

Human Rights, State Compliance, and Social Change

Assessing National
Human Rights Institutions

Edited by
Ryan Goodman and Thomas Pegram

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RIGHTS INSTITUTIONS

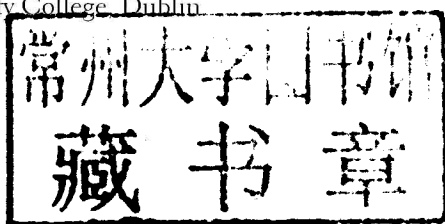
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HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE

National human rights institutions (NHRIs) – human rights commissions and ombudsmen – have gained recognition as a possible missing link in the transmission and implementation of international human rights norms at the domestic level. They are also increasingly accepted as important participants in global and regional forums where international norms are produced.

By collecting innovative work from experts spanning international law, political science, sociology, and human rights practice, this book critically examines the significance of this relatively new class of organizations. It focuses, in particular, on the prospects of these institutions to effectuate state compliance and social change. Consideration is given to the role of NHRIs in delegitimizing – though sometimes legitimizing – governments' poor human rights records and in mobilizing – though sometimes demobilizing – civil society actors. The volume underscores the broader implications of such crosscutting research for scholarship and practice in the fields of human rights and global affairs in general.

Ryan Goodman is the Anne and Joel Ehrenkranz Professor of Law and chair of the Center for Human Rights and Global Justice at New York University Law School, and professor of politics and sociology at New York University. He was previously the Rita E. Hauser Professor of Human Rights and Humanitarian Law and director of the Human Rights Program at Harvard Law School. His publications include *International Human Rights in Context* (with Henry Steiner and Philip Alston), *Socializing States: Promoting Human Rights through International Law* (with Derek Jinks), and *Understanding Social Action, Promoting Human Rights* (with Derek Jinks and Andrew Woods).

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Kieren Fitzpatrick has been the director of the Asia Pacific Forum Secretariat since its inception in 1996. The APF is one of the most developed of the four regional networks of NHRIs operating in the world. Currently, the APF is made up of fourteen full-member institutions and three associate members stretching from Palestine in the west, across Asia, and down to the Pacific. His publications include “The Asia Pacific Forum: A Partnership for Regional Human Rights Cooperation,” in B. Lindsnaes et al. (eds.), *National Human Rights Institutions: Articles and Working Papers* (Danish Centre for Human Rights, 2001).

Ryan Goodman is Anne and Joel Ehrenkranz Professor of Law and cochair of the Center for Human Rights and Global Justice at New York University School of Law. He is also professor of politics and professor of sociology at NYU. Previously, he was the inaugural Rita E. Hauser Professor of Human Rights and Humanitarian Law, and the director of the Human Rights Program at Harvard Law School. His publications include (with Philip Alston and Henry Steiner) *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford University Press, 2007); (with Derek Jinks) *Socializing States: Promoting Human Rights through International Law* (Oxford University Press: forthcoming 2011); and (with Derek Jinks and Andrew K. Woods), *Understanding Social Action, Promoting Human Rights* (Oxford University Press: forthcoming 2011).

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Preface

National human rights institutions (NHRIs) are no longer the institutional oddity they were only ten or fifteen years ago. The speed with which they have moved from the periphery to the central arena of human rights politics – international and domestic – is largely unprecedented. This book is an attempt to take stock of the extraordinary proliferation and growing significance of NHRIs, as the first phase of international promotion and proliferation gives way to a second one of organizational consolidation and outward projection in shaping new human rights norms. The book also uses NHRIs as a lens to examine broader questions about human rights and the diffusion of international norms. With a diverse array of contributors, we explore these subjects from multiple disciplinary perspectives, professional experiences, and geographical areas of expertise.

The idea for this volume emerged out of a series of conferences, lectures, and fellowships convened by the Human Rights Program, Harvard Law School, during the period that Ryan Goodman served as director of the program. A goal of those initiatives was to enhance the study and practice of these novel institutions and develop linkages between legal and social science scholars, policy makers, and practitioners. Conferences held in June 2007 and May 2008 convened an array of scholars and practitioners from around the world to share their insights and experiences working from within and outside NHRIs. Crucial input was received from many people at these various conferences, meetings, and related lecture series. In particular, we wish to thank Emilio Álvarez Icaza Longoria, Raymond Atuguba, William Binchy, Brian Burdekin, Andrew Byrnes, James Cavallaro, Hyo-Je Cho, Andrew Clapham, Jorge Contesse, Brice Dickson, Raquel Dodge, Martin Flaherty, Diego García Sayán, Tyler Giannini, Mario Gomez, Niels Erik Hansen, Maina Kiai, Ildahl Kasim, Morten Kjærum, C. Raj Kumar, Katerina Linos, Jennifer Lynch, Gianni Magazzeni, Mohamed Mahmoud Mohamedou, Rashida Manjoo, Maurice Manning, Ravi Nair, Binaifer Nowrojee, Michael O’Flaherty, Sharanjeet Parmar, Gerard Quinn, Mindy Roseman, Eric Rosenthal, Sima Samar, Miguel Sarre,

Margaret Sekaggya, Emile Short, Sébastien Sigouin, Vijayashri Sripati, Michael Stein, Chris Stone, Tseliso Thipanyane, Sergiu Troie, Andrew Woods, and David Zions, in addition to the contributors to the present volume.

These early conferences, lectures, and research laid the groundwork for the book project. Those initiatives helped to identify gaps in the literature and the most important questions for the study of NHRIs. At the time, the Harvard program recruited Thomas Pogram, in November 2008, tasked with the development of a broader project related to a more general examination of NHRIs, their successes, and ongoing challenges in different political contexts. Pogram, a political scientist with a position inside a law school, brought a social science expertise on institutional analysis and a particular interest in the political accountability functions of NHRIs in the democratizing political systems of Latin America. The project also included the development of linkages with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), and participation at ICC meetings held in Geneva, Nairobi, and Rabat. We owe a debt of gratitude to Gianni Magazzeni, then head of the National Institutions and Regional Mechanisms Section of the Office of the UN High Commissioner for Human Rights, for facilitating our work and participation at those events.

The volume chapters, in particular, are the culmination of a conference convened jointly by Harvard Law School's Human Rights Program and New York University School of Law's Center for Human Rights and Global Justice in September 2009. Development of our own conceptual and theoretical ideas about NHRIs was greatly informed by the insights generated at this workshop where initial drafts of the chapters were presented. We accordingly thank participants Sonia Cardenas, Richard Carver, Jim Cavallero, Chris Elmendorf, Kieren Fitzpatrick, Julie Mertus, David S. Meyer, Obiora C. Okafor, Enrique Peruzzotti, Linda C. Reif, Catherine Renshaw, Mindy Roseman, Peter Rosenblum, Chris Sidoti, and Mark Ungar. In addition, exceptionally useful suggestions were received from Laurence Whitehead in the process of steering Thomas toward the successful completion of his Ph.D. We thank the anonymous reviewers from Cambridge University Press for constructive suggestions. We are also deeply grateful to John Berger at Cambridge for his assistance throughout the production process.

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Introduction

National Human Rights Institutions, State Conformity, and Social Change

Ryan Goodman and Thomas Pegram

1.1. INTRODUCTION

Over the past twenty years national human rights commissions and human rights ombudsmen have emerged in every continent and subregion of the world, and in dozens of democratic and dozens of undemocratic states alike. This institutional innovation – a “national human rights institution” (NHRI) in UN parlance – is broadly defined as “a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights.”¹ Accounts of the number of NHRIs now in existence vary from around 120 to 178, established in approximately 130 countries.² By conservative measures, since 1990 the population of NHRIs has witnessed a staggering fifteen-fold increase (at the rate of over five new institutions established per year).³

The proliferation of NHRIs is part of a broader trend driven by international actors that promote the diffusion of legal and institutional innovations across national boundaries.⁴ Beyond the question of why governments create NHRIs, this

¹ United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (New York: United Nations, 1995), 6; see also R. Carver, *Performance and Legitimacy: National Human Rights Institutions* (Versoix: International Council for Human Rights Policy [hereafter ICHRP], 2000), 3 (defining an NHRI as “a quasi-governmental or statutory institution with human rights in its mandate”).

² For NHRI population data, see International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: <http://www.nhri.net/>; Jeong-Woo Koo and Francisco O. Ramirez, “National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004,” *Social Forces* 87 (2009), 1326.

³ M. Kjaerum, *National Human Rights Institutions: Implementing Human Rights* (Copenhagen: Danish Institute for Human Rights, 2003), 5.

⁴ See, for example, B. Simmons, F. Dobbin, and G. Garrett, *The Global Diffusion of Markets and Democracy* (Cambridge: Cambridge University Press, 2008); Ryan Goodman and Derek Jinks, “How

volume builds on existing scholarship by inquiring into why NHRIs matter, how they operate in practice, and, crucially, under what conditions they can effectuate compliance with human rights standards and bring about social change.

The relationship between NHRIs and the global order is multidimensional. NHRIs first gained recognition as potentially important links in the transmission of human rights norms from the international to the domestic level.⁵ And the activities of NHRIs along that track have accelerated in recent years. The Universal Periodic Review of state practices by the UN Human Rights Council routinely involves governments' encouraging other governments to establish an NHRI if such an institution does not yet exist in the country. Two of the twenty-first century's first human rights treaties – the Optional Protocol to the Torture Convention and the Convention on the Rights of Persons with Disabilities – create an unprecedented role for NHRIs in monitoring and implementing multilateral treaty obligations.⁶ In addition, the UN human rights treaty bodies have begun to rely increasingly on the work of NHRIs in reviewing state reports of compliance, and UN officials increasingly call on NHRIs to address specific subject matters such as multinational corporations and economic and social rights. In short, NHRIs are becoming instrumental in the transmission of human rights norms into domestic systems and ensuring national compliance with global standards.

NHRIs have also emerged as important actors in shaping human rights norms at the international level – both global and regional. Organized as a unified coalition in treaty negotiations, NHRIs from across the world played a significant role in drafting the Disability Rights Convention. They were also directly involved in the negotiations of the UN Declaration on the Rights of Indigenous People (Sidoti,

to Influence States: Socialization and International Law," *Duke Law Journal* 54 (2004), 621–703; R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press: forthcoming); Daniel W. Drezner, "Globalization and Policy Convergence," *International Studies Review* 3 (2001), 53–78.

⁵ For recent UN recognition, see Report of the Secretary-General to the General Assembly, "National Institutions for the Promotion and Protection of Human Rights," UN Doc. No.: A/64/320, 24 August 2009; also UN General Assembly, "The Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights," UNGA Res./RES/63/169, 20 March 2009; UN General Assembly, "National Institutions for the Promotion and Protection of Human Rights," UNGA Res.: A/RES/63/172, 20 March 2009. For practitioner and legal analysis of NHRIs see, for example, K. Hossain (ed.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Boston: Brill, 2000); R. Gregory and P. Giddings (eds.), *Righting Wrongs: The Ombudsman in Six Continents* (Oxford: IOS Press, 2000); and L. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff, 2004).

⁶ For a recent discussion of these developments and their prospects for closing the compliance gap, see Richard Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law," *Human Rights Law Review* 10 (2010), 1–32.

this volume). NHRIs have a formal seat at the table of the UN Human Rights Council, providing them with an opportunity to contribute to standard setting and the development of human rights norms at the global level. And NHRIs, organized in regional associations, have also begun to shape international standards. Consider, for example, pathbreaking work on sexual orientation and gender identity by the Asia Pacific Forum of National Human Rights Institutions. Indeed, acting as a group, these institutions may be more willing to push the frontiers of human rights norms than acting separately or alone.

Despite the growing profile of NHRIs in world politics, cross-fertilization of NHRI research across academic disciplines has only just begun.⁷ Situating the work of NHRIs within the framework of state compliance and social change, our volume responds to a number of converging developments. The disjuncture between human rights ideals and political reality on the ground presents a direct challenge to the aspirational claim of universal human rights.⁸ In response to this compliance gap, institutional mechanisms dedicated to the promotion of human rights norms at the national level have begun to move from the periphery to the center of discussion. By bridging legal scholarship with social science concerns of political contestation and norm diffusion, this book provides a platform for generating new insights and rendering this interdisciplinary knowledge available to a wider community of academics, policy makers, and practitioners.

If the presence of NHRIs in the international human rights regime is becoming a settled fact, the significance of this new class of formal organizations is still undertheorized and not well understood. This lacuna is due, in part, to the recent nature of the NHRI surge. Early debate on the merits of NHRI formation commonly veered between dismissive critique and unmitigated support. Neither position was strongly established in evidence.⁹ And the early literature focused on very general trends of diffusion and exceedingly formal features in the design of institutions. Notwithstanding these limitations, a first generation of NHRI scholarship has produced some valuable insights into why and under what conditions human rights institutions are created by states.¹⁰

⁷ See J. Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford: Stanford University Press, 2009); S. Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007).

⁸ See Oona Hathaway, "Do Human Rights Treaties Make a Difference?" *Yale Law Journal* 111 (2002), 1935–2042.

⁹ Ian Scott, "The Functions of the Ombudsman in Underdeveloped Countries," *International Review of Administrative Sciences* 50 (1984), 212–20.

¹⁰ See Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions," *Global Governance* 9 (2003), 23–42; Jeong-Woo Koo and Francisco O. Ramirez, "National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004," *Social Forces* 87 (2009), 1321–54.

Less attention, however, has been given to important areas of variation, such as divergent outcomes at the regional and subregional level, and unanticipated consequences of NHRI creation in particular domestic settings. For instance, the creation of an NHRI may have perverse effects – in some cases, actively undermining domestic rights frameworks and risking cooptation by a liberal state. Even the well-motivated establishment of an NHRI can unintentionally crowd out other domestic actors, draining them of political and economic resources (in this volume, Pogram, Chapter 9; Meyer, Chapter 13; Rosenblum, Chapter 12). It is important to consider such effects to gain an understanding of the power and potential of NHRIs in different domestic contexts.

This volume is accordingly in conversation with an emergent “second generation” of interdisciplinary NHRI research.¹¹ We focus, in particular, on the role of these institutions in state compliance with international human rights norms as well as their role in socialization of domestic actors and institutions. Three principal objectives motivate this study: (1) to contribute to the general literature concerning the transmission of human rights norms between the international and domestic levels; (2) to provide a forum in which interdisciplinary scholars and reflective practitioners can analyze new theoretical and empirical insights related to NHRIs; and (3) to reach some conclusions about the performance and effects of NHRIs within different regional and national settings. Our objective is *not* to reify “a theory of NHRIs” that aspires to a definitive account of their impact upon international and domestic politics. Notwithstanding the challenges inherent in such a task, the nascent state of the academic literature and the rapid proliferation and complexity of NHRIs in real time cautions against imposing too ambitious an agenda. Rather, this book encourages direct engagement with some of the assumptions, claims, and counterclaims that underlie current thinking on NHRIs. It also provides greater insight into the conditions under which NHRIs are more or less effective in promoting human rights.

Under this broad heading, several topics are addressed by the various authors contributing to the book. Broadly conceived, these topics include the definition of NHRIs (Mertus, Reif, and Sidoti), pathways of NHRI diffusion (Cardenas), the conditions for generating NHRI effectiveness (Cardenas, Carver, Reif, and Mertus),¹²

¹¹ See Mertus, *Human Rights Matters*; Cardenas, *Conflict and Compliance*; Obiora C. Okafor and Shedrack C. Agbakwa, “On Legalism, Popular Agency and ‘Voices of Suffering’: The Nigerian National Human Rights Commission in Context,” *Human Rights Quarterly* 24 (2002), 662–720; Thomas Pogram, “Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996–2001,” *Journal of Latin American Studies* 40 (2008), 51–82; Fredrik Uggla, “The Ombudsman in Latin America,” *Journal of Latin American Studies* 36 (2004), 423–50.

¹² Discussion on NHRI effectiveness has received sustained attention within both academic and policy circles. This discussion marks a departure from earlier contributions, which focused more narrowly on the legal form of NHRIs. Important initial advances in descriptive accounts can be found in

and the embeddedness of NHRIs within the United Nations and other global institutions (Carver and Sidoti). Further contributions reflect on political accountability and informal powers of NHRIs (Pegram, Peruzzotti, and Uggla) as well as relationships between NHRIs and social movements and advocacy networks (Okafor, Meyer, and Rosenblum). The volume also addresses important variation at the regional and domestic level. The contributions include analysis of the growing importance of regional networks of state and nonstate actors in the Asia Pacific region (Renshaw and Fitzpatrick), and features of NHRIs in Central and Eastern Europe (Carver), Latin America (Pegram), and Africa (Okafor).

1.2. SETTING THE AGENDA

In the following discussion, we reflect on three themes that run throughout the volume. We elaborate upon their significance for the study of NHRIs and human rights more generally. Each of these themes recurs in separate chapters. A consensus among the contributors emerges with respect to some issues. Productive disagreement characterizes the rest. We explain the significance of major points of agreement and disagreement with respect to the three themes.

1.2.1. *Refining the Concept of NHRIs*

Debate surrounding the definitional boundaries of NHRIs is addressed, explicitly and implicitly, by a number of contributions in this volume. Despite a growing body of academic interest and empirical research on NHRIs, these organizations remain underconceptualized and ill-defined. This volume does not attempt to close those gaps authoritatively. We, however, seek to refine the terms of debate and to forge greater understanding of the underlying points of disagreement over defining, more or less broadly, what has become something of a term of art.

The current departure point for discussion of NHRIs is the Paris Principles, devised in 1991 and adopted by the UN General Assembly in 1993.¹³ The Principles reflect the codification of decades of intermittent attention to analogous entities, and they ultimately provide an internationally recognized standard for such institutions. However, as Linda Reif notes in this volume, the Paris Principles do not

R. Carver, *Performance and Legitimacy: National Human Rights Institutions* (Versoix: ICHRP, 2000); L. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff, 2004); R. Carver, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva: UNHCR ICHRP, 2005); Rachel Murray, "National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness," *Netherlands Quarterly of Human Rights* 25 (2007), 189–220.

¹³ "Principles Relating to the Status of National Institutions," UNGA Res. 48/134, UN Doc.A/RES/48/134 (1993), art. 1.