

Towards the Establishment of a National Human Rights Institution in
Botswana: Lessons from South Africa and Zimbabwe

By

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and other Cruel Inhuman and Degrading Treatment
CERD	UN Committee on the Elimination of all forms of Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	International Covenant on Economic, Social and Cultural
CHR	Commission on Human Rights
CRC	Convention on the Right of the Child
ECOSOC	Economic and Social Council
ICC	International coordinating Committee of National Human Rights Institutions
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
Paris Principles	Principles Relating to the Status of National Institutions Rights
SAHRC Act	South African Human Rights Commission Act
SAHRC	South African Human Rights Commission

UN	United Nations Organisation
UNCF	United Nations Children's Fund
UNCHR	United Nations Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNDFW	United Nations Development Fund for Women
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNPF	United Nations Population Fund
WHO	World Health Organization
ZHRC Act	Zimbabwe Human Rights Commission Act
ZHRC	Zimbabwe Human Rights Commission

CHAPTER 1: INTRODUCTION

1.1. Statement of the research problem

Botswana is a stable democracy with a good human rights record. Botswana is ranked ‘free’ by Freedom House, receiving a score of 3 out of a worst possible 7 on political rights and 2 on civil rights.¹ Freedom House also ranks Botswana as one of only 8 ‘free’ countries among the 48 states of sub-Saharan Africa, with high scores for both political and civil rights.² Notwithstanding this record, there have been repeated calls for Botswana to establish a national human rights institution (NHRI) which is compliant with the Principles Relating to the Establishment of National Human Rights Institutions (Paris Principles).³

Various reasons have been cited to illustrate the need for a NHRI in Botswana. In the interviews administered by the Electoral Institute for Sustainable Democracy in Southern Africa (EISA), three respondents felt that a NHRI is necessary because it would enhance Botswana’s record on human rights.⁴ This response is apt. Fombad has drawn attention to widespread patterns of discrimination and the serious inadequacies of exclusive reliance on judicial avenues for redressing human rights violations in Botswana.⁵ These are challenges that he reasoned would better be addressed by the establishment of a NHRI. The other reasons cited by Fombad include the need for an agency that can among other things manage in a programmatic manner, some of the policy implications of different interpretations of the

¹ Evaluation of Candidates for 2011-2014 Membership of the Human Rights Council as Submitted to UNGA Member States on May 17, 2011. Presented at United Nations Headquarters, New York, 19 May 2011. Available at <http://blog.unwatch.org/wp-content/uploads/Rating-the-2011-candidates-to-UNHRC.pdf>, accessed on 31 January 2014.

² Botswana Country Overview 2012/2013, available at <http://www.econsult.co.bw/tempex/BOTSWANA%20COUNTRY%20&%20ECONOMIC%20OVERVIEW%202012.pdf>, accessed on 31 January 2014.

³ UN General Assembly resolution 48/134 of December 20, 1993, available at <http://www2.ohchr.org/english/law/parisprinciples.htm>, accessed on 10 January 2014. The document was named after the place where it was adopted (Paris).

⁴ D Mpabanga ‘Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Office of the Ombudsman in Botswana’ (2009) at page 35.

⁵ CM Fombad, ‘The Constitutional Protection against Discrimination in Botswana’ (2004) 53 *The International and Comparative Law Quarterly* 139 at page 170.

Bill of rights without necessarily litigating those rights, as well as to discharge promotional and advisory functions.⁶

Fombad is not alone in calling for the establishment of a NHRI in Botswana. In his annual report to the National Assembly, Lepodise, the former Ombudsman of Botswana, premised his recommendation for the establishment of a NHRI on an increasing number of complaints of human rights violations in the country.⁷ Dinokopila has also called for the establishment of a NHRI in Botswana, pointing out that Botswana's human rights record is weakening due to the following factors: retention of the death penalty; prohibition of termination of pregnancy by choice; growing concerns of racial discrimination, xenophobia and other forms of intolerance; marginalisation of women, children, refugees and asylum seekers, members of the gay and lesbian community, and prisoners; and Botswana's backlog of reports in almost all international human rights protection bodies.⁸

The international community has also noted these concerns. The Committee on the Elimination of Racial Discrimination (CERD) is concerned that the definition of discrimination provided under section 3 of the Constitution of Botswana does not prohibit discrimination on the grounds of descent and national or ethnic origin.⁹ The CERD is further concerned that section 15 of the Constitution of Botswana permits discrimination which is not justified under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as it is not applied pursuant to, neither is it proportional to the achievement of a legitimate aim.¹⁰

The CERD has further taken note of Botswana's willingness to ensure better representation in the House of Chiefs through amendment of sections 77 to 79 of the

⁶ CM Fombad, 'The protection of human rights in Botswana: an overview of the regulatory framework' in CM Fombad (ed) 'Essays on the Law of Botswana' (2007) 139 at page 29.

⁷ E Keoreng 'Ombudsman calls for the establishment of a national human rights commission' *Mmegi Newspaper* 17 April 2009, available at <http://www.mmegi.bw/index.php?sid=1&aid=13&dir=2009/April/Friday17>, accessed on 10 January 2014.

⁸ BR Dinokopila, 'Bringing the Paris Principles home: Towards the establishment of a National Human Rights Commission in Botswana' (2012) 4 *University of Botswana Law Journal* 45 at pages 46 and 68.

⁹ United Nations Committee on the Elimination of Racial Discrimination: Concluding Observations, Botswana, 4 April 2006, CERD/C/BWA/CO/16, paragraph 7, available at: <http://www.refworld.org/docid/453779770.html>, accessed on 3 June 2014.

¹⁰ CERD/C/BWA/CO/16, *op cit* (n9), paragraph 8.

Constitution. However, concern has been expressed that such amendment has reproduced discriminatory rules relating to the participation of ethnic groups in this institution as it does not recognise some ethnic groups as part of the tribes of Botswana.¹¹ In addition, the CERD has noted that the Tribal Territories Act contravenes the ICERD as it discriminates against non-Tswana ethnic groups.¹² The CERD has also noted that Botswana is reluctant to recognize the existence of indigenous peoples on its territory hence it has urged Botswana to respect and protect the existence and cultural identities of all ethnic groups, as well as to review its policy on indigenous people.¹³

The United Nations Human Rights Commission (UNHRC) has also expressed concern that the exceptions to the right not to be discriminated against, particularly those relating to adoption, non-citizens, marriage, devolution of property, burial and divorce as provided for under sections 15 (4) (b), (c) and (d) of the Constitution of Botswana do not comply with articles 2, 3, and 26 of the International Covenant on Civil and Political Rights (ICCPR).¹⁴ The UNHRC has further criticised Botswana for overcrowded prisons and a large number of prison remands.¹⁵

The concerns raised above suggest that there are legal gaps which necessitate the establishment of a NHRI in Botswana. In addition to the legal gaps identified, another concern relating to the institutions that protect human rights in Botswana has been raised. The High Court has been the main mechanism for the protection of human rights since independence. Section 18 of the Constitution of Botswana defines the role of the courts of Botswana in protecting human rights. There also exist institutions that support democracy and/or protect human rights in Botswana namely: Independent Electoral Commission; Office of the Ombudsman and Directorate on Corruption and Economic Crime. Among these, the

¹¹ CERD/C/BWA/CO/16, *op cit* (n9), paragraph 10.

¹² A/57/18, United Nations Commissioner for Human Rights (UNHRC), concluding observation of the Committee on the Elimination of Racial Discrimination: Botswana, 23 August 2002, paragraph 301, available at <http://www.refworld.org/docid/3f52f7aa4.html>, accessed on 01 August 2014.

¹³ CERD/C/BWA/CO/16, *op cit* (n9), paragraph 9.

¹⁴ CCPR/C/BWA/CO/1, United Nations Human Rights Committee (HRC), Consideration of reports submitted by state parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Botswana, 24 April 2008, paragraph 9, available at: <http://www.refworld.org/docid/48c4f4b32.html>, accessed on 19 June 2014.

¹⁵ CCPR/C/BWA/CO/1, *op cit* (n14), paragraph 17.

Ombudsman Office has been presented by the government of Botswana to the international community as an institution with a mandate to promote and protect human rights.¹⁶ This notwithstanding, the UNHRC maintains that there is no NHRI in Botswana, and therefore called for the establishment of such an institution in accordance with the Paris Principles.¹⁷

1.2. Research questions

In light of the statement of the research problem as expounded above, this dissertation seeks to answer the following research questions:

Whether there exist legal and institutional gaps that need to be filled by the establishment of a NHRI in Botswana?

How will the establishment of a NHRI fill gaps in Botswana's existing legal and institutional framework?

What are the minimum standards, guidelines and principles which must be adhered to in order to establish an effective NHRI?

What lessons can Botswana learn from South Africa and Zimbabwe in order to establish a NHRI Botswana's which complies with the Paris Principles?

1.3. Methodology

The first research question is answered through an analysis of Botswana's legal and institutional framework to determine their effectiveness in human rights promotion and protection. This will help to determine how the establishment of a NHRI will fill gaps in the existing legal and institutional framework thereby answering the second research question. To answer the third research question, a discussion of the Paris Principles which are internationally recognised as the minimum standards which NHRIs must comply with in order to function effectively will be done. In addition, the South African Human Rights Commission (SAHRC) and the Zimbabwe Human Rights Commission (ZHRC) will be used

¹⁶ National report submitted in accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, (A/HRC/WG.6/3/BWA/1 of 5 September 2008), Para 13. Available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/BW/A_HRC_WG6_3_BWA_1_Botswana_E.pdf, accessed on 11 June 2014.

¹⁷ CCPR/C/BWA/CO/1 *op cit* (n14) at paragraph 8.

as case studies for Botswana to draw lessons from. Emphasis will be placed on evaluating their compliance with the Paris Principles.

The SAHRC is chosen as a case study because it forms part of the 16 'A' status NHRIs representing the four regions of the International Coordinating Committee of National Human Rights Institutions (ICC). The ICC is a legal entity which was formed by NHRIs at the international conference held in Tunisia in 1993. The SAHRC is one of the four countries which represent the African region in the ICC. It is therefore part of an international entity which provides leadership in the promotion and protection of human rights. The qualified to be in such a global position because it is not only established according to the Paris Principles but continues to practically uphold them. South Africa's experience can be very useful as a benchmark for Botswana in its process of establishing a NHRI.

On the other hand, the ZHRC is chosen as a case study because although its enabling legislation is compliant with the Paris principles, full operationalization of the commission is still pending mainly due to lack of compliance with the Paris Principles on financial independence. There is lack of political will on the part of the government of Zimbabwe to fund it sufficiently or at least cooperate with financial donors. Thus, the ZHRC provides a lesson to Botswana that financial independence which is dependent on political will is paramount in the effective establishment of a NHRI.

1.4. Significance of the study

This dissertation acknowledges that advocacy for the establishment of a NHRI in Botswana has sufficiently been made. The government of Botswana has been fully convinced that indeed there is a need to establish a NHRI and has taken a step towards establishing one. This is evidenced by the advertisement of the post of Deputy Permanent Secretary whose mandate is to facilitate the creation of a NHRI.¹⁸ This development informs the focus of this dissertation. The development presents an opportunity to evaluate the process of establishing a NHRI which is compliant to the guidelines for establishing effective NHRIs-the Paris

¹⁸ Minister of Justice, Defence and Security 'Vacancy Circular No 9 of 2013', available at

<http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-Of-Defence-Justice-and-Security1/Public-Notices--Press-Releases/VACANCY-CIRCULAR-NO-9-OF-2013/>, accessed on 15 January 2013.

Principles. The use of the SAHRC and the ZHRC as case studies will provide practical guidance to Botswana on how to establish a NHRI which is compliant to the Paris Principles.

1.5. Literature review

In his article titled ‘The Constitutional Protection against Discrimination in Botswana’,¹⁹ Fombad has highlighted the shortcomings of legal remedies in the context of discrimination in Botswana hence advocating for the establishment of a NHRI to make up for these limitations. In another article titled ‘The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework’,²⁰ Fombad emphasises that a NHRI is absolutely critical for the promotion and protection of human rights by ensuring that people get redress in the face of injustice, managing some of the policy implications of different interpretations of the Bill of rights in a programmatic manner without necessarily litigating those rights, as well as discharging promotional and advisory functions.²¹ These two articles do not discuss the concept of NHRIs; neither do they discuss the Paris Principles at all. They mention the establishment of a NHRI briefly, recommending it as a solution to discrimination and to the inadequacy of human rights protection identified in Botswana’s regulatory framework.

Dinokopila wrote an article titled ‘Bringing the Paris Principles Home: Towards the Establishment of a National Human Rights Commission in Botswana’.²² Over and above studying how sufficient Botswana’s legal Framework protects human rights, the article assesses adherence of Botswana’s human rights protection institutions to the Paris Principles. It comes to the conclusion that both the legal and institutional framework inadequately protect human rights and that there is no institution that has been established according to the Paris Principles in Botswana. Consequently, the article calls for the establishment of a NHRI in Botswana.

Dinokopila’s article is one of the many works which are acknowledged for the successful advocacy of the establishment of a NHRI in Botswana. However, it was authored at a time when the government of Botswana, save having accepted recommendations to establish a NHRI in 2008, had not taken any step or put arrangements in place locally

¹⁹ *Op cit* (n5).

²⁰ *Op cit* (n6).

²¹ *Ibid* at page 29.

²² *Op cit* (n8).

towards the establishment of a NHRI. This dissertation is however authored at a time when the Botswana government has advertised the post of Deputy Permanent Secretary under the Ministry Defence, Justice and Security to facilitate the establishment of a NHRI.²³ This development has presented an opportunity to write about the process of establishing a NHRI which is the focus of this dissertation.

To make this dissertation original and to extend on existing writings about the establishment of a NHRI in Botswana, the SAHRC and the ZHRC are used as case studies to provide practical guidance on the establishment of a NHRI which is compliant to the Paris Principles. Currently no research work has been conducted using this approach in or about Botswana. The dissertation is not only properly timed but it is an original concept that extends on the existing work related to NHRIs and the Paris Principles in Botswana.

1.6. Dissertation structure

This dissertation has 6 chapters. Chapter 1 introduces this study while chapter 2 discusses the concept of NHRIs and the Paris Principles. Chapter 3 and 4 discusses the SAHRC and the ZHRC respectively. Emphasis is placed on evaluating whether legislation establishing these institutions and the manner in which these institutions execute their functions comply with the Paris Principles. Botswana's legal and institutional framework is discussed in Chapter 5 in order to identify gaps which will be filled by the establishment of a NHRI. Lessons learnt from the SAHRC and the ZHRC respectively are also discussed in chapter 5. Finally, conclusions are drawn from the whole study in chapter 6.

²³ *Op cit* (n18).

CHAPTER 2: NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE PARIS PRINCIPLES

2.1. Introduction

The mandate of the United Nations (UN) includes the achievement of international cooperation in promoting respect for human rights and fundamental freedoms.²⁴ The UN formulates treaties which establish international human rights standards which all states must implement to ensure respect for human rights within their territories. Although the UN has established monitoring bodies, it is not able to monitor and ensure the implementation of treaties in all nations around the world. In that regard, it is assisted by regional human rights mechanisms. These exist in America, Africa, Europe and Asia primarily to mainstream human rights standards contained in UN treaties into the regional context.

Over the years, it has become apparent that the mere fact that states have ratified treaties and incorporated them into their domestic laws or undertaken to comply in other ways is not enough. It has become apparent that it is necessary to establish national institutions which will ensure the full implementation of these treaties. The establishment of NHRIs is therefore a way in which governments ensure implementation of international human rights standards in their territories. NHRIs are mechanisms through which the UN and regional human rights systems achieve international cooperation in human rights protection. This chapter defines NHRIs, describes how they evolved and finally discusses the Paris Principles which are internationally recognised standards with which NHRIs must comply in order to function effectively.

2.2. Definition of national human rights institutions

There is not yet an agreed definition of the term ‘NHRI’.²⁵ Initially, the term was initially applied to any national institution with direct or indirect impact on the promotion and

²⁴ Article 1, United Nations Charter, available at <http://www.un.org/en/documents/charter/>, accessed on 01 August 2014.

²⁵ United Nations Publication ‘National Human Rights Institutions: A handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights’ (2005), page 6, available at <http://www.unrol.org/files/training4en.pdf>, accessed on 8 March 2014.

protection of human rights. With the passage of time, this definition has been narrowed down to exclude some institutions which are not legislatively mandated to deal with human rights issues.

Despite these refinements, the concept of NHRIs is not yet fully evolved. Efforts are however being made to define this term. NHRIs have been defined as institutions with a constitutional and/or legislative mandate to protect and promote human rights.²⁶ Another definition which has been given is that NHRIs are state bodies with constitutional and/or legislative mandate to protect and promote human rights.²⁷ Finally, it has been stated that NHRIs are bodies which are established by a government under the constitution or by law or by decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.²⁸

From the definitions given, it is clear that NHRIs are institutions established by states through legislation with specific mandate to promote and protect human rights. Although there is not any single, universally accepted definition of NHRIs, they can be generally described as permanent and independent bodies which governments have established for the specific purpose of promoting and protecting human rights.²⁹

2.3. Evolution of national human rights institutions and of the Paris Principles

The conception of NHRIs can be traced back to the Nuclear Commission on Human Rights meeting in 1946. A proposal from the meeting was that the Economic and Social Council (ECOSOC) should recommend the member states ‘... to establish information groups or local human rights committees within their countries who would transmit periodic information to the CHR on the observance of human rights in their countries both in their legal systems and

²⁶ United Nations Publication ‘National Human Rights Institutions: History, Principles, Roles and Responsibilities’ (2010), page 13, available at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf, accessed on 8 March 2014.

²⁷ *Ibid.*

²⁸ National Human Rights Institutions: A handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, *op cit* (n25).

²⁹ A Pohjolainen ‘The Evolution of National Human Rights Institutions -The Role of the United Nations’ (2006), page 6.

their jurisdictional and administrative practice.³⁰ Following this recommendation of the Nuclear Commission on Human Rights, the ECOSOC invited member states to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the CHR.³¹

A series of resolutions relating to NHRIs followed, including ECOSOC Resolution 7b (XXX) of 25 July 1960³² and ECOSOC Resolution 888F (XXXIV) of 24 July 1962.³³ Both these resolutions invited governments to favour the formation of local human rights committees or national advisory committees.³⁴ They invited governments to encourage the formation and continuation of such bodies as well as to communicate their ideas and information on the subject to the Secretary-General.³⁵

In 1977, the first ever opportunity to establish the functions of NHRIs presented itself. The UN Secretary General suggested that a seminar could be organised on the subject of NHRIs in 1978, bearing in mind the following possible functions of such institutions: acting as a source of relevant information regarding matters connected with human rights; assisting in the education towards an awareness and respect for human rights; considering, deliberating upon and making recommendations regarding any particular state of affairs that may exist nationally; advising the national government on any questions regarding human rights; studying and keeping under review the status of legislation, judicial decisions and administrative arrangements for the promotion of human rights and preparing and submitting periodic reports connected thereto; and performing any function which the government may

³⁰ A Pohjolainen, *op cit* (n29), page 85.

³¹ UN Economic and Social Council, ECOSOC Resolution 2/9, 21 June 1946, s 5 'Information Groups'.

³² UN Economic and Social Council, ECOSOC Resolution 772b (XXX), 25 July 1960, available at <http://daccessdds.un.org/doc/UNDOC/GEN/NR0/758/40/IMG/NR075840.pdf?OpenElement>, accessed on 18 February 2014.

³³ UN Economic and Social Council, ECOSOC Resolution 888F (XXXIV), 24 July 1962, also available at <http://daccessdds.un.org/doc/UNDOC/GEN/NR0/758/40/IMG/NR075840.pdf?OpenElement>, accessed on 18 February 2014.

³⁴ G Beco, 'National Human Rights Institutions in Europe' (2007), page 8.

³⁵ BG Ramchara (ed), *Human Rights: Thirty Years After the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (1979), Page 27.

assign in connection with its duties under international conventions in the field of human rights to which it is a state party.³⁶

This was a giant leap in the history and evolution of NHRIs because it gave substance to the concept of NHRIs. It signified efforts to move away from an abstract definition of NHRIs as institutions whose business touches on human rights to any extent to a functional definition as an institution whose core mandate is human rights promotion and protection. The UN General Assembly accepted the proposal for a seminar on this topic and requested that the report of the seminar be forwarded to it for consideration.³⁷

In 1978, the Nuclear Commission on Human Rights adopted a resolution in which it invited member states, within the framework of their national legislation and policy and according to their available means, to set up national institutions for the promotion and protection of human rights. It was recommended that such institutions should have such structures, composition and recommendatory or other powers as the government of the member state concerned may wish to give them, should bear in mind the legal, judicial, executive and other systems of the country as well as the goal of the realization and effective achievement of all human rights and fundamental freedoms.³⁸

The International Workshop on National Institutions for the Promotion and Protection of Human Rights which took place in Paris in 1991 presented itself as yet another significant milestone in the development of NHRIs. The significance of the workshop is that its outcome - the Paris Principles are to date regarded as the international minimum standards for NHRIs. The Paris Principles are broadly accepted as the test of an institution's legitimacy and credibility and have become part of the human rights lexicon.³⁹

³⁶ Ramchara, *op cit* (n35), page 32.

³⁷ GA Resolution 32/123, 16 December 1977, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/32/123&Lang=E&Area=RESOLUTION, accessed on 8 March 2014.

³⁸ Resolution 23 (XXXIV), 13 December 1978, available at <http://www.worldlii.org/int/other/UNGARsn/1978/64.pdf>, accessed on 8 March 2014.

³⁹ UNDP-OHCHR Tool kit for collaboration with National Human Rights Institutions (2010), page 10, available at http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human_rights/NHRIToolkit.html, accessed on 8 March 2014.

The year 1993 presented a critical turning point for NHRIs. NHRIs which are compliant to the Paris Principles were formally recognized as important and constructive actors in the promotion and protection of human rights at the World Conference on Human Rights in Vienna.⁴⁰ Thereat, the ICC was established, nullifying its predecessor, the Network of National Institutions which was established in Paris in 1991. The ICC is responsible for reviewing NHRIs on their compliance with the Paris Principles. It is also responsible for encouraging coordination and cooperation among NHRIs as well as to serve as liaison with the UN and other international organisations.

2.4. The Paris Principles

The Paris Principles are standards which all NHRIs should meet in order to function effectively. The principles are provided for under four main headings which are competence and responsibilities, composition and guarantees of independence and pluralism, method of operation and additional principles concerning the status of commissions with quasi-judicial competence.

2.4.1. Competence and responsibilities of national human rights institutions

The Paris Principles require that NHRIs be given a mandate as broad as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its sphere of competence.⁴¹ There are two main roles and responsibilities of NHRIs that are provided in the Paris Principles. These are human rights protection and human rights promotion.⁴² From these two main roles flow the following seven roles and responsibilities: advising government and any other competent bodies concerning the promotion and protection of human rights; promoting and ensuring the harmonization of national legislation and practices with international human rights practices; encouraging ratification, accession and implementation of international human rights instruments; contributing to the reports which states are

⁴⁰ Vienna Declaration and Programme of Action, 12 July 1993 (A/CONF.157/23) part I, paragraph 36, available at <http://www.unesco.org/education/information/nfsunesco/pdf/VIENNA.PDF>, accessed on 8 March 2014.

⁴¹ A/Res 48/134 op cit (n3) competence and responsibilities, Article 2.

⁴² A/Res 48/134 op cit (n3) Competence and responsibilities, Article 1.

required to submit to the UN bodies and committees and to regional institutions; cooperating with the UN and any other organisation in and other NHRI; assisting in the formulation of programmes for the teaching and research into human rights and taking part in their execution; and publicising human rights through education and the press.⁴³

NHRIs have a responsibility to advice government, parliament and any other competent bodies on human rights matters.⁴⁴ Advice means to submit opinions recommendations, proposals and reports on existing legislation as well as proposed legislation to government, parliament and any other competent body to ensure compatibility with human rights norms.⁴⁵ It also means making submissions to government, parliament and any other competent bodies about any specific matter on human rights.⁴⁶ Drawing the attention of government, parliament and any other competent bodies to situations in any part of the country where human rights are violated and making proposals for redress also makes up advice which can be given by national human rights institutions.⁴⁷ NHRIs can perform this advisory role *mero motu* or at the request of government, parliament or any competent authority.⁴⁸

NHRIs also have the responsibility to promote and ensure the harmonization of national legislation and practices with international human rights practices.⁴⁹ This includes advising the state on the incorporation of international human rights law into the domestic law. NHRIs are also mandated to encourage the state to ratify international human rights instruments and to ensure their effective implementation on the ground.⁵⁰

In addition, the Paris Principles require cooperation of NHRIs with regional institutions and the national institutions of other countries.⁵¹ The ICC is a product of this requirement. It was established and mandated to encourage coordination and cooperation among NHRIs as well as to serve as liaison with the UN and other international

⁴³ A/Res 48/134 *op cit* (n3) competence and responsibilities, Article 3 (a-g)

⁴⁴ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (a).

⁴⁵ A/Res 48/134 *op cit* (n3) Article 3(a) (i).

⁴⁶ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (a) (ii).

⁴⁷ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (a) (iv).

⁴⁸ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (a) and Article 3 (a) (ii).

⁴⁹ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (b).

⁵⁰ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (c).

⁵¹ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3(e).

organisations.⁵² The Paris Principles also require that NHRIs should cooperate with the UN and with organisations in the UN system.⁵³ Examples of organisations within the UN are United Nations Development Programme (UNDP), Office of the United Nations High Commissioner for Human Rights (UNHCHR), United Nations Children's Fund (UNCF), United Nations Development Fund for Women (UNDFW), International Labour Organization (ILO), United Nations High Commissioner for Refugees (UNHCR), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO) and United Nations Population Fund (UNPF).

Moreover, NHRIs have the responsibility to contribute to the reports⁵⁴ which states are required to submit to the ten treaty Bodies, special procedures of the UNHRC and to the Review Universal Periodic (UPR). In addition, NHRIs have to ensure that the comments and recommendations issued by these bodies concerning their countries are considered and implemented. NHRIs also have the responsibility to publicize human rights and efforts to combat all forms of discrimination, by increasing public awareness, especially through information and education and all press organs.⁵⁵ Finally, NHRIs have the responsibility to develop and be involved in the implementation of educational human rights curriculum for schools, universities and professional cadres.⁵⁶

2.4.2. Composition and guarantees of independence and pluralism

The Paris Principles provide that the composition of a NHRI and the appointment of its members should be done through a process which ensures pluralism.⁵⁷ Pluralism refers to the representation of the social stakeholders involved in the promotion and protection of human rights. For example, professional organisations such as associations of lawyers, journalists,

⁵² ICC Statute, section 5 'Purpose' available at

<http://nhri.ohchr.org/EN/AboutUs/Governance/Statute/ICC%20Statute%20as%20amended%20at%20ICC%2025.pdf>, accessed on 8 March 2014.

⁵³ A/Res 48/134 *op cit* (n 51).

⁵⁴ A/Res 48/134 *op cit* (n 3) Competence and responsibilities, Article 3 (d).

⁵⁵ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (g).

⁵⁶ A/Res 48/134 *op cit* (n3) Competence and responsibilities, Article 3 (f).

⁵⁷ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1.

scientists and doctors,⁵⁸ philosophical or religious organisations,⁵⁹ universities and qualified experts⁶⁰ parliament⁶¹ and government departments provided that their participation is advisory only.⁶² Pluralism enhances a NHRI's independence, credibility and effectiveness.⁶³

NHRIs are established by states. As a result, they depend on state funding and report their performance to state ministers or parliament through annual reports. Despite these factors, NHRIs are required to be independent. Four factors are used to gauge the independence of NHRIs and these are: legal independence, operational independence, financial independence and independence through appointment and dismissal procedures.⁶⁴

NHRIs are required to have operational independence, that is, to run their daily activities without state interference. The laws establishing NHRIs are required to give NHRIs a distinct legal personality. This is called legal independence which can be achieved by not making NHRIs departments under any ministry of government. Legal independence can also be achieved by making NHRIs to report directly to parliament or to the president without going through any ministry.⁶⁵

The Paris Principles further require NHRIs to have financial independence.⁶⁶ State funding should be sufficient for NHRIs to be able to employ independent staff as well as to secure separate premises.⁶⁷ It is desirable that NHRIs should draw up their own budgets, that their budgets be separated from any department's budget, that they have authority to defend budget requests directly before parliament and finally that their budgets be secure and not

⁵⁸ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1 (a).

⁵⁹ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1(b).

⁶⁰ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1 (c).

⁶¹ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1 (d).

⁶² A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 1 (e).

⁶³ UNDP-OHCHR Tool kit for collaboration with National Human Rights Institutions *op cit* (n39), 252.

⁶⁴ National Human Rights Institutions: History, Principles, Roles and Responsibilities, *op cit*. (n26), page 40.

⁶⁵ National Human Rights Institutions: A handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, *op cit* (n25), page 40.

⁶⁶ A/Res 48/134 *op cit* (n3) Principles on Composition and guarantees of independence and pluralism, Article 2.

⁶⁷ *Ibid.*

subject to arbitrary reduction within the year that the budget is approved and also from one year to the next.⁶⁸

The independence of NHRIs can also be determined through their appointment and dismissal processes. The Paris Principles provide that the appointment of the members of a NHRI should be effected by an official act which shall establish the duration of the appointment and the possibility of renewal of the appointment.⁶⁹ The appointment process of a NHRI has a bearing on its independence since a stable mandate is a precondition for independence.⁷⁰ Dismissal procedures also have a bearing on NHRIs' independence.⁷¹ NHRIs will therefore be regarded as independent if their appointment and dismissal processes are legislated and involve parliament or an autonomous body such as a panel of judges.⁷²

2.4.3. Methods of operation

The Paris Principles provide that in their operations, NHRIs shall freely consider any question falling within their competence;⁷³ hear any person and obtain any information necessary to assess situations within their jurisdiction;⁷⁴ address the public directly or through the media;⁷⁵ hold regular members' meetings;⁷⁶ establish working groups and local or regional sections to help in the performance of their functions;⁷⁷ maintain consultations with other bodies whose mandate is to promote and protect human rights such as ombudsmen and

⁶⁸ National Human Rights Institutions: History, Principles, Roles and Responsibilities, *op cit* (n39), pages 40-41.

⁶⁹ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 3.

⁷⁰ National Human Rights Institutions: A handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, *op cit* (n25), page 42.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ A/Res 48/134 *op cit* (n3) Methods of operation, Article (a).

⁷⁴ A/Res 48/134 *op cit* (n3) Methods of operation, Article (b).

⁷⁵ A/Res 48/134 *op cit* (n3) Methods of operation, Article (c).

⁷⁶ A/Res 48/134 *op cit* (n3) Methods of operation, Article (d).

⁷⁷ A/Res 48/134 *op cit* (n3) Methods of operation, Article (e).

mediators,⁷⁸ and develop relations to non-governmental organisations (NGOs) devoted to promoting and protecting human rights.⁷⁹

2.4.4. Additional principles concerning the status of commissions with quasi-jurisdictional competence

NHRIs may be authorised to hear and consider complaints concerning alleged individual human right violations.⁸⁰ NHRIs are competent to receive complaints brought to them by individuals, their representatives, third parties and NGOs, trade unions or any other representative organisation.⁸¹

Following receipt of complaints, NHRIs can amicably settle the complaint through conciliation or make binding decisions or on the basis of confidential interventions.⁸² NHRIs may also inform complainants of their rights, and of remedies available to them.⁸³ They are authorised to refer complaints to competent authorities⁸⁴ and finally, NHRIs may make recommendations to competent authorities to propose law reforms or administrative practices especially if they perpetrated prejudice on complainants in the course of asserting their rights.⁸⁵

⁷⁸ A/Res 48/134 *op cit* (n3) Methods of operation, Article (f).

⁷⁹ A/Res 48/134 *op cit* (n3) Methods of operation, Article (g).

⁸⁰ A/Res 48/134 *op cit* (n3), Additional principles concerning the status of commissions with quasi-jurisdictional competence.

⁸¹ *Ibid.*

⁸² A/Res 48/134 *op cit* (n3), Additional Principles Concerning the Status of Commissions with quasi-jurisdictional competence, Article (a).

⁸³ A/Res 48/134 *op cit* (n3), Additional Principles Concerning the Status of Commissions with quasi-jurisdictional competence, Article (b).

⁸⁴ A/Res 48/134 *op cit* (n3), Additional Principles Concerning the Status of Commissions with quasi-jurisdictional competence, Article (c).

⁸⁵ A/Res 48/134 *op cit* (n3), Additional Principles Concerning the Status of Commissions with quasi-jurisdictional competence, Article (d).

2.5. Conclusion

NHRIs are entities established by states through legislation with specific mandate to promote and protect human rights. They form part of the many mechanisms used by the UN to achieve international cooperation in the promotion and protection of human rights. NHRIs are regarded as credible and effective only if they are established and function according to the Paris Principles-a set of principles established through a UN resolution to guide states in setting up effectively functioning NHRIs.

The Paris Principles require NHRIs to advise government on matters concerning the promotion and protection of human rights, promote and ensure the harmonization of national laws with international human rights instruments, encourage ratification of international human rights instruments and ensure their implementation, contribute to the reports which Botswana is required to submit to the UN bodies, cooperate with UN, regional and other national institutions that are involved in the promotion and protection of human rights, research and formulate human rights education curriculum and publicize human rights through information and education. (Op cit n43).

In addition, national laws establishing NHRIs must guarantee pluralism and independence of those institutions. Finally, the national laws must legislate for regular meetings of NHRIs and commissions of the committee specialising on thematic areas of human rights. By complying with the Paris Principles in their establishment and execution of duties, NHRIs assist states to comply with their human rights protection and protection obligations. The end result is the observance or respect of human rights by the international community.

CHAPTER 3: A CASE STUDY OF SOUTH AFRICA

3.1. Introduction

This chapter examines the scope of rights recognized and protected, the enforcement measures and institutions that support effective human rights protection in South Africa. Focus will specifically be placed on the SAHRC. Legislation establishing this institution will be examined for compliance with the Paris Principles. Also subject to examination in this chapter is the impact of the SAHRC's achievements and constraints on its compliance with the Paris Principles. A comparative approach is employed to identify the best practices which Botswana can use as a benchmark in establishing its NHRI.

3.2. Legal Framework

The Constitution of South Africa⁸⁶ provides the legal framework for the promotion and protection of human rights. The Bill of rights under chapter 2 in the Constitution of South Africa is one of the most progressive in the world as it guarantees civil and political rights as well social, economic and cultural rights. The civil rights and political rights guaranteed in South African Bill of rights include: the right to equality;⁸⁷ the right to human dignity;⁸⁸ the right to life;⁸⁹ the right to freedom of religion, belief and opinion;⁹⁰ the right to freedom of expression;⁹¹ children's' rights;⁹² the right of access to information;⁹³ and the rights of arrested, detained and accused persons.⁹⁴ The socio-economic rights recognised and protected by the South African Bill of Rights include the right to have access to adequate housing;⁹⁵ the

⁸⁶ Constitution of South Africa, 1996 (Act No. 108 of 1996).

⁸⁷ Constitution of South Africa s 9.

⁸⁸ Constitution of South Africa s 10.

⁸⁹ Constitution of South Africa s 11.

⁹⁰ Constitution of South Africa s 15.

⁹¹ Constitution of South Africa s 16.

⁹² Constitution of South Africa s 28.

⁹³ Constitution of South Africa s 32.

⁹⁴ Constitution of South Africa s 35.

⁹⁵ Constitution of South Africa s 26.

right to have access to health care, food, water and social security,⁹⁶ and the right to education.⁹⁷ The cultural rights recognised and protected in the South African Bill of Rights are the right to language and culture⁹⁸ and the right to belong to cultural, religious and linguistic communities.⁹⁹ Any other rights that are conferred by common law, customary law or legislation can only be recognised as long as they are consistent with the Bill of Rights.¹⁰⁰

International law also plays an important role in the protection of human rights in South Africa. There are ten core international human rights instruments (9 human rights treaties and the Optional Protocol to the Convention on Against Torture (CAT)) and some of these instruments are supplemented by optional protocols dealing with specific concerns.¹⁰¹ South Africa is a party to 6 of these core international human rights protection instruments.¹⁰² South Africa is also a party to the following African Regional Conventions: African Charter on Human and Peoples' Rights (African Charter); Convention Governing the Specific Aspects of Refugee Problems in Africa; Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights; and African Charter on the Rights and Welfare of the Child.¹⁰³

The Constitution of South Africa mandates the Courts of South Africa to consider not only the international and regional human rights treaties which South Africa is a party to, but

⁹⁶ Constitution of South Africa s 27.

⁹⁷ Constitution of South Africa s 29.

⁹⁸ Constitution of South Africa s 30.

⁹⁹ Constitution of South Africa s 31.

¹⁰⁰ Constitution of South Africa s 39 (3).

¹⁰¹ These are: ICERD; ICCPR; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); CRC; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance; and Convention on the Rights of Persons with Disabilities. See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>, accessed on 9 April 2014.

¹⁰² See the University of Minnesota Human rights library generally on South Africa's treaty ratification status, available at <http://www1.umn.edu/humanrts/research/ratification-southafrica.html>, accessed on 3 April 2014.

¹⁰³ *Ibid.*

international law in general when interpreting the Bill of Rights.¹⁰⁴ The influence of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) is evident in the economic, social and cultural rights and the children's rights included in the Bill of Rights.¹⁰⁵ In addition, section 31 of the South African Constitution was modelled on article 27 of the ICCPR.¹⁰⁶ It can therefore be said that the South African Constitution adequately promotes and protects human rights as it holistically contains almost all universally recognised human rights and as it is substantially influenced by international law.

3.3. Institutional Framework

The Constitution of South Africa gives the Court the mandate to enforce the Bill of Rights.¹⁰⁷ The Constitution sets up the structure of the South African judiciary which includes the Constitutional Court,¹⁰⁸ the Supreme Court of Appeal,¹⁰⁹ the High Courts,¹¹⁰ the Magistrates' Courts,¹¹¹ and any other courts established through an Act of Parliament.¹¹² The Constitutional Court is the highest court in all constitutional matters in South Africa.¹¹³ It was established as a specialised court to deal exclusively with constitutional issues.¹¹⁴ It is the only court whose decision on the constitutionality of matters is final.¹¹⁵ The High Court and all other Courts cannot make final orders of constitutional invalidity. The Constitution requires them to grant a temporary interdict or other temporary relief to a party, or may

¹⁰⁴ Constitution of South Africa s 139 (2).

¹⁰⁵ S Lienberg 'Human development and human rights: South African Country Study' Human Development Report (2000), page 17, available at http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf, accessed on 7 April 2013.

¹⁰⁶ *Ibid.*

¹⁰⁷ Constitution of South Africa s 38 (1).

¹⁰⁸ Constitution of South Africa s 166 (a).

¹⁰⁹ Constitution of South Africa s 166 (b).

¹¹⁰ Constitution of South Africa s 166 (c).

¹¹¹ Constitution of South Africa s 166 (d).

¹¹² Constitution of South Africa s 166 (e).

¹¹³ Constitution of South Africa s 167 (3) (a).

¹¹⁴ Constitution of South Africa s 167 (3) (b).

¹¹⁵ Constitution of South Africa s 167 (3) (c).

adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.¹¹⁶

The Courts of South Africa continue to play an important role in the protection of human rights in South Africa. It is beyond the scope of this chapter to critically discuss all the fundamental human rights cases adjudicated upon by the Courts of South Africa. However a few select rights are worth mentioning. The Courts of South Africa have adjudicated on matters concerning the right to equality;¹¹⁷ the right to life;¹¹⁸ freedom of expression;¹¹⁹ the rights of arrested, detained and accused persons;¹²⁰ the right to human dignity;¹²¹ political rights;¹²² the right to health;¹²³ the right to adequate housing;¹²⁴ the right to education;¹²⁵ and the right to water.¹²⁶

Chapter 9 of the South African Constitution establishes institutions that support constitutional democracy as well as promote and give substance to the rights guaranteed in the Constitution. These are the Public Protector;¹²⁷ the SAHRC;¹²⁸ the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;¹²⁹

¹¹⁶ Constitution of South Africa s 172 (2) (b).

¹¹⁷ See *Harksen v Lane NO* 1998 (1) SA 300 (CC), *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), and *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC).

¹¹⁸ See *S v Makwanyane* 1995 (3) SA 391 (CC) and *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

¹¹⁹ See *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), *Government of the Republic of South Africa v The Sunday Times Newspaper* 1995 (2) SA 221 (T) and *Case v Minister of safety and Security, Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC).

¹²⁰ See *S v Zuma* 1995 (2) SA 642 (CC), *S v Agnew* 1996 (2) SACR 535, *Msila v Government of South Africa* 1996 (1) SARB 365 (SE) and *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).

¹²¹ See *S. v Williams* 1995 (3) SA 632 (CC).

¹²² See *August v Electoral Commission* 1999 (3) SA 1 (CC).

¹²³ See *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC) and *Minister of Health v Treatment Action Campaign & Others* 2002 (5) SA 703 (CC).

¹²⁴ See *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

¹²⁵ See *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay NO &* 2011 (8) BCLR 761 (CC).

¹²⁶ See *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹²⁷ Constitution of South Africa s 181 (1) (a).

¹²⁸ Constitution of South Africa s 181 (1) (b).

¹²⁹ Constitution of South Africa s 181 (1) (c).

the Commission for Gender Equality;¹³⁰ the Auditor-General;¹³¹ and the Electoral Commission.¹³² The Civil Society deserves to be mentioned among institutions that continue to be vital in the promotion and protection of human rights in South Africa.

Although these institutions individually and collectively play a role in the promotion and protection of human rights, this chapter will focus only on the SAHRC. Particular emphasis is placed on examining compliance of the SAHRC with the Paris Principles based on the constitutional and other legislative provisions establishing it as well as on its selected achievements and constraints.

3.3.1. The South African Human Rights Commission and the Paris Principles

The SAHRC complies with the Paris Principle on legal independence. The commission is established under section 181 (1) (b) of the Constitution as an independent institution, subject only to the Constitution and the law.¹³³ The Constitution requires it to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice.¹³⁴ The SAHRC Act¹³⁵ which is national legislation enacted to give effect to section 184 (4) of the Constitution emphasises the independence and impartiality of the SAHRC. Section 184 (4) of the Constitution provides for the enactment of national legislation to provide for additional functions and powers of the SAHRC.

The commissioners and members of staff are required to serve impartially and independently and to perform their functions in good faith and without fear, favour, bias or prejudice and subject only to the constitution and the law.¹³⁶ The commissioners and members of staff are further required to act in a manner that will promote the credibility,

¹³⁰ Constitution of South Africa s 181 (1) (d).

¹³¹ Constitution of South Africa s 181 (1) (e).

¹³² Constitution of South Africa s 181 (1) (f).

¹³³ Constitution of South Africa s 181 (2).

¹³⁴ *Ibid.*

¹³⁵ South African Human Rights Commission Act (Act No 40 of 2013).

¹³⁶ South African Human Rights Commission Act s 4 (1) (a).

impartiality, integrity and independence of the SAHRC.¹³⁷ They are required to declare conflict of interest; failing which the SAHRC is mandated to investigate their actions.¹³⁸

The SAHRC also complies with the Paris Principles because it is vested with the mandate to promote and protect human rights which is clearly set out in the Constitution and the SAHRC Act. The establishment of the SAHRC was an integral part of South Africa's paradigm shift from the apartheid legacy to a new constitutional order based on respect and protection of human rights.¹³⁹ The SAHRC was therefore established as part of a democratic system aimed at ensuring that the appalling human rights abuses of South Africa's past could not be repeated. Its overarching functions are to promote respect for human rights and a culture of human rights,¹⁴⁰ to promote the protection, development and attainment of human rights;¹⁴¹ and to monitor and assess the observance of human rights in South Africa.¹⁴²

In addition, the SAHRC complies with the Paris Principles on independence based on appointment and dismissal procedures. The appointment of its members is established in the Constitution and in the SAHRC Act. The two Acts of Parliament disclose the eligibility criteria¹⁴³ upon which the president appoints the commissioners,¹⁴⁴ the chairperson and the vice chairperson of the SAHRC.¹⁴⁵ The National Assembly has authority to decide whether commissioners can serve as on part time or full time basis and to fix the tenure of their office which shall not exceed seven years.¹⁴⁶ The SAHRC Act further prescribes the powers and functions of the chairperson, the deputy chairperson and the commissioners,¹⁴⁷ re-

¹³⁷ South African Human Rights Commission Act s 4 (1) (c).

¹³⁸ South African Human Rights Commission Act s 4 (4) and section 4 (5).

¹³⁹ J Matsheka 'Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of their independence' *African Human Rights Law Journal* 68, page 69.

¹⁴⁰ Constitution of South Africa s 184 (1) (a) and South African Human Rights Commission Act s 2 (a).

¹⁴¹ Constitution of South Africa s 184 (1) (b) and South African Human Rights Commission Act s section 2 (b).

¹⁴² Constitution of South Africa s 184 (1) (c) and South African Human Rights Commission Act s 2 (c).

¹⁴³ Constitution of South Africa s 193 (1) and South African Human Rights Commission Act s 5 (1) (b).

¹⁴⁴ South African Human Rights Commission Act s 5(1) (iv)

¹⁴⁵ South African Human Rights Commission Act s 6 (1).

¹⁴⁶ South African Human Rights Commission Act s 5 (2).

¹⁴⁷ South African Human Rights Commission Act s 7.

appointment procedures,¹⁴⁸ resignation procedures,¹⁴⁹ remuneration and allowances of commissioners,¹⁵⁰ grounds and procedures of removal from office.¹⁵¹

The SAHRC further complies with the Paris Principles on operational independence. The provisions of the SAHRC Act give the commission freedom to determine how it runs its day to day activities. The SAHRC appoints its chief executive officer¹⁵² who in turn as the head of administration appoints the staff¹⁵³ of the commission to help it with its performance of its financial, administrative and clerical functions. As the head of administration, the Chief Executive Officer is responsible for management of the affairs and operations of the SAHRC,¹⁵⁴ gets instructions about the performance of his duties and exercise of his/her powers only from the commission¹⁵⁵ to which he/she exclusively reports.¹⁵⁶

The placement of the SAHRC's budget under the Department of Justice and Constitutional Development negatively impacts on its compliance with the Paris Principles on financial independence. The SAHRC has raised concerns about this arrangement and requested that its budget should fall under Parliament's budget vote, as opposed to that of the Department of Justice and Constitutional Development.¹⁵⁷ The SAHRC's other concern is that its budget is not sufficient to enable it to carry out its functions effectively. In 2012, when the Portfolio Committee on Justice and Constitutional Development approached Parliament to discuss the issue of National Treasury's refusal to increase the budget of the SAHRC, it revealed that with insufficient funds, the commission could not outreach out to the remote rural areas in the provinces, had to use *pro bono* attorneys as it did not have the funds for to litigation, could not conduct awareness clinics to inform the public about its role and

¹⁴⁸ South African Human Rights Commission Act s 5 (4).

¹⁴⁹ South African Human Rights Commission Act s 5 (5).

¹⁵⁰ South African Human Rights Commission Act s 9.

¹⁵¹ Constitution of South Africa s 194 (1-4).

¹⁵² South African Human Rights Commission Act s 19 (1).

¹⁵³ South African Human Rights Commission Act s 19 (3) (a).

¹⁵⁴ South African Human Rights Commission Act s 19 (3) (c) (i).

¹⁵⁵ South African Human Rights Commission Act s 3 (d).

¹⁵⁶ South African Human Rights Commission Act s 3 (c) (v).

¹⁵⁷ Y Erasmus 'Critically reflecting on an institutional journey 2002-2009: The South African Human Rights Commission' (2009), page 4, available at www.gov.za/documents/download.php?f=111467, accessed on 8 June 2014.

operations and its commissioners could not travel to fulfil their duties.¹⁵⁸ These issues hamper the SAHRC from addressing human rights effectively. Inadequate funding has also affected the SAHRC's ability to effectively carry out its constitutional mandate to monitor socio-economic rights, which is its critical mandate.¹⁵⁹ As a result it has relied on donor funding for the socio-economic rights reporting process.¹⁶⁰

The SAHRC advises the government of South Africa on the implementation of and compliance with international and regional law.¹⁶¹ This is in compliance with the Paris Principles. This function goes towards promoting and ensuring the harmonization of national legislation with international human rights instruments to which South Africa is a party to as well as encouraging ratification of such instruments. The Commission reports that it has made submissions on legislation relating to torture, traditional courts, protection of information, and older persons and that these submissions have resulted in the adoption of legislation which complies with international human rights norms and standards.¹⁶² The SAHRC has also recommended that the South African government should consider ratifying the International Convention on the Rights of Migrant Workers, the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to CAT and the ICESCR.¹⁶³

¹⁵⁸ See Business of Parliament News http://www.parliament.gov.za/live/content.php?Item_ID=2749, accessed 8 June 2014.

¹⁵⁹ C McClain, 'The SA Human Rights Commission and Socioeconomic Rights: Facing the Challenges' (2002) 3 *ESR Rev.* 1, available at http://reference.sabinet.co.za/webx/access/electronic_journals/esrrev/esrrev_v3_n1_a5.pdf, accessed on 15 April 2014.

¹⁶⁰ D Horsten 'The Role Played by South African Human Rights Commission Socio Economic Rights Reports in Good Governance' (2006) 2 *PER*, page 8, available at <http://www.saflii.org/za/journals/PER/2006/12.html>, accessed on 14 April 2014.

¹⁶¹ South African Human Rights Commission Act s 13 (1) (b) (vi).

¹⁶² South African Human Rights Commission Responses to OHCHR Questionnaire on Human Rights Defenders (2012) 2, available at <http://www.ohchr.org/Documents/Issues/Defenders/AnswersNHRI/NHRIs/SouthAfrica.pdf>, accessed on 8 June 2014.

¹⁶³ South African Human Rights Commission International Report (2012) 108, available at <http://www.SouthAfricanHumanRightsCommission.org.za/home/21/files/Annual%20International%20Report%202012.pdf>, accessed on 8 April 2014.

The SAHRC also complies with the Paris Principles as it contributes to the reports which South Africa is required to submit to the UN bodies and committees. The SAHRC Act mandates the commission to require relevant organs of state to provide it yearly 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.¹⁶⁴ Through this function, the SAHRC is also able to review government policies relating to human rights as required by the SAHRC Act.¹⁶⁵ Following due consideration of the reports and policies submitted by organs of departments, the SAHRC has the responsibility to recommend the relevant organs of state to take measures to ensure the promotion and protection of human rights within the framework of the Constitution and the law.¹⁶⁶

In addition to socio-economic rights reports, the SAHRC produces annual international reports setting out the international treaty bodies monitored by the commission and providing information on the South African situation and developments in relation to a particular treaty on an annual basis. The SAHRC also prepares and submits reports to the National Assembly pertaining to international or regional law.¹⁶⁷ The Commission also has to produce an annual Equality Report touching on issues such as racism, disability and laws affecting lesbian, gay, bisexual, and transgender rights.¹⁶⁸ Finally, the commission is accountable to the National Assembly to which it reports its activities and the performance of its functions once a year.¹⁶⁹

The SAHRC compiles these reports through its research programme. The SAHRC Act mandates the commission to carry out research¹⁷⁰ and to undertake studies for reporting on or relating to human rights.¹⁷¹ By carrying out research, the commission complies with the

¹⁶⁴ Constitution of South Africa s 184 (3). See also South African Human Rights Commission Act s 14 (1) (a) (v).

¹⁶⁵ South African Human Rights Commission Act s 13 (1) (b) (v).

¹⁶⁶ South African Human Rights Commission Act s 13 (1) (a) (iii).

¹⁶⁷ South African Human Rights Commission Acts 13 (1) (b) (vii).

¹⁶⁸ Critically reflecting on an institutional journey 2002-2009: The South African Human Rights Commission, *op cit* (n157) page 3.

¹⁶⁹ Constitution of South Africa s 181 (5).

¹⁷⁰ Constitution of South Africa s 184 (2) (c).

¹⁷¹ South African Human Rights Commission Acts 13 (1) (a) (iv).

Paris Principles. In addition to research, the SAHRC complies with the Paris Principles because the SAHRC Act empowers it to develop, conduct or manage information programmes and education programmes to foster public understanding of the Bill of Rights and of its activities.¹⁷² In October 2002 the SAHRC collaborated with the National Department of Education to ensure that human rights form part of the mandatory school curriculum.¹⁷³

Connected with the responsibility to develop education programmes in schools and universities, the SAHRC has the responsibility to educate¹⁷⁴ and to develop an awareness of human rights among all the people of South Africa. The commission has ensured that human rights education spreads throughout South Africa through its outreach and community visits.¹⁷⁵ It has also conducted joint public education campaigns with the Public Protector, an example among many of such reported in the media being the one held in Kimberley on Human Rights Day in 2009 where South Africans were urged to use Chapter 9 institutions to protect their rights.¹⁷⁶

The SAHRC further complies with the Paris Principles on pluralism and methods of operation. The Constitution mandates the commission to consider race and gender in the appointment of its members.¹⁷⁷ This ensures pluralism. The SAHRC Act also legislates for pluralism as it mandates the SAHRC to liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objectives of the commission.¹⁷⁸ In addition, the SAHRC Act mandates the SAHRC to maintain close liaison with institutions, bodies and authorities with similar objectives in order

¹⁷² South African Human Rights Commission Act s 13 (1) (b) (i).

¹⁷³ Critically reflecting on an institutional journey 2002-2009: The South African Human Rights Commission, *op cit* (n157) page 5.

¹⁷⁴ Constitution of South Africa s 184 (2) (d).

¹⁷⁵ Critically reflecting on an institutional journey 2002-2009: The South African Human Rights Commission, *op cit* (n157) page 7.

¹⁷⁶ C Musuva 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa's Public Protector and Human Rights Commission' (2006), page 32, available at <http://www.content.eisa.org.za/pdf/rr41.pdf>, accessed on 6 April 2014.

¹⁷⁷ Constitution of South Africa s 193 (2).

¹⁷⁸ South African Human Rights Commission Act s 13 (1) (b) (iii).

to foster common policies and practices and to promote cooperation in relation to the handling of cases of overlapping jurisdiction.¹⁷⁹

The commission reports that it has used public inquiries not only as a mechanism for public education and public accountability but also as tools that advance non-adversarial dialogue between the state, academics, civil society and the citizens of South Africa. Public inquiries conducted by the SAHRC so far include the rights of farm workers, access to basic education, access to health care services, violence in schools, housing and evictions, hearings on the Millennium Development Goals, boom gates and closed communities, and the rights of the Khomani San Community.¹⁸⁰ Networking with these NGOs also satisfies the Paris Principles on methods of operation. In this regard, the commission reports that it has enjoyed great recognition outside South Africa by working closely with structures such as the UNDP, UNHCR, HCHR and the Commonwealth as partner in joint projects and as expert resource to new national institutions.¹⁸¹

Finally, the SAHRC has quasi-jurisdictional competence. It is empowered by the Constitution to investigate actual or threatened human rights violations.¹⁸² The SAHRC Act details the investigation process to be followed¹⁸³ and gives the commission wide investigative powers such as to enter and search the premises and attach and remove articles.¹⁸⁴ After due investigation, if the Commission is of the opinion that there is substance in any complaint made to it, it is empowered take steps to secure appropriate redress where human rights have been violated.¹⁸⁵ Appropriate redress might involve arranging for or providing financial assistance to enable proceedings to be taken to a competent court for the necessary relief or directing a complainant to an appropriate forum.¹⁸⁶ The commission is expressly mandated to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation.¹⁸⁷

¹⁷⁹ South African Human Rights Commission Act s13 (1) (b) (ii).

¹⁸⁰ *Op cit* (n168) page 3.

¹⁸¹ *Ibid.*

¹⁸² Constitution of South Africa s 184 (2) (a).

¹⁸³ South African Human Rights Commission Act s 15.

¹⁸⁴ South African Human Rights Commission Act s 16.

¹⁸⁵ Constitution of South Africa s 184 (2) (b).

¹⁸⁶ South African Human Rights Commission Act s 13 (3).

¹⁸⁷ South African Human Rights Commission Act s 14.

3.4. Conclusion

The South African Constitution adequately promotes and protects human rights as it holistically contains almost all universally recognised human rights and as it is substantially influenced by international human rights law. In addition, although South Africa is not party to all the ten core human rights protection instruments, section 39(1)(b) of the Constitution of South Africa mandates the Courts to consider international law in the interpretation of the Bill of Rights. This makes it possible for international law to be used to fill the gap left by national legislation in the promotion of human rights in South Africa. In essence, international law extends the scope of the protection of human rights in South Africa leading to a conclusion that the legal framework in South Africa adequately protects human rights.

The Courts of South Africa, particularly the Constitutional Court continue to play a role in the protection of the fundamental human rights which are guaranteed by the Bill of Rights in the South African Constitution. In addition to the Courts, the Constitution of South Africa has established independent institutions which have come to be known as Chapter 9 institutions to safeguard democracy and human rights. It has been stated that South Africa is the only country in the world where the Constitution establishes such a large number of different institutions to support constitutional democracy and to monitor, protect and promote human rights.¹⁸⁸ One of these institutions is the SAHRC.

The legislative provisions establishing the SAHRC comply with the Paris Principles. The practices of the commission also comply with the Paris Principles save the placement of the institution under the Justice Ministry which compromises its financial independence. The SAHRC has been accredited as an 'A status' NHRI by the ICC since 1999. It has been certified that it complies with the Paris Principles and is found to continue to do so at every review. It sits in the ICC Bureau consisting of 16 'A status' NHRIs representing the four regions of the ICC. Other regions are Americas, Asia Pacific and Europe. This means that it provides leadership in the promotion and protection of human rights globally.

¹⁸⁸ P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' (2012) In Chirwa, Danwood *et al* 'Accountable Government In Africa: Perspectives from Public Law and Political Studies' 160, page174.

CHAPTER 4: A CASE STUDY OF ZIMBABWE

4.1. Introduction

This chapter examines the scope of rights recognized and protected, the enforcement measures and institutions that support effective human rights protection in Zimbabwe. Focus will be placed on the ZHRC. Legislation establishing this institution will be examined for compliance with the Paris Principles. Also subject to examination in this chapter is the impact of the ZHRC's achievements and constraints on its compliance with the Paris Principles. A comparative approach is employed to identify the best practices which Botswana can use as a benchmark in establishing its NHRI.

4.2. Legal framework

In 2013, Zimbabwe repealed its independence Constitution adopted in 1980. The 1980 Constitution recognised and protected civil and political rights only. The current Constitution¹⁸⁹ considerably improves upon its predecessor as it contains a comprehensive list of rights which one would expect in a liberal democracy.¹⁹⁰ The Constitution of Zimbabwe protects civil and political rights as well as socio-economic and cultural rights. It joins the South African and Kenyan Constitutions in being one of the few African national constitutions which expressly provides for the judicial enforcement of socio-economic rights.¹⁹¹

The Bill of rights in the Constitution of Zimbabwe guarantees political rights such as the right to life,¹⁹² the rights of arrested and detained persons;¹⁹³ the right to human

¹⁸⁹ Constitution of Zimbabwe (Amendment no 20/2013).

¹⁹⁰ D Matyszak 'Human Rights and Zimbabwe's Draft Constitution' Research and advocacy Unit (March 2013) available at http://www.researchandadvocacyunit.org/index.php?view=download&alias=235-human-rights-and-the-draft-consolidatedfinal-edit-for-posting&category_slug=general-reports&option=com_docman&Itemid=160, accessed on 9 April 2013.

¹⁹¹ K Moyo 'Zimbabwe adopts a new Constitution' Stellenbosch University Socio Economic Rights and Administrative Justice Research Project (28 May 2013) available at <https://blogs.sun.ac.za/seraj/2013/05/28/zimbabwe-adopts-a-new-constitution/>, accessed on 9 April 2013.

¹⁹² Constitution of Zimbabwe, s 48.

¹⁹³ Constitution of Zimbabwe, s 50.

dignity;¹⁹⁴ freedom from torture or cruel, inhuman or degrading treatment or punishment;¹⁹⁵ the right to equality and non-discrimination;¹⁹⁶ freedom of expression and freedom of the media;¹⁹⁷ the right of access to information;¹⁹⁸ political rights;¹⁹⁹ and the rights of accused persons.²⁰⁰ Cultural rights, particularly the right to language and culture are also recognised and protected in the Constitution of Zimbabwe.²⁰¹ Moreover, the Constitution of Zimbabwe recognises and protects social and economic rights such as the right to education,²⁰² the right to health care;²⁰³ and the right to food and water.²⁰⁴ The rights and freedoms applicable only to particular classes of people such as women;²⁰⁵ children;²⁰⁶ the elderly;²⁰⁷ and persons with disabilities²⁰⁸ are also recognised and protected in the Constitution of Zimbabwe. Finally, the Constitution of Zimbabwe recognises and protects any other rights and freedoms conferred by law, to the extent that they are consistent with the Bill of Rights.²⁰⁹

The only criticism levelled against the Constitution of Zimbabwe relates to the provision on rights to agricultural land (section 72). This provision ousts the jurisdiction of courts to adjudicate on any judicial challenges on the acquisition or compensation payable in respect of acquisition of agricultural land. This has been seen as unconstitutional as it excludes judicial scrutiny whose function is to curtail any potential abuses of public power.²¹⁰

¹⁹⁴ Constitution of Zimbabwe, s 51.

¹⁹⁵ Constitution of Zimbabwe, s 53.

¹⁹⁶ Constitution of Zimbabwe, s 56.

¹⁹⁷ Constitution of Zimbabwe, s 61.

¹⁹⁸ Constitution of Zimbabwe, s 62.

¹⁹⁹ Constitution of Zimbabwe, s 67.

²⁰⁰ Constitution of Zimbabwe, s 70.

²⁰¹ Constitution of Zimbabwe, s 63.

²⁰² Constitution of Zimbabwe, s 75.

²⁰³ Constitution of Zimbabwe, s 76.

²⁰⁴ Constitution of Zimbabwe, s 77.

²⁰⁵ Constitution of Zimbabwe, s 80.

²⁰⁶ Constitution of Zimbabwe, s 81.

²⁰⁷ Constitution of Zimbabwe, s 82.

²⁰⁸ Constitution of Zimbabwe, s 83.

²⁰⁹ Constitution of Zimbabwe, s 47.

²¹⁰ Moyo *op cit* (n191).

International law is useful in interpreting the Bill of Rights enshrined in the Constitution of Zimbabwe. The Courts and other competent bodies are required to take into account international law and all treaties and conventions to which Zimbabwe is a party.²¹¹ Zimbabwe is party to 5 of the 10 core international human rights instruments²¹² being ICCPR; CEDAW; ICERD; ICESCR; and CRC. Zimbabwe is also party to the African Charter; Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights; Protocol to the African Charter on the Rights of Women in Africa; and African Charter on the Rights and Welfare of the Child.²¹³

The UNDP has recommended that in seeking to build national capacity to promote, protect, respect and fulfil human rights, Zimbabwe should ratify relevant international instruments and optional protocols, including the: CAT; Convention on the rights of persons with disabilities; Convention on the Rights of the Child optional protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict; Protocol to prevent, suppress and punish trafficking in persons especially women and children; and Convention on the protection of the rights of all migrant workers and members of their families.²¹⁴ The Constitution of Zimbabwe requires the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.²¹⁵

4.3. Institutional framework

The Courts of Zimbabwe play an important role in the protection of human rights in Zimbabwe. They are vested with authority to enforce the rights contained in the Bill of Rights in the Constitution of Zimbabwe. Any person acting in their own interests,²¹⁶ acting on behalf

²¹¹ Constitution of Zimbabwe, s 46 (1) (c).

²¹² See *op cit* (n101) for a list of the ten core human rights instruments.

²¹³ Generally see the University of Minnesota Human rights library for Zimbabwe treaty ratification status. Available at <http://www1.umn.edu/humanrts/research/ratification-zimbabwe.html>, accessed on 3 April 2014.

²¹⁴ Universal Periodic review - UN Human Rights Council - UN Compilation Report - March 2011 – Zimbabwe UN Country Team. Available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/ZW/UNCT-eng.pdf>, accessed on 9 April 2014.

²¹⁵ Constitution of Zimbabwe, s 4.

²¹⁶ Constitution of Zimbabwe, s 185 (1) (a).

of another person who cannot act for themselves;²¹⁷ acting as a member, or in the interests, of a group or class of persons;²¹⁸ acting in the public interest;²¹⁹ or any association acting in the interests of its members;²²⁰ is entitled to approach a court in the event that of actual or threatened violation of human rights contained in the Bill of Rights.

The Constitutional Court is the highest court in all constitutional matters whose decisions on those matters bind all other courts.²²¹ The Supreme Court which is established by section 162 (b) of the Constitution of Zimbabwe does not have any jurisdiction over constitutional matters, either as a court of first instance or as a court of appeal.²²² Section 162 (c) of the Constitution of Zimbabwe establishes the High Court and empowers it to decide constitutional matters except those that only the Constitutional Court may decide.²²³ Finally, other Courts which are established in terms of section 174 of the Constitution of Zimbabwe may decide on constitutional matters within their jurisdiction.²²⁴ They may also refer any constitutional matter that arises during their proceedings to the Constitutional Court²²⁵ and where they make an order concerning the constitutional invalidity of any law or any conduct of the president or parliament, they have to refer the order for confirmation to the Constitutional Court. Until such orders are confirmed by the Constitutional Court, they have no force.²²⁶

At the time that other courts make an order of constitutional invalidity, they may also grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the matter.²²⁷ Any person with *locus standi* may appeal, or apply, directly to the Constitutional Court to confirm or vary an

²¹⁷ Constitution of Zimbabwe, s 185 (1) (b).

²¹⁸ Constitution of Zimbabwe, s 185 (1) (c).

²¹⁹ Constitution of Zimbabwe, s 185 (1) (d).

²²⁰ Constitution of Zimbabwe, s 185 (1) (e).

²²¹ Constitution of Zimbabwe, s 167 (1) (a).

²²² Constitution of Zimbabwe, s 169 (2).

²²³ Constitution of Zimbabwe, s 171 (1) (c).

²²⁴ Constitution of Zimbabwe, s 175 (6).

²²⁵ Constitution of Zimbabwe, s 175 (4).

²²⁶ Constitution of Zimbabwe, s 175 (1).

²²⁷ Constitution of Zimbabwe, s 175 (2).

order concerning constitutional validity by any court.²²⁸ After adjudicating on a constitutional matter, the courts shall make any order that is just and equitable including a declaration of rights and an award of compensation,²²⁹ declaring that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency,²³⁰ making an order limiting the retrospective effect of the declaration of invalidity and/or make an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.²³¹

In addition to the Courts, the Constitution of Zimbabwe establishes independent institutions under chapter 12. These institutions are mandated *inter alia* to support and entrench human rights and democracy.²³² These are the Zimbabwe Electoral Commission;²³³ the ZHRC;²³⁴ the Zimbabwe Gender Commission;²³⁵ the Zimbabwe Media Commission;²³⁶ and the National Peace and Reconciliation Commission.²³⁷ The civil society is also actively involved in human rights promotion and protection in Zimbabwe.

Although these institutions individually and collectively play a role in the promotion and protection of human rights, this chapter will focus only on the ZHRC. Particular emphasis is placed on examining compliance of the ZHRC with the Paris Principles based on the constitutional and other legislative provisions establishing it as well as on its practical experiences. A comparative analysis in this regard is important for Botswana to note possible challenges which it is likely to face in establishing its NHRI.

²²⁸ Constitution of Zimbabwe, s 175 (3).

²²⁹ Constitution of Zimbabwe, s 85 (1).

²³⁰ Constitution of Zimbabwe, s 175 (6) (a).

²³¹ Constitution of Zimbabwe, s 175 (6) (b).

²³² Constitution of Zimbabwe, s 233 (a).

²³³ Constitution of Zimbabwe, s 232 (a).

²³⁴ Constitution of Zimbabwe, s 232 (b).

²³⁵ Constitution of Zimbabwe, s 232 (c).

²³⁶ Constitution of Zimbabwe, s 232 (d).

²³⁷ Constitution of Zimbabwe, s 232 (e).

4.3.1. The Zimbabwe Human Rights Commission and the Paris Principles

Sections 107 and 108 of the 1980 Constitution of Zimbabwe established the office of the Ombudsman. The Ombudsman Act of 1982 was passed to give effect to these constitutional provisions, particularly prescribing the appointment, powers and functions of the Ombudsman. The Constitution of Zimbabwe Amendment (No. 18) Act, 2007 repealed sections 107 and 108 of the 1980 Constitution of Zimbabwe and among other things, changed the name of the Ombudsman to Public Protector and prescribed the functions of the Public Protector.²³⁸

Sections 108A and 108B of the Constitution of Zimbabwe Amendment (No. 18) Act, 2007 were repealed by the Constitution of Zimbabwe Amendment (No. 19) Act, 2008. The repeal of these sections effectively abolished the office of the Public Protector and established the ZHRC. The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 transfers the functions previously undertaken by the Public Protector to the ZHRC.²³⁹ The Constitution of Zimbabwe then mandates the ZHRC to promote the protection, development and attainment of human rights and freedoms;²⁴⁰ and to monitor, assess and ensure observance of human rights and freedoms.²⁴¹ The ZHRC is therefore a hybrid NHRI as it has a mandate to promote and protect human rights as well as to investigate maladministration.

The motive for establishing the ZHRC was divulged in 2006 by the then Justice Minister Patrick Chinamasa when he announced that Zimbabwe will establish a NHRI as part of its 'quest to create a culture of human rights.'²⁴² The proposal for the formation of the ZHRC was celebrated for various reasons, *inter alia* that it will create a culture of human rights in the country; it will go a long way in protecting the rights of all Zimbabweans; it will further consolidate the country's democracy; it will show Zimbabwe's commitment to upholding international conventions of human rights; it will serve as *an* indispensable

²³⁸ Constitution of Zimbabwe (Amendment No. 18 of 2007) s 108 (5).

²³⁹ Constitution of Zimbabwe (Amendment No. 20 of 2013) Sixth Schedule 16.

²⁴⁰ Constitution of Zimbabwe, s 243 (1) (b).

²⁴¹ Constitution of Zimbabwe, s 243 (1) (c).

²⁴² Staff Reporter 'Zim to set up human rights commission' Mail & Guardian Newspaper (26 March 2006), available at [http://mg.co.za/article/2006-03-26-zim-to-set-up-human-rights-commission.](http://mg.co.za/article/2006-03-26-zim-to-set-up-human-rights-commission), accessed on 14 April 2014.

institution that would safeguard the soiling of Zimbabwe's human rights profile by NGOs; and reduce the frequency of cases of alleged human rights abuses.²⁴³

The ZHRC complies with the Paris Principles on legal independence. It is established through Acts of Parliament – the Constitution and the ZHRC Act²⁴⁴ as an independent institution which is not subject to the direction or control of anyone.²⁴⁵ The commission is a body corporate capable of suing and being sued in its corporate name and also capable of performing all acts that bodies corporate may by law perform.²⁴⁶ It is mandated to act in accordance with the Constitution²⁴⁷ and to exercise its functions without fear, favour or prejudice.²⁴⁸

The ZHRC also meets the operational independence criteria required by the Paris Principles. Its commissioners and members of staff are required to serve impartially and independently and to exercise or perform their functions in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law.²⁴⁹ They are barred from conducting an investigation or rendering assistance in matters in which they have any interest which might preclude them from performing their functions in a fair, unbiased and proper manner.²⁵⁰ In addition, the state is barred from interfering with the commission, its commissioners or any member of staff in the performance of their duties.²⁵¹

Moreover, the ZHRC has control over its day to day activities which is also adds to its compliance with the Paris Principles on operational independence. The commission has authority to employ its own staff to execute the daily activities of the commission.²⁵² The

²⁴³ Media Monitoring Project Zimbabwe 'Human rights commission and rights abuses' (Monday March 27th –

Sunday April 2nd 2006), available at http://www.kubatana.net/html/archive/media/060407mmpz2.asp?sector=MEDIA&year=2006&range_start=27 I, accessed on 12 April 2014.

²⁴⁴ Zimbabwe Human Rights Commission Act (Act No. 2 of 2012).

²⁴⁵ Constitution of Zimbabwe, s 135 (1) (a).

²⁴⁶ Zimbabwe Human Rights Commission Act section 3 (1).

²⁴⁷ Constitution of Zimbabwe, s 135 (1) (b).

²⁴⁸ Constitution of Zimbabwe, s 135 (1) (c).

²⁴⁹ Zimbabwe Human Rights Commission Act, s 7 (1) A.

²⁵⁰ Zimbabwe Human Rights Commission Act, s 7 (4).

²⁵¹ Zimbabwe Human Rights Commission Act, s 7 (2).

²⁵² Zimbabwe Human Rights Commission Act, s 6 (1) (b).

commission is headed by the executive secretary²⁵³ whose mandate is to oversee the day-to-day administration and management of the affairs, staff and property of the commission.²⁵⁴ Operational independence is even guarded by the fact that the offices of the executive secretary and of the commission's members of staff do not form part of the Public Service.²⁵⁵

The full operationalization of the Commission has however been delayed by the absence of a Secretariat. The Commission was formed in 2009 and its enabling legislation was finalized in October 2012. However, due to the absence of a secretariat, the commission could not operate. ZHRC chairperson Mr Elasto Mugwadi was quoted in February 2014 saying, 'So far we have recruited the human resources, finance and administration managers and a Personal Assistant. We hope by next week we would have recruited the chief executive officer.'²⁵⁶

The ZHRC also complies with the Paris Principles on independence based on appointment and dismissal procedures. The ZHRC Act prescribes conditions which can be used to determine whether someone is eligible to be appointed as a commissioner;²⁵⁷ terms of office and conditions of service of commissioners;²⁵⁸ vacation of office by commissioners;²⁵⁹ and conditions upon which commissioners may be removed from office.²⁶⁰ The UNDP has noted that the non- finalization of the terms and conditions of service of the commissioners has delayed the Commission's work because there was lack of clarity on the commissioners' status.²⁶¹

²⁵³ Zimbabwe Human Rights Commission Act, s 6 (1) (a).

²⁵⁴ Zimbabwe Human Rights Commission Act, s 6 (4) (a).

²⁵⁵ Zimbabwe Human Rights Commission Act, s 6 (3).

²⁵⁶ D Nemukuyu 'Zimbabwe Human Rights Commission ready to start work' The Herald (February 5, 2014), available at http://www.herald.co.zw/Zimbabwe_Human_Rights_Commission-ready-to-start-work/, accessed on 10 June 2014.

²⁵⁷ Zimbabwe Human Rights Commission Act, First schedule paragraph 2.

²⁵⁸ Zimbabwe Human Rights Commission Act, First schedule paragraph 3.

²⁵⁹ Zimbabwe Human Rights Commission Act, First schedule paragraph 4.

²⁶⁰ Zimbabwe Human Rights Commission Act, s 20.

²⁶¹ United Nations Development Programme 'Capacity Building Support to the Zimbabwe Human Rights Commission (2012-2014), available at http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissio.html, accessed on 10 June 2014.

The ZHRC however does not comply with the Paris Principles on financial independence since its inception. The commission's budget falls under the Ministry of Justice and Legal Affairs. The commission has faced acute financial problems that have resulted in it not being effectively operational even up to date. The first head of the ZHRC Professor Reginald Austin resigned citing the fact that the commission was not 'independent and properly capacitated to comply with the international standards set by the Paris Principles for its credibility and recognition to participate as a peer in the international human rights community.'²⁶² Austin was frustrated by the fact that the government of Zimbabwe had neglected the commission to the extent that it had 'no budget, no accommodation, and no mobility.'²⁶³ The extent of the ZHRC's financial constraint was so dire that the commission had to borrow \$500 to open a bank account.²⁶⁴

In addition, the ZHRC is not able to secure its own premises due to lack of funds. The government of Zimbabwe gave the ZHRC a building in Harare to operate from. However the building is dilapidated and requires extensive renovations before the Commission can occupy it. The Danish Institute for Human Rights has rescued the commission by funding the temporary office space which it is currently occupying.²⁶⁵ Norway is reportedly assisting to fund the commission to purchase vehicles.²⁶⁶ The UNDP has noted that the ZHRC has finalized the recruitment of its middle management staff that is, the finance manager, administrator, human resources manager and a secretary, the secretariat was not yet on board because the commission was awaiting release of funding from Treasury to support salaries and operational costs.²⁶⁷

The lack of funding of the ZHRC has caused international concern to the extent that donors have sought to intervene to assist the commission to resume operations in the interest of safeguarding human rights in Zimbabwe. The donors have however attached the condition

²⁶² L Guma 'Human Rights Commission Chief resigns' *Neharanda Radio* (December 29, 2012), available at <http://nehandaradio.com/2012/12/29/zimbabwe-human-rights-commission-chief-resigns/>, accessed on 10 June 2014.

²⁶³ *Ibid.*

²⁶⁴ N Moto 'Zimbabwe Human Rights Commission Pleads for Funding' *SW Radio Africa* (May 23, 2013), available at <http://allafrica.com/stories/201305240335.html>, accessed on 10 June 2014.

²⁶⁵ Capacity Building Support to the Zimbabwe Human Rights Commission (ZHRC) op cit (n261).

²⁶⁶ *Ibid.*

²⁶⁷ Capacity Building Support to the Zimbabwe Human Rights Commission (ZHRC) op cit (n261)

that before they could fund the renovation of the commission's premises, the government of Zimbabwe should provide the commission with \$300 000 as a sign of its commitment to human rights.²⁶⁸ Following concerns that the government had thus far failed to write a letter of commitment to the effect that it would raise the required amount, the government responded that it was not amused that the ZHRC was relying on foreign donors, particularly from countries deemed hostile to Zimbabwe including the European Union which is one of the institutions that imposed sanctions on Zimbabwe. Chipanga, a member of the Parliamentary Portfolio Committee on Justice stated during the 2014 budget debates that 'Given our current financial position and the fact that government is not likely to avail any funds in the near future, I wanted to ask a question on whether the commission cannot tell the EU to keep their money and when we have money we will give them [the commission].'²⁶⁹ The attitude with which the government is responding to concerns of the ZHRC's financial incapacitation have led to comments that the government of Zimbabwe lacks political will to fully operationalize the commission. Political commentator and member of Crisis Zimbabwe, Vivid Gwede called for political will to support the Commission as a solution to problems besetting it.²⁷⁰

The ZHRC however complies with the Paris Principles on competence and responsibilities. The commission has a mandate to promote and protect human rights which is clearly set forth both in the Constitution of Zimbabwe and the ZHRC Act. It is mandated to promote the protection, development and attainment of human rights and freedoms;²⁷¹ and to monitor, assess and ensure observance of human rights and freedoms.²⁷²

²⁶⁸ V Langa 'Donors demand govt commitment on human rights issues: Zimbabwe Human Rights Commission' *The Newsday* (January 17, 2014), available at [http://www.zimbabwesituation.com/news/zimsit_donors-demand-govt-commitment-on-human-rights-issues-Zimbabwe Human Rights Commission/](http://www.zimbabwesituation.com/news/zimsit_donors-demand-govt-commitment-on-human-rights-issues-Zimbabwe-Human-Rights-Commission/), accessed on 10 June 2014.

²⁶⁹ R Chidza 'EU can keep its funds — Zanu PF MP', available at <http://www.thezimmail.co.zw/2014/01/17/eu-can-keep-its-funds-zanu-pf-mp/>, accessed on 10 June 2014.

²⁷⁰ N Sibanda 'Zimbabwe Human Rights Commission should recruit credible staff: Nango' *The Zimbabwean* (5 November 2013), available at [http://www.thezimbabwean.co/human-rights/69198/Zimbabwe Human Rights Commission-should-recruit-credible-staff.html](http://www.thezimbabwean.co/human-rights/69198/Zimbabwe-Human-Rights-Commission-should-recruit-credible-staff.html), accessed on 14 April 2014.

²⁷¹ *Op cit* (n239).

²⁷² *Op cit* (n240).

The ZHRC further has responsibility to advise government which is in line with the Paris Principles. It is authorized to visit and inspect prisons, places of detention, refugee camps and related facilities²⁷³ and places where mentally disordered or intellectually handicapped persons are detained²⁷⁴ and to make recommendations regarding those conditions to the minister responsible for administering the law relating to those places or facilities²⁷⁵ or to parliament.²⁷⁶

Also compliant with the Paris Principles are the ZHRC's responsibilities to promote awareness of and respect for human rights and freedoms at all levels of society;²⁷⁷ to conduct research into issues relating to human rights and freedoms;²⁷⁸ as well as to co-operate with human rights institutions belonging to international, continental or regional organisations of which Zimbabwe is a member.²⁷⁹

The ZHRC falls short of compliance with the Paris Principles in so far as the constitutional and other legislative provisions establishing it do not guarantee pluralism in its composition. It however complies with the Paris Principles on the methods of operation. The ZHRC provides for procedure at meetings of commission. The commission meets at least once in every three months.²⁸⁰ In addition, the ZHRC Act provides for working groups of the commission which are to be established on the basis of human rights thematic areas such as Children's Rights; Gender Equality and Women's Rights; Civil and Political Rights; Economic Social and Cultural Rights; and any other thematic area which the Commission may consider necessary.²⁸¹

Finally, the ZHRC has quasi-judicial competence. It is authorized to receive and consider complaints from the public, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated and to take such action in

²⁷³ Constitution of Zimbabwe, s 243 (1) (k) (i).

²⁷⁴ Constitution of Zimbabwe, s 243 (1) (k) (ii). See also Zimbabwe Human Rights Commission Act, s 4 (c).

²⁷⁵ Zimbabwe Human Rights Commission Act, s 4 (b).

²⁷⁶ Constitution of Zimbabwe, s 243 (1) (i).

²⁷⁷ Constitution of Zimbabwe, s 243 (1) (a).

²⁷⁸ Constitution of Zimbabwe, s 243 (1) (j).

²⁷⁹ Zimbabwe Human Rights Commission Act, s 4 (e).

²⁸⁰ Zimbabwe Human Rights Commission Act, First schedule, paragraph 6 (2).

²⁸¹ Zimbabwe Human Rights Commission Act, First schedule, paragraph 7 (3).

regard to the complaints as the commission considers appropriate.²⁸² The commission can conduct investigations on its own initiative.²⁸³ After investigating human rights issues, the commission is required to ensure and provide appropriate redress for injustices and human rights violations.²⁸⁴

4.4. Conclusion

The legal framework in Zimbabwe adequately protects human rights. The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 joins the South African and Kenyan Constitutions in being one of the few African national constitutions which comprehensively guarantee human rights. It recognises civil, political, cultural and socio-economic rights. Its only shortcoming is section 72 which is deemed unconstitutional for it ousts the jurisdiction of courts to review government's decisions on acquisition or compensation payable in respect of acquisition of agricultural land.

Section 46 (1) (c) of the 2013 Constitution extends the scope of rights human rights protection in Zimbabwe as it requires the Courts and other competent bodies to take international law and all treaties and conventions to which Zimbabwe is a party into account. In addition, section 34 of the 2013 Constitution of Zimbabwe requires the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

The Courts, particularly the Constitutional Court, plays an important role in the protection of human rights in Zimbabwe. The Courts are vested with authority to enforce the rights contained in the Bill of Rights in the constitution of Zimbabwe. The independent institutions established under Chapter 12 Constitution of Zimbabwe also protect the human rights which are recognized and protected in the Bill of Rights.

The ZHRC which forms part of the Chapter 12 institutions and is the subject of investigation in this dissertation has been established in accordance with the Paris Principles save for its shortcomings with regards to pluralism and financial independence. Lack of

²⁸² Constitution of Zimbabwe, s 243 (1) (d) and (f). See also Human Rights Act Zimbabwe Human Rights Commission Act, s 4 (a).

²⁸³ Zimbabwe Human Rights Commission Act, s 4 (a).

financial independence has delayed the full operationalization of the ZHRC. The commission was established in 2009 but up to date it still has not secured proper accommodation, vehicles and staff. The UNDP is involved in a capacity building support project to assist the ZHRC to resume operations. Donors have also demonstrated willingness to assist the ZHRC to become operational. It is hoped that these initiatives will resolve the challenges which the ZHRC is facing.

Political will on the part of the government of Zimbabwe is highly recommended as a solution to problems besetting it. If there is political will, success to secure donor funding and support for all other initiatives that can ever be initiated by stakeholders in the field of human rights protection to assist the ZHRC to operate in line with the Paris Principles is guaranteed. This is an important lesson that Botswana can learn from Zimbabwe as it establishes its NHRI.

CHAPTER 5: TOWARDS THE ESTABLISHMENT OF A NATIONAL HUMAN RIGHTS INSTITUTION IN BOTSWANA:

5.1. Introduction.

A study of the legal and institutional framework undertaken under chapters 3 and 4 shows that the legal and institutional frameworks in South Africa and Zimbabwe comprehensively protect human rights. The South African and Zimbabwean Constitutions recognise and economic, social and cultural rights together with civil and political rights. The two countries have also constitutionally established democratic institutions whose functions among others is to promote and protect human rights. One of the institutions established by those countries is a NHRI. A lesson learnt from the two countries is that even if a country has laws and institutions that sufficiently enforce human rights, the establishment of a NHRI is necessary.

Botswana has a good human rights record as it is ranked ‘free’ by Freedom House, receiving a score of 3 out of a worst possible 7 on political rights and a 2 on civil rights.²⁸⁵ Freedom House also ranks Botswana as one of only 8 ‘free’ countries among the 48 states of sub-Saharan Africa, with high scores for both political and civil rights.²⁸⁶ However, there is no independent institution that is mandated to deal with human rights issues and has been established according to the Paris Principles in Botswana. The study of NHRIs under chapter 2 has shown that it is pertinent for every state to establish a NHRI. NHRIs are mechanisms through which governments ensure implementation of international human rights standards in their territories. The absence of a NHRI has been therefore been cited as the cause of human rights concerns which have been noted to exist in Botswana.

This chapter looks at these concerns which form part of the factors that have prompted local and international calls for the establishment of a NHRI in Botswana. A study of these concerns will reveal whether there exist gaps in Botswana’s legal and institutional framework which can be filled by the establishment of a NHRI. Lessons learnt from the South Africa and Zimbabwe case studies are then used to suggest the process which is in line with the Paris Principles which Botswana should follow to establish its NHRI.

²⁸⁵ Evaluation of Candidates for 2011-2014 Membership of the Human Rights Council, *op cit* (n1).

²⁸⁶ Botswana Country Overview 2012/2013, *op cit* (n2).

5.2. Legal Framework

The Constitution of Botswana²⁸⁷ guarantees fundamental human rights and mechanisms through which those rights can be protected. The fundamental rights that are recognized and protected in Botswana are contained in the Bill of Rights under Chapter 2 of the Constitution. An analysis of the Bill of rights reveals an inclination towards the protection of civil and political rights. These include the right to life,²⁸⁸ the right to personal liberty,²⁸⁹ protection from slavery and forced labour,²⁹⁰ protection from inhuman treatment,²⁹¹ protection of freedom of expression,²⁹² the right to privacy,²⁹³ and protection from discrimination.²⁹⁴ Socio-economic rights are not entrenched in the Constitution of Botswana. The Constitution of Botswana has therefore been described as an ostensibly liberal and conservative Constitution whose design to offer fairly limited human rights protection reflects the traditional British scepticism towards the entrenchment of human rights.²⁹⁵

Concerns have been raised about certain provisions of the Constitution of Botswana. For example, section 3 of the Constitution was interpreted as guaranteeing equal protection of the law for all in *Unity Dow v. the Attorney General*.²⁹⁶ The CERD is however concerned that the definition of discrimination provided under this section does not prohibit discrimination on the grounds of descent and national or ethnic origin.²⁹⁷ The CERD is further concerned that section 15 of Botswana's Constitution permits discrimination which is not justified under the ICERD as it is not applied pursuant to or is proportional to the achievement of a legitimate aim.²⁹⁸ The UNHRC also expressed a concern that section 15 of the Constitution

²⁸⁷ Constitution of Botswana, 1966 (Cap 01:01).

²⁸⁸ Constitution of Botswana, s 4.

²⁸⁹ Constitution of Botswana, s 5.

²⁹⁰ Constitution of Botswana, s 6.

²⁹¹ Constitution of Botswana, s 7.

²⁹² Constitution of Botswana, s 12.

²⁹³ Constitution of Botswana, s 9.

²⁹⁴ Constitution of Botswana, s 15.

²⁹⁵ C.M. Fombad, 'Botswana Introductory Notes' (2011) at page 4, available at

<http://web.up.ac.za/sitefiles/file/47/15338/Botswana%281%29.pdf>, accessed on 8 March 2014.

²⁹⁶ *Attorney-General v Dow* [1992] BLR 119.

²⁹⁷ CERD/C/BWA/CO/16, *op cit* (n9), paragraph 7.

²⁹⁸ CCPR/C/BWA/CO/1, *op cit* (n14), paragraph 9.

of Botswana does not comply with articles 2, 3, and 26 of the ICCPR.²⁹⁹ In 2004, Botswana Parliament amended sections 77 to 79 of the Constitution. The CERD took note of Botswana's willingness to ensure better representation in the House of Chiefs but it has expressed concern that such amendment reproduced discriminatory rules relating to the participation of ethnic groups in this institution.³⁰⁰

Concerns have also been raised regarding some of Botswana's domestic laws. The High Court of Botswana held in *Kamanakao v Attorney General of Botswana*³⁰¹ that the Chieftainship Act was discriminatory as it did not recognise the Wayeyi as one of the tribes of Botswana. The court therefore ordered that the Act be amended. The CERD has noted with concern that the Botswana has not yet amended the Chieftainship Act as ordered by the High Court as such it remains in violation of the ICERD.³⁰² In addition, the CERD has noted that the Tribal Territories Act contravenes the ICERD as it discriminates against non-Tswana ethnic groups.³⁰³ Section 63 (2) of the Penal Code of Botswana provides for death penalty as punishment for treason, murder and assault during piracy. Botswana's status as a death retentionist state continues to raise concerns.³⁰⁴ In view of the fact that Botswana laws do not define torture, the UNHRC has suggested that Botswana should criminalise torture and offer reparations to torture victims.³⁰⁵ The UNHRC has also condemned the laws of Botswana that permit corporal punishment.³⁰⁶

In addition, some of Botswana's policies have been criticised for displaying a shortcoming in the protection of human rights. The CERD has noted that Botswana has implemented its objective to build a nation based on the principle of equality for all in a manner that is detrimental to the protection of cultural and ethnic diversity.³⁰⁷ Of particular reference is the relocation of the San/Basarwa from the Central Kalahari Game Reserve to formal settlements where the Government of Botswana is of the view that they will be

²⁹⁹ CCPR/C/BWA/CO/1, *op cit* (n14).

³⁰⁰ CERD/C/BWA/CO/16, *op cit* (n11).

³⁰¹ *Kamanakao v Attorney-General* 2001 BLR 654.

³⁰² *Kamanakao v Attorney-General supra* (n290). See also CERD/C/BWA/CO/16, *op cit* (n9) at paragraph 11.

³⁰³ A/57/18 *op cit* (n12).

³⁰⁴ CCPR/C/BWA/CO/1, *op cit* (n14), paragraph 13.

³⁰⁵ CCPR/C/BWA/CO/1, *op cit* (n14), paragraph 15.

³⁰⁶ CCPR/C/BWA/CO/1, *op cit* (n14), paragraph 19.

³⁰⁷ CERD/C/BWA/CO/16, *op cit* (n9) paragraph 9.

developed and would equally access infrastructure and services like all Batswana. This culminated into court a case: *Sesana v Attorney General*.³⁰⁸ The CERD has noted that in relocating the San/Basarwa, the government of Botswana did not pay particular attention to the fact that the relocation would sever the close cultural ties that the San/Basarwa have to their ancestral land and to their economic activities such as hunting and gathering practices that are an important aspect of their culture.³⁰⁹ The CERD has noted that Botswana is reluctant to recognize the existence of indigenous peoples on its territory hence it urged Botswana to respect and protect the existence and cultural identities of all ethnic groups, as well as to review its policy on indigenous peoples.³¹⁰ The UNHRC has also criticised Botswana for overcrowded prisons and a large number of prison remands.³¹¹

Unlike its South African and Zimbabwean counterparts, the Constitution of Botswana does not provide for the status of international law in the interpretation of the Bill of rights. In *Attorney- General v Dow*,³¹² the court held that treaty law cannot automatically be applied in Botswana. Parliament has to domesticate international law through an Act of Parliament in order for it to be applicable in Botswana. The Interpretation Act however opens a door for the application of international law in Botswana. It provides that treaties may be used in interpreting the law where the wording of an Act of Parliaments is unclear.³¹³ In *Amadou Oury Bah v Libyan Embassy*,³¹⁴ the Industrial Court also held that customary international law is applicable in Botswana if it is consistent with national laws. Botswana is party to some international and regional human rights instruments that promote and protect human rights.

Out of the ten core international human rights instruments³¹⁵ Botswana is party to only five and these are: ICERD; ICCPR; CEDAW; CAT; and . Regionally, Botswana is party to the African Charter, Convention Governing the Specific Aspects of Refugee Problems in Africa, Protocol to the African Charter on the Establishment of the African Court on Human

³⁰⁸ *Sesana v Attorney-General* 2002 (1) BLR 352 (HC).

³⁰⁹ *Op cit* (n13).

³¹⁰ *Ibid*.

³¹¹ *Op cit* (n15).

³¹² *Attorney-General v Dow supra* (n285).

³¹³ Interpretation Act (Cap 01:04) s 24.*

³¹⁴ *Amadou Oury Bah v Libyan Embassy* 2006 [1] BLR 22 (IC), 25.

³¹⁵ See (n101) for a list of the ten core human rights instruments.

and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.³¹⁶ These treaties and all other international instruments will apply in the interpretation of the Bill of Rights in Botswana if Parliament has passed a law domesticating them, where the wording of an Act of Parliaments is unclear or if they are consistent with national laws.

5.3. Institutional Framework

The Constitution of Botswana recognises a separation of powers. Just like the Constitution of South Africa, there is no express mention of the word 'separation of powers' but the principle of separation of powers is implied in the establishment of the three branches of government in the Constitution. One of the three branches of government, namely, the judiciary, particularly the High Court has been the main mechanism for the protection of human rights since independence. Section 18 of the Constitution of Botswana defines the role of the courts of Botswana in protecting human rights. An aggrieved party can apply to the High Court for redress alleging actual or a threat of violation of the rights contained in the Bill of Rights.³¹⁷ The High Court has original jurisdiction in relation to hear and determine applications of alleged actual or threatened human rights violation.³¹⁸ The fact that the High Court is vested with original jurisdiction in such matters does not however preclude a subordinate court from dealing with the interpretation of a Bill of rights if it arises during any of its proceedings.³¹⁹

If one of the parties in a matter being determined before a subordinate court requests that the matter be referred to the High Court, the presiding officer is may grant or decline such a request.³²⁰ If the request is granted, the High Court shall have jurisdiction to determine the question arising in such a case.³²¹ The remedies which the High Court can order include issuing writs and giving directions as it considers appropriate for the purpose of ensuring that

³¹⁶ See generally, ratification of International Human Rights Treaties – Botswana, available at:

<http://www1.umn.edu/humanrts/research/ratification-botswana.html>, accessed on 03 June 2014.

³¹⁷ Constitution of Botswana, s 18 (1).

³¹⁸ Constitution of Botswana, s 18 (2) (a).

³¹⁹ Constitution of Botswana, s 18 (3).

³²⁰ *Ibid.*

³²¹ Constitution of Botswana, s 18 (2) (b).

justice is duly administered.³²² This is a significantly wide scope of powers endowed on the High Court.

The courts of Botswana have so far interpreted and enforced various provisions of the Bill of Rights. A critical review of these cases is beyond the scope of this chapter. Nevertheless, a sample of such cases is worth undertaking to demonstrate the role which the Courts of Botswana continue to play in the protection of human rights. The Courts of Botswana have dealt with cases involving the interpretation and enforcement of the right to life;³²³ freedom of conscience;³²⁴ the right to personal liberty;³²⁵ freedom of expression;³²⁶ protection from deprivation of property;³²⁷ protection from inhuman treatment;³²⁸ freedom from discrimination;³²⁹ the right to protection of the law;³³⁰ and freedom of association.³³¹ The courts of Botswana continue to play a significant role in the protection of human rights.

Unlike in South Africa and Zimbabwe, institutions that support democracy in Botswana are not constitutionally entrenched. Such institutions are established by Acts of Parliament and these are: Independent Electoral Commission; Office of the Ombudsman and Directorate on Corruption and Economic Crime. Although the civil society is neither constitutionally entrenched nor statutorily regulated, it continues to play a vital role in promoting human rights alongside these institutions. The Ombudsman Office has been presented by Botswana to the international community as an institution with a mandate to promote and protect human rights.³³² This chapter examines the extent to which the

³²² Constitution of Botswana, s 95 (5).

³²³ *Ditshwanelo v Attorney-General* [1999] 2 BLR 56.

³²⁴ *Zachariah v BPC* [1996] BLR 710.

³²⁵ *Serurubela v Attorney-General* [1998] BLR 661.

³²⁶ *Media Publishing v Attorney-General* [2001] BLR 485.

³²⁷ *Azard Hauliers (Pty) Ltd v Attorney-General* [1985] BLR 144.

³²⁸ *Moatshe v State* [2003] 1 BLR 65 and *Petrus v the State* [1984] BLR 14.

³²⁹ *SRC of Molepolole College of Education v Attorney-General* [1995] BLR 178 and *Attorney-General v Dow* [1992] BLR 119.

³³⁰ *Lesetedi v The State* [2001] BLR 393; *Sejammitlwa v Attorney General* [2002] 2 BLR 75; *Attorney-General v Muzila* [2003] 1 BLR 471; *Masuku v The State* [2004] 2 BLR 239; and *Charles v The State* [2005] 1 BLR 421.

³³¹ *BPC Workers Union v BPC* [1999] BLR 159.

³³² A/HRC/WG.6/3/BWA/1, *op cit* (n 324).

Ombudsman protects human rights in Botswana. This is done through examining whether its mandate and functions comply with the Paris Principles.

5.3.1. The Office of the Ombudsman

The Office of the Ombudsman is established by the Ombudsman Act.³³³ The mandate of the Office of the Ombudsman is to investigate alleged acts of maladministration perpetrated on members of the public by the government or authority in which government is a stakeholder.³³⁴ The purpose of establishing the Ombudsman office which is apparent in the preamble of the Ombudsman Act is to investigate maladministration in public institutions.

In the UPR country report of 2008, Botswana submitted that the Ombudsman's jurisdiction extends to the investigation of alleged violations of constitutionally enshrined fundamental rights and freedoms.³³⁵ The Office of the Ombudsman also revealed to the African Commission on Human and Peoples' Rights that it deemed itself to have the mandate to deal with human rights issues.³³⁶ Both the Botswana government and the Office of the Ombudsman based their submissions on interpretation of section 3(3)(b) of the Ombudsman Act which provides that:

'Notwithstanding the provisions of subsection (2), the Ombudsman- (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).'

The interpretation that section 3(3)(b) of the Ombudsman Act confers the Ombudsman with a mandate to deal with human rights issues has been negated. It has been argued that:

'Firstly an interpretation of section 3 (3)(b) of the Act does not lend credence to the assertion that the Ombudsman has been clothed with the mandate to deal with human rights issues. The correct interpretation of

³³³ Ombudsman Act (02:12).

³³⁴ Ombudsman Act, s 3.

³³⁵ *Op cit* (n332).

³³⁶ African Commission Report to the Republic of Botswana (2005), available at

http://www.achpr.org/files/sessions/38th/mission-reports/botswana/misrep_promo_botswana_2005_eng.pdf, accessed on 10 June 2014.

this provision is that the Ombudsman is not, in the event that he is entitled to investigate a matter in accordance with the Act, precluded from investigating on account of the fact that the complainant has a right to approach the High Court under Section 18 of the Constitution. In the absence of any other specific provision mandating the Ombudsman to handle human rights issues, the provision does not clothe the Ombudsman with the power to investigate human rights violations. Secondly, a holistic interpretation of the provisions of the Act does not support this assertion particularly because the redress scheme of the Act is not designed to deal with human rights complaints. The fact that action taken with respect to orders or directions to the Botswana Police Service of Botswana Defence Force or members thereof cannot be investigated further buttresses the point that the whole scheme of the Act was not crafted to investigate and address the allegations of human rights violations. Excluding these institutions from possible investigations will deprive those who have been subjected to police brutality, for example, from obtaining any redress.³³⁷

The essence of this argument is that the Ombudsman is not a NHRI. NHRIs have been defined as independent bodies which governments have established for the specific purpose of promoting and protecting human rights.³³⁸ The Office of the Ombudsman is only mandated to investigate complaints of maladministration and it has not been specifically mandated to investigate human rights issues.

A further argument is made that the Ombudsman Act legislates for only one function of the Office of the ombudsman which is investigation of alleged maladministration in the public sector. The Paris Principles on the other hand establish seven responsibilities of NHRIs. These are: to advise government and any other competent bodies concerning the promotion and protection of human rights; to promote and ensure the harmonization of national legislation and practices with international human rights practice; to encourage ratification, accession and implementation of international human rights instruments; to contribute to the reports which states are required to submit to the UN bodies and committees and to regional institutions; to cooperate with the UN and any other organisation in and other national human rights institutions; to assist in the formulation of programmes for the teaching and research into human rights and to take part in their execution; and publicising human rights through education and the press.³³⁹ None of these responsibilities appear as a function of the Office of the Ombudsman in the Ombudsman Act. The Office of the Ombudsman therefore does not comply with the Paris principles on competence.³⁴⁰

³³⁷ BR Dinokopila, *op cit* (n8) at page 55-56.

³³⁸ *Op cit* (n31).

³³⁹ *Op cit* (n435).

³⁴⁰ *Ibid.*

Although the Ombudsman does not have *de jure* jurisdiction to handle allegations of human rights violations, it appears that it has assumed that mandate nonetheless.³⁴¹ It has been revealed that the Ombudsman deals with human rights violation complaints from prisoners.³⁴² This dissertation notes that human rights protestations reported by prisoners at the Office of the Ombudsman are not the only human rights violations that exist in the country. The former Ombudsman of Botswana, Lepodise, noted that there is an increasing number of human rights violations in Botswana and acknowledged the incapacity of his office to handle these matters. He recommended that Botswana should establish a NHRI.³⁴³

Leodise's submission syncs with the observations of the Committee on the Rights of the Child. while taking note of the existence of the Office of the Ombudsman in Botswana, the Committee on the Rights of the Child expressed concerns at the fact that the office lacks the necessary human and financial resources for proper functioning.³⁴⁴ The UNHRC also acknowledged the existence of the Office of the Ombudsman but expressed concern that there is no national human rights institution in Botswana. It therefore called for the establishment of such an institution in accordance with the Paris Principles.³⁴⁵

Botswana accepted the recommendation to establish an independent NHRI for the promotion and protection of human rights at its UPR session in 2008. The government of Botswana is still engaged in the process of establishing the institution. In November 2013, Botswana advertised the post of Deputy Permanent Secretary under the Ministry Defence, Justice and Security to facilitate the creation and functioning of a NHRI.³⁴⁶ This effort is commendable. It signifies that advocacy for the need to establish a NHRI in Botswana has been successful. It signifies that Botswana recognises that there is an institutional gap hampering the promotion and protection of human rights.

³⁴¹ BR Dinokopila, *op cit* (n8), at page 56.

³⁴² A Look *et al* 'Is Botswana the Miracle of Africa?' 19 (2010) 453 at page 484.

³⁴³ E Keoreng, *op cit* (n7).

³⁴⁴ Concluding Observations of the Committee on the Rights of the Child, Botswana, CRC/C/15/Add.242 (2004), paragraph 16, available at <http://www1.umn.edu/humanrts/crc/botswana2004.html>, accessed on 12 June 2014.

³⁴⁵ *Op cit* (n17).

³⁴⁶ Minister of Justice, Defence and Security 'Vacancy Circular No 9 of 2013' *op cit* (n16).

The next section discusses the lessons learnt from the South Africa and Zimbabwe case studies to suggest the process which is in line with the Paris Principles which Botswana should follow to establish its NHRI.

5.4. Lessons from South Africa and Zimbabwe

5.4.1. Competence and responsibilities of national human rights institutions

It has been established that the Paris Principles require NHRIs to be given the mandate to promote and protect human rights through the constitution or legislation.³⁴⁷ The SAHRC has been found to comply with this requirement as it is established in the Constitution and under the SAHRC Act. These two Acts of Parliament expressly give the SAHRC a human rights mandate which includes: to promote respect for human rights and a culture of human rights,³⁴⁸ to promote the protection, development and attainment of human rights;³⁴⁹ and to monitor and assess the observance of human rights in South Africa.

The ZHRC was also found to be in compliance with the Paris Principle requiring that NHRIs must be given the mandate to promote and protect human rights through a constitutional or legislative text. The ZHRC is established in the Constitution of Zimbabwe and its functions as stipulated in the Constitution of Zimbabwe and in the ZHRC Act include promoting the protection, development and attainment of human rights and freedoms,³⁵⁰ and to monitor, assess and ensure observance of human rights and freedoms.³⁵¹

The lesson which Botswana can derive from the above discussion is that it must establish its NHRIs in the Constitution. There will be need for the constitution to be amended in order to accommodate this initiative. There must also be an Act of Parliament which provides for the powers and functions of the institution. Both the Constitution and the Act of Parliament must expressly give the NHRI a human rights promotion and protection mandate.

It has also been established that the Paris Principles require NHRIs to have responsibility to advice government, parliament and any other competent bodies on human

³⁴⁷ *Op cit* (n41).

³⁴⁸ *Op cit* (n140).

³⁴⁹ *Op cit* (n141).

³⁵⁰ *Op cit* (n271)

³⁵¹ *Op cit* (n272).

rights matters.³⁵² The SAHRC Act accordingly gives the SAHRC the mandate to advise the government of South Africa on the implementation of and compliance with international and regional law.³⁵³ The same applies to the ZHRC.³⁵⁴ A lesson derived from this discussion is that the legislation establishing the NHRI in Botswana must give the institution a mandate to advise government and any other competent body on issues of human rights.

In addition, it has been established that the Paris Principles require NHRIs to promote and ensure the harmonization of national legislation and practices with international human rights practices.³⁵⁵ NHRIs are also mandated to encourage the state to ratify international human rights instruments and to ensure their effective implementation on the ground.³⁵⁶ The SAHRC performs the mandate to advise the government of South Africa on the implementation of and compliance with international and regional law.³⁵⁷ In advising the government of South Africa on the implementation of and compliance with international and regional law, the SAHRC also ensures the harmonization of national legislation with international human rights instruments to which South Africa is a party to as well encouraging ratification of such instruments.

In contrast, there are no provision in the ZHRC Act which give the ZHRC the mandate to promote and ensure the harmonization of national legislation and practices with international human rights practices. There is also no provision which gives the ZHRC the mandate to encourage the state to ratify international human rights instruments and to ensure their effective implementation on the ground. In order to comply with the Paris Principles, Botswana is encouraged to legislate for its NHRI to promote and ensure the harmonization of national legislation and practices with international human rights practices. The legislation must also have a provision that gives the national human rights institution a function to encourage the ratification of international human rights instruments and to ensure their effective implementation.

³⁵² *Op cit* (n44).

³⁵³ *Op cit* (n161).

³⁵⁴ *Op cit* (n275) and (n276).

³⁵⁵ *Op cit* (n49).

³⁵⁶ *Op cit* (n50).

³⁵⁷ South African Human Rights Commission Act, s 13(1)(b) (iv) read together with s 13(1) (b)(v).

Moreover, it has been established that the Paris Principles require cooperation of NHRIs with regional institutions and the national institutions of other countries.³⁵⁸ The SAHRC Act mandates the SAHRC to maintain close liaison with institutions, bodies and authorities with similar objectives in order to foster common policies and practices.³⁵⁹ The ZHRC also has responsibilities to co-operate with human rights institutions belonging to international, continental or regional organisations of which Zimbabwe is a member.³⁶⁰ This therefore leads to the conclusion that in order to comply with the Paris Principles, the legislation establishing the NHRI in Botswana must give it the mandate to cooperate with NHRIs of other countries.

It has further been established that the Paris Principles require NHRIs to have the responsibility to contribute to the reports which states are required to submit to the different treaty monitoring bodies.³⁶¹ There are no provisions in the Constitution of SAHRC Act which expressly state that the SAHRC shall contribute to the reports which South Africa is required to submit to the different treaty monitoring bodies. However, it can be argued that by submitting reports to the National Assembly pertaining to treaties, conventions covenants or charters which South Africa is party to,³⁶² the SAHRC is contributing to the reports which South Africa is required to submit to the different treaty monitoring bodies. The government of South Africa can use such information in compiling its reports to the treaty monitoring bodies

On the other hand, the ZHRC is mandated to require any person, institution or agency to provide it with the information that 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.³⁶³ This section is an express mandate given to the ZHRC to contribute to the reports which Zimbabwe is required to submit to the treaty monitoring bodies. A lesson learnt from this discussion is that in order to comply with the Paris Principles, it is pertinent for Botswana to give its NHRI a function to contribute to the reports which it [Botswana] is required to submit to different treaty monitoring bodies. This would

³⁵⁸ *Op cit* (n51).

³⁵⁹ *Op cit* (n178)

³⁶⁰ Zimbabwe Human Rights Commission Act, s 4 (e).

³⁶¹ *Op cit* (n54).

³⁶² *Op cit* (n169).

³⁶³ Constitution of Zimbabwe, s 244 (1)(b).

remedy the concern which was previously raised that Botswana has a ‘backlog of reports in almost all international human rights protection bodies’.³⁶⁴

Penultimately, it has been established that the Paris Principles require NHRIs to publicize human rights and increase public awareness, especially through information and education and all press organs.³⁶⁵ The SAHRC Act gives the SAHRC the mandate to educate³⁶⁶ and to develop an awareness of human rights among all the people of South Africa. The ZHRC Act also gives the ZHRC the mandate to promote awareness of and respect for human rights and freedoms at all levels of society.³⁶⁷ In seeking to establish a NHRI which is compliant to the Paris Principles, Botswana must therefore follow South Africa and Zimbabwe. Botswana must legislate for its NHRI to be responsible for publicising human rights and ensuring public awareness through education and the media.

Finally, it has been established that the Paris Principles require NHRIs to develop and be involved in the implementation of educational human rights curriculum for schools, universities and professional cadres as well as to encourage research into human rights.³⁶⁸ The SAHRC Act mandates the SAHRC to develop, conduct and manage information and education programmes to as well as to encourage research into human rights.³⁶⁹ The ZHRC on the other hand has not been enabled to carry out such a function. It has only been given a function to research into human rights issues.³⁷⁰ In order to comply with the Paris Principles, Botswana must take the approach taken by South Africa by giving its NHRI the mandate to contribute to the development and teaching of human rights syllabuses at various learning institutions and to encourage research into human rights issues.

³⁶⁴ *Op cit* (n8).

³⁶⁵ *Op cit* (n55).

³⁶⁶ *Op cit* (n172).

³⁶⁷ Constitution of Zimbabwe, s 243 (1)(a).

³⁶⁸ *Op cit* (n56).

³⁶⁹ South African Human Rights Commission, s 13 (1)(a)(b)(i).

³⁷⁰ Constitution of Zimbabwe, s 241 (1)(j).

5.4.2. Composition and guarantees of independence and pluralism

It has been established that the Paris Principles provide that the composition of a NHRI and the appointment of its members should be done through a process which ensures pluralism.³⁷¹ Pluralism refers to the representation of the social stakeholders involved in the promotion and protection of human rights. In that regard, the Constitution of South Africa mandates the SAHRC to consider race and gender in the appointment of its members.³⁷² In contrast, the constitutional and other legislative provisions establishing the ZHRC do not guarantee pluralism in its [the commission's] composition. Botswana is advised to ensure that the legislation establishing its NHRI guarantees pluralism by providing for the appointment of various stakeholders who are involved in human rights promotion and protection.

It has further been established that NHRIs are required to be independent³⁷³ and that four factors are used to gauge the independence of national human rights institutions. These are: legal autonomy, operational independence, financial independence and independence through appointment and dismissal procedures.³⁷⁴

Both the SAHRC and the ZHRC were found to have legal autonomy. As stated under 'competencies and responsibilities' above, both these institutions are established in the Constitution and in an Act of Parliament. In addition, it is clear within the Constitution and the Act of Parliament establishing these two institutions that they [the commissions] have the mandate to promote and protect human rights. As already recommended above, Botswana must establish its NHRI in the Constitution and in an Act of Parliament and expressly give it the mandate to protect and promote human rights.

In addition, both the SAHRC and the ZHRC have been found to comply with the principle of independence based on appointment and dismissal procedures. The procedures to be followed in the appointment and dismissal of the members of these commissions are provided for in the respective constitutions and Acts of Parliament. Moreover, both the SAHRC and the ZHRC comply with the principle of operational independence as they are at liberty to determine how to conduct their day to day activities. Botswana must therefore provide for the terms of appointment and dismissal of its members in the legislation

³⁷¹ *Op cit* (n57).

³⁷² *Op cit* (n177).

³⁷³ A/Res 48/134 *op cit* (n3) Composition and guarantees of independence and pluralism, Article 2.

³⁷⁴ *Op cit* (n64).

establishing its NHRI. The legislation must further give the institution independence to conduct its daily business without government direction or control. This would be compliance with the Paris Principles.

Finally, concerns have been raised concerning compliance of the SAHRC and the ZHRC with the principle of financial independence. The SAHRC has raised concerns about the placement of its budget under the Department of Justice and Constitutional Development. The commission has stated that this arrangement negatively impacts on its compliance with the Paris Principles. It has consequently requested that its budget should fall under Parliament's budget vote.³⁷⁵ The SAHRC's other concern is that its budget is not sufficient to enable it to carry out its functions effectively. As a result it has relied on donor funding for the socio-economic rights reporting process.³⁷⁶

The ZHRC has also faced challenges of complying with the principle of financial independence. Just like the SAHRC, the placement of the ZHRC's budget under the Ministry of Justice and Legal Affairs negatively affects its compliance with the Paris Principles. In addition, the ZHRC has faced acute financial problems that have resulted in it not being effectively operational even up to date. The lack of funding of the ZHRC has caused international concern to the extent that donors have sought to intervene to assist the commission to resume operations in the interest of safeguarding human rights in Zimbabwe. The attitude with which the government is responding to concerns of the ZHRC's financial incapacitation has led to comments that the government of Zimbabwe lacks political will to fully operationalize the commission.

The experiences of the SAHRC and the ZHRC on financial independence serve as a very important lesson for Botswana. Botswana is advised not to place the budget of its NHRI under any government department as this gives the impression that the institution is part of government. The SAHRC is currently fighting the battle to have its budget removed from the Department of Justice and Constitutional Development. It would be unfortunate for Botswana, having had the opportunity to benchmark best practices from countries which have established NHRIs before it (in this instant, South Africa and Zimbabwe) to repeat the mistakes which such countries have made. It is appropriate that the budget of the institution

³⁷⁵ *Op cit* (n157).

³⁷⁶ *Op cit* (n160).

be placed under the National Assembly as the institution is responsible to Parliament for the performance of its functions.

Finally, Botswana is advised to have political will to support its NHRI to function effectively. The case of Zimbabwe has illustrated that lack of political will can hinder the NHRI from even beginning to operate. This is so because NHRIs must be funded by their states. If the government of any particular state is not desirous to have its NHRI to function at all or to function effectively, such lack of political will be evident in lack of or insufficient funding.

5.4.3. Methods of operation

It has been established that the Paris Principles provide that in their operations, NHRIs shall freely consider any question falling within their competence;³⁷⁷ hear any person and obtain any information necessary to assess situations within their jurisdiction;³⁷⁸ address the public directly or through the media;³⁷⁹ hold regular members' meetings;³⁸⁰ establish working groups and local or regional sections to help in the performance of their functions;³⁸¹ maintain consultations with other bodies whose mandate is to promote and protect human rights such as ombudsmen and mediators;³⁸² and develop relations to NGOs devoted to promoting and protecting human rights.³⁸³

It is worth noting that the above listed methods of operation are required to be evident within the whole framework of an institution's operation. They need not be expressly specified in legislation as 'methods of operation'. They can be encapsulated under various provisions of the Act, for example, under 'functions' the SAHRC Act among other things requires the SAHRC to liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objectives of the

³⁷⁷ *Op cit* (n73).

³⁷⁸ *Op cit* (n74).

³⁷⁹ *Op cit* (n75).

³⁸⁰ *Op cit* (n76).

³⁸¹ *Op cit* (n77).

³⁸² *Op cit* (n78).

³⁸³ *Op cit* (n79).

commission.³⁸⁴ Under ‘investigations’, the SAHRC Act empowers the SAHRC to obtain information necessary for its investigations from anyone.³⁸⁵

In the same token, the ZHRC also complies with this part of the Paris Principles in various provisions of its Act. For example, the ZHRC Act provides for procedure at the meetings of the commission³⁸⁶ and establishes working groups of the commission.³⁸⁷ The lesson to be learnt by Botswana is therefore that the legislative framework which establishes its NHRI must be found to encompass the Paris Principles on ‘Methods of operation’ when viewed holistically.

5.4.4. Additional principles concerning the status of commissions with quasi-judicial competence

The Paris Principles provide that NHRIs may be authorised to receive and investigate reported human rights violations³⁸⁸ and offer appropriate remedies.³⁸⁹ In line with this principle, the SAHRC is empowered by the Constitution to investigate actual or threatened human rights violations.³⁹⁰ The SAHRC Act then details the investigation process to be followed.³⁹¹ The ZHRC also has quasi-judicial competence as it is authorized to receive and consider complaints of human rights violations from the public³⁹² and provide appropriate redress.³⁹³ In order to comply with the Paris Principles, Botswana is advised to establish a NHRI with quasi-judicial competence just like South African and Zimbabwe. The powers of investigation and remedies (particularly mediation and conciliation) must clearly be specified in the legislation establishing the institution.

³⁸⁴ *Op cit* (n178).

³⁸⁵ South African Human Rights Act, s 15 (1)(b).

³⁸⁶ *Op cit* (n280).

³⁸⁷ *Op cit* (n281).

³⁸⁸ *Op cit* (n80).

³⁸⁹ See a list of the remedies which national human rights institutions can offer at (n81-84).

³⁹⁰ *Op cit* (n182).

³⁹¹ *Op cit* (n183).

³⁹² *Op cit* (n282)

³⁹³ *Op cit* (n284).

5.5. Conclusion

The Constitution of Botswana does not adequately protect human rights. It provides for civil and political rights only. It does not provide for socio-economic rights. There is a need for constitutional reform to bring the Botswana Constitution to the standard of the Constitutions of South Africa and Zimbabwe which recognise and protect cultural, social and economic rights over and above civil and political rights. Although international law is very important in the interpretation of the Bill of Rights as seen in the Constitutions of South Africa and Zimbabwe, the Constitution of Botswana does not mention the status of international law in the interpretation of the Bill of rights. Although such an omission is compensated for by the interpretation Act and case law, there is a need for the Constitution to be amended to have a clause providing for the use of international law in the interpretation of the Bill of Rights. Such a clause will serve as authority for invalidation of laws and policies which are inconsistent with international law.

The courts of Botswana continue to play an important role in the protection of human rights in Botswana. To optimise the judicial enforcement of Human rights, Botswana should consider establishing a constitutional court to specialise in constitutional issues and enforce the Bill of Rights. That is the case in South Africa and Zimbabwe. The emerging international trend is to constitutionally establish independent institutions to safeguard democracy and protect human rights over and above the use of the courts as human rights enforcement mechanisms. Botswana has established such institutions, namely the Electoral commission, the Directorate of Corruption and economic Crime and the Ombudsman. The institutions are not constitutionally entrenched hence the need to amend the constitution to entrench them therein.

There is a gap in Botswana's institutional framework. There is no NHRI which is established according to the Paris principles and has a specific mandate to promote and protect human rights. The Office of the Ombudsman which is perceived to have the mandate to protect human rights does not have such a mandate. It has assumed the mandate to investigate human rights violations nonetheless. So far the office has reported that it investigates prisoners' human rights violation reports. Concerns have been raised that the office does not have the mandate as well as financial, human resources and expertise capacity to handle human rights issues. The UNHRC and the Commission on the Rights of the Child have acknowledged the presence of the Ombudsman but maintained that the Ombudsman is

not a NHRI and have called upon the government of Botswana to establish a national institution with specific mandate to promote and protect human rights.

Botswana undertook to establish a NHRI in 2008 at its first UPR session. Plans are underway for the establishment of such an institution. It is recommended that the legislation establishing such an institution must comply with the Paris Principles relating to composition and guarantees of independence and pluralism as well as methods of operation. The relevant legislation must also empower the NHRI to carry out the functions that are provided for in the Paris Principles which are: investigation of human rights violation reports, advising government on matters concerning the promotion and protection of human rights, promoting and ensuring the harmonization of national laws with international human rights instruments, encouraging ratification of international human rights instruments and ensuring their implementation, contributing to the report which Botswana is required to submit to the UN bodies, cooperating with UN, regional and other national institutions that are involved in the promotion and protection of human rights, researching and formulating human rights education curriculum and publicizing human rights through information and education.³⁹⁴

³⁹⁴ *Op cit* (n43).

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1. Introduction

This dissertation has discussed the concept of NHRIs in chapter 2. The chapter has defined and traced the evolution of NHRIs. It has been established that NHRIs are an integral part of the human rights protection system. Their formation was encouraged by the international community after realisation that states fail to ratify international human rights instruments or if they do, they fail to domestically incorporate the said instruments into their domestic laws. NHRI therefore complement the UN and regional systems in the promotion and protection of human rights by assisting states to comply with their international human rights obligations.

The Paris Principles guide states on how to establish effectively functioning NHRI. These principles were passed through a UN resolution and they have become a framework for the functions and structure of NHRIs. The Paris Principles require that NHRIs must advise government on matters concerning the promotion and protection of human rights, promote and ensure the harmonization of national laws with international human rights instruments, encourage ratification of international human rights instruments and ensure their implementation, contribute to the reports which Botswana is required to submit to the UN bodies, cooperate with UN, regional and other national institutions that are involved in the promotion and protection of human rights, research and formulate human rights education curriculum and publicize human rights through information and education.³⁹⁵

In addition, the Paris Principles require that national laws establishing NHRIs must guarantee pluralism and independence of those institutions.³⁹⁶ Finally, national laws establishing NHRIs must provide for their mode of operation as established in the Paris Principles, for example, holding of regular meetings and formation of commissions of the committee specialising on thematic areas of human rights.³⁹⁷

Chapters 3 and 4 discussed the SAHRC and ZHRC respectively. Emphasis was placed on examining their compliance with the Paris Principles. The findings reveal that the national

³⁹⁵ *Op cit* (n36).

³⁹⁶ UN General Assembly resolution 48/134 *op cit* (n3), Principles on composition and guarantees of independence and pluralism, Articles 1-3.

³⁹⁷ UN General Assembly resolution 48/134 *op cit* (n3) Principles on Methods of operation, paragraphs a-g.

laws establishing both the SAHRC and ZHRC substantially comply with the Paris Principles. Their shortcoming lies in the fact that they are both established under the Ministry of Justice in their respective countries which has negative implications on their financial independence. The placing of these institutions under government ministries makes them appear like they are part of government. The Zimbabwe case study particularly reveals that it is important for states to show political will to support their NHRIs. The lack of political will on the part of the Zimbabwean government has led to the delayed operation of the ZHRC. The Commission is not only constrained by lack of financial support from the government but it is constrained by government's lack of political will to meet the requirements of financial donors who have displayed interest to bail it from financial crisis.

The study of the legal and institutional framework undertaken under chapters 3 and 4 was meant to justify the findings made in chapter 5 that despite its good human rights record, there is a need for Botswana to establish a NHRI. It has been demonstrated that South Africa and Zimbabwe have established NHRIs to specifically promote and protect human rights despite the fact that their laws comprehensively protect human rights and despite the fact that they have various other institutions that enforce and protect human rights. The legal and institutional gaps identified in Botswana's human rights protection system in Botswana further justify the conclusion that there is a need to establish a NHRI to specifically promote and protect human rights in Botswana. The establishment of a NHRI in Botswana will not only improve the institutional human rights protection framework but it would also improve Botswana's legal framework. The NHRI will advise the Botswana government to ratify treaties and domesticate them in national laws as well to monitor and report on human rights issues. It will lobby for the invalidation of laws and policies which are inconsistent with international human rights standards as contained in various international instruments. Botswana has undertaken to establish such an institution. The purpose of this chapter is therefore make recommendations in relation to the issues raised by previous chapters in order to ensure that Botswana establishes a NHRI which complies with the Paris Principles.

6.2. Recommendations

6.2.1. Constitutional reform

The discussion in chapter 5 has indicated that the Constitution of Botswana does not provide for cultural, civil and political rights. It also does not have provide for institutions that support democracy and protect human rights. Concerns have been raised that the Constitution does not combat discrimination and define torture. Many laws and policies in Botswana have also been found to be contrary to international law. It is recommended that the Constitution of Botswana should be amended to recognise and protect cultural, social and economic rights as well as to entrench institutions that support democracy and promote human rights. In addition, although international law is very important in the interpretation of the Bill of Rights as seen in the Constitutions of South Africa and Zimbabwe, the Constitution of Botswana does not mention the status of international law in the interpretation of the Bill of rights. Despite such an omission being compensated for by the interpretation Act and case law, there is a need for the Constitution to be amended to have a clause that provides for the use of international law in the interpretation of the Bill of Rights

Further, to optimise the judicial enforcement of Human rights, Botswana should consider constitutionally establishing a constitutional court to specialise in constitutional issues and enforce the Bill of Rights. That is the case in South Africa and Zimbabwe. Furthermore the emerging international trend is to constitutionally establish independent institutions to safeguard democracy and protect human rights over and above the use of the courts as human rights enforcement mechanisms. Botswana has established such institutions, namely the Electoral commission, the Directorate of Corruption and economic Crime and the Ombudsman. The institutions are not constitutionally entrenched hence the need to amend the constitution to entrench them therein. It is pertinent for the NHRI which Botswana is in the process of establishing to be established in the Constitution to ensure its independence.

6.2.2. Financial Independence and political will

Chapter 3 discussed political will as a major contributor to the lack of financial independence on the part of the ZHRC. The government of Zimbabwe cannot fund the ZHRC to function effectively yet it cannot cooperate with donors who wish to assist the Commission to come to full operationalization. It is apparent that there is no political will to get the ZHRC to function

effectively. It is therefore recommended that Botswana must provide political will to the NHRI which it is establishing to ensure compliance with the Paris Principles. Such political will be evident in sufficient funding of the NHRI and cooperation with donors to enable the NHRI to have financial independence to acquire premises, purchase cars, carry out its functions and employ and pay its personnel decently.

6.3. Concluding remarks

The pertinent aspect of establishing a NHRI does not only lie in meeting formal legal requirements of the Paris Principles but it is also about practical implementation of the said requirements. Both the South Africa and Zimbabwe case studies have shown that it is one thing to comply with all the Paris Principles in legislation and it is another to operate a NHRI in accordance with the Paris Principles. South Africa has not only legislated for a Paris Principles compliant NHRI but the SAHRC has been operated in a manner that complies with the Paris Principles. Practical demonstration of the SAHRC's compliance with the Paris Principles was done under chapter 3. As a result, the SAHRC has been accredited as an 'A status' National human rights institution by the ICC since 1999. The commission sits in the ICC Bureau consisting of 16 'A status' National human rights institution representing the four regions of the ICC providing leadership in the promotion and protection of human rights to other NHRIs. The ZHRC on the other hand has been criticised as a paper tiger which only serves to tick national democracy reform boxes as opposed to performing the functions which it is established to perform. It is yet to function effectively despite having been established in 2009. Finally, Political will on the part of states is important for both the effective establishment and functioning of a NHRI.

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