



International Human Rights Protection: The Role of National Human Rights Institutions - a Case Study

**Monika Mayrhofer (editor), Francisco Aquilar, Mehdi Azeriah,
Renata Bregaglio, Jeremy Gunn, Patrick Harris, Amal Idrissi, Alvaro Lagresa,
Adrián Lengua, Y.S.R. Murthy, Bright Nkrumah, Kristine Yigen**



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Authors	Mònika Mayrhofer (editor), Francisco Aquilar, Mehdi Azeriah, Renata Bregaglio, Jeremy Gunn, Patrick Harris, Amal Idrissi, Alvaro Lagresa, Adrián Lengua, Y.S.R. Murthy, Bright Nkrumah, Kristine Yigen

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All errors remain the authors' own.

Executive summary

This Report was written as part of the FP7 research project, ‘Fostering Human Rights Among European (External and Internal) Policies’ and falls under Work Package 4, ‘Protection of Human Rights: Institutions and Instruments’. This Work Package aims to ‘map’ and assess current human rights protection systems. The present report focuses on National Human Rights Institutions (NHRIs) and the roles which they play or should play in the monitoring of human rights. This analysis focuses on the national level, through four case studies on the NHRIs of India, Morocco, Peru and South Africa, and on the regional, European level. The report sheds light upon the many and varied institutional foundations and working methods of NHRIs and at times highlights a number of discrepancies between their legal mandates and their practical functions or effectiveness in the promotion and protection of human rights. Whilst all institutions covered were granted ‘A’ status by the International Coordinating Committee of NHRIs, which assesses them in the light of their compliance with the 1993 ‘Paris Principles’, they all have a somewhat different *modus operandi* and approach towards human rights monitoring.

The first part of this report introduces the research and elaborates upon the importance and growing significance of NHRIs. The second part, introduces the ‘Paris Principles’ and the relevant international framework and delineates the concept of monitoring. Part III, as the substantial body of the report, contains four chapters, each contributing a separate national case study based upon, the Indian ‘National Human Rights Commission’ (NHRC), the Moroccan ‘Conseil National des Droits de L’Homme’ (CNDH), the Peruvian ‘Defensoría del Pueblo’ (Office of the Ombudsperson) and the South African ‘Human Rights Commission’ (SAHRC), respectively. The fourth part of the report focuses upon the coordination and collaboration of NHRIs on a European (regional) level, before the fifth and final part notes conclusions which can be drawn from the ways in which the case studies highlight different approaches to human rights monitoring, drawing upon instances and categories of the latter which cut across the different institutions under review.

The insights offered in Part III of the report are somewhat context-specific, but have as their common denominator the elaboration of mandates and functions undertaken by the NHRIs with the ultimate aim of the protection and promotion of human rights. In this work, monitoring necessarily emerges as a crucial and core element of such mandates and functions. The effectiveness of the transition from mandate to concrete action, in other words, the effective practical exercise of such mandates, appears to vary between the different institutions. Despite this, monitoring functions can certainly be noted and have been assessed throughout all case studies. Suggested areas for improvement and factors hampering the effective monitoring mandates are also clearly noted in all chapters. Ultimately, as regards the respective NHRIs, it is noted that the Indian NHRC has a somewhat ‘patchy’ record. Whilst it conducted crucial legislative monitoring and review in certain areas, it neglected to do so in others. It has perhaps not fulfilled its potential to play a coordinating role in harnessing synergies with other monitoring bodies. The assessment of Morocco’s CNDH is that whilst it exists as a Constitutional body, and its mandate allows it to conduct investigative visits, make recommendations, and undertake annual reporting, it has largely neglected some of its functions, including the reporting obligation. It is acknowledged that the CNDH has played a somewhat ‘modest’ role in the identification and monitoring of human rights abuses. In this regard, greater autonomy and collaboration with other state institutions and civil society is greatly

needed. As regards the Peruvian Ombudsperson, whilst it has been increasingly involved in the receipt and addressment of individual complaints, and possesses a function of Constitutional review, the latter has been used sparingly and the former does not appear to guarantee a great deal of redress to victims. The Office of the Ombudsperson does appear to be rather active in the production of reports however, on thematic and regional bases. Despite this, it is concluded that themes addressed in this regard, and in general, would benefit from greater rights-based and gender perspectives in order to provide more useful information with regard to human rights. Finally, the SAHRC of South Africa notes a good number of areas in which monitoring is theoretically provided for and in which it occurs in practice. Concretely, the Commission sends out 'protocols' to state departments in order to measure progress made on specific economic, social and cultural rights, and it has also conducted public hearings on a number of themes. The chapter does note however, that there is an issue with a lack of governmental engagement with recommendations made, and that suggestions are not always taken seriously. It is noted that this may relate to the abstract nature of the issues addressed and a lack of substantive guidance on implementation. A more creative approach is suggested, in order to increase accessibility in this regard and furthermore an increase in the SAHRC's monitoring mandate is also mooted, in order for it to intervene where provision of basic amenities could improve human rights situations. As regards cooperation with the European Union, the chapter notes reasons for the lack of a flourishing relationship, suggesting the need for constant engagement with the provision of technical and logistical resources in this respect.

Part IV of the report focuses upon the key actors at the European level, and aims to elaborate upon the ways in which coordination among European NHRIs is ensured, including through the European Network of National Human Rights Institutions. The chapter notes that the European Union's Fundamental Rights Agency has the potential to play a coordinating role in this respect, given its position in the institutional framework as a form of European 'NHRI'. In relation to engagement of the EU with NHRIs in third countries, the chapter notes the valuable tool of human rights impact assessments as a means and basis for cooperation. It concludes however, that much greater systematic and formalised engagement is still needed.

List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACHR	Advisory Council for Human Rights (CCDH in French)
ACRWC	African Committee of Experts on the Rights and Welfare of the Child
AFSPA	Armed Forces (Special Powers) Act 1958/1983
ANC	African National Congress
ANNI	Asian NGO Network on National Human Rights Institutions
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDDH	Council of Europe Steering Committee for Human Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEO	Chief Executive Officer
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CGE	Commission for Gender Equality
CHPs	Complaints Handling Procedures
CMS	Complaint Management System
CNDH	National Human Rights Council (Conseil National des Droits de l'Homme)
CNDH Dahir	Dahir N° 1-11-19; 1 March 2011 (establishing the CNDH)
CNDH IR	CNDR Internal Regulation
CoE	Council of Europe

ComRC	Committee on the Rights of the Child
CPT	European Committee on the Prevention of Torture
CRC	Convention on the Rights of the Child
CSAP	Civil Society Advocacy Programme
CSO	Civil Society Organisation
DIHR	Danish Institute for Human Rights
DJCD	Department of Justice and Constitutional Development
DROI	Sub-Committee on Human Rights
ECRI	European Commission against Racism and Intolerance
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENNHRI	European Network of National Human Rights Institutions
EP	European Parliament
ERC	Equity and Reconciliation Commission
ESRP	Economic and Social Rights Report
EU	European Union
FRA	Fundamental Rights Agency
HRC	Human Rights Court
HRCA	Human Rights Commission Act
HRDs	Human Rights Defenders
HSRC	Human Sciences Research Council
IACHR	Inter-American Commission on Human Rights
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (UN)

ICC-SCA	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights – Sub Committee on Accreditation
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Services
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDHR	Interministerial Delegation for Human Rights (DIDH in French) Délégation Interministérielle aux Droits de l’Homme
INDECOPI	National Institute for the Defence of Competition and Intellectual Property
ISS	Institute of Social Sciences
JNE	National Elections Board (Jurado Nacional de Elecciones)
LIBE	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
MDMs	Mid-day Meals
MGGs	Millennium Development Goals
MGNREGA	Mahatma Gandhi National Rural Employment Guarantee Act
MISA	Maintenance of Internal Security Act
NCRF	National Consolidated Revenue Funds
NCM	Indian National Commission for Minorities
NCSC	Indian National Commission for Scheduled Castes
NCST	Indian National Commission for Scheduled Tribes
NCW	Indian National Commission for Women
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission of India

NHRI	National Human Rights Institution
NPM	National Preventive Mechanisms
OHCHR	Office for the High Commissioner of Human Rights
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OSCE	Organisation for Security and Cooperation in Europe
PAIA	Promotion of Access to Information Act 2 of 2000
PDS	Public Distribution System
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 2000
PHRC	The Protection of Human Rights Act 1993
POTA	Prevention of Terrorism Act
POTO	The Prevention of Terrorism Ordinance 2001
ROF	Regulation on Organisation and Functions of the Office of the Ombudsperson
SACC	South Africa Council of Churches
SAHRC	South African Human Rights Commission
SAMP	Southern African Migration Project
SHRC	State Human Rights Commission
SUNASS	National Superintendent of Sanitation
SUSALUD	National Superintendent of Health
TADA	Terrorists and Disruptive Activities (Prevention) Act 1985
TDCA	Trade, Development and Cooperation Agreement
ToR	Terms of Reference

TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Council
UNIFEM	United Nations Development Fund for Women
UPR	Universal Periodic Review
WHRDs	Women Human Rights Defenders

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I. Introduction

National Human Rights Institutions (NHRIs) play an increasingly pivotal role in the complex international and national human rights system. NHRIs are national bodies entrusted with the task of promoting and protecting human rights. They are:

established by States for the specific purpose of advancing and defending human rights at the national level, and are acknowledged to be one of the most important means by which States bridge the implementation gap between their international human rights obligations and actual enjoyment of human rights on the ground' (SCA, 2013: Paragraph 2).

The growing importance of NHRIs has been repeatedly endorsed globally not only by defining and adopting 'minimum standards' – the so-called Paris Principles (1993) – which are used as 'benchmarks against which proposed, new and existing NHRIs can be assessed' (UN, 2010: 31). The establishment of NHRIs is also actively promoted by the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2014: 80-81). In addition, NHRIs restrict their activities not only to the national level, they increasingly participate at the international level, for instance the EU or the United Nations (see Wouters, Meuwissen and Barros, 2013: 187-220; Meuwissen, 2013: 263-286).

Given the growing (national and international) significance of NHRIs the present report (D 4.3) aims to scrutinise the role of NHRIs by presenting the results of four case studies on NHRIs in India, Morocco, Peru and South Africa¹ as well as elaborating on the involvement of NHRIs in the monitoring of human rights in the EU. The research was carried out as part of the FP 7 project 'Fostering Human Rights Among European (External and Internal) Policies' (FRAME) and is embedded within Work Package 4 (WP 4) 'Protection of Human Rights: Institutions and Instruments' which was designed to comprehensively assess institutions and instruments operating to protect human rights at the international, regional and national levels. Chapter IV of the 'Report on the mapping study on relevant actors in human rights protection' (Mayrhofer et al, 2014: 69-73) already provides a general introduction into NHRIs including a discussion of the diversity of NHRIs around the globe, the role of NHRIs in the global and regional human rights systems and an evaluation concerning influence, effectiveness and achievements of NHRIs. Based on this initial assessment the present report is dedicated to providing in-depth analysis of selected NHRIs and, based on this analysis, reflecting on the dimension on human rights monitoring.

A. Objective and a note on methodology

The objective of the report D 4.3 is to conduct a case study on the role and functioning of NHRIs. Due to the regional backgrounds of the research partners involved, the focus of the study is on NHRIs in third countries. Thus, the report aims at discussing the context, institutional set-up, functions, competences and activities of NHRIs in selected non-European countries and providing a comprehensive picture of the NHRIs scrutinised. As researchers and experts from different disciplinary, professional and institutional backgrounds were entrusted with drafting the chapters on NHRIs the chapters differ with regard to the

¹ The case studies were selected due to the expertise of research partners.

focus, the approach and the structure adopted. Based on the information provided on the different NHRIs as well as drawing from a discussion of the concept of monitoring presented at the beginning of the report, it will finally be discussed which role NHRIs particularly play concerning the monitoring of human rights. The mandate to monitor is typically described in the legal foundation of NHRIs and in international human rights instruments providing a monitoring role to a national body to ensure that the ratifying state is complying with the content of the respective instrument. NHRIs, even if in compliance with the Paris Principles vary in mandates, types of organisations and *modus operandi*, and often monitoring is rather broadly defined in international instruments. This means that the concrete understanding of the monitoring function of the respective NHRI is essential in understanding its approach.

As already indicated, the study presents findings from researchers with different disciplinary backgrounds. Some of them rely on desk research including a literature review and analysis of legal and policy documents (such as reports, political programmes, constitutions, laws, contributions to international human rights treaty bodies) as well as case law, others have complemented the research with conducting interviews with different stakeholders and experts.

B. Contents of the report

The Report is divided into five main parts, of which the first elaborates its introduction, including a word on the importance of national human rights institutions, and their role in the promotion and protection of human rights; and the fifth draws conclusions from the preceding chapters and studies.

Part II of the report consists of a chapter written by Kristine Yigen which elaborates upon the concept of human rights monitoring and the role of NHRIs in conducting such a task. The chapter introduces the 'Paris Principles' and the role envisioned for NHRIs in relevant global frameworks and international human rights legislation is laid out, as are their general mandates and functions. The definition of monitoring, and what this means in practice, is examined in relation to several international human rights conventions, focusing also upon various mechanisms for monitoring implementation, and also noting the importance of monitoring in order to identify the extent of progress being made and to contribute to targeted policy making. The chapter lays out the so-called 'PRIME' model which describes the policy cycle from inception through to evaluation, with monitoring forming a key constituent element of this process. The chapter concludes with a presentation of different aspects of monitoring.

Part III of the report comprises the most substantial and substantive sections and consists of four separate case studies, contained within chapters focusing upon the work (particularly with regard to monitoring) of national human rights institutions in India (A), Morocco (B), Peru (C) and South Africa (D).

Chapter A (National Monitoring by India's NHRI) was drafted by Y.S.R. Murthy and contains an overview of the establishment, mandate, composition and functions of the Indian National Human Rights Commission (NHRC) including as a facilitator for good governance, and as a catalyst in addressing serious human rights issues. With regard to monitoring, the chapter contains a substantial exposition of case studies showcasing the legislative review function of the NHRC, including on anti-terrorism legislation; which is regarded as having serious, negative consequences for human rights protection. A number of different legislative acts are considered in the review, noting that the NHRC may undertake visits, and

consultations and made public announcements regarding its concerns over such ‘draconian’ legislation. The chapter goes on to focus upon several systemic and serious human rights issues which the Commission identified and reported upon, including starvation, trafficking and healthcare. The chapter then ends by noting synergies between the NHRC and various other bodies, as some suggestions for improvement in the work of the Commission.

Chapter B (National Human Rights Institution of Morocco), written by Amal Idrissi, Jeremy Gunn, Alvaro Lagresa and Mehdi Azeriah, begins with an historical overview of the emergence of Morocco’s Conseil National des Droits de l’Homme (CNDH). This is necessary in order to situate the CNDH within the unique political context of the country and to better understand its position, particularly following a recent history of serious human rights violations. The establishment, status and functions of the CNDH are discussed. With regard to monitoring, the chapter elaborates on the CNDH’s mandate to ‘proactively intervene’, and to monitor the situation of detainees. It notes the Conseil’s catalytic role, as well as its efforts to promote human rights. The final substantive section elaborates on the concrete outputs of these reporting efforts on the human rights situation in Morocco, as well as discussing the relationship between the CNDH and different institutions of government and with civil society, before making conclusions on means needed to improve its functioning.

Chapter C (The Peruvian Office of the Ombudsperson) was drafted by Renata Bregaglio, Francisco Aguilar and Adrián Lengua and aims to provide an insight into the functioning of the Peruvian ‘Defensoría del Pueblo’. After presenting the historical background and context to its establishment, the chapter reviews the functions and competences of the Ombudsperson, placing more particular focus upon the oversight of policy and regulation, the complaints function of the Ombudsperson, (including close analysis of the process and the growth of the mechanism over time) and the Constitutional review function. The chapter then focuses upon the Ombudsperson’s reporting function and aims to analyse the thematic breakdown of such reports. A brief discussion of follow-up and monitoring is included in this regard. Section four of this chapter, considers the interaction between the Ombudsperson and the United Nations, aiming to draw upon areas of coordination and focusing upon the need for improvement with regard to certain Conventions and Optional Protocols. The chapter concludes with information and analysis of the Ombudsperson’s monitoring of ‘social conflicts’.

Chapter D (National Monitoring by NHRIs in South Africa) drafted by Bright Nkrumah, concentrates primarily upon the work of the South African Human Rights Commission (SAHRC) in advancing human rights, specifically through its monitoring functions, and particularly with regard to ‘socio-economic rights’. The chapter begins with an exposition of the legal foundation and composition of the Commission, which it considers with reference to the Paris Principles. The second part of the chapter focuses upon the monitoring strategies of the SAHRC and includes a detailed analysis of such strategies in monitoring policy and legislation in South Africa, and in monitoring the government’s implementation, including through public hearings and enquiries. The section also considers the SAHRC’s role in monitoring compliance with global human rights standards. The chapter focuses further upon the SAHRC’s engagement with Parliament, civil society and finally with the EU, as it reviews and analyses engagement between the latter and the SAHRC, including areas of cooperation and areas for improvement. In its conclusions, the chapter

notes the challenges involved in ensuring that the government take heed of the SAHRC's recommendations.

Part IV of the report (Regional Monitoring of Human Rights in EU Member States and Interaction with EU Institutions) was drafted by Kristine Yigen and focuses upon the key actors at the European level, including the European Network of National Human Rights Institutions which aims to ensure collective engagement of NHRIs with the EU. The chapter further considers the work of the European Union's Fundamental Rights Agency and its role, as well as where it sits within this institutional framework. The chapter then moves on to consider the role of the Council of Europe in engaging with European NHRIs, and finally considering the same issue with regard to national human rights institutions in third countries, presenting some reflections on the case studies presented in Part III.

Part V of the report (Conclusions) draws upon all parts and chapters outlined above, in order to present findings and to tie together the lessons learned from the preceding chapters.

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b) Literature

(1) Book chapter

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Wouters, J., Meuwissen, K. And Barros, A. S. (2013), 'The European Union and National Human Rights Institutions', in Wouters, J. and Meuwissen, K. (eds.) *National Human Rights Institutions in Europe*, Cambridge/Antwerp/Portland: Intersetia, 173-220.

(2) Policy and other reports

Mayrhofer, M. (2014), *Report on the mapping study on relevant actors in human rights protection*, FRAME, Work Package No. 4, Deliverable No. 4.1, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/02-Deliverable-4.1.pdf> (accessed on 9 March 2016).

II. Monitoring of human rights by NHRIs as defined by international instruments²

1. Background

The UN General Assembly adopted the Paris Principles in 1993 in its Resolution 48/134.³ The global principles adopted govern the status and functioning of independent national human rights institutions (NHRIs). The Paris Principles (1993: 3(b)) prescribe that NHRIs shall ensure the effective implementation of international human rights standards and work to ensure that national legislation, regulations and practices conform to the fundamental principles of human rights (1993: 3(a)(i)). NHRIs shall protect and promote universal respect for and observance of human rights and fundamental freedoms (1993: Preamble).

In the same year, the World Conference on Human Rights held in Vienna, had adopted the Vienna Declaration and Programme of Action which encouraged the establishment and strengthening of NHRIs. Anticipating the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights in 1998, the Vienna Declaration asked all states, organs and agencies of the United Nations system related to human rights, to report to the Secretary-General of the United Nations, on the progress made in the implementation of the Vienna Declaration and to submit a report to the General Assembly at its fifty-third session, through the Commission on Human Rights and the Economic and Social Council. (Vienna Declaration, 1993: 100) In the same vein, it asked regional and national human rights institutions, as well as non-governmental organisations, to present their views to the Secretary-General on the progress made in the implementation of the Vienna Declaration. In addition, the Vienna Declaration (1993: 100) stressed that ‘[s]pecial attention should be paid to assessing the progress towards the goal of universal ratification of international human rights treaties and protocols adopted within the framework of the United Nations system.’

The World Conference on Human Rights reaffirmed the ‘important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.’ (1993: 36) The Vienna Declaration encouraged ‘the establishment and strengthening of national institutions, having regard to the “[p]rinciples relating to the status of national institutions” and recognising that it is the right of each [s]tate to choose the framework which is best suited to its particular needs at the national level.’ (1993: 36)

Monitoring of human rights is regarded as one of the core areas of work for NHRIs. All international human rights instruments include sections on national monitoring, primarily targeted at organs of the state, to

² This chapter (Section 1-3) was written by Kristine Yigen (Senior Advisor, Danish Institute for Human Rights). Section 4 was written by Patrick Harris (Straniak Fellow at the Ludwig Boltzmann Institute of Human Rights, Vienna) and Monika Mayrhofer (Senior Researcher at the Ludwig Boltzmann Institute of Human Rights, Vienna).

³ For a more detailed discussion on the objective and content of the Paris Principles as well as on the way, NHRIs are rated (A-, B- and C-status) please see Deliverable 4.1 of Work Package 4 (Mayrhofer, 2014: 69-70).

ensure that an analysis of how the state is complying with ratified obligations is undertaken. National human rights institutions are organs of the state, but at the same time independent institutions with their mandates (often) conferred through Acts of Parliament. Monitoring is, in many ways, at the heart of the work of NHRIs, as such monitoring of human rights often provides the basis for recommendations and advice to the political system. While monitoring may take many forms and require extensive resources, there is limited guidance and perhaps even discussion on the scientific quality and validity of monitoring results of NHRIs, as well as very limited guidance in identifying monitoring methodologies for NHRIs. This is problematic as it leaves NHRIs in a vacuum with no clear concepts or models for monitoring, which can, and often does, backfire on the credibility of NHRIs when they present their reports on the status of human rights in their respective countries. Both states and NHRIs are often criticised for the quality of their monitoring and thus it is also relevant to look deeper into how this can be addressed.

In this light, the chapter will describe the role of NHRIs and how monitoring of rights is legally defined in some of the main international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It will also describe what role has been afforded to NHRIs in this regard, for example as National Prevention Mechanisms in the Optional Protocol to the Convention against Torture, as well as in other more recent instruments such as the Convention on the Rights of Persons with Disabilities. It will also shed further light on the discussion as to what monitoring concepts, if any, are applied in the main international human rights instruments, what role monitoring plays within the policy cycle and, finally, it will present the most important aspects of monitoring.

a) Understanding the role of NHRIs

NHRIs are founded on the vision set forth in the Universal Declaration of Human Rights (United Nations, 1948) and further developed in the international human rights conventions promoting respect for and observance of human rights and fundamental freedoms and in recognition of the universality, indivisibility and interdependence of all human rights (Paris Principles, 1993). NHRIs accordingly work on the basis of international human rights policies (declarations/soft law) as well as international human rights legislation (conventions/hard law).

As a result of states' international cooperation, NHRIs' promotion, protection, and implementation of human rights standards takes place at national, regional and global levels.⁴ The Paris Principles provide that appropriate arrangements shall be made at the national level to ensure the effective implementation of international human rights standards. In addition, national and international cooperation is assumed to be an essential part of effective human rights implementation (United Nations, 1993: Preamble).

The purpose of a NHRI is to constitute the national focal point and centre of expertise for promotion and protection of human rights. The NHRI must have special expertise concerning promotion and protection

⁴ This is the case for instance with The Danish Institute for Human Rights whose 'Establishing Act (2002)' outlines (at section 2, subsection 2(10)) that it may contribute to the implementation of human rights domestically and internationally.

of human rights generally and specifically in relation to declarations and conventions ratified by the national parliament in question.

Based on the human rights expertise, the NHRI is tasked with being a national advisor to the parliament, judiciary, government and all other institutions, organs and organisations of the state, which has chosen by law to establish a NHRI in accordance with the UN Paris Principles. According to these principles, the provision of advice by the NHRI can be upon request or upon its own initiative.

The UN has a specific interest in the development of competent and capable NHRIs in all member states as well as in their cooperating individually, in networks and with the UN system in general, thus optimising in as many ways as possible the work to promote and protect human rights. This international cooperation is mutually reinforcing and enhances the exchange of expertise across borders. The Paris Principles set forth and recommend that the NHRI mandate can be expanded to include specific and specialised tasks. For example, in Denmark this applies to the areas of disability, gender equality and equal treatment in relation to ethnicity and race.

In international cooperation, the NHRI can function as a catalyst for human rights implementation processes in other countries. The NHRI can act as a clearing house between the state and civil society and even between the state, civil society and the private sector in human rights matters. International recognition through cooperation will strengthen the legitimacy of the NHRI and thus enhance its potential effect and impact as an advisor, both nationally and internationally, as the quality and effect of the institution's deliveries are based on a combination of theory and practice.

Paris Principles-compliant NHRIs typically have a legal mandate which can be formulated into six main functions or services as follows:

1. Advise parliament, government and other bodies on human rights issues;
2. Monitor the human rights situation and provide evaluation of policies and their impact on human rights;
3. Support victims of human rights violations, specifically in relation to cases regarding discrimination based on race and ethnicity;
4. Research on human rights;
5. Education on human rights;
6. Communication on human rights in order to raise awareness, provide information and address public opinion.

2. Understanding or misunderstanding monitoring concepts

According to both the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2001) and United Nations Development Programme (UNDP-OHCHR, 2010) monitoring refers to the activity of observing, collecting, cataloguing and analysing data and reporting on a situation or event. The aim of monitoring can be to document human rights abuses so as to recommend corrective action or to be

preventive and educational, or it may serve the purpose of human rights advocacy. The two abovementioned publications outline what monitoring means in the context of NHRIs and also what types of activities can be undertaken in relation to the monitoring mandate of NHRIs. There are a variety of publications explaining what monitoring entails. Of particular importance are those mentioned above, as well as UN publications on the topic, such as the *'Training Manual on Human Rights Monitoring'* (OHCHR, 2001). They also determine what is particularly relevant to the work of a NHRI.

Human rights monitoring is defined as 'the active collection, verification and immediate use of information to address human rights issues' (OHCHR, 2001: 3). Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with national authorities to obtain information and to pursue remedies and other immediate follow-up. Monitoring is considered important because it provides concrete evidence of what is occurring. Monitoring also provides periodic and regularly-collected data, sheds light on trends, signals progress or deterioration, and suggests areas for priority action. In addition, monitoring is generally carried out over an extended period of time, and ought to be of an ongoing nature (UNDP-OHCHR, 2010: 33 and 185). According to this publication, (2010: 33) NHRIs monitor human rights generally, with regard to selected issues, or both. Some have programmes to monitor the situation of specific groups.

The Paris Principles do not, in fact, include the term 'monitoring' in their description of the responsibilities of NHRIs. They describe (1993: 3(a)) that the NHRI can submit to organs of the state 'any matters concerning the promotion and protection of human rights' in any form and further specify that NHRIs shall examine the legislative and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as they deem appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. The NHRI shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures (1993: 3(a)(i)). The Paris Principles are very broad, and the NHRI must carry out an 'examination' of legislation and 'prepare' reports on the national situation with regard to human rights in general, and on more specific matters. They further state (1993: 3(a)(iv)) that the NHRI should draw the attention of the government to situations in any part of the country where human rights are violated and make proposals to it for initiatives to put an end to such situations and, where necessary, express an opinion on the positions and reactions of the government. This provides the NHRI with a very broad mandate, but also leaves them with little guidance as to how this should or could in fact be carried out.

Turning to the international conventions,⁵ Article 19 of the CAT provides that state parties shall submit 'reports on the measures they have taken to give effect to their undertakings under this Convention, [...]' (United Nations, 1984: Article 19). Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.' In short,

⁵ It should be noted, that none of the international human rights covenants and conventions that are discussed in this chapter legally require the establishment of an NHRI. Although OPCAT and CRPD require the setting up of national mechanism, they do not necessarily have to be NHRIs.

state reports must include any new measures taken and any further information which is requested by the monitoring body under the CAT.

Under the Optional Protocol to the Convention against Torture (OPCAT), Article 17 on National Preventive Mechanisms (NPM) states that, 'each state party is obliged to maintain, designate or establish [...] one or several independent national preventive mechanisms for the prevention of torture at the domestic level. This mechanism should be functionally independent and the state should consider Paris Principle NHRIs for the assignment' (United Nations, 2002: Article 17).

The assignment under the NPM is described by OPCAT to include that the NPM should '*regularly examine* 'the treatment of the persons deprived of their liberty in places of detention' (Article 19a) '*make recommendations* to relevant authorities to improve the situation' (Article 19b) and '*submit proposals and observations* concerning existing draft legislation' (Article 19c).⁶

This work is done 'with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment' (Article 19 (a)) and 'with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations' (Articles 19 (a) (b) and (c)).

While the aim of monitoring under OPCAT is well described, there is limited direction on to how to examine regularly. Article 20, however, provides that both qualitative and quantitative data is needed as the NPM should have access to:

[...] all information concerning the number of persons deprived of their liberty in places of detention [...], as well as the number of places and their location' [...] 'information referring to the treatment of those persons as well as their conditions of detention [including] the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the national preventive mechanism believes may supply relevant information. (United Nations, 2002: Article 20)

The quote indicates, that there is some guidance on the methodology, for example, the opportunity to conduct private interviews with detainees is highlighted and thus reports should aim to include this type of information.

Both the ICCPR and ICESCR, are silent on how monitoring should take place, but describe the submission procedure for state reports under the conventions. The reporting guidelines laid down in these two main conventions provide detailed guidance as to how the various articles are to be interpreted and which questions need to be addressed when reporting under each article. Generally, the focus is to a large extent on legal and administrative provisions in national legislation. There is less focus on evidence-based implementation data. NHRIs often facilitate civil society organisations' (CSOs) submission of shadow

⁶ Author's own emphasis throughout.

reports under these conventions. This facilitating role includes that CSOs have access to technical assistance in relation to reporting guidelines and understand the provisions of the conventions as well as the international reporting cycle.

Under the Convention on the Rights of Persons with Disabilities (CRPD), the state is obliged to set up an independent monitoring mechanism to promote, protect and monitor the implementation of the Convention. It is further stated that the: '[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process' (United Nations, 2006: Article 33 (3)).

In an expert paper from 2006 developed by the UN ad hoc Committee on the setting up of an international monitoring mechanism under the CRPD entitled 'Existing monitoring mechanisms, possible relevant improvements and possible innovations in monitoring mechanisms for a comprehensive and integral international convention on the protection and promotion of rights and dignity of persons with disabilities', (UN Ad Hoc Committee, 2006) the objectives of monitoring are outlined in a rather detailed manner. Thus, it is worth investigating the concepts applied by the UN experts drafting the disability monitoring mechanism as it is one of the most recent monitoring mechanism and as there has been a process in connection with the Disability Convention to bring innovation into monitoring part of the Convention.

The paper outlines that the first step is to ensure a proper diagnosis of the existing situation by using specific national and local benchmarks/goals against which performance in a given area can be assessed periodically. It also points out that quantitative as well as qualitative information is useful in tracking progress over time, particularly in regard to those treaties which allow for progressive realisation. This is described as the first purpose, namely to ensure that such 'diagnosis' takes place. (UN Adhoc Committee, 2006: 5) It is interesting that the word 'diagnosis' is being used as this term stems from the scientific tradition, applying a positivist methodology with a clear method and many steps to be observed. Under all circumstances, the term does not fit well into the description of what is needed to obtain the 'diagnosis.' Rather it makes more sense to use the term and methodology for 'baseline' studies.

The second purpose of monitoring, according to the expert paper, is to provide the basis for *targeted policy making*⁷ by the state parties by providing the basis for effective evaluation of progress made towards the realisation of the obligations contained in the treaty (United Nations, Adhoc Committee, 2006: 6). By this, the experts underline that the monitoring should in fact enable policy-making. They point to monitoring as a tool for policy making, which is of course not a new consideration, but provides a hint in relation to discussions about the level upon which monitoring should take place. It points to a more structural, strategic approach, than monitoring on a more individual-based level. Later in this chapter, a proposal for a framework addressing this issue will be presented.

⁷ Author's own emphasis.

The expert paper highlights further purposes of monitoring, which include that it should create opportunities for new partnerships between the duty bearers and rights holders (United Nations, Adhoc Committee, 2006: 7), create opportunities for capacity building and awareness raising (2006: 8), and protect victims when national remedies fail (2006: 9). The focus is on how inclusion and participation of rights holders in the process of monitoring contributes to the promotion, protection and fulfilment of the rights. Repeatedly, the value of the role of NHRIs in the monitoring process is also stressed with reference to other general comments under other international human rights conventions such as the Convention on the Rights of the Child (CRC) and ICESCR, even if it is only under OPCAT that NHRIs in many cases are designated as the national prevention mechanism.

However, the point is that with broad national consultations with rights holders and NHRI participation, national monitoring contains an in-built 'political' process ensuring ownership of problems identified and solutions presented. In a sense, it is this process which ensures the 'full picture' in relation to the human rights situation and which can lead to an appropriate balancing of priorities.

3. Monitoring by NHRIs as an important element of the policy cycle – the PRIME model

Regardless of the form of government, one could argue, social and political developments take place in a five-step-process where each step consists of a number of sub-processes depending on the form of government and social and political culture. Monitoring in general and carried out by NHRIs in particular, thus, is embedded in a broader political process. The first step is the determination of the POLICY. The second step is the development of a set of rules (REGULATION/LEGISLATION). The third step consists of making possible and enforcing compliance with the given set of rules (IMPLEMENTATION). The fourth step consists of measuring whether the set of rules is implemented and how adjustments take place (MONITORING). The fifth step is an assessment of whether the given set of rules and methods of implementation have the desired effect in the form of social behaviour in accordance with the political intent (EVALUATION). The process can be described as follows:

PRIME MODEL:



All steps in the above model can be monitored by the NHRIs and by applying a systematic approach to its monitoring work, the NHRIs can also be strategic about where in the process the NHRI's monitoring is taking place and furthermore, what is selected and left for other actors to monitor.

4. Conclusions – identifying the most important aspects of monitoring

At the beginning of this chapter, it was stated, that monitoring is, ‘a broad term describing the active collection, verification and immediate use of information to address human rights problems’ (see above). This definition elaborates a number of information-gathering activities in this regard, which further notes that the term includes ‘evaluative activities [...]’ (OHCHR, 2001: Paragraph 28). This definition therefore includes separate elements which could be interpreted as falling into the categories of ‘input’, and ‘assessment’ functions of monitoring.

The view taken here therefore, is that the overall practice of effective human rights monitoring necessitates information gathering, be it through visitations, interviews, investigations, or through desk-based research. But if one also focuses on the ‘raison d’être’ of the concept, and takes a goal-orientated view, such a function must also rely upon the production of evaluative outcomes, including analyses, lessons learned and recommendations in order to produce an effective and sustainable monitoring cycle and to improve human rights outcomes.

This interpretation seems to accord well with the view taken by the UNDP-OHCHR ‘NHRI Toolkit’ (2010: 33) which states that ‘[m]onitoring also provides periodic and regularly-collected data, sheds light on trends, signals progress or deterioration, and suggests areas for priority action. In addition, monitoring generally is carried out over an extended period of time, and ought to be of an ongoing nature’. Here then, it seems that suggestions for action, in other words, recommendations, are considered to be an essential part of the monitoring function when it comes to human rights. To look at it in reverse, monitoring is a necessary element, inherent in and at the heart of all useful and informative output functions which aim to raise awareness or improve the human rights situation.

To sum up, definitions on monitoring suggested by international institutions such as the OHCHR or the UNDP or laid down in different human rights instruments (see above) usually include several aspects. Firstly, they have an *input* dimension referring to the observation of as well as collection of information (data) on the human rights situation (human rights violations, developments of human rights laws, etc.). Secondly, monitoring refers to activities of *processing* data and information on human rights such as the systematisation and analysis of acquired data. Thirdly, monitoring requires activities which are directed either to state officials, the international level or the broader public – the *output* dimension – which includes the aspects of reporting but also giving advice and drafting recommendations concerning the improvement of the human rights situation.

In the following, each dimension will be elaborated shortly:

Observing ‘usually refers to the more passive process of watching events’ (OHCHR, 2001: 9) in the area of human rights. It requires the keeping track of human rights-related developments, incidents and events and is generally done over a longer period of time or in recurring time intervals (see Guzman and Verstappen, 2003: 7).

Collecting data on human rights is a key activity in the field of monitoring. Human rights data contain information for describing, analysing and assessing conditions and issues of human rights in a state or society. It may include quantitative, statistical data as well as qualitative data. Typical sources for data in

the field of human rights monitoring are, for example, official statistics, censuses, administrative records, surveys, research, complaints data, qualitative interviews with different stakeholders, policy and legal documents and others.

Cataloguing and analysing requires the systematisation and the assessment of the acquired data according to specific national or international benchmarks, i.e. national and international human rights treaties and laws. Thus, cataloguing and analysing also implies an act of measuring a particular social phenomenon on the basis of a previously agreed definition in order to be able to relate it to a specific (human rights) aim or to specific (human rights) priorities.

Reporting is a process of providing information to public authorities, politicians, the population, stakeholders or international bodies which is based on the evaluation of a broad range of data. This requires the continuous and systematic collection of data and information. It is also closely connected to the aspects of human rights *education and awareness raising* of the broader public.

Recommendations are usually directed to policy makers and representatives of the public administration. They usually include specific advice on how to improve the human rights situation in a specific area or of a specific group or how to enhance the implementation of human rights law in the national context. They can include specific legal and policy advice, proposals concerning positive action and administrative measures.

The present chapter set out to introduce the concept of monitoring which is one of six tasks NHRIs are usually entrusted with according to the Paris Principles. The chapter not only discussed various international human rights instruments and documents containing information and definitions of the concept of monitoring, it also argued that monitoring is an important step of a normal policy process as illustrated by the PRIME-model. The chapter concluded with elaborating on different aspects of monitoring which will be used as a reference point to discuss the results of the different case studies presented in the following chapter of this report.

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III. National/domestic monitoring by NHRIs – case studies from India, Morocco, Peru and South Africa

A. National monitoring by India's NHRI⁸

1. Introduction and historical context

India was in the throes of an economic crisis in 1990. To overcome the crisis, several far-reaching economic reform measures were launched in 1991. Many donor countries had also expressed concern over the human rights situation in certain parts of India and stressed the need to strengthen the machinery for the protection and promotion of human rights.

On 14 May 1993, the Human Rights Commission Bill was introduced in the Lower House of the Indian Parliament. After a detailed debate on the powers, functions and manner of functioning of the National Human Rights Commission in the Parliamentary Standing Committee on Home Affairs, the Protection of Human Rights Ordinance of 28 September 1993 was promulgated. It enabled the establishment of the National Human Rights Commission of India on 12 October 1993 (NHRC, 1993).⁹

As the Protection of Human Rights Ordinance was a temporary law, a revised Bill was presented to the Parliament on 25 November 1993 in order to replace it. The 'Statement of Objects and Reasons' of the Revised Bill noted that there had been 'growing concern in the country and abroad about issues relating to human rights' (NHRC, 1993: Paragraph 1.3). 'Having regard to this, and to changing social realities and emerging trends in the nature of crime and violence', the Government had considered it essential 'to review the existing laws and procedures and the system of administration with a view to bringing about greater efficiency and transparency' (NHRC, 1993: Paragraph 1.3). This Bill was approved by the President on 8 January 1994. The Protection of Human Rights Act (PHRA) 1993 became an important milestone in the efforts to protect human rights in India.

2. Characteristics, composition and functions of the NHRC

a) Legal foundations

The Indian judiciary has been the custodian of fundamental rights since Indian independence. Yet a need was felt for the creation of new institutions for 'better protection' of these rights, which would complement the courts. The NHRC of India was thus established under the PHRA (1993). The Preamble of this Act states that it seeks to 'provide for the constitution of a National Human Rights Commission, State

⁸ This chapter was drafted by Y.S.R. Murthy, Professor and Registrar and Executive Director at the Centre for Human Rights Studies of the O.P. Jindal Global University, Sonapat, NCR of Delhi. He is former Director of the Research in the Policy Research, Programmes and Projects Division of the National Human Rights Commission in India.

⁹ The Constitution of India confers powers upon the President of India to issue an ordinance if neither House of Parliament is in session and 'circumstances exist, which render it *necessary* for him to take *immediate* action' (Constitution of India: Article 123; Author's own emphasis). Such ordinances are normally issued when existing law may not be sufficient to deal with a situation 'which may *suddenly and immediately* arise'. (View expressed by Dr B. R. Ambedkar, principal architect of the Constitution of India; see Constituent Assembly Debates, 1949: VIII, 208; Author's own emphasis).

Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto’.

b) Composition

The National Human Rights Commission of India consists of:

- (a) a Chairperson who has been a Chief Justice of the Supreme Court;
- (b) one Member who is or has been, a Judge of the Supreme Court;
- (c) one Member who is, or has been, the Chief Justice of a High Court;
- (d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights. (PHRA, 1993: Section 3(2))

Furthermore:

The Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12. (PHRA, 1993: Section 3(3))

The National Human Rights Commission has been inviting the Chairperson of the National Commission for the Protection of Child Rights as a Special Invitee to attend its statutory full commission meetings. The lawmakers created synergies between some of the national commissions, which deal with human rights of specific groups and the National Human Rights Commission. Recognising the overlap in the functions of some of these bodies, an innovation was made to avoid duplication in the efforts of various bodies with the National Human Rights Commission of India providing an over-arching umbrella framework for coordinated efforts to protect and promote human rights.

The Chairperson of the NHRC has the same status and conditions of service as the Chief Justice of the Supreme Court of India, while the status and conditions of service of Members correspond to Judges of the Supreme Court. Thus, the independence of the NHRC is expected to be the same as that of the Supreme Court of India (Report of the Working Group of the Universal Periodic Review of India, 2008: Paragraph 21). This factor alone gives the Indian NHRC a high moral status and adds strength to its recommendations.

The Chairperson and Members are appointed on the recommendations of a high level committee,¹⁰ which is a politically balanced one and headed by the Prime Minister of India. The presence of leaders of

¹⁰ Section 4 of PHRA says that ‘every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of –

- (a) The Prime Minister — Chairperson
- (b) Speaker of the House of the People — Member
- (c) Minister in-charge of the Ministry of Home Affairs in the Government of India — Member
- (d) Leader of the Opposition in the House of the People — Member
- (e) Leader of the Opposition in the Council of States — Member

opposition from both the Houses of Parliament in that committee is a form of check and balance and seeks to ensure that only outstanding individuals are appointed for these positions. Despite this, concerns¹¹ have still been raised, including from NGOs, over certain appointments to the post of Chairperson and Members of the NHRC (ANNI, 2010: 69-72).

c) Nature and characteristics of the body

The main characteristics of the NHRC include, among others, its existence as an autonomous, independent entity. It possesses a wide mandate, and monitors the implementation of its own recommendations. Furthermore, it has the powers of a civil court (PHRA: Section 13(4)) including the authority to award interim relief to the victim or their family members while reviewing complaints of human rights violations (Section 17 and 18(c)).

The PHRA defines human rights as the 'rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India' (PHRA, 1993: Section 2(d)). The law makers envisaged that the National Human Rights Commission (NHRC) and State Human Rights Commission should be 'recommendatory' bodies, which shall make suitable recommendations to appropriate authorities on matters concerning the protection and promotion of human rights.

In a matter relating to the procedure to be adopted by the human rights courts, the Madras High Court based in the Southern Indian State of Tamil Nadu made observations on the nature of the National Human Rights Commission and the State Human Rights Commissions. The Madras High Court observed that:

[i]t is correct to state that the scheme of PHRA in constituting NHRC, SHRC¹² and HRC¹³ indicates, in no uncertain terms, the NHRC and SHRC are akin to the Commission of Inquiry set up under Commission of Inquiry Act and have no powers to give a definitive judgement in respect of offences arising out of violation of Human Rights and are constituted with the object of creating awareness of Human Rights at the Governmental level and the public at large excepting the fact they are permanent Standing Commissions, while in sharp contrast, the only institution which can inquire into, adjudicate upon and punish for violation of Human Rights is HRC – first of its kind, anywhere in the world. (Madras High Court, 1997)

In other words, the PHRA envisaged a flexible, informal mechanism which could swiftly respond to human rights violations while outlining the legal framework for the establishment of the National Human Rights Commission.

d) Functions of the Commission

The Indian NHRC has been playing a very important role in the protection of human rights. In the discharge of various statutory functions entrusted to it under PHRA, it acts as a:

(f) Deputy Chairman of the Council of States — Member'.

¹¹ Concerns include a lack of diversity among NHRC members, such as no female members, NGO representatives or members with disabilities of the Commission, or a lack of political independence and experience of the candidates (ANNI, 2010: 69-72).

¹² State Human Rights Commission

¹³ Human Rights Court

- **Facilitator;** to facilitate the efforts of the central government, state governments and other public authorities in ensuring good and humane governance, by making recommendations on human rights issues; and as a:
- **Catalyst;** by getting all relevant agencies together and catalysing action on serious human rights issues.

Under Section 12 of the PHRA (1993) the NHRC shall perform all or any of the following functions, namely:

(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf [or on a direction or order of any court], into complaint of

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation, by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the protection of human rights (PHRA, 1993: Section 12).

Among other things, it **monitors** the elimination of child labour, bonded labour, trafficking in women and children, manual scavenging, public health, quality assurance in mental hospitals. Its role is **complementary** to that of the judiciary. The Supreme Court has, through interim orders in certain cases pending before it, referred to the NHRC the monitoring of the elimination of bonded labour,¹⁴ the functioning of three mental hospitals, the issue of Punjab mass cremations, deaths in Orissa due to starvation and the lifting of the ban on salt iodisation (NHRC, 1998: 14.8).

The Indian NHRC has issued guidelines on a variety of matters concerning civil, political, economic, social and cultural rights. It has a protective role as an effective national level remedy for complaints of human rights violations. It also has a promotional role in promulgating human rights education and awareness.¹⁵

The Indian NHRC is a Member of the International Coordinating Committee of National Human Rights Institutions at the UN and part of two networks namely the 'Asia Pacific Forum of NHRIs' and 'Commonwealth Forum of NHRIs'. It has extended technical assistance to Bangladesh, Nepal, Sri Lanka, South Korea and a number of other countries in the setting up of their Human Rights Commissions. It works in close co-ordination with the office of the UN High Commissioner for Human Rights and other specialised institutions of UN. It has been playing a key role in the Human Rights Council and it played a role in the negotiation process of the UN Convention on Rights of Persons with Disabilities (OHCHR, undated: iii).

e) Main areas of focus

The Commission's mandate is very wide under the PHRA. In the first few years following its establishment in 1993, however, it prioritised civil and political rights. Subsequently, its mandate covered the entire spectrum of civil, political, economic, social and cultural rights.

The main focus areas of the Commission include; the right to health, including mental health and monitoring the conditions of mental health institutions, the right to food, the right to education, the elimination of child labour and bonded labour, the rights of castes, tribes and other vulnerable groups, the rights of women and children, the rights of persons with disabilities, custodial deaths, rape, torture, extra-judicial killings, promulgation of human rights education, and awareness raising and the training of civil servants.

The setting up of the National Human Rights Commission was initially greeted with scepticism from those who felt that it would be a 'toothless body' or a 'paper tiger' (NHRC, 2002b: 40). As the Commission started addressing an exponentially growing number of complaints (ibid: 41) and discharging other responsibilities, it became widely known in the first few years and its stature grew. It earned a great reputation for independently denouncing many serious issues concerning human rights. If one looks at the way the Commission has acquitted itself from 1993-2015, one can discern that there are two distinct

¹⁴ On bonded labour for example, see <http://nhrc.nic.in/Documents/Publications/KYR%20Bonded%20Labour%20English.pdf> (accessed on 11 March 2016).

¹⁵ For further information see online publications, in particular the section 'Know Your Rights' http://nhrc.nic.in/publications_nonpriced.htm (accessed on 8 March 2016).

phases. In the first phase from 1993-2002, its reputation steadily grew while in the period 2003-2015, there was a decline in its public image. Such rises or declines may often be tied to the stature of its Chairperson and his or her own personal standing.

3. The NHRC's policy and legislation monitoring function – examples

Under Section 12(d) of the PHRA, the NHRC of India has the statutory responsibility to 'review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation' (PHRA, 1993: Section 12(d)). Its scope includes drafting as well as reviewing existing legislation. This provision is supplemented by another legal provision which mandates that the NHRC shall 'study treaties and other international instruments on human rights and make recommendations for their effective implementation' (PHRA, 1993: Section 12(f)).

The Commission reviewed a number of legislative Bills/Acts since 1993. These include, among others, the following: the Terrorists and Disruptive Activities (Prevention) Act, 1985 (TADA); the Prevention of Terrorism Bill, 2000; the Prevention of Terrorism Ordinance, 2001 (POTO); the Freedom of Information Act; the Domestic Violence Bill; the Child Marriage Restraint Act, 1929; the National Rural Employment Guarantee Bill, 2004; the Food Safety & Standards Bill, 2005; and the Bill on issues related to Trafficking.

a) Anti-terrorism legislation

The National Human Rights Commission of India took up the review of anti-terrorism legislation and in particular, their negative impact on human rights. The Commission reviewed the Terrorists and Disruptive Activities (Prevention) Act, 1985 (TADA); the Prevention of Terrorism Bill, 2000 and the Prevention of Terrorism Ordinance, 2001 (POTO).

(1) The Terrorist Affected Area (Special Courts) Act 1984 and the Terrorist and Disruptive Activities (Prevention) Act 1987

The Terrorist Affected Area (Special Courts) Act 1984 was enacted in that year, in response to the increasing threat of terrorism in the state of Punjab. To further tackle the problem three years later, the Indian Parliament then passed the Terrorist and Disruptive Activities (Prevention) Act, 1987. Originally intended to be a piece of temporary legislation aimed at terrorist activities in Punjab, it implemented 'considerable deviations from the normal law to meet the emergent situation' (NHRC, 1995: Annexure 1), which were considered by Justice Ranganath Misra, Chairperson of the NHRC, in a letter to the parliament to include the following:

- (i) raising of the presumption of guilt and shifting the burden on the accused to establish his or her innocence;
- (ii) drawing the presumption of guilt for possession of certain unauthorised arms in specified areas;
- (iii) making confession before a police officer admissible in evidence;

(iv) providing protection to witnesses such as keeping their identity and address secret and requiring avoidance of the mention of their names and address in order of the court or judgements or in any records of the case accessible to the public;

(v) modifying the provisions of the Code of Criminal Procedure particularly in regard to the time set for investigation and grant of bail (NHRC, 1995: Annexure 1 Letter from Justice Ranganath Misra, Chairperson NHRC to individual Members of Parliament dated 20th February, 1995, see NHRC (1995: Annexure 1)).

The Commission conducted a ‘full-fledged examination’ and ‘an in-depth study’ of the Terrorist and Disruptive Activities (Prevention) Act (TADA 1987) (NHRC, 1994: 4.2). The examination involved all reports and complaints received by the NHRC concerning the arbitrary and abusive uses of TADA. The NHRC acknowledged, inter alia, the importance of India’s obligations under the International Covenant on Civil and Political Rights when it conducted its study and made known its views on TADA. (NHRC, 1995: 5.4) The Commission added review of TADA as an item on its regular agenda and invited competent senior officials of the Central and State Governments to its periodic meetings to ascertain the ways in which the Act was being applied, the consequences to the individuals and groups affected by it and, indeed, to the country as a whole. (NHRC, 1995: 4.3)

On the basis of field visits and consultations, the Commission made public announcements expressing serious doubts about the Act’s ‘worth and terms’ and considered taking action aimed at seeking a review of the of the Supreme Court judgment in which the Act’s validity was confirmed. (NHRC, 1995: 4.4)

The Commission adopted a ‘threefold strategy’ in its review. (NHRC, 1995: 4.5) Firstly, it closely monitored the implementation of the Act in order to determine its concrete effects, secondly, it made preparations for recourse to the Supreme Court, and thirdly, as the date neared for the consideration of the Statute’s extension, and bearing in mind the increasing number of instances of abuses that had occurred under the Act, it approached all Members of Parliament urging them not to renew it. Thus, the Chairperson wrote a letter dated 20 February 1995 to all Parliamentarians recommending that the Act not be renewed when its validity expired on 23 May 1995 on the grounds that it was ‘incompatible with our cultural traditions, legal history and treaty obligations.’ (NHRC, 1995: 4.5) The Commission pointed out further¹⁶ that ‘Parliament had entrusted [it] with the charge of maintaining human rights and that [it] is finding this difficult to do [...] unless this draconian law is removed from the Statute book.’ (NHRC, 1995: 4.5).

The NHRC contributed to the nation-wide debate on this issue and paid tribute the views of many distinguished citizens and NGOs in so doing. The Commission acknowledged the importance of ‘constant vigilance’ in the defence of human rights and constitutional freedoms and praised the importance of the extent to which awareness had been raised through the national debate. The Commission conducted research in this regard, engaged with senior officials and policy makers from the Union Government as well as States and resorted to media and legislative advocacy (NHRC, 1995: 4.6). Arguably, all of these

¹⁶ The Commission was at this point quoting from the 20 February 1995 letter written from the Chairperson to all Parliamentarians.

strategies together resulted in a positive outcome, given that the TADA was, in 1995, allowed to lapse following the allegations of abuse. (Kalhan et al., 2007: 150)

(2) The Prevention of Terrorism Bill 2000

The NHRC, India initiated a review of this draft legislation following a recommendation made by the Law Commission of India in its 173rd Report (Law Commission of India, 2000) to enact a law to deal with terrorism in the country. The NHRC took the view that:

There is no need to enact a law based on the Draft Prevention of Terrorism Bill, 2000 and the needed solution can be found under existing laws if properly enforced and implemented, and amended, if necessary. The proposed Bill, if enacted, would have the ill-effect of providing unintentionally a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse in the recent past of TADA and earlier of MISA¹⁷ in the emergency days. (NHRC, 2001: Annexure II, Paragraph 7)

Thus, disagreeing with the Law Commission of India's recommendation, the NHRC sent a detailed Opinion to the Ministry of Home Affairs, requesting that the draft Prevention of Terrorism Bill not be enacted (NHRC, 2001: 16.32). In its opinion, the Commission refuted the governmental justification for the new law; namely that it was difficult to secure convictions under the criminal justice system, and that trials were delayed, giving rise to the need for special courts (NHRC, 2001: Annexure II).

(3) Prevention of Terrorism Ordinance, 2001

Subsequently when the Prevention of Terrorism Ordinance was enacted in 2001, the NHRC noted that, '[u]ndoubtedly, national security is of paramount importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, the worth of a nation is the worth of the individuals constituting it.' (NHRC, 2002: 5.3) In an Opinion dated 19 November 2001, the Commission, therefore, reiterated its earlier views on the Prevention of Terrorism Bill 2000 in this regard.

In all the above-mentioned instances, the NHRC differed with the dominant view of the Union of India on the desirability of a strong anti-terror legislation and displayed its independence. As a result, the Commission's stature grew in the eyes of civil society organisations. The Prevention of Terrorism Ordinance was replaced with the Prevention of Terrorism Act (POTA). In the face of public criticism about the misuse of POTA, this legislation was repealed although the Government incorporated most of its provisions in the Unlawful Activities Prevention Act in 2004. The enthusiasm previously displayed by the NHRC was, unfortunately, absent during this phase, however.

(4) Armed Forces (Special Powers) Act, 1958

A similar and vigorous effort to that in the case of TADA was not mounted regarding the Armed Forces (Special Powers) Act, 1958/1983 (NE States and Punjab) (AFSPA) and of the Public Safety Act, 1978. In the context of certain provisions of this legislation, the Commission noted that:¹⁸

¹⁷ Maintenance of Internal Security Act, 1971.

¹⁸ Referring to certain representations received from the South Asia Human Rights Documentation Centre and other civil liberties groups, the NHRC noted as follows: 'the powers under Section 3 to declare any area to be a "disturbed

the defence of civil liberties is not the work of a day but that it requires, instead, constant vigilance and that imposes a continuing responsibility. The Commission will therefore continue to review such legislation as may, in its view, have the potential of negating such liberties (NHRC, 1995: 4.6).

It is a matter of regret that it has not done enough to follow through in this regard.

The Commission received several complaints of abuse of AFSPA as well as representations from a number of NGOs stating that powers conferred by the Act were too wide and that they posed a threat to the human rights of citizens. In May 1997, the Commission organised a workshop on the constitutional and legal issues involved and also on the practical problems faced both by the armed forces and by people in the areas where the Act was being implemented. There was wide participation in the discussions, including from senior members of the armed forces, policy makers, leading jurists and academics, and NGO representatives (NHRC, 1998: 4.2 and 11.17).

The Commission intervened in the proceedings pending before the Supreme Court in respect of AFSPA and placed its views before the Supreme Court. The Commission argued that 'the Act lacked temporal and spatial limitations and that it bestowed draconian powers that could be exercised by non-commissioned officers on the basis of their subjective satisfaction' (NHRC, 1998: 4.3).

Based on the Supreme Court Order of 27 November 1997, the Commission recommended that 'the concerned Ministries issue carefully formulated guidelines to all concerned personnel of the Armed Forces and Para-military Forces' (NHRC, 1998: 4.5). In the decade following the Supreme Court order, the NHRC remained a mute spectator as ever more complaints surfaced regarding the abuse of AFSPA in several parts of the country and despite serious criticism from civil society organisations and an extraordinary protest launched by a female human rights activist from the North-Eastern State of Manipur. 42 year old Ms. Irom Chanu Sharmila has been on a hunger strike since November 2000 demanding the repeal of AFSPA and in protest against the killing of ten persons by Assam Rifles in Imphal. Forcibly fed through her nose by the State and kept alive, her continuing fast for over 15 years is an humongous feat which demands immediate attention (The Indian Express, 2015). However, it is a matter of deep regret that NHRC did not take an active role in this regard. In the UPR review process, the NHRC arguably redeemed itself slightly through declaring its stance against the abuse of AFSPA (NHRC, undated(a)).

b) Torture

Since the inception of the Indian NHRC in October 1993, the elimination of custodial torture has been one of its priorities (NHRC, 1999: 3.17). It redressed individual complaints of torture, besides taking up advocacy for the accession and ratification of relevant international conventions against torture. It also advocated for domestic law reform and worked to generate awareness among the general public, media

area" are too wide unguided and unanalyzed. It is further argued that Sections 4 and 5 are so arbitrary and excessive as to empower the armed forces even to take away the life of a citizen by firing upon him on the mere ground, inter alia, that he is "acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons", or "carrying things capable of being used as weapons." This power, it is asserted, can even be exercised by a non-commissioned officer if he "is of the opinion that it is necessary to do so for the maintenance of public order"" (NHRC, 1997: 4.3).

and other groups. It took up raising awareness among police and prison officials and conducted training programmes for key target groups.

The NHRC undertook documentation of causes and consequences of torture and has also issued instructions and guidelines. Thus, on 14 December 1993, it laid down that all cases of custodial death and rape must be reported to it within twenty-four hours of occurrence. In the event that if any such death or rape in custody is not reported promptly, the Commission made it clear that it will draw the inference that there has been an attempt to cover up the violation (NHRC, 1999: 3.17). On 10 August 1995, the Commission stated that all post-mortem examinations of deaths in custody should be video-recorded (NHRC, undated(b): 13). On 27 March 1997, it recommended a Model Autopsy Form for use by various authorities (NHRC, undated(b) 2: 14).

The need for India to accede to the Convention against Torture was first raised by the NHRC in 1995 (NHRC, 1995: 4.27). To deal with all of the arguments and objections that had been raised, the Commission presented a comprehensive memorandum to the Prime Minister on this subject in April 1997 (NHRC, 1998: 3.13). This analysis contributed in large measure to India signing the Convention on 14 October 1997 (NHRC, 1998: 3.20). Ratification, however, is still awaited, despite the repeated appeals of the Commission. The Commission has reiterated this recommendation for ratification of Torture Convention year after year but without any success.

Insofar as law reform is concerned, the NHRC reiterated a recommendation made by the Law Commission of India regarding insertion of a Section 114(B) in the Indian Evidence Act 1872 'to introduce a rebuttable presumption that injuries sustained by a person in police custody may be presumed to have been caused by a police officer' (NHRC, 1996: Summary of Recommendations, 4). The NHRC also underscored the importance of amending Section 197 of the Criminal Procedure Code, on the basis of Law Commission of India's recommendation. The aim of such an amendment was to 'obviate the necessity of governmental sanction for the prosecution of a police officer where a prima facie case has been established, in an enquiry conducted by a Session Judge, of the commission of a custodial offence' (ibid). As suggested by the National Police Commission, the NHRC recommended that there should be a mandatory enquiry by a Sessions Judge in each case of custodial death, rape or grievous bodily harm (ibid).

4. Monitoring of government's implementation

The Commission is supported by a Secretariat which consists of several Divisions. In particular, the Policy Research, Programmes and Projects Division, Law Division and Investigation Division support the Commission's efforts in monitoring human rights. 'Whenever the Commission, on the basis of its hearings, deliberations or otherwise arrives at a conclusion that a particular subject is of generic importance, it is converted into a project/programme' to be dealt by the Policy Research, Programmes and Projects Division (NHRI Brochure, undated: 10). The Commission dealing with projects or programmes, functions as a catalyst. It normally holds meetings with officers of the organisations or departments concerned to enable targeted focus upon a serious human rights issue. It, thereafter, coordinates, orchestrates and monitors the plan of action and implementation (ibid).

The Indian NHRC has employed a variety of means towards monitoring. They include, among other things, establishment of core groups, appointment of special rapporteurs and special representatives, public inquiries and human rights awareness and facilitating assessment and enforcement of human rights programmes in 28 selected districts of India.

The reach of the Commission's formal administrative structure has been significantly enhanced through the constitution of core groups on specific themes or appointment of special rapporteurs and special representatives. The core groups consist of 'very eminent persons, or representatives of bodies, in their respective fields in the country, who voluntarily agree to serve, in an honorary capacity, as members of such groups' (NHRC Brochure, undated: 5).¹⁹ The special rapporteurs or special representatives are very senior retired civil servants²⁰ who are 'either given a subject, or a group of subjects, to deal with, such as bonded labour, child labour, custodial justice, Dalit issues, disability, etc., or have territorial jurisdictions.' (ibid)

The NHRC, India has, over the years, been monitoring a number of key issues relating to the protection and promotion of human rights (NHRC, undated ('human rights issues')). In what follows, a small number of case studies concerning the monitoring of government's implementation have been described along with the methodology adopted by the NHRC.

a) Measures to prevent deaths by starvation in Orissa

In December 1996, the Commission received a request from the then Union Agriculture Minister, Mr. Chaturanan Mishra, to undertake an investigation into the cases of apparent deaths by starvation in what are popularly known as the 'KBK Districts' of Orissa in Eastern India (NHRC, 1998: XIV(c)(iv)). Ultimately, 'pursuant to the orders of the Supreme Court of 26 July, 1997, the Indian Council for Legal Aid and Advice filed a petition before the Commission seeking interim measures to prevent deaths by starvation' (ibid).

The Commission had sent its Secretary-General and Director General (Investigation) to visit the affected parts and submit a report on this basis. It also conducted eleven in-depth hearings over a span of five months in 1997-98 on this matter. It proceeded in a 'non-adversarial manner with the full involvement and cooperation of all parties concerned' (ibid).

The Commission recommended a series of short-term interim measures as well as long-term measures. They included, among other things, the establishment of a Monitoring Committee under the authority of the Chief Secretary²¹ to guide and oversee the 'overall effort' (ibid). The Commission also appointed a Special Rapporteur for the 'KBK districts'. It also monitored a specific set of commitments both district related and programmatically-speaking, for the period 1 December 1997 to 31 April 1998, 'in respect of each of the 8 districts belonging to the 'KBK' group in respect of the programmes relating to rural drinking water supply, social security, soil conservation and primary health care.' (ibid). The recommendations covered the emergency feeding programme, old age pensions, disability pensions and other social security

¹⁹ This reference provides a full list of all core groups. For further details, see the link relating to Core Groups on the website of the NHRC, India, <http://www.nhrc.nic.in> (accessed on 10 March 2016).

²⁰ They are officers who, prior to their retirement, have served as Secretaries to the Government of India or Directors General of Police. See NHRC Brochure (undated): 5.

²¹ Highest ranking civil servant in the State

measures, employment generation in agriculture, ecological security, soil conservation, irrigation and other schemes and public health and land reform (ibid).

The Commission's intervention led to several tangible benefits and improvements in the situation on the ground. The methodology adopted by it was also appreciated by all concerned including the State Administration. Thus, the officials of State and District Administration became true allies in the task of protection of human rights.

b) National inquiry on right to health:

The NHRC has undertaken work regarding several facets of the right to health since 2000. These include, among others, maternal anaemia, HIV-AIDS, access to health care, nutritional deficiencies and tobacco control. *Jan Swasthya Abhiyan (JSA)* or People's Health Movement-India, a national network of several hundred health and social sector organisations, had been advocating health rights issues. JSA decided to launch a 'Right to Health care campaign' and approached the Commission with a detailed proposal for partnership. The NHRC thus took an initiative to conduct a series of public hearings on health rights, as a national inquiry process.

In 2004, the Commission conducted regional public hearings in each region of the country in collaboration with JSA. Newspaper advertisements were issued ahead of each of these hearings. A common pro forma was devised for documenting the cases of 'denial of health care' in various regions. Participatory surveys of public health facilities such as primary health centres and rural hospitals, across the state, were done using a common checklist. This in turn, formed the basis for organising 'People's Health Tribunals', each involving hundreds of people, public health activists, health officials and expert panelists.

These regional public hearings culminated in a national public hearing involving health officials from the central government and all states of the country in December 2004 at which a comprehensive overview of health rights issues and National Action Plan on the 'Right to Health' were presented. Cases and survey findings collated at state level were fed into the National inquiry. The NHRC followed up the national public hearing by subsequent review meetings to monitor the implementation of recommendations.

Thus, individual cases of denial of health care were documented as well as structural denial of health care recorded by surveys of health facilities. Cases reported included a wide variety of denial of health care resulting in death, disability and serious financial loss. The 'People's Health Tribunal' was attended by hundreds of community members, relevant health officials and a 'judging' panel of prominent experts. Affected persons or family members presented their testimonies of situations where basic health care had been denied. Health officials were allowed to respond while panelists gave their opinion and 'judgment' in the end. Thus, this process can be regarded as truly a 'People's Court'. Some individual cases received instant justice on the spot while officials promised action in more complicated cases. Widely covered by local media, they identified specific gaps and forms of denial and put pressure on health department to make improvements. On the whole, the public inquiry on right to health launched by NHRC, India in 2004 can be regarded as a success story.

On 6-7 January 2016, the Indian NHRC recommenced its National Inquiry on public health by organising the Western Region public hearing on the right to healthcare in Mumbai (NHRC, 2016a). The Commission

took up 88 cases from three States of Maharashtra, Gujarat and Rajasthan in three separate benches and recommended compensation in the amount of Rs.425,000/- in five cases while it asked authorities to conduct detailed enquiries in a number of other cases. In three cases, 'show cause' notices have been issued to the Government of Rajasthan to request their explanation 'as to why monetary relief or compensation should not be recommended to the victims/their next of kin' (ibid). Presentations were made by non-governmental organizations on several systemic issues like maternal health and problems with proper implementation of *Janani Shishu Suraksha Yojana*,²² occupational health care and need for improvement in the Employees State Insurance Scheme and proper community monitoring mechanism for addressing health rights violations (ibid).

c) Trafficking of women and children

The NHRC identified trafficking in women and children as a serious issue within a couple of years after its establishment and engaged relevant stakeholders. In 2001, it appointed Mrs. (Justice) Sujata Manohar, then Member of the NHRC as the Focal Point on Trafficking & Women's Human Rights. It took up an Action Research Study on this issue in collaboration with the UNIFEM and Institute of Social Sciences to ascertain the trends, dimensions, factors and responses related to trafficking in women and children in India (NHRC/UNIFEM/ISS, 2004). It recommended the institution of a monitoring system in all States and Union Territories. It held regional workshops involving various stakeholders across the country. As a part of the research study, brothel owners and traffickers were interviewed (NHRC/UNIFEM/ISS, 2004: 34). It drafted an operational manual for judicial officers on trafficking. The Commission published '[a] Report on Trafficking in Women and Children in India 2002-2003' (NHRC/UNIFEM/ISS, 2004) which contained a number of important recommendations to authorities concerned. It was widely disseminated.

Subsequently, the NHRC prepared a nation-wide Action plan to combat trafficking (NHRC, 2007). The methodology adopted by the Commission on this burning human rights issue was quite unique. It acted as a catalyst by taking up a country-wide action research study, engaged and raised awareness among all stakeholders. The action research study had many positive spin-off benefits.

d) Human rights awareness raising programmes

In the course of the Commission's monitoring of suicides committed by farmers and allegations of death by starvation (NHRC, 2011: 6.6), the Indian NHRC noted the gap between the potential of programmes and their impact on vulnerable sections of the society. It implemented programmes such as the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), the Integrated Child Development Services (ICDS), Mid-day Meals (MDM) in primary schools, and the Public Distribution System (PDS) for scrutiny under the Human Rights Awareness and Facilitating Assessment & Enforcement of Human Rights Programme (ibid). The objective of that Programme is to take stock of the implementation of various policies, programmes and schemes of the State and the Central Government designed to protect and promote human rights. 28 Districts, one from each State,²³ have been selected from the list of identified Districts availing of the 'Backward Regions Grant Fund' of the Ministry of Panchayati Raj, Government of

²² A Scheme which seeks to guarantee health of pregnant mothers and infants.

²³ Now there are 29 States.

India.²⁴ The parameters used in order to identify such underperforming include, among other things, rate of illiteracy, percentage of Scheduled Caste and Scheduled Tribe population and infant mortality rate (NHRC, 2011: 6.7).

The aim of the programme is to 'spread awareness among the people [...] on focused human rights issues like food security, education, custodial justice, health, hygiene and sanitation' (NHRC, 2011: 6.8). It involved field visits by a Member of the Commission accompanied by NHRC staff to

schools, primary health centers, community health centers, hospitals, police stations, prisons, panchayats [...] district food office[s], various Departments working for the empowerment of children, women, Scheduled Castes, Scheduled Tribes and other vulnerable sections of the society. (NHRC, 2011: 6.8)

As a part of the Programme, a Workshop was also organised for the District Level Administration to spread awareness about rights as well as to 'monitor the implementation of the recommendations of the Commission, issued from time to time on specific human rights issues' (ibid).

²⁴ The names of the 28 districts identified by the Commission are as follows.

S. No.	State	District
1.	Andhra Pradesh	Adilabad
2.	Arunachal Pradesh	Upper Subansiri
3.	Assam	Karbi Anglong
4.	Bihar	Jamui
5.	Chhattisgarh	Dantewada
6.	Gujarat	Dang
7.	Goa	South Goa
8.	Haryana	Ambala
9.	Himachal Pradesh	Chamba
10.	Jammu & Kashmir	Kupwara
11.	Jharkhand	Chatra
12.	Karnataka	Bidar
13.	Kerala	Wayanad
14.	Madhya Pradesh	Jhabua
15.	Maharashtra	Gadchiroli
16.	Manipur	Tamenglong
17.	Meghalaya	South Garo Hills
18.	Mizoram	Saiha
19.	Nagaland	Mon
20.	Odisha	Kalahandi
21.	Punjab	Hoshiarpur
22.	Rajasthan	Banswara
23.	Sikkim	North Sikkim
24.	Tamil Nadu	Tiruvannamalai
25.	Tripura	Dhalai
26.	Uttar Pradesh	Sonbhadra
27.	Uttrakhand	Champawat
28.	West Bengal	Jalpaiguri

Between 2008 and 2011, the Commission visited many districts across the length and breadth of India. In the case of Chatra District in the Eastern Indian State of Jharkhand, which was affected by extremist violence, the Commission made a number of recommendations. They include, among others, the following:

- Paying of special attention to the education of girls and the empowerment of women.
- Urgently repair or rebuild infrastructure destroyed by the Naxals.²⁵ Highest priority needs to be given to rebuilding of schools that have been destroyed. [...] The Police in no way should be allowed to occupy schools as camps for themselves.
- As a matter of priority, there is an urgent need to provide basic facilities in hospitals and schools. [...]
- Need to improve the quality and availability of drinking water.
- Consider the needs and demands of extremely large number of people who are below poverty line, but are not taken care of as they have not been enlisted in the existing lists. (NHRC, 2011: 6.13)

The above monitoring programme was a unique initiative taken up by the Indian NHRC. It led to sensitisation of key stakeholders at the District level and at sub-district level in under-developed districts. It led to monitoring of human rights in a targeted manner (NHRC, 2011: 6.13).

e) Elimination of bonded labour

In 1997, the Supreme Court of India had asked the National Human Rights Commission to monitor the implementation of the Bonded Labour System (Abolition) Act, 1976 (NHRC, 2015). The methodology adopted by the Indian NHRC is quite instructive. It adopted the following multi-pronged approach and:

- Established a Central Action Group under the leadership of its Chairperson, with the Secretary, Ministry of Labour as its Member Convenor and with several experts.
- Established an Expert Group in September 2000 to prepare a report on the overall situation of bonded labour in India and make recommendations in respect of the existing schemes.
- Prepared a pro forma for periodical reporting by the State Governments.
- Identified sensitive districts in the country where the problem of bonded labour is acute.
- Appointed Special Rapporteurs in different States and regions of the country to deal with this issue.
- Short-listed reputed and dedicated NGOs for the States/sensitive districts.

²⁵ Communist guerilla groups.

- Laid down the modalities and issues/subjects, resource persons, format etc, for organising one-day workshops for sensitising all officials concerned in the districts identified.²⁶
- Spread awareness about the process of identification, release and rehabilitation of bonded labourers
- Emphasised the constitution of vigilance committees at District level (NHRC, 1999: 9.3-9.6).

The above instances are by no means an exhaustive list of numerous interventions made by the Indian NHRC but only serve to illustrate the means employed by it for effective monitoring. The Commission reports the results of its monitoring efforts in the annual reports of the Commission, Journal and other publications. It also draws on this information in its reports under the Universal Periodic Report. In the past 23 years of its existence, it has made one submission before the Committee on the Elimination of Discrimination Against Women (NHRC, 2014), there being no other noteworthy instances of shadow report or alternate report to treaty monitoring bodies.

5. The complementary and cooperative nature of the NHRC – building synergies

A careful review of the National Human Rights Protection System reveals that while formal institutions of the State like legislature, executive and judiciary have their own mandates in relation to protection and promotion of human rights, the National Human Rights Commission complements and supplements their efforts. It can indeed be regarded as a pivot in the National Human Rights Protection System in India with its own network of inter-relationships with each of the wings of the state. The National Human Rights Commission is expected to submit annual and special reports to the Parliament while the executive is required to submit a report on the action taken on the recommendations of the Commission giving reasons for non-acceptance of the recommendations, if any. In order to ensure that the Indian NHRC enjoys functional and operational autonomy, its budget is approved by Parliament, thus insulating it from the ‘whims and fancies’ of the Executive.

The Executive has a critical role in the monitoring of human rights. For instance, the Ministries or Departments dealing with Home Affairs, Health and Family Welfare, Labour, Human Resource Development, Food and Civil Supplies, Minority Affairs, Drinking Water and Sanitation, Women and Child Development, Disability Affairs, Social Justice and Empowerment are examples whose work relates to protection and promotion of human rights. It includes monitoring as well. However, in practice, a human rights perspective is not consciously integrated into Plans, Policies and Programmes while the Indian NHRC acts as a catalyst by examining issues through a human rights lens and making recommendations on various issues.

India is a signatory to many core human rights treaties. Each of the above-mentioned Ministries or Departments contribute to treaty monitoring processes and submit reports to respective treaty bodies, often in consultation with the Indian NHRC. This process needs to be institutionalised and deepened further. After the birth of the Human Rights Council and introduction of the Universal Periodic Review, a

²⁶ The Commission has organised 34 workshops so far on elimination of bonded labour with the last one organized at Jaipur, Rajasthan on 29 January, 2016 (NHRC, 2016b).

series of recommendations were made to the Indian Government at the end of the first cycle. (Human Rights Council, 2008) When the Indian NHRC tried to monitor implementation by the respective Ministries and Departments, there was a strange reaction from the Ministry of External Affairs which claimed that it alone could monitor that aspect. Though the functions of Indian NHRC have been clearly spelt out in its statute,²⁷ it is a matter of regret that it is often subjected to ‘turf battles’.

a) NHRC’s relationship with the judiciary

The Supreme Court and High Courts in India have been the custodian of rights enshrined in the Constitution of India. The Preamble of the PHRA refers to the creation of NHRC for ‘better’ protection of human rights. The Indian NHRC’s role is ‘complementary’ to that of the Supreme Court and the High Courts in India. The Supreme Court and various High Courts in India have referred several matters relating to human rights to the NHRC for inquiry or for monitoring. Thus, the Supreme Court remitted, among others, matters relating to allegations of deaths by starvation in the KBK districts of Orissa; the monitoring of programmes to end bonded and child labour in the country; the handling of allegations relating to the mass cremations of unidentified persons in certain districts of the Punjab and the proper management of certain institutions for the mentally challenged (NHRC, undated ‘human rights issues’).

On the other hand, the Indian NHRC has also intervened in many important matters concerning human rights in the proceedings pending in the Supreme Court or the High Courts (PHRA, 1993: Section 12(b)). In addition, the Indian NHRC filed petitions before the Supreme Court with regard to the protection of Chakma and Hajong refugees in Arunachal Pradesh, justice to victims of communal riots in Gujarat in 2002, to mention but a few examples. In all these instances, the higher judiciary supported the Indian NHRC in its quest for enforcement of its orders. This unique ‘complementary’ relationship between the judiciary and the NHRC has made a significant difference to the protection and promotion of human rights efforts in the country, as well as their monitoring.

b) Relationship with other sister commissions

Today, there exist 162 institutions either at national level or State level whose mandates cover the protection and promotion of human rights. These include, among others, National Human Rights Commission, National Commission for Women, National Commission for Minorities, National Commission for Scheduled Castes, National Commission for Scheduled Tribes, National Commission for Protection of Child Rights, National *Safai Karamchari* Commission, Central Information Commission and Chief Commissioner for Persons with Disabilities. Many of these institutions also have their counterparts at the State level.

When the lawmakers created synergies between some of the National Commissions which deal with human rights of specific groups of people on the one hand and on the other the National Human Rights Commission, they expected them to coordinate with each other and work in tandem. It is indeed a legitimate and laudable expectation, but has not always been this simple in practice.

²⁷ See Section 12(f) of the PHRA (1993) which requires it to ‘study treaties and other international instruments on human rights and make recommendations for their effective implementation’.

Since the inception of the Indian NHRC, statutory Full Commission Meetings were supposed to be held once in every quarter, but this aim was not achieved. There has been some coordination of efforts, but it is a matter of regret that the full scope for joint action has not been utilised. The combined full potential is yet to be realised. The Asian NGO Network on National Human Rights Institutions (ANNI) said:

India continues to participate in the UN HRC, but since its inception such participation has always been limited to the chairperson, members, or senior bureaucrats of the commission. The “deemed members” of the full Commission, which include the Chairpersons from the NCW, the NCSC, the NCST, and the NCM, have never participated in any international meetings as representatives of the NHRC, even though they are touted as part of the Commission when its pluralism is questioned. (ANNI, 2011: 69)

Referring to the participation in international training programmes organised by OHCHR, APF and other organisations, ANNI has lamented the exclusion of deemed members in such programs, despite recommendations of the International Coordinating Committee of National Institutions – Sub Committee on Accreditation (ICC-SCA) to this effect. In its 2011 recommendations, ICC-SCA emphasised that ‘international involvement is not to be reserved only for the appointed members as the “deemed members” can also benefit from this enrichment’ (ANNI, 2011: 69).

ANNI points out that:

Rather than sharing its breadth of knowledge and expertise with these statutory institutions, the NHRC continues to ignore its responsibility to lead these other human rights institutions and seems to view itself as an exclusive, elite institution [...] but has never in its 17 years extended an invitation to a member of an SHRC or other thematic NHRI, including “deemed members” of the NHRC, to participate in these programs. (ANNI, 2010: 67)

As of now, SHRCs have been established in over 23 States of India, but many of them are affected by constraints relating to infrastructure, financial and human resources. The NHRC maintains contact with all the SHRCs and extends technical support to them. For the past decade, The NHRC has been convening annual meetings with SHRCs for better coordination. The objective of these meetings is to ‘to make the NHRC and SHRCs, which are autonomous and independent of each other, stronger and effective for the protection and promotion of human rights; to explore the areas of cooperation and coordination between them; and to assess the assistance by the Governments to them’.²⁸ At these meetings, issues discussed include, among others, financial, functional and administrative autonomy of SHRCs; complaint disposal by SHRCs - staffing pattern; financial assistance from NHRC for human rights training programmes, seminars and workshops; sittings of the Commission in States; amendments to the PHRA; complaint management system (CMS) and strengthening of District Human Rights Courts (NHRC, 2011: 18.51).

The PHRA was amended in 2006. It now provides for the transfer of human rights complaints by the NHRC to SHRCs. The amended provision reads as follows: ‘Where the Commission considers it necessary or expedient so to do, it may, by order, transfer any complaint filed or pending before it to the State Commission of the State from which the complaint arises, for disposal in accordance with the provisions

²⁸ Please see <http://nhrc.nic.in/disparchive.asp?fno=13812> (accessed on 13 March 2016). Last meeting was held on 18 September 2015.

of this Act; Provided that no such complaint shall be transferred unless the same is one respecting which the State Commission has jurisdiction to entertain the same' (PHRA, 1993: Section 13(6)). The PHRA further provides that '[e]very complaint transferred under sub-Section(6) shall be dealt with and disposed of by the State Commission as if it were a complaint initially filed before it' (ibid).

Stressing the need to protect human rights defenders (HRDs) and in particular women human rights defenders (WHRDs), ANNI notes that:

NHRC has the moral duty as the lone member of the ICC-NHRI from India to encourage the other national and state human rights institutions in India to also establish special procedures for protection of HRDs and WHRDs. Deemed members of the NHRC from other thematic NHRIs working with women, minorities, Scheduled Castes and Scheduled Tribes should also be encouraged to establish special task forces to focus on specialized HRDs working under their respective themes. (ANNI, 2011: 68)

In the last five years, it is a matter of deep regret that the NHRC could not take this recommendation forward in a significant manner. It has, however, established a Focal Point for human rights defenders in the Commission (NHRC, 2013: 13).

The NHRC could have provided an over-arching umbrella framework and a leadership role for a coordinated effort to protect and promote human rights. All these institutions can come together in a voluntary manner and with the common objective of protection of human rights. If any of these institutions wishes to zealously guard its own turf and not concede any leadership role to the Indian NHRC, then the situation becomes muddled.

c) Relationship with civil society

The Indian NHRC has also been closely working with members of civil society organisations. The annual reports of the Commission have affirmed that NGOs and civil society organisations are the 'most important allies' and 'most honest critics' (NHRC, 1996: 7.1). NGOs and civil society organisations have, over the years, filed complaints of human right violations before the Commission, assisted it in its inquiries, conducted research studies and also spread human rights awareness. The Commission interacted with them in its field visits, national inquiries on the right to health, the right to food, disability and mental health. They served in many of the Core Groups established by the Indian NHRC. The Commission asserted that the NGOs have provided a 'multiplier effect' to its efforts. (NHRC, 2010a: 9.1) The Commission established a Core Group of NGOs in July 2001 and held regular meetings with representatives of that core group. NHRC's linkages with NGOs have yielded many significant gains including the establishment of a Focal Point on HRDs. It is equally important to note that the full potential of such a linkage could not be harnessed by the Commission. The frequency of the NGO core group meetings with NHRC has been decreased from once in every quarter to once in every six months (NHRC, 2010a: 9.4).

6. Conclusions

The above represents only a small sample of review of policy and legislation by the Commission. Its scope covers the entire spectrum of civil, political, economic, social and cultural rights. Though the NHRC reviewed much legislation through a human rights lens, its record on the whole appears to be a mixed

one. It regards this as an important statutory responsibility, in practice one can arguably assert that it has not accorded the priority that this matter deserved. The NHRC has achieved notable successes in some areas while it did not subject certain draft or existing legislations to a critical review. It has been entrusted with a range of functions under the Section 12 of PHRA but it appears that it is too pre-occupied with a complaint-led approach rather than policy-based approach. As noted above, the NHRC has kept in view the relevant international conventions to which India is a party while reviewing domestic legislation. The treaty-bodies have provided many opportunities to NHRIs to participate vigorously in the treaty-monitoring process. However, if the submission of alternate or shadow reports is proof of participation, then the Indian NHRC has in fact appeared to shy away from this critical review function.

The Indian NHRI's approach to the more overall structural monitoring and evaluation systems existing domestically has been more or less 'conservative'. The NHRC can influence other monitoring bodies by virtue of the fact that it is headed by the former Chief Justice of the Supreme Court of India and three of its five members are drawn from the higher judiciary. Thus, it has a great moral force to become a leader and coordinate the efforts. Considering its pivotal role, it has only partly fulfilled this expectation.

In a country with a population of over 1.2 billion, and with tremendous diversity, it is impossible for a Commission with five Members and around 350 staff members to make a difference across the length and breadth of the country. What is required is a robust mechanism at National, State and District level. There is no substitute to the decentralised and 'closer-to-home' human rights machinery for effective monitoring. The NHRC requires the building of credible and effective alliances with NGOs, human rights activists, lawyers, academics and other key stakeholders who could act as 'eyes and ears' for the Commission in its monitoring efforts. It has forged some alliances but they need to be deepened in a very big way.

In the ultimate analysis, the NHRC is an important actor in the national human rights protection/system. It has been able to influence other actors with monitoring mandates and overall system thinking to a certain extent. It can indeed be likened to a glass being half full or half empty, depending on the context of the observer.

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B. National Human Rights Institution of Morocco²⁹

1. Introduction

a) Historical introduction

In order to understand the operations of state institutions in Morocco, including the *Conseil National des Droits de l'Homme* (CNDH), it is first important to understand the legal and political role of the monarchy. Since the 8th century of the Common Era, Morocco has principally been ruled by monarchs. Several of Morocco's dynasties, though not all, have claimed lineal descent from the Prophet Muhammad. Descendants of the Prophet are known as 'Sharifs' and one of the popular ways of referring to such dynasties is as 'the Sharifan Kingdom of Morocco', which suggests that the Kings have both political and religious legitimacy. The reigning royal family since the 17th century, the Alaouites, bases its own legitimacy in part on its direct lineage from the Prophet. (The only other state in the world that has a similar claim to prophetic descent is that of the Hashemite Kingdom of Jordan.) Each of Morocco's six constitutions since 1962 has required that the King be a lineal male descendent of the Prophet. The constitutions allotted the King significant state powers with regard to such matters as the appointment of ministers and simultaneously grants him important political powers. The constitutions also identify the King as the 'Commander of the Faithful' (*Amir al-Muminim*), a quasi-religious, quasi-political title that was first adopted by Islam's second caliph, Omar, in the 7th century. The reigning King of Morocco, Muhammad VI (1999-) is thus widely seen in the country as having legitimacy not only because he is the eldest son of former King Hassan II, but also because he is a sharif and is recognized as being the Commander of the Faithful. The Constitution prohibits criticism of the King and the prohibitions are strictly enforced. Thus neither state institutions nor civil society organisations are permitted to challenge royal authority nor to criticise the King, whether in regard to his actions, inactions, or appointments to office.

Moroccan tradition and Moroccan constitutions have recognized the power of the King to issue royal 'Dahirs' (an Arabic word typically translated as 'Royal Decree'). The status of a Dahir in the hierarchy of Moroccan laws is a subject debated among jurists. A Dahir is a royal decree (or regulation) that cannot be challenged in court and that cannot be overridden by a parliamentary act. Although Dahirs in Morocco technically are not described as being 'higher' than a parliamentary act, they nevertheless have a status apart from and, for practical purposes, 'above' an act of parliament. The Parliament cannot enact a statute that supersedes a Dahir. As will be further explained below, the law creating Morocco's national human rights institution, the National Council for Human Rights (known widely as the 'CNDH' from the abbreviation of the French *Conseil National des Droits de l'Homme*) was created by such a Royal Dahir issued by King Muhammad VI in 2011 shortly after the beginning of the so-called 'Arab Spring'. Its predecessor institution, the Advisory Council for Human Rights (ACHR) (in French *Conseil Consultatif des Droits de l'Homme*), similarly was created by a Dahir issued by King Hassan II in 1990.

²⁹ This chapter was drafted by the following authors: Dr. Amal Idrissi is Professor of Law at the University of Moulay Ismail, Meknes, Morocco. Dr. T. Jeremy Gunn is Professor of Law and Political Science at the International University of Rabat. Mr. Alvaro Lagresa is an M.A. candidate in Middle Eastern Studies at the University of Southern Denmark and is a Research Assistant at the International University of Rabat. Mr. Mehdi Azeriah holds an M.A. in International Studies from Al Akhawayn University in Morocco.

Morocco has had three Kings since obtaining independence in 1956: Muhammad V (1927-1961) (who held the symbolically important but ultimately figurehead position of Sultan during the French protectorate in Morocco), Hassan II (1961-1999), and the current King Muhammad VI (1999-present). Although recent Moroccan history is subject to debate, the general parameters of the most widely acknowledged history perceive Muhammad V as a broadly respected and popularly revered King who helped bring independence to Morocco. His son, Hassan II, is characterised as having been an intelligent (almost scholarly) and sophisticated ruler who was a skilled actor in geostrategic politics, including having played a vital background role in the Israeli-Egyptian peace agreement of 1979. His rule, however, took place during a turbulent period in Moroccan history and there were at least two assassination attempts against him from which he only narrowly escaped (One attempt was staged by military officers and the other by high officials in the Ministry of the Interior).

As a result of the unstable political situation in the country during the reign of Hassan II, the state security apparatus grew dramatically and political dissidents were arrested, imprisoned, tortured, and some disappeared. His leading political opponent, Muhammad Ben Barka, was kidnapped in Paris in 1965 and he too subsequently disappeared (Smith, 2000).³⁰ Although the precise details of this period are not known, and are sharply debated, it is generally understood that arrests and imprisonments occurred that were not subject to judicial oversight and that torture was widespread in prisons. In some cases family members of those accused of engaging in unauthorised acts also were deported to outlying regions. During the last few years books and memoirs have been written about the formerly secret prisons, torture, abuse, and flawed judicial proceedings. In Morocco, this period of its recent history is known as a period of heavy pressure from the state, or popularly as 'The Years of Lead' (Mandelbaum, 2009; Oufkir and Fitoussi, 2001).

During the last decade of his reign before his death in 1999, Hassan II slowly liberalised his policies, which brought about a clear albeit modest improvement in the human rights situation in the country. A widely accepted explanation for this gradual improvement in the 1990s was Hassan II's wish to provide a more positive legacy for his son, now King Muhammad VI. It can thus be said that the 1990s saw the beginning of Morocco's transition toward a state with an improved human rights record and a gradual acceptance of international human rights standards. Although the 'new' Constitution of 1992 is frequently seen as the beginning of the change toward greater respect for human rights, it may in fact be traced to the creation in 1990, by Dahir, of the ACHR, the predecessor organisation of the current CNDH. Other important developments began during the 1990s and have continued since Muhammad VI came to the throne.

Moroccans interested in human rights thus look back to the 'Years of Lead' during Hassan II's reign as the worst period in recent Moroccan history and as a period that needs to be better understood, and the 1990s as constituting the beginning of a very slow transition into a modern human rights era. Inquiries into human rights thus look in two directions: toward the past where there needs to be a more complete understanding of the scope of human rights abuses along with efforts for 'reconciliation', and toward the

³⁰ The mystery of 'what happened to Ben Barka?' is a recurring topic in both the Moroccan and French popular press. Although the true story is not known, it is very likely that French and Moroccan security services collaborated in his kidnapping and presumptive execution (Smith, 2000).

present where human rights continue to be a challenge, particularly with regard to women and girls, political dissenters, judicial proceedings, prison conditions including torture, and areas concerning the freedoms of expression, assembly, and religion. Although many in Morocco understandably resist thinking of their governing class as ‘authoritarian’, there nevertheless is a pervasive security service and there are politically powerful elites who resist fundamental reforms that would bring about greater transparency, reduced corruption, democratisation, and open political dissent.

b) Chronological developments in human rights between 1990 and 2016

Following the so-called ‘Years of Lead’ under King Hassan II, the 1990s saw the beginning of an opening up towards human rights and the first signs of a willingness to recognise past abuses of power. Perhaps the first indication of an opening was the establishment by Dahir of the ACHR in 1990 (see Part II.A below). The following year, approximately 300 political prisoners who had been subjected to forced disappearance were released. In 1994, most political prisoners and political exiles were pardoned, and in 1998 the Youssefoufi government integrated approximately 900 former exiles and prisoners into the workforce and gave many retroactive benefits. Further efforts were made under the new King Muhammad VI first to establish an Independent Arbitration Commission in 1999 for the compensation of victims of forced disappearance and arbitrary detention, and then again in 2004 with the establishment of the Equity and Reconciliation Commission (ERC) (see Part I.C.2 below).

By 1990, Morocco had ratified the International Convention on the Elimination of All Forms of Racial Discrimination (1970), the International Covenant on Civil and Political Rights (1979), and the International Covenant on Economic, Social and Cultural Rights (1979). The 1990s witnessed, however, a new wave of ratifications of international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (1993), the Convention against Torture (1993), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1993).

In the mid-1990s, discussions were also underway for a new 1992 Constitution that would, among other issues, pledge Morocco to adhere to human rights ‘as they are universally recognized’ (Constitution, 1992: preamble).³¹ Another Constitution was approved only four years later in 1996. In the intervening period, a Ministry for Human Rights was established with headquarters in Rabat, where it remained until absorbed into the CNDH in 2011. A forerunner of the Office of the Ombudsman, the *Diwan al-Madalim*, was created in 2001.

Following his coming to the throne in 1999, Muhammad VI was commonly seen as a reformer and ‘the King of the Poor’.³² Important legal reforms that had a positive influence on human rights were introduced

³¹ Full quotation: ‘The Kingdom of Morocco, conscious of the need to place its actions in the context of the international bodies of which it is an active and dynamic member, subscribes to the principles, rights and obligations stemming from the charters of those bodies and reaffirms its attachment to human rights as universally recognized.’

³² Since his accession to the throne, Mohammed VI has sent a message of commitment to the poor. The main spheres of action have been those directed towards rural areas, people with disabilities, abandoned children and the elderly.

during the first five years of his reign, including the adoption of a Civil Liberties Code, a Prisons Act, revising the Criminal Procedure Code, the Labour Code, and the Family Code in 2004 (often referred to as the Moudawana). The latter brought about a significant improvement for the legal rights of girls and women, even though the rights have often not been recognised in practice.³³

During the night of 16 May 2003, 12 Moroccan suicide bombers exploded bombs in separate attacks in Casablanca, killing more than 40 people in the deadliest such violence in Moroccan history. Although some reforms continued in Morocco, including the adoption of the Family Code and the establishing of the ERC, by most accounts the security services gained increasing authority at the expense of human liberties. The following six years saw little movement or progress until the Arab Spring prompted demonstrations in the streets of several Moroccan cities beginning mostly in February 2011. The effect of these events, along with the more serious instability elsewhere in the Muslim world, prompted a new wave of reforms. The new CNDH was established on 1 March 2011, followed a few weeks later by the creation of the Office of the Ombudsman, the creation of an Interministerial Delegation for Human Rights (IDHR) under the Prime Minister in April, and the adoption of a new Constitution approved by referendum in July.

c) Moroccan Human Rights Institutions

In addition to the CNDH, discussed more fully in Part II below, there are four other official institutions that have had responsibilities for human rights in Morocco.

First, the Ministry for Human Rights operated from the time of its creation in 1993 until its functions were subsumed into those of the CNDH in 2011. Although the Ministry had its own separate headquarters in Rabat, it was a small institution and had no practical effect on Morocco. According to its organising statute, it had a cabinet, a central administration, and external services.³⁴

Second, the ERC was established by Royal Dahir n° 1-04-42 (2004) on 10 April 2004 for the purpose of coming to terms with the human rights abuses that occurred during the Years of Lead and to further institutionalise the process of providing compensation to victims that had begun in 1999.³⁵ Although many political prisoners had been released at the beginning of the 1990s, virtually no public explanation of what had happened took place and no efforts were undertaken to compensate or exonerate those who had

However, these initiatives are not in tune with the broader governmental policy. It is not by coincidence that Moroccans know him by the term of endearment of King of the Poor (see Berrissoule, 2001).

³³ Divorces for irreconcilable differences and marriages of minors have both increased since 2004, the number of marriages of minors has grown by 11 percent. Requests for the authorisation of polygamous marriages have also increased by 25% since 2004. At the same time, the process for reconciliation put forward in the 2004 Family Code has been rarely used. For more information, see Benezhar (2014).

³⁴ On 11 November 1993, the Ministry for Human Rights was created to design and put forward a governmental policy around the defence, promotion and protection of human rights. This Ministry was also mandated to participate in the promotion of the Rule of Law (Décret n° 2-94-33).

³⁵ In one of his first acts as King, the young Muhammad VI established the Independent Arbitration Commission for Compensation on 16 August 1999. This body was tasked with the responsibility of investigating cases of forced disappearances or arbitrary detention and of determining adequate compensation for the victims and their dependents. The work of this body is viewed as the initial phase of the reconciliation anticipated by the state, but also an implicit acknowledgement of the responsibility of the state.

suffered. The ERC played a role in providing such explanations. The ERC thus very generally plays a role similar to that of the Truth and Reconciliation Commission in South Africa.

Third, the Office of Ombudsman (*Médiateur* in French) was created on 17 March 2011 (two weeks after the creation of the CNDH) by royal decree (Dahir N° 1-11-25). The Office of the Ombudsman is the successor to the *Diwan al-Madalim*, which was created in 2001. The 2011 Constitution, which was ratified a few months after the creation of the Ombudsman, defined the office as:

an independent and specialized national institution that has as its mission, within the framework of the relations between the administration and the users, to defend rights, to contribute to reinforcing the primacy of the law, and to disseminate the principles of justice and of equity and the values of moral behaviour and of transparency in the managing of the administrations, of the public establishments, of the territorial collectivities and of the institutions endowed with prerogatives of public authority. (Constitution, 2011: Article 162)

Fourth, the IDHR in Morocco is a governmental body that was created by the Prime Minister on 11 April 2011 and reports directly to him (Décret n° 2-11-150: Article 1 and 2). It coordinates the government's human rights policies among ministries and agencies. It has the responsibility of developing and implementing government policy in matters related to the protection and promotion of human rights (Décret n° 2-11-150: Articles 1 and 2).

The IDHR's mission is to initiate all actions and to undertake all steps to promote respect for human rights in the implementation of public policies, to promote a positive image of Morocco, and to ensure the implementation of international conventions of human rights and international humanitarian law that Morocco has ratified (Décret n° 2-11-150: Article 2).

2. Historical background of the National Council for Human Rights (CNDH)

The forerunner of Morocco's CNDH, the ACHR, was created by Dahir in 1990 (Dahir n° 1-90-12). The ACHR's creation occurred at the beginning of the decade of the 1990s that would see increasing acknowledgement of human rights and a gradual implementation of human rights norms.

The ACHR made general recommendations to the government and the state through thematic reports on issues such as illegal immigration and detention centres, and formulated recommendations regarding Morocco's compliance with international conventions on human rights. In 2002, the ICC accredited Morocco's ACHR as an 'A' status institution, a status that has continued to be held by its CNDH successor. The ICC classification implies that ACHR has been assessed as in compliance with the Paris Principles, in terms of its independence from the government, as well as its mandate and competence, which includes the protection and promotion of all fundamental rights.

3. Establishment of the National Council for Human Rights (CNDH)

The flagship Moroccan institution on human rights is the National Council for Human Rights (CNDH or *Conseil National des Droits de l'Homme*), which was officially created in 2011 by Dahir n° 1-11-19 (henceforth 'CNDH Dahir'). It is recognized as an 'A' status national human rights institution by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human

Rights (ICC), applying the 1991 Paris Principles Relating to the Status of National Institutions, which were subsequently adopted in UN General Assembly resolution 48/134 in 1993.

The CNDH is responsible for making recommendations and consulting with state institutions and civil society regarding all human rights issues involving the Moroccan government, administration, and political institutions. It has the authority to hear information from the Moroccan public and civil society and it may request (*'demandeur'*) state institutions to provide documentation on human rights practices and access to state institutions. It can, for example, conduct investigative visits to institutions such as prisons and psychiatric hospitals. It has no authority to require any institution to comply with human rights practices, although it may make recommendations. It is thus a consultative and advisory body without any actual enforcement powers to make any changes in institutional practices.

a) *The constitutional status of the CNDH*

The CNDH is specifically recognised in Article 161 of the 2011 Constitution:

The National Council of the Rights of Man [*Conseil nationale des droits de l'Homme*] is a pluralist and independent national institution, charged with taking cognizance of the questions relative to the defense and to the protection of the Rights of Man and of the freedoms, to the guarantee of their full exercise and of their promotion, as well as the preservation of the dignity, of the individual and collective freedoms of the citizens, and this, with strict respect for the national and universal [standards] in the matter.

The specific inclusion of the CNDH in the Constitution constitutes a highly visible raising of its status and profile. It would henceforth be legally impossible to eliminate the CNDH without amending the Constitution. Article 161 also insists on its importance as an entity independent of other government institutions. Although this constitutes the first time in Moroccan history that such a status has been given to a human rights institution, it also should be recognised, similarly to other national human rights institutions, that neither the Constitution nor CNDH Dahir that created it gives the CNDH actual powers to make changes in Moroccan practices or actions. It is thus a symbolic and important rhetorical voice that can speak with some authority, but it is not an institution that can by itself alter the behaviour of other governmental or political bodies. In short, the government and administration may ignore it.³⁶

b) *The legal framework for the operation of the CNDH*

The CNDH operations are governed by two legal texts: first, the Dahir that created the CNDH (Dahir N° 1-11-19; 1 March 2011) (henceforth 'CNDH Dahir') and second, its Internal Regulation (henceforth 'CNDH IR') drafted by the CNDH pursuant to Article 45 of the CNDH Dahir as approved by the King. The CNDH Dahir is a seven-page document consisting of 59 articles while the CNDH IR is a ten-page document consisting of 74 articles.

³⁶ Article 171 of the Constitution (2011) calls for the adoption of the laws that determine its status, composition, organisation, and operating rules. In the absence of a law governing the CNDH, it will continue to operate under the CNDH Dahir (see below).

(1) CNDH internal operation

The CNDH Dahir provides for the establishment of a 30-person commission, as well as a President and Secretary-General (Article 32). All of the members of the CNDH are appointed by the King (by Dahir) for renewable terms of four years (Article 35). Eight members are selected directly by the King, 11 are nominated by NGOs, 8 are proposed by the two chambers of Parliament, two by the Council of Ulama, and 1 by the judicial corps.

The CNDH IR established the governing laws of its internal organs, as well as their administrative and financial structures. The President of the CNDH plays a particularly important role and is often the public face of the institution. He is responsible for overseeing all CNDH business and takes necessary measures for its management and operations. CNDH IR Article 4 provides that, pursuant to Article 49 of the CNDH Dahir, the President is the official spokesperson and interlocutor vis-à-vis national public authorities and international bodies and institutions. Where appropriate, he may delegate this task to one of the CNDH members. The President may seek the approval of the King to delegate some of his powers to the Board. CNDH IR Article 5 provides that the President may appoint as budget-authoriser, the Secretary General and the Presidents of the Regional Commissions, within the limits of funds allocated to them in the CNDH budget. Similarly, Article 6 provides that in order for the CNDH to optimally perform its tasks, the President may strike cooperation agreements with any institution or national authority, foreign or international, for the exchange of expertise, information and documents. Finally, in Article 7, the President of the CNDH is required to inform the Coordination Committee of the content of the agreements concluded.

Members of the CNDH benefit from several guarantees that 'ensure their protection and independence, both in exercising their duties and in carrying out any activity closely related to their mission' (CNDH Dahir, 2011: Article 37). This last measure was not included in the previous version of the ACHR. This immunity nevertheless remains conditioned (CNDH Dahir, 2011: Article 38):

The members of the Council shall refrain from taking any position or performing any action or initiative that might undermine their independence.

They must preserve the confidentiality of the deliberations of the Council and its organs and internal documents.

Article 54 of the CNDH Dahir is devoted to the independence of the CNDH, in its capacity as a national institution of human rights, by offering it full legal and financial autonomy. It also expands its capacity with regard to the diversification of its financial resources (Article 55). Furthermore, the CNDH's budget may include revenue from any national or international institution, private or public. The CNDH may also receive gifts, bequests and income, in addition to subsidies from the state budget.

(2) CNDH competencies: protection, promotion and enrichment of human rights

The first three Sections of the CNDH Dahir are devoted to the 'protection of human rights', the 'promotion of human rights', and the 'enrichment of human rights' respectively.

(a) Protection (CNDH Dahir: Articles 3-12)

The CNDH ‘monitor[s] human rights violations in all of the Kingdom’s regions. [...] The Council shall look into all human rights violations, either on its own initiative or following a complaint by the parties concerned’ (Articles 4 and 5). It may initiate investigations and summon any person to testify, after which it may issue a report ‘containing the findings and results of its monitoring or investigations and inquiries, and shall submit them to the relevant authorities along with its recommendations to address those violations’ (Article 4). Moreover, CNDH’s advisory opinion may be requested by public authorities in all matters relating to the protection and respect of human rights and individual and collective freedoms of citizens, as was the case in June 2012 when CNDH issued an advisory opinion at the request of Parliament (CNDH, 2014: 8).³⁷ The reporting function of the CNDH will be discussed in more detail in Part III.A below.)

The CNDH contributes to the implementing human rights practices and in preparing reports for treaty bodies of international conventions ratified by Morocco. The ACHR and now the CNDH actively participated in the preparation of the sessions of the first two cycles of the Universal Periodic Review (UPR).³⁸

In its contribution to the second review cycle, the CNDH recommended the adoption and implementation of the National Action Plan on Democracy and Human Rights and the implementation of the citizen platform for the Promotion of the Culture of Human Rights. It also spoke in favour of the ‘urgent and comprehensive revision of the regulations governing the communications sector’ and the ratification of the Statute of the International Criminal Court (ICC).³⁹

CNDH is also tasked to ‘intervene proactively and on an urgent basis whenever there is a source of tension that might lead to a breach of individual or collective human rights’ (CNDH Dahir, 2011: Article 9). In addition to these new mediation or conciliation responsibilities, CNDH is now authorised to conduct visits to detention centres in order to monitor the situation of detainees and how they are treated, as well as child protection and rehabilitation centres, specialised mental and psychological hospitals; and detention centres for foreigners in illegal situations after which it reports its findings and recommendations to the responsible authorities (Article 11).

(b) Promotion (CNDH Dahir: Articles 13-25)

The new Dahir identified twelve items in the field of promotion of human rights. It states that the CNDH may suggest to authorities recommendations that have as their aim harmonising legislative and regulatory texts in force by virtue of international conventions in the field of human rights that Morocco has ratified or to which it adheres (Article 13). It also contributes to the preparation of reports for supervisory mechanisms of international conventions relative to the human rights to which Morocco is committed

³⁷ See also Règlement Interieur du Parlement, 2013: Articles 55, 165, 214, 233, 234, 235.

³⁸ For more information please consult for the first cycle in 2008 <http://www.cndh.org.ma/fr/rubriques/rubriques/examen-periodique-universel> (accessed 8 March 2016) and for the second cycle in 2012 <http://www.cndh.org.ma/fr/conseil-des-droits-de-lhomme/rapport-de-lexamen-periodique-universel-2eme-cycle-mai-2012> (accessed 8 March 2016).

³⁹ This it has done, for instance, in the contribution of the CNDH to the Arabic and International Dynamic for the Promotion and Protection of Human Rights <http://www.cndh.org.ma/fr/bulletin-d-information/contribution-du-cndh-la-dynamique-arabe-et-internationale-de-promotion-et-de> (accessed 29 February 2016).

(Article 14), and it 'shall encourage and urge all government departments and public authorities concerned to ensure follow-up on the implementation of the concluding observations and recommendations of treaty bodies' (Article 15). At the request of Parliament or the Government, it offers assistance and advice to harmonise the draft or proposed laws with the provisions of international conventions on human rights to that which Morocco has ratified (Article 16). The CNDH should play a positive role in encouraging Parliament to ratify other international human rights treaties and make recommendations with respect to Morocco's ratification of new international conventions (Articles 17 and 18).

The CNDH also plays a catalytic role in its areas of expertise by establishing a 'constructive partnership' (Article 20) with relevant international institutions on human rights, as it is called upon 'to facilitate and foster relationships of fruitful cooperation and efficient partnership' (Article 21) and is entrusted with contributing to capacity building between governments authorities and national and international associations through training and in-service training in the field of human rights (Article 23). Finally, the CNDH contributes to the promotion and dissemination of the culture of human rights in the fields of education, teaching, training, information and awareness within the framework of the 'Citizen Platform for the Promotion of the Culture of Human Rights'.⁴⁰

(c) Enrichment (CNDH Dahir: Articles 25-27)

The CNDH Dahir also created a new prerogative for CNDH, which would enable it to enrich thought and dialogue on Human Rights and Democracy (Articles 25-27). Thus CNDH aims to 'organize national, regional or international forums on human rights to stimulate and enrich reflection and debate' (Article 25) on the subject. The CNDH's efforts were also acknowledged in the field of demo, by 'promoting democracy-building, by fostering broad-based social dialogue and developing any relevant tools and mechanisms to that end, including election observation' (Article 25). As an example, the CNDH organised the observation of the 1 July 2011 constitutional referendum. CNDH is also tasked with 'creating networks for communication and dialogue' with other NHRIs and experts in the field of Human Rights with the aim of 'enhancing dialogue among civilizations and cultures in this area' (Article 26). Finally, a 'National Human Rights Award' has been created and is awarded to 'any deserving person or organization' as part of the fora organised by the CNDH (Article 27).

(3) The CNDH and regional commissions for human rights

The CNDH Dahir laid the foundation for the improvement of the implementation of CNDH's activities by creating Regional Commissions for Human Rights. It devoted eight articles to regional structures, including four (Articles 28-31) relative to powers, areas of intervention, and mechanisms of protection and promotion of human rights. Overall, these fields of competence are identical to those of the CNDH at the national level. In this respect, Regional Commissions contribute to the creation of regional observatories of human rights, which contain within them associations and individuals active in the field of human rights, from different cultural and intellectual backgrounds that have made serious contributions to the consolidation of the values of responsible citizenship. The Dahir also entrusted Regional Commissions with monitoring the evolution of human rights at the regional level and devoted four articles (Articles 40-43)

⁴⁰ This is a 'national structuring project' involving broad stakeholder inclusion. (CNDH, undated).

to the composition of these councils, the appointment of their presidents, and the selection of their members.

Regional Commissions have the dual mission of ‘following up on and monitoring the situation of human rights at the regional level and receiving complaints about alleged human rights violations’ (Article 28). With regard to this last point, it is stated that the recommendations of the Regional Commissions are transmitted to the President of the CNDH for decision. Moreover, Regional Commissions implement CNDH programs for the promotion of human rights, in collaboration with other actors, particularly associations and representative bodies from civil society. The Regional Commissions ‘shall monitor the development of human rights at the regional level’ (Article 31).

Regional Commissions are scheduled to hold four ordinary sessions a year on the basis of an agenda adopted at the initiative of its President. They may also hold extraordinary sessions, on the basis of an agenda determined by its President (Article 46). Similarly, thematic committees are created within Regional Commissions with the aim of defending and promoting human rights as well as enriching debate and dialogue on democracy building and human rights. These new responsibilities represent a fundamental change that broadens horizons beyond the constraints inherent in centralised structures. It also creates a new dynamic and interactivity between the systems of protection and promotion of human rights at both nationwide and local levels. Ultimately, State structures working in the field of human rights do not have real decision-making power; they often enjoy mostly consultative roles.

4. Activities of CNDH (2011-present)

The CNDH maintains an active web site that makes readily-available reports on its activities and publications.⁴¹ The website is published in four languages (Arabic, French, English and Spanish).

(1) Annual reports

Both the CNDH and its predecessor, the ACHR, were charged with the responsibility of issuing annual reports to explain to the Parliament their activities and recommendations. The ACHR issued five such reports (Conseil Consultatif des Droits de l’Homme, 2008; 2007; 2005-2006; 2004 and 2003). Unlike its predecessor, however, the CNDH has failed to issue even one annual report since its establishment in 2011.

Rather than submitting its Annual Reports, the CNDH issued one report to Parliament under the title *Report Presented by the President of CNDH to the Two Chambers of Parliament* (CNDH, 2014) on 16 June 2014 (hereinafter ‘CNDH Report 2014’). This Report does not claim to satisfy its annual reporting obligations, but is instead a general overview of some of its activities. Assuming that the procedures of the CNDH Dahir were observed, the CNDH Report 2014 was presumptively submitted to the King for his approval before it was transmitted to Parliament. The CNDH Report 2014 is relatively short (50 pages of content) and was designed to cover the entire period from 2011 to 2013. Even though the CNDH Report 2014 does not satisfy its legal reporting obligations, the issuance of the report may be seen as a modestly positive step in that it is the first post-constitutional (2011) inquiry by a state institution into the human rights acts of the state. To some extent it provides a baseline, however modest, for the recognition of

⁴¹ Please consult <http://www.cndh.org.ma/fr> (accessed on 29 February 2016).

human rights abuses. Civil society may cite it without risk and it would be difficult for the government to deny its findings. Nevertheless, while shining some light onto the internal workings of the administration, it falls short of providing a vigorous, serious, independent and conscientious analysis. However, to the extent that the publication of the CNDH Report 2014 is the beginning of a process, rather than the culmination, it may prove to have value by starting the movement toward a more complete analysis of human rights questions.

The CNDH Report 2014 contains neither a table of contents nor an index, meaning that the entire report must be read in order to ascertain what is and is not included. The first section of the CNDH Report 2014 (pages 3-5) discusses the founding of the CNDH. The second section (pages 7-11) discusses its relationship with Parliament (see Part III.B below). In its third section (pages 13-14), it discusses its relationship with the Prime Minister and government (see Part III.C below). The dominant message is that the CNDH is willing to work with other governmental institutions and considers them to be its partners in promoting human rights (CNDH, 2014).

In referring to its accomplishments and actions, the CNDH Report 2014 identifies the compensation given to political prisoners from the 'Years of Lead' (though the CNDH does not use this term). Importantly, it recognises the responsibility of the state for the commission of abuses of human rights. While on the one hand this is admitting the obvious, on the other hand it is a dramatic shift from the firm position of the state during the reign of Hassan II in which he completely denied that political imprisonment and torture existed. Human rights proponents who wish to emphasise the positive may see such admissions as a welcome acknowledgement that the state ultimately is capable of recognising past human rights violations, even though the state continues to deny that abuses occur in the present. It also opens up the public discourse to the difference between formal and official positions versus the reality of human rights abuses. Those less optimistic will see the CNDH Report 2014 as only reluctantly recognising past abuses while remaining unwilling to vigorously confront suspected current abuses of the type identified in reports such as those of Human Rights Watch, Amnesty International, and even the U.S. Government's annual country reports on human rights (Amnesty International, 2015; Human Rights Watch, 2015; U.S. Department of State, 1998).

(2) CNDH and parliament

The 2011 Constitution provides that the parliament, among its other responsibilities, should guarantee the rights of citizens (see Constitution, 2011: Articles 70 and 71 in light of the Preamble). The Moroccan parliament has accepted the Belgrade Principles (2012) with respect to the relationship between national parliaments and NHRIs, as confirmed during the recent Coordination Committee meeting of NHRIs in Geneva (March 2014). The CNDH has noted the parliamentary acceptance of this point. The parliament monitors both the implementation of recommendations of international human rights mechanisms, as well as human rights judgments of courts.

Under Article 16 of the CNDH Dahir, the CNDH should offer assistance and counsel to both Parliament and Government 'regarding the harmonization of draft laws with international human rights conventions which the Kingdom has ratified or to which it has acceded'. The CNDH attends and participates in the work of the committee in charge of human rights within Parliament, especially during discussions of sector

budgets, as in CNDH Dahir Article 23, which emphasises significant contributions of the CNDH in the strengthening of Parliamentary frameworks in the field of human rights. CNDH Dahir Article 24 further extends the scope of the cooperation between the CNDH and Parliament in its last paragraph: 'The President of the Council shall present a summary of the report (annual) before each House of Parliament, in plenary session, [...]'.

The CNDH is, at least theoretically-speaking, an important ally that can be called upon to ensure that the provisions of international human rights are respected within the domestic legal system, that the draft laws are not inconsistent with the State's treaty obligations, and that measures are adopted to maintain the supremacy of international norms over internal standards. The CNDH can submit its recommendations, proposals and reports on human rights to parliament. It can present and discuss the annual reports before parliamentary committees, and formulate opinions on all draft laws and proposals likely to have an impact on human rights. CNDHs can also organise training sessions for parliamentarians to strengthen their capacities in this area.

More specifically, the CNDH and the parliament, with both its chambers, have agreed to create a joint commission, consisting of two members representing both sides. The commission shall meet at least twice a year or when necessary. Both sides have committed to strengthening their partnership in the joint and coordinated implementation of their programs, specifically in terms of the compatibility of national legislation with international conventions ratified or signed by Morocco.

Both Houses of the parliament and the CNDH have signed two memoranda of understanding on the adoption of a human rights approach in the work of the legislative body (CNDH, 2014: 13).

Both agreements are rooted in the Belgrade Principles (2012: Articles 22, 24, 25 and 28), which govern the relationship between parliaments and national institutions for the promotion and defence of human rights. The goal is to adopt a human rights approach in legislation, monitor the government's work and evaluate public policies and parliamentary diplomacy.

The agreement also includes capacity-building. (CNDH, 2014: 14). Parliament and the CNDH organise joint activities to promote a culture of human rights. On the legislative side, Parliament has to take into account CNDH's opinion in the development of legislation. CNDH's opinion should also be taken into consideration in assessing the impact of international human rights conventions and international humanitarian law, in the ratification of national laws, and in Morocco's commitments on the matter.

(3) CNDH and the government

National mechanisms for the promotion and protection of human rights were also strengthened by the establishment of the IDHR, a government structure in charge of coordinating the development of government policy in the field of human rights. IDHR is an important interlocutor with CNDH.

The relationship between CNDH and IDHR has improved significantly, both at the head of government level, and at the level of relations with certain government sectors. CNDH has made sure to invite government ministries to take part in conferences and events it has organised, and also makes its

publications available to them (CNDH, 2014: 13). CNDH has also participated in all discussions and conferences to which it has been invited by ministries (CNDH, 2014: 13).

(a) Prime minister

Immediately following the formation of the government after the elections of 2011, the CNDH immediately took the initiative of sending a memorandum to the new Prime Minister Abdelilah Benkirane, detailing some public policy priorities relative to human rights within Morocco's international commitments (CNDH, 2014: 13). This initiative was followed by the organisation of the first working session with the Prime Minister and the Minister of State to present CNDH's vision and its programs in early 2012 (CNDH, 2014: 13). An agenda was adopted to monitor the implementation of joint commitments, including those relating to the monitoring of specific recommendations of the Equity and Reconciliation Commission (ERC) (CNDH, 2014: 13).

Against this background, the CNDH remarked that (CNDH, 2014: 13-14):

1. it noted the efforts by the Prime Minister in expediting the settlement of pending individual reparation cases;
2. it welcomed invitations to participate in public debates on the justice reform, the Advisory Council for Youth and community action, as well as on new constitutional roles of civil society;
3. it acknowledged and welcomed the cooperation with some government sectors, who requested CNDH's opinion on seven legislative proposals and memoranda [...]
4. praised government reactivity in the implementation of Articles 14, 15, 21, 22 and 23 of the Dahir, establishing the CNDH: the contribution on the reports submitted by the government to the treaty bodies, cooperation on the protection of human rights, contribution in the promotion of the culture of human rights, and strengthening the capacity of public services;
5. noted the fact that a number of bills relative to human rights were not submitted to CNDH for revision, such as the draft law on conditions of employment for domestic workers, the draft law on the relative to violence against women, the draft organic law on the Constitutional Court, and the draft law on persons with disabilities. However, this has not prevented the CNDH for offering feedback on the texts to which it had access, and submitting this to proper authorities in the form of advisory opinions and memoranda.
6. noted the non-implementation to date of Article 16 of the Dahir, which states: "the Council offers assistance and counsel to both Parliament and Government with the aim of harmonizing draft laws with international conventions on human rights to which Morocco adheres".
7. considered the submission of the Organic Draft Law N° 065.13 on the organization and conduct of government, its work, and the status of its members (CNDH, 2014: 13-14) as a good opportunity to strengthen and formalise the relationship between the CNDH and the government. In this sense, CNDH has, in collaboration with the Central Authority for the Prevention of Corruption, also prepared a memorandum on the Organic Draft Law containing a number of proposals and recommendations. 'The memo recommended three main elements to study the impact: studying the impact, from a human rights perspective, studying the impact on local authorities (communes), and studying the corruption risk impact' (ibid.).

(b) Government departments

The CNDH plays an advisory role to the Moroccan Government, and can draw its attention to measures for the promotion and protection of human rights. The particular focus of CNDH is designed to be the examination of existing laws, draft laws, proposed laws, and the harmonisation of laws with international human rights treaties to which the State is a signatory. As mentioned above, the CNDH also develops reports on the situation of human rights at national level, as well as on specific issues, receive and examine complaints, provide legal assistance to complainants, attract the attention of authorities on violations of human rights, propose measures to end it, work toward the effective implementation of the provisions of international instruments of human rights, and raise public awareness to their principles, particularly through information and training for stakeholders (CNDH Dahir, 2011: Article 3-25).

In March 2014, the Moroccan government decided to appoint permanent interlocutors in each ministry in order to enhance the interaction with the CNDH. The interlocutors are entrusted with the task to respond promptly and efficiently to proposals and complaints submitted by the CNDH within a time limit of three months (MAP, 2014). The CNDH President, Driss El Yazami, welcomed this decision, which he described as ‘a turning point in Morocco’s democratic process, a consolidation of the rule of law, and an advance in the effective implementation of the provisions of the Constitution’ (MAM, 2014). The government committed to publish the responses to these complaints (around 50 000), but has to this day failed to do so (El Farah, 2015).

In addition, one political observer argues that the suggestions, initiatives, and recommendations of the CNDH are sometimes overlooked by the government, because the latter sees the CNDH as a component of the opposition. Thus, the government does not see any problem in not consulting with CNDH (ibid).

(c) CNDH and civil society

Although for decades the environment in the country was not promising for civil society to openly campaign for human rights, Morocco officially recognised the defence of these rights, and ‘freedom of association’ formally has been present in all amendments of the constitutions since 1962. Article 12 of the Constitution (2011) reinforces the status of associations by underscoring that ‘the associations of civil society and that non-governmental organisations are constituted and exercise their activities in all freedom, within respect for the Constitution and for the law,’ adding that ‘they may not be dissolved or suspended except by virtue of a court decision.’ Furthermore, Article 29 reiterates the guarantee of that freedom. Moreover, the Constitution clearly states that associations play an important role:

The associations interested in public affairs and non-governmental organizations, contribute, within the framework of participative democracy, in the enactment, the implementation and the evaluation of the decisions and the initiatives of the elected institutions and of authorities. These institutions must organize this contribution in accordance with the conditions and modalities established by the law. (Constitution, 2011: Article 12)

As explained above, prior to the 1990s these formal constitutional protections had little practical effect. Beginning in the 1990s, with the increasing openness towards human rights issues by King Hassan II that were continued particularly during the early years of the reign of Muhammad VI, civil society became increasingly outspoken and influential.

There are, however, significant restraints on the activities of civil society. There are the three 'red lines' that cannot be trespassed: laws and state practices forbid questioning the legitimacy of the monarchy or insulting the person of the King, questioning Moroccan authority over the Western Sahara (Moroccan Sahara), or to show a lack of respect for Islam or ridiculing it. Using derogatory language on any of these three topics is likely to lead to arrest or harassment, regardless of the accuracy or merits of the statements. With regard to questioning Islam, it is forbidden to challenge the truth of Islam itself. The lines are less clear when there is a challenge to what may be perceived as a principle of Islam, such as the prohibition of abortion or rights of inheritance. In 2015 there was a major public debate over the question of whether abortion would be permitted in any circumstances, and the government took the strong position that it should always be forbidden. On 15 May 2015, the King brought an end to the debate by ordering the government to draft a law that would change the criminal code by legalising abortion under certain specified conditions. (As of the beginning of 2016, the proposed law had not yet been adopted.) In other cases, the strongest pressure to prevent open discussion of such issues came not from the state itself, but from religious figures and societal pressures (and sometimes physical threats) against those who raised questions about abortion, homosexuality, and other sensitive issues. Nevertheless, provided that civil society does not cross any of the three 'red lines', it is largely allowed to express opinions and engage in a wide variety of actions to promote their ideas.

An important qualification to this general rule is that associations such as those promoting human rights may be formed only with the authorisation of the Ministry of the Interior. Although many organisations have been formed with such authorisation, others have been prohibited from forming and suffer repression and even violations of human rights by the state. It is often sufficient for the Ministry of the Interior to declare that such groups are a threat to the security of the state or that they are being influenced by outside forces.⁴²

But associations have gone from being on the defensive, denouncing violations of human rights under the rule of King Hassan II, to a more proactive role in promoting democratic values and the rule of law. Some of these large NGOs, such as the Moroccan Organisation of Human Rights (OMDH) and the Moroccan Association for Human Rights (AMDH), provide legal advice to victims of violations of human rights; while, lobbying for legislative reforms to ensure better protection of these rights.

The attention increasingly given to human rights by authorities is a sign of change in the rapport between the State and society (Bras, 1989). These changes reflect a reinforcement of a culture of rehabilitation with the virtues of the rule of law, along with a greater awareness of civil society and the founding values of political modernity (Camau, 1990: 67-79). The fact that the CNDH and its pluralism are mandated by

⁴² Many CSOs have decided to come together to fight against the bans from which they they suffer. Gathered under a new entity called 'Le réseau des associations victimes d'interdiction (RAVI)', these CSOs are campaigning for an end to the bans that many groups have undergone from January 2014 to July 2015. RAVI is made up by, for instance, the Moroccan League for the Defense of Human Rights, Amnesty International-Maroc, Association Racines, Transparency-Maroc, Attac-Maroc and the Moroccan Association for Human Rights. The network explains how this governmental 'campaign' has been intensified after the 'irresponsible propositions voiced by the minister of Interior in Parliament (15 July 2014), which have been followed by a series of bans and restrictions to many associations'. The minister had accused human rights defenders of being coopted by political foreign agendas, putting at risk the counter-terrorism actions of the state (Bennamate, 2015).

the Constitution provides legal support for the activities of civil society. Indeed, 11 members of the CNDH are themselves active members of NGOs and recognised for their hard work in the field. In the public debate regarding abortion mentioned above, the CNDH participated in this debate by organising consultations with civil society over a month-long period, resulting in the presentation of 75 memoranda (Lamlili, 2015).

It goes without saying that the role of civil society in promoting human rights in this context is of fundamental value. Civil society organisations play the important roles of spreading information about human rights and state practices, mobilising people to demand their rights, and encouraging Parliament to enact or amend laws that would promote human rights. In societies in transition, it is often difficult for civil society to act alone and it may well benefit from developing positive working relations with state institutions such as the CNDH. Because there are members of civil society within the CNDH and because the CNDH is the institution within the state that is quite receptive to civil society concerns, this creates the possibility for encouraging the adoption and implementation of an integrated national strategy against impunity; the development and implementation of public policies in the areas of justice, security, policing, education, lifelong learning, as well as the active involvement of all walks of life in society; strengthening the constitutionality of laws issued by the Executive; and increasing transparency through clarifying and publishing laws.

5. Conclusions

The modern era of human rights in Morocco may be traced to the year 1990 with the creation of Morocco's ACHR, the predecessor of the current CNDH. During the following decade, King Hassan II introduced changes to overcome the legacy of the 'Years of Lead' and to prepare for the accession of his son to the throne. During the preparation of the text for the draft 1992 Constitution, the King noted that with regard to human rights 'Morocco cannot remain indifferent to the profound changes that have occurred throughout the world' and that the new Constitution would be a 'passport' for Morocco's entrance onto the world stage. In addition to establishing the ACHR and the commission to compensate victims of political imprisonment, the 1990s witnessed an opening, however modest, to civil society and human rights promotion. Thus the Moroccan state acknowledged for the first time that it had a responsibility for human rights, even though the recognition was not accompanied by a firm indictment of past abuses.

The CNDH is the 2011 institutional embodiment of the halting path that began in 1990. The CNDH, in conjunction with other state and political bodies, has gradually opened the public space to a discussion and recognition of international human rights standards. Although it can certainly be said that there has been real progress in Morocco since the 'Years of Lead', it must also be candidly acknowledged that the CNDH has played a modest rather than active role in identifying human rights abuses. Although formally independent of the state apparatus, and although the CNDH includes members who are well-known human rights activists, it has not in fact acted as a genuinely independent body that fully and courageously exposes human rights abuses within the state. It has not satisfied its most basic obligation of issuing annual human rights reports to the King (and indirectly to the public and the state). Indeed some of its actions appear more to justify state security measures rather than to call upon the state to comply with the full range of its human rights obligations. Though there have been real improvements in Morocco,

however modest, human rights will remain something of an empty shell until there is full determination by the CNDH and other state institutions, working in conjunction with civil society, to strengthen state institutions that take seriously the importance of concrete measures to protect human rights.

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C. The Peruvian Office of the Ombudsperson⁴³

1. Introduction

The Peruvian Office of the Ombudsperson (Defensoría del Pueblo) is an autonomous constitutional body, established through Articles 161 and 162 of the 1993 Constitution.⁴⁴ In accordance with Article 162, the responsibilities of this office are twofold; to defend the fundamental constitutional rights of the individual and the community and; to monitor the fulfilment of the duties of the state administration and the provision of public services to the citizens. As per Article 162, the Ombudsperson must also submit a report to Congress once a year and upon request at any other time. He or she may also recommend measures to improve the performance and functioning of the office of Ombudsperson and may initiate legislation (Constitution of Peru, 1993).

The Peruvian Office of the Ombudsperson was established during the first term of office of the former president Alberto Fujimori.⁴⁵ When in power, Fujimori began to address severe economic issues, including the problem of hyper-inflation, but the situation as regards security and terrorism worsened (Truth and Reconciliation Commission, 2013: Vol. III, 2.3). Therefore, in 1992, Fujimori decided to conduct an internal coup d'état, dissolving Parliament, intervening in regional governance, the judicial authority, the Court of Constitutional Guarantees, the Comptroller General of the Republic and the National Electoral Board, and thereby initiating a period of grave human rights violations.⁴⁶ It is in this context of authoritarianism that, for example, the paramilitary group 'Grupo Colina' was created. It was responsible for various crimes against humanity, and was believed to have been formed within the government (Truth and Reconciliation Commission, 2013: Vol VII, 2.22; 2.25).

During Fujimori's period of governance a series of institutions were formed which were designed to fortify (at least on a superficial level) the rule of law in Peru (such as the Institute for the Defence of Competition and Intellectual Property and the National Superintendancy of Public Registry, amongst others). The emergence of the Office of the Ombudsperson, as an entity directly linked to the defence of rights, was therefore a strange phenomenon in a Constitution designed to fit the interests of Fujimori and his supporters and drawn up by a constituent Congress in which the majority was composed of members of the government benches. However, the creation of the Office of the Ombudsperson did not mean its work was supported by 'Fujimoristas'. Three years passed between the proclamation of the Constitution and the appointment of the first Ombudsperson, Jorge Santistevan de Noriega, in 1996.

The Office of the Ombudsperson, through the actions of the first Ombudsman, became one of the few public institutions to question the authoritarian character of the regime, which saw Fujimori oversee the extension of his mandate. Santistevan was a fierce critic of the fraudulent electoral system (Defensoría

⁴³ This chapter was drafted by Renata Bregaglio (Senior Researcher of the Human Rights Institute of the Pontifical Catholic University of Peru and Professor at the Law Department of the same university) and Francisco Aguilar and Adrián Lengua (Research Assistants of the Human Rights Institute of the Pontifical Catholic University of Peru).

⁴⁴ Also referred to throughout simply as 'the Constitution'.

⁴⁵ Alberto Fujimori was the President of Peru from 28 July 1990 to 22 November 2000.

⁴⁶ To find out more one can consult the Inter-American Commission on Human Rights' website; in particular the second report on the human rights situation in Peru, 2000, available at <http://www.cidh.org/countryrep/Peru2000sp/indice.htm> (accessed on 2 July 2015).

del Pueblo, 2000), but despite this, Fujimori was registered in 1999 for a third presidential term (IACHR, 2000: Paragraph 52) and re-elected for the second time in 2000. The National Elections Board (in Spanish, 'Jurado Nacional de Elecciones' (JNE)), in a controversial decision, supported the Fujimori interpretation of the 1993 Constitution and accepted his candidacy for the presidency. The Constitution was adopted in 1993, when Fujimori was in his first presidential term and it allowed one re-election. However, according to Fujimori and the JNE, the 1995 re-election was the first presidential term under the new Constitution, so Fujimori could run for another re-election (the third in general, but the second under the 1993 Constitution). In that context, the Ombudsman stated that:

The 1993 Constitution modified the 1979 Constitution, which established a five-year presidential term with no immediate re-election. Under the possibility allowed by the Constitution in force, the presidential term may be extended to a maximum of 10 consecutive years, it being impossible for a citizen to run for the presidency three times in a row or more. In the view of the Office of the Human Rights Ombudsman, and in light of the Constitution, this provision cannot be eluded by any law that allows a presidential term of 15 years continuously [...] The ruling of the JNE is final [...] This does not, however, do away with the questioning derived from what has been called the factory defect with which this process has been born. (Defensoría del Pueblo, 2000: 21)

In that electoral context, the Ombudsman also helped ensure that the electoral process respected human rights in accordance with Peruvian law and requested the JNE to conduct an inquiry against candidates based on evidence of the use of public funds for electoral aims (NDI/The Carter Center, 2000: 15).

2. Functions and competences of the Ombudsperson

In accordance with Article 162 of the Constitution, the Office of the Ombudsperson is regulated by Organic Law⁴⁷ No. 26520 (Congreso de la República, 1995a), which, through its 34 articles, establishes its structural body, the electoral system for the Ombudsperson, its specific attributes and the systems through which the principal functions of the institution are carried out.

In accordance with the above Law, the Ombudsperson is appointed by the Congress of the Republic, with the vote of two thirds of its total members.⁴⁸ In order to be elected to the post, one must be a Peruvian citizen, a qualified lawyer, be at least 35 years old and have a well-known reputation for integrity and independence.⁴⁹ The post of the Ombudsperson runs for a period of five years (with the possibility of re-election for an additional term) and is not subject to a binding mandate.⁵⁰ However, the law specifies that once the designated term is completed, the Ombudsperson will continue his or her duties until their

⁴⁷ In accordance with article 106 of the Political Constitution of Peru, the structure and operation of bodies of the state outlined in the constitution are approved of through organic laws. Organic law bills are processed like any other law, but for their approval or modification, the vote of over half of the registered total of members of congress is required.

⁴⁸ There are currently 130 members of Congress in Peru.

⁴⁹ This ultimate requirement is not mentioned in Article 162 of the Constitution, rather it was added through Law no. 26520 (Congreso de la República 1995).

⁵⁰ In accordance with article 4 of Law No. 26520 (Congreso de la República 1995) the Ombudsperson will leave his/her post through i) resignation; ii) expiry of the designated term; iii) death or unforeseen permanent incapacitation; iv) negligent conduct in the observance of responsibilities and duties; v) having been found guilty of a criminal offence; or vi) a case of incompatibility.

successor assumes the post.⁵¹ As will be evident later, this is particularly important in the context of Peru as the current Ombudsman has spent almost five years in the post, despite being initially designated as an interim holder of the position.⁵²

Expanding on the general responsibilities of the Ombudsperson, Article 9 of Law Number 26520 (Congreso de la República 1995a) establishes the competences of the Ombudsperson. The latter may:

1. Initiate and pursue, through his/her own initiative or by request, any investigation conducive to the clarification of actions and rulings of public administration that affect the full application of constitutional and fundamental rights of the individual and community.
2. Initiate before the Constitutional Court any constitutional claims (action of unconstitutionality, Habeas Corpus, legal protection, Habeas Data, popular petition and petition for compliance). In addition he/she can intervene in any of these processes and is qualified or entitled to contribute to the defence of the claimant or the injured party.
3. Initiate or participate in, through his/her own motion or by request, any administrative procedure, on behalf of an individual or a group of people, acting for the defence of constitutional and fundamental rights of the individual and the community.
4. Exercise the right of legislative initiative.
5. Promote the signing, ratification, adherence to and effective circulation of international human rights treaties.⁵³

On an operative level, Law No. 26520 establishes the delegation of work through deputy branches. Article 7 stipulates that the Ombudsperson will be assisted by deputies. The latter should be selected through public tender for a period of three years with the option to re-apply. Up until now, in accordance with the Regulation on Organisations and Functions (ROF) (Defensoría del Pueblo, 2011a) the Office of the Ombudsperson operates through seven deputy branches, considered 'divisions': Human Rights and Disabled People, Women, Environment, Public Services and Indigenous Peoples, Constitutional Affairs, Childhood and Adolescence and the Prevention of Social Conflicts and Governability. These deputy branches are, in turn, comprised of programmes (at the date of publication there are seven), and have as their main function the task of developing lines of action and producing reports and publications which account for the institutional stance regarding certain charges specific to human rights. In addition, the Directorate for Territorial Co-ordination is considered to be a division of the Office of the Ombudsperson, charged with the co-ordination of Ombudsperson's offices throughout the country. In accordance with Article 78 of the ROF, the Ombudsperson's offices have, amongst others, the following functions:

⁵¹ Article 161 of the 1993 Political Constitution, supplemented by Article 2 of Law no. 26520 (Congreso de la República 1995a).

⁵² To this date four people have occupied the post of Ombudsperson: Jorge Santistevan (28th March 1996 – 30th November 2000), Walter Albán (30th November 2000-15th September 2005), Beatriz Merino (15th November 2005-31st March 2011) and Eduardo Vega (31st March 2011-present).

⁵³ The operational rules of the Ombudsperson are articulated in Article 7 of the Resolution of the Office of the Ombudsperson No. 0012-2011/DP (Defensoría del Pueblo 2011a).

1. To direct, co-ordinate and supervise, within the geographical area of their responsibilities, the institutional policy in terms of the protection of rights, done through the processing of complaints and responding to petitions and queries.
2. To conduct investigations through Ombudsperson's procedures.
3. To take practical courses of action, such as verification visits and other actions focused on mediating the resolution of complaints and the handling of queries.
4. To produce regular reports and analysis.
5. To exercise legal representation in contentious judicial and administrative proceedings within the reach of its powers and jurisdiction (Defensoría del Pueblo, 2011a: Article 78).

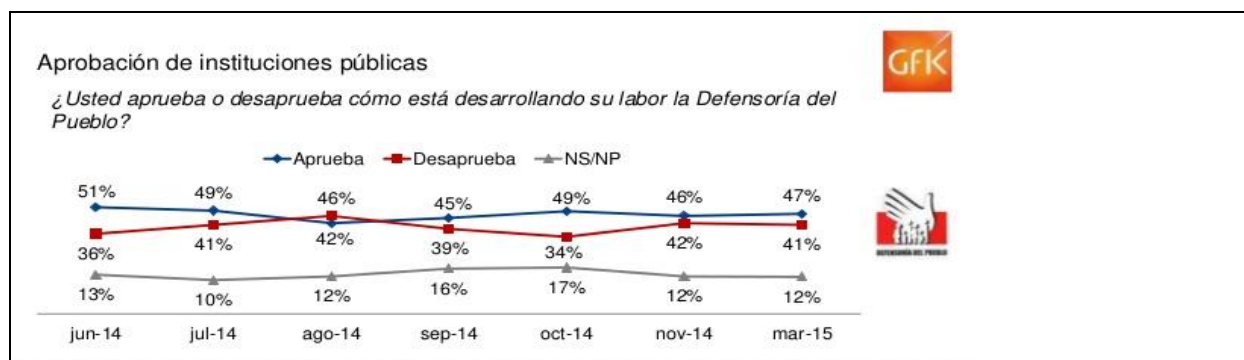
Each Ombudsperson's office depends on a unit of Ombudsperson's service (Defensoría del Pueblo 2015d). In accordance with article 81 of the ROF, it is these units that are charged with the processing of complaints, petitions and requests and the corresponding supervision of public administration.⁵⁴ The hierarchy and structural organisation of the Office of the Ombudsperson can be found on the Ombudsperson's website.⁵⁵

Another relevant organ in the hierarchy of the Ombudsperson is the first deputy branch. In accordance with the ROF (Defensoría del Pueblo, 2011a: Article 12), this is the organ of the senior management directly answerable to the Ombudsperson. It is responsible for managing, supporting, advising and making proposals to the Ombudsperson on strategies, policies and institutional management plans; as well as overseeing the compliance of duties on the part of the general secretary, deputy branches, Ombudsperson's offices and other organisational units of the Office of the Ombudsperson.

With regard to its public approval, the Office of the Ombudsperson has a good reputation within Peruvian society. According to a public opinion survey carried out by GFK Peru (GFK, 2015); the Office of the Ombudsperson maintained a level of support of around 45% between June of 2014 and March of 2015. Although in absolute terms this may seem rather low, it is important to specify that there is a great deal of mistrust of public institutions in Peru. The same opinion poll produced an average disapproval level of 78% for the judicial authority and 80% for congress.

⁵⁴ In accordance with article 19 of the Organic Law of the Office of the Ombudsperson, in places where there is no Ombudsperson's office, complaints can be presented to any Public Prosecutor, who is responsible for processing them immediately to the Office of the Ombudsperson.

⁵⁵ Please consult <http://www.defensoria.gob.pe/organigrama.php> (accessed on 11 March 2016).



Source: GfK Perú (2015) - Encuesta de Opinión Pública Nacional Urbana – March 2015⁵⁶

In addition, the Office of the Ombudsperson has been referred to as an important institution in the fight against corruption in the National Surveys on Perceptions of Corruption in Peru. Its percentage of acceptance as an important entity in combating this phenomenon has progressively increased over time. Its first mention occurred in 2004, in the Third National Survey on Perceptions of Corruption in Peru (Proetica, 2004: 20), in which it was named by 19% of respondents as the fifth most notable institution in the country with a need to address the problem of corruption.⁵⁷ In 2006, in the 4th survey (Proetica, 2006: 107), it occupies first place amongst institutions in which the public most trusts to fight against corruption (17%.) In 2008 (Proetica, 2008: 54) and 2010 (Proetica, 2010: 37), it also occupied first place amongst institutions with the most commitment to battling corruption, with figures of 52% in Lima and 58% in the provinces. Finally, the 7th survey, in 2012 (Proética, 2012: 54) again presented it as the most trusted institution for fighting corruption (49% in Lima, 60% in the provinces) and as the best managed institution in the fight against corruption (55%.)

a) *The role of overseeing policies and regulations in Peru.*

As has been pointed out, the Office of the Ombudsperson operates principally on two levels: i) on a regional level, through the Ombudsperson's offices (which are located in each region of the country)⁵⁸ (Defensoría del Pueblo, 2015e), which attend to public complaints; and ii) on a level of thematically-structured bodies, through deputy branches and programmes, developing the outlines and driving the production of reports; and seeing to claims related to constitutional processes. In this sense, it is responsible for analysing the types of intervention the Office of the Ombudsperson of Peru can undertake when faced with a supposed breach of rights, as well as the criteria that are taken into consideration for the operations of deputy branches. It also analyses cases in which the Office of the Ombudsperson has intervened through claims related to constitutional processes. It is also important to note that in all its operations the Office of the Ombudsperson interprets its mandate in strict accordance with the constitutional framework and with all the human rights treaties ratified in Peru which have constitutional

⁵⁶ Translation: Aprobación de instituciones públicas = Approval of public institutions; ¿Usted aprueba o desaprueba cómo está desarrollando su labor la Defensoría del Pueblo? = Do you approve or disapprove of the way the Office of the Ombudsperson is carrying out its work?; NS/NP = Don't know.

⁵⁷ The surveys were conducted on a multiple choice basis and the participants were able to select more than one option in their answer.

⁵⁸ Peru has 24 regions and 1 Constitutional Province. All of them have a Regional President

status. However, it should also be noted that the work of the Office of the Ombudsperson is not based on a specific policy supervision plan. Despite the fact that an institutional work plan is drafted at the beginning of the year, which mainly determines which thematic reports will be released, this plan does not always respond to specific events or circumstances. Neither is there a clear agenda for the supervision and monitoring of recommendations included in previous reports or made in complaint cases.

b) Receiving and addressing complaints

Although the Organic Law of the Office of the Ombudsperson only refers to the possibility of this body processing complaints, the Protocol of Ombudsperson operations, adopted through Administrative Ruling no. 017-2008/DP-PAD (Defensoría del Pueblo, 2008a), classifies the requests for intervention on the part of the Ombudsperson as:

- Complaints: requests which allege the violation or risk of violation of a constitutional or fundamental right due to the action or lack thereof on the part of a body tied to public administration, judicial administration or an outsourced public service provider.⁵⁹ (Defensoría del Pueblo, 2008a: Article 21).
- Petitions: requests in which an intervention is demanded, so that a situation in which a lack of protection affects or threatens fundamental rights can be dealt with or can be resolved; this situation does not represent a breach of the duties of public administration or of other providers of public services but can be addressed in exercise of its powers.
- Enquiries: a request for information or advice regarding legal matters, institutions, social or mental health services which does not entail a breach of fundamental rights or which covers topics to which the office is not qualified to respond. In such cases, guidance is offered regarding the correct entities or channels to turn to in order to ensure observance of rights.

In accordance with its Organic Law (Congreso de la República, 1995: Article 10), complaints can be brought before the Office of the Ombudsperson by any person or legal entity. The complaint can refer to an individual or collective violation of rights, with no restrictions based on nationality, sex, age, residence or legal status (no administrative authority is entitled to present a complaint to this body.) In addition, complaints can be presented by all those who are incarcerated or interned in social rehabilitation centres, all those at school, in hospitals, clinics or, in general, all those who are dependent on another person or a form of public administration. Furthermore, according to Article 11 of the aforementioned Law, an intervention can be requested on the part of the Plenum and the Committees of Congress (by means of a written request) for the investigation or clarification of operations carried out by public administration, provided it affects a person or group of peoples within the scope of its responsibilities.

⁵⁹ The aforementioned operational protocol establishes that all requests for intervention should be registered on the Ombudsperson's Information System (SID) and designated according to whether they are a complaint, a petition or an enquiry. In the particular case of a complaint, the details of the rights violation and the entity being complained about should be designated. The protocol establishes that if more information is considered necessary, this can be requested from the person who filed the complaint.

It is important to highlight that the Office of the Ombudsperson can only carry out its duties in relation to public administration or private bodies which provide public services (Congreso de la República, 1995: Article 30). In this sense, if the body being complained about is a private body that does not provide public services, the complaint will be disregarded.

In accordance with Article 19 of the Organic Law, complaints must be presented through written requests (through whichever means), accompanied by the signature of the person making the complaint or their representative and indicating their name and place of residence. The law only permits a verbal complaint in exceptional circumstances if the particulars of the case merit it, in which instance minutes will be taken. Despite this regulation, in practice complaints can be received through the following channels:⁶⁰ online form,⁶¹ through units and offices of the Ombudsperson (the citizen has an interview with a civil servant who processes the complaint and puts it into the system), through an online chat system, through e-mail, through post or by telephone. Furthermore, the Office of the Ombudsperson's website has a complaint template which makes the composition of a complaint easier for the citizen.⁶² The submission of a complaint is not subject to any fee.

Once submitted, complaints are subject to a preliminary eligibility test. This process takes into consideration whether or not the complaint is i) anonymous, ii) whether it is poorly or not at all substantiated and iii) whether it is a complaint based on a pending legal process (although the latter criterion does not prevent the investigation of the general problems set out in the submitted complaints). If any of the three elements described are identified, the complaint will not be admitted, though this must be communicated through a ruling which indicates (when possible) if there are other ways for the claim to be validated. This decision cannot be appealed (Congreso de la República, 1995: Article 19).

Articles 21 and 24 of the Organic Law (Congreso de la República, 1995) describe the procedure which should be followed for a complaint. It is important to indicate that, in accordance with Article 31 the actions of the Office of the Ombudsperson are irreversible in court and can only be reconsidered by the Ombudsperson him/herself.

To summarise, once accepted, the complaint must be referred to the state body that is the subject of the complaint, with the relevant body being given a maximum of 30 days to provide a written response (this period can be extended). If the body under complaint does not respond, then the Office of the Ombudsperson will make a second request, with a time period of five days to respond before the request is made to open the appropriate disciplinary proceedings.⁶³ If, as a result of the operations of the Office of the Ombudsperson, it has been acknowledged that a breach of rights has taken place, the Office of the

⁶⁰ Information available at <http://www.defensoria.gob.pe/preguntas-frecuentes.php#a3>, frequent question No. 3, (accessed on 30th July, 2015).

⁶¹ Available at <https://puma.defensoria.gob.pe/form-queja.php> (accessed on 30 July 2015).

⁶² Available at <http://www.defensoria.gob.pe/modelo-queja.php> (accessed on 30 July 2015).

⁶³ In accordance with article 21, the opening of disciplinary proceedings does not apply in the case of the Presidency of the Republic, representatives of Congress, Ministers of State, members of the Constitutional Court, members of the National Council of the Magistracy, chairs of the Supreme Court, Supreme Prosecutors, the Comptroller General, members of the National Electoral Board, the head of the Office for Electoral Proceedings and the head of the Office of Identification and Civil Registry.

Ombudsperson may (through an Ombudsperson Resolution) draw up cautions, recommendations, reminders of legal obligations or suggestions for the adoption of new practices, which should be handed to the authorities, civil servants and employees of the public administration in question.

On the other hand, if the complaint is not related to the malpractice of a body of public administration, but rather the personal conduct of a civil servant, the Office of the Ombudsperson will inform the civil servant who is the subject of the complaint, with evidence handed to his/her immediate superior in the hierarchy and to the head of the corresponding state administration, giving them a minimum timeframe of 6 calendar days to respond. If, as a result of the investigation of the Office of the Ombudsperson it emerges that personal misconduct on the part of the civil servant has occurred, the Ombudsperson will address the immediate hierarchical superior or the body of public administration to which the person who is the object of the complaint belongs, letting them know the results of the investigation and his/her recommendations on the matter. A copy of the correspondence will be sent directly to the person or body affected by the misconduct (Congreso de la República, 1995: Article 24).

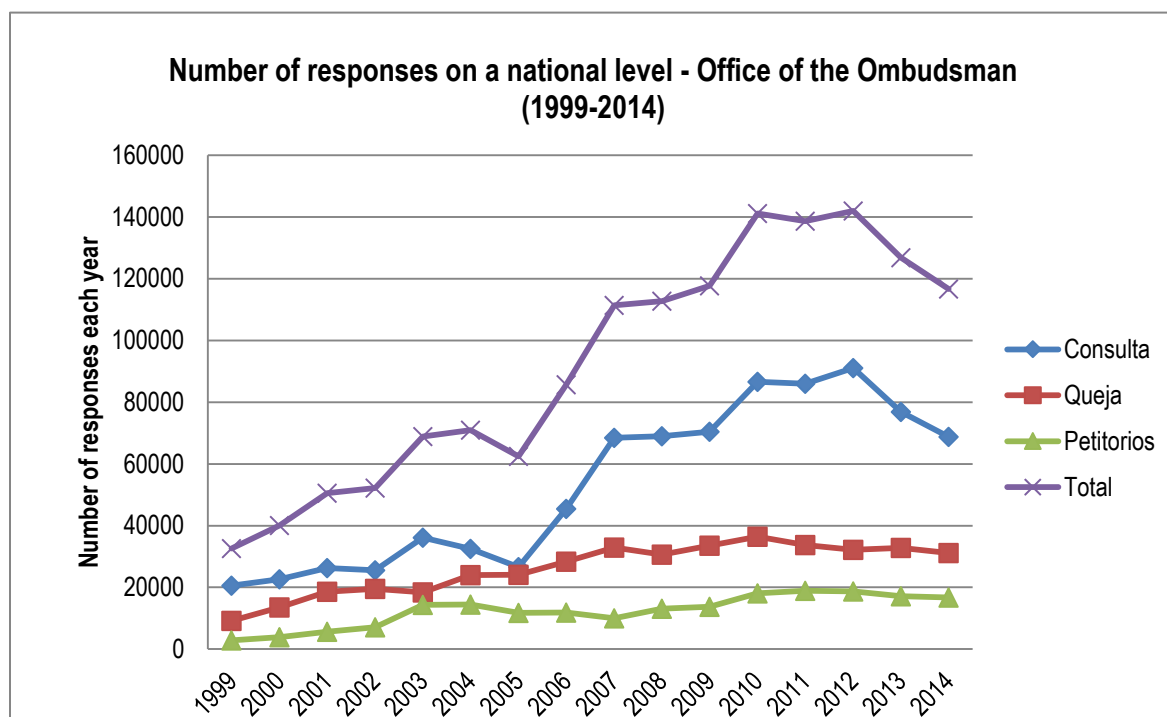
With regard to the number of cases attended to, the Ombudsperson has information for each year between 1999 and 2014 available on its website. The table and graphic below has been constructed using this information.

Number of responses on a national level – Office of the Ombudsperson (Defensoría del Pueblo 1999-2014)

Year	Enquiries	Complaints	Petitions	Total
1999	20 576	9 119	2 848	32 543
2000	22 648	13 549	3 876	40 073
2001	26 220	18 630	5 670	50 520
2002	25 557	19 526	7 097	52 180
2003	36 129	18 410	14 374	68 913
2004	32 449	24 018	14 440	70 907
2005	26 538	24 088	11 793	62 419
2006	45 467	28 297	11 894	85 658
2007	68 416	32 920	10 001	111 337
2008	68 964	30 615	13 115	112 694
2009	70 455	33 497	13 691	117 643

2010	86 631	36 388	18 048	141 067
2011	85 960	33 696	18 939	138 595
2012	91 000	32 171	18 731	141 902
2013	76 821	32 747	17 190	126 758
2014	68 786	31 189	16 696	116 671

Prepared by the authors. Source: Annual reports of the Office of the Defensoría del Pueblo (2015a)



Prepared by the authors. Source: Annual reports of the Office of the Ombudsperson (Defensoría del Pueblo, 2015a).⁶⁴

As the table and graphic shows, the number of inquiries, complaints and petitions has increased over the years, particularly since 2010. This may well have to do with factors regarding the development and progression of the Office of the Ombudsperson. For example, the budget (understood as the ordinary resources and the cooperation funds the Office might have) has been increasing substantially since the office was established. For example, in 1999 the budget was about 15 million Nuevos Soles,⁶⁵ whereas in 2014, it was over 50 million Nuevos Soles⁶⁶ (Defensoría del Pueblo, 2015a: 307-308). This allows the Office to hire more staff and have better and more efficient working methods. The prestige and corresponding

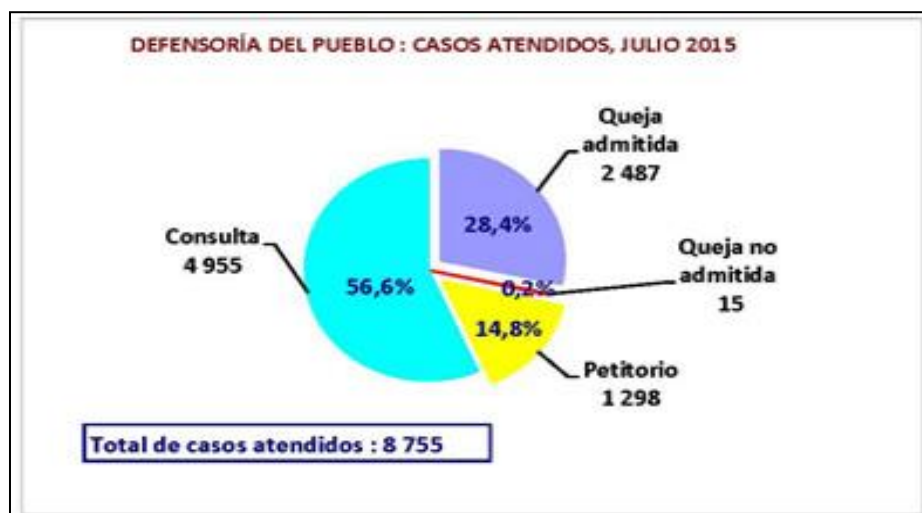
⁶⁴ Translation: Consulta = Enquiry; Queja = Complaint; Petitorios = Petitions

⁶⁵ Approximately 3.8 million Euros.

⁶⁶ Approximately 12.8 million Euros.

increased responsiveness of the Office therefore also encourages many citizens to take their claims there. Finally, it must be taken into account that, back in April 1999, the Office only had representation in six cities (Lima, Arequipa, Ayacucho, Callao, Trujillo and Cusco) (Defensoría del Pueblo, 2000: 29). Currently, the Office has representation in every region of the State. That is also a key factor explaining the rise in the number of responses.

In July of 2015 alone the Office of the Ombudsperson attended to 8,755 cases, distributed in the following way:



Source: (Defensoría del Pueblo, 2015j)⁶⁷

The distribution of the cases shows that one of the main tasks in the Office is to help citizens understand how the State offices work. The complaints represent over a quarter of the procedures and indicate also that the population trusts the Office to help them with what they consider a breach of rights. As can be seen, the number of cases that are not admitted is quite small (0,2%) which reflects the fact that the Office takes all complaints seriously and that the citizens are predominantly reporting serious and well-founded complaints.

In spite of the great efforts made by the Office of the Ombudsperson, it is important to highlight that it has limited capacities to handle the vast number of cases. People who have presented claims before the Office of the Ombudsperson reported that the process takes quite a long time. Moreover, there are many instances in which the Office of the Ombudsperson could not carry out an adequate monitoring process concerning the implementation of recommendations formulated at the end of a complaint case.

c) Intervention in constitutional processes

As has been indicated, in accordance with article 9.2 of the Organic Law of the Office of the Ombudsperson (Congreso de la República, 1995: Article 9.2), the Ombudsperson can file Habeas Corpus, legal protection, Habeas Data, popular petition and petition for compliance in protection of fundamental and constitutional

⁶⁷ Queja admitida = accepted complaint; Queja no admitida = Non-accepted complaint.

rights of the individual and the community.⁶⁸ From 1996 until now, the Office of the Ombudsperson has filed 24 claims of unconstitutionality (Defensoría del Pueblo, 2004b).⁶⁹ Of these, thirteen have been declared justified or partly justified, two without grounding, seven improper, and in two cases the judicial authority decided against declaring an outcome as the case had been deemed resolved. The Constitutional Court was made aware of each claim. The Deputy Branch for Constitutional Affairs is responsible for launching these claims and overseeing the process.

As the Office of the Ombudsperson itself has indicated, this right should be (and has been) used to a limited extent. As such, the institution itself has set out certain criteria to determine its course of action in these cases (ibid). These criteria are:

- That no other possible means to guarantee constitutional rights exists (so to speak, all possible ways to warn the relevant entity have been exhausted.)
- That there is a clear and evident breach of constitutional rights or principles.
- That the person whose rights have been breached is in a vulnerable situation.
- That the issue has a particularly special significance which could contribute to setting an important precedent.

Related to its ability to file constitutional claims, the Office of the Ombudsperson can also intervene in these processes, and has done so on a few occasions, as a 'third co-adjudicator' or through the procedure of *amicus curiae*, both in front of national courts as well as bodies of the Inter-American System of Human Rights Protection (Defensoría del Pueblo, 2009b: 59).

On the other hand, it is possible that in exercising its powers, the Office of the Ombudsperson can refer complaints it has received to administrative disciplinary proceedings or penal jurisdiction. While the possibility of referring a case to the Public Prosecutor is specifically referred to in article 28 of the Organic Law of the Office of the Ombudsperson (Congreso de la República, 1995),⁷⁰ the legal authority to refer cases and even represent victims in administrative disciplinary proceedings derives from article 9.3, which sets out the capacity the Ombudsperson has to:

Initiate or participate in, through its own motion or by request, any administrative proceeding in representation of a person or a group of people in the name of the defence of constitutional and fundamental rights of the individual and the community.

⁶⁸Article 203 of the Political Constitution (1993) furthermore explicitly signals that the Office of the Ombudsperson has the power to file claims of unconstitutionality.

⁶⁹ See further information in Defensoría del Pueblo (2009a). Although on the website no further information is given on constitutional processes, in Defensoría del Pueblo (2004b) the organisation indicates that it also filed two popular claims.

⁷⁰Article 28: When the Ombudsperson, through the exercising of the roles of his post, becomes aware of conduct or incidents which appear to be criminal, he will pass on the documents which contain evidence of it, to the Public Prosecutor so that the appropriate lawyer can proceed appropriately with his assignment.

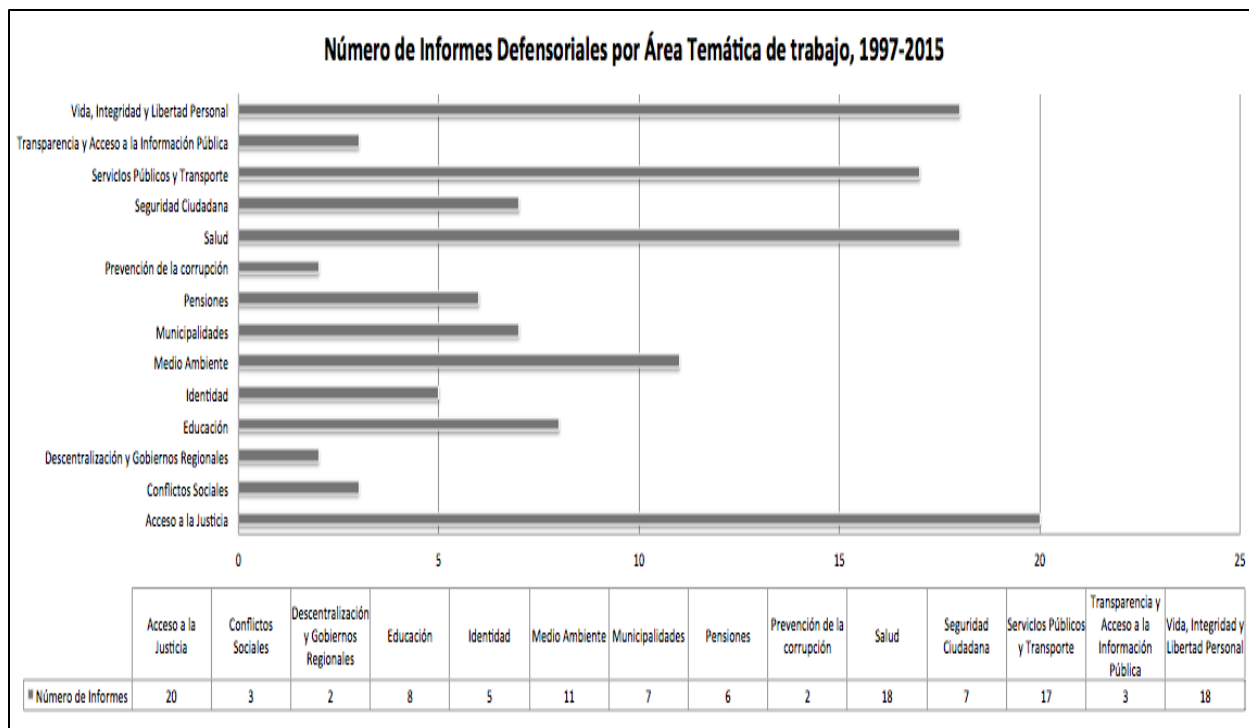
This rule allows one to conclude, firstly, that it is possible for the Office of the Ombudsperson to take up the representation of someone not only in the judicial stage of proceedings of a constitutional process, but also in administrative proceedings. However, one might ask if the proceedings to which such rules refer to processes that should result in a restoration of rights, or if it is possible to conduct administrative disciplinary proceedings, which may have the added value of acting as a deterrent to future violations. In our interpretation, the purpose of the Office of the Ombudsperson is defending the constitutional and fundamental rights of the individual and the community, and overseeing the compliance with duties and delivery of public services on the part of public administration. In that way, considering that the administrative proceedings which article 9.3 refers to are those which are orientated not only to the defence of individual rights, but also those of the community; is possible to interpret the mandate of the Office of the Ombudsperson as being empowered to conduct administrative disciplinary proceedings or, even, represent people in such proceedings, in order to have a 'preventative' effect on future violations.

d) Production of reports

The Office of the Ombudsperson produces two types of report: Ombudsperson's reports and deputy branches' reports. The fundamental distinction between the two, according to the Office of the Ombudsperson, is that the former are constructed based on the details of specific cases, while the latter address problematic issues connected to human rights but not necessarily based on the content of cases dealt with (Defensoría del Pueblo, 2015h).

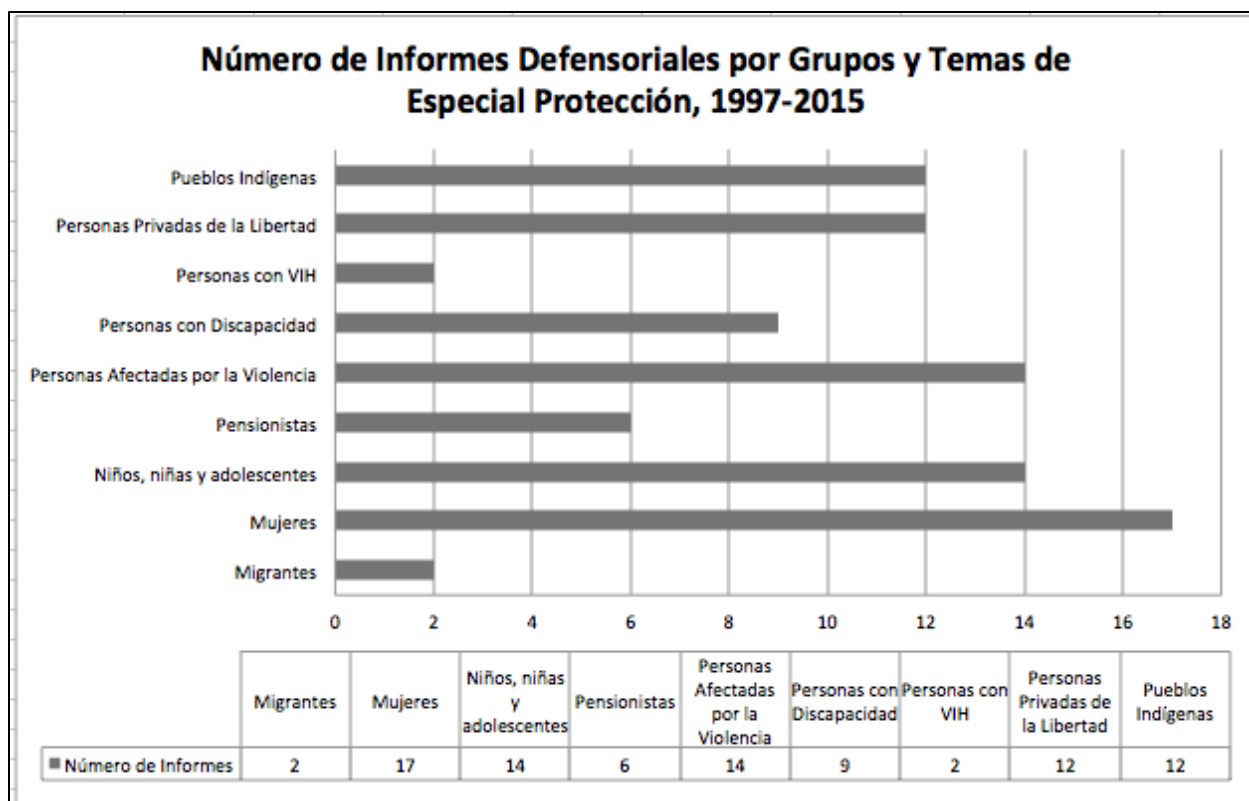
To this day, the Office of the Ombudsperson has produced 171 Ombudsperson's reports and 74 deputy branches' reports (Defensoría del Pueblo, 2015h). The reports may have national scope or can hone in on a particular region or regions of the country. Although there is no standardised methodology or a predetermined format for the production of reports, it is possible to identify a basic structure which they all share: i) presentation of constitutional mandate, ii) national and international framework relevant to the topic of the report, iii) findings of the report, and iv) recommendations for the public administration body. All of the Ombudsperson's reports are approved by Ombudsperson Resolution, which contains the recommendations recorded in the report.

Based on a systematic breakdown of the content of reports up until now, the following results have been identified. They are ordered according to the themes addressed and the groups of people which they refer to.



Translation: Numero de Informes Defensoriales por Area Tematica de trabajo = Number of Ombudsman’s reports per thematic area dealt with; From top to bottom: Life integrity and personal freedom; Transparency and access to public information; Public services and transport; Public safety; Health; Corruption prevention; Pensions; Municipalities; Environment; Identity; Education; Decentralisation and regional governance; Social conflicts; Access to the justice system; Numero de informes = Number of reports.

Source: Annual reports of the Office of the Ombudsman (Defensoría del Pueblo, 2015a)



Title: Number of Ombudsman’s reports by group and issue of special protection, 1997-2015; From top to bottom: Indigenous people; Incarcerated or interned people; People with H.I.V.; People with disabilities; People affected by violence; Pensioners; Children and adolescents ; Women; Migrants.

Source: Annual reports of the Office of the Ombudsman (Defensoría del Pueblo, 2015a)

Even though it is clear that access to justice, health, and the rights to life, bodily integrity and liberty are the most frequent topics, as well as womens rights, it is difficult to state a trend. There are different explanations on why a report is drafted. Sometimes it is because the issue is being discussed in the public space. Other times it is because of the high number of complaints against one institution (that is the case with the social security reports) (Defensoría del Pueblo, 2008a: 22). However it is also the case that, on many occasions, the Office of the Ombudsman issues a report because they have received funding from an international cooperation fund aimed at the protection of a specific group of people. For example, in the case of Report 135, related to public social security, the funding was given by the Belgium Technical Cooperation (Defensoría del Pueblo, 2008a: 9).

Of these reports, some are responsible for the monitoring of national action plans and policy and as such are published with a certain regularity. For example, the 2003 implementation of recommendations adopted by the Peruvian Commission for Transparency and Reconciliation was followed-up by several reports (Defensoría del Pueblo, 2004a, 2005b, 2006, 2007b, 2008b, 2013a). In the same way, the policy of intercultural bilingual education (Defensoría del Pueblo, 2011b) and inclusive education (Defensoría del

Pueblo, 2007a) have also been monitored through two reports each. The same occurred with the Law on Transparency and Access to Public Information (Defensoría del Pueblo, 2013c and 2011c, respectively).

The study of the texts of certain Ombudsperson's reports confirms the interdisciplinary approach taken in their production. As an example, the Ombudsperson's reports on intercultural and bilingual education as regards indigenous persons (Defensoría del Pueblo, 2011a) and on inclusive education (Defensoría del Pueblo, 2011b), and in general all those which oversee care centres and the delivery of public services (health/education etc.) take into account the statistical methodology used, and as such the results can be generalised on a national level with a high degree of reliability. In addition, in Report 150 on the rights of children and adolescents with respect to residential care centres (Defensoría del Pueblo, 2010b), it is indicated that the first chapter (related to perceptions of minor and adolescent residents of such care centres) was produced in collaboration with the relevant expertise of a doctor with a master's degree in public health.

With regard to the deputy branches' reports, they too refer, on the one hand, to issues on a national level, but also focus in on the monitoring of specific policies or rules. In this way, the Law on Equality of Opportunities between Men and Women was the focus of a seventh monitoring report in 2014. Others, like the report on 'Monitoring of the condition of vital infrastructure in traffic accident hotspots', were carried out in more than one city (Lima, Callao, Trujillo), demonstrating the nature of the problem nationwide (Defensoría del Pueblo, 2014, 2015c). In addition, the recommendations of the Ombudsperson's reports are supervised through the reports of the deputy branches. This is the case for the monitoring report of the Recommendations of the Ombudsperson's Report No. 146 'Migration and Human Rights' (Defensoría del Pueblo, 2010a).

Nonetheless, the Office of the Ombudsperson, in addition, must deliver an annual report to the Congress of the Republic in accordance with Article 162 of the Constitution. Furthermore, as part of its activities, it produces other publications. Some of these, such as the Report on Social Conflicts, are published on a monthly basis.

3. Interaction of the Office of the Ombudsperson with the United Nations

The Office of the Ombudsperson, within the framework of the monitoring work it does, maintains a certain level of coordination with bodies of the United Nations. This is the case with the High Commissioner for Human Rights, with whom the Office of the Ombudsperson shared information regarding the production of the report on the education of people with disabilities (United Nations, OHCHR, 2015). However, the Office of the Ombudsperson has no defined protocol for carrying out this type of collaboration.

In addition, there are two issues linked to the United Nations which are particularly relevant for the work of the Office of the Ombudsperson. The first of these is the National Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since 2006, Peru has been part of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. However, on the 30th January 2015 after several years of advocacy, Congress approved a Law number 30394, which increased the powers of the Office of the Ombudsperson to the effect of establishing it as the body responsible for the aforementioned mechanism (Congreso de la

República, 2015). Once this law was passed by Congress (in accordance with the process of adopting laws in Peru), it was submitted to the Executive Authority for any amendments or for enactment. However, the Executive Authority maintained the status quo by deeming that the budget necessary to implement the mechanism had not been included in the General Law of the National Budgetary System. This ignored the fact that, as indicated in the bill, the costs derived from its implementation would be taken up by the Office of the Ombudsperson's own budget (Prado, 2015). To this date the process has remained blocked.

The second issue is the implementation of the mechanism for promotion, protection and monitoring of the application of the Convention on the Rights of People with Disabilities, provided for in Article 32(2) of the said instrument. To this date the mechanism has not been formed, and it is unclear whether the will exists on the part of the State to officially make it part of the Office of the Ombudsperson. However, the Programme of the Defence and Promotion of Rights of People with Disabilities of the Office of the Ombudsperson is perhaps the area of government with the greatest experience in this topic and the highest capacity to monitor the implementation of the Convention.

4. Monitoring with other state institutions

In general, the Office of the Ombudsperson has wide powers to supervise and monitor Public Administration. Although other bodies have this power with regards to certain areas or state provided services, there is no firm setting of limits regarding the extent of the Office of the Ombudsperson's responsibilities and those of other entities. By means of an example, the National Institute for the Defence of Competition and Intellectual Property (INDECOPI), can solve claims for discrimination in consumption relations. As part of this competence, INDECOPI has attend cases on discrimination in public schools. This is also a possible intervention area for the Office of the Ombudsperson.

In the same way, it must be noted that in Peru there is a National Superintendent of Sanitation (SUNASS) and a National Superintendent of Health (SUSALUD). The latter undertook a study throughout 2013 on the opinions of health service users on the topic of Universal Health Insurance in the Apurímac, Ayacucho, Huancavelica, Lima (including Callao), Loreto, Piura and San Martín regions (SUNASA 2013). This same year, the Office of the Ombudsperson published the Ombudsperson's report No. 161 (Defensoría del Pueblo, 2013b), the Road to Universal Health Insurance: Results on the national monitoring of hospitals, with a national reach.

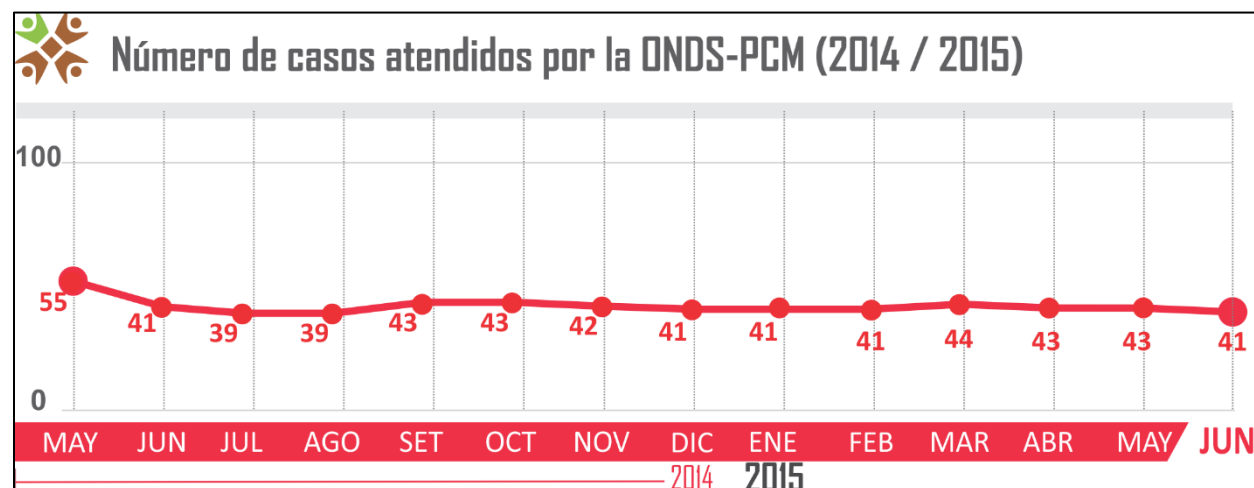
In many cases, furthermore, the task of monitoring not only produces supplementary results, but also contradictory ones. This is the case of the monitoring of social conflicts, undertaken by the Office of the Ombudsperson's unit of Social Conflicts and the National Office of Dialogue and Sustainability of the Presidency of the Council of Ministers. According to the latter, for example, up until June 2015, 41 cases of social conflict were handled, whilst the Office of the Ombudsperson indicated that there were 210 cases in the same time period. If a comparative analysis of the monitoring done in the past year is undertaken, it is possible to observe the differences.

Monitoring of social conflicts – Defensoría del Pueblo



Source: Annual reports of the Office of the Ombudsman (Defensoría del Pueblo 2015k):⁷¹

Monitoring of social conflicts – Presidency of the Council of Ministers



Source: National Office of Dialogue and Sustainability (2015)⁷²

5. The relationship between the Peruvian Office of the Ombudsman and the European Union⁷³

Peru and the EU maintain financial and technical cooperations based on their commercial (Free Trade Agreement) and political (Rome Declaration and the Political Dialogue And Cooperation Agreement)

⁷¹ Translation: Title = Monitoring of social conflicts – Office of the Ombudsman; Frecuencia de los conflictos sociales = Frequency of social conflicts; Casos registrados mes a mes = Cases registered month to month.

⁷² Translation: Numero de casos atendidos por la ONDS-PCM = Number of cases attended to by the National Office of Dialogue and Sustainability – Per Month.

⁷³ This information was obtained from an interview with Aurora Riva, Head of the Office of Strategic Development and International Cooperation of the Office of the Ombudsman, which was conducted for this research.

agreements developed since the early 1990s. The cooperation instruments between the European Union and Peru are the following:

Documents	Year
Framework Cooperation Agreement	1993
Rome Declaration	1996
Political Dialogue And Cooperation Agreement between the European Community and its Member States	2003
Memorandum of Understanding between the Republic of Peru and the European Commission	2009
Trade Agreement between the European Union and Colombia and Peru	2010 (in force since 2013)

Apart from this legal framework, there are two specific documents for the determination of the priorities for cooperation:

- Country Strategy Paper 2007-2013, for bilateral cooperation (European Commission, 2007).
- Roadmap 2014-2020, which defines the priorities and the actions for the articulation between the European Union and the Peruvian civil society.

Besides these instruments, the EU also executes its cooperation actions through the following instruments and programs: (1) the thematic programme *Non-state actors and local authorities in development (NSA-LA)*, (2) the *Global Public Goods and Challenges (GPGC)*, (3) the *European Instrument for Democracy and Human Rights (EIDHR)* and (4) the *Instrument for Stability (IfS)*.⁷⁴

The institutional relationship between the EU and the Office of the Ombudsperson has revolved around the common objective of the promotion and protection of human rights in Peru and also around the promotion of good governance practices by the authorities. Specifically, there are three main concrete experiences of cooperation that the Office of the Ombudsperson has executed with funds awarded by the EU:

(1) Protection of the victims of political violence and monitoring of transitional justice policies

As a product of the armed violence and the human rights violations that took place during the 1980s and 1990s in the country, the Peruvian State started a transitional justice process which aimed at providing compensation for the victims, implementing institutional reforms and seeking reconciliation among the Peruvian society. Because of the importance and enormity of these actions, the final report of the Truth and Reconciliation Commission (TRC) charged the Office of the Ombudsperson with the task of monitoring

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See http://eeas.europa.eu/delegations/peru/eu_peru/tech_financial_cooperation/thematic_prog/index_en.htm#Intro (accessed on 15 November 2015).

the compliance of the final recommendations included in the said document and also with the task of accompanying the actions that the state takes on this matter.

Within this framework, under the initiative of the United Nations Development Programme (UNDP) and with the funding of the EU, the project *Apoyo a la Defensoría del Pueblo en el seguimiento de las recomendaciones de la Comisión de la Verdad y Reconciliación* was created and carried out between 2006 and 2007. The funding received 832,412.00 Euros from the EU and 226,913.00 Euros from the Office of the Ombudsperson (PNUD, 2007). The main objective of this initiative was to strengthen the capacity of the Office of the Ombudsperson to monitor the recommendations made by the TRC and to promote the inclusion of these topics in the national agenda.

The products and activities of this project include:

- A report on the policies adopted by the state with regard to reparation and reconciliation, as well as the pending tasks on said matters (Defensoría del Pueblo, 2008b).
- A national documentation campaign for victims of political violence in the twelve regions most affected by the violence in Peru. As a result, the documentation of 20,640 people and the procurement of 5,371 birth certificates of adults, children and teenagers were obtained in 2006; while in 2007, the documentation of 18,121 men and women and 2,741 children and teenagers were achieved.

In the UNDP's evaluation report (PNUD, 2007), it is noted that, as a result of the project, the Office of the Ombudsperson strengthened its operational capacity for compliance with the legal regularisation process of forced disappearance, and the process and provision of identity documents for the population that was affected by said violence. As part of these results, the UNDP highlights the efficiency of the joined work of the Office of the Ombudsperson and the National Identity and Civil Status Registry. At the same time, the project allowed the establishment of an Information Center that makes it possible for the public to know about the compliance process with TRC recommendations.

Whilst this project had direct support from the EU, the UNDP served as the intermediary for its execution. Nevertheless, taking into consideration the positive outcomes of the project, years later, the EU worked with the Office of the Ombudsperson in another project, in which the later one was the direct executor.

(2) Identity and citizenship

Despite the fact that the percentage of undocumented people in Peru was progressively decreasing as a result of the actions of the Office of the Ombudsperson and the State's policies since 2005, in the year 2001 still a considerable part of population in poverty lived undocumented in the rural and marginal-urban areas. Because of this fact, and thanks to the positive achievements of the previous work, the EU awarded the Office of the Ombudsperson funding for the implementation of the project *Proyecto de inclusión social: identidad y ciudadanía 2010-2012*.

This initiative included a strategic alliance with the National Identity and Civil Status Registry, through an Inter-Institutional Coordination Agreement, with the aim of supporting its actions in order to increase the

registration of people without documentation in Peru. In order to achieve a greater impact on the most vulnerable part of the population, the project focused on the regions of Apurímac, Ayacucho, Cajamarca, Cusco, Huancavelica, Huánuco, Junín, Puno and Ucayali. As a result, 385 public institutions that are part of the documentation project were monitored, which enabled these institutions to correct the problems that were identified in the documentation process.

Nonetheless, despite the positive results of this project, there were a series of tensions and issues during its implementation. Firstly, even if the direct participation of the National Identity and Civil Status Registry and other institutions was vital to achieve the goals of the project, the EU was reluctant to accept a multiplicity of responsible actors, and sought to articulate the work solely through the Office of the Ombudsperson. This situation created many coordination problems with various basic actors for the execution of the program. Eventually, the problems were solved, but it is the opinion of the Office of the Ombudsman that the process would have been more efficient if other entities, such as National Identity and Civil Status Registry, had been able to play a greater role.

Secondly, the procedure established by the EU for the execution of the project was incredibly cumbersome for the Office of the Ombudsperson. The reason was that it was obligatory for the institution in charge to hire a big consulting firm to undertake certain functions. However, this was not the work methodology of the Office of the Ombudsperson. On the contrary, it directly hires individual consultants, whom are supervised by its staff.

Finally, there were also economic problems. The EU's cooperation requirement demands at least 10 percent of the budget to come from the state, the internal procedures and authorizations often delayed the execution of the project. This happened in the present project, because the Ministry of Economy and Finances delayed the authorisation of the budget, which slowed down its implementation.⁷⁵

(3) Migration

The Project *Perú and Beyond: promoviendo los derechos de los migrantes y fortaleciendo la lucha contra el tráfico ilegal de migrantes de Perú hacia la Unión Europea 2011-2014* (Perú Migrante) was implemented in 2011 with the goal of promoting the rights of Peruvian citizens and strengthening the fight against illegal migrants from Peru to the EU. This initiative sought to reduce legal, social and economic vulnerabilities of actual and potential migrants – especially those in the context of illegal trafficking and undocumented migration. Moreover, it was aimed at promoting mechanisms of protection of the rights of migrants and articulating the initiatives of the civil society organisations and the public entities linked to migratory process, for example by sensitising the people in charge of dealing with complaints, petitions and enquiries on possible rights violations that can be suffered by migrants.

⁷⁵ It is important to note that the approval of a European Union funding requires, for the Peruvian government, a positive evaluation from the Agencia Peruana de Cooperación Internacional, a positive evaluation of the entity that receives the funds, one from the Ministry of Foreign Affairs and one from the Ministry of Economy and Finances. This process takes approximately four months.

The latter was a major project executed by the Office of the Ombudsperson with the support of the EU. In 2014, there was a proposal for financing another project in this area. However, the Ministry of Economy and Finances released an unfavorable report for said project and the cooperation could not be established.⁷⁶ Nevertheless, the relationship between these two parties has been maintained with smaller projects in other areas. To this day, there is a cooperation with the European Commission, through the Eurosocial program, for the improvement of the situation of public information in Peru. With regard to this work, currently there are three projects being executed: (i) *Supervisión del cumplimiento de los cambios al reglamento de la Ley de Transparencia y Acceso a la Información Pública*, which seeks to contribute to the proposal for the reformation of the system of sanctions enshrined in the Ley de Transparencia y Acceso a la Información Pública (Transparency and Access to Public Information Law); (ii) *Análisis comparado de regímenes sancionadores para elaborar una propuesta de reforma del régimen sancionador de la Ley de Transparencia y Acceso a la Información Pública*, which aims to contribute to the reform of the system of sanctions established by said law; and, finally (iii) *La interpretación y aplicación del régimen de expresión al derecho fundamental de acceso a la información pública*, which seeks to establish criteria and guidelines for an adequate development of the work regarding the right to access to public information in Peru.

6. Conclusions on the work of the Office of the Ombudsperson

The work of the Peruvian Office of the Ombudsperson has undoubtedly accompanied various important moments in the fight for the protection and regulation of rights. The Office of the Ombudsperson itself highlights several of its contributions on its website, while ex Ombudsman Walter Aban also highlights the importance and national relevance of this institution's work, which in several cases has overcome difficult situations, both political and economic (Defensoría del Pueblo, 2015i). Despite this, it is hard to identify a continuity and sustainability in its work, which would allow a depiction of the different stages of a PRIME analysis. Political and social circumstances in some ways shape the Office of the Ombudsperson's agenda, but restrictions on economic resources, without doubt, form a barrier to the fulfilment of the adequate development and monitoring of nationwide measures.

In any case, beyond visible actions, it is possible to identify certain themes within the framework of rights protection in which the institution finds itself particularly involved. In accordance with the information available on its website, these themes are presented in the following table. It is worth mentioning that the table has been drawn up (including the way it is structured) based upon the information recorded on the website. However, a closer look leads to two conclusions: i) the themes are not wholly comprised of rights of the citizen (for example, 'public safety': 'corruption prevention' or 'public services', and ii) some categories overlap with one other (for example 'public services' with 'health' or 'education'.) In addition, the variable of 'vulnerable' groups (women, indigenous people, and people with disabilities) are considered within the large theme of 'non-discrimination' and not as part of an integrated approach used in all the themes tackled by the Office of the Ombudsperson. This lack of integration is noticeable in the institution's work. By means of an example, if one looks over reports 152 (Defensoría del Pueblo, 2011a) and 155 (Defensoría del Pueblo, 2011b), concerning intercultural bilingual education and inclusive

⁷⁶ Interview with Malin Ljunggren Bacherer, in charge of Thematic Programas. Development Cooperation section of the European Union Delegation in Peru, conducted because of this investigation.

education respectively, it is evident that there is no joint approach. Furthermore, it is surprising that there is no gender perspective included in the majority of the studies.

Themes	Specific Areas
Life, Integrity and Personal Freedom	Negligence on the part of the authorities Arbitrary Arrests
Health	Supply of medication Access to and good treatment in health
Education	Free education Access to and quality of education
Public Services and Transport	Lighting Water Public transport Telecommunications
Environment	Pollution Sewage Sustainable use of resources
Corruption prevention	Promotion of public ethics
Transparency and access to public information	Supervision of channels of transparency
Public Safety	Supervision of Commissioners
Social Conflicts	Social Conflict Monitoring Systems
Identity	Access to I.D. documents
Discrimination	Afro-Caribbean Population Equality of opportunities
Access to the Justice System	Recommendations for improving the justice system

Municipalities	Complaints from neighbours Taxes Services
Decentralisation and Regional Governments	Autonomy Transfer of powers to regional governments
Pensions	Timely access to a pension

*Author's own diagram.*⁷⁷

Another consideration in the Office of the Ombudsperson's capacity to be influential, which has diminished in recent years, is the ongoing interim nature of the position, and the failure to appoint a new Ombudsperson. The interim Ombudsman has been in the post for more than four years and the appointment of a new civil servant is not foreseeable within the short or medium term, given the lack of any political agreement from Congress. Without discrediting the work of the interim Ombudsman, the precariousness of his position would limit the possibility to wade in on controversial issues, with a desired formal appointment in mind. Furthermore, the temporary character of the position limits the possibilities of carrying out long-term strategies.

Finally, the Office of the Ombudsperson's work is structured on the basis of different variables, which do not always take into consideration the need to monitor recommendations formulated in advance. For example, the Informe Defensorial 155 on inclusive education (Defensoría del Pueblo, 2011c) was elaborated in 2011. This was the second report on this matter, the first one being the Informe Defensorial 127, which was released in 2007. However, between 2007 and 2011, the Office of the Ombudsperson did not constantly monitor the policies on inclusive education in Peru. That is the reason why these two reports are just a portrait of the status quo of these policies at this precise moment, and not the product of a work of continuous supervision. After the release of the Informe 155, the Office of the Ombudsperson has not supervised nor made recommendations to educational institutions regarding inclusive education.

As it has been stated above, a major criterion used to define the Office of the Ombudsperson work agenda is the funding that is obtained from international cooperation such as the EU. Moreover, the specific circumstances will cause that its work agenda will be structured 'by reaction'. This could be a correct approach (because it is natural that said institution should have a capacity to respond to specific contexts), if not because, many times, after the specific circumstances change, that agenda point will be left unattended.

⁷⁷ This table was compiled using data from the website of the Ombudsperson: <http://www.defensoria.gob.pe/> (accessed on 15 November 2015).

Perhaps, the monitoring of social conflicts in Peru is the example in which there is a constant work of supervision and of providing public information. This work is done by the Prevention of Social Conflicts deputy branch, which, to this day, has elaborated 144 reports on social conflicts.⁷⁸

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⁷⁸ Available at <http://www.defensoria.gob.pe/conflictos-sociales/home.php> (accessed on 15 March 2016).

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D. National Monitoring by NHRIs in South Africa⁷⁹

1. Introduction

a) Outlining NHRIs in South Africa

The Constitution of South Africa sets out six independent state institutions to ‘strengthen constitutional democracy’ and promote human rights (Constitution, Section 181(1)). These institutions are the South African Human Rights Commission (SAHRC or Commission); Public Protector; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality (CGE);⁸⁰ the Auditor-General; and the Electoral Commission.

Some of these institutions, including the SAHRC and CGE (i) promote human rights through awareness-raising and education such as campaigns, publications and workshops; (ii) monitor, assess and provide suggestions on the level of compliance of human rights by both public and private entities; and (iii) assist victims of human rights violations in obtaining reparations for human rights abuses by conducting investigations, taking cases to court and/or engaging in alternative dispute resolution.

Benchmarks for the establishment of these institutions (popularly called ‘Chapter 9 institutions’)⁸¹ were drawn from existing monitoring institutions worldwide. For instance, the notion of the Public Protector can be traced back to the 1809 Ombudsman launched in Sweden to investigate state officials for corrupt practices (Murray, 2006: 127).

Nonetheless, the notion of autonomous NHRIs is contemporary, and the international yardstick for their composition, mandate and *modus operandi* was only published in the 1993 ‘Paris Principles’ adopted by the United Nations (UN). For this reason, the SAHRC and the CGE, which to a great extent possess clear human rights mandates, are modelled on the Paris Principles. It is important to indicate however, that the SAHRC is the only national human rights institution designated by the 1996 Constitution and the Human Rights Commission Act 54 (HRCA) to protect and promote the basic rights and freedoms of South Africans as set out in the Bill of Rights under the Constitution (Beredugo, 2014: 207).

According to the Paris Principles, NHRIs shall be vested with the competence to investigate any situation of a violation of human rights and to examine legislative proposals and make recommendations to ensure that they are in conformity with international human rights standards (Art 3(a)(ii)). Consequently, both the SAHRC and the CGE are entrusted with the mandate to research, educate, receive complaints, monitor, investigate, make recommendations, and report on human rights matters. The importance of these mandates cannot be overemphasised, especially in view of the lack of knowledge of some on how to protect their fundamental rights, the lack of information on the appropriate legal remedies, and the

⁷⁹ This chapter was drafted by Bright Nkrumah, Researcher at the Centre for Human Rights, Faculty of Law of the University of Pretoria.

⁸⁰ Like the SAHRC, the CGE is an autonomous human rights institution with specific mandate to safeguard women’s rights from gender oppression and inequality. It draws its mandate from the South African Constitution and the Gender Equality Act of 1996.

⁸¹ Chapter 9 institutions are a group of institutions established in accordance with Chapter 9 of the South African Constitution to safeguard and advance human rights and democratic governance.

lack of suitable information on how to pursue or seek legal remedies. Through strategies stretching from human rights education, public awareness, advocacy, research, conferences, training and seminars to awareness campaigns, these NHRIs therefore fulfil the informational needs of South Africans in terms of the Constitution and the channel of seeking redress for violations endured.

In Section 181(1), the Constitution of South Africa asserts in unequivocal terms the autonomy and status of these institutions. Specifically, it guarantees that these 'institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Again, it obliges '[o]ther organs of state, through legislative and other measures, [to] assist and protect these institutions to ensure [their] independence, impartiality, dignity and effectiveness' (Section 181(3)). Furthermore '[n]o person or organ of state may interfere with the functioning of these institutions' (Section 181(4)) which are solely accountable to the 'National Assembly' (Section 181(5)). Clearly, by securing the autonomy of these institutions and situating them outside the ambit of government, the Constitution seeks to depoliticise the matters which they handle (Beredugo, 2014: 208).

Despite their distinct mandates and responsibilities, the grouping of these institutions under a common heading cannot be envisaged as coincidental. Two reasons can be advanced for this strategy. First, they share a joint objective of being instrumental in the transformation of the country into a regime where fundamental human rights and democracy thrives; and second, they provide checks on government excesses (Murray, 2006: 125). Nonetheless, due to the overarching mandates and responsibilities of all these institutions, their respective roles in promoting human rights cannot be covered in a single case study. Accordingly, the focus of the paper will be on the monitoring role of the SAHRC in ensuring government's compliance with its human rights obligations.

In light of its strong legal foundation in terms of the Paris Principles, the SAHRC exists as a permanent state institution to which all South Africans look, for the protection and promotion of human rights as entrenched under the Bill of Rights (Thipanyane, 2007: 11). For this reason, this paper assesses the role of the SAHRC in advancing human rights, specifically through its monitoring mechanism. It generally conducts an examination of the mandate, focus areas and measures adopted by the SAHRC to monitor government's implementation of socio-economic rights in South Africa. The paper is divided into three components. The first section discusses the legal foundation, composition, and structural features of the SAHRC vis-à-vis the Paris Principles. This section will highlight some of the Commission's main focus areas in order to determine the extent to which the Commission is committed to advancing human rights.

The second part of the report focuses on the Commission's strategies for monitoring national human rights policies and legislation. The methodology that is applied by the Commission in examining government's compliance with human rights instruments will be discussed. Furthermore, the paper will assess the role that the SAHRC plays in the adoption of legislation in parliament. This part will also consider whether the Commission engages with other Chapter 9 institutions or civil society organisations (CSOs) in its monitoring mandate.

The third section reviews the engagement between the SAHRC and the European Union (EU) in the monitoring and promotion of human rights in South Africa. The aim of this section is to assess the assistance provided by the EU to the SAHRC and if there is any tension arising from this partnership. To this end, the section will provide a summary of the role of the EU Delegation in South Africa, a brief assessment of the engagement between the EU and the SAHRC and how this engagement has unfolded. Finally, the section will assess whether the bilateral engagement between these two bodies has been successful or marked with tension. The paper concludes with recommendations for a positive relationship between the two actors.

In order to effectively assess the relationship between the EU and the SAHRC, the research employed both desk-based and empirical methods. A theoretical and empirical analysis of the SAHRC was conducted on the basis of: (i) desk research of primary and secondary sources. This was used to assess the legal and theoretical underpinnings of the Commission; and (ii) direct interviews with members of the SAHRC and the EU Delegation in South Africa. To have a balanced and fair perspective from both sides, the views of two members from both sides were sought. From the EU Delegation, interviewees were, Aurelie Voix (EU Project Officer) and Mario-Rui Queiro (First Secretary-Political Section). From the SAHRC side, Khulekani Moyo (Head of Research) and Pandelis Gregoriou (Head of Legal Services) were interviewed.

b) Establishment of the SAHRC

The creation of the SAHRC is a result of the tragic historical experience of Apartheid, which denied basic rights and fundamental freedoms to black Africans. In light of the existing discriminatory laws and practices, people of black descent suffered massive human rights violations which entrenched poverty and inequality in the black communities. While whites enjoyed rights and privileges, other population groups were envisaged as not entitled to either equality or human dignity. Accordingly, the Apartheid regime never contemplated the possibility of setting up a human rights institution to address the prevailing wrongs.

On that account, two of the fundamental issues which came to the fore during the political negotiations leading to the transition into a democratic regime were, how to integrate human rights in the new Constitution and, how to safeguard social justice. Terreblanche (2002: 25) observed that the transition unlocked 'for the first time ever, a window of opportunity for restoring social justice for blacks after centuries of social oppression, political domination and economic exploitation.' In order to ensure that 'the appalling human rights abuses of South Africa's past could not be repeated' (Murray, 2006: 124), the drafters of the 1993 Interim and subsequently the 1996 Constitution, found it imperative to nurture and fortify the newly won democracy by entrenching human rights and fundamental freedoms as key tenets of the national norm. A list of civil and political rights as well as socioeconomic rights were entrenched under Chapter 2 of the Constitution (otherwise called the Bill of Rights). To ensure effective compliance with these rights by government – the SAHRC was made one of the fundamental institutions of the interim Constitution which entered into force on 27 April 1994 (Matshekga, 2002: 69).

Following the first democratic elections in 1994, the newly elected Constitutional Assembly drafted the legislation establishing the Human Rights Commission. On 23 November 1994, the then President Nelson Mandela signed the Human Rights Commission Act 54 (HRCA). The HRCA (Section 7(1)(a)-(d)) specifically

reaffirms the SAHRC constitutional mandate, and sets out considerable ancillary measures that the SAHRC needs to adopt to promote fundamental rights. Following the entry into force of the Act in September 1995, the Commission carried out its first working consultation in October 1995 (Matshekga, 2002: 70).

c) Legal anchoring of the SAHRC

The legal status of the Commission is grounded in four legal frameworks. First, the Commission's mandate is entrenched under Chapter 9 of the Constitution. The second instrument is the HRCA which sets out primarily the *modus operandi* of the Commission, the composition, functions and mode of appointing Commissioners. The 2000 Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA, Section 15(2)) equally mandates the SAHRC to monitor the implementation of the right to equality, whilst the Promotion of Access to Information Act 2 of 2000 (PAIA) (Section 85) obliges the Commission to monitor and enhance the implementation of the legal right of citizens to access public records.

In light of its constitutional mandate, the SAHRC can be said to have a strong legal foundation and status, and exists as a permanent state apparatus for the promotion and protection of human rights guaranteed by both domestic and international human rights instruments. Whereas section 184 of the Constitution provides for the establishment and functions of the SAHRC, it is the HRCA (Preamble) which addresses the composition of the SAHRC, by explicitly providing for the appointment of (full-time and part-time) members of the Commission, conferring of certain mandates on Commissioners, and the appointment of a chief executive officer as director (CEO) of the Commission. The HRCA (Section 3(1)) mandates the President to appoint not less than five individuals as full-time Commissioners. Nonetheless, the same Section confers upon the president the discretion to appoint additional members as Commissioners either on a part-time or full-time basis. Therefore, whereas the Commission must at all times have five members as full-time Commissioners, there is no statutory limit on the number of Commissioners.

Consequently, in comparison to other national human rights institutions where there is a limitation on the number of Commissioners, the president is given a 'blank cheque' to determine the number of Commissioners to be appointed and their respective terms of office.⁸² As a result, while the first batch of Commissioners numbered eleven, they were reduced to almost half (six) in the second tenure (Beredugo, 2014: 208). As of August 2015, it was composed of four full-time and two part-time Commissioners.

The independence and operational autonomy of the Commission is entrenched under the 1996 Constitution (Sec 181(2)). The Constitution (Section 181(3)) prohibits any interference from all other state organs except to assist, defend and safeguard 'through legislative and other measures' the SAHRC's dignity, effectiveness, impartiality and independence. Furthermore, Section 181(2) of the Constitution and subsequently the HRCA (Section 4(1)) obliges the SAHRC and its employees to perform their mandates independently and 'subject only to the Constitution and the law.' The legal ramifications of these provisions are far reaching considering that they extend to the SAHRC's unqualified standing to safeguard its autonomy and protect its members from civil and/or criminal liability for acts or omissions in the discharge of their official mandates (HRCA: Section 17(3)). The Commission therefore has control and

⁸² For example, Sections 2(2) and 2(3) of the 1998 National HRCA of Mauritius limits the number of Commissioners to only four.

power over the content, execution and scope of its action plans, administrative policies, procedures and programmes. The Commission and its staff are therefore not subject to any judicial action or state authority, institution and organs.

Nonetheless, despite these expansive provisions, in practice the SAHRC can roughly be termed as a government agency and not necessarily as autonomous or independent of the government. In practical terms, the SAHRC cannot effectively operate in isolation in view of the fact that it lacks the capacity to operate effectively without government financial support (Beredugo, 2014: 215).

In view of the fact that Section 3(1-2) of the HRCA provides an overarching appointment mandate to the President, the appointment and reappointment of Commissioners, in practice is therefore dependent on the absolute discretion and continual loyalty to the President and his ruling party, which handpicks them (Thipanyane, 2007: 12; Beredugo, 2014: 211). Some commentators have, therefore, classified the SAHRC as 'a dumping ground for ANC cadres' (Zille, 2010) 'who have lost out in internal power struggles' (Giliomee, Myburgh and Schlemmer, 2001: 42) It was against this backdrop that its former CEO, Tseliso Thipanyane (2007: 12) suggested that the SAHRC seems 'to be losing credibility, it is no longer playing its intended or desired role, and its efficiency and quality are questionable.'

Arguably this manner of appointment negatively compromises the autonomy of the SAHRC since it could easily be manipulated by the government to act in favour or against certain individuals or state departments, which might hinder their effort to openly criticise the government in the face of apparent human rights violations (Zille, 2010; Beredugo, 2014: 211).

Presently, the SAHRC lacks financial autonomy. Its annual budget is situated within the general financial vote of the Department of Justice and Constitutional Development (DJCD) since the Commission has no direct access to funding from the national consolidated revenue funds (NCRF) (Department of National Treasury, 2014: 19). This practice does not only deny the SAHRC the opportunity to defend its own budget proposal before parliament, it holds the potential of exacerbating the funding inadequacy presently confronting the Commission.

However, besides the amount it receives from the state, the Commission has received logistical support from international donor agencies since 2007. Yet, external support to the Commission in 2013 was reduced. In its annual report, the SAHRC (2014: 32) intimated that the cut-back on donor support had gravely impacted on its activities. For instance, the SAHRC asserted that its funding proposal for a conference on the right to food was rejected by a potential donor leading to the cancellation of the event (SAHRC, 2014). Therefore, in order for the Commission to effectively discharge its mandate, it is imperative for it to be supported with sufficient financial resources from both state and donors.

Administratively, the SAHRC is structured into two clusters, namely the Commission and the Secretariat (Moyo interview). The primary role of the former is to push forward the affairs of the SAHRC through the drafting of policies and action plans for operationalisation by the latter. Consequently, each of the six Commissioners is assigned a specific thematic area and facilitates human rights interventions at the provincial level. The presence of the full-time Commissioners and part-time Commissioners with the assistance of the Secretariat provides considerable leverage for the SAHRC to (i) effectively engage with

national and provincial parliaments; (ii) engage with civil society organisations; and (iii) collaborate with (sub)regional and international human rights institutions like the Human Rights Council, UN Committee on the Rights of the Child, African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights (SAHRC, 2013: 19-20).

The Secretariat is the operational arm of the SAHRC. Headed by a Chief Executive Officer (CEO), the Secretariat has several departments each charged with a specific mandate. These units are the administration department, human rights advocacy, legal services, monitoring and reporting, research, PAIA unit⁸³ and strategic support and governance departments (Gregoriou interview). The first unit manages the finance and internal operations and coordinates the activities of the various departments. The research unit conducts and manages research on specific human rights issues, whilst the legal department receives and conducts investigation of complaints and provides legal advice in addition to assistance. The PAIA unit undertakes monitoring to ensure the state department's compliance with the promotion of access to information in the country, while the advocacy unit promotes awareness and education on human rights issues.

The SAHRC has its head office in Johannesburg and nine provincial offices located in the capitals of the provinces. The location of these offices makes the SAHRC, to a certain extent, an urban based-institution thereby restricting its access to rural residents (Gregoriou interview). Thus, there is an urgent need for the SAHRC to decentralise its presence to rural and semi-urban areas in order to make it more accessible to 'an overwhelming majority of the people' who live in these locations (Beredugo, 2014: 220).

d) Main focus areas of the SAHRC

The Commission performs both promotional and protective roles (Gregoriou interview). These mandates are derived from Section 184 of the Constitution, which set out the primary responsibility of the Chapter 9 institutions. Section 184(1) of the Constitution confers a general mandate on the Commission to promote, assess and monitor the protection of human rights in the country (Moyo interview). Specifically, the Constitution obliges the Commission to foster respect for human rights and a tradition of fundamental freedom (Section 184(1)(a)). For this reason, the Commission is required to 'promote the protection, development and attainment of human rights' (Constitution, Section 184(1)(b)) and 'monitor and assess the observance of human rights in the Republic' (Constitution, Section 184(1)(c)).

Simultaneously, the provisions of the HRCA shed light on both the protective and promotional obligations of the SAHRC. It is mandated to conduct research, public education and dissemination of information as a means of promoting the rights of people. In terms of protection, the Commission is mandated to resolve any dispute or 'rectify' any 'violation of or threat to any fundamental right' by 'mediation, conciliation or negotiation' (HRCA, Section 8(b)).

The Commission is therefore authorised to perform a quasi-judicial role which involves receiving applications, petitions or recommendations from individuals or classes of persons, while safeguarding individuals from acts or omissions of states which infringe on fundamental rights. The Commission is authorised to carry out investigations into violations of human rights (HRCA, Section 9(a)). To this end, it

⁸³ This is the unit which is entrusted to supervise the Promotion of Access to Information Act 2 of 2000.

may require any individual to appear before it or produce evidence of either articles or documents relevant to a specific inquiry (HRCA, Section 9(c)). In the event that the person refuses to oblige the Commission's request, the latter may consult the Director of Public Prosecutions (previously called the Attorney General) who has the authority to issue a directive to this effect.

Since the Commission is not a judicial but a quasi-judicial body, it may on behalf of a certain group of persons, or in its own name, bring proceedings to court for determination (HRCA, Section 7(1)(e); Gregoriou interview). For instance, the Commission has been involved as *amicus curiae* (friend of the court) in certain human rights cases before the Constitutional Court. In *Grootboom v Oostenberg Municipality*, the plaintiffs who were living in poor conditions in an informal settlement were evicted for illegally occupying the land. The High Court upheld the plaintiffs reasoning that the children and their parents, according to the Bill of Rights were entitled to shelter. The Constitutional Court ruled that since all rights are interrelated, the enjoyment of the right to housing is fundamental to the realisation of others. The SAHRC was mandated by the Court to monitor the government's conformity with its orders under its overarching investigative and monitoring powers.

Apart from the Constitution and the HRCA, there is a wide array of national legislation and policies from which the SAHRC derives its jurisdiction to protect citizens from social deprivation. For instance, legislation which safeguards the right to education includes: the 1996 South African Schools Act 84; the 1996 Admission Policy for Ordinary Schools Act; the 1996 National Education Policy Act 27; the 1998 Exemption of Parents from the Payment of Schools Fees Regulation 1998; the 1999 National Policy for HIV/AIDs for Learners; and the Educators in Public Schools which oblige the Commission to monitor the government's compliance with access to education. In terms of housing rights, the laws and programmes which trigger the Commission's mandate are the 1995 Development Facilitation Act 67, 1997 Housing Act 107, 2000 National Housing Code, 2008 Social Housing Act 16 and the 2008 Housing Development Agency Act 23.

South Africa is party to several fundamental international instruments which oblige the state to adopt measures to promote basic rights. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and the African Charter on the Rights and Welfare of the Child, among others. These international instruments, given their ratification by South Africa, similarly constitute legal sources and feed into the overarching mandate of the SAHRC to monitor human rights compliance in the country. Thus, even though the HRCA does not specifically oblige the SAHRC to monitor the government's compliance in terms of these international instruments, the Commission has creatively adopted measures, including making submissions before some of the human rights monitoring bodies regarding the (lack of) measures adopted by the state in the implementation of these treaties (SAHRC, 2011: 2; SAHRC, 2013: 17-19).⁸⁴

⁸⁴ A detailed analysis of this role by the SAHRC is provided below.

2. Monitoring of policies and legislation in South Africa – the role of SAHRC

The SAHRC advances human rights through its broad mandate deriving from the integration of four instruments, namely the Constitution, HRCA, PEPUDA and PAIA. The 1996 Constitution explicitly calls for the SAHRC to focus on the practical realisation of fundamental rights through research, education, receiving and investigating complaints and securing appropriate redress for victims of human rights abuse. Specifically, Section 184(3) affirms that:

[e]ach year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

The importance of this provision for the functioning of the SAHRC cannot be overemphasised. Section 184(3) according to the SAHRC (2012-2013: 8-9) encompasses three overarching objectives: (i) to determine the extent to which government departments have promoted, protected, respected and fulfilled human rights; (ii) to assess the reasonableness of measures adopted such as laws, policies and programmes; and (iii) to recommend interventions towards the attainment of advancement of human rights.

According to Heyns (1999: 207) the receiving and examination mandate of the SAHRC is akin to the international state reporting procedure under the African Charter on Human and Peoples' Rights and the ICESCR. This mandate on the one hand, places a duty of justification on the state institutions, and on the other hand, a system of monitoring on the SAHRC. As a domestic equivalent of recognised international standards, state organs are legally obliged to make submissions on the steps they have, or have yet to take to give effect to specific human rights.

It is worth emphasising that although the SAHRC institutional reporting procedure is akin to, for instance the Committee on Economic, Social and Cultural Rights (CESCR) or the African Commission on Human and Peoples' Rights (ACHPR) state reporting system, the SAHRC's role is more demanding than the mandate of the others. Contrary to the CESCR or the ACHPR which waits for state parties to make periodic submissions, Section 183(4) obliges the SAHRC to commit a substantial quantity of time and logistics to thoroughly review the measures adopted by government departments to address the rights set out in the Bill of Rights at least once each year. The provision therefore confers an overarching obligation on the monitoring body which can be difficult to execute, especially since it places the burden of carrying out this commitment across all the three levels of government (national, provincial and local) every year. In consequence, besides the extensive financial and human capacity required, the SAHRC must secure sufficient support from all relevant government sectors in order to sufficiently fulfil this obligation (SAHRC, 2011: 16).

a) Methodology applied in monitoring compliance

The SAHRC has been vested with the overarching mandate of ensuring the implementation of fundamental rights as enshrined in both domestic and international law. This obligation was succinctly avowed by Klaaren (2005: 556) when he affirmed that 'the drafters of the Constitution charged us with something very special and that is monitoring the progressive realisation of socioeconomic rights'. The

SAHRC therefore plays a dual role of promoting and protecting basic rights. In terms of the former, the Commission organises training workshops where citizens, including employers from private and public institutions, are educated on their fundamental rights. It further conducts research and assesses implementation of selected human rights themes through systemic investigation. According to the SAHRC (2006-2009: V), the prime objective of the monitoring and assessment is not merely to meet constitutional compliance but rather:

1. To determine the extent to which the organs of the state have respected, protected, promoted and fulfilled human rights.
2. To determine the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of state to ensure the realisation of human rights in the country.
3. To make recommendations that will ensure the protection, development and attainment of human rights.

In accordance with Section 184(3), the Commission sends out 'protocols' or questionnaires to the desks of relevant state departments for information regarding progress made on the specific rights. The protocols are modelled on international human rights reports. The aim of sending out the questionnaires is to collect relevant information from state departments responsible for service delivery in the sectors of health care, water, social security, education, environment, food and housing. The bulk of the issues on the protocols range from legislative, budgetary measures, policies, national action plans and outcomes, to monitoring systems (Moyo interview). Specifically, the protocols are designed to obtain baseline information on issues such as:

- (i) the conceptual understanding of the constitutional obligations of basic rights by diverse state departments;
- (ii) what steps have been taken by these institutions to ensure the implementation of the rights;
- (iii) what progress has been made in enhancing the rights of marginalised and vulnerable people in their access to economic and social rights;
- (iv) what is the level of impact of previous legislations and government policies on the fulfilment of economic and social rights;
- (v) what kind of information-gathering mechanism has been instituted by the departments to trace the progressive attainment of the basic human rights; and
- (vi) whether there exists a consistent action plan with clear goals, targets and duration to effectively implement the rights.

The government departments are obliged to provide information on what measures have been undertaken to advance the rights of vulnerable groups such as female headed households, persons with disabilities, elderly people and inhabitants of rural and informal settlements (Moyo interview).

Upon receipt of the responses from the departments, the Commission then analyses the report to determine the extent to which a specific right has been breached or fulfilled against the benchmark of relevant national and international human rights standards (SAHRC, 2006-2009: 7). To strengthen and

reinforce its evaluation of information supplied by the government units, the SAHRC also relies on primary and secondary sources, such as conclusions from public consultations, field research, research works and reports from independent sources (Beredugo, 2014: 240).

Based on the information supplied and available sources, the Commission then proceeds to make concrete findings on a specific fundamental right, by taking into consideration the approach adopted by the relevant departments, their feasibility or otherwise and how it can be improved. During the monitoring exercise, the Commission uses an indicator as a benchmark for analysis. For instance, in the 2006-2009 combined reports (SAHRC, 2006-2009), the Commission used the Millennium Development Goals (MDGs)⁸⁵ as a yardstick for monitoring institutional compliance with the Constitution. According to the SAHRC, the *raison d'être* for this approach was the fact that the MDGs set out clear standards for evaluating the 'progressive realisation' of key rights and for this reason, could offer improved dynamism for the assessment of human rights abuses (SAHRC, 2006-2009: V). Nonetheless, even though it is obvious that the seven socio-economic rights entrenched in the Constitution and the content of the eight MDGs are somewhat linked, their respective implementations do not require similar approaches (Moyo interview). This is relevant considering that the minimum standards attached to both norms may be qualitatively dissimilar. For instance, whilst the former is driven by both international law and constitutional imperatives to respect, protect, promote and fulfil the rights, the latter is merely a soft law and motivated by political commitments. Consequently, the criteria and benchmarks attached to the MDGs cannot be said to be an appropriate benchmark for monitoring enforceable fundamental rights at the national level.

Thus, measured against other national and international standards, the Commission assesses the submitted information and processes it into the Section 183(4) report. The findings and recommendations are then compiled into a single report, titled *Economic and Social Rights Report* (ESRP), which is tabled before the National Assembly and subsequently circulated among the general public. Arguably one of the Commission's successes regarding economic and social rights has arisen mainly through the publication of the ESRP series which measures progress against the rights set out in the Constitution. The report is submitted to the National Assembly yearly, setting out the progress and/or challenges faced by the Commission in the realisation of economic and social rights. The content of the reports assist the National Assembly in determining whether the executive is fulfilling or renegeing on its constitutional obligation.

Indeed, the review of the state strategies provides a platform for the SAHRC to pick out structural trends of economic and social deprivations; to determine the reasonability of the steps state institutions have adopted to give effect to these rights; and the extent to which these departments have operationalised the rights (Liebenberg, 2001: 83). Further, the identification of systemic violations enables the monitoring body to promote accountability among relevant state agencies by bringing to their attention the success and shortcomings in their operations, while providing appropriate recommendations (Beredugo, 2014: 239-40). This role (monitoring function) therefore has the practical impact of promoting poverty eradication, the right to water, housing, education and healthcare, and is therefore not merely about complying with constitutional obligations. Since its inauguration in 1995, the Commission has conducted

⁸⁵ Meanwhile, the MDGs have been replaced by the Sustainable Development Goals.

eight monitoring exercises, and accordingly generated eight ESRPs. The effectiveness and significance of Section 184(3) therefore lies in the ability of the monitoring body to make economic and social rights a reality in the country.

Considering that the exercise as a whole is akin to conducting a human rights audit on government departments, the content, methodology and outcome of the reports have been replicated or indeed have at least been fairly similar over the years. The ESRPs begin with an overarching introduction, which sets out the general mandate and powers of the Commission to promote, protect and monitor human rights observance in the country. The legal obligation of the Commission to safeguard economic rights is also captured under this heading, with an evaluation of the SAHRC strategies to ensure compliance by governmental departments. This section is then followed by a discussion of the Commission's responsibility per Section 184(3) which sets out the strategic focus area of the report, the primary methodology for obtaining data, the monitoring methods and information received from government departments. A laborious discussion of laws, policies and programmes which according to the SAHRC serve as impediments for the realisation of legal rights is provided. At the concluding part of the report, general remedial recommendations are directed towards a specific government department to implement. It is noteworthy to indicate that most of the recommendations are often the repetition of those in previous reports. This duplication can arguably be linked to the fact that the state seemingly ignores or does not take any action to give effect to the Commission's recommendations, therefore, they have to be reiterated.

In one of its reports, the SAHRC (2006-09) set out the considerable progress made in adopting several laws and policies for the advancement of basic rights. When benchmarked against the millennium development goals (MDGs), the SAHRC also asserted that the government has made some modest headway in the improvement of the rights to water and sanitation, social security and education (SAHRC, 2006-09: VII-XII). Yet, on the contrary, the report highlighted some of the principal barriers to effective realisation of human rights as set out in the Bill of Rights. These shortcomings, according to the SAHRC span from (i) the government's misunderstanding of its constitutional obligations;⁸⁶ (ii) lack of access to information and public participation in decision making processes; (iii) social exclusion of the poor; to (iv) lack of or inadequate capacity to successfully operationalise intended programmes (SAHRC, 2006-09). These hindrances have resulted in making access to food, water and sanitation, education, health care and housing a 'pipe dream' for many South Africans. Either by sheer coincidence or by careful execution, subsequent reports have all followed the same format, matching arguments, themes, findings, recommendations and conclusions.⁸⁷

Although Section 184(3) holds the promise of positively impacting on economic and social rights, due to its explanatory nature, its effectiveness rests on several considerations. For instance, in view of the fact that the findings and recommendations of the Commission's monitoring exercise stem from information

⁸⁶ The SAHRC (2006-2009: 33) notes that some government officials lack a clear understanding of the content and meaning of 'progressive realisation' of socioeconomic rights leading to a violation of most of these rights.

⁸⁷ For example, see the formats, arguments and recommendations in the section 184(3) Reports of 2012-13; 2011-12; 2006-2009.

received from government agencies, the reliability of the data received and the credibility of SAHRC's assessment process is crucial. The authenticity of the Commission's monitoring process can be reached through active cooperation of government departments to submit credible information and for CSOs to actively participate in the monitoring process especially during appraisal of the submitted government reports. Yet, according to the SAHRC (Beredugo, 2014: 244), these factors are rarely evident in the Commission's economic and social rights monitoring process. Despite the fact that it can be asserted that CSOs are not pushed to the fringes or completely marginalised in the monitoring process, their participation has been very minimal (Ntlama, 2004).

The mere fact that the Commission drives the monitoring process from formulation to operationalisation, and solely determines the needs of the general public without the participation of CSOs ultimately taints the credibility of the practice and its eventual report (Kollapen, 2011). Consequently, the credibility of the monitoring process has been questioned and, sometimes condemned by civil society and other stakeholders (Thipanyane, 2007: 14). This condemnation, according to the former Commissioner of the SAHRC is due to the failure of the Commission to make government departments' submissions available to relevant stakeholders and civil societies for a critical appraisal to determine their authenticity. He affirms that where there is no consultation with CSOs the SAHRC undermines essential values such as accountability and openness which serve as 'the golden thread running through the Constitution (Kollapen, 2011: 518). Indeed, without the active participation of society's other reporting stakeholders, no monitoring and reporting mechanism can attain a substantial level of credibility. Since the overarching objective of Section 183(4) is about producing a credible report with the potential of enhancing the promotion of human rights, the continuous exclusion of CSOs however defeats this purpose.

Unfortunately, the SAHRC over the years, has not been able to secure the necessary cooperation from certain government departments which has arguably, negatively impacted on its effectiveness of promoting human rights. For instance, in 2004, four out of nine government departments and in 2009, four out of nine provinces respectively failed to submit their reports (SAHRC, 2012: 15). This figure deteriorated in 2011 when only three out of nine government departments completed and returned the SAHRC's questionnaires (SAHRC, 2012: 1). This led to the Commission assessing only three areas (human settlements, social development and environment) as there were no submissions on others (SAHRC, 2012: 22). In its 2012-2013 combined report, the SAHRC intimated that after questionnaires were sent to seven departments by the Research Programme at the Commission, the 'response rate was very poor and it was not until two departments were threatened with legal action, did they respond to the Commission's request for information' (SAHRC, 2012-2013: 2). Thus the deterioration and/or lack of cooperation from government departments and the failure of the SAHRC to invoke its legal powers to ensure compliance, provides a clear indication of the diminishing interest of the SAHRC to utilise the Section 183(4) procedure to advance economic and social rights.

Over the years, the SAHRC has displayed some inconsistencies regarding the commitments laid down in Section 183(4). Whilst it is obliged to conduct monitoring exercises each year, after fulfilling this obligation in the first five monitoring activities, the six and seventh activities were only undertaken after three intervening years respectively. It was against this backdrop that Klaaren (2005: 550) argues that in light of the inconsistent trend that the monitoring process had settled into, neither NGOs nor the Commission

itself seems to be confident with the monitoring process. As a result, the previous optimism which accompanied the launching of the mechanism has waned to such a degree that relevant human rights actors and stakeholders are seemingly losing interest in its usefulness (Klaaren, 2005).

Apart from the issue of irregular timing, which does not do justice to its human rights mandate, the SAHRC is still unsettled on the kind of methodology or procedure to apply in monitoring basic rights fulfilment. After almost 20 years since its establishment, the Commission is still exploring the appropriate *modus operandi* or process to implement. It has therefore been navigating from using questionnaires to gather data from government departments, to holding public hearings and subsequently reverting to the former. For instance in 2009, the SAHRC, instead of its conventional administration of questionnaires, conducted public hearings and two years later, returned to its former approach of information gathering (SAHRC, 2006-2009: 7; SAHRC, 2012: 14). This inconsistency in methodology could therefore be interpreted as serving as a 'test bed' for the Commission to be more effective in monitoring socioeconomic rights' implementation by the government.

Additional substantive shortcomings confronting the Commission concern the content of its findings and recommendations. The SAHRC's reports often lack substantive guidance on how national and provincial departments could effectively implement their proposed action plans. For instance, virtually all their reports follow a common trend of setting out mechanically abstract issues such as (i) lack of conceptual understanding of basic rights and freedoms; (ii) lack of awareness of these rights; (iii) lack of adherence to a rights-based approach in service delivery; and (iv) lack of advocacy around these issues. Technically, although these concerns clearly fall within the purview of the SAHRC – to conduct advocacy and education – it often passes them on to the government departments. Consequently, even though the significance of the monitoring process for human rights implementation is not in contention, its essence has been lessened to routine machinery for collecting and processing submitted data. Interestingly, having identified these cumulative shortfalls, the SAHRC has intimated that it will be more 'pro-active in terms of its recommendations and securing appropriate redress where human rights have been violated' (Beredugo, 2014: 248).

The relevance of the reports is further watered down as the National Assembly does not take the initiative to debate their contents and enforce compliance with the relevant recommendations due to the 'lack of political will' on the part of the ruling party (African National Congress) which dominates the National Assembly (Beredugo, 2014: 211). This disinterest by Parliament arguably reduces the Commission's effectiveness of ensuring accountability as per its statutory obligation. Also, after fulfilling constitutional requirements by submitting the report to Parliament and for subsequent publication, the SAHRC fails to carry out any follow-up action on its reports to ensure that its recommendations are implemented (Kollapen, 2011). According to its CEO, the subsequent reports of the SAHRC do not even discuss 'progress made on most of its recommendations' as set out in its previous reports (Thipanyane, 2007: 14).

In summary, the ineffectiveness of the Commission's monitoring process can be tied to four overarching factors, namely (i) inactive procedure of the Commission to ensure the gradual and sustainable realisation of rights (Beredugo, 2014: 11); (ii) minimal involvement of CSOs in the planning and execution of the monitoring exercise (Beredugo, 2014: 245); (iii) inadequate capacity of the Commission to influence

compliance; and (iv) the National Assembly's failure to consider and ensure compliance of the reports. Thus, considering that the Paris Principles oblige the Commission to effectively operationalise its mandate, it may, in accordance with Section 7(1(e)) of the 1994 HRCA, use the courts to enforce its decisions and recommendations, especially in cases where government departments fail to comply with such recommendations.

Nonetheless, some scholars have hailed the SAHRC's monitoring exercises as ground-breaking and as holding the potential for advancing human rights in South Africa. Newman (2003: 199) for instance affirms that irrespective of the several challenges which confront its operations, the SAHRC'S monitoring role and human rights reports have 'led to its being recognised as among the best human rights institutions in Africa'. Khoza (2005:16) equally intimated that the reports of the Commission will bring to light the (in)effectiveness of certain government departments and as a result, opposition parties and civil society organisations may rely on these findings to 'name and shame' poor or nonperforming state officials or departments. According to Murray (2006), the SAHRC's reports, although they have their shortcomings, hold the potential to contribute to an accountable government through influence rather than enforcement. Murray further affirms that, the SAHRC therefore provides the state with a 'soft accountability mechanism' by verifying the operations of government through information drawn from the public (Murray, 2006: 12). The general public is therefore ultimately involved in the accountability processes. For this reason, Parliament, and essentially the public is provided with a reliable account of government work. Although the scholars' respective observations might be substantially correct, it is difficult to verify their assertions or measure the extent to which the Commission has used its reports to influence government accountability. This is especially so considering that the SAHRC can only make recommendations and formally sanction offending officials or government departments. The Parliamentary Ad Hoc Committee (2007: 178) could not have said it better when it avowed that the Commission's efficacy is compromised 'since it lacks the power to enforce its recommendations'. Even though the powers of the SAHRC arguably do not extend to ensuring compliance with its recommendations, the Commission's expertise and its institutional resources could be channelled towards assisting government actors to develop action plans (Ebadolahi, 2008).

3. Monitoring of government implementation

The SAHRC uses public hearings as a medium to measure and examine systematic trends of socioeconomic deprivation perpetrated either by private or government agencies. Section 9 of the HRCA specifically mandates the Commission to source for, and gather information from, relevant actors through oral submissions, written testimony or documentation. In the event that an individual or organisation is in possession of a document, data or material, and it is considered to be relevant to a specific hearing, the SAHRC is given the jurisdiction to subpoena such an entity or individual to appear before it, and/or make available the said document or material or give testimony to that effect (HRCA, Section 9). Any verbal testimony may be given either under affirmation or oath.

The hearings are generally not adversarial, and they provide the platform for both citizens to raise their concerns, and for the government to address fundamental human rights issues confronting society. Before the conduct of any hearing, the Commission drafts terms of reference (ToR) which provide the legal basis for those writing the submissions. The ToR are then distributed to relevant stakeholders to

facilitate their submissions during the hearing. Since the multifaceted contributions from stakeholders play a fundamental role in the successful outcome of the hearings, various actors are invited to make inputs. These stakeholders range from all government entities (departments and institutions), academic institutions, and CSOs to the general public (SAHRC, 2006-2009: VI). The participation of the state actors, in particular, enables the Commission to interrogate the respective department's submission in light of the listed socioeconomic rights. The hearing is characterised by verbal statements coupled with written testimonies or available documents. However, the use of this approach has its own shortcomings, mainly in terms of measuring the validity of the data received.

Consequently, the focus group discussion or the public hearings are reinforced or strengthened by other primary and secondary sources such as substantive discussions and informant interviews, academic texts, journal articles, international instruments and government documents (SAHRC, 2006-2009: V). Further, the Commission with the assistance of independent Non-Governmental Organisations (NGOs) occasionally conducts surveys on public perceptions of the enjoyment of these rights. The objective of the study is to supplement and compare the realities on the ground with the information obtained from activists, CSOs and state agencies. Upon completion of the hearing, the SAHRC assesses the various submissions, and compiles its findings.

The findings of the SAHRC are usually classified into two categories, namely: (i) findings with regards to the status of the socioeconomic rights and (ii) findings with respect to the role of the executive in the progressive realisation of these rights (SAHRC, 2006-2009: VI). With regard to the latter, the Commission seeks to determine the successes recorded by the government department whilst determining fundamental barriers faced by the institution(s) in its role towards the attainment of the rights. The most striking impediments to the operationalisation of socioeconomic rights, according to the Commission are: (i) the government's lack of theoretical interpretation and understanding of its legal duty to progressively realise socioeconomic rights; (ii) the weak capacities of government departments to effectively operationalise their intended mandates as a result of the disjuncture between strategic planning and operationalisation; and (iii) the societal exclusion of vulnerable and deprived persons such as migrants, indigenous people, persons with disabilities, women and informal workers.

In terms of the substantive rights, the SAHRC (SAHRC, 2006-2009) observes that (i) in spite of fundamental socioeconomic rights, there has been no signal of continuous progress in service delivery to poor households; (ii) socioeconomic rights programmes at the provincial levels lack indicators to give them effect; and (iii) there is insufficient access to health care. The findings and recommendations are assembled into a report. The report is then submitted to the Parliament and subsequently the general public (HRCA, Section 15). For instance, the basic methodology used for the 7th ESCR Report was the gathering of information through public hearings.

The Commission has the sole mandate to initiate public hearings. According to the SAHRC's Complaints Handling Procedures (CHPs) (Section 20(1)) written complaints from individuals or groups can trigger public hearings by the Commission. However, in order to avoid abuse of the SAHRC's resources, this special procedure may be applied to private matters only in cases where:

- (i) a specific matter or complaint cannot be amicably resolved through conciliation or mediation;
- (ii) the hearing will provide adequate redress to both parties
- (iii) the matter is in the public interest;
- (iv) the issue cannot be settled on the grounds of written statements or documentary evidence; and
- (v) if the applicant can provide substantive grounds as to why it is imperative for the hearing (Section 20(1)(d-e)).

Against this backdrop, the Commission has launched several public hearings targeted at instances of alleged economic and social deprivation between 1996 and 2014. For instance, the SAHRC conducted provincial public hearings on circumstances of farming communities in 2003; the right to basic education in 2006; the right to access health care services in 2007; housing, evictions and possessions in 2007; school-based violence in 2008; and water and sanitation in 2012 (SAHRC, 2012/2013: 2).

The 2003 public hearing on the conditions of farming communities examined the apparent systematic violations of the rights of farmers with specific emphasis on safety and security, tenancy conditions, socioeconomic rights and reasons contributing to their poor standards of living (SAHRC, 2008a). The 2006 public inquiry similarly explored the concept, content and context within which the right to basic education is experienced in the country, and further assessed the government's commitment to the operationalisation of this right as set out under the Bill of Rights (SAHRC, 2006: 4). The 2006 hearings eventually triggered the 2007 public hearing on school-based violence which examined the extent to which violence in schools impacted on the rights to basic education.

Subsequently, based on private complaints from the *Ennerdale, Lawlay and Kathorus* communities of the Gauteng province, the SAHRC again conducted a public hearing on housing, evictions and possessions in 2007. The primary rationale for this hearing was to investigate the extent to which the state has complied with its obligation to provide housing and to recommend practical steps towards the fulfilment of these rights (SAHRC, 2008b: 8). The last public hearing in 2012 investigated the extent to which water and sanitation services are made available and accessible to the general public, identified existing challenges and recommended feasible solutions to improve the conditions of poor households at both provincial and municipal levels (SAHRC, 2014).

The merits of monitoring government's socioeconomic rights compliance through public inquiries cannot be overemphasised. The process primarily creates an effective, legitimate and independent platform for the Commission to check government's compliance as well as corporate entities' violations of economic and social rights. It therefore serves as a conduit for accountability by making state agencies respond directly to questions regarding measures adopted to advance these rights. Considering that the dialogue occurs among duty-bearers, CSOs, general public and government agencies, the dialogue stimulates public participation and induces the holding of governmental and non-state actors to account – even if they are not legally obliged – for their acts or omissions leading to socioeconomic deprivations (Roach, 1995: 269).

The hearing undoubtedly brings together all the relevant stakeholders, to engage in a dialogue and proffer remedies for addressing the existing trends or patterns of economic and social violations. For this reason,

the poor and socially deprived who otherwise could not afford litigation, receive the opportunity to make submissions to the Commission, and bring to the attention of the Parliament their poor living conditions, with the aspiration that these rights will be fulfilled (McClain, 2002: 4-5). The Commission accordingly benefits from this strong platform and obtains the necessary information to investigate the prevailing patterns of socioeconomic violations (SAHRC, 2008). By way of illustration, in the 2012 provincial hearings on the right to water and sanitation, the Commission established that the City of Cape Town installed a total of 1316 unenclosed toilets which violated the human dignity of the residents (SAHRC, 2012: 60). Subsequently, government departments concurred with the SAHRC's findings and pledged to address 'specific complaints raised during the hearings' (SAHRC, 2013).

Even in cases where departments reject and do not implement the SAHRC's recommendations, the outcome and value of the hearings will still not diminish, but greatly impact upon public consciousness even long after the exercise (Cardenas, 2014: 330-333). This is because after such hearings, the poor and marginalised are better-informed of the content of their rights, the extent to which the rights have been breached, and the factors for their non-realisation and witness recommendations for improving their conditions. Salter (1989: 173) was therefore accurate in her observation concerning public inquiries when she noted that even if the Commission's findings and recommendations were ignored, the process of conducting public hearings opens up leeway for communication on matters of public importance, and paves the way for attitudinal change and policy development. Therefore, the regular usage of this approach by the Commission provides a clear indication of its essence for examining and bringing to the attention of government, modalities for advancing this set of rights.

Nonetheless, over the years, there is no evidence to indicate that the outcome of the hearings have made a meaningful contribution to the improvement of economic and social rights or have triggered attitudinal change of government departments to improve service delivery. Undoubtedly, such conclusion or evidence may involve an overarching appraisal and research of relevant issues and institutions in order to substantiate this claim. Nonetheless, Kollapen (2011: 520) has intimated that irrespective of the aforementioned observation, the hearings serve as a 'creative, interactive and dynamic way of providing public information and education, and illustrate the kind of practical measures that government departments could adopt to address socioeconomic deficits.

a) SAHRC monitoring of global human rights standards

The constitutive Act of the SAHRC (HRCA) does not specifically give jurisdiction to the SAHRC to monitor the state's compliance with international human rights instruments. However, with South Africa being a party to fundamental (sub)regional and international human rights treaties, the state has an obligation to adopt measures to protect and promote human rights as laid down in these instruments. Such steps include the transposition and operationalisation of the provisions of these treaties and occasionally reporting to international monitoring bodies on the progress made.

It was against this backdrop that the SAHRC creatively interpreted its mandate to include the task of monitoring government's compliance with international human rights standards. Consequently, it has adopted a promotional stance in advising the government to ratify key international human rights treaties such as the International Convention on the Protection of the Rights of All Migrant Workers and Members

of Their Families (ICRMW) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (SAHRC, 2013: 17-19).

Considering that the state has failed to give effect to several ratified treaties and failed to ratify fundamental ones irrespective of constant petition to do so from the CSOs and the Commission, the SAHRC made a written submission to the Universal Periodic Review in the course of South Africa's second peer-review in 2011 (SAHRC, 2011: 1). Some of the overarching themes within its submission included:

- (i) the prevalent rate of poverty and inequality (SAHRC, 2011: 2);
- (ii) the lack and/or poor delivery of social services (SAHRC, 2011: 2);
- (iii) high maternal mortality rates (SAHRC, 2011: 3);
- (iv) the lack of access to antiretroviral drugs (SAHRC, 2011: 3); and
- (v) the lack of access to basic education for children with disabilities (SAHRC, 2011: 4).

Despite the active participation of the general public in the drafting of the Commission's submissions, the state has systematically disregarded the concerns and recommendations set out in the former's submission to the Universal Periodic Review (UPR). This negative attitude of the government is apparent in the fact that, notwithstanding the SAHRC's recommendations during the UPR, the government has arguably failed to comply with the recommendations of the mechanism (Ad-hoc Parliamentary Committee Report, 2009: 178). For this reason, it has taken an additional step by bringing these non-compliance issues to the attention of the general public through its various publications (SAHRC, 2013: 17-19). However, the publications have equally failed to yield any positive results.

It was against this backdrop that Couzens (2012: 585) mooted that the Commission needs to explore creative working modalities that will make it accessible to key international monitoring bodies such as the Committee on the Rights of the Child (ComRC) and the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) to seek redress for prevalent violations of socioeconomic rights. Thus, without the interventions of these international monitoring bodies, the SAHRC's mere promotional mandates cannot adequately contribute to a significant success in the operationalisation of international instruments (Thipanyane, 2007). This is a valid conclusion bearing in mind that the SAHRC's 'soft' enforcement mechanisms – namely persuasions and moral sanctions – have been grossly ineffective or failed to induce government compliance. Government departments are aware that the Commission's decisions and recommendations are not enforceable, neither do they attract any sanctions for violations. Therefore, these departments have largely refused to cooperate with the Commission and have flatly ignored its recommendations (Ad-hoc Parliamentary Committee, 2009: 178).

4. Structural monitoring and evaluation systems by governments and the role of SAHRC

a) SAHRC's engagement with the National Assembly

The South African National Assembly has been allocated an extensive mandate by the Constitution (Section 55) to protect and advance human rights. Its competences encompass:

- (i) amending, considering, passing or rejecting laws;
- (ii) ratifying international human rights treaties;
- (iii) receiving petitions, representations or submissions from interested individuals; and
- (iv) providing intervention to the SAHRC (HRCA, Section 4(3)).

Consequently, the SAHRC collaborates with the National Assembly through the latter's liaison and legislation monitoring programme to safeguard and improve basic rights operationalisation (SAHRC 2010/2011: 43). Therefore, under the regime of parliamentary partnership, the SAHRC keeps law-making processes under systematic review and makes contributions to draft legislation in order to ensure that national instruments practically comply with international human rights standards (Moyo interview).

According to the SAHRC (2010-2011: 43), it has made substantive contributions in Parliament to several fundamental rights bills including the 1996 Choice on Termination of Pregnancy Bill and Older Persons Bill, 2005 Children's Amendment Bill⁸⁸ and 2011 Basic Education Amendment Bill.⁸⁹ The Bills, which have over the years been passed into law, hold the potential for enforcing and advancing the basic rights and freedoms of vulnerable and marginalised groups in society (Klaaren, 2005). In 2013, the SAHRC again made submissions to the National Assembly on the Employment Services Bill and the Legal Practice Bill. The two instruments seek to guarantee access to justice for marginalised and vulnerable groups in the labour market (SAHRC 2013: 34). It has subsequently made a call for the transposition of the Convention on the Rights of Persons with Disabilities into national legislation (SAHRC, 2013: 34).

Besides providing input on draft bills, the SAHRC frequently makes an appearance at the parliamentary portfolio committee briefings related to its mandate (SAHRC, 2010/2011: 44). The Commission liaises with the National Assembly through conferences, seminars and workshops at municipal, provincial and national levels. Through these platforms, it offers human rights education to members of the National Assembly on issues related to the Bill of Rights, and stimulates their collective and individual duties to advance these rights. This bilateral engagement is crucial for improving the capability and know-how of the National Assembly members on (i) national and international human rights instruments; (ii) the execution of oversight responsibilities; and (iii) adoption of positive attitudes towards human rights (Moyo interview).

Despite the few lists of strategies adopted by the SAHRC to promote human rights through the National Assembly, this collaboration has arguably been instrumental in advancing basic rights. Indeed, these efforts have contributed to the entrenchment of key human rights standards into policy making and legislation in the country. Nonetheless, irrespective of its frequent consultations and cooperation with key portfolio committees, the ability of the SAHRC to influence parliament to adopt and integrate its recommendations remains a challenge (SAHRC, 2011/2011: 16).

⁸⁸ http://www.saflii.org/za/legis/consol_act/ca2005104.pdf (accessed on 11 February 2016).

⁸⁹ http://www.gov.za/sites/www.gov.za/files/a15_2011.pdf (accessed on 11 February 2016).

b) SAHRC engagement with CSOs

From the outset, it is imperative to emphasise that there is no existing legal framework which obliges the Commission engage with CSOs in the protection of human rights. Also, there is no policy or legislation which sets out the modalities or the shape such engagement should take. That is, none of the Commission's operating instruments charge the Commission to build and sustain a relationship with CSOs in order to give effect to their respective provisions. Nonetheless, its foundational Act obligates it to 'maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices' (HRCA, Section 7(1b)).

In terms of engagement with CSOs, the SAHRC does not have a substantive organisational guideline for collaborating with external actors such as CSOs. This position was well articulated by the Human Sciences Research Council (HSRC, 2007) when it observed that the SAHRC lacks an explicit and clearly articulated corporate framework with which to engage with CSOs. Yet, the SAHRC's mandate is too broad for it to operationalise alone, particularly against the backdrop of its inadequate research and social network capacity (HSRC, 2007: 18). Therefore in light of their proximity to the vulnerable and marginalised individuals, CSOs can play an active intermediary role between the ordinary people and the Commission.

Nonetheless, over the 20 years of its existence, it has built and strengthened engagement with some NGOs including the Centre for Human Rights of the University of Pretoria, the Socio-economic Rights Institute of South Africa and the Community Law Centre at the University of Western Cape (Moyo interview). The type of partnership is reliant on the thematic area of CSOs which spans from an advocacy, education, training or research focus. The collaboration with these NGOs are in the areas of research, organising poverty hearings, providing free legal services, improving access to justice and monitoring government's implementations of basic rights in the country.

In terms of advocacy, the SAHRC serves as a mouthpiece for activist organisations like the South Africa Council of Churches (SACC) and Southern African Migration Project (SAMP) considering that it provides a crucial access to higher political levels by reporting its findings to the national assembly. Irrespective of this engagement, Beredugo observes that the SAHRC-CSO's engagement 'is still perceived to be uninspiring' as the SAHRC continues to engage with NGOs often on an *ad hoc* basis or when the need arises. For this reason NGOs are not 'actively interested in its activities' (Beredugo, 2014: 222). This waning interest has lessened the SAHRC effectiveness and exacerbated its invisibility in the rural areas.

5. EU and NHRIs in South Africa- human rights monitoring and cooperation

Over the past fifteen years, respect for human rights and fundamental freedoms have become core values in the European Union's (EU) external engagement with South Africa. With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (CFREU) – which was initially soft law – became legally binding as part of the EU primary law. Consequently, the CFREU has gained considerable status as an influential catalogue of human rights and has transformed the practice and working culture of the Union's engagement with South Africa.

Following South Africa's transition to democracy in 1994, the EU has given high political prominence to its bilateral engagement with the state (Queiro interview). The parties in 2007 entered into a strategic

partnership with key sectors of partnership focusing on employment creation, good governance, social cohesion and gender equality (EU Delegation to South Africa, 2015). With the entry into force of the Lisbon Treaty, the European External Action Service (EEAS) was given competence for representing and conducting negotiations on behalf of the EU globally. The EEAS for that reason has an oversight responsibility towards 139 EU Delegations and offices globally, including South Africa (EEAS, 2015).

The mandate of the EU Delegation in South Africa (which is an arm of the EEAS) spans from presenting, clarifying and operationalising the Union's policies in the South Africa (Voix interview). It has an additional duty to analyse, provide feedback and report back to the EU Commission on the policies, and recent developments in South Africa which might impact on bilateral relations. This partnership is maintained through the administration of development aid, negotiations on trade issues and political dialogues, which may sometimes relate to human rights issues (Queiro interview).

The EU's structured engagement with South Africa, as established in the 1999 Trade, Development and Cooperation Agreement (TDCA), explicitly provides for the protection of human rights through the 'strengthening of civil society and its integration in the development process' (TDCA, Art 66 (1c)). The TDCA therefore serves as a comprehensive and progressive framework for the participation of civil society in the bilateral and development cooperation of the two entities. However, the agreement does not provide any guidelines regarding the Union's engagement with NHRIs. Nonetheless, the EU considers the SAHRC and other NHRIs as key stakeholders in consultation processes, and as a vehicle for enhancing the Union's human rights policies. Consequently, the EU delegation in the country occasionally engages with NHRIs – specifically the SAHRC – in the drafting and operationalisation of development programmes as set out in the country strategy paper (Voix interview).

According to the Human Science Research Council (HSRC) (HSRC, 2007: 46), the EU previously strengthened its ties with the SAHRC through the provision of financial and technical support to the latter to strengthen its human rights collaboration effort. A major EU intervention in this regard was the establishment of the Civil Society Advocacy Programme (CSAP) in 2004. The primary rationale of the four-year programme was to improve the relations between the SAHRC and CSOs in order to enable communities to effectively access and claim their constitutional rights (HSRC, 2007: 54).

The CSAP further sought to 'deepen democracy, improve governance and reduce poverty through the creation of a supportive and enabling environment' through 'regular policy engagement between state institutions and civil society' (HSRC, 2007: 46). Consequently, an outreach programme was developed to boost the collaboration between the SAHRC and CSOs (HSRC, 2007: 54-55). The modality of the project was to set up networks and offices in three provinces with higher rural and poor populations. The three provinces which met these criteria were the Eastern Cape, Limpopo and Kwazulu-Natal. The SAHRC-CSOs partnership was relevant considering that community based organisations (CBOs) are better equipped to liaise with vulnerable and marginalised groups who may need the interventions of the Commission. The SAHRC, on the other hand, saw the project as providing a platform where CSOs can assist marginalised and vulnerable individuals access its services.

Yet, irrespective of several attempts by the CSAP, the partnership between these two entities was riddled with several setbacks. The HSRC (HSRC, 2007: 69) observes that the SAHRC had a penchant for either failing to assume a visible role or withdrawing prematurely from joint campaigns on key human rights issues. As a consequence, the programme did not achieve its intended objective. This is evident in that a structural relationship between the two was weak or almost non-existent (HSRC, 2007: 68). One striking shortfall of the project was the SAHRC's lack of capacity to form meaningful and sustainable engagement with CSOs. Consequently, when the programme came to an end in 2010, the EU did not re-commit financial support to ensure its extension (Voix interview).

It was against this backdrop that the SAHRC affirms that the EU does not generally provide funding or technical support to it (Moyo interview). The only time the Union supported the SAHRC was through the operationalisation of the CSAP. Yet, according to the Commission, its last relationship with the Union did not end on the best terms, especially as the latter is quite precise about how resources are used and how to report on budgeting (Gregoriou interview). Consequently, the SAHRC needed the technical capacities to adequately meet the procedural requirements of reporting on EU finances, which it lacks. Again, in order to guarantee the independence of the SAHRC from any external entity in accordance with the Paris Principle (Paragraph 5), the SAHRC asserts that it is therefore not keen on seeking support from the EU and its member states (Moyo interview). Subsequently, after the winding-up of the CSAP in 2010, there was no direct engagement between the SAHRC and EU, except rare invitations extended by the latter to the former's chairperson and relevant CSOs to attend EU events (Voix interview).

6. Conclusions

In light of the several challenges confronting the monitoring process and its reporting, the SAHRC has intimated in its Strategic Plan (2014-2017: 22), that its disposition is to address the procedural shortcomings and inconsistent timeline with regard to publishing reports (Moyo interview). It also affirms the need to make proactive and substantive recommendations and propose suitable remedies where human rights violations are apparent (Strategic Plan, 2014-2017: 19). Yet, the degree to which these new steps will enhance human rights is not clear considering the Commission lacks the power to compel compliance.

The realisation of human rights and specifically the rights of the marginalised in South Africa is largely contingent on a stricter observance of these rights. A denial of economic and social rights can trigger violence, thereby undermining the freedom and progress recorded over the last two decades. Unfortunately, the Commission's findings and recommendations on the monitoring of basic rights have not been taken seriously by both the government and the general public. The research discovered that the lack of compliance is linked to a number of challenges, including structural challenges. This is mainly due to a lack of support from government departments and a lack of active participation of CSOs in the monitoring process, unenforceable nature of its mandate and lack of follow-up on its recommendations.

Again, government's constant failure to heed the Commission's recommendations is also largely linked to the non-recognition of the merits of monitoring economic and social rights. The rationale for monitoring these rights basically concerns how the poor and marginalised in the communities can be helped through

the provision of basic amenities and effective service delivery. It is therefore imperative for policy makers and relevant stakeholders to provide intervention to the SAHRC to enhance its monitoring mandate.

With regard to the collaboration between the EU In light of the several challenges confronting the monitoring process and its reporting, the Commission has intimated in its Strategic Plan (2014-2017: 22), that its disposition is to address the procedural shortcomings and inconsistent timeline with regard to publishing reports (Moyo interview). It also affirms the need to make proactive and substantive recommendations and propose suitable remedies where human rights violations are apparent (Strategic Plan, 2014-2017: 19). Yet, the degree to which these new steps will enhance human rights is not clear considering the Commission lacks the power to compel compliance.

The realisation of human rights and specifically the rights of the marginalised in South Africa is largely contingent on a stricter observance of these rights. A denial of economic and social rights can trigger violence, thereby undermining the freedom and progress recorded over the last two decades. Unfortunately, the Commission's findings and recommendations on the monitoring of basic rights have not been taken seriously by both the government and the general public. The research discovered that the lack of compliance is linked to a number of challenges, including structural challenges. This is mainly due to a lack of support from government departments and a lack of active participation of CSOs in the monitoring process, unenforceable nature of its mandate and lack of follow-up on its recommendations.

Again, government's constant failure to heed the Commission's recommendations is also largely linked to the non-recognition of the merits of monitoring economic and social rights. The rationale for monitoring these rights basically concerns how the poor and marginalised in the communities can be helped through the provision of basic amenities and effective service delivery. It is therefore imperative for policy makers and relevant stakeholders to provide intervention to the SAHRC to enhance its monitoring mandate. , the entry into force of the Treaty of Lisbon heightened the momentum for a more consolidated effort of the EU towards strengthening human rights in its external engagement (Wouters, *et al* 2013). Unfortunately, irrespective of its specific expertise and overarching human rights monitoring role, the EU Delegation in South Africa – and the SAHRC to a large extent – cooperate minimally with each other. Whereas the EU mooted that the SAHRC had previously not lived up to its expectation of reporting on contributions from the former, the SAHRC also asserts that the Paris Principles (Paragraph 2) bar them from partnering or accepting any form of assistance from the EU since such engagement may compromise their independence (Voix interview; Moyo interview; Gregoriou interview). Ironically, between 2008 and 2012, the SAHRC received various amounts from donors (including some EU states) even though (according to Moyo) the Paris Principles do not encourage such practice (SAHRC, 2014: 116). The SAHRC heavily depends on donors in funding for some of its major programmes, including the Freedom of Expression, Historically Disadvantaged Individuals (HDIs), and the lesbian, gay, bisexual, transgender and intersex (LGBTI) units (SAHRC, 2013: 32). For instance, in its 2013 Annual Report, the SAHRC (2013: 32) reported that its 'Right to Food' conference was cancelled because a potential donor turned down its request for financial assistance. One can therefore sense some degree of inconsistency regarding the actual reason for the minimum level of engagement between the EU and the SAHRC.

The SAHRC holds the potential to foster basic rights culture throughout the country, by providing insight into draft human rights policies, providing human rights expertise to Parliament and advising government departments on the operationalisation and compliance with their respective human rights obligations. Thus, considering that the SAHRC serves as a ‘cornerstone of the protection of human rights’ in the country (United Nations Office of the High Commissioner for Human Rights, 2010: 13), the EU Special Representative for Human Rights who has the mandate of enhancing the effectiveness and visibility of the EU should endeavour to incorporate the SAHRC in his mandate and that of the EEAS. The SAHRC can help the Union to be more effective in operationalising the EU’s external human rights commitment on the ground and based on national experience, offer human rights knowledge to the drafting and operationalisation of the EU-SA human rights projects, such as the EU-South African human rights dialogue. Such an EU-SAHRC partnership will require constant engagement, together with provision of technical and logistical resources to enhance the effective implementation of the mandate of the SAHRC.

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IV. Regional monitoring of human rights in EU member states and interaction with EU institutions⁹⁰

This chapter will discuss regional human rights monitoring in Europe and the engagement of NHRIs with relevant EU bodies responsible for internal and external EU policy. It will review how regional human rights monitoring in Europe is taking place and what challenges exist in the European human rights architecture. It will also review how the various actors, in particular the European NHRIs mandated at the national level to undertake this task, engage at the regional level with the various European institutions working at this level. Finally, the engagement between the EU and the NHRIs in third countries will also be briefly addressed.

There is growing recognition of NHRIs at the international and regional level. In Europe, they play an increasing role in providing a link between the regional human rights system and domestic systems. Yet despite Europe having perhaps the most developed regional framework for the promotion and protection of human rights, and the largest number of NHRIs (Adamson, 2013), it has for many years been the least developed system for the coordination of NHRIs in the region.

Previous studies have described the multi-layered European human rights architecture and the various European actors (Wouters, Meuwissen and Barros, 2013). At the regional European level, instead of the existence of one single institution or unique point of entry when looking at regional human rights monitoring at the inter-state level, multiple European institutions have been set-up to work in multiple ways to address the issue of monitoring of human rights at the regional level. The key bodies and actors are both located in the EU's as well as in the Council of Europe's (CoE) institutional structure. The Organisation for Security and Cooperation in Europe (OSCE) is also a relevant organisation in this field. With regard to the EU, the key actors include, among others, the European Commission's Directorate General for Justice, Consumers and Gender Equality (DG JUSTICE), the EU Special Representative for Human Rights, the European Parliament (EP)'s Committee on Civil Liberties, Justice and Home Affairs (LIBE), the EP's Sub-Committee on Human Rights (DROI), and the EU Fundamental Rights Agency (FRA). The most important institution within the CoE framework is the European Court of Human Rights and with regard to the OSCE the Office for Democratic Institutions and Human Rights. Hence, coordination of regional human rights monitoring is complex, as is a systematic monitoring of human rights at European level. The complexity of the multi-layered architecture is a challenge for a systematic overview or follow-up on European human rights implementation. It is also a challenge for European NHRIs to 'nail down' its most efficient strategic entry points in terms of the European institutions.

The European NHRIs mandated to monitor human rights at domestic level are, at the overall level, described in another FRAME research report (Mayrhofer, *et al*, 2014: 69-76) which provides an overview of the nature and characteristics of European NHRIs including their multiple models and their respective statuses according to the Paris Principles. In the FRA report *National Human Rights Institutions in the EU*

⁹⁰ This chapter was drafted by Kristine Yigen, Senior Adviser at the Danish Institute for Human Rights.

Member States – Strengthening the fundamental rights architecture in the EU (2010), NHRIs in the then 27 member states are mapped including their modus operandi in terms of fulfilling their mandates.

The above mentioned FRA report points at a number of challenges at the national level in relation to NHRIs. These include the lack of sufficient political support for NHRIs in member states and the insufficient independence and effectiveness of NHRIs (Fundamental Rights Agency, 2010). The report also points to the challenge of multiple national bodies with similar mandate areas such as national equality bodies and in this context identifies gaps and overlaps in their mandates and work. Furthermore, the report indicates that the lack of a complaints-handling mechanism at national level compromises the system (Fundamental Rights Agency, 2010: 38).

These considerations add even more complexity to the inherent challenges of the European human rights architecture. Despite this complexity, there are currently many attempts and initiatives to bring NHRIs and European bodies closer, in coordinating their human rights monitoring work, both within the European Union as well as outside.

A. Regional Secretariat of the European Network of National Human Rights Institutions (ENNHRI) and Engagement with Internal EU Policies

The ENNHRI was created in 2013, out of the European Group of NHRIs and, thus, is the result of over two decades of collaboration among national human rights institutions in Europe. In the NHRI infrastructure, it is set out that NHRI representation within the International Coordinating Committee (ICC) which is the global umbrella organisation for the NHRIs, is to be divided into four regional groups: Africa, Asia-Pacific, the Americas and Europe. The ICC is mandated by its members to ensure engagement with the UN system and accredit NHRIs in a peer-to-peer system.⁹¹ The entire group of European NHRIs met three times between the years of 1994 and 2000 (ENNHRI, 2016). In 2002, European NHRIs met in Dublin where they formally agreed upon the Rules of Procedure for the European Group of National Human Rights Institutions. In 2013, a Director was recruited to establish a Permanent Secretariat in Brussels, which was then named ENNHRI. It also adopted its first strategic plan and formalised its statutes on incorporation as an international not-for-profit association (AISBL) under Belgian law (ibid).

ENNHRI⁹² is now tasked, among other functions, with ensuring European NHRIs' collective engagement with the EU and in this regard acts as an 'entry point' for such cooperation. DG JUSTICE has from this year decided to support this structure with funding to the Secretariat. This provides for an opportunity, which should not be overlooked. As mentioned in Wouters, Meuwissen and de Barros,

NHRIs can support the EU to further strengthen a fundamental rights culture throughout the Union. Notably, their expertise can be linked to the means currently employed to ensure that there is compliance with the rights inherent in the Charter. This applies in the first place to the process of EU policy and law-making. Furthermore, NHRIs can play a relevant role in helping to

⁹¹ 'Established in 1993, the ICC promotes and strengthens NHRIs to be in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights.' For further information please see <http://nhri.ohchr.org/EN/AboutUs/Pages/History.aspx> (accessed on 10 March 2016).

⁹² For more information on ENNHRI, please consult www.ennhri.org (accessed on 9 March 2016).

ensure Member States' compliance with the Charter when acting within the scope of EU law. Finally, NHRIs can have an important role in connecting citizens with the procedures that are in place to protect their fundamental rights on the ground. (Wouters, Meuwissen and de Barros, 2013: 5)

One of the gaps or uncertainties for European NHRIs has centred on how they could transmit their expertise and knowledge to EU policy and law making to ensure coherence with international and regional human rights standards including European human rights instruments. The case studies in this deliverable show how NHRIs outside the EU work to advise governments at policy and legislative level.

While EU institutions, bodies, offices and agencies are the first addressees of the EU human rights instruments and, for example, in the context of the Charter of Fundamental Rights of the European Union (CFREU) have to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers' (CFREU: Article 51(1)), some sources agree (e.g. Wouters, Meuwissen and de Barros, 2013; Fundamental Rights Agency, 2010) that NHRIs are important partners for the EU. NHRIs can provide EU institutions with information and expertise on human rights promotion and protection and should be consulted by the EU whenever it develops human rights-related policy initiatives or adopts legislative measures in order to translate NHRI expert knowledge from the national perspective into consistent and efficient EU policy and action (Wouters, Meuwissen and de Barros, 2013).

This work has already commenced in relation to the Commission's consultations preceding the adoption of Green and White Papers on, for example, EU criminal justice legislation in the field of detention adopted by the Commission on 14 June 2011 (Green Paper, 2011), where the process benefited from substantial comments provided by the ENNHRI as well as the Spanish Ombudsman (The Ombudsman of Spain, 2011).

While initiatives similar to the above are ongoing and EU bodies dealing with policies and legislation at the regional level are increasingly consulting ENNHRI and European NHRIs, there is still no formalised, structured or systematic interaction or engagement with the EU. European NHRIs are not resourced to closely follow policy developments at EU level and hence they are not part of any formalised legislative process, nor is there systematic engagement or follow-up on legislative or policy development. The work takes place as an 'auxiliary' activity for well-resourced NHRIs and hence the ENNHRI is assigned with the difficult task of ensuring the engagement and input from the European NHRIs.

The European Parliament has been a vocal promoter of the establishment of Paris Principles-compliant NHRIs by EU Member States (EP Res, 2009). The two relevant Parliamentary sub-committees, namely LIBE and DROI, working respectively with fundamental and human rights issues relating to the internal EU policy and external EU policy would benefit from a more structured EU cooperation with NHRIs to ensure input on, for example, compliance issues when discussing new initiatives or in order to get research based input on human rights trends. At this point, it seems rather 'ad hoc', risking the inclusion of superficial human rights advice and expertise in essential policy steps. While some interaction between the European Parliament and European NHRIs is taking place, this is also on a limited basis, due to resource constraints and the priority agendas of the European NHRIs.

The FRA was established in 2007 to provide EU institutions and Member States (when implementing EU law) with assistance and expertise when they take measures or formulate courses of action, to fully respect fundamental rights (EC Regulation, 2007: Article 2).⁹³ While the FRA appears to function as the EU's own 'NHRI' due to the reference to NHRIs on the basis of UN principles as a source of inspiration, the FRA's main functions consist of data collection, the production of expert opinions, and the establishment of a communication strategy in order to raise public awareness of fundamental rights (Toggenburg, 2008: 387; EC Regulation, 2007: Article 4). These competences are somehow similar to the functions of NHRIs and the same is the case in relation to composition of the management board of FRA.⁹⁴

Whereas the mandate and composition of the FRA seem to be that of a NHRI at regional level, it is clear that the FRA's founding regulation does not provide the Agency with a sufficiently comprehensive mandate nor a truly pluralistic and independent composition, which would allow it to function as a 'Paris Principle-compliant' fundamental rights institution. To some extent, this is due to the specificity of the EU. The FRA does not have, for example, quasi-judicial powers (dealing with complaints and petitions) as some NHRIs do, which is explicitly stated in Article 15 of the Preamble of EC Regulation (2007).

More importantly, however, the FRA does not have the competence to adequately monitor human rights compliance of the EU's internal and external policy and legislative initiatives. For example, its conclusions, opinions and reports which concern legislative proposals from the Commission or positions taken by the EU institutions in the course of the legislative procedure can be formulated only if the respective institution has requested it to do so (EC Regulation, 2007: Articles 2 and 4). Obviously, this restriction falls short of the Paris Principles, which require that NHRIs may freely consider any questions falling within their competence, irrespective of whether they are submitted by the Government and especially 'without referral to a higher authority' (Paris Principles, 1993: 189).⁹⁵

In view of its position in the EU's institutional framework on the one hand, and its explicit mandate to cooperate with NHRIs (EC Regulation, 2007: Article 20 of the Preamble and Article 20(2a)) on the other, the FRA still seems to be the most prominent EU interlocutor for NHRIs (Wouters, Meuwissen and de

⁹³ According to EC Regulation (2007: Article 7 of the Preamble) a 'European Union Agency for Fundamental Rights should accordingly be established, building upon the existing European Monitoring Centre on Racism and Xenophobia, to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.' It is further stated in Article 8 of the Preamble that '[i]t is recognised that the Agency should act only within the scope of application of Community law.'

⁹⁴ '[...] having regard to [...] the Paris Principles, the composition of [FRA's Management] Board should ensure the Agency's independence from both Community institutions and Member State governments and assemble the broadest possible expertise in the field of fundamental rights'. (EC Regulation, 2007: Article 20 of the Preamble)

⁹⁵ See also Paris Principles (1993: 186): '[...] either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights'.

Barros, 2013). The FRA interacts with NHRIs on a regular basis, with regard to the annual planning of its activities as well as its involvement in specific fundamental rights programmes.⁹⁶

The FRA has the mandate to cooperate with ‘public bodies competent in the field of fundamental rights in the Member States, *including* national human rights institutions’ (EC Regulation, 2007: Articles 8(2a) [emphasis added]).⁹⁷ It has been issuing extensive reports providing an overview of the different national bodies in EU Member States mandated to monitor fundamental rights.⁹⁸ There is no doubt that the FRA offers a unique platform to engender better cooperation and synergies between the various EU domestic institutions with a human rights mandate, thereby contributing to a stronger ‘European fundamental rights architecture’ even if it cannot provide a full regional account or systematic overview of human rights at the European level. It does, however, take a research-oriented approach, build human rights networks across Europe and compare regional data on selected topics applying a comparative perspective in its work. Indirectly and informally, FRA has proven to itself able to integrate NHRIs’ input on various levels of European internal policy making by conducting research on a number of human rights issues such as, for example, data protection and gender violence and strongly advocating for better integration of NHRIs into the human rights architecture.

B. NHRIs and their engagement on European human rights issues with the Council of Europe

The Council of Europe (CoE) has been working with European NHRIs since before the European NHRIs formalised their internal cooperation in a network of the European Group of NHRIs and it was also the CoE which hosted the first regional meeting of European NHRIs in 1994 (Adamson, 2013). The European Group of NHRIs has always prioritised the significance of the human rights framework of the CoE covering also states outside the EU (ibid). European NHRIs have applied the European Convention on Human Rights and cases of the European Court of Human Rights in their work, but have also worked with organisations such as the European Committee on the Prevention of Torture (CPT) and the European Commission against Racism and Intolerance (ECRI). They have also worked with instruments such as the European Social Charter, the European Convention against Trafficking of Human Beings and the Framework Convention for the Protection of National Minorities as well as the Charter on Education for Democratic Citizenship and Human Rights Education. European NHRIs gained observer status at the Council of Europe’s Steering Committee for Human Rights (CDDH) in 2001 (Steering Committee for Human Rights,

⁹⁶ For a detailed overview of the interaction of FRA with European NHRIs, see Adamson (2013).

⁹⁷ Europe is the continent with the strongest diversity in domestic institutions with a human rights mandate, ranging from data protection agencies to equality bodies, children commissions or Paris Principle compliant NHRIs. For an overview of the NHRI landscape in Europe, see Nowak (2013).

⁹⁸ FRA, ‘Fundamental rights protection bodies need more support’, press release 7 May 2010: ‘Four new reports issued today by the European Union Agency for Fundamental Rights (FRA) give evidence that data protection authorities, equality bodies and national human rights institutions across the European Union are in need of additional support’. More information and the reports are available at <http://fra.europa.eu/en/press-release/2011/fundamental-rights-protection-bodies-need-more-support> (accessed on 10 March 2016). See especially the foreword of M. Kjaerum (former Director of FRA) in: FRA, *National Human Rights Institutions in EU Member States, Strengthening the fundamental rights architecture in the EU*, Luxembourg, Publication Office of the European Union, 2010.

2001) and are formal observers in the governance structure of the CoE. This shows that European NHRIs are in fact integrating those normative frameworks as well as the work of these European bodies into their work.

According to Bruce Adamson (2013), the CoE has also made twinning arrangements between NHRIs and a network of independent non-judicial human rights actors with special focus on non-EU Member States. This so called 'peer-to-peer' project sought to enable national structures to improve their performances in terms of raising human rights awareness in their countries, detecting potential or existing human rights problems, proceeding to efficient investigations where this is laid out in their mandate, engaging in constructive dialogue with the authorities to avert or solve problems of human rights protection, or triggering rapid mobilisation of international partners if necessary (Adamson, 2013).

The project consisted mainly of workshops for specialised staff members of the NHRIs and missions to countries where interest in setting up a NHRI was expressed (ibid). Much of the engagement has focused on training and capacity building, which has more recently focused on workshops with the European National Preventative Mechanisms under OPCAT rather than substantive work on the policies and programmes of the Council of Europe (ibid).

The European Group regularly engages with the European Commission against Racism and Intolerance (ECRI) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), by attending meetings and conferences, but lacks the capacity and opportunity to engage fully with the implementation of Council of Europe programmes (ibid). Furthermore, the Council of Europe often invites NHRI experts for consultative meetings under the Charter on Education for Democratic Citizenship and Human Rights Education and similarly, European NHRIs have been engaged in the Council of Europe consultations on human rights and business. While in both fields, there is some sort of loose partnership, it is characterised by being on a rather ad hoc basis.

C. NHRIs in third countries and their engagement with the EU

The country case studies on NHRIs presented in this report have been conducted in South Africa, India, Peru and Morocco. While the case studies provide great insight into the modus operandi of NHRIs in third countries including their challenges in terms of independence and efficiency, they provide evidence of areas for improvement in terms of the level of engagement between NHRIs in third countries and the EU at least in some of the selected cases. The EU engages with NHRIs in third countries mainly through funding of projects and programmes (e.g. Peru and South Africa) but also through involvement in human rights dialogues. For example, the EU human rights dialogue with Morocco held on 10 December 2012 ensured the participation of the Moroccan NHRI (*Conseil National des Droits de l'Homme*) (EC Press Release, 2012). Following the human rights dialogue in Morocco, the EU adopted a EUR 2.8 million programme aimed at strengthening the work of the Moroccan NHRI. The broader picture of engagement between NHRIs in third countries and the EU, needs further attention as the case studies could not report on this in a sufficient manner.

In the Multiannual Financial Framework for the EIDHR covering the period from 2007-2013,⁹⁹ the EU's commitment to promote democracy and human rights by supporting human rights institutions worldwide, is reflected through funds provided to support NHRIs. The Commission has funded or co-founded the Human Rights Commission in Rwanda (2002 and 2004), in Mexico (2003), in Kenya (2005), in the Philippines (2006), and the National Council for Human Rights and Women in Egypt (2006) (Consortium PARTICIP–ADE–DIE–DRN–ECDPM–ODI, 2011). In 2015, a 5 million euro global programme on support to the ICC, the four regional networks and their secretariats as well as the NHRIs, was adopted. In addition, at country delegation level, in 2015, the NHRIs of Zimbabwe and Kyrgyzstan also received support from the EU. While this may by no means be the full picture, there is ongoing development, which provides further opportunities for engagement between NHRIs in third countries and the EU. For the same framework for the 2014-2020, a global NHRI grant has been provided to support capacity building of the ICC, the regional network of NHRIs and individual NHRIs (Special Measure EIDHR, 2014).

Currently, one of the main means for the EU to ensure compatibility of legislative proposals with the CFREU is by taking account of human rights in Impact Assessments (IAs). IAs are valuable tools to achieve human rights checks as they enable informed judgments to be made in the evaluation of different policy options and may lead to the discarding of one of those options when it does not (fully) conform to fundamental rights. The Commission launched IAs in 2002¹⁰⁰ and this tool is currently being used prior to all its major initiatives. Importantly - and as recently remarked by the European Parliament when considering the EU's new human rights strategy (EP Committee on Foreign Affairs, 2012) - human rights IAs should also be undertaken by the EU before negotiating any bilateral or multilateral agreement with third countries.

In this regard, the European Parliament called upon the Commission and the European External Action Service (EEAS) to 'develop a robust methodology which enshrines the principles of equality and non-discrimination so as to avoid any negative impact on certain populations and which provides for mutually agreed preventive or remedial measures in the event of any negative impact, before negotiations are finalised' (ibid). As European NHRIs are increasingly involved in development assistance to third countries, there is also room and opportunity to establish peer-group review in relation to Impact Assessment tools of the EU.

D. Conclusions

European NHRIs were late to organise their network and establish a permanent secretariat tasked with coordinating their efforts at the regional level. Even if there are still considerable challenges related to European NHRIs, the establishment of ENNHRI and with the work of FRA, the European human rights architecture now includes bodies mandated to coordinate and ensure cooperation between European NHRIs and European institutions. More systematic and perhaps even more formalised engagement processes are needed to ensure legislative and policy input from NHRIs into the European policy making.

⁹⁹ Please consult for further details

http://ec.europa.eu/budget/biblio/documents/fin_fw0713/fin_fw0713_en.cfm (accessed on 11 March 2016).

¹⁰⁰ Checks on the legality of the final text are carried out at a later stage through processes internal to the Commission. See Commission of the European Communities (2002).

Tools such as the European Commission's impact assessment tool is an area where NHRI and the EU could both benefit considerable from a closer cooperation.

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V. Conclusions¹⁰¹

This study set out to explore the role of NHRIs in third countries. As indicated in the beginning of the report the chapters presenting the analysis on NHRIs in India, Morocco, Peru and South Africa differ concerning their focus, methodology and structure as they were written by experts with different disciplinary and professional backgrounds. Despite these diversity the present chapter aims at bringing together the different chapters by analysing what information they provide concerning the function of monitoring and, in addition, by presenting some reflections on the regional monitoring of human rights in the EU and EU member states. Monitoring is one of the core tasks of Paris Principles-compliant NHRIs. Chapter II discussed the concept of monitoring as defined by international instruments and showed that monitoring is an important phase in the policy cycle (PRIME-model) with the aim of gathering information on the human rights situations as well as drawing conclusions ('diagnosis') and providing knowledge for policy making (see chapter II). Although monitoring is quite a 'fuzzy' concept, there are several dimensions which are relevant in all definitions. They refer to an 'input-dimension' such as observing or collecting data, to activities comprising the processing of data and information, including its acquisition, systematisation and analysis, and to an 'output-dimension' such as reporting and the provision of recommendations to policy makers. Before evaluating each of these dimensions with regard to the case studies presented in this report, the most important aspects concerning the institution in the selected cases, and their respective mandates will be introduced.

A. NHRIs – case studies

In the 'Report on the mapping study on relevant actors in human rights protection' the existence of many and varied types of NHRIs was noted, such as human rights commissions, human rights ombudsperson institutions,¹⁰² consultative and advisory bodies, research institutions and centres and hybrid institutions (Mayrhofer et al, 2014: 70).¹⁰³ The National Human Rights Commission in India, established in 1993, has quite a comprehensive mandate. It not only has complimentary judicial powers, but also works as a consultative and advisory body and as a research institution. The *Conseil National des Droits de l'Homme* (CNDH) in Morocco – which was preceded by the *Conseil Consultatif des Droits de l'Homme* – was created in 2011. CNDH is commission-type NHRI and is mandated to receive and handle individual complaints. It is also tasked with carrying out research-like activities such as investigations and inquiries and its mandate includes consultative and advisory tasks. The Peruvian NHRI, the Defensoría del Pueblo, is an

¹⁰¹ The conclusions were drafted by Monika Mayrhofer, Senior Researcher at the Ludwig Boltzmann Institute of Human Rights, Vienna, and Patrick Harris, Straniak Fellow at the Ludwig Boltzmann Institute of Human Rights, Vienna.

¹⁰² According to Nowak (2013: 15) 'commissions are multi-member bodies, typical for Commonwealth countries and countries in the African and Asia-Pacific regions. Whereas national human rights commissions in Commonwealth countries often are also entrusted with examining individual human rights complaints, the advisory committees in Francophone countries lack such powers and are restricted to a mere advisory role.' While NHRI typically have a broader mandate of protecting and promoting human rights, ombudsperson institutions are 'entities concerned with oversight over the proper administration of justice and not human rights specifically, taking a rather legalistic approach' (Steinerte and Murray, 2009: 54). The latter are 'usually single-member bodies, appointed by parliament' (Nowak, 2013: 15):

¹⁰³ Please consult <http://www.ijrcenter.org/national-human-rights-institutions/> (accessed on 14 March 2016).

ombudsperson institution. One of its main functions is to receive and address complaints. Interventions in this context comprise individual complaints, petitions and enquiries. Among its other various tasks are the oversight of policies and regulations, producing reports on specific cases or on broader problematic human rights issues and supervising and monitoring public administration. The South African Human Rights Commission (SAHRC) entered into operation in 1995. SAHRC has a quasi-judicial function and can receive complaints, petitions or recommendations from individuals or classes of persons (see Chapter III D of this report). The body is entitled to carry out research, public education and dissemination of information as well as to make recommendations to policy makers in the field of human rights. All NHRIs presented in the four case studies are accredited as A-Status NHRIs by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), which means they are fully compliant with the Paris Principles (ICC, 2014: 1-9).

All four NHRIs are legally mandated to carry out tasks that can be classified as monitoring activities in various ways. In the following, there will be a short reflection on the most important aspects of monitoring as presented at the end of Chapter II. These aspects are, the observation of the human rights situation, collecting data and information, cataloguing and analysing and reporting, as well as their advisory function (recommending).

1. Observing

The observation of the (national) human rights situation lies clearly in the mandate of all of the four NHRIs presented in this report. The mandates of the NHRIs are not excluding specific fields of rights but rather entitle the institutions to observe human rights issues in general. However, NHRIs very often select focus areas. Although possessing a broad mandate, for example, the Indian NHRC concentrated on civil and political rights in its earlier days and only later did it broaden its focus to include economic, social and cultural rights (see Chapter III A). Furthermore, the focus seems to depend very much on the specific local and national context. The main areas of the Indian NHRC include, for example, the elimination of child labour and bonded labour and the rights of castes, tribes and other vulnerable groups. The thematic focus of reports of the Peruvian Office of the Ombudsperson are said to be on access to justice, health and the right to life, integrity and liberty as well as women's rights. However, as is noted in Chapter III C, the focus of specific reports are also influenced by public discussions, the number of complaints against a specific institution or result from funding given by international donors for a specific subject. The thematic focus of the respective institution might also be influenced by the specific set-up of the NHRI, for example, the South-African SAHRC has assigned six Commissioners to specific areas such as children's rights or the rights of disabled or older persons (see Chapter III D).

2. Collecting and analysing data and information

All the NHRIs elaborated on in the case studies collect data and information in many ways. All of them are legally entitled to carry out and/or promote research in the field of human rights. All institutions obtain information on human rights violations from complaints they receive and they are entitled to look into specific human rights issues and situations they are aware of. They can obtain information from on-site visits, for example, in jails or other institutions of public administrations (India, Peru), summon any person to testify (Morocco), initiate public hearings or collect information from relevant actors through oral statements, written testimony or documentation (South Africa). Some also carry out surveys. For example

the South African SAHRC sends out questionnaires to relevant state offices together information on specific rights. The reports produced by the NHRIs also indicate that the institutions are collecting and analysing a broad range of other statistical as well as qualitative data including official statistics, administrative records, censuses, policy and legal documents and field research.

3. Cataloguing and analysing

The case studies provide little information on how exactly the NHRIs systematise and process the data and information they gather. The Peruvian contribution states that there is no standardised methodology or predetermined format for the drafting of reports, whereas the South African SAHRC seems to have a more systematic approach and methodically assesses the acquired information against national and international human rights standards (for details see Chapter III D).

4. Reporting

All NHRIs produce reports for various stakeholders such as citizens, policy makers and international organisations. Furthermore most of them are active when it comes to awareness raising or education on human rights issues. The Indian NHRC is mandated to enhance human rights literacy within the society and promote awareness through publications, the media, seminars and other means. The Commission not only writes annual reports documenting its work, but also reports on specific human rights issues, as well as reports to international treaty bodies (e.g. CEDAW Committee) (see Chapter III A). The Moroccan CNDH is actively involved in promoting a culture of human rights through education, teaching, training, providing information and raising awareness. It is involved in preparing reports for international treaty bodies. It also publishes reports on its activities, although the CNDH has only produced one report since 2011, while its predecessor, the Advisory Council for Human Rights (Conseil Consultatif des Droits de l'Homme) published five reports between 2003 and 2008) (see Chapter III B). As already discussed above, the Peruvian Office of the Ombudsperson publishes a variety of reports in a broad area of human rights issues. The SAHRC too does not only publish national (annual) reports on the violation of, or the state of certain rights (e.g. social and economic rights) it also tries to contribute at an international level; for example it drafted a written submission including recommendations to the Universal Periodic Review (UPR) in 2011. Despite SAHRC's efforts however, these recommendations were largely ignored by state officials (see Chapter III D).

5. Recommendation and advice-giving

The NHRIs presented in the case studies are authorised to give recommendations to policy makers and public administration. The Indian NHRC is entitled to review any law with regard to the protection of human rights and to scrutinise international human rights instruments and make recommendations for their effective implementation. It has done so especially in the field of anti-terrorism legislation, but it has also monitored the implementation of other measures and legislation (e.g. in the field of health or trafficking of women and children) (see Chapter III A). CNDH in Morocco may publish recommendations based on investigations into human rights violations. They can give advice to authorities on how to harmonise legislation with international human rights law and may also be active in promoting the implementation of the concluding observations and recommendations by international treaty bodies (see Chapter III B). The Peruvian Office of the Ombudsperson is involved in supervising policies and regulations, for example in the field of equality, mainly through the drafting of monitoring reports including

recommendations (see Chapter III C). As indicated above, SAHRC also submits recommendations at the international level (UPR). In addition, SAHRC includes recommendations in its reports (such as the Economic and Social Rights Report), which are submitted to public institutions such as the National Assembly and to the general public (see Chapter III D).

6. Challenges faced by NHRIs

The analysis above demonstrates that the NHRIs presented in the case studies are carrying out their monitoring function in many and diverse ways, however, also with a mixed record. In addition to the huge amount of work which is apparent in the functions carried out by all four NHRIs presented in this report, there are also several shortcomings mentioned in the respective case studies. The Indian NHRC has achieved a good reputation as being an independent institution and has taken human rights issues seriously. However, it is also said that in recent times its reputation has been somewhat jeopardised. Particularly concerning the monitoring of legislation. The Commission is said to be cautious, reserved and conservative, putting more emphasis on its mandate of receiving complaints (see Chapter III A). Although the overall human rights situation has improved over the last decades, the Moroccan CNDH has only played a 'modest' role in detecting human rights abuses. It is said not to be a very independent body and its recommendations are often ignored by the government (see Chapter III B). The Peruvian Office of the Ombudsperson's influence is also said to have decreased over the last years, which is also apparent in the fact that a new Ombudsperson has not been appointed for more than four years. The interim character of the current Ombudsman limits his possibilities to reach his full potential (see Chapter III C). The SAHRC has also been confronted with challenges concerning its monitoring tasks and its recommendations are said to not be taken seriously by the government (see Chapter III D).

B. Regional monitoring of human rights in the EU and EU member states

Part IV of the report focuses predominantly upon NHRIs at the regional (European level) in terms of their collective engagement with the EU as well as the latter's engagement with NHRIs in third countries. Ultimately it is noted that the coordination of European NHRIs could be significantly improved. The nexuses between European institutions addressing the issue of monitoring at the regional level are complex, and rather under coordinated. There appears to be no systematic oversight and there is perhaps a lack of synergy.

Part IV further noted that the work of NHRIs may be hampered by the lack of political support they garner on the national level, as well as the duplication of work which may occur across bodies with similar mandates. Furthermore, not all NHRIs are equipped with (individual) complaints mechanisms. For these reasons, among others, gaps may well exist in the work that NHRIs undertake concerning the protection and promotion of human rights. Cooperation has, however, been improved in recent years with the development of the European Network of National Human Rights Institutions (ENNHRI) which provides a more tangible focal point for collaboration.

The chapter touches upon another potential gap in questioning how the European NHRIs' experience could be harnessed to inform the development of legislation and policy at the EU level, noting that the

case studies in Part III of this report, may offer some insights in this regard. The chapters on India and South Africa, for example, whilst acknowledging that there is work to be done in seeing governmental compliance with legislative review and recommendation, do focus heavily upon legislative review functions. They note some positive elements and areas where human rights-threatening legislation has eventually been improved or repealed. The policy cycle noted in Part II, must then of course go one step further in order for this influence to be seen in the development of new and improved legislation and regulation from a human rights perspective. At the EU level, it appears to be the systematic interaction of NHRIs with the EU which is lacking in this respect, including, crucially, with the European Parliament and its sub-committees. The conclusion can certainly be drawn that the European Union's Fundamental Rights Agency has an important role to play in this coordination, as the closest body in existence to a European Union 'NHRI' and with the ability to and experience with having conducted research integrating the input of NHRIs.

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