

LLM (Human Rights and Democratisation in Africa) 2006

Oval slides in triangular spaces? Anchoring national human rights institutions in 'tripartite' Commonwealth Africa

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DECLARATION

I, AMBANI JOHN OSOGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

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Date:.....

Dedication

Evelyn Asaala, our time is nigh! I can feel your heart beckoning.

All widows and orphans whose plight remains misunderstood, underestimated and unattended.

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God Almighty you are acknowledged. When I was weak, you gave strength; when hungry you availed food; when angry you extended composure; and when thick you supplied wisdom.

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LIST OF ABBREVIATIONS

Abuja Guidelines	Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
CCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Right of the Child
ECOSOC	Economic and Social Council
NHRIs	National Human Rights Institutions
OAU	Organisation of African Unity
Paris Principles	Principles Relating to the Status of National Institutions
Programme of Advisory Services	Programme of Advisory Services and Technical Cooperation in the Field of Human Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations Organisation
UNCHR	United Nations Commission on Human Rights
UNHCHR	United Nations High Commission for Human Rights
USA	United States of America
Vienna Declaration	Vienna Declaration and Programme of Action
Voluntary Fund	Voluntary Fund for Technical Cooperation in the Field of Human Rights

CHAPTER I

Introduction

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights... ..¹

1 Background to the study

Montesquieu, in *L'Esprit des Lois*,² 1748, divided the functions of state into: the legislative power; the executive power, and the power of judging.³ Indeed, three constitutional organs have invariably dominated state power. These are; the executive, the legislative and the judiciary. According to Montesquieu, the state is said to be at 'equilibrium' when the three organs are independent of each other, with each carrying out its functions without interference. Ideally, the legislative organ ought to make laws, the executive to implement them, and the judiciary to adjudicate over disputes arising out of the day-to-day operations of the state.⁴

This attempt at dispersing state power is not arbitrary. It has got ends. One cardinal end in this regard is the protection of fundamental human rights. It has been argued that where the three organs of state are allowed operational autonomy, individuals stand to enjoy relatively profound liberty.⁵ Where state functions are entrusted with one person or organ, the tyranny of that person or organ is certain to overwhelm the realisation of fundamental freedoms and liberties. The French philosopher himself prescribed that:⁶

Political liberty is to be found ... only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the legislative and executive powers are united in the same person or body... there can be no liberty... Again, there is no liberty if the judicial power is not separated from the legislative and the executive... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.

¹ T Jefferson 'The declaration of independence' in RB Morris (ed) *Morris significant documents in the United States history* (1969) 105.

² For an English version, see B de Montesquieu *The spirit of laws* trans T Nugent (1949).

³ Montesquieu (n 2 above) xi, 4.

⁴ There are still many contemporary writings on the doctrine of separation of powers. See, RC Sarvis 'Legislative delegation and two conceptions of the legislative power' (2006) *Pierce Law Review* 317; Also KE Whittington 'Madison has left the building' (2005) Summer *University of Chicago Law Review*.

⁵ Mr. Justice Frankfurter *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952).

⁶ Montesquieu (n 2 above) xi, 4.

Locke had written long before Montesquieu that:⁷

It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage.

Both Montesquieu and Locke had tremendous faith in the tripartite government structure in so far as the protection of liberties was concerned.⁸ Informed by this philosophy, most democratic constitutions have weaved state power in almost similar terms envisioned by Montesquieu. Thus far, the 1787 Constitution of the United States of America (USA) could be ranked as one with the clearest distinction of state functions.⁹

Contemporary practice, however, appears to be in favour of complementing these traditional state organs, a sign, perhaps, that the conventional three organs of state *per se* have increasingly proved inadequate; at least in the sphere of human rights protection.¹⁰ There is a move, or rather, wave towards the establishment of independent national human rights institutions (NHRIs) to reinforce the bulwark of human rights protection mechanisms at state level, and the wave, arguably, is most pronounced in Africa.¹¹ A writer has, thus, documented this development:¹²

During the 1990s there was an exponential increase in the establishment of national human rights institutions in Africa. As recently as 1989, only one African country had established some form of human rights monitoring body. By the beginning of 2000, twenty-four African countries had provisions in their laws for national human rights bodies.

The United Nations High Commission for Human Rights (UNHCHR) must have been alive to this reality when it reckoned:¹³

It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their protection and promotion. Official human rights institutions have been set up by many countries in recent years.

⁷ J Locke *Second treatise of civil government* (1690) ch xii, 143.

⁸ In L Fisher *American constitutional law* (1990) 217, it is noted: 'It is often said that powers are separated to preserve liberties.'

⁹ See, AW Bradley & KD Ewing *Constitutional and administrative law* (1993) 155., where the Constitution of the USA is hailed as having observed a strict adherence to the doctrine of separation of powers.

¹⁰ It is instructive that institutions autonomous from the main organs of the state have also been found necessary in such areas as election management, anti corruption campaign and central banking.

¹¹ See, ME Tsekos 'Human rights institutions in Africa' (2002) 21 *Human Rights Brief* 21. But the development is not unique to Africa. See, C Evans 'Human rights commissions and religious conflict in the Asia-Pacific region' (2004) *International & Comparative Law Quarterly* 713.

¹² Tsekos (n 11 above) 21.

¹³ *National Institutions for the Promotion and Protection of Human Rights*, Fact Sheet No.19, para 7.

The emergence of these NHRIs has been hailed:¹⁴

It is therefore important for a state committed to human rights to establish a national infrastructure, including relevant institutions, which can promote and protect human rights.

1.1 Research questions

Granted, there seems to be a sufficient case for the establishment of NHRIs. Behind the facade, that is this noble invention, however, are numerous disturbing questions vying for answers. Some of the most challenging could be cited.

Firstly, the establishment of these mostly autonomous autochthonous institutions raises the question as to whether the original tripartite system of checks and balances, praised by Montesquieu and a host of legal and political philosophers, has proved inadequate, in the protection of human rights, and hence the need for complementary bodies. This issue has, again, not eluded the UNHCHR as evidenced by the following excerpt:¹⁵

There are some who see no good reason for establishing special national machinery devoted to the protection and promotion of human rights. They may argue that these bodies are not a wise use of scarce resources and that an independent judiciary and democratically elected parliament are sufficient to ensure that human rights abuses do not occur in the first place.

Secondly, there is apparently no clear consensus how NHRIs should plug into the socket that is the traditional three organs of the state. In this regard, two principal questions fight for supremacy. Are NHRIs envisaged to compose a fourth organ of state? How should these bastions of human rights relate to the other established organs of state? Connected to this are numerous other nagging questions. Are these institutions meant to investigate, for instance, judicial officers, heads of government or even members of parliament? Should they be empowered to influence traditional executive prerogatives such as the signing of - and reporting on - especially human rights treaties? How would these human rights bodies, mostly composed of unelected persons, participate in policy formulation? Should they? And do they? How would these institutions influence legislation and how does this augur with the concept of representative democracy? How much quasi-judicial power should NHRIs wield?

Thirdly, the problem of accountability of NHRIs has yet to attract a convincing panacea. It is, indeed, paradoxical that institutions endowed with enormous powers to check others should, themselves, have no corresponding effective checks. Already, commentators have noted the weaknesses inherent in the existing accountability mechanisms for these nascent citadels of

¹⁴ *National Human Rights Institutions Best Practice* 'National Human Rights as an Integral part of a Democratic Society', para 1. Commonwealth Secretariat, London.

¹⁵ n 13 above.

human rights. Of accountability of NHRIs in Eastern and Southern Commonwealth Africa, a scholarly contribution has observed:¹⁶

At present, most national institutions are required to send a copy of their annual report to parliament and/or to the head of state/government and this supposedly provides a detailed account of its performance. In practice such reports are frequently disappointing with little meaningful data on, or information about, the institution's operation. Furthermore, there are often lengthy delays in publication resulting in reports often out of date before they are even published. Even then, there is no obligation on parliament to debate the report and it appears that almost invariably they are effectively ignored.

1.2 Presumptions and limitations of study

Like any other piece of academic work, this study makes assumptions; and deductions based on these assumptions. For instance, it is presumed that while modern constitutions may vary from state to state, most democratic constitutions in the Commonwealth will endeavour to at least secure three distinguishable organs of state, albeit with varying degrees of powers and autonomy. Each constitution would usually espouse a different nuance of the concept of separation of powers. Further, the study presumes that most Commonwealth constitutions in Africa, even if remotely, have taken after the Westminster constitutional model. Another presupposition is that the efficacy of NHRIs in the protection of human rights has very much suffered a structural problem and that the situation pleads for address. The *Principles Relating to the Status of National Institutions (Paris Principles)*¹⁷ are considered to be authoritative standards in the NHRIs discourse and it is against the backdrop of these standards that the hospitality of the Westminster model to the new bodies is assessed.

The study is limited to Commonwealth Africa, although examples may be drawn from other jurisdictions.

1.3 Research methodologies

Clearly, a non-empirical research methodology would do for this kind of investigation. In addition, primary as well as secondary sources of data are consulted.

1.4 Literature survey

This piece does not pretend to pioneer research in the sphere of government functions (the doctrine of separation of powers) and neither is it set to be the first to extensively study NHRIs in

¹⁶ J Hatchard *et al Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern perspective* (2004) 219.

¹⁷ Adopted by the General Assembly through resolution 48/134 of 20 December 1993.

Commonwealth Africa. Phillips and Jackson,¹⁸ Wade and Bradley¹⁹ and other writers of constitutional and administrative law have had occasion to discuss the concept of separation of powers as it manifests itself in modern constitutions and especially in the United Kingdom (UK). De Smith is also prominent in this respect.²⁰ In Commonwealth Africa, Nwabueze²¹ and Ghai and McAuslan²² are established authorities. Of course, Dicey,²³ Montesquieu,²⁴ Locke,²⁵ and Aristotle,²⁶ in their respective works, laid the philosophical bases that continue to inform state constitutions to date.

As regards NHRIs, the *Paris Principles* stand out as the most influential inspiration for the establishment of human rights bodies in domestic jurisdictions. These guidelines prescribe the role, composition and structure of NHRIs, and are only meant to serve as ideals to which state constitutions ought to aspire. A landmark in this sphere is a publication titled, *Protectors or Pretenders? Government National Human Rights Institutions*.²⁷ This publication focuses on the performance of NHRIs given the investment of the United Nations (UN) in this venture. The research finds that most NHRIs in Africa are 'pretenders' and that it is time the UN reconsidered its mostly unquestioned investment.

Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World,²⁸ narrates the experiences of the various kinds of NHRIs established in the various states. It is an attempt to discover how NHRIs have fared in diverse states such as Cameroon, Ghana, India, Argentina, Austria, Belgium, Namibia, Sweden, Zambia, *et cetera*. The study has little relation to government functions, except a chapter on NHRIs in a federal structure of government. The International Council on Human Rights Policy has also published a report, which examines the degree to which NHRIs are successful in carrying out their mandate to promote human rights and protect the rights of citizens.²⁹ The study looks at how NHRIs in different countries and contexts are acquiring legitimacy and a reputation of effectiveness. Hatchard, Ndulo and Slinn's, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective*,³⁰ carries a detailed account of NHRIs in the specified region. This publication is a general assessment of NHRIs and exhibits no particular bias.

¹⁸ P Jackson & P Leopold, *Constitutional and administrative law* (2001).

¹⁹ Bradley & Ewing (n 9 above).

²⁰ S de Smith *Constitution and administrative law* (1977).

²¹ BO Nwabueze *Constitutionalism in the emergent states* (1973); BO Nwabueze *Presidentialism in commonwealth Africa* (1974).

²² YP Ghai & B McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (1970).

²³ AV Dicey *Introduction to the study of the law of the constitution* (1885).

²⁴ Montesquieu (n 2 above).

²⁵ Locke (n 7 above).

²⁶ JD Kaplan (ed) *The pocket Aristotle* trans WD Ross (1958).

²⁷ Human Rights Watch (2001).

²⁸ K Hossain *et al* (eds) *Human rights commissions and ombudsman offices: National experiences throughout the world* (2000).

²⁹ *Performance and legitimacy: National human rights institutions* International Council on Human Rights (2000).

³⁰ Hatchard *et al* (n 16 above). See ch 10.

The current contribution is unique in that it seeks to assess the doctrine of separation of powers with a view to seeing whether it is receptive to NHRIs enacted in compliance with the *Paris Principles*. It is a theoretical investigation that delves into the conceptual foundations of both the tripartite doctrine and NHRIs. There are, evidently, less writings on NHRIs as they relate to the other government functions, which is the principal focus of the current investigation. Hence, this study should not be seen as superfluous, less at all as extravagant.

1.5 Chapter breakdown

The current investigation will be completed in four distinct chapters. The current chapter serves well to introduce the study. The second chapter constitutes a comprehensive study of the conceptual foundations of NHRIs. The essence, structure and nature of NHRIs is also explored. The third chapter proposes to analyse the doctrine of separation of powers from a philosophical and later, from a practical point of view as it manifests itself in the Commonwealth tradition. The tripartite government configuration is discussed with the ramification of NHRIs in mind. It is instructive that without assessing the parent concept (the rule of law) a discussion on separation of powers remains orphaned. The fourth chapter shall first allude to the new challenges to human rights enforcement: It shall then discuss how these challenges and the development of NHRIs cry for a new thinking on the original tripartite system. The final section is an attempt at supplying a panacea to the challenges accentuated by the preceding part.

CHAPTER II

The evolution of NHRIs: An analytical history

Nevertheless, the Principles so established seem intangible, mainly because they were solemnly endorsed by the General Assembly, but especially because a 'revision' or 'reinterpretation', even with the best intentions in the world, would open Pandora's box. It is mainly a matter of avoiding confusion, as national institutions are by definition at the crossing point between the state and civil society, between public authorities and NGOs.³¹

2 Introduction

The previous chapter hinted that, invariably, state functions have traditionally anchored on a three-legged superstructure composing; the executive, the legislative, and the judiciary. These organs have had distinct roles conventionally allotted them, one cardinal end being the protection of liberties. In the last two decades, however, states appear to have developed interest in complementing these traditional organs ostensibly to secure more protection for human rights.³² The bodies that have emerged to reinforce the bulwark of human rights enforcement mechanisms have taken the form of human rights commissions, ombudsmen offices or more specialised institutions, for instance, on racial discrimination or gender equality. It is not uncommon to find hybrid bodies exhibiting a mixture of these traits. Indeed, Reif defines NHRIs as ombudsmen, human rights commissions or hybrid human rights ombudsmen.³³ It has been possible to compare and contrast these classes of bodies.³⁴

These institutions have similar characteristics; neither institution is judicial in nature nor has lawmaking abilities. Rather, both institutions play an ongoing advisory role regarding human rights matters, at both the national and international levels. The main difference between the two institutions is that an ombudsman's primary role is to monitor human rights abuses perpetrated by government entities, while a human rights commission generally addresses the actions of private entities and individuals as well as government conduct.

An analytical discussion of the evolution of these bodies at the UN level constitutes the current chapter. The ends of the chapter are twofold. Firstly, the study aspires to examine the role and

³¹ E Decaux 'Evolution and perspective for national institutions for the promotion and protection of human rights: Their contribution to the prevention of human rights violations' LA Sicilianos (ed) *The prevention of human rights violations* (2001) 236.

³² See, AE Pohjolainen *The evolution of national human rights institutions: The role of the United Nations* (2006) 2.

³³ LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) Spring *Harvard Human Rights Journal* 2.

³⁴ Tsekos (n 11 above) 21.

nature of NHRIs. To represent the various conceptions of NHRIs at the different epochs, a historical account is thought wise.

2.1 Role and nature of NHRIs: A historical account

2.1.1 The Swedish Ombudsman: The cradle?

Sweden is often, rightly, credited for the invention of the ombudsman institution.³⁵ The ombudsman in the classical Swedish sense could be defined as a statutory entity outside the normal structure of the state, independent in its work, fulfilling its task under the relevant national and international laws, mainly on complaints from the ordinary inhabitant.³⁶ By 'outside the normal structure of the state' is meant that the institution does not operate within the executive, the legislative or the judicial branches.³⁷ The original role of this institution was somewhat unrelated to human rights. A former Ombudsman in Sweden has noted that³⁸

This first Ombudsman, this Ombudsman of 1809, did not focus very much on issues that are today called human rights. Nor was he engaged in prevention... He was – and still is – a maladministration Ombudsman.

2.1.2 NHRIs before Paris

Whereas the original ombudsman was a product of national experience, NHRIs in their prevailing fashion are the brainchild of the international community. International appetite for institutions at national level for the promotion and protection of human rights could be as old as the UN human rights system itself. One of the earliest concerns of the Economic and Social Council (ECOSOC) appears to have been the quest for partners at the national level to assist in the promotional mandate assigned to the then nascent UN Commission on Human Rights (UNCHR).³⁹ At its second session, ECOSOC earnestly invited Members of the UN to⁴⁰

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 Commission on Human Rights.

³⁵ See for instance, F Orton 'Evolution and perspectives of the institution of the Ombudsman' LA Sicilianos (ed) *The prevention of human rights violations* (2001) 226.

³⁶ Orton (n 35 above) 227.

³⁷ As above.

³⁸ Orton (n 35 above) 226.

³⁹ Resolution 9(II) adopted 21 June 1946 (documents E/56/Rev. 1 and document E/84, para 4).

⁴⁰ As above. Emphasis added.

Evidently, ECOSOC was less ambitious. All it bargained for were institutions at national level to collaborate with Member States and the UNCHR in the erstwhile less defined promotional mandate. It would seem the UN advocated for much less complicated institutions as evidenced by the terminology assigned to the envisaged bodies. Indeed, such terms as 'information groups' or 'human rights committees' represent very simple entities devoid of sophistications. However, ambiguity remained as to the designation and function of such institutions.⁴¹

Fourteen years later, ECOSOC, appreciating the crucial role such bodies could play in the promotion and protection of human rights, invited Member States of the UN to favour the formation and continuation of such bodies as well as to communicate all the relevant information on the subject to the Secretary General.⁴²

These efforts had been heightened, as early as 1955, when the UN created the Programme of Advisory Services and Technical Cooperation in the Field of Human Rights (Programme of Advisory Services) to effectively promote the establishment and strengthening of NHRIs.⁴³ This initiative was reinforced in 1987, when, then UN Secretary General, Javier Perez de Cuellar established the Voluntary Fund for Advisory Services and Technical Assistance in the Field of Human Rights,⁴⁴ renamed Voluntary Fund for Technical Cooperation in the Field of Human Rights (Voluntary Fund).⁴⁵ The Voluntary Fund was set up to establish and offer technical support to national and regional institutions aimed at implementing international standards of human rights at the national level.⁴⁶

On 16 December 1977, the General Assembly suggested that a special seminar within the Programme of Advisory Services should be organised at a universal level to discuss NHRIs.⁴⁷ Obviously, a meeting of this kind would seek to seal the void then existing regarding the structure and function of NHRIs.⁴⁸ This ambition was fulfilled in September 1978, when the UNCHR organised a seminar to 'draft guidelines for the structure and functioning of national institutions.'⁴⁹

⁴¹ Decaux (n 31 above) 233.

⁴² ECOSOC resolution 772 B (XXX) of 25 July 1960.

⁴³ The Programme of Advisory Services was established by dint of resolution 926 (X) of 14 December 1955.

⁴⁴ The Voluntary Fund was established pursuant to ECOSOC decision 1987/147 of 29 May 1987.

⁴⁵ The Fund was renamed by dint of UNCHR resolution 1991/49 of 5 March 1991.

⁴⁶ Tsekos (n 11 above) 21.

⁴⁷ This desire was expressed through resolution 32/123 of 16 December 1977.

⁴⁸ The General Assembly by the same instrument recommended, as measures for the celebration of the thirtieth anniversary of the UDHR, the establishment of national or local institutions for the promotion and protection of human rights, and the encouragement of teaching of programmes on human rights at the various levels of education.

⁴⁹ The UNCHR decided to take up the task of organizing the seminar through resolution 23 (XXXIV) of 8 March 1978. See *Official Records of the Economic and Social Council*, 1978, Supplement No. 4 (E/1978/34), chap. XXVI, sect. A.

The *Seminar on National and Local Institutions for the Promotion and Protection of Human Rights*, held in Geneva from 18 to 29 September 1978,⁵⁰ recommended that NHRIs perform at least five functions. It was agreed that NHRIs should act as sources of human rights information for governments and the citizenry, and in this connection assist in educating public opinion and promoting public awareness and respect for human rights. NHRIs would further consider and make recommendations regarding any particular state of affairs referred to them by their host governments as well as offer advice on any questions regarding human rights. At the same forum, NHRIs were also assigned the role of studying and keeping under review the status of legislation, judicial decisions and administrative arrangements for the promotion of human rights, and to prepare reports on these matters to appropriate authorities. It was the outcome of this international gathering that the mandate of NHRIs should be flexible enough to allow the performance of any other role which governments may assign them in connection to international agreements to which they are a party.

Three critical items were stated as regards the structure of NHRIs. Firstly, it was decided that NHRIs should be so designed as to reflect, in their composition, wide cross-sections of the nation, thereby bringing all shades of the population in the decision making process in regard to human rights. Secondly, the seminar expressed that NHRIs need to function regularly, and that access to them should be available to any member of the public or any public authority. The seminar went further to suggest that in appropriate cases, NHRIs ought to have local or regional advisory organs to assist them in discharging their functions. These guidelines were endorsed by the UNCHR⁵¹ and, subsequently, the General Assembly in the same year.⁵²

Thereafter, repeatedly, the UN has called upon Member States to put in place a sound infrastructure at national level for the promotion and protection of human rights. During such deliberations, the UNCHR has invariably been asked to assist Member States technically or even financially in their endeavour to establish NHRIs. Critical General Assembly initiatives in this regard include: resolution 44/64 of 8 December 1989; resolution 1990/73 of 7 March 1990; resolution 1991/27 of 5 March 1991; resolution 46/124 of 17 December 1991; and resolution 1992/54 of 3 March 1992.

These initiatives have not been in vain. Undeniably, during the early 1990s, a burgeoning interest emerged worldwide in the creation, support and strengthening of NHRIs.⁵³ These interests found expression, for instance, during the Regional Meeting for Africa of the World Conference on

⁵⁰ See, ST/HR/SER.A/2 and Add 1.

⁵¹ See, ST/HR/SER.A/2 and Add 1.

⁵² The guidelines were endorsed through resolution 33/46 of 14 December 1978.

⁵³ Pohjolainen (n 32 above) 2.

Human Rights,⁵⁴ the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights Institutions,⁵⁵ and the Workshop for the Asia-Pacific Region on Human Rights Issues.⁵⁶

2.1.3 The Paris Conference

The most momentous of the undertakings on the rubric under review, however, remains the *International Workshop on National Institutions for the Promotion and Protection of Human Rights* held in Paris from 7 to 9 October 1991.⁵⁷ The findings of this workshop were endorsed by the UNCHR⁵⁸ and later by the General Assembly as *Principles Relating to the Status of National Institutions*.⁵⁹

The *Paris Principles* 'represent a refinement and extension of the guidelines developed in 1978'⁶⁰ and are 'considered to be the minimum standards for the establishment and operation of domestic human rights institutions.'⁶¹ Hitherto, *Paris Principles* constitute the most elaborate and widely acknowledged efforts to define and structure NHRIs. Of the normative status of *Paris Principles*, it has been stated:⁶²

The Principles have gained considerable political and moral weight due to the fact that various international and national organisations have welcomed these principles and encouraged governments to follow them.

In fact, one could safely deduce that they represent a fundamental watershed for these bastions of human entitlements. These principles while are not intended for wholesale application are envisioned to guide the process of installing NHRIs where they are not and also strengthening already existing ones. They provide a very general framework for the structure, mandate and powers of NHRIs.⁶³

According to these principles, NHRIs are required to be vested with the competence to promote and protect human rights. The principles prescribe that NHRIs ought to be given as broad a mandate as possible, which should be clearly set forth in a constitutional or legislative text. Even a cursory glance at *Paris Principles* accentuates that the stipulated roles for NHRIs are capable of

⁵⁴ Held at Tunis from 2 to 6 November 1992.

⁵⁵ Held at Ottawa from 30 September to 2 October 1992.

⁵⁶ Held at Jakarta from 26 to 28 January 1993.

⁵⁷ See, E/CN.4/1992/43 and Add. 1 and 2.

⁵⁸ Adopted through resolution 1992/54 of the 3 of March 1992.

⁵⁹ n 17 above.

⁶⁰ ECOSOC, E/CN.4/2005/107 of 19 January 2005.

⁶¹ CJ Peterson 'The Paris principles and human rights institutions: Is Hong Kong slipping further away from the mark?' (2003) *Hong Kong Law Journal* 514.

⁶² Pohjolainen (n 32 above) 9.

⁶³ Pohjolainen (n 32 above) 14.

a dual nomenclature: As actors on the international front and as players on the national scene. In appreciation of this development, it has aptly been pointed out of the emerging ombudsman:⁶⁴

Originally, it was a very national institution with a very national focus. Today that is no longer so; international contacts are common and a number of international bodies exist... in both of which ombudsmen participate, and so forth.

This 'dual mandate' has occurred over time. As stated above, the original idea that ECOSOC had was that NHRIs would act as liaison points for both international and national human rights actors. At least two roles naturally followed from this design. Firstly, it was initially acknowledged that NHRIs would constitute some form of 'human rights information centers.' As information centres, the UN would be able to utilize these outfits as hinter libraries and hence use them for the dissemination of human rights materials most likely generated at the international level.⁶⁵ NHRIs would also utilize their proximity to national authorities and populations to publicize the activities of the UN as well as bring to the attention of their national governments and inhabitants the developments at the international level pertaining to human rights. Thus, NHRIs would bring to the attention of governments the latest treaties enacted, the latest human rights bodies on the scene and other related human rights developments.

That thinking has since changed. Rather, it has been built on. Since the enactment of the *Paris Principles*, NHRIs are seen in more light. More than just acting as liaison points for the UN, NHRIs are increasingly becoming significant players, on both the international and national fronts. Their dual mandate was reaffirmed at Paris when they were designated to:

Cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights...

In practice, this mandate has been widely interpreted. At the international level, NHRIs are now expected to (and they often do) participate in the writing of and negotiation of international human rights treaties and other instruments. They are now critical components of the international community. It is not far fetched to say that hardly any international conference or seminar takes place without the involvement of members of these institutions. This has not been accidental. The international community expects NHRIs to be interactive, to attend international forums, share expertise and experiences as well as offer their manpower in the making and development of human rights jurisprudence. It is very much within their mandate to take part in the implementation and monitoring of international human rights law. The *Paris Principles* desire that NHRIs will play a role in the harmonization of national legislation, regulations and practices with the international human rights instruments to which their host states are a party. It is required, for example, that

⁶⁴ Orton (n 35 above) 229.

⁶⁵ This role was still envisaged in resolution A/Res/46/124 of 17 December 1991.

NHRIs write shadow reports as well as attend and make presentations at the sessions of treaty monitoring bodies. The *Paris Principles* particularly stipulate that one role of NHRIs should be:

To contribute to the reports which states are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence...

The African Commission on Human and Peoples' Rights (African Commission) has honoured this clause by granting all NHRIs of African states observer status so long as they satisfy certain enumerated criterion.⁶⁶ This status allows NHRIs to participate in the submission of reports pertaining to the African Charter on Human and Peoples' Rights (African Charter).⁶⁷ Even the rather formal international human rights tribunals such as the African Court on Human and Peoples' Rights (African Court) and the European Court on Human Rights are equally not out of the bounds of NHRIs. The very nature of NHRIs sanctions the institution of proceedings of human rights import before these international tribunals, and they have been doing it ever since. NHRIs are also expected to support other organizations, mostly NGOs, initiating claims before international tribunals, for instance, through legal advice or material support.

At the national level, NHRIs are performers of many trades. Generally speaking, their role in this regard is to strengthen the protection of human rights.⁶⁸ This broad mandate is amenable to threefold taxonomy; (a) promotion, (b) enforcement, and (c) investigation of individual complaints.

As regards promotion, the *Paris Principles* require NHRIs to assist in the formulation of programmes for the teaching of, and research into, human rights and take part in their execution in schools, universities and professional circles. Alongside this function, *Paris Principles* envisage a role for NHRIs in the publicization of human rights and efforts to combat all forms of discrimination by increasing public awareness especially through information and education using available press organs. They are expected to sensitize people as well as bring to their attention the concept of human rights. The international community is, in fact, opportunistic that public education on human rights done by a national institution is bound to have far greater impact because local bodies will usually have the ability to package human rights items in a manner that is comprehensible by the local populations even defeating the cultural relativism barrier.⁶⁹ This task necessitates that NHRIs open up branches all over the country to ensure quick access as well as prompt dissemination of human rights knowledge.

⁶⁶ During its 24th Ordinary Session, held from 22 to 31 October 1998, in Banjul, the African Commission granted observer status to NHRIs in return for mutual cooperation in the protection and promotional mandate.

⁶⁷ Adopted on 27 June 1981 by the 18th Assembly of Heads of State of the Organisation of African Unity at Nairobi. Entered into force on 21 October 1986.

⁶⁸ S Spencer 'A human rights commission for the United Kingdom – Some options' (1997) *European Human Rights Law Review* 153.

⁶⁹ Tsekos (n 11 above) 22.

Regarding enforcement, policy formulation is one area where active involvement of NHRIs is envisaged. It is projected that NHRIs will have an opportunity to inform the processes that lead to government policy. They are required to advise governments especially where policies that are likely to impact on human rights are concerned. This kind of advice is also required for parliament to enable it perform its roles. As if taking cue from this standard, a piece of academic work has prescribed the following role for the proposed NHRI in the UK, if established:⁷⁰

A key role of the Commission would be to give advice to Parliament, to public and private bodies and to the public at large. Its advice to Parliament would enable MPs and Peers to question more effectively the extent to which legislative proposals conform to... the United Kingdom's ... international obligations...

The *Paris Principles* assign another role to NHRIs: To encourage ratification of international instruments or accession to those instruments, and to ensure their implementation. Even after ratification, NHRIs may be instrumental in the domestication process. It is trite knowledge that most Commonwealth states adopt a dualist position requiring that a separate municipal act give their international obligations domestic effect.⁷¹ Domestication of international obligations is, therefore, a vital component of human rights enforcement and it is ideal that this role has been ascribed to these bodies. The actual legislation process is equally not beyond NHRIs. According to *Paris Principles*, the prerogative of NHRIs extends to: 'Any legislative or administrative provisions, as well as provisions relating to judicial organizations.' Suffice to state, it is considered good practice for NHRIs to breathe human rights life into all proposed laws and measures within their jurisdictions.

Paris Principles further envisage that, as an optional measure, NHRIs may be authorized to hear and consider complaints and petitions concerning individual situations. In this regard, petitions may be brought before NHRIs and it is advised that where such disputes are lodged, an amicable settlement should be sought through conciliation or, within the limits prescribed by the law, through binding decisions. It is important to note that NHRIs are in practice hardly afforded the right to give binding judicial decisions. Thus, in some jurisdictions, the decisions of these tribunals will usually require the endorsement of a proper judicial tribunal before they could come into force.⁷²

NHRIs, however, have come to be known for their role in investigating human rights violations especially by state authorities. In this regard, a scholarly contribution has noted that 'stronger emphasis has, for instance, been placed on the importance of the investigative and complaints-handling function, which is now recognized as one of the core functions of national

⁷⁰ Spencer (n 68 above) 157, 158.

⁷¹ See, I Brownlie *Principles of public international law* (1973) 33.

⁷² For instance, according to sec 19(4) of the *Kenya National Commission on Human Rights Act, 2002*, orders issued under the Act must be filed with the High Court.

institutions.⁷³ This mandate is usually accompanied with the power to summon persons, power to summon witnesses, to compel attendance of suspects and to issue a report.

The Paris Conference also delved to prescribe the nature and composition of NHRIs. The principles require that the institutions be given a broad mandate to enforce human rights and enjoy absolute independence from governments. Independence here is guaranteed by the provision of adequate funding and the ability to higher own staff and premises. The mandates of especially the senior staff are required to be specifically stipulated in an official act to ensure their autonomy in the performance of their functions. The institutions should also have pluralistic membership and represent organizations in civil society that are actively involved in the protection and promotion of human rights. Equally important, the institutions should be accountable, transparent, and accessible to the public.⁷⁴

Even as the *Paris Principles* continue to garner international recognition and acceptance, criticisms have not been in abeyance. A commentator has, for example, succumbed that:⁷⁵

It is true that these principles reflect more the concept of national human rights *commissions* than that of national human rights ombudsmen. The simple explanation is that the host in Paris was a commission and that the main drafter of these principles was a commissioner (the then Federal Human Rights Commissioner of Australia, ... Ms Mary Robinson).

2.1.4 After Paris

Another landmark in the history of the NHRIs is the World Conference on Human Rights⁷⁶ *Vienna Declaration*, which reaffirmed:

The important and constructive role played by national institutions for the promotion and protection of Human Rights, in particular their advisory role to the competent authorities, their role at remedying human rights violations, in the dissemination of information and education in human rights.

The *Vienna Declaration* was significant in more ways than one. It was at Vienna that the double nature of NHRIs became fully apparent. Indeed, it was at this forum that NHRIs were first granted the right to participate in international debates.⁷⁷ NHRIs were effectively represented at this forum,

⁷³ Pohjola (n 32 above) 8.

⁷⁴ Peterson (n 61 above) 514.

⁷⁵ Orton (n 35 above) 229.

⁷⁶ World Conference on Human Rights, Vienna, 14 – 25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20 (1993).

⁷⁷ ECOSOC, E/CN.4/2005/107 of 19 January 2005.

an affirmation of their international mandate. The dual mandate exhibited in Vienna was later acclaimed in the following terms:⁷⁸

National institutions thus have a double legitimacy. On the one hand, their own legitimacy which each institution derives from its own domestic legal basis – and hence the ‘coordination’ of national institutions outside any preestablished framework – and, on the other hand, a new international legitimacy conferred – often with some misunderstandings – by the United Nations system itself, or by a regional system such as the OAU, the OSCE or the Council of Europe.

For the umpteenth time, the *Vienna Declaration* encouraged the establishment and strengthening of NHRIs together with recognising that it is the right of each state to choose the framework, which is best, suited to its particular needs at the national level. *Vienna Declaration* granted formal status to the International Committee for the Coordination of National Institutions as a statutory liaison instrument of the UN human rights system. One of the principle functions of this outfit is the organisation of a biannual world meeting of NHRIs. Interestingly, *Vienna Declaration* sees NHRIs as best suited to play a critical role in eliminating xenophobia:⁷⁹

Between 5 and 7 February 1996, under the auspices of the UNCHR, and the Cameroon National Commission on Human Rights and Freedoms, participants at the First African Conference of National Institutions for the Promotion and Protection of Human Rights met in Yaoundé, Cameroon, and proclaimed the *Yaoundé Declaration*. The Conference reaffirmed the ‘important role that National Institutions must play both with regard to their responsibilities *vis-à-vis* government and their responsibility to promote human rights and provide remedy when those rights are violated.’ It ventured to create a Coordinating Committee of African National Institutions, which would work, in close collaboration with the International Coordinating Committee and the UNCHR.

Yaoundé Declaration called for regular consultation and exchange of information between all NHRIs particularly those within the African region, as well as the development of a common programme of activities. The declaration endorsed the ‘creation of new National Institutions to foster the rule of law and guarantee human rights in Africa.’

⁷⁸ Decaux (n 31 above) 234.
⁷⁹ Decaux (n 31 above) 235.

2.2 In lieu of conclusion

The thirst for NHRIs has not been the preserve of the UN. The Commonwealth has also had its fair share of contribution. Part of its most profound endeavours is the *Human Rights Institutions Best Practice Principles*,⁸⁰ which serve as guidelines for Commonwealth states. Moreover, between 22 and 26 March 2004, representatives of NHRIs and parliaments from ten Commonwealth countries gathered in Abuja, Nigeria, to explore ways in which NHRIs and parliaments could cooperate for the better enforcement of human rights. The workshop gave rise to the *Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions (Abuja Guidelines)*.

As if to complement the efforts initiated by the UN, the Organisation of African Unity (OAU) (as it then was) enacted the African Charter, which treaty became the first to codify the concept of NHRIs. At article 26, the treaty implores Member States to allow for 'the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed' therein.

In 1996, the African Commission, at the platform of the Mauritius Plan of Action,⁸¹ championed for the holding of workshops to promote awareness and enhancement of NHRIs and called for the cooperation of NHRIs in the fulfilment of its mandate of promoting and protecting human and peoples' rights. It further undertook to encourage the establishment of NHRIs. These institutions, it was envisioned, could serve as a basis for initiative for human rights in the respective countries as well as help to disseminate the African Charter and to fulfil its educational mission. The African Commission was upbeat that these bodies may also contribute to protective activities by availing it information on human rights violations and by assisting the victims of such violations.

Come 1998, the African Commission was at it again. During its 24th Ordinary Session it commended 'the increasing interest shown by African states in establishing and strengthening national institutions for the protection and promotion of human rights based on the principles of independence and pluralism.' It further recognised,

The right of each state to establish, according to its sovereign prerogatives and within the most appropriate legislative framework, a national institution charged with the promotion and protection of human rights according to internationally recognised norms.

⁸⁰ Commonwealth Secretariat (2001).

⁸¹ Reprinted in 6 Review of the African Commission on Human and Peoples' Rights (1996-97) 215.

It is here that the African Commission conceded observer status to African NHRIs as beseeched by the *Yaoundé Declaration*.

In lieu of conclusion, it is noted that there are many other sporadic initiatives that have paid tribute to the concept of NHRIs. It would appear the quest for NHRIs has converted into an unstoppable train and there is no gainsaying the fact that these bodies are now fundamental players on both the international and national planes. The tragedy, however, remains that the structure and roles assigned to NHRIs resemble or appear contradict more conventional state organs. One may also argue that these institutions, mostly fronted by the international community, may not find the traditional domestic constitutional structures readily conducive for their blossom.

CHAPTER III

The rule of law, separation of powers and the advent of NHRIs: An anatomy of a discord?

To that end they vested the structure of our central government in the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity... These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.⁸²

3 Introduction

The introductory chapter underscored that the current investigation intends to find an unproblematic pride of place for NHRIs in Commonwealth Africa.⁸³ This chapter revisits two key and common attributes of these Commonwealth constitutions - the concept of the rule of law and the doctrine of separation of powers. The analysis is intended to highlight certain aspects that arguably may pose challenges to the wellbeing of NHRIs in the tripartite government configuration and, consequently, the protection of human rights. It would be idle to pretend to give a detailed account of Commonwealth constitutions in Africa, much less a comprehensive review of any selected constitutional items. Hence, a selective approach is preferred.

It is believed that the clearest appreciation of Commonwealth constitutions in Africa is only possible if the origin of this tradition is first explored. Indeed, it is acclaimed philosophically that a historical perspective is usually a catalyst for quick and proper understanding of any given subject.⁸⁴ Thus, this study traces Commonwealth constitutions in Africa to their cradle - the Westminster constitutional model, the ideal to which the latter counterparts have invariably aspired.

The link between Commonwealth constitutions and the Westminster constitutional model is not difficult to pinpoint. De Smith, for example, documented the typical mechanism for the attainment of independence by the former British colonies.⁸⁵ This procedure included many items and notably 'an independence Order, to which the independence constitution will be scheduled...'⁸⁶ Such an Order would usually be made by Her Majesty in Council under existing statutory or

⁸² Frankfurter (n 5 above).

⁸³ Commonwealth denotes two things. First, an association of independent member states; and second, territories which are in various ways dependent on those independent members. (See de Smith (n 20 above) 627, 628 & 629). The list of Commonwealth states in Africa could be exhausted – they include: Botswana, Egypt, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, The Gambia, Uganda, Zambia, and Zimbabwe.

⁸⁴ In *Politics*, it is stated: 'He who thus considers things in their first growth and origin, whether a state or anything else, will obtain the clearest view of them'. Kaplan (n 26 above) 279.

⁸⁵ de Smith (n 20 above) 635.

⁸⁶ As above.

prerogative powers in the United Kingdom.⁸⁷ As if to supply 'practice' to this theory, Nwabueze described the independence process in the instance of Nigeria succinctly thus.⁸⁸

This final culmination was brought about in Nigeria by an act enacted by the British parliament in 1960 and entitled 'An Act to make provision for, and in connection with, the attainment by Nigeria of *fully responsible status* within the Commonwealth', the short title of which is the Nigerian Independence Act. The legal status and name of the country were changed from 'the Colony and Protectorate of Nigeria' to 'Nigeria' and the dependence of Nigeria upon Britain was formally terminated ...

Against this backdrop, the affiliation of Commonwealth legal systems to the Westminster cannot be clearer.

To achieve the ends of this chapter, the attributes mentioned above will be discussed, each in turn. For each aspect, three distinct ingredients are discernible albeit presented simultaneously: A philosophical account; a revisit of the attribute in question in its most natural and original setting - the Westminster constitutional model - and the attribute in the light of the development of NHRIs.

3.1 The rule of law: The concept in the imminence of NHRIs

Intellectual ownership of the 'concept of the rule of law' would be difficult to claim. This is because the.⁸⁹

Rule of law in some form may be traced back to Aristotle and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders; German philosophers Kant, Hegel and the nineteenth century advocates of the *rechtsstaat*; and in this century such ideologically diverse figures as Hayek, Rawls, Scalia, Jiang Zemin and Lee Kuan Yew.

The concept in its Westminster formulation is, however, often attributed to AV Dicey.⁹⁰ Dicey spared constructive intellectual moments to study the English Constitution and noticed that it had the 'rule of law' as a central feature.⁹¹ The rule of law, he argued, was one expression with at least three though kindred conceptions. In the first place, the concept entails that no man can be lawfully made to suffer in body or in goods except for a distinct breach of law *established in the ordinary legal manner before the ordinary courts of the land*. In this sense, he argued that the rule of law is contrasted with every system of government based on the exercise by persons in authority of *wide*,

⁸⁷ As above.

⁸⁸ BO Nwabueze *A constitutional history of Nigeria* (1982) 60.

⁸⁹ R Peerenboom 'Human rights and rule of law: What's the relationship?' (2005) Spring *Georgetown Journal of International Law* 810.

⁹⁰ See ECS Wade & AW Bradley *Constitutional law* (1970) 63, where it is stated: 'Of all writers on the constitution since Blackstone the most influential has been the late A.V. Dicey...'

⁹¹ Generally, Dicey (n 23 above).

arbitrary, or discretionary powers of constraint.⁹² This postulation was not entirely an innovation. The Magna Carter had recognized much earlier that.⁹³

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

In the second sense, the concept entails not only that no man is above the law, but also that every man, whatever be his/her rank or condition, is subject to the *ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals*. Dicey underscored the need for judicial processes being effected in ordinary tribunals hence elevating the role of the judicial branch of state. Again, this idea was not novel. Locke already held that 'no man in the civil society can be exempted from the laws of it.'⁹⁴

The term 'rule of law' has a third conception. That.⁹⁵

The constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

Dicey praised the rule of law, exemplified by the English Constitution, as a sound concept and ordained it the distinguishing character of English constitutionalism. Of this characteristic, he boasted.⁹⁶

Foreign observers of English manners, such for example as Voltaire, De Lolme, de Tocqueville, or Gneist, have been far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law...

However, it has not been easy to decipher the exact meaning of the rule of law as propagated by Dicey and neither has his idea been unanimously accepted. Writing in 1933, Jennings stated that the exposition given by Dicey of the concept creates a false impression.⁹⁷ Commenting decades later, de Smith described the concept as 'one of open texture' which 'lends itself to an extremely wide range of interpretations.'⁹⁸ He did not, nonetheless, fail to attempt an interpretation of the concept. Writes de Smith:⁹⁹

⁹² Dicey (n 23 above).

⁹³ 'Magna Carter' ch 39 in H Marsh *British documents of liberty* (1971) 44 – 47.

⁹⁴ J Locke *Of civil government* (1948) (1689) 57.

⁹⁵ Dicey (n 23 above) 196.

⁹⁶ Dicey (n 23 above) 184.

⁹⁷ WI Jennings *The law and the constitution* (1933) 44.

⁹⁸ de Smith (n 20 above) 40.

⁹⁹ As above.

One can at least say that the concept is usually intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural.

Understood in this light, the law governs and its jurisdiction is uncontested. This position remains true of the UK more than a century since Dicey's study. As recent as 1989, Verkuil affirmed that 'the rule of law is at the heart of the English constitutionalism that forms the backdrop of our own constitutional experience.'¹⁰⁰

If it is agreed that an accurate meaning of the rule of law has been supplied, then, it is not difficult to identify its traces in modern constitutions of Commonwealth Africa. According to Jennings, the existence of a written constitution is, in itself, evidence of the rule of law. It is his view that the object of the constitution 'is definitely to establish the rule of law.'¹⁰¹ Thus, each 'action of a public authority can be tested by the Constitution, or by the laws made in accordance with the Constitution, to determine whether it was legal or illegal.'¹⁰² He further argues that the law regulates political action far more closely where there is a written constitution prescribing more fundamental functions of government than where there is a supreme legislature as in the UK.¹⁰³

Unlike the UK, most (all) states in Commonwealth Africa have at a given epoch ventured to enact a written constitution. A remarkable feature of these constitutions is that they declare themselves sovereign over and above other laws, actions, authorities, precedents, customs or conventions. The 1996 Constitution of the Republic of South Africa is remarkable in this regard. Its place in the social and political dispensation is clear: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'¹⁰⁴ A similar stipulation exists in the Constitution of the Republic of Ghana¹⁰⁵ and the Constitution of Kenya.¹⁰⁶ The Constitution of the Arab Republic of Egypt is a notable departure from the monologue of supreme constitutions. It recognizes the pillars of Islam law as the principle source of legislation.¹⁰⁷ Nonetheless, it reckons the uncontested supremacy of the law.¹⁰⁸

Looked at from Jennings' point of view, this development of supreme written constitutions is fundamental proof of the resolve to uphold the rule of law, even if in principle only. Invariably, also, modern constitutions stipulate that no person may be punished or made to suffer except through a

¹⁰⁰ PR Verkuil 'Separation of powers, the rule of law and the idea of independence' (1989) *Winter William and Mary Law Review* 305.

¹⁰¹ Jennings (n 97 above) 41.

¹⁰² As above.

¹⁰³ Jennings (n 97 above) 51.

¹⁰⁴ Sec 2.

¹⁰⁵ Art 1(2).

¹⁰⁶ Sec 3.

¹⁰⁷ Art 2.

¹⁰⁸ Art 65.

legal sentence entered by a competent and ordinary tribunal after a due process of law. The constitutions of Ghana,¹⁰⁹ Kenya,¹¹⁰ South Africa,¹¹¹ Uganda¹¹² and many others have adopted this approach, in honour of Dicey's theory. One may add that the doctrine of judicial precedent and the entrenchment of bill of rights within Commonwealth constitutions is now settled custom, bringing to passage Dicey's 'triple limbed' theory.

It is a domestic set up akin to the one described above that is intended to play host to NHRIs, conceptualized at the international level. Arguably, the emergence of these human rights bodies in national constitutional systems breeds two contrasting offshoots. One view holds that the advent of NHRIs is a fundamental step towards a culture of the rule of law. In this regard, NHRIs are seen as vital ingredients in transitional processes especially in states recuperating from civil war or other political calamities. Reif observes that:¹¹³

Given the severe human rights problems in war-torn societies, national human rights protection role will probably continue to be most relevant for potential inclusion in future peace agreements or as elements of civil reconstruction.

For the same reason, this dosage is also prescribed for emerging democracies and there is already sufficient practice in this connection.¹¹⁴ In line with this, it has been suggested that NHRIs should be supplemented with a specific requirement of fundamental democratic processes, including free elections, the rule of law and an independent judiciary.¹¹⁵ This school of thought argues that NHRIs are able to uphold the rule of law in a number of ways. For instance, by instituting proceedings before the ordinary courts of law, these fortresses of human rights assert the supremacy of the law. In the pursuit of this end, NHRIs still have the eye of international tribunals especially where domestic remedies are inadequate or inexistent.¹¹⁶ Moreover, in some cases, NHRIs are given the powers to seek the enforcement of (human rights) law by persuading or even exerting pressure on the executive and legislative branches of state. The budding bodies may also advance the rule of law by investigating violations of human rights norms and ensuring reparations to those who suffer such violations.

Painted differently, these same arguments may constitute a conflicting facet. Firstly, the *Paris Principles* do not eliminate the possibility of NHRIs themselves constituting tribunals that may adjudicate disputes pertaining to human rights. Certain states such as Kenya¹¹⁷ and Uganda¹¹⁸

¹⁰⁹ See, art 19.

¹¹⁰ See, sec 77.

¹¹¹ See, sec 35.

¹¹² Art 28.

¹¹³ Reif (n 33 above) 16.

¹¹⁴ As above.

¹¹⁵ Pohjola (n 32 above) 8.

¹¹⁶ Since the *Interhandel case* ((1959) ICJ Reports), it is now established principle that international tribunals can only be seized after local remedies are exhausted or where they are inadequate or unavailable.

¹¹⁷ Sec 19 of the *Kenya National Commission on Human Rights Act, 2002* (Kenya Gazette Supplement No. 22 (Acts No. 1)) gives the NHRI powers of a court.

have already enacted NHRIs granting them judicial or quasi judicial authority. This makes it accent that the erstwhile formulation requiring judicial adjudication only before ordinary tribunals is already defeated.¹¹⁹ Furthermore, the current trend is in favour of adjudicating human rights violations in international tribunals especially where there are inadequate local remedies. This seems to suggest that the ordinary judicial processes may largely be in abeyance, as regards human rights protection, as long as alternative enforcement forums abound. Nonetheless, NHRIs tribunals mostly lack the power to give binding decisions and their orders will usually require the magic of judicial endorsement to acquire the force of law.¹²⁰ This could still imply the prominence of ordinary domestic courts in the protection of the rule of law, even though tremendously shaken.

Secondly, when Dicey referred to 'ordinary law', he had in mind the common law or law enacted in acts of parliament.¹²¹ The development of NHRIs has occurred concurrently with the tendency of norm setting of matters human rights at the international level. Human rights law is, therefore, increasingly becoming a domain of international law, and national jurisdictions have, invariably, only aspired to these international standards. The enactment of law solely at the national level through ordinary legislative processes is, therefore, no longer the case, and it may be time to reconsider Dicey's postulations. True, human rights are no longer sourced solely from judicial precedents or national constitutions. The situation is less helped in monist states where norms enacted at the international plane immediately sanction domestic force without even requiring any further deliberative processes.¹²² In the case of norms that have coalesced into customary international law such as torture, these may assume the force of law without even tacit or express involvement of national structures, further urging Dicey's postulations into an abyss.

It might help to recall that the Diceyan idea frowns upon the exercise by any organ of state of wide or arbitrary or discretionary powers. This position does not augur well for the *Paris Principles*, which procure as *wide* a mandate as possible for NHRIs. Even though these powers are required to be precisely defined in a constitutional or legislative text, it is not far fetched to hold that the emergence of NHRIs is bound to stifle already established order. Suffice to state, the advent of NHRIs could offer new challenges to the rule of law as erstwhile formulated.

Yet the Diceyan doctrine is not 'good for nothing'. It serves numerous ends. Preambular paragraph 3 of the Universal Declaration of Human Rights (UDHR),¹²³ for instance, reckoned that it is essential that 'human rights should be protected by the rule of law.' In this way the rule of law

¹¹⁸ The Uganda Human Rights Commission has already handed down crucial decisions against government officials. See, for instance, *Kizza Charles and Hon Miria Matembe* UHRC 655/2000.

¹¹⁹ This is not to say that disputes have always been decided before ordinary courts. Commonwealth jurisdictions are known to also establish specialized courts to deal with, say, labour disputes or court martial matters.

¹²⁰ Sec 19(4) of the *Act* requires that orders issued by the NHRI must be filed with the High Court.

¹²¹ Wade & Bradley (n 90 above) 66.

¹²² See, I Brownlie *Principles of public international law* (1973) 33.

¹²³ Adopted and proclaimed by the United Nations (UN) General Assembly in resolution 217A (III) of 10 December 1948.

has come to be identified with the concept of the rights of man.¹²⁴ During a forum organized by the International Commission of Jurists in Delhi in 1959, representatives of no fewer than fifty three countries affirmed their recognition that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. It has been advanced that the observance of the rule of law is critical to progress in both the underdeveloped and developed worlds.¹²⁵ In this regard, the rule of law is said to be the key that can unlock greater economic and ethical wealth.¹²⁶ A former President of the World Bank has even advised that for Africa to develop, 'it needs strong, well established rule of law regimes to enable it to trade itself into prosperity and out of poverty.'¹²⁷

3.2 Separation of powers

3.2.1 The doctrine and the doctorations

De Smith recounted the history and epochs of the doctrine of separation of powers in the most dramatic format. The doctrine, he records,¹²⁸

... is traceable back to Aristotle; it was developed by Locke; its best known formulation, by the French political philosopher Montesquieu, was based on an analysis of the English constitution of the early eighteenth century, but an idealized rather than a real English constitution; the disciples of Montesquieu, particularly numerous in the North American colonies, added their own refinements and today the doctrine survives in a number of curious manifestations.

Aristotle alluded to, perhaps, one of the earliest and most influential statements in political and legal thought. He conceived that 'power tends to corrupt' and that 'absolute power tends to corrupt absolutely.'¹²⁹

In 1690, Locke¹³⁰ warned against the concentration of state powers in a few individuals. He pointed out that where state power is entrusted with a few persons, the liberty of citizens often rests in imminent danger. The panacea he supplied to this vexing state of affairs is the distribution of power to different individuals. Locke posited three powers, a legislative, an executive and a federative.¹³¹ By 'federative', he meant the power to conduct foreign affairs.¹³² The philosopher did not envisage an independent judiciary and neither did he believe in 'independence and equality' as fundamental attributes of separation of powers; for he is on record as having held: 'There can be

¹²⁴ Wade & Bradley (n 90 above) 63.

¹²⁵ Rt. Hon. Lord Woolf of Barnes 'The Judiciary of England and Wales and the rule of law' (2006) *Indiana Law Review* 616.

¹²⁶ As above.

¹²⁷ JD Wolfensohn, President, World Bank Group, Empowerment, Security and Opportunity through Law and Justice, Address in St. Petersburg, Russia (9 July 2001).

¹²⁸ de Smith (n 20 above) 40, 41.

¹²⁹ n 26 above.

¹³⁰ Locke (n 7 above).

¹³¹ Sarvis (n 4 above) 319.

¹³² As above.

but one supreme power, which is the legislative, to which all the rest are and must be subordinate.¹³³

The doctrine of separation of powers is, however, often ascribed to the French jurist, Montesquieu.¹³⁴ Montesquieu assessed the Constitution of the UK and deduced that it had a discernable Executive, a Legislature, and a Judiciary. This tripartite division of functions, he argued, was a common feature of governments. His sentiments, in this regard, have attained sanctity.¹³⁵

In every government there are three sorts of power: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

Montesquieu hailed this set up as the most ideal and further vouched for its ability to secure liberty for all.¹³⁶ But, this doctrine remains evasive. Marshall has described it as 'one of the most confusing in the vocabulary of political and constitutional thought.'¹³⁷ It has also been held that 'in both theory and practice, it teems with subtleties, ironies and apparent contradictions.'¹³⁸

In essence, the French philosopher suggested what in practice would entail a watertight delineation of state functions. Some writers allege that this would be a misnomer in its ultimate.¹³⁹ It would denote, for instance, that members of the executive branch of government do not sit in the legislative organ or in the judiciary; it would mean that no organ of state performs the functions of another; and it would imply that no organ of state is allowed to interfere with the operations of another.¹⁴⁰ Applied in this pure state, government would come to naught.¹⁴¹ The tripartite system would fail to function. True, rigid adherence to separated powers 'in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties.' Of this controversy, Justice Jackson of the USA also ruled:¹⁴²

¹³³ Locke (n 7 above) ch.xii, 149.

¹³⁴ Editorial to Montesquieu's translated treatise states: 'It is he (Montesquieu), and not Locke, who must be called the father of the doctrine.' Montesquieu (n 2 above) lvii.

¹³⁵ Montesquieu (n 2 above) xi, 6.

¹³⁶ As above.

¹³⁷ G Marshall *Constitutional theory* (1971) 97.

¹³⁸ Fisher (n 8 above) 217.

¹³⁹ OH Phillips & Jackson *Constitutional and administrative law* (2001) 12.

¹⁴⁰ Wade & Bradley (n 90 above) 24.

¹⁴¹ Fisher (n 8 above) 217.

¹⁴² n 5 above.

While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity.

Contemporary writers agree that this is the proper interpretation to be given to Montesquieu's idea. A scholarly contribution, thus, interprets the doctrine:¹⁴³

What the doctrine must be taken to advocate is the prevention of the tyranny by the conferment of too much power on any person or body, and the check of one power by another.

It needs to be remembered that complete separation is possible neither in theory nor in practice.¹⁴⁴

There has been tremendous debate regarding whether the Westminster constitutional model thrives on the doctrine of separation of powers. According to Wade and Bradley, though the doctrine was based on a study of the Constitution of the UK, it is in the Constitution of the USA that its influence can best be seen.¹⁴⁵ De Smith asserted that 'no writer of repute would claim that it [separation of powers] is a central feature of the modern British constitution'¹⁴⁶ while Marshall observed that 'Montesquieu's assertions... were inappropriate even when he made them'.¹⁴⁷

While these observations carry sufficient weight, it is not an exaggeration to state that the UK Constitution exhibits an attempt at dispersing the powers of state. Lord Steyn witnesses that:¹⁴⁸

The departments of state are Parliament, the Executive and the Judiciary. Generally speaking Parliament is the supreme law-maker. The Executive carries on the business of the country. The Judiciary adjudicates on disputes between the state and individuals, and between individuals and corporations.

In most Commonwealth constitutions in Africa, attempts have been made to secure these three branches of state. According to Udombana:¹⁴⁹

Postcolonial African States have strived to fashion themselves in the image of Western liberalism ... The term "Modern State" is usually used to illustrate Western political philosophy that conceives government as comprised of three independent organs – the legislature, the executive, and the judiciary – functioning within a territory that is unambiguously defined.

But some African states are quite unique. For instance, the Constitution of South Africa does recognize that State power could be shared between the Executive, Legislative, Judiciary and

¹⁴³ Phillips & Jackson (n 139 above) 12.

¹⁴⁴ Bradley & Ewing (n 9 above) 58.

¹⁴⁵ Wade & Bradley (n 90 above) 25.

¹⁴⁶ de Smith (n 20 above) 41.

¹⁴⁷ Marshall (n 137 above) 97.

¹⁴⁸ Lord Steyn 'Democracy, the rule of law and the role of judges' (2006) *European Human Rights Law Review*

¹⁴⁹ 246. See NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) Summer *Michigan Journal of International Law* 1213.

other institutions supporting constitutional democracy.¹⁵⁰ These ‘chapter 9’ institutions include: the Public Protector;¹⁵¹ the South African Human Rights Commission (SAHRC);¹⁵² the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;¹⁵³ the Commission for Gender Equality;¹⁵⁴ the Auditor-General;¹⁵⁵ and the Electoral Commission.¹⁵⁶ These institutions are independent, and subject only to the Constitution and the law. The law implies that no person or organ of state may interfere with their functioning.¹⁵⁷

Kenya has an overly powerful Executive, a Legislature, and a Judiciary whose independence is not expressly stated in the Constitution.¹⁵⁸ A proposed draft constitution for Kenya had suggested independent constitutional commissions, which in practice would have amounted to an additional organ of state.¹⁵⁹ A prominent institution in this regard would have been the Commission on Human Rights and Administrative Justice.¹⁶⁰

3.2.2 NHRIs in the ‘trinity’ waters

Seemingly, with minimal exceptions, the tripartite system of checks and balances is well entrenched and the roles assigned to the various state organs almost universally understood. Thus, it is submitted that the installation of NHRIs in the tripartite configuration described above is bound to generate more confusion than symphony. It takes a four-pronged analysis to illustrate this submission.

The first limb of argument concerns the apparent ‘usurping’ of mandates by NHRIs. It is accent that the international community has consigned to NHRIs tasks that have conventionally been reserved for the other organs of state. The power to conduct foreign relations, for example, is a jealously guarded prerogative in the Commonwealth that has been exercised mainly by the executive. In the most traditional sense, prerogatives could be described as ‘those inherent legal attributes, which are unique to the Crown.’¹⁶¹ They are inherent in so far as they are derived from customary common law.¹⁶² Contemporary Commonwealth practice has, however, evolved what has come to be known as ‘statutory prerogatives’ – prerogatives that are provided for by statutes as opposed to customary common law practice.¹⁶³ Prerogatives usually consist of executive

¹⁵⁰ The institutions supporting constitutional democracy are established under chapter 9 of the Constitution.

¹⁵¹ Sec 181(1) (a).

¹⁵² Sec 181(1) (b).

¹⁵³ Sec 181(1) (c).

¹⁵⁴ Sec 181(1) (d).

¹⁵⁵ Sec 181(1) (e).

¹⁵⁶ Sec 181(1) (f).

¹⁵⁷ Sec 181(4).

¹⁵⁸ Sec 23 of the Constitution establishes the Executive; sec 30 establishes the National Assembly; and sec 60 establishes the Judiciary. Nothing is expressly stated regarding the independence of the Judiciary in the Constitution.

¹⁵⁹ *Draft Bill of the Constitution of Kenya Review Commission 2002*, ch 17.

¹⁶⁰ Sec 288.

¹⁶¹ de Smith (n 20 above) 114, 115.

¹⁶² de Smith (n 20 above) 41.

¹⁶³ See, ‘prerogative powers’ in, J Ojwang *Constitutional developments in Kenya: Institutional adaptation and social change* (1990).

powers such as the *conduct of foreign relations*.¹⁶⁴ Less wonder, by 'acts of state' are deemed 'those acts of the Crown which are done under the prerogative in the sphere of foreign affairs.'¹⁶⁵ Yet the *Paris Principles* turn a blind eye to this already established order by allotting NHRIs immense international mandate. It would appear the arrival of NHRIs reverses the trend since, henceforth, these human rights bodies are recognized actors on the international scene. They negotiate treaties, make reports concerning their states and have direct contacts with the UN and other international organizations.

Even the making of laws, a role usually confided in parliament, often due to its representative capacity, has partly been assigned NHRIs. Emerging practice appears to confer NHRIs the right to participate in legislative deliberations particularly where human rights are implicated. The NHRIs movement has not spared the judicial branch of state, either. The second chapter noted that NHRIs invariably have the power to constitute judicial tribunals sometimes with the power to issue binding orders.

Secondly, the composition of NHRIs is such that they could effectively alter the much vaunted trinity doctrine. According to the *Paris Principles*, even members of the executive and the legislative could share positions in NHRIs together with members of civil society groups. This implies that the differentiation of persons into separate organs is, again, here shaken and it is the doctrine of separation of powers that suffers. However, as a safeguard to the possibility of members of executive having a dominating voice in these bodies, where they sit in NHRIs, the *Paris Principles* provide that such members should not wield voting rights.

It is instructive that the kind of prescribed autonomy for NHRIs, if faithfully pursued, could translate effectively into an additional organ of state. The distinctiveness of these outfits is marked by the fact that they are required to have constitutional or legislative establishment, financial and human resource independence and such powers as investigation of violations of human rights, power to summon even government officials as well as predetermined tenures for senior officials. The Constitution of South Africa has not shied away from stipulating that 'chapter 9 institutions' shall constitute an additional organ of state. A draft constitution of Kenya had attempted to follow suit and it is possible that these development might take root.

But even as NHRIs begin to constitute independent outfits, at least according to the international standards, there is less talk concerning their accountability. The traditional state organs have at least accounted to each other and to the citizenry through the various established mechanisms such as judicial review, impeachment and vote of no confidence, universal adult suffrage *et cetera*. NHRIs have minimal checks and balances prescribed for them. As matters stand, they have no guarantee of elected membership, no reliable established convention of

¹⁶⁴ As above.

¹⁶⁵ Wade & Bradley (n 90 above) 265.

transparency and accountability to either branch of state or the public and, worse still, little attention given to the rubric by constitutional law theory. Mostly, all that is required is that these bodies submit reports to parliaments¹⁶⁶ an emerging ritual that has been of little significance.¹⁶⁷

3.3 Conclusion

This chapter has endeavored to demonstrate that there is incredible variance between the prevailing principles of constitutional law and the prescribed standards for NHRIs. While it is acknowledged that the concept of the rule of law and the doctrine of separation of powers are not absolute, and also that the *Paris Principles* are not envisioned for wholesale implementation, the chapter has served to illustrate the fundamental problems potentially arising from the formulation of NHRIs. The tragedy with this kind of haphazard international development is that these seeds have been sown in the domestic soil without tilling or even promising to weed the soils in which they are to germinate.

¹⁶⁶ Art 218 (g) of the Constitution of Ghana simply requires the Commission on Human Rights and Administrative Justice to 'report annually to Parliament on the performance of its functions.'

¹⁶⁷ Hatchard *et al* (n 16 above) 219.

CHAPTER IV

Plugging NHRIs into domestic sockets: Towards an accord

Thus, the effort of the human rights movement, first, expanded the notions of what constitutes human rights and how states can encourage their enforcement; and second, worked toward the institutionalisation of human rights, whereby states can enforce activities relating to human rights through actual practice.¹⁶⁸

4 Introduction

Earlier sections of this thesis have alluded to the fact that the international community has had occasion to structure institutions to monitor human rights at national level. These externally created bodies – NHRIs – have been recommended for the national jurisdictions and their emergence would appear to have less factored the unique national experiences. One could safely state that they have been erected without prior consideration of the factors obtaining on the domestic ground on which they are meant to be sown. The result has been that there is already confusion regarding the manner in which the new institutions should be incorporated into the national configurations or whether at all they are necessary. This predicament has been lamented:¹⁶⁹

The fact that the institutions outlined in the Paris Principles did not fit easily in the traditional three-division of state powers but appeared to have a role in both the legislative, judicial and executive field, must have confused many governments.

The current chapter is an attempt at resolving some of the most nagging questions this contribution promised, at the outset, to address: (a) Are NHRIs necessary where an effective tripartite system of government under the rule of law prevails? (b) If in the affirmative, how should these institutions be incorporated into the conventional system? (c) How could NHRIs be made accountable?

¹⁶⁸ CR Kumar 'National human rights institutions; Good governance perspectives on institutionalisation of human rights' (2003) *American University International Law Review* 260.

¹⁶⁹ Pohjolainen (n 32 above) 8.

4.1 NHRIs: Superfluous or necessary tautology?

It is accent that the tripartite government structure is seen as a guarantor of liberties. The advent of NHRIs would seem to confront this established order in at least two prominent respects. Firstly, this development raises the question as to whether the original tripartite framework has failed to secure the desired ends and hence the need for fortification. Secondly, the situation is least helped by the fact that NHRIs have been assigned some of the roles conventionally performed by the other organs of state. It would, therefore, be pertinent to interrogate whether these new outfits are complementary or substitutes, or, indeed, whether they are necessary and feasible at all.

In this connection, it is submitted that there are many reasons why the NHRIs movement should be given a chance even during the sustenance of the tripartite government. The reasons are that: The ancient tripartite government structure is less accustomed to emerging species of rights; that norm setting in matters human rights has since taken a tangent, mandating novel and apt measures; and that the development is in line with the contemporary agenda of mainstreaming human rights concerns. The thesis now turns to discuss these justifications.

4.1.1 Tripartite government: Obsolete or inadequate?

It serves to reiterate that believers in trinity government have variously vouched for the potential of this set up to concede liberty for all. Few contest, for instance, that a representative and supreme legislature can put the executive to task, hence yielding liberty for the citizenry. Where usurpations under the law arise, an independent judiciary has usually offered an impartial arbiter. In a democratic dispensation, even the executive itself is amenable to further checks by the populace mostly through periodic and fair elections. Liberty, it would appear, oozes naturally from this configuration rife with checks and balances. Bolingbroke, a contemporary of Montesquieu, is a bigoted believer in this 'holy trinity'. According to his philosophy:¹⁷⁰

It is division of powers... which constitutes a limited monarchy.... If any of the three ... should at any time usurp more power than the law gives, or make ill use of a legal power, the other two parts may... by exerting their strength, reduce this power into proper bounds. This is that balance which has been so much talked of.... This proposition is therefore true; that in a constitution like ours, the safety of whole depends on the balance of its parts.

¹⁷⁰ Bolingbroke *Remarks on the history of England* (1730).

A convincing argument, indeed, is made that, as regard human rights protection, the trinity configuration is omnipotent. It is submitted that this is a façade as a deeper understanding of the factors at play accentuates a revealing facet. For example, it is hardly reckoned that Montesquieu and ilk, in propagating the trinity doctrine, also ventured to define the gene of liberty expected to accrue from the tripartite government set up. In Montesquieu's own words:¹⁷¹

Political liberty does not consist in an unrestrained freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constraint to do what we ought to will.

Even the most generous interpretation of the context reveals that Montesquieu could only have considered political liberties. His own words expressly refer to *political liberties* and it is clear that political freedom is what preoccupies his thinking. Put differently, it is least likely that Montesquieu prescribed an institutional solution to entitlements other than civil and political.

A different line of deduction could yield the same synthesis. According to Karel Vasak, human rights unveiled at distinct epochs.¹⁷² First to be ascertained were civil and political rights (first generation rights), followed by social and economic rights (second generation rights), and finally group rights (third generation rights). Although this categorisation of rights into epochs has been contested, the thinking serves to illustrate that only civil and political rights could have informed the initial stages of defining the state, especially during the 17th Century. This argument finds exoneration as Heyns and Brand confirm that: 'the inclusion of socio-economic rights in national constitutions is a relatively recent development.'¹⁷³

It is, thus, clear that recent developments on the human rights front have introduced other species of human rights not prevalent when the original state was under formulation. Social and economic rights, for instance, attained international recognition by dint of the UDHR and especially after the International Convention on Economic Social and Cultural Rights (CESCR).¹⁷⁴ Much more prominence was given to social and economic rights during the Vienna Conference where the indivisibility, interrelation, inalienability and interconnectivity of human rights was asserted.¹⁷⁵ At Maastricht, human rights experts declared that:¹⁷⁶

¹⁷¹ Montesquieu xi 3. Emphasis added.

¹⁷² The categorization of rights into different generations is ascribed to the French jurist Karel Vasak. See, M Craston 'What are human rights?' in L Lacqueur & B Rubin (eds) *The human rights reader* (1979) 21.

¹⁷³ C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' G Bekker (ed) *A compilation of essential documents on economic, social and cultural rights* 4.

¹⁷⁴ Adopted by the UN General Assembly in resolution 2200A (XXI) of December 1966; entered into force on 3 January 1976.

¹⁷⁵ Para 8.

¹⁷⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 4.

It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

Recently, national jurisdictions have begun to incorporate these novel entitlements into domestic bills of rights. The Constitution of South Africa has a Bill of Rights with justiciable social and economic rights, a very unique development.¹⁷⁷ A scholarly contribution has in fact ranked this Constitution as 'the most sophisticated and comprehensive system for the protection of socio-economic rights of all constitutions in the world today.'¹⁷⁸

These new human entitlements are different both in their content and nature. While civil and political rights will usually require the massive and oft bothersome hand of the state to remain in the abeyance, social and economic rights yearn for active involvement of government in guaranteeing the stipulated good and services. Rosas and Scheinin write that:¹⁷⁹

Civil and political rights... only require the State to abstain from interfering in the life of the individual ('negative' obligation of the State). Economic, social and cultural rights are often seen as objectives or 'programmatic' rights rather than true individual rights. They are said to require 'positive' action on the part of the State (national policies and programmes), such as the handing out of money and services.

In the light of the foregoing, it is logical that a government superstructure cast against the backdrop of civil and political rights, which rights thrive on the abeyance of government, is bound to prove inadequate in the implementation of social and economic rights, which vigorously beckon state action. Clearly, these new entitlements call for a reconstituted state that reckons these developments. In this regard, NHRIs are seen as potentially sealing the lacunae.

According to the Committee on Economic, Social and Cultural Rights, NHRIs made in the image of the *Paris Principles* have an important role to play in the implementation of social and economic rights. It is the Committee's holding that 'one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights.'¹⁸⁰ The Committee is also of the opinion that institutions at national level in the nature of

¹⁷⁷ Other states with a justiciable set of social and economic rights are Sri Lanka, Hungary, Lithuania and Portugal.
¹⁷⁸ D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns in *Socio-economic rights in South Africa* (2005) 1.

¹⁷⁹ A Rosas & M Scheinin 'Categories and beneficiaries of human rights' R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (2000) 49.

¹⁸⁰ General Comment 10 E/C.12/1998/25. Para 1.

NHRIs have a better disposition to promote the indivisibility and interdependence of all human rights.¹⁸¹ Kumar embraces a similar position thus:¹⁸²

... The role of NHRIs should be to narrow the differences between these two sets of rights so that public policy goals of economic and social development become assertive and enforceable rights for the empowerment of the citizens.

A report has further recommended that NHRIs ought to have a mandate to address economic, social and cultural rights.¹⁸³ These could be achieved, for instance, through auditing governments' policies to ensure that they realise economic, social and cultural rights, addressing cases involving economic, social and cultural rights in terms of government treaty obligations and looking for ways of making these rights justiciable.¹⁸⁴ Moreover, given the domestic stationing of NHRIs, they are in a better position to formulate the core minimum obligations necessary for the realisation of social and economic rights.¹⁸⁵ In South Africa, courts of law have already found the SAHRC a worthy partner in the enforcement of these fairly nascent entitlements.¹⁸⁶

4.1.2 Emergence of the international stage as norm setting forum

Not only have new entitlements emerged, but also national jurisdictions as norms setting scenes have weathered drastically quite to the chagrin of the tripartite doctrine. State sovereignty has weaned almost in the same proportion that the international stage has gained prominence in enacting human rights laws and standards.

Since the birth of the UN on 24 October 1945,¹⁸⁷ it became clear that norm setting in matters concerning human rights would no longer chiefly be the domains of national apparatus but, rather, also of the international community. This statement is vindicated by the fact that within one year of UN's existence, it had already entrenched the Charter-based ECOSOC,¹⁸⁸ which in turn hastily instituted UNCHR.¹⁸⁹ These institutions together with the General Assembly and other affiliate bodies of the UN would then provide the grass on which human rights soccer would be

¹⁸¹ General Comment 10 E/C.12/1998/25. Para 3.

¹⁸² Kumar (n 168 above) 292, 293.

¹⁸³ (n 29 above) 112.

¹⁸⁴ As above.

¹⁸⁵ Kumar (n 168 above) 292, 293.

¹⁸⁶ See, K Pillay 'Implementation of Grootboom: Implication for the enforcement of socio-economic rights' (2003) Vol. 6 *Law, Democracy and Development* 14.

¹⁸⁷ The UN is established by the Charter of the United Nations, adopted by the San Francisco Conference on 26 June 1945; entered into force on 24 October 1945.

¹⁸⁸ Established under art 7(1) of the Charter of the UN.

¹⁸⁹ The UNCHR was brought into existence through a resolution adopted on 21 June 1946 (documents E/56/Rev.1 and document E/84, para 4).

played. They would constitute a forum parallel to that of national jurisdictions; but a no mean forum, nevertheless.

It is instructive that the UN Charter itself had paid sufficient tribute to the concept of human rights. Preambular paragraph 2 of the Charter reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person' and 'in the equal rights of men and women.' Article 1(3) of the Charter identifies one of the purposes of the UN as being:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

In furtherance of this mission, the General Assembly, in 1948, endorsed what has been described as a landmark in human rights' history, the UDHR. That this instrument represents a turning point for human rights is evidenced by the fact that some commentators even concede that it has since ossified into customary international law.¹⁹⁰ This influential international instrument was followed in 1966 by two treaties, the International Covenant on Civil and Political Rights (CCPR)¹⁹¹ and the CESCR. These three instruments are considered so cardinal that they have come to constitute what is known as the 'International Bill Rights.'¹⁹²

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁹³ is another treaty whose prominence has been on steady escalation. It has been hailed in many quotas. For instance, it has been noted that 'the outcome of years of discussions, debates and ultimately compromises, the Convention asserts many of the fundamental rights of women.'¹⁹⁴ In yet another context, it has been described as constituting 'a comprehensive attempt at establishing universal standards on the rights of women' and further that it 'can be regarded as a milestone on the path to the goal of standard-setting for gender-based equality.'¹⁹⁵

The same happy story of increasing significance could be said of the Convention on the Rights of the Child (CRC),¹⁹⁶ which boasts of a near universal endorsement.¹⁹⁷ It is 'the most

¹⁹⁰ See, for instance, A Eide & G Alfredson 'Introduction' in A Eide & G Alfredson (eds) *The Universal Declaration of Human Rights: A common standard for achievement* (1999).

¹⁹¹ Adopted by the UN General Assembly in resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976.

¹⁹² See A Eide 'Economic, social and cultural rights as human rights' in A Eide *et al* (eds) (1995) *Economic, social and cultural rights* (1995) 21.

¹⁹³ Adopted by the UN General Assembly in resolution 34/180 of December 1979. Entered into force on 3 September 1981.

¹⁹⁴ See, Res. 5 (XXIV), 52 UN ESCOR Supp. (No 6), 70.

¹⁹⁵ J Rehman *International human rights law: A practical approach* (2003) 350 – 351.

¹⁹⁶ Adopted by the UN General Assembly in resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990.

¹⁹⁷ With the exception of Somali and the USA, all other states have signed the treaty.

rapidly and universally accepted human rights document in the history of international law.¹⁹⁸ It could be argued that this universal ratification signifies an emerging norm of *jus cogens*.

It is possible to describe the human rights movement within the UN as a normative bandwagon, which has not been averse to novel interests.¹⁹⁹ It is a truism that the UN human rights system has been expanding to incorporate other concerns of human rights import when they garner international recognition and acceptance. The latest entrant in this bandwagon is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).²⁰⁰

Accordingly, these hallowed norms, set at the international level, are now ideals to which national jurisdictions are expected to conform. This change of human rights strategy in terms of the forums and institutions involved certainly calls for a realignment of structural items on the municipal front. This development makes a self evident case for NHRIs even in the lifetime of democratic dispensations upholding the doctrine of separation of powers.

4.1.3 NHRIs as part of mainstreaming of human rights

At the instance when the modern state was under formulation, human rights were not prominent. As stated above, it is only after the establishment of the UN that the human rights discourse acquired both status and urgency. The status attained is that of an imperative and the urgency that of protection and promotion. The UDHR had set the tempo by recognising that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.²⁰¹ Based on this premises, the General Assembly had then proclaimed the UDHR:²⁰²

A common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society... shall strive... to secure their universal and effective recognition and observance....

Since this momentous proclamation, there has been a tendency to mainstream human rights in all manner of governance aspects. In 1993, the *Vienna Declaration* considered that the promotion and protection of human rights is a matter of priority, further asserting the prominence of human rights.

¹⁹⁸ LA Spits 'Implementing the UN Convention on the Rights of the Child: Children rights under the 1996 South African Constitution' (2005) *Vanderbilt Journal of Transnational Law* 853.

¹⁹⁹ Other actors, for instance, regional human rights systems have also played significant roles in setting human rights norms.

²⁰⁰ Adopted by General Assembly resolution 45/158 of 18 December 1990; entered into force on 1 July 2003.

²⁰¹ Preambular para 1.

²⁰² Preambular para 8.

Given the special concern now afforded the human rights discourse, specialised care for this subject has been rightly claimed. Obviously, the establishment of specialised human rights institutions to assist in the protection and promotion of human rights are a natural outcome of the human rights mainstreaming exercise. This development of NHRIs has been seen as potentially contribution 'towards the establishment of a fresh constitutional order in which human rights are widely known and fully respected.'²⁰³ Therefore, the establishment of NHRIs should be seen as a natural correlative to the prominent status attained by the human rights discourse.

4.2 Possible relationship between NHRIs and other organs of state

The present section has the modest object of resolving the potential conflict between NHRIs and the other organs of state. The section contends that neither the tripartite government structure nor NHRIs should be seen as a threat to the other. It is submitted that NHRIs should not compete for the democratic space that has been hitherto within the province of legislature, executive, and judiciary.²⁰⁴ At the same time, NHRIs should continue to be accorded democratic space to continue their independent functions in fulfilling the mandate to protect and promote human rights.²⁰⁵ The rationale for such separate space has been given as to elevate the discussion of human rights from policy guidelines to central political principles.²⁰⁶

Moreover, unique human rights tasks have emerged and *ipso facto* new performers are called for. A writer has best captured this uniqueness:²⁰⁷

The United Nations views NHRIs as useful contacts within their respective countries on human rights matters. It is important to emphasize the uniqueness of this contact, as it is fundamentally different from that with other pre-existing sources and manifestations of states and their instrumentalities, including legislative, executive, and judicial branches.

The new human rights undertakings performed by NHRIs are both queer and entailing in at least three cardinal regards. Firstly, the new tasks call for institutions that are capable of both formal undertakings such as constituting human rights tribunals as well as informal mandates such as teaching and sensitizing the public on human rights. Secondly, sought after are institutions with national stationing yet rife with international obligations and contacts. Thirdly, there are needed institutions that are both civil society soluble (in order to have an impact with the members of the public) as well as semi bureaucratic to be able to influence the usually conservative officialdom.

²⁰³ J Matshekga 'Toothless bulldogs? The human rights commissions of Uganda and South Africa: A comparative study of their independence' (2002) 2 *African Human Rights Law Journal* 90.

²⁰⁴ Kumar (n 168 above) 299.

²⁰⁵ As above.

²⁰⁶ As above.

²⁰⁷ Kumar (n 168 above) 280.

These unique traits have no rivals in the conventional state configuration pressing the need for coexistence of both the tripartite government and NHRIs. For instance, while the judiciary has often been entrusted with the task of determining disputes, its overtly formal stature as well as its strict adherence to rigid fibers of procedures inevitably paves way for NHRIs, which are mostly sufficiently flexible. Human rights imperatives appear to call for such flexibility. Sometimes, the reparations needed may just be in form of reconciliation or simply a declaration of a violation and it is NHRIs, and not courts of law, that are equipped for this kind of undertaking. Another limitation of the court would be its inability to act *suo motu*. Courts have to wait until a violation of rights is lodged with them before they can give a usually predetermined verdict. NHRIs beat this deadlock in that they have both the competence and ability to institute investigations on their own motion even without being moved. They could also easily secure an amicable settlement.

A symbiotic relationship is also possible with parliaments. According to the *Abuja Guidelines*, NHRIs are to feed parliamentarians with the necessary advice when enacting legislation or passing motions that may have impact on the state of human rights. Accordingly, NHRIs ought to advise parliamentarians on the human rights implications of all proposed legislations as well as existing laws. NHRIs could also provide on-going training for parliamentarians on human rights principles. It is equally encouraged that NHRIs conduct research on human rights issues and share the same with parliamentarians. The *Abuja Declaration* also recommended that NHRIs assist parliament in the creation of its committees for furtherance of human rights.

The point is made that there is no cause of worry – all that is needed is symphony and efficiency. There are separate roles carved out for each of these institutions and only optimal uses rather than duplication and conflict should be sort.

4.3 Towards accountability for NHRIs

There is no gainsaying that the *Paris Principles*, if implemented to the letter and spirit, could potentially foster institutions more powerful than most other organs of state. The resultant institutions are bound to be autonomous and enjoying relatively wide mandates both on the national and international scenes. Matshekga has vaunted this autonomy:²⁰⁸

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.

²⁰⁸

Matshekga (n 203 above) 71.

Unfortunately, discussion has tended to focus more on how to guarantee the independence of NHRIs with less attention being devoted to the question how they are to be held accountable.²⁰⁹ Yet, if these human rights bastions are to conform to the established principles of democratic governance, it is vital that they, too, be subjected to checks and balances. Devoid of accountability, NHRIs would remain paper tigers, thereby aggravating the frustration and disillusionment of victims of human rights violation and society as a whole.²¹⁰ This state of affairs is counterproductive and could be a daring affront to the rule of law.

Ancient wisdom would appear to enunciate that only power could check another. In this regard, Montesquieu did prescribe that to prevent abuse of power, 'it is necessary from the nature of things that power should be a check to power'.²¹¹ Of this idea, it has been stated:²¹²

According to him (Montesquieu), power can be checked only by power – a statement with which few will be willing to quarrel. It is not ideologies and beliefs that can check power but only a counter-power.

The tragedy with this kind of accountability mechanism for NHRIs would be that it might end up compromising their independence. Yet their efficacy very much depends on their institutional autonomy as well as independence from the other organs of state. Even then, guarding the autonomy of NHRIs should not be interpreted to mean insulating them from transparency regarding their performance. The effectiveness of these institutions could be improved if a sound accountability mechanism is erected.

Currently, in the Commonwealth, most NHRIs are required to account by submitting annual reports of their activities to parliament or head of state or government.²¹³ This system, research shows, has been a failure in at least three irking respects. Firstly, the reports presented to the legislatures are hardly detailed.²¹⁴ They tend to contain the very hollow administrative and financial operations of the human rights institutions, which reports give no clue of the performance pertaining to the period under review. Secondly, the reports are mostly belated; often containing activities whose social and political 'gestation period' has lapsed.²¹⁵ Thirdly, legislatures rarely pay attention to the content of these reports due to a combination factors. For instance, there is, mostly, no obligation on the legislature to debate the report and it would appear that almost invariably they are effectively ignored.²¹⁶ Also, many parliaments are weak in their composition²¹⁷

²⁰⁹ (n 29 above) 70.

²¹⁰ Kumar (n 168 above) 283.

²¹¹ Montesquieu xi 4. Emphasis added.

²¹² Montesquieu (n 2 above) lvii.

²¹³ LFM Besselink 'Types of national institutions for the protection of human rights and ombudsman institutions: An overview of legal and institutional issues' K Hossain *et al* (eds) *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (2000) 161.

²¹⁴ Hatchard (n 16 above) 219.

²¹⁵ As above.

²¹⁶ As above.

²¹⁷ (n 29 above) 70.

and many wallow in a myriad of institutional trappings. The result is that institutions have emerged which are not yet amenable to a proper system of accountability.

According to Hatchard *et al* this vexing state of affairs could be fixed.²¹⁸ This could be by placing NHRIs under a legal obligation to submit their annual reports to parliament or head of state or government within a specific time. The law could also obligate parliament to debate the document that is the report of NHRIs. A further measure would be to require officials of NHRIs to appear regularly before appropriate parliamentary committees to discuss their report and the institution's operations. Such an exercise stands to be more successful if participants from civil society groups are invited to also give their side of the story. Hatchard *et al* further suggest that as an alternative:²¹⁹

Parliament might consider establishing a formal advisory committee on national institutions whose responsibilities would include holding regular consultations with civil society groups and with members of the institution itself as well as providing advice, support, encouragement and, where necessary, criticism as to its operations.

These recommendations may well restore the institutional checks currently in abeyance. But given the queer nature of NHRIs, other innovative methods of answerability also ought to be considered. Answerability, in this regard, is double edged.²²⁰

It is partly about creating a line of authority that will ensure the national institution can do its job without interference from those whom it is trying to hold to account. It is also about ensuring that the institution's clientele – the public at large – are able to see what it is doing in their name and ensure it is performing properly.

Since NHRIs are specifically for the good of members of the public, it is wise that this group constitutes the first most critical check on their performance. In this regard, NHRIs may be called upon to make detailed reports and circulate them widely to members of the public through mass media.²²¹ These reports should detail the activities of the NHRI in question as well as the objectives, achievements and challenges. In other words, all activities and aspects of NHRIs should be explained to members of the public possibly in the language that they understand. By functioning in a transparent and effective manner, the public can hold NHRIs accountable for their actions.²²²

According to Reif, where there is established more than one class of NHRIs, it is prudent that these institutions check each other.²²³ For example, where there is both an ombudsman and a

²¹⁸ Hatchard (n 16 above) 219.

²¹⁹ As above.

²²⁰ (n 29 above) 70.

²²¹ Hatchard (n 16 above) 218.

²²² Kumar (n 168 above) 282.

²²³ Reif (n 33 above) 26, 27.

human rights commission in a territory, the ombudsman may have the jurisdiction to investigate complaints of maladministration made against the human rights commission.²²⁴ This contribution finds this alternative tenable, as it is a proper case of power checking another. Yet cleverly it abhors dependence on the ordinary organs of state, like the executive, whose agenda is often suspect.

The other pliable system of accountability could be independent external audits that evaluate the impact of NHRIs. This could be in the form of audit reports not just confined to evaluate financial and administrative functions of the NHRIs, but also to evaluate the effectiveness of the procedures employed by NHRIs.²²⁵ These measures, if put to effect, could, arguably, eradicate the problems already witnessed regarding the accountability of NHRIs.

4.4 Conclusion and recommendations

This contribution has noted that concerns have been raised regarding the potential conflict between NHRIs and the conventional organs of state. The conflict arises because these new bodies have been conceptualized at the international level, an eventuality that has not allowed for municipal adjustments or convention. Thus, institutions are now conceptualized which constitutional law has had little time to consider.

Questions have been asked whether these bodies are necessary at all. It is the thesis here that these bodies are needed for at least three prominent reasons. Firstly, new entitlements, for instance, social and economic rights have emerged which rights were not anticipated at the time of formulation of the conventional constitutional structures. Indeed, it is now trite that the tripartite configuration was an institutional solution largely to civil and political rights. A change in human rights strategy has, therefore, become necessary. Secondly, there is a change in the forum for human rights norm setting. Human rights matters are now both international and municipal and their enforcement would, therefore, mandate queer bodies with both national and international contacts. Thirdly, it is only natural that the current human rights mainstreaming exercise be supplemented with specialized institutions to promote and protect human rights.

Regarding how to resolve the possible misunderstandings of the functions of NHRIs in relation to the other organs of state, it is suggested that well defined mandates for NHRIs should be able to abhor such confusion. The argument here is that each of the state organs has its own roles and democratic space. Further, the functions required to be performed by NHRIs have no rivals on the national scene. Each of these organs should, therefore, be allowed democratic space to realize their mandates.

²²⁴ Reif (n 33 above) 26, 27.

²²⁵ Kumar (n 168 above) 282, 283.

Thirdly, there is need to put in place proper systems and conventions for accountability for NHRIs. This may be by enhancing accounting to parliament, and the involvement of members of the public and other autonomous bodies not part of the mainstream government.

Suffice to state, if the loose bolts are fastened, the imperative of human rights protection and promotion has a worthy partner in NHRIs.

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