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RESEARCH ARTICLE

National human rights institutions as fourth-branch candidates

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Abstract

This article examines national human rights institutions (NHRIs) as part of the evolving fourth-branch considerations within contemporary constitutionalism. Critically engaging with recent scholarship on fourth-branch institutions, it argues that, in general, NHRIs satisfy the criteria of double constitutionalization – as constitutionally entrenched entities and as protectors of constitutional rights. Through comparative analysis of ombuds institutions and human rights commissions, the article evaluates their mandate and functions against the existing criteria for fourth-branch actorness, particularly focusing on determining norm breaches and interpreting norms. The article argues that while NHRIs' constitutional design and unique international peer review accreditation suggest significant independence, their de facto performance often depends on volatile political and institutional environments. The empirical discussion in the article exposes how appointment procedures, budgetary control and political capture can undermine their constitutional promise. The article concludes that NHRIs occupy a liminal constitutional space – formally insulated from party politics but deeply implicated in high politics – and that their credibility rests on maintaining a precarious balance between independence and accountability. In doing so, it advances the theoretical and comparative understanding of NHRIs as core protectors of constitutional rights within the broader fourth-branch paradigm.

Keywords: constitutional rights; double constitutionalization; fourth branch; guarantor; integrity; national human rights institutions; ombuds institutions

Introduction

Independent state institutions tasked with combating maladministration and protecting human rights constitute a global phenomenon. Ombuds institutions[1] and/or human

[1]The term 'ombudsman' is gender-neutral, as the 'man' suffix itself is gender-neutral in original Swedish. That is, it applies correctly whether the ombudsman is male or female. However, many states expressly provide a notation for female incumbents ('Ombudswoman,' 'Ombudsfrau,' 'Médiatrice'). To avoid ambiguity and overcomplicated language, this research uses the gender-free term 'ombuds institutions' throughout. It uses 'ombudsperson' when referring to an individual mandate-holder. Such a decision also reaffirms the function-centered approach taken in this research.

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rights commissions are enshrined in more than 120 national constitutions,[2] making them among the most constitutionally entrenched independent institutions worldwide. The constitutional lineage of ombuds institutions can be traced back to Sweden in 1809, whereas human rights commissions began to feature prominently in constitutional texts during and after the third wave of democratization.[3]

Although these two institutional models historically differed in mandate and powers, the distinction between them has narrowed considerably since the late 1990s and early 2000s. This convergence has occurred primarily through the United Nations–facilitated accreditation process for National Human Rights Institutions (NHRIs). This global peer-review mechanism remains a distinctive feature of NHRIs, setting them apart from other categories of independent state institutions. Notably, however, NHRI compliance is assessed against an international normative framework – the Paris Principles, as adopted by the United Nations General Assembly in 1993 – rather than against domestic constitutional standards.

Evaluating these institutions against constitutional benchmarks, that is, against their constitutional promise, directs attention to a growing body of scholarship on so-called 'misfit' institutions that do not fit neatly within the traditional tripartite model of government (the executive, legislative and judicial branches). Such institutions have attracted sustained interest across multiple disciplines. Economists have focused primarily on regulatory agencies; political scientists have examined both regulatory agencies, particularly at the supranational level, and accountability institutions; and legal scholars have approached these bodies from administrative, human rights, socio-legal and constitutional perspectives. The present article situates this inquiry within comparative constitutional studies, and more specifically, within debates on the fourth branch. The article uses 'fourth-branch institutions' as a broad category, covering 'constitutionally entrenched bodies which exist and function outside of the traditional tripartite structure of government, in order to make constitutional promises credible'.[4] When it communicates with the work of specific scholars, it uses their terminology to avoid ambiguity.

While the candidacy of certain specialized, independent, state-funded institutions, such as anti-corruption agencies, supreme audit institutions and electoral commissions, for inclusion within a fourth branch appears largely uncontroversial in the literature, the same cannot be said for NHRIs. Scholarly opinion remains divided on whether NHRIs should be regarded as fourth-branch actors. This article advances the argument that NHRIs can and should be conceptualized as fourth-branch institutions.

I argue that the central ambiguity surrounding NHRIs in this context stems from the absence of a clearly articulated NHRI 'family tree' – that is, a systematic account of their institutional lineage, including which bodies constitute close analogues and which are better understood as more distant relatives. To address this gap, the article reconstructs such a genealogy by tracing the historical evolution and contemporary diversification of the NHRI field. This exercise underpins the article's core claim: that NHRIs, in many jurisdictions, satisfy the requirement of double constitutionalization.[5] First, as institutions, NHRIs are constitutionally entrenched in more than 100 countries worldwide. Second, they are tasked with the protection of human rights, which are constitutional

[2]Many other countries also have them, but have not elevated them to a constitutional rank.

[3]SP Huntington, 'Democracy's Third Wave' (1991) 2 *Journal of Democracy* 12–34.

[4]T Khaitain and others, 'Making Constitutional Promises Credible: The Preventive Potential of Guarantor Institutions' (Constitutional & Legal Tools Workstream, February 2024) vi.

[5]T Khaitan, 'Guarantor Institutions' (2021) 16(S1) *Asian Journal of Comparative Law* S40–S59.

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norms by definition. Moreover, while many human rights operate as self-executing rights, they are not self-enforcing norms, insofar as their realization depends on a robust and interconnected network of institutional actors.

In examining the case of NHRIs, the article revisits and refines the essential criteria of fourth-branch actorness through a critical engagement with the leading conceptual contributions in this field, most notably those of Mark Tushnet and Tarun Khaitan, who offer the most developed theoretical accounts to date. On this basis, the article delineates the defining features of the principal types of ombuds institutions and human rights commissions and compares them in order to assess which meet the core criteria for fourth-branch status and which do not. By foregrounding the distinctive case of NHRIs, the article contributes to the emerging literature on individual institutional candidates for fourth-branch recognition – an intervention that is particularly timely given that scholarship on the fourth branch remains relatively underdeveloped when compared with the extensive literature on the three traditional branches of government.

Three caveats frame the scope and methodological orientation of this article. First, the analysis engages with the literature on the fourth branch in order to assess whether NHRIs satisfy the criteria for fourth-branch institutions developed therein. I do acknowledge compelling scholarly accounts on the preconditions for the fourth-branch (i.e., guarantor) institutions to form a separate branch of the state, such as the work of Dinesha Samararatne.[6] However, for the purposes of this article, I do not engage with debates over whether post-tripartite institutions are best conceptualized as constituting a distinct fourth branch or in some other way. In adopting this analytical posture, I follow the approach advanced by Kosař, Šipulová and Kadlec.[7] At the same time, I depart from the same authors insofar as I do not construct Weberian ideal types – as they do in their analysis of judicial councils – but instead draw on existing constitutional and statutory practices relating to NHRIs across jurisdictions, with the aim of engaging with institutional forms as they are currently constituted in practice. Finally, the article focuses exclusively on general public ombuds institutions and human rights commissions (or analogous collegial bodies). Sector-specific ombuds institutions – such as those operating in the fields of policing, media regulation, higher education or consumer protection – as well as ombuds bodies institutionally located within the executive branch, fall outside the scope of the analysis. These institutions are excluded on the grounds that they do not meet the threshold conditions for fourth-branch candidacy as articulated in the relevant literature.

The article proceeds as follows. It opens with a discussion of the separation of powers and the proliferation of independent state institutions that resist straightforward classification within the tripartite framework. The central part of the article is divided into three subsections. The first traces the historical evolution and global diffusion of the two most prominent NHRI models: ombuds institutions and human rights commissions. The second evaluates their core institutional features against the criteria for fourth-branch actorness identified in the existing literature. The third isolates specific NHRI powers and competences that are constitutive of their potential fourth-branch status. The penultimate section examines the complex and often tension–laden relationship between party

[6]D Samararatne, 'An Umbrella Body for Guarantor Institutions: A Necessary Condition or a Strange-Creature?' (2024) 2 *Comparative Constitutional Studies* 292.

[7]D Kosař, K Šipulová and O Kadlec, 'The Case for Judicial Councils as Fourth-Branch Institutions' (2024) 20 *European Constitutional Law Review* 82, 85.

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politics, institutional independence and accountability in the operation of NHRIs. The article closes with a conclusion.

The rise of the unelected

Montesquieu's *trias politica*, meaning the differentiation of legislative, judicial and executive branches of government, still populates the overwhelming majority of the world's constitutions. Indeed, the doctrine of the separation of powers has enjoyed a position of unparalleled global repute as a foundational tenet of democracy.

For the purpose of this paper, the separation of powers is construed so as to include both the three core components of the principle of 'separation' – of institutions,[8] functions[9] and personnel,[10] as well as the principle of checks and balances,[11] which is a standard account in the separation of powers literature.[12] In other words, the paper combines the 'pure' doctrine of separation of powers[13] with the older doctrine of 'mixed constitutions', which ultimately transformed into the modern principle of checks and balances.[14]

In an ideal world, there would be no need for any branch other than the legislature, the executive and the judiciary. However, this is not an ideal world. As evidenced by all major global democracy indices (such as Freedom House, V-Dem and EUI Democracy Index), even the most advanced and consolidated democracies face great challenges, while the number of hybrid and autocratic regimes is on the rise. In many countries, the system of checks and balances is distorted by the overdominance of the executive branch.

The problems of the functioning of the three branches of power are not new. Important challenges were identified almost a hundred years ago, leading to the establishment of constitutional courts[15] and national banks. Later on, new institutions started to populate world constitutions. Over the past few decades, there has been a veritable explosion in the number and power of independent accountability agencies, as well as regulatory agencies, throughout the world.[16]

[8]J Waldron, *Political Political Theory* (Harvard University Press, 2016) 49.

[9]MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 17.

[10]A Kavanagh, 'The Constitutional Separation of Powers', in D Dyzenhaus & M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 221, 233; J Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 433.

[11]D Kosař, J Baroš & P Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 3 *European Constitutional Law Review* 427, 433.

[12]DB Maldonado, 'The Conceptual Architecture of the Principle of Separation of Powers', in D Bilchitz & D Landau (eds), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar, 2018) 145–76; C Möllers, 'Separation of Powers – A Short Manual for the Perplexed', in H-M Napel et al. (eds), *Powers That Be: Rethinking the Separation of Powers. A Leiden Response to Möllers* (Leiden University Press, 2016).

[13]See Vile (n 9) 14.

[14]A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2016).

[15]H Kelsen, *General Theory of Law & State* (Transaction Publishers, 2006); S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer, 2014).

[16]JM Ackerman, 'Understanding Independent Accountability Agencies', in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 165, 276.

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The emergence of these institutions has caused discomfort for the doctrine of the separation of powers. Some only note the existence of these 'strange amalgam(s)',[17] others deny the possibility that a fourth branch exists, arguing that every formal institution can be consumed by one of the three traditional branches of government,[18] while others embrace this 'rise of the unelected' as a welcome development for democracy.[19]

The literature on the reconfiguration of the separation of powers – often articulated through the notion of a fourth branch of government – remains in an early and formative stage, while simultaneously opening up promising new avenues of constitutional inquiry. One of the earliest and most influential attempts to conceptualize these developments was offered by Bruce Ackerman, who argued that 'the credible construction of a separate 'integrity branch' should be a top priority for drafters of modern constitutions.'[20] Ackerman envisioned this branch as being equipped with both the powers and institutional incentives necessary to exercise continuous and effective oversight. It is only in more recent scholarship that these initial insights have been developed into more systematic conceptual and empirical analyses of post-tripartite constitutional arrangements.

The most advanced discussions in this field come from Mark Tushnet and Tarun Khaitan.[21] Tushnet labels 'the new fourth branch' as 'institutions for protecting constitutional democracy' (IDPs), arguing that 'the reason for creating these institutions rather than relegating their work to the Montesquiean branches is that those branches are placed in a situation of conflict of interest when particular cases challenging democratic functioning arise'.[22] Khaitan, on the other hand, advances the concept of 'guarantor institutions' as tailor-made constitutional institutions, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof).[23] Taken together, the work of Ackerman, Tushnet and Khaitan establishes a compelling case for the recognition of fourth-branch institutions, while simultaneously underscoring the need for further theoretical refinement and empirical investigation. Notwithstanding these foundational contributions, the institutional landscape currently described as 'fourth-branch' remains strikingly heterogeneous and insufficiently theorized. This conceptual looseness risks diluting the analytical purchase of the fourth-branch framework and highlights the importance of developing more precise criteria for identifying which institutions genuinely qualify for inclusion.

[17]S Bartlett Foote, 'Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate' (1988) *Duke Law Journal* 223.

[18]J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

[19]F Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007).

[20]B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 634, 691.

[21]M Tushnet, *The New Fourth Branch* (Cambridge University Press, 2021); M Tushnet, 'Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries' (2020) 70 *University of Toronto Law Journal* 153; M Tushnet, 'Institutions Supporting Constitutional Democracy: Some Thoughts about Anti-Corruption (and Other) Agencies' (2019) *Singapore Journal of Legal Studies* 440–455; M Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12 *Law and Ethics of Human Rights* 181; T Khaitan, 'Guarantor (or the so-called 'Fourth Branch') Institutions', in J King & R Bellamy (eds), *Cambridge Handbook of Constitutional Theory* (Cambridge University Press, 2025), 603–621; See Khaitan (n 4); T Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14 *Law and Ethics of Human Rights* 49.

[22]Tushnet (n 21) 2021 183.

[23]Khaitan (n 4) 14.

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Traditionally, a fourth-branch has been used to describe various entities. For instance, this term has settled into US academia as a description of administrative bureaucracies, while in the European context, it is sometimes used to depict the European Union. Furthermore, some authors used the fourth-branch label for the media and civil society.[24] Such research used the 'fourth-branch' label to denote specific actors with a certain level of autonomy and with growing influence on public policy and legislative decision-making.

More recently, it has become evident that if one seeks to construe a conceptually sound elaboration of the fourth branch, a more nuanced selection of comparable fourth-branch candidates is necessary. Hence, Tushnet focuses on electoral commissions, audit offices and anti-corruption agencies.[25] Integrity branch scholars, mostly coming from Australia, have added different bodies in the Australian context (e.g., the Independent Commission Against Corruption, the Police Integrity Commission and the Crime Commission in New South Wales). According to Gómez Yuri and Loayza Jordán, the fourth branch includes 'constitutional courts upholding the constitutional framework, electoral bodies guaranteeing the peaceful and democratic transfer of powers, ombuds offices investigating human rights violations, independent general attorneys prosecuting crime and representing the state's interest, and comptrollers auditing the use of public resources, among others.'[26] Adding to the list, Kosař, Šipulová and Kadlec have recently made a compelling case for judicial councils as fourth-branch institutions.[27]

Drawing on the recent constitutional law scholarship, the same authors identified three constitutive features of fourth-branch institutions: they are tasked with functions (1) which consist of the protection or realization of a constitutional norm not negotiable through the regular political process; (2) whose proper exercise according to the shared constitutional norm might go against the short-term interest of the current political majority and (3) the realization of which requires political judgement and a greater degree of democratic legitimacy.[28] They largely build on Khaitan's notion of guarantor institutions. According to him, guarantor institutions are constitutionalized in two respects: the norm they seek to guarantee is constitutional, and the institution itself has constitutional status.[29] Such double constitutionalization distinguishes them from ordinary regulators, while the performance of primary functions (to respect and nourish the norm), in addition to secondary duties, separates them from integrity institutions.[30]

[24]For the use of the fourth-branch label for administrative bureaucracies, see: K Yesilkagit, M Bauer, B Guy Peters and J Pierre, 'The Guardian State: Strengthening the Public Service against Democratic Backsliding' (2024) 84 *Public Administration Review* 414–25; N Bowles and RK McMahon, *Government and Politics of the United States* (Third Edition, Palgrave McMillan, 2014); E Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009); P Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 *Columbia Law Review* 573–669. For the EU context, see G Majone, *The European Community: An "Independent Fourth Branch of Government?"* EUI Working Paper (SPS No. 93/9, 1993). For the media and civil society, see, for instance, R Luberda, 'The Fourth Branch of the Government: Evaluating the Media's Role in Overseeing the Independent Judiciary' (2008) 22 *Notre Dame Journal of Law, Ethics & Public Policy* 507–32; J Braeman, 'The Media in Politics: "The Fourth Branch of Government"?' (1985) 16 *Canadian Review of American Studies* 353–372.

[25]Tushnet (n 21) 2021 21.

[26]H Gómez Yuri and F Loayza Jordán, *'Fourth-Branch Institutions and Political Oppositions'* (2024) 57 *World Comparative Law* 649–675.

[27]Kosař, Šipulová and Kadlec (n 7).

[28]Kosař, Šipulová & Kadlec (n 7) 89.

[29]Khaitan (n 4) S42.

[30]Khaitan (n 4).

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While the candidacy of anti-corruption agencies, supreme audit bodies and electoral commissions for fourth-branch institutions seems rather undisputed in the literature, the same cannot be said for NHRIs. Scholars diverge when it comes to including them under the fourth branch. On one side, Pal notes that in some democracies, 'central banks, human rights commissions, prosecutorial services and others are all part of the fourth branch'.[31] Brown includes human rights defenders, ombuds institutions (as different bodies; author's note) and judicial (civil service) commissions within the fourth branch.[32] In their research on the fourth branch and political opposition, Gómez Yuri and Loayza Jordán, focus on constitutional courts (In Colombia and Bolivia) and ombuds institutions (in Peru and Ecuador).[33] On the other side, Khaitan and Tushnet are more hesitant. Khaitan sees ombuds offices more as integrity institutions performing secondary duties, while opening space for human rights commissions to be considered guarantor institutions.[34] Tushnet explicitly says that 'the case for including human-rights agencies in the fourth branch is rather weak',[35] arguing that the courts, the opposition and civil society can do most of their work.

These uncertainties about ombuds institutions and human rights commissions call for a more nuanced account of their evolution, main features and typology. Tushnet warns about the importance of careful classificatory exercise when it comes to constitutional courts,[36] adding that 'classifications become even more complex with other institutions'.[37] Thus, the next section first describes the evolution and diffusion of the two most prominent types of NHRIs – ombuds institutions and human rights commissions. The following section tests their main features against those identified in the fourth-branch literature. The section after identifies specific powers of NHRIs as defining features necessary for their fourth-branch candidacy. The penultimate section discusses the complex relationship between independence, party politics and accountability of NHRIs.

Ombuds and human rights institutions as fourth-branch institutions

The evolution and diffusion

Traditionally, ombuds institutions have been understood as public-sector institutions, preferably established by the legislative branch of the government to assess, as a rule, the administrative activities of the executive branch.[38] The International Bar Association has

[31]M Pal, 'The South Asian Fourth Branch: Designing Election Commissions for Constitutional Resilience, in Constitutional Resilience in South Asia', in S Jhaveri, T Khaitan and D Samararatne (eds), *Constitutional Resilience in South Asia* (Hart, 2023) 283, 288.

[32]AJ Brown, *The Fourth, Integrity Branch of Government: Resolving a Contested Idea* (Australian Political Studies Association 2018 Presidential Address), presented at the International Political Science Association World Congress of Political Science, Brisbane, Australia (2018).

[33]Gómez Yuri and Loayza Jordán (n 26). These authors argue that 'the fourth branch comprises a series of functions allocated to constitutionally entrenched institutions independent of the three traditional branches based on considerations of distrust, meaning that in a given constitutional system, the executive, legislative and the ordinary judiciary are considered to lack the necessary expertise, capacity, or incentives to provide a credible commitment to perform a given function adequately' (650–651).

[34]Khaitan (n 4) S49 & S56–S57.

[35]Tushnet (n 21) 2021 36.

[36]Ibid, 78.

[37]Ibid, 78.

[38]LC Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff, 2004) 1.

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similarly defined the ombuds institution as an office provided by the constitution or by the action of the legislature (parliament) and headed by an independent high-level public official, who receives complaints from aggrieved persons against government agencies, officials and employers, or who acts on his or her own motion, and has the power to investigate, recommend corrective actions and issue reports.[39] This administrative orientation reflects the historical origins of the ombuds institution.[40]

The first-ever (in today's terms) ombuds institution was established in Sweden in 1809 as a parliamentary representative, with the task to safeguard the rights of citizens by establishing a supervisory agency that was completely independent of the executive. It centered on legality, prosecutorial powers, with the jurisdiction over the judiciary.[41] This Swedish model is usually called the classical or administrative ombuds or first-generation ombuds institution. It was to remain the only one for a long time. In 1919, Finland adopted the ombuds idea in a republican constitution for the first time. Nevertheless, it was Denmark that initiated its increasing popularity and, by creating a new legal structure in the mid-1950s, became a role model for its further development. This Danish model is sometimes referred to as a second-generation ombuds institution, as it has abandoned the strict Swedish legal approach and introduced a less formal complaint procedure. In 1963, this legal structure was adopted by Norway, in 1967 by the United Kingdom, and later by the Netherlands.[42] These institutions have thus been focused on (an extra-legal notion of) maladministration.

The collapse of authoritarian regimes in Portugal and Spain in the late 1970s provided new incentives for the establishment of ombuds institutions, which were understood as an important feature of the democratization process. In such contexts, they fulfilled a dual role: to protect and promote human rights in a nascent and fragile democracy, while also serving as a key institution in defending against and preventing a return to authoritarian rule.[43] These two countries introduced a hybrid or human rights ombuds institution, as their ombuds institutions were given an explicit mandate to protect and promote human rights, in addition to fighting maladministration, effectively starting the third generation of ombuds institutions.[44] As argued by Alza Barco, 'authoritarian and leader-based governments, as well as democratic systems lacking strong parties and with authoritarian tendencies, demanded an authority that would put its raison d'être on human rights; that is how 'ombudsman' ended up being the "Defensor del Pueblo"'.[45] Ombuds institutions

[39]C Ferris, B Goodman and G Mayer(1980). Brief on the Office of the Ombudsman (Occasional Paper No. 6, 1980) International Ombudsman Institute, available at <https://www.theioi.org/downloads/epr4c/IOI%20Canada_Occasional%20Paper%2006_Charles%20Ferris_Brief%20on%20the%20Office%20of%20the%20OM_EN_1980.pdf>, 2.

[40]L Glušac, *Leaving No One Behind, Leaving No One Unaccountable: Ombuds Institutions, Good (Security Sector) Governance and Sustainable Development Goal 16* (Ubiquity Press, 2023) 5.

[41]M Remac, Coordinating Ombudsmen and the Judiciary (Intersentia, 2014).

[42]Glušac (n 40) 5.

[43]L Glušac, 'Engagement and Political Institutions: The Case of Ombudsman' (2019) 30 *Philosophy and Society* 493–508.

[44]Some authors see the most recent trend of ombuds institutions designated with anti-corruption function as the fourth generation. See M Remac, 'Standards of Ombudsman Assessment: A New Normative Concept?' (2013) 9 *Utrecht Law Review* 62–78. See also: G Kucsko-Stadlmayer, European ombudsman-institutions: A comparative legal analysis regarding the multifaceted realisation of an idea (Springer, 2008); Reif (n 36); S Carl, 'The history and evolution of the ombudsman model', in M Hertogh & R Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar Publishing, 2018) 17–33.

[45]Carlos Alza Barco, 'The Transposition of the Ombudsman Model to the Human Rights Model Domain: Its Role as a Policy Entrepreneur', in M Hertogh & R Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar, 2018) 188–189.

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in Latin America were largely modelled on the Spanish *Defensoría del Pueblo*.[46] A similar process took place in many post-Communist states in Central and Eastern Europe. Here, newly established democracies saw the need to create independent institutions to protect the rights of citizens, which were systematically violated under communist regimes. Post-Communist European and Latin American countries overwhelmingly adopted the human rights ombuds model. Such a focus on human rights allowed them to be considered national human rights institutions (NHRIs).[47]

NHRIs are independent state-funded constitutional or statutory bodies with a broad mandate to protect and promote human rights at the national level. This composite definition is derived from the Paris Principles on national human rights institutions, the main international standard in this area.[48] The establishment and operations of an NHRI must conform to the Paris Principles on NHRIs, as adopted by the UN General Assembly's Resolution 48/134 in 1993.[49] Despite being legally non-binding, the Paris Principles have great political weight,[50] prompting NHRI practitioners to call it 'the international NHRI constitution'.[51] They are the main international reference providing the basic principles and characteristics of an NHRI. The Paris Principles have not only influenced domestic norms but also the institutional design and architecture of national human rights systems.[52]

The Paris Principles set forth a number of conditions that an institution has to fulfil in order to be recognized and accredited as an NHRI, including establishment under primary law or the Constitution, a broad mandate to promote and protect human rights, formal and functional independence, pluralism (representing all aspects of society), adequate resources and financial autonomy, freedom to address any human rights issue arising, annual reporting on the national human rights situation and cooperation with national and international actors, including civil society.[53]

What separates NHRIs from other fourth-branch institutions is not only the existence of an international standard, but the peer-reviewed process of international accreditation. NHRIs first introduced voluntary accreditation in 2000, which later developed into periodic obligatory re-accreditation in 2008. The accreditation is granted against the criteria set in the Paris Principles and conducted by the Subcommittee on Accreditation (SCA) of GANHRI (Global Alliance of National Human Rights Institutions), whose

[46]Due to the pervasive institutional inspiration provided by the Spanish ombudsman, some observers have called the Latin American prototype of the ombudsman the "Creole ombudsman". See more in: J Madrazo Cuéllar, *El Ombudsman Criollo* (CNDH, 1996).

[47]Most of them have been accredited in the highest A status. The updated list is available at <https://ganhri.org/wp-content/uploads/2025/06/Accreditation-Status_Chart_Jun2025.pdf>.

[48]L Glušac, 'Norm Compliance and International Status: National Human Rights Institutions in Domestic and Global Politics' (2025) 13 *Politics and Governance* 1–17.

[49]UN General Assembly, Resolution 48/134: National institutions for the promotion and protection of human rights (A/RES/48/134, 1993). For the history of the Paris Principles, see: K Linos & T Pegram, 'The Language of Compromise in International Agreements' (2016) 70 *International Organization* 587–621; D Langtry & K Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (Oxford University Press, 2021).

[50]Glušac (n 48).

[51]S Janković, 'Načelo oportuniteta u radu Zaštitnika građana' (2012) 3 *Pravni zapisi* 3 291, 294. Janković is a former ombudsperson of Serbia.

[52]The best evidence for the strong normative power of the Paris Principles is that many countries have changed their human rights infrastructure to comply with them. See more in Glušac (n 48).

[53]UNGA (n 49).

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accreditation system is recognized and facilitated by the UN (specifically, Office of the United Nations High Commissioner for Human Rights).[54]

To be able to conduct accreditations in a consistent and procedurally fair manner, SCA has adopted the General Observations on the Paris Principles, which serve as its authoritative interpretation. SCA consists of four members of GANHRI, one from each of the four regional networks of NHRIs (Europe, America, Asia-Pacific and Africa). In other words, it is a full-fledged peer-review process.[55] NHRIs can be accredited with A or B statuses. The former is proof of full compliance with the Paris Principles, while the latter indicates partial compliance.[56] A-status NHRIs are given full participatory rights, independent of their respective governments, in the UN system but also with leading regional organizations.

A-status NHRIs are re-assessed every 5 years. As of December 2025, a total of 92 institutions worldwide fulfil the Paris Principles and are thus accredited as A-status NHRIs, while 27 hold B status.[57] Out of 92 A-status NHRIs, 27 are in Africa, 16 in North and South America, 18 in Asia and 31 in Europe. Human rights commissions comprise around 55% of all NHRIs, while around 35% of them are (hybrid) ombuds institutions, mostly from Europe and Latin America.[58] The rest are human rights institutes (e.g., Denmark, Germany, the Netherlands) and hybrid bodies (e.g., Finland, Chile, Uruguay, Ghana). It is now established in the literature that the adoption of the Paris Principles and the introduction of accreditation have sparked the comparative growth of NHRIs around the world.[59] This particularly refers to human rights commissions, as there were very few of them before 1993.[60]

Historically, significant distinctions existed between these two ombuds institutions and human rights commissions.[61] Two parallel yet interconnected developments helped blur this line. Firstly, over time, violations of the principles of good governance came to be seen as violations of human rights,[62] meaning that ombuds institutions were effectively performing the kind of human rights monitoring traditionally associated with human rights commissions.[63] The understanding of human rights and the principles of good governance as 'a family of allied norms'[64] has contributed to bringing these two types of institutions into closer alignment. Secondly, accreditation in accordance with the Paris Principles has played a decisive role in the design of new NHRIs that combine the traditional features of both.[65] Indeed, in many cases, it is now challenging even to determine the most appropriate label for a given institution. Although ombuds institutions have traditionally been single-headed institutions, some countries have introduced

[54]See more on accreditation in: Langtry & Roberts Lyer (n 49).

[55]Glušac (n 48) 7–8.

[56]For more, see Langtry and Roberts Lyer (n 49).

[57]See (n 47).

[58]Glušac (n 40).

[59]See S Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014); Langtry and Roberts Lyer (n 49).

[60]For instance, New Zealand, Australia, the Philippines, Mexico, and France.

[61]This is evident from the discussion on the origins of the Paris Principles. See: Linos and Pegram (n 49).

[62]Including by recognizing the right to good administration as a distinct right, as in the EU Charter on Fundamental Rights (art 41).

[63]I thank the reviewer for helping me to underline this.

[64]See more in: T Khaitain and others (n 4) 2024.

[65]L Glušac, 'A Critical Appraisal of the Venice Principles on the Protection and Promotion of the Ombudsman: An Equivalent to the Paris Principles?' (2021) 21 *Human Rights Law Review* 22, 51–52.

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ombuds institutions as collegiate bodies, as in Bosnia and Herzegovina (Institution of Human Rights Ombudsman of Bosnia and Herzegovina) or Austria (The Ombudsman Board), or collective bodies, with the chairperson being appointed among the members, as in Kenya with the Commission for Administrative Justice (Office of the Ombudsman). In some countries, there are multi-member bodies. For instance, Ghana has incorporated its administrative ombuds institution into the new multi-member Commission on Human Rights and Administrative Justice.[66] Furthermore, some countries have opted to have both a general ombuds institution and a human rights commission (or similar collective body).[67]

Are NHRIs good candidates for the fourth branch?

This overview of NHRI evolution helps to address Tushnet's question: 'Are ombuds offices in some places more like general prosecutors' offices or human rights agencies?'[68] More specifically, he asks, 'How do we characterize officials designated as Defenders of the People (Argentina), compared to ombuds offices or prosecutors elsewhere?'[69] The Argentinian *Defensoría del Pueblo* provides a particularly illustrative example of why NHRIs merit inclusion in fourth-branch discussions. Established through the 1994 constitutional reform, it reflects the broader regional trend of introducing ombuds institutions during the 1990s, while simultaneously embodying features that align it with human rights protection and independent oversight. Chapter VII (Section 86) of the Constitution of Argentina reads:

> The Ombudsman is an independent authority created within the sphere of the National Congress operating with full autonomy and without receiving instructions from any other authority. The mission of the Ombudsman is the defense and protection of human rights and other rights, guarantees and interests sheltered under this Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions.
>
> The Ombudsman has capacity to be a party in a lawsuit. He is appointed and removed by Congress with the vote of two-thirds of the members present of each House. He has the immunities and privileges of legislators. He shall hold office for the term of five years and may only be re-appointed on one occasion.
>
> The organization and operation of this body shall be ruled by a special law.

This quote demonstrates that human rights ombuds institutions are doing much more than education and monitoring, as their primary functions include investigations, inquiries, even strategic litigations and conflict resolution. It also testifies to two important features of the fourth branch, as recognized in the literature.

[66]The similar case is with Samoa (Office of the Ombudsman/National Human Rights Institution Samoa) and Uruguay (Institución Nacional de Derechos Humanos y Defensoría del Pueblo).

[67]This applies, for example, to South Africa, Kenya, the United Kingdom, and the Philippines.

[68]Tushnet (n 21) 2021 78.

[69]Ibid, 78.

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The first feature relates to their 'capacity to promote and protect values that underpin a constitutional democracy'.[70] Tushnet evokes Wittgenstein in arguing that these institutions bear 'a family resemblance' in that they seek to prevent a conflict of interest in governance and seek to protect democratic interests over time.[71] The common feature of fourth branch institutions, as captured by the literature, is that their 'primary function is to investigate and hold government accountable for its actions or inactions'.[72] This is, in fact, a primary function of (all) NHRIs.

The second relates to 'their formal, legal relationship with the other branches of the state', as a 'significant marker of the fourth branch status'.[73] Pal argues that if 'they are the central institutions of the state, …, then their respective functions should be clarified in the *constitutional* (italic added) text'.[74] In his chapter on election commissions in South Asia, he posits that a marker that they are 'taken as a true fourth branch', 'is the degree to which constitutions in the region are occupied with detailing the functions, powers, membership and structure of these institutions'.[75] Indeed, the above-quoted section of the Argentinian Constitution about the Defensoria del Pueblo fulfils this requirement. The same applies to the constitutions of other countries with a human rights ombuds model.

Pal also notes that one 'notable, though perhaps unrealized, feature of fourth branch constitutional practice is how it attempts to shape the relationships between the branches themselves'.[76] Political science literature captured this feature under the notion of 'horizontal accountability',[77] which points out the checks and balances between the branches of government. Horizontal accountability includes both a duty to assist the other branches, as well as the oversight elements. However, it is now widely acknowledged that the equilibrium between the branches of power is often distorted, primarily through the aggrandizement of the political executive at the expense of other branches.[78] To rebalance the system, more accountability is needed. In fact, the strong accountability function of NHRIs and their ability to influence both the public decision-making process and the behavior of public authorities have contributed to their acknowledgement as a 'fourth power' institution.[79]

[70]D Samararatne, 'Sri Lanka's Guarantor Branch: Constitutional Resilience by Stealth?', in S Jhaveri, T Khaitan & D Samararatne (eds), *Constitutional Resilience in South Asia* (Hart, 2023) 257, 260–261.

[71]Tushnet (n 21) 2020 105.

[72]Samararatne (n 71) 260–261; CM Fombad, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa' in CM Fombad (ed), *The Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 325, 327; F Mahomed, 'The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa's State Institutions Supporting Democracy' in D Bilchitz and D Landau (eds), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar, 2018) 177; RE Kapindu, 'Separation of Powers and the Accountability Role of NHRIs: The Malawi Human Rights Commission through the Courts' in D Bilchitz & D Landau (eds), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar, 2018) 206.

[73]Pal (n 31) 294.

[74]Ibid.

[75]Ibid.

[76]Ibid, 297.

[77]G O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 *Journal of Democracy* 112–126; A Lührmann, KL Marquardt and V Mechkova, 'Constraining Governments: New Indices of Vertical, Horizontal, and Diagonal Accountability' (2020) 114 *American Political Science Review* 811–820.

[78]Khaitan (n 21).

[79]GH Addink, 'The Ombudsman as the Fourth Power: On the Foundations of Ombudsman Law from a Comparative Perspective,' in ECHJ van der Linden and FAM Stroink (eds), *Judicial Lawmaking and Administrative Law* (Intersentia, 2005) 269–302.

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A human rights ombuds institution often represents the sole institutional actor combining the functions of a classical ombuds institution with those of a human rights commission. By contrast, countries adhering to classical or administrative ombuds models have typically opted to establish separate human rights commissions rather than transform existing ombuds institutions. This pattern is evident in Scandinavia, the Netherlands and various Commonwealth countries. In many other jurisdictions, however, both institutions have been created simultaneously, frequently through constitutional reform, resulting in the incorporation of multiple new bodies within newly adopted constitutions. Countries of the Global South have led this trend, introducing distinct constitutional chapters or sections dedicated to independent state institutions. These institutions have been variously labelled, reflecting national legal and normative contexts: as 'autonomous constitutional agencies (bodies)' in Mexico, 'commissions and independent offices' in Kenya, 'state institutions supporting constitutional democracy' in South Africa and 'independent institutions' in the Draft Constitution of the Gambia.[80]

All these constitutions have not only devoted a separate section to these bodies, but have also invested considerable space in 'delineating the functions, powers, membership and structure of these institutions', to come back to Pal's above-mentioned argument. Out of those countries, only Mexico established the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*), with the integrated ombuds function. All other above-mentioned countries decided to establish both the ombuds institution and the human rights commission. In those countries, human rights commissions are understood (i.e., accredited) as NHRIs. This, however, does not preclude the consideration of ombuds institutions as fourth-branch actors within the same countries. Where both types of institutions meet the essential criteria, there is no principled reason to accord one priority over the other. The following sections examine these basic requirements in detail, situating them within the broader discussion of NHRIs and fourth-branch actorness.

All constitutionally entrenched ombuds institutions and human rights commissions are specialist bodies that share three defining features – independence, expertise and accountability – each of which is widely recognized as essential in the literature on ombuds institutions, NHRIs and the fourth branch. The institutions highlighted above, as well as other NHRIs accredited with A status, perform a dual function: they guarantee a constitutional norm (human rights) and are themselves constitutionally entrenched, whether within 'big-C' constitutional texts or 'small-c' constitutional frameworks.[81] In doing so, they satisfy Khaitan's criterion of double constitutionalization. The critical question that follows Khaitan's conceptualization, however, is whether all such institutions function as genuine guarantors, or whether some should be classified more narrowly as integrity institutions. These categories are overlapping. *Differentia specifica* between them is that 'unlike integrity institutions, which typically only uphold the secondary duties of remedy or redress after a norm has been breached, guarantor institutions may be tasked with primary duties of norm enforcement as well as secondary duties of redressing breach'.[82] Primary duties relate to respecting and nourishing the norm, while secondary

[80]Some constitutions have included a number of independent institutions, but without using the specific overall title for them. For instance, the Constitution of Sri Lanka includes both the Parliamentary Commissioner for Administration (Ombudsman) and the Human Rights Commission.

[81]More detailed research is needed to confirm this in each and every case, but there is a legitimate expectation that NHRIs are entrenched at least in 'small-c'.

[82]Khaitan (n 21) 2025 604.

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duties refer to various aspects of addressing the breach of the norm (criticize, investigate, remedy, publicize and similar).[83] Both elements are necessary for a constitutional norm to be effectively guaranteed; however, if an institution is tasked solely with performing secondary duties, it should be classified as an integrity institution rather than a full guarantor.

Khaitan considers ombuds institutions as integrity institutions, arguing that they are among those institutions which 'only kick in when primary duties have already been breached'.[84] He, however, adds that 'occasionally, they may also be mandated to nourish the norm', which would then open up a space for being more than just integrity bodies.[85] On the other hand, Khaitan counts human rights commissions as guarantor institutions, seeing them as 'specifically designed to guarantee human rights norms in a distinct manner, by determining breaches (like courts), but also through investigating, monitoring, advising, advocating, educating and training in relation to human rights – functions that generalist institutions typically do not or cannot effectively perform'.[86] From Khaitan's framework, two critical functions of NHRIs can be distilled that ultimately determine whether they qualify as fourth-branch institutions: (1) the authority to determine breaches and (2) the capacity to interpret and contextualize norms. These functions must be considered cumulatively, as their effective exercise requires a combination of both expressive and material capacities.

Determining a breach, interpreting a norm

Determining breaches constitutes a central function of all generations of ombuds institutions, as the handling of individual complaints has traditionally formed their core mandate. A similar logic applies to the majority of human rights commissions, which investigate alleged violations – or breaches – of human rights. Notably, however, some prominent human rights commissions, such as the French *Commission Nationale Consultative des Droits de l'Homme* and the Irish Human Rights Commission, do not handle individual complaints. Both institutions nonetheless hold an A status under GANHRI, reflecting the fact that the Paris Principles treat complaint-handling as an ancillary rather than an essential NHRI function. While other activities, such as monitoring, advising, advocating and providing education and training in relation to human rights, are sufficient to qualify an institution as an NHRI, I argue that they are insufficient to confer full guarantor status.

Complaint-handling extends beyond merely determining whether a citizen's rights have been violated by public administration in a particular case. A defining feature intrinsically linked to this function is the NHRI's authority to access, without obstruction, the documents, personnel and premises of public administration.[87] This right of access is imposed as an obligation on all public administrative bodies and constitutes a necessary precondition for conducting any effective and credible investigation.

[83]Khaitan (n 5).

[84]Khatian (n 5) S49.

[85]Khaitan argues that although guarantor institutions are distinct from integrity institutions, the same institution can sometimes be a guarantor as well as an integrity institution. See Khaitan (n 5) S50.

[86]Khaitan (n 5) S56.

[87]More on this in: G de Beco and R Murray, *A commentary on the Paris Principles on national human rights institutions* (Cambridge University Press, 2014); Langtry and Roberts Lyer (n 49).

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When an institution handles multiple cases of a similar nature, it can probe more deeply to determine whether these recurring issues stem from material or procedural flaws in the interpretation and implementation of the law. To facilitate such analysis, an NHRI requires an additional function: the ability to initiate investigations on its own motion. These so-called systemic or thematic investigations are typically launched either as extensions of individual complaint inquiries or based on information from other sources, most commonly the media. Through such broader investigations, NHRIs can identify patterns of administrative behavior that would remain obscured in case-by-case assessments.[88]

Crucially, the capacity to conduct these investigations depends on unhindered access to documents, personnel and premises of public administration. Where such access is mandated by law, the NHRI exercises both expressive and material capacities, in Khaitan's terminology. By contrast, if access depends solely on the goodwill of administrative bodies, the institution effectively resembles an NGO or think-tank: it retains expressive authority but lacks the material capacity necessary to enforce constitutional norms. In these circumstances, Tushnet's observation is particularly salient: 'the case for including human-rights agencies in the fourth branch is rather weak',[89] as other actors can perform many of their functions, such as public education and monitoring. It is precisely the legal guarantee of access to public administration that distinguishes NHRIs from NGOs, think-tanks and academic actors.

Beyond determining breaches, the other function of NHRIs that is crucial for their consideration as fourth-branch institutions is the interpretation and contextualization of constitutional norms. NHRIs can exercise this function through multiple channels. One such channel is complaint-handling, which allows them to observe firsthand how public administration bodies internalize specific norms. Through these interactions, NHRIs can identify misinterpretations or flawed applications of human rights norms and provide corrective guidance. Additionally, NHRIs often draw on international human rights law to advocate for more progressive or expansive interpretations of domestic constitutional rights. For example, the Sri Lankan Human Rights Commission 'uses international human rights standards to interpret constitutionally guaranteed rights, thus broadening their scope'.[90]

Guarantor institutions can also perform both 'norm-specification as well as norm-interpretation', as Khaitan terms it,[91] in the context of their own work. He illustrates this with the example of the South African Public Protector, who interpreted the statutory time limit for investigations stipulated in the Executive Ethics Code as a guideline rather than a strict rule, relying instead on the broader constitutional mandate – an instance of what Khaitan describes as an 'expressive task'.[92] Interestingly, Khaitan employs the Public Protector to exemplify norm nourishment, a primary function of guarantor institutions, even though the Public Protector is otherwise a prime example of an ombuds institution, which he generally regards as an integrity institution. South Africa also maintains a Human Rights Commission, which aligns more closely with Khaitan's conception of a guarantor institution. I argue, however, that both the Public Protector and the Human

[88]More on systemic investigations in: Glušac (n 40) 11–12.

[89]Tushnet (n 21) 2021 36.

[90]The Human Rights Commission of Sri Lanka (HRCSL), History, available at <https://www.hrcsl.lk/about/history/>.

[91]Khaitan (n 5) S52.

[92]Ibid.

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Rights Commission satisfy the criteria for fourth-branch status. I will return shortly to the question of the co-existence of an ombuds institution and a human rights commission within a single country.

The example of the Public Protector demonstrates how guarantor institutions can exercise significant legislative-like powers of norm-specification in contexts where the legislature has provided insufficient elaboration of a constitutional norm.[93] Similarly, many ombuds institutions and human rights commissions can contribute to the legislative supplementation of constitutional norms. They do so through participation in both ex ante and ex post evaluations of legislation, ideally forming part of a continuous legislative-review cycle. Such a cycle effectively integrates otherwise distinct functions, simultaneously ensuring both the normative content and the practical impact of the constitutional norm.

While these processes are formally led by the legislative and the executive branches of government, fourth-branch institutions such as NHRIs can play a significant and influential role in both ex ante and ex post evaluation of legislation and policy. The role of NHRIs in these processes remains under-explored, despite being envisaged in key international standards, including the Paris Principles on NHRIs, the Belgrade Principles on NHRIs and parliaments and the Venice Principles on ombuds institutions.[94] The functions performed by NHRIs in this context are most commonly framed as 'advisories', 'opinions' or 'comments'.

A particularly important emerging element of ex ante evaluation is the review of human rights–relevant provisions,[95] sometimes referred to as a human rights impact assessment. Such a review is crucial to ensure that new legislation effectively addresses the needs of all citizens and aligns with existing national and international legal obligations, rather than reflecting the narrow interests of powerful constituencies or partisan agendas.[96] Through this process, NHRIs can operationalize constitutional norms to benefit the public more broadly. For example, the Human Rights Commission of South Korea is empowered to 'investigate and research on statutes (including bills submitted to the National Assembly), institutions, policies and practices related to human rights and presentation of recommendations or opinions on matters requiring improvement thereof'.[97] NHRIs can do so either on their own initiative or upon the request of either the executive or legislative bodies, depending on whether the draft legislation is in a pre-legislative or legislative stage. To that end, they can influence the draft legislation at different phases of the legislative process. They, thus, have a much wider maneuvering space than constitutional courts to influence the compliance of draft legislation with human rights standards before it is enacted.

Concrete examples illustrate the scale and impact of such NHRIs' work. In 2023–24, the Human Rights Commission of Kenya reviewed 38 bills and policies, submitting

[93]Ibid.

[94]UNGA (n 47); UNHRC, *National Institutions for the Promotion and Protection of Human Rights*, Report of the Secretary-General, Annex: Belgrade Principles on the Relationship Between NHRIs and Parliaments (2012) UN Doc A/HRC/20/9; European Commission for Democracy Through Law (Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles")* (15 March 2019), CDL-AD(2019)005.

[95]Literature uses various terms and concepts to name and describe these processes, such as evaluation, assessment, scrutiny, and review.

[96]A Fonseca and RB Gibson, 'Testing an Ex-Ante Framework for the Evaluation of Impact Assessment Laws: Lessons from Canada and Brazil' (2020) 81 *Environmental Impact Assessment Review*.

[97]South Korea, National Human Rights Commission of Korea Act, Act No. 17126 (24 March 2020) Art 19.

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27 advisories to ensure that legislation and policies were aligned with Kenya's Bill of Rights and international human rights standards.[98] Similarly, in 2024, the NHRI of Croatia (Ombudswoman) provided opinions on 50 draft laws, regulations and strategic documents, drawing on legal sources, including case law and international standards, as well as insights gained from handling citizens' complaints.[99]

Nevertheless, in the case of Croatia, the vast majority of these opinions 'were not accepted or even acknowledged'.[100] When an NHRI's recommendations are disregarded, the consequences often reappear as a boomerang once flawed legislation is adopted and/or implemented. The most severe cases arise when an NHRI considers that certain provisions of newly enacted legislation infringe constitutional rights, yet the legislature disregards its observations. In such situations, NHRIs may raise their concerns with the broader public. Once the legislation enters into force, many NHRIs (particularly human rights ombuds institutions) have the power to challenge the constitutionality and legality of laws and other general acts before the constitutional court.[101]

Negative human rights consequences, however, arise not only from the unconstitutionality of legislation but also, arguably, more frequently from poor policy choices. The Croatian Ombudswoman summarized this dynamic succinctly: 'This is evident in several examples that we have reported on in previous years, when the Ombudswoman warned of possible problems in consultations and proposed changes to the provisions, which were not considered at the time, only to make then these problems visible in the implementation of the law and it was necessary to change it later'.[102] Such implementation gaps can be identified either in the course of routine ombuds work or through more systemic ex post evaluation of legislation – sometimes described as post-legislative scrutiny.[103] NHRIs are thus able to monitor whether the implementation of human rights–related legislation aligns with the intended objectives of the norm. By insisting on such compliance, they contribute to norm nourishment, including statutory updates, when ex post evaluation reveals divergences from constitutional intent.

Beyond these activities aimed at guaranteeing the content of constitutional norms, NHRIs also undertake primary duties related to ensuring their effective impact. According to Khaitan, these duties are manifested in obligations to respect, prevent, fulfil and educate, reflecting the comprehensive role of NHRIs in operationalizing constitutional norms.

Although much of NHRIs' work focuses on determining violations (breaches) of human rights in individual cases, their overarching objective is to prevent future violations and to empower citizens to understand and exercise their rights. This process operates as a continuous cycle. NHRIs educate the public about constitutional rights through awareness campaigns, school programs and other outreach initiatives, equipping citizens with the knowledge necessary to identify potential violations and to utilize available remedies, such as appeal procedures. Where these remedies prove insufficient, citizens may lodge complaints with the NHRI, which investigates and determines whether

[98]Ibid.

[99]Ombudswoman of Croatia, *Annual Ombudsman Report for 2024* (2025) <https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2024/?wpdmdl=21188&refresh=6889fa34c85ed1753872948>, 4.

[100]Ibid, 17.

[101]Venice Principles (n 95) no 19. See more in Glušac (n 65) 44.

[102]Ombudswoman of Croatia (n 100) 17.

[103]P Norton, 'Post-Legislative Scrutiny in the UK Parliament: Adding Value' (2019) 25 *The Journal of Legislative Studies* 340–357.

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a breach has occurred. The NHRI then issues recommendations to remedy the violation and, depending on the nature of the case, may publicize the breach, explain how and why a particular norm was violated by the authorities, and thereby raise awareness and motivate other citizens to exercise their rights.

Are all these avenues of work available to every NHRI? When assessed against the two critical functions identified for fourth-branch candidacy – (1) determining breaches and (2) interpreting and contextualizing constitutional norms – the vast majority of A-status NHRIs meet these criteria, functioning simultaneously as integrity and guarantor institutions. This also holds for many ombuds institutions and human rights commissions, which handle individual complaints, conduct systemic investigations and submit advisories to the executive and legislative branches.

Some institutions, however, fail to meet these requirements. The first category comprises administrative ombuds institutions that lack the right to conduct investigations on their own initiative; this limitation prevents them from pursuing systemic investigations and constrains their capacity to nourish norms. Such institutions function as integrity bodies but do not achieve full guarantor status. The second category includes human rights commissions that do not handle individual complaints and therefore lack full investigative powers – including unhindered access to personnel, premises and documents – which undermines their ability to determine breaches effectively and limits their repertoire of powers.

Do NHRIs deliver?

The discussion so far has focused on the normative preconditions for NHRIs' successful candidacy as fourth-branch institutions. It has been established that human rights ombuds institutions are consistently well positioned for such a role, while administrative ombuds institutions and human rights commissions are, in most cases, similarly equipped under the law. The key question, however, is whether this legal potential translates into actual practice. This challenge is by no means unique to NHRIs. As Kosař, Šipulová and Kadlec observe, 'it is not entirely clear whether fourth-branch institutions deliver the promised goods (although on the de facto level, a similar remark can be made about all three standard branches)'.[104]

Indeed, some fourth-branch institutions 'work well, while others have become prone to concentration of interests or capture'.[105] Like any other type of institution, NHRIs present a mixed record of effectiveness. What distinguishes NHRIs from other independent institutions worldwide is their unique peer-review accreditation process, which evaluates both the legal framework and the practical functioning of a given institution. GANHRI conducts this assessment based on the Paris Principles as an international standard, rather than against national benchmarks or constitutional promises. While the peculiarities – and limitations – of NHRI accreditation are beyond the scope of this article,[106] A-status accreditation nonetheless provides a strong indicator of independence.

Independence can, however, be threatened in several strategically significant ways. Three particularly sensitive junctures are: the appointment of NHRI heads; investigations targeting the highest echelons of government and the determination of the annual

[104]Kosař, Šipulová and Kadlec (n 7) 90.
[105]Ibid.
[106]These have been addressed elsewhere. See: Langtry and Roberts Lyer (n 49); Glušac (n 48).

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budgets of these institutions. These moments are critical, as compromising independence at any of these stages can significantly undermine the institution's ability to fulfil its fourth-branch functions.

As a rule, the heads of NHRIs are appointed through complex procedures that often involve multiple branches of government. Most frequently, the appointment is made by the parliament – sometimes requiring a qualified majority – or the parliament may shortlist candidates for appointment by the head of state, depending on the political system.[107] Sometimes, standing or ad hoc committees (panels) are in charge of vetting and initial selection of candidates.[108] In the NHRI context, the use of a qualified or super-majority in the legislature is intended to prevent the election of a candidate representing a single party and to ensure that the ombudsperson or the chairperson of a human rights commission is a post-partisan figure who commands broad respect, recognized expertise and independence. Achieving this typically requires negotiation between the ruling majority and the opposition to identify the most suitable candidate for an independent office. Nevertheless, appointments are not always insulated from political crises. The already-mentioned Argentinian Ombudsman (*Defensoría del Pueblo*) provides an extreme example of how such processes can be disrupted in practice.

The first-ever Argentinian Ombudsperson, Jorge Luis Maiorano, was appointed in 1994 and served a single term until 1999. In the same year, Eduardo Mondino was elected and remained in office until his resignation in 2009. Since that time, Congress has failed to elect a new Ombudsperson. To ensure the formal continuity of the office, the Bicameral Commission – comprising members from both chambers of Congress – has been mandated to appoint temporary leaders until the vacancy is filled. Initially, the Commission authorized the First Deputy Ombudsman, Anselmo Sella, to serve in this interim capacity, extending his term until December 2013. Following the expiration of this extension, the Commission appointed, on an interim basis, the most senior employee, Secretary Carlos Haquim, who served until his resignation in 2015. The same year, Undersecretary Juan José Böckel assumed leadership as the most senior employee and remains in charge 10 years later, despite repeated urging by the Supreme Court of Justice that Congress fulfil its constitutional mandate.[109] Civil society organizations have continuously highlighted this issue, and Argentina has received and accepted dozens of recommendations to elect the Ombudsperson during the most recent cycle of the UN Universal Periodic Review.[110]

The Congress's persistent failure to reach the two-thirds majority required in both chambers to elect a new Ombudsperson makes clear that responsibility lies with both the ruling majority and the opposition. In the meantime, the Ombudsman's Office continues to exist formally but with severely constrained legitimacy, rendering it unable to address highly sensitive cases or to fulfil its full constitutional mandate. The case of Argentina indicates the importance of well-defined transitional leadership provisions in the NHRI

[107]See Langtry & Roberts Lyer (n 49); Glušac (n 65).

[108]These can be non-partisan or partisan, or a combination of the two. When it comes to partisan panels, Khaitan and others differentiate between uni-partisanship, token multi-partisanship, proportional multi-partisanship, balanced multi-partisanship, and weighted multi-partisanship panels. See Khaitan and others (n 4) 2024.

[109]See more in: Universal Periodic Review 2022 of the Human Rights Council, available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=10816&file=EnglishTranslation>.

[110]See: UNHRC, Universal Periodic Review – Argentina, available at <https://www.ohchr.org/en/hr-bodies/upr/ar-index>.

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founding acts. When the heads of NHRIs (but also other fourth-branch institutions) leave the office, either within or outside of the term of office, legislation must ensure that the institution can continue to fully function. Transitional leadership provisions should provide for the continuation of the powers of office in the event of the absence of the mandate holder. Yet, as Kirsten Robers Lyer determined reviewing legislation from 85 countries, there are 'significant and widespread deficiencies in NHRI legislation regarding the temporary exercise of institutional powers during a gap in leadership'.[111] With frequently unspecified timeframes for the replacement of NHRI heads, many countries have experienced vacancies in the office of the ombudsperson (or the chairpersons of human rights commissions),[112] though not to the extreme observed in Argentina.

In some cases, political actors have appointed loyalists to these positions, effectively seeking to control NHRIs. This underscores that legislators recognize the strategic importance of independent offices and exercise considerable caution when selecting and appointing their heads. A truly independent ombudsperson has the potential to hold those in power accountable, sometimes at high political cost. The mentioned investigation conducted by the South African Public Protector into the conduct of the head of state serves as a salient reminder of this dynamic. A comparable instance occurred in the Philippines, where the Office of the Ombudsman provoked the ire of then-President Rodrigo Duterte by investigating allegations of his failure to disclose assets. Unlike in Argentina, where the parliamentary opposition effectively aligned with the ruling majority to block the election of an Ombudsperson, the opposition in the Philippines strongly defended the institution. In 2017, opposition members of Congress filed a resolution pledging support for 'the constitutional independence of the Office of the Ombudsman', emphasizing:

> …the framers of the Constitution intended that these independent bodies be insulated from political pressure to the extent that the absence of independence would result in the impairment of their core functions to shield it from the pressures and influence of officialdom and partisan politics and from fear of external reprisal (Seventeenth Congress of the Philippines).[113]

Duterte targeted not only the Office of the Ombudsman but also the Commission on Human Rights. Upon assuming the presidency in 2016 on a platform centered around a brutal war on drugs, he quickly identified the Commission as a potential obstacle to the extralegal methods he intended to employ and publicly declared that it should be abolished. However, as a constitutionally entrenched entity, the Commission could not be eliminated outright. Duterte therefore turned to his allies in Congress, who proposed an annual 2018 budget of merely 1,000 pesos (approximately 20 US dollars) for the Commission. Coalition members defended this proposal by asserting that the Commission had wasted funds investigating extrajudicial killings of drug suspects, with the House

[111]K Roberts Lyer, 'Change at the Top: The Necessity of Transitional Leadership Provisions in the Laws of Independent State-Based Institutions' (2023) 15 *Journal of Human Rights Practice* 449, 468.

[112]For instance, Romania, Slovenia, Croatia, and Ukraine.

[113]Seventeenth Congress of the Philippines. (2017). Senate resolution 524 expressing the sense of the Senate supporting the constitutional independence of the Office of the Ombudsman, available at <https://legacy.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SRN-524>.

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Speaker arguing that if the Commission aimed 'to protect the rights of criminals', it 'should get their budget from the criminals'.[114]

The proposed budget was initially approved by Congress, but a week later, it was reversed following a robust pressure campaign led by both international actors, such as GANHRI, and domestic stakeholders, including 'thousands of citizens [who] called, emailed, tweeted, [and] messaged their representatives asking for an explanation'.[115] Ultimately, the Commission received a budget allocation of approximately $13 million, a reduction of around 10 per cent compared to 2017.[116]

These examples illustrate how other branches of government can both threaten and defend the independence of NHRIs, underscoring the importance of a robust system of checks and balances. The dynamic relationship between NHRIs and the traditional branches also highlights the distinction between de jure and de facto independence. While the independence of NHRIs may be challenged externally, in other cases, it is the deliberate choice of the institution itself to curtail its mandate. When confronted with governmental pressure, NHRIs may resist and maintain their role as critical, objective watchdogs. Conversely, if they align with the executive, risking credibility and reputation, they may become effectively captured. In such instances, NHRIs that act as the voice of the executive on human rights, rather than providing independent scrutiny of executive actions, constitute a threat to democracy.

Full capture is rare. More often, NHRIs selectively prioritize issues, ignoring key governmental human rights violations while concentrating on less contentious matters to preserve the appearance of thoroughness and independence. In such circumstances, the institution fails to fulfil its constitutional promise, effectively '[…] commit[ting] suicide to avoid being assassinated. The result is the same. She is dead'.[117]

To avoid being assassinated, an NHRI requires support not only from the legislature – at least from the opposition – but also from other guarantor institutions and horizontal accountability bodies, as well as from actors of diagonal accountability, such as the media, academia and civil society, to use O'Donnell's terminology.[118] NHRIs are also accountable to these actors, though in ways distinct from their formal reporting duties.

Legally, NHRIs are accountable to the legislature, to which they routinely report.[119] This constitutes a form of political accountability, as members of parliament are elected politicians whose oversight reflects partisan as well as public interests. Given the pervasive influence of party politics within both the legislative and executive branches, distrust is widespread both internally and in the institutions' relations with society. It is therefore essential to 'facilitate that accountability, while ensuring the independence of guarantors from the ruling party/coalition'.[120] The state must guarantee that at least some of its core

[114]M Mogato, Philippine Congress backs annual budget of just $20 for agency probing drugs war, Reuters (12 September 2017), available at <https://www.reuters.com/article/world/philippine-congress-backs-annual-budget-of-just-20-for-agency-probing-drugs-war-idUSKCN1BN1IB/>.

[115]A Parrocha, Restoration of CHR budget is "people's win", *Philippine News Agency* (21 September 2017), available at <https://www.pna.gov.ph/articles/1010258>.

[116]Mogato (n 115).

[117]This is the quote from Cecilia Sosa, the President of the Venezuelan Supreme Court, expressing her discontent with the Judiciary's passive stance toward the Constituent National Assembly's measures. See: JJ Aznárez, La presidenta del Supremo venezolano dimite y da por enterrado el Estado de derecho, El País (25 August 1999), available at <https://elpais.com/diario/1999/08/25/internacional/935532004_850215.html>.

[118]O'Donnell (n 78).

[119]This is a standard across the jurisdictions.

[120]Khaitan (n 21) 2025 619.

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functions are executed with trust and confidence, guided by technical rather than political criteria. In this context, politicians have sought to create independent institutions as 'islands of trust', as Serna de la Garza terms them.[121]

This principle has direct implications for the selection and protection of NHRI leadership. Mandate holders of NHRIs and other fourth-branch institutions must not be appointed through partisan networks; they require safeguards from political interference. Such protection is achieved through a combination of legal and institutional mechanisms, including the requirement of a qualified parliamentary majority for appointments, statutory immunities and guarantees of institutional, operational and financial independence.

Being protected from party politics does not imply insulation from high politics. As constitutionally entrenched bodies endowed with a broad repertoire of capacities, fourth-branch institutions – including NHRIs – often act *ex officio* and are explicitly designed to intervene in high politics. At the same time, they must be equipped to withstand partisan pressures.[122] Ideally, fourth-branch institutions should operate 'above party politics';[123] yet, as Tushnet further emphasizes, achieving this in practice requires 'operating at a sufficient height to transcend party politics systematically',[124] a task that is notoriously difficult. This dual imperative underscores their unique position as an intermediary: politically independent, yet inherently intertwined with high politics, embodied in the legislative and executive branches.

NHRIs also maintain a distinctive relationship with the judiciary, the third traditional branch of government. The intensity and form of this interaction vary across constitutional contexts. Where NHRIs are vested with standing to challenge the constitutionality of national legislation – most commonly in the case of human rights ombuds institutions – they routinely engage with supreme courts, particularly in systems where these courts exercise constitutional review. In addition, where NHRIs are empowered to initiate litigation or to participate in judicial proceedings through *amicus curiae* or analogous mechanisms, they also interact with lower courts.

Some ombuds institutions are vested with authority to oversee aspects of judicial administration, while in other jurisdictions the judiciary is empowered to oversee ombuds institutions (and/or other NHRIs) through judicial review. As Khaitan observes, there is 'little reason why guarantor institutions should be exempt' from judicial review.[125] Whether and how judicial review applies to the work of an ombuds institution, however, depends largely on the legal tradition in question.

In civil law systems, the non-binding legal character of ombuds recommendations has traditionally justified their insulation from review by other state organs, including apex courts.[126] By contrast, in the United Kingdom and other Commonwealth jurisdictions operating within a common law tradition – such as Australia and Canada – the acts and decisions of ombuds institutions are subject to judicial review, both at the instance of

[121]José Ma. Serna de la Garza, 'Mexico's National Commission on Human Rights: An Autonomous Constitutional Agency with Too Much Autonomy?' in D Bilchitz & D Landau (eds), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar, 2018) 236, 242.

[122]Tushnet (n 21) 2021 14–15.

[123]Tushnet (n 21) 2021.

[124]Tushnet (n 21) 2021 174.

[125]Khaitan (n 21) 619.

[126]Kucsko-Stadlmayer (n 44).

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complainants and of public bodies that are parties to the complaint.[127] It bears emphasis that judicial review of ombuds' decisions does not constitute an appeal on the merits; where available, it is exercised sparingly and has a consistently low success rate.[128]

Beyond the legislature and the judiciary, NHRIs are also accountable to other fourth-branch institutions. If accountability to the legislature is predominantly political, and accountability to the judiciary primarily legal, accountability vis-à-vis other fourth-branch institutions occupies an intermediate position, combining elements of both.

By way of example, like any other state-funded authority, NHRIs should be subject to oversight by the supreme audit institution. At the same time, to safeguard their independence, the Venice Principles stipulate that financial audits 'shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate'.[129] Similarly, the heads of NHRIs are ordinarily required to submit asset declarations to anti-corruption bodies, which should also be competent to investigate allegations of corruption against them. In addition, NHRIs may fall under the jurisdiction of information commissioners or equivalent authorities where they fail to provide access to information of public importance.

Importantly, these accountability relationships are reciprocal rather than unidirectional. NHRIs may themselves exercise oversight over other fourth-branch institutions, including by investigating complaints of maladministration or human rights violations committed by independent authorities.[130] However, the relationship between fourth-branch institutions goes well beyond horizontal accountability, as they can interact, collaborate and reinforce each other. For instance, the Kenyan Commission on Administrative Justice works closely with the country's Independent Policing Oversight Authority to investigate complaints against the police. In Serbia, the NHRI (Ombudsman; Protector of Citizens) and an independent body for public information (The Commissioner for Information of Public Importance and Personal Data Protection) joined forces and successfully challenged the constitutionality of several laws allowing for the access to metadata on communication without a court order.[131] In Bosnia and Herzegovina, two fourth-branch institutions went further to establish a hierarchy of responsibility and codifying inter-institutional collaboration, by stipulating the division of work between the Parliamentary Military Commissioner and the Ombudsman for Human Rights, when it comes to complaints regarding human rights of the armed forces personnel.[132] While the Bosnian case demonstrates how the relationship between the two fourth-branch institutions can be regulated, Samararatne's work on constitutional councils in Nepal and Sri Lanka shows how the existence of centralized umbrella body for guarantor institutions

[127]T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011).

[128]Where courts have intervened through judicial review, research indicates that they have shaped and legitimized the role of ombuds institutions within the common law constitutional framework. See, R Kirkham and A Stuhmcke, 'The common law theory and practice of the ombudsman/judiciary relationship' (2020) 49 *Common Law World Review* 56–74.

[129]Venice Commission (n 95) para 21.

[130]Of course, in some jurisdictions, NHRIs cannot oversee all other fourth-branch institutions. For instance, in South Africa.

[131]See more at <https://ombudsman.rs/index.php/zakonske-i-druge-inicijative/1151-2010-11-10-11-51-34>.

[132]Parliamentary Military Commissioner of Bosnia and Herzegovina, 'Smjernice o osnovama saradnje parlamentarnog vojnog povjerenika BiH s Institucijom ombudsmena za ljudska prava BiH' [Guidelines on the basics of cooperation between the Parliamentary Military Commissioner of BiH and the Institution of the Ombudsman for Human Rights of BiH], No. 01,02–34-6-1429/09, 24 December 2009.

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can create a more structured relationship between all fourth-branch institutions, by helping to demarcate overlapping mandates, streamline their administration by unifying the procedures, and provide cover and protection against risks of politicization, abuse of power and state capture.[133]

Taken together, this dense web of horizontal interactions among constitutionally entrenched bodies exemplifies what Tushnet describes as the need to 'strike a balance between independence and accountability'.[134] Because this equilibrium is inherently fragile, sustaining it requires a high degree of democratic commitment to constitutional design and institutional self-restraint.

Conclusion

This article sought to show that NHRIs deserve to be part of the fourth branch conversation. It did so by focusing on three important markers of the fourth branch status: independence and expertise; capacity to promote and protect values that underpin a constitutional democracy and their formal, legal relationship with the other branches of government.

This research identified two critical functions that may serve as the ultimate benchmark of NHRIs' candidacy for fourth-branch institutions: (1) to determine breach and (2) to interpret and contextualize the (constitutional) norm. I argued that these two functions should be taken cumulatively, showcasing the combination of expressive and material capacities. The discussion on these functions helped clarify which exact (types of) NHRIs have the potential to be included under the fourth-branch umbrella. NHRIs share this with some other fourth-branch institutions, such as anti-corruption agencies and judicial councils, which come in various shapes, not necessarily even with the same main functions,[135] and with quite different compositions.[136]

By exploring the comparative constitutional landscape, the article demonstrated that NHRIs are double constitutionalized in many countries, meaning they are both constitutionally entrenched and guardians of constitutional norms. Their central task – protecting and promoting human rights and/or the set of rights subsumed by 'good administration' – should not be negotiable through the normal political process,[137] meaning there should be a shared acceptance that human rights should be protected whoever forms the current political majority.[138] To that end, NHRIs inhabit a liminal constitutional space: formally detached from party politics but inevitably shaped by political dynamics. Their effectiveness relies on credibility across both state institutions and the public, illustrating the potential to create 'islands of trust' in polarized systems.

Constitutional design alone does not guarantee effectiveness. De jure independence often coexists with de facto vulnerabilities. Cases from Argentina, South Africa and the Philippines show how political interference in appointments, budgetary control or leadership vacancies can undermine legitimacy and capacity. Legal frameworks and

[133]Samararatne (n 6).

[134]Tushnet (n 21) 2019 447, 454.

[135]As with ACAs. See, F De Vrieze and L Glušac, 'Parliament's Interaction with Anti-Corruption Agencies: It Is Your Own Device, Make it Powerful,' in J Pozsgai-Alvarez and R Bratu (eds), *The Routledge Handbook of Anti-Corruption Research and Practice* (Routledge, 2025) 32–44.

[136]As with judicial councils. See Kosař, Šipulová and Kadlec (n 7).

[137]Khaitan (n 5).

[138]Kosař, Šipulová and Kadlec (n 7) 89.

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international accreditation, while symbolically important, cannot ensure independence in adverse political contexts. The ability of NHRIs to deliver on their mandate depends on the interplay between law, politics and societal engagement.

Although drawing on real-life examples, this article has been primarily conceptual, refining the constitutional understanding of NHRIs rather than offering a comprehensive empirical assessment. Illustrative case studies were used selectively, and sociological or organizational factors, such as bureaucratic culture, received less attention.

Future research could extend these insights. Large-N studies in this field have begun to appear, bringing novel and thought-provoking findings.[139] While these studies paint with a broad brush, further research in this direction may offer a more calibrated approach, taking into account both Big-C and small-c constitutionalism.[140] That said, large-N studies inevitably overlook important details and nuances that may be crucial for understanding individual cases, which calls for small-N research as well, such as studies testing the link between de jure safeguards and de facto independence. Although there has been some exciting research focusing on particular NHRIs from the fourth-branch perspective, as in Malawi and Mexico,[141] these could be expanded to more countries. Furthermore, longitudinal studies could explore the role of robust NHRIs in sustaining democratic resilience amid populist or authoritarian pressures. Finally, attention to transnational accountability mechanisms, such as GANHRI peer review, could clarify their impact on domestic practice. By pursuing these avenues, future scholarship can strengthen the theoretical and empirical foundations of the fourth-branch paradigm and illuminate the evolving role of NHRIs as guarantors of both human rights and democratic governance.

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[139]See, for instance: J Gutmann and S Voigt, 'Fourth Branch Agencies: A Silver Bullet for Making Government Accountable?' ILE Working Paper Series, No. 88 (University of Hamburg, Institute of Law and Economics, 2025).

[140]Contrary to Big-C, what is considered part of a country's small-c constitution is not as straightforward, because the same norm (including formal institutions) can be defined in other constitutional sources, such as organic laws or international treaties, and the relative importance of judicial decisions varies from country to country. As argued by Hirschl, this necessitates rich linguistic skills and jurisdiction-specific acquaintance with small-c constitutionalism–the de facto, on-the-ground practice, meaning and power of constitutional law, constitutional ideals and constitutional norms in a given polity, in addition to acquaintance with that polity's Big-C constitutionalism, namely the formal, de jure or textual elements of the constitutional domain. See R Hirschl, 'Comparative Methodologies,' in R Masterman and R Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019) 11, 36.

[141]See: Bilchitz and Landau (n 12).

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