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NATIONAL HUMAN RIGHTS INSTITUTIONS IN EASTERN AND SOUTHERN AFRICA: LESSONS AND PROSPECTS FOR THE FUTURE

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1 Introduction

In spite of their differing, and often difficult, social, political and economic circumstances, national human rights institutions (NHRIs) are now recognised as critical to the promotion and protection of human rights in Africa. The 15 case studies in this compendium show that although nearly all of the countries reviewed – with the notable, and indeed surprising, exception of Botswana[1] – purport to subscribe to the Paris Principles, they vary widely among each other in terms of their form, mandates and *modus operandi*; for all that, they nonetheless face similar challenges. These include weak legal frameworks, lack of political will to implement the frameworks, interference in their operations, institutional invisibility, problems to do with their credibility, shortages of adequate funding, and the effects of political instability.

Given that a solid legal framework is fundamentally important if an NHRI is to be effective, the overriding objective of this compendium has been to see what lessons can be drawn by comparing and contrasting different such frameworks in a selection of countries in southern and eastern Africa. In considering the prospects for the future, and what measures need to be taken to enhance the effectiveness of these

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1 Botswana and Mauritius are the only two African countries that have had a fully functioning multi-party democracy in place since independence in the 1960s and that have been widely praised for their record of good governance.

institutions, the discussion that follows highlights a number of key issues, starting with the role of the Paris Principles.

2 Looking beyond the Paris Principles

Although much criticism has been levelled at the Paris Principles,[2] they remain a crucial foundation that lays down the basic minimum standards for assessing the potential of an NHRI to deliver on its mandate. However, the case studies clearly suggest that, for such an institution to carry out its mission effectively in practice, it has to go beyond mere formal or symbolic compliance and achieve substantive compliance with the Principles.

The process for obtaining accreditation, which certifies compliance, seems to focus only on formal compliance with the Paris Principles.[3] Thus, receiving "A" status means that a country is in formal compliance with the Principles, regardless of whether or not its NHRI is able to discharge its mandate with any effectiveness in actuality. It is hence no surprise that Zimbabwe was able to get "A" status accreditation in May 2016 at a time when human rights violations in the country were at their peak and led a year later to President Robert Mugabe's removal from office.[4] Whilst accreditation has its merits, it is no indication that a country's institutions are operating at a level where they actually do very much to advance the promotion and protection of human rights.

Some of the case studies indicate that several rather broadly formulated guidelines in the Paris Principles could be made clearer and more incisive. This is particularly true in regard to an NHRI's legal framework, a matter to which we now turn.

3 Enhancing the legal framework of NHRIs

The Paris Principles simply require the mandate of a NHRI to be clearly stated in "a constitutional or legislative text". A constitutional text that merely empowers parliament to enact legislation to set up the institution –

2 See M O'Sullivan, "National Human Rights Institutions Effectively Protecting Human Rights?" 25 *Alternative Law Journal* (2000), p 236.

3 See UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions,* available at https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf (accessed in May 2019), pp 256-265.

4 See "ZPP Monthly Monitoring Report: Human Rights Violations (January 2016)", available at https://bit.ly/2XUhVxY (accessed in May 2019); Human Rights Watch, "Zimbabwe Report 2017", available at https://www.hrw.org/world-report/2017/country-chapters/zimbabwe (accessed in May 2019).

as in Ethiopia – can hardly be said to guarantee the legal certainty and independence which that institution needs in order to function effectively without executive interference or manipulation; the same is true of an institution created by ordinary legislation, as in Botswana, Burundi, the Democratic Republic of the Congo (DRC), Mauritius and Rwanda. The ideal legal framework is one where the mandate of the institution is constitutionally entrenched. The best practices in this respect appear in the Constitution of South African (Chapter 9) and, to some extent, the Kenyan and Zimbabwean constitutions (Articles 59 and 248-254 for the former, and sections 232-237 and 242-244 for the latter).

The elaborate frameworks in the Kenyan, South African and Zimbabwean constitutions provide detailed guiding principles that shield the NHRIs from political interference. The main principles are that:

- the institutions are independent, subject only to the constitution and the law, and must act impartially and perform their duties without fear, favour or prejudice;
- all state organs must, through legislative and other measures, assist and protect the independence, impartiality, dignity and effectiveness of these institutions;
- no person or organ may interfere with their functioning; and
- they are accountable to parliament.

In these three countries, all legislation dealing with the NHRIs is in strict conformity with the constitutional principles (see the relevant Part B in each case). The Kenyan and Zimbabwean constitutions even go further to define the mandates of these institutions in broad and elaborate terms. Moreover, bearing in mind that lack of adequate funding is a key reason that NHRIs are unable to deliver on the mandate, it is notable that the Kenyan and Zimbabwean constitutions provide for autonomous funding through direct parliamentary allocation (see Article 249 for the former and section 322 for the latter).

One of the most serious problems identified in the case studies is that there have either been delays in setting up the institution after the law establishing it was enacted (for example, in Angola the office was set up 13 years after the law was enacted), or it happens that officials are not promptly appointed or are left in office long after their terms have expired, as was the case in Angola and Mauritius. Provisions in the South African and Zimbabwean constitutions state that all constitutional obligations must be performed "diligently and without delay" (see section 237 for the former and section 324 for the latter).

An elaborate and constitutionally entrenched legal framework to regulate a NHRI that lays down the basic principles dealing with the six key issues concerning the effective operation of these institutions, namely their mandate, their independence, autonomy from other state entities, pluralism and cooperation with other bodies, adequate resources and adequate powers of investigation, offers the following advantages:

- It will shield the institution from political interference and ensure that these principles cannot be changed casually or arbitrarily by transient parliamentary majorities or opportunistic leaders trying to promote their own selfish political agenda.[5]
- Provisions imposing a general mandatory duty to implement the constitution[6] ensure that compliance with the constitutional obligations is not entirely at the discretion of the government. Non-compliance opens the way for an action for violation of the constitution where the alleged "violation" consists of a failure to fulfil a constitutional obligation to implement the constitution. The effect of this is to render the duty on the government to establish the NHRI in the exact manner contemplated by the constitution obligatory and legally enforceable, rather than discretionary.
- The obligation to perform constitutional obligations diligently and without undue delay provides sufficient grounds to bring an action against the executive or the legislature for failure to enact implementing legislation promptly or failure to establish the NHRI or appoint its officials promptly.
- This also strengthens the hands of individuals and CSOs to actively monitor and expose public officials and institutions that are not complying with their constitutional mandate. This is an important step towards a self-enforcing constitution, which enhances the right of each individual in society to self-government and inevitably involves the transfer of some powers from the public into private hands in a manner likely to promote greater efficiency and effectiveness in dealing with good-governance institutions such as NHRIs.

To look beyond the broad legal framework, the case studies also point to the many innovative ways in which key principles of NHRIs, such as diversity, can be addressed.

5 See CM Fombad, "Some Perspectives on Durability and Change under Modern African Constitutions", 11(2) *International Journal of Constitutional Law* (2013), pp 382-413.

6 See an example of such an obligation in section 2 of the South African Constitution of 1996, which states in section 2 that "this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, *and the obligations imposed by it must be fulfilled"* (emphasis added).

4 Promoting pluralism, inclusivity and cooperation

The case studies show that NHRIs co-exist with other public institutions, such as the ombudsman (or public protector), gender commission, or equality commission, along with private ones, such as CSOs, that their functions sometimes overlap. This is not necessarily a bad thing, because in certain cases these institutions complement the work done by NHRIs. There is also no doubt that a healthy CSO and NGO sector is of vital importance to a vibrant human rights system. In fact, the Paris Principles require pluralism, which entails strong ties between NHRIs, on the one hand, and human rights CSOs and NGOs, on the other.

However, the case studies show that, in reality, in many countries there is constant friction between NHRIs and the CSOs and NGOs. Two main reasons exist for this. The first is that in many cases they are is competition for funding from foreign donors. The second is mutual suspicion between the NHRI and other institutions, often based on the perception that the former is there to serve the interests of the government and cover up its human rights abuses.

Nevertheless, the case studies also provide evidence of the positive benefits of collaboration and cooperation between them. There is evidence, too, that in some of these countries, for example Burundi, the NHRI acts as a bridge between CSOs and NGOs, on the one hand, and the government, on the other. In other countries, there is close collaboration of many kinds in promoting and protecting human rights. For example, where, due to financial constraints, the NHRI is not able to open offices close to the populace in rural areas and at regional level, it has either used NGOs to reach them or trained some of the latter's staff to fill the gaps. For example, in Ethiopia, the Human Rights Commission sometimes has provided financial assistance to local NGOs dealing with human rights issues.

The major problem the case studies reveal is that of ensuring that the NHRI reflects the diverse nature of each community in terms of gender, ethnicity and the like. This may be difficult or logically impossible; for example, in Lesotho the human rights commission has only three commissioners. However, a number of countries have gone to considerable lengths, both in their constitutions and relevant legislation, to promote diversity and representativeness within the NHRI. An aspect of such representativeness that has become particularly important is the expertise of those who work in these institutions. Although almost all countries require that the administrative head and many of the

commissioners have a legal background, there is now a trend towards ensuring that the staff include experts in other closely related fields.

Whilst there is a conspicuous silence in some legal frameworks, such as those of Botswana, Ethiopia, Lesotho and Mauritius, regarding institutional diversity and representativeness, many other countries have taken extensive measures to deal with this. In both Burundi and the DRC, these are matters regulated by legislation, while in Kenya and Zimbabwe the main principles guiding them are firmly laid down in the constitution.

In this respect, the Kenyan Constitution has probably gone the furthest. In addition to its Articles 100 and 197 that strive to promote diversity, Article 27(8) places an obligation on the legislature to "implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender". Article 250 states that appointments to all commissions and independent offices, such as its National Human Rights Commission, must reflect the regional and ethnic diversity of the country.

Similarly, section 17 of the Zimbabwean Constitution deals exclusively with gender balance, and in subsection 1(b) requires the government to take all measures, including legislative ones, to ensure that women constitute at least half of the membership of all Commissions, which in this context includes the Human Rights Commission and the Gender Commission. However, more needs to be done to ensure that these institutions include other minorities, such as elderly persons and persons with disabilities.

5 Enhancing access

Although many countries have made efforts to decentralise the services of the NHRI to bring them closer to the people, accessibility often remains a huge problem due to the size of the country, financial constraints, and the complexity of the issues encountered at local level. Various innovative measures have been adopted to deal with this problem. The main ones are:

- Simplifying the process of filing complaints, especially by making toll-free telephone numbers available and receiving complaints orally by cell phone. This has been the case in almost all the countries.
- Collaborating with CSOs to receive complaints in those areas where the NHRI is not physically present and forwarding the complaints to the NHRI's offices.
- Holding regular human rights clinics, often in partnership with CSOs, in those parts of the country where the NHRI is not physically present.

- Training members of CSOs, sometimes on a paying basis, to carry out promotional activities.
- Utilising mobile complaints clinics to conduct regular visits to rural areas.

6 Financing

Inadequate budgets are without doubt one of the key factors that render many of the NHRIs in this study weak and ineffective. Often the funding and resources made available to them are arbitrarily reduced over the years. In some cases, funding is made available at the convenience of the government, even where this is not allowed by the relevant legislation, in order to frustrate the institution, punish it for criticising the government, or put pressure on it to stop certain investigations. The main effects of inadequate budgets are:

- Increasing reticence by some NHRIs to investigate and report fully on government abuses owing to the fear that budgets will be cut.
- The inability of most of the NHRIs, even those with limited mandates, to perform their duties fully, leading to service cuts.
- The inability to find the resources to open regional and local offices and recruit and pay qualified personnel to staff these offices.
- The extensive reliance on funding from donors, international agencies and other alternative sources. This often entails a lengthy, cumbersome process of accountability, which tends to distract NHRIs from their main responsibilities. In addition, this creates the risk that the NHRI is perceived as acting in accordance with the donor's agenda.
- Low salaries and the consequent inability to engage and then retain well-qualified staff. A typical example of this is the Ethiopian Human Rights Commission.

The funding situation is unlikely to change soon. However, governments are increasingly willing to allow NHRIs to seek alternative sources of funding from donors and other international agencies. The evidence so far suggests that if specific projects involving the promotion and protection of human rights are well prepared, the chances of obtaining donor financial support are good. This is often more likely where the projects involve close collaboration with CSOs and NGOs. To limit the scope for government control, NHRIs should have a separate budget line voted for separately by the legislature, and, once allocated, this budget should be self-administered without any interference from the government.

7 Concluding remarks

There are other important lessons that can be drawn from the case studies covered in this study. Many of the NHRIs have not been as effective as one would have expected owing to the overbearing influence of the state. Public or popular legitimacy is earned when an NHRI is seen to be standing up for and defending the rights of the weak and marginalised in society.

Although the collection of regulatory documents in this compendium shows that a solid legal framework is crucial, the reality is that an institution's legitimacy, particularly when dealing with the promotion and protection of human rights, is only partly rooted in its formal legal status. For example, in Botswana, although the Ombudsman has no clear human rights promotion and protection mandate, the institution has, nevertheless, in the absence of another institution playing that role, been acting as an NHRI in dealing with some of the complaints concerning human rights abuses.

Hence, although a broad and non-restrictive mandate that includes civic, cultural, economic, political and social rights is ideal, a lot can still be accomplished in spite of a narrow mandate, provided the officials act with some pragmatic creativity. This is particularly so when dealing with newly emerging issues such as lesbian, gay, bisexual and transgendered persons, migrant workers, persons with disability, and racial and national minorities.

Even at the best of times, NHRIs on their own cannot possibly deal with the all human rights issues that arise in a country. There is, clearly, always a need to collaborate and work closely not only with other public institutions that play a cognate role, however limited, but so too with CSOs and NGOs. The case studies also show the many ways in which NHRIs provide an important link between the national human rights enforcement system and regional and other international human rights bodies. The trend suggests that, in addition to establishing NHRIs to promote and protect human rights in general, growing numbers of states are creating specialised institutions to deal with specific aspects of human rights, such as commissions to address gender issues or truth and reconciliation commissions to engage with transitional justice issues.

Generally, NHRIs respond to human rights abuses in a variety of ways. This may lead to an investigation or a public inquiry that may result in a report containing advice and recommendations. Unless the law clearly states otherwise, there is no reason to assume that the advice or

recommendations can be ignored with impunity. There is no justification for spending taxpayers' money to carry out an investigation that ends up with recommendations that can be ignored. Given the limited scope of the investigations NHRIs usually conduct, it can be argued that a party dissatisfied with the outcome of the process is free to apply for it to be judicially reviewed but is not free just to ignore it.

Finally, it is clear that there is no NHRI that is not encountering one challenge or another. Those that are reasonably successful have adopted simple, accessible, affordable and speedy processes for addressing complaints. The legal instruments contained in this compendium illustrate some of the options. The prospects for the future, particularly in the light of the increasing threats to efforts to entrench a culture of democracy in Africa, depend on the continuous presence of NHRIs that are more vigilant and proactive than they have been.

References

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