

The South African National Protection System

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I. Introduction

Domestic institutions play a central role in the implementation of a state's international human rights obligations. Building resilient and sustainable domestic human rights institutions is essential for an effective national protection system. There's increasing focus on implementation at the national level across various international human rights bodies and the recognition that engagement with various actors at the domestic level is needed to help narrow the human rights implementation gap. As noted by Steven Jensen et al, the realisation of human rights at the domestic level entails a complex process involving a wide range of actors.¹ The domestic institutional landscape or system of national human rights protection and promotion will determine the extent to which it is able to respond to different human rights issues. Some of the core features of a National Protection System (NPS) would include the enactment of legal and policy frameworks; establishment of formal processes to facilitate participation, enforcement and accountability; local and national governmental actors, legislative and judiciary actors, and national human rights institutions, to implement the tripartite human rights obligation of the state.² It also includes non-state actors (academia, media, business and civil society) undertaking human rights research, monitoring, and advocacy. This chapter focuses on South Africa's NPS to (i) examine the constitutional foundation and structural features of the NPS; (ii) assess the role of various national actors and the extent of their contributions to the strengthening of the NPS; and (iii) highlight the weaknesses of the NPS and how cooperation between various actors could contribute to strengthening South Africa's NPS. The analysis in this chapter will focus on the constitutional foundations of South Africa's NPS, the institutions for the protection of human rights (focus on the judiciary, parliament, and the South African Human Rights Commission), and the space for civil society organisations.

II. The Constitutional Foundation and Structural Features of the NPS

The current framework for domestic human rights protection in South Africa can only be fully appreciated against the historical background of segregation and colonialism. Apartheid laws and policies were instituted against the black majority impacting on their political, economic, and social life. Civil rights, basic freedoms, economic and social rights, were violated on a large scale.³ An appropriate summation of the apartheid policy was described by the

¹ Steven Jensen et al, 'The Domestic Institutionalisation of Human Rights: An Introduction' (2019) 37 (3) *Nordic Journal of Human Rights* 165, 168.

² States have the obligation under human rights treaties to respect, protect and fulfil human rights.

³ See Lennox Hinds, 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *Crime and social Justice*, 5-43.

Constitutional Court which noted that ‘[r]ace was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.’⁴ There was no domestic protection for these fundamental rights before 1994. The 1996 Constitution of South Africa laid down the foundation for the protection of human rights in South Africa. The Constitution set out some of the building blocks for South Africa’s NPS. Chapter 2 of the 1996 Constitution sets out the Bill of Rights.⁵ The rights outlined in the Bill were profound and provided more than the classic civil and political rights outlined by other states in their national constitutions. In addition to civil and political rights, The Bill of Rights provided an extensive list of socio-economic rights, thereby rejecting the bifurcated approach to human rights.⁶ Some of the socio-economic rights in the Bill of Rights included the right to food, housing, social security, healthcare and environmental rights. The constitutional recognition of environmental rights in the 1996 constitution is particularly noteworthy given this right was only explicitly recognised at the international level on 8 October 2021 by the UN Human Rights Council⁷ and by the UN General Assembly on 28 July 2022.⁸ Even more significant is the fact that these socio-economic rights in the 1996 Constitution are subject to judicial review and enforcement. A constitutional framework for human rights protection will not be effective if the rights set out are not enforceable in practice. This is consistent with the standard of best practice set out by the OHCHR for the development of a constitutional bill of rights⁹ and has led to the development of impactful judicial decisions on socio-economic rights as will be examined later in this chapter.

In addition to the Bill of Rights in Chapter 2 of the 1996 Constitution, Chapter 9, Section 181(1) of the Constitution sets out six independent institutions. These are the South African Human Rights Commission; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality (CGE); the Auditor-General; the Public Protector; and the Electoral Commission.¹⁰ The first three of these institutions outlined above explicitly have a human rights mandate although the South African Human rights Commission (SAHRC) is the only institution empowered by the 1996 Constitution and the Human Rights Commission Act 54 (HRCA) with the responsibility to promote and protect human rights and fundamental freedoms within South Africa.

The influence of local actors and the international human rights movement on the development of the Bill of Rights and legal foundation of the South African NPS has been recognised by

⁴ Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) Butterworths Constitutional Law Reports (BCLR) 1253 (CC), para 7.

⁵ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, Chapter 2.

⁶ *Ibid*, Section 7-39

⁷ UN Human Rights Council, ‘The human right to a clean, healthy and sustainable environment’ (18 October 2021) UN Doc A/HRC/RES/48/13.

⁸ UN General Assembly, ‘The human right to a clean, healthy and sustainable environment’ (26 July 2022) UN Doc A/76/L.75.

⁹ Office of the UN High Commissioner for Human Rights, *Human Rights and Constitution Making* (OHCHR 2018) 111 available at <https://bit.ly/3Ab7ffO> (accessed 22/08/2022; The Danish Institute for Human Rights, *The Constitutional Protection of Human Rights* (Danish Institute for Human Rights 2012) 28 available at <https://bit.ly/3PHgFp0> accessed 22/08/2022.

¹⁰ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, Chapter 9, Section 181(1).

different scholars.¹¹ However, direct adoption of internationally or regionally recognised rights may not be sufficient to ensure an effective constitutional protection for human rights at the domestic level. The Danish Institute for Human Rights have argued that rights protected in the constitution should be ‘founded in the reality of the particular nation and reflect the ambitions and concerns of that nation’.¹² In the case of South Africa, the history of repression, apartheid and systematic discrimination inspired the formulation of a broad equality and non-discrimination clause that captured a comprehensive list of protected characteristics including ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’¹³

Constitutional protections for human rights provide recognition for human rights and an important tool to enable other actors in the NPS to engage in the promotion and protection of human rights. In an empirical study, Frank Cross notes that explicit constitutional protection of human rights affect the manner in which rights are protected at the domestic level.¹⁴ This chapter will now turn to consider the role of various national actors in South Africa’s NPS beginning with the Judiciary.

III. National Actors in South Africa’s NPS

a. The Judiciary

The human rights protections espoused in the 1996 Constitution will be lifeless if there was no authority that would give effect to the constitutional provisions. The judiciary branch of government undertakes the significant responsibility of enforcing the human rights protections in the Constitution and laws passed by parliament. Some of the key actors within the judiciary include judges/courts, lawyers, and prosecutors.¹⁵ It plays a central role in the NPS by providing an avenue for individuals to claim their rights, ensure accountability, and provide remedies to victims of human rights abuses. The Judiciary is a refuge for individuals seeking redress for rights violations and breathes life to statutory protections for human rights through its power of interpretation. One of the distinguishing features of the South African legal system is that it operates a hybrid system. This comprises of both the Roman-Dutch civil law tradition and the English common law tradition. The design of this legal system is a product of South Africa’s colonial history which at different times was colonised by Holland and Britain.¹⁶ In addition there is the customary law system recognised in Section 211(3) of the South African Constitution.¹⁷ The Court Structure comprises of the Constitutional Court, Supreme Court of

¹¹ Makau Mutua, ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 Harv. Hum. Rts. J, 63, 65-71; Sandra Liebenberg, ‘Human Development and Human Rights South African Country’ (2000) 12 available at <https://core.ac.uk/download/pdf/6248724.pdf> accessed 22/08/2022; Study’ Louis Aucoin, ‘The Role of International Experts in Constitution-Making: Myth and Reality’ (2004) 5 (1) *Georgetown Journal of International Affairs*, 89–95.

¹² The Danish Institute for Human Rights, *The Constitutional Protection of Human Rights* (Danish Institute for Human Rights 2012) 15-16 available at <https://bit.ly/3PHgFp0> accessed 22/08/2022.

¹³ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, Section 9 (3).

¹⁴ Frank Cross, ‘The Relevance of Law in Human Rights Protection’ (1999) 19 *International Review of Law and Economics*, 87–98.

¹⁵ Other actors who play an important role are notaries, court clerks, paralegals, law faculties and research centres.

¹⁶ See George Wille, and Dale Hutchison, *Wille's Principles of South African Law* (Juta, 1991) 20-37.

¹⁷ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, Section 211 (3).

Appeal, High Courts, Magistrates' Courts and any other court recognized by an Act of Parliament.¹⁸ The Constitutional Court is the highest court with specific mandate to enforce the Constitution and the Bill of Rights.

The principle of constitutional supremacy is central to the South African legal system. This, in its most basic term, is the idea that the constitution takes precedence over all other laws passed by Parliament.¹⁹ Any law that is in conflict with the Constitution is considered invalid to the extent to which it is in conflict with the Constitution.²⁰ Section 38 of the Constitution enjoins the Judiciary to enforce the rights enshrined in the Constitution and empowers the courts to grant appropriate relief.²¹ The courts are required, when interpreting legislation, common law or customary law, to 'promote the spirit, purport and objects of the Bill of Rights.'²² These broad constitutional powers have given the courts the leeway to enforce both civil and political rights, and economic social and cultural (ESC) rights. The jurisprudence of the South African Constitutional Court on ESC rights has made South Africa prominent in international comparative discourse on domestic incorporation and legal justiciability of ESC rights.²³ In this section, I examine three key areas in which the South African Constitutional Court played a significant role in strengthening the NPS system by addressing issues on the death penalty, ESC rights, and environmental rights. Notwithstanding the significant contributions of the courts to the NPS on these areas, I further consider in this section access to justice as a challenge limiting the ability of the court to contribute more significantly to the NPS.

i. The Death Penalty - *S v Makwanyane & Another* (1995)

Prior to 1995, the death penalty was significantly imposed by Judges and implemented by way of hanging. Between 1910 and 1975 about 4000 people were reportedly executed.²⁴ The last hanging took place in 1989 although the death sentence was still imposed by courts after this date but before 1995.²⁵ The death penalty was imposed for various classes of offences which included murder, rape, robbery, sabotage, kidnapping, terrorism and treason, although about 90% of the number of death penalties imposed were for murder.²⁶ Challenges to the imposition of the death penalty, inconsistency with the right to life and freedom from torture, cruel, inhumane and degrading treatment, has been discussed in various international forums.²⁷ The

¹⁸ See for example the Equality Courts that were extended to the Magistrate Courts.

¹⁹ This can be distinguished from the principle of parliamentary supremacy in the English legal system.

²⁰ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, Section 172(1)(a).

²¹ *ibid*, Section 38.

²² *Ibid*, Section 39(2).

²³ See Cass R. Sunstein, 'Social and Economic Rights - Lessons from South Africa New Developments in World Constitutionalism' (1999) 11 *Constitutional Forum* 123; Eric C. Christiansen, 'Exporting South Africa's Social Rights Jurisprudence' (2007) 5 *Loyola University Chicago International Law Review*, 29-43; Katie Boyle, 'Models of Incorporation and Justiciability for Economic, Social and Cultural Rights' (2018) *Scottish Human Rights Commission*, 30 available at <https://bit.ly/2ALxw6N> accessed 22/08/2022

²⁴ South African Institute of Race Relations, 'Capital punishment in South Africa: Was abolition the right decision?' (2016) 1, available at <https://bit.ly/2uzEZSg> accessed 22/08/2022.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ See UN General Assembly, 'Moratorium on the use of the death penalty' (2 February 2017) UN Doc A/RES/71/187; See also Juan E. Méndez 'The Death Penalty and the Absolute Prohibition of Torture and Cruel,

current trend is towards the abolition of the death penalty or, at the minimum, introducing a moratorium.²⁸ Over 170 UN member States have either abolished the death penalty or instituted a moratorium in law or in practice.²⁹ The International Bar Association argues that while there is not yet a prohibition on the use of the death penalty under universally binding international law, there is a possibility that an international customary law prohibiting the death penalty is developing, given widespread prohibition among states.³⁰ In South Africa, this question on the use of the death penalty was settled in the case of *S v Makwanyane & Another*.³¹ This was the first case decided by the South African Constitutional Court. The two accused in this case were sentenced to death in accordance with Section 277 (1) (a) of the Criminal Procedure Act of 1977, for murder, attempted murder and robbery.³² The key question the Court had to decide here was whether the imposition of the death penalty was a violation of the constitutional right to life³³ and the prohibition against torture, cruel, inhuman or degrading treatment or punishment.³⁴ The Court unanimously held that the death penalty was a violation of the right to life and human dignity, and therefore Section 277 (1) (A) which prescribed the death penalty was unconstitutional.³⁵ The findings of Justice Chaskalson were significant, especially in relation to the cruelty and impact of the death penalty. He opined that:

‘The carrying out of the death sentence destroys life, it annihilates human dignity, elements of arbitrariness are present in its enforcement, and it is irremediable... I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.’³⁶

The role of the judiciary in the abolition of the death penalty within the South African NPS was significant. In essence, the death penalty in South Africa was abolished by a decision of the judiciary in its progressive act of constitutional interpretation. This was a landmark judgement which has become a classic case in comparative constitutional law and has influenced debates before other courts on the death penalty and other related issues.³⁷ Nevertheless, public support on the abolition of the death penalty in South Africa seems to be

Inhuman, and Degrading Treatment or Punishment’ (2012) available at <https://www.corteidh.or.cr/tablas/r27394.pdf> accessed 22/08/2022.

²⁸ See Amnesty International, ‘Death Penalty’ available at <https://bit.ly/3wFG2AH> accessed 22/08/2022

²⁹ See Office of the UN High Commissioner for Human Rights, ‘The Death Penalty’ available at <https://www.ohchr.org/en/topic/death-penalty> accessed 22/08/2022.

³⁰ International Bar Association, ‘The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty’ (2008) 3 available at <https://bit.ly/3CjCkjr> accessed 22/08/2022.

³¹ *S v Makwanyane* 1995 (6) BCLR 665.

³² Criminal Protection Act, 1977 (South Africa), 22 JULY 1977, Section 277 (1) (a)

³³ *Constitution of the Republic of South Africa Act 200 of 1993* (interim Constitution), Section 9.

³⁴ *S v Makwanyane* 1995 (6) BCLR 665, para 392.

³⁵ *Ibid.*

³⁶ *Ibid.*, para 95.

³⁷ Laura Van den Eynde, ‘The South African Constitutional Court’s Death Penalty and Rendition Cases as Tools for Litigants Abroad’ (2016) 49(3) *The Comparative and International Law Journal of Southern Africa*, 369-86.

changing³⁸ and there is the risk for human rights backsliding on this issue.³⁹ Elsa Van Huyssteen engages with empirical evidence to note the disconnect between judicial and public opinion on the death penalty and argues that the ‘constitution becomes a product of the values employed by individual judges in the process of interpretation, and not an expression of the will of the South African people.’⁴⁰ Other actors within the NPS have an important role to play in reversing the trend in public opinion favouring the reintroduction of the death penalty. In fact, Justice Chaskalson pointed out in the case of *S v Makwanyane & Another* that it would have been better if the framers of the Constitution had decided this question whether the death sentence was permissible, rather than leave it to the judiciary.⁴¹

ii. Socio-Economic Rights

The South African Constitutional Court has played a significant role in strengthening protections for socio-economic rights within the NPS, despite some challenges which remain. The drafters of the Constitution had hoped the incorporation of socio-economic rights into the Constitution would help the poor, vulnerable and those disadvantaged by the Apartheid system. However, against the backdrop of arguments that socio-economic rights were not enforceable,⁴² the Constitutional Court has demonstrated through several landmark judgments that these rights are indeed enforceable within the NPS. The South African Constitutional Court is seen internationally as best practice for the adjudication of socio-economic rights and has featured prominently in academic discourse on legal jurisprudence and social mobilisation on ESC rights. The Court’s approach to adjudicating ESC rights includes an element of transformative constitutionalism⁴³ and this has achieved material and political impact within the NPS.⁴⁴ I examine below three key landmark cases which have had a significant impact.

In *Government of the Republic of South Africa v. Grootboom*, the Constitutional Court upheld the right to housing for Irene Grootboom and hundreds of people (including children), that lived in an informal settlement that lacked basic amenities including water, electricity, and

³⁸ See for example the study by Chris Jones who notes the rising public sentiment in favour of reintroducing the death penalty but argues that it should not be an option. See Chris Jones, ‘Death Penalty: A Human Rights Issue for South Africa’ In Trudy Corrigan (ed), *Human Rights in the Contemporary World* (IntechOpen, 2021).

³⁹ Also consider the impact of the death penalty on criminality – See Jolandi le Roux, ‘Impact of the Death Penalty on Criminality’ (2003) available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/impact-death-penalty-criminality> accessed 22/08/2022; See also South African Institute of Race Relations, ‘Capital punishment in South Africa: Was abolition the right decision?’ (2016) 1, available at <https://bit.ly/2uzEZSg> accessed 22/08/2022.

⁴⁰ See Elsavan Huyssteen, ‘The South African Constitutional Court and the Death Penalty: Whose Values?’ (1996) 24 (3) *International Journal of the Sociology of Law* 291, 292; See also John T Whitehead, Michael B Blankenship, and John Paul Wright, ‘Elite versus citizen attitudes on capital punishment: Incongruity between the public and policymakers’ (1999) 27 (3) *Journal of Criminal Justice* 249-258.

⁴¹ *S v Makwanyane* 1995 (6) BCLR 665, para 5.

⁴² See D. M. Davis, ‘The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 *South African Journal of Human Rights* 475; there were also arguments that it would impact on the separation of powers between the executive and the judicial branches of government.

⁴³ This requires that judges embrace the fundamental societal transition envisaged by the Constitution. See Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

⁴⁴ Malcolm Langford et al, *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2015).

sewage.⁴⁵ The intolerable conditions prompted the group to move into a privately-owned land from where they were subsequently evicted and rendered homeless. The government had no policy to assist the homeless and the government's efforts to construct low-income housing would have taken years to be realised. The Constitutional Court, in reaching its decision in this case, rejected the lower threshold of 'minimum core obligations' set at the international level for lack of flexibility and rather adopted the higher Constitutional standard of 'reasonableness' set in Section 26 of the Constitution.⁴⁶ In assessing if the measures taken by the state to guarantee the right to housing were reasonable, the Court concluded that such measures must establish a coherent housing programme to guarantee the right. The Court held that such measures would be unreasonable, if they fail to address those the most urgent needs or fail to respond to the needs of the most desperate in the community.⁴⁷ The Court found in this case that the state did not meet its obligation to guarantee the right to housing but also recognised that cooperation is needed between different governmental actors within the NPS to provide immediate relief and accommodation for persons in dire circumstances.⁴⁸ This ruling provided a powerful tool for individuals and communities, and influenced housing policies and laws in South Africa.⁴⁹ It has also been referenced by courts in Australia, India, New Zealand, Namibia, England and Wales,⁵⁰ and did influence the drafting of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which incorporated the standard of reasonableness in art 8(4).⁵¹

Despite the significance of the decision in the *Grootboom* case and the extent to which it has influenced laws and policies on the right to housing, guaranteeing this right within the South African NPS still remains a significant challenge, exacerbated by the covid 19 pandemic.⁵² 100,000 – 200,000 people were reportedly homeless in South Africa in 2018.⁵³ There were several State and NGO recommendations to South Africa on the right to housing in the 3rd cycle of the Universal Periodic Review (UPR), including the need for the state to provide alternative temporary accommodations for people rendered homeless by eviction.⁵⁴ The Committee on Economic Social and Cultural Rights noted in their 2018 report on South Africa

⁴⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* BCLR 1169 (4 October 2000) para 7.

⁴⁶ *Ibid*, para 33.

⁴⁷ *Ibid*, para 44.

⁴⁸ *Ibid*, paras 39-40; 93-99.

⁴⁹ See Clarence Tshoose, 'A Closer Look at the Right to Have Access to Adequate Housing for Inhabitants of Informal Settlements Post Grootboom' (2015) 30 (1) *Southern African Public Law* 94-111.

⁵⁰ See *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010) para 76; *Society for Un-aided Private Schools of Rajasthan v. U.O.I & ANR* [2012] INSC 248 (12 April 2012) Para 50; *Government of the Republic of Namibia and Others v Mwilima and Others* (SA 29 of 2001) [2002] NASC 8 (07 June 2002) 34; *EW, R (on the application of) v Secretary of State for the Home Department* [2009] EWHC 2957 (Admin) (18 November 2009) para 89; See also Sanya Samtani, 'The International Impact of 'Government of the Republic of South Africa v Grootboom'' (7 June 2002) available at <https://bit.ly/3Cjfw3T> accessed 22/08/2022.

⁵¹ See Sanya Samtani, 'The International Impact of 'Government of the Republic of South Africa v Grootboom'' (7 June 2002) available at <https://bit.ly/3Cjfw3T> accessed 22/08/2022.

⁵² See Socio-Economic Rights Institute of South Africa (SERI), 'Submission on The Impact of the COVID-19 Crisis on Housing Rights' (July 2020) available at <https://bit.ly/3QJ07y5> accessed 22/08/2022.

⁵³ Homeless World Cup, 'Country Statistics: South Africa' available at <https://bit.ly/3T7gXIE> accessed 22/08/2022

⁵⁴ The Centre for the Study of Violence and Reconciliation (CSVR), 'Submission to the Universal Periodic Review (UPR) of South Africa' (2017) para 1.4, available at <https://bit.ly/3pBJXL4> accessed 22/08/2022.

that it remained a ‘highly unequal society where too many people lived in poverty.’⁵⁵ A systemic approach involving collaboration with various actors within the NPS is needed to fully guarantee the right to housing within South Africa. This is in line with the ‘multi-agency housing focused intervention’ approach suggested by Emeka Obioha.⁵⁶

Furthermore, the case of *Minister of Health and Others v. Treatment Action Campaign and Others* (2002) provides a good example of combining law and social mobilisation can help achieve positive judicial outcome on the right to health within the NPS. The outcome of this case had immediate and practical impact on HIV/AIDs policy in South Africa, access to health service and ESC rights broadly. The case was brought by the Treatment Action Campaign (TAC), a group that advocated for equitable access to health care and in particular medicines for HIV treatment as a human right.⁵⁷ The dispute in this case arose over the government’s policy restricting access to Nevirapine (NVP) to prevent mother-child HIV transmission at birth in public health institutions. Doctors at health facilities, other than the few designated sites, were prohibited from dispensing the medicine.⁵⁸ The government had expressed concerns about safety and efficacy of the medicine.⁵⁹ One of the key legal questions the court had to address here was whether the government’s policy of restricting the provision of NVP met the constitutional obligation to guarantee the right to access to health care under section 27 and 28 of the Constitution. The Court evaluated the reasonableness of the policy implemented by the government which restricted access to NVP. They concluded that the government’s refusal to provide NVP to all state hospitals and clinics violated the right to access to health care and therefore unconstitutional.⁶⁰ This judgment is estimated to have saved thousands of lives. It demonstrates how the combination of human rights mobilisation, advocacy by non-governmental actors within the state⁶¹ and judicial establishment of a conceptual and remedial framework for the enforcement of the right to access to health care, can produce tangible outcomes within the NPS. However, access to healthcare remains a significant challenge in South Africa and other actors within the state have a significant role to play in overcoming this challenge. In some instances, it took further litigation to compel state compliance with this decision by the court.⁶² State and NGOs have made several recommendations during South Africa’s UPR process. Japan and Ireland for example recommended that the government ‘[t]ake measures to address inequities in access to HIV-AIDS treatment and support, particularly in rural areas’⁶³ and ‘[d]evelop and implement plans to reduce physical and cost

⁵⁵ Office of the UN High Commissioner for Human Rights ‘Committee on Economic, Social and Cultural Rights considers the report of South Africa’ (03 October 2018) available at <https://bit.ly/3Ab7yad> accessed 22/08/2022.

⁵⁶Emeka E. Obioha, ‘State response to homelessness in South Africa: A multi-agency housing focused intervention approach considered’ (2022) *Development Southern Africa* 1-17.

⁵⁷ *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC)

⁵⁸ *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) paras 10-20.

⁵⁹ *Ibid*, 11.

⁶⁰ For a more detailed analysis on this case see Alex Tawanda Magaisa, ‘Minister of Health and Others v. Treatment Action Campaign and Others (2002)’ (2003) 47 (1) *Journal of African Law* 117-125.

⁶¹For an extended discussion on the impact of human rights mobilisation and advocacy see - Mark Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 (1) *Journal of Human Rights Practice* 14–36.

⁶² Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (The Atlantic Philanthropies, 2014) 57.

⁶³ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: South Africa’ (18 July 2017) UN Doc A/HRC/36/16 para 139.166.

barriers to accessing HIV-related health services in rural areas.’⁶⁴ Therefore, despite the significant efforts by the judiciary to enforce the right to access to healthcare, the extent to which the judiciary can address this issue is limited, and engagement with other actors within the NPS is needed to better guarantee the right to health and other rights within South Africa.

iii. Environmental Rights

A more recent decision by the courts in South Africa sought to give effect to the constitutional right to a healthy environment in section 24 of the South African Constitution. Prior to the 2022 case of *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724/2019) [2022]*,⁶⁵ the courts in South Africa had played very little role in protecting environmental rights, except when it sought to protect the rights of indigenous communities over their ancestral land from corporate exploitation.⁶⁶ Ruth Krüger describes environmental rights as the silent right in the Constitution.⁶⁷ However, this significantly changed in 2022 when the Courts began to play a significant role in protecting environmental rights in section 24 of the Constitution. In the case of *GroundWork Trust & Vukani Environmental Justice Alliance Movement in Action v Minister of Environmental Affairs & Others*, the High Court considered an action brought by two environmental rights groups to determine whether high levels of pollution were a breach of the right to an environment that is not harmful to health or well-being.⁶⁸ The standards of ‘reasonableness’ or ‘progressive realisation’ was deemed not to be applicable to this right. The court held that poor air quality was a violation of the constitutional right to a healthy environment and that the government had a legal duty to implement regulation aimed at enforcing air quality standards.⁶⁹ Judge Collis noted that there is prima facie a violation of the right to a healthy environment where air quality fails to meet the national standards.⁷⁰ This judgment is significant in several ways. First, it acknowledges that the right to a healthy environment can be immediately realised. Second, it addresses the inadequacies of government measures to address dangerous levels of pollution. Third, the important contributions of local environmental rights advocacy groups (GroundWork Trust & Vukani Environmental Justice Alliance Movement in Action) and the UN Special Rapporteur on Human Rights and the Environment (who submitted an *Amicus Curiae*). Ensuring cooperation across multiple actors and stakeholders is therefore important in strengthening the NPS. The state needs to engage with several recommendations on environmental rights made by NGOs and different human rights bodies, including to

⁶⁴ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: South Africa’ (9 July 2012) UN Doc A/HRC/21/16 para 124.133.

⁶⁵ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724/2019) [2022]*

⁶⁶ See for example *Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829*; Ruth Krüger argues that this is due to the complex nature of environmental rights and the difficulty of establishing legal standing see Ruth Krüger, ‘The Silent Right: Environmental Rights in the Constitutional Court of South Africa’ (2019) 9 Constitutional Court Review 473–496.

⁶⁷ *Ibid.*

⁶⁸ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724/2019) [2022]* paras 241.1 – 241.5.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para 10.

implement a framework that holds companies accountable for the human rights violations and the environmental degradation caused by their operations.⁷¹

Challenges faced by the South African Judiciary

There are several challenges limiting the effectiveness of the South African Judiciary to protect human rights within the national system. One key challenge is limited access to justice.⁷²

Access to justice remains a major issue within the South African legal system. Access to justice is both a basic human rights and a means by which people can seek to claim other fundamental rights against the state as a duty bearer. This is enshrined in section 34 of the Constitution⁷³ and includes the ability of individuals to access the court system, legal representation, and other formal and informal judicial mechanisms. Some of the factors limiting access to justice include socio-economic inequalities, high cost for legal representation, and not enough lawyers to provide necessary legal services. Research findings indicate the problem of access to justice impacts especially on women and other vulnerable groups in disadvantaged communities.⁷⁴ In addition, the scarcity of lawyers in rural areas, lack of diversity and gender parity in the legal profession has been identified as key obstacles to achieving access to justice for many.⁷⁵ Some positive steps were taken by the government to address this problem through the enactment of the Legal Practice Act aimed at increasing access to legal services in rural areas and making legal fees more affordable.⁷⁶ However, more actions need to be taken to achieve full compliance with Principles 10 and 11 of the UN Basic principles on the Role of Lawyers.⁷⁷ One aspect of access to justice where meaningful progress has been made in the context of South Africa is physical access to judicial institutions (police stations and court rooms) for persons with disability.⁷⁸ In the case of *Esthé Muller v DoJCD and Department of Public Works*,⁷⁹ the government admitted their failure to provide a proper wheelchair access to a courtroom for a lawyer was a form of discrimination against persons with accessibility needs. In addition, 150 police stations were reconstructed to provide accessibility for wheelchair users following the precedence set by a court ruling in the case of *W B Bosch* which concerned

⁷¹ See UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: South Africa' (18 July 2017) UN Doc A/HRC/36/16 para 139.105. See also *Letter by the High Commissioner to the Foreign Minister* (23 October 2017) page 3, available at <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session27/ZA/SouthAfricaHCLetter.pdf> accessed 22/08/2022.

⁷² There are also questions on lack of adequate resources and challenges on compliance with decisions by the courts.

⁷³ *Constitution of the Republic of South Africa Act 200 of 1993* (interim Constitution), Section 34.

⁷⁴ See Ebenezer Durojaye, Gladys Mirugi-Mukundi, and Oluwafunmilola Adeniyi, 'Legal empowerment as a tool for engendering access to justice in South Africa' (2020) 20 (4) *International Journal of Discrimination and the Law* 224-244.

⁷⁵ See Law Society of South Africa, International Bar Association, Human Rights Institute and South Africa Litigation Centre, 'Joint Stakeholder Submission to the UN Human Rights Council Universal Periodic Review of South Africa' (2017) para 3.4, available at <https://bit.ly/3AdXwFn> accessed on 22/08/2022

⁷⁶ *Ibid*, para 3.6.

⁷⁷ United Nations, *Basic Principles on the Role of Lawyers*, 7 September 1990, principles 10 and 11, available at: <https://www.refworld.org/docid/3ddb9f034.html> [accessed 22 August 2022].

⁷⁸ In addition to the Constitutional Protection in Section 34, protections for persons with disability is also available under The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; The Convention on the Rights of Persons with Disability; Article 13(2) of the Disability Protocol to the African Charter.

⁷⁹ *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).

accessibility to the police station for wheelchair users. The inclusion of ‘equal access to justice’ as part of the targets for the global Sustainable Development Goals, underscore the importance of working towards overcoming various challenges on access to justice. The SAHRC has an important role to play in facilitating access to justice for vulnerable and disadvantaged groups, and litigation is an important tool the SAHRC can use. There is a legal aid system providing legal representation for both civil and criminal cases,⁸⁰ but significant human and financial resources would need to be allocated to overcome many of the obstacles preventing individuals from exercising their right to access justice.

b. The Role of Parliament

Parliament has a crucial role to play within the NPS in the promotion and protection of human rights. The fundamental role national parliaments play have been recognised by various international bodies,⁸¹ including the Draft Principles on Parliaments and human rights developed by the UN Human Rights Council which provides guidance to parliaments for establishing a parliamentary human rights committees.⁸² A wide range of parliamentary activities impact on the promotion and protection of human rights at the domestic level including legislating, integration of international human rights treaties and standards into the NPS, oversight of government agencies, and budgeting. The 1996 South Africa Constitution empowers the South African National Parliament (NP) to carry out these activities.⁸³ The South African Parliament comprises of the National Assembly (NA) and the National Council of Provinces (NCP).⁸⁴ It has played a significant role in promoting and facilitating ratification of treaties, promoting implementation of human rights reporting obligations, and providing oversight of government departments.

One of the areas where the South African parliament has played a significant role is on promoting and facilitating the ratification of treaties. Whereas the South African Constitution assigns to the executive branch of government the power to negotiate and sign treaties, the NA and NCP must approve of the treaty for it to be binding on South Africa, unless they fall in the category of treaties that do not require approval by parliament.⁸⁵ Ahmed has argued that the process of treaty ratification in South Africa requires a collaborative approach between the executive and legislative branches of government.⁸⁶ The South African parliament has played a role in questioning and encouraging the government to ratify international treaties. For example, in 2009, a parliamentary Committee questioned the delay in South Africa ratifying

⁸⁰ Legal aid was established by the Legal Aid SA Act 39 of 2014 (previously Act 22 of 1969).

⁸¹ See UN Human Rights Council, ‘Contribution of parliaments to the work of the Human Rights Council and its universal periodic review’ (13 July 2017) UN Doc A/HRC/RES/35/29; Bingham Centre for the Rule of Law et al, ‘Increasing parliaments’ engagement with human rights’ (2019) available at <https://bit.ly/3Ta2M5o> accessed 22/08/2022; Also relevant are UNGA resolutions 65/123 of 13 December 2010 and 66/261 of 29 May 2012.

⁸² UN Human Rights Council, ‘Draft Principles on Parliaments and human rights’ Un Doc A/HRC/38/25, available at <https://bit.ly/3KbzmzM> accessed 22/08/2022

⁸³ *Constitution of the Republic of South Africa Act 200 of 1993* (interim Constitution), Section 55.

⁸⁴ *Ibid*, Section 42.

⁸⁵ *Ibid*, Section 231; For example, ratification by Parliament is not needed for treaties that are of a technical, administrative, or executive nature.

⁸⁶ A. Kayum Ahmed, ‘The role of parliament in South Africa’s foreign policy development process: Lessons from the United States’ Congress’ (2009) 16 (3) *South African Journal of International Affairs* 291 at 291-293.

the ICESCR.⁸⁷ South Africa subsequently ratified this treaty in 2015, 20 years after it was initially signed. Another example was during the negotiations leading to the ratification of CRPD in 2006 when the South African Parliament encouraged the government to undertake consultation with civil society.⁸⁸ Lilian Chenwi contends that the South African Parliament can play an even more significant role in the process of treaty ratification by questioning the relevance and compatibility of reservations made by the government in the light of the object and purpose of a treaty.⁸⁹

Furthermore, the South African parliament can play a major role in promoting government compliance with its human rights reporting obligations and contributing to the human rights monitoring work of international institutions. South Africa currently has three overdue UN treaty body reports, one of which is more than 10 years overdue.⁹⁰ The Committee on the Elimination of Discrimination against Women has encouraged the South African government to engage parliament with the reporting process under CEDAW and in the implementation of their Concluding Observations.⁹¹ The UN Human Rights Council has equally invited parliaments to contribute to its work on the Universal Periodic Review (UPR) mechanism.⁹² South Africa's country report to the African Peer Review Mechanism have been discussed and adopted in Parliament.⁹³ I have previously argued for the inclusion of representatives from Parliament in South Africa's delegation to the UPR which can help facilitate collaboration between the two branches of government in the responses provided during the review and in the implementation of UPR recommendations.⁹⁴ Chenwi has equally advocated for the inclusion of representatives from the South African parliament in the state's delegation during the examination/consideration of South Africa's report before the treaty bodies.⁹⁵

In addition, the South African parliament through the exercise of its oversight function over government departments, play an important role in the protection of human rights at the national level. Pursuant to Section 92(2) and (3) of the South African Constitution, members of the executive cabinet are required to report regularly to parliament. Through briefings and

⁸⁷ Parliamentary Monitoring Group, 'South African Human Rights Commission: Briefing' (7 July 2009) available at <https://bit.ly/3PXDIfq> accessed 29/08/2022; Parliamentary Monitoring Group, 'Questions and replies: Question No. 1225' (3 May 2010) available at <http://www.pmg.org.za/node/21347> accessed 29/08/2022.

⁸⁸ Joint Monitoring Committee on Children, Youth and Persons with Disabilities, 'Convention on Rights of Persons with disabilities: briefing by the Office on Status of Disabled Persons & Department of Foreign' (24 May 2007) available at <https://pmg.org.za/committee-meeting/8098/> accessed 29/08/2022

⁸⁹ Lilian Chenwi, 'Using international human rights law to promote constitutional rights: The (potential) role of the South African parliament' (2011) 15 *Law, Democracy & Development*, 9.

⁹⁰ Office of the High Commissioner for Human Rights, 'Status of Late and Non-reporting by state Parties' available at <https://bit.ly/3TBAQb8> accessed 29/08/2022.

⁹¹ Concluding Observations by treaty bodies highlight the positive aspects of a State's implementation of the relevant treaty and areas where they state needs to take action to improve upon. See Committee on the Elimination of Discrimination against Women *Concluding observations on the combined second, third and fourth periodic reports of South Africa*, UN Doc. CEDAW/C/ZAF/CO/4 (2011) para 11.

⁹² See UN Human Rights Council, 'Contribution of parliaments to the work of the Human Rights Council and its universal periodic review' (13 July 2017) UN Doc A/HRC/RES/35/29

⁹³ Parliamentary Monitoring Group 'African Peer Review Mechanism: Department of Public Service & Administration Briefing' (2014) available at <https://pmg.org.za/committee-meeting/16800/> accessed 29/08/2022.

⁹⁴ Damian Etone, 'The effectiveness of South Africa's engagement with the universal periodic review (UPR): potential for ritualism?' (2017) 33 (2) *South African Journal on Human Rights* 267.

⁹⁵ Lilian Chenwi, 'Using international human rights law to promote constitutional rights: The (potential) role of the South African parliament' (2011) 15 *Law, Democracy & Development*, 18.

questioning, parliament can monitor the effective management of government departments and ensure that actions and policies taken by the government are in compliance with constitutional and international human rights obligations. There are more opportunities for the South African NP to engage with human rights including promoting consistency between domestic legislation and binding treaties by advising on compatibility whenever a new parliamentary bill is proposed, utilising the budgetary process to implement human rights policies by adopting a rights-based budgeting framework, facilitate public participation in the legislative process, and provide oversight of government's implementation of decisions and recommendations by international bodies/institutions.

c. The South African Human Rights Commission

As I argued earlier in this chapter, the protection of human rights at the domestic level requires a systemic approach involving multiple actors. The South African National Human Rights Commission (SAHRC) is a vital part of South Africa's human rights protection system. It has a solid legal foundation and a prominent status as an institution within the South African NPS. The general mandate of the SAHRC is enshrined in section 184 (1) of the Constitution and requires the Commission to 'promote respect for human rights and a culture of human rights',⁹⁶ 'promote the protection, development and attainment of human rights',⁹⁷ and 'monitor and assess the observance of human rights in the Republic'.⁹⁸ When carrying out this human rights mandate, SHRC is empowered by the Constitution to investigate and report on human rights abuses, secure redress for victims, educate and carry out research.⁹⁹ Moreover, section 184 (3) obliges relevant organs of the government to provide the Commission each year with information on measures taken towards realising the rights enshrined in the Constitution. Christof Heyns more accurately describes this provision of the Constitution as creating a duty of justification on the state and a system of monitoring for the Commission.¹⁰⁰ This is modelled similar to the reporting obligations towards UN human rights treaty monitoring bodies. The powers and function of SAHRC were expanded by the Human Rights Commission Act 54 of 1994 which was subsequently repealed and replaced in 2014 by the South African Human Rights Commission Act of 2013.¹⁰¹ The SAHRC has an 'A' Status for its full compliance with the Paris Principles¹⁰² and has developed a reputation at the domestic, regional and international levels as an effective institution. While an entire research collection can be written on the achievements of the SAHRC, the analysis here will be limited to highlighting its impact on four key areas: litigation; monitoring and investigation; and legislation.

On the aspect of litigation, SAHRC has the powers to institute litigation by itself or following a lodgement of a complaint and has used this power to litigate or join as *amicus curiae* in a

⁹⁶ Section 184 (1) (a)

⁹⁷ Section 184 (1) (b)

⁹⁸ Section 184 (1) (c)

⁹⁹ Section 184 (2).

¹⁰⁰ Christof Heyns, Taking Socioeconomic Rights Seriously: The "Domestic Reporting Procedure" and the Role of the South African Human Rights Commission in Terms of the New Constitution, 32 De Jure 195 (1999), page 207.

¹⁰¹ South African Human Rights Commission Act 40 of 2013.

¹⁰² *Principles relating to the Status of National Institutions (The Paris Principles)* (20 December 1993) UNGA Doc 48/134.

number of cases. Many of these litigations have significantly enhanced domestic human rights protection across a spectrum of human rights issues. These have included advocating for the legalisation of euthanasia and physician-assisted dying before the Constitutional Court;¹⁰³ challenging the detention of 39 foreign nationals at the Lindela Repatriation Centre and securing their release following a court declaration that the detention was unlawful and unconstitutional;¹⁰⁴ Enforcing the rights to access to water under section 27 (1)(b) of the Constitution for thousands of households in the Madibeng Local Municipality;¹⁰⁵ and Protecting sexual minorities and religious communities from hate speech.¹⁰⁶ The SAHRC also contributed, as *amicus curiae*, to the *Grootboom* case examined earlier.

The monitoring and investigation activities of the SAHRC has also impacted on domestic human rights protection. The Commission has in many instances opened up investigations into several human rights issues. It has used some of these investigations as tool for monitoring, human rights intervention and to ensure governmental accountability. Investigations have been launched by SAHRC on issues including access to water, racism, xenophobia, hospital protests, evictions, and right to clean environment.¹⁰⁷ In some instances, the Commission has undertaken high profile investigations such as the investigation of the leader of the Economic Freedom fighters,¹⁰⁸ Julius Malema, following receipt of a complaint alleging hate speech by the political leader.¹⁰⁹ Also, SAHRC has used National Hearings to address systemic issues in the area of business and human rights. These include a National Hearing on socio-economic challenges facing mining communities impacted by the activities of extractive industries,¹¹⁰ and a published report highlighting the impact of debt on the enjoyment of socio-economic rights. These monitoring and investigative activities by SAHRC help to strengthen the NPS.

In addition, SAHRC has also impacted on the legislative process in South Africa by playing a significant role in the drafting process of relevant legislation or urging parliament to ratify human rights treaties. Between 2000 and 2018, SAHRC made over 40 written submissions/comments on draft laws in Parliament.¹¹¹ An example of the significant role SAHRC played was during the legislative process leading to the enactment of the Promotion

¹⁰³ See Dwight G. Newman, 'Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda' 19 SAJHR (2003), pp 189-216

¹⁰⁴ *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198

¹⁰⁵ *SAHRC & 19 Others v Madibeng Municipality, MEG for Local Government & Human Settlement, Minister of Water and Sanitation & Minister of Health*, Case No 21099/17 (Gauteng High Court Division, Pretoria)

¹⁰⁶ *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218; *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (EQ0112012)

¹⁰⁷ South African Human Rights Commission, 'Investigative Reports' available at <https://bit.ly/3wD0GRW> accessed 29/08/2022.

¹⁰⁸ A political party.

¹⁰⁹ South African Human Rights Commission, 'Findings of the South African Human Rights Commission Regarding Certain Statements made by Mr Julius Malema and Another Member of the Economic Freedom Fighters' (March 2019) available at <https://bit.ly/3Q0bTDh> accessed 29/08/2022.

¹¹⁰ See South African Human Rights Commission 'National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa' (2016) available at <https://bit.ly/2Nus9wD> accessed 29/08/2022.

¹¹¹ South African Human Rights Commission, 'Submission on Legislation' available at <https://www.sahrc.org.za/index.php/sahrc-publications/submission-on-legislation> (accessed 21/08/2022).

of Equality and Prevention of Unfair Discrimination Act 4 of 2000, during which the SAHRC organised the unit that developed the draft bill which was presented to the Department of Justice and Constitutional Development for processing and tabling in Parliament.¹¹² South Africa's ratification of OPCAT¹¹³ was preceded by a pressure campaign by SAHRC.¹¹⁴

SAHRC has been able to make an impact on the domestic protection and promotion of human rights through collaboration and cooperation with other stakeholders. They have engaged with both domestic and international partners to achieve common objectives in the promotion and protection of human rights. For example, in their work on protecting the rights of refugees and asylum seekers, SAHRC in 2021, signed a Memorandum of Understanding establishing a partnership with the United Nations High Commissioner for Refugees.¹¹⁵ Similarly, to achieve its mandate on preventing torture and other cruel, inhumane and degrading treatment, SAHRC has signed memorandum of understanding with the South African Police Service, the Independent Police Investigative Directorate, and the Military Ombudsman of South Africa.¹¹⁶

Despite the achievements SAHRC has made through its actions on litigation, monitoring and investigation, and legislation, there are still significant challenges faced by the commission. I focus here on the problem of financial independence. Whereas the independence of the SAHRC is protected in Section 184 (2) of the Constitution, lack of financial autonomy may challenge the independence of the Commission. Edwin Makwati has criticised the model used to fund the Commission and argued that it does not guarantee it genuine independence given that funding towards the work of the Commission is controlled by the executive branch of government.¹¹⁷ SAHRC have had cuts to its budget in past years and this has impacted on its ability to effectively carry out its mandate.¹¹⁸ Financial independence of national human rights institutions is an important aspect highlighted by the Paris Principles. This is because governments can undermine or stifle the work of the national human rights institution by ensuring that they are underfunded or threatened with budgetary cuts. During South Africa's UPR session in Geneva in 2017, Uganda recommended that the South African government 'provide adequate financial resources to the South African Human Rights Commission to enable it to carry out its work.'¹¹⁹ The lack of adequate resources impacts on the ability of the

¹¹² See South African Human Rights Commission, 'The Promotion of Equality and Prevention of Unfair Discrimination Bill, 1999' (Nov. 23, 1999) 1–2.

¹¹³ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (9 January 2003) UN Doc A/RES/57/199.

¹¹⁴ See South African Human Rights Commission, 'NHRI written submission to the Universal Periodic Review (UPR) Mechanism' (28 November 2011) available at <https://bit.ly/3e9dlWk> accessed 21/08/2022.

¹¹⁵ South African Human Rights Commission, 'Media Release: South Africa Human Rights Commission and the United Nations High Commissioner for Refugees sign agreement to formalise partnership in South Africa' (6 October 2021) available at <https://bit.ly/3Rivakm> accessed 29/08/2022.

¹¹⁶ See South African Human Rights Commission, 'National Human Rights Institution Report regarding the South African Government's Combined 2nd and 3rd Periodic Report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (March 2019) available at <https://bit.ly/3e67YHI> accessed 21/08/2022.

¹¹⁷ Edwin Makwati, 'The South African Human Rights Commission' in Charles M Fombad (ed), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (Pretoria University Law Press 2019) 646, 659.

¹¹⁸ *Ibid*, 660.

¹¹⁹ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: South Africa' (18 July 2017) UN Doc A/HRC/36/16 para 139.37.

Commission to provide access to its services to individuals in rural and marginalised communities.

d. The Role of Civil Society

Civil society, including NGOs, play a crucial role in monitoring and promoting human rights at the domestic level. The importance of the role of civil society has been acknowledged at the international and regional levels.¹²⁰ Civil society has made significant impact in driving domestic social, policy and law changes to strengthen domestic protection of human rights. This is even more evident in the context of South Africa where civil society have had a significant impact on the advancement of domestic human rights protection. Civil society mobilisation, drawing on support from the international community, contributed to bring an end to apartheid in South Africa. They also played a significant role in drafting the policies for the post-apartheid government of South Africa and influencing the drafting of the new constitution.¹²¹ The extent to which civil society can have impact at the domestic level depends on factors including the existence of a conducive political and public space, a supportive legal and regulatory environment, capacity, and access to financial resources. The NGO operational environment, financial constraints and lack of accountability are some of the factors that might impact on the ability of civil society to make a significant contribution to domestic human rights protection.¹²²

South Africa has one of the most developed NGO sectors in Africa. In 2019, the Kagiso Trust reported over 200,000 registered NGOs in South Africa. The significant growth of the NGO sector in South Africa indicates the legal and policy framework¹²³ supports the formation of NGOs although some challenges exist in practice, including the long waiting period in some instances, for NGO registration to be processed.¹²⁴ Nevertheless, studies have found no barriers to registration, clear laws governing NGOs, freedom from state interference, and a favourable taxation regime.¹²⁵ Civil society organisations in South African have contributed to the NPS in significant ways, including providing service delivery,¹²⁶ human rights advocacy,¹²⁷ and

¹²⁰ See Council of Europe, *Civil Society and Human Rights* (Council of Europe 2021) available at <https://bit.ly/3AA1878> accessed 29/08/2022; Office of the High Commissioner for Human Rights, 'Civil Society and the United Nations Human Rights System' (October 2014) available at <https://bit.ly/3KqJxkk> accessed 29/08/2022; UN Human Rights Council, 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned - Report of the United Nations High Commissioner for Human Rights' (11 April 2016) UN Doc A/HRC/32/20.

¹²¹ See James Taylor, 'Struggles against systems that impoverish: South African civil society at the crossroads' (2013) 23(5/6) *Development in Practice*, 621.

¹²² For some of the challenging operational environment faced by civil society in Kenya see Damian Etone, *The Human Rights Council: The Impact of the Universal Periodic Review in Africa* (Routledge 2020) Chapter 5.

¹²³ See for example the Non-Profit Organisation Act, No. 71 of 1997 (South Africa)

¹²⁴ Kagiso Trust, *Typologies of Civil Society in South Africa: A Critical Review and Analysis of the Characteristics of The Non-Profit Sector* (Kagiso Trust 2019) 26.

¹²⁵ Ibid.

¹²⁶ For example, NGOs in South Africa play a significant role to address shortage in healthcare professionals. See Ganzamungu Zihindula et al, 'A review on the contributions of NGOs in addressing the shortage of healthcare professionals in rural South Africa' (2019) 5 (1) *Cogent Social Sciences* 1-18; Robert Mutemi Kajiita and Simon Kang'ethe, 'Appreciating the Diversity of NGO's Towards Service Delivery in South Africa: Drawing Evidences from Eastern Cape Province' (2017) 2 *Insight on Africa* 9, 126-40.

¹²⁷ For example various class actions brought by the Legal Resources Centre that sought compensation for people whose disability benefits were unlawfully terminated; class action compelling government to fill teacher

promoting accountability.¹²⁸ Cooperation and collaboration between domestic NGOs on the one hand, and between domestic and international NGOs on the other is key to the success of the work of NGOs. Rachel Murray argues that the work of the African Human Rights Commission has been strengthened by NGOs who played a vital role in the drafting of the African Charter, holding of seminars and submitting cases to the Commission.¹²⁹

Nevertheless, there are several challenges faced by domestic NGOs in South Africa. Financial constraints is one of the challenges. Limited funding impacts on the service delivery provided by NGOs, especially in the health sector. NGOs like TAC have in the past closed provincial offices due to cuts in funding.¹³⁰ Lack of sustainable funding impacts on the work of civil society organisations. There is the need to develop more sustainable sources of funding rather than rely exclusively on foreign donors, some of whom may have objectives that are different from the needs of the people on the ground. According to Simon Kang'ethe and Tatenda Manomano, the funding challenge faced by South African NGOs is critical, weakens and threatens their survival.¹³¹ Only 10% of NGOs surveyed in 2012 were found to be permanently financially sustainable and only 14% had good prospects of long-term financial sustainability.¹³² The formation of NGO coalitions is one way in which NGOs can maximise their capacity and resources. In addition, the South African government has at times been reluctant to engage NGOs at various levels of government and international monitoring processes. The government did not effectively engage with NGOs as is required as part of the national consultation process for the UPR mechanism.¹³³ NGOs have criticised the government for failure to undertake meaningful consultation with them as part of the UPR process.¹³⁴ Nwauche and Flanigan argue that this is due to the lack of adequate procedures in place for inviting NGO participation.¹³⁵ A more proactive approach by NGOs is needed where government is reluctant to engage with them.

IV. Conclusion

vacancies; and class action against 32 gold mining companies; see *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuzza* [2001] ZASCA 85; *Linkside v Minister of Basic Education* [2015] ZAECGHC 36; *Nkala v Harmony Gold Mining Company Limited* 2016 (5) SA 240 (GJ).

¹²⁸ For the impact of NGO work in other sectors of the south African society, see Kagiso Trust, *Typologies of Civil Society in South Africa: A Critical Review and Analysis of the Characteristics of The Non-Profit Sector* (Kagiso Trust 2019) 30-39.

¹²⁹ See Murray, Rachel, 'The Role of NGOs and Civil Society in Advancing Human Security in Africa' in Ademola Abass (ed.), *Protecting Human Security in Africa* (OUP 2010) Chapter 14.

¹³⁰ Simon Murote Kang'ethe and Tatenda Manomano, 'Exploring the Challenges Threatening the Survival of Ngos in Selected African Countries' (2014) 5 (27) *Mediterranean Journal of Social Sciences*, 1495, 1497.

¹³¹ *Ibid*, 1495-1500.

¹³² National Development Agency, 'Funding Constraints and Challenges Faced by Civil Society in South Africa' (2013) 40-41 available at <https://bit.ly/3AvPU1j> accessed 30/08/2022.

¹³³ Damian Etone, 'The effectiveness of South Africa's engagement with the universal periodic review (UPR): potential for ritualism?' (2017) 33 (2) *South African Journal on Human Rights*, 264.

¹³⁴ Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa 'Submission from Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa to the Second Cycle of the South Africa to the Second Cycle of the South African Universal Periodic Review' (2012) 11 available at <https://bit.ly/3AuOQux> accessed 30/08/2022.

¹³⁵ Sokeibelemaye Nwauche and Shawn Teresa Flanigan, 'Challenges to Nonprofit Organization Participation in Social and Development Policy Planning in South Africa' (2022) 13 (2) *Nonprofit Policy Forum* 119, 127-129.

The South African NPS is comprised of various actors who work to give meaning to the constitutional human rights protections and the international human rights obligations of the State. This chapter has examined the constitutional foundations of the South African NPS, and the role various actors play at the domestic level to strengthen the system. It focused on the role of the South African judiciary, national parliament, the South African Human Rights Commission, and civil society organisations to underscore the impact they have made to the NPS, the challenges they face and how this can be overcome. It is evident from the analysis in this chapter that a collaborative approach between the different actors in the NPS is needed for the system to be more resilient and have greater impact in the promotion and protection of human rights. The strong constitutional foundation for human rights protection has provided an important tool for key actors like the judiciary and civil society, to work towards giving meaning to the rights enshrined in the constitution. Without a strong judiciary to carry out interpretation and enforcement, the constitutional rights will not become a reality to many. Access to justice remains a significant problem. There is need for human and financial resources to help address this problem. The National Parliament can play a major role in providing the resources needed to increase access to justice for vulnerable and marginalised communities by adopting a rights-based budgetary framework and through its role in the appropriation of revenue and oversight of government spending. This chapter highlighted the role parliament can play to promote and facilitate the ratification of treaties, promote compliance with human rights reporting obligations, and provide oversight of government departments. SAHRC has been a major player in the NPS, achieving significant impact through its actions on litigation, monitoring and investigation. The National Parliament can help strengthen the work of SAHRC by legislating to secure its financial independence. Where governmental action has been lacking, civil society have helped to fill the vacuum in areas of service delivery, advocacy for human rights and promoting government accountability. A well-functioning NPS will therefore require multiple actors working together to promote and protect human rights.