

A COMPARATIVE STUDY OF EXISTING HUMAN RIGHTS BODIES: AN EXAMINATION OF THE SOUTH AFRICAN, FRENCH, SCOTTISH AND ENGLISH BODIES FOR EQUALITY AND HUMAN RIGHTS

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Abstract

In light of the flexibility granted by the Paris Principles, national human rights institutions are not required to have a rigid structure and therefore a number of human rights bodies in South Africa, France, Scotland and England are examined in order to establish the points of convergence and divergence between the said bodies. By extracting the most salient features, this paper aims to determine what structure the potential Maltese Human Rights and Equality Commission should have.

1. Introduction

The last half a century has attested to an ever-increasing interest in committing States to safeguard and protect human rights, and amongst other means, this has also presented itself in the evolvement of national institutions tasked with the promotion and protection of human rights. If one looks at States worldwide, one would notice that while a number of States have an A-Status institution in place, some are still working towards bettering their already existing ones; however, there are other States such as Malta, which do not have such a recognised institution at all. Nevertheless, establishing an A-status institution is not sufficient, since the said institution is to have the requisite support, independence and finances that are necessary for the smooth running of such an institution. Problems can also arise if one State has more than one human rights institution with overlapping mandates since it may become somewhat blurry as to which institution is responsible for what. What is even more detrimental is if a State has more than one institution each focussing on a specific area, but still leaving gaps with respect to a particular group¹.

This paper will focus on the English, Scottish, French and South African institutions in particular due to the fact they have proven to be quite efficient in the respective States and are perceived to be pioneers when it comes to human rights institutions. While possessing certain common features, they also differ on certain aspects not only in terms of composition but also in terms of mandate and functions. However, reference to other NHRIs will also be made throughout the paper. The reason behind the flexibility and variation in structure owes itself to the general structure of the Paris Principles which do not explicitly mention the structure which should be adopted since this is dependent on the legal system and customs of the respective States and which are to be ‘best suited

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¹ Colin Harvey & Sarah Spencer (2012) “Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland” *The Political Quarterly* 79:1 p 1615.

to [the States'] particular needs at the national level'². Thus, this paper will draw out a comparison of the most salient features of an effective national human rights institution, mainly in terms of structure, roles and functions and this will be done through a brief examination of the types of institutions that can be adopted, that is, by delving into ombudsmen and hybrid institutions, but by focussing mostly on human rights commissions.

2. The Role of Equality and Non-Discrimination in the 21st Century

Whereas in the past, equality and non-discrimination were limited to the area of constitutional law, we have now moved beyond this sphere and thus one is no longer limited to mere equality before the law, since additional and stricter tests are applicable mainly in terms of reasonableness and justification. This has in turn led to a rise in complaints with regard to the lack of clarity of some grounds due to the numerous provisions and instruments addressing equality and non-discrimination. Thus, for the sake of coherence, there is a higher than ever need for a common understanding of what equality is and for the codification of equality laws³. For instance, the United Kingdom's Equality Act 2010 is to be applauded for codifying the otherwise complicated and scattered Acts and Regulations.

Although very often courts appear to be capable of implementing a standard level of equality and non-discrimination in individual situations, it appears that at times courts find themselves 'poorly equipped to implement a group-based concept of equality and to tackle more complex and structural aspects of discrimination'⁴. This has advertently led to the rise of a new mode of governance in addressing equality- a system which is characterised by the collection of data; monitoring and observation by setting reachable targets; and at times by carrying out investigations and inquiries. Mabbett even suggested that such an approach has led to a situation which not only establishes 'legal prohibitions on discrimination' but also creates a 'duty to promote equality'⁵. This modern approach seeks to promote equality by raising awareness rather than adhering to the traditional 'box-checking approach' which has been criticised for merely adopting a set of procedures without substantive content⁶.

Questions also arise as to whether there is a requirement of explicitly highlighting the ground on which there has been discrimination prior to the examination of facts, or whether the mere establishment that there has been discrimination is sufficient. Therefore, with this principle in mind, we are now moving closer to a situation in which merely ascertaining that there has been discrimination is sufficient, and away from the strict distinction between discrimination in terms of one ground and another⁷. This is because the scenario wherein the starting point is the delineation of which ground is applicable prior to the determination of which laws on equality and discrimination are applicable, if any at all, can render justice less accessible in cases where there is no such clear demarcation. In light of this, human rights institutions should follow a somewhat reversed approach of first determining the role that discrimination played in the relevant situation, and then establishing the specific ground that is leading to such discrimination.

² United Nations General Assembly Resolution number 48/134 on National institutions for the promotion and protection of human rights presented at the 85th plenary meeting on 20 December 1993 <http://www.un.org/documents/ga/res/48/a48r134.htm> accessed 28 October 2015.

³ Deborah Mabbett (2008) "Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy" *The Political Quarterly* 79:1 p 45.

⁴ *Ibid*, p 46.

⁵ *Ibid*.

⁶ *Ibid*.

⁷ *Ibid*.

2.1. The ‘Duty to Act’

There might also be the imposition of an additional ‘duty to act’ on public bodies which implies that the latter should not merely refrain from doing something which goes against the principles of equality and non-discrimination, but have a duty to carry out positive actions which prevent such discrimination from taking place. In addressing the ‘duty to act’, the Irish Human Rights and Equality Commission (IHREC) is to be analysed since it is thought to be the ‘first combined equality and human rights public sector duty to be introduced in domestic legislation in an EU Member State’⁸. This enables public bodies to handle equality and human rights challenges in a cohesive manner by applying and following tools of guidance developed by the said Commission. In doing this, the IHREC attempts to follow the reversed approach of rather than waiting for one to complain that there has been discrimination in one’s regard, public bodies first adopt proactive measures which not only promote human rights and equality, but which set up policies and mechanisms with which to combat discrimination. This thus requires the said bodies to determine a priori how their actions and policies would affect individuals. Such a reversed approach would be means of addressing the concerns of many human rights bodies that the lack of reporting in discrimination and inequality cases hinders the effectiveness and efficiency of human rights and equality bodies. Moreover, through the regular procedures, outcomes tend to be only applicable to the individual bringing forth the complaint and not to society at large, and thus the outcome would have an individualistic effect rather than a systemic one. In other words, this would be a preventive measure and public bodies would have the obligation to fulfil this duty at three main stages: at the stage of policy-making and development of early procedures; during implementation and delivery of the said policy; and in evaluating, reviewing and monitoring implementation.

3. The Role of National Human Rights Institutions

The roles of National Human Rights Institutions (NHRIs) are wide since not only do they play a significant part in safeguarding human rights in the domestic scenario, but they also assist in enhancing the already existing link between the national protection of human rights and international bodies such as the European Union or United Nations. In other words, in having a national institution responsible for the protection of equality and human rights, one would be granting individuals an additional remedy as one moves away from the mistaken notion of ‘go to court or do nothing’. However, in order to do this, the public would have to be informed of the legal and non-legal remedies which are available, and the extent to which they could deal with complaints in line with human rights principles⁹.

A concern that an NHRI should address is that resulting from a scattered system where an individual has to go through a number of bodies in order to determine who or which institution is competent to hear his case or answer his query. This bureaucratic approach would not only discourage individuals from seeking redress but would also hinder the overall effectiveness. An NHRI can act as a body which is not only responsible for carrying out research and raising awareness but for also initiating discussion and giving advice on certain matters. The issue here would be to reconcile the two-fold role of such an institution, that is, the role of a regulatory body

⁸ Equality and Rights Alliance ‘A New Public Sector Equality & Human Rights Duty March 2015’ Part 3 of Series on ‘Setting Standards for the Irish Equality March 2015 and Human Rights Infrastructure.’ <http://www.eracampaign.org/uploads/A%20New%20Public%20Sector%20Duty%20March%202015.pdf> accessed 31 October 2015.

⁹ Alice Donald, Jenny Watson and Niamh McClean & Philip Leach and Jörn Eschment (2009) “Equality and Human Rights Commission Research Report 28: Human Rights in Britain since the Human Rights Act 1998: A Critical Review http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf accessed 30 October 2015.”

with that of a lobbying body without overstepping the functions of other institutions which might be specifically tasked with safeguarding or investigating certain violations.

In establishing such an institution, one is to determine the extent to which one can state that in adopting a human rights approach, one would be rendering such bodies more effective. This is because such an approach would render the institution's work more inclusive and accessible to its users by placing the needs of the individuals at the top of the agendas¹⁰. It could also be demonstrated by drawing up guidelines or codes of practices which would enable bodies to carry out duties in a balanced and proportionate manner in accordance with human rights principles. This approach could also manifest itself through the monitoring, regulation and handling of complaints in a transparent and objective manner in line with established standards.

The extent of the powers afforded to NHRIs determines the degree to which such institutions would be able to carry out their functions. For instance, although there might not be anything which explicitly prohibits an NHRI from working with other bodies which can carry out certain functions which it cannot do, the process of such collaboration might take longer and valuable time and resources can be 'wasted' along the way. Moreover, the difficulties that the presence of a number of institutions can give rise to can be depicted by the Scottish scenario wherein the numerous institutions were criticised because 'nobody is sure what their remit is'¹¹. The issue with overlapping mandates is not limited to whether a body is regulatory or advisory but also extends to the confusion that an individual might be faced with, since such an overlap can blur an individual's path when it comes to looking for support. In addition, such an overlap might in turn lead to an ineffective and limited inquiry if a case concerns a matter which falls within the mandate of more than one institution, so as not to impede on another institution's area of expertise.

3.1. The Relationship of National Human Rights Institutions with Civil Society

Civil society is perceived as the foundational basis of the overall productivity and efficiency of an NHRI and this is because the most salient conflicts stem from civil society itself and thus the agenda of such bodies can be moulded accordingly. One should not merely state that such a body should seek to formulate its agenda depending on the demands of civil society since this could lead to the encouragement of civil society to come together in the face of a particular cause, support a legislative or policy proposal or reform and then the NHRI finds itself unable to fulfil expectations. In order to reconcile this, one must ensure that nothing hinders the institution's ability to work closely with a number of stakeholders which would be able to offer expert advice or opinion on certain matters. Thus, there should be an institution which is capable of understanding what civil society wants and which is capable of delivering.

The role of civil society in the work of human rights commission was highlighted by Brand and Liebenberg in their criticism of the lack of involvement of civil society during the compilation of information for a report¹². This was so because, in their opinion, the South African Human Rights Commission (SAHRC) only asked for minimal comments and input of a small number of NGOs on the draft protocols, and the monitoring reports were not made available before being produced in the actual report. Brand and Liebenberg argued that this 'deprived the Commission of valuable independent analysis and input that would lead to a fuller assessment', and also damaged the

¹⁰ Ibid.

¹¹ Colin Harvey & Sarah Spencer (2012) "Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland" *The Political Quarterly* 79:1 p 1615.

¹² Brand Daniel & Liebenberg Sandra (2000) "The Second Economic and Social Rights Report" 2 ESR Rev. 4, available at www.communitylawcentre.org.za/ser/esr2000 as quoted in Jonathan Klaaren, 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' 27:2 *Human Rights Quarterly* p 539.

SAHRC's overall perception as a national human rights body¹³. However, what is quite worrisome is the SAHRC's power to issue subpoenas so as to demand government bodies to provide it with any information that it so demands. Although this ability to take such strong measures in order to ensure compliance with the necessary monitory requirements can enhance the SAHRC's effectiveness, one must be careful not to resort to extreme measures which can hinder constructive dialogue. This somewhat confrontational approach would not be in line with the general principles of a human rights institution which seeks to promote education and healthy dialogue¹⁴.

4. The Varying Structures of National Human Rights Institutions

4.1. Models

Owing to the lack of specificity in the Paris Principles, States have a certain degree of manoeuvring in establishing their form of NHRI. One would have to determine what would have the most desirable and effective outcome in the specific context, and decide whether to set up a larger institution, with many representatives from different sectors of civil society, or a smaller institution which is made up of a single individual or a small number of individuals who are considered to be experts and who are more knowledgeable on human rights. The most common structures are commissions, ombudsmen, hybrid institutions or bodies which are set up with the sole mandate to focus on a particular right or the rights of a specific group. The actual composition of the body is of particular importance especially in terms of continuous efficiency and standard. For instance, shorter terms of appointment would guarantee that no commissioner or ombudsman would abuse his power, but it would also mean that there would be a regular turnover of staff and priorities. One might argue that the fact that the 'head' of the office 'changes does not mean that the whole body of staff also has to change; however, this could lead to a situation where a new 'head' would overrule work that the staff would have previously carried out. On the other hand, having a single commissioner or ombudsman might give the false impression that the role and powers would be clearer, but in reality this would require an extremely high-level of expertise in numerous areas.

5. Ombudsmen

Prior to the rise of the NHRIs, the office of the ombudsman used to play the role of a human rights institution in many States and over the years, many ombudsmen strived to be recognised as an NHRI; however for some, this was to no avail. The Office of the Ombudsman in Malta had also made a proposal to be recognised as Malta's NHRI since it was argued that rather than establishing a new institution to safeguard human rights and 'to act as a watchdog', the said office could be assigned the role of an NHRI since this would enable it to identify any potential violations from an early stage¹⁵. However, this proposal was not accepted.

Despite not being recognised as an NHRI, the French ombudsman assumes the role of the 'Defender of Rights' and his duty is to oversee the overall protection of rights and freedoms within France while ensuring greater access to rights. The French office is highly interesting since the office of the 'Defenseur des Droits' merged a number of institutions such as the French Mediator, the Children's Ombudsman, the Authority for Equality and Anti-discrimination and the National Commission on Security Ethics, into one institution¹⁶. Any person or association

¹³ 13 Ibid.

¹⁴ 14 Ibid.

¹⁵ 'The Setting Up of a National Human Rights Institution: A Proposal by The Office of the Parliamentary Ombudsman', October 2013 <http://www.ombudsman.org.mt/wp-content/uploads/2014/01/The-setting-up-of-a-National-Human-Rights-Institution.pdf> accessed 27 October 2015.

¹⁶ Le Defenseur des Droits <http://www.defenseurdesdroits.fr/> accessed 30 October 2015.

can bring a complaint before the *Defenseur*, and the latter has the power of investigation, and is also able to work to resolve conflict by mutual agreement or even impose more binding decisions. Just like other institutions, the *Defenseur* may also propose reforms and raise awareness while encouraging best practices. He may also conduct inquiries and in carrying out such a function, may request information, conduct interviews and carry out on-site verifications. When it comes to cases of misconduct, he can also request disciplinary action against officers, request observations or recommend sanctions¹⁷.

Similarly, the South African ombudsman assumes the role of a Public Protector and his aim is to strengthen the constitutional democracy through the investigation and redress of improper and prejudicial conduct by public bodies and authorities; and to rectify maladministration and abuse of power. In fulfilling its mandate, the office of the Public Protector may carry out investigations into state affairs or public administration in general; however, it may not investigate specific court decisions¹⁸. The role of the Public Protector is worth noting since it is neither an advocate for the complainant nor for the public authority and thus his role is merely restricted to ascertaining facts and to help reach impartial and independent conclusions. Thus, rather than having the same inquisitive role as the French '*Defenseur des Droits*' does, the South African Public Protector is empowered to assist in establishing and maintaining efficient and proper public administration. However, the Public Protector can also conduct investigations and may direct anyone to appear before it and request public officers to assist him in the fulfilment of his duties and propose remedial actions.

6. Hybrid Institutions

Another institution that some States resort to is what is termed as 'hybrid institution' which is characterised by multiple mandates. The latter not only encompasses institutions related to human rights but even extend further so as to incorporate anti-corruption action, for instance¹⁹. This kind of institution is usually state-funded and thus the same amount of resources that would usually be allocated to a similar single-member institution is awarded in spite of a wider mandate. This could also lead to issues with donors since the latter would be interested in donating to a particular area as in the case of human rights rather than to the broader mandate. This wider mandate can easily lead to an overburden which in turn results in the non-fulfilment of duties²⁰. What is beneficial in such an institution is the promotion of the concept of a 'one-stop-service' whereby individuals would merely go to this institution to get the relevant information of how to address violations rather than be directed from one place to another in order to determine who has the requisite competence to hear the case. Having said that, very often the functions or powers of such hybrid institutions are limited to recommendations and no actual powers of inquiry or investigation are present²¹. One would applaud the fact that this would appear to remove bureaucracy and expedite accessibility and effectiveness; however, this should not be at the cost of quality of decisions and work carried out.

¹⁷ Ibid.

¹⁸ Article 7, Public Protector Act, Act 23 of 1994.

¹⁹ UNDP-OHCHR, 'UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions' <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> accessed 28 October 2015.

²⁰ Ibid.

²¹ Ibid.

7. Equality and Human Rights Commissions: A Closer Look at CNCDH, SAHRC, SHRC and EHRC

7.1. Composition

If one looks at a number of Equality and Human Rights Commissions, one would witness a variety in composition. For instance, in France, the large Commission Nationale Consultative des Droits de l'Homme (CNCDH) appears to be satisfactory in fulfilling the element of 'pluralistic representation' as found in the Paris Principles. This is because the members of the CNCDH encompass the most significant representatives of French human rights bodies, that is, NGOs which specialize in the field of human rights, international humanitarian law and humanitarian action; individuals who are experts and who serve in international organizations also in the field of human rights; representatives of the main trade unions; the French Defender of Rights; a deputy and a senator; and a member of the Economic, Social and Environmental Council nominated by the respective council²². In addition to this, there are then a number of sub-committees which are responsible for specific areas²³. The structure of the CNCDH allows its members to be divided into five sub-commissions with varying mandates and this enables each sub-commission to be fully focussed on the respective spheres whilst offering expert work. For example, sub-commission A determines questions which are related to society, ethics and education on human rights whereas sub-commission B encompasses questions on racism, anti-Semitism and xenophobia, and discrimination in general. Furthermore, sub-commission C deals with national questions particularly migration, penal and institutional spheres, while sub-commission D encompasses questions on Europe and the international forum. Ultimately, sub-commission E is responsible for international human rights and humanitarian action²⁴.

The SAHRC was set up because it was felt that legislation and measures could only be in line with the content of the Bill of Rights if there was the establishment of a Human Rights Commission. It was thus set up in virtue of Section 184 of Chapter 9 of the South African Constitution and it is an independent organ which is granted a general mandate to safeguard and strengthen the constitutional democracy in South Africa. The SAHRC also assumed an additional role as an assistant to NGOs, lawyers or activists who were previously burdened with investigation, reporting and legal assistance²⁵. The SAHRC is answerable and accountable to the National Assembly and has a duty to report to the said Assembly at least once annually. It is also expected to monitor and assess the overall human rights situation in South Africa. In addition to the standard provisions on the right to equality before the law and to equal protection of the law, the South African Constitution goes even further than most constitutions since it contains a clause explicitly dedicated to non-discrimination and which caters for affirmative measures in line with the abovementioned 'duty to act'²⁶. In contrast with the CNCDH, the SAHRC is composed of eight commissioners and the latter are to be South African citizens who 'have a record of commitment to the promotion of respect for human rights and a culture of human rights' and who are 'persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission'²⁷. Thus, the choice of commissioners is based upon knowledge and expertise rather than on their representation of a specific group of people or organisation as in the CNCDH. The term of mandate is fixed and is

²² Article 1, Loi n°2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme (1)

²³ Article 11, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

²⁴ CNCDH 'Rapport d'Activité 2014: La dignité au cœur de la protection et de la promotion des droits de l'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 28 October 2015.

²⁵ Anton J Steenkemp (1995) "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms" *Human Rights Quarterly* 17:1 p 101.

²⁶ Ibid.

²⁷ Article 5, South African Human Rights Commission Act, Act 40 of 2013.

to be determined by the National Assembly at the time of appointment but which should not exceed seven years. Upon expiration, the commissioners would be eligible for an additional term.

The Equality Act of 2006 set up the Equality and Human Rights Commission (EHRC) in the United Kingdom and Schedule 1 of the said Act establishes its composition²⁸. The Secretary of State is to appoint between ten to fifteen individuals as commissioners and the chief executive will be the Commissioner ex officio. When it comes to the choice of the appointees, similar criteria to the ones established for the SAHRC are adopted since in appointing such individuals, the Secretary of State is to appoint individuals who have ‘experience or knowledge relating to a relevant matter’ (which were later defined as referring in particular to discrimination on grounds of age, disability, gender, gender reassignment, race, religion or belief, sexual orientation, and human rights) or are ‘suitable for appointment for some other special reason’, and ‘have regard to the desirability of the Commissioners together having experience and knowledge relating to the relevant matters’²⁹. The duration of the term in office would also be specified upon appointment for a period which should not be less than two years and not more than five years, and commissioners may be subject to re- appointment³⁰. If one looks at the initial stages of the setting up of the EHRC, one would witness that the proposal received a positive response from those for whom there was no statutory body, but a somewhat wary response from existing Commissions, such as the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The latter were suspicious of this proposal due to the fear that their agendas and bodies would be marginalised in a Commission with a broader mandate to promote ‘an inclusive human rights culture which builds on the diversity of British society’³¹. The disadvantage of such a merger is that the responsibilities and functions that were previously the sole responsibility of a single body are now consumed by an all-encompassing body. Having said that, what is the most problematic in such a merger is that it might lead to a ‘dilution of the good work of a predecessor body’³². The Scottish Parliament is duty bound to comply with the principles and individual rights laid down in the European Convention on Human Rights, and as a consequence, any laws which are passed which are incompatible with the provisions of the said Convention have no legal effect whatsoever³³. As per the Scottish Commission for Human Rights Act 2006, the Scottish Human Rights Commission (SHRC) is made up of a member who acts as a Chairperson and not more than four additional members³⁴. The said Chairperson is to be appointed by Her Majesty acting on the nomination of the Scottish Parliament and the rest of the members are appointed by the Parliamentary Corporation³⁵. With regard to independence, the SHRC is independent from any Member of Parliament, any member of the Scottish Executive or Parliamentary Corporation³⁶. Similarly to the EHRC and SAHRC, each term is to be decided at the time of appointment but it should not exceed five years. The said members are eligible to a further reappointment irrespective of whether this is for a consecutive period or otherwise³⁷.

One has already raised the question as to whom such bodies should be accountable to and it has been suggested that ideally it would be accountable to the legislature and not to the relevant government. Such institution can also be answerable to a parliamentary committee or working

²⁸ Schedule 1, Equality Act 2006.

²⁹ Schedule 1, Part 1, Section 2(1), Equality Act 2006.

³⁰ Schedule 1, Part 1, Section 3(2), Equality Act 2006.

³¹ As stated by Baroness Amos House of Lords, 24 November 1997, prior to Baroness Amos becoming a government minister.

³² Colin Harvey & Sarah Spencer (2012) “Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland” *The Political Quarterly* 79:1 p 1615.

³³ Section 29 (2)(d), Scotland Act 1998.

³⁴ Schedule 1, Section 1, Scottish Commission for Human Rights Act 2006.

³⁵ Ibid.

³⁶ Ibid, Schedule 1, Section 3.

³⁷ Ibid, Schedule 1, Section 5.

group which could play a double faceted role of on the one hand enabling one to question the working and findings of the said body, while on the other hand, acting as a limit to the influence that the government could exert on the said body.

7.2. *Duties and Functions*

The functions of an NHRI can be solely consultative or advisory which are limited to awareness raising and provision of recommendations as in France, Greece and Luxembourg; or they can go beyond mere advisory services and permit NHRIs to investigate and even participate or initiate legal proceedings such as in South African and England, and Scotland to a certain degree. There are then States such as Denmark and Germany whose NHRIs focus on advising the government on policies and legislation, on monitoring and on providing general human rights education.

7.2.1. *General Duties*

The United Kingdom's Equality Act of 2006 establishes a general duty for the EHRC to encourage and support the development of British society wherein prejudice and discrimination do not hinder individuals' potential and every individual's human rights, dignity and worth are respected and protected. It also aspires to confirm that there is an equal opportunity for everyone to participate in society, and the existence of 'mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights'³⁸. The Equality Act of 2006 delves into the duties in terms of equality, diversity and non-discrimination by enlisting a number of duties such as the promotion of the importance of the notions of equality and diversity; the encouragement of good practices; the promotion of awareness and understanding of rights; the enforcement of equality enactments; and the elimination of unlawful discrimination and harassment³⁹. The Equality Act 2006 also establishes the powers conferred onto the EHRC in terms of promotion and safeguarding human rights in general and in encouraging 'public authorities to comply with Section 6 of the Human Rights Act 1998'⁴⁰ which states that public authorities are to act in a manner which is compatible with the European Convention on Human Rights, and doing otherwise would be unlawful⁴¹. The said Act also confers a duty on the EHRC to 'promote understanding of importance of good relations'⁴² between different groups and encourage good practices in this regard. It also establishes a duty to 'work towards the elimination of prejudice against, hatred of and hostility towards members of groups'⁴³.

The Scottish Commission for Human Rights Act 2006 follows more or less the same approach in establishing a provision with the general duties of the SHRC. As per Article 2, this general duty is to 'promote human rights and, in particular, to encourage best practice in relation to human rights' which refer to the Convention rights within Section 1 of the Human Rights Act 1998, and other human rights found within other international conventions or treaties as ratified by the UK⁴⁴. This general duty is then tied to the SHRC's ability to publish or disseminate information and ideas, to provide advice or guidance, to carry out research and to provide the requisite training⁴⁵. In addition, the SHRC can also review and make recommendations to Scottish law and policies or practices of public bodies. In light of the content of Section 6 of the Human Rights Act, the office of Amnesty International in Scotland carried out a review encompassing a number of authorities and requested information and documentation on what was being done in compliance with the said

³⁸ Section 3, Equality Act 2006.

³⁹ Section 8, Equality Act 2006.

⁴⁰ Section 9, Equality Act 2006.

⁴¹ Section 6, Human Rights Act 1998.

⁴² Section 10, Equality Act 2006.

⁴³ Section 10, Equality Act 2006.

⁴⁴ Section 2, Scottish Commission for Human Rights Act 2006.

⁴⁵ Section 3, Scottish Commission for Human Rights Act 2006.

section. However, it resulted that a number of authorities confused their duties under the Human Rights Act with those found within the Equal Opportunities Act. The survey also outlined a number of other concerns which were mainly related to the closure of the Scottish Human Rights Centre which many perceived as rendering Scotland without an awareness raising and monitoring body⁴⁶.

The South African Constitution but more specifically the South African Human Rights Commission Act encompasses more or less the same duties mentioned above, that is, the promotion of respect for human rights and human rights culture; and the promotion of the protection and development of human rights. However, they also establish a general duty of monitoring and assessing the overall observance of human rights in South Africa⁴⁷, and confer upon the SAHRC the ability to demand an annual report from State organs on any information on measures that they have adopted in order to realise the rights inherent the Bill of Rights⁴⁸.

The legal text that establishes the CNCDH takes a somewhat different approach since it merely states that it possesses an advisory role which has the ability to assist the Prime Minister and the respective Ministers in opinions on general matters which fall within its jurisdiction and which are related to both the domestic and the international fora. It may also, on its own initiative, request the attention of Parliament or of the relevant government bodies on matters which the CNCDH considers to be related to the protection and promotion of human rights⁴⁹. Although there is no duty to draw up reports, the CNCDH may produce thematic reports. All of the documents drawn up by the CNCDH are discussed and heard before the Plenary Assembly, which is the decision-making body, and such documents are adopted by a majority vote. 50 Individuals who have special competence in the field of human rights can also be heard before the said Plenary and sub-commissions; however, they would not actively participate in the deliberations⁵⁰. Although the CNCDH may assist with any requests from the Prime Minister or members of Government, the former has the ability, on its own initiative, to take measures which are related to the negotiations on human rights; the ratification of international instruments and compliance of national laws with the said instruments; and the implementation of action programmes especially those related to education and research. It may also draw up opinions on humanitarian assistance in crises and examine those measures which are to be adopted to ensure effective application of international humanitarian law⁵¹. With regards to its mandate, the CNCDH assists the Prime Minister and the respective ministers by giving advice on questions which are relevant to its competence and it is also capable of demanding the attention of Government and public bodies when the latter requires assistance in tackling matters related to equality and non- discrimination⁵².

7.2.2. *Information and Awareness-Raising*

The Equality Act of 2006 establishes that in order to fulfil its duties, the EHRC may produce publications and disseminate information; may undertake research; provide training; and offer advice or guidance. It may also issue certain codes of practice which are related to specific

⁴⁶ Alice Donald, Jenny Watson and Niamh McClean & Philip Leach and Jörn Eschment (2009) 'Equality and Human Rights Commission Research Report 28: Human Rights in Britain since the Human Rights Act 1998: A Critical Review' http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf accessed 30 October 2015.

⁴⁷ Section 2, South African Human Rights Commission Act, Act 40 of 2013.

⁴⁸ Preamble, South African Human Rights Commission Act, Act 40 of 2013.

⁴⁹ Article 1, Loi n°2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme.

⁵⁰ Article 12, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

⁵¹ Article 2, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

⁵² CNCDH 'Rapport d'Activité 2014: La dignité au cœur de la protection et de la promotion des droits de l'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 28 October 2015.

matters as provided for in Article 14⁵³. The duty of the SHRC in terms of awareness- raising and dissemination of information⁵⁴ is somewhat identical to that found in the Equality Act of 2006. This objective of developing or managing information and educational programmes is also found within the South African Human Rights Commission Act⁵⁵ and the aim is to ‘foster public understanding and awareness’ on the content of the Constitution and of the general roles and activities of the SAHRC. What is worth noting is that the same duty is also found in the CNCDH; however, this falls more within the competence of sub- commission A which is responsible for general human rights education and awareness- raising.

7.2.3. *Investigation and Inquiries*

In virtue of Article 16 of the Equality Act, the EHRC may carry out an inquiry into a matter which is related to the EHRC’s duties. However, it is bound to publish the relevant terms of reference in a manner which would bring the said inquiry to the attention of the individuals it concerns or of interested parties and give notice of the terms of reference to any individuals specified. On the other hand, the EHRC may investigate whether an individual has committed an unlawful act, whether the said individual has complied with a requirement imposed by an unlawful act notice, or whether such an individual has complied with an undertaking given in virtue of Section 23⁵⁶. However, the EHRC may only conduct such an investigation if it suspects that such an unlawful act has been committed. Prior to such an investigation, the EHRC should prepare any terms of reference establishing who the individual to be investigated is and the nature of the unlawful act which is suspected to have been committed. It should also give the individual a notice of the proposed terms of reference and grant such an individual the opportunity to make representations.

On the other hand, the SHRC is able to conduct inquiries into the general or specific practices or policies of Scottish public authorities. As has been established in the Equality Act 2006, the Scottish Commission for Human Rights Act also establishes a number of criteria that the SHRC has to abide to, such as special documents that are to be drawn up, the notices that are to be given and what is to be made public. However, the SHRC is not allowed to question or conduct an inquiry into the practices or policies of such public authorities with respect to a particular case⁵⁷. Upon completion, a report on the inquiry is to be laid before Parliament⁵⁸.

The method and approach implemented in certain inquiries and investigations by the SAHRC have been somewhat criticised over the years mainly due to the ‘authoritarian’ methods that were adopted in issuing subpoenas to force individuals to appear before it and the existent penalties that one might incur on failure to do so⁵⁹. This adversarial approach is often criticised since the fact that failure to cooperate with the SAHRC might amount to a heavy fine or even imprisonment for a six-month period or seizure of relevant documents seems to give the wrong impression of what the role of the SAHRC truly is. This can be exemplified through a case-study of one of the inquiries on discrimination in the South African media carried out by the SAHRC wherein the issuing of subpoenas was heavily criticised. The point of disagreement was not the mode of action adopted, but the fact that it was so adopted by the SAHRC when the latter has the role to monitor and ensure the respect and safeguarding of human rights and equality⁶⁰. On this point, Glaser argued that

⁵³ Section 14, Equality Act 2006.

⁵⁴ Section 3, Scottish Commission for Human Rights Act 2006.

⁵⁵ Section 13(1)(b)(i), South African Human Rights Commission Act, Act 40 of 2013.

⁵⁶ Section 20, Equality Act 2006.

⁵⁷ Sections 8 & 9, Scottish Commission for Human Rights Act.

⁵⁸ Section 12, Scottish Commission for Human Rights Act.

⁵⁹ Sections 15, 16 and 22, South African Human Rights Commission Act, Act 40 of 2013.

⁶⁰ Glaser, Daryl (2000) “The Media Inquiry Reports of the South African Human Rights Commission: A Critique” African Affairs 99:396 p 373.

although the outcomes of the inquiry did not provide anything scarier than education, the gatherers of information resorted to what he termed as ‘authoritarian’ measures⁶¹.

7.2.4. *Role in Legal Proceedings*

Since the CNCDH’s mandate is limited to advisory functions, it cannot handle complaints or participate in legal proceedings. Similarly, Section 6 of the Scottish Commission for Human Rights Act establishes that the SHRC has no power to assist individuals in claims or legal proceedings; however, it has the power to intervene in civil proceedings, excluding children’s hearings, and which may, after getting the leave of the court, or after being so invited by the court, intervene in such proceedings so as to make submissions on a particular issue⁶². However, in order to intervene in such a manner, the matter which calls for such an intervention should be relevant to its general duties, and also raises a matter which is of general public interest⁶³.

The SAHRC can investigate, on its own initiative or following a complaint, any alleged violations of human rights and if after due investigation it transpires that there is substance in the complaint which was made, then it has the power to assist such an individual and any such individuals who would be affected in securing redress, or to direct the individual to the correct forum. In other cases it may also initiate proceedings in the competent court, either in its own name or on behalf of such individual or class of persons⁶⁴.

The Equality Act of 2006 establishes that the EHRC may assist an individual in legal proceedings if the said proceedings are related to the content of an equality enactment, or if such an individual alleges that there has been behaviour which runs contrary to the provisions of such equality enactments in his regard⁶⁵. This ‘assistance’ may encompass legal advice, representation, and facilities for dispute settlement. When reference is made to ‘equality enactments’, this relates to discrimination on grounds of sex (including gender reassignment), racial origin, ethnic origin, religion, belief, disability, age or sexual orientation, and any provision which confers rights to individuals. If these proceedings relate partly to a matter falling within the provisions of the equality enactment and partly related to another matter, then assistance might be given with regard to any aspect of proceedings as long as they relate to a matter associated with equality enactments; however, if the proceedings cease to be connected to an equality enactment then assistance would not be allowed to continue⁶⁶. The EHRC may also institute and intervene in legal proceedings if the EHRC believes that proceedings are related to its function⁶⁷. During judicial review proceedings, the EHRC is not required to have a complainant of an unlawful act, and may act only if there would be one or more victims of the said unlawful act; however, in awarding damages, no such award shall be granted to the Commission.

7.2.5. *Monitoring*

The Equality Act 2006 states that the ‘Commission shall monitor the effectiveness of the equality and human rights enactments.’ In fulfilling this duty, the EHRC can advise the Government on the effectiveness of certain enactments which are related to equality and human rights, and may also make recommendations on any amendments which should be made to related law. In light of its expertise, the EHRC may also advise the government and the relevant ministries on the effects that a proposed change in law would likely have⁶⁸. In fulfilling its monitoring duties, the EHRC

⁶¹ Ibid.

⁶² Section 14, Scottish Commission for Human Rights Act 2006.

⁶³ Ibid.

⁶⁴ Section 13(3)(3)(a)/(b), South African Human Rights Commission Act, Act 40 of 2013.

⁶⁵ Section 28, Equality Act 2006.

⁶⁶ Section 28(6), Equality Act 2006.

⁶⁷ Section 30, Equality Act 2006.

⁶⁸ Section 11, Equality Act 2006.

is to identify any changes within society which have occurred or which are likely, and which fall within its jurisdiction. In doing so, and in determining the indicators and outcomes that are to be taken into account, the EHRC may consult anyone who possesses the relevant knowledge or experience. In addition, it may also monitor the progress being made in terms of a particular sector and is to publish a report in this regard⁶⁹. Similarly, the SHRC may also review and make the necessary recommendations with respect to any aspect of Scottish law or any policies or practices of Scottish public authorities. However, with regard to reviewing Scottish law, it must do so only after consultation with the Scottish Law Commission⁷⁰. Like the other Commissions under examination, the SAHRC is also tasked with monitoring the implementation of and the compliance with international treaties and conventions⁷¹.

The CNCDH can intervene at every stage of the legislative procedure, that is, it can propose and comment on any proposed law or policy at any stage. Its work is debated at plenary assemblies, and after being voted upon, they are presented to the relevant ministries. Apart from its monitoring role, the CNCDH is also competent in evaluating, from an independent point of view, any public policy related to racism, anti-Semitism and xenophobia, and to the fight against treatment and exploitation of humans. This is done in line with the international instruments that France has signed and ratified⁷².

8. Conclusion

One of the main problems with respect to human rights in Malta is the piecemeal approach that seems prevalent in Maltese legislation- that is, the fact that one has to go through different legal instruments in order to determine which provisions are applicable in a particular situation since the relevant provisions are usually scattered in different legal texts. One hopes that this scattered system will be rectified through the introduction of the Equality Act and through the work of the Maltese Human Rights and Equality Commission since such system often hinders the effectiveness of justice. The scope of this paper was to extract the points of convergence and divergence of a number of human rights commissions, the same factors on which the Maltese Human Rights and Equality Commission will be based on. Most of what has been discussed appears to be in line with what is being proposed for the Maltese context, that is, a Commission which will replace the current National Commission for the Promotion of Equality having a wider mandate⁷³. It appears that the new Commission would not only be able to deal with and investigate complaints, but would also be able to draft reports, propose legislation and policy, and monitor the overall situation vis-à-vis human rights in Malta. Like a number of national human rights institutions, the Commission would also be answerable to Parliament.

⁶⁹ Schedule 1, Part 2, Section 32, Equality Act 2006.

⁷⁰ Section 4, Scottish Commission for Human Rights Act 2006.

⁷¹ Section 13(1)(b)(vi), Scottish Commission for Human Rights Act 2006.

⁷² CNCDH 'Rapport d'Activite 2014: La dignité au cœur de la protection et de la promotion des droits del'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 31 October 2015.

⁷³ Government of Malta, Towards the Establishment of the Human Rights and Equality Commission – White Paper Submissions Report, February 2015 http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/L-8-2015-%20-%20Consumer-%20Alternative%20Dispute%20Resolution%20Regulations%202015/Final%20Report%20-%20Towards-%20the%20Establishment%20of%20the%20Human%20Rights%20and%20Equality%20Commission%20%E2%80-%2093%20White%20Paper.pdf accessed 2 November 2015.

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