National Human Rights Institutions and Parliaments: Committee on Equality and Non-Discrimination Hearing, Parliamentary Assembly, Council of Europe 28 January 2014 Strasbourg

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Madam Chairperson, distinguished Members of Parliament, I am very pleased to have been asked to provide some reflections to you today on your report *Improving cooperation between National Human Rights Institutions (NHRIs) and Parliaments in addressing Equality and Non-Discrimination Issues*. I will also make some remarks on your second report namely *The Impact of the Crisis on Equality*.

Let me begin by saying that your first report is very welcome from the viewpoint of National Human Rights Institutions ("NHRIs"), building as it does on the UN Paris Principles[2], the Assembly's 2011 Resolution 1823[3] and the 2012 Belgrade Principles[4]. As independent statutory bodies charged with promoting and protecting human rights – and increasingly with broader equality mandates – NHRIs are natural partners for parliaments in supporting their role as legislators and as a check and balance on executive and judicial power due to the range of NHRI functions - from public awareness, education and training,

[1] The comments in this paper are those of the author and should not be taken to necessarily reflect those of the Irish Human Rights Commission.
[2] National institutions for the promotion and protection of human rights, A/RES/48/134, 85th plenary meeting, 20 December 1993, 48/134, available at *www.un.org/documents/ga/res/48/a48r134.htm*
[3] *National parliaments: guarantors of human rights in Europe*, Parliamentary Assemby Resolution 1823(2011) available at *http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1823.htm*
[4] The relationship between National Human Rights Institutions (NHRIs) and Parliaments, International Seminar organised by the Office of the United Nations High Commissioner for Human Rights, the International Coordinating Committee of National Institutions for the promotion and protection of human rights, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the UN Country Team in the Republic of Serbia, Belgrade, Serbia 22-23 February 2012 available at *http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf*

litigation and compliance, to research and policy review including draft legislation and interactions with national parliaments. NHRIs also straddle the link between the international and national: both at UN, Council of Europe and EU level. Today we speak to you, the Parliamentary Assembly in Strasbourg, next month we may appear before a parliamentary committee in Dublin to give our views on proposed legislation and the changes that may be required to make it human rights and equality compliant, and thereafter comment on the same legislation and human rights at UN level.

This is also an interesting time for NHRIs whose response to the economic and financial crisis has not only been marked by responding to budgetary cuts to our own institutions but also attempting within ever reducing resources to respond to the effects of the economic and financial crisis on human rights and equality.

How can cooperation between NHRIs and Parliaments improve? To answer this question I suggest we need to consider what has worked and what has not worked and to draw on the experience of the IHRC. Luckily we do not need to begin with the question of the role of parliaments in addressing equality, non-discrimination and human rights: the need for parliaments to uphold human rights has been clearly addressed in a number of standards including the 2011 Resolution.[5] One of the difficulties with the implementation of human rights standards is the amount of Council of Europe resolutions which remain unimplemented. I would respectfully suggest that unless those resolutions targeting means for better implementation of human rights and equality are followed up, future resolutions may be unresponded to. I will return to this shortly. I will use the 2011 resolution to consider some useful follow-up which could occur including in tandem with NHRIs.

What has worked? The IHRC has enjoyed fairly good relations with the Oireachtas[6] which has derived from our view of parliament as an indispensable and under-used democratic brake on executive power. Over many years the Commission has called for additional

[5] "2. National parliaments … are key to the effective implementation of international human rights norms at national level and fulfil their duty to protect human rights through legislating (including the vetting of draft legislation), involvement in the ratification of international human rights treaties, holding the executive to account, liaising with national human rights institutions and fostering the creation of a pervasive human rights culture"; ibid.

[6] Irish Parliament.

parliamentary scrutiny of draft legislation through stronger parliamentary committees properly resourced and supported to perform this function. As part of our legislative review role, we have provided independent observations to government and to opposition parties, briefing parliamentarians, parliamentary committees, suggesting areas of inquiry to committees, making submissions and appearing before these same committees, while sometimes also facing opposition and criticism from parliamentarians in the process.

There is of course no contradiction in this: parliamentarians are meant to question – just because we are an independent statutory body does not mean our views should not be interrogated. We experience similar responses when we intervene before UN committees or the Human Rights Council or when we intervene as *amicus curiae* in constitutional cases – whether before the Irish courts, the European Court of Human Rights or the Court of Justice: we do not always get an easy ride, partly because our views and messages can be uncomfortable. That in my view is the role of an independent NHRI: to critique law and practice against human rights and equality standards without fear or favour. Equally it is the responsibility of Parliamentarians to be informed, even if ultimately our views are not always accepted.

Where could we have done better? My own reflection on this question refers to two areas: capacity and structure. Our institution never had a single officer solely dedicated to parliamentary engagement. This is not only a resource issue: for NHRIs to devote resources to parliamentary liaison there must be an objective need to do so with shrinking budgets. In part this is demand-driven: if parliament does not request substantive interactions with the NHRI it is not viewed as a primary stakeholder by the institution. On the parliament's side, the resourcing of the research arm for parliamentarians on equality and human rights is also lacking and this lack of knowledge feeds into inertia on the parliamentary side. The combination can lead to a lack of understanding and appreciation of the respective and indeed collaborative roles NHRIs and Parliaments can play.

The second aspect relates to structure. How is the NHRI linked to the parliament? Does it report to parliament – administratively and/ or substantively? Taking into account the need for adherence to the UN Paris Principles by NHRIs, the mandate and structural

independence of the NHRI will normally be guaranteed in its founding law which has been passed by parliament. But is this legislation still robust enough to meet rising international standards which also demand ever stronger institutional defence against encroachments on an NHRI's independence? Returning to my previous question: why is it that European NHRIs struggle so much for financial and staff independence leading to an inability to staff and resource key areas? If a NHRI decided in the morning that it wished to have a significant engagement with a willing parliament, would it be able to do so and still maintain other core functions such as vindicating individuals' rights in the courts?

On Parliament's side, what are the structures that allow it to be fully informed of the equality and human rights implications of legislation and what may be called its legislative control role?[7] In other words, is parliament adequately focused and structured to address equality and human rights concerns? Here let us examine the 2011 Assembly Resolution.

The 2011 Resolution considered the role of parliaments in the implementation of judgments of the European Court of Human Rights, deploring the silence of the Izmir Declaration. Why did Interlaken, Izmir and indeed Brighton not give due prominence to the role of parliaments in national implementation and execution of judgments?[8] European NHRIs argued for enhanced reference to parliaments in all three Declarations and will do so again at the upcoming Oslo conference on long term reform.[9] But let us take stock. Since

[7] By this is meant legislative control theory under which parliament seeks to control the interactions of State institutions with the individual through legislation. In the case of privatisation of State functions or private interactions of citizens, a legislative control theory, emphasising the State's international obligations to "respect", "protect" and "fulfil" human rights, provides that the State continues to assert control through accountability mechanisms such as regulation, reporting, delegation conditionality clauses and legality precepts.

[8] An exception being paragraph 9(c)(ii) of the Brighton Declaration on offering to national parliaments information on the compatiblity with the Convention of draft legislation proposed by Governments. When a State is found to violate human rights and equality how should Parliaments respond? If an adverse European Court judgment issues apart from damages it will likely require legislative amendment or administrative change. The first thing a Parliament – through its committee dealing with equality and human rights can do is to invite the State agent to address the State's proposed response. NHRIs should also be called in to provide an independent view. In fact NHRIs should alert Parliament to the implications of the Judgment. A similar situation arises where the European Committee on Social Rights or UN committees act.

[9] In a recent submission to the CDDH on long-term reform of the Court, European NHRIs suggested that to tackle the backlog of the Court and the structural deficits in States resulting in poor implementation of the Convention, new solutions should be found which would require national parliaments to scrutinise implementation of court judgments. In brief we recommended that the State designate a coordinating official empowered to ensure that execution occurs – whether the

2011 has the Parliamentary Assembly followed up its resolution in scrutinising how national parliaments are playing a role in national implementation? Has it surveyed national parliaments as to their role in monitoring the National Action plans required under enhanced supervision of Judgments? How many times have national parliaments called State agents before them to question the State's record on effective implementation?

What of follow up in this regard by the five specialised committees identified, namely the UK, the Netherlands, Germany, Finland and Romania? Has the Assembly followed up with national parliaments on the basic principles for parliamentary supervision of international human rights standards identified in the Resolution? More broadly has the Assembly engaged further with the Committee of Ministers on execution of judgments and the Commissioner for Human Rights before and after his country visits. If we speak of equality and austerity, what interaction is there with the Committee on Economic and Social Rights? The strength of a parliament is that it can call witnesses before it and ask questions others cannot. Why is this strength not utilised more including in relation to follow up with officials?

Recently our Commission has started exploratory discussions with Irish parliamentarians on identifying a specialised human rights and equality committee, one whose structure could draw in representatives from other committees to allow a holistic approach.

State agent or not and that the Action Plan be reviewed by Parliament whether legislative, administrative or judicial change is required. The thinking behind this recommendation focuses on Parliament's structural role as one arm of the State under international law: accordingly it cannot divorce itself from its obligation to ensure that the State adheres to international obligations by putting requisite pressure on the relevant organ – whether executive or judicial – to address the matter properly by arguing that it is an Executive responsibility alone. Clearly one official needs to drive implementation of a State's international obligations and be empowered to do so. Separation of powers between the organs of State however denotes respect not unyielding deference and deeper discussions need to occur between the arms of State so that this collective understanding of the State under international law is better understood. It is unimaginable that the Executive would unilaterally amend judicial procedures to meet an international obligation without first discussing with the judiciary out of deference to its independence. Why should a similar approach not occur with Parliament? As to the role of private viavis public bodies, it makes little sense if differing arms of State regard public or private actors who impact on human rights and equality differently in terms of whether and how the State engages with those actors. If I have a right to water it means little to me whether the responsible utility is in public or private hands: I want to know if my right to safe, potable water is guaranteed under my national constitutional order.

How else can parliaments act on human rights? Much depends on powers and willingness to act independently of the executive. Questions include whether parliamentarians set the agenda of their work or whether they merely react to legislation; whether parliamentary committees – sometimes with opposition party chairs - may institute inquiries of their own volition and robustly call officials to account. Of course this can only happen if the legislature is not under the thumb of the executive, if membership of a committee brings with it an obligation to afford adequate time to priority subject matters, if the committee has the power and inclination to call and interrogate witnesses and if committee recommendations result in action. In the course of an inquiry the committee should of course consider whether domestic law is capable of adequately protecting those at risk of inequality or whether structural changes are required – whether to the Constitution, legislation or administrative practice.

On human rights in particular I would suggest there are clear own-volition time-bound inquiries which could be undertaken by parliamentary committees with support from the NHRI. This refers to the execution of the Judgments of the European Court of Human Rights and the recommendations of other organs of the Council of Europe and UN committees to the State.

If we consider the commonality of Parliaments and NHRIs, it is ensuring that the State respects and upholds human rights including the rights to equality and non-discrimination. The question then turns to what are a State's legal obligations in this regard. It is generally accepted that these comprise the rights under national law – the State's Constitutional framework, international human rights standards and those rights arising under EU law (for example Directives or the Charter) where applicable. If we accept that constitutional rights are capable of being accommodated within the domestic framework while EU rights are a legal obligation of membership, it is international human rights standards that may cause the greatest disequilibrium. It is not for nothing that the European Court finds a State in violation of the Convention, nor that a supervisory UN committee makes adverse Concluding Observations against a State under a treaty's reporting obligations.

How can NHRIs assist parliaments on these matters? They can prompt discussion through regular engagement. We can engage more closely with the Assembly. We can provide commentary on draft legislation and proposed responses to international obligations. We can report on implementation of our own reports. We can appear with State agents before parliament to address State action plans in response to European Court judgments. We can address whether the proposed response is time-bound and capable of addressing the breach found, and also the supports the State agent may need to drive the action plan. We can help State agencies develop equality and human rights impact assessments against relevant benchmarks which look at the experience of inequality and human rights violations in the State, identify vulnerable groups whose members, because of their identity or status, may be at risk of discrimination and then mitigate proposed measures so as to avoid such discrimination. We can offer training to State bodies and parliamentarians in human rights and equality.

At the Council of Europe level NHRIs can engage more closely with the Committee of Ministers through providing independent views on execution through the Rule 9 process. We can call for increased transparency as to how execution of judgments occur. More fundamentally we can support parliaments in developing a counter-narrative to the destructive scepticism aimed at the Court and human rights more generally at a time when ironically other regions of the world are looking to Europe for leadership on human rights and looking in awe at the most advanced inter-governmental court capable of deciding individual cases and providing both individual and more far reaching general remedies.

Impact of the economic and financial crisis

I will address this aspect briefly.

What are the causes of rising inequality in light of the austerity measures taken in response to the economic and financial crisis and how can NHRIs and parliaments work together to address this? Data from across Europe suggests rising inequality. Unemployment has impacted on sectors of society differently with youth and increasingly women and minority groups most adversely impacted. In tandem, poverty is rising with taxation, budgetary and

social security decisions targeting areas where arguably there is most short term budgetary savings and least sectoral resistance.

The first thing we can say when we discuss causes is that the lack of incorporation of human rights and equality standards into domestic law and the consequential lack of justiciability of economic and social rights allow States to target "low hanging fruit" without legal consequence when they seek fiscal consolidation. Provided something is not unlawful it is lawful, or so the argument goes.

The impact of this is that because much of social spending in Europe aimed at marginalised groups at risk of discrimination is discretionary, it is possible to target these areas as so-called luxuries. This happens directly in social security systems but also indirectly where social spending is effectively outsourced to civil society organisations such as charities who receive State funding to deliver essential public services. As these bodies operate outside the public sector it is easier to cut their funding, the result being that the supports necessary for identifiable vulnerable groups is disproportionately cut with no legal consequence for decision-makers.

To address this problem we need to become precise in our use of terminology and reference to the international legal standards European States have obligations to guarantee and uphold. So we need to ask, what the legal standards at issue are as a first step. Originally, economic, social and cultural rights have proved hard to pin down, partly due to the absence of normative standard setting by Council of Europe or UN bodies. But this has changed. The European Court of Human Rights is now more routinely passing judgment on social rights and increasingly in the non-discrimination area. This is also the situation with economic rights and this is buttressed by the European Committee on Social Rights. At the UN level the Committee on Economic, Social and Cultural Rights has made clear that ICESCR rights form legal obligations. Under its "protect", "respect" and "fulfil" typology it is now possible to measure a State's progress on realising economic and social rights in terms of how it legislates, how it plans its budgeting, how it controls privatisation of public services and how it ensures that persons can access entitlements including through positive measures. Under its "progression", "non-retrogression" principles we are

provided with a toolkit of indicators and benchmarks to measure the realisation or regression in human rights. This is more so for what are termed core non-derogable rights such as the right to non-discrimination in the exercise of ICESCR rights.

These human rights law standards place positive obligations on States to identify at-risk groups and to formulate economic and other policies to take into account their vulnerabilities and to mitigate the impact of Governmental decisions. States can do this by implementing the principles of non- discrimination, equality, transparency, participation and accountability, taking into account in particular the needs of at-risk groups.

The impacts of certain cuts made on foot of the economic crisis were predictable. This tells us that the domestic protections for human rights and equality standards are not sufficiently effective and that we need to focus on why that is. This is something NHRIs also grapple with: how to transpose international standards domestically so that vulnerable groups can access clear protections.[10] Although not always supported by domestic law, these standards are usually captured under NHRI's legislative mandates which permit analysis against the State's international obligations. NHRIs can make recommendations to Government but ultimately it is Government that decides. But here the role of Parliaments arises again.

In 2012 the UN Committee on Economic and Social Rights wrote to all States parties to the Covenant reminding them to avoid at all times taking decisions which might lead to the denial or infringement of economic, social and cultural rights.[11] The Committee also set out

[10] In a response to the economic crisis a number of NHRIs are now placing an increasing focus on the impact of austerity measures on minority populations. This is because of the very real impact of budgetary decisions on persons at risk of discrimination on the basis of their identity. Economic measures which on their face may appear neutral are not, we know, neutral in their effect. Thus even if there is no intention to discriminate, minority populations do tend to suffer disproportionately in recessions. Whether it is an unmodified Valued Added Tax whose impact on households experiencing food poverty will be higher than on middle-income families, or a cut in social security benefits such as a disability support for a dependant child or where health insurance barriers to the poor reduce a family's ability to pay out of pocket expenses for basic health care, where the effects of the State's acts or omissions are predictable and disproportionate to the aim being sought, there may be both discrimination and a violation of the principle against retrogression.

[11] "Besides being contrary to their obligations under the Covenant, the denial or infringement of economic, social and cultural rights by States parties to the Covenant can lead to social insecurity and political instability and have significant negative impacts, in particular, on disadvantaged and

four basic human right impact assessment tests to ensure that austerity measures be modified so as not to violate rights including identifying a minimum social protection floor with clear human rights impact assessments.[12] The process rights dimension of economic, social and cultural rights are predicated upon common sense values of fairness, reasonableness, transparency, participation, accountability and proportionality. What may be of interest here is that many of these principles are captured also under equality and non-discrimination law where a tribunal or court is called upon to assess the proportionality of a measure against its impact on an individual.

The letter also raised the role of States in international financial institutions ("IFIs")[13] and their role in setting conditionalities which impact directly and indirectly on human rights.[14]

Parliaments continue to raise the "upstream" role of IFIs but without particular success to date, partly due to the fact that the matter before them is diffused across different

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marginalized individuals and groups"; Letter addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights, 16 May 2012, available at *http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSUS%2f6395&Lang=en*

[12] "[F]irst, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times"; ibid.

[13] IFIs such as the WB, the IMF and the WTO have the status of specialised agencies of the UN and as such are obliged to respect the provisions of the UN Charter.

[14] "…States parties to the Covenant should respect their obligations in relation to economic, social and cultural rights when making decisions, including on official development assistance, in international financial institutions, such as the World Bank, the International Monetary Fund, regional financial institutions and regional integration organizations"; ibid. [14] States in receipt of structural adjustment funds from the IMF or indeed in Europe from the Troika of IMF, EU and ECB only receive funds on the basis of conditionality. The memoranda of understandings entered have never been subjected to a human rights framework, much less a human rights impact assessment. In negotiating with international financial institutions, national governments may feel compelled to agree to the conditions being suggested to them in much the same way as developing States have felt compelled to agree to TRIPs or TRIPs-plus provisions when joining the World Trade Organisation. It could be argued that the threat of trade sanctions under WTO "TRIPS-plus provisions" (its 2006 Agreement on Trade Related Aspects of Intellectual Property Rights) can act as a disincentive to developing States prioritising public health over trade liberalisation policies.

committees, partly because the evidence they are presented with seems difficult to map against legal standards and partly because of a lack of follow up on previous reports or recommendations. The visible consequences of austerity measures and the perception of unfairness and preferential treatment of those with and those without has led to a rise of powerlessness in our societies where parliamentarians – the visible focus of representative democracy – are portrayed as powerless. Resentment against internationalism and intergovernmental organisations has resulted and with it new forms of xenophobia, renewed racism against migrants and ethnic minorities – violations of civil and political rights. Whatever about one's own economic wellbeing, rising inequality is clear where homelessness, emigration, visible deprivation, breakdown of services occurs, which question the ethical nature of austerity responses. Thus the very concepts of universality, indivisibility and interdependence of human rights is challenged when inequalities in our societies increase with no legal or other accountability as to why this is occurring. The human rights bodies and institutions arguably most needed in a time of crisis are also hit: our sister body the Greek Human Rights Commission is arguably more needed than ever but has practically no resources at its disposal to carry out its mandate.

A commitment by IFIs to incorporate human rights impact assessments when negotiating structural adjustment lending programmes would drive this process forward. After all, such conditionalities on commitments to human rights and adherence to the values of the Charter of Fundamental Rights is evident in the EU's negotiations with accession States. Why should it not be an element the EU and other international bodies are themselves bound to uphold?[15]

[15] States will often point to their international obligations in explaining why they take certain actions. This does not necessarily equate to international human rights obligations, rather to international agreements with the IMF/ Troika etc. For national courts and national authorities (including NHRIs), there can be a sense of futility where the upstream decision-taking occurs outside the control of the State. Developing States have complained about the impact of TRIPS and TRIPs-plus provisions for a number of years but it is only now that developed States are more regularly coming to understand what structural loan conditionality means. And yet, if bodies such as the IMF are specialised bodies of the UN, are they not obliged to act in compliance with the Charter and indeed the ICESCR? The current trajectories of these bodies differ from their origins. The Articles of Agreement of the IMF and of the International Bank for Reconstruction and Development, concluded at Bretton Woods Conference in 1944, saw the World Bank originally designed to aid postwar reconstruction, whereas the IMF was originally designed to correct disequilibria in the balance of payments and maintain an orderly system of receipts and payments between nations.

NHRIs with their domestic and international human rights mandates, their bridge to the UN and Council of Europe and their institutional links to the Executive, Legislature, Judiciary, and as importantly, to civil society and the community, have the ability to name, identify, analyse and recommend that which may otherwise go unreviewed. However, if NHRIs are to match their success in the realm of some civil, political and social rights to ESC and equality rights generally, in addition to adequate resourcing, they need greater clarity and precision from UN treaty bodies and greater attention to the role of supranational bodies, be they the EU or the international financial institutions. They also need stronger institutional linkages with parliaments.

Shaping that outcome ladies and gentlemen is, I suggest, a common but achievable challenge.

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