours, ...;
- (c) The Complaints which don't bear the address of the author;
- (d) The Complaints which are not signed or don't have fingerprints of their authors.

Except the complaints referred to under Article 62, all other complaints which don't fulfil the requirements are not admissible.

Article 61: Procedure for lodging complaints

The complaint may be submitted verbally, in writing, by phone, by fax or by e-mail.

Article 62: Complaint presented by the disabled persons

When it is quite clear that the complainant is disabled and the handicap does not allow him or her to make personally a complaint and follow up on the outcome, he or she is helped by anyone who records the complaint, who may also interpret the unknown language or use sign language. When it is necessary, the Commission does all in its power to assist him or her in case he or she does not have anyone who he or she can trust.

Article 63: Scrutiny of complaints

The Commissariat analyses received complaints and takes temporary decisions.

A report on all decisions taken on that level is drawn up and submitted to the Commission; the final decision is taken during the meeting of the council of the Commissioners.

Article 64: Investigations

An investigation is carried out on complaints for which the Commissariat in charge of the Districts or the Kigali City has decided to seek basic information.

Invitations, letters requesting for testimonies, evidences, documents giving basic information, letters acknowledging the admissibility or rejection of a complaint must be signed by the Chairperson of the Commission.

When the respondent accepts the allegations, investigations stop. Then, the Commission tries to help both parties to settle their dispute through conciliation, except for the complaints which must be handled with the utmost concern.

Where the respondent has been informed about the allegations against him/her and does not agree with them, he or she is requested to provide explanations.

The explanations are communicated to the complainant and if he or she does not accept that explanation, broad investigations are carried out.

The Commission can invite or go to see and listen to both the complainant and the respondent.

The Commission can invite witnesses of both parties.

When the respondent does not appear before the Commission after a second invitation and does not provide reasons acceptable to the Commission, it applies legal provisions entrusted to it through its mandate.

Article 65: Procedure for interview the summoned persons

The summoned parties may be interviewed in public or in camera. The complainant, the respondent and people who want to testify can ask to be

interviewed in camera. But this must be confirmed by the Commissioner or the member of staff of the Commission who follow up the complaint.

Before answering or giving testimony, the person summoned by the Commission first must swear before one of members of the Commissariat by pronouncing the following words:

“I.....swear to tell the truth. Should I fail to honour this oath, may I face the rigours of the law”.

After the interview or giving testimony, the minutes are drawn up, the interviewee or the witness must sign them or place their fingerprints on them as well as the representative of the Commission.

Article 66: Procedure for solving complaints

Solving of complaints can be done in two ways:

- (a) Through conciliation of both parties;
- (b) By applying ways provided by Law.

The Commission follows up every complaint until the decision is taken on it.

Article 67: Completion of investigations and conclusion on complaints

At the end of investigations, when there has been violation of human rights, the Commission requests the relevant authorities to solve the problem. Where there was no violation, the Commission closes the file and informs the complainant about it.

Article 68: General investigations at national level

Depending on the nature of a complaint, whether initiated by the Commission or brought to it, the Commission may carry out general investigation at national level so that the truth may prevail, and solutions to those complaints are found.

Depending on the nature of a complaint, the Commission can seek help from various experts.

At the end of investigations, the conclusions are communicated to concerned authorities or provided by law so as to undertake strategies or decisions on basis of the recommendations made by the Commission.

Article 69: Refund of transportation

When a person is summoned by the Commission to testify, and he or she is obliged to take public transport (minibus or bus), the transport fare is refunded. When it becomes necessary, the Commission pays for accommodation.

CHAPTER XI: FINAL AND TRANSITIONAL PROVISIONS

Article 70: Transitional provisions

While awaiting the publication of these Internal Rules and Regulations in the Official Gazette of the Republic of Rwanda, the Commission shall continue to apply National legal provisions concerning it directives relating to the procedure of human rights complaints management adopted by the Council of Commissioners on September 12, 2005.

Article 71: Modification of Internal Rules and Regulations

The proposal to modify these Internal Rules and Regulations can be initiated by the Bureau or one of the Commissioners.

The Internal Rules and Regulations can be modified on decision of at least 6 members of the 7 members of the Commission.

Article 72: Other binding laws

For other matters not specified in these Internal Rules and Regulations, reference shall be made on Law determining the organisation and functioning of the Commission and other existing laws and rules of the Country.

Article 73: Commencement

These Internal Rules and Regulations shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Done at Kigali, on 29/12/2009



14

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

*Edwin Makwati**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The South African Human Rights Commission (SAHRC) has been a model for other human rights institutions, not only in Africa but around the world, given its achievements since the advent of the democratic dispensation. This chapter examines its mandate of protecting human rights, promoting a culture of human rights and monitoring the observance of human rights in South Africa. The analysis demonstrates that the SAHRC is discharging its constitutional mandate, notwithstanding the challenges it faces. The chapter begins with a historical overview of human rights in South Africa to contextualise the SAHRC's mission, vision and values, which are intrinsically linked to the reversal of historical injustices. Thereafter, it considers various aspects of the SAHRC, such as its structure, reporting obligations, and protection of socio-economic rights. A conclusion draws together the points raised in this discussion.

1.1 Historical overview

It is difficult to understand the evolution of South Africa's human rights-centric legislation and institutions in South Africa without having a grasp of the legacy of apartheid and colonialism. The country's legislation,

* Legal Resources Centre, Johannesburg.

jurisprudence and legal scholarship give ample recognition to past injustices as the defect that the new dispensation seeks to cure. Indeed, most of South Africa's socio-economic challenges are a consequence of apartheid and colonialism, which utilised race as the deciding factor in the observance of fundamental human rights. The system of apartheid segregated people along racial lines and denied socio-economic and political rights to non-whites. The Constitutional Court, in one of its first decisions after its establishment, aptly stated, "Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life".¹

The institutionalisation of segregation through "grand apartheid" in 1948 under the National Party saw the promulgation of draconian laws, such as the Population Registration Act of 1950 which provided for the registration of people according to their ethnicity and race. Similarly, the Group Areas Act of 1966 sought to segregate residential areas on racial lines and confine black people to so-called homelands or *bantustans*. The only basis on which blacks could leave the *bantustans*, which were far from sources of employment, and go anywhere else within the borders of South Africa was for the industrial and agricultural advancement of the white population.² Even then, they did so under the shackles of racist legislation and administration.³

The legacy of apartheid is evident in the socio-economic dynamics of contemporary South Africa. Today, only Brazil ranks higher than South Africa in terms of income inequality.⁴ Half of South Africa's population receives 11 per cent of the total income, while 7 per cent of it receives 40 per cent of the total income. Income inequality is especially pronounced along racial lines. In 2017, the SAHRC stated that white households earn four times what black households earn.⁵ South Africa does not fare well in comparison to some other comparable middle-income economies. Statistics released by the World Bank in 2018 ranked South Africa as the country with the highest economic inequality in the world.

It was not only socio-economic rights that were violated under the apartheid system. Successive apartheid governments ensured that the

1 *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC), paragraph 7.

2 J Dugard, *Human Rights and the South African Legal Order New Jersey*, New Jersey, Princeton University Press (1978), p 73.

3 *Ibid.*

4 World Inequality Report, available at <https://bit.ly/2N5WNzG> (accessed 20 March 2019).

5 SAHRC Research Brief on Race and Equality in South Africa 2013-2017 (2017), p 14.

majority of the African population and others who were opposed to the repressive system were subjected to torture and unjustly deprived of liberty and life thanks to the unfettered, arbitrary powers of the executive and state security apparatus. Almost everything provided under today's regime of human rights was at that time merely an abstract concept that had no place in South Africa's governance and legislative framework.

1.2 The end of apartheid

With the fall of apartheid, there was an urgent need to entrench and promote a human rights culture. In 1993, South Africa enacted a new constitution, the Interim Constitution,⁶ propelling the Republic into an era of governance founded on the rule of law and respect for human rights. It was by virtue of section 115 of the Interim Constitution that the SAHRC was established and inaugurated on 2 October 1995 under the Human Rights Commission Act,⁷ which gave effect to the Interim Constitution's provisions on the establishment of the Commission.

The Interim Constitution was repealed in February 1997 when the Constitution of the Republic of South Africa of 1996 (hereafter Constitution) came into effect. It is safe to say that, more than two decades later, South Africa is, in terms of its human rights culture, in a much better position today than at any other point in its history. This is not to suggest that human rights are not being violated, sometimes in similar fashion as during apartheid, but the establishment of various institutions as custodians of human rights is clearly a welcome, signal development.

2 The establishment of the SAHRC

Bodies such as the SAHRC are commonly referred to as "Chapter 9 institutions".⁸ They are established with the aim of ensuring that South Africa's constitutional democracy is strengthened. They must exercise their powers without fear, favour or prejudice, be impartial in the execution of their mandates, and be independent and subject only to the country's constitution and the law.⁹ Chapter 9 institutions are accountable

6 Constitution of the Republic of South Africa Act 200 of 1993.

7 Act 54 of 1994.

8 Other Chapter 9 institutions are the Public Protector, Electoral Commission, Commission for Gender Equality, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), and the Auditor-General.

9 Section 181(2) of the Constitution.

to the Republic's National Assembly and must submit annual reports of their activities to it.¹⁰

The SAHRC is mandated by Chapter 9 of the Constitution to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic.¹¹ As noted, the Commission was inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994, which was subsequently replaced by the South African Human Rights Commission Act 40 of 2013 (SAHRC Act)¹² and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993.¹³

The Constitution gives the SAHRC a general and wide array of powers with regard to the protection of human rights.¹⁴ The institution has powers to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate people on human rights.¹⁵ These powers are given effect by the SAHRC Act,¹⁶ which sets out, inter alia, the composition of the Commission, the powers of the Commission, and matters pertaining to its accountability. The powers and functions of the SAHRC are described in detail below.

2.1 Powers and functions of the SAHRC

The SAHRC has broad powers that make it a quasi-judicial institution, one which is allowed to make investigations, subpoena persons, including members of the executive, institute hearings, and make recommendations. Section 13 of the SAHRC Act spells out the powers and functions of the institution.

10 *Ibid*, section 181(5).

11 *Ibid*, section 184(1)(a)-(c).

12 See note 14.

13 The Interim Constitution was promulgated to effect the transition from apartheid to non-racial democracy and, in particular, to authorise the democratically elected parliament to form a constituent assembly that would adopt a final constitution.

14 Section 184(2) of the Constitution states that: “[t]he Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power: (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate”. The language used is broad, thus showing the drafters’ intent to ensure that the Commission’s work is not impeded by a restrictively narrow formulation.

15 See section 184(2) of the Constitution.

16 Act 40 of 2013 (hereafter SAHRC Act).

While the SAHRC's general mandate is the protection of all human rights,¹⁷ it has a special mandate for the protection and realisation of socio-economic rights.¹⁸ This special mandate has its root in the importance attached to addressing the socio-economic disadvantages suffered by the majority of South Africans during the apartheid era, when the systematic marginalisation of millions of black people resulted in huge economic disparities.¹⁹

To realise its objectives, the SAHRC has several other powers in addition to the powers conferred by the Constitution, the SAHRC Act and other laws. These include making recommendations to organs of state on measures to promote human rights and undertaking such studies on human rights as it deems fit within the parameters of the Constitution to further its objectives.²⁰ The Commission may also request that any organ of state furnish it with information on any executive or legislative measures the organ of state had taken in relation to human rights.²¹ The measures required of organs of state may relate to health care,²² water,²³ housing,²⁴ social security,²⁵ education,²⁶ the environment,²⁷ and food.²⁸ The information provided by organs of state is used for monitoring and evaluation purposes in order to assess progress made in the realisation of human rights.

Furthermore, the SAHRC has additional functions and powers derived from certain legislative obligations, including the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA), or

17 Section 184(1)(c) of the Constitution.

18 See D Horsten, "The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa", 2 *Potchefstroom Electronic Law Journal* (2006), pp 1-21.

19 L C Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", 13 *Harvard Human Rights Journal* (2000), pp 1-69.

20 Section 13(1)(a)(i) and (ii) of the SAHRC Act.

21 *Ibid*, section 13(1)(a)(iii).

22 Sections 27(1)(a) and 28(1)(c) of the Constitution.

23 *Ibid*, section 27(1)(b).

24 *Ibid*, sections 26 and 28(1)(c).

25 *Ibid*, sections 27(1)(c) and 28(1)(c).

26 *Ibid*, section 29.

27 *Ibid*, section 24.

28 *Ibid*, section 27(1)(b) and 28(1)(c).

the Equality Act)²⁹ and the Promotion of Access to Information Act (PAIA).³⁰ Through these pieces of legislation and its broad powers, the SAHRC is instrumental in ensuring adherence to the values enshrined in the Bill of Rights as well as the defence and promotion of the rights therein. PEPUDA and PAIA are central pieces of legislation in that equality and access to information are preconditions for a functional democracy. The SAHRC is also obligated to foster public understanding and awareness of the Bill of Rights of the Constitution, the SAHRC Act and the role of the Commission by developing, conducting and managing education and information programmes.³¹

The SAHRC has overlapping mandates with other institutions, bodies and authorities within the Republic. The Public Protector, other Chapter 9 institutions, and non-governmental organisations (NGOs) have similar mandates as those within the jurisdiction of the SAHRC. Numerous NGOs work within the human rights space in South Africa. These include the Legal Resources Centre (LRC), the Foundation for Human Rights (FHR), Lawyers for Human Rights (LHR), the Institute for Security Studies (ISS) and the Centre for Human Rights (CHR), to mention but a few.

In essence, human rights are not the monopoly of one institution: a range of bodies have an interest in advancing them. The SAHRC is thus obliged to liaise with such bodies to ensure that policies and practices are synchronised as far as possible to achieve common objectives or where circumstances warrant cooperation.³² It appears that the SAHRC has done well in engendering cooperation with other organisations, such as the Centre for the Study of Violence and Reconciliation (CSVr) and the LRC, in pursuit of shared aims and objectives.³³

29 Act 4 of 2000. PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, according to its preamble, the Act recognises the need to address systemic discrimination and specifically aims to achieve the “eradication of social and economic inequalities”.

30 Act 2 of 2000. The Commission promotes compliance with the PAIA and produces an annual report in this regard, in line with sections 83 and 84 of the PAIA. Key prescripts of the PAIA are to develop transparency frameworks and to increase the institutional responsiveness to information requests, with a view to promoting access to information.

31 Section 13(1)(b)(i) of the SAHRC Act.

32 Section 13(1)(b)(ii) of the SAHRC Act.

33 The SAHRC and the LRC, for example, are on the verge of signing a memorandum of understanding which will see them working together towards the implementation of the National Preventative Mechanism, in line with the Optional Protocol to the Convention Against Torture and other Cruel or Inhuman or Degrading Treatment or Punishment, 2002 (OPCAT).

The SAHRC may also consider recommendations on the promotion of human rights from other sources which it deems useful in the achievement of its mandate.³⁴ Furthermore, it may review government policies on the promotion of human rights and monitor compliance with international and regional instruments which have a bearing on the Commission's purports and objects.³⁵ In this way, the Commission maintains a system of checks on the relevant bodies to ensure that a culture of human rights prevails.

The protocols sent by the SAHRC to the various government departments are necessary for at least two reasons. According to McClain, they are a source of information on the steps taken by the government towards the realisation of socio-economic rights. They also serve as a tool for raising the awareness of the relevant government authorities of their socio-economic rights obligations. The protocols are designed to encourage government departments to set goals and make projections to determine future performance. Protocols are in the form of self-administered questionnaires, which the state department or organ completes and submits timeously to the Commission. The protocols are, basically, adaptations of the international reporting instruments on human rights and seek the following kinds of information:

- a description of the system for monitoring and gathering information about the implementation of social and economic rights;
- details of education and awareness programmes designed to increase access to information and recourse in the event of a violation;
- a list of the legislation, policies, and other measures that were introduced to enhance the realisation of social and economic rights; and
- an interpretation of the obligations emanating from the Constitution, on the realisation of socio-economic rights.

Furthermore, the SAHRC is empowered to make legislative inputs. The SAHRC Act states that the Commission may recommend to Parliament or any other legislature the adoption of any legislation which would give impetus to the promotion of human rights.³⁶ One of the milestones the SAHRC attained in this regard is the March 2019 ratification of the Optional Protocol to the Convention Against Torture (OPCAT)³⁷ by the South African parliament,³⁸ which came after years of pressure from the SAHRC and others.

34 Section 13(1)(b)(iv) of the SAHRC Act.

35 *Ibid*, section 13(1)(b)(v).

36 *Ibid*, section 13(2)(a).

37 OPCAT.

38 Parliament ratified the OPCAT in April 2019 after signing it 13 years prior.

The treaty requires the establishment of a National Preventative Mechanism (NPM) to monitor places of detention to combat torture. The OPCAT establishes such mechanisms internationally and domestically, and these entail that regular visits are made to places of detention to prevent torture and other cruel, inhuman, degrading treatment or punishment.

Likewise, if the Commission is of the view that a proposed law is contrary to the Bill of Rights or any norm of international human rights law which is law in the Republic, it may report that fact to the legislature concerned.³⁹ Section 13(4) of the Act also enjoins all organs of state to afford the SAHRC the support and assistance that it may reasonably require to effectively execute its constitutional mandate and perform its functions.

2.2 Conducting investigations of human rights issues

The SAHRC is not only reactive but proactive in its role to promote a culture of human rights. It is notable that the SAHRC Act endows the Commission with broader powers than those found in the Constitution. In terms of section 13(3) of the SAHRC Act, the Commission may commence an investigation of its own accord or upon a complaint being filed with it. If after investigation the Commission is of the view that the complaint made to it has substance, it may assist in obtaining redress for the complainant or any other persons adversely affected by the cause of the complaint. Where the matter is one that warrants being heard by a court of law, the Commission may assist the aggrieved persons in securing the necessary funds for the proceeding to take place.⁴⁰

In carrying out its investigation, the SAHRC may subpoena any person to appear before it. He or she may be requested to submit documents or articles that may be necessary for the conduct of such investigation. Such person is competent and compellable to answer all questions put to him or her, and the answers may be used for investigation notwithstanding that they may incriminate him or her.⁴¹ Should a person subpoenaed by the Commission give an incriminating statement or answer during investigations, it is not admissible as evidence in criminal proceedings against such person before a court of law, except where he or she is charged with perjury in terms of section 22(b) of the SAHRC Act⁴² or section 319(3) of the Criminal Procedure Act of 1955.⁴³

39 Section 13(2)(b) of the SAHRC Act.

40 *Ibid*, section 13(3)(a).

41 *Ibid*, section 15(2)(a).

The SAHRC's investigative procedures closely mirror those of courts of law. This is apparent in the rules relating to privilege, which apply in a similar manner to a witness summoned by the Commission as to a witness before the courts.⁴⁴ Furthermore, a person appearing before the Commission is entitled to the services of a legal representative and to peruse any documents admitted as evidence for the purpose of the investigation.⁴⁵ In instances where a person not present to be examined is implicated during the course of the investigation, such person may be given an opportunity to appear in person or through the intermediary of a legal representative so as to have his or her side heard. The person so implicated may be granted the opportunity to question witnesses. The SAHRC Act also provides that where a person who is not in the public service appears before the Commission as a witness, such person is entitled to receive witness fees at the rate he or she would have been entitled to when appearing before the High Court in criminal proceedings.⁴⁶

The Commission determines the procedure to be followed in an investigation on the basis of the circumstances of each case. However, it must ensure that the particulars of any procedure it decides to use are made public. Whatever procedure the Commission chooses, the Commission must ensure that, if it is in the interests of justice, any person whose presence at the investigation could prejudice any aspect of the investigation is not present during such an investigation.⁴⁷

Apart from the investigation of complaints, the SAHRC may also protect people's rights through mediation, conciliation and negotiation,

42 This provision states that "any person who after having been sworn or having made an affirmation contemplated in section 15(1)(d) gives false evidence before the Commission on any matter knowing such evidence to be false or not knowing or believing it to be true is guilty of an offence and is liable upon conviction to a fine or imprisonment for a period not exceeding six months".

43 Act 56 of 1955 (amended by the Criminal Procedure Act 51 of 1977). Section 319(3) is the only section that was not repealed. It states: "If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements; and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true".

44 Article 15(3)(b) of the SAHRC Act.

45 *Ibid*, section 15(4).

46 *Ibid*, section 17.

47 *Ibid*, section 15(9).

with the aim of reaching equitable solutions without resorting to more adversarial methods such as court proceedings.

2.3 Composition of the SAHRC

2.3.1 Structure

The SAHRC has a binary structure made up of the Commission, whose function is to set out policy, and the secretariat, whose purpose is policy implementation. The secretariat is subdivided into a number of departments: research, legal services, human resources, media and communications, finance and administration, and education and training. The Commission is subdivided into strategic focus areas to ensure a structured approach to the promotion of human rights. These focus areas are access to justice and housing; the environment; natural resources and rural development; basic services and health care; children's rights and basic education; migration and equality; human rights law enforcement and prevention of torture; and, lastly, disability and older persons.⁴⁸

To ensure the accessibility of its services, the SAHRC has offices in each of the country's nine provinces. These offices are tasked with implementing the mandate of the SAHRC at provincial level, with due cognisance given in so doing to a province's distinctive challenges. Provincial offices are managed by provincial managers, who report to the chief operations officer (COO). Each provincial manager is supported by an administration officer, human rights advocacy and research officer, legal officers, and an intake officer.

The overall head of the SAHRC is the chairperson, who has a deputy chairperson.⁴⁹ The chief executive officer (CEO)⁵⁰ heads up the secretariat and oversees the Commission's fiscals as well as taking responsibility for the employment of its personnel. Furthermore, section 11 of the SAHRC Act empowers the Commission to establish standing committees, which are chaired by commissioners.⁵¹

2.3.2 The chairperson and deputy chairperson

The chairperson and the deputy chairperson of the Commission are appointed by the President on the recommendation of the National

48 See SAHRC, available at <https://www.sahrc.org.za/> (accessed 31 March 2019).

49 Advocate Bongani Majola is the current chairperson of the SAHRC.

50 Advocate Tseliso Thipanyane is the current CEO of the SAHRC.

51 Section 11 sets out the procedure for the establishment of committees.

Assembly.⁵² While the chairperson is the Commission's overall head and executive authority,⁵³ the deputy chairperson assumes the role of the chairperson in his or her absence or if for any given reason the chairperson is unable to perform his or her functions.⁵⁴ In cases where both the chairperson and the deputy are absent, the commissioners⁵⁵ may among themselves elect one of them to act as chairperson.⁵⁶ A commissioner acting as chairperson performs all the functions of that office.

2.3.3 Commissioners

The composition of the SAHRC is regulated by section 5 of the SAHRC Act. This provision states, first, that the Commission must have eight commissioners who must be South African citizens, fit and proper persons to hold office in the institution as contemplated in section 193(1) of the Constitution, and be appointed by the President in terms of section 193(4) and (5) of the Constitution.⁵⁷

However, the SAHRC Act states that the following categories of persons may not be appointed as commissioners: persons who are serving the state in any capacity in which they receive remuneration for the service; unrehabilitated insolvents; persons declared to be of unsound mind; and persons sentenced to terms of more than 12 months for a crime inside or outside South Africa where the said conduct would have been a crime in the Republic.⁵⁸ The other category of ineligible persons includes Members of Parliament (MPs), employees of provincial legislatures and municipal councils, as well as employees of political parties.⁵⁹ Should a serving commissioner accept nomination or appointment for any of the posts stated above, such commissioner is deemed to have resigned.⁶⁰

Commissioners of the SAHRC are appointed either on a full-time or part-time basis for a period not exceeding seven years. There may not be less than six permanent commissioners appointed at any given time, and there may not be more than two part-time commissioners.⁶¹ Should a

52 Section 6(1) of the SAHRC Act.

53 *Ibid*, section 7(5).

54 *Ibid*, Article 6(2).

55 See below on commissioners.

56 Section 6(3) of the SAHRC Act.

57 These provisions state, among other things, that "[t]he President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of the South African Human Rights Commission".

58 Section 5(1)(b)(i-iv) of the SAHRC Act.

59 *Ibid*, section 5(1)(b)(v).

60 *Ibid*, section 5(5)(b).

vacancy occur in the office of a full-time commissioner, the President may appoint a part-time commissioner to fill that vacancy for the duration of the period that remained of such part-time commissioner's tenure.⁶² Commissioners whose initial term has expired may be appointed for one additional term.⁶³

The appointment of SAHRC commissioners should be on merit and competence, though this is open to doubt given the penchant of the African National Congress (ANC) government for political appointments. The process as provided for in section 193(4) of the Constitution seems transparent and thorough, but in practice MPs are accountable to their political parties, not the public, and will usually want to have fellow cadres appointed as commissioners.

The most recent outgoing SAHRC chairperson, Lawrence Mushwana, who is also a former Public Protector, openly professed his ANC membership.⁶⁴ In fact, a significant number of SAHRC chairpersons and commissioners past and present who have or have had ties to the ANC. The former part-time commissioner Janet Love is a former ANC anti-apartheid operative whose appointment was heavily criticised by some in the media and political circles.⁶⁵ The ANC has a tradition of cadre deployment, one steeped in the notions of democratic centralism associated with its Marxist-Leninist ideology. The danger of deploying loyal cadres to strategic positions in which they are simultaneously expected to be impartial cannot be overemphasised. It is highly unlikely that a loyal cadre, regardless of his or her opinion on the matter, would be deployed without the expectation of furthering the party's interests even if this were to mean engaging in conduct which is in direct conflict with the Constitution.

2.3.4 *Removal and suspension of commissioners*

Serving commissioners of the SAHRC may be removed from office in accordance with section 194(1) and (2) of the Constitution.⁶⁶ These sections provide a *numerus clausus* of grounds for the removal or suspension

61 *Ibid*, section 5(2).

62 *Ibid*, section 5(3).

63 *Ibid*, section 5(4).

64 NGO Pulse, "Do or Die for Chapter 9 Institutions" (18 June 2008), available at <https://bit.ly/2FUSv9c> (accessed 9 April 2019).

65 G Davis, "An Independent Cadre is a Contradiction in Terms Amid Party Loyalty", *Mail & Guardian*, available at <https://bit.ly/32aPcVe> (19 November 2010) (accessed 9 March 2019).

66 Section 5(6) of the SAHRC Act.

of a member of the Commission. Such grounds include misconduct; incapacity;⁶⁷ or a resolution by the National Assembly supported by a majority of members of the Assembly,⁶⁸ or by a revocation by the President upon the National Assembly's voting in favour of such person's removal.⁶⁹ The process for the removal or suspension of commissioners is therefore a one with in-built safeguards against arbitrariness. The SAHRC has never had a commissioner removed since its inception.

3 The institutional independence of the SAHRC

An institution's credibility and legitimacy hinge significantly on its independence, which has a direct bearing on its effectiveness and efficacy. The law setting up the SAHRC provides for its appointment mechanisms, powers, mandate, funding as well as accountability measures. Independence means that the law makes it difficult for the SAHRC to be undermined.

Section 184(2) of the Constitution provides that Chapter 9 institutions are independent and subject only to the constitution and the law.⁷⁰ The entrenchment of the SAHRC in the Constitution ensures its long-term existence and longevity, but, above all, it guarantees its independence. With independence comes legitimacy, which is a crucial characteristic of any institution having such broad powers. Where an organ exercises certain powers, those who are subjects of such powers must perceive that such power is being rightly exercised over them.

The legitimacy of the SAHRC derives from its entrenchment in the country's first constitution in the democratic dispensation. "Legitimacy" encompasses formal guarantees of independence, the institution's status in law, and its public reputation. According to some, the SAHRC has its shortcomings but its legitimacy is unquestionable given its achievements over the years.

To uphold the independence of the SAHRC, the law ensures security of tenure and makes provisions for members to be appointed through mechanisms that are transparent. The SAHRC Act provides that commissioners are appointed on a fixed term determined by the National Assembly, although the terms may not exceed seven years.⁷¹ Such terms

67 Section 194(1)(a) of the Constitution.

68 *Ibid*, section 194(1)(c) and (2)(b).

69 *Ibid*, section 194(3)(b).

70 *Ibid*, section 184(2).

71 Section 5(2) of the SAHRC Act.

may be renewed for one more term upon expiry. Even though these terms are not as definite as those of judges, in that they are determined by Parliament from time to time, they do ensure, thanks to their fixed nature, that a commissioner need not fear being arbitrarily removed from office should he or she not conform to the demands of those in power.

3.1 Financial autonomy

One of the core tenets of the Paris Principles⁷² concerns the need for national human rights institutions (NHRIs) to be independent of the government and avoid being subject to its financial control. The Principles underline the importance of adequate financing as a way of ensuring independence. Financial autonomy is thus pivotal to the independence of the SAHRC. That being said, the model used to fund the Commission may not be conducive of genuine independence, since such funding is controlled by an executive body.

The SAHRC is funded through a vote of the Department of Justice and Constitutional Development (DOJCD), in addition to which the funding is barely adequate, given that nearly 75 per cent of the budget is spent on salaries, as the table below indicates.⁷³ The implications of this funding model thus make the Commission susceptible to financial control, in direct conflict with the Paris Principles (discussed more fully below).

It can thus be said that while the SAHRC's design is a good model for the rest of the continent, the lack of financial independence adds to the several predicaments of the Commission. In recent years, the South African government has found some of its leaders, for example its President, under scrutiny for conduct that amounts to constitutional delinquency. The failure by the government to recognise that the Commission is in need of financial autonomy to execute its mandate could be construed as a deliberate attempt to render it ineffective: if the Commission has insufficient funding, it is not able to employ enough competent staff, launch investigations and institute proceeding in courts on behalf of victims of human rights violations. This would mean in turn that the SAHRC becomes a white elephant, one with no shortage of laws and powers yet without the ability to turn these paper powers into practical such powers that can be put to use in the execution of its mandate.

72 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

73 See J Van Dyk, "Does South Africa Need a Human Rights Commission?", *Bhekisisa Centre for Health Journalism* (4 July 2018), available at <https://bit.ly/2JfnK0W> (accessed 9 April 2019).

Table 4: The budget allocation of the SAHRC, 2018/2019

| Budget cost centre | MTEF allocation (ZAR) |
|--|------------------------------|
| Personnel cost | 128,900,621 |
| Commissioners' unit | 796,434 |
| CEO's office | 107,998 |
| COO's office | 134,069 |
| Strategic support and governance | 437,291 |
| Legal services unit | 246,582 |
| Research unit | 486,123 |
| Advocacy and communication | 486,123 |
| Provincial offices | 856,444 |
| Human resources | 2,477,933 |
| Information and communication technology | 5,841,288 |
| Finance | 3,218,541 |
| Administration and supply chain management | 35,107,878 |
| Internal audit | 90,528 |
| Total baseline allocation | 178,830,000 |

Source: <https://www.sahrc.org.za/home/21/files/Final%20SAHRC%20Annual%20Performance%20Plan%20201819.pdf>

In 2018 the Commission reported to Parliament that it received ZAR 178 million in 2018/2019 but that after paying all its expenses, only 1.8 per cent of the budget, which translates to ZAR 3.3 million, remained for its core business. The problem was compounded by the reduction of the Commission's budget, by a significant ZAR 5 million, from the previous year.

Indeed, the Commission has cited inadequate funding as the reason for its failure to ensure that some of its recommendations were implemented,⁷⁴ a situation that could worsen in the coming years. Treasury data reveal that from 2018-2021, the SAHRC's budget could be cut by as much as ZAR 5 million per annum to cater for shortfalls in other sectors of government, such as the funding of free education as well as the National Health Insurance Scheme.⁷⁵ Proposals to cut the Commission's budget have been criticised as a strategy for those in power to stifle the Commission in order to avoid accountability.⁷⁶

⁷⁴ *Ibid.*

⁷⁵ See Estimates of National Expenditure 2018, available at <https://bit.ly/2BU3iLA> (accessed 9 April 2019).

⁷⁶ See note 74.

With the SAHRC having made efforts to increase impact litigation, there is a likelihood that it will avoid the courts in the coming years to accommodate the budget deficiencies. This will likely see a number of persons who should be held accountable escape with impunity for human rights violations, a development that presents a some retrogression given the milestones achieved until now. According to the SAHRC's CEO, it is not worthwhile to spend two years and a large portion of the Commission's budget on a single case. This means the SAHRC will have to rely almost entirely on its own internal investigative processes to obtain remedies for complainants. It is commendable, however, that the SAHRC has for years maintained a clean audit despite severe budgetary constraints.⁷⁷

4 Protection of socio-economic rights

South Africa has gross race-based inequalities in wealth emanating from structural injustices that find their origins in the laws and policies of the apartheid era. According to the National Income Dynamics Study (NIDS), the average black household has about four per cent of the wealth of the average white household, while the average coloured household has about six per cent of that wealth.⁷⁸ South Africa remains a highly unequal country in terms of both wealth and income. According to the SAHRC's assessment, poverty levels have soared exponentially over the years, with a general slow-down of economic growth curtailing the achievement of National Development Plan goals.

It is worth noting that the SAHRC has suggested that with the manifestation of inequality comes the recent surge in incidents of racism and hate speech. The Commission states in its 2018 report that certain surveys have identified inequality, as opposed to race, as the most divisive factor in South African society. The report goes on to state that economic inequality erodes social cohesion and social stability. It is on this basis that the SAHRC, recognising that inequality is an affront to meaningful participation both in democratic processes and in the mainstream economy, has devoted much of its resources to eliminating inequality.⁷⁹

As mentioned, among the most notable features of the Constitution are its comprehensive provisions dealing with the protection of socio-economic rights, which are set out in South Africa's Bill of Rights.⁸⁰ The

77 SAHRC, Annual Report 2017, available at <https://bit.ly/2xuW1CN> (accessed 21 March 2019).

78 *Ibid.*

79 See note 78.

Constitution endows the SAHRC with tremendous powers in this regard, stating that:

[e]ach year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁸¹

In discharging its mandate to ensure that socio-economic rights are protected, the SAHRC publishes regular reports in this regard. Since its first report covering the period 1997/1998,⁸² it has submitted several others that document violations with a view to ensuring that policy-makers take steps to prevent them from recurring. In its latest report on equality, the SAHRC states:

In contrast to vertical, economic inequality between households or individuals, human rights practitioners have traditionally focused on horizontal inequality between different groups that share characteristics such as sex, gender, sexual orientation or race. International, regional and South African human rights provisions aim to eliminate status inequality resulting from direct or indirect discrimination. In this context, equality can be thought of in a “formal” or “substantive” sense.⁸³

There has been debate about whether the SAHRC’s violations approach is appropriate for the realisation of socio-economic rights, given that the question in South Africa’s context is not whether but how these rights are justiciable.⁸⁴ Characteristics of the violations approach are the identification, specification and documentation of violations of human rights; however, in South Africa the issue is not primarily whether justiciable rights are being violated, but how those responsible for violations should be held accountable.

Indeed, the view that the SAHRC should not adopt a violations model is sound in that where violations occur, the Constitutional Court has ensured that its jurisprudence guards against such violations by providing

80 Constitution, Chapter 2.

81 *Ibid*, section 184(3).

82 SAHRC, Economic and Social Rights Report: Baseline Information 1997-1998 (1999), available at www.sahrc.org.za/esr_Report_1997_1998.htm (accessed 20 Mar.2019).

83 SAHRC, Equality Report, available at <https://bit.ly/2XpMyHv> (accessed 9 March 2019).

84 See J Klaaren, “Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights”, 27 *Human Rights Quarterly* (2006), pp 539-561.

relief where such relief was warranted.⁸⁵ In the *Grootboom* case, the Court extended support to the SAHRC in this regard when it offered the Commission a role of reporting on violations of socio-economic rights by government bodies.⁸⁶ The Commission could therefore go the extra mile and step up its efforts in monitoring and promoting socio-economic rights, as these continue to be violated.

4.1 The SAHRC's reporting procedure on socio-economic rights.

The SAHRC may collect reports from various government organs and institutions, with such information being utilised for the purposes of the Commission's reporting obligations by way of reports on social and economic rights. The SAHRC uses these reports in the monitoring of policy and legislative frameworks as well as budget allocated for bringing about the results intended by the measures taken. The Commission develops protocols relating to the various socio-economic rights and sends questionnaires to the government departments. Each questionnaire is supposed to be completed by the relevant authority in the department and returned to the Commission.

Through its regular socio-economic rights reports, the SAHRC has made efforts in addressing poverty as part of its broad mandate.⁸⁷ These reports have played a significant role as a means of critical assessment of the government's commitment to meet the obligations entrenched in the Constitution. They have served additionally as a self-assessment tool for civil society and the state in the quest for a continued and sustained realisation of these rights.⁸⁸ At least seven socio-economic rights reports have been released since the SAHRC came into being. These were compiled from information sourced from government institutions and presented in such a way as to be easily understood by ordinary citizens, who are the SAHRC's constituency.

Grootboom was South Africa's landmark socio-economic rights case, and it is no surprise that the judgement influenced the design of the SAHRC's protocols in monitoring human rights. The *Grootboom* and *TAC*

85 See *Government of the Republic of South Africa v Grootboom* 2001 SALR 46 (CC) (hereafter *Grootboom*): this was a socio-economic rights case in which the Constitutional Court held that these rights are justiciable.

86 See note 97.

87 Visit the SAHRC's website at www.sahrc.org.za to view the Commission's socio-economic rights reports.

88 SAHRC, Human Rights Advocacy Programme, available at <https://bit.ly/2FRFRI3> (accessed 21 March 2019).

cases⁸⁹ both utilised the test of whether the government has put in place unreasonable policies or acted unreasonably as a yardstick to determine whether the government has violated socio-economic rights.⁹⁰

A more recent case in which the SAHRC was *amicus curiae* also confirmed the justiciability of socio-economic rights. This is the case of *Residents of Arthurstone Village v Amashagana Tribal Authority and Others* (17978/15) [2016] ZAGPPHC 408. In the *Arthurstone* decision, the North Gauteng High Court found in favour of about 150 applicants who were illegally evicted from a piece of land – the Arthurstone Farm – located in Bushbuckridge, Mpumalanga. After the eviction, the residents' homes were demolished at the instruction of the traditional council, known as the Amashagana Tribal Authority. The effects of the eviction, as well as the demolition of the residents' homes, had an adverse impact on the applicants, who included women, children and elderly persons. It is a given that such endemic evictions are traumatic to the victims, who have to contend with the loss of their homes, being rendered destitute, and a plethora of socio-economic hardships.

The Court held further that the eviction order and processes did not meet the requirements of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 and section 26(3) of the Constitution.

4.2 Notable achievements

Over the years, the SAHRC has established itself as a reputable custodian of human rights and a model on which other countries base their NHRIs. The United Nations (UN) has accredited the SAHRC as an “A” status NHRI.⁹¹ It was indeed a milestone that from 2013-2016, the SAHRC chaired the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Furthermore, the Commission's mandate aligns with the Paris Principles, which were adopted in 1993 by the UN as guidelines for NHRIs in carrying out their mandates,⁹² while the African Union Commission on Human and People's Rights ranked the SAHRC as the second-best NHRI in Africa after the Uganda Human Rights Commission at its 52nd

89 *Minister of Health v Treatment Action Campaign* 2002 1 SA 342 (CC).

90 See D G Newman, “Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda”, 19 *SAJHR* (2003), pp 189-216.

91 “A” status, which means that an NHRI is fully compliant with the Paris Principles.

92 United Nations General Assembly Resolution 48/134 (1993).

Ordinary Session in 2012. This is in recognition of the work the SAHRC has done in the promotion of human rights in the country.⁹³

The SAHRC's track record since its inception has been widely recognised and applauded, with the most prominent accolade being found in the report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions.⁹⁴ The report concludes:

It appears to the Committee that the SAHRC more than adequately satisfies requirements as identified in the Committee's terms of reference with regard to professionalism, efficiency and effectiveness. The Committee believes that the work done by the SAHRC is of vital importance for South Africa and makes an important contribution to the deepening of democracy and the achievement of a human rights culture in this country.⁹⁵

Indeed, the SAHRC has earned a reputation as a highly effective institution, a defender and promoter of human rights of note.⁹⁶ The Ad Hoc Committee's report shows that at least 50 per cent of South Africa's population is aware of the existence of the SAHRC.⁹⁷ The reasons for this public awareness lie in part in its easy accessibility, education programmes and outreach initiatives, all which have gone a long way in cementing its credibility. Through its human rights advocacy programme, the SAHRC has conducted widespread advocacy workshops, seminars, campaigns and conferences.⁹⁸ Its human rights advocacy unit stems from this programme, one which the Commission established to promote human rights awareness.

It is trite that human rights abuses by corporate entities are one of the areas that are highly neglected due to the tremendous influence and power of such bodies; as a result, they get away with violations with impunity. To mitigate this phenomenon, the SAHRC has in the past six years undertaken initiatives to raise awareness of the impact of business entities on human rights.⁹⁹ As part of these efforts, it has been engaging in dialogue to progressively strengthen the responsibility that business carries in respect of human rights. This dialogue seeks to further the SAHRC's mandate in promoting and protecting human rights by improving

93 J C Mubangizi, "A Comparative Discussion of the South African and Ugandan Human Rights Commissions", 48 *Institute of Foreign and Comparative Law* (2015), pp 124-143.

94 Report of the ad hoc Committee on Chapter 9 and Associated Institutions, available at <https://bit.ly/2xwbHWz> (accessed 19 March 2019).

95 *Ibid.*

96 *Ibid.*

97 See note 94, p 30.

98 See note 89.

99 See note 84.

collaboration between the state, business and civil society on pressing business and human rights issues in South Africa.

The SAHRC has also been involved in the development of a human rights curriculum and has consistently lobbied education departments at the national and provincial level, facilitated teacher training and the development of course material for the teaching of human rights subjects.¹⁰⁰ The Commission has also regularly provided sponsorship for human rights-oriented activities in schools, including events such as Human Rights Day, a public holiday in South Africa.¹⁰¹ Moreover, the Commission has committed to providing training on human rights for selected occupations such as law enforcement, social work and nursing.

The achievements of the SAHRC can be measured objectively if juxtaposed against the constitutional provisions which give the Commission its essence. Over the years it has litigated in several cases of public interest and entered the fray as *amicus curiae* in some ground-breaking cases, such as the *Grootboom* case referred to earlier. In early 2019, the SAHRC took the decision to challenge the law on end-of-life decisions before the Constitutional Court, arguing for the legalisation of euthanasia and physician-assisted dying. Should the relief sought by the Commission be realised, this will be one of the SAHRC's greatest achievements in recent years, given the highly contentious nature of the subject matter.

Additionally, over the years the Commission has launched inquiries into various matters, such as issues surrounding the trade in fake foods in the townships, xenophobia, and the rights of minorities such as immigrants,¹⁰² the lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning community (LGBTIQ), people with disabilities, and asylum seekers. These inquiries not only serve as a monitoring and intervention tool but also educate and ensure accountability. It is thus incumbent upon the SAHRC to ensure a consistent and sustained use of its broad powers to ensure accountability at all levels of governance as a way to promote a culture of human rights which continues to be violated both by public and private bodies.

The most recent milestone is securing the country's ratification of OPCAT. The treaty is in essence an appendage to the Convention against

100 See note 74, p 132.

101 See note 95.

102 Gauteng Investigative Report – Lindela GP/2012/0134. The Commission received a complaint from human rights NGOs that it investigate the poor health conditions of undocumented migrants at Lindela Detention Facility.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT). As mentioned, it provides for the implementation of NPMs through a system of regular visits to places of detention, the aim of which is to prevent torture and other ill-treatment. South Africa signed the OPCAT in 2006 but did not ratify it until 28 March 2019. For years, the SAHRC put pressure on the government to ratify the treaty in view of the high prevalence of torture and other ill-treatment of persons deprived of their liberty in South Africa.¹⁰³ The SAHRC is currently in the process of ensuring that South Africa's NPM is established and working in concert with other stakeholders to ensure that this mechanism is effective and attains its objectives.

4.2.1 High-profile litigation and investigation

Over the years, the Commission has received numerous complaints: what is notable is the impressive turnover of cases brought to it. The top five complaints lodged with the Commission relate to equality; section 27 of the Constitution (health care, food, water, and social security); arrested, detained, and accused people; labour relations; and just administrative action.¹⁰⁴ In respect of the right to equality, the highest number of complaints received concerned racism. Complaints related to health have soared by more than 40 per cent since 2016. In an effort to ensure accountability, the Commission has upped its litigation efforts by 32 per cent, which saw it involved in more than 60 litigations in 2016/2017.

The increase in the number of cases involving the SAHRC can be interpreted in various ways. On one hand, it could mean that the SAHRC is doing well as a custodian of human rights in South Africa by using the courts to hold those who violate human rights accountable. On the other hand, it could mean that human rights violations are on the increase and more work needs to be done. Whatever the case may be, the Commission needs to ensure that whatever human violations occur in the Republic, it is able to harness the confidence of the vulnerable people who look to it for the protection of their fundamental rights.

The table below shows the number of cases reported to the Commission from 2012/2013-2017/2018 and the case-completion rate for the same period.

103 SAHRC, "SAHRC Urges Government to Ratify OPCAT", available at <https://bit.ly/2L4M08e> (accessed 8 April 2019).

104 See note 78.

Table 5: Number of cases reported to the SAHRC and completion rates, 2012/2013-2016/2017

| Financial year | Com-plaints | Enquiries | Total caseload | Year-on-year change | Finalised and once-off enquiries | % achievement |
|----------------|-------------|-----------|----------------|---------------------|----------------------------------|---------------|
| 2012/13 | 4,947 | 3,972 | 8,919 | -22% | 7,047 | 79% |
| 2013/14 | 4,980 | 4,237 | 9,217 | 3% | 8,550 | 93% |
| 2014/15 | 3,685 | 4,494 | 8,179 | -11% | 7,337 | 90% |
| 2015/16 | 4,613 | 4,625 | 9,238 | 13% | 8,200 | 89% |
| 2016/17 | 4,938 | 4,792 | 9,730 | 5% | 8,498 | 87% |

Source: www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202017%20HR.PDF

Given the resource constraints, the SAHRC's case completion statistics are impressive. It can thus be said that, should the call for more resources to be allocated to the Commission be heeded, its efficiency could be greatly enhanced.

An important attribute of the SAHRC is its power to institute litigation either in its own name or upon a complaint being lodged with it. Accordingly, it found itself involved in a number of cases over the past few years. A selection of these are summarised below.

South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198

The SAHRC challenged the detention some 39 foreign nationals at the Lindela Repatriation Centre on the ground that they had been held for longer than the period of 30 days provided for under section 34 of the Immigration Act 13 of 2002. In this case, the detained persons were placed in custody for more than four months without a warrant. The court found that the protracted detention period was unlawful and unconstitutional,¹⁰⁵ and ordered that reasonable steps be taken by the respondents to terminate such detention practices.¹⁰⁶

The court further ordered that the respondents provide a regular written report to the SAHRC setting out, inter alia, (1) the steps taken to comply with the judgement to ensure that no person is detained in

105 *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198*, paragraph 52.2

106 *Ibid*, paragraph 52.3.

contravention of the order;¹⁰⁷ and (2) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.¹⁰⁸ Additionally, the respondents were ordered to ensure that the SAHRC has regular access to the Lindela Repatriation Centre and persons detained at the facility.¹⁰⁹

SAHRC & 19 Others v Madibeng Municipality, MEG for Local Government & Human Settlement, Minister of Water and Sanitation & Minister of Health – Case No 21099/17 (Gauteng High Court Division, Pretoria)

On 9 May 2017, the Pretoria High Court granted an interim order directing the Madibeng Local Municipality to increase water supply to the approximately 3,500 households of Klipgat C. This success not only vindicated the rights of the residents to have access to sufficient water in terms of section 27(1)(b) of the Constitution, but also enforced the positive obligations imposed by section 27(2) for reasonable measures to be taken in giving effect to the right to have access to sufficient water.

South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218

On 18 August 2017, the Gauteng High Court Division in Johannesburg, sitting as the Equality Court, granted judgment against Jon Qwelane, a journalist and South Africa's ambassador to Uganda. In a newspaper column in 2008, Qwelane uttered words to the effect that homosexuality amounts to a rapid degradation of values and traditions. He suggested that the Constitution's acceptance of gay marriage would lead to "some idiot demanding to marry an animal". Furthermore, Qwelane voiced an opinion that he also endorsed the views on homosexuality of Zimbabwe's then president, Robert Mugabe.

The Court declared Qwelane's comments as amounting to hate speech in terms of section 10 of the PEPUDA. It ordered him to apologise to the LGBTI community. The Court also ordered the Registrar of the Court to refer the matter to the Commissioner of the South African Police Service for investigation in terms of section 21(4) of the Equality Act.

107 *Ibid*, paragraph 52.4.1.

108 *Ibid*.

109 *Ibid*, paragraph 52.5.

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (EQ0112012)

On 29 June 2017, the Gauteng High Court Division in Johannesburg, sitting as the Equality Court, granted judgment against Bongani Masuku of the Congress of South African Trade Unions (Cosatu), who had made comments against the Jewish community. The Court found that Masuku's comments, which contained threats, were not only hurtful and harmful but also propagated hatred. The Court declared Masuku's comments as amounting to hate speech in terms of section 10 of the Equality Act, and ordered him to apologise to the Jewish community.

Investigation of alleged hate speech by Julius Malema

In March 2019, the SAHRC released its findings on complaints lodged with it against Julius Malema, leader of the Economic Freedom Fighters, a political party.¹¹⁰ The complaints alleged that Malema uttered words amounting to hate speech on different occasions between 2016 and 2018. In the investigation, the SAHRC engaged the services of a legal expert who concluded that although the utterances were emotive and hurtful to white South Africans, they failed to reach the threshold of "hate speech". The SAHRC chairperson, Advocate Bongani Majola, said that hate speech was an emerging field of law and thus still murky, hence the long time taken in completing the investigation.

In an ongoing case in which the Nelson Mandela Foundation has made an application seeking relief in the form of banning the display of the apartheid flag, the respondents, Afriforum, have sought to rely on the decision in the Malema hate speech investigation to invoke freedom of expression as the reason why the flag should not be prohibited. In response, Wim Trengove, counsel for the SAHRC, which is intervening as *amicus curiae* in the case, stated that the facts of the Malema case do not bear any relevance to the facts in the apartheid-flag case.¹¹¹

4.3 The SAHRC's relationship with other Chapter 9 institutions and civil society

The protection of human rights in South Africa is not the monopoly of one institution. In a country with a history like South Africa's, it is only

110 SAHRC, "SAHRC Finds Julius Malema's Comments Not Hate Speech", available at <https://bit.ly/2LDRlmw> (accessed 10 April 2019).

111 BC Simelane, "Court Reserves Judgement in Apartheid Flag Saga", *Daily Maverick* (30 April 2019), available at <https://bit.ly/2L3srNn> (accessed 2 May 2019).

plausible that a multi-pronged approach to the protection and promotion of human rights be adopted. The SAHRC therefore collaborates with other Chapter 9 institutions as well as NGOs to ensure a concerted effort towards engendering a human rights culture.

In cases before the courts, the SAHRC has acted as *amicus curiae* alongside other organisations or litigated in concert with them. A recent example is in the case of *Geneva Claasen and Two Others v The MEC for Transport and Public Works, Western Cape Provincial Department and Other* (WCHC Case No 23595/2015), in which the LRC filed heads of argument on behalf of the SAHRC in a case involving the illegal eviction of women and children from a shelter for destitute persons.

The SAHRC and other state institutions regularly collaborate in holding training seminars and workshops to synergise their efforts against human rights violations. An example is the Commission's commitment to collaborate with the Commission for Gender Equality and the Department of Basic Education in the creation of a safe learning environment. This is in line with the SAHRC Act, which provides that as far as possible the Commission must liaise closely with institutions and organisations with similar objectives to it to foster common policies and practices and to promote cooperation on issues of mutual concern or overlapping jurisdiction.

Over the years the Commission has indeed managed to foster these working relationships, as is evidenced by its regular engagement with various institutions and government bodies. Such consistent collaboration is a step in the right direction in avoiding the fragmentation of efforts to promote a human rights culture.

4.4 Challenges and criticism facing the SAHRC

4.4.1 Funding

Given that a large portion of the SAHRC's funding comes from the state,¹¹² its independence and accountability may be negatively impacted by this model of funding – in the absence of a budget vote specifically for the SAHRC, the DOJCD is responsible for its budget allocation. This means in essence that while the Commission is accountable to the National Assembly, it is also largely accountable to the DOJCD, contrary to the Constitution's stipulations. The arrangement holds the risk that

112 EISA, "South African Human Rights Commission", available at <https://bit.ly/2NJzNYu> (accessed 19 March 2019).

governmental actors could exploit the budgetary mechanism to interfere in the Commission's agenda and how it functions. Glaser, for example, contends that the SAHRC has not been hard enough on the government in seeking to enforce implementation of its recommendations.¹¹³ It is on this basis that the report of the Ad Hoc Committee¹¹⁴ recommended that the SAHRC's budget form part of Parliament's budget vote instead of that of the DOJCD.

4.4.2 Accessibility

A criticism of the SAHRC is that the country's marginalised communities and rural population have limited access to its services. Most of South Africa's population does not have access to information and usually little, if any, awareness of human rights and human rights institutions. This is compounded by the Commission's urban focus when launching its human rights awareness campaigns.¹¹⁵ Limitations of accessibility can be linked to the limited resources the Commission has at its disposal notwithstanding the broadness of its mandate. Due to its limited resources, the Commission's reach is in turn significantly limited, which then denies the rural population access to its services.

The Commission has nonetheless taken deliberate steps to mitigate issues of accessibility. As part of its outreach initiatives in 2016/2017, it introduced a pilot project to train community trainers. The aim is to build capacity for community focal points as well as establish sustainable working relationships with communities. The SAHRC's various provincial offices identified key persons within communities who are engaged or interested in social justice and human rights and have a heart for their communities. The identified persons are then empowered through basic training programmes in issues of human rights and social justice.

The idea to ensure that, with time and experience, these trainers add value to the Commission's work by identifying the broader community's human rights needs and assisting in the SAHRC's community engagements. They will also assist in the mobilisation of community members so as to enhance participation levels in outreach activities. The project seeks to ensure that the necessary tools and skills to convey information about the mandate of the SAHRC are provided. It also provides the tools for rendering basic advice, responding to queries,

113 D Glaser, "The Media Inquiry Reports of the South African Human Rights Commission: A Critique", 99 *African Affairs* (2000), pp 373-393.

114 The Ad Hoc Committee on Chapter 9 and Associated Institutions.

115 See note 77.

reinforcing education in human rights, making referrals of possible human rights violations to the SAHRC, directing communities to relevant institutions where necessary, and creating an enabling environment for communities to work towards a culture of human rights.

4.4.3 *Limited resources and capacity*

As noted, the SAHRC has a broad constitutional and legislative mandate yet limited human and material resources to carry it out. Due to this imbalance between its powers and resources, the SAHRC has been limited to dealing with socio-economic rights and public bodies.¹¹⁶ It has not extended its reach to private bodies even though human rights violations occur within that space, with the result that there is growing impunity for corporate human rights violations.

Probably in part due to its financial constraints, the SAHRC has consistently limited the number of its permanent commissioners to the minimum of five as stated in the Constitution, even though the latter does not restrict it to this number.¹¹⁷ Since it is vital that the Commission is adequately resourced in terms of personnel and other requirements, one of the ways it could maximise its potential efficacy is by doing away with the appointment of part-time commissioners to ensure that all its commissioners give their undivided attention to fulfilling the Commission's mandate.

5 Improving the SAHRC's efficacy

The SAHRC has continually sought to remedy its shortfalls and enhance delivery on its constitutional mandate. In its 2017 annual report it stated that it had recognised the imperative to implement, develop and strengthen an integrated, comprehensive monitoring and evaluation system.¹¹⁸ In the monitoring and evaluation system the SAHRC subsequently developed, the planning framework included elements to ensure that the recommendations of the Commission and court orders emanating from litigation are implemented. The Commission also resolved that it would engage regularly and meaningfully with executive stakeholders, participate in government engagement fora, and devise effective monitoring instruments.

116 CM Peter, "Human Rights Commissions in Africa – Lessons and Challenges", in A Bösl and J Diescho (eds) *Human Rights in Africa: Legal Perspectives and their protection and Promotion*, Namibia, Macmillan Education (2009), pp 351-374.

117 See note 113.

118 See note 78.

The implementation of a sound monitoring and evaluation mechanism should see the Commission's work becoming easier by creating an environment which enables it to accurately assess institutional responses, thus enabling it to act accordingly.

Furthermore, the framework allows the SAHRC to utilise surveys and evaluations to gauge the realisation of outcomes and the achievement of the envisaged impact. Aspects of the monitoring and evaluation framework have been used to assess the effectiveness, relevance, and impact of identified SAHRC processes, including the implementation of recommendations, engagements through provincial visits, engagements with the advisory committee as well as legislative submissions.

The Commission, spurred on by the Constitutional Court's decision in *Economic Freedom Fighters v Speaker of the National Assembly and Others (EFF case)*¹¹⁹ which stated that the Public Protector's remedial action is binding unless the court overrules them, has sought to ensure that the same weight is accorded to its recommendations. In the *EFF* case, the Court stated that:

[t]he Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) (of the Constitution) must accordingly be taken to mean what it says.¹²⁰

The Court also stated that:

[i]f compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy.¹²¹

A textual and purposive reading of the *EFF* judgment warrants that the SAHRC's recommendations be accorded the same binding effect as those of the Public Protector. First, the two bodies are both Chapter 9 institutions established with the purpose of strengthening democracy. Secondly, they both depend on their independence and impartiality for their effectiveness. There has not been any case where the binding effect of the SAHRC's recommendations has been an issue, but such cases may arise in future. Nonetheless, the point of departure is that it will not be rational to deny the SAHRC recommendations binding effect while granting the same to

119 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

120 See note 120, paragraph 68.

121 *Ibid*, paragraph 56.

another institution with an overlapping mandate. If the recommendations of the Commission are ignored willy-nilly, the work of the Commission will continue to be undermined in some quarters.

Succinctly put, the provisions of the SAHRC Act that spell out the Commission's powers, functions and investigative powers, namely sections 13 and 15, must be construed to a large extent as endowing binding powers, given the penchant of some government organs and persons to ignore the Commission's recommendations. It is encouraging that the SAHRC has been engaging with the DOJCD and Department of Correctional Services in this regard, and if its recommendations are acceded to, the efficiency of the SAHRC may be enhanced.

6 Conclusion

South Africa has a dark past, the ramifications of which continue to be felt in the present day. With the advent of constitutional democracy, a resolute commitment to reversing the effects of apartheid had to be made. In the transition from an era when the rights of the majority of the people were flagrantly violated to a dispensation where South Africans have recourse for violations of their fundamental human rights, the establishment of the SAHRC was a milestone event in the history of South Africa. Twenty-four years after its establishment, the Commission continues to champion the promotion and realisation of a culture of human rights, monitoring compliance, issuing reports and educating the populace about human rights. Appointed with a broad mandate, the Commission has ensured that it works with other government agencies, the international community and NGOs in serving as the constitutional custodian of human rights in South Africa. It cannot be said that it has been a smooth sailing: the SAHRC still faces considerable challenges in the form of political pressure and limited resources and funding.

Whether the Commission has done well in the fulfilment of its mandate is something that can be determined only by juxtaposing the results on the ground with the provisions of the Constitution. It would be too bold a statement to claim that the Commission has arrived where it should be. More could certainly be done: as it is with most NHR, conditions do not always favour the SAHRC's making uninterrupted progress towards a dispensation where the respect and promotion of human rights is a national priority. Moreover, the Commission is but one of a number of actors in the South African human rights arena, which makes measuring its specific contribution a complex undertaking.

When all is said and done, one can only appreciate that there is still more to achieve in the total realisation of human rights in South Africa; this feat can be realised with commitment from all stakeholders in government and civil society, coupled with the unwavering support of those who subscribe to the notions of human rights, democracy and the rule of law.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The basic framework of the South African Human Rights Commission is elaborate stated in Chapter 9 of the Constitution, which has as title, “State institutions supporting constitutional democracy.” It provides as follows:

Establishment and governing principles

181.(1) The following state institutions strengthen constitutional democracy in the Republic:

- (a) The Public Protector.
- (b) The South African Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Electoral Commission.

2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

4) No person or organ of state may interfere with the functioning of these institutions.

5) 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.

South African Human Rights Commission

Functions of South African Human Rights Commission

185.(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 South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate.

3) 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.

4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

General Provisions

Appointments

193.(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who –

- (a) are South African citizens;
- (b) are fit and proper persons to hold the particular office; and
- (c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of –

- (a) the South African Human Rights Commission;
- (b) the Commission for Gender Equality; and
- (c) the Electoral Commission.

(5) The National Assembly must recommend persons –

- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
- (b) approved by the Assembly by a resolution adopted with a supporting vote –

- (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.
- (6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Removal from office

194.(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –

- (a) the ground of misconduct, incapacity or incompetence;
 - (b) a finding to that effect by a committee of the National Assembly; and
 - (c) the adoption by the Assembly of a resolution calling for that person's removal from office.
- (2) A resolution of the National Assembly concerning the removal from office of –
- (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
- (3) The President –
- (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
 - (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

B.2 Legislative and regulatory instruments

The main regulatory instrument is Act No 40 of 2013, the South African Human Rights Commission Act, 2013. It is described as an Act to provide for the composition, powers, functions and functioning of the South African Human Rights Commission; to provide for the repeal of the Human Rights Commission Act, 1994; and to provide for matters connected therewith.

Preamble

SINCE sections 181(1)(b) and 184 read with item 20 of Schedule 6 to the Constitution of the Republic of South Africa, 1996, provide that the South African Human Rights Commission, established in terms of section 115 of the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993), continues to function in terms of the legislation applicable to it; and for the conferring of certain powers on and the assignment of certain functions to the Commission;

AND SINCE the Constitution provides that the South African Human Rights Commission must –

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights;
- monitor and assess the observance of human rights in the Republic; and
- annually require relevant organs of state to provide it 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;

AND SINCE the Constitution provides that the South African Human Rights Commission –

- has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate; and
- has the additional powers and functions prescribed by national legislation,

1. Definitions

1. In this Act, unless the context otherwise indicates –

“Chairperson” means the chairperson of the Commission referred to in section 5 6(1);

“chief executive officer” means the chief executive officer referred to in section 19(1);

“Commission” means the South African Human Rights Commission referred to in sections 181(1)(b) and 184 of the Constitution;

“commissioner” means a commissioner referred to in section 5(1)

“committee” means a committee established under section 11;

“Constitution” means the Constitution of the Republic of South Africa, 1996;

“Deputy Chairperson” means the deputy chairperson of the Commission referred to in section 6(1);

“human rights” means the human rights contained in Chapter 2 of the Constitution;

“investigation” means an investigation contemplated in section 15;

“member of staff” means the chief executive officer and any person appointed in terms of section 19(3)(a);

“Minister” means the Cabinet member responsible for the administration of 10 justice;

“organ of state” means an organ of state as defined in section 239 of the Constitution;

“premises” includes land, any building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container;

“private dwelling” means any part of any building or structure which is occupied as a residence or any part of any building or structure or outdoor living area which is accessory to, and used wholly or principally for, the purposes of residence;

“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No 1 of 1999); and

“warrant” means a search warrant or an entry and search warrant, as the case may be, issued in terms of section 16(5).

2. Objects of Commission

- (2) The objects of the Commission are –
- (a) to promote respect for human rights and a culture of human rights;
 - (b) to promote the protection, development and attainment of human rights; and
 - (c) to monitor and assess the observance of human rights in the Republic.

3. Seat of Commission

- 3(1) The seat of the Commission must be in the province of Gauteng.
- (2) The Commission may establish such offices as it may consider necessary to enable it to exercise its powers and to perform its functions conferred on or assigned to it by the Constitution, this Act or any other law.

4. Independence and impartiality

4(1) A commissioner as well as a member of staff –

- (a) must serve impartially and independently and exercise or perform his or her powers and functions in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law;
- (b) may not use the position or privileges of a commissioner or a member of staff for private gain or to benefit another person improperly; and
- (c) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission.

(2) All organs of state must afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission and in pursuit of its objects.

(3) No organ of state and no member or employee of an organ of state nor any other person may interfere with, hinder or obstruct the Commission, any commissioner, a member of staff or a person appointed under section 11(1) or 19(5) in the exercise or performance of its or his or her powers and functions.

(4) No commissioner or member of staff may conduct an investigation or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary or any other interest which might preclude him or her from exercising or performing his or her powers and functions in a fair, unbiased and proper manner.

(5) If any commissioner or member of staff fails to disclose an interest contemplated in subsection (4) and conducts or renders assistance with regard to an investigation, while having an interest so contemplated in the matter being investigated, the Commission may take such steps as it deems necessary to ensure a fair, unbiased and proper investigation.

(6) In the interest of transparency and accountability, a commissioner must, in the manner determined by the Commission, annually disclose his or her financial interests and any other interests determined by the Commission, which information must be accessible to the public.

(7) A commissioner or a member of staff who contravenes or fails to comply with subsection (1)(b) or (4) is guilty of misconduct.

5. Composition of Commission

5(1)(a) The Commission consists of eight commissioners, who must –

- (i) be South African citizens and fit and proper persons to hold office of the Commission, as contemplated in section 193(1) of the Constitution;
- (ii) have a record of commitment to the promotion of respect for human rights and a culture of human rights;
- (iii) be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission; and

- (iv) be appointed by the President in accordance with section 193(4) and (5) of the Constitution.
- (b) Subject to paragraph (a), any person is eligible to be appointed as a commissioner, except –
- (i) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service;
 - (ii) unrehabilitated insolvents;
 - (iii) anyone declared to be of unsound mind by a court of the Republic;
 - (iv) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; or
 - (v) anyone who is an office-bearer or a staff member of a political party, a member of the National Assembly, a permanent delegate to the National Council of Provinces, a member of a provincial legislature or a member of a municipal council or who is on a candidate list for any of those positions.
- (2) The commissioners referred to in subsection (1) may, on the recommendation of the National Assembly, be appointed as full-time or part-time commissioners and hold office for such fixed term as the National Assembly may determine at the time of such appointment, but not exceeding seven years: Provided that not fewer than six commissioners are appointed on a full-time basis and not more than two commissioners are appointed on a part-time basis.
- (3) The President may, on the recommendation of the National Assembly, appoint a part-time commissioner as a full-time commissioner for the unexpired portion of that part-time commissioner's term of office if a vacancy in the office of a full-time commissioner occurs.
- (4) Any person whose term of office as a commissioner has expired, may be reappointed for one additional term.
- (5)(a) A commissioner may resign from office by submitting at least three calendar months' written notice thereof to the National Assembly, unless the National Assembly by resolution allows a shorter period in a specific case.
- (b) A commissioner is regarded as having resigned if that commissioner –
- (i) accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council; or
 - (ii) is elected or appointed as an office-bearer of a political party.
- (c) The Commission must take appropriate steps, where necessary, against a commissioner –
- (i) who fails to give notice in terms of paragraph (a); or
 - (ii) who gives such notice, but fails to comply with the prescribed period referred to in that paragraph, for the recovery of any remuneration and allowances, if any, that were paid to that commissioner in the case of –

- (aa) subparagraph (i), for the three months immediately preceding the date on which his or her resignation took effect; and
 - (bb) subparagraph (ii), for the period that was less than the prescribed period referred to in paragraph (a).
- (6) A commissioner may be removed from office in accordance with section 194(1) and (2) of the Constitution.
- (7) The President may suspend a commissioner from office in accordance with section 194(3)(a) of the Constitution.
- (8) The President must remove a commissioner from office in accordance with section 194(3)(b) of the Constitution.

6. Chairperson and Deputy Chairperson of Commission

- 6(1) The President must, on the recommendation of the National Assembly, appoint 10 a Chairperson and Deputy Chairperson of the Commission, respectively.
- (2) Whenever the Chairperson is absent or for any reason unable to exercise or perform the powers and functions vested in the office of the Chairperson, or whenever the office of Chairperson is vacant, the Deputy Chairperson may exercise all the powers and must perform all the functions of the Chairperson.
- (3)(a) Whenever both the Chairperson and the Deputy Chairperson are absent or for any reason unable to exercise or perform the powers and functions vested in the office of Chairperson, or whenever both offices are vacant, the remaining commissioners must from their number elect an acting Chairperson.
- (b) Any commissioner acting as Chairperson of the Commission by virtue of the provisions of paragraph (a) may, while so acting, exercise all the powers and must, while so acting, perform all the functions of the Chairperson.

7. Powers and functions of Chairperson, Deputy Chairperson and other commissioners

- 7(1) The Chairperson is vested with all the powers and functions conferred on or assigned to him or her by the Commission, this Act or any other law.
- (2) The Deputy Chairperson and any other commissioner are vested with all the powers and functions conferred on or assigned to him or her by the Commission or delegated to him or her by the Chairperson.
- (3) The Chairperson is, for the purposes of exercising the powers and performing the functions conferred on or assigned to him or her by the Commission, this Act or any other law, accountable to the Commission.
- (4) The Deputy Chairperson and any other commissioner are, for the purposes of exercising the powers and performing the functions –
- (a) conferred on or assigned to him or her by the Commission, accountable to the Commission; or

- (b) delegated to him or her by the Chairperson, accountable to the Chairperson.
- (5) The Chairperson is, for the purposes of the Public Finance Management Act, the executive authority of the Commission.

8. Vacancies in Commission

- 8(1) A vacancy in the Commission occurs –
- (a) when a commissioner's term of office expires;
 - (b) when a commissioner dies;
 - (c) when a commissioner is removed from office in accordance with section 194 of the Constitution; or
 - (d) when a commissioner's resignation, submitted in accordance with section 5(5)(a) or as contemplated in section 5(5)(b), takes effect.
- (2) A vacancy in the Commission does not affect the validity of the proceedings or decisions of the Commission.
- (3)(a) The Commission must, as soon as a vacancy occurs, in writing inform the National Assembly of such vacancy.
- (b) A vacancy in the Commission must, as soon as practicable after the National Assembly becomes aware thereof, be filled in accordance with section 193(4) and (5) of the Constitution.

9. Remuneration and allowances of commissioners

- 9(1) The remuneration, allowances and other terms and conditions of office and service benefits of the full-time and part-time commissioners are determined by the President in consultation with the Cabinet and the Minister of Finance.
- (2) The remuneration of the commissioners may not be reduced, nor may the 5 allowances and other terms and conditions of office and service benefits be adversely altered, during their continuation in office.
- (3) A part-time commissioner may, for any period during which that commissioner, with the approval of the Commission, performs additional functions, be paid such additional remuneration as may be determined by the President in consultation with the 10 Cabinet and the Minister of Finance.

10. Meetings of Commission

- 10(1) The meetings of the Commission must be held at the times and places determined by the Commission: Provided that the chief executive officer must, in the absence of the Chairperson, convene the first meeting of the Commission.
- (2) If the Chairperson is absent from a meeting of the Commission, the Deputy Chairperson acts as chairperson, and if both the Chairperson and

Deputy Chairperson are absent from a meeting of the Commission, the commissioners present must elect one from among their number to preside at that meeting.

- (3) The quorum for any meeting of the Commission is a majority of the total number of commissioners.
- (4) The decision of the majority of the commissioners present at a meeting thereof is the decision of the Commission and in the event of an equality of votes concerning any matter, the commissioner presiding has a casting vote in addition to his or her deliberative vote. The Commission must –
 - (a) determine its own procedure: Provided that due regard must be given to the principles of transparency, openness and public participation; and
 - (b) cause minutes to be kept of its proceedings.
- (5) The Commission may from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (5)(a).

11. Committees of Commission

11(1) The Commission may establish one or more committees consisting of one or more commissioners designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it for the purposes of advising the Commission, or make recommendations to it, in respect of the matter for which the committee has been established.

- (2) The Commission may extend the period of an appointment made by it under subsection (1) or withdraw such appointment during the period referred to in that subsection.
- (3) The Commission must designate a chairperson, who must be a commissioner, for every committee and, if it deems it necessary, a deputy chairperson, who must also be a commissioner.
- (4) Subject to the directions of the Commission, a committee –
 - (a) may exercise such powers of the Commission as the Commission may confer on it; and
 - (b) must perform such functions of the Commission as the Commission may assign to it, and must follow such procedure during such exercising of powers and performance of functions as the Commission may direct.
- (5) On completion of the functions assigned to it in terms of subsection (4), a committee must submit a written report thereon, including recommendations, if any, for consideration by the Commission.
- (6) The Commission may at any time dissolve any committee.

12. Conferment of powers and assignment of functions

12(1)The Commission may, in writing, confer the exercise of any of its powers or assign the performance of any of its functions to –

- (a) a commissioner;
 - (b) a member of staff; or
 - (c) a committee of the Commission.
- (2) A conferment or assignment in terms of subsection (1) –
- (a) is subject to such conditions and directions as the Commission may impose; and
 - (b) does not divest the Commission of responsibility for the exercise of the power or the performance of the function.
- (3) The Commission may confirm, vary or revoke any decision taken in consequence of a conferment or assignment in terms of this section, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

13. Powers and functions of Commission

13(1)In addition to any other powers and functions conferred on or assigned to it by section 184(1), (2) and (3) of the Constitution, this Act or any other law and in order to achieve its objects –

- (a) the Commission is competent and is obliged to –
 - (i) 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;
 - (ii) 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; and
 - (iii) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights; and
- (b) the Commission –
 - (i) must develop, conduct or manage information programmes and education programmes to foster public understanding and awareness of Chapter 2 of the Constitution, this Act and the role and activities of the Commission;
 - (ii) must as far as is practicable maintain close liaison with institutions, bodies or authorities with similar objectives to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances;

- (iii) must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission;
- (iv) may consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source;
- (v) must review government policies relating to human rights and may make recommendations;
- (vi) 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;
- (vii) must prepare and submit reports to the National Assembly pertaining to any such convention, treaty, covenant or charter relating to the objects of the Commission; and
- (viii) must carry out or cause to be carried out such studies concerning human rights as may be referred to it by the President, and the Commission must include in a report referred to in section 18(1) a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate.

2(a) The Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights.

(b) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.

(3) The Commission is competent –

- (a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and
- (b) to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.
- (4) All organs of state must afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions.

14. Mediation, conciliation or negotiation by Commission

14. The Commission may, by mediation, conciliation or negotiation endeavour –

- (a) to resolve any dispute; or
- (b) to rectify any act or omission, emanating from or constituting a violation of or threat to any human right.

15. Investigations by Commission

15(1) Pursuant to the provisions of section 13(3) the Commission may, in order to enable it to exercise its powers and perform its functions –

- (a) conduct or cause to be conducted any investigation that is necessary for that purpose;
- (b) through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
- (c) require any person by notice in writing under the hand of a commissioner, addressed and delivered by a member of staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice must contain the reasons why such person's presence is needed and why any such article or document should be produced; and
- (d) through a commissioner, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in that paragraph, irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.

(2)(a) Any person questioned under subsection (1) must, subject to the provisions of paragraph (b) and subsections (3) and (4) –

- (i) be competent and compelled to answer all questions put to him or her regarding any fact or matter connected with the investigation of the Commission notwithstanding that the answer may incriminate him or her; and be compelled to produce to the Commission any article or document in his or her possession or custody or under his or her control which may be necessary in connection with that investigation.
- (b) A person referred to in paragraph (a) is only competent and compelled to answer a question or compelled to produce any article or document contemplated in that paragraph if –
 - (i) the Commission, in consultation with the Director of Public Prosecutions who has jurisdiction, issues an order to that effect;
 - (ii) the Commission is satisfied that to require such information from such person is reasonable, necessary and justifiable in an open and democratic society based on freedom and equality; and
 - (iii) in the Commission's judgement, such person has refused or is likely to refuse to answer a question or to produce any article or

document on the basis of his or her privilege against self-incrimination.

3(a) Any incriminating answer or information obtained or incriminating evidence 15 directly or indirectly derived from a questioning in terms of subsection (1) is not admissible as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law, except in criminal proceedings where the person stands trial on a charge of perjury or a charge contemplated in section 22(b) of this Act or in section 319(3) of the Criminal Procedure 20 Act, 1955 (Act No 56 of 1955).

(b) Subject to the provisions of subsection (2)(a)(i), the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law applies in relation to the questioning of a person in terms of subsection (1).

(4) Any person appearing before the Commission by virtue of the provisions of subsection (1)(c) and (d) may be assisted at such examination by a legal representative and is entitled to peruse such of the documents referred to in subsection (1)(c) or any other relevant documents.

(5) If it appears to the Commission during the course of an investigation that any person is being implicated in the matter being investigated, the Commission must afford 30 such person an opportunity to be heard in connection therewith by way of the giving of evidence or the making of submissions and such person or his or her legal representative is entitled, through the Commission, to question other witnesses, determined by the Commission, who have appeared before the Commission in terms of this section.

(6) Subject to the provisions of this Act, the procedure to be followed in conducting 35 an investigation must be determined by the Commission with due regard to the circumstances of each case.

(7) The Commission must make known publicly the particulars of the procedure which it has determined in terms of subsection (6).

(8) If it is in the interests of justice or if harm to any person might otherwise ensue, the 40 Commission or a commissioner may direct that any person or category of persons or all persons the presence of whom is not desirable may not be present at the proceedings during the investigation or any part thereof.

(9) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of a 45 commissioner or a member of staff or the record of evidence given before the Commission during an investigation, unless the Commission determines otherwise.

16. Entering and search of premises and attachment and removal of articles

16(1) Any commissioner, or any member of staff or a police officer authorised thereto by a commissioner, may, subject to the provisions of this section, for the purposes of exercising the powers and performing the functions mentioned in section or conducting an investigation, search any person or enter and search any premises on or in which anything connected with an investigation is or is suspected to be.

(2) The entry and search of any person or premises under this section must be conducted with strict regard to decency and order, including the protection of a person's right to –

- (a) respect for and protection of his or her dignity;
- (b) freedom and security; and
- (c) his or her personal privacy.

(3) A commissioner or member of staff or police officer contemplated in subsection may, subject to the provisions of this section –

- (a) inspect and search the person or premises referred to in that subsection, and there make such enquiries as he or she may deem necessary;
 - (b) examine any article or document found on the person or on or in the premises;
 - (c) request information regarding such article or document from the owner or person in control of the premises or from any person in whose possession or control that article or document is, or who may reasonably be expected to have the necessary information;
 - (d) make copies of or take extracts from any book or document found on the person or on or in the premises;
 - (e) request from any person whom he or she suspects of having the necessary information, an explanation regarding that article or document;
 - (f) attach anything on the person or on or in the premises which in his or her opinion has a bearing on the investigation concerned; and
 - (g) if he or she wishes to retain anything contemplated in paragraph (f) for further examination or for safe custody, against the issue of a receipt, remove it from the person or premises: Provided that any article that has been so removed, must be returned as soon as possible after the purpose for such removal has been accomplished: Provided further that if there is no person present to receive the receipt when it is issued, it must be affixed to a prominent place on the premises.
- (4) Any person from whom information is required in terms of subsection (3)(a), (c) and (e) may be assisted at such enquiry by a legal representative, and must at the commencement of such enquiry be so informed.
- (a) The person referred to in subsection (1) may only be searched or the premises referred to in the said subsection may only be entered and searched, by virtue of a search warrant or an entry and search warrant issued by a magistrate, or judge of a High Court, if it appears to such

magistrate or judge from information on oath that there are reasonable grounds for believing that any article or document, which has a bearing on the investigation concerned, is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction and cannot reasonably be obtained in any other manner.

- (b) The functions referred to in subsection (3) may only be performed by virtue of a warrant issued by a magistrate, or judge of a High Court, if it appears to such magistrate or judge from information on oath that there are reasonable grounds for believing that an article or document referred to in paragraph (a) is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction.
 - (c) A warrant must authorise any commissioner or any member of staff or a police officer to perform the functions referred to in subsection (3) and must to that end authorise such person to search any person or to enter and search any premises identified in the warrant.
 - (d) A warrant must be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night at times which are reasonable in the circumstances.
 - (e) A warrant may be issued on any day and is of force until –
 - (i) it is executed; or
 - (ii) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
 - (iii) the expiry of one month from the day of its issue; or
 - (iv) the purpose for the issuing of the warrant has lapsed,
 - (v) whichever may occur first.
 - (f) A person executing a warrant under this section must, at the commencement of such execution, hand the person referred to in the warrant or the owner or the person in control of the premises, if such a person is present, a copy of the warrant: Provided that if such person is not present, he or she must affix a copy of the warrant to the premises at a prominent and visible place.
 - (g) A person executing a warrant under this section or an entry or search under subsection (6) must, at the commencement of such execution, identify himself or herself and if that person requires authorisation to execute a warrant under this section, the particulars of such authorisation must also be furnished.
- (6) Subject to the provisions of subsections (2), (4), (5)(g), (7) and (8), any commissioner, or any member of staff or a police officer upon request by a commissioner, may, without a warrant, enter and search any premises, other than a private dwelling, for the purposes of attaching and removing, if necessary, any article or document –
- (a) if the person or persons who may consent to the entering and search for an 10 attachment and removal of an article or document consents or consent to such entering, search, attachment and removal of the article or document concerned; or
 - (b) if he or she, on reasonable grounds, believes –

- (i) that a warrant will be issued to him or her if he or she applies for such 15 warrant; and
- (ii) that the delay in obtaining such a warrant would defeat the object of the entry and search.

(7) An entry and search in terms of subsection (6) must be executed by day unless the execution thereof by night is justifiable and necessary.

(8) A person who may lawfully under this section enter and search any premises may use such force as may be reasonably necessary to overcome any resistance against such entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter and search such premises.

(9) If during the execution of a warrant in terms of subsection (5) or a search in terms of subsection (6), a person claims that an article or document found on the person or on or in the premises concerned contains privileged information and refuses the inspection or removal of such article or document, the person executing the warrant or search must, if he or she is of the opinion that the article or document contains information that has a bearing on the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to attach and remove that article or document for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

17. Compensation for expenses

17. Any person appearing before the Commission in terms of section 15(1)(c) who is not in the public service, is entitled to receive from monies appropriated by law for such purpose, as witness fees, an amount equal to the amount which he or she would have received as witness fees had he or she been summoned to attend criminal proceedings in the High Court held at the place mentioned in the written notice in question.

18. Reports by Commission

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.

(2) In addition to the report contemplated in subsection (1), the Commission must, as soon as possible, submit to the National Assembly reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it: Provided that the Commission may, at any time, submit a report to the National Assembly if it deems it necessary.

(3) The Commission may, subject to the provisions of subsection (5), in the manner it deems fit, in writing, make known to any person, the head of the organisation or institution, or the executive authority of any national or

provincial department, any finding, point of view or recommendation in respect of a matter investigated by it.

(4) If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution or the executive authority of any national or provincial department concerned, the head of the organisation or institution or the executive authority of any national or provincial department concerned must within 60 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating whether his or her organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required.

(5) The findings of an investigation by the Commission must, when it deems it fit but as soon as possible, be made available to the complainant and any person implicated 10 thereby.

19. Staff of Commission

19(1) The Commission must appoint a suitably qualified and experienced person as chief executive officer of the Commission for the purpose of assisting the Commission in the performance of its financial, administrative and clerical functions.

(2) The chief executive officer –

(a) is appointed on such terms and conditions and receives such remuneration, allowances and other employment benefits as the Commission may determine; and

(b) must enter into a performance agreement with the Commission on acceptance of the appointment.

(3) The chief executive officer –

(a) must, subject to the approval of the Commission and the provisions of subsection (4), appoint such staff as may be reasonably necessary to assist him or her with the work incidental to the performance by the Commission of its functions;

(b) is the head of the administration of the Commission;

(c) is responsible for –

(i) the management of the affairs and operations of the Commission;

(ii) the formation and development of an efficient administration;

(iii) the organisation and management of, and administrative control over, all the members of staff appointed in terms of paragraph (a) and all the persons contemplated in subsection (5);

(iv) the maintenance of discipline in respect of the members of staff; and

(v) the carrying out of the decisions of the Commission, and is for those purposes accountable to the Commission and must report thereon to the Commission as often as may be required by the Commission; and

- (d) may exercise the powers and must perform the functions which the Commission may from time to time confer upon or assign to him or her in order to achieve the objects of the Commission, and is for those purposes accountable to the Commission.
- (4) The other members of staff contemplated in subsection (3)(a) are appointed on such terms and conditions and receive such remuneration, allowances and other employment benefits as the chief executive officer may, subject to the approval of the Commission, determine.
- (5) The Commission may in the exercise of its powers or the performance of its functions by or under the Constitution, this Act or any other law, for specific projects, enter into contracts for the services of persons having technical or specialised knowledge of any matter relating to the work of the Commission, and determine the remuneration, including reimbursement for travelling, subsistence and other expenses, of such persons.
- (6) A member of staff must exercise his or her powers and perform his or her functions –
 - (a) conferred upon him or her by or under this Act or any other law; and
 - (b) conferred upon or assigned to him or her by the Commission or the chief executive officer, as the case may be, subject to the general or special directions and instructions that the Commission may, from time to time, issue to him or her.

20. Accountability

20. The chief executive officer is, in accordance with section 36 of the Public Finance Management Act, the accounting officer of the Commission and is charged with the responsibilities referred to in that Act.

21. Legal proceedings against Commission

- 21(1) The Commission is a juristic person.
- (2) The State Liability Act, 1957 (Act No 20 of 1957), applies with the necessary changes, in respect of the Commission, and in such application a reference in that Act to “the Minister of the department concerned” must be construed as a reference to the Chairperson.
 - (3) No –
 - (a) commissioner;
 - (b) member of staff;
 - (c) person contemplated in section 19(5); or
 - (d) member of any committee, not being a commissioner, is liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to the National Assembly or made known in terms of this Act.

22. Offences and penalties

22. A person who –

- (a) without just cause refuses or fails to comply with a notice under section 15(1)(c) or refuses to take the oath or to make an affirmation at the request of the Commission in terms of section 15(1)(d) or refuses to answer any question put to him or her under section 15(1)(d) or refuses or fails to furnish particulars or information required from him or her under that section;
- (b) after having been sworn or having made an affirmation contemplated in section 15(1)(d) gives false evidence before the Commission on any matter, knowing such evidence to be false or not knowing or believing it to be true;
- (c) wilfully interrupts the proceedings at an investigation or misbehaves himself or herself in any manner in the place where such investigation is being held;
- (d) in connection with any investigation does anything which, if such investigation were proceedings in a court of law, would have constituted contempt of court;
- (e) anticipates any findings of the Commission regarding an investigation in a manner calculated to influence its proceedings or such findings;
- (f) does anything calculated improperly to influence the Commission in respect of any matter being or to be considered by the Commission in connection with an investigation;
- (g) contravenes any provision of section 4(3) or 15(9);
- (h) fails to afford the Commission the necessary assistance referred to in section 4(2) or 13(4); or
- (i) acts contrary to the authority of a warrant or, without being authorised thereto under section 16, enters or searches any premises or attaches any article or document or performs any act contemplated in section 16(3), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

23. Regulations

23(1) The Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to the members of staff:

- (a) (i) The requirements for discharge and disciplinary steps; and
- (ii) the procedure and manner of and criteria for evaluation, and the conditions or requirements for the purposes of promotion;
- (b) the powers, duties, conduct and discipline;
- (c) the creation of posts on the establishment of the Commission;
- (d) the training of members of staff, including financial assistance for such training;

- (e) a code of conduct to be complied with by members of staff;
 - (f) subject to section 21, the legal liability of any member of staff in respect of any act done in terms of this Act or any other law and the legal liability emanating from the use of official transport;
 - (g) the circumstances under which and the conditions and manner in which a member of staff may be found to be guilty of misconduct, or to be suffering from continued ill-health, or of incapacity to carry out his or her duties of office efficiently;
 - (h) the procedure for dealing with complaints and grievances of members of staff and the manner in which and time when or period wherein and person to whom documents in connection with requests and communications of such members of staff must be submitted;
 - (i) the membership or conditions of membership of a particular pension fund and the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a pension fund;
 - (j) the membership or conditions of membership of a particular medical aid scheme or medical aid society and the manner in and the conditions on which membership fees and other monies which are payable or owing by or in respect of members of staff or their dependants, to a medical aid scheme or medical aid society, may be recovered from the salaries of such members of staff and paid to such medical aid scheme or medical aid society;
 - (k) the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a medical aid scheme or medical aid society; and
 - (l) in general, any matter, other than a matter relating to the regulation of the terms and conditions of service of members of staff, which is not in conflict with the Constitution or this Act and which the Minister considers reasonably necessary or expedient to prescribe in order to achieve an efficient administration.
- (2) Any regulation made under this section –
- (a) relating to state expenditure, must be made in consultation with the Minister of Finance; and
 - (b) must, after publication thereof in the *Gazette*, be submitted to the National Assembly.

24. Repeal of law and transitional arrangements

24(1) The Human Rights Commission Act, 1994 (Act No 54 of 1994), is hereby repealed.

(2) Any person who, immediately before the commencement of this Act, has been appointed to a post in or additional to the fixed establishment of the South African Human Rights Commission or is otherwise dealt with in terms of the Human Rights Commission Act, 1994, is deemed to have been so appointed or dealt with under the corresponding provisions of this Act.

(3) Anything done, including any regulation made or instruction issued or other administrative measure taken or any contract entered into or any obligation incurred under the Human Rights Commission Act, 1994, which could be done under this Act and which was in force immediately before the commencement of this Act, is deemed to have been so done, issued, taken, entered into or incurred, as the case may be, under this Act until amended, withdrawn or repealed under this Act. Any reference in any law to the Human Rights Commission Act, 1994, must, unless the context otherwise indicates or if clearly inappropriate, be construed as a reference to this Act, or to the corresponding provision thereof, as the case may be.

25. Short title and commencement

25. This Act is called the South African Human Rights Commission Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

B.3 Internal rules and regulations

What follows below are some extracts from the South African Human Rights Commission's Employee Handbook regulating certain internal processes.

B.3.1 CODE OF CONDUCT

A. PURPOSE

A.1 All employees are expected to comply with the Code of Conduct of the SAHRC in order to give practical effect to the relevant constitutional provisions relating to the Commission.

A.2 The Code should act as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct & in their relationship with others. Compliance with the Code can be expected to enhance professionalism & help to ensure confidence in the Commission.

B. INTRODUCTION

B.1 The need exists to provide direction to employees with regard to their relationship with the legislature, political & executive office-bearers, other employees & the public & to indicate the spirit in which employees should perform their duties, what should be done to avoid conflicts of interests & what is expected of them in terms of their personal conduct in public & private life.

B.2 The Code of Conduct is not an exhaustive set of rules regulating standards of conduct. However, line managers, by virtue of their responsibility

for the efficient management & administration of their programmes, provinces or units & the maintenance of discipline, are, inter alia, under a duty to ensure that the conduct of their employees conform to the basic values & principles governing the Commission & the norms & standards prescribed by the Act. Line managers should also ensure that their staff is acquainted with these measures, & that they accept & abide by them.

B.3 The primary purpose of the Code is to promote exemplary conduct. Any employee who contravenes any provision of the Code of Conduct or fails to comply with any provision is guilty of misconduct, & will be subject to disciplinary action.

C. CODE OF CONDUCT

C.1 Relationship with the Legislature & the Executive

An employee-

- C.1.1 is faithful to the Republic & honours & abides by the Constitution in the execution of her or his daily tasks;
- C.1.2 puts the public interest first in the execution of her or his duties;
- C.1.3 loyally executes the policies of the Commission in the performance of her or his official duties;
- C.1.4 strives to be familiar with & abides by all statutory & other instructions applicable to her or his conduct & duties; &
- C.1.5 co-operates with public institutions established under legislation & the Constitution in executing the work of the Commission.

C.2 Relationship with the Public

An employee-

- C.2.1 promotes the unity & well-being of the South African nation in performing her or his official duties;
- C.2.2 will serve the public in an unbiased & impartial manner to create confidence in the Commission;
- C.2.3 is polite, helpful & reasonably accessible in her or his dealings with the public, at all times treating members of the public as customers who are entitled to receive high standards of service;
- C.2.4 has regard for the circumstances & concerns of the public in performing her or his official duties & in the making of decisions affecting them;
- C.2.5 is committed through timely service to the development & upliftment of all South Africans;
- C.2.6 does not unfairly discriminate against any member of the public on account of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language;
- C.2.7 does not abuse her or his position in the Commission to promote or prejudice the interest of any political party or interest group;

C.2.8 respects & protects every person's dignity & her or his rights as contained in the Constitution; &

C.2.9 recognizes the public's right of access to information, excluding information that is specifically protected by law.

C.3 Relationships Among Employees

Employees shall-

- C.3.1 co-operate fully with other employees to advance the Commissions interest;
- C.3.2 execute all reasonable instructions by persons officially assigned to give them, provided these are not contrary to the provisions of the Constitution &/or any other law;
- C.3.3 refrain from favouring relatives & friends in work-related activities & never abuse her or his authority or influences another employee, nor is influenced to abuse her or his authority;
- C.3.4 use the appropriate channels to air grievances or to direct representations;
- C.3.5 show commitment to the optimal development, motivation & utilization of her or his staff & the promotion of sound labour & interpersonal relations;
- C.3.6 deal fairly, professionally & equitably with other employees, irrespective of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language; &
- C.3.7 refrain from party political activities in the workplace.

C.4 Performance of Duties

An employee shall -

- C.4.1 strive to achieve the objectives of the commission cost-effectively & in the public's interest;
- C.4.2 be creative in thought & in the execution of duties, seek innovative ways to solve problems & enhance effectiveness & efficiency within the context of the law;
- C.4.3 be punctual in the execution of duties;
- C.4.4 execute duties in a professional & competent manner;
- C.4.5 not engage in any transaction or action that is in conflict with or infringes on the execution of official duties;
- C.4.6 recuse herself or himself from any official action or decision-making process which may result in improper personal gain, & this should be properly declared by the employee;
- C.4.7 accept the responsibility to avail herself or himself of ongoing training & self development throughout her or his career;
- C.4.8 be honest & accountable in dealing with the Commission's funds & use the Commissions property & other resources effectively, efficiently, & only for authorized official purposes;
- C.4.9 promote sound, efficient, effective, transparent & accountable administration;
- C.4.10 report to the appropriate authorities, fraud, corruption, nepotism, maladministration & any other act which constitutes an offence, or which is prejudicial to the Commissions interest;

C.4.11 give honest & impartial advice, based on all available relevant information, to higher authority when asked for assistance of this kind; &

C.4.12 honour the confidentiality of matters, documents & discussions, classified or implied as being confidential or secret.

C.5 Personal Conduct & Private Interests

An employee shall -

C.5.1 during official duties, dress & behave in a manner that enhances the reputation of the Commission;

C.5.2 not use alcoholic beverages or any other substance with an intoxicating effect during official business hours;

C.5.3 not use her or his official position to obtain private gifts or benefits during the performance of her or his official duties nor does she or he accept any gifts or benefits when offered unless declared & approved by the CEO, as these may be construed as bribes.

C.5.4 not use or disclose any official information for personal gain or the gain of others; &

C.5.5 not, without approval, undertake remunerative work outside her or his official duties or use office equipment for such work.

C.6 Communication with the Media

C.6.1 An employee shall direct all media enquiries to the Office of the CEO.

C.6.2 An employee, in her or his official capacity, shall not irresponsibly criticize the Commission at a public gathering or in a publication, or in any printed or other public media.

B.3.2 SAHRC POLICIES – DELEGATIONS & AUTHORISATION

1. PRINCIPLES

1.1 The CEO shall provide divisional managers with appropriate powers & authority to manage that division effectively & efficiently as recorded in the delegation of authority framework. In turn, a divisional manager may authorise delegations of authority to heads of department, business unit managers & certain other employees in the Division where necessary.

2. DELEGATIONS & AUTHORISATIONS

2.1 The CEO shall record a delegation or authorization in writing & may incorporate it in an employment contract for a Divisional Manager.

2.2 The delegation of a power by a CEO or Divisional Manager does not prevent her or him from exercising the power personally.

3. RESPONSIBILITIES

3.1 The CEO shall uphold the principles & measures set out in these policies & may not require or permit heads of business units or any other employee to engage in an activity or take a decision in breach of these Policies.

3.2 A Divisional Manager shall-

3.2.1 ensure that the employees within her or his division comply with these Policies, collective agreements & any other statutory obligations; &

3.2.2 deal immediately & effectively with any breach thereof.

3.3 The CEO or divisional manager shall exercise her or his powers, perform her or his duties & carry out her or his obligations under these Policies subject to the Labour Relations Act & the relevant collective agreements.

4. CONFLICT OF INTEREST IN EMPLOYMENT ACTS OR DECISIONS

4.1 Where a possible conflict of interest arises in the making of any decision relating to employment, the CEO or an employee to whom any power or duty has been delegated or assigned, shall perform the act or make the decision only after considering a recommendation of an independent panel consisting of at least two persons appointed by the CEO, unless the possible conflict of interest concerns the CEO, in which case the panel is appointed by the executive authority.

4.2 Where the CEO or the employee to whom a power or duty has been delegated or assigned, deviates from the panel's recommendations, she or he shall record the reasons for the deviation in writing.

4.3 The CEO or employee shall not accept or seek material recompense or compensation of any kind from an employee or a prospective employee in return for performing an act or making a decision relating to employment.

5. HANDLING OF OFFICIAL INFORMATION & DOCUMENTS

5.1 An employee shall not release official information to the public unless she or he has the necessary authority from the CEO.

B.3.3 SAHRC STAFF POLICIES – PERFORMANCE MONITORING, EVALUATION & REPORTING

PRINCIPLES

The Commission commits to a strong performance management culture that provides a target driven, motivating, & open work environment for all.

Effective performance management includes a high standard of performance planning, monitoring, evaluation & reporting.

1. PURPOSE

1.1 The primary objective of the Performance Monitoring, Evaluation & Reporting (PMER) Strategy, Policy & System is to provide the framework for the Commission to:

- 1.1.1 deliver on its mandate in an effective, efficient, economical & accountable manner;
- 1.1.2 achieve its strategic performance objectives in terms of its service delivery to stakeholders & within the framework of its legislative mandate;
- 1.1.3 align the performance management system from the most specific level of internal performance monitoring & evaluation to the highest level of external performance reporting; &
- 1.1.4 report regularly within stipulated times on progress to facilitate effective performance monitoring, evaluation & corrective action.

2. POLICY

2.1 Legislative Compliance

The PMER Policy seeks to ensure that the SAHRC:

- 2.1.1 has & maintains an effective, efficient & transparent system & internal controls regarding performance management, which describe & represent how the institution's processes of performance planning, monitoring, measurement, review & reporting will be conducted, organised & managed;
- 2.1.2 has effective performance reporting procedures for:
 - 2.1.2.1 internal monthly reporting,
 - 2.1.2.2 monthly financial reporting to National Treasury; &
 - 2.1.2.3 quarterly reporting to the Executive Authority to facilitate performance monitoring, evaluation & corrective action & to fairly present its performance against predetermined objectives in its annual report;
- 2.1.3 provides Parliament with full & regular reports concerning matters under their control as required by the South African Constitution.

2.2 Performance Planning & Budgeting

- 2.2.1 The performance planning documents will be drafted to comply with the requirements set out in the National Treasury regulations (2005) for the five-year Strategic Plan (section 5.2); & for the Annual Budget (section 6.2).
- 2.2.2 The format of the five-year Strategic Plan & the Annual Performance Plan will be guided by the National Treasury Framework for Managing Performance Information (2007) & the Framework for Strategic Plans & Annual Performance Plans (2010)

- 2.2.3 The five-year Strategic Plan will not be changed over the five-year period unless there are significant policy changes relating to the mandate or service delivery environment of the Commission.
 - 2.2.4 All operational plans, work plans & performance contracts will be aligned to the Annual Performance Plan which in turn will be aligned to the Strategic Plan.
- 2.3 Performance Monitoring & Evaluation
- 2.3.1 Performance will be monitored regularly at all levels as follows:
 - 2.3.1.1 Line managers monitor the performance of their team continuously;
 - 2.3.1.2 Business Unit Managers & Heads of Department monitor the performance of their programmes on at least a monthly basis;
 - 2.3.1.3 Divisional Managers monitors the performance of the organisation on a monthly basis; &
 - 2.3.1.4 Commissioners conduct a formal performance evaluation of the Commission on a quarterly basis.
 - 2.3.2 The Commission will ensure that time is allocated in formal meetings to critically & constructively engage on performance information in relation to the strategic plan & the annual performance plan.
 - 2.3.3 These engagements will not only inform managers on the status of implementation & reasons for deviations, but also provide a platform to put corrective measures in place where necessary.
 - 2.3.4 It is also important to note that these exercises will ultimately inform the strategic & annual planning processes within the Commission.
- 2.4 Performance Information
- 2.4.1 The Commission will produce & regularly review the performance information required to monitor & evaluate its performance against performance indicators & targets
 - 2.4.2 Performance information will be used to:
 - 2.4.2.1 plan;
 - 2.4.2.2 develop policies;
 - 2.4.2.3 monitor delivery against targets;
 - 2.4.2.4 measure the success or otherwise of the Commission's existing policies; responses & programmes;
 - 2.4.2.5 make informed decisions about the continuation, modification or abandonment of existing policies & programmes;
 - 2.4.2.6 hold programmes & individuals accountable; &
 - 2.4.2.7 contribute to/inform personnel development planning.
 - 2.4.3 The frequency, format, data source & responsibility relevant to producing performance information will be included in a Reporting Checklist that will be reviewed on an annual basis.
 - 2.4.4 The internal Reporting Cycle will include monthly submission & distribution deadlines & will be designed to ensure a cyclical flow of performance information throughout the Commission.
 - 2.4.5 Performance information should be readily available, & with proper systems in place, to produce performance reports within 15 days after the end of each month & consolidated organisation-wide performance reports by the 21st of each month which are consolidated into quarterly & annual reports.

- 2.4.6 Performance information will be assessed according to the following quality standards: consistency, relevance, measurability, validity, accuracy, timeliness & completeness.
- 2.5 Performance Reporting
 - 2.5.1 The Secretariat is accountable to the Commissioners as the executive authority of the Commission. Commissioners are in turn accountable to National Parliament & Treasury for performance planning, budgeting, monitoring & reporting.
 - 2.5.2 The secretariat provides to the Commissioners performance information that includes plans & budgets for the next year, implementation for the current year & reporting for the last years' performance.
 - 2.5.3 After consideration of this information, the Commission submits this information to the relevant bodies.

3. ROLES & RESPONSIBILITIES

- 3.1 Executive Authority/Commissioners
 - 3.1.1 The Commissioners are accountable to Parliament & are expected to provide Parliament with full & regular reports concerning matters under their control.
 - 3.1.2 They should:
 - 3.1.2.1 ensure that the Commission sets up appropriate performance information systems so that they are able to fulfil their accountability reporting responsibility.
 - 3.1.2.2 oversee such systems to ensure that they are functioning optimally & comply with the Performance Information Management Framework & other related standards & guidelines
 - 3.1.2.3 ensure that their performance contracts reflect these responsibilities.
- 3.2 Accounting Officer/CEO
 - 3.2.1 The CEO is accountable for establishing & maintaining systems to manage performance information.
 - 3.2.2 The performance agreement of the CEO should therefore reflect these responsibilities.
 - 3.2.3 The assistance of the Head of Strategic Support & Governance, the Chief Financial Officer & the Chief Operating Officer is critical to ensure appropriate capacity within the organisation & the management of performance information.
- 3.3 Divisional Managers & Line Management
 - 3.3.1 Line Managers are accountable for establishing & maintaining the performance information processes & systems within their area of responsibility.
 - 3.3.2 Management are accountable for the quality of the performance information & data & are responsible for using the audit finding & recommendations regarding identified weaknesses in data collection & storage systems to take corrective action.
 - 3.2.3 Their performance agreements should also reflect these responsibilities.
- 3.4 Staff

- 3.4.1 Officials are responsible for capturing, collating & verifying performance data related to their activities.
 - 3.4.2 The integrity of the institutions overall performance depends on how conscientiously they fulfil these responsibilities.
 - 3.4.3 Consequently, their performance agreements & assessments should deal explicitly with the quality aspect of their work.
- 3.5 Internal Audit
- 3.5.1 Internal Audit will assist management to:
 - 3.5.1.1 assess the quality of datasets;
 - 3.5.1.2 identify key risks with regards to the quality of information & weaknesses in data collection & storage; &
 - 3.5.1.3 include the identified risk areas in the internal audit plan for auditing the internal controls relating to data collection.

B.3.4 SAHRC STAFF POLICIES – PERFORMANCE MANAGEMENT & DEVELOPMENT

PRINCIPLES

The Commission is building a strong performance management culture that provides a target driven, motivating, & open work environment for all. The primary objective of the outcomes-based performance management system is to effectively integrate all elements of human resource management with the Commission's wider business to deliver on its vision, mission, & strategic objectives.

1. PURPOSE

The purpose of the Performance Management Policy is to:

- 1.1 ensure the Commission delivers on its mandate & strategic objectives;
- 1.2 develop & promote effective organisational performance;
- 1.3 promote & maintain a performance culture in the organisation at every level of operation;
- 1.4 provide a link between individual & team performance with the achievement of strategic performance objectives;
- 1.5 promote a common understanding of performance objectives & the role both managers & employees play in achieving them;
- 1.6 regulate the performance of all employees & recognise employee contributions to achieve sustainable improvements in organisational, team & individual performance;
- 1.7 develop constructive & open relationships between employees & their managers through continuing dialogue about the work done throughout the year;

- 1.8 ensure that employees are continuously aware of performance at all levels;
- 1.9 enable employees to develop the competencies required of them to perform their current jobs;
- 1.10 ensure the ongoing review of training & development progress;
- 1.11 provide opportunities for employees to express their work aspirations & concerns; &
- 1.12 provide a basis for rewarding people in relation to their contribution.

2. POLICY

The Commission's Performance Management Policy is to:

- 2.1 direct the Commission's resources towards fulfilling its mandate & achieving its strategic objectives;
- 2.2 align the Commission's performance objectives from the Strategic Plan, through the Annual Performance Plan & Operational Plans to the performance targets in individual Performance Agreements;
- 2.3 synchronise the Performance Management System & Cycle with the Commission's Performance Monitoring, Evaluation & Reporting System & Cycle;
- 2.4 review & revise annually the outputs, performance indicators, & targets to accommodate the changing needs of the organisation;
- 2.5 recognise actual performance against the annual targets in the Annual Performance Plan & Operational Plans throughout the Commission, i.e., at the organisational or divisional level, at the department or business unit level & at the individual level;
- 2.6 develop employees' competence to achieve the organisation's objectives;
- 2.7 ensure that the performance system is practical & easy to understand & implement; &
- 2.8 apply the policy consistently at all levels.
- 2.9 Individual Performance Management & Assessment
 - 2.9.1 Performance management at the individual level promotes a shared understanding of:
 - (a) the expected performance outputs & the targets associated with these;
 - (b) the achievement of those targets;
 - (c) performance monitoring & evaluation; &
 - (d) the value of identifying competency gaps to facilitate the mastery of required skills or knowledge.
 - 2.9.2 Performance assessment will be transparent & can be openly challenged & defended;
 - 2.9.3 Performance assessment is evidence based.

2.9.4 The final assessment ratings for the year will be moderated¹²² for fairness, consistency, & appropriate reward distribution across the organisation, in line with the assessment guidelines provided for the period under review.

2.10 Personal Development:

2.10.1 Personal development is monitored & managed using a personal development plan;

2.10.2 Ongoing coaching & mentoring is used to address gaps in the core competencies required in the job incumbent's position &

2.10.3 The minimum requirement is an informal discussion on PDP progress on a six-monthly basis.

2.11 Performance-Linked Rewards:

2.11.1 Performance-linked rewards in the form of incentive bonuses, &/ or salary increases &/or non-financial rewards may be issued:

- (a) annually after the performance stipulated in the performance agreement has been demonstrated at the appropriate level for the annual cycle; or
- (b) on a six-monthly basis for employees on formal development programmes, if they have successfully demonstrated the achievement of the level of performance required within the last six-month period of that programme.

2.11.2 Eligibility criteria for the annual performance bonuses & /or salary increases are that employees:

- (a) have been employed in the Commission for the full annual cycle;
- (b) excel in their contribution to the organisation's objectives;
- (c) are not on a development programme; &
- (d) are still in the employ of the Commission at the time that rewards are issued.

2.11.3 Eligibility criteria for six-monthly development programme performance-linked rewards are that the employee:

- (a) is on an approved development programme & has a signed personal development plan;
- (b) is assessed as competent in terms of the full set of performance standards stipulated in the development programme for the six-month period under review.

2.11.4 The value of the performance incentives will be determined annually depending on budget availability & the levels of performance achieved.

2.11.5 Employees who qualify for a salary increase but who have reached the ceiling of the salary band for their position will be paid a once-off performance bonus, equivalent to that increase.

2.12 Performance-Linked Sanctions:

2.12.1 Performance deficiencies will be managed by the line manager through corrective, progressive intervention.

122 This committee may be a sub-committee of the envisaged HR Committee. The Performance Management Committee conducts & co-ordinates the moderation process.

2.12.2 Persistent poor performance may result in re-deployment, demotion, or dismissal.

2.12.3 Sanctions will be levied against any line manager who does not follow the provisions of the Performance Management System.

2.13 Performance Management Disputes:

2.13.1 Where a dispute arises as to the interpretation of the content of the standard performance agreement for that position, the employee is entitled to take the matter to the next level of management within seven (7) days of the dispute arising, in the presence of the line manager, for a final interpretation.

2.13.2 Where the employee & line manager fail to agree on an annual performance rating:

- (a) the line manager must make a note to this effect on the Performance Assessment form submitted to the HR Department.
- (b) the Performance Management Committee will consider both the line manager & employee scores in the moderation exercise & provide guidelines for the re-evaluation & re-submission within seven (7) days by the line manager & employee.
- (c) In the event that the employee & the line manager have still failed to agree on the annual performance rating in the re-submitted evaluation, the Performance Management Committee will make note of this in their report. The Chief Operating Officer, Chief Financial Officer & Head of Strategic Support & Governance will make a final recommendation for consideration & a final decision by the CEO.

2.13.3 The grievance resolution procedure of the SAHRC will apply for any other disputes (allowing for reasonable response times), after which an employee should follow the provisions of the LRA.

2.14 Performance Management Responsibilities

2.14.1 Employees' responsibilities are to:

- (a) communicate to their line manager work-related aspirations & concerns;
- (b) deliver on their performance agreements;
- (c) deliver on their PDP;
- (d) prepare for, & participate in the performance contracting & evaluation meetings; &
- (e) submit valid evidence showing proof of achievement of set targets on each output contained in the performance agreement & PDP.

2.14.2 Line managers' responsibilities are to:

- (a) deliver on a performance agreement which comprises two components, namely:
 - I. their division, department or business unit's performance targets; &
 - II. generic Core Management Standards;
- (b) ensure that all new employees are orientated to the performance system in the first month of employment resulting in a:
 - I. signed performance agreement; &
 - II. PDP based on the initial competency evaluation;
- (c) manage their staff's performance on a daily basis;

- (d) address performance issues as & when these arise;
 - (e) develop standard performance agreements for each position that state the expected performance targets & performance indicators in measurable terms;
 - (f) ensure that the outputs & targets for each position are relevant to the grade level & job contents of the position in relation to the operational plan;
 - (g) ensure that the standard forms (Performance Agreement & Performance Evaluation Form, & PDPs) are used at all times during the planning & reviewing process;
 - (h) facilitate fair performance evaluation by ensuring that the performance information for their division, department or business unit is accurate, current & complete at all times;
 - (i) conduct formal performance reviews on a six-monthly basis, i.e. a mid-term evaluation in October & a year-end evaluation in April/May of each year;
 - (j) identify appropriate developmental interventions & training needs; &
 - (k) assess the effectiveness of the coaching, mentoring or training provided.
- 2.14.3 HR Department responsibilities are to:
- (a) advise, guide & train management & staff on the application of this policy & associated procedures;
 - (b) be the custodian of the Performance Management System, i.e., monitor, evaluate, review & revise the policy & procedures;
 - (c) keep accurate, current, & complete records for the Commission of all individual level performance management activities & outcomes.
- 2.14.4 Performance Management Committee responsibilities are to:
- (a) provide performance evaluation guidelines twice a year (mid-year & at year-end) based on the performance of the organisation, programmes & sub-programmes to provide the context to be considered by management & staff when preparing their evidence for their performance evaluation meetings;
 - (b) conduct an annual moderation exercise on the individual assessment ratings & make recommendations on the reward allocation for the year;
 - (c) provide guidance to employees & line managers on how to revisit the annual performance appraisal with a view to reaching consensus;
 - (d) review the performance indicators & targets in Performance Agreements & Performance Appraisal Forms against best practice criteria, e.g. SMART statements;
 - (e) monitor the progress & outcomes of all performance-linked disputes; &
 - (f) make recommendations to senior management concerning the improvement of the performance management system.
- 2.14.5 Senior Management responsibilities are to:
- (a) provide the performance monitoring, evaluation & reporting strategy & system within which performance at every level can be managed.

3. **Applicable/Referenced documents**

- 3.1 Performance Management Manual – Procedures
- 3.2 Performance Monitoring, Evaluation & Reporting Policy
- 3.3 Staff Development Policy
- 3.4 Strategic Plan
- 3.5 Annual Performance Plan
- 3.6 Operational Plans



15

THE TANZANIAN COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE

*Alphonse Paul Mbuya**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The United Republic of Tanzania, established on 26 April 1964, is a union of two states, the Republic of Tanganyika and the People’s Republic of Zanzibar. Prior to their union, they were independent states each with its own distinct history. The history of Tanganyika, in particular, shows that the creation in 2000 of the Commission for Human Rights and Good Governance (hereafter CHRAGG or the Commission) was a product of the struggle for the protection and promotion human rights in the country. Some notable aspects of that history are key to understanding the context of the government’s decision to establish the Commission.

Tanganyika was granted independence by Britain on 9 December 1961 via the Independence Constitution of 1961. Unlike the case in most other former British colonies, this constitution did not contain a bill of rights, as the idea had been rejected by the Tanganyika African National Union (TANU) led by Julius Nyerere. The government maintained that the rule of law could be upheld “[by] having independent judges administering justice free from political pressure”,¹ and not necessarily by guaranteeing basic human rights in the form of a bill of rights. The government’s stand on human rights was also manifested in a statement by the then vice president, Rashid Kawawa, who categorically described a bill of rights as

* Assistant Lecturer in Law, Moshi Co-operative University, Tanzania.

1 Proposals of the Tanganyika Government for a Republic, Government Paper No 1 (1962), p 6.

“as a luxury which merely invites conflicts”² and said the government’s priority was to bring development to the people. However, this position could not be sustained owing to the political and other changes that later took place in the country. Key amongst them was the union of Tanganyika and Zanzibar and demands for a stronger human rights system at the national level.

The state of union in 1964 necessitated the promulgation of the Interim Constitution of 1965. One of the demands made during the preparation of this constitution was for human rights to be protected in a bill of rights. The government’s response was the establishment in 1966 of the Permanent Commission of Inquiry (PCE),³ the first ombudsperson in Tanzania as well as in Africa. The Interim Constitution⁴ gave the President the power to appoint five commissioners with varying qualifications. The PCE was composed of a chairperson, commissioners, an executive secretary, directors, heads of divisions, administrative officers, investigation officers, and supporting staff.

The PCE dealt solely with maladministration in the public sector, yet though it did not have a specific human rights mandate, some of its investigations concerned matters with human rights implications. The PCE’s functions were to conduct investigations on all complaints relating to the abuse of office and maladministration after internal complaints-handling procedures in this regard had been exhausted, and to educate the public on the system of administration. One notable feature of the PCE is that it reported directly to the President, who then decided how to deal with its findings and recommendations. Despite these efforts by the government to address abuses of public office, the establishment of the PCE did not quell demands specifically for a bill of rights.

Following internal and external pressure, in 1984 a bill of rights was incorporated for the first time in the Constitution of the United Republic of Tanzania of 1977. However, its justiciability was suspended for a period of three years on the ground that the government needed some time “to put its house in order”. The Bill of Rights thus became justiciable in 1988, notwithstanding that the legislation prescribing the procedure for

2 L. Kalunga, “Human Rights and Preventive Detention Act, 1962 of the United Republic of Tanzania: Some Operative Aspects”, 11(14) *Eastern Africa Law Review* (1978-1981), p 281.

3 Permanent Commission of Inquiry Act 25 of 1966. This Act was repealed by the CHRRG Act of 2001.

4 Article 68.

enforcing the rights was enacted only in 1994.⁵ Be that as it may, the inclusion of a bill of rights in the Constitution was not an end in itself but rather a catalyst for further improvement in the country's human rights system.

In the 1990s there was a national call for reforming Tanzania's legal sector and human rights institutional framework. The government, with the World Bank's financial assistance, initiated the Financial and Legal Management Upgrading Project (FILMUP) in 1992. Under this project, the Legal Task Force was formed to undertake a broad review of the legal sector. It submitted its report to the government through the Minister for Justice and Constitutional Affairs in early 1996, and, among other things, recommended the establishment of a national human rights commission in Tanzania.

Subsequently, the government approved the proposal in its White Paper No 1 of 1998. The White Paper also invited the public to provide its views on the proposal under the coordination of the National Constitutional Review Committee. The public consultation process culminated in the Kisanga Report, which, inter alia, recommended the establishment of a national human rights commission.

However, before the Constitution was amended to establish a national human rights institution (NHRI), the government sought more views through a national consultative process with civil society which was coordinated by the United Nations Association of Tanzania (UNA). On the basis of the recommendations of a workshop held in January 1998, UNA and the Zanzibar Legal Service Centre (ZLSC) prepared a draft bill for the establishment of an independent national human rights commission. The full text of the bill was advertised in newspapers in various regions and discussed at a series of regional workshops. Later, at a meeting of stakeholders held in Dar es Salaam in September 1999 under the auspices of the Ministry of Justice and Constitutional Affairs, a revised draft of the proposed bill was produced and submitted to the government for the necessary action.⁶

In a parallel development during the fiftieth anniversary of the Universal Declaration of Human Rights in 1998, civil society organisations (CSOs) in Tanzania had used the opportunity to demand the establishment of a more elaborate and appropriate human rights institution

5 Basic Rights and Duties Enforcement Act, Chapter 3 of the Laws of Tanzania, Revised Edition 2002.

6 CHRAGG, *Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey (2002-20012)*, p 6.

in the country.⁷ All these efforts from within and outside the government bore fruit and prepared the way for the establishment of an NHRI with a clear and broad mandate to deal with human rights and matters of good governance.

2 Establishment and evolution of the CHRAGG

The CHRAGG was established in 2000 through the Thirteenth Amendment⁸ of the Constitution. It replaced the former PCE and assumed its functions; in fact, it inherited 2,237 matters, which it continued to handle when it began its operations. The CHRAGG officially became operational on 1 July 2001 on the coming into force of the CHRAGG Act.⁹ Its inauguration took place in March 2002 after the appointment of its commissioners by the President of the United Republic of Tanzania.

Despite the fact that the CHRAGG Act¹⁰ applies in Mainland Tanzania and Tanzania Zanzibar, the Commission initially operated only in Mainland Tanzania until such time as its geographical mandate was extended to Zanzibar through the Commission for Human Rights and Good Governance (Extension) Act.¹¹ After this law was passed, the Commission officially began to perform its functions in Zanzibar in 2006.

In carrying out its mandate, the Commission is guided by the vision of “a society in which human rights and principles of good governance are promoted and protected”. To achieve this vision, the Commission has the mission “to promote and protect human rights and good governance in collaboration with stakeholders”. The values core to its work are independent decision-making, integrity, teamwork, transparency, accountability, respect for human rights, impartiality, equality, and a results-orientation.

The Commission’s role is double-pronged in that it serves both as a human rights commission and an ombudsperson. Specifically, the Commission is an “independent” national oversight institution for the protection and promotion of human rights and good governance in the country.

7 CP Maina, “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*, Macmillan Education Namibia, Windhoek (2009), pp 363-364.

8 Act 3 of 2000.

9 Act 7 of 2001.

10 Section 3.

11 Act 12 of 2003.

3 The nature of the CHRAGG

3.1 Legal framework and administration

The Commission is established under Article 129 of the Constitution. However, Parliament is given power under the Constitution¹² to enact specific legislation for the purposes of setting out detailed provisions on matters such as its powers and procedures and the legal immunities of its commissioners. In this regard, Parliament in 2001 enacted the Commission for Human Rights and Good Governance Act¹³ to provide for the “powers, privileges and other matters of the Commission for Human Rights and Good Governance and related matters”.¹⁴ This legal basis conforms to the Paris Principles,¹⁵ which require the composition and mandate of a national institution to be set out in a constitution or legislation.¹⁶

Administratively, the Commission is part of the Ministry of Constitutional and Legal Affairs, along with other organs, namely the Judiciary of Tanzania; Office of the Attorney-General; National Prosecutions Office; Law Reform Commission; Judicial Service Commission; Office of the Solicitor General; Registration, Insolvency and Trusteeship Agency; Law School of Tanzania; and Institute of Judicial Administration – Lushoto.¹⁷

The Commission is composed of a chairperson, vice chairperson, five commissioners, and assistant commissioners whose number is not specified in the law. The Commission has a secretariat, which is responsible for managing day-to-day activities and is headed an executive secretary. The secretariat is composed of divisions, each of which is headed by a director; divisions in turn are made up of sections, which are overseen by heads of sections.

12 Article 131.

13 Act 7 of 2001.

14 See the long title of the Act.

15 The Paris Principles are contained in UN General Assembly Resolution 48/134 of 20 December 1993.

16 See Section I(2) of the Paris Principles.

17 See Ministry of Constitution and Legal Affairs Budget Speech, 2018/2019, available at <https://bit.ly/2XNO8Hb> (accessed 15 March 2019), p 5.

3.2 Independence and financial autonomy

3.2.1 Independence

In terms of the law, the Commission operates as an independent government department with commissioners who perform their functions without the direction or control of any person or authority except as provided for under the Constitution.¹⁸ According to the Commission's annual reports, the Commission has been functioning independently without any interference and influence from private persons or government authorities.

The appointment procedure for the commissioners is clearly laid down in regulations made under the CHRAGG Act. Their tenure is three years, renewable once. The procedure for removing a commissioner from office requires the formation of a special tribunal that enquires into the matter and advises the President accordingly. However, during the inquiry by the special tribunal, the President has the power to suspend the commissioner from duty. Commissioners are removable from office for inability to perform functions due to illness or to any other reason, or for behaviour inconsistent with the ethics of office or any law concerning the ethics of public leaders.

3.2.2 Financial autonomy

The Commission's sources of funds include money allocated by Parliament; money from any other source; or donations and grants from sources within or outside the country.¹⁹ The law rightly recognises that the government alone cannot sufficiently fund the operations and activities of the Commission.

Parliament allocates money to it through the Ministry of Constitutional and Legal Affairs, under which it is administratively placed. However, since the establishment of the Commission, there have been ongoing concerns about its funding in that it has not been receiving its full allocated budget and in some years that allocated budget has been dramatically reduced. This is evident in the available data below.

The Commission's approved budget for the year 2013/2014 was Tanzanian shillings (TZS) 3,795,802,000, but the amount actually received was TZS 1,549,114,131. Again, in 2014/2015 its allocated budget

18 Section 14 of the CHRAGG Act and Article 130(2) of the URT Constitution.

19 Section 29 of the CHRAGG Act.

was TZS 4,556,012,000, but the amount actually received was TZS 1,882,505,315. Surprisingly, for the 2016/2017 period the approved budget dropped to TZS 1,178,854,026; by 31 December 2016, the Commission had received only TZS 556,391,226. According to the Commission, the money allocated enables it only to pay salaries and cover the administrative costs for running its four offices.²⁰

In its annual reports, the Commission points to inadequate funding as one of its major challenges. For example, in its 2002/2003 annual report it said it needed adequate resources to be able to carry out its activities.²¹ During the 2015/2016 financial year, the money set aside for the Commission was TZS 5,005,949,000; however, until June 2016 it had received only TZS 1,241,701,100, which was 55 per cent of the approved amount. The money set aside for development purposes was TZS 382,122,000, but in actuality the Commission received only TZS 324,212,100, or 84 per cent of the approved amount.²²

In 2016 the Network of African Human Rights Institutions (NANHRI)²³ made the following observation about the weaknesses of the CHRAGG:

The Commission's [Commission] faces funding challenges to effectively handle its wide mandate of human rights and maladministration issues. Due to the wide mandate, the Commission is also faced with issues of understaffing and limited expertise in the diverse fields of human rights [and] maladministration. The wide mandate also requires high funding to effectively implement various mandates.²⁴

It is hence clear that government funding of the Commission is insufficient. Although there is no evidence that the independence of the Commission is affected by this situation, it is obvious that inadequate funding prevents it from executing its functions under the law effectively.

20 See Tanzania Human Rights Defenders Coalition, "Statement to the President of the United Republic of Tanzania on the Situation of the Commission for Human Rights and Good Governance since the Expiry of the Commissioners' Terms in January 2018", available at <https://bit.ly/2XokKrI> (accessed 17 February 2019).

21 CHRAGG, 2002/2003 Annual Report (2005), p 253.

22 CHRAGG, 2015/2016 Annual Report, p 115.

23 A Mapping Survey of the Complaint Handling Systems of African National Human Rights Institutions (2016), available at <https://bit.ly/2LEnVV8> (accessed 19 February 2019).

24 *Ibid*, p 37.

To fill this gap the Commission has benefited over the years from the financial and technical assistance of donors and partners. Selected cases of assistance are worth mentioning:

- Since 2001, the Denmark Development Cooperation Agency (DANIDA) has extended material support to the Commission in a number of ways. It financially supported the construction of the Commission's head office building in Dar es Salaam; furnished and equipped the office; facilitated capacity-building for commissioners and staff; and supported various studies.
- In 2006, research and public inquiries on child abuse in 11 regions of Tanzania Mainland were made possible thanks to financial assistance by UNICEF; in 2008, the same support was provided to cover all the regions of Zanzibar. Similarly, in 2011 UNICEF funded capacity-building to enable staff to monitor children's rights during inspections of detention facilities. At various times between 2007 and 2010, UNICEF provided support for the development of training manuals for, and delivery of training to, CSOs and community development officers regarding child-rights monitoring in Tanzania Mainland and Zanzibar.

Other bodies to have worked closely with the Commission on research projects and capacity-building include the following:

- The International Labour Organization (ILO) undertook capacity-building for staff and stakeholders on issues of child labour, and supported research and public enquiries on the same issues in Mwanza, Lindi and Dar es Salaam.
- The Office of the High Commissioner of Human Rights (OHCHR) and UN Tanzania supported training on investigation and human rights monitoring, in addition to which they built capacity on the role of stakeholders in the new Universal Periodic Review (UPR) process.
- The Canadian International Development Agency (CIDA) supported the preparation of a road-map, in the form of an outcome charter, for monitoring the implementation of UPR recommendations.
- ARTICLE 19, a non-governmental organisation (NGO) based in Nairobi, Kenya, also contributed to the preparation of the UPR report, while the African Policing Civilian Oversight Forum (APCOF) provided training to CHRAGG investigators.

The Commission has also enjoyed the assistance of other stakeholders, among them the Legal Sector Reform Programme (LSRP); Public International Law and Policy Group (PILPG); Public Service Reform Programme (PSRP); and Penal Reform International (PRI).²⁵

Overall, the Commission's budgetary situation shows that its financial autonomy is under threat.

25 CHRAGG, Ten Year Report; *ibid*, pp 76-79.

3.3 Appointment procedure, professional skills and knowledge

The application, selection and appointment of the commissioners of the CHRAGG are governed by the Constitution, the CHRAGG Act,²⁶ and the Commission for Human Rights and Good Governance (Appointments Procedure for Commissioners) Regulation.²⁷ The Constitution²⁸ establishes a Nomination Committee which is responsible for obtaining potential candidates for appointment. In the CHRAGG Act²⁹ and the Appointments Regulations,³⁰ this Committee is referred to as the “Appointments Committee”. The members of the Appointments Committee are the Chief Justice of the Court of Appeal; the Speaker of the National Assembly; the Chief Justice of Zanzibar; the Speaker of the House of Representatives [Zanzibar]; and the Deputy Attorney-General, who is the Secretary of the Committee.

As regards the process, a public advertisement inviting applications for the posts of chairperson, vice chairperson, commissioners or assistant commissioners is required to be made and should clearly state all the relevant qualifications. An applicant must be a person who has knowledge and experience in matters relating to law, government, politics, or social affairs; is morally upright and competent in human rights and good-governance matters; demonstrates a strong commitment to human rights; can write and communicate effectively in English and Kiswahili; possesses strong conflict-resolution skills; and can handle delicate social and political matters. In addition, he or she must be a person who can act fairly and expeditiously and be able to work in a team as well as independently. For the post of chairperson, the applicant must, in addition to the foregoing, be a person who qualifies for appointment as a judge of the High Court or the Court of Appeal.³¹

All applicants are subjected to a screening process after which a shortlist of candidates is prepared. Shortlisted candidates are published in newspapers and on television, with the public being invited to submit comments on their suitability – these comments may be considered by the Appointments Committee in its selection process. Thereafter, the shortlisted candidates are invited for an interview with the Appointments Committee.

26 Section 7.

27 Government Notice No 89 (11 May 2001).

28 Article 129(4).

29 Section 4.

30 Regulation 3.

31 For the detailed qualifications, see Regulation 4 of the Appointments Regulations.

After the interviews, the Appointments Committee is required to submit to the President not less than three candidates it recommends to be appointed as chairperson; not less than three candidates it recommends to be appointed as vice chairperson; at least five more than the number of candidates to be appointed as commissioners; and at least five more than the number of candidates to be appointed as assistant commissioners. Additionally, the chairperson and the vice chairperson must be appointed on the principle that they do not both come from the same part of the Union – that is, if the chairperson hails from Mainland Tanzania, the vice chairperson must come from Zanzibar, and vice versa.³² (However, since the establishment of the Commission, the chairperson has been a person from Mainland Tanzania).

Upon submission of the names to the President, he or she makes a formal appointment and swears in the appointed commissioners. The tenure of the commissioners, as noted, is three years, and they are eligible for reappointment for a second term of not more than three years.³³

There are two notable challenges in the appointment of commissioners. The first concerns lack of succession planning and the second, delays in making appointments. With regard to succession, the tenure of the commissioners is not staggered; as a result, the end of the tenure sees all of them leaving the employ of the Commission at the same time, a practice which is not healthy for the sustainability of the Commission's work. For example, in 2008 all the commissioners left the Commission after completing their terms. According to Chris Maina Peter,³⁴ the arrangement does not help to maintain the institutional memory of the Commission.

Secondly, there have been instances of delays in appointing commissioners. For example, when the tenure of the commissioners expired in January 2018, it was not until November of that year that new appointments were made. This was so despite the fact that the commissioners whose terms expired still qualified for reappointment for another term of three years and that some members who had applied for the job had been interviewed. This leadership vacuum rendered the Commission unable to perform many of its core functions effectively.

In terms of professional skills and knowledge, the Commission's approach has been to ensure the existence of a team with diverse

32 Section 7(1)(b) of the CHRAGG Act, and Article 129(2)(b) of the URT Constitution.

33 Section 8(1) of the CHRAGG Act.

34 See note 8.

professional skills and knowledge, especially given that human rights and good governance are cross-cutting matters and therefore not the sole preserve of lawyers. A look at the profile of the commissioners and executive secretary as it was in 2003 sheds more light on the Commission's mixture of expertise.

Table 6: Profile of CHRAGG commissioners and executive secretary, 2003

| Name | Position | Professional qualifications |
|-----------------------------------|---------------------|--|
| Judge Robert Kisanga | Chairperson | Law and economics |
| Ambassador Mohamed Ramia Abdiwawa | Vice Chairperson | Economics and international relations |
| Catherine H M Kivanda | Commissioner | Education and public administration |
| Stephen Z. Mwaduma | Commissioner | Education and political science |
| Jecha Salim Jecha | Commissioner | Political science, international relations and public administration |
| Robert V Makaramba | Commissioner | Law |
| Safia Masoud Khamis | Commissioner | Law |
| Gad J K Mjemmas | Executive Secretary | Law |

Source: CHRAGG 2002/2003 Annual Report, pp xi-xiv

In an attempt to tap into the potential of its members, the Commission has devised a system of “thematic areas”. Under this system, staff are assigned to focus on one or more of 16 different human rights thematic areas as a way of ensuring that responsibilities are efficiently met.³⁵

35 The 16 thematic areas are: indigenous peoples' rights; rights of persons with disabilities; women's rights, gender and children; anti-trafficking in persons, African Ombudsman and Mediators Association (AOMA), International Ombudsman Institute (IOI); business and human rights, International Criminal Court (ICC), Office of the High Commissioner for Human Rights (OHCHR); Freedom of Expression and Opinion and Media Rights; rights to education and health; employment matters, the East African Community (EAC) and the Southern Africa Economic Community (SADC); refugees, internally displaced persons, African Commission on Human and Peoples' Rights, NAHRI, African Court on Human and Peoples' Rights and GANHRI; relationship with criminal justice institutions, enforced disappearances, arbitrary and summary executions, relationship with police, prisons, prisoners' and remand prisoners' rights, acts of violence, and the death penalty; the elderly and pension funds; children's desk; right to water and environmental laws; right to own

3.4 Relationship with civil society, networking and partnership

The Commission has been working closely with CSOs, faith-based organisations (FBOs) and the media both in its promotional undertakings to raise awareness of human rights and good governance and in its monitoring of human rights violations and acts of poor governance. By 2012, it had entered into collaboration agreements with more than ten NGOs³⁶ for the purposes of delivering education on human rights and good governance to target groups in the country.

Some the major challenges that have limited the effectiveness of the Commission's working relationship with civil society are limited financial resources to implement joint projects; poor accountability and low levels of responsiveness in some quarters of civil society; limited technical capacity in executing programmes; and inadequate skills and capacity in dealing with human rights issues.³⁷

The Commission is a member of various international networks, including the Network of African Human Rights Institutions, International Ombudsman Institute (IOI), African Ombudsman Association, and International Network of National Human Rights Institutions, which operates under the International Coordinating Committee (ICC) of the Human Rights Council. It is also an affiliate member of the African Commission on Human and Peoples' Rights. According to the Commission, the networks are an important opportunity for accessing technical and financial support.

3.5 Accessibility

The head office of the Commission is in Dar es Salaam, in addition to which it has a branch office in Zanzibar and a zonal office in Wete on Pemba Island. In Mainland Tanzania, it has zonal offices in Mwanza, located alongside Lake Victoria, and Lindi, in the southern part of the country. The Commission is supposed to serve all 26 regions of Mainland Tanzania and the five regions of Zanzibar. As such, it plans to open

property and land rights; principles of accountability, the Prevention and Combating of Corruption Bureau (PCCB) and Ethics Secretariat; and rights of farmers and people working in rural areas. See CHRAGG 2015/2016 Annual Report, p 23.

36 The organisations are NOLA, Kivulini, KIKANGONET, LINGONET, KCSOF, HUREP-Trust, Network Against Female Genital Mutilation (NAFGEM), TAWG, Umoja wa Walemavu Zanzibar (UWZ) and ZLSC.

37 CHRAGG Ten-Year Report, p 79.

additional offices to make itself more accessible to the populace; it also intends to relocate its head office to Dodoma, after which the current head office in Dar es Salaam will become a branch office.

The Commission has a website, but though it provides contact information (physical and postal address, phone number, fax and email) for each of the offices, much of it is outdated. Even more importantly, there is little or no information on crucial issues such as strategic plans, legal instruments on the establishment and mandate of the Commission, the Commission's activities, participation in international events, human rights treaties, and developments in international human rights law.

4 Mandate of the Commission

The mandate of the CHRAGG is spelt out in the Constitution³⁸ and CHRGG Act.³⁹ Its overall function is to promote, protect and preserve human rights and uphold principles of good governance in the country. It discharges these functions through its promotional, protective, advisory and mediatory or conciliatory role. Moreover, the Commission's advisory role makes it the principal advisor to the government on matters of human rights and good governance.

With regard to other institutions with a similar mandate, the High Court is vested with original jurisdiction to receive and hear human rights petitions.⁴⁰ It also has jurisdiction to receive applications for judicial review of executive actions. A victim of human rights violations or administrative injustice can thus decide to take the matter before either the Commission or the Court. In this sense the two institutions have complementary rather than competing mandates. It is then up to the victim to decide which avenue would better address his or her problem after assessing the nature of the issue and its legal implications.

4.1 Commenting on existing and draft laws

One of the Commission's functions is to comment on existing and draft laws. The CHRAGG Act requires the Commission, inter alia, "[to] make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with

38 Article 130(1).

39 Section 6.

40 Section 4 of the Basic Rights and Duties Enforcement Act and Chapter 3 of the Laws of Tanzania, Revised Edition of 2002.

human rights norms and standards and with the principles of good governance”.⁴¹

On several occasions the Commission has identified and reviewed legislation and bills with a view to ensuring their compliance with human rights standards. These include the Prevention of Terrorism Act of 2002, the Persons with Disabilities Act of 2010, the Law of the Child Act of 2009, and the Constitutional Review Bill of 2011.⁴²

However, the Commission has noted that the “bad laws” in the Tanzanian legal framework identified by the Nyalali Commission in 1990 remain a barrier to the realisation of human rights in that they are outdated and do not conform to international human rights standards. Some of the “bad laws” are the Law of Marriage Act of 1971 and the Local Customary Laws Declaration Order No 4 of 1963.⁴³

4.2 Monitoring domestic human rights situations

The Commission conducts regular monitoring with a view to determining the human rights situation in the country at various levels. For the Commission, monitoring is an essential tool for enhancing protection of human rights and strengthening the role of the state in realising human rights and upholding principles of good governance. For example, in 2008 the United Nations Development Programme (UNDP) Country Office provided it with financial support to monitor the human rights situation in eight regions in Mainland Tanzania with the aim of gathering information on the causes of human rights violations and administrative injustices and proposing appropriate ways of addressing the identified challenges.⁴⁴

4.3 Monitoring and advising on compliance with international standards

The Commission is mandated to promote ratification of or accession to human rights treaties and to advise on harmonisation of national legislation with the treaties. It has a duty to monitor the state’s compliance with international human rights standards under the treaties to which the country is a party.⁴⁵ The Commission is also required to cooperate with

41 Section 6(1)(k).

42 CHRAGG Ten-Year Report, p 64.

43 *Ibid*, p 65.

44 CHRAGG Ten-Year Report, p 62.

45 Section 6(1)(l), CHRAGG Act.

global, regional and national institutions of other countries in the area of human rights and administrative justice.⁴⁶

As a result of this, the Commission has participated in the UPR of the Human Rights Council. In 2011 it submitted its report for the UPR and coordinated 46 CSOs in the country in preparing a joint report that was also submitted to the Council. The Commission, acting in collaboration with UPR stakeholders, has established that its role in ensuring the implementation of the UPR recommendations consists of coordination and monitoring of implementation of the recommendations; development of guidelines and follow-up strategies; mobilisation of resources; conducting awareness campaigns and advocacy programmes; seeking accreditation of local NGOs to participate in UPR activities at the United Nations level; convening meetings of thematic groups; assessing the level of implementation of the recommendations; and building the capacity of stakeholders on various UPR activities.

The Commission also facilitated the formation of four thematic groups as a strategy to lobby for the implementation of UPR recommendations. These groups relate to the administration of justice; economic, social and cultural rights; special groups; and freedom of expression. The roles of the groups were to devise an inclusive formula for lobbying for UPR recommendations; create and maintain strategic dialogue with the government on various aspects of implementation; undertake awareness-raising in the country on UPR issues; coordinate stakeholders in the country in UPR activities; build CSOs' technical capacity and enhance their understanding of international human rights systems; seek a common understanding with the government on UPR commitments; and translate UPR documents into Kiswahili.⁴⁷

In addition, the Commission has been interacting with regional and international human rights mechanisms at different levels, specifically with regard to monitoring the implementation of concluding observations and recommendations stemming from the mechanisms. A number of achievements are worth mentioning. These include successful lobbying that led, first, to Tanzania's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2008 and its domestication in 2010; and, secondly, the domestication of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of Children (ACRWC). In this regard, Mainland Tanzania passed the Law of the Child Act of 2009 and Zanzibar, the Children Act of 2011.

46 *Ibid*, section 6(1)(m).

47 CHRAGG Ten-Year Report, p 81.

The Commission was also at the forefront in implementing the Vienna Declaration and Plan of Action of 1993 and developing of the National Human Rights Action Plan, the implementation of which spanned from 2003-2017.⁴⁸ The Commission encouraged the government to accept the competence of the African Court on Human and Peoples' Rights, as a result of which individuals and local NGOs are now allowed to institute cases directly before the Court. It has also been pushing the government to ratify the Convention against Torture (CAT), efforts which are likely to bear fruit.⁴⁹

More importantly, the Commission has demonstrated its ability to prepare and submit shadow reports to treaty-monitoring bodies. For example, in January 2016 it submitted a shadow report on Tanzania's seventh and eighth report on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵⁰ The report highlighted what the government has been doing to realise women's rights but so too challenges that needed to be addressed, such as witch-killings, limited access to health care, and poor prison facilities for women.

4.4 Research, educating and training

One of the core functions of the Commission is to conduct research and educate the public on human rights and good governance issues.⁵¹ It has used various means to fulfil this function. For example, between 2002 and 2012 the Commission conducted awareness-raising activities through outreach programmes in all regions in Mainland Tanzania and Zanzibar. The programmes entailed holding public meetings in selected villages, primary and secondary schools and colleges; meetings were held in police stations and prison facilities too. The Commission prepared and disseminated educational communication materials such as fliers, posters, copies of the Bill of Rights, t-shirts with human rights messages, and newsletters.

To reach more people, it used print media, radio and television programmes, dramas and jingles. Similarly, as a strategy to enhance its publicity, the Commission participated in national and regional exhibitions such as Local Government Week, an international trade fair popularly known as *Saba*, a farmers' week called *Nane*, and the African Public Service Week Exhibition. At these exhibitions, the Commission

48 The formulation of a second National Human Rights Action Plan is under way.

49 CHRAGG Ten-Report, p 85.

50 Available at <https://bit.ly/2Xu4Wnz> (accessed 15 March 2019).

51 Article 130(1)(d) of the URT Constitution and section 6(1)(d) of the CHRAGG Act.

displayed its work, disseminated information documents, received complaints from the people, and provided legal advice.

With regard to networking, the Commission worked with the Ministry of Education and Vocational Training in developing the National Strategy on the Implementation of Human Rights Education in Tanzania (2011-2016)⁵² and establishing human rights clubs in schools and higher learning institutions as a strategy to advance human rights education and instil a human rights culture among students.⁵³

The Commission collaborated with a variety of stakeholders in raising awareness on human rights issues through seminars, training and workshops. The stakeholders included police and prison officers, the judiciary, the media (editors and journalists), Members of Parliament, ward executive officers, village executive officers, and CSOs. To ensure sustained impact, the Commission prepared training manuals on child-rights monitoring (2008) and human rights monitoring (2007), along with a toolkit for multi-agency monitoring of places of detention of children (2012), and guidelines for facilitators of human rights education. Other materials were entitled *Human Rights Education and Principles of Good Governance*, which was targeted at local government leadership at ward level, and *Simplified Procedures for Observance of Human Rights among Legal Sector Institutions* (written both in Kiswahili and English).

The Commission has encountered many challenges in its education and training programmes. Besides the problem of inadequate funds, which limits the number of people in rural areas to whom training and public education can be offered, trainees have had inadequate basic knowledge of human rights issues and the Commission has been unable to conduct a needs assessment or assess baseline knowledge levels among target groups before offering training.

Unfortunately, the website of the Commission, which could be an important tool in educating the public about its work, contains very limited information. Efforts should be made to address this problem, given that in the digital world the first point of reference for people searching for information is the Commission's website.

52 CHRAGG Ten-Year Report, p 69.

53 CHRAGG 2015/2016 Annual Report, p 78.

4.5 Receiving and dealing with complaints

There are three methods for submitting a complaint to the Commission: first, by way of a letter; secondly, by personal presentation of the complaint at any of the Commission's offices; and, thirdly, by sending a text message to the Commission's mobile number. A complainant can also use the Commission's email address to send further information in case a text message cannot provide it all. A person who uses the text-message method has an opportunity to follow up on the complaint by sending the word 'STATUS', followed by his or her assigned file number, to the Commission's mobile number.⁵⁴ The manner of receiving and dealing with complaints is detailed in the CHRAGG (Complaints Handling Procedure) Regulations.⁵⁵

4.6 Monitoring government compliance with advice and recommendations

Soon after its establishment, the Commission was confronted with a matter that set an important precedent as far as the implementation of its recommendations is concerned. A portion of land in the Serengeti District was registered under the law as Nyamuma Village. In 1994 a large part of this village was expropriated by the government to establish the Ikongoro Game Reserve. As a result of an order issued by the district commissioner, the villagers who were living on the remaining land of Nyamuma Village were forcefully evicted on 12 October 2001 after having been given four days' notice through a loudspeaker.

Following the incident, the Legal and Human Rights Centre (LHRC) – a local human rights NGO – and 135 affected villages filed a complaint with the CHRAGG against the district commissioner, the police officer in charge of the district, and the Attorney-General. The Commission carried out an investigation, interviewing 138 witnesses for the complainants and 20 for the respondents.

Its findings, released on 13 December 2004, were that the government had, by so acting, violated the rights of the complaints. The government was directed to resettle the complainants and pay compensation to the victims to the tune of more than TZS 800 million. But instead of implementing the recommendations, on 18 May 2005 the government, through the Attorney-General, responded in writing to the chairperson of

54 Commission's website at <https://bit.ly/2XLjNJv> (accessed 11 January 2019).

55 Government Notice No 144 (23 May 2003).

the Commission, stating that after conducting its own investigation, it had come to the conclusion that it had not violated any human rights violation during the evictions.

Acting under section 28(3)⁵⁶ of the CHRAGG Act, the Commission asked the LHRC to file a suit in the High Court on behalf of the affected villagers in order to claim resettlement and compensation. The LHRC filed the suit in the High Court (Main Registry) for enforcing the recommendation on compensation and a claim in the High Court (Land Division) for demanding resettlement of the villagers. Both cases were dismissed by the High Court on the ground that the Court had no jurisdiction to enforce the recommendations of the Commission.

In September 2006, the LHRC filed an appeal in the Court of Appeal (the highest court) to challenge the High Court's decision. On 2 January 2005 the Court of Appeal handed down its decision, stating that the High Court had erred in its failure to entertain the matter on merit and that it was proper of the LHRC to have filed the application to enforce the Commission's recommendation. The Court of Appeal ordered the matter to be referred back to the High Court. It also suggested that the Commission advise the Minister of Constitutional and Legal Affairs to make regulations on the procedure for enforcing the recommendation of the Commission.⁵⁷ Following the Court of Appeal's decision, the LHRC and the 135 affected villages filed a successful claim in the High Court.

More generally, the Commission has noted that most of its recommendations are complied with.⁵⁸

4.7 Limitations to the Commission's mandate

The broad mandate of the Commission is not without limitations. The Commission does not have the power to investigate the following: the decision of a judge or magistrate or of the court or tribunal; a matter which is pending before a court or tribunal; a matter involving the relations or dealings between the government and the government of any foreign state or an international organisation; a matter relating to the prerogative of mercy; any matter which is mentioned in any law; or a matter which the

56 The section empowers the Commission to bring an action before any court or recommend to any competent authority to bring such action against any department, authority or person that fails to implement its recommendation(s).

57 The regulations were drafted by the Commission and submitted to the Attorney-General for approval. To date, however, they have not been finalised.

58 CHRAGG Ten-Year Report.

President directs otherwise in accordance with the provisions of the Constitution.⁵⁹

With regard to the last point, the President has the power to give orders or directives to the Commission in respect of any matter or state of affair when the public interest so requires and the Commission is bound to comply.⁶⁰ In this sense, the President can direct the Commission not to investigate a particular matter if he or she is of the opinion that the investigation may pose a real or substantial risk to national defence or security. The direction must be in writing and accompanied by reasons.⁶¹ However, since the establishment of the Commission in 2000, the President has never issued such direction.

Moreover, the national Constitution⁶² and the Constitution of Zanzibar⁶³ grant immunity from criminal and civil proceedings to the President of the United Republic of Tanzania and the President of Zanzibar, respectively. By virtue of the CHRAGG Act,⁶⁴ the said constitutional provisions bind the Commission and therefore it has no power to investigate or institute proceedings against any of the two presidents.

With regard to investigations, there are also limitations. Generally, the Commission is required to deal with any complaint it receives. However, a complaint may be dismissed if the Commission can establish that it relates to an act which the complainant knew of for more than 24 months before submitting it to the Commission; that the alleged victim was supposed to exhaust other reasonably available legal procedures; that the complaint is frivolous and vexatious; or if the Commission does not have jurisdiction over the matter.⁶⁵ The 24-months limitation is further qualified by the law to the effect that the Commission is allowed to deal with the matter if the same would ensure that the ends of justice are met; the complaint is constitutionally significant; or the nature of the complaint and the situation of the complainant require the Commission to act.⁶⁶

59 See Articles 130(5) and 131(2) of the URT Constitution and section 16(2) of the CHRAGG Act.

60 Article 130(3) of the URT Constitution.

61 See section 16(3) of the CHRAGG Act.

62 Article 46.

63 [Revised Edition 2006], Article 36.

64 Section 16.

65 Section 22(4), CHRAGG Act.

66 *Ibid*, section 22(5).

5 Public accountability

The law requires the Commission to prepare an annual report within six months after the end of each financial year.⁶⁷ The report has to be submitted to the National Assembly through the Minister of Constitutional and Legal Affairs, and must contain a copy of the audited accounts of the Commission, together with the auditor's report on those accounts, a report on the operations of the Commission during that financial year, and such other information as the minister may require. The minister is responsible for causing the report to be laid before the National Assembly. The Commission also has to submit an annual report on Zanzibar matters to the minister responsible for human rights in Zanzibar.⁶⁸ The Commission is required, furthermore, to submit a copy of the annual report to the President of the United Republic of Tanzania and the President of Zanzibar.

With respect to laying the report before the National Assembly, the law is silent on important practical details. Before the CHRAGG Act was amended in 2004,⁶⁹ the minister was required to cause the report to be laid before the National Assembly for debate within three months after receiving the report or at the next meeting of the Assembly. The effect of the 2004 amendment was to remove the time for laying the report before the National Assembly and the purpose (i.e. debate) of laying it. However, the Constitution provides that the minister is required to table the report as soon as practicable.⁷⁰ So, currently, the law is silent on what follows after the report is laid before the National Assembly. This position has a serious implication because, for the report to be made public, it first must be laid before the National Assembly.

On the part of Zanzibar, by virtue of the CHRAGG (Extension) Act,⁷¹ once the Commission submits the annual report to the minister responsible for human rights, the minister is required to submit this to the House of Representatives for debate.⁷² Since the "debate" component of laying the report was removed in 2004 through an amendment to the CHRAGG Act, this may mean too that debate requirement in Zanzibar was also removed. However, this is on the condition that the said amendment was approved

67 See Article 131(3) of the URT Constitution and section 33 of the CHRAGG Act.

68 Section 3(1)(b) of the Commission for Human Rights and Good Governance (Extension) Act 12 of 2003.

69 The Written Laws (Miscellaneous Amendments) Act 3 of 2004.

70 Article 131(3).

71 *Ibid*, Section 3(1)(b) of the CHRAGG (Extension) Act.

72 *Ibid*.

by the House of Representatives in Zanzibar, because the CHRAGG (Extension) Act requires all amendments to the CHRAGG Act to be approved by the Zanzibar House of Representatives before they can apply to Zanzibar.⁷³

Stopping the report from being debated by the National Assembly means limiting the publicity of the Commission and making its importance less known to the people. Mindful of the paradox in human rights law that, while the state is the custodian of rights, it remains the principal violator of the same rights, one could argue that the amendment aimed to avoid shaming the government, given that in many instances it is the government that is involved in human rights violations and administrative injustices. In other words, no state would wish to wash its dirty linen in public.

Apart from the annual report, the Commission may, where circumstances so require, produce special and other reports.⁷⁴ A special report may be prepared by the Commission at any time when it is desirable to do so and submit the same to the minister. The report may cover any matter which is incidental to the performance of the functions of the Commission.⁷⁵ With regard to other reports, the law allows the Commission to prepare any report in the public interest or in the interest of any person or authority in relation to the general functions of the Commission; any matter which requires the attention of the President of the United Republic of Tanzania, the President of Zanzibar, the minister, the National Assembly or any other person or authority; or any specific case investigated by the Commission.⁷⁶ However, the law is silent on what follows, or should follow, after the submission of the reports – which, arguably, is a major flaw.

The Commission's relationship with stakeholders is a key aspect of its public accountability and a measure of its effectiveness: given the fact that human rights and good governance are cross-cutting matters, efforts to realise them must involve key stakeholders. The Commission has a good relationship with its many stakeholders, which include local government authorities, CSOs, government departments, the media, and regional and international human rights and ombudsman institutions and networks.⁷⁷

73 *Ibid*, section 4 of the CHRAGG (Extension) Act.

74 Article 131(4) of the URT Constitution.

75 Section 34 of the CHRAGG Act.

76 *Ibid*, section 35.

77 CHRAGG Ten-Year Report, p 94.

6 Concluding remarks

The Global Alliance of National Human Rights Institutions (GANHRI)⁷⁸ ranked the CHRAGG under its “A” institutions (that is, those fully compliant with the Paris Principles) following a review in November 2017. In previous reviews in 2003,⁷⁹ 2006 and 2011, the Commission also got an “A”. Given how the Commission functions in actuality, though, it is doubtful if the GANHRI’s assessment is realistic. What this chapter reveals is that the Commission has been inadequately funded by the government since its inception; conversely, without the technical and financial assistance of development partners, the Commission would have been unable to accomplish most of what it has achieved so far. There are, moreover, other challenges, such as delays in the appointment of Commissioners, an inadequate number of staff, limited staff capacity, and a limited number of zonal or branch offices, all of which are factors impairing the effectiveness of the Commission.

Despite these challenges, the Commission has been able to perform most of its functions with clear, positive results. For it to deliver effectively on its mandate, it must be adequately funded and given the resources it needs, including the required number of staff and branch offices. Furthermore, the reports of the Commission are an important means by which to make the work of the Commission known to the people. Efforts must be taken to ensure that the reports are accessible online and available in key libraries across the country.

The overall finding of this chapter that the Commission does not have all that it needs to deliver effectively on its mandate. However, going on the basis of what it has managed to achieve nonetheless since its establishment, it is clear that with more resources, support and capacity, the Commission would indeed be able to function more effectively.

78 See GANHRI, *Chart of the Status of National Institutions* as of 26 January 2018, available at <https://bit.ly/2XQ60Bp> (accessed 17 February 2019).

79 In 2003 the “A” status was given with a reservation because the insufficient documentation was submitted to confer “A” status. Other categories used by GANHRI are “B”, which indicates partial compliance with the Paris Principles, and “C”, which indicates non-compliance. Before 2008 there was another category “A(R)”, which meant accreditation with reservation and was given where insufficient information was submitted to grant “A” status. This classification is no longer used by GANHRI.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The constitutional framework of the Tanzanian Commission for Human Rights and Good Governance is laid down in Chapter 6, articles 129-131 of the Constitution. This states as follows:

CHAPTER SIX

PART I

THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE

(Articles 129-131)

129(1) There shall be a Commission to be known as the Commission for Human Rights and Good Governance whose functions shall be as prescribed in Article 130 of this Constitution.

(2) The Commission for Human Rights and Good Governance shall consist of the following Commissioners –

- (a) the Chairman, who shall be a person who possess qualifications for appointment as a Judge;
- (b) the Vice Chairman, who shall be appointed on the basis of principle if the Chairman hails from one part of the United Republic, that other person shall hail from the other part of the United Republic;
- (c) other Commissioners not exceeding five who shall be appointed from amongst persons who possess skills, experience and wide knowledge in matters relating to human rights, law, administration, political or social affairs; and
- (d) Assistant Commissioners.

(3) All Commissioners and the Assistant Commissioners shall be appointed by the President after consultation with the Nomination Committee.

(4) There shall be a Nomination Committee for purposes of this Article which shall consist of the following members -

- (a) the Chief Justice of the Court of Appeal;
- (b) the Speaker of the National Assembly;
- (c) the Chief Justice of Zanzibar;
- (d) the Speaker of the House of Representatives; and
- (e) the Deputy Attorney General, who shall be Secretary of this Committee.

(5) A Chairman, Vice Chairman and all other Commissioners, shall each hold office for a period of three years and may be re-appointed for another only one term of three years.

(6) For purposes of protection of Commissioners from conflict of interests, any person who is appointed as Commissioner of the Commission shall immediately abandon any office held by him in any political party or any other office which shall be mentioned on that behalf by a law enacted by the Parliament.

(7) A Commissioner or Assistant Commissioner may only be removed from office for reasons of failure to discharge his duties or due to illness or any other reason, or for reason of his misconduct that affects code of conduct for Commissioner.

(8) The Commission may discharge its duties notwithstanding that there is vacant office among the seats of Commissioners or that one of the members is absent.

130(1) Commission for Human Rights and Good Governance shall discharge the following functions –

- (a) to sensitise countrywide about preservation of human rights and duties to the public in accordance with the Constitution and the laws of the land;
- (b) to receive complaints in relation to violation of human rights in general;
- (c) to conduct inquiry on matters relating to infringement of human rights and violation of principles of good governance;
- (d) to conduct research, to impart or disseminate to the public countrywide education in respect of human rights and good governance;
- (e) if necessary, to institute proceedings in court in order to prevent violation of human rights or to restore a right that was caused by that infringement of human rights, or violation of principles of good governance;
- (f) inquire into the conduct of any person concerned and any institution concerned in relation to the ordinary performance of his duties or functions or abuse of the authority of his office; and
- (g) to advice the Government and other public Institutions and private sector in respect of human rights and good governance;
- (h) to take necessary action in order to promote and enhance conciliation and reconciliation among persons and various institutions appearing or being brought before the Commission.

(2) The Commission shall be an autonomous department, and without prejudice to other provisions of this Article, in exercising its powers in accordance with this Constitution, the Commission shall not be bound to comply with directive or orders of any person or any department of government or any opinion of any political party or of any public or private sector institution.

(3) The provisions of sub article (2) shall not be construed as restricting the President from giving directive or orders to the Commission, nor are they conferring a right to the Commission of not complying with directions or orders, if the President is satisfied that in respect of any matter or any state of affair, public interest so requires.

(4) The Commission shall conduct inquiry in accordance with the provisions of this Article and of any law enacted in that behalf by the Parliament, and shall inquire into the conduct of any person concerned or of any institution concerned whenever the President directs to conduct inquiry; likewise, except as the President directs the Commission not to conduct investigation, the Commission may conduct investigation whenever it deems necessary to inquire into the conduct of any person concerned, or any institution concerned with the provisions of this Article who is suspected or which is suspected to have abused the authority of his office, misused the authority of his office or the functions of such institution or for violation of human rights and principles of good governance.

(5) The Commission shall not have powers, either pursuant to this Article or any provisions of any law enacted by the Parliament for purposes of this Chapter of this Constitution to inquire into decision of any Judge, Magistrate or of the Court if such decision was made in the course of exercise of the powers of his office; likewise, the Commission shall not have a power to inquire into any decision made by any Tribunal established in accordance with a law if that decision was made in the discharge of its functions.

(6) The provisions of this Article shall apply to persons employed in the service of the Government of the United Republic and those of the Revolutionary Government of Zanzibar, employees and leaders of the political parties who deal with public affairs, members and employees of all Commissions of the Government of the United Republic and the Revolutionary Government of Zanzibar, parastatal organizations and other public or private organs, companies, community, associations, trustees or any other schemes, as prescribed by the law enacted by the Parliament; but these provisions shall not apply to the President or Leader of the Revolutionary Government of Zanzibar, except only in accordance with the provisions of Article 46 of this Constitution or Article 36 of the Constitution of Zanzibar, 1984.

131(1) Without prejudice to other provisions of this Article, the Parliament may enact a law pursuant to the provisions of this Chapter of this Constitution for purposes of prescribing provisions in respect of authority of the Commission, procedures for conducting its business and legal immunities for Commissioners and employees of the Commission which shall enable them to discharge their duties without legal constraints.

- (2) The Commission shall not inquire the following matters, for purposes of discharging its functions, that is to say –
- (a) any matter which is before a Court or any Tribunal;
 - (b) any matter concerning relationship or cooperation between the Government and a foreign Government of any country or international organization;
 - (c) any matter concerning powers of the President to award remission; or
 - (d) any other matter that is mentioned in any law.
- (3) In any financial year, the Commission shall prepare and submit to the Minister responsible for human rights a report in respect of –
- (a) activities of the Commission in the preceding year; and
 - (b) implementation of preservation of human rights in the United Republic, and, the Minister shall table before the National Assembly each report submitted to him as soon as practicable after receipt.
- (4) The provisions of sub article (3) shall not be construed as restricting the Commission from submitting any other report to any person or any other authority.

B.2 Legislative and regulatory instruments

The main piece of legislation is the Commission for Human Rights and Good Governance Act. In addition to this, there are other pieces of legislation that regulate different aspects of the Commission.

B.2.1 CHAPTER 391, THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE ACT

[PRINCIPAL LEGISLATION]

ARRANGEMENT OF SECTIONS

Section

PART I: PRELIMINARY PROVISIONS

- 1) Short title.
- 2) Construction.
- 3) Application.
- 4) Interpretation.

PART II: THE COMMISSION

- 5) Act to regulate the Commission.
- 6) Functions of the Commission.
- 7) Composition.
- 8) Tenure and conditions of service.
- 9) Members to relinquish certain offices.
- 10) Removal of Commissioners.
- 11) Executive Secretary and other staff of Commission.
- 12) Oaths.

PART III: STATUS, POWERS AND COMPETENCE OF COMMISSION

- 13) Commission a public department.
- 14) Independence of the Commission.
- 15) Powers of the Commission.
- 16) Limitations and restrictions on investigations.
- 17) Status of proceedings, decisions and witnesses.
- 18) Proceedings in public.
- 19) Secrecy and confidentiality.
- 20) Procedure for hearings.
- 21) Meetings and decisions of the Commission.

PART IV: COMPLAINTS AND INVESTIGATIONS

- 22) Manner of bringing complaints.
- 23) Representation.
- 24) Notice of complaint and opportunity to be heard.
- 25) Special powers of investigation.
- 26) Procedure in respect of investigation.
- 27) Evidence at investigations.
- 28) Procedure after investigations.

PART V: FINANCES, AUDIT AND REPORTS

- 29) Resources of the Commission.
- 30) Accountability.
- 31) Estimates of revenue and expenditure.
- 32) Audit.

- 33) Annual reports.
- 34) Special reports.
- 35) Other reports.

PART VI: MISCELLANEOUS PROVISIONS

- 36) Procedure, etc., of the Commission.
- 37) Offences and penalties.
- 38) Regulations.
- 39) [Repeal of Act No 25 of 1966.]
- 40) Transitional.

SCHEDULE

CHAPTER 391

THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE ACT

An Act to make provisions in pursuance of article 131 of the Constitution in relation to the functions, powers, privileges and other matters of the Commission for Human Rights and Good Governance and related matters.

[9th May, 2001]

[G.N. No 67 of 2001]

Acts Nos.

7 of 2001

16 of 2001

PART I: PRELIMINARY PROVISIONS (ss 1-4)

1. Short title

This Act may be cited as the Commission for Human Rights and Good Governance Act.

2. Construction

This Act shall be read together with the Constitution.

3. Application

This Act shall apply to Mainland Tanzania as well as to Tanzania Zanzibar.

4. Interpretation

In this Act, unless the context requires otherwise—

“**Appointments Committee**” means the committee established by Article 129(4) of the Constitution;

“**appropriate Authority**” includes any person or authority, whether corporate or otherwise, to whom or to which a recommendation is made by the Commission under the provisions of section 28;

“**Chairman**” means the Chairman of the Commission or, where appropriate, a Commissioner performing the functions of the Chairman;

“**Commission**” means Commission established by Article 129 of the Constitution;

“**Commissioner**” and “**Assistant Commissioner**” means a Chairman or other members of the Commission appointed in pursuance of Article 129 of the Constitution;

“**Constitution**” means the Constitution of the United Republic of Tanzania;

“**enquiry**” means an enquiry carried out by the Commission in pursuance of the provisions of this Act;

“**Government**” includes the Government of the United Republic, the Revolutionary Government of Zanzibar, or a local government discharging the power or authority of or on behalf of a local government authority;

“**High Court**” means the High Court of the United Republic or the High Court of Zanzibar;

“**member**” means a Commissioner or Assistant Commissioner;

“**Minister**” means the Minister for the time being responsible for human rights;

“**public officer**” or “**public office**” means every officer or department vested with or performing duties of a public nature, and includes an officer or department under the control of a local government authority, the Community or a public corporation or other authority by whatever name called.

PART II: THE COMMISSION (ss 5-12)

5. Act to regulate the Commission

The composition, functions, powers, privileges and other matters in relation to the Commission for Human Rights and Good Governance established by Article 129 of the Constitution shall be regulated by the provisions of this Act.

6. Functions of the Commission

- 1) The Commission shall carry out the following functions –
 - (a) to promote within the country the protection and the preservation of human rights and of duties to the society in accordance with the Constitution and the laws of the land;
 - (b) to receive allegations and complaints in the violation of human rights generally;
 - (c) to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice;
 - (d) to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues;
 - (e) when necessary, to institute proceedings in court designed to terminate activities involving the violation of human rights or redress the right or rights so violated, or the contravention of the principles of administrative justice;
 - (f) to investigate the conduct of any person to whom or any institution to which the provisions of this section apply in the ordinary course of the exercise of the functions of his office or discharge of functions in excess of authority;
 - (g) to investigate or inquire into complaints concerning practices or actions by persons holding office in the service of the government, public authorities or other public bodies, including private institutions and private individuals where those complaints allege abuse of power, injustice, unfair treatment of any person, whether complainant or not, in the exercise of their official duties;
 - (h) to visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and making recommendations to redress the existing problems in accordance with the provisions of this Act;
 - (i) to take steps to secure the remedying, correction, reversal or cessation of instances referred to paragraphs (e), (f), (g) or (h) through fair, proper and effective means, including the institution of legal proceedings;
 - (j) to provide advice to the government and to other public organs and private sector institutions on specific issues relating to human rights and administrative justice;

- (k) to make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with human rights norms and standards and with the principles of good governance;
 - (l) to promote ratification of or accession to treaties or conventions on human rights, harmonization of national legislation and monitor and assess compliance, within the United Republic, by the government and other persons, with human rights standards provided for in treaties or conventions or under customary international law to which the United Republic has obligations;
 - (m) under the auspices of the government, to cooperate with agencies of the United Nations, the OAU, the Commonwealth and other bilateral, multilateral or regional and national institutions of other countries which are competent in the areas of protection and promotion of human rights and administrative justice;
 - (n) to take such measures as may be appropriate for the promotion and development of mediation and reconciliation amongst the various persons and institutions who come or are brought before the Commission;
 - (o) to perform such other functions as may be provided for by any other written law.
- 2) Without prejudice to provisions of subsection (1), the Commission shall, generally in relation to members of the public, use Commission's good office to promote, protect and where necessary to provide assistance to persons whose human rights have or are in imminent danger of being violated.

7. Composition

- 1) The Commission shall consist of-
 - (a) a Chairman, who shall be a person qualified for appointment as Judge of the High Court or a Judge of the Court of Appeal;
 - (b) a Vice-Chairman who shall be appointed on the basis of the principle that where the Chairman hails from one part of the United Republic then the Vice-Chairman shall be a person who hails from the other part of the Union;
 - (c) not more than five other Commissioners appointed from amongst persons who have knowledge, experience and a considerable degree of involvement in matters relating to human rights, law, government, politics or social affairs;
 - (d) Assistant Commissioners.
- 2) The President shall, acting upon recommendations of the Appointments Committee, appoint the Commissioners and Assistant Commissioners.
- 3) A person shall be qualified for appointment as a Commissioner or Assistant Commissioner who is of the highest reputation and is known for his high morality, integrity, impartiality and competence in matters of human rights and good governance.

- 4) The Minister shall make regulations providing for the procedure to be followed by the Appointment Committee and involvement of the civil society in scouting the candidates for appointment to be the Commissioners and Assistant Commissioners.

8. Tenure and conditions of service

- 1) A Commissioner shall hold office for a period of three years, and shall be eligible for reappointment for no more than a second term not exceeding three years.
- 2) There shall be paid to the Commissioners such salaries or remuneration as shall be determined by the President, and those salaries shall be charged on the consolidated fund.
- 3) A Commissioner may resign his office upon giving one month's notice in writing to the President.
- 4) The office of a Commissioner shall become vacant –
 - (a) upon the Commissioner's resignation or removal from office;
 - (b) if the Commissioner is declared bankrupt;
 - (c) upon the Commissioner's retirement or death.

9. Members to relinquish certain offices

- 1) In addition to any office held in any political party which in accordance with Article 129(6) of the Constitution a person appointed a Commissioner is required to vacate, on appointment as a Commissioner a person holding any of the following offices shall forthwith vacate that office, that is to say –
 - (a) the office of member of Parliament;
 - (b) the office of member of the Zanzibar House of Representatives;
 - (c) the office of Speaker of the National Assembly;
 - (d) the office of Speaker of the Zanzibar House of Representative;
 - (e) the office of Judge or other judicial office;
 - (f) any office in the Public Service;
 - (g) the office of member of an Electoral Commission;
 - (h) the office of member of a local government authority and any office in the service of any local government authority;
 - (i) any other public office.
- 2) Where a person has been appointed a Commissioner and has in accordance with subsection (1) vacated any of the offices specified in it, other than an office the holder of which is required by any written law to be elected by any body of persons, that person may, upon his ceasing to be a Commissioner, be reappointed to that office by the appropriate appointing authority and, where that person is so reappointed, his service in that office subsequent to the reappointment shall, and notwithstanding the provisions of any written law or of any contract of service affecting

that person to the contrary, be deemed to be continuous with his service in that office prior to his appointment as a Commissioner.

- 3) Where a person is reappointed to any office in accordance with subsection (2) and his service in that office subsequent to that reappointment is deemed to be continuous with his service in it prior to his having vacated it under subsection (1) –
 - (a) the period between his having vacated the office and his reappointment to it shall not be taken into account for the purposes of computing the amount of any pension gratuity or other retirement benefit payable to him upon his retirement from that office;
 - (b) the period during which he actually served as a Commissioner shall be taken into account for the purposes of computing the length of service in that office for determining whether that person is eligible for any pension, gratuity or other retirement benefit as if that person had not vacated the office during that period.
- 4) In this section –

“appropriate appointing authority” in relation to any office means that person or authority having the power to make appointments to that office;

“civil service office” and “judicial officer” have the meaning ascribed to those terms in the Public Service Act and the Judicial Service Act, respectively.

10. Removal of Commissioners

- 1) Subject to this Act, a Commissioner may be removed from office only for inability to perform the functions of his office, due to illness or to any other reason, or for misbehaviour inconsistent with the ethics of office or any law concerning ethics of public leaders.
- 2) Where the question of the removal of a Commissioner arises and the President is satisfied that the matter be investigated –
 - (a) he shall appoint a special tribunal consisting of a chairman and not less than two other members, the Chairman and at least half of the other members of the tribunal being persons who are Judges of the High Court or of the Court of Appeal of Tanzania;
 - (b) the special tribunal shall investigate the matter and within 90 days from the date on which the special tribunal was formed, make a report to the President on the whole matter and advise on whether or not the Commissioner concerned should be removed from office in accordance with the provisions of this section;
 - (c) if the special tribunal advises the President that the Commissioner concerned be removed from office on any of the grounds stipulated in subsection (1), then the President shall remove that Commissioner from office.
- 3) Where the question of removing a Commissioner from office has been referred to the special tribunal pursuant to this section, the President may suspend the Commissioner concerned from duty, and he may at any time rescind the suspension and in any case such suspension shall lapse if the

special tribunal advises the President not to remove the Commissioner concerned.

11. Executive Secretary and other staff of Commission

- 1) There shall be the Executive Secretary of the Commission who shall be appointed by the President after consultation with the Commission from among persons holding or who have held senior position in the service of the Government.
- 2) A person may not be appointed Executive Secretary of the Commission unless he holds a degree in law from a university whose awards in law are recognised by the Government and has had experience in public administration or management since graduation, practised law or been engaged in teaching or research in law, for a period of not less than five years.
- 3) The Executive Secretary shall be the chief executive of the Commission and, subject to the general direction and control of the Commission, shall –
 - (a) be responsible for the carrying out of the policy decisions of the Commission and the day to day administration and management of the affairs of the Commission;
 - (b) be responsible for arranging the business for and the recording and keeping of the minutes of all decisions and proceedings of the Commission at its meetings; and
 - (c) perform any other function assigned to him by the Commission or by or under any written law.
- 4) The Secretary shall, unless in any particular case the Commission otherwise directs in writing, attend all meetings of the Commission but shall have no vote on any matter falling to be decided by the Commission at any such meeting.
- 5) There shall be such other officers and staff of the Commission as may be appointed by the Commission under this section.
- 6) The Commission shall, acting in consultation with the Civil Service Department, be responsible for the appointment, control and discipline of its officers and employees and may, in accordance with the provisions of the Public Service Act terminate appointments.
- 7) Public officers may, at the request of the Commission, be seconded to the service of the Commission.

12. Oaths

- 1) Every Commissioner and the Secretary of the Commission shall, before entering upon the duties of his office, take and subscribe the oath of allegiance and the oath for the due discharge of the functions of his office set out in the Schedule to this Act, which oaths shall be administered by the President.

- 2) Every person appointed to an office under the Commission shall, before entering upon the duties of his office, take and subscribe the oath of secrecy set out in the Schedule to this Act, which oath shall be administered by a Commissioner.

PART III: STATUS, POWERS AND COMPETENCE OF COMMISSION (ss 13-21)

13. Commission a public department

- 1) Subject to the provisions of the Constitution and of this Act, the provisions of any law relating to public departments shall apply to the Commission, and the office of the Commission and any office established under the Commission shall be public offices in the service of the United Republic.
- 2) For the purposes of the better performance of its functions, the Commission may, where it considers it necessary or appropriate, establish branch offices away from its headquarters in such geographical areas as it may deem necessary and may establish divisions or departments and assign to them particular responsibilities in respect of the functions of the Commission.
- 3) There shall be an Assistant Commissioner or a person appointed by the Commission at every branch office to be its representative.
- 4) An assistant Commissioner or a representative of the Commission shall –
 - (a) receive complaints from the public;
 - (b) make such on-the-spot investigation as may be necessary; and
 - (c) discharge any other duties relating to the functions of the Commission as may be assigned to him by the Commission.

14. Independence of the Commission

- 1) Except as provided by the Constitution, the Commission shall be an independent department and the Commissioners shall not, in the performance of their functions, be subject to the direction or control of any person or authority.
- 2) The Government, public authorities and other bodies shall provide such assistance and co-operation as may be required to ensure the effectiveness of the provisions of subsection (1).

15. Powers of the Commission

- 1) The Commission shall have power to investigate any human rights abuses or maladministration –
 - (a) on its own initiative; or
 - (b) on receipt of a complaint or allegation under this Act by–
 - (i) an aggrieved person acting in such person's own interest;

- (ii) an association acting in the interests of its members; or
 - (iii) a person acting in the interest of a group or class of persons.
- 2) After conducting an investigation under this Act, the Commission shall have power to –
 - (a) where appropriate, promote negotiation and compromise between the parties concerned; or
 - (b) causing the complaint and the findings of the Commission to be reported to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out by the Commissioner; or
 - (c) recommending to the relevant person or authority such measures, or requiring that authority to take such measures, as will provide an effective settlement, remedy or redress.
 - 3) Notwithstanding the provisions of subsection 2 of this section, for the purposes of performing its functions under the Constitution and this Act, the Commission may bring an action before any court and may seek any remedy which may be available from that court.

16. Limitations and restrictions on investigations

- 1) The provisions of article 46 of the Constitution of the United Republic of Tanzania and article 36 of the Constitution of Zanzibar shall bind the Commission, and the Commission shall have no power to investigate or institute any proceedings against the President or the President of Zanzibar.
- 2) The Commission shall not investigate –
 - (a) a matter which is pending before a court or other judicial tribunal;
 - (b) a matter involving the relations or dealings between the Government and the Government of any foreign State or an international organisation;
 - (c) a matter relating to the prerogative of mercy;
 - (d) a matter on which the President directs otherwise in accordance with the provisions of the Constitution.
- 3) Where the President is minded to direct that the Commission shall not carry out an investigation in accordance with the provisions of the Constitution or this Act, he shall so direct in writing and furnish the Commission with the reasons for such direction and the Commission shall within 30 days of the decision inform the complainant, if any, of the decision and the reasons for it.
- 4) Any such direction shall be made in accordance with the provisions of article 130 of the Constitution if the President considers that there is a real and substantial risk that an investigation would prejudice matters of national defence or security.
- 5) Nothing in this section shall be construed as precluding any person from otherwise seeking redress in the High Court under the provisions of article 30 (3) of the Constitution.

17. Status of proceedings, decisions and witnesses

- 1) The decisions of the Commission shall have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.
- 2) The proceedings of the Commission and its decisions and any information, document or thing produced by any person in relation to an inquiry under this Act shall be privileged in the same manner as the proceedings and other matters before a court.
- 3) No inquiry, proceeding or process of the Commission shall be invalid on the grounds only of any error or irregularity of form and, except on the ground of lack of jurisdiction, no inquiry, proceeding, process or report of the Commission shall be liable to be challenged, reviewed, quashed or called in question in any court.
- 4) No proceeding shall lie against the Commissioners, officers and employees of the Commission and other persons authorised by the Commission for anything done or omitted to be done in the exercise of their functions under this Act unless it is shown that the act or omission was done or omitted in bad faith.
- 5) No Commissioner or any other person referred to in subsection (4) shall be called to give evidence in any court or in any other proceedings of a judicial nature in respect of the proceedings in any inquiry or anything coming to his knowledge in the exercise of his functions under this Act.
- 6) Nothing in subsection (4) or (5) shall apply in the case of any proceedings for an offence under the National Security Act, for an offence contrary to sections 102, 103, 106, 108 or 109 of the Penal Code in relation to an inquiry, or for an offence contrary to section 37 of this Act.
- 7) A witness before the Commission shall be entitled to the same privileges as a witness before the High Court.

18. Proceedings in public

Subject to section 19, proceedings during an inquiry before the Commission shall be conducted in public.

19. Secrecy and confidentiality

- 1) The Commission may, on its own initiative or on an application, take appropriate measures and make any order it considers necessary to ensure the confidentiality of an inquiry or any part of it if, having considered all available alternative measures, the Commission is satisfied that –
 - (a) there is a real and substantial risk that –
 - (i) the disclosure would prejudice the national security or sovereignty of the State, its defence or international relations;

- (ii) a confidential source of information in relation to the inquiry or to the enforcement of the criminal law would be identified or compromised; or
 - (iii) the fairness of the inquiry is such that the need to prevent disclosure outweighs the interests of having the inquiry or that part of the inquiry conducted in public;
- (b) there is a likelihood that the life, liberty or physical safety of a person or the interests of vulnerable persons, including children will be endangered.
- 2) The Commission may prohibit or restrict the publication of any evidence given before it or the identity of any person if it considers that the reasons for ordering such a prohibition or restriction outweigh the public interest in the publication of that evidence or identity.
 - 3) Every member of the Commission and every person employed by the Commission shall take reasonable precautions to avoid disclosing any matter the disclosure of which is prohibited or restricted by the Commission under subsection (1) or subsection (2).

20. Procedure for hearings

- 1) The Commission shall have power to determine its own procedure for the conduct of hearings of matters brought before it but may otherwise be guided by such procedures as may be prescribed by regulations made under this Act.
- 2) In conducting an inquiry, the Commission shall observe the rules of natural justice but shall not be bound by any legal or technical rules of evidence applicable to proceedings before the courts; and all proceedings shall be conducted informally and expeditiously.
- 3) In proceedings under this Act, a decision of the majority of the members present at a meeting, if the members present constitute a quorum, shall be the decision of the Commission; and in the event of any equality of votes on any matter, the member presiding shall have a casting vote in addition to his deliberative vote.

21. Meetings and decisions of the Commission

- 1) The meetings of the Commission shall be presided over by the Chairman or in his absence by the Vice-Chairman, and in the absence of both, the Commissioners present shall appoint one of their number to preside over the meeting.
- 2) The quorum for a meeting of the Commission shall be formed by the presence of more than half of the members of the Commission other than Assistant Commissioners, and where the meeting is not constituted for lack of required number of Commissioners, an Assistant Commissioner may be invited to attend for purpose of a quorum.
- 3) A meeting of the Commission for the purpose of conducting an inquiry shall comprise a Commissioner and not less than two senior officers of the Commission as may be appointed by the Commission on the basis of

their knowledge, experience and competence to deal with a given subject matter of an enquiry.

- 4) A meeting of the Commission for the purpose of conducting an enquiry shall be duly constituted if it comprises an Assistant Commissioner and two senior officers.

PART IV: COMPLAINTS AND INVESTIGATIONS (ss 22-28)

22. Manner of bringing complaints

- 1) All complaints to the Commission may be made orally or in writing and shall be recorded in such form as may be prescribed by the Commission.
- 2) Subject to any relevant law where a letter written by –
 - (a) a person in custody; or
 - (b) a patient in a hospital,

is addressed to the Commission, it shall be immediately forwarded unaltered to the Commission by the person to whom it is entrusted.

- 3) A complaint under this Act may be made by any individual or a body of persons whether corporate or unincorporated
- 4) The Commission shall deal with every complaint brought before it unless the Commission is satisfied that –
 - (a) the complaint relates to a decision, recommendation, act or omission of which the complainant has had knowledge for more than 24 months before the complaint is received by the Commission; or
 - (b) the alleged victim of the act or acts complained of ought to exhaust grievance or other procedures prescribed by law otherwise reasonably available;
 - (c) the complaint is frivolous, vexatious or made in bad faith; or
 - (d) the complaint is not within the jurisdiction of the Commission.
- 5) The Commission may deal with any complaint which it would otherwise reject for the reason that the complainant has had knowledge for more than 24 months before the complaint is received by the Commission if –
 - (a) for the purposes of ensuring that ends of justice are met, it is otherwise worth to deal with the complaint than rejecting it; or
 - (b) a complaint is of a constitutional importance; or
 - (c) considering the nature of the complaint and circumstances surrounding the complainant, the Commission is satisfied that it should deal with such complaint.

23. Representation

- 1) A complainant, an interested party and any other person whose conduct or act is likely to be the subject of adverse comment by the Commission

may be represented by an advocate or by any other person suitable to represent him.

- 2) Where a person by whom a complaint might have been made under this Act has died or is, for any sufficient reason, unable to act for himself, the complaint may be made by his personal representative or by a member of his family or other person suitable to represent him.

24. Notice of complaint and opportunity to be heard

After a complaint has been received by the Commission, the Commission shall notify the person against whom the complaint is made and, at the discretion of the Commission, any other interested party and shall give sufficient opportunity to all parties to whom notice has been given to appear, in person or through a representative, at the inquiry and to present evidence and make representations.

25. Special powers of investigation

The Commission shall for the purposes of performing its functions under the Act, have power –

- (a) to issue summons or other orders requiring the attendance of any person before it and the production of any document, record or anything relevant to an investigation or inquiry which may be in the possession or control of that person;
- (b) to examine, on oath or affirmation, any person in respect of any matter under investigation;
- (c) to require any person to provide any information within his knowledge relevant to an investigation or enquiry;
- (d) to make interim orders to preserve, pending determination of the matters at issue the existing state of affairs between the parties to the proceedings or the rights of the parties;
- (e) subject to any other law, to enter upon, and inspect, any premises relevant to an investigation and to seize any relevant document, record or anything; and
- (f) to cause, any person contemptuous of its proceedings or orders to be prosecuted before a competent court.

26. Procedure in respect of investigation

- 1) Where the Commission decides to conduct an investigation under this Act, it shall give the authority or person concerned and to any other person who is alleged in the complaint to have taken or authorised the act or omission complained of, an opportunity to comment on any allegations contained in the complaint and the representative of the authority or person concerned shall submit his comments within such time as the Commission may specify.

- 2) Without prejudice to the generality of the provisions of this section, the Commission may obtain information from such persons and in such manner, and make such inquiries as it considers necessary.

27. Evidence at investigations

- 1) Subject to this section, the Commission may require any person who, in its opinion, is able to give any information relating to a matter being investigated by the Commission –
 - (a) to furnish the information to it;
 - (b) to produce any document, paper or thing that in its opinion relates to the matter being investigated and which may be in the possession or control of that person.
- 2) The Commission may summon before it and examine on oath or affirmation –
 - (a) a person required to give information or produce anything under subsection (1) of this section;
 - (b) a complainant;
 - (c) any other person who the Commission considers will be able to give information required under subsection (1) of this section.
- 3) Any person summoned by and appearing before the Commission as a witness is entitled to be paid by way of reimbursement of his or her expenses, such allowances as are payable to a witness appearing before the High Court in criminal proceedings.
- 4) Any person invited by the Commission to attend any meeting of the Commission may be paid such allowances as the Commission may consider reasonable.

28. Procedure after investigations

- 1) Where after making an investigation under this Act, the Commission is of the view that the decision, recommendation, act or omission that was the subject matter of the investigation –
 - (a) amounts to a breach of any of the fundamental rights and freedoms provided in the Constitution or in any international instrument to which the United Republic is a party;
 - (b) appears to have been contrary to law; or
 - (c) was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or a provision of any Act or a practice that is unreasonable, unjust, oppressive, or discriminatory; or
 - (d) was based wholly or partly on a mistake of law or fact; or
 - (e) was based on irrelevant grounds or made for an improper purpose; or
 - (f) was made in the exercise of discretionary power and reasons should have been given for the decision the Commission shall report its decision, recommendation and the reasons for it to the appropriate authority concerned.

- 2) The appropriate authority shall, within such time not exceeding three months from the date of recommendation as the Commission prescribes, make a report to the Commission with details of any action taken by such authority to redress the impugned fundamental rights or acts of maladministration.
- 3) If within the prescribed time after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commission, may after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made either, bring an action before any court or recommend to any competent authority to bring an action and seek such remedy as may be appropriate for the enforcement of the recommendations of the Commission.
- 4) The provisions of this section shall not be construed as precluding the Commission from resolving any complaint or rectifying any act or omission emanating from a violation of any fundamental right or acts of maladministration in any other manner including mediation, conciliation or negotiation.

PART V: FINANCES, AUDIT AND REPORTS (ss 29-35)

29. Resources of the Commission

The funds of the Commission shall consist of moneys –

- (a) appropriated by Parliament for the purposes of the Commission;
- (b) accruing to the Commission from any other source; or
- (c) which are donations or grants from sources within or outside the United Republic.

30. Accountability

- 1) The Commission shall be responsible to the National Assembly in accounting for all its revenue and expenditure.
- 2) The Commission shall –
 - (a) keep full and proper records of all its revenue and expenditure and of all the assets, liabilities and financial transactions;
 - (b) satisfy itself that all reasonable management measures have been taken to ensure that resources which are necessary for achieving its objectives are as far as possible, obtained, safeguarded and utilised in the most economic, efficient and effective manner;
 - (c) prepare appropriation accounts in accordance with the Public Finance Act; and
 - (d) prepare annual accounts in accordance with generally accepted accounting practice, covering all its transactions.

31. Estimates of revenue and expenditure

- 1) The Commission shall, in respect of its first financial year under this Act and for each subsequent financial year, prepare and submit to the Minister estimates of its revenue and expenditure and the Minister shall examine those estimates and table them before the National Assembly.
- 2) In preparing its estimates under subsection (1), the Commission shall have regard to the advice of the Minister and the Minister responsible for Finance.

32. Audit

- 1) The accounts of the Commission shall be audited, once in every financial year, by the Controller and Auditor-General.
- 2) Upon the completion of his examination of the accounts, the Controller and Auditor-General shall certify those accounts and submit his report to the Commission.

33. Annual reports

- 1) The Commission shall, within six months after the end of each financial year, prepare and submit to the National Assembly through the responsible Minister an annual report in respect of that year containing –
 - (a) a copy of the audited accounts of the Commission together with the auditor's report on those accounts;
 - (b) a report on the operations of the Commission during that financial year; and
 - (c) such other information as the Minister may require,

and the Minister shall cause the report to be laid before the National Assembly.

- 2) The Commission shall also submit a copy of the annual report to the President and to the President of Zanzibar.

34. Special reports

The Commission may at any time, if it appears to the Commission to be desirable, submit to the Minister a special report, on any matter incidental to the performance of its functions.

35. Other reports

The Commission may, in the public interest or in the interest of any person or authority make and submit reports relating –

- (a) generally to the exercise of its functions;

- (b) to any matter to which the attention of the President, the President of Zanzibar, the Minister, the National Assembly or any other person or authority should be drawn; or
- (c) to any particular case investigated by the Commission, whether or not the matters in the report have been the subject of a report to the National Assembly.

PART VI: MISCELLANEOUS PROVISIONS (ss 36-40)

36. Procedure, etc., of the Commission

Subject to this Act and any subsidiary legislation made thereunder, the Commission may regulate its own practice, procedure and the matters relating to its meetings, inquiries and investigations.

37. Offences and penalties

- 1) A person commits an offence and is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or both if that person, in connection with the exercise of any function by the Commission under this Act—
 - (a) hinders, obstructs, molests, interferes with or exerts undue influence on, a member of the Commission, an employee of the Commission or a person performing any functions of the Commission;
 - (b) without lawful excuse or justification, refuses or fails to attend before the Commission upon being summoned or to take an oath or to make an affirmation at the request of the Commission, or refuses to answer any questions after he has been ordered to appear before the Commission;
 - (c) gives false or misleading information or evidence to the Commission on any matter, knowing such information or evidence to be false or not knowing or believing it to be true; or
 - (d) intimidate or victimises a person who gives information, evidence or assistance to the Commission;
 - (e) without lawful excuse or authority refuses or neglects to comply with any recommendation made under subsection (3) of section 28 of this Act.
- 2) For the purposes of subsection (1) (e) where an offence is committed by—
 - (a) a body corporate, every director, chief executive or other officer of the body who is responsible for implementation of the recommendation shall be guilty of the offence;
 - (b) a partnership, every partner responsible for implementation of the recommendation shall be guilty of the offence; and
 - (c) a public authority, the officer or officers charged with the responsibility of acting on a recommendation and making a report on such recommendation shall be guilty of the offence.

38. Regulations

The Minister may make regulations for the better carrying into effect of the provisions of this Act.

39. Repeal of Act No 25 of 1966

[Repeals the Permanent Commission of Enquiry Act.]

40. Transitional

Notwithstanding the repeal of the Permanent Commission of Enquiry Act, 1966, any complaint, investigation or inquiry pending before that Commission immediately before the commencement of this Act shall be proceeded with under the provisions of this Act.

SCHEDULE

OATH OF MEMBER

(Section 12 (1) and (2))

I,....., having been appointed a Commissioner/Assistant Commissioner/Executive Secretary in the Commission for Human Rights and Good Governance, do swear/affirm that I will freely and without fear or favour, affection or ill-will, discharge the functions of a Commissioner/Assistant Commissioner/Executive Secretary and that I will not directly or indirectly reveal any matters relating to such functions to any unauthorised person or otherwise than in the course of duty.

SO HELP ME GOD

Sworn/Declared before me this.....day of.....20.....
.....

President

OATH OF OFFICER OF THE COMMISSION

I,....., being called upon to exercise the functions of an officer of the Commission for Human Rights and Good Governance, do swear/affirm that I will not, directly or indirectly, reveal to any unauthorised person or otherwise than in the course of duty the contents of any documents, communication or information whatsoever which may come to my knowledge in the course of my duties as an officer of the Commission or under the provisions of the Commission for Human Rights and Good Governance Act.

SO HELP ME GOD

Sworn/Declared before me this.....day of.....20.....

.....

Commissioner

JEDWALI

(Fungu la 12(1) na (2))

KIAPU CHA MJUMBE

Mimi.....naapa/nathibitisha kwamba nitatekeleza majukumu ya Mjumbe wa Tume ya Haki za Binadamu na Utawala Bora kwa uhuru bila woga, upendeleo, huba au hila, na kwamba sitatoa siri zozote nitakazozifahamu wakati nikitekeleza majukumu yangu bila kibali cha Tume isipokuwa katika kutekeleza majukumu ya Tume.

MUNGU NISAIDIE

Kiapo/tamko limetolewa mbele yangu leo tarehe.....mwezi.....20.....

.....

Rais

KIAPU CHA WATUMISHI WA TUME

Mimi.....naapa/nathibitisha kwamba sitatoa siri zozote moja kwa moja au kwa namna nyingine kwa mtu yeyote ambaye haruhusiwi isipokuwa katika utekelezaji wa majukumu yangu nyaraka, mawasiliano au taarifa zozote nitakazozifahamu wakati nikitekeleza majukumu yangu kama mtumishi wa Tume au kwa mujibu wa masharti ya Sheria ya Haki za Binadamu na Utawala Bora.

MUNGU NISAIDIE

Kiapo/tamko limetolewa mbele yangu leo tarehe.....mwezi.....20.....

.....

Kamishna

B.2.2.2 THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE (APPOINTMENTS PROCEDURE FOR COMMISSIONERS) REGULATIONS, 2001

Made under Section 7(4)

G.N. No. 89 of 2001

1. Citation

These Regulations may be cited as the Commission for Human Rights and Good Governance (Appointments Procedure for Commissioners) Regulations.

2. Commencement

These Regulations shall come into operation on the date of publication.

3. Interpretation

In these Regulations –

“**Act**” means the Commission for Human Rights and Good Governance Act;

“**Appointments Committee**” means the Committee established by Article 129(4) of the Constitution;

“**appointment procedure**” means the procedure to be followed by the Appointments Committee for the appointment of the Commissioners;

“**Chairman**” and “**Vice-Chairman**” means the Chairman and Vice-Chairman of the Commission;

“**Commissioner**” and “**Assistant Commissioner**” means a Commissioner or Assistant Commissioner appointed in pursuance of article 129 of the Constitution and section 7(1)(a) and (b) of the Act.

4. Appointment procedure

- 1) There shall be public advertisement of the posts of Chairman, Vice-Chairman, Commissioners or Assistant Commissioners.
- 2) The advertisement shall be published in Mainland Tanzania and Tanzania Zanzibar for three consecutive days in three leading English and Kiswahili newspapers that have wide circulation and shall be immediately followed by three successive advertisements on national and private television stations.
- 3) The advertisement shall stipulate the requisite nationality, qualifications and experience necessary for the posts and shall include a requirement that the applicants have:
 - (a) Knowledge, experience and a considerable degree of involvement in matters relating to law, government, politics, or social affairs;
 - (b) the highest reputation known for their high morality, integrity, impartiality, and competence in matters of human rights and good governance;
 - (c) strong commitment to human rights norms and values;
 - (d) excellent writing and communication skills in both English and Kiswahili;

- (e) ability to balance rights and to make fair and sound decisions expeditiously, and to articulate them in writing or orally;
 - (f) capacity to handle emotionally difficult and challenging situations with tact and diplomacy;
 - (g) capacity to handle delicate social and political situations and complaints with confidentiality, where necessary;
 - (h) strong conflict resolution skills; and
 - (i) ability to work effectively as a team member, as well as alone.
- 4) In the case of the Chairman, the applicant shall, in addition to the requirements of subregulation (3), be a person who qualifies for appointment as a judge of the High Court or Court of Appeal.

5. Applications

- 1) All applications, including three letters of recommendation, shall be forwarded by registered post, fax or e-mail or submitted in person to the Office of the Secretary, Appointments Committee.
- 2) Subject to subregulation (1), the civil society may also nominate any person to be considered for appointment for the post of Chairman, Vice-Chairman, Commissioner or Assistant Commissioner, provided the person so nominated gives his or her consent.
- 3) The deadline for submission of applications shall be twenty-one days from the date of first publication of the advertisement.

6. Short-listing of candidates

- 1) There shall be a screening process of applications submitted for the purpose of drawing up a short list of candidates.
- 2) The screening process shall be conducted by:
 - (a) Two independent professional human resource personnel from the private sector with experience in executive job search and recruitment processes, who shall be appointed by the Appointments Committee;
 - (b) two members of the Secretariat on the Commission for Human Rights and Good Governance;
 - (c) a representative from the Tanzania Women Lawyers Association;
 - (d) a representative from the Faculty of Law, University of Dar es Salaam;
 - (e) a representative from the Tanganyika Law Society;
 - (f) a representative from the Legal and Human Rights Centre, Zanzibar;
 - (g) a representative from the United Nations Association of Tanzania;
 - (h) a representative from the Legal and Human Rights Centre, Dar es Salaam.
- 3) The screening team shall meet two days after the deadline for submission of applications and it shall submit the short-list of candidates to the

Appointments Committee within five working days from the date it sits to consider the applications.

- 4) The Appointments Committee shall inform by writing the short-listed applicants only and shall publish their names in the newspapers and television stations which carried the advertisement referred to in subregulation 2 of regulation 4.

7. Publication of short-listed candidates

- 1) The publication listing the names of the short-listed applicants shall include an invitation to members of the public to submit to the Secretary of the Appointments Committee, within a specified time, comments they consider relevant to the suitability of any of the short-listed candidates.
- 2) The Appointments Committee may consider comments received from members of the public and take whatever action it considers appropriate.

8. Interviews

- 1) The short-listed candidates shall be invited for interviews, which shall be conducted by the Appointments Committee.
- 2) The Appointments Committee may co-opt any person it considers appropriate to assist it in conducting the interviews.
- 3) The interviews shall seek to elicit appropriate details on, and clarification of, key contents in the candidates' *curriculum vitae*, comments received from members of the public, and to reconcile written and oral information the candidates have supplied.
- 4) The object of the interviews shall be to determine the suitability of the candidates for the job as measured by:
 - (a) Appreciation of, and commitment to human rights norms and values, and good governance;
 - (b) educational and professional background;
 - (c) scope and depth of relevant experience;
 - (d) vision for the Commission for Human Rights and Good Governance, maturity and judgment;
 - (e) fairness, impartiality and ability to maintain confidentiality;
 - (f) demonstrated capacity for, or skills in, conflict resolution; and
 - (g) reasoning skills and powers of articulation.

9. Final selection process

The Appointments Committee shall submit to the President the names of:

- (a) Not less than three candidates they recommend to be appointed as Chairman;
- (b) not less than three candidates they recommend to be appointed as Vice-Chairman;

- (c) at least five more than the number of candidates to be appointed as Commissioners;
- (d) at least five more than the number of candidates to be appointed as Assistant Commissioners.

10. Remuneration for Appointments Committee members

The Minister responsible for human rights may make provisions for the remuneration of the members of the Appointments Committee and any other person involved in the appointment process.

H. BAKARI MWAPACHU,
Minister for Justice and Constitutional Affairs

B.2.2.3 THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE (COMPLAINTS HANDLING PROCEDURE) REGULATIONS, 2003

Made under section 38

1. These Regulations may be cited as the Commission for Human Rights and Good Governance (Complaints Procedure) Regulations, 2003.
2. These Regulations shall come into operation on the date of publication.
3. In these Regulations, unless the context requires otherwise –
 - “Act” means the Commission for Human Rights and Good Governance Act, 2001;
 - “Chairman” means the Chairman of the Commission or, where appropriate, a Commissioner performing the functions of the Chairman;
 - “Commission” means the Commission for Human Rights and Good Governance established by Article 129(1) of the Constitution;
 - “complainant” means a person, group or class of person organisation or association who alleges that a violation of his, her or its human right or an act of administrative injustice has occurred;
 - “complaint” means a communication addressed to the Commission that alleges a human right violation or an act of administrative injustice;
 - “conciliation” means a process through which the parties in dispute use the services of a third person to assist in bringing the parties together in an effort to ascertain the facts of a complaint and to effect a mutually acceptable solution;
 - “hearing” means an enquiry contemplated under sections 6(1)(c) and 20(2) of the Act;
 - “enquiry” means conduct of hearings contemplated under sections 6(1)(c) and 20(2) of the Act;
 - “investigation” means an investigation conducted by the Commission in terms of sections 6(1)(f) and 6(1)(g) of the Act;

“mediation” means a process through which the parties in dispute uses the services of a third person who controls the process without having any influence on the content, to help themselves or attempt to reach an agreement;

“negotiation” mean a process through which the parties in dispute attempt to resolve their dispute themselves or attempt to reach an agreement;

“person” means an individual, a juristic person or group or class of persons;

“respondent” means a person, group or class of persons, body, organisation or association against whom a complaint is made.

4(1) The following persons may lodge complaints with the Commission.

- (a) any individual acting in his or her own interest;
- (b) any one acting behalf of another person who cannot act in his or her own name;
- (c) any one acting as a member of, or in the interest of, a group or a class of persons;
- (d) a body of persons whether corporate or unincorporated;
- (e) any one acting in the public interest.

(2) A person who lodges a complaint on behalf of another shall state in writing the capacity in which he or she does so and the reason for so doing.

(3) All persons claiming any right to a relief in respect of a violation of any human right or freedom or an act of administrative injustice may apply to the Commission for redress whether jointly severally or in the alternative and may be joined in one complaint, provided that if those persons brought separate claims, each will disclose the violation of a common right.

5(1) A complaint under the Act may be made in writing, orally, by fax or e-mail.

(2) Where the complaint is in writing, it shall be addressed to any office of the Commission or to the Chairman and shall be signed or thumbprinted by the complainant or his or her agent.

(3) Where the complaint is made orally, or the complainant cannot read or write, the complaint shall be reduced into writing by a designated officer of the Commission to whom the complaint is made or by any other person chosen by the complainant.

(4) A person who reduces into writing the oral complaint of any person shall –

- (a) read over and explain the contents to the complainant;
- (b) declare on the document that the appointment has fully understood or appeared to understand and appreciate the contents;
- (c) cause the complainant to append his/her signature or thumbprint to the bottom of each page of the document.

6(1) A complaint lodged with the Commission shall contain –

- (a) the full name, house or other contact address, telephone, fax or e-mail of the complainant(s);
 - (b) the full name, house or other contact address, telephone, fax or e-mail of the respondent(s);
 - (c) particulars of the nature of the complaint together with copies of any document in support of the complaint;
 - (d) the nature of the human rights violation, injustice or harm that the complainant has suffered as a result of the action, inaction or omission of the body, organisation or person against whom the complaint is made; and
- (2) Notwithstanding the provisions of sub-regulation (1), the Commission may entertain a complaint even though it does not contain all the stipulated particulars.

7(1) A complaint, response or any other communication made to the Commission by any of the parties may be amended at any state of investigation at the request of either the complainant or respondent, as the case may be, by serving notice of the intended amendment on the opposing party and the Commission.

(2) The Commission may accept or reject the application for amendment, having regard to the circumstances of the case.

8(1) A complaint shall be lodged with the Commission within 24 months from the date when the complainant had knowledge of the decision, recommendation, act or omission complained of.

(2) The Commission may still accept a complaint which is not lodged with the Commission within the time stipulated in sub-regulation (1) if –

- (a) for purposes of ensuring that the ends of justice are met, it is otherwise desirable to deal with the complaint than rejecting it; or
- (b) the complaint is of constitutional importance; or considering the nature of the complaint and circumstances surrounding the complaint, the Commission is satisfied that it should deal with such complaint.

9(1) Where a complainant fails or neglects to respond to communication from the Commission within three months from the date of such communication, the Commission may consider the complaint to have lapsed.

(2) Where a complainant has lapsed under sub-regulation (1), the Commission upon good cause shown shall restore the complaint.

10(1) Where the Commission decides not to investigate or to cease to investigate a complaint, it shall within 30 days of the decision, inform the complainant in writing of its decision and the reasons thereof.

(2) A complainant whose complaint has been rejected may appeal in writing to the Chairman of the Commission within 30 days from the date he or she obtains knowledge of the Commission's decision.

(3) Where the Commission decides not to investigate a complaint on the ground that the complaint can be handled more appropriately by another forum, it shall refer the complainant to such forum.

11(1) Where the Commission considers that a complaint lodged with the Commission is a matter within the function of the Commission, it shall cause a copy of the complaint or appropriate notification to be transmitted to the head of the body or organisation and or the person against whom the complaint is made with a request for comments.

(2) The head of the body or organisation or person against whom the complaint is made shall within fourteen days from the date of the receipt of the complaint or such further period as the Commission may specify, submit comments to the Commission.

12(1) The Chairman or his or her representative may assign an investigator or officer of the Commission to make a preliminary investigation into any complaint lodged with the Commission.

(2) The Commission may, for the purposes of performing its functions under the Act, require the services of a member of the Police Force or any public institution with expert knowledge relevant for redressing any particular complaint.

13(1) A complaint, response or any other communication made to the Commission by any of the parties to the Commission may be amended at the request of either the complainant or respondent, as the case may be, by serving notice of the intended amendment on the opposing party and the Commission.

(2) The Commission may accept or reject the application for amendment, having regard to the circumstances of the case.

14(1) Upon receipt of the comments of the respondent the Commission may, when it considers that in view of the comments, the complaint could be settled, invite the parties concerned and attempt a mediation, conciliation or negotiation of the complaint between the parties.

(2) Where the Commission considers that the comments require a reaction from the complainant, it shall forward the comments to the complainant for his or her reaction.

(3) The provisions of these Regulations shall not preclude the Commission on receipt of a complaint from inviting the parties concerned and attempting a settlement of the issue or issues between the parties.

15. Where the commission decides not to institute a full investigation it shall give the parties an opportunity to make oral or written submission after which the Commission shall fix a reasonable date for its decision.

16(1) Any of the parties may, before or during an investigation, apply to the Commission to have a summons issued to any person whose evidence may be relevant to the investigation of the complaint.

(2) The Commission may, on its own initiative, issue a summons to any person who, in the opinion of the Commission, can give evidence relevant to the matter being investigated.

17(1) Every complaint, response, summons or any other written notice requiring personal service shall, as far as practicable, be served personally on the person named therein by delivering or tendering to him or her a duplicate of the document and at the same time producing the original of so required.

(2) A document required to be served may be served by registered mail addressed to the person's latest known place of abode or usual address or at his or her place of business.

(3) Every person upon whom a complaint, response, summons or any other document is personally served shall sign or put his or her mark in recognition of the receipt of the document, upon the back of the original of the document; and if he or she refuses to do so, the person who has effected service of the document shall record in writing the refusal.

(4) Where an advocate has appeared for any party either in writing or orally before the Commission, any document shall be served either on advocate alone or on both the party and advocate.

(5) Service of any document or papers, other than a summons to appear and testify or to produce a document, on such advocate shall be deemed to be service on the party he or she represents.

18. Every complaint, response, summons or any other document issued under these Regulations and requiring service shall be served by an officer of the Commission or any other person authorised do to so by the Commission.

19(1) Where the time for doing any act or taking any proceedings expires on a Sunday or any other day on which the offices of the Commission are closed, and by reason thereof such act or proceedings cannot be done or taken on that day, such act or proceedings shall, so far as regards the time for doing or taking the same be held to be dully done or taken the day on which the offices shall next be open.

(2) In any case in which any particular number of days is prescribed by these Regulations, the same shall be reckoned exclusively of the first day and inclusively of the last day.

20. Person appearing before the Commission may be represented by an advocate or by any other person suitable to represent them.

21. In respect of any matter relating to the proceedings at an enquiry where these Regulations have not expressly or by necessary implication made provision, the rules of court applicable to the High Court shall apply with such modifications as the Commission may consider appropriate.

22. The provisions of these Regulations shall apply, as far as practicable to the allegations investigated by the Commission on its own initiative.

23. Non compliance with any of these Regulations shall not render void any step taken unless the Commission shall so direct.

HARITH B. MWAPACHU,
Minister for Justice and Constitutional Affairs
Dar es Salaam, 9th May, 2003

B.2.3 THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE (ENQUIRIES PROCEDURE) REGULATIONS, 2003

Made under section 38

1. The Regulation may be cited as the Commission for Human Rights and Good Governance (Enquiries Procedure) Regulations, 2003.
2. These Regulations shall come into operation on the date of publication.
3. In these Regulations, unless the context requires otherwise:-
 - “Act” means the Commission for Human Rights and Good Governance Act, 2001;
 - “Commission” means the Commission for Human Rights and Good Governance established by Article 129(1) of the Constitution.
 - “complainant” means a person, group or class of persons, organisation or association who alleges that a violation of his, her or its human right or an act or administrative injustice has occurred;
 - “complaint” means a communication addressed to the Commission that alleges a human rights violation or an act of administrative injustice;
 - “Enquiry” means conduct of hearings contemplated under sections 6(1)(c) and 20(2) of the Act;
 - “joinder” means the joining of a party to a complaint;
 - “misjoinder” means the improper joining together of parties to a complaint;
 - “next friend” means a parent, brother, sister or guardian of a minor;
 - “nonjoinder” means the omission to join some person as party to a complaint;
 - “person” means an individual, a juristic person, group or class of persons;
 - “respondent” means a person, group or class of persons, body, organisation or association against whom a complaint is made;
 - “response” means an answer to a complaint;
 - “summons” means a formal issued by the Commission commanding a person named therein to appear at a certain time and place to testify or to produce any document;
4. Where it appears to the Commission any joinder of complainants may embarrass or delay the hearing or cause a miscarriage of justice, the

Commission may order separate hearings or make such other order as may be expedient.

5. All persons against whom there is a claim or any right to relief in respect of a violation of a human right, freedom or an act of administrative injustice, whether jointly or severally or in the alternative, may be joined in one complaint where, if separate complaint were brought against them, there would arise for determination the violation of a common human right or act of administrative injustice.

6. Where a complaint is in doubt as to the person from whom he or she is entitled to obtain redress, he or she may claim from two or more respondents in order that the question as to which of the respondents is liable and to what extent, may be determined between all parties.

7(1) Where several persons have the same right or claim, any one or more of those persons may, on written authority signed by each of the interested persons, lodge a complaint with the Commission on behalf of all of them.

(2) Any person on whose behalf a claim to a right or claim is lodged, may apply to the Commission to be joined as party to the complaint.

8(1) The Commission may order that the name of any person whose presence is necessary in order to enable it to settle effectively a claim to any violation of a human right, freedom or act of administrative injustice, be joined.

(2) Where a person is joined or substituted, an amended copy of the complaint and response indicating the new parties shall be served on the person joined and all other parties.

9. No claim to a right or claim may be defeated by the reason of misjoinder or non-joinder of parties; and the Commission may, in any claim deal with the rights and interests of the parties actually before it.

10(1) Where a complaint has been lodged in the name of the wrong person as complainant, or where it is doubtful whether it has been lodged in the name of the complainant, the Commission may, at any stage of the enquiry, if satisfied that the claim has been filed through a mistake made in good faith, and that it is necessary for the determination of the real claim to a right in question, order that other person to be substituted or joined as complainant upon such terms as the Commission thinks fit.

(2) No person may be joined as a complainant or next friend of a complainant under any disability without the consent of that person.

11(1) The Commission may, at any stage of the investigation, either of its own motion or on application made for the purpose by any person and on such terms as may appear to the Commission to be just, order that the name of any party improperly joined to be struck out.

(2) Where a complainant or respondent is struck out before the enquiry, a notice to that effect shall be served upon him or her before the date fixed for hearing.

12(1) Every complaint, response, summons or any other written notice requiring personal service shall, as far as practicable, be served personally on the person named therein by delivering or tendering to him or her a duplicate of the document and at the same time producing the original if so required.

(2) A document required to be served may be served by registered mail addressed to the person's latest known place of abode or usual address or at his or her place of business.

(3) Every person upon whom a complaint, response, summons or any other document is personally served shall sign or put his or her mark in recognition of the receipt of the document, upon the back of the original of the document; and if he or she refuses to do so, the person who has effected service of the document shall record in writing the refusal.

(4) Where an advocate has appeared for a party either in writing or orally before the Commission, any document shall be served either on the advocate alone or both the party and the advocate.

(5) Service of any document or papers, other than a summons to appear and testify or to produce a document, on such an advocate shall be deemed to be service on the party he or she represents.

13. An advocate who appears for a party at any stage shall be deemed to remain that party's advocate throughout the investigation until:

- (a) the party represented files with the Commission a written revocation of the advocate's authority;
- (b) the advocate files with the Commission a written statement of his or her withdrawal from the case;
- (c) the advocate states on the record that he or she is withdrawing from the case;
- (d) the party represented states on the record that he or she is revoking advocate's authority; or
- (e) the Commission receives notice of advocate's death or disqualification.

14.(1) Where the Commission decides to institute a full investigation into a complaint, it shall in writing invite to attend and interviewed:

- (a) the complainant;
- (b) a representative of the body, organisation or person against whom the complaint is made;
- (c) any interested party;
- (d) any other person whose conduct is likely to be the subject of adverse comment by the Commission.

(2) The notice inviting the parties shall state the date, time and place of attendance.

(3) The date for attendance shall not be less than seven days from the date of the notice.

(4) A person appearing before the Commission in answer to a complaint shall:-

- (a) be informed again of the particulars of the complaint and relief sought;
- (b) be afforded full opportunity to answer the complaint and to question any witness.

15. A notice served upon the parties shall declare that if the complainant or respondent does not appear before the Commission on the date, time and place specified in the notice fixed, it may proceed to dismiss the complaint, enquire into the matter, or make any appropriate order.

16(1) Any person who appears before the Commission in any investigation shall be given a fair hearing.

(2) In conducting an inquiry, the Commission shall observe the rules of natural justice but shall not be bound by any legal or technical rules of evidence applicable to proceedings before courts; and all proceedings shall be conducted informally and expeditiously.

17(1) Any of the parties may, before or during an enquiry, apply to the Commission to have a summons issued to any person whose evidence may be relevant to the investigation of the complaint.

(2) The Commission may, on its own initiative, issue a summons to any person who, in the opinion of the Commission, can give evidence relevant to the matter being investigated.

18. Every complaint, response, summons or any other document issued under these Regulations and enquiring service shall be served by and officer of the Commission or any other person authorised to do so by the Commission.

19(1) If on the day fixed for the hearing of a complaint, the respondent appears but the complainant does not appear, the Commission shall, if satisfied that a notice of the date, time and place for inquiry has been duly served upon the complainant, ask the respondent whether he or she admits the claim and:-

- (a) if the respondent admits the claim or any part of it, the Commission may make a decision against him or her for the claim or that part of it as he or she admits; or
- (b) if the respondent does not admit the claim, the Commission may dismiss the complaint or proceed to hear the complaint or adjourn the enquiry to another date, and when another date is fixed for enquiry, the Commission shall cause a notice to be served on the complainant and the respondent requiring each to attend the Commission at the time and place specified in the notice.

(2) Where a complaint is dismissed under this regulation, the complainant may bring a new complaint or ask that the original complaint be reinstated

upon satisfying the Commission as to the reasons why he or she did not appear at the previous sitting.

20 If on the date fixed for the enquiry, the respondent does not appear, the Commission may, if satisfied that the notice to the respondent indicating the date, time and place for the hearing has been dully served upon him or her, proceed to hear the evidence of the complainant and his or her witness, if any, and decide the matter on the basis of the evidence before it.

21(1) Where a decision has been given against a respondent under regulation 20, the respondent may apply for the decision to be set aside on satisfying the Commission of the reasons which prevent his or her attendance at the place and time fixed for the hearing.

(2) No decision made may be set aside unless the application to set aside is made within thirty days from the date on which the decision was given.

22(1) If on the day fixed for the conduct of the enquiry or any date to which the hearing of the complaint is adjourned, neither party appears, the Commission may order that the complaint be dismissed.

(2) Where a complaint is dismissed, the complainant may bring a new complaint or ask that the original complaint be reinstated upon satisfying the Commission as to the reasons why he or she did not appear at the previous sitting.

(3) No decision made pursuant to sub-regulation (1) may be set aside unless the application to set aside is made within thirty days from the date on which the decision was given.

23 On appearance of both parties before the Commission, the respondent shall be asked by the Commission whether or not he or she admits the claim of the complainant and if:-

- (a) the respondent admits the claim in its entirety, the decision shall be given confirming the complainant's claim; and the Commission shall make the appropriate orders in the circumstances in favour of the complainant;
- (b) the respondent does not admit the claim or admits it only in part, the Commission shall proceed to hear the evidence of the parties.

24(1) Unless the Commission otherwise orders, the evidence of the complainant shall be heard first, followed by that of his or her witnesses, if any, and the respondent or his or her counsel shall be given the opportunity to cross-examine the complainant and each of his or her witnesses.

(2) At the close of the evidence of the complainant or that of his or her witness, the evidence of the respondent shall heard, followed by that of his or her witnesses, if any, and the complainant or his or her counsel shall be given the opportunity to cross-examine the respondent and each of his or her witnesses.

(3) The Commission may, at any time, put questions to either party or to any witness and may, at its discretion, call such additional evidence as it considers necessary.

(4) The Commission may, for sufficient reason, at any time before or after the beginning of the enquiry, adjourn the proceedings; and in every such case the Commission shall fix a date for further hearing of the enquiry.

25. The Commission shall observe the rules of natural justice but shall not be bound by any legal or technical rules or evidence applicable to proceedings before the courts; and all proceedings shall be conducted informally and expeditiously.

26. The Commission shall permit the parties or their advocate to submit oral or written arguments within such time limits as the Commission may determine.

27(1) After conclusion of the enquiry, the parties or their advocate may make oral or written submissions, After which the Commission shall fix a reasonable date for its decision.

(2) All rulings and decisions of the Commission shall be by majority vote.

28. The proceedings of the enquiry shall be open to the public unless otherwise directed by the Commission; and the reasons for the direction shall be recorded in writing.

29. Any function which is conferred by these Regulations upon the Commission may, unless it is otherwise provided expressly or by necessary implication, be performed by the Commission in any premises in which the Commission ordinarily sits or elsewhere.

30(1) Where the time for doing any act or taking any proceedings expires on a Sunday or any other day on which the offices of the Commission are closed, and by reason thereof such act or proceedings cannot be done or taken on that day, such act or proceedings shall, so far as regards the time for doing or taking the same be held to be dully done or taken on the day on which the offices shall next be open.

(2) In any case in which any particular number of days is prescribed by these Regulations, the same shall be reckoned exclusively of the first day and inclusively of the last.

31. Non-compliance with any of these Regulations shall not render any proceedings at an enquiry void unless the Commission shall so direct.

32. In respect of any matter relating to the proceedings at an enquiry where these Regulations have not expressly or by necessary implication made provision, the rules of court applicable to the High Court shall apply with such modifications as the Commission may consider appropriate.

HARITH B. MWAPACHU,
Minister for Justice and Constitutional Affairs
Dar es Salaam, 9th May, 2003

B.2.4 THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE(EXTENSION) ACT No 12 2003

ARRANGEMENT OF SECTIONS

SECTION

- 1) Short title and commencement.
- 2) Interpretation.
- 3) Extension.
- 4) Amendment to the principal Act.
- 5) Regulations.

ACT No 12 OF 2003

I ASSENT

{AMANI ABEID KARUME}
PRESIDENT OF ZANZIBAR
AND

CHAIRMAN OF THE REVOLUTIONARY COUNCIL

..... [25th April], 2007

AN ACT TO PROVIDE FOR THE EXTENSION OF JURISDICTION, FUNCTIONS AND POWERS OF THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE TO ZANZIBAR AND MATTERS RELATED THERETO

ENACTED by the House of Representatives of Zanzibar.

1. This Act may be cited as the Commission for Human Rights and Good Governance (Extension) Act, 2003 and shall come into operation on such a date as the Minister may, by notice published in the Gazette, appoint.

2. In this Act unless the context other wise requires –

“The principal Act” means the Commission for Human Rights and Good Governance Act, No. 7 of 2001 enacted by the Parliament of the United Republic of Tanzania;

“Commission” means the Commission for Human Rights and Good Governance established by the principal Act;

“House” means the House of Representatives, Zanzibar;

“President” means the President of Zanzibar and the Chairman of the Revolutionary Council.

“Responsible Minister” means the Minister responsible for human rights in Zanzibar.

3(1) The principal Act, with its necessary amendments, is hereby extended and adopted to apply to Zanzibar as if enacted by the House on the following terms and conditions that:-

- (a) the responsible Minister should be clearly stated and recognised in the principal Act;
 - (b) the Commissions annual report on Zanzibar matters should be submitted to the responsible Minister who shall submit the same to the House for deliberation;
 - (c) the Minister responsible for human rights of the United Republic of Tanzania when making regulations under the principal Act shall consult and agree thereto with the responsible Minister in Zanzibar.
- (2) For avoidance of doubt but subject to the provisions of subsection (1) of this section it is hereby expressly provided that the Commission shall exercise jurisdiction, functions and powers over and on respect of all public institutions of the Revolutionary Government of Zanzibar and other private institutions and individuals operating or residing in Zanzibar in the manner and to the extent provided under the principal Act.
4. Any amendment made to the principal Act and its regulations thereto shall not apply to Zanzibar until and unless specifically approved by the House by way of resolution.
- 5(1) The responsible Minister may make regulations for better enforcement of the provisions of this Act, and where circumstances require specific regulations for the operation of the Commission on any matter in Zanzibar.
- (2) Save in the circumstances provided under subsection (1) of this section regulations made under the principal Act shall also apply to Zanzibar.
- Passed in the House of Representatives on the 5th day of August, 2003.



16

**THE ZAMBIAN HUMAN
RIGHTS COMMISSION**
*Landilani Banda**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

Zambia's Human Rights Commission (HRC) was established in 1997 and thus has been operating for more than two decades. It has its headquarters in the capital city, Lusaka, and is composed of seven commissioners, among whom are its chairperson and deputy chairperson. The day-to-day activities are carried out by a directorate headed by a director-general, who also acts as the secretary to the commissioners.

At the regional level, the HRC is a member of the Network of African National Human Rights Institutions (NANHRI), which provides a platform for collective action as well as capacity-building of member national human rights institutions (NHRIs). At the international level, the HRC for the most part of its existence has been recognised by the United Nations Office of the High Commissioner for Human Rights (OHCHR) as an "A" status NHRI, having adhered to the provisions of the Principles Relating to the Status of National Institutions (The Paris Principles).¹ From 2000-2011 the HRC enjoyed "A" status; from 2011-2015, however, the HRC had no commissioners and as a result could not maintain this

* Lecturer, Faculty of Law, University of Zambia.

1 The Paris Principles are a set of internationally recognised standards governing the role, status, mandate, composition and functions of NHRIs. They are the basis on which the independence, effectiveness and status of an NHRI is assessed. The Principles were adopted by the United Nations General Assembly (UNGA) on 20 December 1993 under Resolution 48/134 regarding National Institutions for the Protection of Human Rights.

status, albeit that there was no formal communication that this status had been revoked.²

The vision of the HRC is “to be an effective, respected, responsive and independent guardian of human rights for all times”. Its mission in furtherance of this vision is:

[t]o promote and protect human rights for all Zambians through investigations of human rights violations, rehabilitation of victims of human rights abuses, education of communities and advocacy for policy and legal changes influenced by evidence based research.³

In spite of its progressive vision and mission statement, the HRC has not been able to live up to its aspirations. It remains largely unknown to people in Zambia and is thus underutilised.

This chapter discusses some of the factors that are responsible for the ineffectiveness of the HRC. The argument is that the HRC retains weaknesses it had from the time it was first established, and operates in an unfavourable legal and political environment. Nevertheless, it has the potential to make a difference in the human rights situation in Zambia even in the face of these weaknesses. To do so, the HRC must take capitalise on its potential and use its strategic influence to improve the human rights situation in the country.

2 The evolution and establishment of the HRC

The establishment of an NHRI was recommended by the Bruce Munyama Human Rights Commission of Inquiry (hereafter Munyama Commission). The commission was an ad hoc body appointed in 1992 to investigate and report on the human rights violations that took place in Zambia during the so-called Second Republic, that this, the era when it was a one-party state.

In 1991, after the fall of the iron curtain in Europe in 1989, Zambia returned to a system of multi-party democracy after 18 years of one-party rule under the leadership of President Kenneth Kaunda and the United

2 Zambia’s status review has been deferred three times, the most recent such occasion having been in August 2018. It is not known what status Zambia will receive, given the progressive amendments to the Constitution and the outdated Human Rights Commission Act. Zambia, does not appear on the list of countries with “A” status NHRIs published in March 2019 by the Global Alliance of National Human Rights Institutions (GANHRI).

3 See the HRC’s official website at <http://www.hrc.org.zm> (accessed 10 December 2018).

National Independence Party (UNIP).⁴ The one-party state was characterised by human rights violations such as extrajudicial killings, torture, the disappearance of political opponents, and the suppression of fundamental freedoms including freedom of expression, assembly and association.⁵ The Movement for Multiparty Democracy (MMD), which came to power after the 1991 elections under the leadership of President Fredrick Chiluba, sought to investigate violations that occurred during the Second Republic. To this end, President Chiluba appointed the Munyama Commission to carry out an investigation and report on its findings.

In 1993, the commission began work, travelling around the country to collect submissions from citizens. The overwhelming number it received confirmed that there were massive human rights violations during this era. For instance, the commission found evidence of secret detention centres throughout the country where human rights had been violated.⁶ In 1995, it handed in its report to the President with the recommendation that a permanent Human Rights Commission be established to prevent future human rights violations.⁷

It would thus be true to say that, at the start of the Third Republic in Zambia, the country had high expectations of this institution and its effectiveness. (Whether these expectations have been met will be the subject of discussion in this chapter's conclusion.) As Alfred Chanda, a prominent activist and scholar based at the University of Zambia, suggested at the time in his study of the human rights situation under the Second Republic, "given the rampant human rights abuses that have occurred in Zambia since independence and the failure of the majority of victims of such violations to obtain redress for various reasons, a permanent human rights commission should be created".⁸

4 At independence in 1964, Zambia was a multi-party democratic state. However, in 1973, like most African states at the time, the government, under the leadership of Dr Kenneth David Kaunda, amended the Constitution by establishing what they called a one-party participatory democracy. This was done through the first-ever Constitutional Review Commission, called the Chona Commission and headed by the then Minister of Justice, Mainza Chona. A philosophy of humanism was propounded and close relations with eastern powers were nurtured. For a detailed constitutional history, see J Mwanakatwe, *End of an Era*, Lusaka, Multimedia (1994).

5 Munyama Human Rights Commission of Inquiry Report (1995).

6 *Ibid.* Most of these detention centres were located in inaccessible rural parts of the country.

7 *Ibid.*

8 A Chanda, *Zambia: A Case Study of Human Rights in Commonwealth Africa* (unpublished PhD thesis) (1992), p 410.

The Munyama Commission's recommendation of a permanent human rights commission was reiterated by the Mwanakatwe Constitutional Review Commission (hereafter Mwanakatwe Commission). In 1991, following the return to multi-party politics, the MMD government embarked on a process of constitutional reform, appointing the Mwanakatwe Commission at the same time as the Munyama Commission. The purpose of the Mwanakatwe Commission was to travel throughout the country to ascertain the views of the people of Zambia on how a new constitution should be developed and what content it should have.

One of the issues to arise was the protection of human rights. Like the Munyama Commission, the Mwanakatwe Commission found that citizens were concerned about the violations that occurred during the Second Republic.⁹ To that end, among the recommendations that were made was that a referendum be held to amend the Bill of Rights¹⁰ and that a permanent human rights commission should be established.

Following these recommendations, a constitutional amendment in 1996 established the HRC in Article 125, while Article 126 provided that its functions powers, composition, funding and administrative procedures, including the employment of staff, would be prescribed in an Act of Parliament. To actualise these provisions, the Human Rights Commission Act 39 of 1996 (the HRC Act) was enacted. In 1997 the Commission came into operation under its first chairperson, the then High Court judge Madam Justice Lombe Chibesakunda.

From the time of its establishment, the HRC has consistently drawn criticism of its autonomy, effectiveness and structure. Many have said it is based on a weak legal framework, describing the Commission as a dog that barks but lacks the teeth to bite anything. In response to these criticisms, Article 230 of a 2016 constitutional amendment re-established the HRC and spelt out its functions and powers with a view to enhancing its effectiveness.

9 See note 5.

10 The Bill of Rights is found in Part 3 of the Constitution, where it has remained unchanged since independence. The recommendation that a referendum be held to amend it was never accepted. In 2016 an attempt was made to amend the Bill of Rights through a referendum but, unfortunately, it failed. According to Article 79 of the Constitution, the Bill of Rights can be amended only through a national referendum where not less than 50 per cent of registered voters participate and vote in favour of the amendment.

The 2016 amendment to the Constitution was, arguably, a symbolic rebirth of the HRC, given that for more than five years from 2010- 2016 it had been non-functional in many respects as it had no commissioners. New Commissioners were appointed in 2016 and sworn in by Present Edgar Lungu following the amendment. Moreover, to ensure that the HRC functions in line with the constitutional amendment, a bill has been drafted to amend the 1996 HRC Act. The bill is not available to the public, however, and so it remains to be seen whether the changes that are to be introduced will indeed make the HRC more effective. The bill did not go through wide stakeholder consultation, which raises concerns about its contents. Nonetheless, when it goes through the parliamentary-committee stage, stakeholders will have an opportunity to make their comments on it.

3 The nature of the HRC

3.1 Model

NRHIs take different forms and have different natures.¹¹ Zambia has chosen the model of a human rights commission, the most common form of NHRI in the Commonwealth tradition. Commissioners are appointed by the presidents and work on a part-time basis.

Zambia also has a special commission on gender equality, along with a public protector, an office which replaced that of the administrator-general in 2016. However, this chapter deals with the country's general NHRI, the HRC.

3.2 Legal framework

As noted, the HRC was created by the 1996 amendment to the Constitution. Whilst Article 125 merely provided for its establishment of the Commission, Article 126 left all matters pertaining to its functions to be determined through ordinary legislation. The Human Rights Commission Act 36 of 1996 was enacted to provide for its functions and other matters, as required by Article 126 of the Constitution.

However, due to numerous calls for a more effective human rights commission, Articles 125 and 126 were repealed by the 2016 amendment to the Constitution. As it stands, the existence of the HRC is now based on part 18, Article 230 of the Constitution as amended in 2016. The provision

11 Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, New York/Geneva, United Nations (2010), p 22.

states: “There is established the Human Rights Commission which shall have offices in the provinces and progressively in the districts”.

Part 18 creates other commissions and institutions in Zambia. Article 238 provides that a commission shall be a self-accounting institution that in matters of finance deals directly with the ministry responsible for finance. It thus goes without saying that the HRC receives funding from the central government through the Ministry of Finance.¹² By way of illustration, because the latter has not yet made the appropriate financial provision, the HRC does not offices in all provinces and districts of the country.

Article 240 provides for the appointment of members of commissions and the general qualifications a person should have to be eligible for appointment. In essence, the article requires that commissioners should be Zambian citizens, of good financial standing, have paid all their taxes, and not have criminal records. This provision should be read together with the detail furnished in the HRC Act.

In turn, this Act can be said to derive its authority from Article 242 of the Constitution, which provides that “[t]he functions, composition, appointment of members, tenure of office of members, processes and procedures, operations, administration, structures finances and financial management of a Commission shall be prescribed”. The loose wording of Article 242 casts serious doubt on the independence of the HRC because would depend entirely on the goodwill of politicians.

3.3 Composition of the HRC

The composition of the HRC is provided for in the HRC Act. Section 5 prescribes that the Commission shall consist of a chairperson, a vice chairperson and not more than five other commissioners.¹³ The commissioners serve for a term of three years, renewable for another three years.

12 This is so because, in practice, the Ministry of Finance has the power to decide how much to allocate to a particular commission or department, irrespective of the fact that the ZHRC submit its budget indicating how much it needs for its operations. The Ministry of Finance usually reduces the budget in the name of “many other competing and equally important matters of national interest and priorities”.

13 Currently the Commission is filled to the maximum constitutional capacity. The chairperson, vice chairperson and five commissioners were appointed from across cultures and professions.

With regard to qualifications, the chairperson and vice chairperson should be persons who are qualified at the very least to be High Court judges.¹⁴ The Act is silent on the qualifications of other commissioners. However, Article 240 of the Constitution provides guidance, as it sets out the general qualifications for members of all commissions. It states that a person qualifies to be a member of a commission if that person is a Zambian citizen, has not served a term of more than three years' imprisonment immediately before appointment, has declared his or her assets and liabilities, paid his or her taxes, and does not have a mental or physical disability that would make him or her unable to perform the functions required by a Commissioner.

The most controversial issue to do with the HRC's composition relates to the appointment of commissioners. All of them are appointed by the President under section 5(2) of the HRC Act, which raises serious doubts about their independence. For instance, at his or her discretion, the President can decide to pack the Commission with government sympathisers. The fact that Members of Parliament vote along party political lines means that the process of parliamentary ratification does not offer any real safeguard to prevent the President from doing so.

The situation is compounded by the fact that section 7(1) of the Act gives the President sweeping powers to remove a Commissioner on obscure grounds, such as inability to perform, incompetence or misbehaviour. The Act does not define what amounts to incompetence or misbehaviour, and as such gives the President wide-ranging discretionary powers to remove any commissioner on any of these grounds.

The day-to-day activities of the HRC are run by the secretariat, which is headed by a director and deputy Director. The director of the HRC also acts as the secretary to the commissioners. The director and all other members of staff are appointed by the commissioners. The members of staff of the Commission are regarded as public officers by virtue of the fact that Article 266 of the HRC Act states that every person who is paid from public funds is a public officer.

3.4 Functions and powers of the Commission

The HRC's functions are set out in Article 230 of the Constitution. Article 230(2) states that the general function of the HRC is to "ensure that the Bill

14 The qualification for a judge of the High Court Judge is that a person should be a lawyer with at least ten years standing at the bar. See Article 141(1) of the Constitution.

of Rights is upheld and protected”.¹⁵ Article 230(3) prescribes that its specific functions are to:

- investigate and report on the observance of rights and freedoms;
- take necessary steps to secure appropriate redress where rights and freedoms are violated;
- endeavour to resolve a dispute through negotiation, mediation and conciliation;
- carry out research on rights and freedoms and related matters;
- conduct civic education on rights and freedoms; and
- perform such other functions as prescribed.

These functions stated in the Constitution are supplemented by section 9 of the HRC Act, which provides that the Commissions are to:

- investigate human rights violation;
- investigate any maladministration of justice;
- propose effective measure to prevent human rights abuse;
- visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for protection of human rights; and
- do all such things as are incidental or conducive to the attainment of the functions of the Commission.

To enable it to carry out its functions, the HRC Act gives powers to the HRC to investigate violations on its own initiative or on receipt of a complaint. In this regard, the HRC can summon any person or authority to appear before it and answer questions. The HRC also has powers to summon the production or disclosure of any information relevant for the investigation.¹⁶ These powers are provided for under section 10 of the Act. Lastly, the HRC has powers to make recommendations appropriate to its findings.¹⁷

15 Broadly interpreted, the function of the ZHRC can be said to extend to international human rights law in the sense that the Commission can monitor the implementation of regional and international instruments that Zambia has ratified. Narrowly interpreted, the mandate of the Commission seems to be limited to only the Bill of Rights.

16 Section 10 of the HRC Act.

17 It has been argued that the Commission should be given the power to make binding decisions instead of recommendations as these are usually ignored. A solution might be to make the Commission a quasi-judicial body as this would give it power to make binding decisions.

Given the limited nature of Zambia's Bill of Rights its claw-back clauses, and bearing in mind the Paris Principles, it can be argued that the functions and powers of the HRC are very narrow. The Bill of Rights provides only for civil and political rights, and with a claw-back clause in the case of each right. It does not help that the Bill of Rights was adopted from the colonial constitution. The upshot of this is, then, that the scope of rights the HRC is mandated to protect is extremely limited.

Moreover, the fact that the HRC does not have offices in all the provinces and districts means that the geographical reach of its services is also limited. Of the ten provinces, the HRC has offices in only five of them, and these are not staffed by the qualified personnel. In practical terms, the HRC reaches about only 40 per cent of the national territory.

Another limiting factor is that the Commission has no power to be a party in a matter that is in court.¹⁸ In fact, the Commission has no separate or independent legal personality, and as such it cannot join matters as an *amicus curiae* or intervenor. This has rendered it largely impotent on important human rights issues that have become the subject of court proceedings in Zambia.

The Constitution and HRC do not give the HRC the express power to monitor compliance with international and regional human rights treaties. However, if the functions and powers of the HRC are broadly, and creatively, interpreted, they could be considered, arguably, to include the monitoring of international and regional human rights treaties and hence conform to some of the standards in the Paris principles.¹⁹ This would require commissioners and the secretariat staff to be knowledgeable about human rights and have the ability to act independently without being subjected to political or other undue influence.

As a further limitation, the thematic areas in which the HRC works was limited by the creation of the Gender Equality and Equity Commission (GEEC) in 2016. The GEEC is established under Article 231 of the Constitution and has the mandate to deal with human rights issues related to sex and gender. The functions and powers of the GEEC are

18 Section 10 of the HRC Act. Acting as *amicus curiae* in human cases is one of the most important strategic interventions an NHRI can do. For details of how an NHRI can do so, see Asia Pacific Forum, "Fact Sheet 8, Responsibilities and Functions of an NHRI: Intervening in Court Proceedings", available at <https://www.asiapacificforum.net/support> (accessed 10 March 2019).

19 See note 18.

provided under section 9 of the Gender Equity and Equality Act of 2015.²⁰ The functions are, basically, to ensure gender mainstreaming in public institutions and promote gender equality through sensitisation programmes.

Notably, the two commissions have different functions and therefore do not overlap in their work. The Constitution, the Gender Equity and Equality Act and the HRC Act do not create any specific relationship between the two commissions, albeit that at a practical level it is envisaged that they will collaborate with each other. However, section 9(1)(d) of the Gender Equity and Equality Act gives power to the GEEC to liaise with other institutions in the performance of its function. In terms of this section, a framework for interfunctionality and collaboration can be created between the two commissions. Given that, at the time of writing, the GEEC has been in existence for a little more than a year, it is too early to comment on whether the two commissions have any effective working collaboration.²¹

Another institution with the potential to collaborate with the HRC is the Office of the Public Protector, or Ombudsman. In some jurisdictions, the NHRI takes the form of an ombudsperson with a wide mandate that includes aspects of human rights. In Zambia, this office is established under Article 243 of the Constitution, read together with the Public Protector Act 15 of 2016 and its focus on ensuring that there is no maladministration in public institutions. The Office of the Public Protector, previously known as the Office of the Administrator-General, is one of the new institutions introduced in the 2016 amendment to the Constitution, although at the time of writing it was not yet fully functional as it had not received funding for its operations. There are no overlaps in the functions of the HRC and the Ombudsman; however, the potential for collaboration does exist, especially in cases where human rights violations are alleged with respect to public officers carrying out the functions of their offices.

20 Section 10 of the Gender Equity and Equality Act 22 of 2015. The Act was passed before the constitutional amendment of 2016, so its contents reflect the aspirations people had for a new constitution. For example, under Part 5, the Act provides for economic, social and cultural rights relating to, inter alia, employment, education and health. The hope at the time was that the Bill of Rights would be amended by referendum and see the introduction of economic, social and cultural rights.

21 During the parliamentary debate on the establishment of the GEEC, one of the arguments against the GEEC was that the ZHRC had sufficient mandate and powers to deal with the issues that the GEEC was proposed to be set up for. In this regard it was argued that the GEEC was an unnecessary institution, creating a duplicate expense for the state, given the existence of the ZHRC.

3.5 Public accountability

The HRC has an inconsistent record of public accountability. While it has produced human rights annual reports for most of the years of its existence, in many instances they come out late and amount to replicas of previous reports. At the time of writing, the most recent such report that is publicly available is the 2015 report.

As regards performance, section 25 places a responsibility on the HRC to submit an annual report to the President on its activities, finances and expenditure and such other information as the President may require. It can be argued that reporting to the President undermines the autonomy of the HRC and makes it vulnerable to executive control. In this regard, what would be preferable is to have a date set aside every year on which the HRC makes its report to Parliament and can answer questions. In this way, the report would be made directly to the representatives of the people. Of course, the challenge with this is that Parliament is divided along political lines, with the party in power having control of the executive and thus the decisions of the house.

4 Factors affecting the HRC's effectiveness

4.1 A weak human rights system

The primary function of the HRC is to ensure that “the Bill of Rights is upheld and protected”. As noted, the scope of the rights recognised and protected by the Constitution is limited to civil and political rights. Moreover, thanks to the Constitution’s extensive use of claw-back clauses, the nature and scope of the human rights the Commission is supposed to uphold is vague and uncertain. As far back as 1996, the HRC observed that Zambia’s domestic human rights system made it vulnerable to dictatorship. In 2016, an attempt was made to amend the Bill of Rights by referendum, but this failed because the threshold for approving the amendment was not met. The failed referendum has meant that economic, social and cultural rights remain as directive principles of state policy and are therefore not justiciable.

It is difficult, then, for the HRC to be effective in the context of a weak legal framework. Although the establishment of the HRC ought to have enhanced this framework, its functions and powers are very limited, leaving it unable to have a strong, positive effect on the country’s human rights situation.

4.2 Limited functions and powers

As just noted, the functions and powers of the HRC are limited. For a start, it cannot use Zambia's international and regional human rights obligations to monitor the state. This is so despite the fact that Zambia has ratified all the major regional and international human rights treaties. Zambia is a dualist state and thus international and regional human rights standards have to be domesticated to be enforceable.²² Owing to its limited mandate, the HRC cannot receive complaints or investigate violation of rights such as the right to health, social security education and other economic, social and cultural rights.

Another limitation on the powers of the HRC is that it cannot make binding decisions. The Constitution grants power to the HRC to conduct investigations and make decisions appropriate to its findings. However, the decisions are merely recommendatory and not binding on any institution or body, be it public or private.

4.3 Lack of independence

Under the Paris Principles, independence is the defining characteristic and key indicator of an "A-level" NHRI.²³ Independence is not defined in the Principles, but it can be understood as the ability of an NHRI to carry out its mandate without fear or favour and free of interference from external forces such as the state, the private sector or individuals. The main requirements for independence are that the NHRI must be answerable to Parliament and not the executive, its members must be appointed by a body which is not controlled by the executive (a special parliamentary committee would be ideal), they must have security of tenure, and the NHRI must appoint its own secretariat staff.²⁴

22 On the other hand, in many cases the Courts have been progressive and decided some cases on the basis of Zambia's international obligations. For example, in *Sara Longwe v Intercontinental Hotel 1992/HP/10* the court decided the case on the basis of the Convention on the Elimination of All Forms of Discrimination Against Women. However, in most cases the Supreme Court has cautioned against the use of international law, indicating that it has only persuasive authority. The most prominent judgment is that by former Chief Justice Mathew Ngulube in *Sata v Post Newspaper* (1995).

23 The accreditation process is done by the Global Alliance of National Human Rights Institutions (GANHRI) through its sub-committee on accreditation (SCA). The SCA will only consider an NHRI as independent if it is independent both in law and practice. For detail, see <https://bit.ly/2XvgiTa>.

24 International Council of Human Rights and the Office of the United Nations High Commissioner for Human Rights, *Assessing the Effectiveness of National Human Rights Institutions*, Switzerland (2005), p 12.

The HRC fails to meet most of these conditions. For instance, the fact that commissioners are appointed and removed by the President undermines both the institutional independence of the HRC and the individual independence of the commissioners. Related to this is the fact that commissioners and members of the HRC's staff are considered as public officers in terms of Article 266 of the Constitution.²⁵ Furthermore, Article 185 of the Constitution gives the President the power to terminate the services or employment of any public officer, in addition to which it does not outline any reasons that the President has to cite in doing so.

The lack of independence of the HRC is also evident in the fact that it has to report annually to the President about everything from its activities to the way it spends the money allocated to it. The practical implications of this are likely to defeat the provisions of Article 216 of the Constitution, which prescribe as follows:

A commission shall –

- Be subject to this Constitution and the law;
- Be independent and not subject to the control of a person or an authority in the performance of its functions;
- Act within dignity, professionalism, propriety and integrity;
- Be non-partisan; and
- Be impartial in the exercise of its authority.

It is difficult to reconcile section 25 of the HRC Act with Article 216 of the Constitution. However, it must be appreciated that Article 216 came into being in 2016, whereas section 25 has been in existence since 1996. This disharmony between some provisions of the Constitution and those in the Act speak to the urgent need to amend the HRC Act so as to align it with the 2016 constitutional amendments. The slow pace of legislative harmonisation is in itself a major stumbling block to the effective operation of the Commission, given that some of the challenges it faces could be removed easily by amending the HRC Act.

4.4 Lack of financial autonomy

Financial autonomy is key to the independence and operational effectiveness of any NHRI. It entails that there should be a mechanism whereby public funding is provided to an NHRI in a way that does not subject it to the control of the state.

25 Article 266 is the definitions part of the Constitution. A public officer is defined as person who receives his or her salary or any allowance from public funds.

From this perspective, the HRC does not have financial autonomy. It is heavily dependent on the government for its funding and operations, in addition to which the government often does not provide it with adequate funds. This combination of lack of financial autonomy, on the one hand, and inadequate funding, on the other, are at the core of the problems the HRC faces.

First, it is the case that the HRC falls under the Office of the Vice President at cabinet level. The Office of the Vice President, through the Ministry of Finance, oversees its budget process. The HRC has the power to determine its own budget according to what it deems are priority areas under its mandate. However, this budget can be adjusted by the Office of the Vice President through the Ministry of Finance. The budget is then presented as either a Ministry of Justice or Office of the Vice President line item. For this reason, Parliament does not have the opportunity to deliberate on the HRC's work and the importance of funding its activities.

However, a system of autonomous funding, one in which the HRC presents its stand-alone budget to Parliament and Parliament votes on the budget, would be a more desirable situation as it allows for some level of autonomy. In this way, it could be said, theoretically at least, that through their elected representatives the people have a say over the institution mandated to ensure the protection of their rights.

The extent of the lack of financial autonomy is seen in section 22(2) of the HRC Act. The provision prohibits the HRC from sourcing or accepting funding such as grants, donations or loans from a source other than the government without the approval of the President. The reason for this provision is the preservation of national security.²⁶ In this regard, the HRC is subject to presidential, or rather executive, control over the funding it receives from the state and that it can receive from other sources. Although the HRC has indeed received donor funding with the President's approval, the very existence of this provision in law undermines the principle of financial autonomy.

Lack of autonomy feeds the problem of inadequate funding, and this impacts on the effective operation of the HRC. The fact that the HRC is not adequately funded cannot be overstated. In the 2012 Universal Periodic Review, one of the most important recommendations the Human

26 The intelligence and security wing of Zambia falls under the office of the President. Section 22(2) of the HRC Act was drafted with the idea that presidential approval for external funding of the ZHRC is given after the security wing has done background checks to ensure that such funding poses no threat to national security.

Rights Council made with regard to Zambia was that the government should start funding the HRC adequately and ensure its financial autonomy. Although this was accepted, it has not been implemented and hence the situation has not improved. The HRC itself observes this situation and states the following in its strategic plan:

Additionally, in the last 5 years there has not been a significant increase in the funding provided to the HRC by the government. The fact that at no point in time has funding to the HRC been adequate means that over time the gains made are slowly being lost in promotion and protection of human rights. The organisational capacity quagmire has rendered the institution unable to effectively and efficiently execute its mandate.²⁷

Arguably, the poor funding of the NHRI is indicative of the government's lack of commitment to human rights' promotion and protection.

4.5 The Commission's inaccessibility

The Constitution requires that the HRC have offices in every district of every province in Zambia. To put this in perspective, Zambia has a total area of 752,612 km², a population of 13,092,666,²⁸ and ten provinces, with 117 districts. In principle, this would mean that a total of ten provincial offices, 117 district offices and one national office, all of them fully staffed and adequately funded, have to be established. Given the present financial incapacity, the constitutional mandate can best be described as aspirational.

The HRC's lack of accessibility has rendered it very ineffective. Two factors are responsible for this situation. First, the majority of Zambia's inhabitants are unaware both of their rights and of the HRC's existence as an institution that can provide redress for violations; as such, and simply put, members of the public do not turn to the HRC. This in part explains the low volume of cases that the HRC's complaints unit receives. Secondly, the HRC does not have the material and financial capacity to be mobile and reach the country's vast population in all the districts.

To mitigate this problem of inaccessibility, the HRC plans, as a temporary measure, to work with the constituency offices of Members of Parliament found across the country and located in all of its districts.²⁹ The

27 Zambia Human Rights Commission Strategic Plan (2014-2016). This is the most current plan. Due to financial constraints, the strategic plan for later years is yet to be finalised and approved.

28 Zambia National Census Report 2010.

29 See note 27.

successful execution of the plan would require, however, that the HRC is adequately funded.

4.6 Organisational incapacity

The HRC's organisational incapacity contributes significantly to its ineffectiveness. The issues in this regard include poor staffing, lack of adequate office space, limited logistical support, and inadequate collaboration with stakeholders.

4.6.1 *Inadequate staffing*

Currently, the HRC has an establishment of about 131 members of staff, excluding the commissioners. However, it has never operated at this full staffing level of 131.³⁰ It has been operating instead with less than 50 per cent of the required staff³¹ – for instance, the present staff level is 55.³² With provincial and district offices yet to be funded, it can hardly be said that this staffing problem is likely to improve in the near future. In the early days of its operations, the HRC functioned with a skeleton staff, with some departments having only one member and others none at all. It was only in 2005 that the staffing level began to improve, but staff shortages nevertheless remain a critical issue to this day.³³

A positive note is that existing members of staff are drawn from diverse groups and there is a balance in gender representation. Half of the HRC's commissioners as well as members of staff are women, in addition to which most of the senior positions, such as director and deputy director, are likewise held by woman. This is in keeping with the Paris Principles' requirement that NHRIs evince pluralism in their representation of a country's societal diversity.

4.6.2 *Lack of office space*

The HRC has its headquarters in Lusaka. A visit to them reveals that the premises are too small and cramped to provide a conducive working environment for members of staff. Problems of office space and working premises are compounded by the fact that the districts and provinces do

30 See the Commission's official website at <http://www.hrc.orgf.zm> (accessed 10 December 2018).

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

not have any offices at all. This situation is not likely to improve as there are no plans in the offing for upgrading the HRC's infrastructure.

The plan to use the constituency offices of Members of Parliament is an innovative idea but is not a long-term solution to the problem. If the HRC is to be effective, there is no substitute for its having its own physical infrastructure within the provinces and districts.

4.6.3 *Challenges of transportation and logistics*

In order to carry out its activities nationwide, the HRC needs efficient and properly functioning vehicles, but here too it faces severe challenges. As the HRC notes in one of its reports:

[a]part from two vehicles purchased in 2013, the HRC vehicle fleet is aging, with most of the vehicles having been in operation between 5 and 10 years, thus increasing the cost of maintenance due to a high downtime of these assets. Some relief is provided with projects that are run with cooperating partners. However, this is not a sustainable form of operating as the commission needs its own fleet of vehicles to effectively operate.³⁴

4.6.4 *Uncoordinated relations with stakeholders*

The HRC has made many efforts to collaborate with stakeholders in the human rights space. Indeed, it can be said to be very open to collaboration. Such collaboration is not, however, at its optimal level. Many institutions still ignore overtures by the HRC, with civil society organisations (CSOs) saying they do so because they perceive it as a government department unable to participate independently in programmes. Some go so far to as to say they fear the HRC will undermine their activities, and as such they prefer to exclude it from their affairs and decline its overtures to them.³⁵

The perception of the HRC as government-controlled goes back to its early days, with the belief being that it fails to put pressure on the state to meet its human rights obligations and rarely issues statements on violations by the government. This situation impedes fruitful relations between the HRC, civil society and other stakeholders. As a result, efforts towards human rights promotion in Zambia remain fragmented. The HRC has sought to address this challenge in its strategic plan:

34 See note 27.

35 For instance, during the process leading to the 2016 amendment, a CSO coalition excluded the HRC from its advocacy out of fear that it was compromised on the issue of the Bill of Rights.

Currently, the monitoring of human rights is fragmented and uncoordinated. There are several stakeholders who are involved in this important endeavour but mostly limited to their areas of interest. Moreover, the data that they collect rarely feeds into the human rights reporting framework which should be informing the local stakeholders and backing the country's fulfilment of its international obligations to continuously report on the state of human rights in Zambia. The lack of a coordinated national human rights monitoring mechanism has also resulted in the Human Rights Commission [having] to shoulder this enormous responsibility single-handedly, [notwithstanding] its own institutional and financial limitations. The need to put in place a soundly coordinated monitoring mechanism that embraces the involvement of all national stakeholders is therefore of great significance.³⁶

It goes without saying that if the HRC were to have strong relationships with all stakeholders, its operational capability would improve, leading to more effective performance.

5 Conclusion

The HRC remains a significant institution in the protection and promotion of human rights in Zambia, but in this analysis of its nature and the challenges it faces, one important issue stands out: the need to amend the HRC Act so as to bring it into alignment with the constitutional amendment of 2016. The Constitution is progressive in its provisions for the HRC save for a few that do not seem to speak to each other. Thus, amending the Act by removing some of its problematic provisions would enhance the effectiveness of the HRC.

In particular, the amendment should address the issue of financial autonomy, as the lack thereof is a major constraint to the HRC's operations. The amendments should also give the HRC wider powers and functions and enhance its mandate, in keeping line with the Paris Principles.³⁷ For instance, the HRC should be given the powers to make binding decisions and not merely recommendations, as these are seldom respected. The question of its independence also be addressed, this by ensuring that appointments are not politically motivated.

In this regard, an important issue the HRC can address at the moment is its public relations. Its image is a negative one, as it is perceived as a state-controlled entity. The HRC would do well to develop an effective public communication strategy that addresses this negative perception.

36 See note 27.

37 See note 8, p 297.

Furthermore, it can capitalise on some of the successes it has garnered by showcasing them to inspire confidence among the general public.

A crucial matter the amendment should deal with is the legal personality of the HRC. The Act should give legal capacity and personality to the HRC so that it can be able to join court matters as an *amicus curiae* or intervenor. Here, the HRC would be able to take advantage of section 58 of the Constitutional Court Act which permits any institution interested in a matter to be *amicus curiae* and file an *amicus* brief. This would be an important way in which the HRC can carry out the “protection” aspect of its mandate.

In terms of structure, it is a good idea for there to be 12 commissioners. One of them would serve as chairperson, another as deputy, and the ten other ordinary commissioners each would be responsible for overseeing one of the ten provinces in Zambia. In this way, the HRC would be better placed to exercise more effective oversight of what is happening in the provinces and districts. This would also help give focus to the work of the commissioners and compensate to some extent for the shortage of staff in the provinces. The reporting structure of the HRC should be improved too as part of this recommended change in structure.

At a practical level, the HRC’s strategic action plan needs to emphasise collaboration with other institutions such as the GEEC and Public Protector, which currently work in isolation of it. Although their mandates differ, it is possible for these institutions to complement one another. The onus to initiate such collaboration is on the HRC, as it is the one with the wider mandate and has been in existence the longest.

It is clear that building a strong human rights institution is a daunting task. This task cannot be left to the Commission alone, nor to the goodwill of the government. All other stakeholders, ranging from CSOs, activists, scholars and lawyers to the general public, should play a role. As the benefits of a strong NHRI are felt by all, so the task of building a strong HRC is a common responsibility of all.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The Zambian Constitution, much to a limited extent, like the Kenyan, South African and Zimbabwean Constitution has a constitutionally entrenched Human Rights Commission which is included amongst other commissions such as the Gender Equity and Equality Commission and the Public Protector. These are all provided for in part XVIII of the Constitution. The relevant provisions are as follows:
Constitution of Zambia (Amendment) No 2 of 2016

PART XVIII: SERVICES, COMMISSIONS AND OTHER INDEPENDENT OFFICES

216. A commission shall –

- (a) be subject only to this Constitution and the law;
- (b) be independent and not be subject to the control of a person or an authority in the performance of its functions;
- (c) act with dignity, professionalism, propriety and integrity;
- (d) be non-partisan; and
- (e) be impartial in the exercise of its authority.

Human Rights Commission

230(1) There is established the Human Rights Commission which shall have offices in the Provinces and progressively in districts.

2) The Human Rights Commission shall ensure that the Bill of Rights is upheld and protected.

The Human Rights Commission shall –

- (a) investigate and report on the observance of rights and freedoms;
- (b) take necessary steps to secure appropriate redress where rights and freedoms are violated;
- (c) endeavour to resolve a dispute through negotiation, mediation or conciliation;
- (d) carry out research on rights and freedoms and related matters;
- (e) conduct civic education on rights and freedoms; and
- (f) perform such other functions as prescribed.

Gender Equity and Equality Commission

231(1) There is established the Gender Equity and Equality Commission which shall have offices in the Provinces and progressively in districts.

2) The Gender Equity and Equality Commission shall promote the attainment and mainstreaming of gender equality.

3) The Gender Equity and Equality Commission shall –

- (a) monitor, investigate, research, educate, advise and report on issues concerning gender equality;
- (b) ensure institutions comply with legal requirements and other standards relating to gender equality;
- (c) take steps to secure appropriate redress to complaints relating to gender inequality, as prescribed; and
- (d) perform such other functions as prescribed.

General Provisions Relating to Commissions

238(1) A commission shall be a self-accounting institution which deals directly with the Ministry responsible for finance in matters relating to its finances.

(2) A commission shall be adequately funded in a financial year to enable it to effectively perform its functions.

239. The expenses of a commission, including emoluments payable to, or in respect of, persons serving with that commission, shall be a charge on the Consolidated Fund.

240. A person qualifies to be appointed as a member of a commission if that person –

- (a) is a citizen;
- (b) is permanently resident in Zambia;
- (c) has not, in the immediate preceding five years, served a term of imprisonment of at least three years;
- (d) declares that person's assets and liabilities, as prescribed;
- (e) has paid that person's taxes or has made arrangements satisfactory to the appropriate tax authority for the payment of the taxes;
- (f) does not have a mental or physical disability that would make the person incapable of performing the functions of office;
- (g) is not serving a sentence of imprisonment for an offence under a law; and
- (h) has other qualifications, as prescribed.

241. A commission –

- (a) shall appoint its staff;

- (b) may refer matters within its mandate to appropriate State organs or State institutions for action;
- (c) may initiate its own investigations and receive complaints from a person on matters within its mandate;
- (d) shall take measures to ensure that State institutions and other persons comply with its decisions; and
- (e) shall submit annual reports to the National Assembly on its accounts and activities as prescribed.

242. The functions, composition, appointment of members, tenure of office of members, processes and procedures, operations, administration, structures, finances and financial management of a commission shall be prescribed.

Other Independent Offices Public Protector

243(1) There shall be a Public Protector who shall be appointed by the President, on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly.

- (2) A person qualifies for appointment as Public Protector if that person –
 - (a) is qualified to be appointed as a judge; and
 - (b) does not hold a State office or Constitutional office.
- (3) The office of Public Protector shall be decentralised to the Provinces and progressively to districts, as prescribed.
- (4) The procedures, staff, finances, financial management, administration and operations of the office of the Public Protector shall be prescribed.

244(1) The Public Protector may investigate an action or decision taken or omitted to be taken by a State institution in the performance of an administrative function.

- (2) For purposes of clause (1), an action or decision taken or omitted to be taken is an action or decision which is –
 - (a) unfair, unreasonable or illegal; or
 - (b) not compliant with the rules of natural justice.
- (3) For purposes of clauses (1) and (2), the Public Protector may –
 - (a) bring an action before a court;
 - (b) hear an appeal by a person relating to an action or decision taken or omitted to be taken in respect of that person; and
 - (c) make a decision on an action to be taken against a public officer or Constitutional office holder, which decision shall be implemented by an appropriate authority.
- (4) The Public Protector shall not be subject to the direction or control of a person or an authority in the performance of the functions of office.

- (5) The Public Protector has the same powers as those of the High Court in –
- (a) enforcing the attendance of witnesses and examining them on oath;
 - (b) examining witnesses outside Zambia;
 - (c) compelling the production of documents;
 - (d) enforcing decisions issued by the Public Protector; and
 - (e) citing a person or an authority for contempt for failure to carry out a decision.
- (6) A person summoned to give evidence or to produce a document before the Public Protector is entitled, in respect of that evidence or the production of the document, to the same privileges and protection as those that a person would be entitled to before a court.
- (7) An answer by a person to a question put by the Public Protector is not admissible in evidence against that person in civil or criminal proceedings, except for perjury.

245. The Public Protector shall not investigate a matter which –

- (a) is before a court, court martial or a quasi-judicial body;
- (b) relates to an officer in the Parliamentary Service or Judicial Service;
- (c) involves the relations or dealings between the Government and foreign government or an international organization;
- (d) relates to the exercise of the prerogative of mercy; or
- (e) is criminal in nature.

246. Where the Public Protector is absent from Zambia or is unable to perform the functions of office due to illness or other cause, the President shall appoint a person qualified to perform the functions of the Public Protector until that appointment is revoked or until the Public Protector returns to office.

247(1) Subject to this Article, the Public Protector shall retire from office on attaining the age of sixty years.

- (2) The Public Protector may retire, with full benefits, on attaining the age of fifty-five years.
- (3) The Public Protector may be removed from office on the same grounds and procedure as apply to a judge.
- (4) The Public Protector may resign from office by three months' notice, in writing, to the President.

248. The office of the Public Protector shall report to the National Assembly on matters concerning its affairs.

B.2 Legislative and regulatory instruments

THE HUMAN RIGHTS COMMISSION ACT

CHAPTER 48 OF THE LAWS OF ZAMBIA CHAPTER 48 THE HUMAN RIGHTS COMMISSION ACT

THE HUMAN RIGHTS COMMISSION ACT

ARRANGEMENT OF SECTIONS

PART I: PRELIMINARY

Section

- 1) Short title
- 2) Interpretation

PART II: THE HUMAN RIGHTS COMMISSION

- 3) Extent of Commission's autonomy
- 4) Seal of Commission
- 5) Composition of Commission
- 6) Oath on appointment
- 7) Tenure of office and vacancy
- 8) Filling of casual vacancy
- 9) Functions of Commission
- 10) Powers of Commission
- 11) Complaints
- 12) Sittings of the Commission to be public
- 13) Recommendation by Commission
- 14) Proceedings of Commission
- 15) Committees
- 16) Disclosure of interest
- 17) Prohibition of disclosure of information to unauthorised persons

PART III: DIRECTORATE OF THE COMMISSION

- 18) Director, Deputy Director and other staff
- 19) Prohibition of disclosure of information by staff to unauthorised persons
- 20) Immunity of Commissioners and staff

- 21) Offences

PART IV: FINANCIAL AND OTHER PROVISIONS

Section

- 22) Funds of Commission
- 23) Financial year
- 24) Accounts
- 25) Annual report
- 26) Rules
- 27) Regulations

SCHEDULE

FORM 1-OATH OF HUMAN RIGHTS COMMISSION

FORM 2-OATH OF SECRETARY OR STAFF OF COMMISSION

CHAPTER 48

HUMAN RIGHTS COMMISSION

An Act to provide for the functions and powers of the Human Rights Commission; to provide for its composition and to provide for matters connected with or incidental to the foregoing.

[12th December, 1996]

PART I: PRELIMINARY

1. This Act may be cited as the Human Rights Commission Act.
2. In this Act unless the context otherwise requires –
 - “appropriate authority” means the authority to whom a recommendation is made by the Commission under section *thirteen*;
 - “appointed date” means such date as the President may appoint under section *one*;
 - “Chairperson” means the person appointed as Chairperson under section *five*;
 - “Commission” means the Human Rights Commission established under the Constitution;
 - “Commissioner” means a person appointed Commissioner under section *five*;
 - “Deputy Director” means a person appointed as Deputy Director under section *eighteen*;

“Director” means the person appointed as Director under section *eighteen*;
“Secretary” means the Secretary to the Commission referred to in section *eighteen*;

“Staff” means the staff of the Commission appointed under section *eighteen*; and

“Vice-Chairperson” means the person appointed as Vice- Chairperson under section *five*.

PART II: THE HUMAN RIGHTS COMMISSION

3. The Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.

4(1) The seal of the Commission shall be such device as may be determined by the Commission and shall be kept by the Secretary.

(2) The affixing of the seal shall be authenticated by the Chairperson or the Vice-Chairperson and any other person authorised in that behalf by a resolution of the Commission.

5. Any document purporting to be under the seal of the Commission or issued on behalf of the Commission shall be received in evidence and shall be deemed to be so executed or issued, as the case may be, without further proof, unless the contrary is proved.

5(1)The Commission shall consist of the following Commissioners:

- (a) the Chairperson;
- (b) the Vice-Chairperson; and
- (c) not more than five other Commissioners.

(2) The Commissioners shall be appointed by the President, subject to ratification by the National Assembly.

(3) The Chairperson and Vice-Chairperson shall be persons who have held, or are qualified to hold, high judicial office.

6(1)Every Commissioner shall, on appointment affirm or take an oath in Form I as set out in Part I of the Schedule, and such oath shall be administered by the President.

(2) The Secretary and other members of staff shall on appointment, affirm or take an oath in Form 2 as set out in Part II of the Schedule and such oath shall be administered by a Commissioner for Oaths.

7(1)A Commissioner referred to in subsection (1) of section *five* shall be appointed

- for a term not exceeding three years, subject to renewal:

Provided that the first Commissioners shall be appointed for periods ranging from one to three years in order to facilitate retirement by rotation.

(2) A Commissioner may be removed from office for inability to perform the functions of the Commissioner's office, whether arising from infirmity of body or mind, incompetence or for misbehaviour.

(3) A Commissioner may resign upon giving one month's notice in writing to the President.

(4) The office of a Commissioner shall become vacant –

- (a) if the Commissioner is absent without reasonable excuse from three consecutive meetings of the Commission of which the Commissioner has had notice;
- (b) if the Commissioner is a declared bankrupt; or
- (c) upon the Commissioner's death.

8. If the office of a Commissioner becomes vacant before the expiry of the term of

- office, the President, may, subject to ratification by the National Assembly, appoint
- another person to be a Commissioner, for the unexpired term, in place of the
- Commissioner who vacates the office.

9. The functions of the Commission shall be to –

- (a) investigate human rights violations;
- (b) investigate any maladministration of justice;
- (c) propose effective measures to prevent human rights abuse;
- (d) visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- (e) establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights;
- (f) do all such things as are incidental or conducive to the attainment of the functions of the Commission.

10(1) The Commission shall have powers to investigate any human rights abuses –

- (a) on its own initiative; or
- (b) on receipt of a complaint or allegation under this Act by –
 - (i) an aggrieved person acting in such person's own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of an aggrieved person; ora person acting on behalf of and in the interest of a group or class of persons.

(2) The Commission shall have powers to –

- (a) issue summons or orders requiring the attendance of any authority before the Commission and the production of any document or record relevant to any investigation by the Commission;

- (b) question any person in respect of any subject matter under investigation before the Commission;
 - (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission; and
 - (d) recommend the punishment of any officer found by the Commission to have perpetrated an abuse of human rights.
- (3) A witness summoned under subsection (2), shall be examined under oath and such oath shall be administered by the Chairperson.
- (4) Subject to subsection 5, the Commission may where it considers it necessary recommend –
- (a) the release of a person from detention;
 - (b) the payment of compensation to a victim of human rights abuse, or to such victim's family;
 - (c) that an aggrieved person seek redress in a court of law; or
 - (d) such other action as it considers necessary to remedy the infringement of a right.
- (5) Notwithstanding subsection 4, the Commission shall not have powers where a matter is pending before a court.
- 11(1) A complaint or allegation referred to in paragraph (b) of subsection (1) of
- section *ten* may be made orally or in writing and shall be addressed to the Secretary
 - who shall, in the case of an oral complaint or allegation, reduce the same to writing.
- (2) Every complaint or allegation shall-
- (a) be signed or thumb-printed by the person making it; and
 - (b) bear the complainant's name and address.
- (3) A complaint or allegation shall not be received by the Commission unless it is made within a period of two years from the date on which the facts giving rise to any such complaint or allegation become known to the person making the complaint or the allegation.
- (4) The Commission may refuse to conduct, or may decide to discontinue an investigation where it is satisfied that the complaint or allegation is malicious, frivolous, vexatious or the particulars accompanying it are insufficient to allow a proper investigation to be conducted, and shall indicate accordingly in the report.
- (5) The Commission shall, in any case in which it decides not to conduct an investigation, or decides to discontinue an investigation inform the complainant in writing accordingly, and give reasons therefor.
- (6) The Commission may in any inquiry make such orders and give such directions as it may consider necessary for the purpose of conducting any investigation.

12. The Commission shall –

- (a) conduct all its sittings in public:

Provided that the Commission may hold its sittings in camera when the Commission considers it necessary; and

- (b) make all its reports in respect of such sittings public.

13(1) The Commission shall –

- (a) send written reports of its findings to the parties concerned; and

- (b) dependant on the findings made, make such recommendation as it considers necessary to the appropriate authority.

(2) The appropriate authority shall, within thirty days from the date of such recommendation make a report to the Commission, on any action taken by such authority to redress any human rights violation.

(3) Any person who contravenes the provisions of subsection (2) shall be guilty of an offence, and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units, or to imprisonment for a term not exceeding three years, or to both.

(4) For the purposes of subsection (3), where an offence is committed by –

- (a) a body corporate, every director or similar officer of the body shall be guilty of the offence;

- (b) a partnership, every partner shall be guilty of the offence; and

- (c) a public authority, the officer or officers charged with the responsibility of acting on a recommendation and making a report on such recommendation shall be guilty of the offence.

(5) A person shall not be guilty of an offence under subsection (3) if such person proves to the satisfaction of the court that-

- (a) the act constituting the offence was done without the knowledge, consent or connivance of such person; or

- (b) such person attempted to prevent the commission of the offence having regard to all the circumstances of the case.

6(1) Subject to the other provisions of this Act, the Commission may regulate its own procedure. The Commission shall meet for the transaction of business at least once every three months at such places and times as the Chairperson may determine.

(2) The Chairperson may at any time call a meeting of the Commission and shall call a special meeting to be held within fourteen days of receipt of a written request addressed to the Chairperson by at least four other Commissioners.

(3) If the urgency of any particular matter does not permit the giving of such notice as is required under subsection (3), a special meeting may be called by the Chairperson, upon giving a shorter notice.

(4) The Chairperson or Vice-Chairperson with four other Commissioners shall constitute a quorum at any meeting of the Commission.

(5) There shall preside any meeting of the Commission –

- (a) the Chairperson;
- (b) in the absence of the Chairperson the Vice-Chairperson; or
- (c) in the absence of both the Chairperson and the Vice-Chairperson, such other Commissioner as the Commissioners present may elect for the purpose of that meeting.

(6) A decision of the Commission on any question shall be by a majority of the Commissioners present and voting at the meeting and, in the event of an equality of votes, the Chairperson presiding at the meeting shall have a casting vote, in addition to such Chairperson's deliberative vote.

(7) The Commission may invite any person, whose presence is in its opinion desirable, to attend and to participate in the deliberations of the meeting of the Commission, but such person shall have no vote.

(8) The validity of any proceedings, acts or decisions of the Commission shall not be affected by any vacancy in the membership of the Commission or by any defect in the appointment of any Commissioner by reason that any person not entitled to do so, took part in the proceedings.

14(1) The Commission may, for the purpose of performing its functions under this Act, establish such committees as it considers necessary, and delegate to any of those committees such of its functions as it considers fit.

(2) Subject to subsection (1), the Commission may appoint as members of a committee, persons who are, or are not, Commissioners except that at least one member of a Committee shall be a Commissioner.

(3) A person serving as a member of a committee shall hold office for such period as the Commission may determine.

(4) Subject to any specific or general direction of the Commission, a committee may regulate its own procedure.

(5) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and which matter that person or that person's spouse is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or the committee otherwise directs, take part in any consideration or discussion of, or vote on, any question touching such matter.

(6) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

15. Any person who contravenes the provisions of subsection (1) shall be guilty of an offence, and shall be liable, upon conviction, to a fine not exceeding five thousand penalty units.

(1) A person shall not without the consent in writing given by, or on behalf of the Commission, publish or disclose to any person otherwise than in the

course of such person's duties, the contents of any documents, communication, or information which relates to, and which has come to such person's knowledge in the course of such person's duties under this Act.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence, and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units or to imprisonment for a term not exceeding three years, or to both.

(3) If any person having information which to such person's knowledge has been published or disclosed in contravention of subsection (1), unlawfully publishes or communicates any such information to any other person, such person shall be guilty of an offence, and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units or to imprisonment for a term not exceeding three years, or to both.

PART III: THE DIRECTORATE OF THE COMMISSION

16(1) The Commission shall appoint a Director and a Deputy Director of the Commission. The Director shall be –

- (a) the Secretary to the Commission;
- (b) responsible for the management and administration of the Commission;
- (c) a qualified advocate;
- (d) a full-time officer; and
- (e) responsible for the implementation of any matters referred to such Director by the Commission.

(2) The Commission may appoint, on such terms and conditions as it may determine, such other staff as it may consider necessary for the performance of its functions under this Act.

(3) The Public Service Regulations shall apply to the staff appointed by the Commission.

(4) The Commission may engage the services of such advisors and experts as it thinks necessary.

(5) Section *seventeen* shall apply, with the necessary modifications, to the staff.

(6) No proceedings, civil, or criminal, shall lie against any Commissioner or the staff, for anything done in the exercise of such person's functions under this Act. Subject to the provisions of this Act, a Commissioner or a staff member shall not be called to give evidence before any court or tribunal in respect of anything coming to such person's knowledge in the exercise of such person's functions under this Act.

(7) For the avoidance of any doubts, nothing in this section shall protect any Commissioner or the staff, for anything done outside the functions of such person's office.

17(1) A person who –

- (a) is a witness before the Commission and without lawful excuse refuses to be sworn or affirmed, or having been sworn or affirmed refuses to answer fully and satisfactorily any question lawfully put to such person;
- (b) gives false testimony in any material particular to any matter under investigation;
- (c) insults, interrupts or otherwise obstructs any Commissioner or any member of staff in the performance of such person's functions under this Act; or
- (d) disobeys any order made under this Act;

shall be guilty of an offence, and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units, or to imprisonment for a term not exceeding three years, or to both.

PART IV: FINANCIAL AND OTHER PROVISIONS

18(1) The funds of the Commission shall consist of such moneys as may –

- (a) be appropriated by Parliament for the purposes of this Act;
- (b) be paid to the Commission by way of grants or donations; and
- (c) vest in or accrue to the Commission.

(2) The Commission may subject to the approval of the a President –

- (a) accept money by way of grants or donations from any source; and
- (b) raise by way of loans or otherwise, such moneys as it may require for the discharge of its functions.

(3) There shall be paid from the funds of the Commission –

- (a) the salaries, allowances, pensions and loans of the Commissioners and staff;
- (b) such reasonable travelling, transport and subsistence allowances for the Commissioners and members of any committee of the Commission, when engaged in the business of the Commission; and
- (c) any other expenses incurred by the Commission in the performance of its functions.

(4) A person summoned as a witness under this Act, may on the order of the Commission be paid such allowances as may be prescribed by the Commission.

19. The financial year of the Commission shall be the period of twelve months ending on 31st December in each year.

(1) The Commission shall cause to be kept proper books of account and other records relating to its accounts.

(2) The accounts of the Commission shall be audited annually by independent auditors appointed by the Commission.

(3) The auditors' fees shall be paid by the Commission.

(4) As soon as is practicable, but not later than ninety days after the end of the financial year, the Commission shall submit to the President a report concerning its activities during the financial year. The report referred to in subsection (1) shall include information on the financial affairs of the Commission and there shall be appended to the report –

- (a) an audited balance sheet;
- (b) an audited statement of income and expenditure; and
- (c) such other information as the President may require.

(5) The President shall not later than seven days after the first signing of the National Assembly next after receipt of the report referred to in subsection (1), lay the report before the National Assembly.

20. The Commission may, by statutory instrument, make rules for the –

- (a) appointment, including the power to confirm appointments of persons, to any office in respect of which it is charged with responsibility under this Act;
- (b) disciplinary control of persons holding or acting in such offices;
- (c) termination of appointments and the removal of such persons from office;
- (d) practice and procedure of the Commission in the exercise, of its functions under this Act; and
- (e) delegation of its functions or powers.

21. The Commission may, by statutory instrument, make regulations for the better carrying out of the purposes of this Act.

SCHEDULE

Form 1

PART I

(Section (6)(1))

OATH OF HUMAN RIGHTS COMMISSION

I, having been appointed as Chairperson/Commissioner of the Human Rights Commission will, discharge the functions of the office of Chairperson/Commissioner of the Human Rights Commission and that I will not, directly or indirectly, reveal any matters relating to such functions to any unauthorised persons or otherwise than in the course of duty.

SO HELP ME GOD

Sworn/ Affirmed before me this..... day of.....19.....

President

Form 2

PART II

(Section (6)(2))

OATH OF SECRETARY OR STAFF OF COMMISSION

I,.....
having been appointed to exercise the functions of Secretary of the Commission/a member of the staff of the Commission, do swear/affirm that I will not, directly or indirectly, reveal to any unauthorised person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information whatsoever which may come to my knowledge in the course of my duties as such.

SO HELP ME GOD

Sworn/ Affirmed before me this..... day of.....19.....

Commissioner for Oaths



17

THE ZIMBABWE HUMAN RIGHTS COMMISSION

*Nqobani Nyathi**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

The Zimbabwe Human Rights Commission (ZHRC) is an independent constitutional commission that was created in 2007 as a result of political and constitutional developments in Zimbabwe. In its current form, it has a broad mandate to promote and protect human rights and, additionally, to protect the public against abuse of power and maladministration.¹ Nevertheless, the ZHRC was formed and exists in an unfavourable environment.² In spite of some constitutional provisions guaranteeing its independence,³ this is compromised by political interference and the nature of its appointment procedure. The ZHRC also lacks visibility and accessibility and, as shown below, is hamstrung by inadequate funding.

The formal constitutional and legislative provisions creating and operationalising the ZHRC give the impression that there is compliance with the Principles Relating to the Status of National Institutions (The Paris Principles). In reality, the political climate poses challenges that hinder the work of the ZHRC and erode its conformity with the Paris

* C1079 Phakama, Gwanda, Zimbabwe.

1 Section 243 of the Constitution.

2 D Matysak and T Reeler, "Articles of Good Faith: Assessing Zimbabwe's GPA as a Mechanism for Change – a Legal Perspective", *Research and Advocacy Unit* (2011), pp 55-57.

3 Section 235 of the Constitution.

Principles, thus diminishing its effectiveness in promoting and protecting human rights in Zimbabwe.

Despite these challenges, the ZHRC is indeed contributing to the promotion and protection of human rights. It monitors human rights situations and receives and deals with complaints of human rights violations. Its constitutional framework aside, the ZHRC also has an opportunity to ensure compliance with international standards in human rights law due to its affiliation with the African Commission on Human and Peoples' Rights (hereafter African Commission),⁴ stakeholders such as the Global Alliance of National Human Rights Institutions (GANHRI),⁵ and various civil society organisations (CSOs).⁶

This chapter is organised into six sections. The next section discusses the establishment and evolution of the ZHRC. Section 3 focuses on the nature of the ZHRC and explores its legal framework, independence, appointment procedure, financial autonomy, professional skills and knowledge, relations with civil society, and accessibility. Section 4 deals with its mandate, and section 5, with its public accountability. The last section offers recommendations on how the ZHRC may be made more effective.

2 Establishment and evolution of the ZHRC

2.1 The model of the ZHRC

The ZHRC is made up of nine members.⁷ It is a hybrid human rights commission whose duty is to promote and protect human rights and, additionally, to protect the public against abuse of power and maladministration.⁸ The ZHRC is a “body corporate capable of suing and being sued in its corporate name”.⁹ To assist the ZHRC in the discharge of

4 Telephone communication with Dr Makanatsa Makonese, executive secretary, Zimbabwe Human Rights Commission, on 6 February 2019.

5 See GANHRI, *Chart of the Status of Institutions Accredited by the Global Alliance of National Human Rights Institutions*, available at <https://bit.ly/2LudOCh> (accessed 22 February 2019).

6 MOUs' signing ceremony with civil society report (14 March 2016), available at <https://bit.ly/2XwySu5> (accessed 11 January 2019).

7 Section 242(1) of the Constitution.

8 See note 1.

9 Section 3(1) of the ZHRC Act.

its mandate, it has the power to appoint and regulate the conditions of service of an executive secretary, other staff members, and consultants.¹⁰

2.2 Relationship with other constitutional commissions

The ZHRC is established under section 242 of the Constitution and set up under Chapter 12, which deals with independent commissions supporting democracy.¹¹ The other commissions include the Zimbabwe Electoral Commission (ZEC), Zimbabwe Gender Commission (ZGC), Zimbabwe Media Commission (ZMC) and National Peace and Reconciliation Commission (NPRC).¹²

There is some risk of mandate overlaps with other commissions, for example where violations of gender-related rights are concerned. The Zimbabwe Human Rights Commission Act 2 of 2012 (hereafter ZHRC Act) provides for a working group on gender equality and women's rights.¹³ This may lead to an unnecessary duplication of effort. The ZHRC should therefore ordinarily be limited in scope when it comes to investigating possible violations of such rights that are in the specialised domain of the ZGC.¹⁴

As part of its broad human rights mandate, the ZHRC may also observe elections in terms of the Electoral Act "in order to ensure respect for the human rights and freedoms guaranteed by the Constitution".¹⁵ It has to seek accreditation from ZEC, and in this regard the Electoral Act envisages a working relationship between the two independent commissions.¹⁶ However, such a relationship encroaches on the independence of ZHRC, as the Electoral Act further provides as follows:

Before issuing any report on an election or electoral process it has observed in terms of this section, the Zimbabwe Human Rights Commission shall provide

10 Section 234 of the Constitution empowers the ZHRC to employ staff and regulate their conditions of service. Section 6 of the ZHRC Act provides for the appointment of the executive secretary and other staff of the ZHRC, along with consultants, for the proper exercise of its functions.

11 Chapter 12 of the Constitution.

12 Section 232 of the Constitution.

13 First Schedule, paragraph 3(b) of the ZHRC Act.

14 In terms of section 246 of the Constitution of Zimbabwe, investigating possible violations of rights relating to gender is the mandate of the Zimbabwe Gender Commission.

15 Section 40K(1) of the Electoral Act.

16 Section 40K(2) of the Electoral Act.

the Commission with a draft of the report and shall pay due regard to any comments the Commission may make on the draft.¹⁷

There is no compelling reason why the ZHRC is obliged to pay due regard to comments by the ZEC. While admittedly the ZHRC has to work closely with other independent commissions, its independence must not be compromised, especially given that the ZEC has its own reporting obligations under the Electoral Act.¹⁸

During the electoral period, the ZHRC also has a role to play in responding to electoral violence by reporting cases of intimidation through a special police liaison officer appointed for that purpose.¹⁹ In the 2018 election report, the ZHRC reported that the manner in which elections were conducted pointed to “challenges in fulfilling the right to vote as provided for in the Constitution”.²⁰ The inclusion of the ZHRC in the electoral process is commendable and within the ambit of its broad mandate; however, as noted, some of the legal provisions may undermine the ZHRC’s independence.

2.3 The evolution of the ZHRC

The evolution of the ZHRC has been influenced by political and constitutional developments in Zimbabwe. The country’s first national human rights institution (NHRI), taking the form of an ombudsperson, was established in 1982.²¹ The formation of the Office of the Ombudsman was part of the proliferation of such offices in Commonwealth countries and worldwide in the early 1980s.²² The Ombudsman Act set out its legal framework and the office started operating in 1983.²³ Given that Zimbabwe was a country then emerging from a litany of human rights violations under white minority rule, this system of accountability was new and greeted with some degree of enthusiasm by the government.²⁴

17 Section 40K(4) of the Electoral Act.

18 Section 13 of the Electoral Act.

19 Section 133(1)(h) of the Electoral Act.

20 ZHRC, Final Report on Zimbabwe 2018 Harmonised Elections, available at <https://bit.ly/2L3JQFW> (accessed 22 February 2019).

21 LC Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection”, 13 *Harvard Human Rights Journal* (2000), pp 7-9.

22 See note 21.

23 J Hatchard, “The Institution of the Ombudsman in Africa with Special Reference to Zimbabwe”, 35 *The International and Comparative Law Quarterly* (1986), pp 260-261.

24 *Ibid*, p 261.

With the passage of time, that enthusiasm fizzled out. Authoritarianism, human rights abuses and corruption were on the rise under the leadership of Zimbabwe's ruling party, the Zimbabwe African National Union (Patriotic Front) (ZANU-PF), and led to a crisis of governance.²⁵ Although the Ombudsman Act was amended to widen its mandate to include investigating human rights violations,²⁶ the Office of the Ombudsman was understaffed and ineffective. At one point, it only had two legal officers out of the required ten.²⁷ The African Commission, in a report of a fact-finding mission it made to Zimbabwe, painted a grim picture of a highly compromised institution that fell short of the Paris Principles.²⁸

The Ombudsman Act was replaced by the Public Protector Act pursuant to a 2007 constitutional amendment. The mandate of the Public Protector was limited to protecting the public against abuse of power and maladministration.²⁹ The same constitutional amendment created the ZHRC and tasked it with the promotion and protection of human rights. The constitutional amendment was the result of political negotiations, a process that involved the Southern African Development Community (SADC) and sought to bring about a conducive political and legal environment for free and fair elections in 2008.³⁰

However, the 2008 elections were characterised by high levels of violence and human rights violations. SADC had to intervene again. As part of the reforms, the Constitution was amended in 2009, establishing a Government of National Unity (GNU) made up of three main political parties.³¹ The GNU ran from 2009-2013.³² Under the 2009 constitutional amendment, both the Public Protector and ZHRC were retained.³³

25 J Chikuhwa, *A Crisis of Governance: Zimbabwe* (2004), p 49.

26 Ombudsman Amendment Act 1996. The human rights mandate was, however, limited in scope.

27 "Ombudsman Office in Shambles", *Zimbabwe Independent* (21 April 2006), available at <https://bit.ly/2S1AWt9> (accessed 14 January 2019).

28 African Commission on Human and Peoples' Rights, *Zimbabwe: Report of the Fact-Finding Mission* (June 2002), available at <https://bit.ly/2XQnc58> (accessed 14 January 2019), p 30.

29 Constitutional Amendment 18 Act 11 of 2007.

30 "The Constitutional History and the 2013 Referendum of Zimbabwe" *Nordem Special Report*, available <https://bit.ly/2xE6knX> (accessed 14 January 2019), p 13. See note 2, p 55.

31 See note 2.

32 See note 30.

33 See note 2. Under the 2009 Constitutional Amendment No 19, the provision establishing the ZHRC became section 100R of the Constitution.

The old Lancaster House Constitution creating the ZHRC provided for a law that would confer it the power to carry out its functions.³⁴ After the constitutional amendment of 2009, Parliament did not pass any law to enable the ZHRC to function, and indeed the ZHRC Act came into effect only in October 2012. During that time, the Office of the Public Protector was in place, having taken over the Office of the Ombudsman. However, its mandate now excluded human rights, as the Constitution gave the ZHRC the power to take over investigations that related to them.³⁵ Between 2007 and 2013, the Public Protector and the ZHRC existed concurrently.

In addition to the fact that there was a delay in enacting legislation to operationalise the ZHRC, the appointment of the first members of the ZHRC in 2010 was not in accordance with the old Lancaster House Constitution. Whereas the Constitution provided that at least four out of eight commissioners had to be women,³⁶ the President appointed only three women.³⁷ The ZHRC, without any law giving it powers and without a secretariat, existed in name only. For example, no money was allocated to it in the 2010 budget, and it did not have any offices or infrastructure to carry out its activities.³⁸ The ZHRC thus started on a bad note. Besides this, the appointed commissioners – save for the inaugural chairperson and at least one commissioner – were criticised for lacking the background in social justice and human rights that was required of them under the Constitution.³⁹

A new constitution was inevitable under the GNU.⁴⁰ A draft constitution was finally accepted in a referendum held on 16 March 2013. This 2013 Constitution abolished the Office of the Public Protector, but retained the initial ZHRC, albeit in a modified form – it is modelled as a hybrid human rights commission with the mandate of promoting and protecting human rights and also protecting the public against maladministration and the abuse of power.

At its formation, the ZHRC lacked stable leadership. Its first chairperson, Professor Reginald Austin, resigned in frustration at the way the government treated it,⁴¹ bemoaning, among other things, the

34 Section 100R(8) of the old Constitution.

35 Section 100R(7)(a) of the old Constitution.

36 Section 100R(1)(b) of the old Constitution.

37 See note 2, pp 55-56.

38 *Ibid.*

39 Section 100R(3) of the old Constitution.

40 See note 2, pp 28-31.

41 *Ibid.*, p 54.

government's "unreadiness, delay, lack of commitment and serious focus" as well as executive influence over the work of the commission.⁴² Jacob Mudenda, who succeeded Austin as chairperson in March 2013, did not stay long, and went on to become the Speaker of the National Assembly in September 2013, having been nominated by ZANU-PF.⁴³ In February 2014, Mudenda was replaced by Elasto Hilarious Mugwadi, the current chairperson.⁴⁴ The ZHRC had, in other words, changed leadership thrice before even becoming fully operational.

3 The nature of the ZHRC

3.1 Legal framework

The Constitution provides for the establishment of independent commissions, among them the ZHRC.⁴⁵ The general objectives of independent commissions include supporting and entrenching human rights and democracy.⁴⁶

The establishment and composition of the ZHRC,⁴⁷ including its mandate,⁴⁸ are set out in the Constitution. Giving the ZHRC constitutional status is "conducive to institutional stability".⁴⁹ The constitutional framework satisfies the Paris Principles, which provide that an NHRI "shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence".

While the constitutional provisions providing for the establishment and functions of the ZHRC are indeed clearly set forth, the ZHRC Act, which came into effect in 2012, precedes the 2013 Constitution. There is hence a need to align the ZHRC Act with the new Constitution through an

42 "Human Rights Commission in Limbo", *Zimbabwe Independent* (5 April 2013), available at <https://bit.ly/2RYxQ94> (accessed 28 January 2019).

43 "Mudenda Brings Honour to Matabeleland", *The Chronicle* (5 September 2013), available at <https://bit.ly/3295I8d> (accessed 28 January 2019). Section 126 of the Constitution provides for the election of the Speaker, a wholly political process in practice.

44 "Commissioners Sworn in", *The Herald* (3 February 2014), available at <https://bit.ly/2L66YDI> (accessed 28 January 2019).

45 Section 232(b) of the Constitution.

46 *Ibid.*, section 233(a).

47 *Ibid.*, section 242.

48 *Ibid.*, section 243.

49 T Pegram, "National Human Rights Institutions in Latin America: Politics and Institutionalization", in R Goodman and T Pegram (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, Cambridge, Cambridge University Press (2012), p 212.

extensive amendment of the ZHRC Act to reflect the changed structure, form and mandate of the ZHRC.

The ZHRC Act empowers the ZHRC to have regulations prescribing the manner in which complaints may be made.⁵⁰ It further provides that the ZHRC shall make regulations to enable it to carry out its mandate.⁵¹ The regulations may also prescribe the conditions of the employees of the ZHRC, including those of the executive secretary.⁵² The current regulations came into effect in 2016,⁵³ and lay down provisions for the complaints procedure of the ZHRC and other issues relating to its functions.

3.2 The independence of the ZHRC

According to Mertus, “[the] hallmark of NHRIs is their independence from both the state and civil society”.⁵⁴ While a formal guarantee of independence is an important factor in an NHRI’s effectiveness, it does not necessarily have a bearing on its “performance on the ground”,⁵⁵ especially in a country that, like Zimbabwe, has a long history of human rights violations, weak institutions and a “culture of impunity”.⁵⁶

The ZHRC is one of the commissions whose independence is entrenched and guaranteed in the Constitution.⁵⁷ Members of the ZHRC must also be politically non-partisan.⁵⁸ Yet although the constitutional framework guarantees the independence of the ZHRC, the ZHRC Act gives the Minister of Justice, Legal and Parliamentary Affairs wide powers over the ZHRC. For example, the Minister is empowered to issue a certificate to have the evidence before the ZHRC heard *in camera* if, in his

50 Section 10 of the ZHRC Act.

51 *Ibid*, section 23(1)(a).

52 *Ibid*, section 23(1)(b).

53 Zimbabwe Human Rights Commission (General) Regulations, Statutory Instrument 77 of 2016.

54 J Mertus, “Evaluating NHRIs: Considering Structure, Mandate and Impact”, in R Goodman and T Pegram (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, Cambridge, Cambridge University Press (2012), p 79.

55 OC Okafor, “National Human Rights Institutions in Anglophone Africa: Legalism, Popular Agency, and the Voices of Suffering”, in R Goodman and T Pegram (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, Cambridge, Cambridge University Press (2012), p 149.

56 ZHRC Strategic Plan Report 2015-2025, available at <http://www.zhrc.org.zw/download/zhrc-strategic-plan-report-2015/> (accessed 28 January 2019), p 25.

57 Section 235 of the Constitution.

58 *Ibid*, section 236.

or her opinion, such evidence is prejudicial to the “the defence, external relations, internal security or economic interests of the State”.⁵⁹ Arguably, however, if the ZHRC is to be seen as independent, it must have sole discretion to regulate its own procedures without undue interference by the executive.

The legal framework guaranteeing the ZHRC’s independence is also threatened by the backlash from the government when it seeks to evade accountability. The ZHRC has been subjected to subtle threats in this regard. For example, after the Commission detailed human rights violations in a monitoring report in January 2019,⁶⁰ the government gratuitously accused it of bias.⁶¹ The Minister of Justice, Legal and Parliamentary Affairs, Ziyambi, whose position makes him responsible for the administration of the ZHRC Act,⁶² said the ZHRC’s report was not based on a thorough investigation.⁶³ Such an action by the government jeopardises the independence of the ZHRC, bearing in mind that the Minister has wide powers in administering the ZHRC Act, which includes submitting ZHRC reports to Parliament.⁶⁴

3.3 Appointment procedure

The ZHRC consists of nine members, including the chairperson. The procedure for their appointment is provided for by the Constitution.⁶⁵ Women must constitute at least half of the membership of the ZHRC.⁶⁶

There is notable executive influence in the appointment procedure. The appointments are made by the President, with the input from the legislature’s Committee of Standing Rules and Orders (CSRO) and the Judicial Services Commission (JSC).⁶⁷ The public participates in the appointment of the eight ordinary members of the ZHRC, but the procedure for appointing the chairperson excludes public participation. These procedures are discussed separately below.

59 Section 12(6) and 12(7) of the ZHRC Act.

60 HRC, ZHRC Monitoring Report in the Aftermath of the 14 January to 16 January 2019, available at <https://bit.ly/2XR1UsL> (accessed 28 January 2019).

61 “Be Impartial, Govt Tells Rights Body”, *The Herald* (26 January 2019), available at <https://bit.ly/2YwvfG1> (accessed 28 January 2019).

62 Section 2 of the ZHRC Act.

63 See note 61.

64 Sections 244 and 323 of the Constitution.

65 *Ibid*, section 242(1).

66 *Ibid*, section 17(1)(b)(ii).

67 *Ibid*, section 242(1). The Committee of Standing Rules and Orders is established under section 151 of the Constitution. The Judicial Services Commission is established under section 189 of the Constitution and consists mostly of presidential appointees.

3.3.1 *Appointment of the ZHRC's chairperson*

The chairperson is appointed by the President after consulting the JSC and CSRO.⁶⁸ There is, however, no clearly laid down procedure regarding what that consultation entails and what the extent of the JSC and CSRO's involvement in it is. The appointment in 2010 of the first chairperson, made under a constitutional framework largely similar to the current one,⁶⁹ was the result of political manoeuvring during the GNU.⁷⁰ The details remain obscure, but there is little doubt that the names of the heads of constitutional commissions were negotiated by political parties in the GNU.⁷¹ After the resignation of the first chairperson, his successor, Jacob Mudenda, was appointed in almost the same fashion, with political considerations appearing to prevail over consultation with the JSC and CSRO.⁷² Indeed, Mudenda's appointment was criticised in view of his political history.⁷³ The current chairperson, Elasto Hilarious Mugwadi, was appointed after the GNU.

3.3.2 *Other members of the ZHRC*

The eight other members of the ZHRC are appointed by the President from a list of not fewer than 12 nominees submitted to him or her by the CSRO.⁷⁴ First, the CSRO advertises the positions and invites the public to make nominations. Secondly, public interviews for prospective candidates are conducted by the CSRO. Thirdly, the shortlisted names are submitted to the President, who appoints from that list.⁷⁵ The deputy chairperson is appointed by the President from the eight members after consulting the CSRO.⁷⁶ The appointment of the ZHRC's eight ordinary members enables the public to play a minimal role in its composition.

Members of the ZHRC are appointed for a term of five years that is renewable once.⁷⁷ They are guaranteed immunity in the exercise of their

68 Section 242(1)(a) of the Constitution.

69 Section 100R(1)(a) of the old Constitution.

70 See note 2, pp 53-57.

71 *Ibid.*

72 "Mugabe, Tsvangirai 'Misfire'" *Newsday* (20 February 2013), available at <https://bit.ly/2L3ev67> (accessed 28 January 2019).

73 See note 70, p 56.

74 Section 242(1)(b) of the Constitution.

75 See note 86.

76 Section 5(1) of the ZHRC Act.

77 Section 320(1) of the Constitution.

duties.⁷⁸ Such immunity provides a safeguard against retaliation by “disgruntled parties”.⁷⁹

The Constitution provides, too, for the procedure for removing ZHRC members from office.⁸⁰ They may be removed from office by the President when they have become ineligible for appointment or on the grounds of gross incompetence, gross misconduct, or inability to perform their functions.⁸¹ To ensure security of tenure, the procedure for the removal of a member of the ZHRC is onerous and the same as that for removing a judge from office.⁸² To date, though, no member of the ZHRC has been removed from office.

When it comes to making constitutional appointments that require independence of the appointees, it is difficult to find a satisfactory formula, but there should be at least some basic standards in this regard. The Paris Principles, for example, have been criticised for being vague and offering little guidance on how a state can achieve “[the] guarantees of independence and pluralism” which they call for.⁸³ What is apparent from the ZHRC’s appointment procedure is that it does not afford “all necessary guarantees to ensure the pluralist representation of the social forces” that are involved in the promotion and protection of human rights in Zimbabwe.⁸⁴

3.4 Financial autonomy

It is the obligation of the state to ensure that the ZHRC is provided with resources and facilities adequate for it to perform its functions effectively.⁸⁵ The Constitution requires that the ZHRC must be given a reasonable opportunity to make representations to a parliamentary committee regarding the funds allocated to it each year.⁸⁶

78 Section 21 of the ZHRC Act.

79 Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, UN Doc HR/P/PT/4/Rev.1 (2010).

80 Section 237(2) of the Constitution.

81 *Ibid.*

82 *Ibid.*, section 237(3).

83 See note 54, p 79.

84 Paris Principles.

85 Sections 9(2) and 325 of the Constitution.

86 *Ibid.*, section 325(2).

Like other African NHRIs, the ZHRC also receives donor funding.⁸⁷ The ZHRC Act provides for funding of the ZHRC through donations, grants, bequests or loans made by any person, organisation or any government of any country, with the approval of the Minister of Justice, Legal and Parliamentary Affairs.⁸⁸ In this regard, the financial autonomy of the ZHRC is not absolute when it comes to external funds. Donor funding is, in practice, acquired through the proposals the ZHRC makes in regard to specific projects.⁸⁹

The ZHRC labours under dire funding constraints. Its budget allocations are paltry: in the 2019 budget, it was allocated only USD 3.3 million of the USD 7.1 million that was required.⁹⁰ Indeed, in 2010, when its first commissioners were appointed, it was not allocated any funds at all.⁹¹ The ZHRC thus could not afford personnel and offices, which, needless to say, significantly hindered its ability to carry out its functions.⁹² Without sufficient government funding, the ZHRC will, among other things, continue to be geographically centralised and thus inaccessible to most of the populace.

3.5 Professional skills and knowledge

The Constitution sets out various requirements that have to be met in the appointment of members of the ZHRC. First, it requires that they must be chosen for their “integrity and their knowledge and understanding of, and experience in, the promotion of human rights”.⁹³ Secondly, the chairperson must be “a person who has been qualified for at least seven years to practice as a legal practitioner in Zimbabwe”.⁹⁴ The profiles of the ZHRC’s members are briefly discussed below.

87 F Viljoen, *International human Rights Law in Africa*, 2nd edition, Oxford, Oxford University Press (2012), p 388.

88 Section 17(1)(c) of the ZHRC Act. See also second Schedule, paragraph 7, providing for the ancillary powers of the ZHRC.

89 See note 4.

90 “Constitutional Commissions Underfunded”, *Newsday* (14 December 2018). See also 2019 Budget, available at <http://www.zimtreasury.gov.zw/index.php/resources/2019-budget> (accessed 22 February 2019).

91 See note 2, p 55.

92 “Zimbabwe Human Rights Commission Pleads for Funding”, *The Zimbabwean* (May 2013), available at <https://bit.ly/2JqXShv> (accessed 28 January 2019).

93 Section 242(4) of the Constitution.

94 *Ibid*, section 242(2).

Currently, the Commission has eight out of its required nine members,⁹⁵ three of whom are lawyers, including the chairperson.⁹⁶ Prior to joining the ZHRC, the chairperson had no demonstrable experience in human rights. In fact, during his tenure as Chief Immigration Officer, he defied a High Court order interdicting the deportation of a journalist, thereby taking part in the violation of human rights.⁹⁷ The other two lawyers, however, have notable experience in human rights.⁹⁸

The majority of the members are non-lawyers and have various academic backgrounds.⁹⁹ They also have differing career backgrounds, with their experience in human rights ranging from fair to minimal.¹⁰⁰ Thus, while there is diversity in the composition of the ZHRC, such diversity is not accompanied by relevant expertise in human rights. Also, what is conspicuous is the lack of representation of persons with a background in civil society human rights organisations.

In sum, the profile of the ZHRC's membership points to the need in future to appoint office-holders with demonstrable experience in human rights, as required by the Constitution, and correlatively to avoid appointing those with a history of undermining these rights, a practice which diminishes public confidence in the ZHRC.

3.6 Relations with civil society

While the constitutional provisions do not clearly set out the parameters of the relationship between the ZHRC and civil society, it is apparent that to

95 One of the members of the ZHRC, Dr Carroll Temba Khombe, left it in 2018 and joined the Public Service Commission. See <http://www.zbc.co.zw/pres-mnangagwa-appoints-civil-service-commissioners/> (accessed 22 February 2019).

96 The profiles of the members of the ZHRC are on the ZHRC website at <http://www.zhrc.org.zw/commissioners/> (accessed 22 February 2019).

97 See note 2, p 56. See also "Meldrum Meets Immigration Boss", *Zimbabwe Independent* (22 July 2005), available at <https://bit.ly/32eZV0y> (accessed 19 February 2019); *Zimbabwe Lawyers for Human Rights and IHRDA (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, available at <https://bit.ly/2JhKb5G> (accessed 22 February 2019).

98 Dr Ellen Sithole is a senior academic; Sethulo Ncube is a human rights lawyer. Both have strong academic credentials in human rights.

99 See note 96. These are Japhet Ndabeni Ncube, a former executive mayor with a background in economics, and Sheila Hilary Matindike, with a background in social work. There is also Joseph Kurebwa, with a background in political science, and Kwanele Jirira, with a background in social work and political science. Lastly, there is Petunia Chiriseri, a religious leader with academic credentials ranging from botany and zoology to a doctorate in business leadership.

100 "Scepticism Greets Human Rights Commission", *The Standard* (8 April 2010), available at <https://bit.ly/2JrVlnh> (accessed 22 February 2019).

enable it to carry out its work in general, relations with civil society are essential. In this regard, the ZHRC Act mentions, as part of the Commission's ancillary powers, engaging "in any activity, either alone or in conjunction with other organisations or international agencies, to promote better understanding of human rights violation issues".¹⁰¹

Similarly, the ZHRC regulations provide for a committee or committees to assist the executive secretary of the ZHRC with the observance of human rights and freedoms and implementation of the Commission's recommendations. The committee or committees must include "representatives of organisations, bodies and persons concerned with the promotion and protection of human rights and freedoms".¹⁰²

The ZHRC therefore engages with civil society as directed by its broad mandate. It has entered into memoranda of understanding with certain civil society organisations (CSOs) with the intention of raising public awareness of its mandate and human rights.¹⁰³

CSOs should be involved proactively in the programmes of the ZHRC; likewise, the ZHRC must acknowledge the role played by civil society in the promotion and protection of human rights, given the large number of human rights CSOs that pre-date its establishment.¹⁰⁴ Through such a process of mutual recognition and support, civil society can help to amplify the ZHRC's voice on issues of common concern.

3.7 Accessibility

The ZHRC is generally inaccessible. Its operations are divided into two regions, the northern and southern region.¹⁰⁵ Dividing the country in two in this way for the purposes of receiving complaints was perhaps an ill-considered idea, given that Zimbabwe has always struggled to decentralise its delivery of basic services.

Although the ZHRC has undertaken to "progressively set up offices in every district for ease of access by the public", this has not been done.¹⁰⁶ It

101 Second schedule, paragraph 7 of the ZHRC Act.

102 Section 29(2)(d) of the ZHRC Regulations.

103 See note 6.

104 See note 25, pp 51-52.

105 Section 3 of the ZHRC Regulations, 2016. The northern region comprises the provinces of Harare, Manicaland, Mashonaland Central, Mashonaland East and Mashonaland West. The southern region comprises the provinces of Bulawayo, Masvingo, Matabeleland North, Matabeleland South and Midlands.

106 *Ibid.*

has only two offices, one in Harare and the other in Bulawayo.¹⁰⁷ The ZHRC must endeavour to set up offices in every province.

4 The mandate of the ZHRC

Section 243 of the Constitution defines the mandate of the ZHRC. This mandate is focused on the promotion and protection of human rights, and additionally, the protection of the public against abuse of power and maladministration. In keeping with the Paris Principles, the mandate is a broad one.¹⁰⁸

4.1 Commenting on existing and draft laws

There is no express provision giving the ZHRC the mandate to comment on existing and draft laws. However, commenting on existing and draft laws is within the ambit of its broad mandate.

As a result, the ZHRC became a committee member of a task force responsible for aligning laws with the 2013 Constitution.¹⁰⁹ It has also participated in the development of bills. For example, in 2016 it was involved in the development of the Zimbabwe Prisons and Correctional Services Bill to ensure that it took cognisance of human rights in the operations of prisons and was thus aligned with the Constitution and international standards.¹¹⁰ Similarly, the ZHRC has contributed to the Coroner's Bill.¹¹¹ It is ironic, however, that the ZHRC Act itself has not been aligned yet with the Constitution.

The Constitution gives the ZHRC a mandate to visit places of detention in order to ascertain conditions of detention and make recommendations to the minister responsible for the law relating to such places.¹¹² Under such circumstances, the ZHRC may make observations and go so far as making proposals on current and draft legislation.

A need that is clearly apparent is for the ZHRC Act to be amended so as to grant the ZHRC the express mandate to comment on existing and draft laws.

107 See note 4.

108 Section 243(1)(b) of the Constitution.

109 ZHRC Annual Report 2016.

110 *Ibid.*

111 *Ibid.*

112 Section 243(1)(k) of the Constitution.

4.2 Monitoring domestic human rights situations

The ZHRC has a mandate to “monitor, assess and ensure observance of human rights and freedoms”.¹¹³ The ZHRC regulations provide that the executive secretary of the ZHRC shall monitor the observance of human rights and implementation of recommendations made by the ZHRC in its reports.¹¹⁴

The ZHRC has monitored human rights situations ranging from the plight of internally displaced persons (IDPs) after floods¹¹⁵ to instances where stage agents used excessive force against demonstrators.¹¹⁶ In so doing it has encountered obstacles that diminish its effectiveness in executing its mandate to monitor such situations. In one case, for example, police officers denied its members of staff relevant information and access to holding cells.¹¹⁷

There is hence a need to engage with stakeholders, especially the police, to make them aware of the mandate and privileges of the ZHRC. As noted, there have been instances where the government expresses opposition to ZHRC reports in ways threatening to its independence.¹¹⁸

The Constitution also grants the ZHRC the mandate to visit and inspect prisons and places of detention.¹¹⁹ The ZHRC has been conducting such inspections and making recommendations to ensure that the rights of detained people are not violated. In particular, it has noted that prisons and other place of detention are understaffed, recommending that they be adequately resourced.¹²⁰

The Constitution grants the ZHRC the power to require that any person, organisation or organ of government report to it the measures it has taken to give effect to the recommendations;¹²¹ the Constitution

113 *Ibid*, section 243(1)(c).

114 Section 29 of the ZHRC Regulations

115 ZHRC, Report on the Mission Visit to Chingwizi Conducted from 19-22 August 2014, available at <http://www.zhrc.org.zw/download/chingwizi-report-19-august-2014/> (accessed 22 February 2019).

116 For example, see note 60.

117 See note 60.

118 See note 61.

119 See note 112.

120 ZHRC, Annual Report 2015, available at <http://www.zhrc.org.zw/download/2015-annual-report/> (accessed 22 February 2019). See also ZHRC, Annual Report 2016, available at <http://www.zhrc.org.zw/download/2016-annual-report/> (accessed 22 February 2019).

121 Section 29(3) of the ZHRC Regulations.

requires too that if any organisation fails to implement the recommendations, the ZHRC report such failure to Parliament.¹²²

4.3 Monitoring and advising on compliance with international standards

The mandate to monitor and give advice on compliance with international standards is provided by the Constitution. The ZHRC may solicit information it needs “to prepare any report required to be submitted to any regional or international body under any human rights convention, treaty or agreement to which Zimbabwe is a party”.¹²³ The ZHRC thus plays an advisory role with regard to Zimbabwe’s state-reporting obligations.¹²⁴

So far, it has participated in the reporting procedures of the Universal Periodic Review (UPR) mechanism,¹²⁵ and has advised the state on compliance with the UPR recommendations.¹²⁶ The ZHRC has an affiliate status with the African Commission.¹²⁷ This affiliation imposes an obligation on the ZHRC to encourage the state to ratify human rights treaties.¹²⁸

Under its broad mandate to protect and promote human rights, the ZHRC has a duty to monitor and advise on the state’s compliance with the decisions of judicial and quasi-judicial bodies established by the treaties to which Zimbabwe is a party. There may be some challenges in executing this facet of its mandate, though, given that Zimbabwe has ignored recommendations by the African Commission.¹²⁹ In a joint effort with a local partner, the ZHRC has a programme aimed at ensuring compliance with the decisions of the African Commission.¹³⁰ The impact of the programme is yet to be seen.

122 See sections 29(4) of the regulations as read with section 244(2) of the Constitution.

123 Section 244(1)(b) of the Constitution.

124 See note 4.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 National Human Rights Institutions; see <http://www.achpr.org/network/nhri/> (accessed 22 February 2019).

129 See <https://bit.ly/2ZZm6WJ> (accessed 28 January 2019).

130 See note 4.

4.4 Educating and informing

The ZHRC is tasked with promoting awareness of human rights and freedoms at all levels of society.¹³¹ To this end, it conducts a programme aimed at educating and informing the public.¹³² It is difficult, however, for the ZHRC to deliver on its mandate if it has only two offices, a limited number of officers, and few in Zimbabwe know of its existence. What is needed is a far-reaching, proactive human rights sensitisation programme. A good start would be to employ outreach officers in each district who are tasked with educating people about their rights.

4.5 Receiving and dealing with complaints and petitions

The ZHRC has the mandate to “receive and consider complaints from the public and take such action in regard to the complaints as it considers appropriate”.¹³³ It is also mandated to investigate human rights violations by any person or authority.¹³⁴ The ZHRC therefore has the jurisdiction to undertake investigations on receipt of a complaint.¹³⁵ Furthermore, it has the power to investigate, on its own initiative, any conduct that constitutes a human rights violation by any person or authority.¹³⁶

The ZHRC Act defines human rights as rights that are provided in the Constitution or any international human rights instrument that Zimbabwe is a party to.¹³⁷ The prescribed period for making a complaint is, however, limited to three years from the date on which the violation of human rights occurred; in addition, the violation may not have happened before 13 February 2009.¹³⁸ The ZHRC does not have jurisdiction in civil cases pending before the courts,¹³⁹ nor does it have jurisdiction where a human rights violation relates to the prerogative of mercy.¹⁴⁰ Similarly, its jurisdiction is limited where the violation involves relations between the government of Zimbabwe and that of a foreign power.¹⁴¹ In such cases, the

131 Section 243(1)(a) of the Constitution.

132 See note 4.

133 Section 243(1)(d) of the Constitution.

134 *Ibid*, section 234(1)(f).

135 Section 9(1) of the ZHRC Act.

136 *Ibid*, section 9(2).

137 *Ibid*, section 2.

138 *Ibid*, section 9(4)(b).

139 *Ibid*, section 9(4)(c).

140 *Ibid*, section 9(4)(b).

141 *Ibid*, section 9(4)(e).

ZHRC assumes jurisdiction where “there has been an allegation of a human rights violation by a citizen or resident of Zimbabwe”.¹⁴²

The ZHRC Act provides that the manner of making complaints should be flexible and unencumbered by procedural rigidity.¹⁴³ In this regard, the ZHRC has regulations prescribing a detailed complaint-handling procedure.¹⁴⁴ There are two ways of lodging a complaint before the ZHRC. First, a complaint may be lodged by any person affected by the human rights violation.¹⁴⁵ Secondly, where a person affected by a human rights violation is “unable or unwilling” to lodge a complaint, it may be lodged by any person on his or her behalf, or any person acting in the public interest.¹⁴⁶ Any association may also lodge a complaint in the interests of its members.¹⁴⁷ The ZHRC therefore complies with the tenet of the Paris Principles that “cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organizations”.¹⁴⁸

A complaint must be lodged at the regional office in the region in which the violation took place, and if received at a different regional office, steps shall be taken to send it to the correct office.¹⁴⁹ As mentioned, the ZHRC has only two regional offices, in Harare and Bulawayo. This is mitigated by the fact that complaints may be lodged telephonically, by post, by telefacsimile, or electronically.¹⁵⁰ Such basic services are, nevertheless, still out of reach for the indigent, making the ZHRC generally inaccessible.

The ZHRC, through its officers, must acknowledge receipt of the complaint within seven days, together with a reference number.¹⁵¹ Complainant may require the ZHRC to keep their details confidential.¹⁵² In cases where a complainant is a child or a person with a mental disability, the ZHRC shall, on its own initiative, take measures to keep their particulars confidential.¹⁵³

142 *Ibid.*

143 *Ibid.*, section 10(3).

144 ZHRC Regulations, Statutory Instrument 77 of 2016.

145 Section 5(a) of the ZHRC Regulations.

146 *Ibid.*, section 5(b).

147 *Ibid.*

148 Paris Principles.

149 Section 7(1) of the ZHRC Regulations.

150 *Ibid.*, section 7(2).

151 *Ibid.*, section 8.

152 *Ibid.*, section 9(1).

153 *Ibid.*, section 9(2).

After a complaint is received, it is assessed.¹⁵⁴ This entails, *inter alia*, requiring further information from the complainant.¹⁵⁵ The complaint may either be rejected or accepted. If the complaint is accepted, the next stage is investigation by an officer of the ZHRC. The first stage of investigation is the notification of the respondent and requesting a response.¹⁵⁶ After this stage, details relevant to the case are noted, places relevant to it are visited, and witnesses and other sources of information are interviewed.¹⁵⁷ After investigation, the officer refers the matter to the commissioners, together with the record and documents collected in the course of the investigation and the recommendations of the officer.¹⁵⁸

The commissioners may reject the complaint on grounds set out in the ZHRC regulations.¹⁵⁹ They may also refer the complainant to any other body appropriate to hearing the complaint.¹⁶⁰ For example, a matter may be referred to another Chapter 12 commission, such as the ZGC. They may also attempt to resolve the complaint by negotiation, conciliation and mediation,¹⁶¹ in compliance with the Paris Principles. Alternatively, a formal hearing may be held.¹⁶²

In determining a complaint, the ZHRC may either reject the complaint or find that it has been resolved satisfactorily.¹⁶³ A complaint may be considered concluded when it is withdrawn.¹⁶⁴ If the complainant is successful, the ZHRC recommends suitable action or redress,¹⁶⁵ by issuing a final order or a final direction.¹⁶⁶ The ZHRC may also institute proceedings in a court of law for resolution of the complaint.¹⁶⁷ Where there is criminal conduct in the human rights violation, the ZHRC has the power to direct the Commissioner General of Police to investigate.¹⁶⁸ The power to receive and deal with complaints is derived from the

154 *Ibid*, section 10(1) of the ZHRC Regulations.

155 *Ibid*, section 10(2) of the ZHRC Regulations.

156 *Ibid*, section 12(2)(b) of the ZHRC Regulations.

157 *Ibid*, sections 12(3) and 12(4) of the ZHRC Regulations.

158 *Ibid*, section 10(1) of the ZHRC Regulations.

159 *Ibid*, sections 10(3)(a) and 10(3)(b) of the ZHRC Regulations.

160 *Ibid*, section 13(2)(b) of the ZHRC Regulations.

161 *Ibid*, section 13(2)(c) of the ZHRC Regulations.

162 *Ibid*.

163 *Ibid*, section 25 of the Regulations.

164 *Ibid*.

165 Section 14 of the ZHRC Act.

166 Section 25(f) of the ZHRC Regulations.

167 Section 15 of the ZHRC Act.

168 Section 243(1)(h) of the Constitution.

Constitution. As such, the ZHRC's recommendations in conclusion of the complaints are binding.¹⁶⁹

The ZHRC reports generally do not contain much information on how complaints have been handled. As a hybrid human rights commission, it classifies the cases received under the headings of "general", "human rights" and "maladministration".¹⁷⁰ In its 2015 and 2016 annual reports, there are no details one could use to analyse the nature of the human rights complaints received and how they were resolved. According to the 2015 report, 162 human rights cases were received out of a total of 482 cases.¹⁷¹ Then, according to the 2016 report, there was a marked increase in human rights cases: of the 666 cases received, 245 were human rights cases. Missing is a summary account of what compliance there was with the Commission's decisions.

4.6 Monitoring government compliance

In general, it would seem that the recommendations of the ZHRC are complied with,¹⁷² but as pointed out, there is insufficient information to enable one to make an accurate assessment of the state of compliance. Be that as it may be, in cases of non-compliance, the ZHRC regulations provide that the executive secretary shall monitor "implementation of recommendations made by the Commission in its reports" and regularly report such observance and implementation to the ZHRC.¹⁷³ As noted, the ZHRC can be assisted by a committee or committees in monitoring the implementation of its recommendations.¹⁷⁴ In this way, it is able to ensure compliance with its recommendations.

169 *Ibid*, section 2.

170 See note 120.

171 *Ibid*.

172 See note 4.

173 Section 29(1)(b) of the ZHRC Regulations.

174 See note 102. These committee or committees are meant to consist of members of the civil service and the security services, representatives of the commercial, industrial, agricultural and mining sectors, representatives of employers and employees and representatives of organisations, bodies and persons concerned with the promotion and protection of human rights and freedom.

5 Public accountability

5.1 Reporting by the ZHRC

The legal framework of the ZHRC affords some measures to ensure its public accountability. The Constitution provides that, through the Minister of Justice Legal and Parliamentary Affairs, it submits reports to Parliament and that these are of two kinds. First, the ZHRC may submit any report to Parliament on particular matters relating to human rights that, in its view, should be brought to Parliament's attention.¹⁷⁵ Secondly, the ZHRC is obliged to submit annual reports to Parliament.¹⁷⁶ This creates an avenue not only to account to the public but to inform stakeholders, including civil society, about the activities of the ZHRC. So far, only the 2015 and the 2016 reports are available on the ZHRC's website. To account effectively to the public and strengthen its independence, the ZHRC should publish its annual reports timeously.

5.2 Regular consultations with stakeholders

In terms of its broad mandate under the Constitution and specific powers under the ZHRC Act, the ZHRC may "engage in any activity, either alone or in conjunction with other organisations or international agencies, to promote better understanding of human rights violation issues".¹⁷⁷ This includes consultation with stakeholders such as state representatives and civil society.

Accordingly, as part of its strategic planning process, the ZHRC has engaged with "various arms of the State and law enforcement agencies, as well as members of Civil Society".¹⁷⁸ Consulting stakeholders in its planning process has been a positive move. However, on closer examination, the ZHRC's relationship with the government is, as discussed above, a cause for concern.¹⁷⁹ The government's public statements to the effect that the ZHRC is biased weakens the latter's position in promoting and protecting human rights.

175 Section 244(2) of the Constitution.

176 *Ibid*, section 323.

177 ZHRC Act, Second schedule, paragraph 17.

178 See note 8, pp 12-13.

179 See note 61.

The ZHRC has also developed significant international relations, which, by contrast, can serve to strengthen its position in this regard. As noted, it has affiliate status with the African Commission,¹⁸⁰ in addition to which it is a member of the Network of African National Human Rights Institutions (NANHRI).¹⁸¹ The ZHRC is accredited with an “A” status by the Global Alliance of National Human Rights Institutions (GANHRI).¹⁸² This certifies its formal compliance with the Paris Principles and provides avenues to strengthen its effectiveness in promoting and protecting human rights in Zimbabwe.

6 Conclusion

The creation of the ZHRC was a significant development in Zimbabwe in that it presented new opportunities for the advancement of a culture of human rights. On paper, the ZHRC complies with the Paris Principles to a good degree: among other things, it has a broad mandate to protect and promote human rights protection and in theory is meant to be independent.

Its evolution shows, however, that the prevailing political climate limits its effectiveness. It was not allocated resources when it began, and only became fully operational about four years after its inaugural members were sworn in. It has also suffered leadership challenges, while the backlash it has faced from the government threatens its independence. The budget allocated to the ZHRC is inadequate, as a result of which it sometimes relies on external funding that it is available and allocated only for specific projects it undertakes. The ZHRC currently operates a mere two offices, and these are not easily accessible to the majority of the population, especially those in rural areas. In regard to professional skills and knowledge, a politicised appointment process prevents the ZHRC from being pluralist in composition and having members with a demonstrable human rights background.

The ZHRC has monitored human rights situations in Zimbabwe, and it also receives and deals with human rights complaints. However, its reports need to indicate the extent to which its recommendations are complied with. Despite the problems of limited accessibility, the legal framework provides for public accountability. The ZHRC has a good relationship with civil society and stakeholders at both the domestic and

180 See note 128.

181 See member profiles at <https://www.nanhri.org/members/member-profiles/> (accessed 22 February 2019).

182 See note 5.

international levels. This offers it an avenue through which to improve its capacity to monitor and advise on compliance with international human rights law.

Legislative reforms are necessary if the ZHRC is to be an effective NHRI. The most urgent reform is the alignment of the ZHRC Act with the 2013 Constitution. The ZHRC's reports should also be prepared timeously and posted on its website to improve accountability to the public. This would go some way to inspiring public confidence. Finally, the ZHRC needs to enhance its visibility and increase its number of offices so as to strengthen its capacity to promote and protect human rights in Zimbabwe.

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PART B SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The Zimbabwe Human Rights Commission is constitutionally entrenched in Chapter 12, sections 232-244 of the Constitution. It provides as follows:

CHAPTER 12: INDEPENDENT COMMISSIONS SUPPORTING DEMOCRACY

PART 1: GENERAL

232. Independent Commissions

The following are the independent Commissions –

- (a) the Zimbabwe Electoral Commission;
- (b) the Zimbabwe Human Rights Commission;
- (c) the Zimbabwe Gender Commission;
- (d) the Zimbabwe Media Commission; and
- (e) the National Peace and Reconciliation Commission.

233. Objectives of independent Commissions

The independent Commissions have the following general objectives in addition to those given to them individually –

- (a) to support and entrench human rights and democracy;
- (b) to protect the sovereignty and interests of the people;
- (c) to promote constitutionalism;
- (d) to promote transparency and accountability in public institutions;
- (e) to secure the observance of democratic values and principles by the State and all institutions and agencies of government, and government controlled entities; and
- (f) to ensure that injustices are remedied.

234 Staff of independent Commissions

The independent Commissions have power to employ staff and, subject to the law, to regulate their conditions of service.

235 Independence of Commissions

- 1) The independent Commissions –

- (a) are independent and are not subject to the direction or control of anyone;
 - (b) must act in accordance with this Constitution; and
 - (c) must exercise their functions without fear, favour or prejudice; although they are accountable to Parliament for the efficient performance of their functions.
- 2) The State and all institutions and agencies of government at every level, through legislative and other measures, must assist the independent Commissions and must protect their independence, impartiality, integrity and effectiveness.
- 3) No person may interfere with the functioning of the independent Commissions.

236 Members of independent Commissions to be non-political

- 1) Members of the independent Commissions must not, in the exercise of their functions –
- (a) act in a partisan manner;
 - (b) further the interests of any political party or cause;
 - (c) prejudice the lawful interests of any political party or cause; or
 - (d) violate the fundamental rights or freedoms of any person.
- 2) Persons who are members of a political party or organisation on their appointment to an independent Commission must relinquish that membership without delay and in any event within thirty days of their appointment.
- 3) If a member of an independent Commission –
- (a) becomes a member of a political party or organisation; or
 - (b) having been a member of a political party or organisation on his or her appointment to the commission, fails to relinquish that membership within thirty days of the appointment; he or she ceases immediately to be a member of the Commission concerned.

237 Appointment and removal from office of members of independent Commissions

- 1) For the purpose of nominating persons for appointment to any independent Commission, the Committee on Standing Rules and Orders must –
- (a) advertise the position;
 - (b) invite the public to make nominations;
 - (c) conduct public interviews of prospective candidates;
 - (d) prepare a list of the appropriate number of nominees for appointment; and
 - (e) submit the list to the President.

- 2) A member of an independent Commission may be removed from office only on the ground that the member concerned –
 - (a) is unable to perform the functions of his or her office because of physical or mental incapacity;
 - (b) has been grossly incompetent;
 - (c) has been guilty of gross misconduct; or
 - (d) has become ineligible for appointment to the Commission concerned.
- 3) The procedure for the removal of judges from office applies to the removal from office of a member of an independent Commission.

PART 3: ZIMBABWE HUMAN RIGHTS COMMISSION

242 Establishment and composition of Zimbabwe Human Rights Commission

- 1) There is a commission to be known as the Zimbabwe Human Rights Commission consisting of –
 - (a) a chairperson appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders; and
 - (b) eight other members appointed by the President from a list of not fewer than twelve nominees submitted by the Committee on Standing Rules and Orders.
- 2) The chairperson of the Zimbabwe Human Rights Commission must be a person who has been qualified for at least seven years to practise as a legal practitioner in Zimbabwe.
- 3) If the appointment of a chairperson to the Zimbabwe Human Rights Commission is not consistent with a recommendation of the Judicial Service Commission, the President must cause the Committee on Standing Rules and Orders to be informed as soon as practicable.
- 4) Members of the Zimbabwe Human Rights Commission must be chosen for their integrity and their knowledge and understanding of, and experience in, the promotion of human rights.

243 Functions of Zimbabwe Human Rights Commission

- 1) The Zimbabwe Human Rights Commission has the following functions –
 - (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
 - (b) to promote the protection, development and attainment of human rights and freedoms;
 - (c) to monitor, assess and ensure observance of human rights and freedoms;
 - (d) to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;

- (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;
 - (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;
 - (g) to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;
 - (h) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation;
 - (i) to recommend to Parliament effective measures to promote human rights and freedoms;
 - (j) to conduct research into issues relating to human rights and freedoms and social justice; and
 - (k) to visit and inspect –
 - (i) prisons, places of detention, refugee camps and related facilities; and
 - (ii) places where mentally disordered or intellectually handicapped persons are detained; in order to ascertain the conditions under which persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places.
- 2) The Commissioner-General of Police must comply with any directive given to him or her by the Zimbabwe Human Rights Commission under subsection (1)(h).

244 Reports to and by Zimbabwe Human Rights Commission

- 1) The Zimbabwe Human Rights Commission may require any person, institution or agency, whether belonging to or employed by the State or otherwise –
- (a) to inform the Commission of measures they have taken to give effect to the human rights and freedoms set out in the Declaration of Rights; and
 - (b) to provide the Commission with information it needs to prepare any report required to be submitted to any regional or international body under any human rights convention, treaty or agreement to which Zimbabwe is a party.
- 2) In addition to the report it is required to submit in terms of section 323, the Zimbabwe Human Rights Commission may, through the appropriate Minister, submit reports to Parliament on particular matters relating to human rights and freedoms which, in the Commission's opinion, should be brought to the attention of Parliament.

SIXTH SCHEDULE (Sections 329 and 332)

COMMENCEMENT OF THIS CONSTITUTION, TRANSITIONAL PROVISIONS AND SAVINGS

PART 4: SAVINGS AND TRANSITIONAL PROVISIONS

Public Protector

16(1) The Public Protector Act [*Chapter 10:18*] is repealed.

(2) Any matter that was being dealt with by the Public Protector immediately before the effective date must be transferred to the Zimbabwe Human Rights Commission for finalisation.

B.2 Legislative and regulatory framework

Two main pieces of legislation regulate the ZHRC.

B.2.1 ZIMBABWE HUMAN RIGHTS COMMISSION ACT [CHAPTER 10:30]

Act 2/2012

ARRANGEMENT OF SECTIONS

PART I: PRELIMINARY

Section

- 1) Short title.
- 2) Interpretation.

PART II: ZIMBABWE HUMAN RIGHTS COMMISSION AND STAFF

- 3) Corporate status of Commission, etc.
- 4) Functions of Commission.
- 5) Deputy Chairperson of Commission.
- 6) Executive Secretary, and other staff of Commission and consultants.
- 7) Independence and impartiality of Commission, Commissioners, etc.
- 8) Reports of Commission.

PART III:PROCEDURE AND MANNER OF INVESTIGATIONS BY COMMISSION

- 9) Jurisdiction of Commission to conduct investigations.
- 10) Manner of making complaints.
- 11) Refusal to investigate.
- 12) Manner of conducting investigation.
- 13) Conflict of interest.
- 14) Proceedings after investigation.
- 15) Commission may institute actions for redress of human rights violations.
- 16) Commission may state case for High Court

PART IV: FINANCIAL PROVISIONS

- 17) Funds of Commission.
- 18) Accounts of Commission and appointment of internal auditor.
- 19) Audit of Accounts.

PART V: MISCELLANEOUS PROVISIONS

- 20) Removal of Commissioner from office.
- 21) Immunity.
- 22) Provincial, district and other offices of Commission.
- 23) Regulations.

FIRST SCHEDULE: Provisions Applicable to Commissioners and Working Groups. SECOND SCHEDULE: Ancillary Powers of Commission

THIRD SCHEDULE: Oath of Secrecy

ACT

AN ACT to provide for the procedure of the Zimbabwe Human Rights Commission; to provide for the appointment of the Deputy Chairperson, Executive Secretary and staff of the Commission; and to provide for matters incidental to or connected with the foregoing.

WHEREAS section 100R of the Constitution provides as follows:

100R Zimbabwe Human Rights Commission

- 1) There is a commission to be known as the Zimbabwe Human Rights Commission which shall consist of –
 - (a) a chairman who has been qualified for at least five years to practise as a legal practitioner and who is appointed by the President after

consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders; and

- (b) eight other Commissioners, at least four of whom shall be women, appointed by the President from a list of sixteen nominees submitted by the Committee on Standing Rules and Orders.
- (2) If the appointment of a chairman of the Zimbabwe Human Rights Commission is not consistent with any recommendation of the Judicial Service Commission in terms of subsection (1)(a), the President shall cause the Senate to be informed as soon as practicable.
- (3) Persons appointed to the Zimbabwe Human Rights Commission shall be chosen for their knowledge of and experience in the promotion of social justice or the protection of human rights and freedoms.
- (4) A Commissioner of the Zimbabwe Human Rights Commission shall, before entering upon his or her office, take and subscribe before the President or some person authorised by the President in that behalf the oath of office in the forms set out in Schedule 1.
- (5) The Zimbabwe Human Rights Commission shall have the following functions –
- (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
 - (b) to promote the development of human rights and freedoms;
 - (c) to monitor and assess the observance of human rights in Zimbabwe;
 - (d) to recommend to Parliament effective measures to promote human rights and freedoms;
 - (e) to investigate the conduct of any authority or person, where it is alleged that any of the rights in the Declaration of Rights has been violated by that authority or person; and
 - (f) to assist the Minister responsible for the Act of Parliament referred to in subsection (8) to prepare any report required to be submitted to any regional or international body constituted or appointed for the purpose of receiving such reports under any human rights convention, treaty or agreement to which Zimbabwe is a party.
- (6) The Zimbabwe Human Rights Commission may require any person, body, organ, agency or institution whether belonging to or employed by the State, a local authority or otherwise, to provide the Commission annually with such information as it may need for the purpose of preparing and submitting any report required to be submitted to any regional or international body constituted or appointed for the purpose of receiving such reports under any human rights convention, treaty or agreement to which Zimbabwe is a party.
- (7) The Zimbabwe Human Rights Commission shall have power –
- (a) to take over and continue any investigation that has been instituted by the Public Protector in terms of section 108(1), where it determines that the dominant question in issue involves a matter pertinent to its function referred to in subsection (5)(e); or

- (b) refer to the Public Protector for investigation in terms of section 108(1) any matter in respect of which it determines that the dominant question in issue involves a matter pertinent to the functions of the Public Protector.
- (8) An Act of Parliament may confer power on the Zimbabwe Human Rights Commission –
 - (a) to conduct investigations on its own initiative or on receipt of complaints;
 - (b) to visit and inspect prisons, places of detention, refugee camps and related facilities in order to ascertain the conditions under which inmates are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places or facilities;
 - (c) to visit and inspect places where mentally disordered or intellectually handicapped persons are detained under any law in order to ascertain the conditions under which those persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places; and
 - (d) to secure and provide appropriate redress for violations of human rights and for injustice.

NOW, THEREFORE, be it enacted by the President and the Parliament of Zimbabwe as follows –

PART I: PRELIMINARY

1. Short title

This Act may be cited as the Zimbabwe Human Rights Commission Act [Chapter 10:30].

2. Interpretation

In this Act –

“authority or person”, in relation to an authority or person against whom or which any complaint of a human rights violation has been made in terms of section 9, means any person, body, organ, agency or institution, whether belonging to or employed by the State, a local authority or otherwise;

“Chairperson” means the Chairperson of the Commission appointed in terms of section 100R (1) of the Constitution;

“Commission” means the Zimbabwe Human Rights Commission established in terms of section 100R of the Constitution;

“Commissioner” means a member of the Commission, and includes the Chairperson; “complaint” means a complaint of a human rights violation

made to the Commission in terms of this Act and “complainant” shall be construed accordingly;

“Committee on Standing Rules and Orders” means the committee referred to in section 57(2) of the Constitution;

“Deputy Chairperson” means the Deputy Chairperson of the Commission appointed in terms of section 5(1);

“Executive Secretary” means the Executive Secretary of the Commission appointed in terms of section 6(1);

“human rights violation” means a violation of –

- (a) the Declaration of Rights in the Constitution; or
- (b) any international human rights instrument that Zimbabwe is a party to; “international human rights instrument” means any international treaty, convention, protocol or other agreement to which Zimbabwe is a party and –
- (c) is required in terms of the Constitution to be approved by Parliament; and
- (d) provides for any human right that is included in or additional to the Declaration of Rights in the Constitution;

“legal representative” means the representative recognised by law of any person who has died, or is an infant or a minor, or of unsound mind, or is otherwise under a disability;

“Minister” means the Minister responsible for Justice and Legal Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“prescribe” means prescribed by regulations made in terms of section 23;

“principal officer,” in relation to an authority or person which is a Government Ministry or department or a statutory or corporate body, means the head of the Ministry or department in question, or the chairperson of the governing body or chief executive officer of the statutory or corporate body in question, by whatever title he or she may be called.

PART II: ZIMBABWE HUMAN RIGHTS COMMISSION AND STAFF

3. Corporate status of Commission, etc.

- 1) The Zimbabwe Human Rights Commission shall be a body corporate capable of suing and being sued in its corporate name and, subject to this Act, of performing all acts that bodies corporate may by law perform.
- 2) The First Schedule applies to the tenure of office and conditions of service of the Commissioners as well as to the procedure to be followed by the Commission at its meetings.
- 3) The Second Schedule sets out the ancillary powers of the Commission.

4. Functions of Commission

In addition to the functions and powers set out in section 100R(6) and (7) of the Constitution, the Commission shall have the following functions and powers –

- (a) to conduct investigations on its own initiative or on receipt of complaints;
- (b) to visit and inspect prisons, places of detention, refugee camps and related facilities in order to ascertain the conditions under which inmates are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places or facilities;
- (c) to visit and inspect places where mentally disordered or intellectually handicapped persons are detained under any law in order to ascertain the conditions under which those persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places; and
- (d) to ensure and provide appropriate redress for violations of human rights and for injustice;
- (e) to co-operate with human rights institutions belonging to international, continental or regional organisations of which Zimbabwe is a member.

5. Deputy Chairperson of Commission

- 1) After consulting the Committee on Standing Rules and Orders, the President shall appoint a Deputy Chairperson from among the Commissioners.
- 2) If the office of the Chairperson is vacant or the Chairperson is absent from duty, the Deputy-Chairperson shall act as Chairperson.

6. Executive Secretary, and other staff of Commission and consultants

- 1) The Commission shall –
 - (a) appoint an Executive Secretary; and
 - (b) employ such other staff as maybe necessary for the proper exercise of its functions, and engage consultants where necessary:

Provided that the Commission shall consult the Minister and the Minister responsible for Finance on the extent to which additional public moneys maybe required for this purpose.

- 2) In order for a person to be appointed as Executive Secretary of the Commission, he or she must –
 - (a) be qualified to be appointed as a judge of the High Court or the Supreme Court; or
 - (b) have a graduate or postgraduate qualification in human rights law or humanitarian law or a related discipline.

- 3) The offices of the Executive Secretary and other members of staff shall be public offices but not form part of the Public Service.
- 4) The Executive Secretary shall, subject to the general control of the Commission –
 - (a) be responsible for carrying out the decisions of the Commission and the day-to-day administration and management of the affairs, staff and property of the Commission; and
 - (b) be the custodian of the Commission's records; and
 - (c) attend all meetings of the Commission, but shall have no vote on any matter before the Commission; and
 - (d) perform such other functions as may be assigned by the Commission.
- (5) The Executive Secretary shall swear and subscribe to the oath of secrecy set out in Third Schedule, which shall be administered by the Chairperson.

7. Independence and Impartiality of Commission, Commissioners, etc.

- 1) A Commissioner or a member of staff of the Commission shall serve impartially and independently and exercise or perform his or her functions in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law.
- 2) Neither the State or any person, body, organ, agency or institution belonging to or employed by the State, a local authority or otherwise shall interfere with, hinder or obstruct the Commission, its Commissioners or any member of staff of the Commission, in the exercise or performance of its, his or her functions.
- 3) The State and any person, body, organ, agency or institution, belonging to or employed by the State, shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission.
- 4) No person shall conduct an investigation or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary or any other interest which might preclude him or her from exercising or performing his or her functions in a fair, unbiased and proper manner.
- 5) If any person fails to disclose an interest contemplated in subsection (4) and conducts or renders assistance with regard to an investigation, while having an interest so contemplated in the matter being investigated the Commission may take such steps as it deems necessary to ensure a fair, unbiased and proper investigation.

8. Reports of Commission

- 1) The Commission shall no later than sixty days after the end of each financial year submit to the Minister an annual report on its operations and activities during the preceding financial year.
- 2) In addition, the Commission –

- (a) shall submit to the Minister any other report, and provide him or her with any other information, that he or she may require in regard to the operations and activities of the Commission; and
- (b) may submit to the Minister any other report that it considers desirable.
- 3) The Minister shall table before Parliament any report submitted to him or her by the Commission under subsections (1) and (2), no later than the thirtieth sitting day of whichever House of Parliament sits first after he or she has received such report.

PART III: PROCEDURE AND MANNER OF INVESTIGATIONS BY COMMISSION

9. Jurisdiction of Commission to conduct investigations

- 1) The Commission may on its own initiative investigate any action or omission on the part of any authority or person that constitutes or may constitute a human rights violation.
- 2) Any person affected by any actual or perceived human rights violation arising out of any action or omission on the part of any authority or person may make a written complaint to the Commission requesting it to investigate such action or omission.
- 3) When a person by whom a complaint might have been made under this section has died or is for any reason unable to act for himself or herself, the complaint may be made by his or her legal representative or a member of his or her family or such other person as the Commission considers suitable to represent him or her.
- 4) The Commission shall not investigate a complaint –
 - (a) unless the complaint is made within three years from the date on which the action or omission occurred;
 - (b) Provided that such investigation shall not relate to an action or omission that occurred earlier than the 13th February 2009; or
 - (c) where the action or omission complained of is the subject-matter of civil proceedings before any court of competent jurisdiction; or
 - (d) where the action complained of relates to the exercise of the prerogative of mercy; or
 - (e) where the action or omission complained of involves relations or dealings between the Government and a foreign Government, unless there has been an allegation of a human rights violation by a citizen or resident of Zimbabwe.

10. Manner of making complaints

- 1) The Commission shall, in regulations, prescribe the general manner in which complaints to it should be made, including the particulars required to be completed in a form specified by the Commission in those regulations.

- 2) The Commission may require a complaint to be supported by such evidence and documentation as it may prescribe or in any particular case.
- 3) The Commission shall not refuse to investigate a complaint solely on the grounds that the complaint is not in proper form or not in compliance with the prescribed requirements or that it is not accompanied by the required documentation.

11. Refusal to investigate

- 1) The Commission shall refuse to investigate any complaint if it is satisfied that it is not authorised in terms of the Constitution and this Act to carry out an investigation.
- 2) The Commission shall discontinue any investigation if it is satisfied by the evidence received that it is not authorised in terms of the Constitution and this Act to continue the investigation.
- 3) If the Commission refuses to investigate a complaint or discontinues an investigation it shall, in writing –
 - (a) inform the complainant and any party complained against of its decision, stating its reasons for the decision; and
 - (b) if appropriate, advise the complainant of any other remedy that appears to it to be available to him or her.

12. Manner of conducting investigations

- 1) Subject to subsection (6) (concerning non-disclosure of certain evidence) the Commission may in its discretion conduct an investigation in the form of a public or closed hearing, for which purpose the Commission shall have the following powers –
 - (a) to issue summons to any authority or person or the principal officer thereof to attend before the Commission and to produce any document or record relevant to any investigation by the Commission; and
 - (b) to put any questions to any authority or person or the principal officer which the Commission considers will assist its investigation of the complaint in question; and
 - (c) to require any person questioned by it to answer such questions and to disclose any information within such person's knowledge which the Commission considers relevant to any investigation by it; and
 - (d) to request the assistance of the police during an investigation.
- (2) In conducting a hearing the Commission shall not be bound by the strict rules of evidence, and it may ascertain any relevant fact by any means which it thinks fit and which is not unfair or unjust to any party.
- 3) The Commission shall afford the authority or person or the principal officer thereof, who is alleged to be responsible for the human rights violation, an adequate opportunity to respond to such allegations.
- 4) Any person appearing before the Commission may be represented by a legal practitioner.

- 5) Information obtained by the Commission or any member of its staff at a closed hearing shall not be disclosed to any person except –
 - (a) without disclosing the identity of any person who gave the information in confidence, for the purposes of the investigation and for any report to be made thereon; or
 - (b) for the purposes of any proceedings for perjury alleged to have been committed in the course of an investigation.
- 6) The Minister may, at any stage during the investigation of a complaint by the Commission, produce to the Commission a certificate in writing signed by him or her to the effect that the disclosure of any evidence or documentation or class of evidence or documentation specified in the certificate is, in his or her opinion, contrary to the public interest on the grounds that it may prejudice the defence, external relations, internal security or economic interests of the State, whereupon the Commission shall make arrangements for evidence relating to that matter to be heard in camera at a closed hearing and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter.
- 7) Upon receipt of a certificate in terms of subsection (6) –
 - (a) the Commission or any member of the staff of the Commission shall not communicate any such evidence or documentation to any other person for any purpose, unless the Minister allows the Commission to do so, subject to such conditions as he or she may fix; and
 - (b) an aggrieved person may, in accordance with the Administrative Justice Act [Chapter 10:28] (No 24 of 2004), appeal against such certificate, and the court hearing the appeal shall treat any evidence or documentation subject to the certificate in the manner specified in section 8 (“ Discretion to refuse or to restrict supply of reasons”) of the Administrative Justice Act [Chapter 10:28] (No 24 of 2004).
- 8) Any person who –
 - (a) has been summoned by the Commission to give evidence or to produce any documentation for the purposes of an investigation and who fails to attend or to remain in attendance until excused by the Commission from further attendance, or refuses without sufficient cause, the onus of proof whereof lies upon him or her , to be sworn as a witness or to answer fully and satisfactorily a question lawfully put to him or her, or to produce the evidence or documentation requested; or
 - (b) gives false evidence to the Commissioners, knowing such evidence to be false or not knowing or believing it to be true;
 - (c) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.
- 9) For the avoidance of doubt it is declared that the law relating to the competence or compatibility of any person on the grounds of privilege to give evidence, answer any questions or produce any book or document before the Commission, shall apply.

10) Any Commissioner or member of staff who without being authorised to do so by the Commission, discloses any information, evidence or documentation referred to in subsection (5) or (6), or makes any use of such information for his or her benefit, shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

13. Conflict of interest

- 1) No Commissioner shall participate in a hearing of a human rights violation or have a vote on any question before the Commission, whether or not involving any human rights violation, in which the Commissioner is aware that he or she has direct or indirect interest that may conflict with his or her functions as a Commissioner.
- 2) A Commissioner who contravenes subsection (2) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

14. Proceedings after investigation

- 1) If, after conducting an investigation, the Commission is of the opinion that the action or omission which was the subject-matter of the investigation constitutes a human rights violation and that –
 - (a) the action or omission relates to any decision or practice on the part of any person or authority which needs to be abolished, cancelled, reversed, varied or altered; or
 - (b) the issue giving rise to the complaint should be given further consideration by the person or authority against whom or which the complaint was made; or
 - (c) the action or omission should be rectified; or
 - (d) any law on which the act or omission was based should be reconsidered; or
 - (e) reasons should have been given for any decision complained against; or
 - (f) any other steps should be taken in relation to the action or omission complained against; the Commission shall report its opinion, together with its reasons, to the authority or person against whom the complaint was made and may make such recommendations as it thinks fit and shall also send a copy of its report and recommendations to the Minister.
- 2) In particular, the Commission may, where it considers it necessary, recommend –
 - (a) the release of a person from prison; or
 - (b) the payment of compensation to a victim of a human rights violation, or to such victim's family; or
 - (c) that the complainant seek redress in a court of law.

3) The Commission may request the authority or person in relation to whom or which it made any recommendation to notify it, within a specified time, of the steps, if any, that it proposes to take to give effect to its recommendation.

4) If, within a reasonable time after a report is made in terms of subsection (1), no action is taken which, in the opinion of the Commission, is adequate and appropriate, the Commission may, if it thinks fit after considering the comments, if any, made by or on behalf of any authority or person affected, submit a special report on the case to the Minister for the Minister to present to the President and lay before Parliament.

15. Commission may institute actions for redress of human rights violations

1) The Commission may, if it thinks fit, where it has completed an investigation of any human rights violation –

- (a) on its own initiative in terms of section 9(1); or
- (b) on the basis of a complaint;

in its own name or on behalf of any complainant or class of complainants pursue any action in any court of competent jurisdiction for the redress of any human rights violation, for which purpose it shall, where it acts on the basis of a complaint, be cited as a joint party with the complainant or class of complainants in question.

2) Where the Commission institutes any action against the State or any authority or person belonging to or employed by the State, the provisions of the State Liabilities Act [Chapter 8:14] shall apply to such action.

16. Commission may state case for High Court

1) If any question arises as to whether the Commission has jurisdiction to initiate, continue or discontinue an investigation or to exercise powers in connection therewith, the Commission may state a special case on the question for the decision of the High Court.

2) In any case so stated the Commission shall state – (a) the facts which it has established; and

(a) the view of the law which it proposes to adopt in relation to the facts.

(3) Any expenses incurred by the Commission in the determination of any question referred to in subsection (1) shall be met from the funds of the Commission.

PART IV: FINANCIAL PROVISIONS

17. Funds of Commission

1) The funds of the Commission shall consist of –

- (a) moneys appropriated by Act of Parliament for the salaries and allowances payable to and in respect of members of the Commission and the recurrent administrative expenses of the Commission; and
 - (b) any other moneys that may be payable to the Commission from moneys appropriated for the purpose by Act of Parliament; and
 - (c) any donations, grants, bequests or loans made by any person or organisation or any government of any country to the Commission with the approval of the Minister; and
 - (d) any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise.
- 2) The Commission shall apply its funds to the fulfilment of its functions.
 - 3) Moneys not immediately required by the Commission may be invested in such a manner as the Commission, with the approval of the Minister and the Minister responsible for finance, considers appropriate.

18. Accounts of Commission and appointment of internal auditor

- 1) The Commission shall ensure that proper accounts and other records relating to such accounts are kept in respect of all the Commission's activities, funds and property, including such particular accounts and records as the Minister may direct.
- 2) As soon as possible after the end of each financial year, the Commission shall prepare and submit to the Minister a statement of accounts in respect of that financial year or in respect of such other period as the Minister may direct.
- 3) Section 80 of the Public Finance Management Act [Chapter 22:19] (No 11 of 2009), shall apply, with such changes as may be necessary, to the appointment of an internal auditor to the Commission in all respects as if the Commission were a Ministry or department of a Ministry.

19. Audit of Accounts

- 1) The accounts of the Commission shall be audited by the Comptroller and Auditor- General, who for that purpose shall have the functions conferred on him or her by sections 7 and 8 of the Audit Office Act [Chapter 22:18].
- 2) Any person under the authority or supervision of the Commission who refuses to provide the Comptroller and Auditor-General with an explanation or information required by him or her for the purposes of an audit or knowingly provides the Comptroller and Auditor- General with a false explanation or information, or an explanation or information that the person has no grounds for believing to be true, shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

- 3) Notwithstanding anything contained in subsection (1), the Comptroller and Auditor- General may appoint a suitably qualified person to audit the accounts of the Commission and if he or she does so –
 - (a) subsections (1) and (2) shall apply in respect of the person so appointed as if he or she were the Comptroller and Auditor-General; and
 - (b) any expenses incurred by the person so appointed in carrying out his or her audit shall be met from the funds of the Commission.

PART V: MISCELLANEOUS PROVISIONS

20. Removal of Commissioner from office

- 1) A Commissioner may be removed from office for inability to discharge the functions of his or her office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour and shall not be so removed except in accordance with this Act.
- 2) A Commissioner shall be removed from office by the President if the question of his or her removal from office has been referred to a tribunal appointed under subsection (4) and that tribunal has advised the President that he or she ought to be removed from office for inability to discharge the functions of his or her office or for misbehaviour.
- 3) If the question of removing a Commissioner has been referred to a tribunal appointed under subsection (4), the President may suspend that person from performing the functions of his or her office and any such suspension –
 - (a) may at any time be revoked by the President; and
 - (b) shall cease to have effect if the tribunal advises the President that the person should not be removed.
- 4) The tribunal referred to in this section shall consist of a chairperson and two other members appointed by the President, and –
 - (a) the chairperson shall be a person who is or has been a judge of the Supreme Court or the High Court;
 - (b) at least one of the other members shall be a person who is and has been for not less than seven years, whether continuously or not, qualified to practise as a legal practitioner in Zimbabwe.
- 5) In computing, for the purposes of subsection (4)(b), the period during which any person has been qualified to practise as a legal practitioner, any period during which he or she was qualified to practise as an advocate or attorney in Zimbabwe shall be included.

21. Immunity

No legal proceedings shall lie against the Commission or any Commissioner or the Executive Secretary or any person acting under the

direction of the Commission in respect of anything which is done in good faith and without gross negligence in pursuance of this Act.

22. Provincial, district and other offices of Commission

The Commission shall endeavour to establish a principal office and offices at provincial, district and other administrative levels as it considers fit for the better performance of its functions.

23. Regulations

- 1) The Commission may make regulations –
 - (a) prescribing anything which by this Act and its Constitutional mandate is required or permitted to be prescribed or which, in its opinion, is necessary or convenient to be prescribed for the carrying out or giving effect to this Act; and
 - (b) providing for the conditions of service of the Executive Secretary and the staff of the Commission.
- 2) The regulations of the Commission shall not have effect until they have been approved by the Minister and published in the *Gazette*.

FIRST SCHEDULE (Section 3(2))

PROVISIONS RELATING TO COMMISSIONERS AND WORKING GROUPS

Paragraph

- 1) Interpretation in First Schedule
- 2) Disqualifications for appointment to Commission.
- 3) Terms of office and conditions of service of Commissioners.
- 4) Vacation of office by Commissioners.
- 5) Filling of vacancies.
- 6) Procedure at meetings of Commission.
- 7) Working Groups of Commission.
- 8) Minutes of Proceedings.
- 9) Validity of decisions of Commission and Working Groups.

1. Interpretation in First Schedule

- 1) In this Schedule –
“Working Group” means any group established in terms of paragraph 7.

2. Disqualifications for appointment to Commission

2(1) A person shall not be qualified for appointment as a member of the Commission, nor shall he or she hold office as an appointed member, if –

- (a) he or she is not a citizen of Zimbabwe or ordinarily resident in Zimbabwe; or
- (b) he or she is a member of any other statutory body; or
- (c) he or she is a member of Parliament; or
- (d) he or she is a member of a local authority or is in the full-time employment of a local authority; or
- (e) in terms of a law in force in any country –
 - (i) he or she has been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or
 - (ii) he or she has made an assignment or composition with his or her creditors which has not been rescinded or set aside; or
- (f) he or she has been sentenced in any country to a term of imprisonment imposed without the option of a fine, whether or not any portion thereof has been suspended, and has not received a free pardon.

2) For the purposes of subparagraph (1)(b) –

- (a) a person who is appointed to a council, board or other authority which is a statutory body or which is responsible for the administration of the affairs of a statutory body shall be regarded as a member of that statutory body;
- (b) “statutory body” means –
 - (i) any commission established by the Constitution; or
 - (ii) any body corporate established directly by or under an Act for special purposes specified in that Act, the membership of which consists wholly or mainly of persons appointed by the President, a Vice-President, a Minister or any other statutory body or by a commission established by the Constitution.

3. Terms of office and conditions of service of Commissioners

3(1) A Commissioner shall hold office for a term of five years and shall be eligible for reappointment for another term of office not exceeding five years.

2) For the avoidance of doubt, it is declared that the terms of office of Commissioners shall be regarded as full terms of office.

4. Vacation of office by Commissioners

4(1) The office of a Commissioner shall become vacant upon –

- (a) the death of the Commissioner; or
- (b) the resignation from office in writing under the Commissioner’s hand addressed to the President; or

- (c) the Commissioner is convicted of an offence and sentenced to a term of imprisonment without the option of a fine; or
 - (d) the Commissioner is absent without good cause from three consecutive meetings of the Commission of which he or she has received due notice; or
 - (e) the Commissioner is declared insolvent by a court of competent jurisdiction; or
 - (f) the Commissioner takes up, whilst in office, an appointment to a position which will render him or her incapable of qualifying for appointment as Commissioner; or
 - (g) the Commissioner is removed from office by a tribunal pursuant to section 22.
- 2) For the purposes of subparagraph (1) a Commissioner shall be deemed to have resigned his or her office and his or her office shall become vacant –
- (a) if he or she becomes disqualified for appointment to the Commission in terms of paragraph 2(1)(a),(b), (c), (d) or (e); or
 - (b) on the date he or she begins to serve a sentence of imprisonment, whether or not any portion was suspended, imposed without the option of a fine –
 - (i) in Zimbabwe, in respect of an offence; or
 - (ii) outside Zimbabwe, in respect of conduct which, if committed in Zimbabwe, would have constituted an offence.
- 3) The President shall notify the termination of the appointment of any Commissioner under this Act in the *Gazette*.

5. Filling of vacancies

On the death of, or the vacation of office by, a Commissioner, the President shall fill the vacancy within three months.

6. Procedure at meetings of Commission

6(1) Subject to subparagraph (2), the Commission shall meet –

- (a) at such dates, times and places as may be fixed by the Chairperson:

Provided that the Commission shall meet at least once in every three months; and

- (b) written notice shall be sent to each Commissioner not later than seven days before the meeting and shall specify the business for which the meeting has been convened.

2) The Chairperson –

- (a) may convene a special meeting of the Commission at any time; and

- (b) shall convene a special meeting of the Commission on the written request of not fewer than two Commissioners, which meeting shall be convened for a

date not sooner than seven days and not later than thirty days after the Chairperson's receipt of the request.

3) Written notice of a special meeting convened in terms of subparagraph (2) shall be sent to each Commissioner not later than forty-eight hours before the meeting and shall specify the business for which the meeting has been convened:

Provided that a failure by a Commissioner to receive such a notice, or an inadvertent failure to send such a notice to a Commissioner, shall not invalidate the meeting.

4) No business shall be discussed at a special meeting convened in terms of subparagraph (2) other than –

(a) such business as may be determined by the Chairperson, where he or she convened the meeting in terms of subparagraph (2)(a); or

(b) the business specified in the request for the meeting, where the Chairperson convened the meeting in terms of paragraph (2)(b).

5) The Chairperson or, in his or her absence, Commissioner designated by him or her, shall preside at all meetings of the Commission.

6) At any meeting of the Commission, five of Commissioners shall form a quorum.

7) The Commission will endeavour to make decisions by consensus among the Commissioners present at a meeting of the Commission at which a quorum is present, failing which anything authorised or required to be done by the Commission shall be decided by a majority vote of the members at the meeting.

8) At all meetings of the Commission each Commissioner present shall have one vote on each question before the Commission:

Provided that, in the event of an equality of votes, the Chairperson or person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

9) With the approval of the Commission, the Chairperson may invite any person to attend a meeting of the Commission, where the Chairperson considers that the person has special knowledge or experience in any matter to be considered at that meeting.

10) A person invited to attend a meeting of the Commission in terms of subparagraph (9) may take part in the meeting as if he or she were a member of the Commission, but he or she shall not have a vote on any question before the meeting.

11) Any proposal circulated among all Commissioners and agreed to in writing by a majority of them shall have the same effect as a resolution passed at a duly constituted meeting of the Commissioners and shall be incorporated into the minutes of the next succeeding meeting of the Commission:

Provided that, if a Commissioner requires that such a proposal to be placed before a meeting of the Commission, this subparagraph shall not apply to the proposal.

12) Except as otherwise provided in this paragraph, the procedure for the convening and conduct of meetings of the Commission shall be as fixed from time to time by the Commission.

7. Working Groups of Commission

7(1) For the better exercise of its functions the Commission may establish one or more Working Groups in which the Commission may vest such of its functions as it considers appropriate:

Provided that the vesting of any function in a Working Group shall not divest the Commission of that function and the Commission may amend or rescind any decision of the Working Group in the exercise of that function.

2) On the establishment of a Working Group, the Commission –

(a) shall appoint at least one member of the Commission as a member of the Working Group, and that member or one of those members, as the case may be, shall be chairperson of the Working Group; and

(b) may appoint as members of the Working Group persons who are not members of the Commission and may fix terms and conditions of their appointment.

3) The Working Groups established in terms of subsection (1) shall be based on human rights thematic areas including –

(a) Children's Rights;

(b) Gender Equality and Women's Rights; (c) Civil and Political Rights;

(d) Economic Social and Cultural Rights; and

(e) any other thematic area which the Commission may consider necessary.

4) Meetings of a Working Group may be convened at any time and at any place by the chairperson of the Working Group.

5) If the chairperson of a Working Group is absent from any meeting of the Working Group, the members present may elect one of their number to preside at that meeting as chairperson.

6) A majority of members of a Working Group shall form a quorum at any meeting of the Working Group.

7) Anything authorised or required to be done by a Working Group may be decided by a majority vote at a meeting of the Working Group at which a quorum is present.

8) At all meetings of a Working Group each member present shall have one vote on each question before the Working Group:

Provided that in the event of an equality of votes the chairperson or person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

9) Subject to this paragraph, the procedure to be followed at any meeting of a Working Group shall be as fixed by the Commission.

8. Minutes of proceedings

8(1) The Commission shall cause minutes to be taken at its meetings and the meetings of its Working Groups and enter them in books kept for the purpose.

2) Any minutes which purport to be signed by the person presiding at the meeting to which the minutes relate or by the person presiding at the next following meeting of the Commission or the Working Group concerned, as the case may be, shall be accepted for all purposes as prima facie evidence of the proceedings and decisions taken at the meeting concerned.

3) The Commission and any Working Group of the Commission shall cause copies of all minutes that have been signed to be sent to the Minister for his or her information.

9. Validity of decisions and acts of Commission and Working Groups

9(1) No decision or act of the Commission and any Working Group or act done under their authority shall be invalid solely because –

(a) the Commission or Working Group consisted of less than the number of persons for which provision is made in paragraphs 6 and 7; or

(b) a disqualified person acted as a Commissioner or member of a Working Group at the time the decision was taken or the act was done or authorised;

if the decision was taken or the act was done or authorised by a majority vote of the persons who at the time were entitled to act as Commissioners or members of a Working Group.

2) The decisions of the Commission shall be enforced by the High Court.

SECOND SCHEDULE (Section 3(3))

ANCILLARY POWERS OF COMMISSION

1. To acquire premises necessary or convenient for the exercise of its functions and for that purpose to buy, take on lease or in exchange, hire or otherwise acquire immovable property and any interest therein and any rights concessions, grants, powers and privileges in respect thereof.

2. To buy, take in exchange, hire or otherwise acquire movable property necessary or convenient for the exercise of its functions.

3. To maintain, alter or improve property acquired by it.
4. To mortgage any assets, or part of any assets and, with the approval of the Minister, to sell, exchange, lease, dispose or turn to account or otherwise deal with any assets or part of any assets which are not required for the exercise of its functions for such consideration as it may determine.
5. To open bank accounts in the name of the Commission and to draw, make, accept, endorse, discount, execute and issue for the purposes of its functions promissory notes, bills of exchange, securities and other negotiable or transferable instruments.
6. To insure against losses, damages, risks and liabilities which it may incur.
7. With the approval of Minister, to establish and administer such funds and reserves not specifically provided for in this Act as the Commission considers appropriate or necessary for the proper exercise of its functions.
8. To pay such remuneration and allowances and grant such leave of absence and to make such gifts, bonuses and the like to members of the Commission as it considers fit.
9. To provide pecuniary benefits for members of the Commission on their retirement, resignation, discharge or other termination of service or in the event of their sickness or injury and for their dependants, and for that purpose to effect policies of insurance, provident funds or make such other provision as may be necessary to secure for its members and their dependants any or all of the pecuniary benefits to which the provisions of this paragraph relate.
10. To purchase, take on lease or in exchange or otherwise acquire land for residential purposes or dwellings-houses for use or occupation by members of the Commission.
11. To construct dwellings, outbuildings or improvements for use or occupation by members of the Commission.
12. To provide or guarantee loans made to members of the Commission for the purchase of dwelling-houses or land for residential purposes, the construction of dwelling-houses and the improvement of dwelling houses or land which are the property of its members, subject to any conditions that may be imposed by the Commission from time to time.
13. To provide security in respect of loans by the deposit of securities, in which the Commission may invest such money as it may consider necessary for the purpose.
14. Subject to any conditions that may be imposed by the Commission from time to time, to provide loans to any members of the Commission –
 - (a) for the purpose of purchasing vehicles, tools or other equipment to be used by the members in carrying out their duties; or
 - (b) not exceeding six months' salary or wages payable to the members concerned, for any purpose on such security as the Commission thinks adequate.

15. To do anything for the purpose of improving the skill, knowledge or usefulness of members of the Commission, and in that connection to provide or assist other persons in providing facilities for training, education and research, including the awarding of scholarships for such training.

16. To provide such services as the Commission considers appropriate and to charge for such services such fees as the Commission, may from time to time determine.

17. To engage in any activity, either alone or in conjunction with other organisations or international agencies, to promote better understanding of human rights violation issues.

18. To provide advice or assistance, including training facilities, to the other human rights organisations from other countries.

19. To do anything which by this Act or any other enactment is required or permitted to be done by the Commission.

20. Generally to do all such things that are conducive to the performance of the functions of the Commission in terms of this Act or any other enactment.

THIRD SCHEDULE (Section 6(4))

OATH OF SECRECY

Oath of Secrecy of Executive Secretary

I,..... having been appointed as Executive Secretary of the Human Rights Commission do swear [or solemnly affirm] that I will not, directly or indirectly, reveal any matters relating to such functions to any unauthorised persons or otherwise in the course of my duty.

So help me God.

B.2.2 Zimbabwe Human Rights Commission (General) Regulations, 2016 Statutory Instrument 77 of 2016 (CAP.10:30)

ARRANGEMENT OF SECTIONS

PART 1: PRELIMINARY

Section

- 1) Title.
- 2) Interpretation.

PART II: ADMINISTRATION

- 3) Regions.
- 4) Regional offices of Commission.

PART III: LODGING AND INVESTIGATION OF COMPLAINTS

- 5) Persons who may lodge complaint.
- 6) Form of complaint
- 7) Lodging of complaint
- 8) Acknowledgement of receipt of complaint.
- 9) Confidentiality
- 10) Assessment of complaint.
- 11) Appeal against rejection of complaint.
- 12) Investigation on complaint.
- 13) Procedure at close investigation by appropriate officer.

PART IV: RESOLUTION OF COMPLAINTS THROUGH NEGOTIATION, CONCILIATION OR MEDIATION

- 14) Initiation of process of negotiation, conciliation and mediation.
- 15) Recording of argument of negotiation, conciliation and mediation.
- 16) Procedure on failure of negotiation, conciliation or mediation.

PART V: HEARINGS

- 17) Informal hearing
- 18) Convening of formal hearing.
- 19) Persons presiding over formal hearing.
- 20) Procedure at formal hearing.
- 21) Announcement of findings following formal hearing.
- 22) Notification to parties and other persons of findings of formal hearing.
- 23) Submission of record of formal hearing to Commission.
- 24) Report following formal hearing.

PART VI: CONCLUSION OF COMPLAINTS

- 25) When complaint is concluded.
- 26) Reports by Commission on agreements following negotiation, conciliation or mediation.

PART VII: GENERAL

- 27) Violation of human rights or freedoms
- 28) Investigation may be instituted by Commission.
- 29) Monitoring of observance of human rights or freedoms.
- 30) Service of documents.
- 31) Duties to be carried out promptly.
- 32) Costs.
- 33) Publicity.

SCHEDULE: Form of summons

IT is hereby notified that the Minister of Justice, Legal and Parliamentary Affairs has, in terms of section 23 of the Zimbabwe Human Rights Commission Act [Chapter 10:30], approved the following regulations made by the Zimbabwe Human Rights Commission-

PART 1: PRELIMINARY

Title

1. These regulations may be cited as the Zimbabwe Human Rights Commission (General) Regulations, 2016.

Interpretation

2(1) In these regulations-

“appropriate officer”, in relation to a particular function, means the member of the Commission’s staff assigned by the Commission to perform that function;

“assessment”, means the process by in which the Commission screens a complaint in order to decide whether it has jurisdictions to deal with it, and to make initial finding on its merits;

“business day”, means any day other than Saturday, a Sunday or a public holiday;

“complaint”, means an oral, written, telephonic or electronic communication to the Commission alleging an act or omission which-

(a) violates or threatens to violate human rights or freedom; or

(b) amounts of maladministration or abuse of power;

“complainant” means a person who lodges a complaint;

“finding” means a conclusion reached by the Commission after an assessment or investigation regarding any-

(a) violation of human rights or freedom; or

(b) maladministration or abuse of power;
“formal hearing” means a formal hearing conducted in terms of section 12 of the Act;

“informal hearing” means a hearing, other than a formal hearing, conducted in terms of section 18;

“investigation” means an investigation referred in section 9 of the Act;

“organ of government” means-

- (a) a Ministry or department of the State; or
- (b) a provincial or metropolitan council or local authority; or
- (c) a statutory body; or
- (d) a body corporate whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of majority of shares in the body corporate or otherwise;

“organisation” includes any association of persons, whether corporate or unincorporated;

“region” means a region described in section 3

“respondent” means any person who is responsible, or is alleged to be or suspected of being responsible, for-

- (a) a violation of human rights or freedom; or
- (b) maladministration or abuse of power.

PART II: ADMINISTRATION

Regions

3. For the purpose of receiving and dealing with complaints, the Commission shall divide Zimbabwe into two regions namely-

- (a) the Northern Region, comprising the provinces of Harare, Manicaland, Mashonaland Central, Mashonaland East and Mashonaland West and
- (b) the Southern region comprising the regions of Bulawayo, Masvingo, Matabeleland North, Matabeleland South and Midlands.

Provided that the Commission shall progressively set up offices in every district for ease of access by the public.

Regional offices of Commission

4. The Commission shall establish one or more offices in each region for the purpose of receiving and dealing with complaints arising from that region and shall make all necessary arrangements to make sure that the public is kept aware of their locations and is able –

- (a) to attend them during ordinary business hours on all business days; and

- (b) to contact them at all reasonable times by post, telephone or electronic means.

PART III: LODGING AND INVESTIGATION OF COMPLAINTS

Persons who may lodge a complaint

- 5. A complaint may be lodged with the Commission by-
 - (a) any person affected by a violation of human rights or freedom or by maladministration or abuse of power; or
 - (b) when the person referred to in paragraph (a) is for any reason unable or unwilling to lodge a complaint, by
 - (i) any person acting on that person's behalf ; or
 - (ii) any person acting in the public interest; or
 - (iii) any association in the interest of its members.

Form of complaint

- 6(1) A complaint shall be made in writing, in a prescribed manner;
- (2) If for any reason the complainant is unable or unwilling to make a written complaint or to complete the form, the appropriate officer to whom the complaint is made shall complete the form on the basis of whatever information the complainant has given him or her, and the complaint shall be processed as if the complainant had completed the form.
- (3) A complaint shall not be rejected solely on the ground that it has not been made in the prescribed manner.
- (4) In filing the complaint, the complainant shall provide such of the following information as is applicable and as he or she can be reasonably expected to provide-
 - (a) whether the complainant is personally affected by the violation, maladministration or abuse complained of, or is acting on another person's behalf or in the public interest and
 - (b) the following personal information concerning the complainant and, if he or she is acting on another person's behalf, that of the person he or she is acting on behalf of-
 - (i) his or her full names and national registration number; and
 - (ii) his or her physical and postal address and telephone or cellphone number; and
 - (iii) where the person is an organisation, its nature and the business or activities it carries on;

Provided that, if the complainant fears any form of reprisal for making the complaint, he or she may omit any or all of such information, and the complaint shall be processed notwithstanding the omission; and

- (c) if the complainant is acting on another person's behalf, the reason why that other person is not lodging the complaint; and
 - (d) the following information regarding the violation, maladministration or abuse complained of;
 - (i) the nature of the violation, maladministration or abuse; and
 - (ii) the date on which and place at which the violation, maladministration or abuse occurred or arose; and
 - (iii) particulars of the person responsible for the violation, maladministration or abuse; and
 - (e) particulars of any person who may provide information relevant to the complaint, and
 - (f) information regarding any steps the complainant has taken to try to resolve the issues arising from the violation, maladministration or abuse complained of; and
 - (g) the remedy or redress, if any, which the complaint seeks through lodging the complaint.
- (5) An appropriate officer may require a complainant to furnish such additional information and documents as may reasonably be required to make an assessment or to resolve the complaint.
- (6) An appropriate officer with whom a complainant has been lodged shall provide the complainant with all reasonable assistance in completing the complaint form and in providing any additional information and documents that may be required.
- (7) When an appropriate officer completes the complaint form on behalf of complainant or assists a complainant in completing it, he or she shall keep a full written record of what he or she has done.

Lodging of complaint

7(1) A complaint shall be lodged at a regional office of the Commission in the region in which the violation, maladministration or abuse of office complained of occurred.

Provided that, if a complaint is lodged at a different regional office, the appropriate officer who receives it shall take all reasonable steps to transfer it to the correct office, and the complaint shall be dealt with at that office as if had been lodged there.

(2) A complaint shall be regarded as lodged at an office for the purpose of subsection (1) if –

- (a) it is made orally at the office or by telephone to the office; or
- (b) it is reduced to writing and handed in to the office; or
- (c) it is sent to the office by post, telefacsimile or any electronic means; or
- (d) the complainant completes a complaint form online via the Commission's website and transmits it electronically to the Commission.

Acknowledgement of receipt of complaint

8. Within seven days after a complaint has been lodged in terms of section 7, an appropriate officer shall send the complainant a written acknowledgement of the complaint specifying the reference number assigned to the complaint.

Confidentiality

9(1) If a complaint, when lodging a complaint or at any stage thereafter, request in writing his or personal particulars be kept confidential, the Commission and all members of the Commission staff shall, subject to this section, take all reasonable steps to comply with that request.

(2) Where a complainant is a child or person with mental disability, the Commission and all members of the Commission staff shall, subject to this section take all reasonable steps to keep the complainant's personal particulars confidential.

(3) Subject to subsection (1), where the Commission considers that the disclosure of the complainant's personal particulars is necessary in order to resolve the complaint, an appropriate officer shall, in writing-

- (a) inform the complainant which particulars the Commission considers must be disclosed and the reason for such disclosure; and
- (b) request the complainant's written consent to disclose the said particulars.

(4) Subject to subsection (2), where the Commission considers that disclosure of personal particulars of a complainant who is a child necessary in order to resolve the complaint, an appropriate officer shall in writing-

- (a) inform the complainant's guardian which particulars the Commission consider must be disclosed and the reason for such disclosure; and
- (b) request the complainant's guardian to written consent for the disclosure of the said particulars;

(5) If a person refuses to consent to the disclosure of particulars, having been requested to do so in terms of subsection (3) or (4), the Commission may decline to deal with the complaint.

(6) If the Commission declines to deal with a complaint in terms of subsection (5), it shall inform the complainant in writing with seven days of its decision and state the reason for such decision.

Assessment of complaint

10(1) After a complaint has been lodged in terms of section 7, the officer who received it shall submit it to an appropriate officer for assessment.

(2) If the appropriate officer considers that additional information would facilitate the assessment of the complaint, he or she shall forthwith attempt to obtain the information from the complainant, and if the complainant fails or refuses to provide the information the appropriate officer shall endeavor to assess the complaint on the available information but, if that is impossible may reject the complaint.

(3) After assessing a complaint, the appropriate officer –

- (a) shall reject the complaint if the Commission, in terms of section 9 of the Act has no jurisdiction to investigate it.
- (b) may reject the complaint on any of the following grounds-
 - (i) that the complaint does not *prima facie* show that a violation of a human right or freedom or maladministration or abuse of power has occurred or is likely to occur;
 - (ii) that the subject matter of the complaint has been settled between the complainant and the respondent, whether by agreement, arbitration or a judgment of a competent court;
 - (iii) that the subject matter of the complaint would be more appropriately be dealt with by –
 - (A) another Commission or body; or
 - (B) a statutory or contractual dispute-resolution mechanism readily available to the complainant
- (c) may, without rejecting the complaint, refer it to another Commission or body which, in the appropriate officer's opinion, can more appropriately deal with the subject matter of the complaint;

And in all other cases the appropriate officer, subject to this section, shall accept the complaint on behalf of the Commission:

Provided that, if the appropriate officer is in doubt as to whether or not to accept the complaint, he or she shall refer it to the Commission for decision.

(4) If, after assessing a complaint, an appropriate officer-

- (a) rejects the complaint, the appropriate shall notify the complainant in writing of the fact, giving reasons for the rejection and advising the complainant of his or her right to appeal to the complaint but considers that –
 - (i) some other body can deal with the subject matter of the complaint; or
 - (ii) some other form of redress, such as instituting legal proceedings or utilizing some other dispute-resolution mechanism, is open to the complainant;
- (b) the appropriate officer shall, in addition to notifying and advising the complainant as provided in paragraph (a), inform the complainant of the existence and availability of that other body or form of redress.
- (c) refers the complaint to another body which he or she considers can more appropriately deal with the subject matter of the complaint, the appropriate officer shall inform the complainant of what he or she has done.

(5) If, on assessing a complaint, the appropriate officer is unable to decide whether to accept it or reject it, he or she shall refer it to the Commission for a decision.

(6) Upon a complaint being referred to it according to subsection (5), the Commission shall consider in conjunction with any comments from the appropriate officer and shall accept or reject the complaint in accordance with this section:

(7) In deciding whether to accept or reject the complaint in terms of subsection (6), the Commission may direct the appropriate officer to request the complainant to supply the Commission with additional information it may require before it reaches a decision on the complaint.

(8) If the Commission decides to reject a complaint, the appropriate officer shall notify the complainant of his or her complaint in writing and state the reasons for such rejection.

Appeal against rejection of complaint

11(1) Any person who is aggrieved by the rejection of a complaint by an appropriate officer, may appeal against the rejection in Commission.

(2) An appeal in terms of subsection (1) shall be made in writing within three months after the complainant was notified of the rejection of the complaint and shall specify the grounds on which he or she considers the complaint should have been accepted.

(3) In an appeal in terms of subsection (1), the Commission may confirm or set aside the rejection appealed against or make such order or give such direction as it considers appropriate to ensure the proper resolution of the matter and shall notify –

- (a) the appropriate officer against whose decision the appeal was made of the outcome of the appeal and the directions given, if any; and
- (b) the appropriate officer shall, within seven days of the decision on the appeal, notify the complainant of the outcome of the appeal in writing.

Provided that, before reaching a decision in appeal, the Commission may do all or any of the following-

- (a) invite representations from the aggrieved party; or
- (b) refer the matter back to the appropriate officer for further consideration; or
- (c) itself make such further consideration in the matter as it deems fit.

Investigation of complaint

12(1) Upon acceptance of complaint, the Commission shall appoint an appropriate officer to investigate it.

(2) Upon being appointed to investigate a complaint, the appropriate officer shall –

- (a) inform the complainant of his or her appointment and, where necessary, request the complainant to furnish more information or documents to facilitate the investigation; and
- (b) notify the respondent in writing that the Commission is investigating a complaint against him or her, informing the respondent of –
 - (i) The complainant's identity, unless it is to be kept confidential in terms of section 9; and
 - (ii) the nature and circumstances of the violation, maladministration or abuse of office complained of, in sufficient detail to enable the respondent to respond adequately to the allegations made against him or her in the complaint;

and shall request the respondent to respond, in writing, to the allegations within a reasonable period specified by the appropriate officer.

(3) After complying with subsection (2), the appropriate officer shall conduct such investigation into the complaint as may be necessary, in the light of any further information and documents provided by the complainant and any response received from a respondent.

(4) For the purpose of an investigation referred to in subsection (3), the appropriate officer may, with the consent of the affected person or on his or her own initiative-

- (a) interview any person; and
- (b) visit and inspect any place; and
- (c) receive or make a copy of any document; and
- (d) receive any article;

and shall duly record the information received and or observations made and take measures to ensure that the safe custody of any document or article received.

(5) Any person who appears before an appropriate officer in an investigation referred to in subsection (3) shall be entitled to be represented by a legal practitioner at his or her own expense, and the appropriate officer shall ensure that the person is aware of that right.

(6) An appropriate officer shall take reasonable steps to keep the complainant informed about the progress of an investigation referred to in subsection (3).

(7) An appropriate officer who is conducting an investigation referred to in subsection (3) shall keep a proper record of whatever he or she does in the course of the investigation.

Procedure at close investigation by appropriate officer

13(1) After conducting an investigation in terms of section 12, the appropriate officer shall refer the record of the complaint to the Commission together with –

- (a) the record of the investigation; and
- (b) any additional documents collected in the course of the investigation; and
- (c) his or her recommendations regarding the complaint;

for a decision how to proceed:

Provided that, if so authorized by the Commission, the appropriate officer may attempt to resolve the complaint by negotiation, conciliation or mediation.

(2) On receipt of the record in terms of subsection (1), the Commission may

- (a) reject the complaint on any of the grounds set out in section 10(3) (a) or (b), if the committee considers that the investigation has shown that the complaint should be rejected; or
- (b) refer the complaint to another Commission or body which, in the Commission' opinion, can be more appropriately deal with the subject-matter of the complaint; or
- (c) attempt to resolve the complaint by negotiation, conciliation, mediation or the holding of a formal hearing.

(3) If the Commission rejects a complaint or refers it to another Commission or body, the Commission shall notify the complainant in writing of the fact, giving reasons for the rejection and advising the complainant of his or her right to appeal against the rejection in terms of section 11.

(4) In resolving a complaint, an appropriate officer or the Commission shall adopt the method, which, in the opinion of the officer or the Commission, as the case may be, is best suited to achieve a result that is fair and satisfactory, taking due account of –

- (a) the degree of co-operation shown by the parties during the investigation; and
- (b) the likelihood of the parties participating meaningfully in the resolution process; and
- (c) the public interest; and
- (d) any other relevant consideration.

(5) The Commission shall keep records of any action it takes in terms of this section.

PART IV: RESOLUTION OF COMPLAINTS THROUGH NEGOTIATION, CONCILIATION OR MEDIATION

Initial process of negotiation, conciliation or mediation

14(1) Where a decision has been made to resolve a complaint by negotiation, conciliation or mediation –

- (a) the appropriate office, is so authorized by the Commission, shall forthwith assume the role of negotiator, conciliator or mediator, as the case may be, in attempt to resolve the complaint by that process; or
- (b) The Commission may appoint a Commissioner to act as the negotiator, conciliator or mediator.

(2) Any process of negotiation, conciliation or mediation carried out in terms of these regulations shall be conducted in accordance with generally accepted practices for the process concerned and, in particular, the negotiator, conciliator or mediator shall observe the rules of the natural justice.

Recording of agreement reached through negotiation, conciliation or mediation

15(1) If the negotiator, conciliator, or mediator succeeds in getting the parties to agree to a resolution of a complaint, he or she shall ensure that their agreement is recorded and is signed by both parties.

(2) After an agreement has been signed in terms of subsection (1) the negotiator, conciliator or mediator shall, together with any comments he or she may wish to make on it, refer the agreement to the Commission for adoption.

Procedure on failure of negotiation, conciliation or mediation

16(1) If the negotiator, conciliator or mediator fails for any reason to resolve a complaint, or believes that he or she will be unable to resolve it for any reason he or she shall-

- (a) report the fact to the Commission, providing the Commission with a written explanation for the reason of failure or anticipated failure; and
- (b) notify the complainant or respondent of what he or she has done and the reasons for doing so, and inform them that they may submit written representations in the matter to the Commission within a period specified by him or her.

(2) On receipt of a report in terms of subsection (1), and after considering any representation signed by the complainant and respondent in terms of that subsection the Commission may –

- (a) give directions to the negotiator, conciliator or mediator as to alternative methods of resolving the complaint, and the negotiator, conciliator or mediator shall act accordingly; or
- (b) if the complainant obstructed the process of negotiation, conciliation or mediation or was otherwise responsible for the failure or anticipated the failure of the process, discontinue the process altogether; or
- (c) direct that the issues arising from the complaint should be subject of a formal hearing in terms of section (12) of the Act; or
- (d) direct that the Commission should institute proceedings in a competent court for the resolution of all or any of the issues arising from the complaint.

and shall cause the complainant and the respondent to be notified of its decision in writing within 7 days of the date of such decision.

PART V: HEARINGS

Informal hearings

17(1) At any stage during an investigation, an appropriate officer or a Commissioner appointed by the Commission may hold an informal hearing –

- (a) to obtain any information for the purpose of investigation; or
- (b) to try to resolve the complaint that is being investigated.

(2) An informal hearing shall be convened by the appropriate officer or the appointed Commissioner informing the parties, and any other person who is being interviewed or questioned at the hearing, of the date on which and the time and place at which the hearing is to be held.

(3) An informal hearing shall be conducted by the appropriate officer or the appointed Commissioner who convened it or by a Commissioner or an officer appointed by the Commission.

(4) Members of the public shall not be permitted to attend an informal hearing unless the person conducting the hearing, with the consent of the complainant and the respondent, permits them to attend.

(5) The procedure at an informal hearing shall be as informal as possible, but –

- (a) the rules of natural justice shall be observed; and
- (b) the complainant and the respondent and anyone else appearing before the hearing must be permitted, at their own expense, to be represented by a legal practitioner or by any other suitable person of their own choice.

(6) Persons who are interviewed or questioned at an informal hearing shall not be required to give their evidence or answer on oath.

(7) The person conducting an informal hearing shall keep, or cause to be kept, a proper record of the proceedings.

Convening of formal hearing

18(1) Where the Commission has resolved to hold a formal hearing into a complaint or any issues arising from a complaint, it shall cause the complainant and the respondent to be given at least 7 days' written notice of the date on which, the time and place at which the hearing will be held.

(2) In the notice referred to in subsection (1), the Commission shall invite the complainant and the respondent to bring to the hearing any person whom they consider can give evidence regarding the complaint that is being investigated.

(3) For the purpose of securing the attendance of any person at a formal hearing, the Commission may issue a summons in the form set out in the Schedule, and may require a police officer or an appropriate officer to serve it on that person.

(4) The provisions of the Criminal Procedure and Evidence Act [Chapter 9:07] relating to the service of subpoenas shall apply, with any necessary changes to the service of a summons in terms of subsection (3).

Persons presiding over formal hearing

19(1) The Commission, or a panel of three or more Commissioners selected by the Commission or by the Chairperson of the Commission, shall preside over a formal hearing.

Provided that no person who has been involved in the assessment or processing of a complaint shall preside over a formal hearing into that complaint.

(2) Where a panel of three or more Commissioners is selected to preside over a formal hearing, the Commission or the Chairperson of the Commission, as the case may be, shall assign to one of the selected Commissioners the role of chairing the formal hearing.

Procedure at formal hearing

20(1) In this section –

“Chairperson” means the Commissioner assigned to chair a formal hearing in terms of the section 19(2).

(2) Subject to section 12 of the Act, a formal hearing shall be conducted in accordance with procedures fixed by the Commission or by the Chairperson:

Provided that –

- (i) the proceedings shall be inquisitorial in nature, and the persons presiding over the hearing shall be entitled to question anyone appearing before the hearing
- (ii) the proceedings shall be conducted in English, unless the Chairperson directs otherwise;
- (iii) if the complainant or respondent, or anyone who is giving evidence or information to the hearing, has difficulty in understanding the language in which the proceedings are being conducted, he or she shall be provided with an interpreter.
- (iv) the complainant and the respondent shall be entitled, through the Chairperson or directly if the Chairperson so permits, to put questions to anyone appearing before the hearing.
- (v) the rules of natural justice shall be observed, and in particular the complainant and the respondent shall be given a reasonable opportunity to respond to allegations made against them;
- (vi) the complainant and the respondent and anyone else appearing before the hearing shall be entitled to be represented, at their own expenses, by a legal practitioner or by any other suitable person of their own choice, who shall be given reasonable access to all documents held or received by the Commission in relation to the issues to be decided at the hearing.

(3) Unless the persons presiding over a formal hearing decide otherwise in terms of section 12 of the Act, members of the public shall be permitted to attend the hearing and the proceedings of the hearing may be published without restrictions.

(4) A direction prohibiting or limiting public attendance at a formal hearing or the publication of its proceedings shall not be made unless the person presiding over the hearing consider it necessary or appropriate to do so –

- (a) in light of the factors set out in section 3(2) of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter7:04]; or
- (b) to ensure the successful conduct of the hearing; or
- (c) to facilitate the functioning of the Commission.

(5) At the commencement of the formal hearing, the Chairperson shall explain the purpose of the hearing and the procedure to be followed, and shall outline the complaint and the issues to be decided at the hearing.

(6) The Chairperson may require persons appearing before a formal hearing to give their evidence on oath, and for that purpose may administer the oath to them.

(7) The Chairperson of a formal hearing may adjourn the hearing for the purpose of considering the evidence received at the hearing.

(8) The Chairperson shall keep, or cause to be kept, a proper record of the proceedings at the formal hearing.

(9) Before a formal hearing is closed after all the evidence have been received, the complainant and the respondent shall be given a reasonable opportunity to address the person presiding over the hearing.

Announcement of findings following formal hearing

21. After evidence has been received at a formal hearing and the parties have been given an opportunity to deliver the closing addresses, the persons presiding over the hearing shall consider the evidence and the, either orally or in writing-

- (a) summarise the evidence and information; and
- (b) state the findings on the complaint, giving full reasons for the findings; and
- (c) specify any remedial action proposed;

Provided that the Chairperson shall ensure that where the summary and statement are made orally, they are reduced to writing.

Notification to parties and other persons of findings of formal hearing

22. After the findings of a formal hearing have been stated in terms of section 21, an appropriate officer shall-

- (a) send a copy of the statement to the complainant and respondent and to any other person interested in the matter; and
- (b) invite the complainant and respondent, and every other person who is sent a copy, to submit a written response to the Commission within such reasonable time as the appropriate officer may specify.

Submission of record of formal hearing to the Commission

23(1) Upon the expiry of the time of submitting responses in term of section 22 (b), the Chairperson of the formal hearing shall lay before the Commission the record of the hearing and any responses that may have been received, together with any comments he or she and the other persons presiding over the hearing may wish to make in regard to the responses.

(2) The Commission shall consider the documents laid before it in terms of subsection (1) and –

- (a) issue a report in terms of section 24; or
- (b) if the Commission considers it needs further information before issuing a report, direct –
 - (i) that the formal hearing be convened in order to obtain the information; or
 - (ii) that an appropriate officer should obtain the information.

(3) Where the Commission makes a direction in terms of subsection (2)(b), it shall within 7 days thereof, inform the complainant and the respondent of the direction and of any further steps that are to be taken as a result of it.

Report following formal hearing

24(1) A report issued by the Commission following a formal hearing shall

- (a) summarise the evidence; and
- (b) state the Commission's findings on the complaint; and
- (c) specify any remedial action ordered by the Commission;

Provided that instead of restating the summary and findings of the persons who presided at the hearing, the Commission may refer to them by reference.

(2) Having issued a report in terms of subsection (1), the Commission shall –

- (a) within 7 days thereof, send copy of it to the complainant and the respondent and to any other person who is interested in the report; and
- (b) ensure that it is the field of recording purposes.

PART VI: CONCLUSION OF COMPLAINTS

When complaint is concluded

25. A complainant shall be regarded as concluded for the purposes of these regulations –

- (a) if the complaint is rejected following an assessment or investigation; or
- (b) if, following an investigation, the Commission finds that –
 - (i) there was no substance in the complaint.
 - (ii) the violation, maladministration or abuse of power complained of has been remedied satisfactory; or
- (c) if the complainant withdraws the complaint and the Commission is satisfied that he or she has done so voluntarily and that there is no need for further investigation or action by the Commission; or
- (d) upon the complaint being referred to another Commission or body; or
- (e) if the complaint is resolved through negotiation, conciliation or mediation; or
- (f) when the Commission issues a final order or give a final direction in regard to the complaint; or
- (g) if the Commission institutes proceedings in a court of law of the resolution of the complaint, when the court issues a final order in regard to the complaint.

Report by Commission on agreements following negotiation, conciliation or mediation

26(1) When an agreement reached after negotiation, conciliation or mediation has been referred to the Commission in terms of section 15(2), the Commission may issue a report on it outlining its provisions and, if the Commission thinks it appropriate to do so, adding its own comments on it.

(2) The Commission shall ensure that a copy of any report issued in terms of subsection (1) is sent to the complainant, the respondent and every person interested in the report.

PART VII: GENERAL

Violation of human rights or freedom

27(1) Any reference in these regulations to a violation of human right or freedom or to maladministration or abuse of power shall be construed as including an alleged, suspected or threatened such violation, maladministration or abuse.

(2) A person shall be regarded as affected by –

- (a) a violation of human rights or freedom; or
- (b) maladministration or abuse of power;

If he or she

- (i) has been, is being or is likely to be prejudiced or potentially prejudiced by the violation, maladministration or abuse of power; or
- (ii) has reasonable grounds to believe that he or she has been, is being or is likely to be prejudiced or potentially prejudiced by the violation, maladministration or abuse of power.

(3) Without limiting the ordinary meaning of the expression, a person shall be regarded as interested in a report for the purposes of these regulations if –

- (a) the person's conduct is criticised in the report; or
- (b) the report recommends or directs a change in the procedure or manner in which the person does anything; or
- (c) the report recommends or directs the person to take any measures or do anything.

Investigation may be instituted by the Commission

28. The Commission may initiate an investigation into any –

- (a) violation of human right or freedom; or

- (b) maladministration or abuse of power;

even if no complaint has been lodged in respect of the violation, maladministration or abuse and these regulations shall apply, with any necessary changes, in relation to such an investigation.

Monitoring of observance of human rights and freedom

29(1) The Executive Secretary shall monitor –

- (a) observance of human rights and freedom in Zimbabwe; and
- (b) implementation of recommendations made by the Commission in its reports;

and shall report regularly to the Commission on such observance and implementation.

(2) To assist the Executive Secretary in his or her function under subsection (1), the Commission may establish one or more committees consisting of –

- (a) members of the Civil Service and the security services; and
- (b) representatives of the commercial, industrial, agricultural and mining sectors; and
- (c) representatives of employers and employees; and
- (d) representatives of organizations, bodies and persons concerned with the promotion and protection of human rights and freedoms;

and shall fix the terms and conditions of service of the members of such committees.

(3) On the recommendation of the Executive Secretary or a committee established in terms of subsection (2), the Commission may require any person or organization, including an organ of government, to report to the Commission on measures they have taken to give effect to human rights and freedoms or any recommendation of the Commission.

(4) If any organization fails or refuses to comply with a requirement under subsection (3), the Commission shall report the failure or refusal to Parliament.

Service of documents

30(1) Any document that is required to be served under these regulations may be served by an appropriate officer or police officer whom the Commission calls upon to do so.

(2) Where a document referred to in subsection (1) requires any person to do anything, the document shall be served on the person in reasonable time to enable him or her to do the thing.

(3) Section 382 and 383 of the Criminal Procedure and Evidence Act [Chapter 9:07] relating to the service of documents shall apply, with any necessary changes, to the services of the documents referred to in subsection (1).

Duties to be carried out promptly

31. Anything that is required to be done under these regulations shall be done without delay.

Costs

32. The Commission shall not charge a fee for dealing with complaints under these regulations.

Publicity

The Commission shall ensure that –

- (a) the form in which the complaints are to be made is published as widely as possible and in manner that will bring it to the attention of all sections of the public; and
- (b) complaint forms are available for the public to use at all the Commission's offices.

(2) Where the Commission issues or ratifies a report, it shall ensure that the report is published so as to bring it to the attention of as wide a section of the public as possible, in order to acquaint the public with the Commission's work and inform them about the human rights and freedoms to which they are entitled.

SCHEDULE (Section 18)

FORM OF SUMMONS

ZIMBABWE HUMAN RIGHTS COMMISSION

[Telephone and cell numbers] [Postal and physical address]

SUMMONS

To:

[Name of person summoned]

Of:

.....

[Address of person summoned]

You are hereby summoned to appear before the hearing of the Zimbabwe Human Rights Commission to be held at.....

[Place]

on the.....*[date]* at.....*[time]*.

The hearing has been convened to investigate.....

[State the subject matter of complaint or other matter that is being investigated]

You are required to bring with you:

[If the person summoned is required to bring any document or article, describe it]

Signed at:.....*[place]* on the.....*[date]*

.....

For the Zimbabwe Human Rights Commission

[Reverse of form]

Return of Service

To be filled in by the appropriate officer or police officer who served this summons on the person named therein:

On the.....*[date]* and at.....*[place]*

I served this summons on the person named therein, by:

.....

[State how the summons was served]

Signed:

.....

Authorised officer/ Police officer

.....

Name and designation rank

B.3 INTERNAL RULES AND REGULATIONS

A sample copy of a collaboration and partnership memorandum of understanding (MOU) between the ZHRC and a partner.



MEMORANDUM OF UNDERSTANDING

Between:
The Zimbabwe Human Rights Commission Of
Number 144 Samora Machel Avenue
Harare
Zimbabwe
(Hereinafter “ZHRC” and Represented by Represented by Chairperson of
the Zimbabwe Human Rights Commission)
AND

.....
Harare
Zimbabwe
(Hereinafter “.....” and Represented by, being duly
authorised)

PREAMBLE

WHEREAS the Zimbabwe Human Rights Commission (ZHRC) is desirous of forging alliance with other stakeholders for the purpose of mutually nurturing the protection and enforcement of human rights in Zimbabwe;
AND WHEREAS the Commission is aware of threats posed by both human rights violations and abuses to the stability and security of our communities and the nation at large, such threats further undermining the institutions and values of democracy, ethical values, justice and public trust, and jeopardizing sustainable development, social and economic prosperity, and the rule of law;
RECOGNISING the devastating and negative effects human rights violations pose on the realization of the Zimbabwe Agenda for Sustainable Social Economic Transformation (ZIMASSET) and any other national development agenda;

BEING AWARE of the significance of the African Development Agenda 2063, predicated on sustainable development underpinned by human rights observance as prescribed by the African Charter on Human and Peoples' Rights and other African treaties and conventions drawing therefrom;

RECALLING the numerous international conventions and mechanisms on human rights, especially the Universal Declaration of Human Rights as well as other relevant international and regional instruments that Zimbabwe is party to;

PROMOTING the respect for human rights and the rule of law in Zimbabwe and Africa as a whole;

COGNISANT of the fact that protecting and promoting human rights demands intersectional approaches and can be significantly enhanced by multi-organizational co-operation through sharing knowledge and expertise and referral of clients to organizations best suited to deal with the challenges at hand;

DETERMINED to create a strong partnership that will generate synergies and enhance the sharing of human rights, democracy, good governance knowledge and expertise between the ZHRC and other stakeholders;

ACKNOWLEDGING the importance of human rights education, training, networking and cooperation as well as academic research in the promotion and protection of human rights;

NOW THEREFORE, the Parties hereto bind themselves to work in collaboration within the scope of this agreement:

ARTICLE 1: INTERPRETATION

In this Agreement, Clause headings are for convenience only and shall not be used in its interpretation unless the context clearly indicates a contrary intention;

1.1 a word or an expression which denotes –

1.1.1 any gender includes the neutral and other genders;

1.1.2 a natural person includes the plural and vice versa;

1.2 the following words and expressions shall bear the meanings assigned to them below and cognate words and expressions bear corresponding meanings;

1.2.1 "**this Agreement**" – this document together with its annexures, as amended from time to time;

1.2.2 "**confidential information**"- the fact and details of the investigations and negotiations between the Parties concerning the subject matter of this Agreement, as well as the information which any Party discloses, furnishes or makes available to another Party in connection with the subject matter of this Agreement whether prior to, in contemplation of, during or after negotiations and irrespective of whether such information is marked "confidential" or "proprietary" or otherwise. The confidential information

accordingly includes, without limitation, all communications (whether written, oral or in any other form), all reports, statements, schedules and other data concerning any financial, technical, labour, marketing, administrative, accounting and other matters;

- 1.2.3 “**Collaboration**” – working together by referring cases and sharing knowledge and expertise on human rights in order to achieve the goal of promoting, protecting and enforcing human rights;

ARTICLE 2: AREAS OF COOPERATION AND MUTUAL OBLIGATION

2.1 The purpose of this MOU is to establish a mutual relationship between the Parties by ensuring smooth referral of cases from one organization to another in order to enhance the protection and promotion of human rights; and to exploit and develop the synergies and complementarities between the Parties.

2.2 The Parties agree to co-operate on the basis of mutual respect and as set out herein in this Memorandum of Understanding;

2.3 This Memorandum of Understanding creates a framework of co-operation between the Parties and sets out their intended roles and participation;

2.4 Each Party shall implement this Memorandum within the scope of its mandate and in accordance with its own policy framework, legislation, rules and procedures. There is no intention under this Memorandum to modify, or create any obligations contrary to the institutional and policy framework of either Party or the scope of either Party’s respective mandate. In the event of an inconsistency between this Memorandum and the relevant framework, the latter shall prevail.

2.5. The collaboration of the Parties shall aim to achieve the main goal of protecting and enforcing human rights primarily through:

ARTICLE 3: DISCLOSURE

3.1 This MOU is open to the public domain. Any sharing of confidential information between the Parties shall be subject to their respective policies and procedures relating to the disclosure of confidential information.

3.2 Each Party shall take appropriate measures to protect confidential and/or classified information of the other Party.

ARTICLE 4: STATUS OF THE MOU

4.1 Nothing in this MOU shall be construed as creating a joint venture, an agency relationship or a legal partnership between the Parties.

4.2 No provision of this MOU shall be construed so as to in any way interfere with the respective decision-making processes of the Parties with regard to their own respective work and operations.

4.3 Each Party shall bear its own costs incurred in the implementation of this MOU. This MOU does not represent a commitment of funds on the part of either Party.

ARTICLE 5: INSTITUTIONAL FRAMEWORK

5.1 After the signature of this MOU, each Party shall appoint a representative who shall act as a focal point for the implementation of this MOU.

5.2 Each focal point shall promote the implementation of the cooperation and facilitate exchange of information between the Parties on matters of common interest.

ARTICLE 6: DISPUTE RESOLUTION AND APPLICABLE LAW

6.1 Any dispute between the parties arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be resolved through mutual negotiation.

6.2 This Agreement shall be governed by, and shall be construed and enforced in accordance with the laws of Zimbabwe.

ARTICLE 7: ENTIRE AGREEMENT

7.1 This document records the entire Agreement between the parties and any amendment or variation thereof shall not be binding or of any force of effect unless reduced to writing and signed by or on behalf of all parties hereto.

ARTICLE 8: DURATION

8.1 This MOU shall come into force upon signature by both Parties and shall last for a period of three (3) years. It may be renewed by mutual written agreement between the Parties.

ARTICLE 9: DOMICILIUM CITANDI ET EXECUTANDI

9.1 The addresses of the Parties to this Agreement for the purpose of correspondence and for the service of any notice of process shall be as set out above, which addresses the Parties choose as their *domicilium citandi et executandi*. Provided that a party may, by written notice to the other, change its address to another.

ARTICLE 10: TERMINATION

10.1 This MOU may be terminated by either Party by providing two (2) weeks prior written notice of such intention to the other Party.

Done and signed at Harare on this the day of 2018

ZIMBABWE HUMAN RIGHTS COMMISSION Represented by
Commissioner XXX

Done and signed at Harare on this the day of 2018

Represented by Mr/s. XXXXX

Witnessed at Harare on this the day of 201.....

Witness:

Witness:



18

NATIONAL HUMAN RIGHTS INSTITUTIONS IN EASTERN AND SOUTHERN AFRICA: LESSONS AND PROSPECTS FOR THE FUTURE

*Charles M Fombad**

1 Introduction

In spite of their differing, and often difficult, social, political and economic circumstances, national human rights institutions (NHRIs) are now recognised as critical to the promotion and protection of human rights in Africa. The 15 case studies in this compendium show that although nearly all of the countries reviewed – with the notable, and indeed surprising, exception of Botswana¹ – purport to subscribe to the Paris Principles, they vary widely among each other in terms of their form, mandates and *modus operandi*; for all that, they nonetheless face similar challenges. These include weak legal frameworks, lack of political will to implement the frameworks, interference in their operations, institutional invisibility, problems to do with their credibility, shortages of adequate funding, and the effects of political instability.

Given that a solid legal framework is fundamentally important if an NHRI is to be effective, the overriding objective of this compendium has been to see what lessons can be drawn by comparing and contrasting different such frameworks in a selection of countries in southern and eastern Africa. In considering the prospects for the future, and what measures need to be taken to enhance the effectiveness of these

* Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria.

1 Botswana and Mauritius are the only two African countries that have had a fully functioning multi-party democracy in place since independence in the 1960s and that have been widely praised for their record of good governance.

institutions, the discussion that follows highlights a number of key issues, starting with the role of the Paris Principles.

2 Looking beyond the Paris Principles

Although much criticism has been levelled at the Paris Principles,² they remain a crucial foundation that lays down the basic minimum standards for assessing the potential of an NHRI to deliver on its mandate. However, the case studies clearly suggest that, for such an institution to carry out its mission effectively in practice, it has to go beyond mere formal or symbolic compliance and achieve substantive compliance with the Principles.

The process for obtaining accreditation, which certifies compliance, seems to focus only on formal compliance with the Paris Principles.³ Thus, receiving “A” status means that a country is in formal compliance with the Principles, regardless of whether or not its NHRI is able to discharge its mandate with any effectiveness in actuality. It is hence no surprise that Zimbabwe was able to get “A” status accreditation in May 2016 at a time when human rights violations in the country were at their peak and led a year later to President Robert Mugabe’s removal from office.⁴ Whilst accreditation has its merits, it is no indication that a country’s institutions are operating at a level where they actually do very much to advance the promotion and protection of human rights.

Some of the case studies indicate that several rather broadly formulated guidelines in the Paris Principles could be made clearer and more incisive. This is particularly true in regard to an NHRI’s legal framework, a matter to which we now turn.

3 Enhancing the legal framework of NHRIs

The Paris Principles simply require the mandate of a NHRI to be clearly stated in “a constitutional or legislative text”. A constitutional text that merely empowers parliament to enact legislation to set up the institution –

2 See M O’Sullivan, “National Human Rights Institutions Effectively Protecting Human Rights?” 25 *Alternative Law Journal* (2000), p 236.

3 See UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions*, available at <https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> (accessed in May 2019), pp 256-265.

4 See “ZPP Monthly Monitoring Report: Human Rights Violations (January 2016)”, available at <https://bit.ly/2XUhVxY> (accessed in May 2019); Human Rights Watch, “Zimbabwe Report 2017”, available at <https://www.hrw.org/world-report/2017/country-chapters/zimbabwe> (accessed in May 2019).

as in Ethiopia – can hardly be said to guarantee the legal certainty and independence which that institution needs in order to function effectively without executive interference or manipulation; the same is true of an institution created by ordinary legislation, as in Botswana, Burundi, the Democratic Republic of the Congo (DRC), Mauritius and Rwanda. The ideal legal framework is one where the mandate of the institution is constitutionally entrenched. The best practices in this respect appear in the Constitution of South African (Chapter 9) and, to some extent, the Kenyan and Zimbabwean constitutions (Articles 59 and 248-254 for the former, and sections 232-237 and 242-244 for the latter).

The elaborate frameworks in the Kenyan, South African and Zimbabwean constitutions provide detailed guiding principles that shield the NHRIs from political interference. The main principles are that:

- the institutions are independent, subject only to the constitution and the law, and must act impartially and perform their duties without fear, favour or prejudice;
- all state organs must, through legislative and other measures, assist and protect the independence, impartiality, dignity and effectiveness of these institutions;
- no person or organ may interfere with their functioning; and
- they are accountable to parliament.

In these three countries, all legislation dealing with the NHRIs is in strict conformity with the constitutional principles (see the relevant Part B in each case). The Kenyan and Zimbabwean constitutions even go further to define the mandates of these institutions in broad and elaborate terms. Moreover, bearing in mind that lack of adequate funding is a key reason that NHRIs are unable to deliver on the mandate, it is notable that the Kenyan and Zimbabwean constitutions provide for autonomous funding through direct parliamentary allocation (see Article 249 for the former and section 322 for the latter).

One of the most serious problems identified in the case studies is that there have either been delays in setting up the institution after the law establishing it was enacted (for example, in Angola the office was set up 13 years after the law was enacted), or it happens that officials are not promptly appointed or are left in office long after their terms have expired, as was the case in Angola and Mauritius. Provisions in the South African and Zimbabwean constitutions state that all constitutional obligations must be performed “diligently and without delay” (see section 237 for the former and section 324 for the latter).

An elaborate and constitutionally entrenched legal framework to regulate a NHRI that lays down the basic principles dealing with the six key issues concerning the effective operation of these institutions, namely their mandate, their independence, autonomy from other state entities, pluralism and cooperation with other bodies, adequate resources and adequate powers of investigation, offers the following advantages:

- It will shield the institution from political interference and ensure that these principles cannot be changed casually or arbitrarily by transient parliamentary majorities or opportunistic leaders trying to promote their own selfish political agenda.⁵
- Provisions imposing a general mandatory duty to implement the constitution⁶ ensure that compliance with the constitutional obligations is not entirely at the discretion of the government. Non-compliance opens the way for an action for violation of the constitution where the alleged “violation” consists of a failure to fulfil a constitutional obligation to implement the constitution. The effect of this is to render the duty on the government to establish the NHRI in the exact manner contemplated by the constitution obligatory and legally enforceable, rather than discretionary.
- The obligation to perform constitutional obligations diligently and without undue delay provides sufficient grounds to bring an action against the executive or the legislature for failure to enact implementing legislation promptly or failure to establish the NHRI or appoint its officials promptly.
- This also strengthens the hands of individuals and CSOs to actively monitor and expose public officials and institutions that are not complying with their constitutional mandate. This is an important step towards a self-enforcing constitution, which enhances the right of each individual in society to self-government and inevitably involves the transfer of some powers from the public into private hands in a manner likely to promote greater efficiency and effectiveness in dealing with good-governance institutions such as NHRIs.

To look beyond the broad legal framework, the case studies also point to the many innovative ways in which key principles of NHRIs, such as diversity, can be addressed.

5 See CM Fombad, “Some Perspectives on Durability and Change under Modern African Constitutions”, 11(2) *International Journal of Constitutional Law* (2013), pp 382-413.

6 See an example of such an obligation in section 2 of the South African Constitution of 1996, which states in section 2 that “this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, *and the obligations imposed by it must be fulfilled*” (emphasis added).

4 Promoting pluralism, inclusivity and cooperation

The case studies show that NHRIs co-exist with other public institutions, such as the ombudsman (or public protector), gender commission, or equality commission, along with private ones, such as CSOs, that their functions sometimes overlap. This is not necessarily a bad thing, because in certain cases these institutions complement the work done by NHRIs. There is also no doubt that a healthy CSO and NGO sector is of vital importance to a vibrant human rights system. In fact, the Paris Principles require pluralism, which entails strong ties between NHRIs, on the one hand, and human rights CSOs and NGOs, on the other.

However, the case studies show that, in reality, in many countries there is constant friction between NHRIs and the CSOs and NGOs. Two main reasons exist for this. The first is that in many cases they are in competition for funding from foreign donors. The second is mutual suspicion between the NHRI and other institutions, often based on the perception that the former is there to serve the interests of the government and cover up its human rights abuses.

Nevertheless, the case studies also provide evidence of the positive benefits of collaboration and cooperation between them. There is evidence, too, that in some of these countries, for example Burundi, the NHRI acts as a bridge between CSOs and NGOs, on the one hand, and the government, on the other. In other countries, there is close collaboration of many kinds in promoting and protecting human rights. For example, where, due to financial constraints, the NHRI is not able to open offices close to the populace in rural areas and at regional level, it has either used NGOs to reach them or trained some of the latter's staff to fill the gaps. For example, in Ethiopia, the Human Rights Commission sometimes has provided financial assistance to local NGOs dealing with human rights issues.

The major problem the case studies reveal is that of ensuring that the NHRI reflects the diverse nature of each community in terms of gender, ethnicity and the like. This may be difficult or logically impossible; for example, in Lesotho the human rights commission has only three commissioners. However, a number of countries have gone to considerable lengths, both in their constitutions and relevant legislation, to promote diversity and representativeness within the NHRI. An aspect of such representativeness that has become particularly important is the expertise of those who work in these institutions. Although almost all countries require that the administrative head and many of the

commissioners have a legal background, there is now a trend towards ensuring that the staff include experts in other closely related fields.

Whilst there is a conspicuous silence in some legal frameworks, such as those of Botswana, Ethiopia, Lesotho and Mauritius, regarding institutional diversity and representativeness, many other countries have taken extensive measures to deal with this. In both Burundi and the DRC, these are matters regulated by legislation, while in Kenya and Zimbabwe the main principles guiding them are firmly laid down in the constitution.

In this respect, the Kenyan Constitution has probably gone the furthest. In addition to its Articles 100 and 197 that strive to promote diversity, Article 27(8) places an obligation on the legislature to “implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. Article 250 states that appointments to all commissions and independent offices, such as its National Human Rights Commission, must reflect the regional and ethnic diversity of the country.

Similarly, section 17 of the Zimbabwean Constitution deals exclusively with gender balance, and in subsection 1(b) requires the government to take all measures, including legislative ones, to ensure that women constitute at least half of the membership of all Commissions, which in this context includes the Human Rights Commission and the Gender Commission. However, more needs to be done to ensure that these institutions include other minorities, such as elderly persons and persons with disabilities.

5 Enhancing access

Although many countries have made efforts to decentralise the services of the NHRI to bring them closer to the people, accessibility often remains a huge problem due to the size of the country, financial constraints, and the complexity of the issues encountered at local level. Various innovative measures have been adopted to deal with this problem. The main ones are:

- Simplifying the process of filing complaints, especially by making toll-free telephone numbers available and receiving complaints orally by cell phone. This has been the case in almost all the countries.
- Collaborating with CSOs to receive complaints in those areas where the NHRI is not physically present and forwarding the complaints to the NHRI's offices.
- Holding regular human rights clinics, often in partnership with CSOs, in those parts of the country where the NHRI is not physically present.

- Training members of CSOs, sometimes on a paying basis, to carry out promotional activities.
- Utilising mobile complaints clinics to conduct regular visits to rural areas.

6 Financing

Inadequate budgets are without doubt one of the key factors that render many of the NHRIs in this study weak and ineffective. Often the funding and resources made available to them are arbitrarily reduced over the years. In some cases, funding is made available at the convenience of the government, even where this is not allowed by the relevant legislation, in order to frustrate the institution, punish it for criticising the government, or put pressure on it to stop certain investigations. The main effects of inadequate budgets are:

- Increasing reticence by some NHRIs to investigate and report fully on government abuses owing to the fear that budgets will be cut.
- The inability of most of the NHRIs, even those with limited mandates, to perform their duties fully, leading to service cuts.
- The inability to find the resources to open regional and local offices and recruit and pay qualified personnel to staff these offices.
- The extensive reliance on funding from donors, international agencies and other alternative sources. This often entails a lengthy, cumbersome process of accountability, which tends to distract NHRIs from their main responsibilities. In addition, this creates the risk that the NHRI is perceived as acting in accordance with the donor's agenda.
- Low salaries and the consequent inability to engage and then retain well-qualified staff. A typical example of this is the Ethiopian Human Rights Commission.

The funding situation is unlikely to change soon. However, governments are increasingly willing to allow NHRIs to seek alternative sources of funding from donors and other international agencies. The evidence so far suggests that if specific projects involving the promotion and protection of human rights are well prepared, the chances of obtaining donor financial support are good. This is often more likely where the projects involve close collaboration with CSOs and NGOs. To limit the scope for government control, NHRIs should have a separate budget line voted for separately by the legislature, and, once allocated, this budget should be self-administered without any interference from the government.

7 Concluding remarks

There are other important lessons that can be drawn from the case studies covered in this study. Many of the NHRIs have not been as effective as one would have expected owing to the overbearing influence of the state. Public or popular legitimacy is earned when an NHRI is seen to be standing up for and defending the rights of the weak and marginalised in society.

Although the collection of regulatory documents in this compendium shows that a solid legal framework is crucial, the reality is that an institution's legitimacy, particularly when dealing with the promotion and protection of human rights, is only partly rooted in its formal legal status. For example, in Botswana, although the Ombudsman has no clear human rights promotion and protection mandate, the institution has, nevertheless, in the absence of another institution playing that role, been acting as an NHRI in dealing with some of the complaints concerning human rights abuses.

Hence, although a broad and non-restrictive mandate that includes civic, cultural, economic, political and social rights is ideal, a lot can still be accomplished in spite of a narrow mandate, provided the officials act with some pragmatic creativity. This is particularly so when dealing with newly emerging issues such as lesbian, gay, bisexual and transgendered persons, migrant workers, persons with disability, and racial and national minorities.

Even at the best of times, NHRIs on their own cannot possibly deal with the all human rights issues that arise in a country. There is, clearly, always a need to collaborate and work closely not only with other public institutions that play a cognate role, however limited, but so too with CSOs and NGOs. The case studies also show the many ways in which NHRIs provide an important link between the national human rights enforcement system and regional and other international human rights bodies. The trend suggests that, in addition to establishing NHRIs to promote and protect human rights in general, growing numbers of states are creating specialised institutions to deal with specific aspects of human rights, such as commissions to address gender issues or truth and reconciliation commissions to engage with transitional justice issues.

Generally, NHRIs respond to human rights abuses in a variety of ways. This may lead to an investigation or a public inquiry that may result in a report containing advice and recommendations. Unless the law clearly states otherwise, there is no reason to assume that the advice or

recommendations can be ignored with impunity. There is no justification for spending taxpayers' money to carry out an investigation that ends up with recommendations that can be ignored. Given the limited scope of the investigations NHRIs usually conduct, it can be argued that a party dissatisfied with the outcome of the process is free to apply for it to be judicially reviewed but is not free just to ignore it.

Finally, it is clear that there is no NHRI that is not encountering one challenge or another. Those that are reasonably successful have adopted simple, accessible, affordable and speedy processes for addressing complaints. The legal instruments contained in this compendium illustrate some of the options. The prospects for the future, particularly in the light of the increasing threats to efforts to entrench a culture of democracy in Africa, depend on the continuous presence of NHRIs that are more vigilant and proactive than they have been.

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