

Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence

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1 Introduction

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

In an attempt to curb these violations, close to 100 countries have established national human rights institutions to serve as independent bodies for the protection and promotion of human rights. In Africa, 24 such institutions have been established.¹ The purpose of this contribution is to examine the independence of these institutions, focusing

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¹ Human Rights Watch identified the following national human rights commissions in Africa: Observatoire National des Droits de l'Homme (Algeria); Commission Beninoise des Droits de l'Homme (Benin); National Commission on Human Rights and Freedoms (Cameroon); Haut-Commissariat charge des Droits de l'Homme et de la Promotion de la Culture Democratique (Central African Republic); Commission Nationale des Droits de l'Homme (Chad); National Commission for Human Rights and Ombudsman (Ethiopia); Commission on Human Rights and Administrative Justice (Ghana); Standing Committee on Human Rights (Kenya); Human Rights Commission (Liberia); Human

particularly on the Ugandan Human Rights Commission (UHRC) and the South African Human Rights Commission (SAHRC).

The UHRC was founded in November 1996, on the recommendation of the Commission of Inquiry into Violations of Human Rights in Uganda (CIVHU) which was established by the National Resistance Army Movement (NRAM) government in 1986. The CIVHU had to document human rights violations in Uganda, occurring during the period 1962 to 1986 when the country was governed by various repressive regimes. Pursuant to its findings, CIVHU proposed to the Uganda Constitutional Commission (UCC) that a permanent and independent human rights Commission be included in the new constitutional draft.² This proposal was accepted by UCC and provision for the establishment of the UHRC was made in the constitutional draft. When the Uganda Constitution was adopted in 1995, the UHRC was constitutionally entrenched in articles 51 to 59. These articles define the function, powers, and structure of the institution.

Although the SAHRC came into being under similar political circumstances, its establishment was not recommended by a commission of inquiry. 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. The SAHRC was established with a view to ensure that 'the appalling human rights abuses of South Africa's past could not be repeated'.³

The interim Constitution,⁴ which came into force on 27 April 1994, made provision for a wide array of government-funded monitoring bodies⁵, including a national human rights commission. After the 1994

Rights Commission (Malawi); Commission Nationale Consultative des Droits de l'Homme (Mali); Commissariat aux Droits de l'Homme, a la Lutte contre la Pauvrete et a l'Insertion (Mauritania); Conseil Consultatif des Droits de l'Homme (Morocco); Commission Nationale des Droits de l'Homme et des Libertes Fondamentales (Niger); National Human Rights Commission (Nigeria); Commission National des Droits de l'Homme (Rwanda); Comite Senegalais des Droits de l'Homme (Senegal); National Commission for Democracy and Human Rights (Sierra Leone) South African Human Rights Commission (South Africa); Advisory Council for Human Rights (Sudan); Commission Nationale des Droits de l'Homme (Togo); Higher Committee on Human Rights and Fundamental Freedoms (Tunisia); Uganda Human Rights Commission (Uganda); Human Rights Commission (Zambia). See Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001).

² The UCC was established by the government of Uganda in 1988 and was charged with the task of writing a new draft constitution for Uganda.

³ Human Rights Watch (n 1 above) 293.

⁴ Constitution of the Republic of South Africa Act 200 of 1993.

⁵ Chapter 8 of the interim Constitution provides for the office of the Public Protector, a Human Rights Commission and the Commission on Gender Equality. In addition to these institutions the final Constitution of the Republic of South Africa Act 108 of 1996 provides for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (art 185–186), an Auditor-General (art 188), an Electoral Commission (art 190–191) and an Independent Authority to Regulate Broadcasting (art 192).

elections, South Africa's first democratically elected parliament drafted legislation establishing the SAHRC and President Mandela signed the Human Rights Commission Act⁶ into law on 23 November 1994. The Act came into force in September 1995 and the SAHRC held its first working session in October 1995.

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

2 Importance of independence

The independence and impartiality of national human rights institutions are frequently cited as prerequisites for their effective operation.⁷ As far as national human rights commissions are concerned, the United Nations (UN) maintains that such institutions should operate in such a manner that their independence is beyond reproach.⁸ The Paris Principles,⁹ which were adopted at a workshop organised under the auspices of the UN Commission on Human Rights, provide as follows with regard to the independence of national human rights institutions:

Composition and guarantees of Independence and Pluralism

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

⁶ Human Rights Commission Act 54 of 1994.

⁷ See, eg, Commonwealth Secretariat Human Rights Unit *National human rights institutions: Manual* (1998) 15; UN Centre for Human Rights *National human rights institutions: A handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (1995) 10.

⁸ UN Centre for Human Rights (n 7 above) 10.

⁹ The Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights, Resolution 18/134 of 20 December 1993. The principles were adopted at a workshop that was held in Paris from 7 to 9 October 1991.

- a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
 - b) Trends in philosophical or religious thought;
 - c) Universities and qualified experts;
 - d) Parliament;
 - e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).
- 2 The national institution shall have infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
 - 3 In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

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

Independence is, however, a relative concept as far as national human rights institutions are concerned. The relativity of the concept manifests itself in three ways. Firstly, national human rights institutions are established by law and thus derive their powers and functions from the enabling and empowering legislation. As such, they are inextricably linked to the legislature. The legislature therefore has the competence to determine the extent to which the institutions can exercise their authority. Secondly, it is an established and general practice for national human rights institutions to be required to report on their activities to parliament in most jurisdictions. This requirement ensures that these institutions do not exercise their powers arbitrarily. Lastly, a lack of full financial autonomy is another reality that inhibits complete independence.

The preceding paragraph gives some indication of the complex nature of the relationship between national human rights institutions and governments.¹⁰ The reporting obligations and financial dependence

¹⁰ The relationship is complicated by the fact that it does not fit easily into the normal structure of democratic governance. In the South African context, this is so because the government has overlapping accountabilities to parliament and the SAHRC. The relationship is further complicated by the fact that the SAHRC, just like the UHRC, primarily depends on the government for financial support.

of national human rights institutions are important innovations aimed at ensuring accountability. However, it is also important that there is, at all times, an understanding of the nature of the underlying relationship between these institutions and governments. The credibility of national human rights institutions and governments depends on the extent to which governments are prepared to respect the independence of the institutions and on the willingness of these institutions to respect governmental authority.

Although the establishment of a national human rights institution inevitably entails the imposition of specific restrictions on the institution, it is vital that restrictions on independence be minimal. Restrictions must not be of such a nature that the institution is rendered incapable of discharging its responsibilities. According to the Paris Principles and the guidelines laid down by the UN Centre for Human Rights,¹¹ the following four criteria are used to determine the independence of national human rights institutions:

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

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

3 Legal and operational independence

3.1 The UHRC

The 1995 Uganda Constitution establishes the UHRC as an independent state institution.¹² The Commission is compelled by the Constitution to be independent *in the performance of its duties*,¹³ and not to be subject to the direction or control of any person or authority.¹⁴ The question to be asked is whether this constitutional mandate has been effectively discharged.

¹¹ UN Centre for Human Rights (n 7 above) 10.

¹² Art 54 Constitution of the Republic of Uganda (1995).

¹³ My emphasis.

¹⁴ Art 54 Constitution of the Republic of Uganda (1995).

Uganda's history has been characterised by political turmoil and considerable executive control of all state institutions.¹⁵ All state institutions established under previous regimes were literally rubberstamps and did not enjoy any measure of independence from the government. Although the present government has attempted to change the position, much still needs to be done before there can be any public confidence in state institutions. It is in this light that the operational independence of the UHRC has to be evaluated.

That said, an examination of the work of the UHRC since its establishment¹⁶ reveals that the institution has managed to perform its constitutional functions to a great extent.¹⁷ This it has done independently of government, thus enhancing its credibility. The Commission has achieved this by exposing to the public human rights violations resulting from government's actions or inactions. The Commission has particularly criticised the government on three main areas of concern in Uganda.

In the first instance, the UHRC came out strongly against the death penalty and fiercely criticised the government's failure to abolish the death sentence.¹⁸ Secondly, the Commission was very critical on detentions without trial, detentions under inhuman conditions, and cruel, inhuman and degrading treatment.¹⁹ Thirdly, the Commission criticised the Ugandan government for its failure to curb the insurgencies in northern Uganda.²⁰

These three examples demonstrate that the UHRC can and does criticise the government. The fact that a state-created institution reacts strongly against state policies or human rights abuses perpetuated by the state may be taken as a clear indication that the institution is committed to the protection and promotion of human rights. In my opinion, such criticism also constitutes an unequivocal assertion of institutional independence from the government.

Apart from these three examples, the UHRC has also demonstrated its institutional independence by handing down crucial decisions against

¹⁵ For a discussion of the political history of Uganda, see the following: Report of the Commission of Inquiry into Human Rights Violations in Uganda *Findings, conclusions, and recommendations* (October 1994); B Wairama *Pearl of blood, A pamphlet summary of the report of the Uganda Commission of Inquiry into the Violations of Human Rights* (October 1994); D Mukholi *A complete guide to Uganda's Fourth Constitution: History, politics, and the law* (1995); O Odongo *A political history of Uganda* (2000).

¹⁶ The UHRC was established in November 1996 and opened its doors to the public for the first time in April 1997.

¹⁷ The Commission's functions are set out in art 53 of the Constitution of the Republic of Uganda (1995).

¹⁸ UHRC (June/July 1999) 2 *Your Rights* 2. See also UHRC (August 1999) 2 *Your Rights* 29.

¹⁹ UHRC *Annual Report* (1998) 31. See also UHRC (February 2000) 3 *Your Rights* 10.

²⁰ UHRC (n 19 above) 56.

government officials guilty of human rights abuses.²¹ Similarly, reports published by the Commission on the human rights situation in Uganda indicate a measure of independence from government.²²

These examples notwithstanding, the UHRC has been criticised for focusing on civil and political rights, thus failing to pay sufficient attention to the enforcement of socio-economic rights in Uganda. The Commission is said to have paid 'scant attention to these rights [socio-economic rights] in its 1997 annual report'.²³ Although the Commission is alleged to have failed 'to appreciate and emphasise the interrelationship that exists in the enjoyment of the two sets of rights'²⁴ in the report, it should not be crucified for this. Perhaps the reason for its apathy is the fact that socio-economic rights are not emphasised in Uganda. Ugandan courts also tend to deal with civil and political rights on a larger scale than socio-economic rights.²⁵ The failure to protect socio-economic rights can be attributed partly to the nature of the economic, social, cultural, political and legal environment under which the institution operates. In my opinion, the environment curtails the activities and operations of the Commission. Generally speaking, it is my argument that the UHRC acts independently of the government and has managed to contribute towards the creation of a culture of respect for human rights in Uganda. In the next section I consider the legal and operational independence of the SAHRC with a view to determine whether that institution carries out its mandate in an independent manner.

²¹ See, eg, the decisions of the Commission in the following cases: *Kasoga and Hon Basoga Nsadhuh* UHRC 264/97; *Katende Angello and Hon Zimula Mugwany* UHRC 16/98; *Masombuko Edward and Hon Muganwa Kajira* UHRC 679/98; *Mwesineza A and Hon Lt DG Gumisiriza* UHRC 804/98; *Busima T John and Hon AWH Kanyike* UHRC 926/98; *Makode Christopher and Hon Basoga Nsadhuh* UHRC 61/99; *Wandera Zephania and Hon Baitera Maiteki* UHRC 66/99; *Osekeny PE and Hon Tom Butime* UHRC 153/99; *Ssalongo Ibrahim Lulika and Hon Janat Mukwaya* UHRC 393/99; *Wanyera George and Hon Pajobo Joram* UHRC 444/99; *Mugabo Goret and Hon Eddy Kwizera* UHRC 479/99; *Begambagye G and Hon Stephen Karuma* UHRC 504/99; *Kasule Silas and Hon Tom Butime* UHRC 834/99; *Nyarubona Rose Mary and Hon Manzi Tumubweine* UHRC 870/99; *Katerega John and Hon Kezimbira Musingo* UHRC 1023/99; *Wafula Wilson and Hon Pascal Mukasa* UHRC 1147/99; *Siluma Charles and Hon Wanjusi Wasyeba* UHRC 1256/99; *Kabuga Onesimus and Hon Dr Timothy Mutesasira* UHRC 102/2000; *Ahim-bisibwe et al and Hon DG Gumisiriza* UHRC 201/2000; *Ruhemba K Ruth and Hon K Ruhemba* UHRC 308/2000; *Kizza Charles and Hon Miria Matembe* UHRC 655/2000; *Kubona L Louisa and Hon Basoga Nsadhuh* UHRC 769/2000.

²² In this regard see the UHRC (n 19 above). For a critique of the 1997 report, see A Makubuya 'Breaking silence: A review of the maiden report of the Uganda Human Rights Commission' (1999) 5 *East African Journal of Peace and Human Rights* 213.

²³ Makubuya (n 22 above) 213. The broad focus of the 1997 report was on civil and political rights.

²⁴ Makubuya (n 22 above) 213.

²⁵ This is evidenced by the fact that there are very few, if any, cases dealing with socio-economic rights that have come before Ugandan courts.

3.2 The SAHRC

The SAHRC is an independent, constitutionally entrenched institution.²⁶ The SAHRC is explicitly designated as a state institution supporting constitutional democracy.²⁷ The Commission is subject only to the Constitution and other organs of state are obliged, through legislative and other measures, to assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness.²⁸ They are also barred from interfering with its functioning.²⁹

Despite constitutional guarantees, practical problems remain in respect of the nature of the obligations imposed by the Constitution'.³⁰ The problem is said to be complicated by the 'variations of understanding of the nature and meaning of independence depending on who spoke among cabinet ministers'.³¹ The problem of the independence of the SAHRC is also said to stem from the fact that 'politicians seemed resentful about the extent of the independence from state institutions'.³²

Having realised the gravity of the problem and the fact that political whims were likely to affect its independence, the Commission decided that its members should desist from active participation in party politics and a register of members' interests was opened.³³ This was done immediately upon the commissioners assuming office. In an attempt to be people-centred, the Commission also forged links with non-governmental organisations (NGOs) and human rights experts through its standing committee system.³⁴ By incorporating the knowledge of

²⁶ Sec 181(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution). It should be noted that the SAHRC was established under secs 115–118 of the interim Constitution and the Human Rights Commission Act 54 of 1994 was passed under this Constitution.

²⁷ See in this regard ch 9 final Constitution.

²⁸ Sec 181(3) final Constitution.

²⁹ Sec 181(4) final Constitution.

³⁰ B Pityana 'National institutions at work: The case of the South African Human Rights Commission' (1998) unpublished paper on file with author 5.

³¹ Pityana (n 30 above) 5. The Commission also noted in its fourth annual report to parliament (SAHRC *Fourth Annual Report* December 1998–December 1999) that there is a lack of understanding of the role of the Commission within government circles and an inability to utilise the Commission to good effect. The problem, the Commission observes, emanates from the fact that 'in the minds of some civil servants and ministers, the Commission is of no more than nuisance value'.

³² Pityana (n 30 above) 5.

³³ See in this regard SAHRC *Annual Report* (1995–1996) 10.

³⁴ According to sec 5(1) of the Human Rights Commission Act 54 of 1994, the Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it. Sec 5(4) further provides that the committee shall, subject to the directions of the Commission, exercise such powers and perform such duties and functions of the Commission as the Commission may confer on or assign

people from outside, the Commission sought to emphasise the importance of partnerships with experts and members of civil society in the development of a national culture of human rights.³⁵

Although the SAHRC generally performs its functions independently of executive and political manipulations, there is a growing concern within the human rights community that it is not effectively discharging its constitutional mandate.³⁶ The Commission has been criticised for 'focusing on the 'softer' human rights issues and ignoring human rights issues with major relevance for South Africa'.³⁷ Concerns have also been raised about the Commission's operation and its broad mandate to protect and promote human rights.³⁸

The SAHRC has also been criticised for its alleged failure to promote human rights awareness in South Africa. The obligation to promote an awareness of human rights in the country falls within the Commission's promotional mandate.³⁹ In 1998 the Community Agency for Social Enquiry (CASE), which carried out research in a bid to assess the awareness of human rights and knowledge about the Bill of Rights among the general South African public and specified target groups,⁴⁰ found that just over half of the South African population (55%) had heard about the Bill of Rights.⁴¹ In addition, CASE found that participants were in the dark regarding organisations and structures that were available to assist them. No mention of human rights bodies such as the SAHRC, Commission for Gender Equality (CGE) or any other relevant NGO working in the field of human rights was made.⁴²

to it and follow such procedure during such exercising of powers and performance of duties and functions as the Commission may direct. In accordance with the section, the SAHRC has established standing committees consisting of commissioners and outside experts and stakeholders who advise the Commission on policy and help implement the Commission's programmes.

³⁵ See SAHRC *Annual Report* (1997–1998) 40.

³⁶ J Sarkin 'Reviewing and reformulating appointment processes to constitutional (chapter 9) structures' (1999) 15 *South African Journal on Human Rights* 587–596.

³⁷ As above.

³⁸ The US State Department in its South Africa country report on human rights practices for 1998 noted that 'the SAHRC's operations have been hampered by red tape, budgetary concerns, the absence of civil liberties legislation, several high-level staff resignations, and concerns about the Commission's broad mandate.' The report is available on <http://www.state.gov/www/global/human_rights/1998_hrp_report/southafr.html> (accessed 14 May 2001).

³⁹ Sec 7(1)(a) of the Human Rights Commission Act 54 of 1994 provides that 'the SAHRC shall develop and conduct information programmes to foster public understanding of [t]his Act, Chapter 3 of the interim Constitution [the Bill of Rights], and the role and activities of the Commission'.

⁴⁰ The specified target groups were children, prisoners, refugees, disabled people, people living with HIV/AIDS, and dispossessed people.

⁴¹ P Pigou, R Greenstein & N Valji (1998); <<http://www.case.org.za/htm/knowle2.html>> (accessed 19 May 2001).

⁴² As above.

Criticisms levelled against the operational efficiency of the SAHRC notwithstanding, the SAHRC has, in its five years of existence,⁴³ managed to discharge its constitutional⁴⁴ and legislative⁴⁵ mandate in an independent manner. The Commission has attempted, through its various programmes and activities,⁴⁶ to comply with and appreciate the circumstances under which it is expected to operate, especially in a highly politically charged environment like that of South Africa. The Commission has, for instance, issued a number of publications⁴⁷ that generally contribute to human rights awareness in the country, promote knowledge of the Commission's complaint procedures, and assist other bodies in conducting their own human rights training and awareness campaigns. The Commission intervened as *amicus curiae* in a number of court cases,⁴⁸ addressing pertinent human rights issues. These interventions are a useful advocacy tool and provide evidence of the Commission's commitment to a culture of respect, protection and promotion of human rights.

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

⁴³ The SAHRC held its first working session on 12 October 1995 and was officially launched on 21 March 1996.

⁴⁴ In terms of sec 184(1) of the final Constitution, the Commission must promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; and monitor and assess the observance of human rights in the Republic. The Commission is also implored by sec 184(3) to require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of socio-economic rights in the Bill of Rights.

⁴⁵ The SAHRC has additional functions set out in national legislation, supplementing its constitutional mandate. This include the functions of the Commission in terms of the Human Rights Commission Act 54 of 1994; the Promotion of Access to Information Act 2 of 2000; and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁴⁶ Major programmes and projects of the commission include: National Action Plan and Strategy to Combat Racism; Roll Back Xenophobia Campaign; Socio-economic Rights Campaign; and Investigations into Racism in the Media. For a detailed discussion of the Commission's activities, see Human Rights Watch (n 1 above) 297–303.

⁴⁷ These include booklets, comics, a newsletter, pamphlets, and workshop manuals.

⁴⁸ Examples of the cases include: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); *Fose v Minister of Safety & Security* [1997] 7 BCLR 851 (CC); *S v Twala* [2000] 1 BCLR 106 (CC).

it.⁴⁹ It is therefore my argument that, despite the minor pitfalls, the SAHRC has managed to perform its functions independently of the government.

3.3 Concluding remarks

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

4 Independence through appointment and dismissal procedures

4.1 The UHRC

The method by which members of a national human rights institution are appointed is crucial in ensuring the independence of the institution. An appointments procedure can be described as 'a confidence-building exercise for the government, citizens, and organs of civil society in the integrity, independence, and competence of the institution'.⁵⁰ As far as possible there should be little executive influence over the process.

The 1995 Constitution of Uganda provides for the appointment of the commissioners of the UHRC by the president with the approval of parliament.⁵¹ Although this is allegedly working fairly well in practice, 'the procedure itself is flawed in that it gives the president [and thus the executive] too great an influence in the exercise'.⁵² There is minimal or no opportunity for input from the organs of civil society.⁵³ The appointment of commissioners of the UHRC is essentially a governmental issue. Members of the public are completely excluded from the exercise. The

⁴⁹ Government officials subpoenaed by the Commission in the past include: the premier of the Northern Cape, Mr Manne Dipico; the MEC for Health in Mpumalanga, Ms Sibongile Manana; the former chief of the South African National Defence Force (SANDF), General Georg Meiring and the former Minister of Health, Dr Nkosazana Zuma.

⁵⁰ J Hatchard 'A new breed of institution: The development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission' (1999) *Comparative and International Law Journal of Southern Africa* 28.

⁵¹ Art 51(2) Constitution of the Republic of Uganda (1995).

⁵² Hatchard (n 50 above) 32.

⁵³ As above.

entire process takes place in secrecy. When asked whether NGOs play any role in the process, a representative of the Uganda Association of Women Lawyers (FIDA) commented as follows:⁵⁴

Not to my knowledge, because these things are normally confidential. Normally we just see them in newspapers. You just see once in a while in papers that so and so have been nominated and will be going to screening by Parliament. We even do not know how they were selected in the first place. The whole process is not transparent. We as NGOs do not play any role. We are not consulted.

The participation of civil society and its organs in the consultative process leading to the creation of national human rights institutions is vital for two reasons. Firstly, it grounds these entities within the context of the common people, eventually leading to credibility and independence. Secondly, it ensures that the institutions are perceived by citizens as true representatives of their interests, rather than mere creatures of governmental processes born out of closed negotiations between bureaucrats and politicians.

The exclusion of civil society and NGOs from the appointment process is deplorable, particularly when considering that the institutions are created primarily to cater for and safeguard the rights and interests of members of civil society. The question is how members of civil society can be expected to have confidence in the institution when appointments take place behind closed doors.

Despite the problems inherent in the appointments procedure and process, members of the UHRC have security of tenure. Commissioners serve for a renewable period of six years,⁵⁵ enjoy the same terms and conditions of service as judges, and they are immune from civil proceedings.⁵⁶ In addition, the commissioners are protected, by virtue of article 56 of the Ugandan Constitution, from arbitrary removal from office. This is achieved by providing for the same formal removal process as that of a judge, namely, inability to perform the duties of office by reason of mental incapacity, misconduct, misbehaviour or incompetence.⁵⁷

4.2 The SAHRC

Under the interim Constitution, the formal power of appointment of members of the SAHRC vested with the president who had to appoint persons nominated by a joint committee of the two houses of

⁵⁴ Interview with Ms Maria-Goretti Karuhanga Mayiga, 25 September 2000.

⁵⁵ The Ugandan Constitution and the Uganda Human Rights Commission Act 4 of 1997 are silent on the issue of the number of times that the commissioners' term may be renewed. The Constitution simply state that the commissioners' term of office is renewable. It therefore, by implication, presupposes that the term may be renewed more than once.

⁵⁶ Arts 51 & 56 Constitution of the Republic of Uganda (1995).

⁵⁷ Hatchard (n 50 above) 34.

parliament.⁵⁸ Commissioners are appointed to hold office for a fixed term of up to seven years, which is renewable only once.⁵⁹ Although the interim Constitution contained detailed appointment procedures, neither the independence of the SAHRC nor dismissal procedures were provided for in the interim Constitution. These matters were left to the legislature and are covered in greater detail by the Human Rights Commission Act. In terms of section 3 of the Act, the president is given the power to remove any member of the SAHRC if a joint committee of parliament requests such a removal. The request has to be approved by parliament by means of a resolution adopted by a majority of at least 75% of the members present and voting. The Act does not set out the reasons for which or the circumstances under which a member may be dismissed. These are set out in section 194 of the final Constitution. The section provides that members of the SAHRC may be removed from office only on —

- a. the ground of misconduct, incapacity or incompetence;
- b. a finding to that effect by a committee of the National Assembly; and
- c. the adoption by the Assembly of a resolution calling for that person's removal from office.⁶⁰

The procedure for the appointment of members of the SAHRC is now governed by section 193 of the final Constitution, which repealed the interim Constitution. In terms of section 195, the President appoints the commissioners on the recommendation of the National Assembly.⁶¹ The marked distinction between the appointment procedure of the UHRC and the SAHRC should be noted: In the case of the UHRC it is the President who makes the appointment subject to approval by parliament, whereas in the case of the SAHRC the President approves the appointment on the recommendation of the National Assembly.

The process for the appointment of members of the SAHRC started in early 1995. The public was invited, by advertisement in the press, to submit nominations to the joint committee.⁶² However, no short-listing process took place. The committee decided that all nominees should be interviewed. By March 1995 each political party had submitted its proposed list of commissioners. The nomination of the 11 commissioners

⁵⁸ Sec 115(3) interim Constitution.

⁵⁹ Sec 3 Human Rights Commission Act 54 of 1994.

⁶⁰ Sec 194 (1)(a)–(c) final Constitution.

⁶¹ Sec 193 (4) final Constitution.

⁶² The committee operated under the chairpersonship of African National Congress (ANC) Senator Bulelani Ngcuka, now the Director of Public Prosecutions.

was unanimously approved by parliament on 6 April 1995.⁶³ Former President Nelson Mandela made the formal approval of the appointments on 1 October 1995, some six months after the appointments were approved by parliament. The delay in approval of the appointments by the President is said to have been caused by, among others, negotiations between the Department of Justice and the nominees about their salaries, the seat of the Commission, and who would serve as full-time and who part-time.⁶⁴

Despite the political consensus⁶⁵ surrounding the appointment of the SAHRC commissioners, human rights activists expressed fierce criticism of the practicalities of the procedure and the politicised nature of the process.⁶⁶ The following discrepancies were identified during the interview process:⁶⁷

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

Given the highly politicised nature of the appointment process of the SAHRC commissioners under the interim Constitution, it is becoming increasingly apparent that necessary safeguards have to be put place to prevent a future recurrence of the problem. If this is not done the legitimacy and independence of the institution will be grossly jeopardised. Perhaps the first step in addressing this impasse will be to forbid future appointees from holding or having held any political office.⁶⁸ Another alternative will be to review the nature and role of parliament's participation in the process.

Sarkin proposes that 'while parliament should undoubtedly play a role in the determination of the composition of the SAHRC, it is also essential

⁶³ The commissioners appointed were: Barney Pitso (Chairperson), Shirley Mabusela (Deputy Chairperson), Max Coleman, Helen Suzman, Anne Routier, Rhoda Kadalie, Pansy Tlakula, Brigalia Bam, Karthy Govender, Charles Dlamini and Chris de Jager. Commissioners Marx Coleman, Helen Suzman, Anne Routier, Rhoda Kadalie, Brigalia Bam and Chris de Jager have since resigned from the Commission and they have been replaced by Commissioners Jody Kollapen, Zonke Majodina, Charlotte McClain, Tom Manthata and Leon Wessels.

⁶⁴ Sarkin (n 36 above) 593.

⁶⁵ It is important to note that the nomination and appointment of SAHRC commissioners under the interim Constitution were very much a political compromise. This, however, is no longer the position under the final Constitution.

⁶⁶ Sarkin (n 36 above) 593.

⁶⁷ As above.

⁶⁸ Sec 6 of the Uganda Human Rights Commission Act 4 of 1997 obligates persons holding office as members of parliament, members of local government councils, members of the executive of political parties or political organisations, and public officers to relinquish their duties upon appointment as commissioners of the UHRC.

that adequate safeguards, as well as checks and balances be put in place to prevent unwarranted political manipulation'.⁶⁹ He is of the view that an independent panel should be created to receive nominations, perform interviews, and recommend candidates for appointment.⁷⁰ This should, however, not be construed to mean that parliament should play no role in the appointment process. The most tenable situation will be for a limited number of parliamentarians, as elected representatives of society, to serve on the proposed panel.⁷¹ However, the majority of the panellists should be non-partisan members of civil society. Such a panel, Sarkin suggests, should be composed of one member nominated by the president's office; one member nominated by the National Council of Provinces; one member nominated by the National Assembly; and four members of civil society nominated by the SAHRC, the CGE, the Public Protector, and the Auditor General respectively.⁷² To this list I wish to add three members nominated by law faculties of institutions of higher learning in South Africa.⁷³

4.3 Concluding remarks

In conclusion on the point of appointments, I would like to reiterate that civil society should play a clearly defined role in the appointment of members of both the UHRC and the SAHRC. An inclusive approach should be adopted in order to afford civil society a more participatory role in the process. The public may, for instance, be afforded an opportunity to comment on the nominations, to lodge objections to the appointment of certain nominees, or to provide input into the interview questions. This will inevitably require the adoption by the stakeholders of a rigorous advertising campaign of the process. To ensure maximum participation by the public in the process, such a campaign will inevitably have to set out lucid time frames for the receipt of nominations and for lodging objections. The campaign will also have to entail substantial and sufficient advertising of the interview times and schedules.⁷⁴

⁶⁹ Sarkin (n 36 above) 610. The primary purpose of undertaking this venture will be to ensure that the institution functions independently of party politics.

⁷⁰ Sarkin (n 36 above) 611.

⁷¹ As above.

⁷² As above. The same panel is with the necessary changes recommended for the UHRC.

⁷³ Legal academics constitute what one can term the 'brain' of the legal profession and will therefore add impetus to the proceedings.

⁷⁴ For a detailed suggestion on how the publicity plan can be conducted, see Sarkin (n 36 above) 612.

5 Financial independence

5.1 The UHRC

The concept of financial independence, as far as national human rights institutions are concerned, implies the ability to have access to funds reasonably required to perform constitutional obligations.⁷⁵ Access to adequate financial resources and an ability to have control over those resources are prerequisites for the effective operation of national human rights institutions.

The 1995 Uganda Constitution states that the administrative expenses of the UHRC must be charged to the country's consolidated fund.⁷⁶ Similarly, the Ugandan parliament is required to ensure that adequate resources and facilities are provided to the Commission to enable it to perform its functions effectively.⁷⁷

The UHRC enjoys a measure of financial independence from the executive. In practice the Commission submits its proposed budget to the president, who tables it *without revision* before parliament for approval.⁷⁸ The president is only permitted to make his recommendations on the proposed budget.⁷⁹

Even though the UHRC is assured financial autonomy in the Constitution, practical problems remain. The government constantly underfunds the Commission.⁸⁰ As a result, the UHRC finds itself in the unfortunate position of having to obtain funds from sources other than government, which has the primary obligation to finance the institution. The Uganda Human Rights Commission Act permits the Commission to obtain grants and donations from other sources, whether within or outside the country.⁸¹ However, the Commission requires the approval of the Minister of Justice, acting in consultation with the Minister of Finance, to fundraise.⁸²

The requirement for ministerial approval 'places both an unnecessary and unfortunate restriction on the functioning and fundraising ventures

⁷⁵ H Corder, S Jagwanth & F Soltau *Report on parliamentary oversight and accountability* (July 1999) 88.

⁷⁶ Art 155 Constitution of the Republic of Uganda (1995).

⁷⁷ Sec 13 Uganda Human Rights Commission Act 4 of 1997.

⁷⁸ My emphasis.

⁷⁹ Art 155(3) Constitution of the Republic of Uganda (1995).

⁸⁰ For example, in the 1997–98 fiscal year the Commission had budgeted for 5 billion Uganda shillings, but the Treasury reduced the amount to 1,3 billion Uganda shillings.

⁸¹ Sec 13(3) Uganda Human Rights Commission Act 4 of 1997. The main external funders of the Commission include the following institutions: the Swedish government, the Royal Belgium government, the British government, the Australian government, the Raoul Wallenberg Institute of Human Rights and Humanitarian law, the Friedrich Ebert Foundation, the Konrad Adenauer Foundation and The Danish Centre for Human Rights.

⁸² Sec 13(3) Uganda Human Rights Commission Act 4 of 1997.

of the commission'.⁸³ Fundraising is a matter that should be left entirely to the discretion of the Commission. In principle, so long as the Commission's independence is not compromised, there should be no government involvement in the fundraising ventures of the Commission. Perhaps the only caveat on external funding should be that it must be limited to projects and other activities of the Commission. In other words, 'administrative and operational expenditures must remain covered by government funding to guard against the possible future withdrawal, non-renewal, or non-availability of donor funds'.⁸⁴ It is therefore suggested that the section should be amended to allow the Commission to fundraise without undue hindrance or interference from the executive.

5.2 The SAHRC

One of the ways in which the independence of the SAHRC has been rigorously tested has been in the administrative arrangements for the funding of the Commission. Although the SAHRC is assured financial independence by the Human Rights Commission Act, it competes with other departments in the Ministry of Justice for funds. The Commission pointed out in its maiden report⁸⁵ that the Ministry of Justice had made provision for it out of its own budget. This arrangement, the Commission argues, does not appear to be what the Human Rights Commission Act intended. The Commission's main objection against the present⁸⁶ financial arrangement is twofold. Firstly, the Commission does not believe that state officials should dictate to it how it should do its work. Secondly, the Commission feels that it is grossly inappropriate for a national institution to be dependent upon and supervised by a governmental department to undertake its work.

The present financial arrangement does not in any way comply with international standards⁸⁷ for the maintenance of independent national human rights institutions. Government's commitment towards human rights inevitably lies in the amount of financial independence it provides to the Commission and the present arrangement does not appear to comply with that commitment. The provision of an adequate and independent budget helps establish and maintain an effective and clearly independent and impartial institution.

⁸³ Hatchard (n 50 above) 36.

⁸⁴ As above.

⁸⁵ SAHRC (n 33 above) 40.

⁸⁶ Correct as of 31st December 2001.

⁸⁷ In this regard, see The Paris Principles 'Composition and guarantees of independence and pluralism,' art 2 Commonwealth Secretariat (n 5 above) 29, and UN Centre for Human Rights (n 5 above) 11.

The Zimbabwean situation serves as a good example of the problems inherent in the present financial arrangement of the SAHRC. In Zimbabwe, funding for the office of the Ombudsperson (except the salary of the Ombudsperson) comes from the Ministry of Justice, Legal and Parliamentary Affairs.⁸⁸ As the Ombudsperson has noted, this situation 'tarnishes the image of the office as an independent body in the eyes of the public and causes problems when investigations are undertaken following complaints against the ministry itself'.⁸⁹

To be able to carry out its functions effectively, the SAHRC requires financial independence from the executive, particularly from ministerial bureaucracies. In their report on Parliamentary Oversight and Accountability, Corder, Jagwanth and Soltau argue that:⁹⁰

[T]o make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. These institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.

Pursuant to this argument, the ideal situation would be for the SAHRC's funding to be supervised by parliament and drawn from the country's national revenue fund, as in the case of the UHRC.⁹¹

In *New National Party of South Africa v Government of the Republic of South Africa*,⁹² the South African Constitutional Court noted the importance of guaranteeing both financial and administrative independence to the Independent Electoral Commission (IEC). As the IEC is also explicitly designated as a state institution supporting constitutional democracy,⁹³ the findings of the Constitutional Court in this regard apply with the necessary force to other chapter 9 institutions. As far as financial independence is concerned, the Court remarked that:⁹⁴

In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which . . . are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution . . . This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. *It is for parliament, and not the executive*

⁸⁸ Commonwealth Secretariat (n 7 above) 30.

⁸⁹ As above.

⁹⁰ Corder, Jagwanth & Soltau (n 76 above) 88.

⁹¹ See discussion below.

⁹² *New National Party v Government of the Republic of South Africa* [1999] 5 BCLR 489 (CC).

⁹³ Sec 181(1)(f) final Constitution.

⁹⁴ *New National Party* (n 92 above) para 98.

*arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate.*⁹⁵ The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before parliament or its relevant committees.

At the moment the situation regarding the budget and financing of the SAHRC has allegedly reached rock-bottom and is a cause for concern.⁹⁶ The Department of State Expenditure, without consultation, has allegedly adopted a practice of not designating funds to be made available to the Department of Justice for the budget of the Commission.⁹⁷ Contrary to the express provisions of section 16(3) of the Human Rights Commission Act, the SAHRC is allegedly not invited to participate in the budgetary process that determines its annual budget or in the determination of its Medium Term Expenditure Plans.⁹⁸ The Department of Finance allegedly insists on communicating with the Department of Justice about the financial arrangements of the SAHRC. The Department of Finance is reported to have sought to inscribe the arrangement into law by requiring that in terms of the Treasury Control Bill,⁹⁹ the accounting officer of the SAHRC account to the accounting officer of the Department of Justice.

The current financial arrangement of the SAHRC is, in my view, unacceptable. It is in conflict with the provisions of the Human Rights Commission Act, which require that the SAHRC participates in the budget process *not through another state Department*,¹⁰⁰ but as if it was a fully-fledged department of state.¹⁰¹ The arrangement also flies in the face of the Constitution, which not only obliges state organs to give assistance to the Commission, but also that they must do so as 'to ensure the independence, impartiality, dignity and effectiveness of the institution.'¹⁰² In the *New National Party Case*, Langa DP held that:¹⁰³

[i]f this constitutional obligation means that old legislative and policy arrangements, public administration practices and *budgetary conventions*¹⁰⁴ must be adjusted to be brought in line with the new constitutional prescripts, so be it.

⁹⁵ My emphasis.

⁹⁶ The SAHRC has threatened to take the issue of the financing of the institution to the Constitutional Court if it is not resolved as a matter of urgency. The threatened lawsuit will, if pursued, sour relations between the government and the institution.

⁹⁷ The author is indebted to Donna Reid (Communication Technician) of the SAHRC for the information.

⁹⁸ As above.

⁹⁹ Now the Public Finance Management Act 1 of 1999.

¹⁰⁰ My emphasis.

¹⁰¹ Sec 16(3)(a) Human Rights Commission Act 54 of 1994.

¹⁰² Sec 181(3) final Constitution.

¹⁰³ *New National Party* (n 92 above) para 78.

¹⁰⁴ My emphasis.

As far as the allocation of adequate resources to the Commission is concerned, the SAHRC, like the UHRC, constantly faces practical problems of underfunding by the government. For instance, in the 1998–1999 financial year, the Commission was allocated R13,2 million, a figure which it described as inadequate for its work.¹⁰⁵ Although the Human Rights Commission Act and the final Constitution are silent on whether the Commission can fundraise, the Commission receives a lot of financial, material and technical support and assistance from donors.¹⁰⁶ The fundraising activities of the Commission are governed by an internal Commission policy.¹⁰⁷ A working plan has to be submitted to the Chairperson of the Commission or the Chief Executive Officer before any fundraising activity is undertaken.¹⁰⁸ In the event the funds to be received from donors are in excess of R100 000, the venture has to be submitted before and approved by parliament.¹⁰⁹ In November 1998, a trust fund was set up by the SAHRC to raise money from donors. The fund is chaired by a High Court judge.

5.3 Concluding remarks

The allocation of adequate resources and an independent budget are essential to a national human rights institution for three major reasons. First of all, they help establish and maintain an effective and clearly independent and impartial institution. Secondly, financial security is a prerequisite to the satisfactory development of national institutions. Thirdly and lastly financial independence ensures that institutions are free to utilise their resources without political interference or manipulation.¹¹⁰

6 Independence through composition

The Paris Principles, because national human rights institutions themselves have formulated them, are the benchmark against which the composition of these institutions may be judged. These principles delineate broad guidelines for a composition that can minimally ensure the independence and pluralism of national human rights institutions. These principles require that a commission 'shall be established in accordance

¹⁰⁵ Human Rights Watch (n 3 above) 304.

¹⁰⁶ These include the United Nations Commonwealth Secretariat; human rights institutions in individual Commonwealth countries like Australia, Canada, India, New Zealand and the United Kingdom; United Nations High Commissioner for Human Rights; and USAID.

¹⁰⁷ The author is indebted to Thediso Tipanyane of the SAHRC for the information.

¹⁰⁸ As above.

¹⁰⁹ As above.

¹¹⁰ For further exposition, see in this regard Commonwealth Secretariat (n 7 above) 30.

with a procedure which affords all necessary guarantees to ensure the pluralistic representation of the social forces (of civilian society) involved in the protection and promotion of human rights'.¹¹¹

The composition of national human rights commissions is 'a threshold issue that is inextricably linked to the commission's mandate and independence in any particular jurisdiction'.¹¹² Human rights commissions form an informal counter to the frequently formal adversarial methods of adjudication. As quasi-judicial bodies, they are vital to the interests of the poor as an approachable place for conciliation and enforcement of rights. Serving this broad segment of the population makes diversity of composition a pre-requisite. Therefore, human rights commissions must include NGOs, women, men, differently-abled people and other minorities. In the next section I consider whether the composition of the UHRC and the SAHRC complies with this requirement. In carrying out the analysis, I refer to the profiles of the current commissioners of the two institutions.¹¹³

6.1 The UHRC

Although the UHRC acts independently of the government, its composition leaves much to be desired. Of the seven commissioners, four were members of parliament immediately prior to their appointment.¹¹⁴ According to the director of the Human Rights and Peace Centre (HURIPEC) at Makerere University, three were appointed after they failed to be re-elected as members of parliament in the 1996 Uganda general elections.¹¹⁵ Although three of the commissioners are women, only one has been actively involved in NGO work.

The current composition of the UHRC indicates that the institution is not broadly representative of Ugandan society and therefore does not represent the aspirations of society. It thus fails to comply with the provisions and guidelines laid down in the Paris Principles. The composition of the institution calls for immediate review. In my view a human rights commission must be composed of individuals who have worked tirelessly and are well versed in human rights principles. This, however, does not seem to be the case with the UHRC. According to Ms Maria-Goretti Karuhanga Mayiga, the current commissioners were appointed not on the basis of performance or past human rights experience, but because of lobbying and their allegiance to the current regime.¹¹⁶

¹¹¹ The Paris Principles 'Composition and Guarantees of Independence and Pluralism' art 1.

¹¹² Commonwealth Secretariat (n 7 above) 35.

¹¹³ The information is correct as of 31st December 2001.

¹¹⁴ These are Mr Constantine Karusoke, Mrs Faith Mwondha and Mr Andrian Sibbo.

¹¹⁵ The situation is clearly indicative of the problems inherent in the appointment process of the Commission members discussed above.

¹¹⁶ Interview with Ms Maria-Goretti Karuhanga Mayiga, 25 September 2000.

According to her, the government picked the people it knew would safeguard its interests. Her sentiments were shared by Mr Sam Tindifa of HURIPEC who maintains that current commissioners were primarily appointed on the basis of their loyalty to the president and the political system existent in the country.¹¹⁷

The indiscriminate appointment of political allies and acquaintances as commissioners of national human rights institutions is very problematic. This is even more obtrusive in a country that is in the process of re-building public confidence in state-created institutions. Commissioners should be appointed on merit and not on the basis of their past or present allegiance to a president or government. That will ensure that they carry out the institution's constitutional mandate wholeheartedly without fear or favour. The task of ensuring that independent commissioners are appointed falls squarely on the shoulders of the Ugandan parliament. It assumes the responsibility primarily and largely because it is a representative and custodian of civil society. Similarly, NGOs should also play a pivotal role in ensuring that the *status quo* is not maintained and perpetuated.

6.2 The SAHRC

In contrast to the UHRC and despite being political appointees, commissioners of the SAHRC reflect a composition that is truly representative of all the social forces of South African society. Of the 11 commissioners, six are lawyers, two theologians, one a psychologist, one an academic, and one a social worker.¹¹⁸ Four of the commissioners are women and commissioners Jerry Nkeli and Charlotte McClaine represent the differently-abled community in the Commission. Most of the commissioners have also been and are still actively involved in NGO work. This brings credibility and respect to the Commission.

6.3 Concluding remarks

The above analysis depicts that, on the whole, the SAHRC is broadly representative of South African society.¹¹⁹ Against this backdrop, it is clear that the SAHRC, unlike the UHRC, complies with the conditions laid down by the Paris Principles for a composition that ensures the pluralist representation of the social forces involved in the promotion and protection of human rights. This composition guarantees the

¹¹⁷ Interview with Sam Tindifa, 26 September 2000.

¹¹⁸ The commissioners also come from diverse political backgrounds and adhere to different political ideologies. For example, Dr Barney Pitso was an ANC member, while Commissioner Leon Wessels was an active member of the then National Party.

¹¹⁹ The commissioners are also, to a great extent, a true reflection of the racial demographics in the country.

independence of the Commission from the executive and affords the institution credibility.

7 Conclusion

Establishing and maintaining independent and effective national human rights institutions are challenges that all governments have to meet. This is so because national human rights institutions not only provide a new layer of accountability, but they also 'contribute towards the establishment of a fresh constitutional order in which human rights are widely known and fully respected'.¹²⁰ Drawing from the experiences of the UHRC and the SAHRC, this paper demonstrates not only the potential of national human rights institutions as appropriate *fora* for the protection and promotion of human rights, but also the care necessary to make them genuinely independent and effective. As the study demonstrated, national human rights institutions are vulnerable to executive and bureaucratic manipulations. Consequently, their effectiveness depends largely upon legal and operational autonomy, financial autonomy, clear and transparent appointment and dismissal procedures, and the appointment of demonstrably able, independent, and effective commissioners.

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

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

Lastly, there should be mutual respect for the relationship between the two institutions and their respective governments, so as to guarantee the independence of the former. It is also recommended that governments

¹²⁰ Hatchard (n 50 above) 51.

desist from exercising political interference in the activities of the institutions. Similarly, commissioners should desist from political activism upon assumption of office. In this way the credibility of these institutions and their respective governments will remain intact and unhampered. If these concerns are addressed, the UHRC and the SAHRC will certainly raise the protection and promotion of human rights to a higher level. However, this will only be possible if the respective governments have the political will to respect the institutions' autonomy, thus enhancing their credibility and effectiveness.