

Review

International Council on Human Rights Policy (2000)
Performance and Legitimacy: national human rights institutions. Versoix, Switzerland.

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Until its recent hearings on racism in the media, it is likely that most South Africans were unaware of the existence of the Human Rights Commission while even fewer will have understood it to be post-apartheid South Africa's statutorily-created national human rights institution. This is probably as much a consequence of its having been overshadowed in the first years of its existence by the Truth Commission as by its not having developed a clear public profile and programme of action. The racism hearings may have served somewhat to overcome this visibility problem but they could also turn out to be a two-edged weapon. For one of the key recommendations of this study of national human rights bodies worldwide is that they need to cultivate close ties to the media as a means to both 'educating the public about human rights issues and for exposing public institutions and officials that have committed human rights violations' (2000:111). A sustained assault on the media is probably not the most effective means of forging such links.

The International Council on Human Rights Policy (ICHRP) was formed in 1998 to conduct applied research into current human rights issues. It grew out of a long period of consultation starting with a 1991 workshop in Paris on the need to create national human rights groups and a 1993 World Conference on Human Rights in Vienna. In its mission statement, the Council describes itself as a 'forum for applied research, reflection and forward thinking on matters of international human rights policy' with a primary role of identifying 'issues that impede efforts to protect and promote human rights and propose approaches and strategies that will advance that purpose'.

Simultaneous with the growth of a significant international human rights culture in the latter half of the 20th century, a plethora of national

human rights institutions (NHRIs) emerged. These include not only national commissions, such as ours in South Africa, but also such ombuds-type entities as the Public Protector in South Africa, *Defensores del Pueblo* in Spain and some Latin American countries, most notably Peru, and *The Procurador de Derechos Humanos* in Guatemala, or hybrids of both. Operating in widely differing political contexts, NHRIs of various types with a range of powers have developed. Some, like the South African, are constitutionally entrenched while others have only limited advisory roles with little or no protection from executive interference.

The 1991 Paris workshop sketched out an ideal role for NHRIs that included promoting human rights, reviewing human rights legislation, advising governments on human rights protection, preparing reports on human rights and receiving and investigating complaints of human rights abuse by the public. The goal of the study which forms the basis of this publication was to assess the extent to which NHRIs have succeeded in applying these 'Paris principles' in pursuit of their civil rights mandates.

Conducted over a 21-month period, the project comprised detailed fieldwork studies in three countries – Ghana, Indonesia and Mexico – and short visits to eleven other countries, including South Africa and Zimbabwe. Principal researcher on the project was the long-time British human rights activist Richard Carver, formerly of Amnesty International and the freedom of expression NGO, Article 19.

The project was guided by three main research questions:

- Under what conditions do NHRIs acquire public – and not just constitutional – legitimacy?
- How far do vulnerable social groups have effective access to their services?
- To what extent do other bodies in and outside government influence their work?

Before discussing the report's general findings and recommendations, those on the three country case studies are interesting. These particular cases were selected as they represented distinct models or types of NHRIs, had different legal foundations and functioned in state situations with a diversity of human rights records and contexts. These ranged from relative respect in Ghana to little or none in Suharto's Indonesia. Mexico fell somewhere in between. Unsurprisingly, the human rights records and the levels of effectiveness of the three NHRIs turned out to be very different.

One factor common to all three, however, was their post-cold war origins with each emerging in the wake of the collapse of communism and the United States' newly-discovered concern for human rights issues as the basis for its foreign and economic aid policies. A number of other NHRI incarnations of the 1990s had the same post-communism origins. Once tolerable allies of the United States were now embarrassments and, thus, were pressured into change and into cleaning up their human rights records.

In Ghana, the Commission on Human Rights and Administrative Justice (CHRAJ) came into existence in terms of the 1992 democratic constitution which returned sub-Saharan Africa's first independent state to civilian rule, albeit under a soldier-turned-politician. The study found that the CHRAJ had succeeded in winning a high measure of public legitimacy and that it alone of national institutions enjoyed 'a considerable measure of confidence and credibility' (2000:20). This derived from a number of factors: one, the fact that the commission derived its authority from the constitution resulted in it being seen as the people's property rather than the government's instrument; two, its record of holding accountable senior public figures over such matters as corruption; and three, the accessibility of the commission at local level and 'its willingness to adopt a problem-solving approach to dealing with people's complaints rather than a legalistic one' (2000:20).

The Indonesian National Commission on Human Rights (Komnas HAM) was established by presidential decree in June 1993 by the country's then dictator, General Suharto. The timing was cynical, coming just a week before the opening of the World Conference in Vienna and in the context of intense and growing international criticism of the regime in the wake of the 1991 massacre of civilian demonstrators in the East Timor capital of Dili.

At one level, the creation of Komnas Ham did little to stem the tide of human rights abuse in the country, particularly in Irian Jaya and Aceh where secessionist movements were harshly suppressed. Timor too, continued to experience severe repression. Nonetheless, the study found that the body was not entirely a write-off and that it had succeeded in establishing a degree of credibility and legitimacy. A poll conducted in the capital Jakarta found that 45 per cent of those surveyed regarded Komnas Ham as the country's most credible institution for defending human rights. It also found that the organisation had successfully identified itself with the

general public's perception of human rights to the point where in 1999, it was able to propose a new law which would greatly enhance its stature and capacity for independent action.

This positive achievement, and some of the other civil rights successes cited in the study, is attributed largely to the personality and character of its first chairperson (General Ali Said) who though a military man, was a strongly independent figure. He along with the retired generals and so-called 'political insiders' who made up Komnas Ham's leadership acquired 'a certain leverage over the powerful institutions of state, and the armed forces' (2000:35).

This example serves again to reinforce the oft-made point that even in the tightest of repressive circumstances, committed and courageous leadership can score gains. It also reinforces one of this study's key recommendations pertaining to the leadership of NHRIs namely, the need for committed, independent and demographically-representative staff and leaders whose appointment should not be the sole prerogative of the executive branch of the state. The appointments procedure, the study recommends, should be open and involve full consultation with civil society. Once appointed, the study argues, the commissioners should have security of tenure.

As in the Indonesian case, the establishment of an NHRI in Mexico was for opportunistic reasons. With negotiations pending for the finalisation of the North American Free Trade Agreement (NAFTA) and Mexico under attack internationally for its poor human rights record, the government rushed through in 48 hours – without any consultation with anyone or any NGO group – the creation of a National Human Rights Commission (CNDH).

Unlike the Indonesian case, the Mexican body has failed to win over a sceptical public and remains in their eyes a discredited and illegitimate organ. This is despite the fact that the Mexican NHRI system is perhaps the best resourced in the world. As of 1999, the national commission had 'a staff in excess of 600' while outside of the capital 32 local commissions had been set up, 'each with a staff running into dozens, if not hundreds' (2000:54).

The study attributes the CNDH's ineffectiveness to two factors; one, its lack of autonomy; and two, its ineffective leadership. Despite its supposed character as an autonomous body, the CNDH has functioned as an arm of Mexico's highly centralised corporatist state to the point of even clearing

in advance with the executive branch its public utterances. With the government held in low esteem by the Mexican people as a whole, this sentiment has extended to the national human rights body. So pliant has the CNDH been to the government and particularly to the growing role of the military in state policy making that, as the study notes, it failed to make even a single comment on the military's brutal conduct in the 1990s rebellion in Chiapas. Though largely respected figures, the CNDH's leaders have not, unlike their Indonesian counterparts, been able or willing to use their good standing to useful effect in regard to the excesses of the state and the military.

Emphasising the CNDH's ineffectiveness, the study notes a deterioration in the Mexican human rights situation in the 1990s. In the face of the growing power of Mexican drug cartels and the outbreak of armed rebellions in three southern provinces - Chiapas, Guerrero and Oaxaca - with significant indigenous Indian populations, the army has moved centre stage:

Narco-crime and left-wing insurgency between them have given the army a much more prominent role in the political balance of the country - as well as involving it in serious violations of human rights. The army's increased political leverage has rendered the CNDH largely powerless to deal with the increase in human rights violations. (2000:55)

With regard to the project's three principal research questions cited earlier, the study found that an NHRI with a constitutional or legislative origin was more likely to win public support than one created by unilateral means - such as presidential edict. It was, however, no guarantee; legitimacy always had to be earned. In this regard, the independence and integrity of the leadership, and the quality of staff in general, was seen as crucial. An office staffed by significant numbers of individuals recruited from the ranks of vulnerable groups, like women and minorities, was seen as more likely to be trusted by those at the political receiving-end than one full of lawyers and other such elite categories. Another important determinant related to the management of complaints. A complaints mechanism which was low cost, understandable and unbureaucratic stood the best chance of gaining public trust.

The study found that the most effective NHRIs were those which focussed on key problem areas, like corruption and social taboos (homosexuality, for example) and specifically identified vulnerable groups like women, children, minorities of various kinds, those with disabilities,

prisoners, etc. Accessibility was also found to be an important legitimating factor. This requires more than the locating of offices in remote rural areas but a capacity, for example, to work in and produce materials in all local languages.

A final set of factors related to the location in political space of the NHRI. To be effective, the NHRI has to be seen to be truly independent of the executive and other branches of government, including the judiciary, but still to have the means to access government and influence its deliberations and decisions. A key determinant of independence is the NHRI's financial base. Those dependent on government for their funding are seen as vulnerable. The ideal situation, the study found, was one where NHRIs managed their own budgets from funds allocated to them by institutions independent of the executive, while also being empowered to raise their own funds from local and international sources.

These findings form the bases for eight recommendations with which the study is concluded. These repeat the need for NHRIs to be independent of the government, to consult widely with vulnerable groups and NGOs with expertise in human rights, and to be accessible to the public in general and the rural poor in particular. An investigative role is also recommended for NHRIs but, in this regard, it is emphasised that they should not seek to displace the functions of the courts. Any cases they raise or develop should be referred to the courts for prosecution. While stressing the need for NHRIs to move from a complaints-led to a programme-led approach, the point was made that the needs of vulnerable groups are best served by moving beyond political issues to addressing underlying economic, social and cultural rights.

Space and this reviewer's lack of detailed knowledge precludes an in-depth look at how South Africa's Human Rights Commission measures up against the 'Paris principles', the research questions which drove this study and its findings and recommendations. Some tentative observations are, however, offered with a view to hopefully drawing the HRC into the debate.

Mention has already been made of the HRC's lack of a clear profile. Apart from a methodologically-dubious report on racism in the media, a more favourably received report on South Africa's school system and an investigation it undertook of the situation at a high school in Vryburg, little else seems to have come out of the HRC in the way of human rights reportage.

Up to this point in time, the HRC seems not to have had a clear programme of human rights promotion. However, the HRC has recently opened a National Centre for Human Rights Education and Training which may well fill this gap. Set up to offer professional training and education in human rights issues, the Centre plans to operate in tandem with relevant state and non-state structures and organisations both nationally and regionally. It also plans to support human rights institutions throughout the continent by operating in close tandem with UN agencies and other African institutions. These are lofty and ambitious goals which others before the HRC have also proclaimed. Few have succeeded, even partially. Here in regard to the HRC the proof will be in the eating.

Presumably due to budget constraints, the HRC has not been able to make itself easily accessible to some of the country's most vulnerable groups, like the rural poor in general and black farmworkers in particular. Apart from its head office in Johannesburg, the HRC only has a small branch office in Durban. The result is a limited capacity to receive and investigate complaints from the public. This is not to suggest that it is inactive in this arena. Recently, the HRC confirmed that it was investigating allegations of racist treatment meted out to black visitors to the St Lucia resort area. The area has long been notorious as a racist bastion and this intervention is important. It is also precisely what a national human rights body should do. But how much of these investigative-type interventions does the HRC do? Either very little or the organisation is not getting its message through to even those in the wider public with an interest in these issues.

In regard to other aspects of the 'Paris principles', the HRC has not to this reviewer's knowledge either advised the government on areas where human rights require protection or defended the public interest where certain public statements, by for example, the Minister of Safety and Security, have had negative human rights implications. This latter point raises the question of the HRC's autonomy vis-a-vis the current government.

The HRC has itself complained that the fact that it has annually to go cap-in-hand to the legislature for its funding compromises its independence. That may be so. However, what in this reviewer's view is more compromising is a perception that the HRC has aligned itself with certain parts of the Mbeki regime's agenda. Its decision to investigate the alleged racism of the media coincided with a spate of pre-election attacks by the government on the press in particular, as well as other allegedly dissident bodies or groups

(like COSATU and the SACP). The fact that the ANC used the HRC hearings to launch a strident attack on what is probably South Africa's most independent and outspoken newspaper, *The Mail and Guardian*, underscored its growing intolerance of dissent. However, a larger test for the HRC lies in the fact that the ANC's statement contained disgraceful and false allegations about the paper's editor and one of its former journalists. False testimony before a state commission is an offence yet the HRC seems content to fold its arms and do nothing. The fact that it appears unwilling to invoke the law against the ANC discredits the organisation and undermines its independence far more than its fiscal dependence on parliament.

These may be unfounded or unfair statements and the HRC will be invited to respond to this review. However, it would seem to this reviewer that the HRC has much to do if it is to meet the challenges which this study throws down to NHRIs. Amongst these are deepening public and official respect for human rights by, one, extending protection and assistance to vulnerable groups; and, two, by legitimising and communicating human rights values in society. It would be interesting to hear how it feels it is performing in these particular areas. It would also be interesting to learn of the HRC's views on the recommendations and many other important observations contained in this fascinating and important work in the realm of international human rights education.

Copies of this publication which runs to 132 pages can be obtained from the ICHRP, 48 chemin du Grand-Montfleury, Box 147, CH-1290 Versoix, Switzerland at a price of Frs 39.00. A 16-page summary is also available at Frs 10.00. The Institute's e-mail address is <ichrp@international-council.org> and its web site is accessible at www.international-council.org.