



National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights

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In recent decades, there has been increasing interest in both the development of new methodologies for monitoring economic, social and cultural rights (ESCR), such as using a system of indicators, and the establishment and strengthening of national human rights institutions (NHRIs). Nevertheless, discourse around these two areas has largely proceeded on two parallel tracks, with only limited thought given to how they might reciprocate one another. This background paper aims to bridge this divide, arguing for greater engagement with NHRIs in the ongoing development of new monitoring methodologies.

Introduction

It has become almost clichéd to refer to the 1993 Vienna World Conference on Human Rights as a 'watershed' moment for the human rights movement. Known primarily for its pronouncement on the indivisibility and universality of human rights, the Conference called for "concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international level".¹ Two "tools" for such effort, which received particular attention in the Vienna Declaration and Programme of Action, were the establishment and strengthening of national human rights institutions (NHRIs) and the examination of new methodologies, such as using a system of indicators, to monitor progress under the International Covenant on Economic, Social and Cultural Rights.²

Both of these tools have evolved significantly since the Vienna Conference. The number of internationally recognised NHRIs has tripled to more than 60 and their role as a fundamental element of a strong national human rights protection system is widely acknowledged.³ Similarly, the increasing elaboration and clarification of the norms contained in the International Covenant on Economic, Social and Cultural Rights has prompted efforts to conceptualize new methodologies for monitoring states' compliance with their obligation of progressive realization under the Covenant.⁴

Nevertheless, the discourse in these two areas has largely proceeded on two parallel tracks, with only very limited thought given to how these two tools might reciprocate one another. This background paper aims to bridge this divide; taking stock of the mandates of NHRIs to monitor economic, social and cultural (ESC) rights and analysing current efforts and

methodologies adopted by NHRIs to this end. Specifically, it argues that engaging NHRIs in the ongoing development of methodologies for monitoring ESC rights can complement and enhance the strengths of each.

The measurement challenge for economic, social and cultural rights

As affirmed in the Maastricht Guidelines, ESC rights impose three types of obligations on states, in a manner similar to civil and political rights. These include: the obligation to respect, to refrain from interfering with the enjoyment of ESC rights; the obligation to protect, to prevent violations of such rights by third parties; and the obligation to fulfil, to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.⁵ Though this tri-level formulation does not qualitatively differentiate between ESC rights and civil and political rights, the perception has persisted that civil and political rights primarily concern the negative obligation to respect and ESC rights primarily concern the positive obligations to protect and fulfil.⁶

While the accuracy of this perception is debatable, it is true that the obligation to fulfil is framed quite differently under the International Covenant on Economic, Social and Cultural Rights, in comparison with that in the International Covenant on Civil and Political Rights. In particular, article 2(1) states that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...⁷

The element of flexibility in this formulation has been a key factor in assumptions that ESC rights are “either non-justiciable or merely aspirational or both”.⁸ Nevertheless, as the Maastricht Guidelines stress, the fact that the full realization

of most ESC rights can only be achieved progressively does not alter states’ legal obligation to take certain steps immediately and others as soon as possible. This confers a burden on the state to “demonstrate that it is making measurable progress toward the full realization” of the rights in question.⁹

However, a complex web of determinative factors affects the adequacy or sufficiency of steps taken to achieve the full realization of ESC rights. Compounding this complexity, effects of globalisation—growth in the influence of international financial markets and institutions in determining national policy; a diminishing role for the state and the size of its budget; privatization of former state functions; deregulation to facilitate investment; and an increase in the role and responsibilities of private actors—reduce states’ ability to control the size and allocation of their resources.¹⁰ Thus, in measuring states’ progress under the Covenant, the challenge is to distinguish between rights deprivations resulting from factors beyond the state’s control, and deprivations for which inadequate state action (or inaction) has been a contributing, if not a causal factor in creating, perpetuating, or exacerbating.¹¹

Evolving methodologies for measuring economic, social and cultural rights fulfilment

The Committee on Economic, Social and Cultural Rights, the treaty body mandated to monitor state compliance with the Covenant, has dealt with the question of progressive realization in two ways. First, the Committee attempted to circumvent the difficulties inherent in evaluating progressive realization. It did this by emphasizing states’ “immediate duties” under the Covenant, which include upholding the principle of non-discrimination; to meet the provisions that were capable of immediate application by judicial and other organs; and to fulfil the “minimum core obligations” contained in the Covenant.¹² Second, it called for states to monitor their own progress towards realizing ESC rights in a manner reviewable by it; an obligation “not in any way eliminated as a result of resource constraints”.¹³

Though continuing to rely on self-reporting by states, the Committee has shown increasing interest in the development of standardized international indicators to monitor state compliance. In 2006, at the request of the chairpersons of the UN treaty bodies, the Office of the U.N. High Commissioner for Human Rights (OHCHR) presented a background paper considering how quantitative indicators could be used to make the assessment of states' reports more streamlined; transparent; temporally and spatially comparable; and effective.¹⁴ The paper proposed a conceptual framework centred on three types of indicators: structural indicators, reflecting the ratification or adoption of legal instruments and the existence of basic institutional mechanisms necessary for realization of the right concerned; process indicators, connecting state policy instruments to milestones or outcomes; and outcome indicators, which capture the individual and collective realization of human rights in a given context.¹⁵ Acknowledging that a universal set of indicators might not be possible, the paper advocates balance "between a core set of human rights indicators that may be universally relevant and...more detailed and focused assessment on certain attributes of the relevant human right, depending on the requirements of a particular situation".¹⁶

Critics of OHCHR's framework have expressed concern about its inability to resolve this tension between universality and local specificity. Jannette Rosga and Meg Satterthwaite warn that as indicators tend to consolidate authority for judgment in the hands of those with technical expertise, universal indicators tend to locate decision-making in the global North; here the agenda is set, indicators named and criteria assembled by U.N. agencies or other international actors. This risks closing off democratic space at the national level to contest how that judgment is exercised.¹⁷

Accordingly, they recommend that UN treaty bodies (in consultation with OHCHR and NGOs) select universal *outcome* indicators, but that the identification of *structural* and *process* indicators be devolved to the state (guided by and supplementing the illustrative indicators proposed by OHCHR).¹⁸ This dual level approach indeed holds much promise. Establishing outcome indicators at the international level can give greater determinacy to the normative standards articulated in the Covenant. This is important for creating space for democratic

dialogue about ESC rights at the domestic level. As Rosga and Satterthwaite note, it also allows for human judgment and political contestation; in the form of competing indicators, multiple assessors of state compliance, deeply contextual information, and qualitative data.¹⁹

In addition to conceptual debates around how indicators should be *identified*, there are also methodological questions about how they should be *used*. The OHCHR framework lacks a clear articulation of the reference points against which to judge the indicator. A quantitative indicator by itself is just a number; on its own unable to us tell if it is a very high or a very low number in relation to the country's development level.²⁰ Efforts by scholars and practitioners to develop more dynamic ways of articulating these reference points that use indicators to develop more comprehensive monitoring tools, such as budget analysis, human rights impact assessments and ESC rights indexes, are therefore positive developments.²¹

These newer techniques and tools build on and contribute to the OHCHR framework by offering more nuanced and sophisticated approaches to the notion of progressive realization. However, no one tool can capture the multiple policy factors that affect the level of resources that a state devotes to the progressive achievement of economic and social rights.

The Center for Economic and Social Rights has thus adopted a monitoring framework, around which these various quantitative techniques and tools can be structured. The framework is built around four levels of analysis: outcomes, efforts, resources, and assessment. Importantly, each step is connected to at least one relevant human rights standard or principle (e.g. policy content is assessed against the criteria developed by the Committee on Economic, Social and Cultural Rights, policy process are assessed against the principles of participation, transparency etc.)

Nevertheless, the questions of how to find the right combination of tools to adapt the framework to a particular monitoring activity, and, importantly, who should have responsibility for doing so, remain open questions.

OHCHR argues that an independent institution should be identified to take a lead in interpreting available information from a human rights perspective and possibly also coordinating the assessment of other partners. This institution,

they suggest, “could well be a NHRI”.²² However, the strength of this proposition is yet to be analysed. The following discussion offers some preliminary thoughts on why NHRIs, at least conceptually, can suitably play such a role.

National Institutions as Monitoring Stakeholders

National Human Rights Institutions (NHRIs) are quasi-governmental or statutory institutions; administrative in nature, in the sense that they are neither judicial nor law-making; and have an “on-going, advisory authority in respect of human rights at the national and international level”.²³ The main normative source for NHRIs is the Paris Principles,²⁴ which require that an institution is established by constitution or legislation; that it is independent and enjoys functional and structural autonomy; that its membership reflects the principle of pluralism; that it has a broad mandate to protect and promote human rights; that it receives adequate funding; that it is accessible; and that it interacts with national civil society organizations, as well as regional and international bodies.

Institutional advantages of national institutions

There are a number of institutional characteristics unique to NHRIs that make them potentially effective ESC rights monitors. Most significantly, NHRIs have a legally-defined relationship with the state. This gives them an official voice that means that, at least in theory, NHRIs work with a broader set of ‘tools’ than the judiciary or civil society groups. They are generally less dependent on techniques that seek to stigmatize the government through naming and shaming. And while the majority of NHRIs have quasi-judicial competence—in that they are able to receive complaints from individuals—they are also able to offer advice, assistance and capacity building. For this reason, the International Council of Human Rights Policy is right to suggest that, despite the trend towards asserting the justiciability of ESC rights, it is in fact the “broader and conciliatory powers enjoyed by most NHRIs [that] make

them, in practice, well-suited to promote and protect these rights”.²⁵

Sonia Cardenas’ grouping of NHRI functions as either “regulative” (focused on eliciting conformance with international norms and rules) or “constitutive” (aiming to transform the identity of the state or societal actors) provides a clear means to understand their operational framework. The regulative functions carried out by NHRIs relate to government, to the judiciary, or that the institution undertakes independently. Though of course varying, government-related activities can include advising on human rights issues; encouraging treaty ratification and assisting the state in its reporting obligations; contributing to the development of national action plans for human rights; and reviewing existing or proposed legislative or administrative provisions. In terms of activities that relate to the judiciary, NHRIs can assist victims to seek legal redress; refer cases to competent tribunals; or participate in legal proceedings as *amicus curiae*. Functions NHRIs undertake independently can include reporting on the national human rights situation or on specific human rights issues; conducting national inquiries; and submitting parallel reports to UN treaty bodies.²⁶ In its General Comment No.10, the Committee on Economic, Social and Cultural Rights addressed how these functions can be performed in relation to ESC rights.²⁷

Although the Paris Principles themselves do not use the term, in carrying out their regulative functions NHRIs rely on various techniques of ‘monitoring’; an ongoing activity that “systematically uses information” to measure the achievement of defined targets” and provide feedback on the processes for implementing these targets.²⁸ Monitoring is therefore an activity that, in Richard Carver’s words, “all NHRIs are to be engaged in”.²⁹ What is unique about NHRIs is that their functions can feed into the policy cycle at various points. Thus NHRIs play an important role in linking the outcomes of monitoring with the development or amendment of policy, to ensure that actions taken by the state to give substance to its international obligations in fact achieve their stated aims. Their capacity in this regard is strengthened by the fact that, as permanent institutions, NHRIs are able to track issues over extended periods to identify trends (subject of course to their institutional capacity).

This temporal advantage is reinforced by their periodic reporting function; a key obligation

under the Paris Principles. Most institutions are required to produce an annual report.³⁰ A number of survey respondents reported that they have used such reports to periodically monitor the ESC rights situation in their country,³¹ often relying on socioeconomic data or development indicators to track progress in this area. In addition, some NHRIs have statutory obligations to report *specifically* on ESC rights. The South African Human Rights Commission (SAHRC) is the clearest example of this. Under Article 84(3) of the Constitution of the Republic of South Africa, national and state government bodies must report to the SAHRC annually on the measures they have taken towards the realization of the Bill of Rights.

Provisions that require an institution's annual reports to be tabled before parliament, such as Article 52(2) of the Constitution of the Republic of Uganda, are also significant.³² Reports submitted to Parliament go on the public record and the open debate on their findings and recommendations can prompt a formal or informal response from the government. It may be that a government's acceptance of an NHRI's finding can amount to a commitment to take action which then forms reference point against which to compare indicators.

Further, in line with the Paris Principles, many NHRIs have information gathering powers,³³ including in some cases the power to subpoena information, which imposes a corresponding duty on state departments to cooperate with them. Accordingly, they can seek information that civil society organizations may not be able to. Thus, NHRIs have a key role to play in increasing the 'demand' for the collection of usable statistical information by government departments. In 2005, for example, the Kenya National Commission on Human Rights released a report titled *Living Large: Counting the cost of official extravagance in Kenya*. Drawing on its powers to issue subpoenas, the Commission was able to obtain information about the amount spent by government departments on luxury cars.³⁴ It then considered what difference this amount would have made in realization of ESC rights, noting that Kshs 878 million would have been enough to see 25,000 children through eight years of school or provide antiretroviral treatment for 147,000 people for a whole year.³⁵

The "unique position" NHRIs occupy "somewhere between" governments and civil society, to use Anne Smith's terminology,³⁶ also

means they can bring together various stakeholders to facilitate the participation of social actors in the process of defining indicators and collecting data. Social movement theory, which views legal rules and institutions themselves as type of political opportunity structure, offers an important perspective on this dynamic.³⁷ The presence of an NHRI in the monitoring process can provide local and transnational advocacy networks with an important ally inside state bureaucracies and give social groups a channel through which to make their claims for information. As discussed earlier, it is important that indicators not become a technocratic tool that closes democratic space. Community participation in the process of developing indicators is essential if they are to have an effect in developing "people's sense of themselves as citizens and subjects of rights".³⁸

A good example of NHRI collaboration with civil society is the Australian Human Rights Commission's experience with the "Close the Gap Campaign", which focuses on the 17 year gap in life expectancy between Indigenous and non-Indigenous Australians. The campaign originated with the Aboriginal and Torres Strait Islander Social Justice Commissioner's 2005 Social Justice Report, which recommended that the Government adopt the following targets: 25 years to achieve equality in health status and life expectancy; and 10 years to achieve equal opportunity to access to primary health care and in relation to infrastructure that supports health (housing, food supplies, water etc).³⁹ Following the launch of the report, a coalition of 40 Indigenous bodies and NGOs worked with the Commissioner to develop the campaign.⁴⁰ The campaign culminated in the National Indigenous Health Equality Summit in March 2008, where the Prime Minister and other government ministers, as well as leaders of Indigenous and mainstream health peak bodies committed to achieving equality in life expectancy by 2030 and to measure, monitor, and report on their joint efforts in accordance with a range of supporting sub-targets and benchmarks.⁴¹ The Indigenous Health Equality Targets were then developed through expert working groups to be integrated into a variety of existing government monitoring frameworks. Since 2009, the Government has tabled an annual report in Parliament, documenting its progress towards the targets; with the coalition submitting its own 'shadow report'.

The experience of the UK Equality and Human Rights Commission is also instructive. As part of an Equality Measurement Framework the commission is developing, it has created a list of the critical areas of life, from which the position of individuals and groups will be evaluated. Arriving at this list was a two-stage process. It first drew up a core list based on the international human rights framework and then supplemented and refined it through a series of deliberative consultations (workshops and interviews with the general public and with individuals and groups at high risk).⁴² The result was a detailed list grouped under: life; health; physical security; legal security; education and learning; standard of living; productive and valued activities; individual, family and social life; identity, expression and self-respect; and participation, influence and voice. What is commendable about this approach is that engaging the public avoided overly technical or legalistic standards, in favour of simple concepts that meaningfully describe people's daily lives.⁴³ That the EHRC is legislatively required to consult in carrying out its reporting function is also significant, as it enables its beneficiaries to "claim" space in the debate around the development of indicators.⁴⁴

NHRIs' strategic position as monitoring stakeholders is bolstered by the fact that they take the U.N. human rights instruments as their core frame of reference. This positioning enables NHRIs to act as both "receptors and transmitters in the cycle of human rights activity".⁴⁵ This is particularly important in the context of ESC rights monitoring, given that a number of state parties to the Covenant on Economic, Social and Cultural Rights have not explicitly incorporated its provisions into enforceable domestic law.

At the national level, the international dimension of an NHRI's mandate means it can play a role in translating externally negotiated human rights norms for local audiences. Research by social anthropologist Sally Engle Merry, focuses on the central role played by "cultural translators",⁴⁶ who bring international norms to the local vernacular, to influence the way people form their identity as rights claimants locally.⁴⁷ NHRIs hold significant potential to act as in this role, as they mediate between the universal claims of the international rights regime and national idiosyncrasies that are sometimes perceived to be incompatible with universal principles.⁴⁸

The international dimension of an NHRI's mandate is also significant at the international level. Commentators have noted shortcomings in the system that stem, at least in part, from the fact that it relies heavily on self-reporting from states. States tend to submit "formalistic" or "self serving" reports that emphasize their country's legal framework, while ignoring or understating violations.⁴⁹ The Paris Principles envisage a 'triangular' relationship between the international system-state-NHRI,⁵⁰ which can help to loosen what Rosga and Satterthwaite call the conditions of "mutual distrust" between the international system and state parties.⁵¹ If NHRIs act as a genuinely independent third actor in the process, national expertise provided by NHRIs should carry considerable authority to either corroborate or challenge the state's interpretation of its performance. Conversely, the state should be more receptive to international critique when it is underpinned by information gathered by an official process at the national level. This triangular relationship is also important in ensuring the implementation of international recommendations, as the international mechanisms lack formal follow-up procedures at the national level.

Potential Limitations

Despite their potential, NHRIs have traditionally been seen to be less effective in relation to ESC rights than in relation to civil and political rights and international bodies have conditioned their comments on the potential of NHRIs with a call for improved performance.⁵² As Julie Mertus concludes, NHRIs are ultimately "only as good as the local political and economic context permits them to be".⁵³ So it is important to understand how local particularities impact on NHRIs' capacity to address ESC rights. Local particularities operate in two interlinked and overlapping ways: first on the internal (organizational) dynamics of the institution and second on its external (relational) dynamics. Such relationships move, to use Anne Smith's terminology, "downwards" to partners, beneficiaries and supporters and "upwards" to government, parliament and funders.⁵⁴

In relation to the internal dynamics of the institution, it should first be noted that not all NHRIs, particularly the earlier established ones with a predominately anti-discrimination focus, have an explicit mandate to address ESC rights.⁵⁵ It has therefore been necessary for some to adopt a 'creative' interpretation of their

mandate in order to encompass ESC rights. The Canadian Human Rights Commission, for example, has used its annual reports to speak out about the close connection between many of the enumerated grounds of discrimination and economic deprivation, and has voiced concern about poverty as a human rights issue.⁵⁶ However, there are limits to the extent to which it can address economic and social rights within the scope of its mandate.⁵⁷

Second, even where an NHRI does have a mandate to address ESC rights in a general sense, its powers to promote and protect these rights may be more vaguely defined than for civil and political rights.⁵⁸ The powers of Human Rights Commission of the Philippines (CHRP) illustrate how more specific protections can be accorded to civil and political rights than to ESC rights. Article XIII, Section 18(1) of the Constitution of the Republic of the Philippines gives the CHRP powers to “investigate on its own or on complaint of any party all forms of human rights violations involving *civil and political rights*”. In *Simon v. Commission on Human Rights*,⁵⁹ the Supreme Court ruled that this provision gave the CHRP the power to investigate political rights only and did not include economic rights.⁶⁰ However, in response to the *Simon* case, the CHRP has adopted a system of “investigative monitoring”, which enables it to respond to the large number of complaints it receives alleging violations of ESC rights by drawing on its other powers.⁶¹

Institutional typology may also be a factor in an institution’s effectiveness in ESC rights monitoring. Nowosad suggests that ombudsmen may have a greater opportunity to deal with socioeconomic issues than human rights commissions; because such institutions have traditionally worked with the public sector on matters such as health, education, social welfare and labour.⁶² Consequently they have stronger network ties with relevant external stakeholders. The *Defensoría del Pueblo* in Colombia, for example, has a Deputy Ombudsman specifically dealing with health and social security, whose functions include monitoring health and social security authorities with respect to the quality, efficiency and opportunities of services offered.⁶³ On the other hand, being primarily complaints-driven, it may be harder to address systemic issues on their own initiative, given their often heavy workload and case backlog.

Despite such challenges, few NHRIs are actually precluded from addressing economic and social rights *per se*. The organizational capacity to deal with ESC rights depending on the availability of resources and staff expertise is a more common internal limitation on an institution. While some NHRIs have begun to incorporate ESC rights into their institutional structure by establishing committees or working groups, or dedicating staff to work in this area, according to OHCHR, NHRIs “in many instances” lack an “understanding of the legal nature and content of economic, social and cultural rights”.⁶⁴ While staff may recognize the importance of the indivisibility and interdependence of all human rights, they are insufficiently trained to deal with ESC rights. Respondents to a survey circulated by the Center for Economic and Social Rights in 2010 frequently cited lack of staff expertise as a challenge in ESC rights monitoring.

In relation to an institution’s external dynamics, the independence of an NHRI—including its financial autonomy—is widely recognized as one of the most important preconditions for its effective functioning and credibility. However, as the International Council on Human Rights Policy rightly points out, the very fact that (for the most part) NHRIs receive their funding from the state means that they “can never realistically be insulated from the financial restraints under which the whole machinery of government operates”.⁶⁵ This can make it difficult to engage in debates about budget allocations and spending decisions.

For NHRIs that receive financial support from international donors, there is the added complexity of potentially competing priorities, which “may reorient accountability upward, away from the grassroots, supporters and staff”.⁶⁶ The experience of the Provedoria for Human Rights and Justice in Timor Leste reflects challenges with this donor-agenda-driven assistance. The Provedoria has received assistance from the World Bank, the United Nations Integrated Mission in Timor-Leste, UNHCR, OHCHR, USAID and others. However, donors’ preference for some sections over others has apparently fragmented it.⁶⁷ A number of respondents to the survey noted above identified a lack of donor interest in funding ESC rights initiatives as a challenge.

This upward dynamic to government and funders can particularly affect its downward dynamic to beneficiaries and supporters. The

public credibility of an NHRI is largely determined by the extent to which it is perceived as an institution providing meaningful benefits to the community. However, establishing partnerships with community-based organizations can be a challenge for NHRIs when, at the same time, it is their independence from NGOs that makes them an “effective conduit” through which concerns can be brought to the attention of the government.⁶⁸ This duality can create misunderstanding and misperceptions between NGOs and NHRIs about the appropriate role for the NHRI.⁶⁹

Moving forward

How NHRIs can overcome some of the challenges outlined above to more effectively address ESC rights has been the subject of increasing attention by the international and regional networks of NHRIs.⁷⁰ For example, at the international level, NHRI participants at a Roundtable held in New Delhi in 2005 adopted a plan of action committing themselves to, *inter alia*, strengthening their institutional capacity in relation to ESC rights.⁷¹ At the regional level, the Network of National Human Rights Institutions of the Americas recently emphasized the need to prioritize social rights, including reporting on individual complaints, advising government, supporting social movements and monitoring social rights policies and budgets of governments to ensure they are appropriate and not discriminatory in the Concluding Observations of a regional seminar held in Caracas.⁷² Members of the Asia Pacific Forum of National Human Rights Institutions recently identified the Covenant on Economic, Social and Cultural Rights as a high priority area for training.⁷³ At the sub-regional level, NHRIs in South East Asia have established a formal cooperation framework that includes a joint project to promote participatory processes focusing on ESC rights.⁷⁴

These increasing declarations of commitment to ESC rights amongst NHRIs are encouraging. However, the challenge is in translating this commitment into effective action. While many NHRIs have demonstrated a capacity to exert influence on public policy in the political sphere, the traditional techniques they use to do so may not be as helpful in addressing the complexity associated with public policy in the economic

sphere. Engaging in debates affecting employment, health, housing, social security, and education requires knowledge of how these issues actually manifest. As discussed earlier, the complexity of socio-legal and economic structures and policies that give rise to violations in these areas often not readily attributable to single incidents or particular perpetrators. Identifying appropriate supplementary methodologies and approaches for NHRIs—including building competency in fact-finding; community consultation; collecting and analysing primary and secondary data; and analysing economic, including budgetary, information—to address ESC rights and allocating priority to their implementation is therefore crucial.⁷⁵

Conclusion

It is clear that the effective implementation of ESC rights in the domestic context necessitates new mechanisms and methodologies to pragmatically address the broader issues of resource allocation and socioeconomic policy that are so central to the realisation of these rights. This paper has explored two such mechanisms: national human rights institutions and quantitative monitoring methodologies. As the discussion has showed, NHRIs have unique institutional characteristics that should make them well equipped to play a strategic role in monitoring states' compliance with their obligation of progressive realization. Nevertheless, there is a clear need to increase capacity in this area; in particular, in relation to the institutional structures and working methods that govern the way NHRIs carry out their mandated roles. Quantitative methodologies to measure a state's fulfilment of its obligation of progressive realisation hold much promise in this regard. By breaking down the narrative of a particular right into a series of more visible characteristic attributes, indicators act as a sort of diagnostic tool that make it possible to unpack the complex social beliefs, legal systems, and economic structures that give rise to violations in the context of ESC rights and are often not readily attributable to single incidents or particular perpetrators.

Nevertheless, the risk that quantitative methodology can turn questions of human rights compliance into a merely technocratic exercise—entrenching power dynamics that

may ultimately be counterproductive to improving rights compliance—needs to be considered. The paper offered some preliminary thoughts on how NHRIs might address some of these issues as important monitoring stakeholders at the national level. Though to date NHRIs have not been particularly engaged in the development of new monitoring methodologies, their role in translating externally negotiated human rights norms for local audiences is particularly relevant. The unique institutional position they occupy between government, civil society and the UN human rights system means that—when credible, legitimate, and independent—NHRIs can help facilitate the space needed to advance deliberations and debates to guide the state in fulfilling its international obligations.

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- ¹⁰ECOSOC, CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶ 21, U.N. Doc. E/C.12/2001/10 (May 10, 2001).
- ¹¹Center for Economic and Social Rights [CESR], *A New Frontier in Economic and Social Rights Advocacy? Using Quantitative Data for Human Rights Accountability*, 6 (2008).
- ¹²ECOSOC, CESCR, *Report on the Fifth Session*, Supp. No. 3, Annex III, ¶ 5, U.N. Doc. E/1991/23 (1991). The rights identified include arts 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3). The concept of a “minimum core obligation” is, in the Committee’s view, the obligation incumbent on states “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” regardless of their level of economic development. *Id.*, at ¶ 10.
- ¹³*Id.*, at ¶ 11. Over the past two decades, the Committee’s general comments and concluding observations have adopted increasingly strong language requiring states to monitor their progress—including through the identification of appropriate indicators and benchmarks.
- ¹⁴OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, ¶ 2, 26, delivered to the Eighteenth Meeting of Chairpersons of the human rights treaty bodies. U.N. Doc. HRI/MC/2006/7 (Jun. 22, 2006).
- ¹⁵*Id.*, at ¶ 17-19.
- ¹⁶*Id.*, at ¶ 28.
- ¹⁷Rosga & Satterthwaite, *supra* note 8, at 48.
- ¹⁸*Id.*, at 58-59. Indeed, OHCHR has begun validating and piloting its framework and illustrative indicators through a series of national and regional consultations. There is now increasing emphasis on the participation of national stakeholders in the development and use of indicators and a greater inclusiveness in terms of sources of data. See OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, Report to the Twentieth Meeting of Chairpersons of the human rights treaty bodies (Geneva, 26-27 June 2008). U.N. Doc. HRI/MC/2008/3* (2008).
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- ²⁶ Sonia Cardenas, *Emerging Global Actors: the United Nations and National Human Rights Institutions*, 9 GLOBAL GOVERNANCE 23, 26 (2003).
- ²⁷ U.N. Econ. & Soc. Council [ECOSOC], *Comm. on Econ., Soc. & Cult. Rts [CESCR], General Comment No. 10 The role of national human rights institutions in the protection of economic, social and cultural rights*, ¶ 3, U.N. Doc. E/C.12/1998/25 (Dec. 14, 1998).
- ²⁸ High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, ¶ 8, delivered to the Economic and Social Council, U.N. Doc. E/2009/90 (Jun. 8, 2009).
- ²⁹ Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1, 11 (2010).
- ³⁰ OHCHR, *Survey on National Human Rights Institutions: report of the findings and recommendations of a questionnaire addressed to NHRIs worldwide* 26 (2009).
- ³¹ As well as reporting on the institution's performance for the year, annual reports describe the national human rights situation and the institution's opinions, recommendations and proposals to address any human rights issues of concern. See COMMONWEALTH SECRETARIAT, *NATIONAL HUMAN RIGHTS INSTITUTIONS: BEST PRACTICE*, 28 (2001).
- ³² See also e.g. Equality Act, 2006, section 12(5) (Eng.); Australian Human Rights Commission Act, 1986, Section 46M (Aus.).
- ³³ OHCHR Survey, *supra* note 30.
- ³⁴ KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *LIVING LARGE: COUNTING THE COST OF OFFICIAL EXTRAVAGANCE IN KENYA* 22-24 (2005).
- ³⁵ *Id.*, at 9-10.
- ³⁶ See Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?*, 28 HUM. RTS. Q. 904 (2006).
- ³⁷ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 144 (2009).
- ³⁸ See Valerie Miller, Lisa Vene Klasen and Cindy Clark, *Rights-based Development: Linking Rights and Participation – Challenges in Thinking and Action*, 36.1 IDS BULLETIN – DEVELOPING RIGHTS? 31-40, 33 (January 2005).
- ³⁹ Australian Human Rights Commission [AHRC], *Aboriginal and Torres Strait Islander Social Justice Report 2005* 96 (2005).
- ⁴⁰ AHRC & St. Comm. for Indigenous Health Equality, *National Indigenous Health Equality Targets: Outcomes from the National Indigenous Health Equality Summit Canberra, March 18–20, 2008* 7 (2008).
- ⁴¹ *Id.*, at 7-8.
- ⁴² Equality and Human Rights Commission [EHRC], *Developing the Equality Measurement Framework: selecting the indicators*, Chapter 1, 3 (2009).
- ⁴³ It should be noted, however, that so far the Equality Measurement Framework process has not involved public participation in the process of developing indicators to measure the freedoms identified above.
- ⁴⁴ See Miller et al, *supra* note 38 at 32 (discussing the difference between “claimed” and “invited” policy spaces).
- ⁴⁵ John Hucker, *Bringing Rights Home: the Role of National Human Rights Institutions*, in *HUMAN RIGHTS PROTECTION: METHODS AND EFFECTIVENESS* 29, 34 (Francis Butler ed., 2002).

- ⁴⁶ Cultural translators are individuals “deeply rooted in a particular local social and political context but with extensive connections to international and transactional communities”. Merry quoted in SIMMONS, *supra* note 37 at 141.
- ⁴⁷ *Id.*
- ⁴⁸ See Noha Shawki, *A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions*, in *NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: ACTORS AND ISSUES IN CONTEMPORARY HUMAN RIGHTS POLITICS* 41, 52-53 (Noha Shawki and Michaelene Cox eds. 2009).
- ⁴⁹ Hucker, *supra* note 45, at 32.
- ⁵⁰ Carver, *supra* note 29, at 20.
- ⁵¹ See Rosga & Satterthwaite, *supra* note 8, at 27-28.
- ⁵² For example in its General Comment No. 10, the Committee on Economic, Social and Cultural Rights noted that a mandate to address ESC rights “has too often either not been accorded to the institution or has been neglected or given a low priority by it”. The 1998 Maastricht Guidelines similarly state that monitoring bodies, such as national human rights commissions, “should address violations of economic, social and cultural rights as vigorously as they address violation of civil and political rights” (emphasis added). Even OHCHR has described the work of NHRIs in relation to ESC rights as “uneven and sporadic”, with NHRIs being “less active than many other institutions and organizations”. OHCHR, *OHCHR, Economic, Social and Cultural Rights: a Handbook for National Human Rights Institutions*, viii (Professional Training Series No. 12, 2005).
- ⁵³ Julie Mertus, *HUMAN RIGHTS MATTERS: LOCAL POLITICS AND NATIONAL HUMAN RIGHTS INSTITUTIONS 2* (Stanford: Stanford University Press, 2009).
- ⁵⁴ Smith, *supra* note 36, at 906.
- ⁵⁵ The Paris Principles do not make any specific reference to ESC rights, however they do require that a commission “be given as broad a mandate as possible” (emphasis added).
- ⁵⁶ Hucker, *supra* note 45, at 41.
- ⁵⁷ ICHRP, *PERFORMANCE AND LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS* 76 (2004).
- ⁵⁸ Philip Eldridge, *Emerging Roles of National Human Rights Institutions in Southeast Asia*, 14 *PAC. REV.* 209, 210 (2002).
- ⁵⁹ *Simon vs. Commission on Human Rights*, G.R. No. 100150, (S.C. January 5, 1994).
- ⁶⁰ Dr. Purification C. V. Quisumbing, *The Protection Role of the Philippines Human Rights Commission*, in *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* 159, 161 (Bernard Ramcharan ed. 2005).
- ⁶¹ *Id.* Section 18 of the Constitution also grants the CHR the power “to monitor the Philippine government’s compliance with the international treaty obligations on human rights”, which does include the Covenant on Economic, Social and Cultural Rights.
- ⁶² Orest Nowosad, *National Institutions and the Protection of Economic, Social and Cultural Rights*, in *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* 179, 183 (Bertrand Ramcharan, ed., 2005).
- ⁶³ *Id.*, at 185.
- ⁶⁴ OHCHR, *Economic, Social and Cultural Rights Handbook*, *supra* note 52, at viii.
- ⁶⁵ ICHRP, *PERFORMANCE & LEGITIMACY*, *supra* note 57, at 91.
- ⁶⁶ Smith, *supra* note 36, at 922.
- ⁶⁷ Guteriano Nicolau, *Ombudsman for Human Rights: The Case of Timor-Leste*, HURIGHTS OSAKA, <http://www.hurights.or.jp/asia-pacific/047/02.html> (last visited May 5, 2010).
- ⁶⁸ See ICHRP, *PERFORMANCE & LEGITIMACY*, *Id.*, note 57. See also Smith, *supra* note 36, at 932.
- ⁶⁹ See ICHRP, *PERFORMANCE & LEGITIMACY*, *Id.*, at 57.
- ⁷⁰ See 22nd Session of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), Geneva, Switz., Mar, 23-27 2009, Report of Proceedings, 19-20, at <http://www.nhri.net/2009/ICC%2022%20Record%20of%20Discussions%20-%20final%20JUL09.pdf>.
- ⁷¹ International Roundtable on National Institutions Implementing Economic, Social and Cultural Rights, New Delhi, India, Nov. 29-Dec. 1, 2005, Concluding Statement.
- ⁷² International Seminar on National Human Rights Institutions and the Protection of Social Rights: Experiences, Perspectives and Challenges, Caracas, Venezuela Jul. 13-15, 2009, Concluding Observations, ¶ 11-14, at: <http://www.nhri.net/default.asp?PID=353&DID=0>
- ⁷³ APF, *Assessment of the Training Needs of Member Institutions of the Asia Pacific Forum of National Human Rights Institutions*, 12 (March 2010).

⁷⁴See ASEAN NHRI Forum, Promoting ESCR and the Right to Development, <http://www.aseannhriforum.org/en/joint-projects/escr.html> (lasted viewed May 5, 2010).

⁷⁵To this end, the 2005 Handbook on Economic, Social and Cultural Rights, developed by OHCHR specifically for NHRIs is an important contribution. While the guidance offered in the handbook gives sound practical advice for institutions when using indicators and benchmarks—in terms of collecting data and analysing information—significant conceptual gaps remain. For example, the Handbook is virtually silent on the role that civil society and NGOs should play in the monitoring process. Further work in this area is therefore needed.

Established in 1993, the Center for Economic and Social Rights (CESR) works for the recognition and enforcement of economic, social, and cultural rights as a powerful tool for promoting social justice and human dignity. Exposing violations of economic, social, and cultural rights through an interdisciplinary combination of legal and socioeconomic analysis, we advocate for changes to economic and social policy at the international, national and local levels to ensure these policies comply with international human rights standards. We seek to uphold the universal human rights of every person to education, health, food, water, housing, work, and other economic, social, and cultural rights essential to basic dignity.

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