Strengths and weaknesses of human rights institutionalisation: comparative insights from Europe and its National Human Rights Institutions

Dr Tom Pegram
Lecturer in Global Governance
University College London
t.pegram@ucl.ac.uk

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Introduction

Thank you for this opportunity to contribute to this important discussion. It is a pleasure to be with you all today. I will speak in Spanish, apologies in advance if I slip into Spanglish at times. I have been tasked with bringing a European perspective to the question of human rights institutionalisation and change. For the sake of brevity, I'll focus my comments on the experience of national human rights institutions (NHRIs) as attention shifts to a new paradigm of integration and coordination within local human rights systems – drawing on case materials. I have prepared a memo with additional information and sources, for those who are interested.

Although I emphasis the domestic in my remarks. Of course, in Europe, as in Latin America, it is impossible to ignore the shadow of international human rights law which deeply informs domestic human rights politics, policy and law. There is an extraordinary amount of activity above the nation state in the region. Similarly, while I'll also skim over the region as a whole, it is important to note important sub-regional variation.

There is much to be learnt from comparing across Europe and Latin America. However, opportunities to do so are surprisingly rare. Certainly, different combinations of factors underpin the development of these two regional protection systems, from civil society activism, legal traditions, to democratisation and authoritarian histories. However, both display similar

characteristics, including comparatively robust formal institutionalisation, an unusually articulated multi-level human rights architecture, perhaps best symbolised by the existence of apex supranational human rights courts in San Jose and Strasbourg respectively.

On a more practical note, pro-human rights actors have much to gain from sharing insights on innovative methods, as well as sharing "lessons learnt", conducive to cooperation among human rights decision-makers. And where cooperation fails, it is vital to experiment further with the harder edge of the accountability toolkit to compel action. If global human rights indices suggest improvement in the aggregate (Fariss 2014), this finding should not inspire complacency. Human rights defenders are today under unprecedented threat from powerful reactionary forces.[1] This is, perversely, perhaps a mark of the success of an increasingly dense, globalising and intrusive human rights system. However, it also raises immediate challenges, including the protection of those brave enough to speak out in public forum.[2]

Some observers suggest that human rights implementation has got harder due to diminishing political consensus and second-order problems brought on by an expansion of core rights concerns. However, perhaps it is not that the problem has got harder, but rather that we are more attuned to the open-ended, uneven and contested realities of human rights politics and less prone to being seduced by elegant legal frameworks. The conflictual reality of human rights politics is nothing new to those on the advocacy frontline. However, increasing official resistance to a new generation of intrusive human rights norms and structures has magnified the implementation challenge (and credibility threat) for system stewards, including the Council of Europe and its subsidiary bodies.

[1] See *The Guardian*, "Human rights groups face global crackdown 'not seen in a generation'", 26 August 2015.
[2] UN News Centre, "UN experts urges Honduras to end impunity in murder of human rights defenders", 11 April 2016.

Closing the "compliance gap" between standards and practice is a pressing concern across Europe. Ensuring actual compliance with legal rulings, navigating political opposition to more robust institutional protections, improving access to remedy for vulnerable rights claimants, and resisting funding cuts, often under the pretext of austerity economics, reflect challenges familiar to human rights professionals, regardless of regional setting.

The European human rights panorama

Such challenges are compounded by a deteriorating rights situation in Europe, including derogation from constitutional protection in response to terrorist actions, inequality and social hardship as a consequence of economic crisis, combined with rising xenophobia against migrants, refugees and asylum seekers.

To set the scene briefly, the overarching architecture of fundamental rights in Europe include the Racial Equality Directive, and the monitoring mechanisms of equality bodies, data protection agencies and national human rights institutions (NHRIs). In general terms, we observe innovation focused on enhancing scrutiny of states' practices, a move towards more "joined-up" human rights governance, more prescriptive laws and policy, and the proliferation of mechanisms dedicated to enhancing coordination and increasing access to remedy for human rights claimants.

Above the nation state, the Council of Europe (CoE) constitutes the principal executive human rights organ, while the European Court of Human Rights (ECtHR) serves as the apex judicial venue. Other agencies, such as the EU Fundamental Rights Agency (FRA) established in 2007, serve to coordinate activities within a network of pro-human rights actors. This regional backdrop, coupled with ongoing activities at the United Nations, strongly informs the activities of European NHRIs, whether that be strategic litigation before the ECtHR, financial support from the CoE, which last year announced a fund of €5 million to supporting NHRI

activities as part of the European Instrument for Democracy and Human Rights, or rhetorical, legal and policy support for their domestic human rights work.

Although much scholarship has understandably focused on a uniquely robust legal protection system underpinned by the EU Charter of Fundamental Rights which entered into force in 2009, observers have more recently engaged much more seriously with the local inadequacies of legal remedy in the absence of sufficient political will. Human rights institutionalisation in a region which includes Hungary, the Russian Federation, Sweden, the UK is clearly not going to be uniform. Two-thirds of all applications to the ECtHR refer to six states, many being repeat case resulting from structural problems such as delays in trial proceedings.[3] However, it is important to note that rhetorical backlash against human rights is not solely confined to jurisdictions with weaker attachments to democratic practice and respect for rights. Britain is a case in point, where the European human rights system is regularly subjected to excoriating criticism by sections of the political elite and media.[4]

Clearly, many steps will separate the ratification of law and its effects on human rights practice. More systemic appreciation of the division of labour among diverse regulatory agencies, coupled with a trend towards mandate integration, informs recent innovation in European human rights institutionalisation. As detailed below, processes of merger between NHRIs and precursor thematic and issue-specific bodies showcase ongoing efforts to advance a more comprehensive approach towards human rights protection and promotion. This development is supported by an operational turn within CoE institutions towards identifying hubs for enhancing coordination within local human rights systems, as detailed in the 2013 Brighton Declaration.[5]

[3] The six states are Italy, Poland, Romania, Russian Federation, Turkey and Ukraine.
[4] The Guardian, "Why is the European court of human rights hated by the UK right", 22 December 2013.
[5] High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, 20 April 2012.

National human rights institutions

The CoE now looks to NHRIs as important rights interlocutors. As of today, there are 38 NHRIs operating across Europe, with 25 fully accredited in accordance with UN-endorsed design guidelines, the Paris Principles. In general terms, NHRIs in Europe are distinct on a number of counts. First, their proliferation across sub-regions is not uniform and is suggestive of diverse diffusion logics, established in Spain and Portugal in the 1970s, much of Central and Eastern Europe following the end of the Cold War, and much more recently in many Western European jurisdictions (Pegram 2010).

In another twist, NHRIs are incredibly diverse structurally, ranging from human rights ombudsmen (predominant in Central and Eastern Europe), to quasi-judicial human rights commissions (Ireland and the UK), advisory human rights commissions (France, Greece, and Luxembourg), and hybrid advisory/research institutes (Denmark, Germany and Norway).[6] In recent years, regional NHRIs have notably scaled up peer-to-peer engagement beyond well-established United Nations forums,[7] with the European Group of NHRIs establishing a secretariat in Brussels in 2014.[8]

The NHRI experience in Europe

As NHRIs take centre stage as a possible "missing link", increasing attention is being paid to how they actually work, and crucially, when and why they matter. High-level European officials have acknowledged the role of NHRIs in: monitoring and reporting on domestic compliance with ECtHR judgement, legal education, public information campaigning, amicus curiae actions, and even compensating for jurisdictional deficits such as investigating complaints against non-state actors (Council of Europe 2011: 4).

[6] See Reif 2012 for a systematic review of diverse NHRI structures globally.
[7] See International Coordinating Committee of NHRIs, here: http://nhri.ohchr.org/EN/Pages/default.aspx
[8] See http://www.ennhri.org/

However, the work of these new agencies is rarely straightforward. The challenge now confronting NHRIs and their supporters is to ensure that they are actually enabled to improve human rights on the ground. Belying the increasingly thin political consensus on certain rights protections in many European settings, NHRIs have rarely inserted easily into variably dense pre-existing institutional settings, often regarded with indifference, suspicion, or worse by status quo actors within the state, judiciary and (un)civil society.

Issues of institutional autonomy, *de jure* and *de facto*, are material to the European NHRI experience, as are questions of adequate funding and community relations. A particular challenge surrounds insertion within domestic protection systems which historically have been institutionally fragmented, geared towards protection of designated vulnerable groups under equal treatment and anti-discrimination directives. I will briefly outline in turn the contours of these challenges.

The politics of institutional autonomy

Institutional autonomy is vital to the ability of an NHRI to operate without fear or favour. It is nevertheless impossible to take the politics out of NHRI design or operation. A mandate to pursue remedy on behalf of the most politically disadvantaged groups is a deeply challenging – and challenged – policy goal. In turn, their unusual position within political systems bridging state and society requires them to be responsive to multiple sites of authority within and outside the state. As such, they are highly sensitive to – and wary of – potential encroachment onto their autonomy.

In Europe institutional autonomy is sometimes jeopardised by powerful background norms. For example, the Westminster system generally places regulatory bodies such as NHRIs under the direct control of a government minister. Both the British and Irish NHRIs suffer from this arrangement, with appointment of Commissioners by the minister. However,

in a promising departure from precedent, the Scottish Commission is accountable only to parliament and is entirely independent of government.

In fragile democratic settings, conflict between NHRI and political elite are more likely to render formal safeguards obsolete. In Croatia, the parliament examined but failed to adopt the NHRI's annual report repeatedly from 2009 to 2011, offering no explanation.[9] This was widely viewed as an effort to influence the office. In 2012 the Croatian office was abruptly dissolved and merged with four other bodies under the pretext of cost-saving concerns. Tilting towards more hostile settings, an independent and effective Russian ombudsman was summarily dismissed by the Russian Duma in 1995 after confronting the government over violations in Chechnya (Finkel 2012: 304).

Observers would do well though not to conflate high democratic performance with political support for the NHRI. Indeed, the work of the Irish Commission has been hampered by a "highly personalised" civil service and political system defined by "an anti-independence culture" (Pegram 2013: 8). The Irish office's 2007 report detailing the alleged use of Shannon Airport by US Aircraft involved in rendition flights caused a political storm and was condemned by government officials. Shortly thereafter the office was subject to a budget cut of 37.5 percent and a protracted process of institutional reform which placed the viability of the body in doubt. Similarly, investigation by the British NHRI into whether the Treasury has fulfilled its duties to assess the impact of austerity-inspired spending reviews on vulnerable groups is unlikely to have endeared it to ministers.

The appropriate configuration of linkages between government and NHRI is therefore of central concern for the CoE and human rights system stewards in Europe (FRA 2010). NHRI accountability to government ministers is likely to prove particularly problematic when their

[9] In Kyrgyzstan, a 2007 amendment to the NHRI's governing law grants parliament the right of dismissal if the office's annual report is not approved. Law no. 97, 'On Amendments and Additions to the Law of the Kyrgyz Republic On Akyikatchy (Ombudsman) of the Kyrgyz Republic', 6 July 2007.

function is neither well-understood nor deemed legitimate practice by significant elements within the political elite and state bureaucracy. Responding to such concerns, the new Irish Human Rights and Equality Commission Act establishes an important innovation to appointment procedures, granting the Director of the FRA a role in candidate selection.[10] This lays down an important marker for future reform efforts.

Budgetary matters

Political interference often takes the form of subtler efforts to bend NHRIs to partisan wills, not least through the withholding of resources and dubious appointments. The severe impact of fiscal austerity on public sector spending throughout Europe has had a pronounced impact on the finances of NHRIs. As mentioned above, the Irish office received a budget cut of 37.5% in 2008. Similarly, the British NHRI has seen its budget and workforce halved since 2010. Another driver of financial pressure is expansion of mandate without a commensurate increase in funding. This has been an issue for some NHRIs assigned new statutory duties under the Optional Protocol to the Convention Against Torture (OPCAT). Notably, NHRI budgets in Europe are far inferior to those found in Latin America.[11]

Mobilising support outside of the state

NHRIs in Europe have sought to establish good relations with civil society. Civil society representation is widely regarded as an important guarantee of independence, as well as a means to facilitate access to vulnerable groups. In turn, effective implementation, especially at the limits or beyond of executive cooperation, is likely to be contingent on popular mobilisation. In contrast to Latin America, this popular component of the human rights system

[10] Art. 13(4), IHREC Act 2014.
[11] For instance, for 2011 in Spain $19.7 million and in Ireland $1.9 million.

has arguably been under-developed in Europe. Reflecting its largely democratic regional setting, the emphasis has often fallen on government and parliaments to ensure compatibility of local laws with convention provisions in good faith.

This good faith assumption has also informed domestic human rights ecosystems in important ways. In contrast to Latin America, civil society in Western Europe has tended towards international advocacy. NGOs focused on remedying domestic violations have often been poorly resourced, highly issue-specific and focused on legal advocacy. This may well reflect the relative functionality of traditional representative institutions. However, it has also led to factionalism among different communities and protection gaps for those who fall through the cracks. This factionalism has been imprinted onto structures, with governments across the region establishing multiple group-specific commissions and other bodies, with little or no systemic coordination.

The legacy effort of this panoply of regulatory bodies has posed perhaps the most fundamental challenge to NHRIs in terms of building a social support base for their activities. One unintended consequence of Europe's tradition of strong legal protections for vulnerable groups, dating back to anti-discrimination legislation in the 1970s, has been to foment division among rights claimants along factional lines. This has led to competing claims to "special status" among variably resourced and powerful communities of interest, many of whom are instinctively resistant to the new human rights system paradigm. Even though equality is a fundamental human right, it has commonly been treated as a separate policy space by government and civil society.

The potential for integrating a human rights and community relations paradigm is nevertheless evident in a series of mergers between NHRIs and National Equality Bodies (NEBs) throughout Europe (Crowther and O'Cinneade 2013). Five accredited NHRIs in Europe now also serve as NEBs (Belgium, Ireland, Netherlands, Slovakia, and Britain).

Merger processes have often been initially contentious for advocacy organisations, especially when moving from separate precursor bodies into one merged agency risks diluting the visibility of any one community.

There are valid arguments for integration, not least ensuring a comprehensive approach to protecting those most vulnerable in society (Reif 2012; Carver 2011). In Britain, a merger equality and human rights commission with a broad and unrestrictive mandate was viewed as essential, particularly in a post 9/11 context of derogations from provisions about unlawful internment and rising xenophobia. However, this rationale was resisted by powerful actors who have continued to frame the NHRI as an international imposition, a burdensome and unnecessary bureaucratisation and, most worryingly, as an advocate for the rights of the "undeserving" (read: prisoners, foreign criminals, those accused of terrorism offences). It is not just the British NHRI which has struggled to communicate human rights in a popular lexicon capable of countering such distortions.

Institutional reform and drivers of change

The issue of institutional merger raises important questions regarding design and reform, above all the importance of careful evaluation of the pre-existing human rights architecture to ensure enhanced coordination and complementarity. If properly managed and resourced, institutional reform can enable a more comprehensive and coherent approach towards human rights protection and promotion. Indeed, there are signs that after six years of organisational limbo, the new Irish merged body is beginning to make headway. However, the European experience suggests that human rights and equality or community approaches may not be reconciled easily.

In practice, the plurality of commission membership appears vital to the performance integrated protection agencies. The newly merged Irish Commission provides an example of

plural representation within a highly credible council membership.[12] Where newly merged equality and human rights bodies have had little prior experience of joint-working, differing institutional cultures, working practices and staff profiles must be carefully negotiated. Reluctance to merge in the British case, especially for the Commission on Racial Equality and its constituents, led to a spectacular falling-out among commissioners, documented in exhaustive detail by the Parliamentary Joint Committee on Human Rights.[13]

Another pressing motive for integrative reform of separate bodies is to fill protection gaps. A key problem in European jurisdictions centres on human rights infractions which are not necessarily justiciable. From the arbitrary withdrawal of benefits, to denial of services to prisoners, medical negligence or delays in pension payments, effective remedy for what often amounts to oversight, omission or neglect by state officials is often difficult. Existing structures, tribunals, utility supervisors and other regulatory bodies often fail to integrate a human rights approach in their work, which may leave victims in a situation of absolute vulnerability.

Diagnosing and rectifying protection gaps has also been spurred on by international developments. Obligations arising from two recent additions to the UN treaty system, the Optional Protocol to the Convention Against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD) has had a significant impact on reconfiguration of protection frameworks in these two specific rights domains (Pegram 2015; De Búrca 2015). The CRPD places particular emphasis on agency coordination, differentiating monitoring and implementation duties among two obligatory national preventive mechanisms. Observers note that during its OPCAT review of existing structures, UK officials were surprised to realise that there was no inspectorate for prisons. In many instance, NHRIs have been designated national

[12] See http://www.ihrec.ie/about/the-commission.html
[13] See Joint Committee on Human Rights, Thirteenth Report of Session 2009-10, 15 March 2010.

implementation mechanisms under these two instruments. Elsewhere, new structures have been established.[14]

Public policy impact

Where cooperation fails in the face of resistance, NHRIs also enjoy statutory powers to require action, short of legal enforcement. The significance of powers to secure entry to closed detention facilities or formal investigation and inquiry powers should not be under-estimated. However, it is also material to note that an NHRI operating in high-performing democracies has in theory allies among other representative institutions, control and regulatory agencies through to close the accountability circle. Indeed, an NHRIs contribution to public policy in such settings may be difficult to observe for the simple fact that its actions may be most impactful in the intermediate actions it takes, advising legislators, facilitating legal action or mobilising third party advocacy.

That said, NHRIs in Europe have made important verifiable contributions to public policy. NHRIs and others have focused attention on linking human rights into unorthodox public policy terrain, including European trade and security debates.[15] Notwithstanding a challenging context, the British NHRI has made important intervention on a range of public policy concerns, including disproportionate use of stop and search powers by the police, retention of DNA data, opposition to arbitrary detention under anti-terrorism legislation, and raising issues of fairness in British society and intergenerational inequality.[16] The Irish NHRI has received praise for its active campaigning for the European Human Rights Act to be

[14] after careful evaluation of existing architecture, Moldova chose to establish a mixed OPCAT model, with the NHRI serving as the hub for a national preventive mechanism which also includes a new Consultative Council. In France, despite the presence of a robust NHRI, legislators opted to establish a new structure for the purposes of the NPM. The resulting institution, General Inspector of Places of Deprivation of Liberty, has already gained a reputation for independent and authoritative impact.

[15] See European Bank of Reconstruction and Development Review of Good Governance Policies – Environmental and Social Policy Submission of WG on Business and Human Rights of the ICC. March 2014.

[16] The Guardian, "The equality commission deserves our support", 6 October 2011.

incorporated into Irish law, collaboration with NGOs to establish an independent police complaints body, and provided human rights education to civil servants (Pegram 2013).

Research institute-type NHRIs in Denmark and Germany have made important contributions to public debate through human rights education, documentation, research and advice to government. The Danish Institute in particular is pioneering human rights approaches to emergent issues, including business and human rights, the challenge of safeguarding the environment, and auditing equal treatment impact assessments. European NHRIs also play an important role in terms of monitoring and data collection on human rights, alongside other governmental agencies. For example, the Danish NHRI has entered into a Memorandum of Understanding with the designated NPM under OPCAT, the Danish Parliamentary Ombudsman, to provide expertise on international law.

Another impactful route through to public policy change has been the domestication the international human rights law. NHRIs in Northern Ireland and Britain have interpreted their mandates to include the protection of all human rights standards, regardless of their status under UK law. In Central and Eastern Europe, NHRIs have made frequent use of international law to contest problematic constitutional norms. The Georgian NHRI has frequently invoked international human rights standards, resulting in successful procedural interventions, as well as statutory reforms (Carver 2012: 195-6).

The Spanish NHRI regularly monitors legislation to ensure conformity with international standards and has been particularly active on CRPD implementation. This advisory function also has a clear policymaking component. In its submissions to the UN Human Rights Committee, the Northern Ireland Human Rights Commission drew attention to a series of concerns regarding the compatibility of many proposals in the Counter-Terrorism Bill of 2008 with the UK's obligations under international human rights law.[17]

[17] See NIHRC Submission to the UN Human Rights Committee, 93rd Session, May 2008.

Three takeaways

1. The challenge of implementation: the compliance gap demands that we take much more seriously the political task environments which impede effective implementation. In politics, demand does not translate automatically into supply. Even where legal frameworks exist, power often rules. NHRIs and other actors should experiment with the full range of tools at their disposal, drawing on instruments beyond legal claims to embrace agenda-setting, advisory functions, monitoring and data collection, campaigning and other political advocacy instruments, which can inform their day-to-day work and galvanise meaningful action on the part of government and state officials.

2. Protection of vulnerable groups: this study highlights the challenge of ensuring vulnerable groups do not fall through protection nets. High performance on human rights indicators at the aggregate must not lead to a false complacency. A move towards a more integrated human rights system approach is underway in Europe to insure against the risks of fragmentation. Access to justice and remedy for certain "at risk" groups remains a pressing concern in Europe, not least economic migrants, refugees, ethnic minorities and detainees held under anti-terrorism legislation. Similarly, attention must be given to human rights infractions arising from omission or neglect of state officials. There is also a need to enhance understanding of the cross-cutting nature of discrimination and underlying drivers of abuse, which may amount to structural violations of human rights.

3. Evidence-based institutional reform: the challenge of reconciling equality and human rights mandates under one roof speaks to the complexity of human rights institutionalisation, particularly in settings of dense pre-existing frameworks. It is incumbent upon human rights

systems architects to ensure modification of existing structures or the introduction of new ones serves to improve the performance of the system as a whole. Complementarity and coordination is the goal. Reform on the basis of cost-cutting or political expediency risks conflict, duplication of functions or worse.

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