
16. Advancing economic and social rights through national human rights institutions

Mario Gomez¹

1. INTRODUCTION

The past 25 years has seen a huge growth in independent institutions across many parts of the world. These institutions have included national human rights institutions (NHRIs), gender and women's commissions, ombudspersons, public defenders, children's commissions, commissions to combat bribery and corruption, right to information commissions and temporary bodies such as truth commissions and reparations commissions. Many of these commissions emerged against a backdrop of political transitions in different parts of the world, whether from dictatorship to democracy, or from war to peace. They were promoted by liberal cosmopolitan ideologies that placed faith in new institutions to preserve and promote the democratic gains that were the result of these political transitions. Many of these institutions have implications for the advancement of ESCR in their respective jurisdictions.

Twenty years ago, the Committee on Economic, Social and Cultural Rights (CESCR) adopted two General Comments, No. 9 and No. 10, that recognized the role that NHRIs could play in promoting and ensuring the interdependence and indivisibility of all human rights and identified several possible roles that NHRIs could play in relation to ESCR. The views of the Committee could be applied with equal relevance to other independent institutions such as gender commissions, children's commissions and reparations commissions.

Since these two General Comments, many NHRIs and other independent institutions have begun to work on advancing ESR in their respective countries.² Some NHRIs have begun to work on vulnerable and disadvantaged groups and explored issues of intersectionality, indivisibility and interdependence.³ Other NHRIs, however, have not pursued ESR with the same

¹ My thanks to the Centre for Asian Legal Studies (CALs) and the National University of Singapore, where much of the writing took place, and to Panuga Pulenthiran for some of the early research.

² The Scottish Human Rights Commission has initiated several activities on ESR: see Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018). The Jordanian NHRI has engaged in budget monitoring and the South African Human Rights Commission engages in activities around ESR every year. In the Asia-Pacific region, several NHRIs have held public inquiries on ESR. These are more fully discussed later in this chapter. See also Global Alliance of National Human Rights Institutions (GANHRI), 'Mérida Declaration – The Role of National Human Rights Institutions in implementing the 2030 Agenda for Sustainable Development' (10 October 2015) <<https://nhri.ohchr.org/EN/ICC/InternationalConference/12IC/Background%20Information/Merida%20Declaration%20FINAL.pdf>> at 3; and GANHRI, 'Amman Declaration and Programme of Action' (7 November 2012) <<https://nhri.ohchr.org/EN/ICC/InternationalConference/11IC/Background%20Information/Amman%20PoA%20FINAL%20-%20EN.pdf>>.

³ The Sri Lankan Human Rights Commission previously worked on internally displaced persons: see Mario Gomez, 'National Human Rights Commissions and Internally Displaced Persons: Illustrated

vigor – either because they believe that they lack an explicit mandate to work on ESR, because they believe that the political context requires them to focus on other areas of intervention, or because they believe that ESR are not a priority for their work.

Given the potential that NHRIs and other independent commissions have to advance ESR, one would have expected greater institutional momentum on ESR.⁴ Given that poverty and inequality is a feature of both the global north and the global south, one would have thought that NHRIs would have prioritized ESR irrespective of the political context and their institutional constraints. Tangible outcomes could provide added impetus to the work of independent institutions. More creative use of their mandates and better use of the strategies available at their disposal could have resulted in more important work on advancing ESR globally. While there has been some progress, it has been less than one would have imagined given the broad range of strategies that NHRIs can potentially employ in their work.

This chapter asks if NHRIs and independent institutions can play a transformative role in advancing ESR in those societies in which they operate. What roles may these institutions play? How can they best engage with state and other actors? In which areas should they prioritize resources and where may they achieve tangible outcomes? While the focus of this chapter is on NHRIs, some of the arguments may apply with equal force to other independent institutions.⁵

2. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS)

An NHRI is an entity set up under the constitution or by way of statute with a mandate to protect and promote human rights. In doing this it may perform a variety of functions, which include investigating complaints; promoting human rights education; litigating; conducting public inquiries; documentation; conducting research; and advice to government institutions. It may also address systemic and structural human rights issues and respond to individual and group complaints. Many NHRIs focus on vulnerable groups and individuals and the ‘worst off’. Several NHRIs engage with parliaments, the executive, the courts and civil society organizations.

NHRIs, and other independent institutions, have grown in recent decades as governments, donors, the United Nations and global civil society have placed faith in institutions to consolidate gains in democracy and promote human rights. The creation of NHRIs in a country

by the Sri Lankan Experience’ (Brookings Institution 2002). The Commission has more recently set up a separate unit to address the rights of persons living with disabilities.

⁴ See Eva Brems, Gauthier de Beco and Wouter Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights* (Intersentia 2013) and the examples from Bolivia, India, Ethiopia, Ghana and the Netherlands discussed in that book. See also the several examples discussed in Allison Cockery and Duncan Wilson, ‘Building Bridges: National Human Rights Institutions and Economic, Social and Cultural Rights’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014) 473–97.

⁵ For some early thinking on the subject see Mario Gomez, ‘Social Economic Rights and Human Rights Commissions’ (1995) 17 *Human Rights Quarterly* 155 and Mario Gomez, ‘The Role of Human Rights Commissions in the Realization of Economic, Social and Cultural Rights’ in ‘Circle of Rights: Economic, Social and Cultural Rights Activism, A Training Resource’, International Human Rights Internship Program and Asian Forum for Human Rights and Development (2000).

has sometimes accompanied a political transition and has been viewed as one way of trying to ensure that the transition stays on track and does not get derailed.⁶ In some other parts of the world the institution of the Ombudsman and the Public Defender has been vested with a human rights jurisdiction. NHRIs have also been established at the state, provincial or other regional level.

NHRIs are now strongly embedded as part of the domestic and international human rights architecture and have played an important role in the development of both domestic and international standards on human rights.⁷ For example, NHRIs participated in the development of the standards contained in the Convention on the Rights of Persons with Disabilities, and more recently in the generation of the Global Compact on Migration.⁸ NHRIs have a designated role in the Universal Periodic Review Process of the Human Rights Council and have increasingly participated in reviews of state parties by the CESCR.⁹ The Convention on the Rights of Persons with Disabilities has an innovative monitoring mechanism that is discussed below.

The growth of NHRIs has occurred in two phases. While NHRIs have been in existence from the 1940s, the first being set up in Saskatchewan, Canada in 1947,¹⁰ the 'modern' NHRI is different from many of the older institutions set up in Canada, the UK and New Zealand. Many of the older institutions were 'complaints oriented' and tended to focus on equality and other civil and political rights. For example, the Saskatchewan Human Rights Commission focuses on receiving and investigating complaints and attempting to mediate complaints; where mediation fails, it refers the matter for adjudication to the Court of Queen's Bench.¹¹

⁶ One of the earliest 'modern' NHRIs was the Philippines Human Rights Commission established in 1987, soon after the political transition and the fall of former President Marcos.

⁷ See the views of the other treaty bodies on the role of NHRIs: the Human Rights Committee (Paper on the relationship of the Human Rights Committee with National Human Rights Institutions, adopted by the Committee at its 106th session, 15 October–2 November 2012, CCPR/C/106/3); the Committee on the Rights of the Child ('The role of independent national human rights institutions in the promotion and protection of the rights of the child', 15 November 2002, CRC/GC/2002/2); the Committee on Enforced Disappearances ('The relationship of the Committee on Enforced Disappearances with national human rights institutions', adopted at the Committee's seventh session, 15–26 September 2014, CRD/C/6) and the Committee on the Elimination of Racial Discrimination, General Recommendation No. 17: The Establishment of National Institutions to Facilitate the Implementation of the Convention (Forty-second session, 1993), A/48/18 at 116 (1994).

⁸ See for example the Guidelines adopted by the UN Committee on Disabilities at its 16th Session on Independent Monitoring Mechanisms and NHRIs: <<https://nhri.ohchr.org/EN/IHRS/TreatyBodies/PersonsDisabilities/Pages/Guidelines.aspx>> and the conclusions of the meeting between the UN Committee on Disabilities, NHRIs, independent monitoring mechanisms designated under Article 33.2 (IMMS) of the Convention on the Rights of Persons with Disabilities, and organisations of persons with disabilities (DPOs) to exchange views in September 2014: <<https://nhri.ohchr.org/EN/IHRS/TreatyBodies/PersonsDisabilities/Pages/default.aspx>>. See also the conclusions of the meeting organized by the National Human Rights Council of Morocco (CNDH) and the Network of African National Human Rights Institutions (NANHRI), 'The Role of African NHRIs in the Process of Negotiations leading to the adoption of the Global Compact for Safe, Orderly and Regular Migration' in May 2017 in Niamey, Niger: <www.cndh.org.ma/an/press-releases/global-compact-migration-special-event-role-african-nhris>.

⁹ See for example the procedures for the participation of other stakeholders in the Universal Periodic Review Process: <www.ohchr.org/en/hrbodies/upr/pages/NgosNhris.aspx> and <<https://nhri.ohchr.org/EN/IHRS/UPR/Documents/FINAL%20ICC%20paper%20on%20NHRIs%20UPR%20follow%20up.pdf>>.

¹⁰ Saskatchewan Human Rights Commission <<http://saskatchewanhumanrights.ca/>>.

¹¹ *Ibid.*

The second wave of NHRIs started in the late 1980s and saw the establishment of NHRIs with broad mandates and a capacity, at least in theory, to engage in a variety of activities. The modern NHRI tends to have a broad mandate combining a complaints resolution function, an educational function, an advisory function and a law reform function. They also tend to interact more closely with civil society than the older commissions.¹²

The Second World Conference on Human Rights, held in Vienna, Austria in 1993, provided impetus to the establishment of NHRIs. The Vienna Declaration and Programme of Action, adopted unanimously by the Conference, declared:

The World Conference on Human Rights reaffirms 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. The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.¹³

In 1995, added momentum was provided when the United Nations appointed a Special Adviser on National Institutions to work with the High Commissioner for Human Rights. As of May 2019, there were 123 NHRIs who were members of the Global Alliance of National Human Rights Institutions (GANHRI).¹⁴ Of those institutions, 79 were in full compliance with the Paris Principles, 34 were 'not fully in compliance' with the Paris Principles and 10 were assessed as not being in compliance with the Paris Principles.¹⁵

3. THE 'PARIS PRINCIPLES'

NHRIs received prominence after the United Nations began to actively promote the concept. In 1991 the Centre for Human Rights in Geneva organized a consultation on NHRIs. One of the results of this meeting was a statement of principles titled 'Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights ('Paris Principles')'.¹⁶ These principles were subsequently endorsed by the Commission on Human Rights in 1992 and the General Assembly and Vienna World Conference in 1993.

¹² See also Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 642–729; Mark Tushnet, 'Fifth-Branch Institutions: South Africa' in David S. Law (ed.), *Constitutionalism in Context* (Cambridge University Press 2019); Mark Tushnet, 'Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries' (2020) 70 *University of Toronto Law Journal* 95; Mark Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12(2) *Law & Ethics of Human Rights* 181–202, available at <<https://doi.org/10.1515/lehr-2018-0010>>.

¹³ Vienna Declaration and Programme of Action; part 1 para 36.

¹⁴ Global Alliance of National Human Rights Institutions (GANHRI) <www.nhri.ohchr.org>.

¹⁵ *Ibid.*

¹⁶ 'Principles relating to the Status and Functioning of National Institutions', E/CN.4/1992/54, Annex (1992).

Since then the UN and the Human Rights Council have adopted several resolutions urging states to set up and strengthen NHRIs in accordance with the Paris Principles.¹⁷

The Paris Principles emphasize that these institutions should operate independently of government and have the necessary resources and infrastructure to function effectively. They also draw attention to the flexibility of these institutions and state that the members of these commissions should be drawn from different sections of society. Some NGOs, among them Amnesty International, have also issued guidelines on human rights commissions.¹⁸ The Amnesty standards emphasize that while human rights commissions can be an important mechanism for the protection of human rights, they can never replace and should not in any way diminish the legal structures enforced by an independent and impartial judiciary.

While the Paris Principles may have been overtaken by subsequent developments, they still remain the global benchmark for assessing the work of NHRIs and provide the overarching framework to the Office of the United Nations High Commissioner for Human Rights (OHCHR) and GANHRI for its accreditation process.¹⁹

The Paris Principles also find recognition in the Sustainable Development Goals (SDGs). Goal 16 of the SDGs seek to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.²⁰ Target 16.A.1 of Goal 16 refers to the 'existence of independent national human rights institutions in compliance with the Paris Principles'.

4. THE GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS (GANHRI)

At a conference held in Tunis in 1993, NHRIs established the International Coordinating Committee of NHRIs to help coordinate the activities of the NHRIs globally. In 2016, the International Coordinating Committee changed its name to the Global Alliance of National Human Rights Institutions (GANHRI). GANHRI is incorporated as a legal entity under the Swiss law and has a Bureau that consists of 16 'A-status' NHRIs representing the four regions of GANHRI: Africa, the Americas, Asia-Pacific and Europe.

GANHRI, in partnership with OHCHR, accredits NHRIs according to the Paris Principles as either fully compliant (A-status) or partially compliant (B-status). The Sub-Committee on Accreditation (SCA) of GANHRI reviews and analyzes accreditation applications received by OHCHR and makes recommendations to the GANHRI Bureau on the compliance of NHRIs with the Paris Principles. The SCA is composed of one 'A-status' NHRI from each of the four regional groupings. Members of the SCA are appointed by the regional groupings for

¹⁷ 'National institutions for the promotion and protection of human rights', UN General Assembly, 48th Session, A/RES/48/134 (4 March 1994); 'National institutions for the promotion and protection of human rights', UN General Assembly, 72nd Session, A/RES/72/181 (2017), 'National human rights institutions', UN Human Rights Council, A/HRC/RES/39/17 (2018), 'The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights', UN General Assembly, 72nd Session (Dec 2017) A/RES/72/186.

¹⁸ Amnesty International, 'Proposed Standards for National Human Rights Institutions', IOR 40/01/93 (January 1993).

¹⁹ Global Alliance of National Human Rights Institutions (GANHRI) <www.nhri.ochr.org>.

²⁰ Goal 16 of the Sustainable Development Goals <sustainabledevelopment.un.org/sgd16>.

a renewable term of three years. As of May 2019, there were 123 NHRIs who were members of the GANHRI, out of which 79 NHRIs were fully compliant with the Paris Principles.²¹ In assessing compliance GANHRI *does not* take into account if the mandate of the NHRI has express reference to ESCR, or if in practice the NHRI is dealing with a broad spectrum of human rights issues including ESCR.

‘A-status’ NHRIs have the right to participate in UN human rights mechanisms such as the Human Rights Council and the UN Working Groups, as well as in regional human rights mechanisms. They provide additional information to these UN bodies, provide information on good practices in implementing human rights norms, highlight challenges for realizing human rights and help international bodies develop relevant recommendations for human rights enforcement and advancement.

5. NHRIS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

In its General Comment on the Domestic Application of the Covenant, the CESCR made some key observations that are worth restating.²² The Committee drew attention to the basic principle that states should use all the means at their disposal to give effect to the rights recognized in the Covenant.²³ The Committee also observed that the norms in the ICESCR must be recognized in appropriate ways within the domestic legal order; appropriate means of redress, or remedies, must be available to any aggrieved individual or group; and appropriate means of ensuring governmental accountability must be put in place.²⁴ While highlighting the relevance of legal remedies and observing that it would be difficult for a state to justify excluding judicial remedies from the requirement of realizing Covenant rights ‘by appropriate means’,²⁵ the Committee also drew attention to the relevance of administrative remedies. The Committee observed that those living within a state’s jurisdiction would have a legitimate expectation that administrative authorities will take account of the Covenant in their decision-making and that such administrative remedies would be accessible, affordable, timely and effective.²⁶

That same year the CESCR adopted a second General Comment that dealt specifically with the role of NHRIs in the advancement of ESCR.²⁷ The Committee observed that Article 2(1) of the ICESCR required each state party to take steps with a view to achieving progressively the full realization of the Covenant rights by all appropriate means. It identified one way through

²¹ Global Alliance of National Human Rights Institutions (GANHRI) <www.nhri.ohchr.org>.

²² CESCR, General Comment No. 9: The Domestic Application of the Covenant (3 December 1998) E/C.12/1998/24.

²³ Para 2.

²⁴ Para 2.

²⁵ Para 3.

²⁶ Para 9.

²⁷ CESCR, General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights (10 December 1998), E/C.12/1998/25 (General Comment No. 10).

which important steps could be taken, as being the work of national institutions for the promotion and protection of human rights.²⁸

The Committee noted that NHRIs have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights but that unfortunately, this role has too often either not been accorded to these institutions or been neglected or given a low priority by them. It was therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The Committee listed the range of activities that NHRIs could perform in relation to economic and social rights:

1. Promoting educational information programs designed to enhance awareness and understanding of ESCR, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labor movement.
2. Scrutinizing existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights.
3. Providing technical advice, or undertaking surveys in relation to ESCR, including at the request of public authorities and or other appropriate agencies.
4. Identifying national level benchmarks and indicators against which the realization of Covenant rights can be measured.
5. Conducting research and inquiries designed to ascertain the extent to which particular ESCR are being realized, either within the state as a whole or in areas or in relation to communities of particular vulnerability.
6. Monitoring compliance with specific rights recognized under the covenant and providing reports thereon to the public authorities and civil society.
7. Examining complaints alleging infringements of applicable ESCR standards within the state.

To this list provided by the Committee may be added the following tasks:

8. Conducting public inquiries or national inquiries in cases where there is evidence to suggest a violation of ESCR or in cases of systemic violations of ESCR.
9. Monitoring government policy and budgets and suggesting changes so that they advance ESCR.
10. Advising government departments and institutions, and the private sector, on how best to integrate practices, into policy, budgets, and legislation that best advances ESCR.
11. Inquiring into violations and abuses on its own initiative.
12. Acting as an independent *amicus curiae* in litigation before courts, and in other interventions before administrative tribunals or other independent commissions.

²⁸ The Committee continues to highlight the role of NHRIs in the realization of ESC: see for example the Committee's comments on the periodic reports submitted by Cape Verde and Niger, in the Global Initiative for Economic, Social and Cultural Rights, 'The Committee of Economic, Social and Cultural Rights – 2018 Yearbook', available at <<https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5d1e4828eaad05000174a4ac/1562265823952/CESCR-Yearbook-2018-Final.pdf>>.

13. Issuing ‘public comments’ (as the treaty bodies do) on ESCR that will help develop a fuller and richer understanding of these rights, especially in the particular local context in which the NHRI or the independent institution operates.
14. Submission of reports where the state is a party to the ICESCR or other international treaty, and the state report is being considered by the relevant Committee.²⁹
15. Conducting joint campaigns with NHRIs and independent commissions from other countries on themes of common interest.
16. Developing national action plans or Bills of Rights for the advancement of ESR and other human rights.³⁰
17. Monitoring the implementation of judicial decisions.
18. Functioning as a ‘court-appointed’ monitor of judicial decisions.
19. Documentation and research.
20. Establishing regional or provincial sub-commissions to facilitate public access and help it conduct the above activities.
21. Preparing an Annual Report to be submitted to Parliament and be placed before the public.
22. Writing to ministries and other government institutions to request information on how they have advanced or implemented ESR and integrated ESR into their policies, programs and budgets, or requiring regular reporting of such measures.
23. Conducting periodic consultations with the public and private sectors on the progress achieved in advancing ESR.
24. Interacting regularly with the media to see that ESR figure in media reports and analysis.
25. Monitoring the recommendations of the international human rights treaty bodies and special procedures.
26. Contributing to the development of global standards on human rights.
27. Contributing to the universal periodic review process at the Human Rights Council.³¹

6. NHRIS AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Convention on the Rights of Persons with Disabilities (CRPD) was one of the first human rights treaties to recognize civil and political rights and economic, social and cultural rights as part of a single treaty. The CRPD also contains an innovative monitoring mechanism, unique among human rights treaties.³² According to Article 33(2) and (3) of the Convention:

²⁹ In 2018 the CESCR received 11 parallel reports from NHRIs: see the Global Initiative for Economic, Social and Cultural Rights, ‘The Committee of Economic, Social and Cultural Rights – 2018 Yearbook’ at p.7, available at <<https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5d1e4828eaad05000174a4ac/1562265823952/CESCR-Yearbook-2018-Final.pdf>>.

³⁰ The Northern Ireland Commission for Human Rights made recommendations for the development of a Bill of Rights for Northern Ireland: <www.nihrc.org/>.

³¹ See also Mario Gomez, ‘From Rhetoric to Realization: Delivering Socio-Economic Rights through Courts and Commissions’ in C. Raj Kumar and D.K. Srivastava (eds) *Human Rights and Development: Law, Policy and Governance* (LexisNexis 2006) 65–94.

³² The Optional Protocol to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, also provides for the designation of one or more focal points within the government for matters relating to the implementation of the Convention and the establishment of a frame-

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights. (emphasis added)
3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

The CRPD is unique in that in designating or establishing a monitoring mechanism, the state is required to take into account the Paris Principles.³³ The Committee on the Rights of Persons with Disabilities subsequently adopted ‘Guidelines on Independent Monitoring Frameworks and their participation in the work of the Committee’.³⁴ These Guidelines emphasize the variety of roles that NHRIs could potentially play in implementing the standards contained in the CRPD.³⁵

7. INSTITUTIONAL FLEXIBILITY

One of the biggest advantages of NHRIs is the institutional flexibility they bring to their work. In theory, NHRIs and similar institutions can perform a broad range of functions and activities, even if not all NHRIs have explored the full gamut of their potential powers. In some cases, NHRIs may be curtailed by their legal foundation and mandates. In most cases, though, NHRIs engage in a range of strategies that includes litigation, monitoring, budget analysis, public inquiries and public education. Unlike most courts, they can engage in initiatives of their own volition, which may include helping victims advance human rights claims and access courts and administrative remedies. For example, in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act allows the South African Human Rights Commission to institute proceedings under the Act and allows the Commission to assist complainants to institute proceedings in the equality courts set up under the legislation.³⁶

The institutional flexibility of NHRIs offers a particular advantage in advancing ESR. ESR require multiple strategies for their realization, ranging from litigation to budget monitoring to advocacy and awareness-raising. NHRIs by their very nature are capable of multiple activities that straddle all of these options, and in that sense provide an exciting vehicle for the delivery of ESR in those societies in which they operate.

The other advantage that NHRIs carry is their position between state and civil society and within the larger framework of institutional governance. Provided with either a constitutional

work for the monitoring of its provisions at the national level. However, unlike the CRPD it does not make express reference to the ‘Paris Principles’.

³³ Article 33(2) of the Convention on the Rights of Persons Living with Disabilities.

³⁴ ‘Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities’, see the annex to the CRPD Rules of Procedure, CRPD/C/1/Rev.1, 10 October 2016 <www.un.org/en/ga/search/view_doc.asp?symbol=CRPD/C/1/Rev.1>.

³⁵ See for example paras 3, 4 and 5.

³⁶ Sections 20(1)(f) and 25(3)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act No 4 of 2000) (PEPUDA) of South Africa.

or a statutory mandate, they are endowed with the credibility and legitimacy that constitutional and legal recognition brings. This enables NHRIs to have access to state institutions, public officials and other officials, and to proactively engage with them to shape policy and practice. It also enables them to confront these institutions in cases where there is evidence of a violation or systemic violation, and to help victims claim access to administrative or legal remedies.

Being located in this ambiguous space between state and civil society allows NHRIs to access information and documents that civil society would not generally be able to access. This position also allows NHRIs to engage with government officials and private actors more closely than civil society would be able to do, and to demand standards of accountability that civil society would be unable to demand. In many situations they have the capacity and reach to help victims access courts and administrative remedies. Their reports and recommendations are also likely to have a stronger impact within government than civil society findings and reports. Their location within this ambiguous space helps NHRIs to interact with other independent institutions and organizations such as gender commissions, ombuds offices, employers' organizations and chambers of commerce, and to coordinate their activities with the work of these institutions and organizations and engage in collaborative endeavors. There is an additional factor which makes NHRIs potentially significant actors. Failure to protect human rights is sometimes related to the lack of political will on the part of state structures. NHRIs have the potential to catalyze this political will on the part of political actors and institutions because of their legal status, their public profile, their access to resources and their location within the overall governance framework.

The institutional flexibility available to NHRIs is illustrated by a recent survey of 41 NHRIs on the strategies they have employed to prevent and combat gender-based violence.³⁷ In seeking to prevent gender-based violence, in the home, in public spaces and in other contexts such as conflict situations, NHRIs from different parts of the world have used a variety of interventions. These interventions straddled public education, awareness-raising and media campaigns, including specific training and capacity building exercises for those working in specific sectors, such as health care professionals, lawyers, police officers, educators, local government officials and social workers. It included the submission of shadow reports to international treaty bodies and workshops and seminars that explored how concluding observations and recommendations could be implemented and taken forward domestically.³⁸

It extended to studies on the 'war against drugs and extra-judicial killings' conducted in partnership with civil society, universities and church-based groups; other data collection initiatives; public inquiries; work on intersectionality and vulnerability; and advocacy around law and policy reform. It also included the monitoring of budgets and government austerity measures, and understanding their impact on women's rights, how changes in tax and welfare policies were affecting women and other vulnerable groups, studies on women heads of household (especially those with young children), working with the private sector to implement the

³⁷ 'Preventing and Eliminating All Forms of Violence Against Women and Girls: The Role of National Human Rights Institutions', GANHRI and German Institute of Human Rights (2019) <www.nhri.ochr.org>.

³⁸ Between 2016 and 2018, 32 NHRIs (A and B-status) submitted parallel reports to the CEDAW Committee during the reporting procedure of their own state: 'Preventing and Eliminating All Forms of Violence Against Women and Girls: The Role of National Human Rights Institutions' (GANHRI and German Institute of Human Rights 2019) p.14, <www.nhri.ochr.org>.

SDGs and how small and medium enterprises could empower women. Several NHRIs worked with internally displaced persons and refugees and looked at the impact of armed conflict on women. Supporting victims to claim remedies and assisting victims with litigation also formed part of the interventions that NHRIs made with regard to gender-based violence.

The potential that NHRIs have exists, in theory, yet many NHRIs around the world have not made maximum use of it. While NHRIs may perform a broad range of functions, their interventions have been restricted by human and financial resources and the socio-political context in which they operate. Even in cases where there exists a will within the NHRIs to exercise the full range of interventions, they may be forced to prioritize their interventions. State control over financial resources, and volatile political contexts, may force NHRIs to prioritize some rights and certain types of interventions over others. Attention to context would then be important in shaping interventions related to ESR, as would pressures from domestic civil society and other stakeholders, including other independent institutions.

8. INCLUSION OF ESR IN THE MANDATE OF NHRIS?

NHRIs' broad mandates to promote and ensure the protection of human rights in general should be interpreted and applied so as to give equal attention to ESR. When enabling legislation for NHRIs is drafted or revised, ESRs should be explicitly included and NHRIs given a full mandate and responsibility to promote them and to ensure access to effective remedies.

In analyzing the work of three African NHRIs and the impact their work has had on ESC, Beredugo and Viljoen conclude that an explicit mandate is important in helping NHRIs advance ESR. They note:

Against this background, we conclude that the confluence of the following factors would see the greatest improvement in the role of NHRCs in advancing the domestic implementation of socio-economic rights: the constitutionalisation of socio-economic rights; giving an explicit legal mandate on socio-economic rights to NHRCs; the strengthening (of) the institutional independence and capability of these institutions, especially in terms of providing adequate institutional, operational and financial independence and autonomy; and support of NHRCs by other public accountability institutions, such as the judiciary and parliament.³⁹

Of those NHRIs with an explicit mandate to enforce ESR, South Africa's Human Rights Commission (SAHRC) is the most widely known. The SAHRC has been given a specific mandate to monitor the realization of all human rights as well as a special mandate in relation to socio-economic rights.⁴⁰

Section 184(3) of the South African Constitution obliges the Commission to collect information from relevant organs of the state on the measures they have taken to realize the socio-economic rights of housing, health care, food, water, social security, education and the environment.

³⁹ Ayebaesin Jacob Beredugo and Frans Viljoen, 'Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies' (2015) 48(3) *The Comparative and International Law Journal of Southern Africa* 430.

⁴⁰ Section 184(3) of the Constitution of South Africa and Human Rights Commission Act 54 of 1994.

Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.⁴¹

There is no obligation on the state entities to proactively disclose information. They are requested instead to respond to a request of the SAHRC.⁴²

In compiling Section 184(3) reports the SAHRC sends open-ended questionnaires to government departments seeking information on the realization of a particular ESR. The questionnaires seek information on policy, legislative, budgetary and other measures adopted by the relevant government department. It also includes questions on vulnerable groups, and problems encountered by the departments, the measures taken to address these problems and indicators of progress. As of 2019, the SAHRC had produced nine Section 184(3) reports.⁴³ In its most recent report for 2012–13, the Commission noted the difficulties it has encountered in obtaining information from government departments. The Commission sought information from seven government departments for that report. None of the departments met the deadline and two had to be threatened with legal action before they submitted the required information.⁴⁴

While the SAHRC has been challenged on some occasions, it has also done important work, especially with regard to the right to access sufficient water and decent sanitation and the right to access adequate housing, illustrating the impact that NHRIs can have on the progressive realization of ESR.⁴⁵

8.1 The South African Human Rights Commission and the Right to Water and Sanitation

The Constitution of South Africa, in Section 27(1)(b), guarantees everyone the right of access to sufficient water and requires the state to adopt reasonable legislative and other measures to progressively realize this right within its available resources. However, the Constitution does not explicitly provide for the right to sanitation. The right to sanitation has been derived from other sections in the Constitution, including the right to a clean environment, health and dignity.

⁴¹ Section 184(3). See also D. Horsten, 'The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa' (2006) 9 *Potchefstroom Elec. L.J.* 1 and Ayebaesin Jacob Beredugo and Frans Viljoen, 'Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies' (2015) 48(3) *The Comparative and International Law Journal of Southern Africa* 401–30.

⁴² Section 184(3).

⁴³ South African Human Rights Commission <www.sahrc.org.za>.

⁴⁴ South African Human Rights Commission <www.sahrc.org.za>, '9th Section 184(3) Report on Economic and Social Rights, SAHRC (2012–2013)' 10.

⁴⁵ See South African Human Rights Commission, 'Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014, <[www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf)> and South African Human Rights Commission, 'Water and Sanitation Research Brief' (March 2018) <www.sahrc.org.za/home/21/files/The%20Right%20to%20Water%20&%20Sanitation%20-%20Monitoring%20the%20Implementation%20of%20the%20SAHRCs%202014%20Recommendations%202017-2018.pdf>.

The SAHRC's 2014 report on water and sanitation was triggered by two complaints it received alleging that two municipalities had built unenclosed toilets. The SAHRC inquired into these complaints and held that there was a violation of the rights to dignity, privacy and a clean environment. This was followed by national and provincial hearings by the SAHRC between August and December 2012 on the right to access water and sanitation, and consultations with key government stakeholders in 2013. After further consultations in the nine regions that hosted the public hearings, the SAHRC issued its 2014 report with recommendations for ensuring access to water and sanitation. The recommendations included capacity building for local authorities and regular engagement with vulnerable communities to ensure adequate access to water and sanitation.

In 2018, the SAHRC issued another report that assessed progress on its recommendations in the interim three-year period.⁴⁶ Information provided by departments of the state and key stakeholders, coupled with the SAHRC's independent research, formed the basis for the subsequent report. In its 2018 assessment, the SAHRC once again flagged the reluctance of key government agencies, including the departments of Water and Sanitation, the Department of Cooperative Governance and Traditional Affairs and the Department of Mineral Resources, to provide relevant information.⁴⁷

8.2 The South African Human Rights Commission and the Right to Housing

The SAHRC has also made important interventions with regard to the realization of the right to adequate housing.⁴⁸ In a recent research policy brief the SAHRC looked at the policy and implementation of access to housing for those with special needs, including persons with physical, intellectual and psychiatric disabilities; the elderly; victims of domestic abuse; orphans; homeless people; persons under substance rehabilitation; and parolees, ex-offenders and juvenile offenders.

Using qualitative research techniques, the policy brief highlighted the plight of persons with special needs regarding their specific housing needs and recommended the formulation of a special policy that provides for funding to build facilities for persons with special needs. The policy brief provided recommendations to government, to ensure that persons with special needs are able to exercise their right to adequate housing.

In its recent annual Trends Analysis Report, the SAHRC notes the increase in the number of ESR-related complaints.⁴⁹ The SAHRC comments:

⁴⁶ South African Human Rights Commission, 'Water and Sanitation Research Brief' (March 2018), article available at <www.sahrc.org.za/home/21/files/The%20Right%20to%20Water%20&%20Sanitation%20-%20Monitoring%20the%20Implementation%20of%20the%20SAHRCs%202014%20Recommendations%2020117-2018.pdf>.

⁴⁷ Ibid.

⁴⁸ See for example, South African Human Rights Commission, 'Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Needs Housing Policy and Programme', Economic and Social Rights Research Policy Brief 2016/2017 (2017) <www.sahrc.org.za/home/21/files/SAHRC%20Research%20Policy%20brief%202016-2017%20-The%20Right%20to%20Adequate%20Housing%2031%20March%202017%20-v3.pdf>.

⁴⁹ South African Human Rights Commission, 'Annual Trends Analysis Report 2016/17', available at <www.sahrc.org.za/home/21/files/SAHRC%20Trend%20Analysis%202016%20-%202017.pdf>.

The 2016/17 figures illustrate a complete shift in the hierarchy of complaints. ESR related complaints far exceed three of the four remaining complaints categories, namely, administrative action, labour relations; and arrested, detained and accused persons. ESR complaints (631) are second on the hierarchy of complaints, with equality (705) the highest. More significantly, when ESR complaints (631) are taken together with other socio-economic rights complaints relating to housing (297) and education (289), the total number of socioeconomic rights complaints (1,217) exceeds equality complaints (705) by 512 in the 2016/17 year.⁵⁰

9. PUBLIC INQUIRIES

The ‘public inquiry’ or ‘national inquiry’, among its many variations, has been one of the most frequent strategies used by NHRIs to gather data on systemic violations of ESR. The term public inquiry is used here in preference to national inquiry because the public hearing forms an intrinsic part of this process.

The public inquiry has several advantages, among them the ability to gather data on systemic violations through public testimony and the testimony of experts; the capacity to detect individual violations and take steps to redress those; the capacity to raise public awareness both in the locations in which the hearings are conducted and also at the broader country-wide level; and the capacity to influence policy and practice through the subsequent engagement with state and other actors. In some cases, it may provide a ‘baseline survey’ for subsequent inquiries held at a later stage. It also provides an opportunity to engage with the media on important human rights issues.⁵¹ In many cases ESR involves complex scenarios and the inter-relationship among a range of different actors. The public inquiry is a potent strategy to address this complexity and identify the patterns and the actors resulting in systemic violations of ESR.⁵² In some cases the public inquiry may be a consequence of a high number of complaints with regard to a particular issue, as in the case of the Malaysian inquiry into the land rights of Indigenous peoples, or the case of the South African Human Rights Commission’s inquiry on land rights.⁵³

A public inquiry is an inquiry into a human rights issue that affects a group of persons or a large population group. It is generally initiated after prior research or surveys by the NHRI, or complaints received by the NHRI, establish that there is a case that warrants a more detailed inquiry. Most public inquiries are conducted in a transparent manner with prior notice. They entail testimony from members of the public and from experts. The report or reports will contain recommendations for policy and practice addressed to a variety of state and non-state actors. They may also form the basis for subsequent public education and public awareness initiatives. They may also result in court action and action before administrative tribunals.

⁵⁰ Ibid 21.

⁵¹ See generally ‘Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation’, Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law (September 2012).

⁵² Most of the examples listed in the Manual above in n 22 consist of violations of ESR.

⁵³ The SUHAKAM Inquiry is available at <www.suhakam.org.my> and the report of the South Africa Human Rights Commission is available at <www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>.

In their manual on national inquiries, the Asia-Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, listed fourteen steps in the conduct of a public inquiry:

1. Choose the issue; 2. Prepare a background or scoping paper; 3. Identify, consult and engage stakeholders; 4. Draft objectives and terms of reference; 5. Appoint Inquiry Commissioners and staff; 6. Gather other resources; 7. Finalize an inquiry plan; 8. Obtain information: research and evidence; 9. Conduct public hearings; 10. Develop recommendations; 11. Prepare the report; 12. Release the report; 13. Follow up; 14. Evaluate.⁵⁴

9.1 Suhakam's Inquiry into Land Rights of Indigenous Peoples in Malaysia

Suhakam's inquiry into the land rights of Indigenous people was triggered by a large number of complaints to the Commission. The inquiry established a tension between the model of development pursued by the state, and the land rights of Indigenous peoples and the disruption of their way of life. Among its recommendations, the Commission established that the state should follow a human rights-based approach to development to ensure that communities have rights to participate in decision-making and access to prior and informed consent when land is being expropriated for development purposes.

The Commission invited public submissions before starting the hearings and engaged a wide range of stakeholders, including government departments and agencies, non-governmental organizations, Indigenous communities, private companies, the media and other groups and individuals.

One of the objectives of the inquiry was also to build public awareness on the rights of Indigenous peoples and their way of life. In this respect, Suhakam made a special effort to involve and engage the media to play an educational role. The inquiry also presented an opportunity for the Indigenous people to submit historical evidence in support of their oral evidence before the Commission.

9.2 The Inquiry on the Right to Health in India

The Indian National Human Rights Commission initiated a series of public hearings on the rights to health in partnership with Jan Swasthya Abhiyan (JSA) or People's Health Movement – India, a network of several hundred health and civil society organizations.⁵⁵ The

⁵⁴ 'Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation', Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law (September 2012).

⁵⁵ See 'Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation', Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law (September 2012) 102. The Manual lists the following among the inquiries conducted by NHRIs in the Asia-Pacific Region: Australian Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) National Inquiry into Homeless Children, 1989 <www.humanrights.gov.au/human_rights/housing/index.html#youth_1989>; National Inquiry into Human Rights and Mental Illness, 1993 <www.humanrights.gov.au/disability_rights/inquiries/mental.htm>; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997 <www.humanrights.gov.au/social_justice/bth_report/index.html>; National Inquiry into Rural and Remote Education, 2000 <www.humanrights.gov.au>

process included public inquiries in different parts of the country and participatory surveys to understand the facilities in primary health care centers and rural hospitals. The regional public hearings culminated in a national public hearing with the participation of health officials from the central government and the several states in December 2004. Policy recommendations were presented and a National Action Plan on the ‘Right to Health’ was developed. The reports documented individual violations as well as structural violations. The Indian commission continued this work with several subsequent inquiries into the right to health. This also generated orders from the commission to compensate individuals and groups. The process attracted the participation of civil society and several organizations working in the health sector in India.⁵⁶

9.3 The South African Inquiry into the Right to Adequate Housing

The right to access to adequate housing is found in Section 26 of the South African Constitution, and in terms of this Section, the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right. In addition, Section 26 provides for security of tenure by protecting persons against eviction or the demolition of one’s home without an order of court made after considering all relevant circumstances. There have been some important cases, interpreting these Sections, decided by the Constitutional Court on these rights.⁵⁷

In 2015, following its report on access to water and sanitation (discussed above), the South African Human Rights Commission initiated an ‘investigative hearing’ into the right to adequate housing.⁵⁸ One of the conclusions of the report on water and sanitation related to the failure of local government to provide adequate service delivery. The February 2015 Investigative Hearing of the SAHRC on adequate housing focused on a number of issues,

.gov.au/human_rights/rural_education/;>; National Inquiry into Children in Immigration Detention, 2004 <www.humanrights.gov.au/human_rights/children_detention_report/index.html>; National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, 2007 <www.humanrights.gov.au/human_rights/samesex/report/index.html>; Human Rights Commission of Malaysia National Inquiry into the Land Rights of Indigenous Peoples in Malaysia, 2012 <www.suhakam.org.my/web/682315/1>; Independent Commission on Human Rights in Palestine National Inquiry into Employment of Persons with Disabilities (commenced 2011); National Human Rights Commission of India National Inquiry on the Right to Food, 2004; National Inquiry on the Right to Health Care, 2004; National Human Rights Commission of Mongolia National Inquiry on Freedom from Torture, 2006 <www.asiapacificforum.net/members/full-members/mongolia/downloads/annual-reports/Annual_Report_2006.pdf>; New Zealand Human Rights Commission National Inquiry into Accessible Public Land Transport, 2005 <www.hrc.co.nz/disabled-people/inquiry-into-accessible-public-land-transport-for-people-withdisabilities/>; Inquiry into Discrimination and Human Rights Issues for Transgender People, 2008 <www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/resources>.

⁵⁶ See also Justice B.C. Patel, ‘The Role of NHRC in Protecting and Promoting the Economic and Social Rights of Vulnerable Groups in India’ in Eva Brems, Gauthier de Beco and Wouter Vandenhoe (eds) *National Human Rights institutions and Economic, Social and Cultural Rights* (Intersentia 2013) 79–148.

⁵⁷ See for example *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁵⁸ See South African Human Rights Commission Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery (2015) <www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>.

including urbanization, town planning, the upgrading of informal settlements, the role of the private sector, the manner in which evictions are carried out and the role of third parties in these processes. One of the key factors underpinning the approach of the SAHRC was that the right to adequate housing is intrinsically linked to other rights, such as the right to water and sanitation and the rights to public participation, equality, human dignity and access to information.

The report made several far-reaching recommendations for the realization of the right to adequate housing. One of the conclusions was that the needs of the ‘worst off’ had not been prioritized so far, with the focus on the ‘world class’ city narrative resulting in a focus on private sector investment over the needs of vulnerable communities. These policies had failed to reverse the legacy of ‘apartheid era’ special planning. Low capacity at local government level, varying interpretations of law and policy, poor housing products provided by third party contractors and poor monitoring mechanisms were also reasons why many sections of the South African population did not have access to adequate housing. Lack of access to information, low levels of security of tenure and poor coordination among the different tiers of government were also identified as being problematic.⁵⁹

10. MONITORING POLICY AND BUDGETS

Monitoring policy and budgets is another intervention that NHRIs are particularly well placed to undertake. This requires competent and well-equipped staff within the NHRI or access to a pool of external experts to assist with analyzing information and drawing conclusions on the impact that policy and budgets are having on the ESR of individuals and groups, especially the most vulnerable groups. Monitoring can help establish if policy and public spending are privileging certain groups over a period of time, if there has been public participation across a broad spectrum in the development of policy and budgets, if the conditions of disadvantaged groups are being exacerbated and what alternatives may be pursued to ensure that ESR is advanced across the entire population spectrum.⁶⁰

Monitoring would entail analyzing public budgets, public spending and public policies and making the connection with the impact that these policies are having on ESR. One of the objectives would be to demonstrate that even by ‘staying within existing resources’ an adjustment to public policy and spending could help advance ESR for identified groups, especially those who are most disadvantaged.

One of the more difficult challenges is to monitor ‘progressive realization’ against acceptable and credible indicators. While this may challenge most NHRIs, one way to proceed would be to develop partnerships with universities and think tanks and develop a long-term plan to monitor progressive realization of ESR. NHRIs may want to consider the development

⁵⁹ See also the inquiry launched by the Kenya National Commission on Human Rights (KNCHR), *Living Large: Counting the Cost of Official Extravagance in Kenya* (2005), that documented evidence of the misuse of public resources by the government: <www.khrc.or.ke/>.

⁶⁰ See for example Kofi Quashigah, ‘The Monitoring Role of the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) in the Protection of Economic, Social and Cultural Rights’ in Eva Brems, Gauthier de Beco and Wouter Vandenhoele (eds) ‘National Human Rights Institutions and Economic, Social and Cultural Rights’ (Intersentia 2013), 107–27.

of a ‘vulnerability spectrum’ or ‘vulnerability index’ that will enable it to identify vulnerable groups or those groups on the edge of vulnerability and make specific recommendations for the guarantee of ESR for those who are ‘worst off’.

Britain’s Equality and Human Rights Commission (EHRC) has developed a Methodology Framework for assessing the state of human rights and equality in Britain. It provides one possible model for NHRIs to monitor and comment on the state of a wide range of human rights in a society.

In its latest report, ‘Is Britain Fairer? The State of Equality and Human Rights 2018’, the EHRC presents a comprehensive picture on the state of equality and human rights in Britain.⁶¹ The Methodology Framework developed by the EHRC consists of six major areas of life, each of which contains three ‘core’ indicators. The six areas are education, work, living standards, health, justice and personal security and participation. In some, there are supplementary indicators.

Within each indicator, the Measurement Framework identifies the ‘structure’, the ‘process’ and the ‘outcomes’. The ‘structure’ relates to the laws affecting equality and human rights across Britain. The EHRC makes observations about the overall efficacy of this legal framework and considers where changes may be needed to ensure greater equality and better protection of human rights. The ‘process’ relates to the efforts that are being made by governments to effectively implement the obligations contained in human rights and equality standards, including the implementation and evaluation of public policies. In ‘outcomes’, the EHRC presents an analysis of the experiences and end results for individuals and groups in relation to the various indicators. This includes the outcomes for people with differently protected characteristics, people with certain combinations of protected characteristics and those ‘at-risk’ groups specified in the Measurement Framework.⁶²

11. NHRIS AND THE ‘WORST OFF’

The Committee on Economic, Social and Cultural Rights has noted that a state where significant numbers are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of the most basic forms of education would *prima facie* be failing to discharge its obligations under the Covenant.⁶³

Jurisprudence from some of the global courts, notably the Brazilian, Colombian, Indian, German and South African courts, has established that states cannot evade their ‘basic’ or ‘minimum’ obligations by pleading a lack of resources. Where groups are in a state of ‘crisis’ or ‘vulnerability’ then states are obliged to respond immediately. Although ESR entail the expenditure of resources, they also entail a threshold level below which state conduct cannot sink. Global jurisprudence also observes that the concept of progressive achievement encapsulated in these rights enables courts to monitor their realization over a period of time.⁶⁴

⁶¹ ‘Is Britain Fairer? The State of Equality and Human Rights 2018’ (June 2019) <www.equalityhumanrights.com/sites/default/files/is-britain-fairer-accessible.pdf>.

⁶² *Ibid* 272–76.

⁶³ General Comment No 3, 1990.

⁶⁴ See Mario Gomez, Conor Hartnett and Dinesha Samararatne, ‘Constitutionalizing Economic and Social Rights in Sri Lanka’, Centre for Policy Alternatives, Working Paper No 7 on Constitutional

These state obligations are discussed in Chapters 14 and 15. For example, the recent report by the British EHRC identifies certain vulnerable groups, including persons with disabilities, children in poverty, certain ethnic minorities and those in detention, where there has been a regression and the picture remains ‘bleak’.⁶⁵

These conceptual frameworks developed by domestic courts provide a strong impetus for NHRIs to demand similar standards of accountability from the state in their monitoring activities on policy and budgets. Where there is data and analysis from monitoring activities to support the conclusion that pockets of the population are being deprived of essential goods and services, which is in conflict with the idea of human dignity, the NHRI concerned should then be able to demand that the state in question act immediately to ameliorate this state of affairs. Given that poverty in its many variations is a feature of both the global north and global south, NHRIs may want to consider prioritizing the ‘worst off’ irrespective of the political context in which they work.

12. NHRIS AND LITIGATION

In her recent report to the Human Rights Council, the Special Rapporteur on the Right to Housing makes the following observation:

National human rights institutions should provide public legal education and assistance to rights claimants to access justice for the right to housing through all available mechanisms. They may assist rights holders to bring cases to courts or tribunals by initiating claims jointly with rights holders, by participating as third parties or amicus, by providing necessary evidence on systemic issues or by supervising the implementation of remedies. The Defensoría del Pueblo in Colombia has conducted site visits in order to hear directly from communities, forwarded information about systemic violations of the right to housing to municipal or national authorities and followed up with strategic litigation on the right to housing when necessary. The Scottish Human Rights Commission is playing a leading role in developing models for ensuring effective remedies for the right to housing and other socioeconomic rights.⁶⁶

Reform, September 2016 <www.cpalanka.org> and Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018), Chief Justice Alejandro Linares, ‘Colombian Constitutionalism: Judicial Review, Rights and Rule of Law’, presented at the conference on ‘Constitutional Review in Asia: Promoting Equality, Integrity and the Rule of Law’, October 2018, International Centre for Ethnic Studies, Sri Lanka, on file with the author; Katharine G. Young, ‘Constituting Economic and Social Rights’ (Oxford University Press 2012); Magdalena Sepulveda, ‘The Constitutional Court’s Role in Addressing Social Injustice’ in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International Law* (Cambridge University Press, 2008) 144.

⁶⁵ Is Britain Fairer? The State of Equality and Human Rights 2018’ (June 2019) <www.equalityhumanrights.com/sites/default/files/is-britain-fairer-accessible.pdf> at 8. See also Laurien J.L. Koster, ‘Equal Treatment, an Effective Mechanism to Protect Human Rights in the Netherlands?’ in Eva Brems, Gauthier de Beco and Wouter Vandenhoe (eds) *National Human Rights Institutions and Economic, Social and Cultural Rights* (Intersentia 2013), 149–66.

⁶⁶ ‘Access to justice for the right to housing’, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/40/61 at p.16.

Litigation provides the ‘cutting edge’ to human rights. Without legal remedies the notion of human rights would lose much of its potency. Litigation is one of the most effective ways of locating responsibility and accountability and then mobilizing for the realization of remedies. Litigation and interventions before administrative tribunals often provide the best way of delivering concrete outcomes for individuals and groups that are subject to violations of ESR. Litigation can also help develop an understanding of some difficult concepts. This is especially true when the litigation is participatory in nature and the court allows *amici curiae* to intervene. The willingness to resort to international and comparative material can help in clarifying issues and provide relevant analogies. Litigation can also help in raising awareness, provide a useful educational tool and prod policy reform.⁶⁷ One way of looking at litigation in the case of ESR is to think of adjudication as an institutional dialogue, where the court can order the legislature or executive to ‘rethink’ a flawed policy without necessarily declaring it void.⁶⁸

An NHRI can support litigation for victims in several ways. First, it can provide legal advice and help a victim access legal or administrative remedies. This it could do by helping the victim petition in an appropriate court or administrative tribunal. Second, it can intervene strategically in significant cases as an *amicus curiae*. Third, it can initiate legal action on behalf of a victimized or vulnerable group on its own. This court action could emerge as a result of complaints the NHRI has received, as a result of surveys or research it has conducted or as a result of the public inquiries it has launched. Fourth, it may, in appropriate cases, initiate litigation to compel a public official to act in accordance with its recommendations. Fifth, the NHRI may monitor court orders, and in some cases the court may specifically request the NHRI to monitor a court decision.⁶⁹

13. TRANSNATIONAL DIALOGUE ACROSS NHRIS

One of the consequences of the growth of NHRIs has been the global and regional alliances that have emerged. Both the regional and global alliances, through the accreditation and other processes, have provided support to NHRIs in a variety of different ways. What has emerged is a transnational dialogue of NHRIs, speaking to each other and learning from each other,

⁶⁷ See Mario Gomez, ‘From Rhetoric to Realization: Delivering Socio-Economic Rights through Courts and Commissions’ in C. Raj Kumar and D.K. Srivastava (eds) *Human Rights and Development: Law, Policy and Governance* (LexisNexis 2006) 65–94 and Open Society Foundations, ‘Strategic Litigation Impacts: Insights from Global Experience’ (2018), available at <www.opensocietyfoundations.org>.

⁶⁸ As the Colombian, Indian and South African courts have done on several occasions. See *Aguero, Aurelio E v GCBA*, Buenos Aires Administrative Court of Appeals, December 2003 and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others*, CCT 24/07 and Gomez, Hartnett and Samararatne, ‘Constitutionalizing Economic and Social Rights in Sri Lanka’, Centre for Policy Alternatives, Working Paper No 7 on Constitutional Reform, September 2016 <www.cpalanka.org>.

⁶⁹ See also the work of the Colombian *Defensoria del Pueblo*, and the *Argentinean Defensoria*, discussed in Allison Cockery and Duncan Wilson, ‘Building Bridges: National Human Rights Institutions and Economic, Social and Cultural Rights’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds) *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014) 473, 480 and 484.

regionally and also globally. This dialogue, as it expands, has the potential to strengthen the work of NHRIs in implementing and advancing ESR.

14. INSTITUTIONAL AND TRANSFORMATIVE IMPACTS

NHRIs rely on a number of factors to drive their impact.⁷⁰ Among them are the personality, the commitment and the dynamism of those at leadership level. All institutions, whether public, private or independent, rely on imaginative and creative leadership to drive transformative potential. Leaders of NHRIs will need not only to be dynamic in their thinking and independent in their approach, but also to show the capacity to engage astutely with political actors, the media and public opinion. The dynamism and skills of those at other tiers of the NHRI will also affect their performance. Societies that have undergone political transitions benefit from new appointments at the leadership level. Yet, transforming the culture at mid and lower levels can be a challenge, and internal organizational cultures and processes can display resistance to change, even if there is will at the leadership level.

The availability of adequate financial and human resources would also affect the impact that NHRIs can have. Control of financial resources is a way through which the legislature and executive can control the NHRIs, including the quality of human resources. The obligation of funding a NHRI should ideally lie with the state. In some cases, NHRIs have the capacity to access additional financial resources from international donors and private foundations.

The political culture and the democratic space that exists for NHRIs to operate will also drive impact. Clearly, a more tolerant political culture and open space for NHRIs to function will significantly enhance their impact. At moments of oppression, NHRIs will need to re-strategize and ensure that they prioritize those human rights issues that are under most threat.

Public benefit can drive the resilience, creativity and sustainability of NHRIs and independent commissions. Should NHRIs and other independent commissions begin to have a public impact and create tangible public benefit, this will add momentum to the work of these commissions, whether it be with regard to ESR or in other areas.⁷¹ Public support for an NHRI can be crucial when the democratic space closes and in ensuring that these institutions stay resilient at times of political crisis.

An NHRI's relationship and engagement with civil society, and the space that civil society correspondingly has for influencing the work of NHRIs, will have an impact on the realization of ESR. Strong partnerships with civil society will ensure that NHRIs stay briefed on individual violations and systemic issues. Civil society partnerships will also help monitor and add pressure for implementation of NHRI recommendations to state entities. Partnerships will also drive innovative and bold interventions. Strong partnerships with civil society and public support for NHRIs would be important should democratic backsliding occur, helping them

⁷⁰ See also Mario Gomez, 'The Right to Information and Transformative Development Outcomes' [2019] *Law and Development Review* 837 <<https://doi.org/10.1515/ldr-2019-0046>>.

⁷¹ See for example the work of the Sri Lankan Right to Information Commission and Mario Gomez, 'The Right to Information and Transformative Development Outcomes' [2019] *Law and Development Review* 837 <<https://doi.org/10.1515/ldr-2019-0046>>.

stay resilient. At these times of crisis and oppression, NHRIs benefit from support from civil society and the public to ensure that they remain robust and independent.

The connections and engagements NHRIs have with similar institutions from other parts of the world, whether it be NHRIs or other independent institutions, and with regional and global alliances will also help shape their work and practice, and provide support at moments of crisis.

Sri Lanka's brief experience with a right to information (RTI) legal regime illustrates two points that have relevance for NHRIs and independent institutions working on ESC in other parts of the world.⁷² The RTI Commission established under the Sri Lankan legislation has endeavored to provide a fair hearing and to scrupulously observe the rules of natural justice in the appeals it has heard, which arise after the initial request for disclosure of information is refused by the public officer concerned. Second, it has balanced an adversarial and an engaging approach and in many orders has 'persuaded' state officials to disclose information that should be in the public domain.⁷³ An order from the Commission has provided cover for public officers who may have feared reprisals should they disclose information.⁷⁴

15. A LARGER INSTITUTIONAL DIALOGUE

This chapter has sought to ask if NHRIs and independent institutions can be transformative in their approach to ESR. The answer to this depends on whether NHRIs are willing to see themselves as one part of a larger institutional landscape that seeks transformation of social structures and inequalities through different methods and at different levels. The answer also depends on whether NHRIs are able to make optimum use of the broad range of strategies available to them, even if their legal mandate is ambiguous. An explicit statutory or constitutional mandate, as we have noted above, will no doubt assist these institutions.

The enforcement and realization of ESR call for a broad range of actions and interventions involving a number of different of state and non-state actors. NHRIs, because of the capacity they have to engage in a broad range of interventions, their location between state and civil society, their capacity to engage with both state and civil society organizations and their constitutional or statutory mandate, are uniquely placed to intervene to advance ESR. The effectiveness of NHRIs will be constrained by limits to financial and human resources, the political context and priorities of the state in which they operate, and by persons in positions of leadership within the institutions. Yet, within those parameters, NHRIs possess an ability to unleash a momentum that can generate tangible outcomes around ESR, including for those in particularly vulnerable situations.

⁷² See the Right to Information Act, No 12 of 2016 and Article 14A of the Sri Lankan Constitution, introduced by the Nineteenth Amendment to the Constitution in 2015. See also RTI Commission of Sri Lanka, 'Selected Orders of the Right to Information Commission of Sri Lanka 2017–2018' (February 2019) <www.rticommission.lk/web/images/pdf/books/selected-orders-of-the-rtic-06032019.pdf> and Kishali Pinto-Jayawardena (ed), *Reflections on Sri Lanka's RTI Act & RTI Regime* (Right to Information Commission of Sri Lanka 2019).

⁷³ Mario Gomez, 'The Right to Information and Transformative Development Outcomes' [2019] *Law and Development Review* 837 <<https://doi.org/10.1515/ldr-2019-0046>>.

⁷⁴ *Ibid.*

The work of NHRIs should be viewed as one part of a wider legal and political strategy for the realization of ESR. It is one part of a larger process of rights implementation. This strategy encompasses the courts, other independent institutions, the legislature, the executive, international and domestic civil society and international human rights processes. This strategy may require NHRIs to be confrontational at moments and engaging at other moments. It may require NHRIs to suspend remedies and allow the executive and legislature time to modify policies and practice. At other times it may require the NHRI to hold that there have been violations of ESR or help victims access remedies before courts or administrative tribunals. A larger institutional dialogue will also help maintain institutional resilience at times of political crisis and democratic push-back. For NHRIs, being transformative will require a vision and a plan of action that encompasses strategic engagement, principled decision-making and creative interventions.