FEATURE

Emerging Opportunities for Economic and Social Rights Adjudication: Exploring the Inquiry Procedure of National Human Rights Institutions

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National human rights institutions (NHRIs) play a distinct role in the promotion and protection of human rights at the domestic level. It has been argued increasingly that their role is instrumental in monitoring compliance with economic and social rights (ESR) obligations. NHRIs across the globe, from Asia Pacific and Africa to Europe and Latin America, are using national inquiries to address and redress a wide range of ESR issues, such as health, housing, land, employment, and water and sanitation.

Considering how intricate the judicial adjudication of ESR is in many national jurisdictions, this article aims to explore the alternative avenue for ESR adjudication that may be offered by NHRIs' inquiry procedures. The article looks at specific examples, and, as part of its account of the role of non-judicial mechanisms in the protection of ESR, it endeavours to shed some light on the nature, advantages and effectiveness of national inquiries as ESR redress mechanisms.

NHRIs as ESR review mechanisms

NHRIs are domestic mechanisms with a constitutional or statutory mandate to promote and protect human rights. The Paris Principles (1991), which define the roles and responsibilities of NHRIs, prescribe review or adjudicative functions – that is, compliance monitoring (investigation) and complaints handling – as well as advisory and educational functions.

As non-judicial independent state institutions 'created to narrow the gap between human rights standards and their practical application' (De Beco 2013:7), NHRIs occupy a central position in the domestic implementation of human rights norms. Even though various legal, political, financial and other factors may affect NHRIs' operations and effectiveness, their unique place and crucial role within the national and international human rights system have been recognised unequivocally (Smith 2006; De Becko 2013; Lindholt 2013; Corkery & Wilson 2014).

As a matter of general principle, NHRIs are vested with the power to promote and protect all rights without distinction by virtue of the Paris Principles (Principle 1(a)), which further stipulate that NHRIs should be given the broadest possible mandate, including with respect to the ESR (Principle 2(a)). Given the indivisibility and equal importance of all rights, 'it must be considered implicit that

[the Paris Principles] apply equally to all aspects of human rights, without any specification or qualification [...] and [...] must be considered as providing equal weight to [ESR]' (Lindholt 2013: 46).

In General Comment No. 10, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has already emphasised the key role of NHRIs in ESR implementation, in addition to which it highlighted activities that NHRIs may undertake in the promotion and protection of ESR. The activities range from educational activities and technical advice to reviewing laws and administrative acts, setting national benchmarks, carrying out research, and conducting inquiries. Corresponding emphasis is given in the Maastricht Guidelines on violations of economic, social and cultural rights (para 25) and in the 'Principles and guidelines on the implementation of Economic, Social and Cultural Rights' in the African Charter on Human and Peoples' Rights (para 49).

Nevertheless, the role of NHRIs in ESR enforcement is still an emerging subject in contemporary discussion. The reason for this lies in the fact that human rights practice is conventionally inclined not only towards civil and political rights but to judicial enforcement of rights. In counter-reaction, the role of the judiciary in ESR enforcement has become a subject of extensive scholarly exposition (see, for example, Gargarella et al. 2006; Guari & Brinks 2009; Langford 2008; Liebenberg 2008; Michelman 2011; Ramcharan 2005; Young 2010).

Challenging the traditional discourse, Gomez (1995:163) has argued that '[t]he very nature of socioeconomic rights demands that models for their realization not be confined to a complaints-oriented model such as the court process'. Apart from the debate on the legitimacy of judicial review of ESR, the limitations of the judicial process are a source of discontent. Given that courts are confined to dealing with complaints brought before them, their success is dependent on active litigation, a situation calling for non-judicial approaches utilising a broader set of tools. While the important role of the judiciary in ESR enforcement should not be ignored, other, non-judicial means continue to be necessary for addressing the underlying structural factors of ESR violations (Yamin 2005: 1220).

In this regard, Kumar (2006) affirms that NHRIs are well positioned to fill the gap as a non-judicial ESR enforcement mechanism, arguing that they are particularly suited for undertaking policy analysis (which is especially important in addressing ESR violations attributable to failures in government policies) and that governments would be more open to assessments by NHRIs than those by other role-players. 'Uniquely positioned between government, civil society and [international] human rights system', NHRIs can convene state and non-state actors in identifying indicators and collecting data (Quashigah 2013: 113). Over and above their quasi-judicial, or complaint-handling, competence, NHRIs leverage a wider range of tools than the judiciary, and hence their working methods make them well suited to orchestrating ESR enforcement (Quashigah 2013: 113; De Beco 2013: 7). At times, these methods have proven handy in cases where 'the traditional institutions of justice (the courts) were hopelessly inadequate in addressing human rights violations' (Burdekin 2013: 188).

Notwithstanding the fact that most NHRIs lack an express ESR mandate anchored in their countries' national law, ESR should inherently form part of the mandates of NHRIs (even in the absence of explicit formal authority) by virtue of the role these institutions play in monitoring compliance with international obligations. Furthermore, it has been maintained that '[a]n NHRI should employ all available means to respond to inquiries related to the advancement of [ESR], whether or not its enabling statute or national constitution recognises [ESR] as justiciable' (Commonwealth Secretariat 2001: 33-34). The broader mandate of NHRIs thus needs (as of a right and duty) to incorporate all categories of rights, without the necessity that there be express legal authority for this (Nowosad 2005).

NHRIs and national inquiries

An inquiry procedure is an important means by which NHRIs play their fundamental role in the protection of human rights. As part of their monitoring function, NHRIs have the power to examine state compliance with human rights standards both at a legislative and policy

level as well as in practice. They may therefore conduct public inquiries to evaluate the broader implications of laws, policies and public or private acts for the enjoyment of human rights. National inquiries are non-judicial hearings or investigations into widespread or systemic human rights abuses; in these investigations, NHRIs document violations and recommend measures to remedy human rights compliance (Burdekin 2007: 112-116; Brodie 2015: 1227).

In terms of the Paris Principles, NHRIs should have broad powers of investigation in order to facilitate access to state and non-state entities in the undertaking of large-scale investigations to address human rights issues. The Principles clearly establish that NHRIs must be free to consider any question falling within their competence as well as to hear any person, and so obtain any evidence, relevant to their human rights mandate (section III, 1 a-b). The CESCR also clearly identified that the activities NHRIs could undertake in relation to ESR include conducting 'inquiries designed to ascertain the extent to which particular [ESR] are being realised, either within the State as a whole or in areas or in relation to communities of particular vulnerability', monitoring compliance with the rights under the Covenant, and providing reports to public authorities (General Comment No. 10, para 4).

In this regard, NHRIs may have formal authority of inquiry enshrined in their enabling law (as is the case, for instance, in Australia, India, Kenya, New Zealand and South Africa), while in other instances, where they are devoid of an explicit 'inquiry power', they can be creative in leveraging their general investigation or monitoring powers for conducting national inquiries (Brodie 2015: 1239).

It is argued indeed that '[a]mong the most significant powers enjoyed by many NHRIs [...] is the formal power of inquiry [...] into systemic human rights concerns' (Corckery & Wilson 2014: 482). This can often be as strong as judicial authority in that it bestows a statutory power of subpoena compelling state departments to cooperate with NHRIs, consequently empowering NHRIs, unlike civil society organizations, with unlimited access to information from both state and non-state entities. These broad and significant powers authorise them to inquire into sensitive questions, to gather information, and to report to government

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authorities, and thus make NHRIs exceptionally well-placed to facilitate ESR enforcement (De Beco 2013: 20-21).

National inquiries have distinctive attributes: they are public, dialogic, dynamic and reformist in nature. Inquiries are interactive processes held in public, engaging a range of stakeholders and facilitating interaction between all affected and concerned groups with a view to resolving systemic issues and bringing about positive change. As Brodie (2015: 1219) explains,

> *[a]t the centre of national inquiries conducted by NHRIs are grievous human rights violations. While the specific aims of each inquiry will differ, all national inquiries seek to create change: to stop systemic or widespread abuse, and to encourage the internalisation of human rights norms. As part of the process, NHRIs provide a platform for the voices of victims to be heard, gather evidence and stories to educate the community, and facilitate dialogue with violators.*

National inquiries have several advantages over other ways of redressing human rights violations, advantages that are pertinent to ESR. In summary, they are as follows:

- Unlike litigation, inquiries are generally dependent on NHRIs' discretion (that is, their proactiveness) to initiate the process by identifying a trend of concern in individual complaints before them, cases before courts, public outcries or media reports. Since NHRI inquiries do not involve a complaint-triggered procedure, they are dynamic in reaching marginalised or disadvantaged people 'who for various reasons, including disability, isolation or ignorance of the NHRI mandate or even its existence' would not have approached the institution (Burdekin 2013: 184).
- NHRI inquiries provide a cost-effective forum for

complainants (that is, the affected groups) as well as for the NHRIs themselves. A substantial number of individual complaints, wide-ranging issues and a huge amount of information can be handled in a less costly manner on a national or large-scale basis through hearings, submissions and research. No prohibitive cost of litigation is involved, whereas most ESR litigation has proven to be very expensive (with cases often having to be sponsored by NGOs, as has happened, for example, in prominent ESR litigation in South Africa).

- The flexible, non-adversarial style of the procedure does not require the complainants, victims or witnesses to resort to lawyers and legal complexities. They simply have to tell their stories, and without strict formality. Referring to the Ghanaian NHRI, Quashigah (2013: 110) describes it as a mechanism that ordinary citizens find more approachable and accessible than they do the courts – which in turn highlights that, even for the well-to-do, the court process is not only expensive but complex and laborious.
- The dialogic, interactive nature of the procedure facilitates broad participation in the adjudication process, both by the public as well as state and non-state actors, and creates the context for 'robust, frank, open debate' (SAHRC 2008: 4). As Brodie (2015: 1226) notes, 'dialogue is often central to the inquiry process', one in which NHRIs focus on seeking and gathering contributions from all groups concerned, including wrongdoers as well as victims.
- The process can often offer a negotiated remedy or solution as it fosters meaningful deliberation on measures to be taken to realise ESR progressively. NHRIs can engage with affected communities to deliberate on the changes that are needed and convene concerned public officials and organisations to discuss how to implement recommendations and proposed remedies (De Beco 2013: 22; Brodie 2015: 1218). As such, NHRIs can facilitate justice with regard to ESR by stimulating deliberative processes in the design and implementation of legal rights and seeking to negotiate and coordinate solutions. This was demonstrated by the famous Australian Human Rights Commission inquiry into mental illness (Burdekin 2013).
- Inquiries, arguably, 'can most effectively address systemic violations of human rights' by analysing individual violations as well as scrutinising laws, policies and programmes causing the violations (Burdekin 2013: 184). They may not necessarily result in immediate or individual remedies, but they do tackle underlying factors and catalyse structural change. The experience of Latin America and the Asia-Pacific region, for example, demonstrates the potential of NHRI inquiries in exposing and redressing systemic and widespread human rights violations (Corkery & Wilson 2014; Brodie 2015).
- Inquiries offer a key opportunity for the application or domestication of international standards, by using such standards 'as benchmarks against which national laws, policies and programmes can be assessed' as well as the basis for developing new policies or legislation (Burdekin 2013: 184-188). This has proved particularly advantageous for enforcing ESR on the same footing as civil and political rights, even in jurisdictions where ESR are not enshrined in the constitution or recognised as justiciable rights (for example, Australia, Canada and India).

An important question concerns the effectiveness of this procedure, in particular with respect to the implementation of the recommendations emanating from it. Evidence shows that if inquiries are widely publicised, they have the power to build up pressure for political will. Burdekin (2013: 185), referring to the Australian experience, argues that 'community awareness and political pressure generated by a well-publicized national inquiry maximizes the likelihood that [an] NHRI's recommendations to the parliament and/or government will produce practical results'. Media coverage of inquiries is key; equally so is the power of an NHRI to make its reports public. By giving ESR concerns prominence on the public agenda, '[a] national inquiry can be the start of a national conversation [on systemic human rights issues]',

one that triggers long- term remedies and structural reforms enabling the realisation of ESR (Brodie 2015: 1226).

Furthermore, for inquiries to be effective, NHRIs need to have a structured follow-up mechanism in place. This is particularly important given the non-binding nature of the recommendations emanating from a non-judicial process. In this regard, the Ghanaian experience is worth noting as a good practice, seeing as the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) instituted a tracking programme to monitor compliance with its recommendations (Quashigah 2013: 122-124).

Similarly, the cooperation of civil society organisations (CSOs) cannot be underestimated. As highlighted by the Kandy conference (1999), NHRIs rely on the support of CSOs to publicise matters at domestic and international level, facilitate media coverage, as well as lobby for and follow up on the implementation of recommendations.

The independence of NHRIs is key to ensuring the effectiveness of their inquiry power (Brodie 2015: 1218). In addition, technical capacity and adequate funds are necessary preconditions for a successful inquiry mechanism. Monitoring ESR generally requires technical capacity on these rights and can be resource-intensive as it depends on the collection and in-depth examination of large amounts of data relevant to the issues at stake (De Beco 2013: 23, 30). NHRIs need to be adequately resourced both financially and technically to be able to engage in impactful inquiries.

A glance at African experiences

The Malindi Inquiry (Kenya)

In 2005, the Kenyan National Commission for Human Rights (KNCHR) launched an inquiry (the Malindi Inquiry) to investigate alleged human rights violations arising from the activities of salt manufacturing companies in the Magarini Malindi district. Following a simple hearing process, the five-day inquiry gathered oral and written evidence from communities, companies, local and national authorities, and experts. The investigation looked into several ESR issues, including evictions, land rights, health and water matters, and workers' rights, and found evidence of, among other things, a denial of land rights; unjust compensation (even no compensation); destruction of property; denial of access to water resources or clean water; and unfair labour practices, such as extremely poor working conditions, excessively low wages, and restrictions on unionisation (KNCHR 2006).

The KNCHR called for accountability by public and private actors, making detailed recommendations in this regard for each its finding. The recommendations included legal and policy reform, institutional or regulatory framework reform, investigation and prosecution of perpetrators of violations, and community participation in designing interventions. Over and above garnering increased attention from the relevant actors and catalysing long-term interventions in the issues concerned, the inquiry reportedly also led to a more concrete remedy for workers by facilitating, among other things, the provision of safety equipment and negotiations for better pay.

The housing and evictions inquiry (South Africa)

Among the several inquiries conducted by the South African Human Rights Commission (SAHRC) involving ESR is the housing, evictions and repossessions inquiry of 2007. It covered evictions that took place in Gauteng province due to bond default; affected persons had not been informed of the eviction proceedings, which left many households homeless, blacklisted with credit bureaux, and burdened with the legal cost of the eviction.

The inquiry allowed submissions from large numbers of individuals, experts, CSOs and institutions, with the process bringing to light

incidents of illegal eviction and showing the most affected to have been those from vulnerable groups. The inquiry involved an extensive examination of all the role-players concerned, including banks, the police and Department of Housing, and highlighted the measures they should take in order to play a positive role in realising the right to housing in South Africa. While the SAHRC brought increased attention to systemic problems in this aspect of housing, the Commission's findings and recommendations also applied more widely beyond the specific scope of the inquiry.

The Bumbuna Inquiry (Sierra Leone)

The Human Rights Commission of Sierra Leone (HRCSL) undertook an inquiry into human rights violations that occurred in the Northern Province town of Bumbuna in 2012 in relation to the operation of African Mineral Ltd (AML). The inquiry was preceded by a strike by workers of AML and members of the Bumbuna community. The inquiry investigated the state of labour rights and issues of rights to water, finding that workers and the community had long-standing grievances, respectively about working conditions and access to water (due to AML's interference with water sources). It also dealt with alleged police atrocities in response to the strike.

The Commission heard personal statements of victims, members of the community, the police and others concerned. It received written submissions through an open call and at public hearings. In addition, the Commission conducted focus group discussions to document detailed accounts of events as experienced by of the community. The process allowed for dialogue and the participation of victims and community members, and took into account their views on causes, impacts and solutions. The inquiry offered relevant recommendations to strengthen AML's accountability and the community's access to remedy.

The experiences related above show that while the national inquiry process may not necessarily result in individuals being granted enforceable remedies (though such remedies that do arise cannot be ignored), it does certainly engage with the underlying problems that cause systemic human rights violations. As the examples demonstrate, through a simple, accessible and relatively fast adjudicative process – one that also allows the use of human rights standards (both national and international), facilitates dialogue, and covers large numbers of affected people and a range of fundamental ESR issues in a cost-effective manner – it is possible to bring about accountability and negotiated solutions for ESR violations. Clearly, national inquiries orchestrate reform towards ESR realisation, with their impact being manifested in laws and policies reviewed, standards set, new policies introduced and implemented, budgets allocated, new frameworks established, and practices and behaviours changed (Brodie 2015: 1245).

Conclusion

National inquiries offer an alternative avenue for adjudicating ESR in a proactive, cost-effective (that is, less costly) and dialogic manner, addressing systemic violations and resulting in a negotiated remedy or solution. They deal with large numbers of individuals and are flexible and accessible. If the necessary requirements are fulfilled, such as independence, a broad mandate and adequate budget and human resources, inquiries, as proven in several cases, hold strong potential for adjudicating widespread ESR violations. Ideally, the enabling legislation must facilitate NHRIs' power of inquiry, while NHRIs in turn should use their general investigation or monitoring mandate innovatively. If NHRIs remain proactive in conducting impactful national inquiries, and, equally, persist in following up to ensure compliance with their recommendations, their 'inquiry powers' can and do produce positive change for ESR enforcement, facilitating both individual remedies, whenever possible, as well as structural ones.

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References

African Commission on Human and Peoples' Rights (2010) *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.* Available at https://bit.ly/2y4K2ib

Brodie M (2015) 'Uncomfortable truths: Protecting the independence of national human rights institutions to inquire.' *UNSW Law Journal,* 38(3), pp. 1215-1260

Burdekin B (2007) *National Human Rights Institutions in the Asia Pacific.* Martinus Nijhoff

Burdekin B (2013) 'The role of national inquiries in the protection of social and economic rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

CESCR (1998) *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights.* 19th Session, 16 November-4 December 1998. UN E/C.12/1998/25

Commonwealth Secretariat (2001) *National Human Rights Institutions: Best Practice.* Available at https://bit.ly/2KykXkl

Corkery A and Wilson D (2014) 'Building bridges: National human rights institutions and economic, social, and cultural rights.' In E Riedel, G Giacca, and C Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges.* Oxford University Press

De Beco G (2013) 'The role of national human rights institutions in the promotion and protection of economic, social and cultural rights: Historical, theoretical and critical perspectives.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

Gomez M (1995) 'Social economic rights and human rights commissions.' *Human Rights Quarterly*, 17(1), pp. 155-169

HRCSL (2012) *Bumbuna Inquiry Report (2012).* Available at https://bit.ly/2MevgvY

KNCHR (2006) *The Malindi Inquiry Report: Economic interests versus social justice: Public inquiry into salt manufacturing in Magarini, Malindi district (2006).* Kenya National Commission on Human Rights. Available at https://bit.ly/2NvxO8K

Kumar CR (2006) 'National human rights institutions and economic, social, and cultural rights: Toward the institutionalization and developmentalization of human rights.' *Human Rights Quarterly,* 28(3), pp. 755-779

Lindholt L (2013) 'National human rights institutions as independent actor in relation to economic, social and cultural rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

Maastricht Guidelines on violations of economic, social and cultural Rights (1998). *Human Rights Quarterly,* 20(3), pp. 691-701

Nowosad O (2005) 'National institutions and the protection of economic, social and cultural rights.' In BG Ramcharan (ed), T*he Protection Role of National Human Rights Institutions.* Martinus Nijhoff

Quashigah K (2013) 'The monitoring role of the Ghana Commission on Human Rights and Administrative Justice (GCHRAJ) in the protection of economic, social and cultural rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

SAHRC (2007) *Report on the Public Hearing on Housing, Evictions and Repossessions.* Available at https://bit.ly/2z630mF

Smith A (2006) 'The unique position of national human rights institutions: A mixed blessing?' *Human Rights Quarterly,* 28(4), pp. 904–946

Yamin AE (2005) 'The future in the mirror: Incorporating strategies for the defense and promotion of economic, social and cultural rights into the mainstream human rights agenda.' *Human Rights Quarterly,* 27(4), pp. 1200-1244