The Role of National Human Rights Institutions in Post-Legislative Scrutiny

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Abstract

This article explores the role of national human rights institutions (NHRIs) in post-legislative scrutiny (PLS), a topic that has been notably neglected in existing literature. The present research demonstrates that (1) legislative review is actually part of NHRIs' mandate and (2) the applicable international standards (e.g. Belgrade and Paris Principles) provide for their actorness in all stages of legislative process. The main hypothesis is that NHRIs have already been conducting activities most relevant for PLS, even though they have not often been labelled as such by parliaments or scholars. In other words, we argue that their de facto role in PLS has already been well established through their practice, despite the lack of de jure recognition by parliamentary procedures. We support this thesis by providing empirical evidence from national practices to show NHRIs' relevance for PLS of both primary and secondary legislation. The central part of this article concentrates on the potential of NHRIs to act as (1) triggers for PLS, and (2) stakeholders in PLS that has already been initiated. The article concludes with a summary of the results, lessons learned, their theoretical and practical implications and the avenues for further research.

Keywords: National Human Rights Institution, parliament, legislation, reporting, post-legislative scrutiny.

A Introduction

Traditionally, legislative studies have focused on the process of adopting legislation, given this is the most visible role of parliaments, consuming the largest part of their human and financial resources. Recently, greater attention has been given to assessing whether the laws fulfil their purpose in practice, through a process known as post-legislative scrutiny (PLS). PLS is actually one of the most critical tasks of parliament, as its successful employment guarantees that the ultimate goal of legislation is actually achieved.

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There is no universally accepted definition of PLS. For the purposes of this article, following the UK Law Commission, we understand PLS to refer to a broad form of review, the purpose of which is to address the effects of the legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively.[1]

Different countries have established the legal and policy framework for PLS in different documents.[2] Irrespective of the framework itself, parliaments form the core of a broader system of scrutiny. They should be tapping into that system and working closely with external actors. In other words, in one way or another, all *ex post* evaluation systems are multi-institutional. Taking into account the limited parliamentary resources, particularly in developing countries, efficient cooperation with other stakeholders has to be maintained to allow evidence-based PLS. Various stakeholders can also provide initial incentives (so-called triggers) for PLS of individual laws, particularly where PLS is not a legal requirement but occurs as result of parliament's case-by-case decision.

Existing literature recognizes that the selection of stakeholders is one of the most important steps in planning a PLS inquiry,[3] and studies have identified a variety of possible stakeholders.[4] This article concentrates on one important actor – National Human Rights Institutions (NHRIs) – whose role in PLS have been largely neglected in the literature. Such is surprising, as human rights present 'particularly interesting topics' for PLS.[5] The present research demonstrates that (1) a legislative review is actually part of NHRIs' mandate and (2) the applicable international standards (*e.g.* Belgrade and Paris Principles) stipulate that NHRIs should have an active role in all stages of legislative process.

With this article, we seek to unwind these international principles by providing empirical evidence from national practices, to show that NHRIs are relevant across jurisdictions in the process of PLS. Our main hypothesis is that NHRIs have already been conducting activities most relevant for PLS, even though those have not been often labelled as such, neither formally by parliaments nor by scholarly literature. In other words, we argue that their *de facto* role in PLS has already been well established through their practice, despite the often-lacking *de jure* recognition by parliamentary procedures.

This article starts with an overview of the concept of NHRIs, followed by a short description of their relations with national parliaments. The central part concentrates on the potentials of NHRIs' to act as (1) triggers for PLS and/or

1 UK Law Commission (UK Law Com), Post-Legislative Scrutiny: Report No. 302, London, 2006, p. 7.

2 *See* more in: Westminster Foundation for Democracy (WFD), Post-Legislative Scrutiny: Guide for Parliaments (drafted by Franklin De Vrieze), London, 2017a, Westminster Foundation for Democracy (WFD), The Comparative Study on Post-Legislative Scrutiny (drafted by Franklin De Vrieze and Victoria Hasson), London, 2017b; UK Law Com, 2006, pp. 54-56.

3 UK Law Com, 2006; WFD, 2017ab; I. Pîntea & P. Vanhoutte, Post-Legislative Scrutiny: Practices, Experiences and Recommendations, Chisinau, Institute for Public Policy (IPP), Republic of Moldova, the Centre for European Security Studies (CESS), the Netherlands, and the Centre for Democratic and Participatory Governance (CDPG), Belgium, 2017.

4 WFD, 2017ab; UK Law Com, 2006.

5 WFD, 2017a, p. 13.

(2) stakeholders in PLS that has already been initiated, in cases of both primary and secondary legislations. The article concludes with a summary of the results, lessons learned, their theoretical and practical implications and the avenues for further research.

B What Are National Human Rights Institutions?

Acting as state authorities established by the Constitution or special (organic) law, NHRIs are mandated to protect and promote human rights. Operating independently of the three traditional branches of power, they have positioned themselves as a well-desired feature of the human rights governance.[6]

It is widely acknowledged that NHRIs have substantially changed national, regional and global human rights architecture in the past 20 years or so.[7] Today more than a 100 countries have established NHRIs, of which almost 80 are accredited with the highest A status by the Global Alliance of NHRIs (GANHRI) in a process facilitated and approved by the United Nations.[8] The accreditation is based on compliance with the Paris Principles, adopted in 1993 by the UN General Assembly Resolution 48/134. The Paris Principles set forth a number of conditions that an institution has to fulfil in order to be recognized and accredited as an NHRI, including, *inter alia*, a broad mandate to protect and promote human rights provided in a constitutional or legislative text; independence and autonomy; an inclusive and transparent selection and appointment process; free access to documents, people and premises; direct communication with universal and regional human rights mechanisms and so on. The compliance, both normative and practical, with the Paris Principles serves as a key benchmark for assessing whether an institution can be called an NHRI.[9]

What is particularly appealing in the very concept of an NHRI is the freedom of the state to choose the institutional form that is most suitable for it. A range of models of NHRI can be found: ombudsmen – in Central, Eastern and Southern Europe, Africa and Latin America; commissions – in Asia, Commonwealth states

6 L. Glušac, 'Local Public Libraries as Human Rights Intermediaries', *Netherlands Quarterly of Human Rights*, Vol. 36, No. 2, 2018a, p. 143.

7 G. De Beco & R. Murray, *A Commentary on the Paris Principles on National Human Rights Institutions*, Cambridge, Cambridge University Press, 2015; S. Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights*, Philadelphia, University of Pennsylvania Press, 2014; J. Wouters & K. Meuwissen (Eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, Antwerp, Intersentia, 2013; R. Goodman & T. Pegram (Eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, Cambridge, Cambridge University Press, 2013.

8 A regularly updated chart of accredited NHRIs is available at: https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%2826%20December%202018.pdf (last accessed 3 January 2019).

9 L. Glušac, 'National Human Rights Institutions and Oversight of the Security Services', *Journal of Human Rights Practice*, Vol. 10, No. 1, 2018b, p. 59. *See* more in: De Beco & Murray, 2015, pp. 34-35.

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and some African countries; and institutes – among Western European countries, such as Denmark, Germany or the Netherlands.[10]

It should be noted that not all ombudsmen[11] are automatically considered NHRIs, but only those with an explicit human rights mandate. So-called classical administrative ombudsmen, such as the Swedish, Danish or Irish ombudsmen, do not reach the threshold for NHRI status; that is, they do not have a mandate to protect and promote human rights, but rather they are mandated to fight maladministration and to control the legality of the work of administrative authorities.[12] Human rights ombudsmen and hybrid ombudsmen were introduced in the Iberian Peninsula in the late 1970s and in Central and East Europe a decade or so later. Those ombudsmen have an explicit mandate to protect and promote human rights, allowing them to fulfil the Paris Principles.[13]

While all types of NHRIs share compliance with the Paris Principles, which stipulate for the broad mandate for protection and promotion of human rights, it is the additional principle foreseen in the Paris Principles that distinguishes the human rights ombudsmen from other types of NHRIs. That is the quasi-judicial power of handling individual complaints. Ombudsmen-type NHRIs collect a variety of first-hand evidence on the implementation of primary and secondary legislations through complaint-handling. NHRIs that do not handle complaints have more resources to conduct in-depth targeted studies on the implementation of human rights laws. In both cases, irrespective of their main method of work, NHRIs are on the very source of information.

C Relations between NHRIs and Parliaments

The institutional ties between NHRIs and parliaments are close given that the heads of NHRIs are in most cases elected by the parliament, which also supervises their work. In addition, NHRIs report to their respective parliaments. Nevertheless, as an NHRI is an independent oversight authority, the parliament must not interfere with the work of this body or issue specific instructions and orders to it, as that would violate its functional independence.[14] The relationship between the two institutions is thus in practice based on the principle of cooperation rather

10 Glušac, 2018b, p. 59. *See* more in: Wouters & Meuwissen, 2013.

11 The term ombudsman is gender-neutral, as the 'man' suffix itself is gender-neutral in original Swedish. That is, it applies correctly whether the ombudsman is male or female. Following that, we use 'ombudsmen' in plural throughout this article.

12 Glušac, 2018a, p. 143.

13 *Ibid.*

14 V. Petrov, 'The Constitution and Regulatory Bodies (Independent Bodies) – An Attempt at Defining the Place and the Role of Regulatory Bodies in the Constitutional System', *in* B. Čamernik, J. Manić & B. Ledeničan (Eds.), *National Assembly of the Republic of Serbia and Independent Bodies*, Belgrade, United Nations Development Program, 2009, pp. 43-55.

than subordination. Despite that, it is parliament's responsibility to ensure that NHRI has all necessary preconditions to fulfil its mandate.[15]

The Belgrade Principles, a key international reference document on relations between NHRIs and parliaments introduced in 2012, which has also been endorsed by the UN,[16] has identified six areas of cooperation between the two. One of these areas actually specifically refers to legislation. The Belgrade Principles lay down five principles pertaining to the legislative relations between NHRIs and parliaments: (1) NHRIs should be consulted by parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein; (2) parliaments should involve NHRIs in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies; (3) NHRIs should make proposals of amendments to legislation where necessary, in order to harmonize domestic legislation with both national and international human rights standards; (4) NHRIs should work with parliaments to promote human rights by legislating to implement human rights obligations, recommendations of treaty bodies and human rights judgments of courts; and (5) NHRIs should work with parliaments to develop effective human rights impact assessment processes for proposed laws and policies.[17]

Furthermore, the Paris Principles stipulate that NHRIs shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as they deem appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. They may, if necessary, recommend the adoption of new legislation or the amendment of legislation in force.[18]

Many NHRIs, particularly human rights ombudsmen, have the right to propose laws directly to parliaments.[19] The Serbian Ombudsman presents an illustrative example on how an NHRI uses this mandate. In its annual reports, the ombudsman has repeatedly stated that it uses the right of legislative initiative if two cumulative preconditions are met: (1) when it is necessary to amend the text of a law or a draft law to ensure full and free exercise of citizens' rights and (2) when the government fails to use its legislative initiative to ensure respect for exercise, protection and improvement of citizens' rights and there is a threat of

15 L. Glušac, 'Assessing the Relationship between Parliament and Ombudsman: Evidence from Serbia (2007-2016)', *The International Journal of Human Rights*, 2018c, https://doi.org/10.1080/13642987.2018.1513400, p. 6.

16 UN General Assembly (UNGA), Report of the Secretary General: National Institutions for the Promotion and Protection of Human Rights, Annex: Belgrade Principles on the Relationship between NHRIs and Parliaments, A/HRC/20/9, 2012, para. 67.

17 UNGA, 2012, para. 27-31.

18 UN General Assembly (UNGA), National institutions for the Promotion and Protection of Human Rights, Resolution A/RES/48/134, 1993, para. 3a.

19 Global Alliance of National Human Rights Institutions (GANHRI), General Observations of the Sub-Committee on Accreditation of the Paris Principles Relating to the Status of National Human Rights Institutions, Geneva, 2018; G. Kucsko-Stadlmayer (Ed.), *European Ombudsman-Institutions*, Vienna, Springer, 2008.

European Journal of Law Reform 2019 (21) 2
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delay.[20] Proposing amendments and laws to the parliament is a measure of last resort for the ombudsman; it is done only when it finds that the government will not take the necessary steps to benefit citizens' rights pursuant to an initiative, a recommendation or other proposal made by the ombudsman.[21] Thus, the legislative activity of the ombudsman mainly consists of submission of substantive initiatives to the public administrative authorities (competent ministries and the government), which call on them to prepare and propose normative changes.[22] That approach is well-balanced, given that it is the government's jurisdiction to establish and implement policy, including the human rights policy; that is, only in exceptional cases does the (Serbian) ombudsman submit legislative proposals directly to the parliament.[23]

D Scrutinizing Primary Legislation

In this part, we first demonstrate how NHRIs' outputs may serve as triggers for PLS. After that, we provide examples of NHRIs' participation as stakeholders in PLS.

I NHRIs' Reports as Triggers for PLS

While in some countries, for example, Switzerland, PLS is a legal requirement, in most jurisdictions a decision to perform it is actually brought on *ad hoc* basis. In latter cases, because there is no robust institutional setup within parliaments for PLS, external factors may be of paramount importance for triggering it. Triggers may be of various kinds, for example, events, published academic studies or CSOs' project outputs, stakeholders' opinions, official reports, media coverage and so on. In this part we present three different types of NHRIs' reports that may serve to trigger PLS.

1 NHRIs' Annual Reports

Presenting an annual report to parliament is a statutory obligation of NHRIs.[24] The Belgrade Principles foresee that NHRIs should submit to parliament an annual report on activities, along with a summary of its accounts, as well as reports on the human rights situation in the country and on any other issue that is related to human rights.[25] On the other hand, parliaments should receive, review and respond to NHRI reports and ensure that they debate the priorities of the NHRI and seek opportunities to debate the most significant reports of the

20 The Protector of Citizens (Ombudsman) of the Republic of Serbia, 2015 Annual Report, 2016, p. 314.

21 *Ibid.*

22 L. Glušac, 'Protecting the Rights of Refugees in Transit Countries: What Role for National Human Rights Institutions (NHRIs)?', *in* S. Stanarević, I. Djordjević & V. Rokvić (Eds.), The 3rd International Academic Conference on Human Security (Conference Proceedings), Belgrade, University of Belgrade – Faculty of Security Studies, 2016, pp. 65-72.

23 Glušac, 2018c, p. 15.

24 GANHRI, 2018; De Beco & Murray, 2015; Kucsko-Stadlmayer, 2008.

25 UNGA, 2012, para. 15.

NHRI promptly.[26] In addition, parliaments should develop a principled framework for debating the activities of NHRIs consistent with respect of their independence.[27] In its interpretation of the Paris Principles, the Subcommittee on Accreditation (SCA henceforth) of GANHRI stated that "NHRIs should be given the legislative authority to table its reports directly to the legislature, which should be required to discuss and consider the reports of the NHRI, so as to ensure that its recommendations are properly considered by relevant public authorities."[28]

NHRIs' annual reports often contain recommendations and/or opinions to amend legislation for which implementation proved to be inefficient, contrary to its legislative objective, or open to contradictory interpretations by implementing agencies. Furthermore, annual reports usually contain the overview of NHRIs' legislative initiatives submitted to the executive. It is the parliament's task to follow up on them, exercising its oversight function over the government. Indeed, parliamentary oversight of the executive is one of the pillars of the checks and balances system, both in general and in human rights terms. If there is no effective oversight, there is no real division of powers. Without division of power, there is no democracy.

NHRIs traditionally use their annual reports to advocate for legislative changes. For instance, in its 2017 annual report, the Croatian NHRI called on the government to initiate amendments to the referendum legislation to exclude human and minority rights as issues suitable for referendum.[29] The NHRI of Uganda called on the authorities to review the Regulation of Interception of Communications Act and the Anti-Pornography Act, to address the overly restrictive provisions affecting the freedom of speech and expression, as well as to expeditiously review and strictly implement the laws relating to corruption.[30] Similarly, in its 2017 annual report, the Montenegrin NHRI repeated its initiative to amend the Law on Pension and Disability Insurance,[31] while the Portuguese NHRI reiterated its previous legislative amendments on gambling activities, raised in its previous reports.[32] In 2016, on a suggestion of the Portuguese NHRI, applicable reg-

26 *Ibid.*, para. 16.

27 *Ibid.*, para. 17.

28 GANHRI – Subcommittee on Accreditation (SCA), General Observation of the Paris Principles, 2018, G.O. 1.11, available at: https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf (last accessed 3 January 2019).

29 Pučki pravobranitelj, Izvješće Pučke pravobraniteljice za 2017, 2018, pp. 45-46, available at: http://ombudsman.hr/hr/izvjesca-2017/izvjesce-pp-2017/send/82-izvjesca-2017/1126-izvjesce-pucke-pravobraniteljice-za-2017-godinu (last accessed 3 January 2019).

30 Uganda Human Rights Commission, The 19th Annual Report to the Parliament of the Republic of Uganda, 2016, pp. 181-182, available at: http://uhrc.ug/system/files_force/ulrc_resources/UHRC%2019th%20Annual%20Report%202016.pdf?download=1 (last accessed 3 January 2019).

31 Zaštitnik ljudskih prava i sloboda Crne Gore, Izvještaj o radu za 2017. godinu, 2018, p. 71, available at: www.ombudsman.co.me/docs/1522665383_final-izvjestaj-za-2017.pdf (last accessed 3 January 2019).

32 Portuguese Ombudsman, Report to the Parliament 2015, 2016, p. 127, available at: www.provedor-jus.pt/site/public/archive/doc/Report_2015_0.pdf (last accessed 3 January 2019).

European Journal of Law Reform 2019 (21) 2
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ulation was amended to eliminate discrimination that existed as the amounts of the prizes awarded in recognition of the value and merit of the remarkable sporting results of the Paralympics athletes were 50% lower than those of Olympic athletes.[33] The Polish NHRI has been particularly active in using its annual reports to promote its proposals to amend legislation that have a negative impact on human rights. It has directed a number of legislative initiatives to both legislature and the executive.[34] Likewise, after conducting thorough analyses, the South Korean NHRI addressed multiple recommendations to relevant authorities to amend current legislation, most notably to better address the problems of child abuse and protection of the human rights of child victims.[35]

2 NHRIs' Special Reports

Besides annual reports, NHRIs are mandated to submit special reports to parliaments. These reports usually deal with specific human rights issues or connected groups of issues. One type of special reports is that looking at the effects of legislation that has human rights implications. An example of that kind of report is one made by the Serbian NHRI on the implementation of the provision of the Law on Local Self-Government concerning the establishment and functioning of the municipal councils for inter-ethnic relations. The Serbian Law on Local Self-Government envisages the creation of a council for inter-ethnic relations in ethnically mixed units of local self-governments, as an autonomous working body, composed of representatives of the Serbian people and national minorities.[36] The council's task is to consider the issues of achieving, protecting and promoting national equality, in accordance with law and statutes of their respective local self-government. Even after 10 years of the enactment of the law, not all ethnically mixed municipalities have established the council, nor have the councils proved to be effective in the municipalities where they have been indeed established. Hence, the NHRI conducted a large-scale study, covering more than 70 local self-governments, to determine the reasons for such a poor record, particularly taking into account that the Council of Europe has raised concerns about this issue.[37] The results showed that the legal provision stipulating for the establishment of the councils[38] is imprecise and contains terms and formulations open

33 Portuguese Ombudsman, Report to the Parliament 2016, 2017, p. 35, available at: www.provedor-jus.pt/site/public/archive/doc/Report_to_the_parliament_2016__EN__0.pdf (last accessed 3 January 2019).

34 *See*: Commissioner for Human Rights, Summary of the Report on the Activity in 2016 with Comments on the Observance of Human and Civil Rights and Freedoms, 2017 available at: https://www.rpo.gov.pl/sites/default/files/Summary_2016_EN.pdf (last accessed 3 January 2019).

35 National Human Rights Commission of Korea, Annual Report 2016, 2017, p. 25, available at: www.humanrights.go.kr/site/inc/file/fileDownload?fileid=5210&filename=bd5014cd8bccbfb2bc001d3011177206.pdf (last accessed 3 January 2019).

36 Art. 98 of the Law on Local Self-Government, Official Gazette of the Republic of Serbia, Nos. 129/2007 and 83/2014 – other law.

37 Council of Europe Committee of Ministries, Resolution on the implementation of the Framework Convention for the Protection of National Minorities by Serbia, CM/ResCMN(2015)8, 2015.

38 Art. 98 of the Law on Local Self-Government.

to different interpretations. The report has provided a detailed analysis of this legal provision.[39] The report was praised by the competent ministries of justice, and public administration and local self-government, which announced that the amendments to the law would be proposed, implementing the recommendations from the report.[40]

An interesting case where an NHRI has on its own initiatives performed a deep analysis of both legislation and its implementation can be witnessed in Georgia, where the Public Defender (ombudsman) has recently published two special reports – The Special Report on Situation in the Field of Tobacco Control[41] and The Special Report on the Law on Occupied Territories.[42] Both reports contain an analysis of existing legislation, the effectiveness of its implementation, as well as the legislative gaps, and provide the authorities with a number of recommendations. The Public Defender pointed out numerous problematic issues in the law which require amendment for the purpose of achieving the level of protection of human rights and freedoms guaranteed by international standards.[43]

3 *NHRIs' Reports to International Human Rights Mechanisms*

Existing PLS literature emphasizes that good sources of relevant data in planning PSL are "state party reports to, and the general conclusions from, a treaty monitoring body on relevant UN human rights conventions or their regional equivalents".[44] It should be noted that accredited NHRIs are given opportunities to communicate through various avenues with universal and regional human rights bodies, well beyond the control of the executive branch.[45]

With relevant resolutions of the UN General Assembly and Human Rights Council, the Paris Principles-compliant NHRIs have been granted not only full independent participatory rights in the Council's work but also a possibility to actively engage with the complaints procedure, special procedure mandate-holders and the Universal Periodic Review (UPR).[46] Furthermore, all human rights treaty bodies have established close cooperation with NHRIs, encouraging them to take active participation in their work, that is, before, during and after the

39 The Report is available here (in Serbian): www.pravamanjina.rs/images/stories/Poseban-izvestaj-o-savetima-za-medjunacionalne-odnose.pdf (last accessed 3 January 2019).

40 *See* more at (in Serbian): www.ljudskaprava.gov.rs/sh/press/vesti/predstavljen-poseban-izvestaj-zastitnika-gradana (last accessed 3 January 2019).

41 Available (in English) at: https://sites.google.com/view/geoombudsman2/reports/special-reports (last accessed 3 January 2019).

42 Available (in English) at: https://sites.google.com/view/geoombudsman2/reports/special-reports (last accessed 3 January 2019)..

43 The Public Defender of Georgia, Special Report on the Law on Occupied Territories, 2017, p. 22.

44 WFD, 2017a, p. 27.

45 Glušac, 2018b, p. 59.

46 UN Commission of Human Rights (CHS), Human Rights Resolution 2005/74, UN Doc. E/CN.4/RES/2005/74, 2005; General Assembly (UNGA), Resolution 60/251 on Human Rights Council, Un Doc. A/RES/60/251, 2006; Human Rights Council (HRC), Resolution 5/1 on Institution-building of the United Nations Human Rights Council, UN Doc. A/HRC/RES/5/1, 2007a; Human Rights Council (HRC), Resolution 16/21 Review of the work and functioning of the Human Rights Council, UN Doc. A/HRC/RES/16/21, 2011; General Assembly (UNGA), Resolution 65/281 on Human Rights Council, UN Doc. A/RES/65/281, 2011.

European Journal of Law Reform 2019 (21) 2
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review of states' reports.[47] NHRIs are granted active participatory rights in regional human rights entities as well, for example, the Council of Europe, Inter-American Commission on Human Rights, and African Commission on Human and Peoples' Rights. In sum, NHRIs may interact with international mechanisms independently of the state. In fact, they do so very often. For example, the proportion of the A status NHRIs that submitted their independent UPR reports has grown from 65% in the first cycle, to almost 80% in the second.[48] NHRIs have been quite active in reporting to the UN treaty bodies, as well.[49] In that sense, NHRIs really use their submissions to bring international attention to problematic national legislation.[50] To that end, their international reports may serve to inspire and/or inform PLS.

II NHRIs as Stakeholders in PLS

Besides serving as potential triggers for PLS, NHRIs can actively contribute to the procedures already initiated either directly by parliamentary committees or independent review bodies mandated by the parliament. In order to portray NHRIs' experiences in acting as PLS stakeholders, we turn to one specific issue relevant for the broadest NHRI community, given that parliaments worldwide have been especially vigorous in amending it the past 20 years – that is, national security and criminal legislation. Considering that actions of the security (intelligence) services may interfere with human rights in an unparalleled way, as they are authorized to use special measures to penetrate deep into the private lives of citizens, NHRIs should pay special attention to legislative developments in this field.[51]

The Australian Human Rights Commission (AHRC) has been exceptionally active in the promotion and protection of human rights through submissions to parliamentary inquiries, government departments and law reform bodies. Given that Australia has introduced numerous changes to its national security and criminal legislation after 2001, the AHRC has been a rigorous watchdog providing valuable submissions highlighting human rights concerns that can either arise from proposed amendments or have already been determined in the implementation of legislation in force. In addition to providing its opinion on various security-related bills tabled before the parliament, the AHRC has also provided submissions to independent reviews, such as the Independent National Security Legisla-

47 UN Office of the High Commissioner for Human Rights (OHCHR), Information Note National Human Rights Institutions interaction with the UN Treaty Body System, 2011, available at: http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/NIRMS%20-%20NHRIs%20and%20the%20Treaty%20Bodies%20Infonote%202011.pdf (last accessed 3 January 2019).

48 L. Glušac, *The Evolution of National Human Rights Institutions and their Relations with the United Nations* (PhD thesis, University of Belgrade), 2018d, p. 235.

49 For statistical data on that, see regular reports on NHRIs by the UN Secretary General. The latest is A/HRC/39/20from August 2018, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/250/53/PDF/G1825053.pdf?OpenElement (last accessed 3 January 2019).

50 For NHRIs' reports to UN treaty bodies see country-specific information on the OHCHR website, *see*: www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (last accessed 3 January 2019). For NHRIs' UPR submissions, see documentation by country, available at: www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx (last accessed 3 January 2019).

51 Glušac, 2018b.

tion Monitor (INSLM) in its inquiry into Australia's counterterrorism and national security legislation in 2012,[52] or the Independent Review of the Intelligence Community in 2011.[53] In both cases, the AHRC highlighted legal provisions that have to be amended for human rights reasons.

Similarly, since 2013, legislation in New Zealand requires independent reviews to be conducted of the intelligence and security agencies, the legislation governing them and their oversight legislation every 5-7 years.[54] The first review was conducted in 2015 and finalized with the presentation of the report of New Zealand's Parliament.[55] The New Zealand Human Rights Commission, an NHRI accredited with A status since 1999, has participated actively in the review. In its lengthy and substantive submission to the reviewers,[56] the Commission underlined that "human rights are of central importance when considering intelligence and security policy, practice and legislation"[57] and recommended them to, *inter alia*, "undertake a comprehensive review of New Zealand's intelligence and security legislation for consistency with international human rights law and norms".[58] The final report echoed much of Commission's recommendations, stating that the legislation is neither comprehensive nor consistent, can be difficult to interpret and has not kept pace with the changing technological environment".[59] While New Zealand's Prime Minister and Minister of National Security and Intelligence welcomed the report,[60] the ultimate results of this first statutory review of intelligence and security services are yet to be seen.

In these cases, NHRIs provided their reports as part of public call opened to collect relevant information. In some other instances, NHRIs have performed legislative analysis on their own initiatives, aiming to motivate the authorities to undertake necessary actions. Examples of Serbian and British NHRIs are illustrative.

The Equality and Human Rights Commission, Great Britain's NHRI, commissioned the preparation of a report on the impact of counterterrorism measures on Muslim communities, as "there has been concern regarding the compliance of

52 View submission at: https://www.humanrights.gov.au/review-counter-terrorism-and-national-security-legislation (last accessed 3 January 2019).

53 View submission at: https://www.humanrights.gov.au/independent-review-intelligence-community-submission-2011 (last accessed 3 January 2019).

54 Section 21 of the Intelligence and Security Committee Act, available at: www.legislation.govt.nz/act/public/1996/0046/latest/whole.html#DLM5648420 (last accessed 3 January 2019)..

55 Final report available at: https://www.parliament.nz/resource/en-nz/51DBHOH_PAP68536_1/64eeb7436d6fd817fb382a2005988c74dabd21fe (last accessed 3 January 2019).

56 New Zealand Human Rights Commission, Submission on the Independent Review of Intelligence and Security Services, 2015, p. 1, available at: https://www.hrc.co.nz/files/5514/5747/1648/Submission_of_Human_Rights_Commission_-_Intelligence_and_Security_Review.pdf (last accessed 3 January 2019).

57 *Ibid.*, p. 1.

58 *Ibid.*, p. 6.

59 Michael Cullen and Dame Patsy Reddy, Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand, 2016, p. 2.

60 The New Zealand Government, 'PM welcomes Security and Intelligence Review', 10 March 2016, available at: https://www.beehive.govt.nz/release/pm-welcomes-security-and-intelligence-review (last accessed 3 January 2019).

European Journal of Law Reform 2019 (21) 2
doi: 10.5553/EJLR/138723702019021002006

counter-terrorism laws and policies with human rights, and their potential discriminatory impact on specific communities".[61] The report found that counterterrorism measures have been contributing to a wider perception among Muslims that they are being treated as a 'suspect community' and targeted by authorities simply because of their religion.[62] As stated in the conclusion, the report "outlined some of the drivers for this and provided the basis for further analysis and action by policymakers".[63]

Similarly, in Serbia, in early 2010 the NHRI (ombudsman) made a preventive oversight visit to the civilian security service – the Security Information Agency (SIA) – on its own initiative. The main purpose of the visit was to examine the legality and regularity (purposefulness, proportionality etc.) of the SIA's activities in carrying out the duties within its sphere of competence that impinge on the guaranteed rights and freedoms of citizens.[64] The ombudsman concluded that when restricting certain rights and freedoms of citizens guaranteed by the Constitution in the course of its work, the SIA adhered to the relevant legislation.[65] However, the ombudsman identified a need to improve the protection of and respect for those human rights that may be restricted by the SIA's activities, including at the levels of primary legislation, secondary legislation and procedures that regulate the SIA's operations.[66] The course and results of this visit were presented in detail in a special report with recommendations addressed to, among others, the parliament. There is no record that the parliament has ever discussed the report. However, to date this visit remained the most comprehensive on-site oversight of the SIA ever performed by any external state authority.[67]

E Scrutinizing Secondary Legislation

The amount of legislation is steadily growing worldwide, with a large body of secondary legislation in force, produced by an unknown number of agencies. Secondary legislation, also known as subordinate or delegated legislation, can be generally defined as legislation made under an empowering law, such as an Act, an instrument under an Act, or the Royal prerogative (in case of monarchies).[68] This type of legislation is "subordinate" because its existence is derived from, is

61 Equality and Human Rights Commission, The Impact of Counter-Terrorism Measures on Muslim Communities (authored by Tufyal Choudhury and Helen Fenwick), Research Report 72, available at: https://www.equalityhumanrights.com/sites/default/files/research-report-72-the-impact-of-counter-terrorism-measures-on-muslim-communities.pdf, 2011, p. v (last accessed 3 January 2019).

62 *Ibid.*

63 *Ibid.*, p. 87.

64 The Protector of Citizens, Report on a Preventive Control Visit to the Security Information Agency with Recommendations and Opinions, 2010, available at: http://ombudsman.rs//attachments/971_889_BIA%20engleski%20web.pdf (last accessed 3 January 2019).

65 *Ibid.*

66 *Ibid.*

67 Glušac, 2018b, p. 13.

68 R.I. Carter, R.M. Malone & J.S. McHerron, *Subordinate Legislation in New Zealand*, Wellington, LexisNexis, 2013.

dependent on and has to be consistent with the empowering provision in the primary Act under which it was created. Secondary legislation allows parliament to focus on key points, policies and principles, that is, establishing frameworks under which ministries or agencies can be authorized to make more precise provisions.[69] To that end, secondary legislation may, arguably, have more profound and direct influence on citizens' lives, as it operationalizes the primary legislation to implementable rules. While human rights should be, in general, covered by primary legislation, in order to regulate in a detailed manner the procedure for the exercise of different rights (particularly those consumed by the so-called right to good administration), secondary legislation often has to be enacted. As such secondary legislation is often not subject to parliamentary scrutiny in drafting phase, it is important to establish mechanisms for its *ex post* oversight.

In New Zealand case, specific procedures have been put in place in Standing Orders to ensure they are subject to the scrutiny of parliament. A select committee, called the Regulations Review Committee (RRC), carries out detailed scrutiny and considers complaints about secondary legislation on grounds set out in the Standing Orders.[70] One of the grounds for the review is if the regulation "trespasses unduly on personal rights and liberties".[71] The RRC acts on the parliament's behalf to ensure that the delegated law-making powers are being used appropriately.[72] After the report from the RRC, the House of Representative can 'disallow' a regulation, meaning it no longer has force.[73]

New Zealand Human Rights Commission has participated in the inquiries conducted by the RRC. For instance, in 2015, the Commission took part in RRC's inquiry into parliament's legislative response to future national emergencies.[74] Following several earthquakes in New Zealand, the RRC started an inquiry. In December 2014, the RRC issued a statement detailing the terms of reference of its inquiry, describing the purpose of the inquiry as being "...to establish the most appropriate legislative model for enabling and facilitating response to, and recovery from, national emergencies once a state of emergency has been lifted, while maintaining consistency with essential constitutional principles, the rule of law, and good legislative practice".[75] In the course of this, the Human Rights Commission provided its submission, stating that future disaster recovery legislation should be guided by, and founded in, a human rights approach that requires compliance with international standards and emphasizes non-discrimination, partici-

69 R. Baldwin, *Rules and Government*, Oxford, Oxford University Press, 1995, p. 63.

70 Standing Orders 2017, para. 319(2).

71 *Ibid.*, para. 319(2b). For more on the Committee's reviews initiated on this and other grounds, *see*: D.R. Knight & E. Clark, *Regulations Review Committee Digest*, 6th ed., Wellington, New Zealand Centre for Public Law, 2016.

72 *See* more at: https://www.parliament.nz/en/get-involved/features/what-does-the-regulations-review-committee-do/(last accessed 3 January 2019).

73 *Ibid.*

74 *See*: Regulations Review Committee (RRC), Report on the Inquiry into Parliament's Legislative Response to Future National Emergencies, 2016.

75 Regulations Review Committee, 'Media Statement', 17 December 2014, available at: https://www.parliament.nz/en/pb/sc/business-before-committees/document/00DBSCH_INQ_56953_1/inquiry-into-parliaments-legislative-response-to-future (last accessed 3 January 2019).

European Journal of Law Reform 2019 (21) 2
doi: 10.5553/EJLR/138723702019021002006

pation, empowerment and accountability.[76] The Commission enlisted a number of human rights-led principles that should apply to any future recovery legislation and emphasized that recovery legislation must also be subject to robust checks and balances and oversight.[77] While the final inquiry report of the RRC does not express what submissions informed its findings, it is evident that its recommendations coincide to a large extent with those provided by the Commission.[78]

Besides providing information to the parliament when it initiates its own formal inquiries, NHRIs can, in fact, conduct their own research, the results of which can provide parliament with empirical evidence that secondary legislation needs to be amended. For example, the Serbian NHRI conducted an analysis of the work of public authorities included in the system for the protection of women against domestic and intimate partner violence. The findings were presented in the Special Report on the implementation of the General and Special Protocols for the protection of women against violence, with an assessment of the situation and recommendations to relevant authorities.[79] Those protocols are subordinate legislation; that is, the General Protocol was adopted by the government, while the special protocols were adopted by relevant ministries (Ministry of the Interior; Ministry of Labour, Employment and Social Policy; and Ministry of Health). The report noted that the practice of the authorities has not been aligned with the commitments that the state has undertaken by the ratification of international treaties. The NHRI identified a number of problems in their implementation and issued a dozen or so recommendations to relevant authorities. A competent parliamentary committee recognized these activities of the NHRI and has called the NHRI a key partner in the fight against domestic and partner violence.[80] Ultimately, the new Law on the Prevention of Domestic Violence and the Law on Amendments to the Criminal Code have been passed. After that, the NHRI reported that recommendations from its special report on the implementation of the protocols, and from its previous annual reports, have been implemented.[81]

F Conclusion

Despite being recognized as indispensable interlocutors when analysing states' human rights record, NHRIs have been mostly disregarded by existing scholarship on PLS. In order to fill this gap, the aim of the present research was to show

76 Human Rights Commission, Inquiry into Parliament's Legislative Response to Future National Emergencies, 2015, para. 2.

77 *Ibid.*, para. 3 and 63.

78 RRC, 2016, pp. 18-25.

79 The Protector of Citizens, Special Report on the Implementation of the General and Special Protocols for the Protection of Women against Violence, 2015, available at: http://ombudsman.rs/index.php/izvestaji/posebnii-izvestaji/3710-2015-02-24-13-35-38 (last accessed 3 January 2019).

80 See the blog by the Chairman of the Parliamentary Committee for Human and Minority Rights and Gender Equality, available at: https://iskljucinasilje.rs/rs/blog/o-nasilju-u-porodici/(last accessed 3 January 2019)..

81 The Protector of Citizens, 2016 Annual Report, 2017, p. 94.

how they can effectively serve as a valuable source of information for PLS, in its different stages.

We have demonstrated that NHRIs' value for PLS is not dependent on the existence of the formal legal framework for such procedure. NHRIs already produce evidence-based outputs relevant for PLS in their regular reports, that is, annual, special and international. We have shown that through an overview of the best comparative practices in various jurisdictions and politico-legal systems. That has extended our knowledge of a possible modus operandi of NHRIs in regard to PLS and can also be informative for parliamentarians on how to establish more effective relations with NHRIs. Indeed, this research has reiterated that effective PLS is a collaborative effort. As the powers of particular institutions differ in nature, scope and reach, a high level of cooperation and coordination between them is necessary, both in normative and operational terms. To that end, this research has important practical implications. First, the ultimate success of PLS depends on parliaments. NHRIs may feed them with most perfect evidence-based materials, but if parliaments are reluctant to pick them up and transform them into legislation, the entire endeavour is futile. Second, legislative collaboration between these two actors remains strongly entrenched in a wider context of their relations. Parliaments should act as a supreme protector of an NHRI's independence and its strongest ally in the protection and promotion of human rights. When that really is the case, and close institutional cooperation is established, good results are almost guaranteed. However, sometimes parliaments develop a practice of hampering an NHRI's work.[82] That has particularly been the case in fragile democracies, where the checks and balances system seems to be only a façade. In such instances, parliaments become tools of the executive branch.

As this study was limited to the place and role of NHRIs in legislative review, it did not explore the perceptions and views of members of parliaments about NHRIs' actorness in the PLS. Thus, future studies could further expand our understanding in that direction. While we touched a little bit upon the 'legislative' relationship between NHRIs and the executive, the influence of the government on NHRIs' performance would be another rewarding avenue for further research. Finally, it would be of utmost benefit to both PLS and NHRI scholarship to compare the experiences of individual NHRIs in more detail. In that sense, we hope that this research would inspire further comparative case studies.

82 To different extent and in different periods, that was witnessed in, for instance, Serbia, Croatia, Philippines, Peru and Poland.

European Journal of Law Reform 2019 (21) 2
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