The global diffusion of National Human Rights Institutions and their political impact in Latin America

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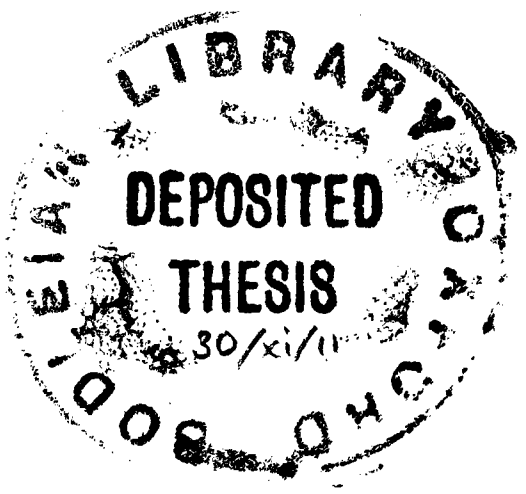

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Abstract

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In this thesis, two questions are analysed: (1) why have National Human Rights Institutions (NHRIs) become so widely disseminated among contemporary states? And, (2) what explains the variable institutionalisation of NHRIs once activated? The thesis first traces the diffusion of NHRIs across political regimes in general, with particular attention to unstable democratic regimes. It argues that NHRI creation can be attributed to three principal diffusion mechanisms: coercion, acculturation, and persuasion. These three explanatory models, however, lack precision. Linking each mechanism to recent processes of diffusion in Latin America, the analysis identifies how the diffusion of an Iberian variant to the generic NHRI category – the Defensoría del Pueblo – corresponds to three intermediate categories: compulsion, material inducement and framing of ideas. The initial political circumstance of Defensoría creation in Latin America, in turn, has significant implications for their institutionalisation.

A domestic level of analysis is necessary to explain the institutionalisation of Defensorías operating in the democratic regimes of Latin America. The standard explanation correlates performance with structural form. While this thesis recognises the development of formal design principles is important in explaining institutionalisation, it adds a major qualification. It shows that the informal dimension of Defensorías' relations with organised state and social actors and rules of access across accountability arenas is often decisive. A typological framework is generated to assess the impact of these two dimensions on Defensorías when formal rules are enforced in a variable manner and tend to lack stability over time. This comparative analysis highlights the accountability gap which these institutions attempt, importantly, to address. By explaining how Defensorías actually work, including when and why they matter, this thesis goes beyond narrow institutionalism as suggested by the political accountability literature.

Dedicated to the memory of my Grandfather,
Ernest Gutman

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List of Abbreviations

Title	Abbreviation
Andean Council of Defensorías del Pueblo	CADP
APRA Alianza Popular Revolucionaria Americana (American Revolutionary Popular Alliance)	APRA
Anticoncepción Quirúrgica Voluntaria (enforced 'Voluntary' Anti-contraceptive Surgery – Peru)	AQV
Asociación pro derechos humanos (Pro Human Rights Association – Peruvian NGO)	APRODEH
Asia Pacific Forum	APF
Central American Council of Procuradurías of Human Rights	CCPDH
Nacional de Derechos Humanos de Perú (Peruvian National Coordinator for Human Rights)	CNDH
Commission for the Consolidation of Peace	COPAZ
Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights	ICCNI
Comision de Tarifas de Energia (Peruvian electricity tariffs regulador)	CTE
Dirección Contra el Terrorismo (Peruvian Counter-Terrorist Directorate)	DIRCOTE
Economic and Social Commission for Asia and the Pacific	ESCAP
European Union	EU
Human Rights Council	HRC
Human Rights Watch	HRW
Iberoamerican Centre for Cooperation with Development	CICODE
Ibero-American Federation of Ombudsman	FIO
Instituto de Defensa Legal (Legal Defence Institute – Peruvian NGO)	IDL
Inter-American Court of Human Rights	IACHR
Inter-American Institute for Human Rights	IIDH
International Financial Institutions	IFI
International Governmental Organisation	IGO
International human rights law	IHRL
International Monetary Fund	IMF
International Non-Governmental Organisation	INGO

International Ombudsman Institute	IOI
Jurado Nacional de Elección (Peruvian National Elections Jury)	JNE
Latin American Institute of Ombudsmen	ILO
Ministerio de Economía y Finanzas (Peruvian Ministry of Economy)	MEF
Ministerio Público de la Nación (Peruvian Public Prosecutors Service)	MPN
National Commission of Reconciliation	CNR
National Human Rights Institutions	NHRI
National Preventive Mechanism	NPM
Network of African National Human Rights Institutions	NANHRI
Non-Governmental Organisation	NGO
Office of the High Commissioner for Human Rights	OHCHR
Optional Protocol to the Convention Against Torture	OPCAT
Organisation for Security and Co-operation in Europe	OSCE
Organization of American States	OAS
Organismo Supervisor de Inversión Privada (Peruvian telecommunications regulador)	OSIPTEL
Registro Nacional de Identificación y Estado Civil (Peruvian National Register of Identification)	RENIEC
Spanish Agency for International Cooperation and Development	AECID
Truth and Reconciliation Commission	TRC
UN Refugee Agency	UNHCR
United Nations	UN
United Nations Development Program	UNDP
United Nations Economic and Social Council	ECOSOC
United States Agency for International Development	USAID
Universal Periodic Review (under the Human Rights Council)	UPR
World Bank	WB

Chapter 1: Introduction

'Between the Idea and the Reality...Falls the Shadow'.
T. S. Eliot[1]

This is an indepth study of the origins and subsequent institutionalisation of National Human Rights Institutions (NHRIs) in Latin America. NHRIs are bodies created by government and specifically empowered to protect and promote human rights.[2] This analysis illustrates how their rapid diffusion beyond liberal Western democracies constitutes an important, and overlooked, example of global norm diffusion to the local level. Often created under adverse political conditions, the analysis further demonstrates the variable institutionalisation of the Iberian variant of the NHRI – the Defensoría del Pueblo – and its distinctive political accountability function as a potential bridge between state and society.[3] More specifically, relying on extensive primary material, including interviews with key participants, the analysis disaggregates the formal and informal dimensions that shape NHRI institutionalisation within Latin America.

The thesis contributes to existing knowledge in three core areas of institutional and political inquiry. First, the analysis identifies the relationship between social mechanisms of diffusion and instances of NHRI creation by states, highlighting distinct but inter-related behavioural modes of influence based on instrumental and normative rationales. In

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[1] T. S. Eliot, *The Hollow Men*, (Collected Poems 101, (1936) [1925]).
[2] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN Human Rights Commission, Res. 1992/54, 3 March 1992 and the UN General Assembly, Res. 48/134, 20 December 1993.
[3] This thesis uses the generic Spanish title Defensoría del Pueblo ('Citizens Defender'), or Defensoría for short, to refer to NHRIs in Latin America and Defensor or Defensora to refer to the office-holder. Other titles for these entities in the region also include Procuraduría de los Derechos Humanos ('Human Rights Attorney') and Comision de los Derechos Humanos ('Human Rights Commission').

particular, it is shown that processes of norm diffusion are not amenable to discrete categorisation but rather display both coercive and persuasive dimensions in what this thesis broadly terms intermediate categories of diffusion. Analysis of NHRI diffusion in Latin America substantiates the dynamic and complex mediation of norms to diverse local contexts as well as reflects on the implications of incomplete institutionalised outcomes for future institutional development.

Second, the study adopts a distinct understanding of institutionalisation, one that incorporates not only formal design principles but also the ability of informal rules, norms and practices to decisively shape behaviour and outcomes. Informal factors of institutional development merit greater attention. By specifying specific linkages that exist between formal design and informal practices this thesis does not subscribe to the often implicit predictive assumptions that treat institutional structures as instrumentally autonomous from social conditions. More specifically, the analytical framework developed for evaluating the development of NHRIs in Latin America's democratic regimes focuses on three interrelated, but distinct, features of institutionalisation: formal design principles, relations with organised state and social actors, and rules of access across institutional arenas.

Third, despite their prominence in political systems throughout Latin America, political and institutional scholarship has largely neglected NHRIs as a subject of analysis. A principal objective of this thesis is to address such theoretical and empirical deficits, exposing limitations in conventional approaches toward understanding the political accountability function of an institution that generally lacks coercive faculties. Through case study

analysis, what emerges is a highly contextualised picture of an institution capable of bridging an often problematic state-society divide characterised by the failure of democratic regimes to meet social needs and demands. The analysis substantiates the dynamic nature of institutionalisation driven primarily not by formal design prerogatives but rather by deeper structures of political accountability and the failure of formal institutional frameworks in Latin America to address crucial and persistent 'accountability gaps' between democratic promise and the lived experience.

The first section of the introduction provides an overview of the key theoretical points of departure for the thesis. The second section builds upon this discussion by laying out the analytical approach that will guide the study's application of the theory. Finally, the central thrust of the thesis is outlined.

1.1. Diffusion-as-process and outcome

Recent years have witnessed the movement of diffusion scholarship from the periphery to the centre of disciplinary and thematic debates, ranging from democratisation, economic reform and regulation.[4] This has been mirrored in the acceleration of universal norms across national boundaries, especially in relation to political democracy, human rights and regulatory practices.[5] In contrast to earlier work on norm emulation, for instance on transitions to democracy, which emphasised domestic causal mechanisms, diffusion

[4] See B. Simmons et al., *The Global Diffusion of Markets and Democracy*, (Cambridge: Cambridge University Press, 2008).
[5] See A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, (Oxford: Oxford University Press, 2007).

scholarship, importantly, acknowledges the influence of external agency in domestic processes of regime change.[6] Scholars from a variety of disciplines have contributed to developing claims around the international dissemination of norms. Following Strang's popular definition, diffusion can be defined as a process where 'prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters'.[7]

This definition, however, provides little indication of the *processes* that underpin norm diffusion. Additional work, primarily in international relations and law, but also in comparative politics,[8] has sought to supplement empirical claims with analytical frameworks that focus on the processes by which states are influenced by law (and norms). According to Andrew Moravcsik, scholarship on human rights norms has focused, with few exceptions, on two modes of interstate interaction: coercion and normative persuasion.[9] Working within predominantly rationalist and constructivist traditions, this generation of scholarship has produced important advances for diffusion analysis, both in terms of conceptual clarity and empirical support.[10]

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[6] L. Whitehead, 'International aspects of democratization', in Guillermo O'Donnell, Phillippe Schmitter, and Laurence Whitehead (eds.), *Transitions from Authoritarian Rule: Comparative Perspectives*, (Baltimore: Johns Hopkins University Press, 1986), pp. 3-46.

[7] David Strang, 'Adding social structure to diffusion models: An event history framework', *Sociological Methods and Research*, vol. 19, no. 3, February 1991, p. 325.

[8] In work on the international dimensions of democratisation, emphasis is placed on repeating clusters and sequences within and across regions and the presence of what Whitehead terms 'neutral transmission mechanisms,' such as accelerating flows of information especially within regional contexts. See L. Whitehead (ed.), *The International Dimensions of Democratization*, (Oxford: Oxford University Press, 2001), p. 22.

[9] Andrew Moravcsik, 'The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organizations*, vol. 54, no. 2, Spring 2000, p. 220.

[10] For representative examples see: Jack L. Goldsmith and Eric A. Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', *The Journal of Legal Studies*, vol. 106, January 2002, pp. 115-139;
Harold H. Koh, 'Why Do Nations Obey International Law?', *Yale Law Journal*, vol. 106, 1997, p. 2599.

However, the binary division found in this literature is not exhaustive and, significantly, tends to under-specify the potential for overlap, tensions and complementarities across instrumental and normative diffusion-regimes. Whereas a coercion-based logic often neglects the influence of broader normative dynamics upon states within regional and international social systems, persuasion-based models tend to underplay the coercive and regulative dimensions of norms. Such discrete bifurcation of diffusion regimes may provide certain parsimonious benefits for theory-building. However, arguably, such an approach is less appropriate to the empirical task of explaining why norms diffuse and how different drivers of diffusion lead to states creating certain policies and formal organisations while ignoring others. This has led scholars to begin to explore the 'micro-processes' of diffusion and the potential for simultaneous interaction across causal logics.[11]

An important contribution in this regard is the category of acculturation, with its emphasis on 'the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture'.[12] This approach challenges the conventional division of diffusion-based regimes and instead focuses on a diffusion mechanism that falls somewhere in between the two extremes of coercion and persuasion – containing what Goodman and Jinks term micro-processes including orthodoxy, mimicry, identification, and status maximization.[13] Some brief reflection is necessary here. If, in principle, the presence or absence of an enabling surrounding culture varies then certain norms are more or less likely to diffuse widely. This reality provides a necessary corrective to any notion of an inevitable

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[11] David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', *Annals of the American Academy of Political and Social Science*, vol. 598, March 2005, pp. 12-32.
[12] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law', *Duke Law Journal*, vol. 54, no. 3, December 2004, p. 626.
[13] Ibid., p. 638.

'universalist' liberal doctrine. For the purposes of this thesis, the key question that arises is: under what conditions does acculturation operate powerfully? In particular, how does it operate across institutional cultures in Latin America? Acculturation is, therefore, considered a useful point of departure. However, as will be developed, more fine-grained intermediary categories of diffusion such as compulsion, inducement and framing of ideas may better capture processes of diffusion in Latin America that are more or less driven by general cultural processes or, rather, assume a more organised and coordinated character.

Another key issue for the thesis is the relationship between diffusion processes and outcomes. Although analytically distinct, the process of diffusion cannot be de-linked entirely from diffusion outcomes. Scholars that emphasise the de-linking of process from outcome rightly demonstrate that diffusion processes do not necessarily lead to uniform diffusion outcomes. For instance, similar mechanisms of diffusion may both encourage and repel the emulation of norms by states (hegemonic versus counter-hegemonic norms).[14] However, scholars have equated causal logics to particular behavioural outcomes, at least in theory, with coercion leading to compliance, acculturation to conformity and persuasion to acceptance.[15] From this perspective, different diffusion regimes will have different implications for diffusion outcomes, especially in terms of norm durability and depth of compliance at the local level. As they further recognise, coercion or persuasion-based diffusion regimes rarely, if ever, lead to 'full institutionalisation' due to a range of structural obstacles.[16] This is particularly true of variably formal human rights norms which, in

[14] Zach Elkins and Beth Simmons, 'On Waves, Clusters, and Diffusion: A Conceptual Framework', *Annals of the American Academy of Political and Social Science*, no. 598, March 2005, p. 33-52.
[15] Goodman and Jinks, 'How to Influence States', pp. 621-703.
[16] *Ibid*, p. 702.

contrast to other normative frameworks, seek to regulate essentially domestic activities and are 'not generally enforced by interstate action'.[17]

The literature provides a general indication of structural obstacles, including density of international interactions, the degree to which relevant states share important cultural characteristics, and the distribution of military and economic power.[18] Focusing in particular on Latin America, it is important to acknowledge that informal practices and weak enforcement of formal rules is not a secondary feature of the institutional landscape. Rather, they define, to varying degrees, all aspects of the social system. Attention to this regional context demands attention to the content of the diffusing norms and acculturative assimilation of potentially undesirable, but widespread, features of the broader institutional context. Rather than being in tension with acculturation, such local conditions may actually assume primacy over this mechanism and challenge any claim to normative neutrality. In other words, the relevant actors themselves are acculturated into a reality of unstable formal rules and routine norm violations. It follows that under such circumstances, incomplete institutionalisation is the most likely outcome of NHRI diffusion – not only in terms of formal rules but also normative understandings attached to the new organisational form. Intermediate categories of diffusion, with their emphasis on degrees of coercion and persuasion rather than absolutes, therefore provide a useful prior indication of local acceptance or resistance around the norm in question.

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[17] Moravcsik, 'The Origins of International Human Rights Regimes', p. 212.
[18] Goodman and Jinks, 'How to Influence States', p. 701.

To provide a deeper understanding of diffusion outcomes across time and space, this line of inquiry advocates tracing patterns of diffusion and their linkages to particular instances of creation. The degree of acceptance or resistance at point of origin is likely to be replicated in the formal design of the resulting institutional reform. In turn, the degree of compromise at design stage may have significant effects for future development, not least in whether the new structure 'satisfies the prior intentions of those who initiate'.[19] The distinctive profile of human rights norms also poses a challenge to diffusion analyses that advocate a neat demarcation between international and domestic levels of explanation.[20] Furthermore, the transmission of human rights norms does not necessarily occur at the inter-state level. Indeed, scholars are increasingly focused on the role of domestic politics and non-state actors in leveraging local compliance with international human rights norms.[21] However, this is no longer a question of diffusion, but rather institutionalisation at the domestic level.

1.2. Perspectives on institutional change

Research on institutions has a long pedigree. However, for the purposes of this study, institutional analysis has experienced a significant resurgence since the 1980s with the rise of 'new institutionalism' and the assertion of the autonomous role of institutions in shaping the logic and outcome of political processes.[22] Following Hall and Taylor's seminal review, this new school of analysis can be divided into three principal theoretical clusters: rational

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[19] James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*, (New York: The Free Press, 1989), p. 65.
[20] Elkins and Simmons, 'On Waves, Clusters, and Diffusion', p. 38.
[21] B. Simmons, *Mobilising for Human Rights*, Cambridge: Cambridge University Press, 2009).
[22] James G. March and Johan P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life', *American Political Science Review*, vol. 78, September 1984, pp. 734-749.

choice, historical and sociological institutionalism.[23] Without entering into expansive discussion, all frames consider institutions as the primary mechanism of political power but each rest on distinct theoretical foundations, be it efficiency-based, power-based, or cultural, and entail different analytical and empirical assumptions. Work in the field has variably emphasised the coercive, normative or mimetic 'effects' of institutions in constraining and structuring actor behaviour. Furthermore, in aggregating interests, institutions have tended to be viewed as solutions to collective action problems, sustaining equilibriums amidst diverse interests and antagonisms.[24]

Despite important contributions to the understanding of how institutions can influence norms, beliefs and actions, and therefore affect outcomes, the unity, coherence and independence of formal structures have often been overstated to the detriment of questions of agency, distributional effects, and the conflictive nature of institutional development.[25] As an early important corrective to this drift, DiMaggio proposed a re-centring of institutional analysis toward questions of agency and interests, with a focus not on structural outcomes but rather the process of institutionalisation to show:

> ...that institutionalisation is a product of the political efforts of actors to accomplish their ends and that the success of an institutionalisation project and the form that the resulting

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[23] Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms', *Political Studies*, vol. 44, no. 5, 936-957.

[24] See, for example, W. W. Powell and P. J. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis*, (Chicago: University of Chicago, 1991).

[25] Richard W. Scott, 'Approaching adulthood: the maturing of institutional theory', *Theory and Society*, vol. 37, no. 5, October 2008, p. 431.

> institutions takes depend on the relative power of the actors who support, oppose, or otherwise strive to influence it.[26]

This re-framing by DiMaggio undergirds some of the most important recent advances in new institutionalism, particularly within the historical frame, toward analysing not only the impact of institutions upon individuals, but also the interaction between institutions and individuals, and the importance of broader institutional frameworks and historical context.[27] In recent years, formal structures have been usefully re-conceptualized as processes, whereby 'structures only exist if and to the extent they are continually produced and reproduced'.[28] This perspective emphasises the 'double life' of institutions, viewed as both social 'products' as well as social 'forces' in their own right.[29] It also raises the probability that processes of institutionalisation may equally give rise to deinstitutionalisation or reinstitutionalisation moving the focus away from questions of equilibrated order to new actors, agency and transformation.[30] Such insights draw attention to the likelihood of outcomes in Latin America to be regulated by informal mechanisms in a loose institutional framework.

The 'double life' of institutions is apparent in the role of informal institutions and wider institutional orders in structuring behaviour, overlaying, and supplementing, formal rules.

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[26] Paul J. DiMaggio. 'Interest and Agency in Institutional Theory', in Lynne G. Zucker (ed.), *Institutional Patterns and Organizations: Culture and Environment* (Cambridge: Ballinger, 1988), p. 13. (pp. 3-21). Cited in Scott, 'Approaching adulthood', p. 431.
[27] Kathleen Thelen, 'Historical Institutionalism and Comparative Politics', Annual Review of Political Science, vol. 2, 1999, pp. 369-404.
[28] Scott, 'Approaching adulthood', p. 438.
[29] Robert Grafstein, 'The Problem of Institutional Constraint', *The Journal of Politics*, vol. 50, no. 3, August 1988, pp. 577-578.
[30] Robert C. Lieberman, 'Ideas, Institutions, and Political Order: Explaining Political Change', *American Political Science Review*, vol. 96, no. 4, December 2002, pp. 697-712.

Sociological and historical institutionalists have incorporated informal institutions, conceived as cognition, shared beliefs, norms and conventions, into the core of their analysis.[31] Similarly, rational choice institutionalists, although less concerned about constraining social norms and values, have increasingly drawn on the role of informal rules, culture and even endogenously produced preferences to account for continuity and change.[32] Informal rules are by their nature difficult to observe and measure. However, despite persisting epistemological differences, it is widely held that their existence and effects on social phenomena necessitate careful attention. Building upon this discussion, Rueschemeyer provides a useful concept of institutions that combines a reasonably narrow definition focused on norms but with ample scope for propositions: 'Institutions are clusters of norms with strong but variable mechanisms of support and enforcement that regulate and sustain an important area of social life'.[33]

Rueschemeyer's emphasis on mechanisms of norm support and enforcement as a variable echoes DiMaggio on institutionalisation and speaks to a central concern of this dissertation: how to account for institutional change? All three schools of new institutionalism struggle to account for change due to an emphasis on stability and endurance being more or less explicitly built into their explanatory models, and encapsulated in heuristic concepts such as 'path dependency'.[34] This has led, overall, to an emphasis on large-scale exogenous shocks

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[31] See Roger Friedland and Robert R. Alford, 'Bringing society back in: symbols, practices, and institutional contradictions', in Powell and DiMaggio, *The New Institutionalism in Organizational Analysis*, pp. 232-263.
[32] See D. North, *Institutional Change, and Economic Performance*, (Cambridge: Cambridge University Press, 1990); also, I. Katznelson and B. Weingast (eds.), *Preferences and Situations: Points of Contact between Historical and Rational Choice Institutionalisms*, (New York: Russell Sage Foundation, 2005).
[33] D. Rueschemeyer, *Usable Theory: Analytical Tools for Social and Political Research*, (NJ: Princeton University Press, 2009), p. 210.
[34] P. Pierson, *Politics in Time: History, Institutions, and Social Analysis*, (NJ: Princeton University Press, 2004). The causal process in Pierson's framework involves the 'locking-in' of policies or other arrangements

or shifts to account for change, with few clues as to how or why endogenous change might occur. Despite similar proclivities, historical institutionalism, with its focus on legacies of historical contest as opposed to efficiency or cultural scripts, has begun to make incipient, but important, inroads into questions of endogenous change by 'conceiving of institutions, above all else, as *distributional instruments* laden with power implications'.[35]

Recognising that the interaction between formal properties of institutions and their institutional contexts is crucial in explaining change has important implications for the study of formal and informal institutional development. As Rueschemeyer notes, 'institutions create power advantages and disadvantages, and they reproduce patterns of power over time'.[36] Such distributional effects provide a locus for dynamic change, their function shaped, in part, by the properties of the institutions themselves. From a formalist perspective, the common analytical division between institutional design and institutional change becomes less obvious. Rather, as Thelen remarks, 'institutional design matters for change because it determines the content of the rules themselves'.[37] In addition to Pierson's treatment of obstacles to *successful design*,[38] a focus on the specific content of rules, the degree to which they shift power resources and, in turn, affect institutional mechanisms of support and enforcement, may valuably elucidate upon an as yet under-specified arena of institutional change.

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through processes of learning, the coordination of political actions, and adaptation to new expectations, among others.

[35] James Mahoney and Kathleen Thelen, 'How Historical Institutionalists Explain Change', presented at *Democratisation Seminar*, Nuffield College, University of Oxford, 25 April 2008, p. 9.

[36] Rueschemeyer, *Usable Theory*', p. 224.

[37] Mahoney and Thelen, 'How Historical Institutionalists Explain Change', p. 38.

[38] Pierson identifies a myriad of obstacles that confront successful design including heterogeneous coalitions, non-instrumental orientations, short planning horizons, limited foresight, adverse developments in the social environment and generational turnover. See Pierson, *Politics in Time*.

A focus on balance of power and distributional effects also 'has the desirable effect of focusing attention on the various actors involved in institutional development'.[39] Thus, this approach provides an analytical window onto the informal dynamics of institutionalisation, identifying relational patterns of interaction across formal and informal institutional arenas, driven by cooperation and conflict. How do new institutions occupy institutional space and effect, enable, displace or undermine other actors and processes? A focus on power also highlights the relative power of the winners ('supporters' and 'enforcers') of institutional innovation versus the losers ('detractors' and 'evaders'). Orren and Skowronek argue that historical institutionalism 'brings questions of timing and temporality in politics to the centre of how institutions matter'.[40] A focus on the institution's ongoing distributional effects and the impact of feedback loops – coalition formation, pushback or backlash – brings this assertion into stark relief. This is not institutionalisation understood in terms of stable equilibria but rather as instances of stability and rupture, subject to repetition, as actors and processes join together in specific historical circumstances.

1.3. The study of national human rights institutions

Despite a growing profile in international legal and human rights scholarship, cross-fertilization of NHRI research with the social science fields has only just begun. A practitioner-oriented literature forms the bulk of the work on NHRIs, with particular regard

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[39] Rueschemeyer, *Usable Theory*, p. 225.
[40] Karen Orren and Stephen Skowronek, 'Beyond the Iconography of Order: Notes for a "New Institutionalism"', in Lawrence C. Dodd and Calvin Jillson (eds.), *The Dynamics of American Politics: Approaches and Interpretations*, (Boulder: Westview Print Inc., 1994), p. 312.

for questions of NHRI origins, institutional effectiveness and descriptive accounts of NHRI activity.[41] The strength of these works is that they are grounded in the practical imperatives of NHRI activity. Their anecdotal character and their often uncritical acceptance of various theoretical assumptions are, on the other hand, significant weaknesses. In particular, this literature has generally advocated in general terms, with some outstanding exceptions,[42] that formal design, as prescribed by the UN-endorsed Paris Principles, is a necessary – even if not sufficient – precondition to the effective functioning of these organisations.

Performance-based conceptions of NHRIs are important to the degree to which they offer or approximate objective validation of popular normative claims. However, a reliance on standardised outcomes based on legal form can obscure issues of context and resources that may provide more insight into the activity and social impact of new institutions. Substantive and critical evaluations of NHRIs have been conducted by non-governmental organisations (NGOs), providing a useful contrast to overly formalist descriptive work. Significant, if infrequent, evaluations by transnational and domestic NGOs have appeared on NHRIs in Africa and Asia, as well as individual countries such as Mexico.[43] The best of this work

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[41] Examples include K. Hossain, (ed.), *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*, (Boston: Brill Publishers, 2000); R. Gregory and P. Giddings (eds.), *Righting Wrongs: The Ombudsman in Six Continents*, (Oxford: IOS Press, 2000); B. B. Lindsnaes et al. (eds.), *National Human Rights Institutions: Articles and Working Papers*, (Copenhagen: The Danish Centre for Human Rights, 2001); B. Burdekin with J. Naum, *National Human Rights Institutions in the Asia-Pacific Region*, (The Netherlands: Martinus Nijhoff Publishers, 2007).

[42] Particularly impressive contributions include International Council on Human Rights Policy [ICHRP] (R. Carver), *Performance and Legitimacy: National Human Rights Institutions*, (Versoix: ICHRP, 2000); International Council on Human Rights [ICHRP] (R. Carver), *Assessing the Effectiveness of National Human Rights Institutions*, (Geneva: UNHCR, 2005).

[43] Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, (New York: Human Rights Watch, 2001); Human Rights Watch, *La Comisión Nacional de los Derechos Humanos de México: Una Evaluación Crítica*, Mexico D. F.: Human Rights Watch Americas Division, 2008); The Asian NGOs Network on National Human Rights Institutions, *2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, (Bangkok: Asian Forum for Human Rights and Development, 2009).

rigorously interrogates the sometimes stark disparity between ideal structures and actual performance, suggesting that a partial decoupling of formal design principles and evaluation frames is necessary and desirable. NGOs often use design principles as an advocacy tool to highlight 'compliance gaps' between government obligations and practice.[44] Nevertheless, their work also shows that however well or poorly-designed, NHRIs may strengthen or undermine domestic human rights frameworks, as well as fade into obsolescence.

A growing body of interdisciplinary work on the origins and function of NHRIs has provided macro-level accounts of NHRI activity at the international and regional level. Some of these works focus exclusively on descriptive accounts of NHRI interaction with UN mechanisms while others analyse NHRI activity as part of more general theories of international law, human rights and good governance.[45] NHRIs have gained recognition among legal scholars as a possible missing link in the transmission of international human rights norms and their implementation at the domestic level. Legal scholarship has also, on occasion, incorporated insights from political science to propose a democratic function for NHRIs. As Reif asserts, in fragile democracies, where the judicial system is 'weak, politicised, slow or otherwise incapacitated', NHRIs can play a more important role in enhancing 'the democratisation process'.[46] Despite their contribution to understanding NHRI effectiveness, the work in this category typically adopts the perspective of a single discipline

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[44] Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology*, vol. 110, no. 5, March 2005, p. 1377.
[45] Examples include L. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, (Boston: Martinus Nijhoff Publishers, 2004); A. Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, (Copenhagen: The Danish Institute for Human Rights, 2006); R. Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, (Oxford: Hart Publishing, 2007).
[46] L. Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', *Harvard Human Rights Journal*, vol. 13, Spring 2000, p. 2.

or leave the institution theoretically and conceptually underspecified. Furthermore, NHRI effectiveness is not always sufficiently contextualised with the distinction between the general state of human rights and the actual effects of the institution an important caveat.[47]

Recent additions within the field of political science have begun to inquire into the role of NHRIs in closing the compliance gap.[48] Inquiry into this development has thus far generated significant insights into why and under what conditions human rights institutions are created by states.[49] Relatively little attention, however, has been given to questions of how domestic human rights institutions actually work in practice, and why and when they matter. Despite the significance of these recent contributions, the authors rely primarily on a documentation approach toward NHRIs with little reference to wider disciplinary debates within and across social science and legal scholarship. Important, if scarce, additions to NHRI research have emerged in the field of comparative politics, in particular focused on the Iberian variant to NHRIs, the Defensoría del Pueblo.[50] For instance, Uggla's assertion is instructive: that 'the influence of the ombudsman can hardly be deduced from the formal, legal dispositions regulating the institution. Instead, the strength and autonomy of the institution are generated by a process that is primarily political'.[51] Uggla draws on institutional and political literature

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[47] ICHRP (R. Carver), *Assessing the Effectiveness of National Human Rights Institutions*, p. 10.
[48] S. Cardenas, *Conflict and Compliance State Responses to International Human Rights Pressure*, (Philadelphia: University of Pennsylvania Press, 2007).
[49] J. Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions*, (Stanford: Stanford University Press, 2009).
[50] See Jorge Madrazo Cuéllar, 'El ombudsman criollo', *Academia Mexicana de Derechos Humanos*, 1997); M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, (Boulder: Lynne Rienner, 2002); Michael Dodson and Donald Jackson, 'Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala', *Latin American Politics and Society*, vol. 46, no. 4, 2004, pp. 1-27; Pilar Domingo, 'Weak Courts, Rights and Legal Mobilization in Bolivia', in Roberto Gargarella et al. (eds.), *Courts and social transformation in new democracies: an institutional voice for the poor?* (Burlington: Ashgate, 2006), pp. 233-254.
[51] Fredrik Uggla, 'The Ombudsman in Latin America', *Journal of Latin American Studies*, vol. 36, no. 3, August 2004, p. 448.

to hypothesise a causal mechanism focused on inter-relations within the political system and their effects on NHRI independence and power. The internal mechanics of this 'primarily political' causal mechanism, nevertheless, remain under-specified with an over-focus on formal channels of interaction, such as appointment procedures and budget negotiation.

Although existing literature on NHRIs is minimal, the field of institutional analysis and comparative politics is vast, with issues of democratisation, rule of law and accountability at the forefront of current research efforts. A survey of scholarship that has the potential to generate new and important insights into the institutionalisation of NHRIs at the national level reveals significant areas of related research. In particular, within political accountability, neo-functionalist contributions that emphasise formal enforcement powers and coordination usefully contrast with other accounts that dispute formalist assumptions which de-emphasise questions of power asymmetries and political conflict.[52] An important additional strand of research challenges the common focus on formal rules within mainstream comparative research on political institutions.[53] Similarly, questions concerning alternative modes of accountability – such as social sanctions that may still entail material consequences – have only just begun to be addressed.[54]

Finally, grounding the analysis in compatible and focused theory frames of democratisation and 'vertical' (state-citizen) and 'horizontal' (state checks and balances) political

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[52] Contrast R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, (Basingstoke: Palgrave Macmillan, 2003) with A. Schedler et al. (eds.), *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder: Lynne Rienner, 1999).
[53] Gretchen Helmke and Steven Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda', *Perspectives on Politics*, vol. 2, no. 4, December 2004, pp. 725-740.
[54] E. Peruzzotti and C. Smulovitz (eds.), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*, (Pittsburgh: University of Pittsburgh, 2006).

accountability serves the comparative intent of this thesis, permitting, through appropriate application, closer assessment of the extent to which similar actors, patterns and processes exist within individual cases and across different contexts.[55] Importantly, in contextualising the theory frame of political accountability, the thesis conceives of 'vertical' and 'horizontal' dimensions as variables rather than fixtures of institutional frameworks often characterised more by informal power structures than by formal compliance arrangements. In Latin America, instances of angular framing of relations are rare, with accountability relations more often than not assuming a distinctly irregular, even invertebrate, character. This subject is explored indepth in Chapter 4.

1.4. Analytical approach and logic of the argument

This thesis analyses how the theoretical perspective of norm diffusion can account for the global dissemination of NHRIs, their distribution to a wide range of political systems, and the implications of this initial point of origin for their future institutionalisation in Latin America. The domestic level of explanation, which forms the bulk of the thesis, analyses how theoretical perspectives on institutional analysis on the one hand and political accountability on the other, come together in the cases of Costa Rica, Peru and other NHRIs throughout the democracies of Latin America. The region of Latin America is an especially instructive illustration of the experience of these institutions. Every country in the region, with the exception of Brazil and Chile, has established a NHRI of some description over the

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[55] L. Whitehead, *Democratisation, Theory and Experience*, (Oxford: Oxford University Press, 2002); Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', *Journal of Democracy*, vol. 9, no. 3, 1998, p. 112-126; J. Fox, *Accountability Politics: Power and Voice in Rural Mexico*, (New York: University Oxford Press, 2008).

past 30 years.[56] NHRIs in the region owe their creation to a diverse array of international and domestic drivers, including processes of democratisation, conflict cessation, and modernisation and restructuring of the state. Hence these institutional innovations interact with other actors in democratising contexts displaying variably stable and enforced institutional frameworks but also, importantly, new political openings for domestic accountability actors.

From this perspective, institutional development is informed by the relationships and complex interplay of actors based within and outside of state structures. As NHRIs operate across institutional arenas as a way of effecting change, the linkages, complementarities and tensions that arise from actor interaction is highly significant. More specifically, variability appears at various structural and process levels, with actors' distinct location and relative power within institutional frameworks likely to have a bearing on their ability to enable or constrain one another. Similarly, the form and specific mechanisms of distinct accountability actors will vary greatly within state and social arenas. The study analyses how the interlinkages, reinforcement or tensions between formal design attributes, interrelations, and rules of access shape the ability of NHRIs to fulfil an accountability function and, more broadly, the implications of such processes for understanding the deeper structures of accountability within fluid institutional contexts.

As such, formal design principles are only a part, and not necessarily the most significant part, of the story as to how NHRIs actually work in practice, and why and when they matter. Rather, formal structures are constitutive of an institutionalisation process grounded in

[56] See Chapter 3, pp. 136-143 for discussion of these negative cases in the region.

domestic political processes shaped by complex interdependencies and cause-effect relations. The impact, therefore, of NHRIs is not dispositive. Rather, it is variable and depends upon the complementary or adverse interaction of the institution with other domestic political patterns and processes. More specifically, there are at least two clusters of significant relations, the balance of power within state and societal arenas and the power relations between state and society. Within these arenas, the development of the NHRI is highly sensitive to the nature and character of prevailing institutional frameworks over time and the interest orientation of powerful coalitions.

Comparative research has begun to turn away from issues of formal design to issues of institutional strength and has emphasised the effects of variation in stability and enforcement of formal rules in shaping actors' expectations and behaviour.[57] This literature has suggested that variation within these two dimensions of institutional strength matters, especially for developing theories around institutional analysis that can travel beyond industrialised countries to new democracies. In other words, the strength of formal institutions cannot be taken for granted. Contextual variation, reasonably inferred from the stability and enforcement of formal rules, is likely to impact upon the behaviour and outcomes of activities across state and non-state actors – especially the legal sector – as well as rules of access to institutional arenas that correspond, more or less, to formal and informal practices. This emerging area of research constitutes an important and, as yet, under-developed platform upon which to build better explanations of the factors and conditions that shape the experience of existing organisations.

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[57] See Steven Levitsky and María Murillo, 'Variation in Institutional Strength', *Annual Review of Political Science*, vol. 12, 2009, pp. 115-133.

This thesis addresses this gap by looking at the institutional development of NHRIs in context and the extent to which the behaviour and outcomes of these organisations corresponds to formal and informal dimensions. Toward this end, it identifies within these two dimensions those factors likely to be of causal relevance to institutionalisation. More specifically, the thesis examines through a paired case study the variable development of NHRIs in the contrasting institutional terrains of Costa Rica and Peru. The development of NHRIs is analysed with a view to ascertaining the interplay of political conditions and formal structures. The thesis evaluates how the content of formal rules is conditioned by broader political processes of democratisation, especially unfulfilled social needs and demands. Through a deductive-inductive approach, the comparative analysis also relates the content of NHRI reform to deeper structures of political accountability which exist alongside, but apart from, widely disseminated frameworks of classic rules. The backdrop to the thesis is well captured by O'Donnell's fundamental observation, that the enduring challenge in 'societies marked not only by pervasive poverty but also, and even more decisively for our theme, by deep inequalities, is how to ensure that the weak and poor are at least decently treated by [state] agents'.[58]

1.5. Analytical framework and research questions

This thesis begins by analysing the complex interaction of international and domestic drivers of NHRI diffusion to a wide range of political regimes, especially the democratic regimes of Latin America. While analytically distinct, the study reflects on how such pathways to

[58] O'Donnell, 'Horizontal Accountability in New Democracies', p. 116.

reform and resulting incomplete institutionalised outcomes have a bearing on the future development of NHRIs. At the domestic level, the analysis indentifies and explains how the interplay of formal rules and informal practices impacts upon NHRI institutionalisation. The dynamic character of NHRI institutionalisation is examined as follows. First, the institutional development of NHRIs is comprised of both formal and informal dimensions that can combine to advance a political accountability mandate, as well as potentially reduce tensions between state and society. However, the scale of tension between state and society may be too formidable for the NHRI to navigate, exposing the institution to powerful countervailing feedback effects. As such, the development of the NHRI is guided by a precarious balance between formal rules and informal practices and the nature of this balance differs across different institutional contexts. However, it is always the interaction, rather than a single dimension acting alone, that informs the development of an institution embedded in its social context.

In developing this argument, the thesis concentrates on two key sources of institutional stability and change: first, the exogenous pressures borne of broader institutional settings and captured in historical institutionalism's emphasis on timing, temporality and the contingent assemblage of institutional arrangements and, second, endogenous dynamics of conflict over decision-making within a framework of accountability theory. Three main features of NHRI institutionalisation are examined in this thesis with a view to identifying 'mechanisms and processes [that] play significant parts in quite disparate episodes, but produce varying overall outcomes depending on their sequence, combination, and context'.[59]

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[59] D. McAdam et al., *Dynamics of Contention*, (Cambridge: University of Cambridge Press, 2001), p. 306.

First, the thesis acknowledges the dominant claim in the literature that development of formal design principles is important in explaining the institutionalisation of Defensorías. However, such a claim needs to be nuanced in light of local political and institutional conditions. The implication is that rather than conceiving of formal design as 'locked-in' at origin, careful attention should be paid to temporal stability, as well as rupture, with formal design subject to modification as circumstances change. Pertinent questions include: to what extent might such an analytical approach reframe thinking on fundamental NHRI design problems?

Second, the thesis conceives of the NHRI as a potential point of intersection between state and society. Drawing on Guillermo O'Donnell's focused-theory frame of horizontal accountability, the NHRI's relations with organised state and social actors is analysed along vertical (state-citizen) and horizontal (state checks and balances) dimensions. The experience of the NHRI is shaped by diverse agency, distributional effects, and conflict within at least two clusters of significant relations: the balance of power within state and societal arenas and the power relations between organised actors located within and outside historically highly centralised state structures.

Third, the thesis identifies the formal and informal rules that govern NHRI access to state and social accountability arenas. Lacking enforcement powers, the ability of the NHRI to shape political outcomes irrespective of other potentially significant factors poses a challenge to functionalist approaches that emphasise legal compliance frameworks over questions of power asymmetries and conflict. This thesis demonstrates how the NHRI shifts

power resources through strategic use of its own modes of accountability and external structures of opportunity. Central to the analysis is identifying the rules of access and rationale for NHRI engagement with different arenas of accountability, in particular the legal and non-governmental human rights sector, and the interlinkages, tensions and expectations that emerge as a result.

The formal and informal dimensions of NHRI institutionalisation are evaluated through these three interrelated clusters of research questions. Given their shared concerns, there are also important linkages between the kinds of actors and processes found within each cluster and their causal relevance to the dynamic character of institutional development over time cannot be fully understood without an appreciation of their interactions. Similar actors and processes may in one instance enhance stability while in another induce change. This idea is well, if simply, captured in the metaphor 'taking on a life of its own'. From this perspective, it is useful to locate those factors, or combination of factors, that allow an institution to achieve primacy over the outcome of political processes independent of other potentially significant factors. In responding to this question with some explanatory ideas, the results of this thesis may invite re-modification of parts of the original analytical framework.

1.6. Comparative logic and methods

The analytical framework presented above is a heuristic device and should not be reified. As such, a historical institutionalism approach is used alongside a comparative case study

method that combines a search for causal processes with sensitivity to context.[60] This involves using structured focused comparisons to explore the various groups of causally relevant actors and processes that explain NHRI institutional development. This approach is intended to develop meaningful explanations as to how NHRIs actually work in practice, and why and when they matter, as well as, potentially, draw out some theoretical inferences for institutional analysis and comparative political research.

A case study approach is well suited to a subject 'about which little is previously known or about which existing knowledge is fundamentally flawed'.[61] Thanks to the combination of narrative cases that characterise this approach, it is possible to identify causal structures of historical processes without depriving them of their process character – in contrast to variable-oriented unit analysis often associated with large-n accounts of political phenomena.[62] Following Rueschemeyer, irrespective of the preferred tools of analysis, 'assertions about causal mechanisms have to be supported by empirical evidence regarding the presence of a mechanism that is not directly observed, regarding its causal nature, and regarding its relevance for the phenomena to be explained'.[63] To this end, the thesis adopts a small-n comparative method that does not seek to develop general covering laws or engage in universal probability distribution.[64] Rather, the thesis sets out to better capture the complexity of social life by developing both a set of causal hypotheses able to infer the presence of causally relevant factors and, in recognition of the potential for 'equifinality'

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[60] G. L. Munck and R. Snyder, *Passion, Craft, and Method in Comparative Politics*, (Baltimore: The Johns Hopkins University Press, 2007).
[61] John Gerring, 'What is a Case Study and What is it Good For?', *American Political Science Review*, vol. 28, no. 2, pp. 341-354.
[62] James Mahoney, 'Revisiting General Theory in Historical Sociology', *Social Forces*, vol. 83, no. 2, 2004, pp. 459-489.
[63] Rueschemeyer, *Usable Theory*, p. 22.
[64] G. King et al., *Designing Social Inquiry*, (Princeton: Princeton University Press, 1994).

(multiple-causation), consider alternative paths through which the outcome of interest might have occurred.[65]

The thesis presents a highly contextualised picture of the Latin American NHRI, albeit one with comparative intent. In order to achieve this objective, a number of strategies are used. One such strategy is to focus on a single institution, policy or process and reduce some of the potential for extraneous variance.[66] The Latin American Defensoría, with its broadly analogous formal structure and common set of organisational problems, provides some control of extraneous variance among cases. Also, the use of single and clustered case studies allows for the identification of common patterns of causation that may serve to develop larger contingent generalisations across cases. A key technique in the pursuit of this goal is process tracing and typological categorisation.[67] Process tracing is an approach that draws on a range of sources and evidence to identify a process connecting cause and outcome in a particular case. The combination of process tracing and causal process observations is distinct to methods that rely on co-variation and its avoidance of intuitive regression circumvents some of the methodological shortcomings often associated with large-n research.

1.6.1. Comparative strategy and case selection

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[65] A. L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences*, (New York: Harper and Row, 2005), p. 207.
[66] B. Guy Peters, *Institutional Theory in political Science: 'The New Institutionalism'*, (New York: Pinter, 1999), p. 67.
[67] George and Bennett, *Case Studies and Theory Development*, p. 78.

The thesis draws on a selection of NHRIs operating in Latin American political systems that display variably stable and enforced institutional frameworks, as illustrated in Table 1.1 and Figure 1.1. Underlying the dynamic nature of institutionalisation is the premise that variation in the stability and enforcement of formal rules shapes actors' expectations and behaviour.[68] Simply put, the challenge faced by NHRIs in contexts where formal rules are widely contested, routinely violated, and frequently changed takes on a particular character. Despite such variance, the majority of NHRIs in the region were established within a circumscribed timeframe (1985 to 1995), share many analogous institutional attributes, and provide some basic control of variation in political systems, history and regional culture.

Table 1.1: Constitutional change in Latin America 1900-2000 (Stability)[69]

Country	Constitutions 1900-2000	Average duration	Implemented in democratic context	Year of current constitution	Amendments to constitution
Argentina	3	36.75	3	1994	1
Bolivia	6	20.00	1	1967*	4
Brazil	6	18.20	2	1988	62
Chile	3	55.70	2	1980	10
Colombia	2	57.00	2	1991	28
Costa Rica	**4**	**32.25**	**1**	**1949**	**54**
Ecuador	8	12.90	3	1998*	4
El Salvador	7	16.30	1	1983	8
Guatemala	5	24.20	4	1985	1
Honduras	8	13.25	3	1982	29
Mexico	2	71.00	1	1917	92
Nicaragua	8	13.40	1	1987	5
Panama	4	24.00	2	1972	5
Paraguay	4	32.50	1	1992	No information

[68] Levitsky writes, 'Good measures of enforcement and stability – and particularly measures that can travel across cases – are critical to our ability to explain variation in institutional strength across cases and over time. Developing such measures may be the biggest challenge facing comparative research in this area'. For the purposes of the present discussion this data is sufficiently suggestive across space and time to broadly delineate NHRIs along the dimension of their institutional environments. See Levitsky and Murillo, 'Variation in Institutional Strength', p. 129.

[69] Gabriel L. Negretto, 'The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America', Kellogg Institute, Working Paper No. 350, August 2008, p. 12. For constitutional amendments see Detlef Nolte, 'Constitutional Change in Latin America: Power Politics or Symbolic Politics?' Paper presented at the ECPR Joint Session of Workshops Rennes, April 11-16, 2008, p. 25-28.

Country	Constitutions 1900-2000	Average duration	Implemented in democratic context	Year of current constitution	Amendments to constitution
Peru	**5**	**26.60**	**2**	**1993**	**8**
Uruguay	6	28.30	5	1967	4
Venezuela	16	6.30	3	1999	1
Total	98	-	37	-	316
Mean	5.8	28.75	2.18	-	19.75

*New constitution in process as of 2009.

Incorporating a combination of primary and secondary data, a comparative analysis of NHRI institutionalisation at the regional level is then followed by a paired-case comparison of Costa Rica and Peru. This comparative design is intended to identify relevant actors and processes across cases and their influence over outcomes with a view to enhancing confidence in the interpretation of the empirical material advanced by the study. Importantly, this is not an attempt to replicate controlled comparisons or to advance claims of proof as to the validity of a general theory.[70]

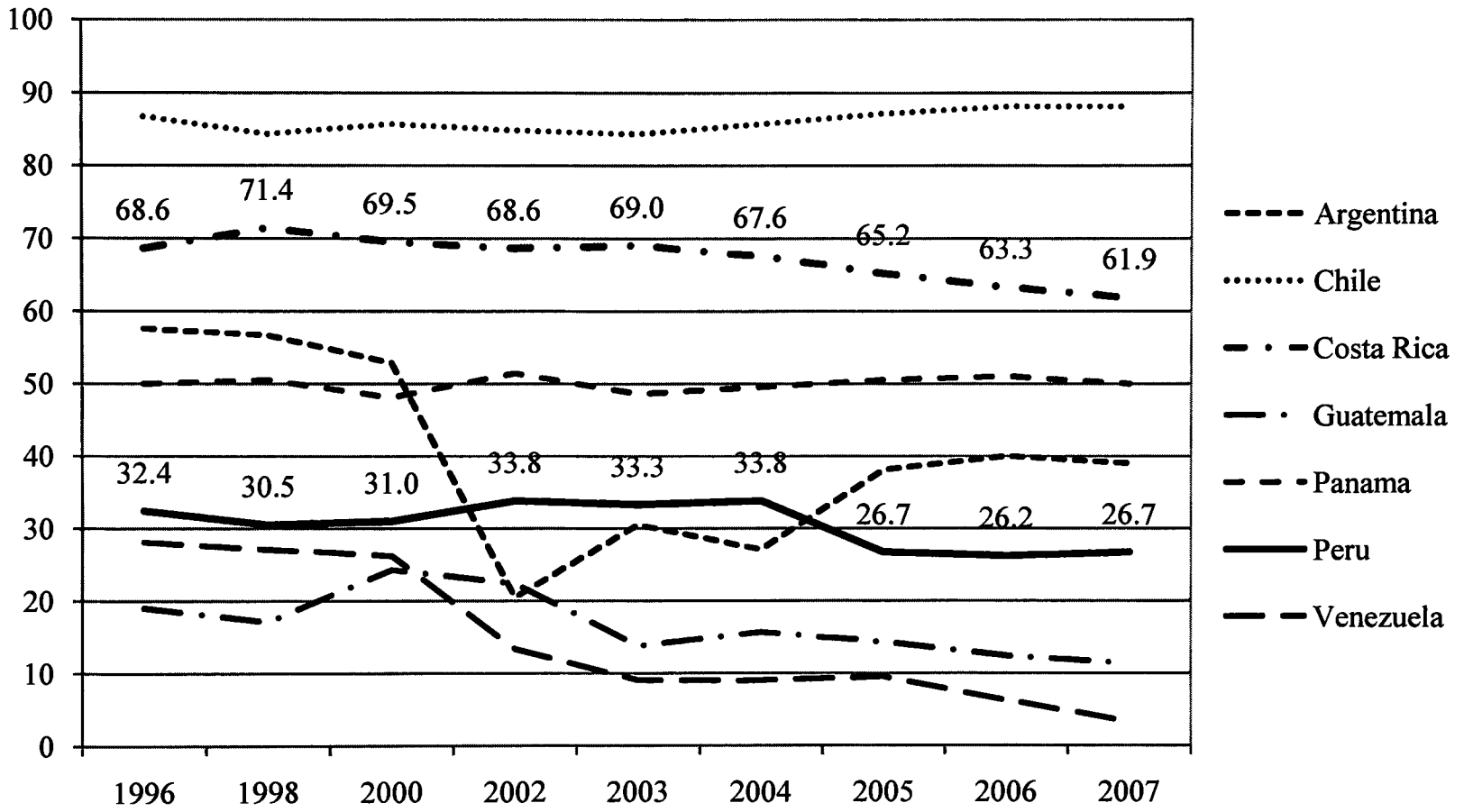
As Table 1.1 shows, the shelf life of Latin American constitutions has often been short. Of a sample of 17 countries, there have been a total of 98 constitutions between 1990 and 2000 with a mean average of 5.8. Furthermore, of those 98, only 37 were implemented under democratic conditions. Constitutional longevity may further belie frequent amendments to the original text, as in Mexico where two constitutions have been subject to 92 amendments. Further disjuncture between formal rules and their enforcement is discernible with reference to World Bank Governance proxies on rule of law, as shown in Figure 1.1.[71] Costa Rica and

[70] See Harry Eckstein, 'Case Study and Theory in Political Science', in F. Greenstein and N. Polsby (eds.), in *Handbook of Political Science*, (Mass.: Addison-Wesley, 1975), pp. 94-137.

[71] The indicator, rule of law, 'measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence'. See http://www.govindicators.org for definitions and methodology.

Peru display distinct experiences, most evident in the longevity of Costa Rica's Constitution. That said, the figures also show Costa Rica's relatively recent experience of constitutional stability, displaying four constitutions over the course of the Twentieth Century with an average duration of 32.35 years to Peru's 26.60.

Figure 1.1: World Bank Governance indicators on rule of law 1996-2007 (Enforcement)



Source: World Bank Governance Indicators. See http://www.govindicators.org.

The seven countries included in Figure 1.1 provide an indication of the range of variance found within the region. Chile, Costa Rica and Panama display the highest and most constant trend lines on rule of law while Guatemala and Venezuela occupy the lowest positions.[72] Notably, despite a highly stable constitutional order in Table 1.1, perceptions of

[72] The study acknowledges the methodological pitfalls of relying on World Bank data. However, it is one of few sources of time-series data on rule of law. Notably, Transparency International's 'Corruption Perception Index' on levels of corruption in the region produces a similar spread of cases (see Appendix 2).

the rule of law in Argentina are extremely volatile.[73] For the purposes of this thesis, Chile does not have a NHRI and therefore Costa Rica is the regional case that displays the highest stability and enforcement ratings. In selecting Peru over Guatemala and Venezuela, the thesis recognises the importance of range while also cautioning against selection of 'most different' outliers. Peru provides a reasonable degree of variance in both categories and shares many of the formal and informal institutional features of similarly located cases in the region. A further consideration is the relative lack of available primary material on the Guatemalan case and the recency of the Venezuelan model. Nevertheless, the thesis does reflect on the institutional experience of all fourteen Defensorías in the region.

In methodological terms, Costa Rica and Peru can be characterised as 'critical' and 'extreme' cases respectively. A critical case is defined by Flyvbjerg as 'having strategic importance in relation to the general problem' and follows the logic of 'if it is not valid for this case, then it is not valid for any (or only few) cases'.[74] Costa Rica displays a highly institutionalised political system and, in contrast to all other countries in Latin America, has not experienced any constitutional rupture since the establishment of democracy in 1948.[75] According to conventional analyses, such an institutional setting provides a more hospitable terrain for NHRI institutionalisation where formal rules may have more of a bearing upon institutional outcomes.

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[73] Institutions may vary widely on both dimensions of stability and enforcement. However, for the sake of parsimony, this study delineates between contexts where formal rules are broadly stable *and* enforced (such as Costa Rica) and other settings where they are not (such as Peru) to establish a baseline indication of diverse institutional settings.

[74] Bent Flyvbjerg, 'Five misunderstandings about case-study research', in C. Seale et al. (eds.), *Qualitative Research Practice*, (London: Sage, 2004), pp. 425-6.

[75] B. M. Wilson, *Costa Rica: Politics, Economics, and Democracy*, (Boulder: Lynne Rienner Publishers, 1998).

Conversely, as one of the world's most unstable electoral democracies,[76] Peru offers a more improbable context for the insertion of the organisation and as such is considered an 'extreme case' – the purpose of which is to obtain more fine-grained information on unusual cases.[77] In Peru, despite a return to democracy in 2001, issues such as persistent power asymmetries between state and society, an ambiguous attachment to democratic practices, and a profound lack of rights in society all resonate strongly in the institutional sphere.[78] Costa Rica, in contrast, displays high values on democratic and rights-based indicators, and is notable for a particularly activist constitutional tribunal and enduring democratic status.[79] That said, the challenge of binding state and society through institutional channels remains a pressing concern in both contexts.[80]

Table 1.2: Selected social and economic indicators for Costa Rica and Peru[81]

	Costa Rica	**Peru**
GDP per capita ($)	4,627	2,838
Income distribution	37.8	30.4
GINI Index	49.8	52
HDI	0.846 (48 out of 117)	0.773 (87 out of 117)
Poverty (%)	9.8	39.3
Extreme poverty (%)	3.3	13.7
Adult illiteracy (%)	5.1	12.1
Total population	4,550,000	29,190,000
Urban population (%)	62.6	72.6
Indigenous population (%)	1	45

[76] Michael Shifter, 'Breakdown in the Andes: Fire on the Mountain', *Foreign Affairs*, September/October 2004.
[77] Bent Flyvbjerg, 'Five misunderstandings about case-study research', p. 426.
[78] See, for example, J. Cotler, *Clases, Estado y Nación en el Perú*, 2nd edn. (Lima: Instituto de Estudios Peruanos, 2005); Martin Tanaka, 'Relations between state and society in Peru: Destructuring without Restructuring', *DFID Target Strategy Research Paper*, 2002.
[79] Key texts include J. A. Peeler, *Latin American Democracies: Colombia, Costa Rica, Venezuela*, Chapel Hill: University of North Carolina Press, 1985); Fabrice Lehoucq, 'Costa Rica: Paradise in Doubt', *Journal of Democracy*, vol. 16, No. 3, July 2005, pp. 140-154.
[80] J. Crabtree (ed.), *Making Institutions Work in Peru*, (London: ISA, 2006); Bruce Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics', *Comparative Political Studies*, vol. 39, no. 3, 2006, pp. 325-351.
[81] See Appendix 2 for detailed breakdown of sources.

Further differentiation between these two cases is evident with reference to basic aggregate social and economic indicators (Table 1.2). According to this data, Peru is considerably poorer, less developed, and far more heterogeneous in its demographic panorama. Although, in keeping with overall regional traits, both countries display high levels of inequality. Disaggregating the data, one finds further evidence of the severity of the Peruvian social situation with, for instance, a large disparity between urban (25.7%) and rural poverty (64.6%).[82] As O'Donnell observes, '[i]n Latin America the countries of relatively high homogeneity (especially territorial) are the ones that have an older and more solid democratic tradition—Costa Rica, Chile, and Uruguay. Peru is the polar opposite'.[83]

The logic for case selection is broadly consistent with the objectives of qualitative social science research, namely, to locate smaller populations of cases that exhibit sufficient similarity to be meaningfully compared to one another.[84] In particular, emphasis is placed on ensuring causal relevance and conceptual equivalence across cases. Rueschemeyer explains how conceptual equivalence involves 'careful translation of indigenous descriptions of various practices...into a common conceptual language'. This endeavour promises to 'lead back to the detection of widespread problems and contrasting responses to them, as to the identification of factors of causal relevance...'[85] This approach contrasts with Przeworski and Teune's most similar or most different method, a variation on Mill's classic method of

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[82] *Instituto Nacional de Estadística e Informática* (INEI), 2007: http://www.inei.gob.pe/
[83] Guillermo O'Donnell, 'On the State, Democratization and some Conceptual Problems', The Helen Kellogg Institute, Working Paper 192, April, 1993, p. 9.
[84] James Mahoney, 'Qualitative Methodology and Comparative Politics', *Comparative Political Studies*, vol. 40, no. 2, February 2007, p. 129.
[85] Rueschemeyer, *Usable Theory*, pp. 293-294.

agreement and difference, which is often invoked as a sound logical basis for the selection of paired cases.[86] The authors offer two ways of explaining variation on the dependent variable. The most similar design selects two cases that are very similar but where the outcome on the dependent variable is different. Holding all other factors constant, the independent variable that causes the outcome on the dependent variable can therefore be identified. The most different technique reverses this logic, with the selection of two cases that vary in all aspects except on the outcome of the dependent variable.

However, a number of limitations to Przeworski and Teune's approach inform this study's comparative approach. First, experimental isolation of causal effects is rarely, if ever, feasible and as such poses a problem for the level of control desired. Second, the inability of the 'most-different' approach to account for multiple-causation where the outcome is produced by different conjunctive combinations of factors is a serious impediment to its application.[87] Third, this thesis is sceptical of predicting outcomes on the basis of change in a selection of 'independent variables' related to the outcome in question. In selecting Costa Rica and Peru, this thesis shares an interest in the impact of sharply contrasting political and institutional conditions on the NHRI. But unlike the most different design logic of causation, does not assume *a priori* the outcome on the dependent variable, focusing rather on causal interpretation and developing preliminary hypotheses.

1.6.2. Constructing the case studies

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[86] A. Przeworski and H. Teune, *The Logic of Comparative Social Inquiry*, (London: Wiley-Interscience, 1970).
[87] George and Bennett, *Case Studies and Theory Development*, p. 165.

The study of the Costa Rican and Peruvian case are both approached as circumscribed single studies in their own right with comparative intent. To enhance equivalence across narratives the focus is on salient episodes of political institutionalisation in both cases that accord with the analytical framework, providing coherence to the comparison.[88] For instance, the congressional negotiation surrounding design and formation of the NHRI, the sequential moments and feedback loops of designation and appointment, budgetary discussion and resource allocation can all be considered significant or critical episodes that act as loci for interaction among relevant actors, institutions, events and relationships. Analysis of the institutionalisation of the NHRI also requires identification and selection of key events that may act as points of departure for interactions, rules of access, or outcomes of relevance to the analytical framework.

The case studies are constructed using both primary and secondary data. Primary sources include government records, archival documents, interview transcripts, contemporary news accounts, biographies and memoirs and other information that pertain to the subject. Particular attention is paid to the legislative record surrounding the creation of the organisation in Costa Rica and Peru. Extensive semi-structured interviews have also been conducted with a range of actors within NHRIs at all levels of the organisation and other branches of government, including the executive, legislature, the judiciary and other horizontal agencies. Beyond the state, interviews have been carried out with relevant actors in human rights bodies, non-governmental organisations, policy think tanks, and universities. All currency figures refer to US dollars ($).

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[88] Charles Tilly, 'Mechanisms in Political Processes', *Annual Review of Political Science*, vol. 4, 2001, p. 24.

Due attention has been paid to the potential motivated and informational biases of each source. Elite interviewing is fraught with such pitfalls. Despite this cautionary proviso, the thesis contends that interviews constitute an indispensable source of data collection, the validity of which may be further strengthened by their integration into the narrative in conjunction with process tracing and other corroborating data.[89] Further ballast to the propositions advanced is provided by the use of quantitative data where appropriate.

1.7. Outline of the thesis

Following this introductory chapter, the thesis is structured as follows. Chapter 2 situates the primary Latin American cluster of cases within a global context and undertakes to outline: (1) a conceptualisation of NHRIs and their basic types; (2) a framework to explore the processes and mechanisms by which the institution has diffused globally; and (3) a comparative exercise to observe how the distribution of NHRIs corresponds to regime type using Freedom House data. It is not possible for this thesis to address in detail the universe of NHRIs, but as will become apparent, the diffusion and experience of the institution in Latin America cannot be considered in isolation from global antecedents and trends.

Chapter 3 is devoted to further refinement of the mechanisms underlying diffusion and distribution of an Iberian variant to the generic NHRI category: the Defensoría del Pueblo. The chapter begins by demonstrating the overall trend of regional diffusion of Defensorías throughout Latin America. Regional cases are surveyed along a range of formal design

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[89] Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-probability Sampling', *Political Science & Politics*, vol. 40, no. 4, 2007, pp. 765-772.

principles, in the process building a comparative chart of 'constrained' and 'unconstrained' models at point of origin. Consideration is then given to the mechanism by which Defensorías have diffused between the international, regional and local levels in Latin America, reflecting on the interaction of intermediate categories of compulsion, material inducement and framing of ideas. Finally, the chapter assesses the implications of incomplete institutionalised outcomes for the Defensoría's future institutional development.

Chapter 4 to 7 focus on the domestic institutionalisation of Defensorías in Latin America. Chapter 4 identifies the kinds of causal conditions and process patterns relevant to the issues raised by past research as well as those that emerge within this thesis. The analytical framework that results identifies the actors and processes central to the three features of institutionalisation outlined above, as well as analytically and normatively interrelates the Defensoría within the focused theory frames of institutional analysis, democratisation, and political accountability theory. A typological classification of Defensorías follows, with attention paid to the outcomes on Defensorías of formal design, relations with organised state and social actors, and formal and informal rules of access to institutional arenas. The chapter ends by exploring the implications of the analysis for understanding an often overlooked 'accountability gap' in contemporary Latin American democracies.

Having identified those factors and conditions relevant to Defensoría institutionalisation, Chapter 5 applies this analytical framework to the Latin American experience. It identifies how different actors and processes have interacted with the Defensoría within the three areas of institutionalisation and explores the impact upon institutional development of feedback

effects within and across vertical and horizontal dimensions of interaction. Analysis is undertaken of the conditions and factors that facilitate the Defensoría to assume a bridging position between state and society are analysed, as well as why similar factors may, under different conditions, lead to alternative outcomes. Chapter 6 examines the experience of the Peruvian Defensoría and asks how distinct actors and processes have informed NHRI development under highly unstable institutional conditions where state-society relations are exacerbated by extreme asymmetries of power. Chapter 7 conducts a similarly structured examination of the Costa Rican Defensoría and advances a fine-grained analysis of the actors, processes and feedback effects that have informed the development of the institution within a relatively institutionalised context displaying stable, if asymmetrical, relations between state and society.

Chapter 8 concludes by summarising the key findings of the thesis and outlining its analytical and conceptual contribution to the relevant literature. It ends by proposing a number of avenues for further research and reflects on the analytical and conceptual implications of this thesis for the study of NHRIs, institutional analysis, and political accountability.

Chapter 2: Diffusion across political systems: the global spread of National Human Rights Institutions

2.1. Introduction

This chapter examines the proliferation of national human rights institutions (NHRIs) and seeks to explain the drivers of this institutional innovation across contrasting political regimes. The chapter – suggests that the NHRI phenomenon can be attributed to increasingly sophisticated international organisational platforms and three distinct, but complementary, mechanisms of diffusion: (1) coercion, (2) acculturation, and (3) persuasion. The chapter argues that a powerful international process of diffusion is at work and NHRIs are no longer the exclusive preserve of liberal democratic regimes. Instead NHRIs have diffused to a wide range of political systems, subjecting these human rights institutions to new and often competing demands and expectations.

The NHRI offers a particularly compelling subject of analysis. Most political systems have established in law a variant of a NHRI, but not all of these political systems can be considered consolidated democracies.[1] Instead, most adopting states present relatively hybrid forms of democracy, from those with a loose adherence to democratic constitutionalism, to even those states enduring dictatorships. In recent years, research on NHRIs has turned away from often highly positivist analyses toward taking a more political

[1] See K. Hossain (ed.), *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*, (Boston: Brill Publishers, 2000).

and multidisciplinary approach.[2] Among a myriad of issues raised by this chapter and developed further with respect to Latin America in Chapter 3, it is increasingly apparent that the diffusion of a NHRI in any one instance cannot be considered in isolation from global antecedents and trends.

Some provisos are necessary at the outset. This focus precludes consideration of ombudsman-type institutions that operate in the private sector, at the sub-national level, or within a highly restrictive mandate. The thesis also recognises, but does not directly consider, the contribution of alternative institutional forms to the objectives of administrative oversight, human rights compliance, and political accountability such as advocates offices, anti-corruption commissions, electoral commissions, information commissions, petitions committees, privacy commissions, state auditors and other so-called 'advisory counterparts'.[3]

The global expansion of the NHRI template is a complex phenomenon, raising questions of diverse origins, and the impact of new institutional arrangements. This chapter restricts its attention primarily to the former concern. However, reflecting the difficulties inherent in discretely compartmentalising process from outcome, this chapter engages with the idea that paths to reform may have an important bearing on the resulting configuration of these new institutional forms. The resulting distribution of NHRIs by regime types uncovers certain trends; a predominance of classical ombudsman in consolidated democracies, human rights

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[2] See L. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, (Boston: Martinus Nijhoff Publishers, 2004).
[3] See Christopher Elmendorf, 'Advisory Counterparts to Constitutional Courts', *Duke Law Journal*, vol. 56, no. 4, February 2007, pp. 954-1045.

ombudsmen in a range of hybrid democratic regimes, and the human rights commission present in the widest range of political systems, from Denmark to Afghanistan and Iran. The fact that NHRIs have spread across so many different regimes is indicative of a powerful international diffusion process in play.

This chapter begins by examining the concept of NHRIs within a framework of three models. This is followed by an explanatory mapping of their global diffusion. Finally, using Freedom House data, it is demonstrated that NHRIs have spread across a wide range of political systems, subjecting the institution to new and often competing demands and expectations. Chapter 3 is devoted to further refinement of conceptual equivalence, diffusion and distribution of the Iberian variant to the generic NHRI category.

2.2. National human rights institutions (NHRI)

The contemporary departure point for discussion of NHRIs is the Paris Principles (Principles), devised in 1991 and adopted by the United Nations (UN) General Assembly in 1993.[4] This document provides an internationally recognised standard for such institutions. As will be developed in the following section, the Principles reflect the codification of decades of intermittent attention to these entities. In formulating a generic configuration of NHRIs, the Principles pay particular attention to the formal independence, competence, mandate, and composition of the institution:

[4] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, UN Human Rights Commission, Res. 1992/54, 3 Mar. 1992. Also, UN Gen. Ass., Res. 48/134, 20 Dec. 1993.

- Established in the national constitution or by law
- Role of the institution is clearly specified and the mandate is as broad as possible
- Pluralism in governing structures and independence of appointment procedures
- Infrastructure commensurate to functions, with particular importance attached to the need for adequate funding
- Ability to perform a monitoring, advisory and recommendation function on various matters relating to human rights
- Institution relates to regional and international organisations
- Requirement to promote public awareness, teaching and research on human rights, and
- The possibility that NHRIs possess quasi-jurisdictional functions e.g. the handling of individual complaints or petitions on human rights grounds.

The correct application of the NHRI label to institutions that fulfil the above criteria, to a greater or lesser extent, is a matter of debate. Recent surveys suggest that by 2003 there were approximately 55 national-level human rights ombudsmen worldwide,[5] a significant increase on one survey's findings of only eight NHRIs in 1990.[6] The UN-affiliated International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICCNI) identifies 119 NHRIs, with 63 fully accredited NHRIs in accordance with the Principles.[7] Within the broad designation of NHRIs there exists

[5] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, p. 11.
[6] M. Kjaerum, *National Human Rights Institutions: Implementing Human Rights*, (Copenhagen: Danish Institute for Human Rights, 2003), p. 5.
[7] The ICCNI was created in 1993 at the second international workshop on National Institutions for the Promotion and Protection of Human Rights held in Tunis. Report of the second International Workshop on

considerable design variation across a range of dimensions. This chapter uses three models as its conceptual framework: the classical ombudsman, human rights commission, and human rights ombudsman.

2.2.1. The classical ombudsman

The historical genesis of NHRIs can be traced back to two distinct traditions, the ombudsman and the commission of inquiry.[8] The classical Swedish model of the ombudsman is a single appointee, elected by parliament and empowered to investigate, and prosecute if necessary, grievances of the citizenry against the public bureaucracy pertaining to legality and administrative fairness. Sweden, the original classical template, displays a structural configuration that qualifies it as a NHRI. Most notable is the institution's prosecutorial authority and, following a constitutional revision, an explicit mandate to 'examine the observance of the human rights provisions in the Swedish Constitution by the administration'.[9]

The Danish model is considered the modern paradigm ombudsman design, departing significantly from Swedish antecedents; prosecutorial authority is jettisoned along with much-reduced special powers and a formal mandate over administrative fairness, not legality. However, the office retains robust investigative powers, and, while not formally ascribed a human rights mandate, in practice the office may perform a core human rights

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National Institutions for the Promotion and Protection of Human Rights, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 11(b), U.N. Doc. E/CN.4/1994/45 (1993).

[8] International Council on Human Rights Policy [*hereafter* ICHRP], *Performance and Legitimacy: National Human Rights Institutions*, (Versoix: ICHRP, 2000), p. 92.

[9] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, p. 6.

function, for example, in its oversight of persons deprived of liberty.[10] The insertion of classical ombudsmen into an increasingly potent human rights normative framework is evident throughout Europe. Following Finland's revision of its constitution in 1995, the ombudsman was officially designated a human rights institution. The ombudsman of the Netherlands has also incorporated human rights norms into its resolutions.[11]

In 1962, New Zealand became the first commonwealth country to adopt the Danish ombudsman model. The UK, primarily due to its constitutional tradition of favouring political accountability and political control of power, and the principle of ministerial responsibility to Parliament, deviated from the Danish model. In 1967 the UK created what remains a highly restrictive ombudsman model in terms of jurisdiction and mandate. Most striking is the limited access of the citizen to the institution, whereby the citizen's complaint must first be directed to a Member of Parliament (replicated only in the French model). It is the New Zealand adaptation of the Danish model, not the British exemplar, which remains popular within Western Europe and among commonwealth countries. Such emulation may also explain the frequent occurrence of multiple institutions – both a classical or human rights ombudsman and human rights commission – operating within a single jurisdiction,[12] as opposed to the unitary hybrid agency predominant in Latin America and Central and Eastern Europe.

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[10] This has been recognised in its accreditation in 2004 as the national preventive mechanism under the Optional Protocol to the Convention Against Torture (OPCAT). See Association for the Prevention of Torture, 'OPCAT Country Status Ratification and Implementation', 12 April 2010, p. 150.

[11] Linda Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', *Harvard Human Rights Journal*, vol. 13, Spring 2000, p. 34.

[12] *Ibid.*, p. 10. In Africa countries such as Ethiopia, Kenya, Malawi, Nigeria, Senegal, South Africa, Tanzania, and Uganda have all created parallel ombudsmen and commissioner offices. See Lindsnaes and Lindholt, 'National Human Rights Institutions: Standard Setting and Achievements', p. 24.

2.2.2. The human rights commission

Along with the classical ombudsman, commissions of inquiry have informed the contemporary configuration of NHRIs. The classical commission model is a body established by government often for a finite period to inquire into matters of public concern and to advise government on policy options.[13] The contemporary human rights commission has an express human rights mandate, may be appointed by the executive or legislature, is composed of representatives from government and civil society with human rights expertise, and has a mandate that may encompass an advisory, research, educational, and investigative function. Early national human rights commissions were established as standing commissions to inquire into discrimination and equality.[14] Contemporary European NHRIs have been described as operating in a similar way to ongoing commissions of inquiry.[15]

It is commonly claimed that human rights ombudsmen exist on a spectrum, with the classical administrative ombudsman at one end, and human rights commissions at the other.[16] Similarly, in functional terms, a spectrum may be applied to human rights commissions; from those enjoying strong remedial powers to address individual complaints, to others that act as governmental advisory bodies or educational research institutes. Some NHRIs might be more accurately described as research institutes or consultative commissions with an advisory or promotional human rights mandate, as opposed to the investigative faculties

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[13] Martin Bulmer, 'Introduction', in Martin Bulmer (ed.), *Social Research and Royal Commissions*, (London: Unwin Ltd., 1980), p. 1.
[14] These include the United Kingdom (created in 1976), Canada (1978), New Zealand (1978), and Australia (1981). See A. Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, (Copenhagen: The Danish Institute for Human Rights, 2006), pp. 16-17.
[15] Elmendorf, 'Advisory Counterparts to Constitutional Courts', p. 962.
[16] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, p. 8.

required to perform a regulative function. Such a model can be found in France (created in 1948), Denmark (1987), Germany (2001) and Norway (2005).[17] In contrast, human rights commissions in Namibia (1990) and Uganda (1995) have prosecutorial or court-referral powers more akin to the Swedish variant of the ombudsman.[18] The broad range of models in this category reflects contrasting political contexts, in particular a variation in local existing democratic and human rights institutional frameworks.

2.2.3. The human rights ombudsman

Reif defines the human rights ombudsman as 'an institution that expressly has been given or that in practice undertakes two roles: to protect and promote human rights and monitor government administration'.[19] The institution commonly reflects the classical ombudsman (i.e. one appointee) in its composition. This variant on the classical ombudsman model is elected by the legislature, has an express human rights mandate, combined with oversight over administrative fairness and legality and, on occasion, has a political accountability jurisdiction over issues such as corruption and electoral monitoring. The institution may also actively engage in human rights policy research, advice, documentation and educational activities. Investigative and court-referral powers are common within this group, although prosecutorial authority and jurisdiction over private entities and actors are rare.

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[17] Kjaerum, *National Human Rights Institutions: Implementing Human Rights*, p. 8.
[18] Marcus Topp, 'Uganda: Human Rights Protection by the State in Uganda', in Birgit Lindsnaes et al., *National Human Rights Institutions: Articles and Working Papers*, p. 192.
[19] Reif, 'Building Democratic Institutions', p. 11.

The Portuguese *Provedor de Justiça* (1976), Spanish *Defensor del Pueblo* (1978), and Polish Commissioner for Civil Rights Protection (1987) were the first ombudsman models to incorporate human rights as an explicit standard of control. These three ombudsman models provided the basic configurative template for many contemporary NHRIs in Central and Eastern Europe and, most pertinently for this study, Latin America.[20] The evolution of ombudsman design, from the classical to the human rights model, can be identified by three progressive 'waves':

1. The rule of law model (1809-1962).[21] The paradigmatic model of the first ombudsman framework is the Swedish ombudsman. This model has relatively powerful jurisdictional authority, including the ability to prosecute public officials, oversight over administrative fairness and legality and faculties exceeding soft legal powers.

2. The basic model (1962-1976).[22] The spread of the ombudsman framework from Denmark to New Zealand introduced the institution to the Anglo-Saxon world. The paradigmatic and enduring basic model that emerges in the second wave is the Danish ombudsman. This model removes coercive prerogatives, retains extensive powers of examination, has a mandate on administrative fairness rather than legality, and enhances a mediation function.

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[20] G. Kuckso-Stadlmayer (ed.), *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multi-faceted Realisation of an Idea*, (Springer Wein: New York, 2008), pp. 37-38.
[21] Other rule of law models in Europe include Austria, Bosnia and Herzegovina, Croatia, Czech Republic, Estonia, Finland, France, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Portugal, Romania and Slovenia, Spain. See *Ibid.*, pp. 62-4.
[22] Basic models found in Europe include Andorra, Belgium, Bulgaria, Cyprus, Denmark, Ireland, Iceland, Israel, Luxembourg, Malta, the Netherlands, Norway, and the UK. See *Ibid.*, pp. 61-2.

3. The human rights model (1976-1987). The inclusion of the office in the post-authoritarian contexts of Poland, Portugal and Spain provides the template for the human rights model. These institutions have at their core a human rights protection mandate, exceed the soft powers of the basic model, and introduce human rights standards as a primary and explicit standard of control. However, the assignment of powers equivalent to the rule of law model varies.[23]

The genealogy of the NHRI outlined here provides the basic foundations for the eventual expansion of the institution's mandate. The primary focus of this thesis is on the diffusion of these generic NHRI models, in particular the human rights ombudsman, to Latin America and the creation of a new variant of institution attuned to distinct regional and local conditions. As will be substantiated, the evolution of the institution does not in practice adhere uniformly to any one discrete categorisation. Rather, the eventual structural baseline of the institution reflects a dialogue between international and domestic forces as new institutional forms are subjected to political negotiation.

2.3. NHRI diffusion

The diffusion of the NHRI follows a contagion logic in the sense that one instance of establishment appears to increase the probability of another such occurrence within a fairly circumscribed period of time. This results in spatial and temporal clustering of NHRIs.

[23] Human rights models also assigned 'hard' powers commensurate with the rule of law model include Czech Republic, Estonia, Latvia, Lithuania, Moldova, Poland, Portugal, Romania, Russia, and Slovakia. See *Ibid.*, pp. 61-5.

Rather than the notion of contagion, it is diffusion theory that offers the most promising theoretical avenue for explaining the spread of NHRIs. Strang defines diffusion as a 'process where prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters'.[24] Processes of international socialization, through the transmission of norms from organisational platforms at the international and regional level to individual states identified by Finnemore and Sikkink, are instructive when reflecting on an increasingly sophisticated normative framework governing NHRIs.[25]

In work on the international dimensions of democratisation, emphasis is placed on repeating clusters and sequences within and across regions, as well as the presence of what has been termed 'neutral transmission mechanisms', such as accelerating flows of information especially within regional contexts.[26] More recently, in terms of predictive scope, recent statistical research suggests that once a norm is institutionalised, a strong predictor for whether an individual state will enact that norm is whether other states in its region have done so in the past five years.[27]

The survey of the diffusion of 124 NHRIs in Figure 2.1 strongly suggests a transmission process, especially at the regional level with a wave phenomenon of varying intensities across regions. Europe provides the most constant curve, while all regions show a marked increased in the mid-1970s, with Africa and the Americas experiencing rapid acceleration

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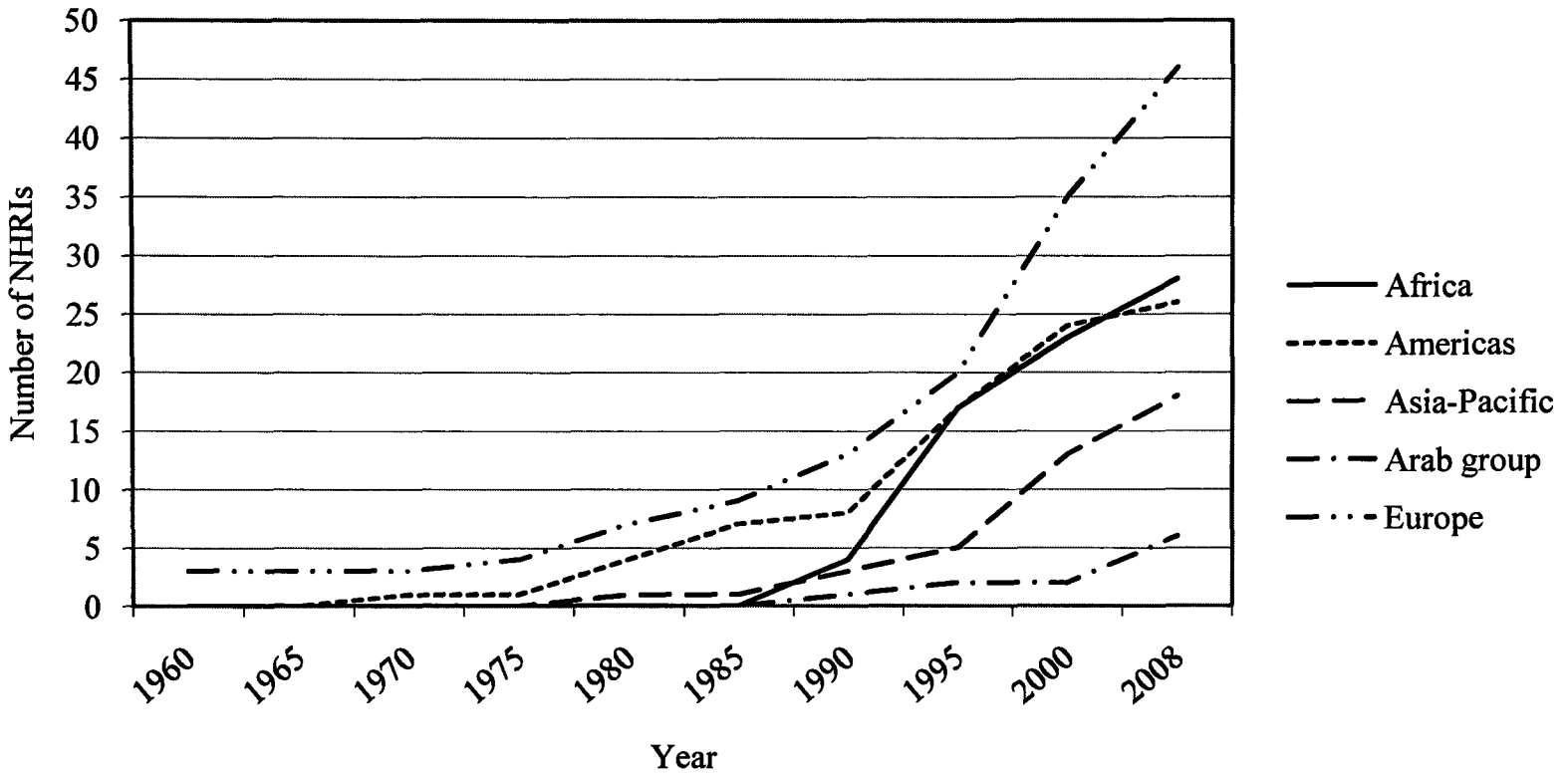
[24] David Strang, 'Adding social structure to diffusion models: An event history framework', *Sociological Methods and Research*, vol. 19, no. 3, February 1991, p. 325.
[25] See Martha Finnemore and Kathryn Sikkink, 'International Norms and Political Change', *International Organizations*, vol. 52, Autumn 1998, pp. 887-917.
[26] L. Whitehead (ed.), *The International Dimensions of Democratization*, (Oxford: Oxford University Press, 2001).
[27] Francisco O. Ramirez, 'The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights 1890 to 1990', *American Sociological Review*, vol. 62, no. 5, October 1997, p. 742.

from 1990 onwards. Interestingly, an incipient NHRI presence can also be found in Arab Group countries with human rights commissions established in Morocco (created in 1990), Palestine (1993), Qatar (2002), Egypt (2003), Jordan (2006) and Saudi Arabia (2006).

Figure 2.1: Regional proliferation of NHRIs 1960-2008[28]



Source: NHRI population data collected from ICCNI and NHRI Forum: http://www.nhri.net/.

Initial expansion of the classical ombudsman model was confined to the Scandinavian countries, with large time lags between Sweden in 1809, Finland in 1920 and Denmark in 1955. This process of contagion spans 146 years and is confined to a small cadre with clear regional and cultural affinities. The second wave transgressed Nordic frontiers with the establishment of the office in New Zealand in 1962 – preceding that of Norway by one year

[28] Regional group designations follow membership of the Council of Europe (*see* http://www.coe.int/), the Arab League (*see* http://en.wikipedia.org/wiki/Arab_League), the African Union (*see* http://www.africa-union.org/), the Organization of American States (*see* http://www.oas.org/), and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (*see* http://www.unescap.org/). The sample does not include non-regional members of ESCAP: France, the Netherlands, the UK and USA. Additional NHRIs include: Andorra (included in COE group).

– and introduced the ombudsman to the English-speaking world of the Commonwealth. A single human rights commission was established in France in 1948, predating its successor by 30 years. The third wave of the mid-1970s saw NHRIs begin to undergo a global expansion, with the emergence of human rights commissions and human rights ombudsmen. The third wave took on new momentum in the mid-1980s as NHRIs began to diffuse to a multiplying array of loosely democratic constitutional regimes throughout the Americas, Africa, Asia-Pacific and the peripheries of Europe. The 1990s and 2000s have witnessed a deceleration, but have also witnessed the appearance of the institution in a growing number of highly unstable and authoritarian regimes.

2.3.1. International organisational platforms and networks

Cardenas argues that international organisations, especially the UN, have played a crucial role in creating and strengthening NHRIs by means of four mechanisms: standard setting, capacity building, network facilitating, and membership granting.[29] The UN first referred to the need for NHRIs in the second session of the United Nations Economic and Social Council (ECOSOC) in 1946 and the institution received intermittent attention over the next 40 years.[30] Despite the issuing of guidelines and statements regarding NHRIs 'during this initial phase, there were virtually no limitations on the definition of a national human rights

[29] Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions', *Global Governance*, vol. 23, no. 1, January 2003, p. 23.
[30] See Commission on Human Rights, adopted 21 June 1946, ECOSOC Res. 2/9, U.N. ESCOR, 2d Sess., U.N. Doc. E/RES/9(II) (1946); National Institutions for the Promotion and Protection of Human Rights, adopted 14 Dec. 1978, G.A. Res. 33/46, U.N. GAOR, 33d Sess., 83d mtg., U.N. Doc. A/RES/33/46 (1978); Declaration on the Right to Develop, adopted 4 Dec. 1986, U.N. GAOR, 41st Sess., U.N. Doc A/RES/ 41/128 (1986).

institution'.[31] The 1991 Paris workshop galvanised a new interest in NHRIs and provided a concrete – if imperfect – structural basis for NHRIs through the Paris Principles.[32]

The UN definition of NHRI still retains a lack of precision. A NHRI is variably defined as 'a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights,'[33] or, alternatively, 'a quasi-governmental or statutory institution with human rights in its mandate'.[34] As Reif notes, '[T]he UN recognises that classical and human rights ombudsmen constitute [NHRIs], along with human rights commissions and specialised institutions'.[35]

The upsurge of NHRIs has led to sustained interest within UN structures, with regular pronouncements since 1991 by the UN General Assembly, Secretary General, and Commission on Human Rights, as well as by UN agencies such as the UN Development Programme.[36] The integration of NHRIs within the UN human rights machinery continues to evolve, most notably in the creation of a NHRI Unit within the Office of the High Commissioner for Human Rights (OHCHR), NHRI monitoring activity on state compliance

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[31] Lindsnaes and Lindholt, 'National Human Rights Institutions: Standard Setting and Achievements', p. 8.
[32] The headline in the original Paris Principles, contained in the original report of the workshop (E/CN.4/1992/43), reads quasi-judicial rather than quasi-jurisdictional. B. Lindsnaes and L. Lindholt, 'National Human Rights Institutions: Standard Setting and Achievements', in *Ibid.*, p. 11, fn. 25.
[33] United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, (4 UN Document HR/P/PT 4, 1995), p. 6.
[34] ICHRP, *Performance and Legitimacy*, p. 3.
[35] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, p. 94.
[36] *Ibid.*, pp. 97-98.

with treaty body norms,[37] participation of ICCNI-accredited institutions in the deliberations of the Human Rights Council (HRC), and, in particular, the newly established universal periodic review mechanism.

The UN may represent the most advanced organisational platform by which NHRIs have been diffused, but it is by no means the sole significant normative agent at the global level. The Commonwealth, the largest association of independent states after the UN, has also supported the creation of NHRIs with virtually every member state having established the institution, although the institutions vary greatly in their adherence to the Paris Principles. International financial institutions such as the International Monetary Fund (IMF) and the World Bank (WB) have also promoted the ombudsman institution under the auspices of 'good governance',[38] a normative framework distinct from, even sometimes at odds with, the human rights framework espoused by the UN human rights mechanisms.[39]

Furthermore, international non-state actors, such as Amnesty International and Human Rights Watch (HRW), have made efforts to incorporate a NHRI focus into their work.[40] The HRW report on the experience of African NHRIs placed a sometimes unwelcome spotlight on the many challenges that confront individual institutions at the domestic level, challenges often not captured by UN formal peer review mechanisms such as the ICCNI. Norm

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[37] See A. Müller and F. Seidensticker, *The Role of National Human Rights Institutions in the United Nations Treaty Body Process*, (Berlin: German Institute for Human Rights, 2007).
[38] See World Bank (Nick Manning and J. D. Galligan), 'Using an Ombudsman to Oversee Public Officials', *PREMnotes*, No. 19, (Washington: World Bank, 1999).
[39] Peter Uvin, 'On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise', *The Fletcher Journal of Development Studies*, Vol. XVII, 2002, p. 3.
[40] Amnesty International, *NHRIs: Recommendations for Effective Protection and Promotion of Human Rights*, (London: AI Index: IOR 40/007/2001, 2001); Also Human Rights Watch [HRW], *Protectors or Pretenders? Government Human Rights Commissions in Africa*, (New York: Human Rights Watch, 2001).

entrepreneurs need not necessarily be organisations. This discussion would not be complete without consideration of another category of norm entrepreneurs, namely, individual NHRI advocates. During the late 1950s and early 1960s, the prolific publications in English of Stephen Hurwitz and Alfred Bexelius,[41] the Danish and Swedish Ombudsmen, are widely credited with bringing the ombudsman to world attention and their names have duly entered ombudsman folklore. Within the NHRI community, key individuals have worked, often from within and across international organisations and academia, to champion these institutions throughout the world.[42]

2.3.2. Regional organisational platforms and networks

Simmons has suggested that regional diffusion may play an important independent role in state compliance with international norms.[43] In the democratisation literature, the hypothesis that regional organisations, such as the European Union (EU) and Organization of American States (OAS), can have an important role in transition to, and subsequent stabilising of, democracy has been convincingly argued.[44] NHRI diffusion has occurred not only through organisational platforms but also via transnational networks, devised by NHRIs themselves. The transnational networks operate at the regional level to facilitate information exchange among offices, and also in some cases, to confer legitimacy in the form of peer review

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[41] Alfred Bexelius, 'The Swedish Institution of the Justitieombudsman', *International Review of Administrative Sciences*, vol. 27, no. 3, 1961, pp. 243-256; Stephan Hurwitz, 'Control of the Administration in Denmark: The Danish Parliamentary Commissioner for Civil and Military Government Administration', *Journal of the International Commission of Jurists*, vol. 1, no. 2, Spring 1958, pp. 224-243.

[42] An example of these individuals would include Brian Burdekin, the former Special Adviser on National Institutions to the OHCHR and first head of the National Institutions Unit.

[43] Beth Simmons, 'Why Commit? Explaining State Acceptance of International Human Rights', Weatherhead Center for International Affairs, Harvard University, 28 (2002), p. 28, http://www.wcfia.harvard.edu/node/693.

[44] See J. C. Pevehouse, *Democracy From Above: Regional Organizations and Democratization*, (Wisconsin: University of Wisconsin, 2005).

mechanisms of evaluation. The degree of NHRI interaction within different arenas varies from region to region.

The African human rights system has evolved over the past twenty-five years toward an established and potentially important arena for NHRI activity.[45] However, the regional system is the subject of sustained criticism for its inability to censure rights abuses by member states, as well as for procedural issues such as delays in determining cases.[46] NHRIs, however, have proliferated in Africa.[47] In 2009, thirty-two of the fifty-three members of the African Union, or sixty percent of this regional group, have installed NHRIs with the most common model being the human rights commission.[48] Despite this presence, participation by NHRIs in the African Human Rights Commission's work has thus far been minimal, and not encouraged by member states.[49] At the transnational level, the Network of African National Human Rights Institutions (NANHRI) was created in 2007 under the initiative of the Kenyan Commission, and replaced the largely defunct Coordinating Committee of African National Human Rights Institutions, established in 1996. Collaboration, information-sharing, and networking between NHRIs in Africa has been poor. The NANHRI proposal drafted in 2006 recognised these shortcomings.[50]

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[45] The regional human rights system in Africa is centred on the African Union (AU), the African Charter on Human and Peoples' Rights (ACHPR) and the regional human rights mechanisms; the African Commission on Human and Peoples' Rights and the recently established African Court of Justice and Human Rights. See O. C. Okafor, *The African Human Rights System: Activist Forces and International Institutions*, (Cambridge: Cambridge University Press, 2009).

[46] Rachel Murray, 'Recent Developments in the African Human Rights System 2007,' *Human Rights Law Review*, Vol. 8, No. 2, 2008, p. 370.

[47] See Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, (Oxford: Hart Publishing, 2007).

[48] Data compiled by author from the Network of African National Rights Institutions (NANHRI) (see http://www.nanhri.org/) and the African Union (see http://www.africa-union.org/).

[49] Murray, *The Role of National Human Rights Institutions at the International and Regional Levels*, pp. 47-57.

[50] Kenya National Commission of Human Rights, *Project Proposal: Establishment of the Network and the Secretariat of African National Human Rights Institutions*, January 2006, pp. 1-2.

The lack of an intergovernmental system for the protection of human rights in the Asia-Pacific region and the unlikelihood of its robust materialisation, has led commentators to suggest the advancement of human rights platforms at the sub-regional and national levels.[51] In the absence of a regional mechanism, it is perhaps unsurprising that the impetus for the creation of human rights commissions has emanated from international arenas. Of the fifty-three countries that comprise the Economic and Social Commission for Asia and the Pacific (ESCAP), twenty-seven regional members, or fifty-one percent of the membership, have established a NHRI of some kind.[52] The ICCNI currently recognises fifteen institutions in the region as NHRIs, all with 'status A' accreditation.[53]

An alternative peer review mechanism is also available in the form of the transnational network of NHRIs, the Asia Pacific Forum (APF). The APF, created in 1996 with the support of the UN and spearheaded by the Australian Commission, is a membership organisation that administers its own evaluation – according to the Paris Principles – of prospective and current members separate to, but in cooperation with, the ICCNI. The APF currently has fourteen members and three associate members, with one member, Fiji, suspended.[54] The APF is one of the most sophisticated NHRI regional networks in

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[51] Australian Human Rights Centre, 'National Human Rights Institutions: An Overview of the Asia Pacific Region', *International Journal on Minority and Group Rights*, Vol. 7, No. 3, 2000, p. 258.

[52] This does not include non-regional members France, the Netherlands, the UK and USA. Data compiled by author from the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (*see* http://www.unescap.org/) and NHRI Forum (*see* http://www.nhri.net/).

[53] See ICCNI, National Institutions Accreditation Status as of January 2010, at 1-2. Available at: http://www.nhri.net/2009/Chart_of_the_Status_of_NIs__January_2010.pdf.

[54] The Fijian Commission was suspended by the APF following the military coup of December 2006 and the undermining of the independence and credibility of the body. Subsequent to the coup the Fijian Commission Chair, Dr Shaista Shameem, echoed government claims that the Australian military was involved in the overthrow. Andrew Byrnes et al., 'Joining the club: the Asia Pacific Forum of National Human Rights

operation. It maintains a high level of integration with international forums, and is recognised as an important source of technical assistance for regional offices. As such, it is able, up to a point, to push for greater compliance with the Paris Principles.[55]

The Council of Europe is the principal human rights body in the region and exercises influence through various treaties and enforcement mechanisms.[56] The Council of Europe has been engaged in calling for the creation of NHRIs since the mid-1970s and twenty-six of the twenty-seven EU member states, or ninety-three percent, have established a NHRI.[57] This figure excludes Italy, which features multiple ombudsmen at the local level but no national entity.[58] Europe has the greatest regional concentration of institutions, with the ICC recognising twenty-seven accredited institutions, although this classification extends beyond member countries and includes the sub-national office of Northern Ireland.[59]

The Council of Europe has also supported the European Group of NHRIs, a transnational network with forty-three member institutions. Of these forty-three members, twenty-four are from member countries, of which thirteen institutions are fully accredited. While the European group may be the principal NHRI network, prominent sub-regional networks are also in operation. For instance, the *Eunomia* project launched by the office of the Greek

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Institutions, the Paris Principles, and the advancement of human rights protection in the region', Australian Journal of Human Rights, vol. 14, no. 1, p. 81.

[55] Byrnes et al., 'Joining the club', p. 83.

[56] An extensive range of human rights are given legal status by the Convention on the Protection of Human Rights and Fundamental Freedoms, its' Protocols, and The European Social Charter and its' Protocols and are enforceable through the European Court of Human Rights. See Kevin Boyle, 'Europe: Council of Europe, OSCE and European Union', in Hurst Hannum (ed.) *Guide to International Human Rights Practice*, (Washington D.C.: Pail Institute, 2d ed., 2004), pp. 143-170.

[57] See Council of Europe, Parliamentary Assembly, Rec. 757 (1975).

[58] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, p. 126.

[59] Data compiled by author from the Council of Europe (see http://www.coe.int/) and NHRI Forum (see http://www.nhri.net/).

Ombudsman in conjunction with the Greek Government and Council of Europe in 2001, seeks to strengthen ombudsman offices in South Eastern Europe.[60] Despite these advances in networking among European NHRIs, one observer concluded that efforts to enhance cooperation have yielded only partial results: 'the network of European NHRIs has almost no institutional support...has no geographical base and relies on the willingness of the European Coordinating Committee, which employs only one person (half time)'.[61]

Finally, the focus of international organisation in the Americas is the OAS, the Inter-American Commission of Human Rights and its enforcement arm, the Inter-American Court of Human Rights (IACHR). The Inter-American system has made significant advances in protecting human rights, especially since the demise of authoritarian governments throughout the region.[62] Outside of Europe, the Americas display the highest regional concentration of NHRIs, with twenty-six of thirty-five OAS members, or seventy-five percent, having established the institution.[63] The OAS has promoted the establishment of NHRIs in all member states since the mid-1990s.[64] In turn, NHRIs have made sporadic use of their power to submit petitions to the IACHR.[65] NHRI coordination has generally focused on regional platforms rather than the UN, reflecting prevalent geopolitical dynamics,

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[60] Members include Albania, Bosnia and Herzegovina, Croatia, Greece, Kosovo, Bulgaria and Montenegro. See http://www.synigoros.gr/eunomia/.
[61] Gauthier de Beco, 'Networks of European National Human Rights Institutions', *European Law Journal*, vol. 14, no. 6, November 2008, p. 872.
[62] See Tom J. Farer, 'The Rise of the Interamerican Human Rights Regime: No Longer a Unicorn, Not yet an Ox', *Human Rights Quarterly*, vol. 19, no. 3, 1997, pp. 510-546.
[63] It is important to qualify this claim by reflecting on the size of the population in those remaining negative cases. Just Brazil and the US alone account for 504 million people who lack access to a NHRI in the region.
[64] See Support for International Exchanges Among Ombudsmen, adopted 5 June 1997, G.A. Res. 1505 (XXVII-0/97).
[65] Reif, *The Ombudsman, Good Governance and the International Human Rights System*, pp. 172-87.

particularly its strong ties to Spain. In turn, the UN has paid limited attention to NHRIs in the region.[66]

Beyond the OAS, there is a plethora of regional and sub-regional peer networks operating in the Americas. Two prominent networks are the Ibero-American Federation of Ombudsman (FIO) and the Inter-American Institute for Human Rights (IIDH). Originally, the IIDH was the technical secretariat of the FIO. However, the Spanish, upon assuming the Presidency of FIO in 1999, successfully lobbied for the Secretariat to be moved to Spain. The resulting schism has had serious repercussions, with the Spanish-controlled FIO excluding all Caribbean ombudsmen (with the anomalous exception of Puerto Rico). In response, the IIDH has developed a parallel network.[67]

2.4. Diffusion mechanisms

The manner and degree to which wider normative forces shape the behaviour of states within their wider regional and international social system is a matter of contention. Drawing on the work of Goodman and Jinks, this chapter emphasises three classes of diffusion mechanism, leading to contrasting modes of diffusion, in order to explain the spread of the ombudsman: (1) coercion (potentially leading to compliance); (2) acculturation (potentially leading to conformity); and (3) persuasion (potentially leading to habituation).[68] Each class of mechanism entails different actors, levels of analysis and predictive assumptions

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[66] Pohjolainen, *The Evolution of National Human Rights Institutions*, p. 110.
[67] Gonzalo Elizondo, former Director for Public Institutions, Inter-American Institute of Human Rights, interview by author, San José, Costa Rica, 1 September 2007.
[68] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law', *Duke Law Journal*, vol. 54, no. 3, December 2004, pp. 621-703.

concerning actor autonomy and behaviour, without denying potential for overlap. The three distinct, but complementary, logics of diffusion will be contrasted in this chapter, with consideration of both rational and constructivist explanations. However, for the purposes of explaining diffusion of institutions such as NHRIs, approaching these three mechanisms of diffusion as discrete categories may be problematic – at least in their most simplistic form.

2.4.1. Diffusion by coercion

The underlying explanatory model of the majority of diffusion analysis is one focused on coercion and competition within the international system.[69] Similarly, in the literature on democratisation, a focus is placed on control, whereby the promotion of democracy by one country in another is levered by positive or negative sanctions. However, for the purposes of explaining diffusion of institutions such as NHRIs, coercion is problematic and potentially does not apply to such phenomena, at least in its strict form. As a diffusion category, coercion lacks precision and is an over-simplification although it does, importantly, grant the possibility of explicit external agency.[70]

An indirect relationship exists between the ombudsman and three arenas of foreign intervention: colonialism, democracy promotion, and post-conflict scenarios. Coercive policy transfer was a common feature of the colonial era, with significant transfers of legal codes, governing institutions, currencies, and bureaucratic structures from the centre to the

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[69] B. Simmons et al., *The global diffusion of markets and democracy*, (Cambridge: Cambridge University Press, 2008).

[70] It may gain nuance by introducing other depictions of power – such as the popular dichotomy between 'hard' and 'soft' power – but in terms of explaining the spread of the ombudsman it may be more appropriate to combine coercion with the concept of institutional façade.

peripheral European colonies of Africa, Asia, and Latin America. In the post-colonial era, many former colonies continued to look toward countries of colonial, as well as cultural or regional, affinity for lessons on institution-building. Given the prevalence of the Westminster model of political institutions in former British colonies, it is not surprising to also find that many of the earliest ombudsmen outside Europe appear in Commonwealth countries. However, as is developed in Chapter 3, compulsion rather than coercion more accurately captures a process of diffusion that does not necessarily conform to simple cause-effect logic.

The direct coercion of policy transfers, as occurred in Japan or Germany in the aftermath of World War II, is rare. However, recent events have seen a resurgence of such systemic engineering, most visibly in Afghanistan and Iraq. Democracy promotion is often associated with the projection abroad of institutions found in the US and the creation of new external arenas through which to project US interests.[71] Despite the absence of a national level human rights ombudsman or commission in the US, this has not prevented the implantation of a NHRI, the High Commission for Human Rights, in Iraq in late 2008, and a human rights commission was installed in Afghanistan in 2002.[72] A similar dynamic of imposition by external actors can be observed in post-conflict scenarios. The following events, to varying degrees, have all involved an element of compulsion in the establishment or strengthening of NHRIs:

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[71] M. Cox et al. (eds.), *American Democracy Promotion: Impulses, Strategies, and Impacts*, (Oxford: Oxford University Press, 2000), p. 5.
[72] See Chapell Lawson, 'How Best to Build Democracy: Laying a Foundation for the New Iraq', *Foreign Affairs*, vol. 82, no. 4, July/August 2003, pp. 206-209. pp. 207-208.

- The UN-sponsored peace agreement in El Salvador in 1992 (NHRI created 1991)
- The Bosnia-Herzegovina Dayton Agreement and the Paris Peace Accords in 1995 (NHRI created 1996)
- The Good Friday Agreement of Northern Ireland in 1998 (NHRI created 1999)
- The Lomé Peace Agreement for Sierra Leone in 1999 (NHRI created 2002)
- UN Transitional Administration of East Timor (UNTAET) in 1999 (NHRI created 2002)
- UN Mission to Kosovo (UNMIK) in 1999 (NHRI created 2000)
- The Bonn Agreement of Afghanistan in 2001 (NHRI created 2002)
- UN Mission to the Democratic Republic of Congo (MONUC) in 1999 (NHRI created in 2002 – and decommissioned in 2005)
- UN Assistance Mission for Iraq (UNAMI) in 2003 (NHRI created 2008), and
- UN Mission in Sudan (UNMIS) and the Comprehensive Peace Agreement in 2005 (NHRI created in Southern Sudan in 2007)

These instances of common institutional forms have been heavily promoted, in some instances imposed, by external agencies.[73] Irrespective of political, institutional, historical or cultural conditions, where a coercive dynamic – although normatively desirable in the minds of the architects – is in play, the resulting function is highly unpredictable.

[73] It is important to note variation within this category. For instance, the coercive dimension of NHRI diffusion in Northern Ireland is significantly different to that of the Congo. See Chapter 3 for further discussion on the appropriateness of coercion as a category for explaining NHRI creation.

A significant sub-category of coercion, conditionality is a more operational category that emphasises degrees of external coercion through institutional channels. Conditionality refers to the use of coercion through specific conditions attached to the distribution of benefits to recipient countries, commonly administered by IFI and individual donor countries. For the concept of conditionality to have leverage, the specification of the obligations must be precise, and the enforcement method for non-compliance explicit. Conditionality, as it pertains to the adoption of NHRIs, is a limited terrain, given the peripheral nature of the institution, the limited material benefits such transmission implies, and the lack of a coercive mechanism in cases of non-compliance.[74] The ombudsman has received attention from the World Bank, often attached as a component part to judicial and administrative reform packages.[75] The institution can also be found in the harmonization programmes that have accompanied the accession of new states into the European Union (EU). In the case of recent accession states such as Bulgaria, and candidate countries such as Croatia, the Former Yugoslav Republic of Macedonia, and Turkey, the establishment of the ombudsman is explicitly referred to in their respective harmonization packages.[76]

2.4.2. Diffusion by acculturation

[74] This is particularly true of human rights organisational platforms, such as the UN, which tend to favour an inclusive membership model that imposes a highly elastic conditionality, if any at all.
[75] World Bank, 'Fostering institutions to contain corruption', *PREMnotes*, No. 24, (Washington: World Bank, 1999).
[76] See Commission of the European Communities, Croatia 2008 Progress Report; Commission of the European Communities, The Former Yugoslav Republic of Macedonia 2008 Progress Report; Commission of the European Communities, Turkey 2008 Progress Report.

Rose has identified a range of micro-processes including copying, emulation, hybridisation, synthesis and inspiration in his work on policy transfers.[77] Elkins and Simmons speak of 'uncoordinated interdependence' and draw attention to the important distinction between adaptation to altered conditions and learning, the predominant benefit of the former being the conferring of legitimacy or '*cover* from criticism'.[78] In work on constitutional convergence across states,[79] the importance of referent groups is clear. Goodman and Jinks define acculturation as 'the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture'.[80] What all of these contributions share in common is a concern with the relationship of the actor to a reference group or wider social system. There is a propensity for institutional architects to emulate countries of colonial, cultural, or regional affinity, as well as the preferred institutions of dominant international actors.

Such a framework emphasizes indirect but material consequences, such as status maximisation and reputation costs, to explain adaptation to altered conditions within the international or regional social system. This provides a useful process-oriented explanatory framework with which to evaluate the diffusion of NHRIs across time and space. The global diffusion of NHRIs, the spread of the institution, and lines of influence are highly suggestive of an acculturation mechanism, increasing in intensity post-1990. In keeping with the self-determination and relativist mantra of the cold war, the UN may have professed support for NHRIs, particularly with regard to the protection of minorities, but few states were willing to

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[77] Richard Rose, 'What is Lesson Drawing?' *Journal of Public Policy*, vol. 11, no. 1, 1991, p. 22.
[78] Elkins, Zachary and Beth Simmons, 'On Waves, Clusters, and Diffusion: A Conceptual Framework', *Annals of the American Academy of Political and Social Science*, no. 598, March 2005, p. 39.
[79] Donald Horowitz, 'Constitutional Design: Proposals versus Process', in Andrew Reynolds (ed.), *The Architecture of Democracy*, (Oxford: Oxford University Press, 2002), p. 31.
[80] Goodman and Jinks, 'How to Influence States', p. 626.

implement them throughout this era.[81] The classical ombudsman diffused modestly in the 1960s and 1970s but the French human rights commission institution of 1948 remained a solitary figure for 30 years.

The challenge of state socialization is also marked throughout the 1980s. The appearance of the commission model in Togo and Benin in the latter half of the decade corresponded primarily to the perceived need of the ruling military elite to seek international legitimacy. However, in Benin, sustained pressure by the Benin Bar Association was also a factor in the appearance of the commission model.[82] The first commission in Asia, created in the Philippines in 1987, occurred during transition to democracy. The degree to which the institution emulates the international UN guidelines contained in the 1978 Geneva Principles is highly indicative. Such phenomena may be synonymous with the intermittent appearance of 'demonstration democracies' in the developing world during the Cold War.[83]

Reflecting an increasingly conducive regional social system as well as sophisticated diffusion platforms, the creation of domestic human rights instruments has been evident among European human rights ombudsmen since the early 1970s. The Swedish ombudsman office was provided with an explicit human rights mandate in the constitutional revision of 1974. This was followed by the creation of the Iberian human rights ombudsman in Portugal (1976) and Spain (1978) in the wake of post-authoritarian transitions. The impetus for these

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[81] Human rights commissions created in Canada and New Zealand in 1978 were heavily influenced by the race relations commissions of the 1950s, described as 'anti-discrimination commissions with a broad mandates'. See Pohjolainen, *The Evolution of National Human Rights Institutions*, p. 45.
[82] HRW, *Protectors or Pretenders?*, p. 337.
[83] See E. S. Herman and F. Brodhead, *Demonstration Elections: US Staged Elections in the Dominican Republic, Vietnam and El Salvador*, (Boston: South End Press, 1984).

innovative designs must be placed in the febrile context of early democratisation, as in the case of Portugal, a highly charged human rights discourse, and the desire to emulate European institutions.[84] It is interesting to note that the other paradigm transition of Southern Europe, that of Greece in 1974, did not establish a NHRI until 1997. The human rights model was also replicated in Poland in 1987 two years before the first parliamentary elections. The Polish office provided an important 'demonstration effect' for other countries in Eastern Europe, beginning with Croatia in 1990.[85]

Despite variation of enabling conditions and platforms across regions, the institutional profusion of NHRIs in the 1990s is evident across all regions, even in the Arab world, with the creation of a number of human rights commissions in Morocco, Palestine, and Jordan during this decade. Growing leverage and sophistication of international organisational platforms, combined with domestic processes of economic and political opening, have provided the drivers for institutional implantation. They have also led to a general conformity, or isomorphism, across models within regional referent groups. Thus we see the Iberian human rights model largely dominant in Latin America (excluding North America and the Caribbean), the human rights commission prevailing in Africa and Asia-Pacific, and the Arabic world, and in Europe the human rights model throughout Eastern and South Eastern Europe.

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[84] Walter C. Opello Jr., 'Portugal's New Ombudsman: A Preliminary Assessment', *Luso-Brazilian Review*, vol. 18, no. 2, Winter 1981, p. 251.

[85] Evgeny Finkel, 'Defending Rights, Promoting Democracy: The Institution of Ombudsman in Poland, Russia and Bulgaria', Working Paper No. 50, Institute of European Studies, The Hebrew University of Jerusalem, 2006, p. 8.

This phenomenon has continued to a lesser extent into the 21st century, especially in the outer boundaries of Europe and among Arab countries. The continuing creation of offices in Arab countries, as well as in Central Asia and the Caucasus, including Egypt, Qatar, Jordan, and Kazakhstan, has been actively promoted by the Organisation for Security and Co-operation in Europe (OSCE) with significant US funding.[86] The acceleration and deceleration of this wave of NHRI appears to bear out Schmitter's assertion that the relevance of the international context may increase with each successive instance of diffusion.[87]

To reiterate, the process of acculturation emphasises the relational environment of the actor, not the content of the reform adopted. In turn, this chapter has also emphasised acculturation operating through more or less coordinated and sophisticated diffusion platforms. In this chapter's discussion, little has been said of the processes of insertion of new institutional forms that are critical to the depth and durability of NHRI reform. As Goodman and Jinks state, 'the acculturation mechanism as such is neutral – under different conditions, it may yield normatively attractive, unattractive or ambiguous results'.[88] The state may adopt a NHRI largely as a response to altered conditions within its social system. However, the transmission of the policy to the domestic level, and the durability and depth of the new reform will be determined not only by international structural and normative scripts, but also by a broad range of internal political forces.

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[86] Richard N. Haass, 'Toward Greater Democracy in the Muslim World', *The Washington Quarterly*, vol. 26, no. 3, Summer 2003, p. 147.
[87] Philippe Schmitter, 'The Influence of the International Context upon the Choice of National Institutions and Policies in Neo-Democracies', in Whitehead, *The International Dimensions of Democratization*, pp. 26, 39.
[88] R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law*, (Oxford: Oxford University Press (Forthcoming 2011), p. 22.

2.4.3. Diffusion by persuasion

Persuasion orientates the analysis toward a domestic level of explanation. The focus descends to the internal level with emphasis on the compatibility of underlying preferences within states, and the content or values attached to the diffusing policy. According to this logic, persuaded actors 'internalise' new norms and rules of appropriate behaviour, and redefine their interests and identities accordingly.[89] In the language of policy transfer, it is a process of learning where '[a]ctors internalise the principles and rationale of the reform when they accept and understand the need for reform, as well as the logic of the reform'.[90] Theorists have argued that the process of transnational socialisation may lead to the internalisation of norms across international dimensions.[91] This logic of diffusion places emphasis on the content of the norm, its ideational framing, and the receptiveness of the adopting country to the intrinsic values contained therein.

Implicit to the logic of this process of diffusion is the recognition that no two instances of adoption will follow the same logic of diffusion. Indeed, there is likely to be a 'discount effect' as the rate of adoption increases. The underlying assumption that institutions are borne out of political contestation, and continue to be responsive to their political environment suggests that the internalisation of norms – as opposed to their initial diffusion – should not be conceived as a finite process with a standardised outcome or timescale. This

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[89] Jeffrey T. Checkel, 'Norms, Institutions and National Identity in Contemporary Europe', *International Studies Quarterly*, vol. 43, no. 1, 1999, p. 84.
[90] See Elkins and Simmons, 'On Waves, Clusters, and Diffusion', p. 48.
[91] Finnemore and Sikkink, 'International Norms and Political Change', p. 895.

is a dominant theme in the literature on democratisation, with theorists marking a significant differentiation between instrumental (electoral democracy) and normatively desirable (liberal democracy) models of democracy. Diamond asserts that an incipient 'democratic recession' is in motion partly due to a lack of internalisation of democratic norms, especially in nascent democracies.[92]

Persuasion is a unique category in the sense that it focuses on the outcome of diffusion as opposed to the process only. Persuasion does not neatly demarcate between the internal and external, but it ratchets up the complexity of interactions as international processes collide with domestic dynamics, thus generating new norms, demands, and expectations from below.[93] In the modern social system, as has been elaborated, international processes and platforms have exerted an important influence over the initial diffusion of institutional forms. However, to account for the experience of these institutions during the design phase, and subsequent to activation, requires consideration of a primarily domestic explanatory model. The ability of an imported institution to transcend the formal constraints imposed at point of origin, for example, and to attain primacy over the outcome of political processes, is a key dimension to this thesis. New institutional forms have the ability to redistribute power, and as such, are likely to meet robust resistance, but may also open up new opportunities. As Portes writes:

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[92] Larry Diamond, 'The Democratic Rollback: The Resurgence of the Predatory State', *Foreign Affairs*, vol. 36, no. 2, March/April 2008, p. 36.

[93] The Swedish case may be the only example of internalization in perfect isolation, but even here the exposure of King Charles XII to similar institutions in the Ottoman Empire is said to have inspired his thinking. See Roberta Jamieson, 'The Ombudsman: Learning From Other Cultures', *Ottawa Law Review*, vol. 25, no. 3, 1993, pp. 629-635.

> Institutional grafting takes place at the surface level of things and, as such, faces the potential opposition of a dual set of forces grounded in the deep structure of the receiving societies: those based on values and those based on power…These plans do not necessarily backfire, but they can have a series of unexpected consequences.[94]

New institutional forms are unlikely to endure or function well without the development of an internal platform of legitimacy among a variety of stakeholders. The notion of internalisation is indicative of the need for some degree of persuasion or consent. Given the specialised institutional characteristics of the NHRI – in particular its lack of enforcement authority – consent is desirable and, in this respect, more relevant to its eventual function than compliance or conformity with international norms. This discussion moves the analysis beyond the scope of the present chapter of how norms diffuse among states toward questions of diffusion outcomes. More specifically, it emphasises the role of domestic politics in understanding the ways in which diffused norms interact with domestic political forces to shape NHRI outcomes.

2.5. Political regimes and NHRIs

Once the preserve of a small clique of Western countries, NHRIs are now a truly global phenomenon established in a wide array of political regimes. As Figure 2.2 shows, according to Polity IV there were 99 electoral democracies worldwide in 2005, while the number of one or more NHRIs written into law within a single jurisdiction totalled 120. The

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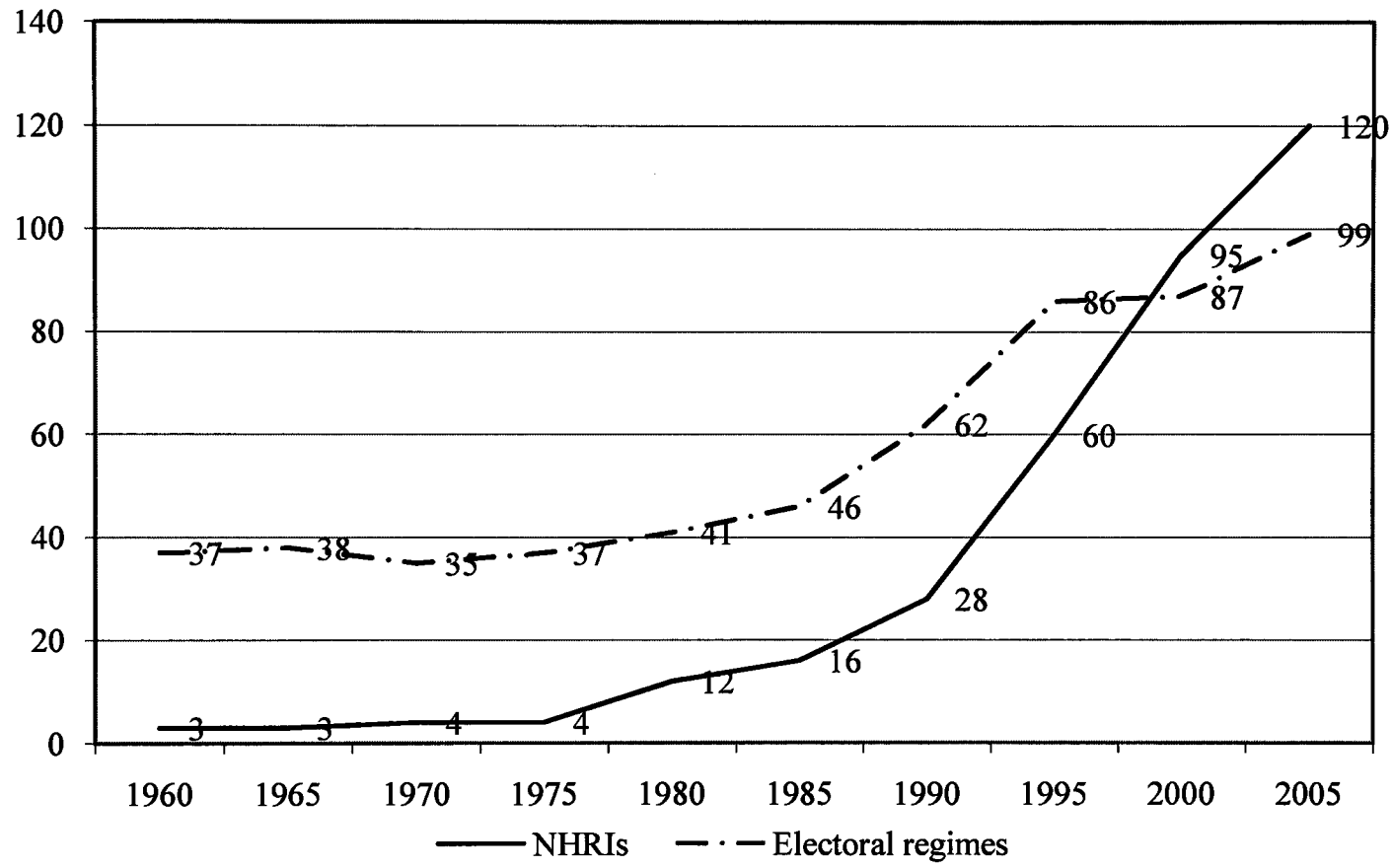
[94] Alejandro Portes, 'Institutions and Development: A Conceptual Reanalysis', *Population and Development Review*, vol. 32, no. 2, June 2006, p. 242.

task of classifying political regimes by refining the classic procedural definition of democracy advanced by Dahl has preoccupied political scholars for decades.[95] A substantial literature exists on the many subtype classifications of regimes – including electoral, illiberal, limited, controlled, hybrid, semi-democratic, virtual, façade, and others – often drawing on primarily procedural criteria.[96]

Figure 2.2: Global growth of NHRIs and electoral regimes 1960-2005



Source: NHRI population data collected from ICCNI and NHRI Forum: http://www.nhri.net/. Democratic regimes follows the number of nations scoring five or higher on the Polity IV scale 1960-2005.

The process of diffusing and activating new institutional forms is not immune from domestic political conditions. The objective of this section is to demonstrate that NHRIs have diffused to a wide range of political systems. In doing so, some of the obstacles posed to

[95] See R. Dahl, *Polyarchy: Participation and Opposition*, (New Haven: Yale University Press 1971).
[96] See David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research', *World Politics*, vol. 49, no. 3, April 1997, pp. 430-451.

rights protection and promotion by novel local, political, institutional, historical and normative conditions, are raised. For the sake of parsimony, the chapter proceeds by using one of the most widely used measures of democratisation in the literature, the Freedom House 'freedom in the world' regime classifications.[97] Using a seven point ordinal measurement of 'political liberties' and 'civil rights' to survey 193 countries, Freedom House constructs a composite measurement for both categories to produce a three-fold classification of political regimes:[98]

- Free (1.0 to 2.5)
- Partly Free (3.0 to 5.0)
- Not Free (5.5 to 7.0)

The Freedom House metric considers a range of measurements under the rubric of political liberties (electoral process, political pluralism, and functioning of government) and civil rights (freedom of expression and belief, associational and organisational rights, rule of law and personal autonomy, and individual rights).[99] Figure 2.3 provides an aggregate distribution of NHRIs by political regime type since 1975, and is adjusted for regime variation at five-year intervals. The figure reveals an increase in NHRIs within all political

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[97] Similar to other measurements of democracy such as Polity IV and Polyarchy 1.2 (to which it is highly correlated), Freedom House departs from Dahl's classic definition of democracy as well as the Universal Declaration of Human Rights. See Gretchen Casper and Claudiu Tufts, 'Correlation Versus Interchangeability: The Limited Robustness of Empirical Findings on Democracy Using Highly Correlated Data Sets', *Political Analysis*, vol. 11, no. 2, 2003, pp. 196-203.

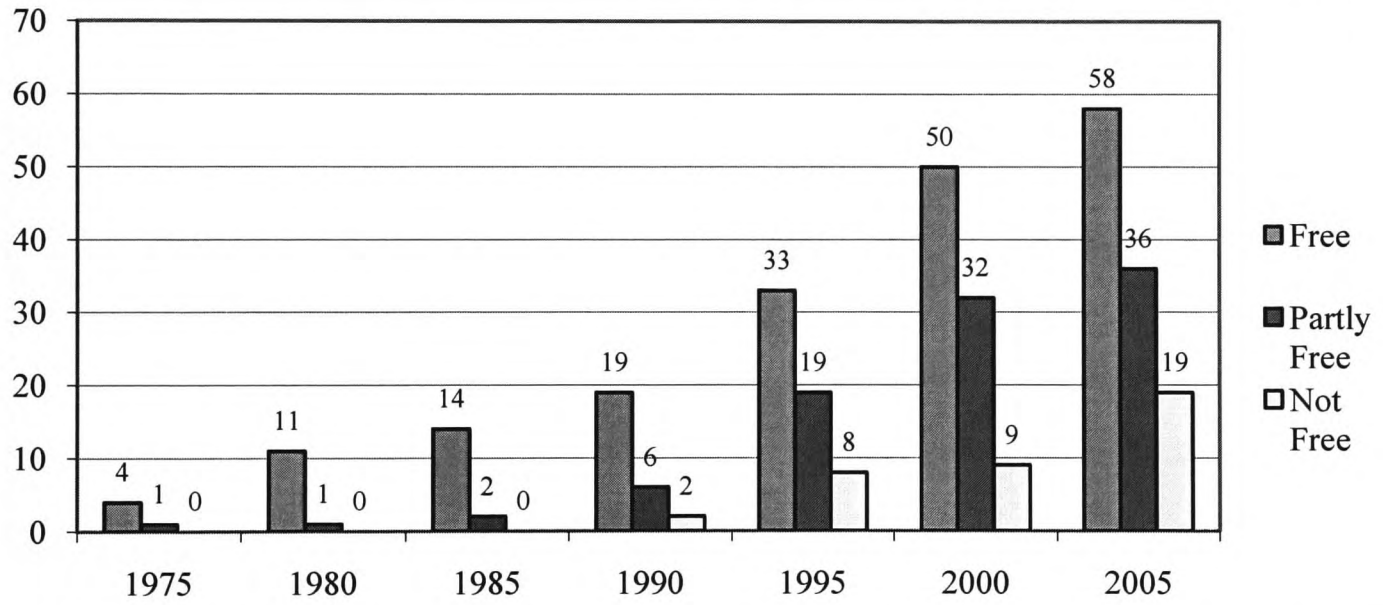
[98] For a full explanation of the survey methodology, see Freedom House, *Freedom in the World 2007: The Annual Survey of Political Rights and Civil Liberties*, (New York: Freedom House, 2007), pp. 982-1001.

[99] For a comprehensive discussion of the Freedom House measurements and methodology see Joseph Ryan, 'Survey Methodology', *Freedom Review*, vol. 25, no. 1, 1994, pp. 9-13.

regime categories, most notably among 'partly free regimes' since 1985. The number of NHRIs found in 'not free regimes' has also doubled between 2000 and 2005.

The reliability of Freedom House data has been subjected to sustained scrutiny and the study recognises – among a range of valid methodological concerns – the pitfalls of both a democratising bias, and the cloaking of important differences between political regime types within these three very broad categories.[100] However, for the purposes of the present discussion, the framework is sufficiently suggestive across space and time to broadly delineate NHRIs along the dimension of their political environments.

Figure 2.3: NHRIs by Freedom House Political Regime Classification (1975-2005)



Source: NHRI population data collected from ICCNI and NHRI Forum: http://www.nhri.net/. Freedom House country data has been calculated to reflect regime change over time at five year intervals. Time series data is not available for Bermuda, Hong Kong, Kosovo, Palestine, Puerto Rico, and Saint Lucia.

Unlike in earlier decades, it is increasingly difficult to equate NHRIs with free regimes or political systems that display a largely consolidated, stable, and comprehensive adherence to

[100] Gerardo L. Munck and Jay Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices', *Comparative Politics Studies*, vol. 35, no. 1, February 2002, p. 14.

the principles of liberal democracy. Rather, NHRIs are becoming increasingly synonymous with a wide range of what may be termed hybrid democratic regimes. These loosely democratic constitutional regimes display a variation in terms of regime stability, rights observation, and adherence to democratic precepts, such as the rule of law and political accountability. The consequence of this contemporary trend is to endow NHRIs with an increasingly complex array of competing demands and expectations in international and domestic arenas. The neutrality of the normative scripts attached to the institution by organisational platforms, with their implicit teleology of value homogeneity, is increasingly contested by adoptive contexts.[101]

Table 2.1: NHRI type and regime type following Freedom House classifications 2008

	Political liberties average score	Civil rights average score
Classical Ombudsmen (15 NHRIs)	1.2	1.2
Human Rights Ombudsmen (43 NHRIs)	2.7	2.8
Human Rights Commissions (63 NHRIs)	3.7	3.4

Source: Sample of 121 NHRIs from ICCNI and NHRI Forum: http://www.nhri.net/. Freedom House data from 'Freedom in the World' Survey 2008.

It is not possible to declare a strong correlation between type of political regime and the presence of a NHRI. As Figure 2.3 reveals, these institutions can be found in all regime types considered here. Table 2.3 identifies a basic correlation between NHRI type and regime type. Despite the presence of all NHRI types in all three regime categories, the classical ombudsman continues to predominate in 'free' regimes, increasingly operating in conjunction with a human rights commission model. The human rights ombudsman and

[101] Important differences across contexts cautions against the overtones of value homogeneity sometimes found in intra-regional practitioner material. See Quórum (Revista), *Las Defensorías del Pueblo y la Protección de los Derechos Humanos*, (Madrid: Universidad de Alcalá, 2008), p. 11.

commission are the NHRI of choice for many 'partly free' regimes inspired by a confluence of international factors, the former especially prevalent in the post-authoritarian terrain of Eastern and Central Europe, and in Latin America. It appears the human rights commission is the standard template for those 'not free' regimes to have established the institution. This could be due to the fact that the generic commission model is viewed as an advisory body (with no investigatory powers) while all human rights ombudsman have investigatory powers.[102]

Before descending to the regional level, this chapter ends with a global summary of NHRI distribution by regime classifications. The analysis provides some observations on the diffusion of the institution and the potential implications inherent to the process of transplantation of institutional forms to new political terrain. The severity of the challenge faced by these institutions – especially in terms of capture by powerful political forces – is especially multiplied in regimes with only a tenuous or even non-existent adherence to democratic practices.

2.5.1. NHRIs and political regimes in 2008

In 2008 the Freedom House report surveyed 193 countries and 15 related and disputed territories, resulting in ninety countries being classed as free, sixty as partly free, and forty-three as not free. Of the 193 countries, 121 countries were considered to qualify as electoral democracies, located somewhere in between the non-democratic and liberal polarities of the

[102] I am grateful to Linda Reif for this observation. Personal communication by email with author, 10 March 2009.

one to seven scale. Of the ninety countries rated 'free' by Freedom House in 2008, sixty-three countries have established a NHRI. This group contains many political systems commonly associated with the first or second wave of democracies, following Huntington's three wave metaphor.[103] The high political liberties and civil rights scores in this category are indicative of the enduring characteristics of many of these democracies. As stated earlier, the enduring classical model, or second generation of ombudsmen – found for the most part in democracies with the highest score on political and civil indicators – is particularly common to Western Europe.

Despite base line commonalities across regimes, this category of institution reveals considerable political, institutional, historical, and cultural diversity. The result of international diffusion has been to borrow institutional forms from established, highly-structured democracies, and extend them into a diverse group of political systems that nevertheless may be considered broadly stable, democratic, and governed by the rule of law. The structural and normative conditions commonly associated with the Western NHRI decisively part company with their diffused counterparts in at least three key areas. Firstly, in countries where the state has traditionally neglected the institutional sphere of representative democracy or actively perpetrated systematic and widespread human rights violations, an institution such as a NHRI may assume an additional resonance. Secondly, the NHRI has commonly developed in parliamentary systems, and the transplanting of the institution to a presidential setting introduces a destabilising dynamic as the institution struggles to define its position in the political system. Thirdly, this discussion raises the

[103] S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (London: University of Oklahoma Press, 1991).

inherent problems associated with uprooting and transferring institutions intrinsic to a specific history and culture.

Of sixty countries rated 'partly free' by Freedom House in 2008, thirty-nine countries have established a NHRI. All of these models can be located in the third generation of NHRIs dating from 1976. There is also increasing instability among regimes in this classification with scores fluctuating from three to six. NHRIs established in this setting confront a range of systemic challenges along political, civil, and institutional dimensions such as executive dominance, weak rule of law, and the systematic violations of rights. Regimes considered partly free range from weak liberal democracies that enjoy limited political and civil rights, to those regimes where such rights are severely curtailed, but may still be considered electoral democracies. Political systems within this group range from those that display a high political liberties average over time – such as Bolivia, Ecuador, and Venezuela – to others beset by internal conflict – Afghanistan, Sri Lanka, and Colombia – and fractious post-conflict situations, such as in Bosnia and Herzegovina.

This study does not discount the potential for NHRIs within this classification to be established, and subsequently contribute to processes of rights protection and promotion, given that many of these countries may be considered basically free by Freedom House standards. However, this range of political systems is, for the most part, recently democratised and show variation over time. This may fundamentally impact the autonomy and institutionalisation of new institutions. Further complications arise from the diversity of political systems – with presidential authority being particularly acute in many African and

Latin American countries – legal systems – with the spread of the ombudsman to both civil and common law jurisdictions – and finally, cultural diversity, in cases as diverse as Ethiopia, Jordan, and Morocco.

Many of the institutions in this classification were instituted following the Paris Principles of 1991 and in turn contain an explicit human rights mandate in their title. The nomenclature of the office in all three classifications of regime is suggestive of the normative demands and expectations attached to the office. Beyond the title of Ombudsman, Mediator and Commissioner found in Europe, the translation of the office to Africa, Asia-Pacific, Eastern Europe, and Latin America has resulted in titles as diverse as Protector, Defender, Prosecutor, Advocate, and in Andorra, 'The Person Who Reasons In Favour of the Citizen'. Such assertive titles are a reflection of internal demand and expectations often driven by historically antagonistic relationships between state and citizen. However, the titles of the office can also be construed as responding to external incentives, such as the proliferation of human rights institutions accelerating rapidly post-1991, and, in the cases of Tanzania and Mauritania, explicit reference to the World Bank maxims of good governance, poverty, and social inclusion.

Of forty-three countries rated not free by Freedom House in 2008, seventeen countries have established a NHRI. There is a surprisingly high number of human rights commissions in regimes that are considered not free, thus failing to meet the basic criteria for electoral democracy. Given the conditions under which these institutions operate, evaluating the manner of their diffusion and institutionalisation can prove problematic. Practical

challenges include access to reliable information, level of adversity confronted by the institution, and the likelihood that these institutions exist as little more than regime façades.

Scant literature exists on these cases, although some are formally recognised by the ICC – including Chad, Sudan and Rwanda. The exception to this rule may be the Kosovan Ombudsperson, which has received some attention as a post-conflict protagonist in domestic and international debate.[104] Furthermore, the Human Rights Watch publication 'Protectors or Pretenders' has provided a valuable and sobering assessment of the challenges confronted by many of these institutions in Africa. The report documents both important signs of progress in the face of adversity, as well as highlighting inauspicious beginnings. As one extract on Togo reads:

> In 1987, Yao Agboyibor and Aboudou Assouma represented Togo at the UN Commission on Human Rights. On their return from Geneva, they proposed the human rights commission to President Eyadema, largely as a means of "responding to the wishes of the international community," according to Aboudou Assouma. President Eyadema responded positively. "I'm a soldier," he reportedly told Assouma, "you tell me what to do".[105]

2.5.2. Negative cases: The absent institution

Despite the prevalence of NHRIs across political, regional, and cultural jurisdictions, there remain many countries that have not instituted a national level human rights instrument in

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[104] Christopher Waters, ''Kosovanizing' the Ombudsperson: Implications for Kosovo and Peacekeeping', *International Peacekeeping*, vol. 15, no. 5, November 2008, pp. 648-662.
[105] HRW, *Protectors or Pretenders?* p. 337.

accordance with the Paris Principles. Prominent among the twenty-seven countries classified as Free by Freedom House in 2008 not to have instituted an ombudsman or commission model at the national level are Brazil, Chile, and the US. In the Partly Free classification 21 countries, primarily in Africa and the Asia-Pacific, have not established a NHRI of some description. These include Mozambique, Comoros, Guinea-Bissau, Singapore and Yemen. Only in the Not Free category do a majority of countries not have a national-level NHRI.[106] Countries such as China and Cuba are emblematic exceptions to the general expansion of the western liberal model.[107]

It is not within the scope of this chapter to elaborate on why these states have resisted the international momentum behind NHRIs. Particularly intriguing are the few states that can be included at least loosely within, or aspiring to, the liberal internationalist social system. One can speculate on a number of potentially inhibiting factors. There may be a desire to remain unique or outside international norms. A 'fatigue effect' may also be felt by a region saturated by these innovations. The existence of an existing institutional framework may be considered adequate to the task. Structural obstacles such as a federal system of governance has, in the case of Brazil and the US, led to the creation of ombudsman offices at the state, but not at the national level.[108] There may be normative resistance at the regional or national level, whereby prevailing values are resistant, or even antithetical, to those associated with such institutions.

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[106] Data by author compiled from NHRI Forum (http://www.nhri.net/) and Freedom House survey data for 2008 (http://www.freedomhouse.org/).

[107] See generally Bert Hoffman and Laurence Whitehead (eds.), *Debating Cuban Exceptionalism* (New York: Palgrave Macmillan, 2007); and G. John Ikenberry, 'The Rise of China and the Future of the West: Can the Liberal System Survive?', *Foreign Affairs*, vol. 87, January/February 2008, pp. 23-37.

[108] It is interesting to note that even at the state level there are very few ombudsmen in the legislative-public sector arena in Brazil or the US. I am grateful to Linda Reif for this observation. Personal communication by email with author, 10 March 2009.

2.6. Conclusion

The findings of this chapter point not to absolutes, but rather to questions of degree. NHRIs assume distinct institutional forms, a spectrum commonly devised with reference to the inclusion of an explicit human rights mandate in the case of the classical ombudsman, and to the independence and breadth of powers built in to alternate human rights commissions. The historical origins of the institution, traced to 19th century antecedents of public commissions of inquiry and ombudsmen, provide a point of departure to explore competing demands and expectations placed on the institution. The commission model is imbued with an explicit political mandate connected to its role as an advisory body to government on matters of public policy. In contrast, the ombudsman is traditionally perceived as a technocratic administrative entity operating horizontally within the public structures – albeit, at least in the case of the Swedish model, one with teeth. Both entities derive a dual authority from their standing as government bodies as well as a vertical interaction with the citizenry. In turn, NHRIs proved to be highly pliable in adapting to new political conditions. Interestingly, innovative adaptation of formal design principles is not solely the preserve of recent NHRIs. Rather, it is observable, to varying degrees, from the reform of the classical model of Sweden to the enhanced judicial prerogatives of the Spanish model and prosecutorial authority of the Ugandan office.

With respect to drivers of institutional innovation, the chapter has identified a sophisticated array of organisational frameworks operating within the international social system. From

the sporadic development of a NHRI normative framework within the UN and early ombudsman advocates of the Cold War era, NHRI diffusion is now harnessed by an increasingly sophisticated range of platforms, from international and regional governmental institutions, to international financial institutions and non-governmental entities. In turn, the normative precision of NHRI form and function has been enhanced, most visibly in the form of the Paris Principles. The transmission of normative templates may initially be channelled through such organisational platforms. However, arguably the most significant recent advances of standard setting, capacity building, and network facilitating are occurring as much within regional NHRI peer networks as at the inter-governmental level. The APF offers a parallel standard setting mechanism in the Asia-Pacific to the ICC, with some success. As will be developed further in Chapter 3, in Latin America it is the FIO, not UN or OAS, which most closely coordinates the activity of NHRIs in the region. This reflects the strong regional and cultural affinity among these institutions and, at a practical level, the common challenges faced.

The genesis of NHRIs is acted upon by a confluence of factors, above all overlapping and interacting mechanisms of diffusion operating through organisational platforms. Diffusion theory provides a valuable point of departure for this analysis. The study draws on three broad categories of mechanisms in the literature: coercion, acculturation, and persuasion. Given the scope of the chapter, the objective has been to contrast these distinctive logics of diffusion, as opposed to extrapolating on the intricacies of any particular instance, or of the overall historical pattern. However, the findings suggest that the logic of diffusion in any one instance will differ to any other. The configuration of mechanisms, and the form of

transmission they take, is likely to be informed by both domestic and, to a lesser extent, international conditions.

Such a process suggests these mechanisms are not discrete categories easily amenable to empirical testing, but instead are prone to overlap, complementarities, and counteractions. In the case of NHRI diffusion, the thesis argues that coercion in its most simplistic form has limited utility in explaining their transmission, except possibly in situations of *extremis* such as post-conflict external intervention. Diffusion by acculturation and persuasion are more promising avenues of inquiry. This is further developed in Chapter 3 where NHRI diffusion in Latin America is evaluated by drilling down into the logic underpinning this conventional three-fold classification of diffusion mechanisms. The thesis argues that the interacting components of diffusion within this regional cluster of cases is more accurately captured by three prominent diffusion mechanisms – compulsion, material inducement and framing of ideas – that exist within and across the dominant categories of diffusion discussed in this chapter.

This chapter has demonstrated that far from being a Western democratic phenomenon, the NHRI form can now be found in an eclectic range of regime types. While powerful countervailing domestic forces in more adverse contexts may effectively neuter some of these institutions at birth, others have emerged structurally intact and made important contributions to human rights protection and political accountability at the domestic level. Internal political forces may largely govern the outcome of the diffusion of new institutional forms across international boundaries. However, international context matters.

Chapter 3: Diffusion of Defensorías del Pueblo across political systems in Latin America

3.1. Introduction

This chapter examines the origins and distribution of the Iberian variant to the generic NHRI category – the Defensoría del Pueblo – in Latin America, seeking to explore the interaction between processes of diffusion, domestic political conditions and the implications of this relationship for the outcome of Defensoría reform. Building upon Chapter 2, the analysis further explores why states within a defined regional social system have, almost without exception, chosen to create Defensorías within a circumscribed period of time. In doing so, the chapter provides more fine-grained empirical insight into the process and outcome of Defensoría diffusion and suggests possible modification to conventional frameworks of diffusion analysis.

The chapter begins by demonstrating the overall trend of regional diffusion of Defensorías throughout Latin America. In mapping the rapid spread of Defensorías over the past 25 years, the thesis also illuminates our understanding of this regional proliferation. It argues that the diffusion of the institution is attributable to an increasingly organised and coordinated array of international and regional norm platforms and networks. In particular, the chapter highlights the importance of norm entrepreneurship at the regional and even sub-regional level. Indeed, the analysis builds on the discussion in Chapter 2 by substantiating an unusually dense arena of regional norm activity in Latin America.

Not-withstanding this broad trend of Defensoría creation at the regional level, the thesis also highlights significant variation in structural outcomes across cases at point of origin. More specifically, the chapter presents a categorisation of 'unconstrained' and 'constrained' Defensorías according to formal design principles of autonomy and powers. It is important to note that this analytical focus on formal design outcomes is just one component, albeit a significant one, of the broader conception of political institutionalisation that is developed in subsequent chapters. For the purposes of this chapter, the focus is on how frameworks of diffusion analysis can assist in explaining observed structural conformity, variation, as well as absence, across cases.

The analysis argues that variation in Defensoría reform outcomes can be usefully analysed with reference to three distinct, but complementary, intermediate mechanisms of diffusion: compulsion (following from coercion), inducement (a component of acculturation) and framing of ideas (an indispensable part of persuasion). Identifying the linkages across these mechanisms and their constitutive or individual impact upon institutional outcomes in context, the discussion elucidates upon the tensions and complementarities across logics of diffusion that are often left under-specified in the literature. In particular, by incorporating a focus on domestic political process in explaining the outcome of Defensoría creation the thesis asserts that diffusion processes should not be decoupled completely from outcome – especially in terms of the depth and durability of new reform. Further insights are generated by critically evaluating the external and internal factors underlying Brazil and Chile's resistance to Defensoría reform (thus far).

The first section provides an overview of Defensoría distribution in Latin America and their transmission through a range of international and regional platforms. This is followed by a discussion of formal design variation among Defensorías in the region and their categorisation as 'unconstrained' and 'constrained' models. The analysis then turns to explaining this variation by linking the creation or absence of Defensorías to distinct logics of diffusion, broadly captured by intermediate diffusion mechanisms. The chapter concludes by considering the implications of diffusion process and initial outcomes on Defensoría reform moving forward.

3.1. Diffusion of Defensorías in Latin America

As Table 3.1 demonstrates, fifteen NHRIs are distributed throughout Latin America, with the first model appearing in Guatemala in 1985 followed five years later by Mexico in 1990. The diffusion of the Defensoría in Latin America follows a contagion logic, with the number of offices in the region all created within a period of 14 years, with the exception of Uruguay in 2009. As observed in Chapter 2, Latin America displays the highest density of NHRIs outside Europe. The lines of influence become even more pronounced at the sub-regional level with temporal clustering suggestive of a powerful local diffusion effect. In Central America, following Guatemala in 1985, the majority of offices were established by 1993; in the Andean region, initiated by Colombia in 1991, all countries had established a Defensoría by 1999; only in the Southern Cone have states resisted this norm transmission, with caveats.

Table 3.1: NHRIs in Latin America (1985-2009)[1]

Country	Year created	Nomenclature
Guatemala	1985	Procuraduría Nacional de los Derechos Humanos
Mexico	1990	Comisión Nacional de los Derechos Humanos
Honduras	1990	Comisionado Nacional de Protección de los Derechos Humanos
Colombia	1991	Defensor del Pueblo
El Salvador	1991	Procuraduría para la Defensa de los Derechos Humanos
Costa Rica	1992	Defensor de los Habitantes
Paraguay	1992	Defensor del Pueblo
Argentina	1993	Defensor del Pueblo de la Nación
Peru	1993	Defensoría del Pueblo
Bolivia	1994	Defensor del Pueblo
Nicaragua	1995	Procuraduría para la Defensa de los Derechos Humanos
Ecuador	1996	Defensor del Pueblo
Panama	1996	Defensor del Pueblo
Venezuela	1999	Defensor del Pueblo
Uruguay	2009	Institución Nacional de los Derechos Humanos (NHRI)

In contrast to other regions, the contemporary departure point for discussion of NHRIs is not the UN Paris Principles adopted in 1993 but rather Article 54 of the Spanish Constitution creating the Defensor del Pueblo in 1978.[2] This fact is consistent with a chronology which dates the creation of eight regional models prior to 1993. It is also underlined by the nomenclature of these offices. The Spanish 'Defender' title is predominant. However, titular variations include the *sui generis* 'Human Rights Prosecutor' in the Central American countries of Guatemala, El Salvador and Nicaragua, the UN-influenced 'Human Rights

[1] Table does not include NHRIs found in the Caribbean.
[2] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, UN Human Rights Commission, Res. 1992/54, 3 Mar. 1992. Also, UN Gen. Ass., Res. 48/134, 20 Dec. 1993.

Commission' in Mexico, and, most recently, the UN-generic 'National Human Rights Institution' in Uruguay. As will be developed, these titles reflect, in part, the interests of institutional designers and diverse lines of external influence.

The following analysis outlines the normative drivers of this regional trend toward creating Defensorías in Latin America. The discussion places emphasis, in particular, upon a continually evolving and increasingly sophisticated array of organisational platforms operating at the regional level and their role in propagating the Defensoría del Pueblo throughout the region.

3.1.1. International organisational platforms and networks

Latin American NHRIs stand out for their historical lack of engagement with international organisational platforms. Unlike Africa, Asia-Pacific and Europe, the role of the UN in the transmission of NHRI norms has been notably less apparent. It is acknowledged among NHRI observers that the UN has neglected the Latin American Defensoría until recently.[3] Rather, the region presents a highly developed array of organisational platforms engaged in standard setting, capacity building, network facilitating, and membership granting within a regional referent group. Despite this proviso, the UN remains a prominent actor in the region and was instrumental in the creation of Defensorías in the conflict and post-conflict scenarios of El Salvador and Honduras.

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[3] A. Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, (Copenhagen: The Danish Institute for Human Rights, 2006), p. 110.

In part the absence of the UN stems from enduring disputes over whether the human rights ombudsman model can be defined as a NHRI.[4] Nevertheless, the Vienna Declaration and Program of Action adopted in 1993 by the UN General Assembly made explicit mention of NHRIs and was endorsed by many Latin American states.[5] An incipient UN presence in the form of the Network of National Human Rights Institutions of the Americas created in 2000 signals greater engagement with the Americas by the Office of the High Commissioner for Human Rights (OHCHR). However, unlike other coordinating platforms the network still lacks dedicated infrastructure or personnel. UN in-field agencies, especially the UNDP (United Nations Development Program) and UN Refugee Agency (UNHCR) are important partners of Defensorías across countries. In turn, experts operating from within UN structures, such as the Special Rapporteurs for Extra-Judicial Executions and Internally Displaced Persons, have frequently coordinated activities with Defensorías.

The focus on regional platforms rather than the UN also reflects prevalent geopolitical dynamics, particularly its strong ties to Spain, discussed further below. Lacking a national-level NHRI itself and not necessarily viewed as a regional leader in human rights, the United States has played only a peripheral role in the transmission of such norms. Nevertheless, the United States Agency for International Development (USAID) has materially supported the work of Defensorías in the region and US Department of State country reports make

[4] The UN General Assembly released simultaneous, but separate, resolutions on human rights ombudsmen and commissions in 2009. See UN GA, 'The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights', UNGA Res. no.: A/RES/63/169, 20 March 2009; and UN GA, 'National institutions for the promotion and protection of human rights', UN GA Res. no.: A/RES/63/172, 20 March 2009.

[5] Article 36, Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

frequent reference to NHRIs.[6] Other international government agencies have also provided significant support for the creation and subsequent activation of NHRIs, notably the European Union and Scandinavian countries.[7] Similarly, international financial institutions (IFI) have actively promoted the creation of ombudsmen, often as part of broader rule of law reforms.[8] Finally, international non-governmental organisations, such as the International Commission of Jurists, Amnesty International and Human Rights Watch, have also been active, if sporadically, in supporting NHRIs in Latin America.[9]

3.1.2. Regional organisational platforms and networks

The density of international interactions at the regional level and degree of coordination among NHRI norm transmission platforms has increased considerably in recent years. The Organization of American States has shown growing interest in Defensorías, signalled in 1997 with a declaration calling for their establishment in all member states.[10] The OAS has continued to promote the role of these institutions in human rights protection and promotion, with a recent declaration of July 2008 notably using UN standardized language.[11] All discussion up to this point, however, provides few clues as to what platforms were instrumental in the transmission of Defensoría norms to the region prior to the early 1990s.

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[6] See, for example, US Department of State, Guatemala Report, March 11, 2008.
[7] See European Commission, *EC-LA Development Cooperation Guide 2008-2010*, (Brussels: EC, 2008), p. 110.
[8] World Bank, 'Fostering institutions to contain corruption', *PREMnotes*, No. 24, Washington: World Bank, 1999).
[9] See 'The PDDH in El Salvador – An important step towards reconciliation and democracy', Student Essay, Göteborg University, 2003, p. 50.
[10] OAS General Assembly: Support for International Exchanges Among Defensorías, OAS AG/RES 1505, XXVII-0/97 (June 5, 1997)
[11] OAS AG/RES. 2421 (XXXVIIIO/08) Strengthening the role of National Human Institutions for the Promotion and Protection of Human Rights in the Organization of American States (OAS).

The evidence indicates that the answer lies with two principle sources: the influence of norm entrepreneurs operating from within regional universities and Spanish government agencies.

In the words of Jorge Santistevan, 'the ombudsman first arrived to Ibero-America as an intellectual preoccupation before becoming a constitutional creation'.[12] The regional Latin American Institute of Ombudsmen (ILO) was established in Caracas in 1983 by university professors specialised in constitutional law.[13] This incipient transnational network of Defensoría advocates produced some notable norm entrepreneurs among their ranks, including Isaac Hochman, the founder of the ILO and credited with introducing the Defensor del Pueblo to Latin America.[14] Many ILO-affiliated academics within the region would go on to be instrumental in the eventual creation of Defensorías within their countries. The Portuguese and Spanish governments also provided material and diplomatic support to ILO initiatives, with both Spanish and Portuguese Defensors attending regional meetings during the 1980s.

The three Defensoría coordinating organisations within the Americas are the Inter-American Institute for Human Rights (IIDH), the International Ombudsman Institute (IOI) and the Iberoamerican Federation of Ombudsmen (FIO). Despite its title, the IOI is viewed as an essentially Eurocentric organisation. It has limited presence in Latin America and many subscriptions in the region have lapsed in recent years. Since its creation in August 1995, all

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[12] Jorge Santistevan, 'El Defensor del Pueblo en Iberoamérica', in Comisión Nacional de los Derechos Humanos, *Retos actuales de las instituciones nacionales de protección y promoción de los Derechos Humanos*, (Mexico City D.F.: CNDH, 2004), p. 27.
[13] Carlos Constenla, 'Latinoamerica y la experiencia del Defensor del Pueblo', Speech at Instituto Latinoamericano del Ombudsman, 10 September 2008.
[14] See Constenla, 'Latinoamerica y la experiencia del Defensor del Pueblo'.

Defensorías in the region have affiliated with the FIO. Originally, the IIDH based in San José, Costa Rica, was the technical secretariat of the FIO until 1999 before it was moved to the University of Alcalá in Spain. The IIDH has since diminished in profile, especially since its designated Defensoría personnel left in 2008. It is also important to acknowledge the activity of sub-regional peer networks operating in coordination, but independent from, the FIO. For instance, the Central American Council of Procuradurías of Human Rights (CCPDH) created in 1990 was the first regional peer network in the Americas.[15] In addition, Andean Defensorías established the Andean Council of Defensorías del Pueblo (CADP) in 1998.[16]

From its early intermittent involvement, official Spanish interests have coalesced around the FIO which it sees as a principle vehicle to influence the development of Defensorías in the region. Notably, the FIO is Iberian-oriented with Spain and Portugal among its members but with the US, Canada and Caribbean countries excluded. The creation of the FIO was followed by the establishment of the Iberoamerican Centre for Cooperation with Development (CICODE) in 1996 based at the University of Alcalá which funnels EU and Spanish government funding to projects within the region, including the FIO.[17] By identifying the relevant organisational platforms and actors, the analysis raises the question of vested interests and the underlying rationale that drives the diffusion of Defensorías. In the case of FIO, it forms part of a broader 'soft power' agenda by the Spanish government and EU to maintain influence within Latin America.

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[15] Members include Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.
[16] Members include Bolivia, Colombia, Ecuador, Panama, Peru and Venezuela.
[17] See http://www.fgua.es/en/cooperation/cicode (accessed 21 February 2010).

3.2. Formal design and categorisation of Defensorías

Despite a general trend toward Defensoría diffusion within the region, this phenomenon masks significant variation of formal design principles across models. That said, the Latin American NHRI does provide some support for the claim of greater isomorphism within regional referent groups. In contrast to the extreme variation observed among NHRIs at the global level, all models within the region largely conform to the third generation or 'human rights ombudsman' model.[18]

In terms of composition, all offices are led by one appointee with the exception of a five-member commission in Uruguay. The predominance of individual office-holders corresponds to the vertical political culture of Latin America and is formalised in the title of the majority of these cases. Further evidence of broad isomorphism across regional Defensorías is also evident with reference to the Paris Principles which provide a general indication of baseline structural commitments of independence, competence, mandate, and composition. All fourteen NHRIs (with the exception of Uruguay which is still to activate the office) have been fully accredited by the UN-affiliated International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICCNI).

Despite their value as a point of departure, the Paris Principles offer an inadequate basis upon which to contrast Latin American Defensorías. More specifically, the Paris Principles' lack of precision on questions of complaint reception and plural composition (i.e. multi-

[18] See Chapter 2, p. 61.

member leadership models) are problematic and in practice mask other significant areas of structural variation.[19] It is widely accepted among Latin American scholars that Article 54 of the 1978 Spanish Constitution provides the 'true paradigm' for the Iberian Defensor del Pueblo.[20] The Spanish model, in turn, derived inspiration from the Swedish rule of law ombudsman, incorporating a novel human rights mandate and removing prosecutorial authority while enhancing certain legal and investigative prerogatives.[21] As such, the Spanish Defensor design principles offer, at the very least, a necessary supplement to the Paris Principles as a basis for comparison:

- Established in the national constitution
- Appointed by and reporting to the legislative branch of government (majority of three-fifths required)
- Is not subject to any imperative mandate, does not receive instructions from any authority, carries out its function with autonomy
- Broad mandate to defend fundamental rights and freedoms, to supervise activity of the administration, incl. military and judiciary
- Comprehensive powers of investigation, act ex officio without prior notice and respond to admitted complaints
- Obligation to assist the Defensor in inspections, data collection, incl. classified documents, interviews; summon powers over officials

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[19] International Council on Human Rights Policy [*hereafter* ICHRP] (Richard Carver), *Performance and Legitimacy: National Human Rights Institutions*, (Versoix: ICHRP, 2000), p. 2.
[20] Santistevan, 'El Defensor del Pueblo en Iberoamérica', p. 31.
[21] See Antonio La Pérgola, 'Ombudsman y Defensor del Pueblo: Apuntes Para una Investigación Comparada', *Revista de Estudios Políticos*, no. 7, January-February 1979, p. 71. pp. 69-92.

- May lodge appeals of unconstitutionality, amparo, suggest to Parliament laws be modified
- Suggest modifications to rules, criteria, laws, sanction powers; notify superior authorities of non-compliance; submit annual reports

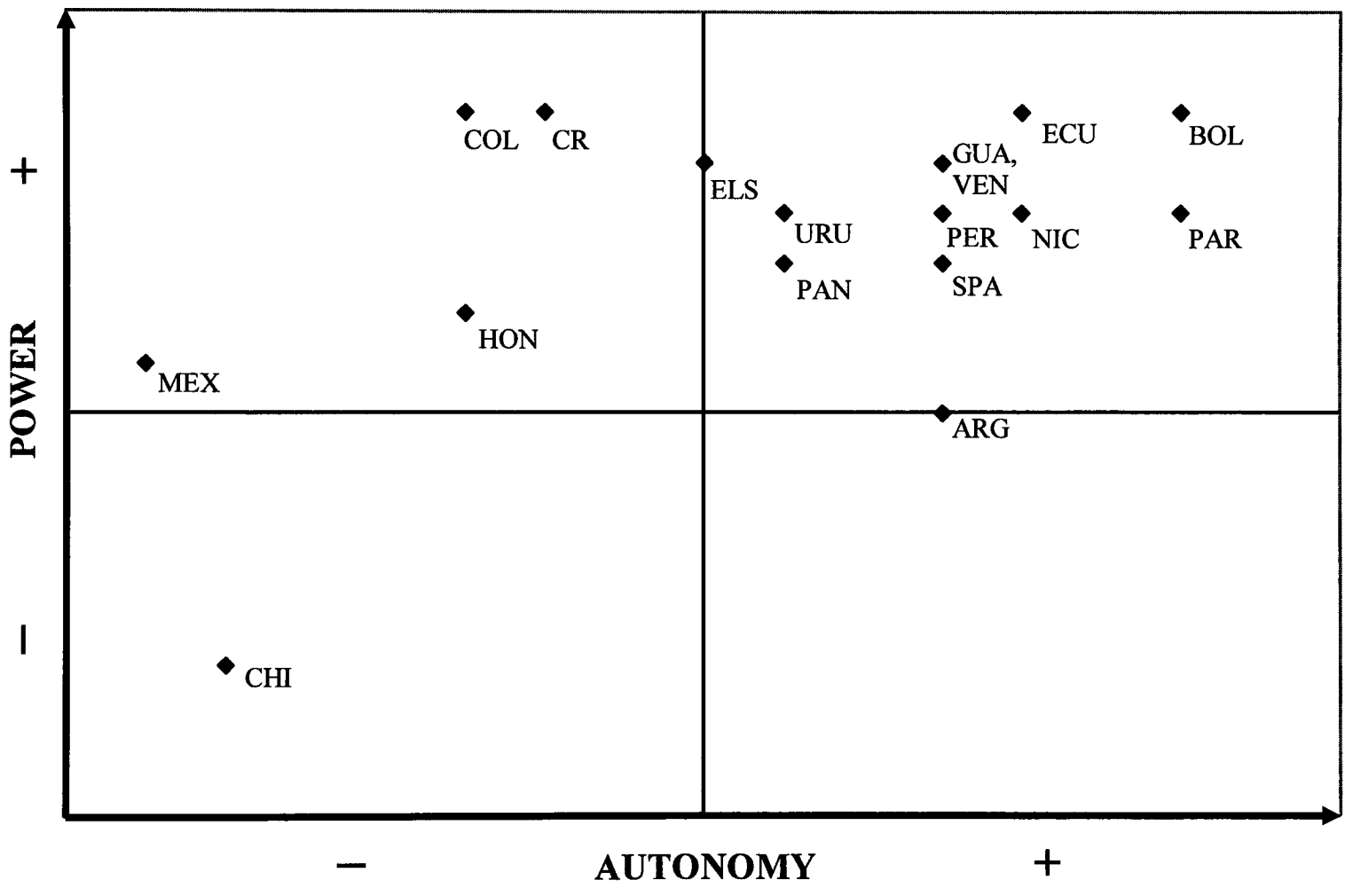
These attributes are emulated to varying degrees among Latin American Defensorías, generally setting a high formal design standard. Having surveyed the literature and drawing in particular on Volio and Elizondo and Aguilar's treatment of formal 'minimum standards' for Defensorías del Pueblo,[22] Figure 3.1 maps appropriately selected design principles along the dimensions of formal autonomy and power. It also includes the Spanish Defensor for reference. The data refers to formal design features at point of creation and each variable is weighted in accordance with its impact upon the dimension in question. The thesis further develops this discussion of formal design principles in the following empirical chapters, with particular regard for the Defensoría's autonomy from the executive branch and lack of legal enforcement powers.

Modifications upon Article 54 are apparent. Notably, many Latin American offices expand political supervision to corruption and electoral monitoring. The Spanish model makes no explicit reference to educational or promotional functions whereas many of its Iberian protégés have a mandate in this area. Further tweaking is apparent in relation to legal prerogatives, with additional habeas corpus and data powers common in the region and

[22] Lorena Gonzaléz Volio, 'The Institution of the Ombudsman: the Latin American Experience', *Revista IIDH*, vol. 48, pp. 219-237; Gonzalo Elizondo and Irene Aguilar, 'The Ombudsman Institution in Latin America: Minimum Standards for its Existence', in Birgit B. Lindsnaes et al. (eds.), *National Human Rights Institutions: Articles and Working Papers*, (Copenhagen: The Danish Centre for Human Rights, 2001), pp. 209-221.

outliers capable of detaining individual violators (in Colombia) and prosecuting habeas corpus writs (in Guatemala). This reflects regional legal traditions of expansive formal constitutional protections for individual rights as well as Defensorías being initially viewed as auxiliary agents to Public Prosecutor's Offices.[23] Also, building upon the Spanish incorporation of international human rights law (IHRL) within the constitution, many Latin American Defensorías have explicit IHRL mandates.[24]

Figure 3.1: Formal institutional strength of Defensorías in Latin America at point of origin[25]



Source: author's own formulation. See Appendix 2 for methodology and sources.

[23] See Hugo Morales, 'El Procurador de los Derechos Humanos en Guatemala', in Germán Cisneros Farías et al. (eds.), *Ombudsman Local*, (Mexico D.F.: UNAM, 2007), pp. 51-77.
[24] These include Bolivia, Ecuador, El Salvador, Guatemala, Mexico, Panama, Peru, Uruguay, and Venezuela.
[25] ARG: Argentina, BOL: Bolivia, COL: Colombia, CHI: Chile, CR: Costa Rica, ECU: Ecuador, ELS: El Salvador, GUAT: Guatemala, HON: Honduras, MEX: Mexico, NIC: Nicaragua, PAN: Panama, PARA: Paraguay, SPA: Spain, VEN: Venezuela.

From this survey of formal design it is possible to distinguish between formally constrained and unconstrained models. In terms of optimal structural form, the Defensoría in Bolivia presents the highest values along each axis.[26] Other models display high values along one axis but fall short on the other. For example, Spain displays high autonomy but lacks habeas corpus powers common to Latin American Defensorías. The autonomy of the El Salvadorian models is lessened by its inclusion within the Public Prosecutor's Office. Conversely, Costa Rica displays relatively robust powers but is undermined by its lack of constitutional status. The diagram also exposes a number of extreme cases. The Colombian office is stripped of many of the formal autonomy provisions, most visible in a hybrid Presidential appointment process. This situation is further exacerbated in the Honduran and Mexican cases where the offices were created by Presidential decree. At the other end of the spectrum is Argentina, with a design that provides reasonable autonomy but few of the powers associated with these offices. The recently created Chilean National Institute bears little structural resemblance to the Iberian Defensoría model.

This exercise provides a baseline indication of the relative formal strength of Latin American Defensorías at point of origin. Central to the argument presented in this thesis is the assertion that formal design principles are important in explaining the institutionalisation of Defensorías as they may have significant material implications. However, safeguards of autonomy and power are themselves dynamic loci for political conflict among actors and are often subject to modification over time. From this perspective, formal design principles

[26] It is important to note that certain formal attributions may be variably explicit or emphatic across cases. For example, in terms of an education mandate, the Nicaraguan Procurador is 'obligated' by law to be an active protagonist in the education and promotion of human rights. For an extensive review of such nuances, see Santistevan, 'El Defensor del Pueblo en Iberoamérica', pp. 27-106.

alone shed, at best, partial light on the actual institutional development of Defensorías. This is especially true in variably stable institutional settings.

3.3. The mechanics of Defensoría diffusion in Latin America

This section focuses on the processes that underpin Defensoría diffusion in Latin America. Moving beyond the dominant coercive and persuasive models within the literature, the analysis focuses on three intermediary categories of diffusion: compulsion, material inducement, and framing of ideas. The findings show that while different diffusion mechanisms should not be equated to uniform formal outcomes, their interaction with domestic political conditions does have important implications for the resulting depth and durability of Defensoría reform.

3.3.1. Compulsion (following from coercion)

As stated in Chapter 2, for the purposes of explaining diffusion of institutions such as NHRIs, coercion is problematic. This is especially true of the Latin American cluster of cases where there are few, if any, instances of diffusion through precise obligations and enforcement mechanisms. Compulsion provides a more appropriate basis for analysis. Compulsion, unlike coercion, does not necessarily entail control, use of military force, or direct cause-effect relations guided by the application of sanctions. It does, however, indicate overwhelming pressure, direct or indirect material costs, influence sustained through highly organised and coordinated platforms, and diminished emphasis on enabling local

conditions. Two cases in the region offer a useful contrast to explore some of these dynamics: El Salvador and Honduras. In order to illustrate compulsion operating at a lower threshold, and potentially overlapping with other mechanisms, the case of Mexico is instructive.

The El Salvadorian Procurador for the Defence of Human Rights was created in 1991 in the context of conflict cessation and transition to democracy. Party to a series of Central American UN-brokered peace agreements, the 1991 Mexico Agreement stipulated that El Salvador should create a Defensoría or 'Procurador', that this new office should be elected by Congress with a two-third majority, and that its 'essential mission shall be to promote and ensure respect for human rights'.[27] The El Salvadorian government reaffirmed its commitment to creating the Procurador in the Chapultepec Peace Accords that officially ended the conflict in 1992. This agreement further specified that the Procurador legislation:

> '...shall establish appropriate means for putting into effect the firm commitment assumed by a systematic practice of human rights violations, in particular, arbitrary arrests, abductions and summary executions, as well as other attempts on the liberty, integrity and security of persons. This includes the commitment to identify and, where appropriate, abolish and dismantle any clandestine jail or places of detention...'[28]

The Procurador therefore resulted from a highly coordinated external platform of norm transmission. To insulate the process from domestic politics, conditions within the

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[27] Article II(c-d), Acuerdo de México, Mexico City, 27 April 1991.
[28] See Truth Commission 1993, Ch. III 2C. Cited in L. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, (Boston: Martinus Nijhoff Publishers, 2004), p. 261.

Chapultepec agreement further required that the Procurador be appointed within 90 days after entry into force of constitutional reforms and entrusted preparation of the legislation to the National Commission for the Consolidation of Peace (COPAZ).[29] The pace of reform is also indicative of compulsion, with the Constitution amended (Article 164), a regulative decree (no. 163) approved in March 1992, and the Procurador operational by July 1992. Furthermore, this reform was conducted in a context where powerful actors were mobilising in opposition to reform of the armed forces.[30] Despite resistance from within the state to systemic reform, the El Salvadorian model emerges as one of the most powerful, if not independent, formal models in the region drawing inspiration from the Guatemalan prototype.[31]

In Honduras, the National Commissioner for Human Rights also emerged in 1990 out of the Central American peace process. However, relative to El Salvador, the degree of compulsion is lower and the influence of domestic politics higher. Honduras signed the UN-sponsored Esquipulas Peace Agreement in August 1987 and in doing so committed itself to establishing a National Commission of Reconciliation (CNR). Although supported by the UN, the CNR was a domestic entity accruing authority primarily from the leadership of Archbishop Enrique Santos. The recommendations issued by the Commission for demilitarisation and modernisation included a proposal to create the 'Commissioner for Human Rights' which the President swiftly enacted into law by executive decree in June 1990. Unlike in El Salvador, the governing Honduran regime was not subject to similar

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[29] Chapultepec Peace Accords, Mexico City, UN Document A/46/864-S/23501, 16 January 1992.
[30] Michael Dodson, 'The Human Rights Ombudsman in Central America: Honduras and El Salvador Case Studies', *Essex Human Rights Review*, vol. 3, no. 1, 2000, p. 30.
[31] José Ricardo Gómez Gálvez, former President of the Guatemalan Congress (1987), interview by author, San José, Costa Rica, 23 August 2007.

levels of precise obligations or overt external pressure to create the Commissioner. Rather, it was responding to internal and, to a lesser extent, external pressure, embodied in the CNR, and retained significantly more control over the process of reform.

Government control is apparent in the formal design principles of the Honduran office, with its status as an adjunct office to the executive branch. Furthermore, although also inspired by the Guatemalan model, many of the formal safeguards of autonomy and power are removed, resulting in one of the most constrained offices in the region.[32] There is no evidence that the CNR specified design conditions equivalent to the Chapultepec agreement. Even if it had, the government was subject to lower levels of compulsions to respond positively. The UN was a part of the creation process but not instrumental. The presence of the UN was certainly lower in Honduras, with no in-country mission bringing to bear resources similar to ONUSAL in El Salvador. The CNR appears to have been the principal source of pressure upon government, also proposing the list of candidates. However, the governing regime retained influence over a largely 'top-down' creation process with minimal input from organised social actors and no overwhelming external pressure.[33]

The cases of El Salvador and Honduras demonstrate the sometimes porous boundaries across diffusion mechanisms, as external stimulus sets in motion more diffused sources of internal pressure upon states to create Defensorías. Both of these cases, it is argued, demonstrate degrees of external compulsion. Local conditions played a marginally greater role in

[32] The denomination of Commissioner replicates not the generic UN-endorsed NHRI model but rather the formal title within the Guatemalan legislation of 1987 which originally conceived of the office as a 'congressional commissioner'. Gálvez [Guatemala], 23 August 2007.
[33] Dodson, 'The Human Rights Ombudsman in Central America', p. 32.

Honduras with lower external pressure allowing government to dictate organisational form. A similar dynamic is observable in the Mexican case. Not subject to external intervention, nevertheless, the creation of the Mexican Commission of Human Rights in 1990 by a one-party electoral façade also raises questions of overlap between compulsion and inducement modes of influence. Arguably, in this case the compulsion threshold is lowered still further, but remains present in the regulative forces acting upon Mexico within its regional social system.

The Commission was created by executive decree in June 1990. The rationale behind creation lay primarily with government efforts to pre-empt criticism of Mexico's human rights record.[34] The Commission was seized upon as a quick fix with the measure rushed through in 48 hours and with no consultation outside government circles.[35] The regime may have felt compelled to create the Commission due to amassing external pressure. However, similar to Honduras, a highly vertical regime-controlled process of creation resulted in the least independent NHRI design in Latin America. Within the context of a managed transition to democracy, the Commission was firmly embedded within the executive branch and tasked with 'representing the federal government'.[36] As such, the processes of norm diffusion and controlled manner of local reception common to this category, with the (at least formal) exception of El Salvador, have resulted in Defensorías closely aligned with the strategic interests of ruling elites. This outcome highlights the interplay of diffusion mechanisms that are neither perfectly coercive nor neutral to local conditions.

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[34] J. Ackerman, *Organismos Autónomos y Democracia: El Caso Mexicano*, (México, D.F.: Siglo XXI Editores, 2007), p. 125.
[35] ICHRP, *Performance and Legitimacy*, p. 37.
[36] Article 3(v), Secretaría de Gobernación, 'Decreto por el que se crea la Comisión Nacional de Derechos Humanos como un órgano desconcentrado de la Secretaría de Gobernación', 5 June 1990.

3.3.2. Inducement (a component of acculturation)

The Mexican case demonstrates the blurring of the boundary between diffusion mechanisms. There was significant pressure to respond to international concerns. However, the creation of a NHRI was not driven by a precise or enforceable obligation. Rather, the regime created the Commission in order to appease its domestic and international critics and deflect growing reputational costs. As such, the above cases were also responding to powerful acculturative pressures within their social system, broadly driven by regional and sub-regional processes of conflict-cessation, democratisation and modernisation. In order to understand why the majority of Latin American states have created Defensorías, it is necessary to disaggregate the dynamics of institutional emulation that are underpinned, to a greater or lesser extent, by inducements administered by highly organised norm platforms.

One of the last additions to Central America, the Nicaraguan Procurador for the Defence of Human Rights was created in 1995. The creation of the office can be largely attributed to pressure from international governments, in particular the Nordic countries.[37] Not stipulated in any binding peace accord, the reform appears to have provoked little resistance, viewed as benign or possibly even consonant with government attempts to placate rising social demands. Reflecting regional lines of influence, the office replicates the Guatemalan legislation, with the Procurador referred to as a 'Commissioner of the National Assembly' (Article 3). International influence is apparent in the text of the legislation, with the

[37] C. Quesada, *Entre la cal y la arena: IV Informe sobre las Procuradurías de Derechos Humanos en El Salvador, Guatemala, Honduras, Nicaragua y Costa Rica*, (San José: CODEHUCA, 1997), p. 32.

Procurador assigned the most emphatic human rights education function in the region (law no. 201, 1995). Furthermore, the Nicaraguan office is one of the most unconstrained formal models in the region.

The effects of material inducement are most apparent in the procedural guarantees of plurality, with the Procurador obligated to consult with legally recognised human rights organisations and consult civil associations (Article 96, Constitution). Furthermore, the Nicaraguan Procurador was created in formal consultation with over sixty civic organisations, a process that would be copied in Panama two years later.[38] This was largely at the behest of the Norwegian government, the chief financiers of the Nicaraguan reform.[39] The Procurador was one of a cluster of reforms adopted by the Nicaraguan government, including an additional human rights agency. This situation is mirrored in Guatemala and Venezuela and indicates adaptation to changing conditions over consideration of whether the reform actually addresses local needs and demands.

The Defensor del Pueblo created in Colombia constitutes the first office in the Andean region and the first in Latin America to nominally emulate the Spanish model. Colombia presents a challenging context of a distinct magnitude with democratic government existing uneasily alongside severe armed conflict for decades. However, in contrast to Central America, there was minimal international involvement in the domestic Colombian peace

[38] The last office to be created in Central America, the Panamanian Defensor del Pueblo in 1997, also established a consultative commission to debate the Defensor bill.
[39] Quesada, *Entre la cal y la arena*, p. 31.

process prior to 1998.[40] Despite the international origins of the Defensoría norm, its creation corresponds primarily to local drivers. The constitutional reform of 1991, in which the Defensor was introduced, can be placed in the context of rising social protest, ongoing peace negotiations, regime crisis, and recognition of institutional reform as an urgent priority.[41] The resulting Constitution created the Defensor alongside other significant rights protection actors, most importantly the Constitutional Court.[42]

The Colombian case raises a number of important insights for Defensoría diffusion in the region. The relative lack of external inducement reflects the incipient nature of Defensoría norm transmission platforms within the region and globally in 1991. With the exception of the CCPDH, no formal Defensoría infrastructure yet existed in the region and the UN had not endorsed the Paris Principles. As with the Mexican case, the Colombian government faced few, if any, restraints on formal design standards and proceeded to create a highly constrained office. However, the institution retains key formal powers associated with the Defensoría model, including the powerful *acción de tutela* (writ for the protection of constitutional rights). Further innovation upon the original Spanish template reflects regional influences, with the Defensor directed to 'promote human rights and recommend teaching policies' (Article 282, Constitution). In the absence of external instrumental or normative inducement, local legal traditions in Colombia for protection of individual rights nevertheless exerted a strong influence over the diffusion outcome. In other words, the

[40] Augusto R. Ocampo, 'The Role of the International Community in Colombia', in Mauricio García Durán (ed.), *Alternatives to War: Colombia's Peace Processes Accord*, (London: CINEPP, 2004), p. 75.
[41] 'We agree on the necessity of...approving issues of primary importance to the realization of peace and strengthening the state's institutional legitimacy'. See Article 1, Accord between the National Government, the political parties, the M-19 and the Catholic Church in the capacity of a moral and spiritual guide for the process, 9 March 1990.
[42] Constitutional Courts have been created alongside Defensorías in Bolivia, Colombia, Ecuador, Guatemala and Peru.

content and local framing of Defensoría norms in this case was important, a theme explored further in the following section.

The local framing of Defensoría norms appears to be more important among earlier instances of diffusion, reflecting a discount effect as the region becomes saturated with these institutions. The Argentinean Defensor de la Nación, the first model created in the Southern Cone in 1993, provides further insight into this claim.[43] Created by law in 1993 and subsequently inserted into the 1994 constitutional reform, this model achieved legislative approval in the context of a rare party agreement, with both parties seeking stronger checks and balances on the executive and positive media coverage.[44] However, many local observers credit the jurist and first Defensor, Jorge Maiorano, with importing the idea, as an 'intellectual curiosity', from Spain.[45] Importantly, as a former Justice Minister, member of the Peronist party, and advisor to President Carlos Menem's brother, Maiorano also had influence. Not viewed as conflicting with the core objective of the 1994 reform to secure Presidential reelection, the government offered little resistance to the Defensor project. However, there was little, if any, consultation outside of government circles.[46]

A highly controlled process of diffusion is reflected in the outcome of reform. Despite Argentina's recent history of human rights violations and authoritarian government, the Defensor was not framed in terms of human rights. Domestically, the powerful human

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[43] The Paraguayan Defensor was created in the 1992 Constitution but legal wrangling over its formal design would continue until at least 1995. The office would not be activated until 2001.
[44] M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, (Boulder: Lynne Rienner, 2002), p. 38.
[45] J Maiorano, *El Ombudsman: Defensor del Pueblo y de las Instituciones Republicanas*, (Buenos Aires: Macchi, 1987).
[46] Gaston Chillier and Diego Morales, Executive Director and Litigation and Legal Defense Director of CELS, the *Centro de Estudios Legales y Sociales*, interview by author, Buenos Aires, Argentina, 11 August 2008.

rights community was not consulted in the reform process and viewed the resulting reform as administrative, oriented toward the protection of consumer rights and aligned with IFI regional modernisation policies.[47] This impression is reinforced by design principles with the Argentinean model alone in not having jurisdiction over the military (Article 16, law 24,284). Furthermore, the office lacks many of the formal powers associated with Defensorías in the region, while retaining autonomy safeguards. As such, and in contrast to Colombia, the outcome of reform – merging a classical and human rights ombudsman model – indicates normative inducements of modernisation over human rights. It also corresponds to a limited 'academic' framing of the project with little design input by government and neglects the plurality of needs and demands within society.

Sharing diffusion dynamics similar to that of Argentina, the creation of the Peruvian Defensoría del Pueblo in 1993 by an increasingly authoritarian electoral regime nevertheless reflects a contrasting framing process. This case also bears resemblance to Mexico, with an element of compulsion or conditionality. The Defensoría was established as a political act of good faith to the international community following the rupture of the constitutional order in 1992.[48] As with Argentina, it did not conflict with the thrust of the 1993 Constitution to liberalise the economy. In turn, it was strongly promoted by the World Bank along with other rule of law reforms.[49] The high normative and material inducement resulted in a model that literally replicates Article 54 of the Spanish Constitution, with some modifications. Crucially, there was a high level of plurality at design stage with civil society jurists

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[47] *Ibid.*
[48] Thomas Pegram, 'Accountability in Hostile Times: the Case of the Peruvian Human Rights Ombudsman 1996–2001', *Journal of Latin American Studies*, vol. 40, no. 1, February 2008, p. 56.
[49] Ibid.

instrumental in drafting the 1996 regulative law.[50] Similar to Nicaragua, this civil society engagement is attributable not solely to external facilitation but also to regime attempts to deflect domestic, as well as international, criticism. Framing of the idea was outsourced to non-state actors with the government apparently not comprehending the implications of reform, as Jorge Santistevan, the first Peruvian Defensor, elaborates:[51]

> You have to understand, in 1993 nobody really understood what the Defensoría was and even less, gave it any importance. I had lived in Mexico and Central America, where the institution first began – In Guatemala. From this experience, I had a good idea of the potential of an institution such as the Defensoría.[52]

Increasingly sophisticated global and regional Defensoría norm platforms have accelerated the proliferation of the institution in the region. For instance, the IIDH provided technical assistance in the creation of Defensorías in Paraguay, Nicaragua, Panama, Venezuela, and Uruguay. The influence of external Defensoría platforms is observable in the level of design conformity among these cases, with all constrained models created prior to 1993 (see Figure 3.1). The Bolivian Defensor del Pueblo created in 1994 reflects powerful normative inducement from international donors and domestic constituencies, resulting in the most unconstrained model in the region. The Ecuadorian office created as part of constitutional reforms in 1996 formed part of a larger outward-looking project that included a National

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[50] Renzo Chiri, Secretary General of the Comision Andino de Juristas (CAJ), interview by author, 8 July 2005, Lima, Peru.

[51] Alternative explanations raised in multiple interviews for this lack of foresight include the peripheral nature of the institution, its technocratic antecedents, a lack of legal training among principal political backers, and potential reinforcement with government economic and political objectives.

[52] Jorge Santistevan, former Defensor del Pueblo (1996-2000), personal communication by email with author, 22 February 2006.

Plan for Human Rights coordinated by the Ministry of Foreign Affairs.[53] Similarly, the Paraguayan office, described as having the most 'inauspicious beginnings' of any office in the region,[54] has formal human rights credentials, including assistance of victims of the dictatorship (Law no. 838, 1996).

Among the last entrants, the Venezuelan Defensor was created in 1999 as part of a new 'Citizen Branch' of government. Finally, the Uruguayan model of 2009 emulates the UN-generic NHRI template, presenting a relatively constrained model and the only office in the region to adopt a multi-member leadership model (Article 36, law no. 18,446).[55] The Uruguayan reform has been jointly supported by the UNDP and the Spanish Agency for International Cooperation and Development (AECID). In particular, Uruguay's ratification of the Optional Protocol to the Convention Against Torture (OPCAT) in 2005 and its stipulation that a National Preventive Mechanism (NPM) be created within one year galvanised debate on establishing a NHRI, with UN-affiliated organisations working with the Uruguayan Ministry of Foreign Affairs to advance this agenda.[56]

All instances of diffusion within this category reflect, to a greater or lesser extent, the hallmarks of broader normative inducement, often through increasingly organised and coordinated platforms of norm diffusion. Instrumental inducement or compulsion is less applicable, but not absent, among this cluster of cases. In contrast to compulsion, discussion

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[53] Santistevan, 'El Defensor del Pueblo en Iberoamérica', p. 45.
[54] Hugo Valiente, 'Defensoría del Pueblo: polémica elección', *Informativo Mujer*, vol. 16, no. 169, June 2004, p. 21.
[55] Other offices such as the Mexican Commission do envisage a consultative committee but leadership of the institution resides with the appointed office-holder.
[56] Association for the Prevention of Torture, 'Monthly OPCAT Briefing For the SPT', Geneva: APT, May 2009, p. 2.

has also incorporated local framing of ideas as an interactive, if secondary, feature of diffusion by inducement, especially in Colombia and Argentina. In order to explore this dynamic further, the next section focuses on two contrasting prototypical cases: Guatemala and Costa Rica.

3.3.3. Framing of ideas (an indispensable part of persuasion)

Moving away from compulsion as an explanatory model, this thesis suggests that framing of ideas has also played a central role in the diffusion of Defensorías in Latin America. In the absence of highly organised or coordinated norm platforms or sources of external, potentially enforceable, instrumental inducement, normative inducement must appeal, at least partially, to the preferences of local actors. However, in contrast to persuasion, the focus here is on *degrees* of learning alongside adaptation, recognises the potential for conflict, and is sceptical of complete internalisation outcomes. Framing is particularly pertinent to early instances of diffusion. Guatemala is the prototype Defensoría in the region and demonstrates the interplay of inducement and framing processes. In contrast, Costa Rica is arguably the case that most closely corresponds to a framing model.

Created in 1985, the Guatemalan Procurador for Human Rights is unique within the region. Not only is it the first NHRI in Latin America but it was also created under a military regime in the midst of ongoing armed conflict. As such, its initial circumstances were not propitious. Its inclusion within broader constitutional reforms of 1985 is largely due to Guatemala's international pariah status as a human rights violator and the regime's desire to

signal a managed transition to civilian rule.[57] Regime sensitivity to international criticism is apparent in the formal design, with the office to 'establish and maintain communication with different inter-governmental and non-governmental human rights organisations' (Article 14(c), law 1986). However, this instance of diffusion does not respond to any precise externally administered obligation or coordinated normative template. Rather, to explain why the regime chose to establish a Defensoría, rather than disregard this novel idea, it is necessary to identify how early norm entrepreneurs generated local consent around the idea.

It is important to emphasise the role of domestic entrepreneurs within Guatemala. Deriving inspiration from constitutional jurists in the region, the College of Lawyers organised a series of 'Constitutional Debates' in 1984, one month before elections for the National Constituent Assembly.[58] What emerged was a proposal to create the Constitutional Court, Supreme Electoral Tribunal and the Procurador for Human Rights. The legislative project was, in effect, drafted by a civic organisation with little input by a disinterested military regime resulting in a reasonably robust formal model. With half of all its articles dedicated to the protection of human rights, the 1985 Constitution fulfilled its purpose for an image-conscious military regime, even if it bore little resemblance to the Guatemalan lived reality.[59] Former members of the College, subsequently elected as new legislators, were also instrumental in its passage into law.[60] Notably, diminished design autonomy can also be

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[57] Michael Dodson and Donald Jackson, 'Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala', *Latin American Politics and Society*, vol. 46, no. 4, Winter 2004, p. 14.
[58] See 'La Función del Procurador de los Derechos Humanos' [Guatemala], at http://www.derechos.org/nizkor/guatemala/pdh/funcion.html (accessed 30 April 2010).
[59] Article 21, Decree No. 54-86, 1986.
[60] See 'La Función del Procurador de los Derechos Humanos' [Guatemala], at http://www.derechos.org/nizkor/guatemala/pdh/funcion.html (accessed 30 April 2010).

attributed to these civilian politicians. In contrast to the Spanish model, the Procurador is designated as the 'Commissioner of Congress for the Defence of Human Rights'.

It is worth reflecting briefly on the broader effects of this prototypical creation. The first Latin American Symposium of Ombudsmen was held in 1985 and attended by the Defensor of Spain who, reflecting on the Guatemalan development, remarked that the ombudsman must "convert itself into the protector of human rights and a promoter of a culture of peace".[61] As such, the question emerged: how appropriate is the Defensoría to the Guatemalan reality, and the region more broadly? This question remains particularly pertinent among those negative cases within the region, discussed in the next section. In broad terms, Spain did offer important dimensions of comparison, the Defensor having emerged from transition from authoritarian rule and similar external normative pressures to enhance rule of law and human rights protection. A further dimension is egregious rights violations, with approximately 30,000 Spanish civilians still interred in unmarked graves.[62] However, important differences were, and remain, apparent cautioning against the overtones of value homogeneity sometimes found in intra-regional practitioner material.[63]

In contrast to Guatemala and the majority of countries in the region, Costa Rica displays high democratic, rule of law and social indicators and boasts over 60 years of uninterrupted political democracy. The Costa Rican Defensor de los Habitantes, created in 1992, was the result of protracted internal debate dating back to 1977 over its appropriateness to the Costa

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[61] Quoted in Constenla, 'Latinoamerica y la Experiencia del Defensor del Pueblo', p. 2.
[62] Iosif Kovras, 'Unearthing the Truth: The Politics of Exhumations in Cyprus and Spain', *History and Anthropology*, vol. 19, No. 4, December 2008, p. 373.
[63] See Quórum (Revista), *Las Defensorías del Pueblo y la Protección de los Derechos Humanos*, (Madrid: Universidad de Alcalá, 2008), p. 11.

Rican context.[64] It is important to recognise the influence of broad international and regional influences on the creation of the Defensor, especially Costa Rica's reputation as regional guardian of democracy and rights. Observers ascribe the Defensor's robust formal human rights mandate primarily to such external pressures rather than internal factors.[65] Furthermore, the Iberian influence of the Spanish model is literally apparent in Law No. 7319 of 1992, with the notable removal of constitutional status.

However, beyond external inducement, the creation of the Costa Rican Defensor bears the hallmarks of a rigorous process of ideational framing, with the innovation subject to high levels of domestic debate at point of origin. Costa Rica presents one of the densest institutional frameworks in Latin America, particularly notable for its judicial character following a process of state modernisation and the creation of the Constitutional Tribunal in 1989.[66] In this context, the Defensor provoked robust resistance amongst those who argued that such an institution was superfluous to an already over-bureaucratised state apparatus. Within the legislature, Deputy Danilo Chaverri Soto challenged the project in the following terms:

> It is yet to be demonstrated to this Plenary what aspects of citizens' lives are to be represented and protected by an institution of monarchical origins grafted onto our

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[64] For an excellent indepth analysis of the origins of the institution see M. A. Esquivel Faerron and M. E. Montiel Castillo, *"Doña Marta ya tiene quien le escriba..." Un análisis sociopolítico del proceso de creación y el primer período de labores de la Defensoría de los Habitantes de la República*, Unpublished Masters Thesis, Costa Rica: Ciudad Universitaria Rodrigo Facio, December 1997.

[65] Juan Carlos Rodríguez Cordero, Costa Rican academic and jurist, interview by author, San José, Costa Rica, 19 September 2007.

[66] Bruce M. Wilson and Roger Handberg, 'Opening Pandora's Box: The unanticipated political consequences of Costa Rican legal reform', Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 1998.

> democratic republican system which is not already within the competence of the Attorney General's Office, the Ministry of Justice, the Office of the Prosecutor or the Public Defenders.[67]

Powerful actors within the judiciary also opposed the creation of the Defensor. The Justice Minister publicly described the project as 'well intentioned but lacking common sense',[68] and threatened to veto the law.[69] Most serious of all was the ruling of the Constitutional Chamber in March 1991, finding that the law contravened the Constitution on an unprecedented 14 separate occasions.[70] Initial resistance to the Defensor project would inform the institutionalisation of the institution, with Chaverri, among others, continuing to attack the institution following its creation.[71]

Despite robust resistance, the project had gained widespread support within academic circles as a potentially important corollary to the judiciary.[72] Norm entrepreneurs, such as the jurist and legislator Hugo Muñoz, were instrumental in reviving the project throughout the 1980s in the face of congressional stonewalling. Such advocates acknowledged the incorporation of a range of ombudsman-like mechanisms with varying levels of autonomy over the past decade. However, they argued that the Defensor, in contrast to existing institutions,

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[67] Danilo Chaverri Soto, 3 November 1992, Acta de la Sesion 91, p.872.
[68] *La Nación* [Costa Rica], "El Defensor de los Habitantes", 27 February 1991.
[69] Rodrigo Alberto Carazo, Costa Rican Defensor 1993-1997, interview by author, San José, Costa Rica, 31 August 2007.
[70] Sala Constitucional, vote no. 502-91, 7 March 1991.
[71] In Chaverri's judgement, 'the adoption of this Nordic entity in the Costa Rican political system is nothing more than snobbery…' *La República* [Costa Rica], 'Próximamente en Costa Rica – Un Defensor para todo', 28 February 1993.
[72] R. Vega Robert, *Ombudsman: el defensor de los habitantes*, San José: Editorial Investigaciones Jurídicas S.A., 1993.

incorporated a novel doctrinal and proactive rights function.[73] Decisive in generating consent among political elites was the framing of the project as a corrective to an unpopular process of state reform and diminishing public support for the political system and its representatives. As Miguel Ángel Rodríguez Echeverria, a former President of Costa Rica, recalls:

> I supported the project in the face of opposition from within my own party who asked "why do we need another agency?" I justified the creation of the Defensoría as a loudspeaker for the citizenry; in particular, to deal with the small problems that affect their everyday lives.[74]

Without intervening in the drafting of the law, President Rafael Angel Calderón defended the law against its detractors and supported its passage through the legislature in 1992.[75] The project also received strong support from the Supreme Electoral Tribunal, the General Attorney's Office and those few civil society organisations engaged in the project.[76] The eventual passage into law of the Defensor was met with little fanfare, reflecting, in the words of one observer, the 'academic' profile of this foreign entity for many observers in Costa Rica.[77] However, this observation should not mask the importance of ideational framing to appeal to the interests and preferences of a highly organised political elite as well as the conflict inherent to overcoming the principled objections of its detractors.

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[73] Hugo Alfonso Muñoz, jurist and former Minister and Leader of the Opposition, interview by author, San José, Costa Rica, 15 August 2007.
[74] Miguel Ángel Rodríguez Echeverria, President of Costa Rica 1998-2002, interview by author, San José, Costa Rica, 28 September 2007.
[75] Rafael Angel Calderón, President of Costa Rica 1990-1994, interview by author, San José, Costa Rica, 12 September 2007.
[76] These organisations included the Ombudsman Association, the Costa Rican Women's Alliance and the Disabled Foundation of Costa Rica .
[77] Carazo [Costa Rica], 31 August 2007.

Both Guatemala and Costa Rica demonstrate the importance of local framing of the Defensoría project. In the former case, framing was secondary to normative inducement exerted upon a military regime which had become a pariah within the region. However, norm entrepreneurs did engage in intellectual debate on the merits of the Spanish Defensor model to the Guatemalan context resulting in a unique variant upon the original template. Costa Rica, on the other hand, was subject to low levels of inducement with framing of the Defensor norm the essential factor in the institution's eventual passage through the legislature. Furthermore, regional models, such as Guatemala, bore little relation to the Costa Rican reality, leading designers to look to Spain for inspiration. As detailed in the next section, powerful domestic resistance at point of origin may effectively stall the creation of Defensorías.

3.4. Negative cases in Latin America: Brazil and Chile

Neither subject to external compulsion nor powerful instrumental or normative inducement, Brazil and Chile remain regional outliers, having not created a Defensoría. These cases demonstrate several obstacles to positive diffusion outcomes where not driven by overwhelming compulsion or highly coordinated and organised norm platforms, including fatigue effects, the existence of an adequate institutional framework, structural obstacles, such as political federalism, and resistance to the diffusing norm. That said, Brazil and Chile have not been immune to the Defensoría idea.

3.4.1. Brazilian exceptionalism

As in Guatemala, Brazil transitioned toward democracy in 1985 after 21 years of military dictatorship. Transition toward civilian rule was a carefully managed affair, in part, a response to powerful normative pressures to democratise. The new constitution of 1988 incorporated a strong human rights component. However, Brazil chose not to emulate the Iberian Constitutions of Portugal or Spain in creating a Provedor de Justiça or Defensor del Pueblo, despite congressional debate on the topic.[78] Nascent Defensor norm platforms were also present in Brazil with the Second Latin American Symposium of Ombudsman of 1987 held in the state of Paraná.[79] Spurred on by this initiative, the state of Paraná created the first state-level ombudsman office (Ouvidoria) in 1991.[80]

Counter to Iberian templates, Ouvidorias are executive bodies with an often restrictive oversight mandate. In turn, they are often found in specific sectors such as the penitentiary system, universities and the police. The creation of local police ombudsmen is arguably the most significant innovation in this field, pioneered by the governor of São Paulo in 1995 as a response to public perceptions of police impunity.[81] This model has been replicated in fourteen of twenty-six states with the institution credited with raising transparency and

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[78] Jorge L. Maiorano, 'El Ombudsman en América Latina', *Revista de Información Legislativa del Senado Federal de Brasilia*, vol. 23, no. 92, October-December, 1986.

[79] Jorge L. Maiorano, 'Experiencias latinoamericanas sobre el Ombudsman e instituciones afines. Exposición crítica de sus resultados', Anales del II Simposio Latinoamericano del Ombudsman, Curitiba, Paraná, Brasil, January 1988.

[80] This model was subsequently replicated in Sao Paulo, Ceará, Espíritu Santo, Mato Grosso do Sul and the municipalities of Curitiva and Santos.

[81] Fiona Macaulay, 'Problems of Police Oversight in Brazil', Working Paper CBS 33-2002, Oxford: Centre for Brazilian Studies, 2002.

public confidence in local government.[82] However, observers also note difficulties in gauging the impact of police ombudsmen and raise concerns as to the office's autonomy and investigative capacities.[83]

The receptiveness of Brazil to external normative inducements surrounding Defensoría norms at the federal level has remained limited. Since the 1980s there has been minimal engagement with regional Defensoría platforms, although the Brazilian Procuraduría General de la República (General Attorney's Office) has recently attended meetings organised by the FIO with Spanish funding.[84] International NHRI platforms have also met with resistance. In response to UN calls for the establishment of a NHRI, Brazil has responded by creating human rights bodies that bear little relation to the Paris Principles.[85] Unlike Uruguay, Brazil has not followed ratification of OPCAT with a commitment to create a NHRI.[86] One hypothesis to explain this exceptionalism is that the immense corporatist strength of the Brazilian legal profession has encouraged strong isomorphism within the Brazilian state, but low isomorphism with the rest of Latin America.[87]

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[82] J. Lemgruber, Leonarda Musumeci and Ignacio Cano, *Quem vigia os vigias: Um estudo sobre controle externo da polícia no Brasil*, (Río de Janeiro: Record, 2003).
[83] Anthony W. Pereira, 'Paper cemeteries and organisational traps: The institutional dimension of public security in Brazil', Paper presented for presentation at the Centre for Brazilian Studies, University of Oxford, 24 April 2007, p. 16.
[84] See FIO, 'BRASILIA: II Encuentro Internacional de Derechos Humanos y Metrópolis', 5 August 2009.
[85] See Briefing document, Working Group on the Universal Periodic Review First session Geneva, 7-18 April 2008, UN Doc., A/HRC/WG.6/1/BRA/2, 31 March 2008, p. 3.
[86] See Association for the Prevention of Torture, 'Brazil approves the first state law to create a local preventive mechanism under the OPCAT', 8 December 2009.
[87] I am grateful to Tim Power for this observation. Personal communication by email with author, 30 March 2010.

Although the Brazilian state may counter that existing institutional structures are adequate, continuing widespread and systematic violations place such a claim in doubt.[88] Observers have noted that the Procuraduría General does have certain analogous features to the Defensoría, including significant investigation prerogatives.[89] However, this is a legal body with enforcement powers and therefore distinct to the Defensoría model. Other instances of rights protection include the Ministry of Justice's secretariat of human rights and, in particular, the Public Prosecution Service (Ministério Público) which has been described as displaying 'remarkable' autonomy, an 'almost unlimited' scope of prosecutorial activity, and even engaging in public censure of elected officials through the media.[90] However, none of these agencies can be described as NHRIs as they lack formal designation to protect and promote human rights and associated design principles.

Beyond local structural obstacles, it is also necessary to acknowledge domestic resistance to Defensorías as part of an idiosyncratic process of Brazilian framing of human rights. The manner of Brazil's transition to democracy and the enduring influence of authoritarian enclaves within the Brazilian state have hindered political transformation.[91] At the domestic level, extremely high levels of violent crime, combined with historical disrespect for civil rights and a severely flawed justice system, have exacerbated deep public ambivalence

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[88] In its 2009 report on Brazil Amnesty International highlighted high levels of violent crime, police abuse, torture, forced labour, and persecution of indigenous and landless peoples as enduring and widespread features of the Brazilian reality. See http://www.amnesty.org/en/region/brazil (accessed 8 March 2010).
[89] J. Santistevan, 'El Defensor del Pueblo en Iberoamérica', p. 42.
[90] T. J. Power and M. M. Taylor (eds.), *Corruption and Democracy in Brazil: The Struggle for Accountability*, (University of Notre Dame Press, forthcoming 2011), p. 22.
[91] James L. Cavallaro, 'Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil', *Chicago Journal of International Law*, vol. 3, no. 2, pp. 481-492.

toward human rights norms.[92] These factors deserve more attention than is possible here. Suffice to say, framing of Defensoría norms are affected by broader ideational conflicts within local social systems. Human rights constitute a political battleground in Brazil, with incremental advances subject to backlash witnessed in the President's recent proposal to establish a Truth and Reconciliation Commission (TRC).[93] As such, despite pressing local needs and demands, the prospects for a Brazilian Defensoría remain low for the foreseeable future.

3.4.2. The Chilean National Institute for Human Rights

Chile emerged in 1990 from a protracted period of authoritarian government and systematic human rights violations by pacted transition to democracy. Chile has made notable recent advances in accounting for past crimes.[94] Chile also displays some of the highest political, institutional and social indicators in the region and is widely viewed as an economic success story.[95] As in Costa Rica, a highly centralised political system and dense institutional apparatus have led detractors to question the need for a Defensoría. Resistance from various quarters has repeatedly conspired to undermine legislative attempts to create a Chilean

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[92] See Teresa P.R. Caldeira, 'The paradox of police violence in democratic Brazil', *Ethnography*, vol. 3, no. 3, 2002, pp. 235-263.
[93] President Luiz Inacio Lula da Silva announced the establishment of the TRC in December 2009. In February 2010 he was forced to dismiss General Maynard Marques de Santa Rosa for criticising the initiative as a "slander commission". See *Estadão*, 'Lula exonera general que criticou Comissão da Verdade', 10 February 2010.
[94] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America', *Journal of Peace Research*, vol. 44, no. 4, 2007, p. 434.
[95] See Juan Carlos Moreno-Brid and René A. Hernández, 'Chile: The Lonely Success Story', *Revista Harvard Review of Latin America,* Spring 2004.

Defensor. Indicative of this protracted process, at the close of 2009 the Chilean Senate approved the creation of a National Institute for Human Rights (INDH).[96]

However, as the Human Rights Centre of the University Diego Portales pointedly asks in its 2008 Annual Human Rights Report, 'is the National Institute for Human Rights an authentic national human rights institution?'[97] In many respects, the resulting institutional reform bears the hallmarks of significant compromise with powerful political forces resistant to the creation of a Defensoría. The resulting structural form bears little relation to Latin American Defensorías and consigns the model to the outer fringes of global NHRI models, bearing a resemblance to the Danish or German research institute variants. In terms of autonomy, the Institute is not constitutionally entrenched, comprising seven Councillors, including two appointed by the President (Article 6).[98] The powers of the office are also circumscribed, with no provision to receive complaints, no inspection powers and ambiguity surrounding the office's legal competencies (Article 3(5)).

Ideational framing has been informed by the conservative orientation of the Chilean political elite. Opponents have asserted that Chile's institutional framework is already sufficiently robust to guarantee human rights. Chile has embraced to an extent the embedding of human rights within state structures.[99] However, none of these structures meet the minimum standards contained within the Paris Principles. Furthermore, human rights defenders point

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[96] Law no. 20405, Instituto Nacional de Derechos Humanos, published 10 December 2009.
[97] Centro de Derechos Humanos, Universidad Diego Portales, Infor*me sobre Derechos Humanos en Chile DDHH 2008*, UDP: Santiago, 2008, p. 565.
[98] President Ricardo Lagos 2000 proposal to create a Defensor Ciudadano included constitutional recognition.
[99] Public agencies entrusted with protecting and promoting human rights include the Human Rights Programme of the Ministry of the Interior (created in 1997), the Office of Human Rights within the Judicial Assistance Corporation (created in 1993), and the Presidential Advisory Commission for the Protection of Human Rights (created in 2001).

to a lack of progress in enhancing access to justice, especially for economic, social and cultural rights claims, and the continued exclusion of traditionally marginalised groups within Chilean society, such as indigenous communities and detainees.[100] Given the INDH lack of ex officio or reactive investigative authority, it is unlikely to satisfy the demands of human rights defenders or broader social needs and demands.

Driven by domestic elite interests, the INDH is the culmination of a sporadic process of dialogue with international norm entrepreneurs. The UN has been increasingly engaged in promoting a NHRI in Chile, with the Regional Office of the OHCHR hosting a high-profile meeting on the subject in March 2007. This gathering revealed the fault lines between external advocates and local actors, with the government providing a long list of achievements in human rights protection and other politicians questioning the motive for reform. As Senator Kuschel asserted:

> I understand that the UN wants its bureaucracy to exist all over the world but we have to question whether the Defensor Ciudadano is really going to be effective, much of the work that this institution is supposed to carry out is already undertaken by existing regulatory bodies...[101]

Unlike in Brazil, debate around OPCAT implementation in Chile has explicitly referred to the INDH as the designated NPM.[102] Nevertheless, the resulting legislation makes no

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[100] *Ibid.*, p. 560.
[101] *El Mostrador*, 'Senador Kuschel insta a estudiar argumentos para creación de Ombudsman', 27 March 2007.
[102] Asociación Para la Prevención de la Tortura, 'Resumen de situación en Estados Partes y Signatarios de América Latina', 22 February 2007: http://www.apt.ch/

reference to OPCAT and falls short of the obligations contained therein. Finally, Chile has also been largely impervious to regional NHRI peer networks. The Chilean Chapter of the ILO, created in 1983, is one of the oldest in the region and has conducted a constant campaign in support of a Defensor. However, its powers of persuasion have failed to convince legislators.

3.5. Conclusion

This chapter has offered an empirically rich assessment of the factors underling the rapid diffusion of Defensorías in Latin America over the past 25 years. In mapping the location of Defensorías throughout the region, the study argues that a general trend of Defensoría diffusion at the regional level is reflective of broader global convergence around liberal Western norms, especially concerning political democracy, human rights and regulatory regimes. In turn, the empirical material assembled indicates that convergence of Defensoría norms in Latin America is attributable, in large part, to an unusually organised and sophisticated array of norm transmission platforms and networks operating at the global and especially regional level.

Despite a general conformity at the regional level, the study has also exposed significant structural variation across cases. Specifically, the chapter has developed a set of formal features of Defensorías to propose a categorisation of 'constrained' and 'unconstrained' models in Latin America. Beyond mapping the location of Defensorías, therefore, the study has also mapped structural form in order to understand how these offices differ from one

another, as well as how to explain such variation. It finds that variation along the dimensions of formal autonomy and power at point of origin can be usefully explored with reference to diffusion analysis and the impact of intermediate mechanisms of diffusion upon formal outcomes.

Building on Chapter 2, this chapter has proposed a distinct framework to understand the mechanics of diffusion, focusing on intermediary categories of compulsion, material inducement and framing of ideas. This is not a radical departure from conventional frameworks but rather recognition that the process of Defensoría diffusion is guided, to a greater or lesser extent, by both coercive and constructivist forces acting upon states.[103] The empirical material further supports the assertion that the logic of diffusion in any one instance will differ from any other and, indeed, distinct logics are likely to collide and overlap. Focusing attention on the interplay of external and internal factors in explaining the creation and structural form of Defensorías, the chapter also elucidates upon the puzzle presented by those regional outliers that have resisted Defensoría reform.

Above all, the chapter claims that context at the local level is important in explaining both the creation of Defensorías and why they take on certain characteristics. Regional processes of democratisation and conflict-cessation have facilitated powerful acculturative processes in Latin America. In particular, changing political conditions at the local level underpin the proliferation of Defensorías as reform-inclined political elites respond affirmatively to

[103] For instance, whereas the difference is drawn between acculturation (social costs alone) and coercion (social costs that entail material costs), such distinctions break down where neither social sanctions nor their translation into material costs are assured. Rather, perceptions of social costs may be real or imagined, their translation into material costs contingent upon other significant local factors.

increasingly organised and coordinated norm platforms. However, the evidence strongly indicates that across cases internal political forces largely govern structural and political outcomes. In particular, key characteristics of the political context, namely unstable formal rules and political conflict, explain variation in reform outcomes and the existence of negative cases in Brazil and Chile. The absence of compelling external incentives and ideational resistance to the Defensoría at the local level have combined to effectively close-off reform in these two cases.

The chapter has demonstrated the impact of distinct, but overlapping, diffusion mechanisms upon the creation and resulting structural form of Defensorías in Latin America. However, as is developed in the following chapters, formal design principles constitute just one component, albeit a significant one, of the dynamic conception of institutionalisation advanced by this thesis. Broadly speaking, this chapter raises important questions surrounding the process of insertion of new institutional forms. In particular, the potential for prior intentions of reform advocates to be subverted by domestic political forces – an eventuality often skated over by the optimistic liberal orthodoxy of the 1990s. It is political context that conditions the creation and resulting structural form of Defensorías. And, as will now be explored, it is political context, not formal rules, which ultimately shapes the political impact of the Defensoría.

Chapter 4: Politics and institutionalisation of the Defensoría: A framework of analysis

4.1. Introduction

This chapter elaborates the theoretical framework that frames the study's explanation of the variable institutionalisation of NHRIs – or, more specifically, Defensorías del Pueblo – in Latin America. Moving beyond questions of why states create Defensorías, the focus now turns to the domestic level and their institutional development following activation. The analysis demonstrates how the institutionalisation of Defensorías operating in the democratic regimes of Latin America is shaped by the interaction of formal design and informal rules and practices. More specifically, the chapter identifies those actors and processes relevant to the institutionalisation of the Defensoría, as well as analytically and normatively inter-relates the institution to the focused-theory frames of institutional analysis and political accountability.

The study departs from the premise that development of formal design principles is important in explaining institutionalisation. However, the informal dimensions of Defensorías' interactions with organised state and social actors along vertical and horizontal axes are often decisive. To this end, the analytical framework focuses on three features of institutionalisation: (1) formal design principles, (2) relations with organised actors within and outside the state, and (3) rules of access across state and non-state arenas. In so doing, the analysis elaborates on three key points. First, by unpacking the internal mechanics of distinctive, but overlapping, formal and informal dimensions of institutionalisation, the

framework demonstrates how informal norms often overlay and supplement formal rules. In particular, by specifying specific interactions across actors and processes the analysis highlights their complex interdependencies.

Second, the framework employs institutional analysis and political (as opposed to formal) accountability theory to elucidate questions of institutional stability and change. By emphasising broader institutional settings, conflict, distributional implications, and timing and temporality, these frames facilitate more fine-grained analysis of Defensoría development under variable institutional conditions. In addition, political accountability theory provides a valuable lens through which to assess the structural and political significance of an institution that lacks formal enforcement powers. What emerges is a deeply contextualised picture of a distinctive institution capable of intersecting an often conflictive state and society divide.

Third, a basic contention of this study is that the Defensoría is an important institution that has been generally overlooked in political comparative study or approached almost exclusively in a highly formalistic manner. The political institutional perspective employed in this study is therefore incipient and evolving. By framing Defensoría institutionalisation as dynamic, the study demonstrates that it is the interaction of formal and informal dimensions, rather than any one dimension acting in isolation, that is crucial to explaining stability and change. In turn, the framework relates the political significance of the Defensoría not so much to the realm of formal rules but rather to 'accountability gaps' with weakly institutionalised political systems. Defensorías are important because they reflect the

failure of formal institutional frameworks to resolve unfulfilled social needs and demands that fall 'in the gaps' that pervade Latin American democracies.

4.2. Features of political institutionalisation

This section reflects on the components of three core features of institutionalisation: (1) formal design principles, drawing on accountability theory to explore the institution's lack of enforcement powers, (2) Attention to the informal or 'political' features of institutionalisation, namely, relations with multiple actors within and outside state structures, as well as (3) rules of access across accountability arenas.

4.2.1. Formal design principles

The study acknowledges the importance of formal design principles in explaining institutionalisation. As demonstrated in Chapter 3, formal independence and power at point of origin have produced variably constrained and unconstrained models within Latin America. This reflects a traditional concern for robust formal design found within much of the literature on Defensorías. For instance, scholars argue that constitutional status grants the institution enhanced independence due to the elevated cost of repealing constitutional reform.[1] Additional safeguards include autonomy over appointment and recruitment, operational procedures, and, crucially, budgetary resources. Similarly, scholars consider a wide-ranging human rights mandate and unrestricted investigative jurisdiction to be essential

[1] Lorena Gonzaléz Volio, 'The Institution of the Ombudsman: the Latin American Experience', *Revista IIDH*, vol. 48, 2003, pp. 219-237.

to the power of the office.[2] The Defensoría's lack of formal enforcement powers has led, often implicitly, to formally-oriented observers characterising the institution as a 'toothless watchdog'. Such assumptions neglect the political significance of the Defensoría within their wider social settings.

Indeed, the evidence suggests that the near consensus in the literature on formal design rests on shaky empirical ground. The perennial issue of how to make institutions *work* remains a pressing concern for this study, with Latin America littered with institutional creations that have long ceased functioning (if they ever did) as intended.[3] In Latin America where formal rules are widely contested, routinely violated and frequently changed, even the most robust formal defences may not withstand determined attack. In turn, unstable conditions may present opportunities, as well as challenges to an institution able to operate outside strictly formal parameters. In other words, experience suggests Defensorías are greatly influenced by their political settings, presenting a direct challenge to notions of 'democracy by design' and structural insulation from social forces.[4]

All Defensorías are operating in a relatively less stable institutionalised environment than that presupposed by formal institutional theory.[5] Recognising the potential for informal norms and practices to overlay and supplement formal rules presents an empirical challenge,

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[2] Gonzalo Elizondo and Irene Aguilar, 'The Ombudsman Institution in Latin America: Minimum Standards for its Existence', in Birgit Lindsnaes et al. (eds.), *National Human Rights Institutions: Articles and Working Papers*, (Copenhagen: The Danish Centre for Human Rights, 2001), pp. 209-221.
[3] J. Crabtree (ed.), *Making Institutions Work in Peru*, (London: ISA, 2006).
[4] A. Reynolds (ed.), *The Architecture of Democracy*, (Oxford: Oxford University Press, 2002); Matthew D. McCubbins et al., 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics and Organization*, vol. 3, no. 2, Fall 1987, pp.243-278.
[5] O'Donnell has observed the presence of 'brown areas' in Latin America where formal rules of the game bear little resemblance to widely accepted informal practices. Guillermo O'Donnell, 'On the State, Democratization and some Conceptual Problems', *The Helen Kellogg Institute*, Working Paper 192, April, 1993.

namely, how to observe Defensoría engagement with its institutional setting – especially with those norms, rules and procedures that are not necessarily codified in law. This challenge has been taken up in recent contributions to comparative political study. For instance, Tsai has convincingly demonstrated that informal social norms – in the absence of incentivising formal institutions – may assume primacy in shaping the behaviour of public officials in response to the demands of the local populace.[6] This study addresses the interplay of formal attributes and informal practices, from legislative norms to systems of patronage, and ascertains the degree to which one or the other shapes the nature and direction of Defensoría institutionalisation.

Before unpacking the informal dimensions of institutionalisation, the implications of the Defensoría's lack of enforcement powers merit further attention. The narrow field of political accountability scholarship that has directly addressed the accountability function of Latin American Defensorías outlined in Table 4.1 has generally placed emphasis on formal powers. Formally-oriented theorists who tend to precondition accountability with formal compliance frameworks have described the Defensoría's accountability function as 'diminished', 'soft' or limited to a 'fire alarm' form of oversight. An alternative school of political accountability theory, one that associates the exercise of accountability principally with 'arenas of conflict over whether and how those in power are held responsible for their decisions', encourages a substantial re-framing of the Defensoría's accountability function

[6] L. Tsai, *Accountability Without Democracy*, (New York: Cambridge University Press, 2007).

that recognises the impact of unstable institutional settings upon actors and processes of political accountability.[7]

Table 4.1: Selected comparative politics scholarship on the Defensoría's accountability function

Source	Selected references on the Defensoría's accountability function
J. Ackerman (2009, pp. 8-9)	Ombudsmen depend entirely on the 'good will' of executive agencies to comply with their recommendations and information requests for information. However, they can establish alternative sources of political and institutional support.
P. Domingo (2006, p. 234; 242)	Ombudsmen have encouraged and pioneered novel forms of societal accountability. Particularly important is their ability to file direct or abstract actions to test the constitutionality of laws and other acts.
C. Kenney (2003, p. 66)	Ombudsmen may only offer a diminished, limited form of accountability if other horizontal powers upon which accountability depends fail to act.
G. O'Donnell (2006, p. 337)	Appointed agencies can exercise control in a proactive and permanent manner; involve professional, apolitical criteria that tend to diminish conflicts; and specialise to investigate complex state bureaucracy and policies.
E. Peruzzotti and C. Smulovitz (2006, p. 21)	Ombudsmen have contributed to the increase in judicial oversight of rights and of administrative actions constituting new and alternative tools for the exercise of control.
A. Przeworski (1999, p. 29)	The ombudsman can be understood as a 'fire alarm' form of oversight, possibly offering a solution to the agency problem inherent in the presidential system of delegation to a bureaucracy.
L. Reif (2004, p. 61)	Many human rights ombudsmen (e.g. in Latin America) have additional, stronger powers, such as the ability to take cases to constitutional and other courts for judicial determination.
J. Santistevan (2000, p. 5)	Bridging and networking in a non-binding capacity is important to the activities of the ombudsman 'since it may permit a multiplying of his or her persuasive effect amongst different quarters of society and influential circles'.
A. Schedler (1999, pp. 16-7)	The ombudsman may still offer a degree of accountability even if only exercising an answerability function – what might be termed 'soft' types of sanction.
F. Uggla (2004, p. 448)	The influence of the ombudsman can hardly be deduced from the formal, legal dispositions regulating the institution. Instead, the strength and autonomy of the institution are generated by a process that is primarily political.
M. Ungar (2002, p. 37)	The Defensoría has a defined set of formal powers but a wide range of informal ones. They can become more powerful than expected as they grow adept at nurturing allies and publicising abuses...

[7] J. Fox, *Accountability Politics: Power and Voice in Rural Mexico*, (New York: University Oxford Press, 2008), p. 3.

Importantly, two emerging trends are apparent in the above scholarship. First, scholars, such as Domingo and Reif, highlight the impact of formal control or referral powers common to Defensorías in the region – especially concerning constitutional review powers. Second, beyond questions of formal legal form, others such as Ackerman and Ungar place emphasis on the ability of Defensorías to utilise a 'wide range of informal powers', to 'establish alternative sources of political and institutional support', and to 'pioneer novel forms of 'societal accountability'. Fredrik Uggla writes that 'the influence of the ombudsman can hardly be deduced from the formal, legal dispositions regulating the institution. Instead, the strength and autonomy of the institution are generated by a process that is primarily political'. This thesis builds upon such assertions of a 'primarily political' causal mechanism by further specifying the interplay and impact of formal and informal, or political, dimensions of institutionalisation upon the Defensoría.

Finally, without entering into an extended conceptual discussion, this study demonstrates that accountability can be exercised in the absence of one of its core dimensions – be it 'enforcement' or 'answerability' – without it necessarily being considered a diminished form of accountability as a result.[8] This perspective recognises a range of informal, as well as formal, modalities of accountability that do not necessarily entail legal sanction. Indeed, where formal rules are unstable and weakly enforced, answerability and the potential to realise 'material consequences' through informal mechanisms of accountability may be of

[8] A general understanding of the concept of accountability hinges on whether an actor is formally ascribed the right to demand answerability of a public official or bureaucracy. See Mainwaring and Welna (eds.), *Democratic Accountability in Latin America*. Schedler considers that, in addition to answerability, the notion of political accountability implies enforcement – the capacity to impose sanctions on power holders who have violated their public duties. Beyond answerability and enforcement, Schedler also adds to this definition elements of monitoring and justification. See A. Schedler, 'Conceptualising Accountability', in Schedler et al., *The Self-Restraining State*, pp. 13-28.

equal or more importance.[9] Indeed, the distinctive scope of the Defensoría's accountability function hinges on a remit that encompasses not only formal but also political accountability, concerning 'the answerability of those in public office to partisan elements within the political system'.[10] The ability to exercise political accountability and appeal to the 'court of public opinion' unimpeded by legal protocol may explain why relations with elected officials are often defined by mistrust and hostility.

Thinking in formalist terms, it is odd that an office lacking in enforcement power should be thought to be powerful at all. However, the portrayal of the Defensoría as 'toothless' fails to appreciate fully the institution's informal attributes. Drawing on its political accountability function, a Defensoría capable of mobilising public opinion can tap into an alternative source of extra-legal but material 'power'. The responsiveness of public officials to such mobilisation by the Defensoría is likely to hinge on the popular credibility of the office. This *modus operandi* is particularly pertinent to the Defensorías that populate this study. In highly institutionalised contexts, power may reside primarily within formal rules with few, if any, avenues for mobilising public opinion. However, in Latin America, not-withstanding variation from country to country, enforcement powers are often either absent or unstable. In such settings, mobilising a collective awareness around an issue may be the crucial instrument for getting things done, so far as anything can be done.

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[9] E. Peruzzotti and C. Smulovitz (eds.), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*, (Pittsburgh: University of Pittsburgh, 2006), p. 16.

[10] Philp continues that with political accountability the 'issue is not whether someone acted within his or her legitimate and allocated powers, but whether they exercised those powers in ways their political constituencies are willing to endorse or approve'. See Philp, 'Delimiting Democratic Accountability', pp. 38-9.

4.2.2. Relations

The Defensoría can be conceived as a point of intersection between the state and society. The development of the institution is decisively shaped by its relationship and complex interplay with actors within and outside state structures. Political accountability theory offers a useful point of departure for grappling with the complex linkages of the Defensoría to its surrounding political and institutional setting. Table 4.2 provides an overview of the Defensoría's interaction with three significant clusters of relations, distinguishing among accountability actors (who are the actors?) and arenas (where are they positioned?).

According to O'Donnell's division of 'vertical' and 'horizontal' accountability, the state can be framed along two dimensions.[11] Vertical accountability refers to the idealised principal-agent relationship between elected officials and their principals, most visible in the ability of the citizen to select and eject their leaders from office, typically through the electoral process.[12] Horizontal accountability can be defined as the arena of state's checks and balances.[13] The study also highlights the significance of organised social actors working through vertical channels and, to a lesser extent, relations with external agencies.

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[11] Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', *Journal of Democracy*, vol. 9, no. 3, 1998, p. 112-126.

[12] The subjects of accountability are state agents and agencies, including elected officials at the sub-national level, non-elected functionaries within the state bureaucracy. Many Defensorías also have jurisdiction over private entities engaged in public service delivery.

[13] O'Donnell defines horizontal accountability as 'the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions...in relation to actions or omissions by other agents or agencies of the state that may, presumably, be qualified as unlawful'. O'Donnell's narrow definition which focuses exclusively on control of unlawful actions or omission by agents or agencies of the state, is, arguably, insufficient to account fully for the vertical and horizontal activities of the Defensoría. See Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', in Schedler et al., *The Self-Restraining State*, p. 38.

Table 4.2: Actors and arenas of accountability

DIMENSIONS OF INTERACTION		CLUSTERS OF RELATIONS		
		State actors	**Social actors**	**External actors**
	Vertical accountability	• Executive • Ministries • Executive appointed agencies	• NGO • The media • Civic associations • Individual citizens	• United Nations • OAS • Foreign governments • Donor agencies • INGOs
	Horizontal accountability	• Legislature • Judiciary • Public Prosecutor • Attorney General • Comptroller General • Appointed and regulatory agencies	• Participative mechanisms • Citizen auditing bodies	• Foreign governments • Transnational IGO networks • INGOs and transnational peer networks

Source: author's own formulation

Distinguishing between vertical and horizontal lines of accountability serves a useful heuristic purpose. However, such neat demarcation must be balanced against an appreciation of a more complex reality. Importantly, O'Donnell's theory does not imply that state institutions are necessarily horizontal in a hierarchical sense nor does it deny that, internally, power often flows through vertical channels. Such finer-grained distinctions are, nevertheless, possible and important to this study. The experience of the Defensoría shows that relations across state agencies are in reality tacitly unstable, with theoretically angular lines of accountability more accurately framed as variables rather than fixtures of Latin American institutional frameworks.

Defensoría relations can be broken down into three significant clusters of relations. First, the institutionalisation of the Defensoría is greatly influenced by the balance of power within the state. Concentration of authority within the executive branch is a distinctive

characteristic of the region's political systems and often dominates Defensoría relations with vertical and horizontal state actors.[14] Not-withstanding this reality, the Defensoría is one nodal point within a rights network of horizontal state actors, which includes balancing institutions – the legislature and judiciary – as well as a range of appointed agencies responsible for legal control, investigation, judicial review and regulation.[15] However, the general weakness of horizontal accountability actors has been identified as a major flaw of democracies in Latin America.[16]

Distinctive among horizontal actors, the Defensoría also operates through vertical channels, activated directly by the citizen (at no cost) and able to initiate ex officio investigations. Nowhere is this more evident than in its relations with the second significant cluster of relations with vertical social actors. 'Vertical social' accountability refers to channels of access to public officials distinct to elections 'carried out by actors with differing degrees of organisation who recognise themselves as legitimate claimants of rights including social movements, the media and NGOs'.[17] Throughout Latin America, organised social actors outside state structures, especially watchdog media, human rights organisations and civic associations, constitute an influential force in domestic politics and a key relationship for the Defensoría. In general, relations with organised social actors are shaped by the composition, degree of organisation, and nature of the claims in question. It is important to note that

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[14] Juan Linz, 'Perils of Presidentialism', *Journal of Democracy*, vol. 1, no. 1, Winter 1990, pp. 51-69.
[15] Christopher Elmendorf, 'Advisory Counterparts to Constitutional Courts', *Duke Law Journal*, vol. 56, no. 4, February 2007, pp. 954-1045.
[16] Juan Mendez, 'Fundamental Rights as a Limitation to the Democratic Principle of Majority Will', in Guillermo O'Donnell et al. (eds.), *The Quality of Democracy: Theory and Applications*, (Notre Dame: University of Notre Dame Press, 2004), p. 202.
[17] Enrique Peruzzotti and Catalina Smulovitz, 'Societal and Horizontal Controls: Two Cases of a Fruitful Relationship', Conference Paper for Institutions, Accountability and Democratic Governance in Latin America, 8-9 May 2000, Notre Dame: Kellogg Institute University of Notre Dame.

vertical social relations are distinct to the horizontal social arena identified in the hatched quadrant in Table 4.2 which is not addressed here.[18]

External agents are a notable, if less significant, cluster of Defensoría relations. This refers to what Pastor identifies as a 'third axis' of accountability as well as to the broader phenomena of 'norms cascade'.[19] Relations within this category can also be sub-divided along vertical and horizontal dimensions, albeit distinct to the internal channels of domestic relations discussed above. External interaction with Defensorías occurs through vertical mechanisms, such as the attaching of conditions to the distribution of benefits to Defensorías in the region. The World Bank, United Nations, Organizations of American States, and European Union, among others, have shown increasing interest in Defensorías as potential vehicles through which to pursue their policy interests. A distinction can be drawn between this vertical-type of relationship and a more horizontal interaction in which transnational Defensoría peer networks and other international non-governmental organisations play a role in facilitating information exchange, capacity building, standard setting and promoting institutional legitimacy.[20]

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[18] Termed 'co-governance,' scholars have advocated opening up core activities of the state to societal participation as a means of improving accountability and governance. This arena of accountability relations is limited terrain for the study of the Defensoría given that its interaction with social actors rarely, if ever, meets the standards of co-governance. See Anne Marie Goetz and Rob Jenkins, 'Hybrid Forms of Accountability: Citizen engagement in institutions of public-sector oversight in India', *Public Management Review*, vol. 3, no. 3, 2001, p. 364.

[19] See Martha Finnemore and Kathryn Sikkink, 'International Norms and Political Change', *International Organizations*, vol. 52, Autumn 1998, pp. 887-917; Whitehead, *The International Dimensions of Democratization.*

[20] See A. Slaughter, *A New World Order: Government Networks and the Disaggregated State*, (Princeton University Press, 2004).

A further crucial aspect to the nature of Defensoría relations is the power balance between state and society. State structures are traditionally highly centralised in Latin America, with extreme asymmetries between state and society being a common feature. Nevertheless, the relative authority of organised state and social actors varies, often related to historical processes of democratisation and the breadth and depth of political openings. Social actors have long been associated with political processes underpinning democratic regimes in the region.[21] The institutional development of the Defensoría is intimately connected to the power of social constituencies vis-à-vis political elites. As such, contextualising 'vertical' and 'horizontal' relations entails balancing a focus on formal institutions with prevailing informal power structures. More specifically, embedding the institution in its social context, the development of the Defensoría is directly affected by the changing composition of supportive or opposing coalitions within and outside state structures.

In evaluating how these clusters of relations impacts upon the Defensoría, the study underlines accountability relations defined not in zero-sum terms, but rather as the interaction of power and coordination games. Without power there is little prospect of coordination and vice versa.[22] Framing the Defensoría as a point of intersection between state and society, the analytical framework also unpacks how the institution has empowered otherwise weak actors in challenging powerful political interests. Ultimately, this will depend upon the relative power of the Defensoría, its ongoing distributional effects, and

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[21] Scott Mainwaring, 'Urban Popular Movements, Identity, and Democratization in Brazil', *Comparative Political Studies*, vol. 20, no. 2, July 1987, pp. 131-159.

[22] This refines the distinction drawn by Schedler who asserts 'imposing institutional constraints on the state represents in most cases a 'power game' rather than a 'coordination game'; it is a conflict-ridden enterprise rather than some smooth and voluntary affair'. Schedler, 'Conceptualising Accountability', p. 35.

ability and willingness to build and sustain plural coalitions against an ever-shifting institutional backdrop.

4.2.3. Rules of access

The ability of the Defensoría to access legal (formal) and political (informal) accountability arenas is central to understanding the impact of the office. Lacking explicit enforcement powers, the Defensoría nevertheless has a range of formal prerogatives that permit access to judicial, legislative and bureaucratic arenas. Importantly, the Defensoría generally relies on other 'complementary' accountability institutions to close the legal accountability cycle. In turn, as an autonomous state entity it stands apart from social actors. Using its mandate in the broadest sense, Defensorías do, however, access political accountability arenas to exert pressure on public officials from 'outside' the state. It is this ability to traverse state and social arenas that facilitates the office's wide-ranging activities and provides its distinctive position within the political system. Table 4.3 outlines the formal, informal and external points of access for the Defensoría operating at the vertical and horizontal level. As noted above, this table serves a heuristic purpose. It does not attempt to capture all of the fluidities observed in practice. Indeed, most realities flow between these categories.

In terms of rules of access, Defensorías generally have a formal mandate to report to the legislative branch, to investigate and supervise the activity of the administration, review and propose legal modifications, and initiate legal actions on matters of human rights. As such, the office has formal access to most arenas within the state, with occasional exceptions

relating to the judiciary, military and state secrets. Along vertical lines of access, the Defensoría can serve an advisory function to the executive on matters of public policy, funnelling social needs and demands from below. This has its clearest expression in critical annual reports to the legislature and input into ministerial and executive directives and decrees. Its role in the supervision and monitoring of unelected state officials in Latin America's presidential systems also constitutes a core function for the office.[23] Drawing on public administration scholarship the Defensoría can also access bureaucratic channels of 'reflexive control' over public officials, much like specialised regulatory agencies.[24]

Table 4.3: Rules of access to vertical and horizontal accountability arenas

		RULES OF ACCESS		
		Formal rules of access	**Political rules of access**	**External rules of access**
ARENAS OF ACCESS	**Vertical accountability**	• Policy setting • Regulation • Administrative oversight • Nomination and demotion of personnel	• Social mobilisation • Public denunciation • Denunciation by oversight agencies • Agenda setting • Investigation	• Legal sanction • Material sanction • Agenda setting • Public denunciation
	Horizontal accountability	• Policy setting • Regulation • Administrative oversight • Control of law abidance • Investigative and denouncing faculties	• Policy setting • Administrative oversight • Nomination and demotion of personnel • Investigative and denouncing faculties	• Public Denunciation • Agenda setting • Investigation • Agenda setting

Source: author's own formulation drawing on E. Peruzzotti and C. Smulovitz (eds.), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*, (Pittsburgh: University of Pittsburgh, 2006), p. 27.

[23] Przeworski et al., *Democracy, Accountability, and Representation*, p. 29.
[24] See Mark Hertogh, 'The policy impact of the ombudsman and administrative courts: a heuristic model', *The International Ombudsman Yearbook*, vol. 2, 1998, pp. 63-85.

The scope of Defensoría access to horizontal accountability arenas is broad, reflecting the institution's functional affinity with state checks and balances. Notably, many offices can submit legislative projects, initiate constitutional review actions and pursue claims of habeas corpus, habeas data, amparo and amicus curiae briefs.[25] Defensorías also can serve as a supplement to the investigative and auditing wing of the state, able to initiate investigations on receipt of complaints or ex officio. Courts rightly occupy a central role in the debate on horizontal accountability. However, appointed agencies such as the Defensoría may provide an important addition to formal processes of accountability in matters ranging from ethical oversight to egregious violations. To briefly illustrate, the control of corruption and prevention of torture are considered to require specialised agencies equipped with legal powers commensurate to their mandate. However, the role of Defensorías is increasingly recognised as a vital institutional additive in contexts displaying unstable horizontal accountability.[26]

A focus on formal rules of access provides partial insight into why and when Defensorías seek to pursue accountability actions through legal or legislative channels. In practice, despite wide-ranging formal prerogatives, access is often far from straightforward. Indeed, access is often governed by informal norms of intra-agency receptiveness, structures of opportunity, and inter-personal reciprocity rather than formal disposition. This recognises a reality where formal accountability actors can rarely be relied upon to fulfil their function in a uniform fashion. Simply put, conflict is likely to pose a significant obstacle to achieving

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[25] Amparos (emergency writs for the protection of constitutional rights) and habeas corpus (protection from unlawful detention) reflect regional legal traditions for the protection of individual rights. Habeas data refers to freedom of information petitions.

[26] Estado de la Región, *¿Cómo está Centroamérica? Una mirada realista sobre su presente y futuro*, San José: Estado de la Región, 2008), p. 352.

legal and legislative recourse. In turn, theoretically benign mechanisms of internal or 'reflexive' control under adverse conditions may deny the institution public visibility as well as risk political capture. All that said, experience demonstrates that Defensorías may achieve formal accountability outcomes despite robust official opposition. However, such outcomes are often contingent upon building momentum and swaying public opinion around the violation in question.

Reflecting a distinctive doctrinal function, the Defensoría has a wide-ranging mandate that goes beyond legal parameters to encompass a political accountability function. A proactive mandate to produce special reports on rights issues, to facilitate individual and collective legal claims, and promote rights education among state agents and citizens are important supplements to the institution's accountability role. This raft of activities outlined in Table 4.3 shares commonalities with organised social actors engaged in promoting accountability from outside the state. Peruzzotti and Smulovitz identify three core accountability strategies for social actors, through the judiciary, through mobilisation, and through the media.[27] The Defensoría can coordinate with social actors to activate these political accountability mechanisms and, in so doing, scale up the visibility and impact of accountability actions. Responsiveness to credible social actors provides Defensorías with legitimacy, information, as well as political incentives to pursue challenging accountability objectives. In turn, social actors benefit from an additional point of access to state channels of redress and resources.

A remaining arena of accountability is external rules of access. As developed in Chapters 2 and 3, international actors have had a powerful influence on the creation and development of

[27] Peruzzotti and Smulovitz, *Enforcing the Rule of Law*, p. 19.

Defensorías throughout Latin America. However, for the purposes of this study access to external mechanisms of accountability for the Defensoría is not central to the analysis. One exception is the Inter-American Human Rights System where Defensorías are permitted to submit amicus curiae briefs to the Inter-American Court or Commission as a third party.[28] As will be further discussed, petitions to the IACHR have been used by Defensorías to apply pressure on domestic governments akin to Keck and Sikkink's 'boomerang effect'.[29] Transnational peer networks are also active in the region and the potential advocacy role of civil society transnational networks is a prominent theme in the literature.[30] This study shows that under certain conditions, when coupled with an internal political dimension, access to external mechanisms of accountability can prove highly significant.

4.3. Politics and institutionalisation: actors, patterns and interactions

The preceding discussion has identified three core features of Defensoría institutionalisation. It has also unpacked the interactions between the various internal actors involved. This chapter now turns to the processes of institutionalisation, and focuses especially on the way both formal and informal processes contribute to the diversity of trajectories and outcomes we observe across the region.

An adequate explanatory model of institutionalisation must engage with both formal and informal influences upon institutional development. Formal structures in Latin America are

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[28] American Convention on Human Rights (1969), OAS T.S., No. 36 (in force 18 July 1978), Art. 62(3).
[29] See M. E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Cornell: Cornell University Press, 1998).
[30] See Slaughter, *A New World Order*.

constitutive of an institutionalisation process grounded in domestic political processes. Experience tells us that instead of conceiving of institutionalisation as the creation of predictably stable, credible and routinised internal practices, formal structures are subject to abrupt or gradual change over time due to a range of cross-pressures, from tampering by powerful social forces, to legislative interpretation, endogenous change agents and institutional decay. As a result, a static institutional incentive model does not serve to capture processes defined by complex interdependencies and contextualised cause-effect relations.

Focusing on the rules, norms and practices that inform institutional development also gets us closer to when and why Defensorías actually matter. The wide-ranging formal mandate of the office is crucial to the experience of the office, providing a point of interaction between formal properties and the institution's wider setting. In contrast to specialised agencies that are constrained by narrow legal mandates, the function of the Defensoría is comparatively open-ended and its eventual design compliance will depend greatly on the relative power of those actors who support, oppose or otherwise strive to influence it. As such, context is more important than origin. Beyond context, the study also gives weight to idiosyncratic drivers of development, especially the character of individual leaders having a significant effect across cases. Factors such as leadership may be decisive in the influencing of political outcomes and neutralising or evading political backlash. By combining formal and informal strengths the Defensoría may even assume primacy over the outcome of political processes.

The typology presented in Table 4.4 serves as a key interpretative device for the study.[31] Optimally, the Defensoría complies with the formal prerequisites of the institution to act as an institutional bridge between the state and society.[32] However, the ability of the Defensoría to assume such an ideal point of intersection across the state-society divide will be affected by the complex interplay of formal rules and local conditions, especially the balance of power within and between state and social arenas. To this end, the typology highlights the observable outcome of three alternative types of Defensoría, all of them partially corresponding to the formal design ideal. Where cross-pressures are not too great and coordination is feasible, the Defensoría may fulfil its formal bridging mandate as well as achieve significant accountability outcomes.[33] However, becoming involved in broader power struggles may ultimately risk political capture. Alternatively, if disregarded by other actors the Defensoría may simply slide into obsolescence.

Generalising across cases in Latin America we find instances of reasonably institutionalised Defensorías within the state apparatus as well as Defensorías with strong ties to highly organised social actors. These two outcomes do not necessarily coincide, nor do they cover all cases. Consequently Table 4.4 portrays a range of four possibilities. These 'ideal types' are not intended to be exhaustive, but rather, in the Weberian sense, to be useful tools by which to assess the extent to which certain factors or causal processes may account for

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[31] This typology builds on Fredrik Uggla's pioneering work on kinds of ombudsmen in Latin America. See Uggla, 'The Ombudsman in Latin America', p. 428.

[32] Ana María Romero Campero, 'El Defensor del Pueblo Como Puente Entre la Sociedad y el Estado', in Pilar Domingo (ed.), *Bolivia: Fin de un Ciclo y Nuevas Perspectivas Políticas [1993-2003]*, (Barcelona: Ediciones Bellaterra, 2006).

[33] It is important to recognise the problem that the 'significance' of the Defensoría's contribution will depend upon the baseline for evaluation. Such a baseline should ideally be calibrated in light of prevailing political and institutional conditions. Such context-sensitive evaluation would provide a valuable corrective to standardised evaluation exercises. What might look like a modest accountability gain or assertion of authority in one case versus another might be because the political conditions are so closed.

expected outcomes. In turn, they allow for further specification of the conditions and factors that shape the institutional development of the Defensoría.

Table 4.4: A typology of Defensoría political institutionalisation

Formal design compliance	**Type 1: Institutional Bridge**		
Observable outcomes	**Type 2: Regime Proxy**	**Type 3: Rights Defender**	**Type 4: Façade**
	Transmission from above	Transmission from below	Limited to no transmission

Source: Author's own formulation

Particularly important is the incorporation of timing and temporality into explaining institutionalisation. The analytical framework seeks to highlight the precarious balance between formal and informal dimensions in explaining institutional development. More specifically, in addressing institutional change, the experience of the Defensoría highlights the potential for causally relevant factors to coalesce in different formations and, depending on circumstance, produce widely divergent results. In other words, processes underpinning institutionalisation may, moving forward, equally give rise to deinstitutionalisation or reinstitutionalisation.[34] As such, it is always a precarious balance between formal and informal dimensions that shapes the trajectory of the Defensoría, subject to stability, rupture

[34] Scott describes de-institutionalisation as 'processes by which institutions weaken and disappear…some analysts emphasize primarily the regulative systems, noting enfeebled laws, diluted sanctions, and increasing noncompliance. Others stress eroding norms and evidence of the diminished force of obligatory expectations…The possible causes of deinstitutionalisation are multiple'. R. W. Scott, *Institutions and Organizations: Ideas and Interests*, (London: Sage Publications ltd., 2008), p. 196.

and repetition. In some instances, formal rules may matter more while in others informal practices prevail. However, in all cases it is the interaction that is crucial. This is especially true in Latin America where 'there is simply a great deal of "play" in the interpreted meaning of particular rules or in the way they are instantiated in practice'.[35]

However, it is not sufficient to talk of the strength and weakness of the Defensoría. It is also necessary to distinguish between different combinations of factors that may lead to the four types of institutional outcomes above. Table 4.5 demonstrates how the three features of institutionalisation differ from one another across types and also provides a foundation to begin assessing their distribution across cases. As will become clear in the empirical evaluation that follows in Chapter 5, the position of the Defensoría within the political system is closely related to the impact of formal and informal factors upon the office, identified in this study and unpacked in Table 4.5. For instance, a formally constrained office is less likely to offer robust defence to political interference or otherwise assert its authority if lacking formal attributes of independence and powers, so risking capture or obsolescence.

The types of Defensoría that emerge from the typology in Table 4.4 provide a general guide to the actors, processes and patterns likely to be of causal relevance to their institutional development. Toward assessing the interplay of formal and informal features, the typological exercise contained in Table 4.5 encourages evaluation of the interlinkages,

[35] James Mahoney and Kathleen Thelen, 'How Historical Institutionalists Explain Change', presented at Democratisation Seminar, Nuffield College, University of Oxford, 25 April 2008, p. 14.

reinforcement or tensions that arise between formal design principles, relations, and rules of access.

Table 4.5: A typological classification of Defensorías in Latin America

Type → / Dimensions ↓	Regime proxy (from above)	Rights defender (from below)	Institutional bridge	Façade
Formal design principles	• Constrained	• Unconstrained	• Unconstrained	• Constrained
Relations	• 'State vertical' • 'Horizontal'	• 'Social vertical'	• 'State vertical' • 'Horizontal' • 'Social vertical'	• Limited or no interaction
Rules of access	• 'Formal vertical' • 'Formal horizontal'	• 'Informal vertical' • 'Formal horizontal'	• 'Formal vertical' • 'Formal horizontal' • 'Informal horizontal' • 'Informal vertical'	• Limited or no access

Source: Author's own formulation.

Institutional bridge: the ability of the Defensoría to assume a stable and enduring point of intersection between state and society is central to this study. It is important to note that in this case, the Defensoría is viewed by both state and social actors as a viable framework through which to pursue their mutual or competing interests. Under such conditions the Defensoría may achieve optimal design compliance as well as primacy over the outcome of political processes. However, such a result, while desirable in theory, is elusive in practice, subject to rupture through pushback or backlash from powerful actors. Design is likely to be unconstrained, with formal design principles granting the institution autonomy and powers commensurate to its bridging mandate. For a Defensoría to intersect there must be at least partial consent by organised actors within and outside of state structures. This consent in

turn informs formal and informal rules of access, providing the Defensoría with access to significant, if not all, arenas of accountability.

Regime proxy: the political capture of Defensorías in Latin America is a common outcome, especially through partisan appointment. Such an outcome reflects the traditional power of political elites vis-à-vis social constituencies. In this scenario, the Defensoría is a partisan instrument of powerful forces within the state: viewed as a viable framework through which to transmit regime interests and as such enjoying influence over the outcome of political processes in the service of the regime. Design is likely to be constrained, particularly in the area of independence from government interference. Relations with organised social actors are likely to be characterised by indifference or hostility, with the Defensoría identified with the interests of the governing regime. With relations largely dictated by the consent of the executive branch, access to formal and informal arenas of accountability will be similarly affected. The Defensoría is likely to have access to formal state channels and regime-aligned informal arenas.

Rights defender: alignment of Defensorías with powerful social constituencies is also a common outcome in Latin America. It is likely to reflect the fragmentation of political elites relative to highly articulated social organisation. In this case, the institution is viewed by social actors as a viable framework through which to transmit their interests. Despite resistance from political elites, the Defensoría may still achieve primacy over the outcome of political processes, principally by mobilising public opinion from outside state structures. Design is likely to be unconstrained, providing some protection from interference by veto

players within the state. Relations with public officials are generally defined by indifference or hostility, with the institution viewed as a social actor opposed to governing regime interests. That said, this outcome is not incompatible with an institutional bridge position. It follows that formal rules of access are likely to be circumscribed along both vertical and horizontal channels, with the Defensoría dependent on access to informal vertical arenas of accountability.

Façade: over time, perhaps as many as a third of Defensorías in Latin America have taken on the characteristics of façade. Unable or unwilling to appeal to the interests of either state or social actors, the Defensoría has little or no influence over the outcome of political processes. This eventuality is, nevertheless, subject to change. However, one limiting condition is the degree of constraint present in formal design principles. Lacking independence and powers commensurate with its bridging mandate, a Defensoría is unlikely to fulfil this function. Relations with actors within and outside the state are defined at the outset by indifference, with the institution viewed as largely irrelevant to organised interests. It follows that the Defensoría has limited or no access to informal accountability arenas and has few incentives or opportunities to pursue unilateral actions through formal channels of access.

4.4. Political institutionalisation and the 'accountability gap'

This study seeks to understand and explain the impact of formal and informal dimensions of institutionalisation upon the development of the Defensoría in Latin America over time.

More broadly, the analysis asks why these institutions are significant players in domestic politics and how they work across variably stable institutional settings. A central assertion is that the experience of the Defensoría reflects deeper accountability gaps within Latin America's democratic regimes. Specifically, the significance of these institutions can be located in the disjuncture between democratic promise and the failure of existing regimes to meet pressing social needs and demands. In the absence of fully reliable and effective democratic structures, Defensorías are subject to new and competing demands which the institution has attempted imperfectly, but importantly, to address.

This disjuncture can be characterised in terms of an accountability gap. The presence of 'brown areas' in Latin America where formal rules of the game bear little resemblance to widely accepted informal practices has been identified as a defining feature of regional democracies.[36] Due attention should be given to the impact of such a gap upon the behaviour and expectations of domestic actors who must navigate a reality of unstable formal rules and routine norm violations. Following from this, the accountability gap, firstly, refers to the disjuncture between citizens' demands and expectations toward democratic structures and, in turn, the ability of those structures to fulfil their democratic function. Beyond such a socially immediate perception of an accountability gap, the study also reflects on an alternative 'idealistic' notion: the accountability gap between theory and practice. No existing democracy fully realises the idealised model of liberal democratic theory and O'Donnell rightly does not confine 'brown areas' to Latin America.[37] These two

[36] See O'Donnell, 'On the State, Democratization and some Conceptual Problems', p. 10.
[37] 'The ideal of 'equality before the law' has not fully been achieved in any country...But the Scandinavian countries come quite close to full homogeneity, while the United States, both territorially and functionally, is

understandings of the accountability gap do not necessarily go hand in hand. In other words, it is conceivable to have a gap in theory that goes unnoticed by the citizens living under that regime. Alternatively, you may have huge citizen dissatisfaction over a gap that in theory appears relatively insignificant.[38]

The socially perceived gap is significant to the extent that it drives political behaviour and informs the actions of the Defensoría. The idealised gap is also an important rejoinder to those Defensoría critics that deny the need for such an institution in contexts of consolidated democracy. Drawing out this distinction is, however, not so applicable in the Latin American context where, to varying degrees, democracies present significant accountability gaps in both idealised and socially perceived terms. Non-compliance with formal rules is widespread and not a particularly controversial claim. This study, however, avoids a formalist discourse of 'democratic failure' to direct attention to two quite different things: the gap that actually exists between what people living under these regimes expect their Defensorías to do and what these institutions can actually achieve under prevailing institutional conditions. In so doing, the study brings us closer to the real dimensions of the accountability gap and the ways in which it shapes accountability politics in the region.

The typology developed in Section 4.3 rests on the assumption that the accountability gap varies across cases. By applying the analytical framework to the Defensoría in Latin

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close to the lower limit among contemporary institutionalized democracies'. See O'Donnell, 'On the State, Democratization and some Conceptual Problems', p. 9.

[38] Such gaps are universal and potentially serious, for instance the Chilcott Inquiry into the United Kingdom's role in the 2003 invasion of Iraq is arguably the result of an accountability gap both in idealised and socially perceived terms. See Paul C. Roberts, 'The Rule of Law Has Been Lost', *Foreign Policy Journal*, 20 January 2010.

America the typology raises the question of the extent of variation across institutional contexts and its impact. More fine-grained distinctions are drawn out through the two limited cases which are broadly located at opposing polarities in terms of broader institutional stability. The accountability gap is likely to be more visible where formal rules are enforced in a variable manner and lack stability over time. In turn, where a pronounced gap between formal rules and actual behaviour of powerful actors exists, relations across state and society arenas are likely to be defined more by conflict than coordination as mutual expectations are continually subject to disruption. Importantly, this study also substantiates the existence of significant if often overlooked accountability gaps in those institutional contexts that more closely approximate idealised frameworks.

Observing and understanding what such accountability gaps actually mean for political processes of accountability has been hindered by an over-emphasis on formal compliance frameworks, in theory and practice. The persistence of informal or political accountability gaps is a crucial deficit perpetuated by the failure of formal accountability frameworks to fulfil their democratic function. In turn, an excessively legalistic approach toward evaluating constitutional democratic regimes often obscures a reality defined by conflict and power asymmetries as well as fails to capture the internal contradictions that define these regimes and the lives of those that live under its rules. As such, the accountability gap derives meaning not only from the inadequacy of formal frameworks in fulfilling their purpose but also in the informal experience of interactions between officialdom and citizens.

The experience of the Defensoría can shed light on some of these internal contradictions. In navigating formal arenas within the state the Defensoría exposes accountability gaps within formal state arenas, in particular the willingness and ability of state actors to abide by the tenets of the rule of law. In turn, given their wide-ranging mandate and direct interface with the citizen, the Defensoría provides further insights into the often concealed realm of informal norms and practices that exist alongside, but apart from, widely disseminated frameworks of formal rules. Broadly speaking, the impact of accountability gaps is most pronounced at the informal rather than formal level. More specifically, this study points to deeper structures of political accountability that inform the daily lives of citizens living under democratic regimes, especially those most marginalised in society. The Defensoría can be framed as a barometer of the breadth and depth of accountability gaps within broader social systems.

Defensorías can also be framed as a response to the accountability gap. If there was no gap, there would be no need for NHRIs. The very existence of a Defensoría is official recognition of an accountability gap. What is open to debate is the breadth and depth of that gap. As discussed in Chapter 3, many regimes have created Defensorías in part to respond to domestic and international concerns over accountability deficits. In highly institutionalised contexts where frameworks are clear, comprehensive and appropriate, the creation of a Defensoría may still constitute a useful addition to the credible denial of narrow accountability gaps. In other highly institutionalised settings, such as in Chile, the governing regime may be unwilling to admit to deficiencies in existing institutional frameworks. In contrast, where the severity of accountability gaps means official denials ring hollow,

institutions such as the Defensoría are often created to at least ameliorate, if not resolve, social tensions. In such contexts of deficient formal structures, Defensorías may assume a novel political significance not foreseen by their designers and different, often controversially so, from that of their more legalised contemporaries in highly institutionalised settings.

4.5. Conclusion

This chapter has presented the analytical framework that will guide inquiry into the institutionalisation of the Defensoría in Latin America. Discussion has focused on elaborating upon the various facets of the phenomenon through the use of an abstract decontextualised Defensoría. The following chapters animate this framework with an analysis of the experience of actual contextualised offices. By explicitly unpacking the parameters of the Defensoría experience in abstract, this chapter has served to breakdown a dynamic conception of institutionalisation into causally relevant sub-categories and link this discussion back to the theory frames of institutional analysis and political accountability. Three principal categories – formal design features, inter-relations, and rules of access – have been unpacked to reveal both their discrete and interacting components.

The chapter concluded by presenting an extended discussion of interaction across formal and informal dimensions of institutionalisation as well as the implications of the study's findings for processes of political accountability more broadly. The four-fold typology of Defensorías is a key heuristic device for the empirical analysis in subsequent chapters,

serving to differentiate among diverse experiences as well as characterise the significance of these political accountability actors within their social contexts. The following three chapters take up this task with an empirical analysis of the regional experience of Defensorías over time followed by a paired case comparison of the Costa Rican and Peruvian offices.

Chapter 5: Politics and institutionalisation: the Latin American Defensoría in comparative perspective

5.1. Introduction

This chapter empirically assesses the formal and informal dimensions of the Defensoría's institutionalisation as elaborated upon in Chapter 4. The chapter uses the experience of the office in Latin America to demonstrate that a central problem for institutional analysis is the ability of informal rules, norms and practices to shape behaviour and outcomes. The empirical evidence assembled here indicates that development of formal design principles is important in explaining Defensoría institutionalisation. However, the informal dimensions of the Defensoría's interactions with organised state and social actors are often decisive.

The analysis clarifies the relationship between three features of institutionalisation: formal design principles, relations with actors within and outside the state, and rules of access to accountability arenas. In particular it is shown that formal and informal features of institutionalisation, not-withstanding distinct internal logics, nevertheless also display significant areas of overlap. Through careful attention to the experience of the Defensoría, this study unpacks the dynamic character of institutionalisation and disaggregates the logic and nature of institutional development toward a more complex picture of political institutionalisation. Furthermore, the chapter builds on Chapter 4 by applying O'Donnell's framework of 'vertical' and 'horizontal' accountability to the Latin American institutional reality.

In addition, by locating regional cases within the typological framework developed in Chapter 4, close attention is paid to the interplay of institutional design and broader institutional settings in shaping specific Defensoría types. Particular emphasis is placed on the temporal instability of Defensoría outcomes as diverse actors compete to shape the nature and direction of its institutional development. More specifically, the chapter identifies the interlinkages that arise between formal and informal features of institutionalisation and their impact upon the Defensoría's ability to fulfil a political accountability role.

The chapter begins with a visual summary of the institutional development of Defensorías in Latin America before embarking on an empirical assessment of the development of formal design principles across cases. This is followed by analysis of relations between Defensorías and organised actors within and outside the state, as well as rules of access across arenas of accountability. The final section of the chapter interrogates the interplay between actors, processes and patterns and their impact on the institutional development of the Defensoría.

5.2. A descriptive typology of Defensorías in Latin America

Figure 5.1 provides a descriptive typological illustration of this chapter's findings, the organisation of which is intended to highlight the close coupling between Defensoría institutional development and high (+) or low (–) responsiveness to organised actors within and outside state structures. As opposed to a stable or linear trajectory from activation to the optimal prototype of institutional bridge, the following analysis demonstrates that

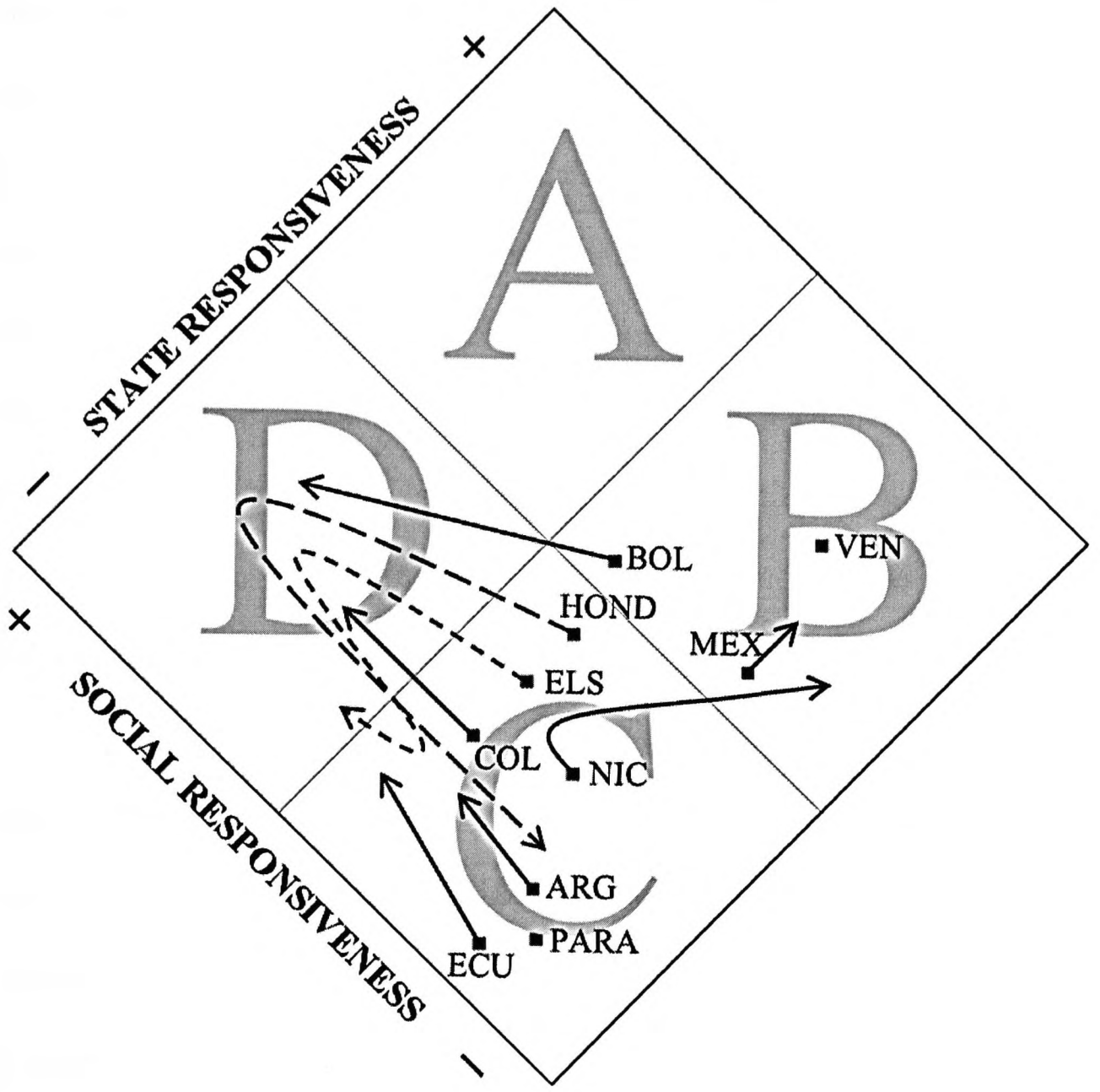
Defensorías have tended to move, with few exceptions, from one institutional type to another, often in an erratic and unstable manner. This movement across types is driven by the three core features of institutionalisation developed in Chapter 4.[1] Quadrant A represents an ideal bridging function whereby the Defensoría is compliant with the formal prerequisites of the institution. However, the findings of the thesis show no Defensoría has assumed a position of institutional bridge, at least in general terms. Rather, they have gravitated toward one of three alternative types in partial compliance with their formal design function: regime proxy (quadrants B), façade (quadrant C) and rights defender (quadrant D). The façade type represents the lowest level of design compliance.

Whereas the abstract typology presented in Chapter 4 was deduced from first principles, Figure 5.1 locates types of Defensorías based on empirical observation. Some cases demonstrate considerable inertia and linearity, notably in Argentina, Bolivia, Mexico and Nicaragua. Others, especially El Salvador and Honduras, display far more volatility over time. At the other end of the spectrum are those cases where the available material suggests a static picture of political development, such as in Paraguay and Venezuela. More fine-grained typological illustration is conducted in the subsequent paired case comparisons of Peru and Costa Rica. Figure 5.1 serves a heuristic purpose, with the construction of the chart corresponding to this study's interpretation of the empirical material. It is not intended to substantiate causal relationships but, more modestly, to serve to frame the analysis that follows. Indepth discussion of the factors that influence institutional development and the

[1] The three core features of institutionalisation are: (1) formal design principles, (2) relations, and (3) rules of access.

conspicuous absence of the 'institutional bridge' type of Defensoría is developed further in subsequent chapters.

Figure 5.1: A descriptive typology of Defensorías in Latin America[2]



[2] Source: author's own formulation. The start point for each case corresponds to the year for which reliable information is available. The arrow ends at the latest year for which empirical material is available. For instance, in Ecuador the timeframe is 1996 to 2009, for Paraguay it is 2001 to 2004.

5.3. Formal design principles

According to formal analyses, the stability of formal design principles is important to the institutionalisation of Defensorías – among them constitutional entrenchment and appointment procedures. Such formal attributes can directly affect the independence and power of Defensorías, the former by raising the political costs of reversal and the latter by instituting plural leadership. However, the dynamic experience of Defensoría institutionalisation in Latin America suggests that some re-specification of formal analytical frameworks is necessary. The section addresses five key formal design principles: (1) constitutional status; (2) mandate and powers; (3) budgetary autonomy; (4) operational autonomy; and (5) appointment procedures.

5.3.1. Constitutional status

Scholars argue that constitutional status grants the Defensoría enhanced stability due to the elevated cost of repeal. The empirical evidence is broadly consistent with the claim that constitutional entrenchment increases the probability of institutional stability. However, while true up to a point, constitutional status does not always deliver the associated benefits, with cases in Latin America deviating from the dominant claim on at least two counts: (1) Defensorías included within the constitution but subject to interference, and (2) Defensorías not in the constitution, or without such status for a significant time, that nevertheless display relative autonomy.

A general trend toward assigning constitutional status to Defensorías in the region is apparent with all six offices originally created by legislation or executive decree, except for Costa Rica and Uruguay, subsequently elevated to constitutional rank.[3] No office in the region has been stripped of constitutional status once assigned. A number of cases are illustrative of the protection afforded by constitutional status. For instance, the Honduran Commission was created in 1990 by executive decree as an adjunct office to the Secretary of State and remained under executive auspices until its inclusion within the constitution in 1995. A subordinate position prior to 1995 limited the autonomy of the office, with wider ramifications for the activity of the office. The first Commissioner, Leo Valladares, characterised the time leading up to 1995 as "years of preparation".[4]

Similar to Honduras, other offices display lengthy time-lags between initial establishment and constitutional reform. The Panamanian Defensor experienced a seven-year interlude between legislative creation in 1997 and constitutional elevation in 2004. Feedback loops resulting from its inferior status were highly negative, with a 1998 ruling by the Supreme Court declaring various articles of the instituting law to be unconstitutional.[5] Despite continuing to meet resistance from within the judiciary,[6] the 2004 reform has rectified many structural limitations, not least in the transfer of Defensor appointment powers from the Executive to the Legislature.[7] As such, this empirical material does appear to support the claim that constitutional entrenchment is preferable.

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[3] These cases include Argentina, Ecuador, Honduras, Mexico and Panama.
[4] C. Quesada, *'En Procura de la Paz: Tercer Informe Sobre las Procuradurías de Derechos Humanos de Guatemala, El Salvador y Honduras*, (San José: CODEHUCA, 1996), p.22.
[5] Ruling by the Supreme Court of Panama, 12 February 1998
[6] See *La Prensa* [Panama], 'Nuevo defensor toma posesión', 3 April 2001.
[7] Reformatory Act, No. 1, 2004 altering articles 129 and 130, Chapter 9, Title III of the Constitution.

However, other experiences in the region complicate the picture. As demonstrated in Chapter 3, Defensorías have been created by variably democratic regimes in response to a range of different incentives. Contexts defined by high levels of political conflict, power asymmetries and only a loose adherence to the constitutional order pose a formidable challenge to dispositive assumptions. A number of Defensorías installed within the constitution at point of origin fit this profile, notably the Colombian, Guatemalan, Mexican and Peruvian offices, which were created by authoritarian regimes or in the midst of armed conflict. Under such conditions, constitutional status may do little to safeguard, let alone guarantee, independence.

The case of Mexico provides a good illustration. Created by executive decree in 1990, the Commission was included by amendment within the 1992 Constitution in a context of a highly managed transition to democracy by an authoritarian regime. The elevation of status may have provided the office with the appearance of greater autonomy but executive influence remained considerable.[8] In this instance, the process of constitutional elevation was used by the governing regime to further constrain the Commission's jurisdiction and mandate.[9] The office was finally granted autonomy in the 1999 constitutional reform. This could be interpreted as a sign of institutional strengthening one year prior to formal transition to electoral democracy. However, the 1999 constitutional reform was used by the

[8] J. M. Ackerman Rose, *Organismos Autónomos y Democracia: El Caso Mexicano*, (México, D.F.: Siglo XXI Editores, 2007), p. 130.
[9] Ibid.

Mexican Senate as an opportunity to dismiss the presiding Commissioner, casting this reform as a 'false positive'.[10]

In contrast, the Costa Rican Defensoría has been repeatedly frustrated in its wishes for constitutional status.[11] Nevertheless, the institution has experienced no significant formal interference. This relative stability reflects a political context that, in regional perspective, is highly institutionalised. As Rodrigo Carazo, a former Defensor, puts it, "It is very nice to have [constitutional rank] but it is not necessary. At least not in Costa Rica, where there is no fear that Congress will shut down the institution tomorrow".[12] Nevertheless, the experience of the Defensoría does reveal, albeit to a lesser extent, similarities to other cases that lack constitutional status, with oversight robustly resisted by the judiciary and a lack of safeguards, such as immunity, informing the relationship of the entity with elected officials.[13]

5.3.2. Mandate and powers

Defensorías lack legal enforcement powers. However, they do generally have a broad mandate, comprehensive powers of investigation and certain legal prerogatives. Unsurprisingly, the distributional potential of such powers has been noticed by other powerful actors and has prompted attempts to constrain the Defensoría following activation.

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[10] See *La Jornada* [Mexico], 'Defiende Roccatti ante senadores su permanencia al frente de la CNDH', 15 October 1999.
[11] Defensoría de los Habitantes, *Informe Anual 2002*, (San José: DHR), p. 3.
[12] Rodrigo Alberto Carazo, Costa Rican Defensor 1993-1997, interview by author, San José, Costa Rica, 31 August 2007.
[13] See Chapter 7, p. 305.

For instance, the decision by the Panamanian Supreme Court in 1998 noted above also removed the Defensoría's supervisory mandate.[14] Similarly, the constitutional reform of the Mexican office in 1992 restricted the office's jurisdiction and imposed a strict interpretation of its mandate with a focus on case reception.[15] However, actual modification of powers is rare despite indications to the contrary. Threats by public officials to formally constrain Defensorías are often not followed through, as occurred in Honduras following criticism by the Commission of government handling of humanitarian aid.[16]

In turn, more unusually, offices have been subject to positive modification. In Costa Rica, the regulative law that followed constitutional insertion significantly expanded the normative letter of the Defensoría's mandate.[17] The 2006 reform of the Mexican Commission giving the office constitutional review powers is highly significant for the most constrained office in the region.[18] Nevertheless, formal strengthening of Defensorías is not necessarily positive when placed in context. In the Mexican case, reform is likely to conform to a process of political bargaining more than to an attempt to actually empower the office.[19] Specifically, the outgoing administration may have sought to constrain its successor, elected months later. Other instances of empowerment, such as new mandates, also warrant critical appraisal, especially when such expansion is not accompanied by new resources. In Nicaragua and Guatemala, the Procuraduría is now the formal legal redress mechanism for Laws of Access to Public Information.

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[14] Ruling by the Supreme Court of Panama, 12 February 1998
[15] Ackerman, *Organismos Autónomos y Democracia*, p. 130.
[16] Michael Dodson, 'The Human Rights Ombudsman in Central America: Honduras and El Salvador Case Studies', *Essex Human Rights Review*, vol. 3, no. 1, 2000, p. 38.
[17] See Chapter 7, p. 306.
[18] Cámara de Diputados, Boletín 2931, 20 April 2006.
[19] Private communication with John Mill Ackerman Rose by email 21 July 2009

5.3.3. Budgetary autonomy

Interference through budget allocation has proved to be a popular means of exerting control over Defensorías in the region. The regional norm is for the Defensoría's budget to be allocated by the legislature. The removal of direct influence by the Executive in budget allocation is often cited as an important formal safeguard.[20] Interference or not, Defensorías throughout Latin America are uniformly under-funded given the scope of their mandates. A notable exception to this rule is the Mexican office with a budget for 2008 of $75 million.[21] Table 5.1 summarises the (not readily available) budgetary information for six of 14 cases under analysis.

These figures demonstrate how governments can use budget freezes and cuts to exert control over the Defensoría. Often under the pretence of austerity measures, governments have imposed punitive budget cuts, as in Colombia and Panama in 2003, with reductions of 25 and 20 percent respectively. In Ecuador, the Finance Ministry delayed transferring funds to the Defensoría and reduced its budget request by 59 percent.[22] Honduras may be the poorest office among those surveyed in Table 5.1. However, available data shows Nicaragua is the poorest Defensoría in the region. Repeatedly subject to budget freezes and cuts, the Nicaraguan Procuraduría was subject to a 50% reduction in 2001, an attempt, according to

[20] In Colombia, Ecuador, Honduras, Nicaragua, and Venezuela the budget forms part of state expenditure, essentially controlled by the Executive.
[21] *The Economist*, 'Big, expensive and weirdly spineless', February 14, 2008.
[22] M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, (Boulder: Lynne Rienner, 2002), p. 42.

one observer, to "asphyxiate" the institution.[23] The situation has not improved in recent years, with the budget for 2008 standing at a lowly $1,454,545 or $0.26 per capita.[24]

Table 5.1: Budgetary and operational data on Defensorías in Latin America 2002-2006

Year	2002	2003	2004	2005	2006
Bolivia					
Budget (total $)	4,049,934	4,462,464	4,040,482	3,975,462	4,879,813
GDP (% of)	0.05	0.06	0.05	0.04	0.04
Per capita ($)	0.46	0.49	0.44	0.41	0.50
International cooperation (%)	53.3%	62.7%	54.6%	61.2%	66.1%
Number of regional offices	5	8	8	8	8
Costa Rica					
Budget (total $)	2,738,132	2,976,833	3,092,388	3,559,847	3,511,457
GDP (% of)	0.02	0.02	0.02	0.02	0.02
Per capita ($)	0.67	0.71	0.73	0.82	0.80
International cooperation (%)			11%		2.2%
Number of functionaries			144	151	152
Number of regional offices	4	4	4	4	4
Guatemala					
Budget (total $)	4,514,890	5,046,256	5,983,851	8,733,658	9,093,804
GDP (% of)	0.02	0.02	0.02	0.03	0.03
Per capita ($)	0.38	0.42	0.48	0.69	0.70
International cooperation (%)	1.2%	2.5%	2.7%	1.9%	2.4%
Number of functionaries	61	59	69	62	84
Number of regional offices	28	28	28	33	36
Honduras					
Budget (total $)	1,300,000	1,400,000	1,400,000	1,500,000	1,700,000
GDP (% of)	0.02	0.02	0.02	0.02	0.02
Per capita ($)	0.20	0.21	0.21	0.22	0.24
International cooperation (%)	69.2%	50.0%	42.8%	46.7%	41.2%
Number of functionaries	94	114	119	126	129
Number of regional offices	14	15	16	16	16
Panama					
Budget (total $)	2,800,000	2,325,000	2,325,000	2,345,000	2,437,000

[23] *El Nuevo Diario* [Nicaragua], 'Política de asfixia a Procuraduría de DDHH', 10 October 2000.
[24] *El Nuevo Diario* [Nicaragua], 'Procuraduría de DH abrirá tres nuevas delegaciones', 15 February 2008.

Year	2002	2003	2004	2005	2006
GDP (% of)	0.02	0.02	0.02	0.02	0.01
Per capita ($)	0.92	0.75	0.73	0.73	0.74
International cooperation (%)		1.2%			
Number of functionaries	125	124	122	126	138
Number of regional offices	3	1	0	0	0
Peru					
Budget (total $)	22,469,134	27,698,322	31,989,180	33,499,228	35,935,647
GDP (% of)	0.04	0.05	0.05	0.04	0.04
Per capita ($)	0.85	1.04	1.19	1.23	1.30
International cooperation (%)	26.2%	29.0%	38.2%	41.9%	18.9%
Number of regional offices	23	28	28	28	28

Sources: database compiled by author with information received directly from individual offices, with the exception of Bolivia which was compiled from annual reports 2002-2006. All per capita data is from CEPAL. GDP data is from IMF World Economic Outlook Database, October 2009.

Per capita and percentage of GDP expenditure figures for these Defensorías indicates that, with the possible exceptions of Bolivia, Mexico and Peru all offices labour under inadequate financial support from the state and many rely heavily on international funding. Honduras has traditionally enjoyed the highest levels of international funding in the region, with state provision finally matching international donations in 2003. Originating primarily from Scandinavia and Spain, international aid is a vital source of support. However, dependency on foreign donations can also pose risks, offering little long-term security as well as de-incentivising adequate provision by the state. For instance, the Danish and Swedish governments withdrew all funding from the Nicaraguan Procuraduría in 2006, citing non-compliance with attached conditions.[25] The withdrawal of $1,800,000 from the Peruvian Defensoría's budget in 2006 by USAID led to a narrowly averted crisis.[26]

[25] *El Nuevo Diario* [Nicaragua], 'Suecia corta a PDDH', 9 May 2006
[26] See Chapter 6, p. 249.

5.3.4. Operational autonomy

Operational autonomy means the Defensoría is not subject to any imperative mandate, does not receive instructions from any authority and carries out its function with autonomy. More specifically, the Defensoría ideally has autonomy over recruitment, defining internal structures, and developing a strategic plan. Reflecting concern over operational autonomy, many Defensorías have drafted their own regulative laws in consultation with civil society. In Costa Rica, the regulative law was drafted by Defensoría personnel and endorsed by executive decree, thereby avoiding congressional negotiation.[27] This outcome may be widely viewed as positive for institutional autonomy but it also raises important questions as to the accountability of the Defensoría itself. Similarly, the Peruvian regulative law was drafted in large part by civil society jurists.[28] Even in Mexico, as a concession of 'semi-independence', the Commission was permitted to draft its own internal regulation.[29]

Despite such formal safeguards, operational autonomy is subject to wider informal practices such as clientelism. Taking the area of recruitment, a vertical organisational culture common to Latin America's public sector and with little civil service ethos often combines to undermine meritocratic procedures. This can be particularly damaging in a context of deep ambivalence or hostility between state structures and society. For instance, the Guatemalan Procuraduría has been criticised for a general lack of transparency over internal

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[27] Max Esquivel, Ex-Deputy Defensor of Costa Rica (2001-2005), interview by author, San José, Costa Rica, 28 September 2007.
[28] Renzo Chiri, Secretary General of the Comision Andino de Juristas (CAJ), interview by author, 8 July 2005, Lima, Peru.
[29] Ackerman, *Organismos Autónomos y Democracia*, pp. 122-124.

procedures and accused as late as 1996 of recruiting personnel with links to the military.[30] In contrast, transparent recruitment of highly qualified personnel can quickly become a potent source of organisational credibility under difficult operating conditions.[31] Operational autonomy appears to be reflective of the leadership of individual Defensors more than of formal rules, with individuals rejecting or perpetuating norms of patronage upon appointment.[32]

In terms of internal structures, a key area of development is decentralisation. Decentralising structures can serve to raise the national profile of the Defensoría through penetration at the sub-national level. Local presence can also convert into a source of political leverage against elected officials.[33] Table 5.1 shows all the Defensorías sampled have developed local infrastructure to some extent or used mobile units to reach remote areas. Guatemala and Peru stand out as highly decentralised offices. However, in the smaller territory of Costa Rica, decentralisation has also been actively pursued. One way in which powerful actors may constrain Defensoría expansionism is through the budget. The Nicaraguan office's precarious financial situation has meant that only one local office has been created.

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[30] Comisión para la Defensa de los Derechos Humanos en Centroamérica, 'Procuradurías de Derechos Humanos: La fuerza de la presión', *Brecha: Informe Especial*, vol. 1B, no. 1, 1994, p.22.

[31] This is well captured in the following statement by a functionary of the El Salvadorian Procuraduría in 1997: "the people that work in the Procuraduría do so through conviction, even if the salaries are not competitive." C. Quesada, *Entre la cal y la arena: IV Informe sobre las Procuradurías de Derechos Humanos en El Salvador, Guatemala, Honduras, Nicaragua y Costa Rica*, (San José: CODEHUCA, 1997), p. 19.

[32] Following the appointment of Julio Arango Escobar as Guatemalan Procurador in 1997 many specialist employees were fired and replaced by family members. Michael Dodson and Donald Jackson, 'Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala', *Latin American Politics and Society*, vol. 46, no. 4, Winter 2004, pp. 10-15.

[33] Successful financial negotiations by the Peruvian Defensora in 2006 can be partly attributed to the unpopularity of threatened local office closures.

Similarly, in Panama a programme of decentralisation was aborted in 2004 due to budget cuts.[34]

5.3.5. Appointment procedures

Many observers lament the influence of political partisanship in the election of Defensors. Appointments constitute a key battleground for political actors competing to shape the nature and direction of Defensoría institutionalisation. Formal safeguards including appointment by the legislature rather than by the executive and security of tenure are widespread.[35] Disregarding whether finite terms actually constitute security of tenure,[36] the empirical evidence demonstrates that formal rules surrounding appointment are often supplemented by informal norms and practices. In particular, as the political capital of Defensorías has increased in recent years so has political conflict surrounding candidates for Defensor.[37]

In order to ensure a modicum of plurality, many cases in the region require a legislative two-thirds majority for successful appointment. In practice, this arrangement frequently leads to protracted horse-trading among political blocs in Congress and the designation of interim office-holders who lack the legal status of elected Defensors.[38] Defensorías throughout the

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[34] *Martes Financiero* [Panama], 'Los contratiempos de un Defensor', 8 November 2005.
[35] Two prominent outliers are Colombia where the Executive presents a list of candidates to the Senate and El Salvador where tenure is limited to three years.
[36] Compare an average of five-year term limits to life-time terms for US Supreme Court justices, for instance.
[37] The Honduran Commission successfully evaded an attempt by Congress in 1999 to reduce the term of office from six to four years.
[38] A four year deadlock in Peru was finally resolved through informal negotiations within Congress prior to it being put to a vote guaranteeing the election of a new Defensora in 2005.

region have repeatedly experienced delayed appointments.[39] Formal rules stipulating a compulsory time frame for election, such as a limit of 30 days in Bolivia, are routinely violated.[40] Where conflict is high, political actors may use the opportunity presented by appointment to severely undermine the office. For instance, in El Salvador Congress reformed the regulative law in 1998 to ensure a highly effective Procuradura was unable to serve as interim leaving the office in limbo.[41]

The influence of the Executive within the legislature should also not be underestimated. The appointment of partisan candidates can severely undermine the credibility of formal procedures and the Defensoría more generally, as occurred in Argentina where the first Defensor was closely associated with the Menem government.[42] Nevertheless, adherence to such requirements is limited at best. The 2009 election of Defensor in Costa Rica was widely criticised when a highly qualified candidate was given a zero rating by a government-aligned Congressperson on the nomination committee. The President's preferred candidate was duly elected.[43]

It is also worth reflecting briefly on emerging trends regarding appointment practices. In an earlier phase, many Defensorías were effectively decommissioned through electoral manoeuvring. In Paraguay, a nine-year delay in the appointment of a Defensor was finally

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[39] These include Costa Rica in 2005, El Salvador in 1998 and 2001, Ecuador in 1999, Peru in 2001, Bolivia in 2003 and 2008 and Colombia in 2003.
[40] Although Waldo Albarracín's term in office expired in December 2008 a new Bolivian Defensor was not appointed until May 2010.
[41] Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', pp. 9-10.
[42] The first Defensor, Jorge Luis Maiorano, of Argentina, while a respected jurist, was also a former Justice Minister, member of the Peronist party, and advisor to President Carlos Menem's brother.
[43] See Chapter 7, p. 315.

overcome in 2001 with the appointment of a regime proxy.[44] Similarly, the Ecuadorian congress went through a succession of Defensors from 1997 to 2000 before finally leaving the position vacant until 2005.[45] Other sources of opposition have also effectively blocked appointment, including the Nicaraguan Supreme Court in 1996.[46] In Bolivia, social actors effectively mobilised to end the brief incumbency of the government-aligned Defensor in 2003.[47] However, a contemporary phase since 2004 sees a concerted turn toward influence through appointment and, specifically, re-election of incumbents. Defensors in Colombia, El Salvador, Guatemala, Honduras, and Mexico have all been re-elected in recent years. Viewed in a positive light, this trend may indicate institutional stability.[48] However, a more circumspect appraisal might note that these individuals tend to be less combative than their predecessors and more acquiescent to governing regime interests.

5.4. Relations

The Defensoría offers a point of intersection between state and society, of a kind relatively scarce in Latin America. This is facilitated by the institution's ability to interlink and

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[44] Hugo Valiente, 'Defensoría del Pueblo: polémica elección', *Informativo Mujer*, vol. 16, no. 169, June 2004, pp. 19-25.

[45] Julio César Trujillo, elected in 1997 as Defensor, promptly quit in 1998 following a sudden reduction in his term by congress from four years to one. This was followed by the election of Milton Alava Ormaza, who abruptly succumbed to allegations of financial irregularities in 2000. The position of Defensor was subsequently left vacant until 2005.

[46] the 1996 election of a Nicaraguan Procuradora was annulled by a Supreme Court ruling the following month, leaving the office vacant until 1998

[47] The decisive rejection of the government candidate for the Bolivian Defensoría in 2003 by the powerful Federated Neighbourhood Committees of El is an example of an effective intervention from outside the system. Marina Vargas Sandoval, functionary of the El Alto office of the Bolivian Defensor (1998-2005), interview by author, La Paz, Bolivia, 17 July 2008.

[48] The Danish Ombudsman remarking on the Guatemalan re-election stated: "when an ombudsman is re-elected it demonstrates recognition of their work, indicating that those in positions of power recognise the function of the Procurador and respect it". Hans Gammeltoft, quoted in *Prensa Libre* [Guatemala], 'Sergio Morales, Procurador hasta 2012', 12 April 2007.

promote accountability across vertical and horizontal arenas. This section highlights the importance of relations in understanding the institutional development of the Defensoría by focusing on four clusters of significant relations: (1) vertical (executive branch), (2) horizontal (state checks and balances), (3) social (organised civil society), and (4) external (international actors).

5.4.1. Vertical (executive branch)

The position of the Defensoría within the political system at point of origin has a bearing on relations with the executive. The executive has wide powers of designation and internal organisation across Ministries but also legal and investigative agencies, including the Public Prosecutor's Office.[49] Many Defensorías were initially created by executive decree and incorporated into the executive branch.[50] All Defensorías have subsequently been relocated from this vertical command and control structure to the legislature. Even for those autonomous Defensorías, many offices were established in response to overburdened public prosecutor's offices.[51] Such origins continue to influence relations moving forward, especially where executive encroachment in the public sector is extremely entrenched, such as in Mexico.[52] Ackerman suggests one solution is to establish the Defensoría within a new branch of government, as in Ecuador and Venezuela.[53]

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[49] For instance, in Argentina the Attorney General is designated by the President following ratification by a two-third majority in the Senate. See Article 5 of the Organic Law of the Public Prosecutor's Office (Ministerio Público).
[50] This is the case in Costa Rica, Honduras, Mexico, Argentina, Ecuador and Panama.
[51] Ungar, *Elusive Reform*, p. 37.
[52] See *Fundar* [Mexico], 'El senado y la CNDH La Oportunidad' (Sergio Aguayo Quezada), 26 October 1999.
[53] J. M. Ackerman Rose, 'Independent Accountability Agencies & Democracy: ¿A New Separation of Powers?', Paper presented at Latin American Studies Association 2009 Congress, June 11-14 2009, p. 2.

The Defensoría has a novel doctrinal function, able to operate through vertical channels similar to those of elected officials. The direct receipt of complaints, ex officio powers of investigation, and policy and legislative prerogatives have been characterised by one senior functionary in Peru as "quasi-executive".[54] Such a wide-ranging mandate sets the institution apart from other horizontal agencies. It also presents an arena of overlap with elected officials and a potential challenge to their democratic authority. However, the latent potential for conflict also presents opportunities for coordination. Executives in the region have recognised Defensorías as viable frameworks through which to pursue their own interests. For example, in Peru the Defensoría appealed to the Fujimori regime's discourse of renewal and internationalism and its promotion of a new public service culture.[55] In the highly conflictive context of Colombia, the government has requested the assistance of the Defensoría as a means to publicly affirm its commitment to human rights.[56]

However, Defensorías perceived as a threat to, or which directly challenge, official interests are often subject to backlash. This is particularly true in the aftermath of intervention in core arenas of political competition, such as elections and corruption. Possibly, most disconcerting for political elites is the high public standing of many Defensorías.[57] A sense of popular competition is further exacerbated by Defensors running for public office, including the Presidency.[58] Conflict is observed in Nicaragua, where the first Defensor's opposition to electoral reform was described as the one 'dissonant note' in the Alemán-

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[54] Eduardo Vega, Defensor for Human Rights and the Disabled, interview by author, Lima, Peru, 30 June 2008.
[55] *El Peruano* [Peru], 'Defensoría del Pueblo: En Salvaguarda de los Derechos Ciudadanos', 29 April 1997.
[56] 'Presidente pide a Defensor del Pueblo tramitar ante Fiscalía denuncias de indígenas sobre violación de DD.HH', Press Release of the President's Office, 2 November 2008.
[57] Public opinion mobilisation is discussed further below at pp. 207-208.
[58] In highly unusual circumstances, the former Guatemalan Procurador, Ramiro Leon de Carpio, was appointed President in 1993. Similarly, Peruvian Defensor, Jorge Santistevan, made a failed bid for the Presidency in 2000.

Ortega pact of 1999 and led to the appointment of a regime proxy in 2004.[59] Highly publicised clashes between the Executive and Defensor in Colombia over internally displaced persons and crop eradication programmes has led to attempts to subordinate the Defensoría to the Attorney General's office and the early exit of the Defensor in 2003.[60] These cases highlight the dangers inherent in directly challenging executive authority.

The executive may seek to exert a direct command and control over the Defensoría through informal channels. Principally, this has been achieved through appointment of regime proxies. As noted above, the trend is toward increasingly government-aligned appointees. This is most evident in Nicaragua and Venezuela. In the former, a vocal regime loyalist was appointed in 2004.[61] In the latter, successive Defensors have promoted a partisan agenda and the current Defensora has close ties to the official party of government.[62] Other governments have attempted to exert control indirectly by isolating the Defensoría or creating directly competing agencies with rights mandates.[63] Dodson and Jackson draw a distinction between marginalisation due to perceived threat (in El Salvador) and just plain indifference (in Guatemala).[64] Relations between the executive and Defensoría are also

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[59] *La Prensa* [Nicaragua], 'Benjamín Pérez Fonseca: "Al disidente lo ven como tonto"', 11 February 2001.
[60] See Center for International Policy, 'CIP memo: Colombia's Álvaro Uribe – The first 100 days,' 18 November 2002.
[61] The Procurador, Omar Cabezas, is an ally of President Daniel Ortega and a former military commander within the Ortega-led Sandinista movement of the 1980s.
[62] The first Defensor, Germán Mundaraín, declared in 2004 that "in Venezuela there are no political prisoners, only politicians in prison". BBC Mundo, 'Venezuela: denuncian excesos', 26 March 2004. Also see *El Universal* [Venezuela], 'Lista terna de candidatos a cargos del Poder Ciudadano', 27 November 2007.
[63] The case of Guatemala is interesting in this regard. Despite the profile of the President, Ramiro León de Carpio (1993-1996), as a former Procurador, he attempted to retain control of the human rights agenda by creating an alternative Presidential Coordinating Commission for Executive Policy on Human Rights (COPREDEH). This agency duplicated the function of the Procuraduría, diverted resources and undercut the authority of the new Procurador.
[64] Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', p. 21.

subject to broader informal structures. In particular, powerful special interests such as the military and church have also had a significant influence across cases.[65]

5.4.2. Horizontal (state checks and balances)

Initial executive influence over Defensoría reform has generally led to subsequent ad hoc insertion into pre-existing institutional frameworks and, inevitably, tensions arising from the ability of the office to enable, displace or undermine other accountability actors. Cañas and Dada aptly suggest that 'some time must pass before the old institutions stop producing antibodies to this new organ'.[66] In settings where the Defensoría inserts into a dense cluster of horizontal agencies, the activity of the office is more constrained than where it inserts into an institutional vacuum. In this regard, an articulated Colombian state can be contrasted with the dysfunctional apparatus found in Peru.[67] However, a lack of stable, credible and routinised practices in Latin America means that the supplementary role of the Defensoría alongside other agencies is often undermined by political conflict. A critical perspective might even frame the Defensoría as parasitic, exploiting broader systemic failings. In turn, Defensorías are not themselves always immune from wider institutional pathologies. For

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[65] The Mexican Commissioner, José Luis Soberanes (2000-2009), was accused of aligning policy with the interests of Opus Dei, a conservative Catholic organisation. See *El Universal* [Mexico], 'Las deudas de Soberanes', 4 August 2009. A number of local functionaries of the Colombian Defensoría have been assassinated and subject to death threats. In Guatemala, the wife of the Procurador, Sergio Morales, was kidnapped in March 2009 by masked assailants shortly after the publication by the Procuraduría of a report into crimes committed by the National Police during the country's civil war.

[66] Antonia Cañas and Héctor Dada, 'Political Transition and Institutionalisation in El Salvador', in Cynthia J. Arnson (ed.), *Comparative Peace Processes in Latin America*, (Stanford: Stanford University Press, 1999), p. 82.

[67] The Colombian Defensor, created in 1991, inserted into a formally robust and extensive horizontal apparatus, dominated by the Presidential Council for the Defence of Human Rights, the Attorney General's Office and Constitutional Court.

instance, Brett argues that the Guatemalan office has succumbed to widespread institutional racism.[68]

In relation to the legislature, the notion that 'public office belongs to the political parties' is widespread among Latin America's political classes and commonly leads to the Defensoría being regarded as competitor rather than collaborator.[69] As such, relations are guided not so much by formal rules but rather by inter-personal norms of reciprocity and the receptiveness of individual legislators and committees.[70] More often, Defensorías are subject to particular partisan interests within Congress and have surprised politicians by resisting conventional practices of political patronage.[71] Reflecting a learning process, many notably independent first generation Defensors have been replaced by individuals with ties to the political class as the significance of the office grows.[72] Nevertheless, political vocation is not necessarily bad for the Defensoría. Rather, it is the appointment of partisan or incompetent individuals that poses the greatest threat. Such actions can also backfire on the legislature, the election of Eduardo Peñate in 1998 was later described by El Salvador's main opposition party as "one of our greatest mistakes" following his dismissal for misconduct.[73]

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[68] Roddy Brett, 'Confronting Racism from within the Guatemalan State: the challenges faced by the Defensoría of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office', paper presented at conference 'how can the law help reduce group-based inequalities?', Centre for Research, Inequality, Human Security and Ethnicity (CRISE), Keble College, Oxford, May 14-15, 2009.

[69] Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', p. 14.

[70] Collaborative Defensors are often former members of Congress or members of other state bodies, such as the former Bolivian Defensor, Waldo Albarracín, previously a member of the Permanent Commission on Human Rights in the Constituent Assembly.

[71] Defensora Ana Maria Romero Campero of Bolivia recalls having to firmly refuse attempts by legislators to exchange votes for jobs (for family members) shortly after her election in 1998. Ana Maria Romero Campero, former Bolivian Defensora 1998-2003, interview by author, La Paz, Bolivia, 15 July 2008.

[72] Notably independent and effective first generation Defensors are found in Bolivia, Colombia, Costa Rica, Honduras, and Peru.

[73] Farabundo Martí National Liberation Front (FMLN) representative Miguel Saenz quoted in: Inforpress Centroamericana, 'El Salvador: Human rights ombudsman resigns under pressure', *Central American Report*, vol. 27, no. 7, 18 February 2000, p. 3.

As with all horizontal agencies, the judiciary is not monolithic, and differentiation among actors and processes is important. Relations remain highly problematic with a branch of the state that is widely viewed as corrupt, inefficient, and inaccessible.[74] Of particular note is the relationship between Defensorías and Constitutional Tribunals as normatively complementary custodians of the Constitution.[75] Highly activist Constitutional Tribunals, such as those found in Costa Rica and Colombia, have increasingly intervened in matters of public policy, leading scholars to note a 'judicialisation of politics'.[76] Such new legal openings may provide structures of opportunity for Defensorías.[77] Domingo has pointed to the potential of the Bolivian Defensoría to push judicial activism into 'potentially controversial social and economic rights issues'.[78] An accessible and activist constitutional authority may also pose challenges for a Defensoría not wishing to duplicate the role of existing agencies. Nevertheless, the dismantling of such a resource, as occurred under the Fujimori regime in Peru, poses a much greater impediment to the office.[79]

The Defensoría also intersects with an array of appointed horizontal agencies with investigative and auditing authority. Together with the Attorney General and Comptroller General, these offices exercise legal control and investigative accountability through

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[74] W. Prillaman, *The Judiciary and Democratic Decay in Latin America*, (Praeger Publishers, 2000)
[75] Constitutional Tribunals have been created throughout Latin America, including Chile in 1980, Costa Rica in 1989, Colombia in 1991, Peru in 1993 and Bolivia in 1999.
[76] R. Sieder, L. Schjolden, and A. Angell (eds.), *The Judicialization of Politics in Latin America*, (London: Palgrave Macmillan, 2005).
[77] A judgment by the Colombian Tribunal in 2009 for 'the transformation of entire [health] system' sets the way for a series of public consultation within which the Defensor may play a significant role. See A. Yamin and O. Parra-Vera 'How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court', *PLoS Medicine*, vol. 6, no. 2, February 2009.
[78] Pilar Domingo, 'Weak Courts, Rights and Legal Mobilization in Bolivia', in Roberto Gargarella et al. (eds.), *Courts and social transformation in new democracies: an institutional voice for the poor?* (Burlington: Ashgate, 2006), p. 242.
[79] See Chapter 6, p. 263.

horizontal channels. A further tier of specialised, advisory and regulatory agencies, among them the Defensoría, constitute a second level of appointed agencies. This highly diverse patchwork of appointed agencies is a significant arena of strategic interaction for the Defensoría. However, coordination depends, on the one hand, upon the compatibility of respective agency mandates and scope of enforcement authority. On the other, relations are impacted upon informal norms and practices, specifically the ability and willingness of agencies to coordinate accountability actions and hold powerful actors to account.[80]

Finally, relations of the Defensoría at the sub-national level merit more attention than is possible here. It is often in remote areas where the state is largely absent that the greatest gaps between formal rules and informal practices exist.[81] Defensorías throughout Latin America have decentralised and the dynamics that govern horizontal relations are applicable to the microcosm of local politics. In particular, the level of political conflict and the balance of power between state and social actors are crucial in this arena. This subject takes on a distinct resonance in federalised states where the national and local Defensorías are autonomous agencies, such as in Argentina and Mexico. Preliminary evidence suggests that federalised autonomous Defensoría systems can be problematic when characterised by jurisdictional overlap, a dilution of leadership and authority, and conflict, as opposed to

[80] Relations between appointed agencies may on rare occasion be openly hostile as actors vie to be the 'guardian of the guardians'. For instance, the Nicaraguan Procurador has been subject to an investigation by the Public Prosecutor's Office and Comptroller General since 2006 for embezzlement of government funds. See *El Nuevo Diario* [Nicaragua], 'Cabezas ya debería estar preso', 11 October 2008.

[81] Local government municipalities are the source of thousands of annual complaints to Defensorías throughout the region.

coordination, among offices. Notably, the local Mexico City office has provided a highly credible rights counterpoint to a regime proxy national-level Commission.[82]

5.4.3. Social (organised civil society)

Social relations refer to interaction with organised actors exercising accountability over elected officials from outside the state, notably human rights NGOs, media and civic organisations. Such relationships have been a crucial addition to the activities of many Latin American Defensorías, highlighting the ability of the office to operate through vertical as well as horizontal channels. However, the quality of these relations varies considerably across cases. Notably, in contexts with a recent history of authoritarian government, human rights abuse and generally deficient representative institutions, the challenge of bridging the state-society divide is particularly acute.

The extent to which social actors have been engaged in Defensoría reform at point of origin is significant for future relations. In the cases of El Salvador, Honduras, Mexico and Paraguay, there was little or no participation of social actors in the design or establishment of the Defensoría.[83] In contrast, the Nicaraguan reform involved consultation with over sixty

[82]In Mexico the Commission of Mexico City has clashed with the National Commission over jurisdiction and human rights. See *La Jornada* [Mexico], 'Impugnaciones al aborto frenan derechos humanos: Alvarez Icaza', 1 June 2007.

[83] As Dodson writes, 'although human rights activists worked behind the scenes through the Human Rights Commission of the United Nations, the creation of Honduras' Ombudsman did not result directly from popular pressure; it was a more top down initiative'. Dodson, 'The Human Rights Ombudsman in Central America', p. 32.

civic organisations.[84] Social participation at design stage may have material consequences for formal structures, injecting an element of plurality.[85] More broadly, an insular process of institutional design conducted by political elites is likely to colour social relations following activation. For instance, the Bolivian Defensor was initially viewed with deep scepticism by social actors as part of a regime-managed "neo-liberal project".[86]

The ability of the Bolivian Defensor to overcome popular scepticism and decisively "move away from the [neo-liberal] category" is attributed to the election of individuals with strong inter-personal ties to social actors.[87] Relations with social actors based on established 'relationships of opportunity' are likely to facilitate coordination. The appointment of plural (i.e. without militant or radical profiles) Defensors explains the rapid social legitimisation of many of these entities.[88] Even for Defensorías emerging from elite political pacts, overtures to civil society actors by the leadership can significantly alter social relations for the better.[89] Conversely, the appointment of a regime proxy as Defensor will effectively close off social relations, resulting in direct conflict or indifference.[90] In other instances, despite vocal

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[84] The Nicaraguan consultation process was heavily promoted by the Norwegian government, the chief financiers of the Defensoría reform. Quesada, *Cuarto Informe Sobre las Procuradurías de Derechos Humanos*, p. 31.

[85] In Nicaragua and Ecuador the legislation explicitly states civil society or human rights organisations must be consulted on the selection of candidates.

[86] Diego Pary Rodríguez, Senior advisor to Confederación Sindical Unica de Trabajadores y Campesinos de Bolivia (CSUTCB), interview by author, La Paz, Bolivia 17 July 2008.

[87] Rodríguez, Bolivia 17 July 2008. The first Defensora, Ana Maria Romero Campero (1998-2003), was a journalist and editor, with a track record for progressive journalism. Her successor, Waldo Albarracín (2003-2008), was a former human rights activist and member of the Permanent Assembly on Human Rights.

[88] Many non-partisan Defensors have subsequently drafted in highly credible civil society activists to senior level positions within the organisation. This method of signalling to social constituencies is particularly apparent in Peru under Jorge Santistevan, El Salvador under Velásquez de Avilés, and others.

[89] The first Procurador of Nicaragua, Benjamín Pérez, assiduously sought alliances within civil society. Vilma Nuñez de Escorcia, President of CENIDH, interview by author, Managua, Nicaragua, 28 August 2007.

[90] Vocal attacks by the Nicaraguan Procurador in 2008 against regime opponents have led to the organisation's alignment with regime sympathisers in society against human rights defenders. See Centro Nicaragüense de Derechos Humanos, *Derechos Humanos en Nicaragua 2008*, (Managua: CENIDH, 2008), p. 171.

criticism of official policy by the Defensor, relations remain distant due to inter-personal mistrust or broader structural issues of competition over resources.[91]

Similar to Defensoría insertion within state structures, the Defensoría also can enable, displace or undermine actors within social accountability arenas. Crowding out of social actors is a concern, with Defensorías potentially diverting international funding away from civil society actors as well as enticing highly qualified personnel away from the human rights sector.[92] Despite initial tensions, some Defensorías have cultivated good relations by using resources, coupled with official recognition, to bolster the profile of social actors.[93] Other cases have been less successful. Argentina has arguably the most highly organised human rights communities in the region. However, due to multiple factors, relations with the Defensor have been defined primarily by indifference and competition.[94] As one senior NGO Director states:

> The Defensoría has excellent resources. Their investigations are of a high quality and we frequently review Defensoría reports and communicate with the office. Even so, we do compete with the Defensoría but they have 100 times more resources than us. Unfortunately, they are not maximising the power of the institution.[95]

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[91] Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', p. 17.
[92] See Coletta Youngers, 'Promoting Human Rights: NGOs and the State in Peru', in John Crabtree (ed.), *Making Institutions Work in Peru*, (London: ISA, 2006).
[93] Leo Valladares the first Honduran Procurador was careful to assure social actors that "we do not want to create large structures that substitute the work that must be done by civil society". Quoted in Quesada, *En procura de la paz*, p.22.
[94] The appointment of successive partisan Defensors, its restricted jurisdiction over non-federal matters and the military, as well as the self-sufficiency of the NGO community are all material to explaining this outcome. Gaston Chillier and Diego Morales, Executive Director and Litigation and Legal Defence Director of CELS, the Centro de Estudios Legales y Sociales, interview by author, Buenos Aires, Argentina, 11 August 2008.
[95] Martin Sigal, Director of Civil Association for Equality and Justice (ACIJ), interview by author, Buenos Aires, Argentina 1 August 2008.

That said, a proposal to strengthen the human rights profile of the Argentinean Defensor, led by a coalition of human rights organisations in 2009, follows incipient signs of a new willingness on the part of the Defensoría to mobilise alongside social actors to advance human rights claims.[96] The proposal received considerable media coverage and cross-party support in Congress, with the exception of the Radical Party.[97] In contrast, similar attempts by social actors in Mexico to publicly challenge a failing institution have had far less impact, due to a lack of political will within Congress and a political system relatively unresponsive to wider social needs and demands.[98]

Reflective of an ongoing and dynamic process, Defensoría social relations are continually subject to modification as circumstances change. Defensoría relations are affected by broader conditions of power asymmetries and conflict between state and society. For instance, the rights work of the Guatemalan office received growing recognition throughout the 1990s. Nevertheless, commenting in 1996, one NGO worker claimed, "This work is not exploited by human rights NGOs, who still view the Procuraduría as a government entity and therefore uninterested in 'getting to the bottom of the matter"'.[99] Criticism of Defensoría timidity toward government policy on sensitive issues is widespread, even if the

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[96] Enrique Peruzzotti, 'The Societalization of Horizontal Accountability: Rights Advocacy and the Defensoría del Pueblo de la Nación in Argentina', in Ryan Goodman and Thomas Pegram (eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, (New York: Cambridge University Press, forthcoming 2011).
[97] *Página 12* [Argentina], 'Por una elección más transparente', 17 July 2009.
[98] See generally work produced by Programa Atalaya (Análisis académico sobre la CNDH) since 2003: http://atalaya.itam.mx/.
[99] Quoted in Quesada, *En procura de la paz*, p.11.

independence of the office is acknowledged.[100] Most dramatic for the Defensoría is where the balance of power between state and society shifts decisively. With the election of Evo Morales in Bolivia and ascendance of the traditionally excluded into the heart of government, social actors have begun questioning the need for a Defensor "when we [the people] defend the community".[101]

The ability of the Defensoría to appeal to the interests of organised social actors relies to a large extent on media exposure. Indeed, the media constitute a critical relationship for the office. High profile coverage of the Defensoría can significantly raise the public credibility of the office and, in turn, its leverage over the behaviour of elected officials. Defensorías throughout the region use the media as a means to mobilise public opinion around violations, often of a symbolic nature, and also to highlight structural obstacles to rights compliance. Notably, mobilising public opinion does not conform strictly to either vertical or horizontal dimensions. The Defensoría may channel public opinion vertically through public censure of elected officials. Simultaneously, the Defensoría can transmit public opinion horizontally through its advisory role to the legislature. Most importantly, the force of the Defensoría's words lies not with formal rules but rather its ability to generate publicity and mobilise public opinion. Not-withstanding legitimate concern over the validity of public opinion polling on Defensorías,[102] in many countries in Latin America much of the time this is an

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[100] The selection of 'middle class' concerns by the Guatemalan Procurador García Laguardia, including excessive public service tariffs or rapid increase in prices of certain products, was criticised by social actors as out of step with the political reality of the country. See Quesada, *Entre la cal y la arena*, p.15.

[101] Sonia Cuentas, functionary in the Bolivian Defensor del Pueblo since 2002, interview by author, La Paz, Bolivia 17 July 2008.

[102] As Ackerman argues in relation to the Mexican Commission, 'high public approval ratings bear little resemblance to more concrete indicators of legitimacy'. Ackerman, *Organismos Autónomos y Democracia*, p. 148. This is certainly borne out in the Mexican case where approval ratings of 55% in 2004, for instance, are at odds with the findings of this thesis. Arguably, such results reflect positive opinion toward human rights as

organisation held in high public esteem in political systems that are generally not trusted.[103] Such public legitimacy constitutes a powerful instrument of accountability that overlays and supplements the Defensoría's vertical and horizontal characteristics.

Conversely, media neglect of the office can effectively consign it to oblivion. National media environments pose a number of challenges, not least countervailing interests among powerful commercial proprietors.[104] Unaccountable corporate actors operating within liberalised markets and capable of setting the agenda, present a complex, opaque and largely unstudied arena of accountability politics for the Defensoría. Also, reflective of a highly heterogeneous social sphere, powerful constituencies within the media, state and broader society may actively oppose the institution's human rights agenda. Evidence of this is apparent in Colombia, Peru and elsewhere.[105] In Honduras, the Defensor has noted that its work on the extra-judicial killing of street children is hampered by public opinion toward these children becoming increasingly aggressive.[106]

5.4.4. External (international actors)

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opposed to an informed assessment of the Commission's work. This is further substantiated by the high percentage of people who claim not to know the function of the Commission. See IPSOS, Encuesta Nacional Trimestral de Opinión Pública, Noviembre 2004, pp. 7; 10.

[103] Indepth analysis of public opinion data in the Costa Rican and Peruvian Defensorías is analysed in Chapters 6 and 7. Both cases display high approval ratings, a feature shared by offices in Central America, for instance, see Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', pp. 7-8.

[104] Erick Torrico, National Coordinator of Communication and Investigation for UNIR Foundation, interview by author, La Paz, Bolivia 28 July 2009.

[105] See, for example, *BBC Mundo*, 'Colombia/Uribe: críticas de DDHH', September 9, 2003. In Peru, Human rights NGOs have faced severe hostility from government officials and politicians linked to the previous Garcia (1985-1990) and Fujimori (1990-2000) administrations.

[106] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Ms. Asma Jahangir), Mission to Honduras, UN Doc. E/CN.4/2003/3/Add.2, 14 June 2002, p. 20.

A remaining category of relations is external. Without denying their significance and evolution in recent years, external relations are generally a secondary consideration for this study and the activity of regional Defensorías. Along vertical lines, the UN has, on occasion, intervened on behalf of Defensorías subject to political attack. This is particularly the case in countries with in-country UN missions, such as Guatemala and El Salvador,[107] as well as in contexts which display ongoing violation of human rights, such as Colombia.[108] Such interaction has been a valuable, if sporadic, resource for many Defensorías in the region but has also produced tensions due to duplication of functions,[109] conditions attached to aid, and the withdrawal of support.[110]

A recent shift has seen Defensorías engaged by UN member state bodies, treaty bodies and other agencies as independent experts on state compliance with human rights standards.[111] The formalisation of relations has been enhanced in relation to the UN Human Rights Council, various UN treaty bodies and special procedures (independent human rights experts).[112] Initial signs suggest that these reforms are a novel deepening of engagement by Defensorías with external actors. Nevertheless, a range of obstacles impede relations, from

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[107] For example, 'MINUGUA condena la intimidación a la Procuraduría de los Derechos Humanos', Centro de Noticias ONU, 27 August 2003.

[108] President Uribe's attempts to subordinate the Defensor to the Attorney General's Office in 2002 was opposed by the UN which described the package of reforms as leaving 'wide sectors of Colombian society absolutely defenceless'. Quoted in A. Isacson and A. Hare, 'Colombia's Alvaro Uribe: The First 100 Days', International Policy Report, Washington D.C.: Center for International Policy, 2002, p. 4.

[109] MINUGUA in Guatemala and ONUSAL in El Salvador were subject to occasional criticism for duplicating the functions of the Procuradurías. However, MINUGUA's forceful condemnations of human rights abuse were viewed by social actors as providing an important challenge to a muted Procuraduría.

[110] As discussed above, the Nicaraguan and Peruvian offices have both experienced abrupt withdrawals of international funds. See pp. 189-190.

[111] The UN General Assembly passed two resolutions in 2008: Resolutions 63/169 on the role of ombudsman institutions; and Resolution 63/172 on NHRIs.

[112] See Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies (Berlin, 23 and 24 November 2006). HRI/MC/2007/3, 7 February 2007.

logistical to substantive concerns, such as the cost of flying to Geneva.[113] The UN machinery compares favourably with the limited human rights infrastructure of the OAS Inter-American Commission of Human Rights. That said, the OAS has recently signalled an interest in facilitating interaction of Defensorías with 'the organs, agencies and entities of the Organization'.[114] Separate to the Commission, the Inter-American Court of Human Rights provides for submissions by Defensorías as third parties in amicus curiae briefs.

Defensorías also insert into loose arrangements of horizontal transnational actor networks. As discussed in Chapter 3, the three principal Defensorías coordinating organisations within the Americas are the IIDH, the IOI and the FIO. These networks have become increasingly formalised, superseding bilateral exchanges among offices, with a focus on strengthening Defensorías operating under difficult conditions and denouncing interference in these offices, funding cuts, and death threats.[115] In turn, Defensorías engage intermittently with INGOs such as Amnesty International and Human Rights Watch. These actors have intervened in defence of offices under threat and have also robustly criticised under-performing Defensorías.[116]

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[113] Intervention in plenary discussion, the 22nd Meeting of the International Coordinating Committee of National Human Rights Institutions, Geneva, Switzerland, 26 March 2009.

[114] Strengthening the role of NHRIs for the Promotion and Protection of Human Rights in the Organization of American States, AG/RES. 2421 (XXXVIII-O/08), adopted on June 3, 2008).

[115] Writing in 2000, officials of Defensoría networks write 'we can attest that the current political context is not lacking in enemies for the ombudsman. Some of these enemies are powerful, some are hidden from public light'. See Gonzalo Elizondo and Irene Aguilar, 'The Ombudsman Institution in Latin America: Minimum Standards for its Existence', in Birgit Lindsnaes et al. (eds.), *National Human Rights Institutions: Articles and Working Papers*, (Copenhagen: The Danish Centre for Human Rights, 2001), p. 222.

[116] See 'Guatemala: Threats and Attacks Against Human Rights Defenders Must Be Investigated', Amnesty International-Press Release, 27 March 2009. See also Human Rights Watch [HRW], *La Comisión Nacional de los Derechos Humanos de México: Una Evaluación Crítica*, (Mexico D. F.: Human Rights Watch Americas Division, 2008).

5.5. Rules of access

This section turns its attention to the formal and informal rules that govern Defensoría access to accountability arenas. In the absence of legal enforcement powers, the Defensoría relies on third parties to enforce compliance. Nevertheless, it has a range of legal, investigative and advocacy prerogatives that may incur material consequences, if not legal sanction. Rules of access refers to four principal arenas: (1) vertical access (executive arenas), (2) horizontal access (state checks and balances), (3) social access (organised civil society), and (4) external access (international actors).

5.5.1. Vertical access

The Defensoría has a range of policy and legislative advisory powers that shares comparisons with an executive function. In particular, the Defensoría may act through vertical channels to influence the political agenda, submitting legislative proposals and publicly opining on official policy through the media. Under certain conditions, the Defensoría may access vertical channels with the support of the executive where interests converge. The Defensoría, with its access to channels of vertical accountability, offers a potential ally in the quest for popular legitimacy. In turn, for the Defensoría, responsiveness to such a powerful actor carries risk but may also yield dividends. For instance, Defensorías have been incorporated into a wave of sometimes controversial National Human Rights Plans across the region with variable results.[117] In general, working alongside the Executive

[117] The Ecuadorian Defensoría was established in conjunction with and remains an integral component of the National Human Rights Plan issued by the government in 1999. A similar plan issued by the Colombian

is rare in Latin America and will be conditioned by the nature of the accountability objective, the violators in question, and the expected consequences of action.

An important caveat to this claim is where the Defensoría is effectively captured by the Executive. One important indicator of independence is the extent to which the Defensoría holds the Executive accountable through vertical channels. In this regard, the Mexican Commission is notable for its reticence in criticising executive policy. The Commission issued its first recommendation directly addressed to the President in 2001, 11 years following its activation and one year after transition to democracy.[118] This intervention was significant, resulting in the appointment of a Special Prosecutor by the President to investigate and prosecute crimes committed during the 'dirty war' of the 1960s and 70s.[119] However, the Commission subsequently failed to follow up on its recommendations or provide support to an isolated and ineffectual Prosecutor.[120] In this instance, the Defensoría may be more an obstacle to accountability for violations than an enabler, failing to ensure proper scrutiny. Similar concerns apply to the alleged conduct of the Honduran office during the military coup of 2009.[121]

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government in 2006 also envisages a central role for the Defensoría. The Peruvian Defensoría has played a high profile role in maintaining a focus on the 2005 National Action Plan despite an increasingly hostile official stance toward human rights policy.

[118] Recommendation No. 26/2001, 27 November 2001.

[119] Order of the President of the Republic, 27 November 2001.

[120] According to Human Rights Watch, one functionary explained that "the CNDH does not comment publicly while government authorities are attempting to implement its recommendations". HRW, *La Comisión Nacional de los Derechos Humanos de México*, pp. 33-34.

[121] Further study to trace how the situation has evolved is necessary. However, the Honduran Commissioner endorsed the interim coup government and also allegedly failed to provide assistance to victims of military aggression. See Comité de Familiares de Detenidos Desaparecidos en Honduras, *Informe Preliminar: Violaciones a Derechos Humanos en el Marco del Golpe de Estado en Honduras*, (COFADEH: Tegucigalpa), 15 July 2009, p. 10.

More commonly, Defensorías access vertical accountability channels unilaterally or in coordination with social actors, as discussed below. However, given the potential for backlash from the Executive through formal or informal channels, access and exercising of vertical accountability in direct confrontation with the Executive is rare and likely to result in powerful opposition. Indeed, actions by the Defensorías to constrain the Executive are likely to have immediate or delayed repercussions.[122] That said, independent Defensorías that directly criticise official policy may, even under adverse conditions, incidentally bridge the divide between the Executive and civil society. For instance, the groundbreaking report by the Honduran Commission in 1993 on forced disappearances during the 1980s gained the support of the then President Roberto Reina. By directly implicating the military and old political guard in the killings, the Commission assisted Reina in overcoming powerful opposition to establishing a High Level Ad Hoc Commission for Institutional Reform.[123] In turn, the report cemented the Defensoría's profile as a rights defender.

Nevertheless, more often than not, relations defined by mistrust and hostility translate into limited access to vertical accountability arenas within the state. Beyond influencing the public agenda, the Defensoría can also monitor the public bureaucracy, including ministries and agencies, through 'reflexive' channels of persuasion. However, Defensorías are poorly equipped to effect systemic change. Rather, they have focused on pursuing amicable resolution with public officials through informal horizontal channels. For this form of

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[122] A dramatic example is that of the hunger strike conducted by the Bolivian Defensora, Ana Maria Romero, in 2003, shortly after stepping down from office. The then sitting Vice-President, Carlos Mesa, has remarked that this action by the Defensora 'resulted in the destruction of the government's support base within the middle classes' and precipitatèd the fall of the government. Mesa and the political elite refused to support the re-election of Romero installing a regime proxy in her place. See C. Mesa, *Presidencia Sitiada: Memorias de mi Gobierno*, (La Paz: Editores Plurales, 2008), p. 64.

[123] Dodson, 'The Human Rights Ombudsman in Central America', p, 30,

pressure to be effective, however, it appears to be closely related to the high public standing of the Defensoría and the implicit threat that non-compliance will result in damaging public criticism. As the Bolivian Defensora recalls:

> As we entered our third year of operations, we began a new initiative to 'shame' state functionaries into cooperating with the Defensoría. We produced lists of uncooperative functionaries and published it widely within the media. The following year, there was a marked rise in cooperation and responsiveness.[124]

However, in more conflictive settings, Defensorías have struggled to change the behaviour, let alone preferences, of state officials. This is especially the case where the office lacks presence and authority within its social setting, as reflected on by the first Nicaraguan Procurador:

> With reference to human rights, there is much ignorance among public functionaries....We have tried to maintain a working relationship and good communications, which is the first step in order to reach solutions to the many problems we confront. However this just does not exist.[125]

Beyond the receptiveness of non-elected bureaucracy to the mandate of the Defensoría, such internal channels of accountability may be problematic in a Latin American context where, too frequently, formal rules are overlooked in favour of personal discretion. It also risks reinforcing what is already often an opaque arena of accountability. Furthermore, from an

[124] Ana María Romero Campero, 15 July 2008.
[125] *El Nuevo Diario* [Nicaragua], '5 años de atropello a derechos humanos', 30 December 2001.

empirical perspective, it is hard to quantify the impact of such internal channels of redress and the extent to which individual claimants are satisfied with the result.

5.5.2. Horizontal access

Reflecting its status as a horizontal institution, the Defensoría has a range of administrative, regulatory, legal and investigative prerogatives despite its lack of enforcement powers. Working within, across and apart from state checks and balances, the Defensoría does rely on other actors with compliance authority to advance legal claims. Ideally, Defensoría access to this arena is reflective of a highly articulated horizontal apparatus, with clear division of labour among actors. However, in Latin America access is often governed by informal norms as well as by political conflict among agencies. This presents a severe challenge to the legal mandate of the Defensoría. It can also impede horizontal powers more broadly; for instance, the Mexican Commission submitted a constitutional review action in 2009 against a new law governing the Prosecutor's Office which places restrictions on the Commission's requests for information.[126]

Unsurprisingly, many Defensorías have advocated greater transparency within the state, with the Panamanian and Costa Rican offices formally coordinating inter-institutional networks of transparency.[127] However, the above Mexican example needs to be qualified in light of the Commission's own dubious record in this area. The Mexican Commission was

[126] *UPI* [Mexico], 'Impugna oficina del Ombudsman ley que rige la justicia mexicana', 27 July 2009.
[127] Domingo writes on the Bolivian Defensor: 'Reliable data is hard to come by, and only recently have there been efforts to build databases. One of the more reliable sources since 1998 is the information generated by the human rights Ombudsman (and to some extent by the Constitutional Tribunal)'. Domingo, 'Weak Courts, Rights and Legal Mobilization in Bolivia', p. 238.

considered to be one of the least transparent public institutions in 2008 and has repeatedly denied information requests from civil society actors.[128] Similarly, the Honduran Commission presented its 2010 annual report to Congress in a private session, denying public scrutiny of its controversial actions in the wake of the military coup of July 2009.[129] In these instances, it is the Defensoría itself which is undermining access to horizontal arenas for social actors. More generally, offices have been criticised for narrow interpretation of their mandate that effectively closes off or underutilises access to horizontal accountability. For instance, in Guatemala, successive Procuradors throughout the 1990s imposed a narrow interpretation on investigative powers.[130] In Nicaragua the Procuraduría has been criticised for not recognising that judicial administration falls within its mandate.[131]

Conversely, other Defensorías have actively sought to expand horizontal access through creative interpretation of formal mandates. In El Salvador, under the leadership of Velázquez de Avilés, the Procuraduría exercised an aggressive investigative mandate which gained the institution widespread recognition.[132] Defensorías have also expanded the range of legal powers at their disposal. For example, in 2001 the Argentinean Defensor launched a class action (amparo colectivo) after reasoning that despite a lack of explicit provision such a

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[128] *El Universal* [Mexico], 'Fallan Senado, Banxico y CNDH en transparencia', 20 November 2008.
[129] *Tiempo* [Nicaragua], 'Custodio culpa a Zelaya en el informe entregado al Congreso', 18 March 2010.
[130] Dodson and Jackson, 'Horizontal Accountability in Transitional Democracies', p. 15.
[131] *El Nuevo Diario* [Nicaragua], 'Aterradora situación de derechos humanos en CA (Rafael Lara)', 3 April 2001.
[132] For discussion of the highly symbolic investigation into the killing of Manuel Adriano Vilanova see Lawrence Michael Ladutke, 'Freedom of Expression and Human Rights Violations in Postwar El Salvador: The Vilanova Case', paper delivered at Latin American Studies Association Conference, Washington DC, September 6-8, 2001.

faculty was compatible with its legal mandate.[133] Defensorías have frequently argued for a broad interpretation of their mandate on the grounds of public interest. Notably, Defensorías in Costa Rica and Panama have successfully overcome judicial resistance to their oversight of judicial administration. A similar logic underpins the intervention of the office into the electoral arena throughout the region, often emphasising due process and universal suffrage rights.[134] The role of Defensorías in monitoring elections is often subject to dispute, especially when offices are highly critical of the electoral process and the conduct of political parties.[135]

Intervention in such sensitive policy terrain will affect the receptiveness of partisan forces within the legislature to the Defensoría. A key arena of horizontal accountability is the legislature and the Defensoría has a mandate to advise congress on draft legislation, and to submit legal projects as well as to present annual reports.[136] In practice, informal access to plenary, committees and individual legislators and their staff is a highly negotiated affair. Despite the prevalence of conflict in this relationship, Defensorías have achieved material outcomes in this arena.[137] In particular, Defensoría technical expertise can serve to enhance

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[133] See Eduardo Mertehikian, 'Jurisprudencia comentada: La legitimación del Defensor del Pueblo de la Nación Argentina y una sentencia de alcance general contra el corralito bancario', *Revista Argentina del Régimen de la Administración Pública*, vol. 24, No. 286, 2002.

[134] Many offices are mandated to intervene in electoral matters with express prohibition only in Costa Rica, Ecuador, Mexico, Panama and Paraguay.

[135] The El Salvadorian Procuraduría Special Report on the 2004 elections included the recommendation '...to take all necessary measures to ensure that future campaigns avoid the levels of violence and attacks in the cause of electoral proselytism that we experienced in this process'. G. Escobar, 'Defensorías del Pueblo y Democracia', *Quórum: Revista de pensamiento iberoamericano*, no. 13, Winter 2005, p. 80.

[136] The Colombian Defensoría has recently begun to exercise this function, working closely with Congress to pass an Anti-Discrimination Statute in 2008 and the submission of a project on the 'right to water' in 2009. See Law Project No.: 66 2008 and Law Project No.: 197/2007.

[137] The Bolivian Defensor del Pueblo received or initiated reviews of 27 Supreme Decrees, preliminary texts, and drafts of laws during 2008. Of these, 15 were approved by the Defensoría, 11 rejected and in one case the institution recommended a technical work group be set up to study the proposal. Of eight cases where the

legislation's conformity with democratic and rule of law principles. Jurists consider this as a legitimate task given the mediocrity of much legislation.[138] However, Defensorías must also give due regard to independence when exercising an advisory function. The Mexican Commission has been criticised for focusing on the application of existing norms and neglecting advocacy for legislative change.[139]

Defensorías also have a range of legal prerogatives. But access to this arena of accountability is complicated by the variably dysfunctional character of judiciaries throughout the region. Broadly speaking, Defensorías do not exercise their legal powers in a systematic manner and internal offices are often under-resourced in manpower and technical expertise.[140] Obstacles to legal accountability for Defensorías are not only structural but also political. Strategically, Defensorías may be reluctant to pursue legal action due to excessive time delays, process visibility and the potential for adverse outcomes. As a functionary of the Argentinean office relates:

> The Defensor can open a judicial process. However, there may be tactical disadvantages to such action. Once a case is within the legal system it closes off further activity on the claim.

Defensoría intervened in the legislative process, five proposals were approved as norms by the Congress. See Bolivia Defensoría del Pueblo, *Informe Anual*, (La Paz: DP, 2008), p. 28.

[138] "It is important legal projects are well informed as we all know bad law could be worse". César Landa, President of the Peruvian Constitutional Tribunal (2006-2008), interview by author, Lima, Peru, 20 June 2008.

[139] Programa Atalaya, *Análisis de gestión de la CNDH en 2003*, (Mexico City: ITAM, 2003), p. 30.

[140] An observer in El Salvador observed: The Procuraduría does not use its legal faculties "due to the fact that these actions demand a certain level of juridical technical expertise in order to ensure they meet the procedural requirements demanded by the Supreme Court of Justice...For now, only two people work in this area". Quoted in Quesada, *En procura de la paz*, p.18.

> And once a ruling is issued, which may or may not be adverse to the determination of the Defensor, there is little more we can do.[141]

The Argentinean case provides a good example of the risks entailed in accessing legal arenas. The Supreme Court has rejected multiple submissions by the Defensoría on procedural grounds. For instance, the court has repeatedly rejected class actions presented by the Defensor, in marked contrast to other associations with similar legal status under Article 43 of the Constitution.[142] This can have wider damaging effects: a failed class action in the wake of the banking collapse of 2001 has been used as a precedent to constrain other social actors presenting similar actions.[143]

However, Defensorías have worked alongside actors such as Constitutional Tribunals to advance progressive jurisprudence.[144] Across cases, Defensorías have submitted cases to constitutional authorities and achieved significant rulings. In Peru, a landmark ruling by the Constitutional Tribunal in 2003 curtailing the jurisdiction of military justice followed years of advocacy by the Defensoría.[145] Defensorías have also made gains in economic, social and cultural rights recognition. As Domingo writes of the Bolivian Defensoría, '[t]o the degree [the Constitutional Tribunal] has had to engage with potentially controversial social and economic rights issues, this somewhat reflects the 'judicial activism' pushed by the

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[141] Leandro Garcia, Legal advisor to Defensor de la Nación, interview by author, Buenos Aires, Argentina, 7 August 2008.
[142] Crocioni notes, 'the Court has displayed a far less hostile attitude toward associations, accepting in various cases their legitimacy to defend collective rights'. Francisco Crocini, 'Los Procesos Constitucionales Colectivos en el Derecho Constitucional Argentino', *Temas de derecho procesal constitucional*, No. 1, July 2008, p. 118.
[143] Supreme Court Case 1837.
[144] Constitutional Courts have been created alongside Defensorías in Bolivia, Colombia, Ecuador, Guatemala and Peru.
[145] See Defensoría del Pueblo, *Informe Anual*, (Lima: Defensoría del Pueblo, 2009), p. 519.

Ombudsman'.[146] Across these cases, as well as others such as Colombia and Costa Rica, formal access to this arena constitutes a rare area of relative stability. However, access to justice and enforcement of legal decisions remain deeply problematic across settings.[147]

5.5.3. Social access

One of the more novel features of Defensorías in Latin America is their extensive access to, and use of, social accountability mechanisms. Strong relations with non-state actors can provide the Defensoría with crucial ballast against hostile state actors. In turn, interaction often proves mutually reinforcing, scaling up an array of accountability strategies. Specifically, Defensorías can provide resource-stretched social actors with legal and technical expertise and access to the legislative process. Defensorías also benefit from association with credible social actors who bring with them mobilisation strength and publicity. This has its clearest expression in the signing of formal inter-institutional agreements between Defensorías and prominent NGOs pioneered by the El Salvadorian Procuraduría and now common throughout Latin America.

Defensorías have often issued special reports on compelling human rights topics likely to resonate among the broader public. This serves to maximise impact with limited resources and also encourages the media to report upon the findings. More broadly, Defensorías can

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[146] Domingo, 'Weak Courts, Rights and Legal Mobilization in Bolivia', p. 242.

[147] In one of its earliest reports released in October 1992, the Colombian Defensoría documented 717 cases of murder of elected officials, candidates and members of the Patriotic Union party (UP) between 1985 and 1992. It went on to note that despite the pervasive prosecution of members of the UP, a judicial sentence had been reached in only 10 of the 717 cases. C. Arnson and R. Kirk, *State of War: Political Violence and Counterinsurgency in Colombia*, New York: Human Rights Watch, 1993), p. 17.

facilitate information-exchange to enable mobilisation and increase political pressure upon elected officials. Throughout Central America, Defensorías have publicly confronted the state over past massive violations of human rights. The Honduran 1993 report 'The Facts Speak for Themselves' on forced disappearances of the 1980s pioneered this highly public accountability activity.[148] It was subsequently emulated later in El Salvador in 2002 and Guatemala in 2009. Not only do such initiatives raise the profile of the office, they can also legitimate human rights mobilisation more broadly. In the case of Guatemala, the report constitutes a valuable advocacy tool, building on unearthed official documents and years of advocacy by social actors. As the Procurador remarked upon publication:

> [This] archive was condemned to a slow death and with it would have disappeared an infinity of signs, clues and keys essential to understanding the national tragedy from which we are still yet to recover.[149]

Defensorías can also use their media profile to publicly censure elected officials over current human rights violations. Denouncing official policy through social mechanisms of accountability is also an effective means of signalling independence from the state. The El Salvadorian Procuraduría under the leadership of Velasquez de Aviles frequently criticised the President Armando Calderón, resulting in high public approval ratings.[150] Similarly, the actions of the Peruvian Defensoría during the fraudulent elections of 2000 cemented its

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[148] Dodson, 'The Human Rights Ombudsman in Central America', p. 33.
[149] Guatemala Procuraduría de los Derechos Humanos, *El Derecho a Saber*, (Guatemala City: PDDHH, 2009), p. 7.
[150] M. Popkin, *Peace without justice: obstacles to building the rule of law in El Salvador*, (Penn State: Penn State University Press, 2000), p. 173.

public profile as a leading democratic actor.[151] Defensorías can scale up human rights claims to the national level in a way few NGOs can and turn individual grievances into public issues. In turn, Defensorías can offer a rare human rights counterpoint to official state policies. For instance, the Colombian Defensoría issued its policy recommendation on the prevention of massive violations of human rights to coincide with the government's 'democratic security' policy of 2002.[152]

However, Defensorías are also often subject to robust criticism by NGOs for not going far enough in holding officials to account. The Honduran Commission's preference for public announcements as opposed to formal resolutions which carry an enforceable obligation to cooperate has been criticised as weakening the influence of the office.[153] More seriously, the Guatemalan Procurador has been accused of delaying the publication of the 2009 report concerning past violations as well as censoring its content.[154] Defensorías operating under highly conflictive conditions face a dilemma in this regard: do too little and disappoint social actors, do too much and risk backlash from hostile state actors. Cautionary tales abound. For instances, a campaign by the Colombian Defensoría questioning the legality of US government-backed coca crop eradication in 2002 was followed by the reassignment of the Defensor and an alleged 'softening of the position against the spraying program'.[155] In the

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[151] See 'Organizaciones que cumplen un papel importante en el fortalecimiento de la democracia', Survey conducted by DATUM Internacional, August 2000.
[152] Defensoría del Pueblo, *Informe Anual*, (Bogota: DP, 2004), p. 82.
[153] Quesada, *Entre la cal y la arena*, p. 28.
[154] The Procurador allegedly removed evidence of US involvement in counter-insurgency operations; the control exercised by the Guatemalan military over the National Police; specific information on command structures within the police; and the removal of indepth scrutiny of nine human rights cases. See *El Periódico* [Guatemala], 'Acusan a PDH de censurar informe de archivo de policía', 25 June 2009. For the Procurador's response see *El Periódico* [Guatemala], 'Opinión: "En el informe digo lo que veo y creo"', 25 June 2009.
[155] See Aida Memorandum to Tim Rieser, Inter-American Association for Environmental Defence, 12 December 2003, p. 3.

worst case scenario, partisan appointments may go onto actively undermine regime opponents within society.[156]

Beyond access to the media and mobilisation through public advocacy, the Defensoría can also facilitate access to the legal system for rights claimants, through ex officio submissions and participation in amicus curiae briefs. In facilitating legal expertise, the Defensoría brings "value added" support to NGO efforts to seek justice through the courts.[157] Conversely, where civil society is highly expert in legal advocacy, such as in Argentina, the services of the Defensoría are not as much in demand.[158] In turn, the Defensoría may use litigation strategies, not only to win individual cases, but also to set the parameters of public debate. As Human Rights Watch has stated, Defensoría intervention may become 'a decisive factor in the multifaceted process through which the…state determines the rights of individuals'.[159] In contexts with high levels of impunity for human rights violations, Defensoría litigation, when combined with an internal political dimension, can produce results. For instance, pressure by the Colombian Defensoría alongside social accountability actors finally led to the sanctioning of the responsible military Commander for the massacre

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[156] In 2006 the Nicaraguan Procurador launched defamation proceedings against journalists of the newspaper El Nuevo Diario after an investigation highlighted a series of anomalies within the Procuraduría. An NGO which produced a report in defence of the journalists was dismissed by the Procurador as 'kaibiles' [Guatemalan troops known for their cruelty]. See *El Nuevo Diario* [Nicaragua], 'Termina amenazando a directores de END', 1 April 2006.

[157] Ana Leyva, Environmental Officer for FEDEPAZ, an NGO based in Lima, interview by author, 23 August 2005, Lima, Peru.

[158] See Jean Grugel and Enrique Peruzzotti, 'Grounding Global Norms in Domestic Politics: Advocacy Coalitions and the Convention on the Rights of the Child in Argentina', *Journal of Latin American Studies*, vol. 42, no. 1, February 2010, p. 29-57.

[159] HRW, *La Comisión Nacional de los Derechos Humanos de México*, p. 27.

of Bojayá, Chocó.[160] The government has also been ordered to pay $800,000 in compensation to families of the victims.[161]

Table 5.2: Total complaints received by Defensorías per 10,000 inhabitants 2002-2006

	Costa Rica		Bolivia		Guatemala	
Year	**Total**	**10,000**	**Total**	**10,000**	**Total**	**10,000**
2002	23,024	56.3	9,566	11.3	23,299	19.8
2003	24,079	57.8	11,691	13.5	36,908	30.5
2004	25,812	60.8	11,966	13.5	35,677	28.8
2005	24,901	57.6	13,093	14.5	25,361	20
2006	19,934	45.3	15,607	17	24,020	18.5
Total/Av.	117,750	55.6	61,923	14	145,265	23.5
	Honduras		**Nicaragua**		**Peru**	
Year	**Total**	**10,000**	**Total**	**10,000**	**Total**	**10,000**
2002	9,273	14.3	1,877	3.6	52,180	19.8
2003	9,374	14.2	2,423	4.6	68,913	25.9
2004	11,500	17	1,936	3.6	70,907	26.3
2005	9,061	13.1	2,425	4.4	62,419	22.9
2006	9,390	13.4	n/a	n/a	85,658	31.1
Total/Av.	48,598	14.4	8,661	4	340,077	25.2

Source: Annual Reports 2002-2006. Population data calculated from Economic Commission for Latin America and the Caribbean (CEPAL).

Access to social accountability arenas is facilitated by the direct interaction of the Defensoría with the citizen. Accountability actions result not only from ex officio actions but more commonly upon receipt of complaints. Table 5.2 displays data for six regional offices, with complaints received per 10,000 inhabitants. From this sample, Costa Rica appears to be the most accessible office with 55.6 complaints received per 10,000 over the period in question.

[160] The Bojayá massacre of 119 civilians occurred in May 2002 during a battle between Revolutionary Armed Forces of Colombia (FARC) and United Self-Defence Forces of Colombia (AU). The potent "political echo" of this, the worst massacre in 40 years of conflict, to the present day was recognized by President Uribe. See *Primera Pagina* [Colombia], 'Confirmada sanción disciplinaria a ex coronel que no hizo nada para prevenir la masacre de Bojayá', 6 February 2005.

[161] In 2003, the Defensoría launched a $5.3 million lawsuit against the Government for alleged military negligence in failing to protect these citizens. See *El Tiempo* [Colombia], 'Estado deberá pagar 1.552 millones de pesos a familiares de dos víctimas de la masacre de Bojayá', 29 May 2008

This contrasts with Nicaragua which averages 4.0 complaints per 10,000. Indeed, the results for Costa Rica are markedly higher than all other cases. The findings point to the difficulties associated with seeking redress in many countries in Latin America. Although the severity of grievances in Guatemala, for example, may be higher than in Costa Rica, the low number of complaints received by the former indicates citizens are unable or unwilling to access the Guatemalan office. As such, the number of complaints may reflect not so much the human rights situation as the accessibility of the office and institutions more generally in these settings.

Given that systematic data on compliant handling is almost always generated by the institution itself and methodological protocol varies across cases it is difficult to conduct indepth comparative analysis of complaint handling. However, some important considerations can be identified. First, the number of resolutions or other formal undertakings by the Defensoría relative to the total volume of admitted complaints may provide insight into the dedication of resources to complaint handling. Second, total complaints received by the Defensoría that are deemed inadmissible indicate that citizens do not understand the function of the institution. Third, Defensorías frequently self-report compliance, or at least partial compliance, levels of 50 percent or higher.[162] Compliance is intimately connected to questions of case follow-up and associated budget constraints, often an under-resourced area given budget limitations (Ríos, 21 September 2007). Without denying the persuasive power of the Defensoría, it is important to evaluate in detail the

[162] For example, time series data from 2002 to 2007, reveals that 59.7% of all complaints received by the Peruvian Defensoría were concluded and substantiated with the cooperation of the institution in question. See Defensoría del Pueblo, annual reports 2002-2007.

manner in which cases are determined as 'closed' as well as the wider political implications of reporting compliance levels.

5.5.4. External access

Building on the Spanish incorporation of international human rights law (IHRL) within the constitution, many Defensorías have explicit IHRL mandates.[163] Regulative laws often mandate the promotion of signing, ratification, and effective diffusion of international human rights treaties. Nevertheless, for Defensorías in Latin America access to external arenas is an infrequent occurrence. At the international level, the reformed UN Human Rights Council provides for NHRIs to report to plenary on human rights compliance by Member States through its 'Universal Periodic Review' (UPR) mechanism. Defensorías in the region have begun to submit shadow reports to Member State submissions.[164] The potential value of this incipient arena of access is evident to Defensoría functionaries, offering a counterpoint to sometimes "ambiguous, irrelevant, or inexact" official reports.[165] Importantly, Defensorías, such as the Mexican Commission, have desisted from the earlier practice of officially representing Member State interests in UN forums.[166]

At the regional level, UN field missions, such as MINUGUA in Guatemala from 1996 to 2004, have provided Defensorías with access to international resources and protection. The

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[163] These include Bolivia, Ecuador, El Salvador, Guatemala, Mexico, Panama, Peru, Uruguay, and Venezuela.
[164] See submission by Peruvian Defensoría, Working Group on the Universal Periodic Review, UN Doc.: A/HRC/WG.6/2/PER/3, 2 April 2008
[165] Fernando Castañeda Portocarrero, ICC22 Workshop on NHRI interaction with international human rights mechanisms, Plenary session 10-11.30am, 27 March 2009.
[166] International Council on Human Rights Policy (Richard Carver), *Performance and Legitimacy: National Human Rights Institutions*, (Versoix: ICHRP, 2000), p. 49.

Colombian Defensoría has developed relations with multiple UN agencies, coordinating response activities to massive violations of human rights.[167] Nevertheless, the level of impunity in settings such as Guatemala places severe limitations on the office, even with the political support of UN agencies.[168] On rare occasions, Defensorías may gain access to powerful political arenas in other States. For example, the Honduran Commission gained important support and assistance from the US Senate when preparing the report 'The Fact Speak for Themselves' in 1993.[169] Most significantly, Defensorías in the region have submitted successful amicus curiae petitions to the IACHR, pioneered by the Peruvian office in the 1990s.[170] Notably, since 2003, the Bolivian Defensoría has submitted six petitions to the IACHR on issues of military conscription, HIV/Aids treatment, and refugee rights, among others. The office has successfully used IACHR decisions to leverage negotiations with government at the local level.[171]

A further tier of external access is found within Defensoría regional peer networks. The FIO has developed a highly sophisticated NHRI regional network. It is highly integrated with international forums and recognized as an important source of technical assistance for regional offices.[172] Notably, Defensorías have begun to send integrated electoral observer

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[167] See Defensoría, Humanitarian Resolution No. 012, May 25, 2002 and UNHCHR Office in Colombia, *Informe de la Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos sobre su Misión de Observación en el Medio Atrato*, May 20, 2002.

[168] As Philip Alston starkly puts it, 'Guatemala is a good place to commit a murder, because you will almost certainly get away with it'. See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Guatemala, UN Doc.: A/HRC/4/20/Add.2, February 19, 2007, p. 17.

[169] Letter from Honorable Caliborne Pell, US Senate and Congressional Human Rights Caucus, 18 December 1993.

[170] See L. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, (Boston: Martinus Nijhoff Publishers, 2004), pp. 182-183.

[171] Defensoría del Pueblo [Bolivia], 'El Defensor al Servicio del Pueblo', November 2007, p. 15.

[172] See 'Support for the work of Defenders of the People, Defenders of the Population, Human Rights Attorneys, and Human Rights Commissioners (Ombudsmen) in the Context of Strengthening Democracy in the Hemisphere,' OEA/Ser.P AG/RES. 1670 (XXIX-O/99), 7 June 1999, Res. 5.

missions throughout the region.[173] An incipient UN presence is also apparent at this level, with the Network of National Human Rights Institutions of the Americas created in 2000, signalling greater engagement with the Americas by the Office of the High Commissioner for Human Rights (OHCHR).[174] Annual meetings have been held since 2002 on a range of human rights themes, such as the rights of indigenous peoples, migrants, and persons with disabilities leading to ceremonial declarations. It should be noted that external access has also been used by Defensorías to censure peers when their actions have threatened to undermine the public image of the Defensoría community. The support of the Honduran Commissioner for the military coup of July 2009 was criticised by regional Defensorías.[175]

5.6. Politics and institutionalisation: the Defensoría in Latin America

This chapter has unpacked the internal actors, processes and interactions of each of the three core features of institutionalisation identified by the study. Drawing on the available empirical evidence, it has subjected the claims of formal theory to indepth evaluation. The analysis has further drawn on available empirical material, including primary sources. Limited available evidence explains the uneven coverage of some Defensorías in the chapter, such as those of Ecuador and Paraguay. In the absence of additional evidence, the study has relied upon what few reliable accounts of these offices are available. In any case, the objective of the chapter is not to enter into the intricacies of individual Defensorías'

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[173] Defensoría electoral observation missions were present in Guatemala in 2003 and 2007; Panama in 2004; and El Salvador in 2009.
[174] Its membership include Argentina, Bolivia, Canada, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Venezuela.
[175] See 'Doctor Italo Antinori, primer Defensor del Pueblo de Panamá repudió la actitud del Defensor del Pueblo de Hondura por apoyar el golpe contra el presidente constitucional de Honduras, Manuel Zelaya Rosales'. Open letter to the Honduran Commission, 29 June 2009.

experiences but rather to highlight the dynamic nature of their institutionalisation across settings in Latin America.

The study demonstrates that each feature of institutionalisation has its own internal actors, processes, and patterns. In other words, modification of one design principle can have spill-over effects elsewhere: the absence of constitutional status in the Panamanian case effectively robbed the Defensoría of its formal budgetary autonomy and immunity. The more dynamic features of institutionalisation, relations and access also present individually complex arenas of interaction. For example, working relations with one group of organised actors are likely to have important feedback effects for the character of others. In this sense, we see a rapid realignment of the Bolivian Defensoría away from the 'neo-liberal category' promoted by its original designers toward the interests of powerful social actors following activation. Access across accountability arenas presents an additional complex terrain, with the enabling or denial of access in one arena likely to determine the nature of access in another. For instance, the dismantling of horizontal institutions under Fujimori in Peru effectively forced the Defensoría to seek access to accountability arenas outside the state, or resign itself to obsolescence.

The analysis also highlights the importance of interaction effects across formal and informal dimensions of institutionalisation. More specifically, how do particular processes, actors and patterns in one arena significantly affect others, simultaneously or in sequence? This draws attention to questions of timing and temporality, as well as to broader institutional conditions. Placed in context, the Mexican reform process of 1999 which gave the

Commission formal autonomy poses problems for formal theoretical assumptions. In this instance, the Senate used the reform process as a pretext to initiate a technical procedure and to dismiss the incumbent Defensora without adequate explanation for its actions.[176] Rather than framing this episode of formal strengthening as a positive step, a focus on hostile relations with powerful state actors casts the reform process in a negative light. Alternatively, positive development in one arena may open up new structures of opportunity in another. For instance, effective social mobilisation around the Bojayá massacre increased the likely political costs of ignoring the Colombian Defensoría and social actors' legal petitions on behalf of victims' families.

Furthermore, different features, and their component parts, may have an equal or distinct bearing on institutionalisation outcomes. The evidence suggests formal design principles provide little protection against interference when confronted by entrenched and adverse informal norms and practices. This was the case for the Paraguayan Defensoría, which was effectively paralysed by partisan negotiations within Congress for nine years. Following activation, formal appointment safeguards made little impact in preventing the installation of a regime proxy as Paraguay's first Defensor. Indeed, excessive focus on formal rules can neglect important questions of context and resources. The impressive budget of the Mexican Commission, for example, says more about the partisan status of the office than the formal robustness of its budgetary autonomy. A further factor of considerable consequence that emerges from the analysis is the individual leadership of Defensors. Forceful and effective leadership can quickly reverse the fortunes of failing offices, as witnessed in El Salvador

[176] A report issued by the Mexican Defensoría in 1998 (44/98) on the killings in Juarez directly charged the PAN-led state and municipal governments of failing to prevent, protect or guarantee the rights of the victims in an electoral year.

under Velasquez de Aviles. The precariousness of such institutional strength is sadly also demonstrated by the experience of the El Salvadorian Procuraduría following de Avile's departure.

As such, it is necessary to pay attention to the nature of the precarious balance between formal and informal dimensions across cases to explain institutionalisation. Nicaragua demonstrates this interplay between vying political forces and formal rules, with the Procuraduría initially led by a Defensor intent on establishing a tentative zone of independence from powerful political forces. The office nevertheless quickly succumbed to interference through appointment procedures in 2004. Various cases highlight the potential for Defensorías to be undermined by broader turf wars within their institutional settings. This dynamic is compounded by the widespread mistrust and hostility of elected officials in the region toward horizontal accountability actors in general, often pitting institutional checks and balances against their claims of democratic legitimacy. Such systemic dynamics can have the indirect effect of curtailing the Defensorías' ability to build plural coalitions of support. In other situations, the Defensoría can itself become the direct target of hostilities. In extremis, this may lead the office to seek support through external arenas of accountability, most evident in Peru under Fujimori, but also in Colombia, and throughout Central America.

In sum, a major conclusion of this study is that two crucial factors explain the diverse institutionalisation outcomes of Defensorías in Latin America: (1) the relative stability and enforceability of formal rules within local settings, and (2) narrow versus expansive mandate

interpretation. Regarding the first factor, under conditions of relatively stable and enforced formal rules, organisational form may take on heightened significance. We find evidence for this in the effects of constitutional status, or lack thereof, in Costa Rica and Panama. Also, the Argentinean Defensor's conflict with the courts indicates a relatively highly institutionalised, if also politicised, judicial sector.[177] Where formal rules are extremely unstable and subject to routine norm violations, informal practices are likely to be the dominant factor for understanding political outcomes. This takes its most extreme form in Ecuador where political fragmentation ensured the Defensoría was repeatedly decommissioned prior to 2005.

Local conditions of rule stability and enforcement also have a significant impact upon the second conclusion identified in this study: creative interpretation of the *content* of formal rules. Simply put, there is a great deal of 'play' in the interpretation of formal mandates among Latin American Defensorías. That said, the density of pre-existing institutional frameworks will affect the office's scope of activity. For instance, while offices in El Salvador and Peru developed an election oversight mandate following activation, this was expressly prohibited in Costa Rica and Mexico where specialised electoral oversight institutions already existed. In Argentina, the Defensoría's attempt to expand upon the letter of the law was decisively rebuffed by powerful actors through formal channels. However, importantly, interpretation of mandates appears to correspond as much, if not more, to internal factors; especially individual leadership. In this sense, the restrictionist orientation

[177] See Pilar Domingo, 'Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America', *Democratization*, Vol. 11, No. 1, February 2004, pp. 104-126.

of Defensors in Guatemala and Nicaragua in the 1990s can be contrasted to the aggressive expansionism pursued by De Avilés in El Salvador.

Across all of the Latin American cases analysed it is the interaction between formal and informal dimensions that count. Even in relatively highly institutionalised settings, informal norms and practices assume primacy: witness the questionable meritocracy of the Costa Rican appointment in 2009. In turn, even under unstable conditions Defensorías can use formal rules of access to directly, or indirectly, constrain powerful actors. Most clearly, the use of petition powers to Constitutional Tribunals and, to a lesser degree, the IACHR, has led to decisive accountability outcomes against powerful actors. It is important to acknowledge that not-withstanding uneven stability and enforcement of formal rules at the aggregate level, there may still be significant pockets of reasonably reliable formal opportunity structures.

In this sense, Defensorías are well-placed to strategically exploit the reputational benefits by those political elites keen to maintain at least the formal appearance of rule abidance, especially in the areas of political, human rights and regulatory frameworks. This observation can be applied, for instance, to regimes with only a loose adherence to constitutional democracy which constitutes the majority of cases in Latin America. However, the claim is also pertinent to illiberal democracies, such as Mexico and Peru in the 1990s, which were nevertheless often punctilious about the observance of formal rules. Consequently, this study is intended to draw out some of these more fine-grained distinctions among political regimes in Latin America, as opposed to falling back on the

conventional dichotomy between strongly institutionalised constitutional democracies and their opposite.

A further finding of the study is that in no case does one feature of institutionalisation acting in isolation, or in combination, guarantee the institutionalisation of the Defensoría in a permanent manner. The continual production and reproduction of institutional form over time challenges conventional formalist analytical frameworks. If we discount the possibility of institutionalising the institution in a permanent manner, can we therefore specify some of the limiting conditions which might encourage stabilisation over change? Factors that encourage stability include structural developments, such as decentralisation of operations. Most decisive, however, appear to be the more contingent aspects of institutional development; notably effective leadership by the first and successive Defensors. Not-withstanding the methodological difficulties of quantifying this highly particularistic and elusive feature of institutionalisation, the personality of individual Defensors can make a huge difference to both the internal functionings and the external reputation of the institution.

5.7. Conclusion

This chapter has assessed the institutional development of Defensorías in Latin America. At a general level, the analysis substantiates the claim of this study that the result of Defensoría diffusion across the region has resulted in broadly similar structures acquiring different characteristics in social settings defined by variably stable and enforced formal rule

frameworks. The chapter began by illustrating the trajectory of the Defensoría across political systems within this study's typological classification of the office. The analytical framework elaborated in Chapter 4 grounded the empirical analysis of cases with particular regard for the formal and informal dimensions of institutionalisation. Careful attention to the actors, processes and interactions that populate these two core dimensions confirms the general utility of this study's analytical framework to the task at hand, namely, understanding how Defensorías actually work, including when and why they matter.

The findings of the chapter have uncovered some significant inferences capable of enriching current understanding of institutional development in Latin America. In particular, this includes the strategic mobilisation around rule abidance and violation in contexts of instability as well as the importance of expansive versus narrow mandate interpretation. The analysis also poses some challenges to the analytical framework devised in Chapter 4. In particular, the importance of individual leadership across cases introduces a crucial, if elusive, intervening factor in understanding institutional development. With regard to accountability theory, the relationship between the media and the Defensoría defies easy categorisation along vertical and horizontal axes. The thesis now turns to the paired case comparisons of Peru and Costa Rica to develop further the varied institutionalisation and political impact of the Defensoría in Latin America. The concluding chapter will return to the broader themes of political institutionalisation in Latin America, offering a reassessment of the typology and theory in the light of comparative developments.

Chapter 6: Politics and institutionalisation in Peru: Assessing the Defensoría del Pueblo

6.1. Introduction

The Peruvian Defensoría del Pueblo offers a compelling subject for analysis. Emerging in 1996 under the leadership of Jorge Santistevan (1996-2000) amidst a process of institutional deconstruction and the aftermath of widespread human rights violations, it nevertheless became practically the sole democratic state agent of accountability and was recognized as such by civil society and international observers.[1] Following a democratic re-transition in 2001, the Defensoría, led by (interim) Defensor Walter Alban until 2006 and subsequently by Beatriz Merino, has continued to assert its presence on the public stage in a restored, if fragile, democratic context under the administrations of Valentín Paniagua (2000-2001), Alejandro Toledo (2001-2006) and the present incumbent, Alan Garcia of the American Revolutionary Popular Alliance party (APRA). Adapting to a radically altered institutional context over its lifespan, the Defensoría remains a key institutional actor in Peru, described recently by one scholar as holding 'a solid political position not only in public life in general, but also with regard to the respect that it commands from other state institutions'.[2]

The study recognises the limitations imposed by case-study as a method of analysis. However, the activity of the Peruvian Defensoría stands out as deserving of individual consideration. At its most fundamental level this thesis seeks to understand the institutional

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[1] See Coletta Youngers, 'Promoting Human Rights: NGOs and the State in Peru', in John Crabtree (ed.), *Making Institutions Work in Peru*, (London: ISA, 2006), pp. 158-184.
[2] Fredrik Uggla, 'The Ombudsman in Latin America', *Journal of Latin American Studies*, vol. 36, no. 3, August 2004, p. 446.

development of the Defensoría in a country where democratic institutions have been tough to establish and even more difficult to sustain. The extent to which the experience of the office can be instructive for processes of institutionalisation in Peru or elsewhere may be debatable. However, this study argues that such case studies can identify those actors, processes and patterns likely to be of causal relevance to developing larger, if still contingent, generalisations across Defensoría cases.

As discussed, moving beyond assumptions prevalent in the literature that correlate institutional performance with structural form is an important and necessary step. This chapter further builds upon the elaboration of a 'primarily political' causal mechanism in Chapter 5 by further specifying the interplay and impact of formal and informal, or political, dimensions of institutionalisation upon the development of the Defensoría in Peru. As one of the world's most unstable electoral democracies,[3] Peru can claim only a weak liberal or republican tradition and displays a profound divide between state and society.[4] Despite the challenges presented by such a context, the Peruvian Defensoría provides a rare point of intersection between state and society. The distinctive position of the Defensoría is analysed along 'vertical' (state-citizen) and 'horizontal' (state checks and balances) dimensions. As noted in Chapter 4, and further explored here, this right angular framing of relations may be more appropriate to Costa Rica than Peru where informal power structures prevail.

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[3] Michael Shifter, 'Breakdown in the Andes: Fire on the Mountain', *Foreign Affairs*, September/October 2004.
[4] , J. Cotler, *Clases, Estado y Nación en el Perú*, 2nd edn, (Lima: Instituto de Estudios Peruanos, 2005); M. Tanaka, 'Relations between state and society in Peru: destructuring without restructuring', DFID Target Strategy Research Paper, 2002.

The timeframe for the study is 1993 to 2009, evaluating the institutionalisation of the office at the national level under 'competitive authoritarian' and the opening up of new political opportunities under democratic conditions.[5] As such, this chapter does not go into detail on individual complaints, internal administration, or differentiating among human rights thematic domains. Also, it is important to emphasise that the story of the Defensoría and its implementation is not a homogenous one in all instances throughout the country.[6] The arguments advanced in this chapter rely on extensive primary material, including over fifty interviews with key participants.

The chapter begins with a visual illustration of the institutional development of the Peruvian Defensoría before turning to formal design principles and their modification by powerful state and social actors. This is followed by an evaluation of the office's interaction with organised state and social actors. The third section analyses the rules that govern the Defensoría's access to accountability arenas within and outside the state. The chapter concludes by reflecting on the interaction of formal and informal dimensions of institutionalisation and their individual and combined impact upon the experience of the Peruvian office.

6.2. A descriptive typology of the Peruvian Defensoría

[5] Steven Levitsky and Lucan A. Way, 'The Rise of Competitive Authoritarianism', *Journal of Democracy*, vol. 13, no. 2, 2002, pp. 51-65.

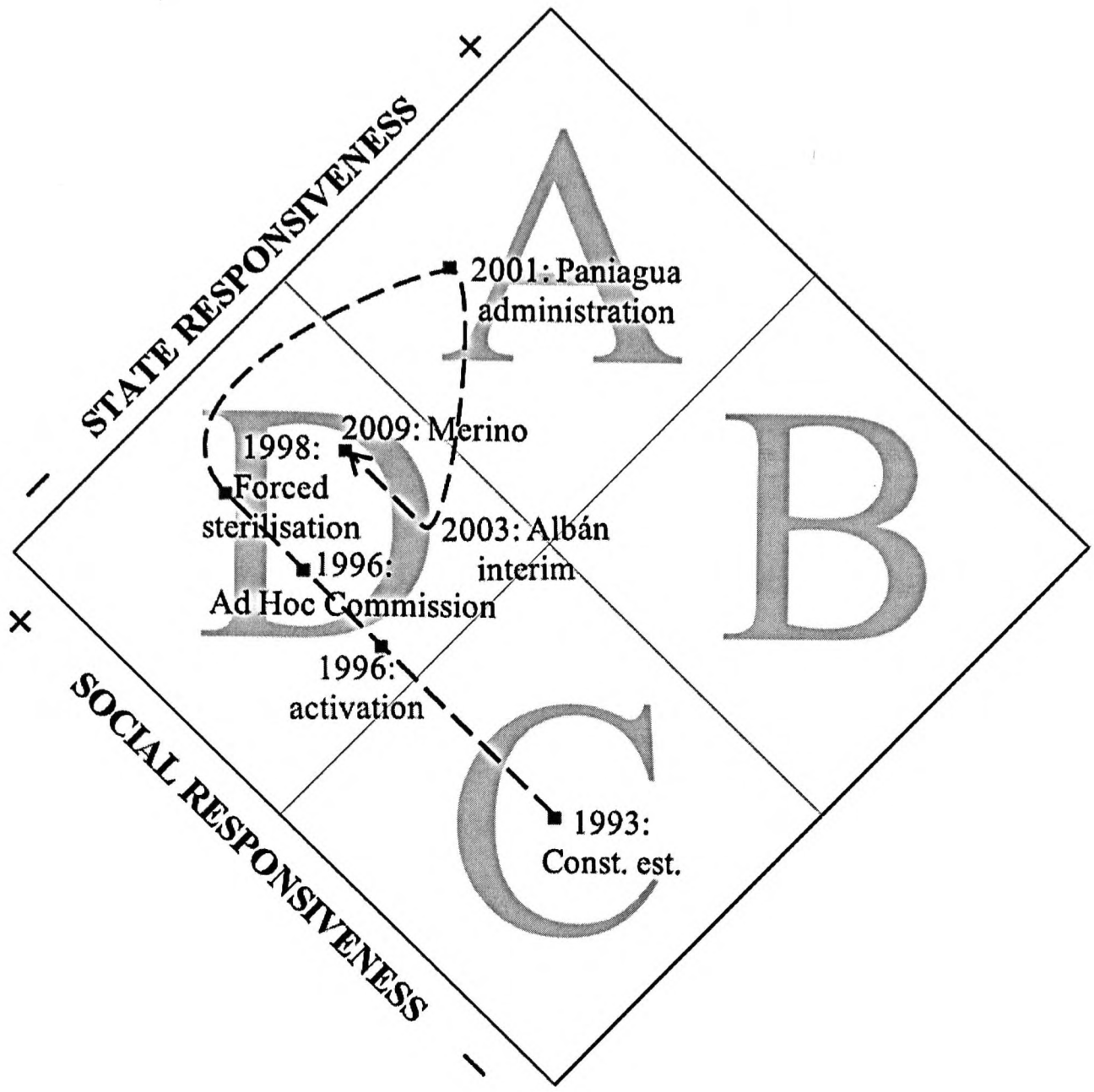
[6] I have explored some of these issues elsewhere, in particular how the Defensoría engages with those most marginalised in Peruvian society. See Thomas Pegram, 'Weak institutions, rights claims and pathways to compliance: the transformative role of the Peruvian Human Rights Ombudsman', *Journal of Oxford Development Studies*, (forthcoming 2010).

Figure 6.1 provides an overview of this chapter's analysis of the development of the Peruvian Defensoría from its creation in 1993 onwards, organised as in Chapter 5 with the intention of showing the movement of the Peruvian office across the four types of Defensorías.[7] This illustration serves a heuristic purpose only and does not conform to a systematic variable-oriented treatment of the subject. Rather, the construction of the chart corresponds to this study's interpretation of the empirical material and is intended, above all, to emphasise the general trend of dynamic institutional development in Peru. As opposed to a stable or linear trajectory, the following analysis demonstrates that the Peruvian office has moved within and across the typology.

In contrast to other cases in the region, the Peruvian office displays some distinctive traits. First, the Defensoría has achieved a relatively stable position as a rights defender (quadrant D), not-withstanding significant movement within this quadrant itself. Second, closer assessment of the office's political trajectory reveals a rare instance of institutional bridge as the Defensoría briefly assumed an optimal position of intersection between state and society (quadrant A). This is not the only instance of institutional bridging that the Peruvian case displays. However, it is the most evident example in terms of general trends. The following analysis elaborates upon the factors that underlie this distinctive institutional development within a context of institutional weakness and human rights violations.

[7] The framework traces the trajectory of Defensorías in Latin America from point of origin across four institutional types, from the design ideal institutional bridge (quadrant A), to regime proxy (quadrant B), façade (quadrant C), and rights defender (quadrant D). See Chapter 4 pp. 164-172.

Figure 6.1: A descriptive typology of the Peruvian Defensoría[8]



6.3. Formal design principles

As elaborated in Chapter 5, this section addresses five key formal design principles: (1) constitutional status; (2) mandate and powers; (3) budgetary autonomy; (4) operational autonomy; and (5) appointment procedures. The experience of the Peruvian Defensoría injects a strong element of contingency into whether formal structures can, in practice, safeguard the independence and power of the office.

[8] Source: author's own formulation.

6.3.1. Constitutional status

In contrast to other regional offices that were initially enacted by law,[9] the Peruvian Defensoría was included within the 1993 Constitution. The regional experience attests to the potential cost of inferior status, with the autonomy of Defensorías in Honduras, Mexico and Panama directly affected.[10] The Peruvian model's constitutional safeguards of independence are comparatively robust. Table 6.1 details the principal attributes of the institution, with particular reference to its functional, administrative and budgetary independence.

Table 6.1: Attributes of the Peruvian Defensoría

Function	Attributes	Legal basis
Independence	The Defensoría is independent. The Defensoría enjoys total independence in the exercising of its functions. It is subject to no imperative mandate, nor receives instruction from any authority. It is subjugated only to the Constitution and its Organic Law.	1993 Constitution, Art. 161
Budgetary independence	The annual budget project is presented for approval by the titular before both the executive and congress.	Organic Law, Art. 34
Immunity from Prosecution	The Defensor enjoys the same immunity and prerogative as afforded to members of congress.	1993 Constitution, Art. 161
Designation	The Defensor is elected by a majority vote of two thirds of congress.	1993 Constitution, Art. 161
Term of office	The Defensor is elected for a term of five years and may be re-elected once only.	1993 Constitution, Art. 161
Grounds for Dismissal	The Defensor may be dismissed for negligence in the carrying out of his or her duties and obligations, among others.	Organic Law, Art. 4

[9] Defensorías in Honduras, Argentina, Mexico, Venezuela and Panama were created by executive decree. In Costa Rica, Ecuador, Panama, the office was enacted in law.
[10] See Chapter 5, pp. 182-185.

Source: Defensoría del Pueblo, *Primer Informe del Defensor del Pueblo al Congreso de la Republica 1996-1998* (Lima: DP, 1998) [*Hereafter* cited 'Defensoría Annual Report'].

The Fujimori regime did not, however, place the Defensoría within the constitution in order to safeguard its independence. Rather, its inclusion was principally a political act of good faith to the international community, alongside a variety of democratic innovations that were not envisaged to contradict the central thrust of the Fujimori project.[11] External normative and material inducement is also indicated by the Defensoría's literal replication of Article 54 of the Spanish Constitution, with some minor modification. As with important modifications to the remit of the Constitutional Tribunal, little attention was paid to peripheral innovations such as the Defensoría.[12] The Constitution of 1993 did succeed in decisively shifting the balance of power in favour of Fujimori despite its dubious legality.[13]

According to Steve Ellner, Fujimori's political project was striking in its 'institutional barrenness' the new president overseeing the deconstruction of those democratic institutions, however flawed, that had previously existed.[14] In turn, Coletta Youngers observes that the Fujimori government 'perfected the technique of 'using the law to trample the law'.[15] In a context where 'authoritarianism...was not a function of formal design' but rather conducted through informal channels,[16] the importance of constitutional status is greatly diminished.

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[11] Thomas Pegram, 'Accountability in Hostile Times: the Case of the Peruvian Human Rights Ombudsman 1996–2001', *Journal of Latin American Studies*, vol. 40, no. 1, February 2008, p. 56.
[12] Samuel Abad, Deputy Defensor and Head of Constitutional Affairs (1996-2007), interview by author, Lima, Peru, 14 July 2005.
[13] The Constitution was approved by the narrowest of margins by popular referendum in 1993 – a process criticised for irregularities.
[14] Steven Ellner, 'The Contrasting Variants of the Populism of Hugo Chavez and Alberto Fujimori', *Journal of Latin American Studies*, vol. 35 (2003), pp. 139–62.
[15] C. Youngers, *Deconstructing Democracy: Peru under President Alberto Fujimori*, (Washington, D.C.: Washington Office on Latin America, 2000), p. 68.
[16] C. Conaghan, *Fujimori's Peru: Deception in the Public Sphere*, (Pittsburgh: University of Pittsburgh Press, 2005), p. 24.

That said, the regime's reliance upon a thin veneer of formal rule abidance did provide a constitutionally-entrenched Defensoría with additional protection, especially as relations deteriorated through 2000.[17]

Following Fujimori's ignominious exit in November 2000, the transitional government of Paniagua made important strides to restore Peru's constitutional order.[18] Not-withstanding formidable challenges, a fragile democratic rebuilding has continued under Toledo and Garcia.[19] However, it is important to reflect on the pervasive informality that continues to shape many aspects of Peruvian life.[20] Restoration of democratic structures has contributed to stabilising the Defensoría's position within the political system. Perversely, however, one threat to the future stability of the office is its very inclusion within a Constitution viewed as illegitimate within certain quarters. Opponents of the Defensoría have advocated a return to the 1979 Constitution as a pretext to erase the office.[21]

6.3.2. Mandate and powers

Relatively unconstrained among its regional peers, the Peruvian Defensoría has a broad mandate to defend fundamental rights and freedoms and to supervise the public

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[17] Jorge Santistevan became the focus of a proposed congressional investigation for misconduct in March 2000 but the institution remained intact. See *La República*, 6 March 2000.
[18] Lewis Taylor, 'From Fujimori to Toledo: The 2001 Elections and the Vicissitudes of Democratic Government in Peru', *Government and Opposition*, vol. 40, no. 4, September 2005, pp. 571-572.
[19] J. Crabtree, (ed.), *Making Institutions Work in Peru*, (London: ISA, 2006).
[20] According to Marcial Rubio, power resides not in formal structures but rather "in the private market, in narcotraffic, among intellectuals, the informality has a great influence in Peru." Marcial Rubio, Minister for Education under the Paniagua transition government (2000-2001), interview by author, 7 September 2005, Lima, Peru.
[21] Walter Albán, Deputy Defensor (1996-2000) and Interim Defensor (2000-2006), interview by author, 23 June 2008, Lima, Peru.

administration, including the military and judiciary. In turn, wide-ranging powers of investigation include the ability to act ex officio without prior notice and respond to admitted complaints, to lodge appeals of unconstitutionality, amparo, habeas corpus and suggest to Parliament laws be modified. Unlike other regional cases, the Peruvian office has experienced no formal interference in its mandate since its creation. However, due to factors internal and external to the institution, powers have tended to be exercised sporadically. For instance, electoral oversight has diminished significantly since 2001. Others have criticised the limited use of legal prerogatives under the stewardship of Beatriz Merino, as explored further below.

Crucially, the Peruvian Defensoría does not have legal enforcement powers and cannot compel compliance with its decisions. Nevertheless, as detailed, the Defensoría does enjoy a range of legal prerogatives, especially in matters relating to human rights.[22] This lack of coercive authority reflects the influence of the European ombudsman and a normative auxiliary function to the legislature and judiciary. In this respect, the doctrinal novelty of the institution, neither subordinate to the executive nor to the judiciary, able to recommend, investigate, supervise and moderate, but not to prosecute, arguably facilitated legislative approval within a Peruvian Congress hostile to all forms of oversight.[23] A lack of 'hard' power is, therefore, an important element to understanding the creation of the Defensoría. It also has a bearing on the future institutionalisation of the office. As Marcial Rubio wryly

[22] Notably, it can petition the Constitutional Tribunal and the Inter-American Court of Human Rights.
[23] José Távara, Deputy Defensor for Public Services 1998-2001, interview by author, Lima, Peru 18 July 2005, Lima, Peru.

notes, "the Defensoría has no power. If it were to have power, it would have no autonomy".[24]

6.3.3. Budgetary autonomy

Interference through budget allocation has proved to be a popular means of exerting control over Defensorías in the region. Reflecting the regional norm, the Defensoría's budget is allocated by the legislature. As is the case with other ombudsmen in the region, public expenditure is inadequate given the breadth of the institution's mandate.[25] Figure 6.2 shows a reasonably positive trend line, with the exception of a budget freeze and contraction (once inflation adjusted) between 1998 and 2001. This episode may be attributable, in part, to the effects of the Asian crisis on the Peruvian economy. However, it may also correspond to political motivated reductions. In any case, the Peruvian Defensoría has avoided the fate of other offices in the region that have had their budgets dramatically slashed. Despite his interim status, the data shows Albán oversaw a steady increase in funding from 2001, much of it directed toward decentralisation initiatives.

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[24] Marcial Rubio [Minister under Paniagua], 7 September 2005.
[25] The 2006 budget for the Defensoría was 10.98% of the overall judicial budget ($10.8 million to $98.9 million). Calculations based on 2003 data from *Consorcio Justicia Viva*: http://www.justiciaviva.org.pe/indicadores/ (accessed 26-02-09).

Figure 6.2: Total budget 1996-2008 (inflation-adjusted index)

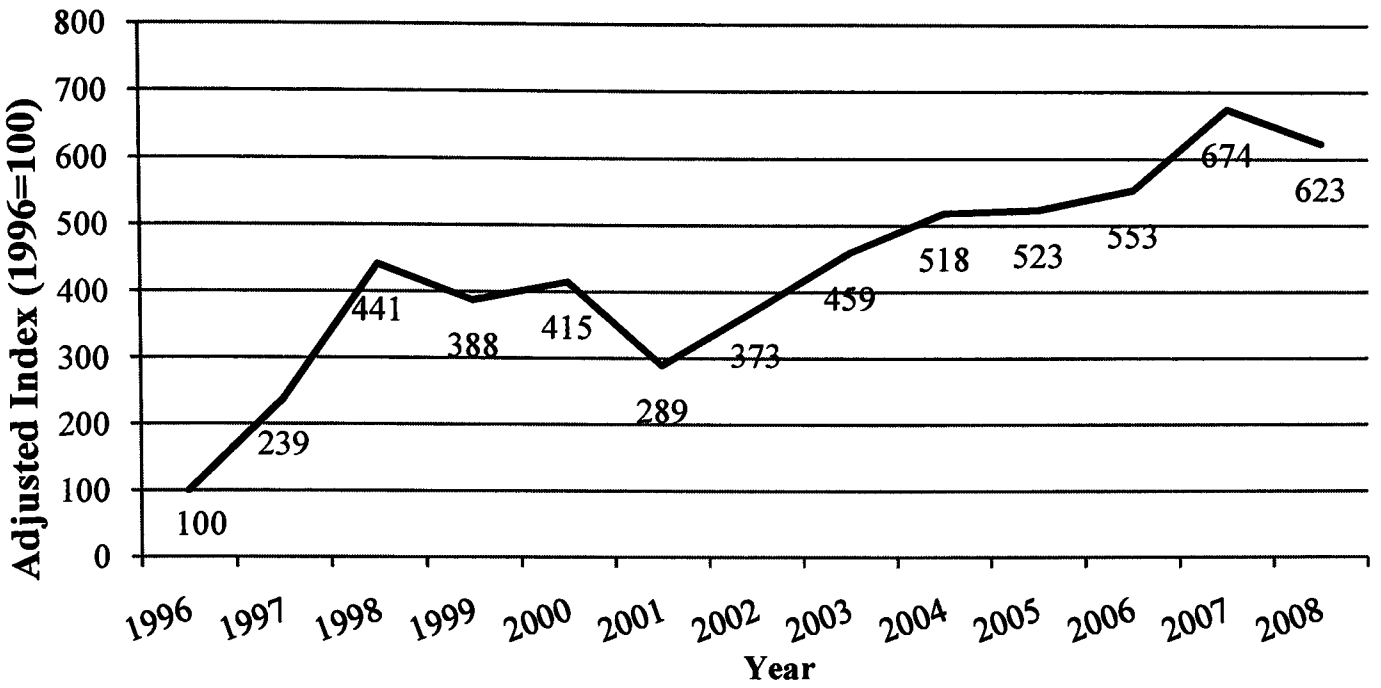

Table 6.2: Total budget 1996-2008 in US Dollars (1 USD/3.5 PEN in 2008)

1996	1997	1998	1999	2000	2001
1,727,510	4,236,873	7,708,175	6,299,141	6,760,164	6,316,283
2002	**2003**	**2004**	**2005**	**2006**	**2007**
6,139,108	7,693,978	9,139,766	10,151,281	10,695,133	13,979,008
2008					
14,213,456					

Source: author's own formulation using Defensoría Annual Reports 1998-2009.

From an early stage, the Defensoría drew upon the public purse and from a range of international donors such as the World Bank and some bilateral agencies. Between 1996 and 2006, the Defensoría received approximately a third of its total income from international sources.[26] As with many regional ombudsmen, the Peruvian Defensoría has utilised this relationship with international agencies in order to bolster its independence from the state. However, such dependence on foreign aid can be a cause of financial instability. A financial crisis in 2006, brought on by the sudden withdrawal of almost $2 million by USAID, was only narrowly averted through effective lobbying of the Ministry of Finance (MEF) that tied

[26] Data collected from Defensoría Annual Reports 1996-2006.

financial reductions to the politically sensitive closure of regional offices.[27] International funding as a percentage of the total budget fell from 42 percent in 2005 to 19 percent in 2006 with Merino, fortunately, proving to be an effective budget negotiator. This episode may help explain why some observers consider the Defensoría to be neglecting its international cooperation networks.[28] Another plausible explanation is simply that the Defensoría now finds itself working within a relatively more democratic state apparatus as opposed to from outside an illiberal regime.

6.3.4. Operational autonomy

Regulative law no. 26520 assigns the Defensoría, through the Defensor, a wide range of powers guaranteeing the institution's autonomy and independence, including the approval and modification of internal structures. The regulative law passed in 1995 was subject to modification by Congress, with the reference to the Defensoría's powers of access to military facilities eliminated. Despite this, the Organic Law passed by a C90-NM (the official party) majority. Furthermore, there was a high level of engagement by civil society jurists in drafting the law which may explain its robustness.[29]

The quality of the Defensoría personnel has been identified as a key factor behind the high degree of legitimacy enjoyed by the institution. Granted full autonomy in recruitment by the regulative law, upon assuming office Santistevan began recruiting candidates with credibility

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[27] Defensoría Annual Report *2005-2006,* p. 24.
[28] Ismael Muñoz, Professor of Economics at La Católica University, interview by author, Lima, Peru 19 June 2008.
[29] Renzo Chiri, Secretary General of the Andean Commission of Jurists (CAJ), interview by author, Lima, Peru, 8 July 2005.

and a proven commitment to human rights.[30] Furthermore, these positions were filled through an open recruitment process, contrasting to a Peruvian public sector susceptible to political patronage and lacking any strong civil service ethos.[31] That said, a high degree of inter-personal cohesion among senior personnel is also apparent, many of them alumni of the Lima Catholic University. Despite considerable turnover of key human rights personnel with the exit of Santistevan in 2000 and, in particular, the entrance of Beatriz Merino in 2006,[32] the Defensoría has "retained a high degree of mystic, in particular the mystic of efficiency".[33]

Internal structures have periodically undergone transformation often reflecting the priorities of individual Defensors. In recent years internal structures have expanded to encompass environmental rights, the protection of populations affected by violence, decentralization and good governance, social conflict and public policy, among others. Significantly, the regulative law also obligates the Defensoría to decentralise operations (Article 32). This was begun by Santistevan, with the establishment of ten decentralised offices between 1996 and 2000, and consolidated by Albán with twenty-eight departmental offices in operation by 2003. As Salomon Lerner notes, in effect, the Defensoría became the first state institution in Peru to successfully decentralise.[34]

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[30] Beginning with the appointment of Walter Albán, a well respected human rights lawyer, as Deputy Defensor on 20 July 1996, Santistevan went on to recruit other prominent members of civil society including Rocio Villanueva, Samuel Abad, Gino Costa, José Távara and Vladamir Huaroc.

[31] Maria Remy points to a "species of alliance between the public administration bureaucracy and political parties in Peru". Maria Remy, Senior Research at Institute of Peruvian Studies, interview by author, Lima, Peru, 2 September 2005.

[32] Gino Costa and José Távara left with Santistevan. Walter Albán, Rocio Villanueva and Samuel Abad departed following the arrival of Merino.

[33] César Landa [Constitutional Tribunal], 20 June 2008.

[34] Salomón Lerner, jurist and Ex-President of the Peruvian Truth and Reconciliation Commission, interview by author, Lima, Peru, 10 August 2005.

In stark contrast to other accountability actors, the Defensoría remained relatively autonomous under the Fujimori regime, subject to no imperative mandate and not effectively silenced, as occurred with the Constitutional Tribunal after a ruling against the regime.[35] Notably, it is in recent years under the Garcia administration that the formal operational autonomy of the Defensoría has been tested. For instance, despite autonomy over appointments, executive emergency decree 05-2007, issued on 16 February 2007, suspended the appointment of 10 regional representatives of the Defensoría. A petition of unconstitutionality by the Defensoría to the Constitutional Tribunal was subsequently rejected by the Tribunal leaving open the possibility of executive appointment to these positions.[36]

6.3.5. Appointment procedures

Following the regional norm, the Peruvian Defensor is elected by a majority vote of two-thirds in Congress.[37] However, such formal safeguards of plurality in appointment procedures must contend with political negotiation and the traditional dominance of the executive within the legislature. As Lerner notes, "sadly, it is inevitable that an institution such as the Defensoría in the Peruvian context would be subject to political calculation and congressional negotiation".[38] Despite this observation, a combination of the high majority

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[35] See Javier De Belaúnde, 'Justice, Legality and Judicial Reform', in John Crabtree and Jim Thomas (eds.), *Fujimori's Peru: The Political Economy*, (London: University of London, 1998), pp. 173-191.
[36] Constitutional Tribunal, Process of unconstitutionality, decision 00004-2007-PI/TC, 22 June 2007.
[37] Colombia is the only model which incorporates a formal Executive role in appointment procedures.
[38] Salomón Lerner [civil society], 10 August 2005.

required, Fujimori's sensitivity to international and domestic criticism,[39] and the relative obscurity of the institution, led to the appointment of a remarkably independent first Defensor. Following months of deadlock, the largely unknown Jorge Santistevan emerged in early 1996 to be elected by a majority of ninety-five to fifteen.[40]

However, this experience sharply contrasts with that of Santistevan's acting successor, Walter Albán, who was repeatedly thwarted in his attempts to receive official endorsement as Defensor from 2001 to 2005. Santistevan's ill-advised decision to resign and enter the presidential race in 2000 almost certainly contributed to Albán's difficulties. The political capital amassed by the Defensoría, Albán's status as a political outsider, and delayed appointments to the Constitutional Tribunal in 2005, also factored into legislative resistance, especially within the APRA bloc. The stand-off was finally resolved in 2005 with the appointment of ex-President of the Council of Ministers and former World Bank analyst, Beatriz Merino. Bypassing formal niceties, Merino was the only candidate invited to stand and consensus for her candidature was negotiated prior to the final vote (only two votes against and one abstention).[41]

Albán regards his ordeal as "symptomatic of a learning process by Congress and the eventual realisation that 80 votes will prevent them from installing one of their own".[42] Certainly, failed proposals by legislators in 2003 to reduce the votes required to a simple

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[39] The Comisión Andina de Juristas received funding from international bodies including USAID in 1995 to advance the establishment of a Defensoría del Pueblo.
[40] Santistevan was assisted by his international credentials as a former UN official, his apparent political neutrality, and a domestic network of support which spanned government and civil society.
[41] See *La República*, 'Merino regresa convertida en la Defensora del Pueblo', 30 September 2005.
[42] Walter Albán [Interim Defensor 2000-2006], 23 June 2008.

majority points to such a learning process.[43] However, the lessons learnt from this process are less apparent. The election of Merino was highly informal. As a credible contender for the presidential elections of 2006, her appointment as Defensora also served the interests of her potential political competitors. As such, appointment procedures are likely to remain a political affair, driven by partisan criteria within a highly fragmented party system.

However, despite Merino's profile as a political insider (but not party militant) compared to her predecessors, she has surprised many civil society observers with her stabilizing influence and robust defence of rights.[44] The Peruvian experience (thus far) suggests that informal appointment practices are, indeed, the Achilles heel of the Defensoría. However, the case also cautions against assuming negative outcomes. Instead, moving beyond questions of formal design, the ability of the Peruvian Defensoría to produce, and reproduce, plural coalitions of support appears to have been decisive in avoiding political capture and obsolescence. It is to such questions that the chapter now turns.

6.4. Relations

The Peruvian Defensoría offers a point of intersection between state and society, of a kind relatively scarce in Latin America. In particular, the Peruvian experience demonstrates the importance of relations outside the state, especially as conditions deteriorated under

[43] See Law Projects No. 10675/2003-CR and 10865/2003-CR, Congressional Constitution and Rules Commission.
[44] Wilfredo Ardito, Director for Economic, Social and Cultural Rights in APRODEH, interview by author, Lima, Peru, 10 June 2008.

Fujimori. In turn, democratisation and new political openings have led to a cautious re-engagement with state actors.

6.4.1. Vertical relations (executive branch)

Under Fujimori, Peru became a paradigmatic case of 'delegative democracy' and increasingly resembled an authoritarian state.[45] Although transition to democracy in 2001 led to a period of diminished executive authority, the traditional influence of the executive has re-asserted itself under the Garcia government. Each administration has posed distinct opportunities and challenges to the Defensoría.

Despite its authoritarian character, a working relationship with the Fujimori regime existed until the Defensoría's decision in 1999 to monitor and ultimately contest a third presidential term. The Defensoría appealed to the regimes discourse of renewal and internationalism and its promotion of a new public service culture was enough of a novelty to attract media attention, and the active support of Fujimori.[46] Santistevan also benefitted from his lack of political affiliation and status among civil society and international observers, his profile serving to project an image of democratic normality.[47] In turn, the Defensoría was careful to

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[45] Guillermo O'Donnell, 'Delegative Democracy', *Journal of Democracy*, vol. 5, no. 1, January 1994, pp. 55-69.
[46] *El Peruano*, 'Defensoría del Pueblo: En Salvaguarda de los Derechos Ciudadanos', 29 April 1997.
[47] Santistevan held a number of meetings with Vladimiro Montesinos, Fujimori's personal advisor, to discuss the details of initiatives such as the Ad-Hoc Commission. Samuel Abad [Deputy Defensor], 14 July 2005.

develop a less confrontational stance toward the regime. This approach yielded concrete advances in rights protection sometimes through coordination with the executive.[48]

The structural limitations and strategic caution of the Defensoría in holding the Fujimori administration to account did provoke criticism and frustration.[49] However, avoiding direct confrontation with the regime on core interests, such as re-election and corruption, was arguably crucial to the institution's preservation under extremely hostile conditions. Even with such precautions, relations with the executive were fragile from the outset with the Defensoría opposing government policy on a range of rights issues, with material consequences on more than one occasion.[50] Drawing protective cover from social and external alliances, the Defensoría also cemented its reputation as a lone democratic actor within state structures through vocal intervention in the disputed elections of 2000 and their aftermath.[51]

The contrast between the authoritarian and secretive Fujimori regime and the transitional government led by Valentín Paniagua from 2000 to 2001 could not be starker and, arguably, constitutes the high watermark for Defensoría relations with the executive, albeit under unique circumstances. Highly regarded by international actors, the Defensoría became a key partner to an OAS high-level mission in June 2000. By November, with Fujimori gone, Santistevan's approval ratings had reached 53 percent and he was even tipped to head a

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[48] "The Defensoría has to have a particular language, a unity of action with the Defensor as its moral focus. For example, Santistevan was not going to say "Fujimori is a delinquent" no? It was a language that emphasised the neutrality and autonomy of the institution. After all, the Defensoría is not an NGO that criticises". Ibid.
[49] See *Ideele* 'Control de daños o daños sin control ', no. 128, June 2000.
[50] Examples, discussed further in the next section, include the exposure of forced sterilisation and the Defensoría's involvement in successful actions against the Peruvian state before the Inter-American Court of Human Rights.
[51] See Pegram, 'Accountability in Hostile Times', pp. 75-79.

provisional government.[52] It is under these unusual conditions that he chose to resign and pursue the Presidency. Notably, his political capital quickly evaporated upon leaving the Defensoría whereas the institution's approval ratings remained robust.[53] In turn, Paniagua, enjoying high approval ratings himself and with few political debts,[54] appointed leading civil society figures to various ministries, many of whom were sympathetic to the mandate of the Defensoría.[55]

This situation produced a species of symbiosis between the executive and Defensoría with Paniagua highly receptive to the Defensoría, even consulting Albán on transition priorities.[56] Paniagua's first decree issued in February 2001 on access to information made direct reference to the Defensoría's recent report on the issue.[57] In turn, the Defensoría submitted legislative projects to Congress advocating the repeal of draconian terrorism legislation and penal codes.[58] Most significantly, the Defensoría was instrumental in convincing Paniagua of the value of a Truth and Reconciliation Commission (TRC), countering opposition from certain political elites.[59] These were important initial steps in what amounted to a brief

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[52] See *Ideele*, no. 132, April-May 2000, pp. 5-18 and *Caretas*, 'Que Proeza!' no. 1623, 15 June 2000, p. 31.
[53] See M. Tanaka and P. Zárate, *Valores democráticos y participación ciudadana en el Perú 1998 – 2001*, (Lima: Instituto de Estudios Peruanos, 2002), p. 20.
[54] Paniagua polled 57 percent in January 2001 but did not run for election, Apoyo Opinion y Mercado, año 1, no. 1, 22 January 2001.
[55] Appointments included Pedro Franke, Diego García-Sayán, Ernesto de la Jara, Marcial Rubio, Fernando Tuesta and Susana Villarán, among others.
[56] Albán recounts being asked by Paniagua: "what are the priorities for the Defensoría? To which I replied, access to information as this is essential for increasing public confidence in the state". Walter Albán [Interim Defensor (2000-2006)], 23 June 2008.
[57] See Supreme Decree No. 018-2001-PCM.
[58] See Decree Law No. 25475.
[59] Carlos Iván Degregori, academic and former Commissioner of the Truth and Reconciliation Commission, interview by author, Lima, Peru, 30 June 2008.

'democratic spring'. As Albán notes, with the election of a new congress in July 2001 the special relationship was effectively lost.[60]

Toledo begun his term in July 2001 by promising his would "not be a government of transition but rather government as usual".[61] However, a litany of errors in personal judgement, combined with severe political and social challenges, served to undermine this claim.[62] By October 2002 his approval ratings had plummeted from fifty-nine to fourteen percent.[63] In this context, Toledo made little progress in the reform agenda begun by Paniagua and relations with Albán remained distant. Notably, Toledo did not expend political capital on supporting Albán's candidature within Congress – put to a vote upon two occasions. As a result of this legislative impasse and a muted personal style, Albán's political profile was also markedly lower than Santistevan's, making coordination a less appealing proposition to government. As the administration became increasingly incapacitated by rising social conflict, Toledo did, on occasion, call upon Albán for assistance "but it was always with the *papas quemadas* [potatoes burnt]".[64]

On a substantive level, Toledo also showed little consistent interest in advancing a democratic or rights agenda. Initial signs of promise were short-lived. Activation of the TRC in August 2001 was overshadowed by Toledo's appointment of a military representative and two Catholic priests. The President's lack of interest in the Commission's

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[60] Walter Albán [Interim Defensor 2000-2006], 23 June 2008.
[61] *"Toledo en su primer discurso en agosto del 2001 dijo que él no era un gobernante de transición, que él iba a gobernar de verdad"*. Quoted by Javier Ciurlizza, Paniagua's Chief of Staff and Executive Secretary of the Truth and Reconciliation Commission, interview by author, Lima, Peru, 24 August 2005.
[62] See Taylor, 'From Fujimori to Toledo'.
[63] Apoyo Opinión y Mercado, 'Opinión Data', Ano 3, no. 35, 7 July 2003, p. 2.
[64] Walter Albán [Interim Defensor 2000-2006], 23 June 2008.

Final Report published in 2003 was also apparent.[65] Furthermore, appointment of credible civil society figures to key ministries was short-lived.[66] Nevertheless, the Defensoría cultivated good relations with individual Ministers, including, somewhat surprisingly, the Minister of Energy and Mines, Jaime Quijandria, but met with resistance elsewhere, especially in developing a public policy mandate.[67]

Despite a marked decline in coordination under Toledo, it is important to note that relations were generally defined by indifference rather than conflict. In contrast, under Garcia, relations with the executive have plumbed new depths of hostility. This is largely due to the appointment of a highly visible and politically able Defensora who consistently out-polls the President.[68] Notably, Merino has never been invited to the Presidential Palace and is the subject of virulent attacks by administration officials.[69] As such, the Defensoría confronts a government intolerant of opposition and intent on concentrating power, with the legislature granting Garcia wide-ranging legislative authority in 2007.[70] The administration has clashed repeatedly with the Defensoría, resulting, on occasion, in u-turns on government policy.[71]

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[65] Upon the completion of a Final Report that ran to nine volumes, Toledo requested a 10 page 'executive summary' from the Commission. See *Caretas*, 'Comisión de La Verdad: Los Entretelones', no. 1788, 4 September 2003.

[66] Appointments included Fernando Rospigliosi, Susana Villarán, Nicholas Lynch, and former Deputy Defensor Gino Costa. Many of these individuals had resigned by 2003.

[67] Nicholas Lynch, a Minister of Education under Toledo states: "I considered [the Defensoría's intervention in education policy as an infraction of the Constitution. The Defensoría has no mandate over sector policy. If it did, why is it not intervening in fiscal policy? Because it would be a complete disaster". Nicholas Lynch, academic and former Minister of Education, interview with author, Lima, Peru, 10 June 2008.

[68] Merino's public approval rating of 55.7% in November 2008 far exceeds any other public figure in Peru, with President Alan Garcia languishing at 23.1%. CPI, 'Estudio de Opinión Publica a Nivel Perú Urbano', 23-28 November 2008.

[69] *La República*, 'La Defensora y el atacante', 11 November 2007.

[70] Law no. 29009 delegates legislative authority to the Executive in order to implement the Free Trade Agreement between Peru and the US.

[71] The Defensoría publicly denounced the government's failed attempt in 2007 to re-instate the death penalty for child sex offenders jeopardizing Peru's membership of the IACHR. At the end of November 2007, the administration proposed to publish the names of all ex-felons convicted on terrorism charges. Merino,

More generally, the relative openness of the state has diminished with functionaries replaced by APRA militants, leaving the Defensoría increasingly isolated.[72]

Within this context, Merino has been accused of timidity toward the Executive, especially in relation to a steep increase in police violations of civil rights.[73] This contrasts with her strong commitment in the area of poverty and exclusion, possibly reflecting the priorities of her former employer, the World Bank. Although wary of direct confrontation with Garcia, Merino has been surprisingly effective in reining in political and business elite interests.[74] Furthermore, alliances have been forged with actors working from within the executive branch. For instance, Prime Minister Jorge Del Castillo during his tenure repeatedly requested the intervention of the Defensoría in conflict situations.[75] In turn, Del Castillo came to the defence of Merino against colleague's attacks.[76]

In sum, despite the challenges posed by an overweening executive, coordination with the executive branch within a new democratic context has been possible, even if more often based upon inter-personal norms than formal arrangement. This marks a crucial difference to the experience of the Defensoría under Fujimori where interaction with other state actors

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alongside other public figures such as Eduardo Pérez Rocha ex-General of the National Police of Peru, strongly criticized this initiative as counter-productive.

[72] Ruth Borja, Director of the Center of Information for Collective Memory and Human Rights, interview by author, 9 June 2008.

[73] In the five years of Toledo's government, 15 individuals died at the hands of the police. 18 individuals died in the first two years of the Garcia government. See APRODEH, *Serios Peligros Para Los Derechos Humanos: La Criminalización de la Protesta en el Gobierno de Alan García*, (Lima: Asociación Pro Derechos Humanos, 2008).

[74] Some speculate that Merino's access to highly sensitive information on tax and profit arrangements as Director of Peru's tax authority (SUNAT) in the 1990s may have deterred business elites from overtly attacking the Defensora.

[75] *La República*, 'Defensora Merino defiende a nativos Ashuar y aclara al premier Del Castillo', 20 October 2006.

[76] *Agencia Perú*, 'Del Castillo pide respetar opinión de Merino sobre ley que regula ONGs', 8 November 2006.

was largely conditional upon the client status of the respective institution with the Commander-In-Chief. As developed in the next section, a return to democracy has also opened up new areas of coordination with horizontal accountability actors. Nevertheless, reflecting the broader challenges of democratisation, coordination in one instance may be mirrored by conflict in another.

6.4.2. Horizontal relations (state checks and balances)

Peru displays some of the worst rule of law indicators in Latin America and a judiciary viewed as deeply flawed and illegitimate by a majority of Peruvians.[77] As Kenney accurately depicts, under Fujimori 'it is as if the legitimacy derived from vertical accountability – with its roots deep in the democratic tradition – were at war with institutions of horizontal accountability'.[78] This analysis elucidates what remains a deeply problematic horizontal tier of accountability institutions in Peru's restored democracy. Nevertheless, relations between the Defensoría and a range of horizontal agencies, including the judiciary, have improved.

Under Fujimori, the judiciary became a partisan political tool with the Supreme Court packed with regime supporters. The creation of the Executive Commissions of the Judiciary and a similar body for the Public Prosecution Service, ostensibly to monitor an institutional reform programme, served to politicise both institutions until their deactivation in 2000.[79] Furthermore, prominence was given to the military judicial system within areas commonly

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[77] The judiciary consistently receives public approval ratings far below any other state institution, with the exception of congress. See *Caretas*, 'Los Faxes de Canaán', no. 2052, 6 November 2008 (judiciary 7.5 percent approval, political parties at 2.5 percent).
[78] Kenney, 'Horizontal Accountability: Concepts and Conflict', p. 72.
[79] See De Belaúnde, 'Justice, Legality and Judicial Reform', pp. 173-191.

beyond its jurisdiction. The legal arena presented the Defensoría with its most severe challenge. Resistance was encountered from a suspicious judiciary, with cooperation in only 25 percent of all cases presented by the Defensoría between 1996 and 1998.[80] As such, relations were defined largely by conflict with Deputy Defensor Samuel Abad, a noted jurist, clashing repeatedly with the regime on issues of military jurisdiction and draconian anti-terrorism laws.[81]

Paniagua and Toledo did much to dismantle Fujimori's authoritarian apparatus. Nevertheless, the judiciary has proven resistant to further reform, rejecting implementation of a Special Commission for the Reform of Judicial Administration's (CERIAJUS) recommendations.[82] As such, coordination remains limited by the insular character of the judicial branch and individual preferences. César Landa identifies three groups within the judiciary: those sympathetic to human rights; those that consider human rights a partisan agenda; and, a neutral group who tend to subscribe to formalistic legal codes.[83] As such, while a minority are receptive to the work of the Defensoría, others regard its intervention with concern and hostility. Notably, an institution, such as the Supreme Court, contains elements of all three groups, with former President, Francisco Távara (2006-2008), widely regarded as a constructive interlocutor.[84] However, many judges have only a tenuous understanding of the role of the Defensoría, particularly among judicial personnel outside

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[80] 'Cooperation' is defined as 'the total disposition of the institution in question to the requirements and recommendations of the Defensoría'. Defensoría Annual Report 1998-1999, p.351.
[81] Pegram, 'Accountability in Hostile Times', p. 68-69.
[82] The CERIAJUS proposal concerning Constitutional Reform was passed by a majority without the consent of the President of the Judiciary, Hugo Sivina, The Public Ministry and the Academy of Magistrates.
[83] César Landa [Constitutional Tribunal], 20 June 2008.
[84] Ismael Muñoz, [civil society], 19 June 2008.

urban centres.[85] The Defensoría has attempted to address this by conducting workshops with judicial functionaries and judges.[86] However, responsiveness to the Defensoría's work remains highly contingent.[87]

Of particular note is the relationship between the Defensoría and the Constitutional Tribunal as normatively complementary custodians of the Constitution.[88] The dismissal of three Tribunal magistrates in May 1997 removed one of the Defensoría's fundamental channels of judicial recourse and relations rapidly deteriorated, reflected by a breakdown in coordination.[89] Reinstated by Paniagua, relations have since improved between the two institutions with the Defensoría presenting 13.42 percent of all demands of unconstitutionality placed before the Tribunal by 2004.[90] However, unlike other Tribunals in the region, the Peruvian institution has made little inroads into jurisprudence outside a core civil and political arena. Furthermore, concerns have been recently raised as to the Tribunal's independence.[91] Under Merino, there have been regular meetings between institutional heads, but subjects are generally approached on an individual basis.[92] In turn, personnel within the Defensoría are reticent to characterise complementarity in terms of alliance. Rather, they argue such outcomes are simply the result of each institution fulfilling

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[85] Fernando Castañeda Portocarrero, Defensor for Constitutional Affairs, interview by author, Geneva, Switzerland, 27 March 2009.
[86] Ruth Borja [civil society], 9 June 2008.
[87] For instance, requests by the Defensoría to the Ministry of Justice for a chronogram on compliance with IACHR rulings have received no official response. Eduardo Vega, Defensor for Human Rights and the Disabled, interview by author, 30 June 2008, Lima, Peru.
[88] The Constitutional Tribunal is an independent and autonomous entity and the highest legal authority in matters of constitutionality of Peruvian laws and decrees.
[89] Between 1998 and 1999 the Defensoría submitted only two amparo actions, with one of those being a joint action. Defensoría Annual Report 1999-2000, pp. 339-341.
[90] Defensoría del Pueblo, *Ocho años de procesos constitucionales en el Perú: Los aportes de la Defensoría del Pueblo 1996-2004*, no. 24, (Lima: Defensoría del Pueblo, 2004).
[91] The abrupt resignation of the President of the Tribunal in July 2008 was widely regarded as a response to external interference.
[92] César Landa [Constitutional Tribunal], 20 June 2008.

its function.[93] This may also reflect the personal preferences of individual Defensors, with Merino notably less focused on advancing the Defensoría's mandate through legal action.

The 1993 Constitution undermined the horizontal function of the legislature. Elimination of the Senate chamber ensured that the official party majority in a unicameral Congress prevailed and Fujimori could rely on Congressional endorsement.[94] This client status meant the Defensoría had few allies in the legislature.[95] Indeed, Santistevan became the focus of a proposed congressional investigation for misconduct in 2000.[96] Reflecting a regional trend, relations between the Defensoría and a highly fragmented Congress following transition have continued to be defined by partisan conflict rather than coordination, typified in the electoral experience of Albán. In part, this stems from resentment toward a perceived competitor that consistently receives media attention and much higher public approval ratings than Congress. It also reflects a generally resistant culture toward all forms of horizontal oversight, with Congress often ignoring or modifying legal decisions. According to one functionary, the introduction of the concept of 'political accountability' in the Defensor's first report to Congress "was like a bomb going off, and the legislators, many of them were left stunned...asking what is this 'accountability'?"[97]

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[93] Federico Chunga Fiestas and Edson Berríos Llanco, Commissioners in the Area of Constitutional Affairs, interview by author, Lima, Peru, 16 June 2008.
[94] In the 1995 presidential elections the traditional political parties between them received only 7% of the popular vote against Fujimori's 64%.
[95] See Samuel Abad, 'El Ombudsman o Defensor del Pueblo en la Constitución Peruana de 1993; Retos y Limitaciones', *Boletín Mexicano de Derecho Comparado*, vol. 29, no. 86 Mayo-Agosto, 1996, pp. 401-417.
[96] *Caretas*, 'La Batalla Por la Verdad', 9 March 2000.
[97] Carlos Alza, Former Deputy Defensor and Head of Public Services and the Environment, interview by author, Lima, Peru, 6 July 2005.

Despite such entrenched challenges, relations have improved under Merino. Her background as a legislator and former Prime Minister has translated into astute tactical engagement with Congress, including use of informal channels.[98] The relative robust budgetary and operational standing of the Defensoría attests to this adept political manoeuvring, distinct to the diplomatic style of Santistevan or the politically-averse Albán. Elena Alvites describes this relationship as "a core normative alliance", noting advances made on decentralisation policy, among others.[99] Indicative of this development are increasing requests by legislators and their advisors for review of legislative proposals by the Defensoría.[100] Opinion is divided as to how important this advance is for the institutionalisation of the office. Observers have flagged the risk of politicisation as outweighing the potential benefits of engagement as well as neglect of other relationships, especially within the legal sector.[101] However, senior personnel consider engagement as vital to the Defensoría's role as a public policy change agent and appear to be aware of the attendant risks.[102]

Beyond the courts and legislature, the Defensoría also interacts with the principal horizontal agencies responsible for legal control and investigation: the Public Prosecution Service

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[98] "Merino was in congress for years and knows many of them very well. She can call people up and say "*que pasa*?" This level of political navigation is not necessarily good". Senior functionary of the Defensoría, interview by author, Lima, Peru, 17 June 2008.
[99] Elena Alvites, Defensora for Decentralisation and Good Government, interview by author, Lima, Peru, 13 June 2008.
[100] Federico Chunga and Edson Llanco [Defensoría], 16 June 2008.
[101] Samuel Abad, Samuel Abad was Deputy Defensor and Head of Constitutional Affairs (1996-2007), interview by author, Lima, Peru, 18 June 2008.
[102] Susana Silva Hasembank, Defensora for State Administration (2007-present), interview by author, Lima, Peru, 16 June 2008.

(MPN), led by the Attorney General, and the Comptroller General.[103] Indeed, an antecedent to the Defensoría was created within the MPN in the 1979 Constitution.[104] As with offices throughout the region, the Peruvian Defensoría was initially envisaged as an auxiliary investigative agent to the over-burdened MPN. Politicised by an Executive Commission in 1996 and the appointment of a regime client as Attorney General, the MPN under Fujimori failed to fulfil its prosecutorial function and was largely unresponsive to the Defensoría. In effect, although lacking coercive powers, the Defensoría provided an inadequate, but important, palliative to this absent tier of horizontal accountability.

The situation has improved following 2000. In a context of many more autonomous institutions, such as the MPN, the Defensoría has also had to redefine itself in a relatively denser horizontal apparatus. Relations with the MPN have generally been good, with cooperation rising from 42 percent in 1998 to an average of 77 percent during Albán's tenure but challenges remain.[105] For example, the Defensoría has highlighted the failure of the MPN to pursue claims of police abuse as well as abuse of authority by some prosecutors.[106] In turn, some lower-level prosecutors question the Defensoría's investigative competence over human rights violations.[107] This is indicative of what Federico Chunga terms a 'two-tier impact', drawing a distinction between the receptiveness of high officials and their subordinates to the work of the Defensoría.[108]

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[103] The Public Prosecution Service is an independent and autonomous entity mandated to balance a dual brief of prosecuting crimes as well as providing state oversight.
[104] Organic Law of the Peruvian Public Prosecution Service, Legislative Decree 52, Heading III. March 1981.
[105] Defensoría Annual Reports 1998 to 2005. Data is not available for 1999, 2000 and 2004.
[106] See Defensoría Annual Report 2003-2004, pp. 72-78.
[107] Ibid.
[108] Federico Chunga and Edson Llanco [Defensoría], 16 June 2008.

A wide range of specialised regulatory agencies also populates the Peruvian state. Regulatory agencies were created alongside the Defensoría in the 1990s to oversee newly private public services. Some agencies such as OSIPTEL (telecommunications) and CTE (electricity tariffs) have often been receptive to the work of the Defensoría, reflecting the sensitivity of the private sector to social mobilisation. Others have shut their doors to the office, possibly due to conflicting loyalties among some civil servants.[109] Such dynamics inform inter-agency relations. Opportunities for coordination are often limited due to narrow mandates and the autonomy of these agencies has been subject to encroachment under Garcia.[110] Within this category, further problems arise in the case of internal Defensorías within the police and health sector which often serve to duplicate functions as well as confuse the public.[111]

To contrast experiences, a notable case of coordination is the Defensoría's work alongside the National Registry of Identification (RENIEC) on issues of identity, especially in rural zones. As a result of this campaign, RENIEC achieved an approval rating of 70 percent in 2007.[112] The Defensoría subsequently emulated this focus by creating its own internal office for identity. Conversely, consensus surrounds the intransigence, until recently, of the National Election's Board (JNE) toward Defensoría jurisdiction over electoral matters.[113] The Defensoría's important – if idiosyncratic – role in the electoral fraud of 2000 has led the office to carve out a novel electoral supervision mandate, not foreseen in its formal design.

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[109] José Távara [Deputy Defensor 1998-2001], 18 July 2005.
[110] In 2007 Garcia appointed a party militant as Director of OPSITEL. This was resisted by OPSITEL Council Member who subsequently jointly resigned. Furthermore, the government has proposed all regulatory agencies be merged. See *La República*, Fusionar organismos reguladores hará menos eficiente su labor', 25 May 2009.
[111] Federico Chunga and Edson Llanco [Defensoría], 16 June 2008.
[112] *El Comercio*, Apoyo Opinión Mercado, 17 September 2007.
[113] Samuel Abad [Deputy Defensor], 18 June 2008.

Nevertheless, the recent signing of an inter-institutional agreement to prevent 'electoral conflict' may signal a thawing of relations.[114]

6.4.3. Social relations (organised civil society)

In contrast to the varying experiences of other regional ombudsmen, the Peruvian model has cultivated a strong support base among human rights NGOs, in part thanks to a highly organised human rights network and the direct transfer of personnel from respected organisations to the Defensoría.[115] The relationship has not always been harmonious. Initially, the Defensoría was criticised for siphoning off valuable personnel and some funding.[116] However, the committed actions undertaken and results achieved on the national stage have been widely recognised as outweighing the negatives.[117]

Santistevan frequently referred to the role of the Defensoría as a bridge between the state and civil society.[118] During the Fujimori era, both the Defensoría and NGOs drew strength from this shared human rights platform, NGOs providing crucial legitimacy to a young institution and the Defensoría amplifying the human rights agenda at the national and local level.[119] An

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[114] *El Comercio*, 'El JNE y la Defensoría del Pueblo suscriben convenio para prevenir conflictos electorales', 29 September 2009.
[115] For contrasting experiences see Michael Dodson and Donald Jackson, 'Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala', *Latin American Politics and Society*, vol. 46, no. 4, Winter 2004, pp. 1-27.
[116] Jorge Farfan, analyst for Legal Defence Institute (IDL), interview by author, Lima, Peru, 26 August 2005.
[117] Francisco Soberón, Executive Secretary of the CNDH until 2006, interview by author, Lima, Peru, 16 August 2005.
[118] Jorge Santistevan, 'Defensor que no critica, que renuncie', *Ideele*, Revista del Instituto de Defensa Legal, no.119, June 1999, p. 22.
[119] Javier Torres asserts that "although the Coordinator was also important at the local level, the Defensoría was a state institution with resources. If, as Martin Tanaka says, NGOs are political brokers, then the Defensoría was a broker with more muscle..." Javier Torres, Director of Rural Education Services (SER), interview by author, Lima, Peru, 19 June 2008.

altered democratic panorama post-2000 has led to a re-assessment of priorities and relations for these actors. In part, this stems from a process of adaptation to new circumstances. Some observers argue that many actors, including the Defensoría and NGOs, lowered their guard with the entrance of Paniagua and Toledo and remain in a process of re-organisation.[120] Furthermore, tensions within civil society over how to engage in the broader scheme of social, economic and cultural rights have been mirrored within the Defensoría.[121]

Even so, Albán, with his civil society background, maintained strong relations with prominent human rights NGOs. In turn, Albán began the process of orientating the Defensoría toward social rights, conducting important investigations into pensions, health and water. However, it is the issue of social conflict that initially provided the Defensoría with fresh oxygen of legitimacy. As attested to by various NGO representatives:

> The Defensoría always arrives. Even to places where the police will not enter. For instance, during the 2004 conflict in Puno the police requested that the Defensoría enter the conflict zone first. In the case of Ilave, the people recognized that the Defensoría arrived and tried. All other institutions refused.[122]

Following an internal review in 2004, the Defensoría began to re-orientate toward applying a rights optic to issues of public policy. This move has been expanded and consolidated under Merino. Despite the fears of some civil society observers that "she would bring in a lot of

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[120] Javier Ciurlizza [Paniagua's Chief of Staff], 24 August 2005.
[121] María Isabel Remy [civil society], 2 September 2005.
[122] Javier Torres [civil society], 19 June 2008.

lawyers from Harvard",[123] she has largely silenced her detractors and "appears to feel great responsibility when it comes to issues of poverty and social exclusion".[124]

Despite this largely positive assessment, others perceive an official policy of detachment from the NGO community. For instance, the lack of high-level representation at the inauguration of a new Executive Secretary of the Coordinator in May 2008 was noted. Such a perception has provoked consternation among a human rights community increasingly subject to attacks by the Garcia administration.[125] Senior functionaries within the Defensoría deny this claim but agree that the relationship has changed. They suggest NGOs are important sources of information but do not accord them special status. For instance, unlike her predecessors, Merino "is uncertain as to the value of inter-institutional agreements with NGOs as they merely serve to replicate existing obligations".[126] Distancing the Defensoría from human rights NGOs would constitute a serious concession to the institution's detractors, and the evidence suggests otherwise, with the Defensoría the only state institution to publicly defend NGOs.[127] A more complex side to the debate concerns the growing influence of militant social movements engaged in direct confrontation with the state.

The Fujimori government was arguably the first in Latin America to appreciate fully the power of systematically bankrolling the media to further the government's own political

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[123] María Isabel Remy, Senior Research at Institute of Peruvian Studies, interview by author, Lima, Peru, 11 June 2008.
[124] Wilfredo Ardito [civil society], 10 June 2008.
[125] Human rights NGOs have faced growing hostility from government officials and politicians linked to the previous Garcia (1985-1990) and Fujimori administrations. See Pegram, 'Weak institutions, rights claims and pathways to compliance', p. 18-19.
[126] Susana Silva Hasembank [Defensoría], 16 June 2008.
[127] *La República*, 'Ley contra ONGs enfrenta a Beatriz Merino con Mercedes Cabanillas', 7 November 2006.

ends.[128] This situation did not however preclude the Defensoría from enjoying a working relationship, particularly with the print media, actively encouraged at the outset by Fujimori.[129] However, access was largely dictated by the independence of the media outlet or partisan criteria. The return to democracy in 2000 did open up important space in the public sphere for watchdog media.[130] But it should be noted that the majority of media outlets in Peru remain in the hands of a small group of private interests and, in particular, television presents an ideological consensus that is essentially right-wing and pro-market.[131] Furthermore, there are indications of a return to government interference after a brief hiatus under Toledo.[132] Even so, the Defensoría has taken advantage of a more accessible media environment, with Merino conducting television interviews and the Defensoría presenting a weekly broadcast on Channel 7 titled 'In the company of the Defensoría' [De la Mano con la Defensoría] since 2007.[133]

The public authority of the institution is borne out in Figure 6.3, with public confidence in the Defensoría largely correlating with Merino's personal approval ratings (although, disapproval ratings for the institution are markedly higher).[134] The stability and levels of confidence in the institution stand in stark contrast to other state institutions, with congress and the judiciary vying for bottom place. Figure 6.3 further suggests that awareness of the Defensoría has increased, with the number of those unaware of the institution falling from

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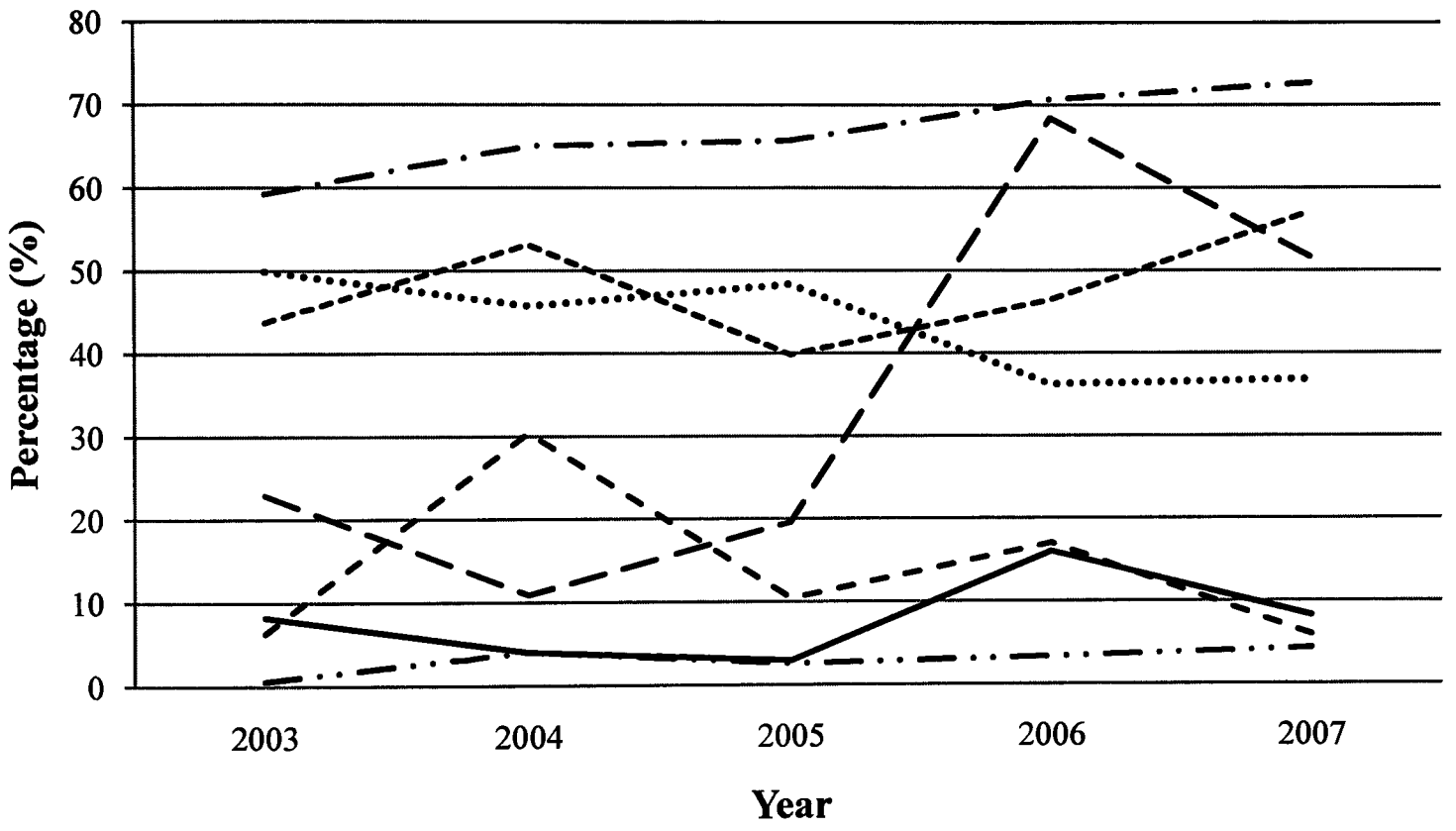
[128] Conaghan, *Fujimori's Peru*, pp. 140-162.
[129] See for example *El Sol*, 'Defensoría del Pueblo Sostiene Que es Urgente Mas Transparencia en la Administración Pública', 15 March 1999.
[130] A large but volatile printed press of about 27 dailies, including tabloids, is concentrated in Lima, due primarily to distribution problems and lower literacy rates in rural areas.
[131] For a concise statement of the Garcia government's thesis on social and economic development, see *El Comercio*, Alan García: 'El sindrome del perro del hortelano', 28 October 2007.
[132] See *Peru 21*, "El presidente es quien manda en el Canal 7", 3 September 2009.
[133] Television interview with Beatriz Merino, *Pulso*, broadcast 10.30 PET, 29-06-08.
[134] See p. 235, fn. 67.

30.4 percent in 2004 to 5.9 percent in 2007. It is important to emphasise that the collaboration between the Defensoría and opposition forces promoting human rights and democracy during the Fujimori era underpins the contemporary legitimacy of the institution.[135] Opinion poll data illustrates the popularity of Santistevan and the Defensoría from August 1996 to July 2000, fluctuating near 50 percent for much of this period, rising to a high of 64 percent amidst the drama of the 2000 election.[136]

Figure 6.3: Public confidence in the Defensoría del Pueblo [DP] (yes, no, and don't know) and other state and non-state institutions (2003-2007)

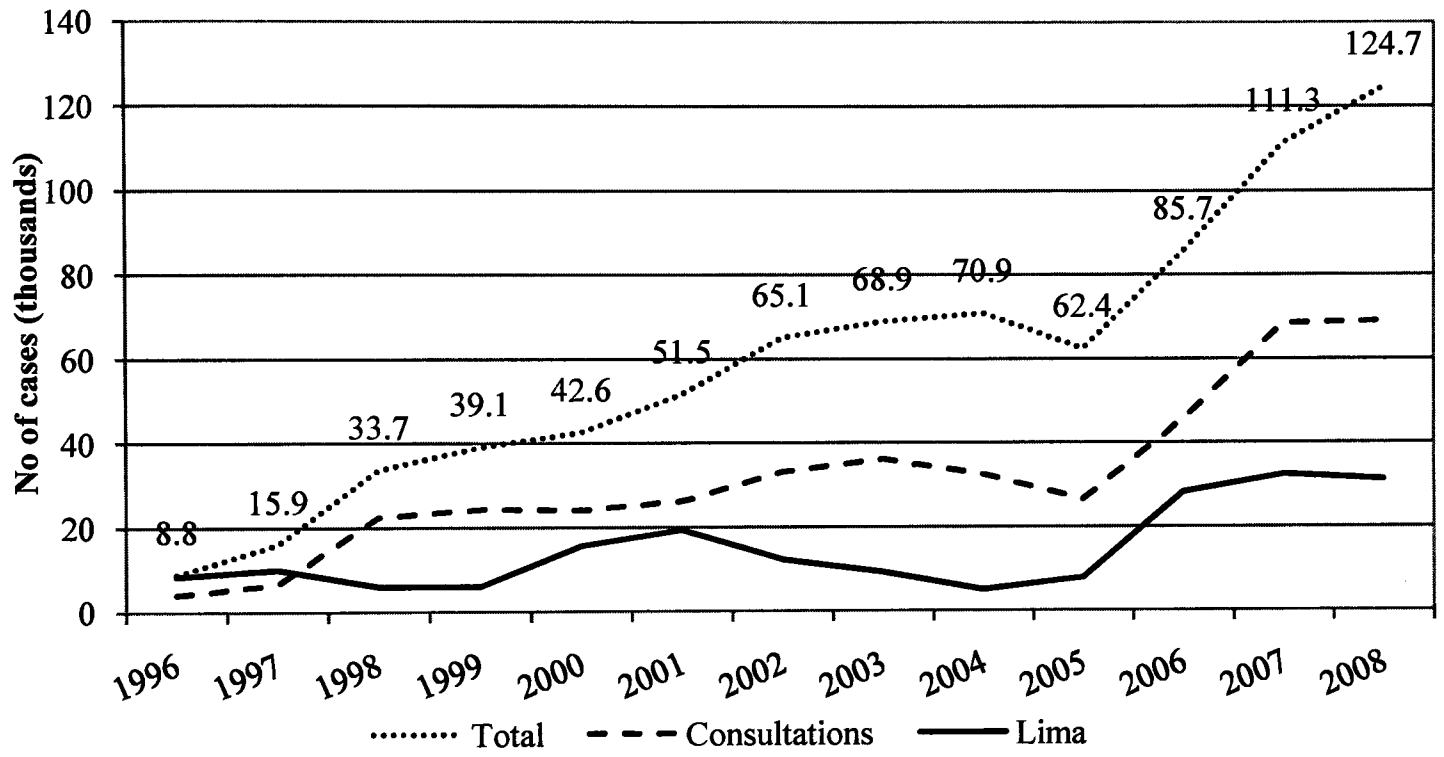


Source: Grupo de Opinión Pública de la Universidad de Lima, Estudio 387, Barómetro Social: IV Encuesta Annual Sobre Confianza en las Instituciones, Lima Metropolitana y Callao, 27-28 October 2007.

[135] Peruvians consistently expressed their dissatisfaction with the autocratic methods employed by the regime throughout the 1990s, even as they simultaneously supported Fujimori at the ballot box. See Conaghan, *Fujimori's Peru*, pp. 5-6.
[136] See Pegram, 'Accountability in Hostile Times', p. 73-74.

As such, despite challenges, the media has proven to be a valuable resource in promoting the image of the Defensoría, in particular the high approval ratings of Beatriz Merino, as well as informing the citizenry of their rights and available institutional channels. In part, the high profile of the Defensoría since Merino's arrival explains the dramatic rise in complaints since 2005, as shown in Figure 6.4.

Figure 6.4: Total complaints received by the Peruvian Defensoría (1996-2008)



Source: Defensoría Annual Reports 1996-2009
No data available for total Lima cases in 1999. Figure duplicates 1998.
Total cases on data labels are in thousands.

It is also important to acknowledge that outside of the organised human rights community, civil society in Peru remains fragmented, often regionally isolated and this is exacerbated by the lack of a rights culture in Peruvian society. The Defensoría has made inroads into engaging with the citizenry outside Lima, as attested to in Figure 6.4 with reception of cases from the Lima office as a percentage of the total falling from 38 percent in 2000 to 7 percent in 2004 following extensive decentralisation. However, a host of challenges confront the

institution in engaging those traditionally most marginalised in Peruvian society and facilitating their organisation as accountability advocates. Many citizens still do not know of, or understand, the function of the Defensoría as shown by persistently high levels of consultations in Figure 6.4 (cases received that fall outside the jurisdiction of the institution). Given that many individuals approach the Defensoría as a last resort, such misunderstanding may severely jeopardise the ability of the institution to meet the demands of those claimants most in need.[137]

6.4.4. External relations (international actors)

The international presence in Peru and its influence over the Fujimori regime was significant, finding an expression in the international community's democratic and human rights agenda toward Peru.[138] Santistevan, upon assuming the post, turned toward the task of enlisting international guardians. As discussed above, the role of international cooperation in financially supporting the Defensoría has, until recently, been crucial to the development of the institution. Above all, the ability of the Defensoría to produce results in difficult operational circumstances has impressed the international donor community.[139]

The Defensoría has also integrated into a developed and responsive regional network of actors, drawing international strength from its prominent role in the IOI and FIO.[140] The

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[137] For further discussion see Pegram, 'Weak institutions, rights claims and pathways to compliance'.
[138] Fujimori felt impelled to brief the OAS Commission after the 1992 coup to reassure them that democracy would be quickly restored to Peru.
[139] Carlos Alza [Deputy Defensor 2007-2008], 6 July 2005.
[140] Santistevan became Vice-President of the IOI in 1999 and Merino became the Vice-President of the FIO in 2007.

Defensoría community further provided a channel into the world of international government and organisations. It is clear that Santistevan travelled extensively during the first two years, to seek advice and recognition for the new institution.[141] This contrasts with Merino who appears less focused than either of her two predecessors on external relations, preferring to send subordinates to UN meetings and making little use of the IACHR petition system. Arguably, the importance of external relations has, inevitably, declined with the return to democracy and re-instatement of functional domestic rights frameworks, of which the Defensoría forms an integral part.

6.5. Rules of access

In the Peruvian context of institutional informality, weak enforcement of formal rules, and severe power asymmetries, it is the interaction of formal rules and institutional context that shapes access to accountability arenas within and outside the state.

6.5.1. Vertical access

In the case of Fujimori, popular approval and strategic alignment was the over-riding motive for early 'state vertical' access, with the government viewing the Defensoría as a useful tool by which to emphasise its commitment to rights observance, modernity and efficiency. The Defensoría encouraged a perception of efficiency by aggressively applying itself to monitoring the state administration. In particular, Defensoría campaigns on access to public

[141] Santistevan and Defensoría personnel took a total of 26 international trips between March 1997 and May 1998.

services, excessive tariffs, the quality of service, and the supervision of regulators played well with the regime and among the Peruvian middle-class.[142] This early focus on public services paved the way for expansion of the Defensoría's mandate and the construction of a fragile zone of independence. As Samuel Abad reflects, "under authoritarian conditions small achievements in one area can become a source of legitimacy, political capital that can then be redirected elsewhere".[143] Certainly, the ability of the Defensoría to generate space within the political apparatus which is then difficult to reduce is a core strategic tool and also evidenced under Albán (decentralisation) and Merino (public policy).

The first priority for Santistevan was to position the Defensoría as a human rights actor without provoking regime backlash. To achieve this he used the office's incipient political capital to successfully advance the Ad-Hoc Commission of the Innocents, the result of years of pressure from the human rights community and seven failed legislative initiatives to address the issue of thousands of innocent Peruvians jailed on dubious terrorism charges.[144] In a context of high domestic and international visibility, Fujimori himself became personally interested in the subject and consented to a draft of law no. 26655 and its passage through Congress, largely guided by Santistevan.[145] As one observer notes, "in this instance, the Defensoría's supervisory mandate assumed a more executive character".[146] The initiative not only cemented the legitimacy of the Defensoría, it also showcased a distinctive political operator:

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[142] For instance, *El Comercio*, 'Defensores del pueblo abogan por los consumidores', 9 September 1998.
[143] Samuel Abad [Deputy Defensor 1996-2007], 18 June 2008.
[144] See Pegram, 'Accountability in Hostile Times', pp. 67-8
[145] Jorge Santistevan [Defensor 1996-2000], 22 February 2006.
[146] Eduardo Vega [Defensoría], 30 June 2008.

> In the case of the Constitutional Tribunal it was a foregone conclusion. The Constitutional Tribunal was not going to negotiate with the government to arrive at a solution. The Defensoría could and did negotiate with the government, with Fujimori, and with Montesinos.[147]

Even under authoritarian conditions, therefore, access to state vertical arenas was possible, if highly contingent. As relations deteriorated, coordination also diminished with the Defensoría focusing increasingly on unpopular government policy such as the 'faceless judges', in any case due to expire in October 1997.[148] The early achievements of the Defensoría's in this field continue to resonate, with the office remaining closely associated with the dismantling of the security state. For instance, a proposal by Garcia in 2007 to publish the names of all ex-felons convicted on terrorism charges was successfully resisted by Merino, alongside Eduardo Pérez Rocha ex-General of the National Police of Peru.[149] The modus operandi of the Defensoría to avoid conflict in pursuit of resolution, however possible, is a key proviso to, albeit limited, state vertical access.

Conversely, the Paniagua transition administration practically incorporated the Defensoría within government. With unprecedented access, the Defensoría was instrumental in advancing projects through vertical channels, including penitentiary reform, recognition of IACHR jurisdiction, and transparency legislation. Paniagua's Chief of Staff recalls: "I used to speak with Santistevan every day; I would ask "this law, how shall we do it?" They would

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[147] Javier Ciurlizza [Paniagua's Chief of Staff], 24 August 2005.
[148] *La República*, 'Defensor del Pueblo, Jorge Santistevan, Plantea: Deben Desaparecer "Jueces Sin Rostro', 26 January 1997. The 'faceless judges' refers to the practice of trying the accused before a panel of judges with their faces concealed by balaclavas, ostensibly to protect their identity.
[149] *Perú 21*, 'La polémica propuesta de García sigue generando resistencias', 20 November 2007.

send law projects to the government and we would simply sign them".[150] The idiosyncrasy of this moment is evident with comparison to what followed. Although not comparable to Fujimori, vertical access under Toledo and, even more so, under Garcia has markedly diminished. The lack of receptivity under Garcia is pronounced, with Merino herself commenting, "I cannot make recommendations to the President, only exhortations".[151] Operating within a conflictive, but democratic, setting highlights the advantage of Merino's formation in politics. As Susana Silva claims, "the Defensoría forms part of the body politic and for this reason we must take great care in sustaining its voice".[152]

On substantive matters, Toledo may have relented to a human rights agenda but the Garcia administration has proven to be an obdurate opponent, its revision of the National Plan for Human Rights 2006-2010 upon assuming office an early indication. In turn, the granting of wide-ranging legislative powers to Garcia, ostensibly to implement a Free Trade Agreement, has led to various executive decrees which threaten to criminalise social protest, grant police immunity, and undermine land rights.[153] The Defensora has called on Garcia and Congress to respect the legality of the Constitution and "stop banging the drum of war".[154] However, the impact of such declarations on government behaviour is minimal. Nevertheless, one arena of state vertical access is social conflict. During his tenure, Prime Minister Jorge del Castillo (2006-2008) repeatedly requested the Defensoría to intervene in escalating conflict scenarios. Such intervention has, on occasion, been decisive, as in relation to the Ashuar

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[150] Ibid.
[151] Television interview with Beatriz Merino, Pulso, broadcast 10.30 PET, 29-06-08.
[152] Susana Silva Hasembank [Defensoría], 16 June 2008.
[153] Defensoría del Pueblo, *Análisis de los Decretos Legislativos promulgados al amparo de las facultades otorgadas por la Ley N° 29009*, Informe no. 129, (Lima: Defensoría del Pueblo, 2008).
[154] Television interview with Beatriz Merino, *Pulso*, broadcast 10.30 PET, 29-06-08.

community in 2006 and, the taking of police hostages in Moquegua.[155] The Defensoría, under Merino, has consolidated a profile as a legitimate conflict mediator. In turn, the Defensoría has used this vertical opening to make potent links between violence and socio-economic inequalities, issues administration officials prefer to approach separately (if at all).[156]

6.5.2. Horizontal access

The Defensoría is formally empowered to suggest to Congress modification to laws and advise on legislative projects. Generally, however, the institution made only very limited use of this point of access under the Fujimori regime.[157] Following 2000, Congress has remained a highly problematic actor for the Defensoría. Characterised by party fragmentation, with the exception of APRA, and a dearth of quality legislators, the Defensoría has, until recently, deemed this arena inaccessible. Such a perception was reinforced under Albán, who was effectively shut out of the legislature.

Under Merino, horizontal access to the legislature has increased. However, doubts remain as to whether oversight of often very mediocre legislation produced by a highly fragmented political class constitutes the best use of resources. Defensoría personnel acknowledge the difficulties of monitoring an increasing amount of legislation with a staff of just six

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[155] See *La República*, 'Defensora Merino defiende a nativos Ashuar y aclara al premier Del Castillo', 20 October 2006.
[156] Defensoría del Pueblo, *Informe Extraordinario: Los Conflictos Socioambientales por actividades extractivas en el Perú*, (Lima: Defensoría del Pueblo, 2007).
[157] Only thirty-three legislative initiatives were submitted to Congress from 1996-2000. See Annual Reports 1996-2001.

officers.[158] They also identify the "dispersed nature of norm creation" in Congress as a challenge in setting priorities for Defensoría intervention.[159] Nevertheless, the Defensoría has begun to make an impact through this channel. For instance, in April 2008 the Defensoría promoted the introduction of a bi-partisan legislative project, following informal consultation between the Defensoría, legislators, and their aides, and specific recommendations by the Defensoría. The office also sent a formal report to Congresswoman Mercedes Cabanillas commenting on legislation ensuring political participation of women.[160]

The low esteem in which the judiciary is widely held and a lack of substantive reform since 2000 provides few opportunity structures for interest alignment with the Defensoría. Furthermore, it is the MPN, not the Defensoría, which conducts criminal inquiries with a view to prosecution through the courts. The exception to this is on matters of human rights and the Defensoría has on occasion advanced important rights claims through the court system. Given resource limitations and the risk of adverse outcomes, such cases have often been selected for their political and social resonance. For instance, a successful habeas corpus action to release eight individuals detained in Ayacucho on terrorism charges in 2006 became a symbol of the persistent violation of political and civil rights suffered by the Andean communities.[161] The case had national repercussions with growing public concern

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[158] Federico Chunga and Edson Llanco [Defensoría], 16 June 2008.
[159] Ibid.
[160] See Multi-Party Law Project No. 2240 and Law Project No. 2175/2007-CR; Defensoría Annual Report 2008-2009, p. 145.
[161] *La República*, 'Liberan a ocho campesinos acusados injustamente de matar a policías', 13 January 2007.

over a lack of due process causing Garcia to eventually call for the release of the detainees.[162] However, such legal action by the Defensoría is rare.

Unlike Santistevan and Albán, Merino, bolstered by a strong congressional mandate, has overseen a reduction in constitutional legal actions and moved the focus toward public policy, as shown in Figure 6.5.[163] This development has been attributed by some to Merino's reticence to confront Congress through the courts. Constitutional actions presuppose confrontation with the legislature.[164] As a result, there is concern that the institution is ceding important space within the political apparatus and not fully realising its mandate. With the departure of Albán and, in particular, Samuel Abad, a developing legal doctrinal mandate has stalled. In particular, successful use of legal compliance by the Defensoría in 2004 and 2006 constituted an important additional channel of accountability for the institution over elected officials.[165] Whereas Albán claims, "I believe we need to intensify the use of [legal] tool that allow the DP to intervene".[166] Functionaries within the Defensoría confirm the perception of external observers, emphasising legal actions as "a last resort" and the need to "avoid friction".[167] Furthermore, the Defensoría has highlighted excessive delays in processes before the Tribunal as a further impediment, pointedly noting the fundamental urgency of many of these claims.[168]

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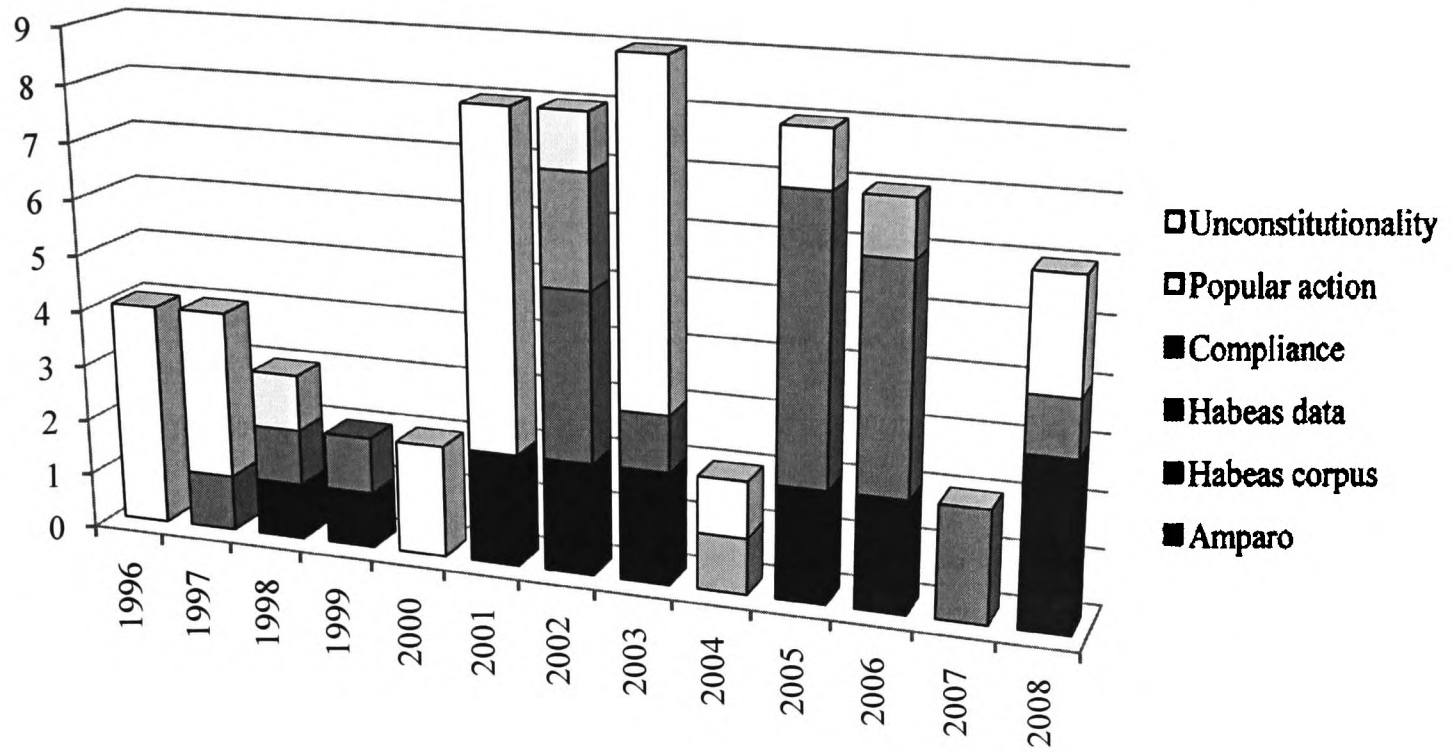
[162] For detailed analysis of this case see Pegram, 'Weak institutions, rights claims and pathways to compliance', pp. 15-16.
[163] Note that a lack of unconstitutionality actions in 1998 and 1999 follows the dismissal of three magistrates from the Constitutional Tribunal in 1997 and its effective obsolescence.
[164] César Landa [Constitutional Tribunal], 20 June 2008.
[165] The Defensoría successfully intervened in these two cases to compel the Health Ministry to provide morning after pills, a significant legal ruling. See Constitutional Tribunal, Sentence: EXP. No. 7435-2006-PC/TC, 13 November 2006.
[166] Walter Albán [Interim Defensor (2001-2006)], 23 June 2008.
[167] Federico Chunga and Edson Llanco [Defensoría], 16 June 2008.
[168] Defensoría Annual Report 2006-2007 , p. 226.

Figure 6.5: Legal actions presented by the Peruvian Defensoría 1996-2008



Source: Defensoría del Pueblo Annual Reports 1996-2008

Actions of unconstitutionality, a central plank of Defensoría strategy since 1996 have fallen away with only two actions since Merino took office. Actions of habeas corpus and amparo have also been very rare despite express recognition of these powers in new penal code legislation.[169] Instead the Defensoría has made increasing use of amicus curiae submissions which some jurists consider to be problematic. César Landa contends that amicus briefs "are not well regulated and their purpose is not entirely clear. Furthermore, the Defensoría often appears to take a side in the case rather than adopt a neutral stance as 'a friend of the court'".[170] As such, despite the Defensoría's significant constitutional action against Legislative Decree No. 1015 in 2007, credited as crucial to "changing the conditions of the debate and defusing imminent violent conflict",[171] such actions remain the exception rather than the rule. Notably, a precedent for successful actions of unconstitutionality does exist

[169] Código Procesal Penal, Legislative Decree No. 957, published in *El Peruano*, 29 July 2004, Article 433(4).
[170] César Landa [Constitutional Tribunal], 20 June 2008.
[171] Ismael Muñoz [civil society], 19 June 2008.

against the delegation of legislative powers to the Executive.[172] However, in the current climate, Merino may have judged that such an action would be extremely hazardous for the Defensoría, pitting the institution against the democratic legitimacy of the President.

Placed in context, a move away from legal rules toward accessing legislative channels to effect change can be viewed as adaptation to democratic conditions and new political openings. This process of experimentation is apparent, with one senior functionary noting that "the powers of the Defensoría are very elastic. One can engage from a narrow or broad base, expanding or contracting the normative parameters of intervention".[173] This is evidenced in the Defensoría's tactical engagement with horizontal agencies to achieve accountability outcomes. An important recent example is coordination between the Defensoría and the MPN in the exhumation of mass graves in Putis and Cabitos. Not only does the Defensoría draw authority from formal investigative prerogatives but also, and more importantly, its close association with the human rights legacy of the conflict. The Defensoría and MPN initiative has met with robust criticism from the Ministry of Defence and the military.[174] Nevertheless, strong support from the human rights community and the personal commitment of the Superior Prosecutor in charge, Victor Cubas, has stabilised this platform of coordination.[175] However, the challenge remains to balance the search for new arenas of advocacy while shoring up, and advancing upon, those already hard-won.

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[172] In 1998 the Defensoría launched an action against legislative decree No. 900 which gave the executive broad legislative powers. This action was not upheld until 2001. See Exp. No. 004-2001-AI-TC.
[173] Susana Silva Hasembank [Defensoría], 16 June 2008.
[174] *La República*, 'Oficiales del ejército y la marina son citados por la matanza de Putis', 25 February 2009.
[175] Eduardo Vega [Defensoría], 30 June 2008.

6.5.3. Social access

As discussed above, strong relations with non-state actors provided the Defensoría with crucial ballast against a hostile political regime. In turn, interaction has often proven mutually reinforcing, bringing an array of accountability strategies to bear and the Defensoría facilitating access to state resources for NGOs. The Defensoría has been recognised as a valuable ally in formulating legal reform projects and placing them on the national agenda. As Leyva says, "they are professionals, with sufficient expertise and faculties to draft legislation and successfully lobby for its implementation at the legislative level."[176] As such, when the Defensoría has also been involved in a campaign or legislative initiative, it has brought valuable resources to the table.

In order to engage with the most marginalised in Peruvian society, the Defensoría under Santistevan worked closely with grass-roots NGOs to address failings of the justice system, especially in rural areas. On occasion this has led to the exposure of extremely abusive state practices within Andean communities, such as the 1997 campaign, alongside civil society, against forced sterilization of women in Andean and indigenous communities.[177] In this instance, national NGOs, such as the Legal Defence Institute (IDL), Pro-Human Rights Association (APRODEH) and the CNDH acted as vital interlocutors between women's rights NGOs, such as Flora Tristan and Manuela Ramos, and the Defensoría. Bringing its investigative resources to bear on the issue, the Defensoría succeeded in scaling up these

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[176] Ana Leyva [civil society], 23 August 2005.

[177] Introduced by Fujimori in September 1995, AQV was aggressively implemented by Health Ministry personnel from spring 1996. Furthermore, this was conducted with considerable international support and funding, the project briefly becoming the largest recipient of USAID family planning funds in the Western Hemisphere.

claims to the national and international level.[178] The exposure and subsequent public and international censure surrounding this abusive intervention of the state led to a dramatic reduction, though not total eradication, in AQV procedures.[179]

The Defensoría has also proved to be a valuable source of information on rights issues within the public realm. During the Fujimori era, the office relied extensively on special reports – 79 issued over four years – which were targeted toward strategic campaigns issues and accompanied by media attention and the collaboration of international agencies in their production.[180] The focus fell not only on high profile issues such as the military justice system, torture, and freedom of the press, but also on more peripheral concerns that, in some cases, became high profile following their exposure. These included forced sterilization (AQV) and arbitrary police detention, as well as other issues which remained largely unreported, such as conflict reparation for the Rondas Campesinas (local self-defence committees). The Defensoría continues to rely extensively on ex officio special reports. These reports serve as a means for the Defensoría to signal its relevance to the lives of Peruvians. For instance, a recent report on provincial transport and road safety has amplified wider concerns on discrimination, citizen security and public services.[181] Merino has claimed that the number of road-related deaths fell following the release of the report.[182]

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[178] Defensoría del Pueblo, *La aplicación de la anticoncepción quirúrgica y los derechos reproductivos III*, Informe No.69, (Lima: Defensoría del Pueblo, 2002).
[179] According to Defensoría figures, procedures fell from 120,086 in 1997 to 27,996 in 1998. Ibid., p. 136.
[180] See the special reports produced by the Defensoría, available at www.ombudsman.gob.pe.
[181] Defensoría del Pueblo, *Pasajeros en Riesgo: La Seguridad en el Transporte Interprovincial*, Informe no. 108, (Lima: Defensoría del Pueblo, 2006).
[182] Television interview with Beatriz Merino, *Pulso*, broadcast 10.30 PET, 29-06-08.

Defensoría access to social accountability resources, such as public exhortation, special reports, media exposure, and mobilisation, independently, or in coordination with, social actors, also highlights the distinctive, sometimes awkward, position of the institution within the political system. Not-withstanding the political skills of Merino, Defensoría access to state arenas remains a negotiated affair, mirroring the challenges faced by social actors. This is particularly true of politically sensitive subjects. For instance, despite vocal support by Merino for the TRC upon entering office, the Defensoría has achieved few material advances in its capacity as official custodian of the TRC legacy. Another highly sensitive issue where the Defensoría has made little inroads is that of corruption. Transparency initiatives and campaigns against 'the culture of secrecy' have given the institution a public profile in this arena. However, the potential for severe political backlash has possibly been deemed too high. Taking their lead from the Defensoría, it is NGOs, such as Ciudadanía Propuesta, that now appear to be advancing this agenda.[183]

6.5.4. External access

Under the Fujimori regime, relations between the Defensoría and international actors provided important ballast to the institution's independence. Beyond international aid agencies, the Defensoría also made overtures to the diplomatic community based in Lima. As Santistevan recalls, "I knew that if the government decided to pressure the Defensor or the institution it would be essential that international cooperation and the embassies step up to defend the institution".[184] This resource was evident in the strong defence of the

[183] Elena Alvites [Defensoría], 13 June 2008.
[184] Jorge Santistevan [Defensor 1996-2000], 22 February 2006.

Defensoría by the diplomatic community during the hostile election process and the subsequent retreat of its attackers.[185] Since 2000, and especially under Merino, the use of external arenas of support has notably diminished. In part, this development may stem from the insecurity provoked by USAID's withdrawal of monetary support in 2006. However, more broadly, the importance of external access has declined with the return to democracy and re-instatement of functional domestic rights frameworks, of which the Defensoría forms an integral part.

The Peruvian Defensoría also has an explicit IHRL mandates. Its regulative law mandates it to promote the signing, ratification, and effective diffusion of international human rights treaties. With the collapse of domestic legal redress under Fujimori, the Defensoría pioneered a number of successful amicus curiae petitions to the IACHR against the Peruvian government.[186] In part due to such pending cases, Fujimori took the costly decision to withdraw from the jurisdiction of the IACHR in July 1999.[187] Infrequent but significant use of IACHR legal channels has been a feature of Defensoría advocacy since a return to democracy with landmark cases on questions of women quota in electoral processes as well as military jurisdiction.[188] Beyond such petitions, the IACHR also presents the Defensoría with an external mobilising platform. The ruling of the IACHR in July 2007 finding the state responsible for the violent death of a union official in 1989 during Alan Garcia's first

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[185] Santistevan became the focus of a proposed congressional investigation for misconduct in March 2000. This threat was 'postponed', following the intervention of the US and UK ambassadors in support of the work of the Defensoría. See *Gestión*, 8 March 2000; *El Comercio*, 8 March 2000.
[186] L. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, (Boston: Martinus Nijhoff Publishers, 2004), pp. 182-183.
[187] Defensoría Annual Report 1997-1998, p. 138.
[188] See Report No. 51/02 on Admissibility, by the IACHR, of 25 October 2002; Defensoría Annual Report 2008-2009, p. 519.

term in office has provoked controversy. Thus far, the Defensoría has not sought to pressurise the Peruvian states to comply with this decision.[189]

6.6. Politics and institutionalisation: the Peruvian Defensoría del Pueblo

The Peruvian Defensoría constitutes a rare, possibly unique example of a horizontal accountability mechanism created and successfully activated within an increasingly authoritarian context.[190] The objective of this chapter has been to provide a more fine-grained analysis of the internal mechanics of a dynamic process of political institutionalisation from inception through to democratic transition and the restoration of a fragile democratic order in 2001. In particular, the chapter has elucidated why the Peruvian Defensoría matters, how it works in practice, and, crucially, under what conditions it has made a difference to accountability politics.

Importantly, case study analysis allows for more careful attention to what the Defensoría has achieved in its relatively brief lifespan. By focusing on the material impact of the office, the analysis also challenges formalist analyses that all too often misunderstand or misclassify an institution that lacks formal enforcement powers. As stated at the outset of the chapter, the evidence presented is necessarily selective in tracing the development of the Defensoría from 1993 to 2009. However, most importantly, it serves to further substantiate the interplay of formal and informal factors in explaining the political institutionalisation of the Defensoría.

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[189] *El Comercio*, CIDH ordena investigar muerte de Saúl Cantoral, 04 August 2007.
[190] NHRIs established in 'Partly' or 'Not Free' regimes according to Freedom House data is discussed in Chapter 2, pp. 92-96. Little reliable data exists to evaluate the effectiveness of these offices.

The Peruvian case raises important questions concerning the empirical application of abstract analytical principles. In terms of formal design, the chapter provides support for the observation that under democratic conditions formal rules may be more significant. Under the competitive authoritarianism of Fujimori, the Defensoría was subject to little interference through formal channels. Threatened by a formal congressional investigation in 2000, this action was 'postponed' following representations by the Defensoría's allies within the Lima diplomatic community. The office's ability to assume a 'quasi-executive' function to advance the Ad-Hoc Commission owed more to its public standing among international and domestic commentators as to any formal disposition. With the reinstatement of democracy, the Defensoría has been subject to greater constraint through formal rules – for instance, Garcia's successful action to control local appointment of Defensoría personnel in 2007.

The Peruvian case suggests that the independence and power of the office lies primarily in the informal dimensions of institutionalisation. In particular, relations of the office with variably organised and powerful actors within and outside state structures are decisive. The evidence indicates that where broader institutional frameworks are systematically weak or absent, the Defensoría may assume a position of authority irrespective of formal disposition. This is not power understood in the binary terms of formal strength or weakness, but rather a more complex picture of 'strength in context'. In particular, the ability of the Defensoría to appeal to organised actors as a viable framework through which to pursue their interests emerges as a vital additive to the office's ability to assume primary over political processes. The collapse of horizontal accountability under Fujimori compelled the Defensoría to seek out responsive allies beyond state structures. Importantly, Santistevan did manage to bridge

regime and society interests at crucial moments – as in the case of the Ad-Hoc Commission. Under the stewardship of Merino, there has been a concerted effort to re-balance relations with emphasis on coordination with notably functional and receptive horizontal agencies.

A further significant component to the study is rules of access. Variably stable and enforced formal rules raise important questions concerning formal and informal compliance frameworks. The Peruvian case highlights the role of the Defensoría as a rights defender that does not, and to a large extent, cannot enforce rights claims in a conventional manner. This limitation resides not only in the organisation's lack of legal enforcement powers but also in the absence of fully reliable and effective democratic structures. This chapter has exposed the failure of formal institutions in Peru – especially the judiciary – to address crucial and persistent accountability gaps. The evidence demonstrates that the ability of the Defensoría to advance rights claims relies as much, if not more, in the office's ability to mobilise public opinion around the issue in the media as to advancing claims through formal channels. This is witnessed, for instance, in the effective Defensoría campaign, alongside civil society, against forced sterilizations in 1997 as well as the release of those Ayacucheños unjustly detained under anti-terrorism laws in 2006. Both instances demonstrate the failure of formal institutions to fulfil their lawful and democratic function and the instrumental use of public exposure to shame officials into changing their behaviour.

As with the regional analysis, the Peruvian case substantiates that, above all, it is the interaction across formal and informal features of institutionalisation that ultimately shapes the Defensorías institutional development. In no case does one factor acting in isolation

explain the experience of the office. The importance of interaction effects is well illustrated with reference to the Peruvian Defensoría's expansive interpretation of mandate. The broad mandate contained in Article 162 provides a crucial point of departure for the office's scope of activity, with intervention into new arenas of oversight robustly defended in terms of legal precedent. However, beyond formal criteria, the prior consideration for expansive interpretation can be located in a strategic evaluation of what is desirable and achievable under prevailing conditions. In this sense, the decision to undertake electoral supervision in 2000 responded to the failure of designated electoral agencies to fulfil their function independently, as well as broad support for such action among the Defensoría's domestic and international supporters. Similarly, Merino's decision to intervene in matters of public policy reflects both a personal preference for tackling structural rights violations as well as the presence of contingent, but relatively effective, structures of opportunity within the state.

In turn, calibrating the breadth of the mandate reflects not so much formal structures as the opposing forces acting upon the Peruvian Defensoría within its political context. State actors may support the work of the Defensoría in areas deemed to be of mutual advantage, often those of a more technocratic nature. Even Fujimori supported the work of the office on maladministration and improving the delivery of public utilities. But these same actors are also likely to strongly resist any actions which compete with, or threaten, core political interests. In the opposing corner, social actors present the Defensoría with the full gamut of social needs and demands and often criticise the office for not doing enough to diminish extreme asymmetries of power perpetuated by a dysfunctional democratic apparatus. Such tensions were particularly acute following the fall of Fujimori and the re-organisation of

priorities beyond a core political and civil rights focus. Given such conditions, sustaining an institutional bridge position is difficult. The shifting orientation of the Defensoría between a bridging and rights defender position within the political system has been driven primarily by these external, cross-cutting pressures and the incompatible demands and expectations being hoisted upon the office.

The chapter also sheds further light on whether different features of institutionalisation, and their component parts, have an equal or distinct bearing on institutional outcomes. Without attempting to resolve this issue here, it seems apparent that the ability of senior personnel to accurately gauge the political temperature during the Fujimori years and beyond has been central to maintaining the Defensoría's independence. The flexibility of the institution in formal and operational terms, demonstrated by the application of an expansive mandate, has been more decisive in terms of institutional impact. Mirroring the regional experience, one factor does appear to stand out as crucial to understanding impact: the leadership of the first Defensor. Internally, Santistevan developed a strong organisational credibility drafting in highly expert and competent Defensoría personnel at all levels that has persisted into the 2000s. In terms of external reputation, Santistevan's qualities as an effective orator and political operator were also crucial to the Defensoría's rapid ascent in the estimations of the Peruvian public. Fundamentally, Santistevan successfully positioned the Defensoría as an institutional anomaly in a country where the state has traditionally neglected the institutional sphere of representative democracy. As Rubio states:

> The Defensoría gained public support above all because it listened to the people. In a country where nobody has ever listened to the people, the very fact that someone could go to their offices and be heard was very important.[191]

Accountability theory provides a valuable conceptualization of the Defensoría's functional relationship to other actors, such as the courts and civil society. This chapter suggests that the question of vertical and horizontal accountability, initially developed as a tool to analyse weak or low-quality democracies, may have a wider applicability to a range of hybrid regimes. The existence of the Defensoría was an indication of the illiberal nature of the Fujimori regime. Caught between the competing desires to control and maintain a veneer of democratic normalcy, Fujimori allowed a diminished, albeit not insignificant, form of horizontal accountability to exist. The persistence of the Defensoría may suggest not so much its capacity to defend or strengthen democracy, as its ability to remain independent as the surrounding political context degenerated. That said, even under more conducive conditions, the role of the Defensoría may be better framed as testimonial – the monitoring, supervision and promotion of rights observance – as opposed to enforcement of rights claims in the pursuit of effecting systematic change.

While affirming the general utility of accountability theory as a framework with which to assess the function of the Defensoría, analysis of the Peruvian experience also suggests the need for critical refinement of the theory and its application. The delineation of accountability along 'vertical' and 'horizontal' dimensions requires significant qualification in light of the actual erratic functioning of accountability relations and the presence of

[191] Marcial Rubio [civil society], 7 September 2005.

powerful informal structures of power. In Peru the constraint of power by horizontal accountability agencies remains highly contested, reflecting a political culture where power is traditionally concentrated in elected officials. The political system in Peru, in comparison to more institutionalised settings, can be characterised as invertebrate. A good example of this extreme verticalism is the dysfunction of the Supreme Court. The evidence indicates that this apex court, representing the pinnacle of horizontal legal control, is itself internally divided and not immune from political interference.[192] As such, the apex of the legal system is neither fully reliable nor effective. Given these conditions, 'vertical' and 'horizontal' accountability may be an organising ideal but it is not readily amenable to empirical observation. Interestingly, the JNE's resistance to Defensoría oversight in electoral matters may constitute a rare case of horizontal boundaries being apparently defined and upheld in the Peruvian context.

Finally, the Peruvian Defensoría defies simple categorisation as a horizontal accountability institution. Features shared by few other such agencies include a broad and unrestrictive rights mandate, the direct interaction and reactive duty to the citizen, and a mandate to generate public information on rights and legality for public dissemination. The distinctive position of this institution amongst horizontal control agencies is most evident in the responsiveness of the Defensoría to social actors outside the state. Ideally, coordination across agencies is mutually reinforcing, bringing diverse toolkits and strategies to bear on a given issue. In particular, the mobilisation of public opinion emerges as a crucial additive that supplements and overlays the office's 'vertical' and 'horizontal' impact. The Peruvian

[192] Tom Ginsburg focuses on the effects of domestic political fragmentation on the creation and functioning of 'apex courts'. See T. Ginsburg, *Judicial Review in New Democracies*, (New York: Cambridge University Press, 2003), pp. 226-46.

Defensoría has recognised from its earliest campaigns the potency of mobilising public opinion through vertical channels. In turn, the office has scaled up public opinion through horizontal channels to fundamentally alter the terms of debate.

6.7. Conclusion

This chapter has assessed the institutional development of the Peruvian Defensoría. In keeping with the broader findings of this study, the institutionalisation of the office does not conform to a linear process of gradual embedding but rather is an unstable and contextually shaped ongoing process of institutional reinvention. The analysis has disaggregated in detail the moving parts that animate the analytical framework of political institutionalisation adopted by this study. In doing so, the chapter has highlighted areas of comparative scope with other Defensorías in the region, such as the importance of leadership and expansive interpretation of mandate. However, the study of the Peruvian office also highlights differentiation among cases – importantly, the ability of the office to maintain autonomy and exercise an, albeit circumscribed, sphere of accountability under the illiberal regime of Fujimori contrasts with the experience of similar cases in the region such as Mexico.

This chapter has also developed further some of the inherent limitations of the Defensoría. Some of the key fragilities and pit-falls that confront the institution include the prospect of new leadership, along with financial instability, government hostility, the failure of complementary institutions to fulfil their democratic function, among others. However, possibly most notable is the generally affirmative conclusion of this chapter on the

institutionalisation and accountability role of the Peruvian Defensoría. Despite the challenges presented by its operational context, the office has on occasion provided a rare point of intersection between state and society and established a durable position as a 'rights defender'. It has been capable of navigating an institutional setting where informal norms and practices often trump formal rule frameworks to not only maintain its independence but also, under certain conditions, make an important contribution to accountability politics. The thesis now turns its attention to the case of Costa Rica to interrogate the institutionalisation and political impact of a Defensoría operating in a radically different institutional environment. Locating these cases, along with their regional peer, within a typology of institutionalisation outcomes is a theme returned to in the thesis' conclusions.

Chapter 7: Politics and institutionalisation in Costa Rica: Assessing the Defensoría de los Habitantes

7.1. Introduction

The Costa Rican Defensoría de los Habitantes presents a markedly different story to its Peruvian peer.[1] Activated in 1993 under the leadership of Alberto Carazo (1993-1997), the Defensoría has not faced a political panorama defined by Peru's institutional instability and weaknesses or its widespread human rights violations.[2] Instead, the office emerged as part of a programme of structural reform intended to address a growing dislocation between public institutions and the citizenry.[3] Costa Rica offers no 'tipping point' comparable to Peru's transition to democracy in 2001. Nevertheless, it is important to place the Defensoría in a context of growing doubts about Costa Rica's myth of regional 'exceptionalism' as it is tested by a faltering political model.[4] The creation of the Defensoría has been described as a 'notable democratic success'.[5] However, this study places such a conclusion in doubt, documenting a difficult process of institutionalisation within a complex political and institutional setting.

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[1] The unique title of Defensoría de los Habitantes reflects an intention to include all persons, irrespective of citizenship, within the national territory, including a sizeable undocumented Nicaraguan population. This development fits the general idea advanced by this thesis that the way in which the NHRI is institutionalised varies according to local conditions.

[2] Rodrigo Carazo was followed as Defensor by Sandra Piszk (1997-2001), Manuel Echandi (2001-2005), Lisbeth Quesada (2005-2009) and Ofelia Taitelbaum (2009-2013).

[3] See B. M. Wilson, *Costa Rica: Politics, Economics, and Democracy*, (Boulder: Lynne Rienner Publishers, 1998).

[4] See Fabrice Lehoucq, 'Costa Rica: Paradise in Doubt', *Journal of Democracy*, vol. 16, no. 3, July 2005, 140-154.

[5] *La Nación*, 'Ojo Crítico', 27 March 2005.

The Costa Rican experience serves to highlight the institutional development of the Defensoría within a highly institutionalised political setting where formal rules are relatively stable and enforced. The findings of the chapter, while affirming the utility of accountability theory, provide further evidence of the need to balance attention to formal rules with an appreciation of the informal dimensions of institutionalisation. At a more contextual level, the chapter challenges the prevalent myth that Costa Rican political culture and attachment to democratic norms is necessarily exceptional within the region.[6] The study also adds to existing literature on a highly significant area of contemporary institutional innovation in Costa Rica. As Fabrice Lehoucq argues, a 'new stress on finding a more active role for people to play in their own governance may be the most important and understudied development in contemporary Costa Rican politics'.[7]

The analysis of the Costa Rican Defensoría follows the framework elaborated in Chapter 4 and applied in Chapters 5 and 6. The chapter traces the development of the office from its activation in 1993 to 2010, highlighting significant actions such as its role in the nationwide 'El Combo' protests of 2000 and the referendum on the Free Trade Agreement (TLC) in 2007. The analysis pays particular attention to those causally significant actors, mechanisms and processes that help explain variable outcomes across disparate episodes. As with the Peruvian case, the arguments advanced rely on extensive primary material (including over forty interviews with key participants), and the same caveats apply regarding the comprehensiveness of the analysis.

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[6] For a critical 'demystification' see J. A. Booth, *Costa Rica: Quest for Democracy*, (Boulder: Westview Press, 1998).
[7] Lehoucq, 'Paradise in Doubt', p. 152.

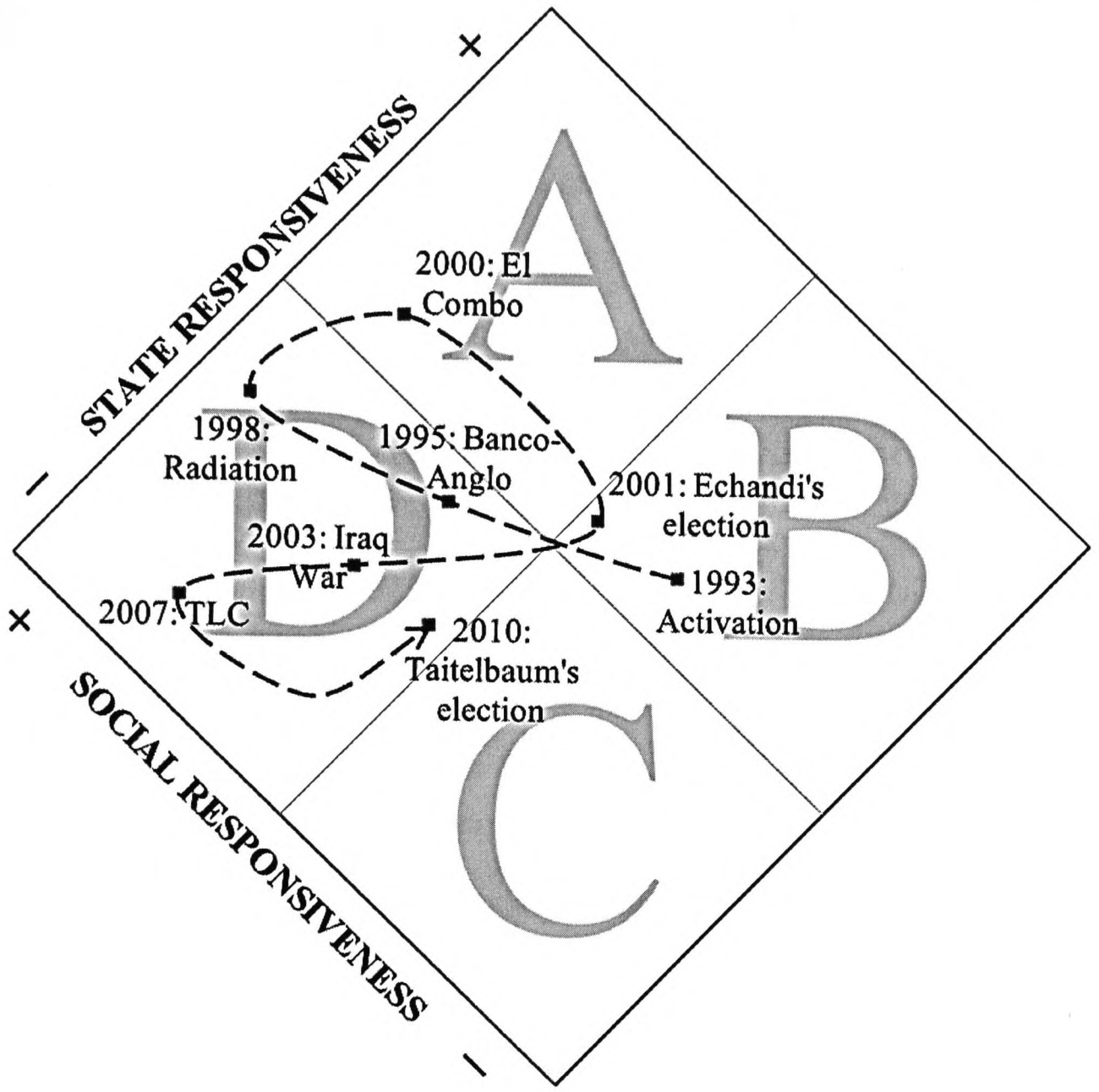
The chapter begins with a typological illustration of the Costa Rican Defensoría before turning to questions of formal design principles and their modification following activation. This is followed by an evaluation of the office's interaction with organised state, social as well as external actors. The third section analyses the rules that govern the Defensoría's access across accountability arenas. The chapter ends by reflecting on the interaction of formal and informal dimensions of institutionalisation and their individual and combined impact upon the institutional development of the Costa Rican office.

7.2. A descriptive typology of the Costa Rican Defensoría

Figure 7.1 provides an approximate illustration of this chapter's findings on the development of the Costa Rican Defensoría from its creation in 1993 onwards, equal to the exercise conducted in the preceding two chapters.[8] Case study analysis allows for more indepth tracing of the movement of individual offices across the typology elaborated in this study. The movement of the Costa Rican Defensoría reflects at a general level the regional picture of dynamic and unstable institutional development. More specifically, similar to the Peruvian office, the Costa Rican Defensoría has managed to generate space within the political apparatus as a rights defender (quadrant D), as well as having assumed, if briefly, the position of institutional bridge (quadrant A). Strikingly, what differentiates these two cases is the trajectory of the Defensoría subsequent to assuming a bridging position, with the Costa Rican case briefly displaying the characteristics of a regime proxy (quadrant B).

[8] The framework traces the trajectory of Defensorías in Latin America from point of origin across four institutional types, from the design ideal of institutional bridge (quadrant A), to regime proxy (quadrant B), façade (quadrant C), and rights defender (quadrant D).

Figure 7.1: A descriptive typology of the Costa Rican Defensoría[9]



The following analysis will identify and elaborate upon the formal and informal factors of institutionalisation that underpin the development of the Costa Rican Defensoría. The Costa Rican experience provides further evidence of the distinctive characteristics that these offices have assumed in different societies according to prevailing political and institutional frameworks. Above all, it substantiates the critical role of political or informal factors in determining the outcome of processes of institutionalisation upon the Defensoría. Despite being situated in a highly credible democratic regime, the Costa Rican Defensoría has

[9] Source: author's own formulation.

deviated in important ways from the expectations of formalist observers, with significant consequences.

7.3. Formal design principles

The experience of the Costa Rican office demonstrates the decisive impact of political or informal factors on Defensoría formal design principles even in a context that displays a relatively stable and enforced framework of formal rules.

7.3.1. Constitutional status

The Costa Rican office stands alone in the region as the only Defensoría not to have been granted constitutional status at point of origin or through subsequent reform. As discussed in Chapter 3, this institutional deficit results in a relatively constrained formal structure in terms of independence. However, the Costa Rican model's constitutional safeguards of power are comparatively unconstrained. Table 7.1 details the principal formal attributes of the institution, with particular reference to its functional, administrative and budgetary independence. Notably, the Defensor does not enjoy immunity from prosecution.[10]

The genesis of the Defensoría can be traced back to 1977 and a protracted process of debate surrounding its appropriateness to the Costa Rican context.[11] Reflecting the interest of the legislature and other powerful veto players, there appears to have been little possibility of

[10] The only other cases that lack immunity are Colombia, El Salvador, Mexico and Uruguay.
[11] See Chapter 3, pp. 132-136.

establishing the Defensoría through modification of the constitution.[12] Indeed, the creation of the office was subject to robust resistance from within the legislature and judiciary. Rodrigo Carazo argues that "it is very nice to have [constitutional rank] but it is not necessary. At least not in Costa Rica, where there is no fear that Congress will shut down the institution tomorrow".[13] However, insecure status is a source of anxiety among Defensoría personnel who point to the potential for interference through budgetary provision, investigation and legislation.[14]

Table 7.1: Attributes of the Costa Rican Defensoría

Function	Attributes	Legal basis
Independence	The Defensoría is attached to the Legislature and undertakes its activities with functional, administrative and discretional independence. The Legislative Assembly will evaluate the performance of the institution on an annual basis with the presentation of a report by the functionary…	Law No. 7319, Article 2.
Budgetary independence	The Budget of the Defensoría will be included under a separate title in the budget of the Legislature.	Law No. 7319, Article 2.
Grounds for dismissal	The Defensor may be dismissed for: (a) flagrant negligence or grave violations of the juridical order in the exercising of their duties, (b) violation of incompatibility (below), and (c) being sentenced for a criminal act.	Law No. 7319, Article 6.
Designation and term of office	The Legislature will appoint the Defensor for a period four years by an absolute majority of Deputies in attendance. The Defensor can be re-elected for one further period only.	Law No. 7319, Article 3.
Designation of Deputy Defensor	The Legislative Assembly will nominate the Deputy Defensor from a list of three candidates proposed by the Defensor no more than one month after the appointment of this post.	Law No. 7319, Article 10.

Source: Costa Rica: Ley de la Defensoría de los Habitantes, Ley No. 7319, 17 Noviembre 1992.

[12] For an excellent analysis of the legislative creation of the Costa Rican Defensoría see M. A. Esquivel and M. E. Montiel, *"Doña Marta ya tiene quien le escriba..." Un análisis sociopolítico del proceso de creación y el primer período de labores de la Defensoría de los Habitantes de la República*, Unpublished Masters Thesis, (Costa Rica: Ciudad Universitaria Rodrigo Facio, December 1997), Chapter 1.

[13] Rodrigo Alberto Carazo, Defensor 1993-1997, interview by author, San José, Costa Rica, 31 August 2007.

[14] Ricardo Varela, Director of International Relations within the Defensoría, interview by author, San José, Costa Rica, 06 August 2007.

Abolition of the Defensoría may remain a remote possibility, but powerful actors have used the office's inferior rank as a pretext to undermine its structural attributes. The Sala Constitucional declared a range of independence safeguards in the original legislation to be unconstitutional, including designation by qualified majority and immunity.[15] Hugo Muñoz argues that the ruling of the Sala "was baseless and arose chiefly from institutional jealousy".[16]

The impact of this intervention by the Sala has been significant. The lower designation threshold has led to the election of partisan, as opposed to consensus, candidates as Defensor. A lack of immunity has resulted in threats of legal action by Ministers and private corporations alleging defamation against the Defensor.[17] The Attorney General has also determined that in the absence of constitutional status or explicit legislative provision the wage scale of Defensoría personnel should be determined by the legislature.[18] Such an arrangement erodes the independence of the office from Congress. Defensor remuneration has also remained far short of that received by equivalent public office, with successive Defensors reticent to seek a pay rise.[19] Repeated attempts to insert the Defensoría into Article 48 of the Constitution have failed, largely due to opposition within the legislature.

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[15] Sala Constitucional, vote no. 502-91, 7 March 1991.
[16] Hugo Alfonso Muñoz Quesada, Jurist and former legislator and Justice Minister, interview by author, San José, Costa Rica, 15 August 2007.
[17] *Diario Extra*, 'Es necesario que Defensoría tenga rango constitucional', 3 January 2003, p. 15.
[18] See Procuraduría General de la República, Dictamen C-202-96, 16 December 1996.
[19] Max Esquivel, Ex-Deputy Defensor of Costa Rica (2001-2005), interview by author, San José, Costa Rica, 30 August 2007.

Carazo presented a project to modify Article 48 to Congress twice during his tenure.[20] Carazo's successors have fared no better.[21]

7.3.2. Mandate and powers

The Defensoría's formal attributes of mandate and powers are relatively unconstrained. The final text of Law 7319 suggests that this was not necessarily the original intention. The broad scope of intervention contained in Article 1 sits awkwardly with the narrow focus of Article 14 which limits oversight to 'effectively ensuring legality'. However, the Defensoría regulative law issued in June 1993 expressly expands the normative and doctrinal scope of the Defensoría's promotional human rights function.[22] Investigative faculties include unrestrictive inspection of public facilities, access to documents except state secrets, and the enforceable summoning, by police escort if necessary, of public officials. Within a dense institutional apparatus, the Defensoría is expressly prohibited from electoral oversight, control of criminal legality, and matters pending before the courts.[23]

Reflecting the regional norm, the Defensoría lacks formal enforcement powers but does enjoy significant legal prerogatives, including recourse to habeas corpus, amparo, and constitutional review powers. The use of such powers to access formal accountability arenas has been sporadic and is a subject developed below. The Defensoría has been subject to

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[20] See M. Esquivel and M. Montiel, *"Doña Marta ya tiene quien le escriba..."*, p. 76.
[21] See Defensoría de los Habitantes de la República, *Informe Anual 1999-2000*, (San José: DHR, 2000), p. 86. [*Hereafter* cited 'Defensoría Annual Report']; Defensoría Annual Report 2002-2003, p. 3.
[22] See Executive Decree no. 22266-J, 15 June 1993.
[23] Furthermore, as in Honduras, Mexico, Panama and Peru, recommendations issued by the Defensoría are expressly limited as non-binding and subordinate to other types of resolution.

minimal interference in the area of formal powers. This may reflect a regional fixation on vertical control powers and little understanding of the Defensoría's non-coercive accountability function. Carazo recalls that the Defensoría was initially viewed with scepticism by the political elite.[24] However, this quickly began to change. By 1995 the growing public authority of the new agency was apparent, with one legislator exclaiming "who will defend us from the Defensoría?"[25] This public clash also led to an unsuccessful bid to limit the Defensoría's jurisdiction over private sector public service providers.[26]

7.3.3. Budgetary autonomy

Budgetary independence is often the Achilles heel of the Defensoría. As with all public institutions, final budget allocation for the Costa Rican office is made by the legislature, an arrangement superior to Executive control. Although not subject to overt interference, the Defensoría is subject to criticism during budgetary debates.[27] The nature of the Costa Rican political system increases vulnerability to political interference during election years and to the rotation of new government.[28] Table 7.2 shows a steady nominal increase in budget allocation with the exception of 2004 and 2006. Indeed, despite a cap on annual budget increases in the public sector of between 6 and 7 percent, the Defensoría often achieves increases of 7 to 10 percent in the final approval stage.[29] Nevertheless, Figure 7.2 tells a different story with the budget flat lining from 1994 to 1998. Pizsk is the only Defensor to

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[24] Rodrigo Carazo [Defensor], 31 August 2007.
[25] See Defensoría Annual Report 1995-1996, p. 587.
[26] Ibid.
[27] Rodrigo Carazo [Defensor], 31 August 2007.
[28] Ibid. The significance of relations between the traditional political parties and individual Defensors is discussed below.
[29] Franklin Ríos, Director of Finances at Defensoría, interview by author, San José, Costa Rica, 21 September 2007.

have negotiated successive above-inflation funding increases. Since 2003 the Defensoría's financial situation in real terms has been subject to volatility.

Figure 7.2: Total budget received from the State 1994-2008 (inflation-adjusted index)

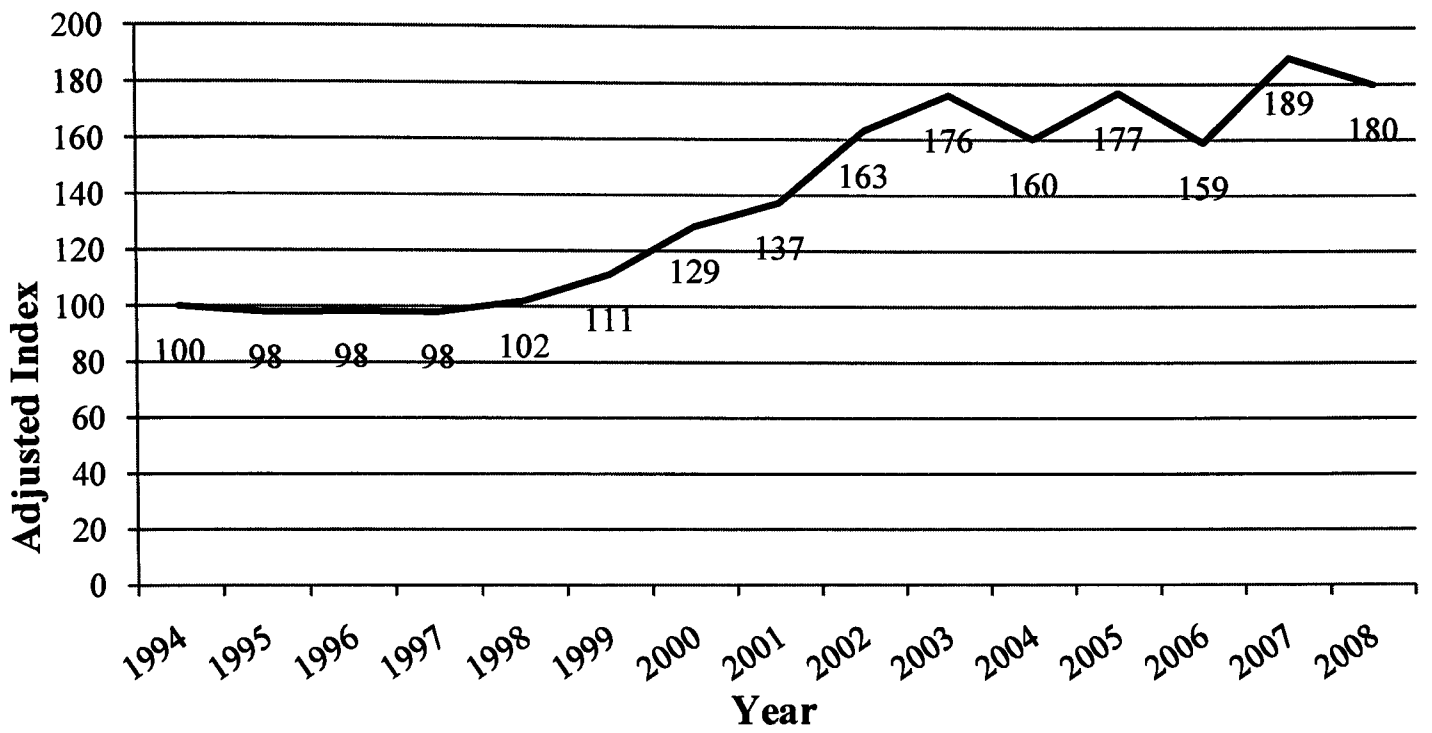

Table 7.2: Total budget 1996-2008 in US Dollars (1 USD/554 CRC in 2008)

1994	1995	1996	1997	1998	1999	2000	
1,649,642	1,692,772	1,802,191	1,826,518	1,831,398	2,042,998	2,485,864	
2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
2,743,974	3,296,394	3,518,290	3,207,199	3,668,633	3,507,258	4,534,377	4,611,343

Source: author's own formulation using Defensoría annual report data.

A relatively stagnant financial picture compared to the Peruvian experience constitutes a brake on institutional activity. Indeed, the vast majority of the annual budget received from the state is spent on wages.[30] The Defensoría has often relied on international funding to finance promotional activities. Carazo proved highly successful in attracting international cooperation, especially in promoting rights in remote areas of the country. As Esquivel

[30] Franklin Ríos [Defensoría], 21 September 2007.

recalls, "we were always looking for resources and we had luck with international cooperation who responded positively to the work of the institution".[31]

Available data shows international support constitutes an additional 41 percent on top of the total budget in 1995.[32] Although, this represents a notably high percentage, external donor funding remained significant throughout the 1990s.[33] However, international funding has fallen sharply since 2003. One of the principal reasons for this is law 8131.[34] Introduced in 2002, the law dictates that all international funds must be transferred via the Ministry of the Treasury rather than direct to the Defensoría. In practice, this has led to the withdrawal of funds from donors whose policies conflict with such allocation mechanisms and severe delays in the processing of international funds.[35] A fall in international funding contrasts with many of the Defensoría's regional peers. Nevertheless, the backdrop to this finding is declining international funding throughout Latin America as external donors prioritise aid flows to low-income countries.[36]

7.3.4. Operational autonomy

Law no. 7319 establishing the Defensoría offers little instruction on the operational organisation of the office, other than to affirm it as the sole prerogative of the Defensor. The

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[31] Max Esquivel [Deputy Defensor], 30 August 2007.
[32] Defensoría Annual Report 1995-1996, p. 34.
[33] In 1999 external funds represented an additional 18 percent of the total budget. See Defensoría Annual Report 1999-2000, p. 549.
[34] Ley de la Administración Financiera de la República y Presupuestos Públicos, no. 8131, 18 September 2001.
[35] In 2003, international funds constituted an additional 8.64 percent. However, due to delays the Defensoría only received 3.23 percent in additional funding. See Defensoría Annual Report 2002-2003, p. 799.
[36] Nina Fenton, 'International Finance: Aid and Middle-Income Countries', Oxfam paper series, *From Poverty to Power: How Active Citizens and Effective States Can Change the World*, Oxfam International, June 2008.

Executive Decree no. 22266 issued months later affirms the Defensor's discretion in defining the internal structure and function of the institution, including nomination and removal of personnel. Notably, the decree was written exclusively by personnel within the Defensoría, with the approval of the Minister for Justice. There was no formal consultation of organised social actors in the design process. This opportunity to 'design' the institution was seized upon to cement the Defensoría's independence.[37]

As with other Defensorías, institutional credibility to a large extent stands or falls with the quality of its personnel. Carazo's criterion was highly particularistic, as he recalls, "I did not choose anyone because they had experience of human rights. I chose people that I considered professional, serious, with whom I could work well. I knew almost all of them personally".[38] In turn, Carazo emphasised a pluralistic skill base beyond simply legal training.[39] Carazo did succeed in recruiting a body of highly professional and technically expert individuals, their retention contributing to institutional stability over time.[40] Political criteria, however, has also informed recruitment. The party political profile of Piszk, for instance, resulted in the strategic placement of National Liberation Party (PLN)-aligned individuals.[41] The ambitious Echandi reportedly employed individuals in exchange for future political favours.[42] Even Carazo, with no overt political affiliation, was unable to deny the personal request of certain powerful actors.[43]

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[37] See M. Esquivel and M. Montiel, *"Doña Marta ya tiene quien le escriba..."*, p. 59-61
[38] Rodrigo Carazo [Defensor], 31 August 2007.
[39] Ibid.
[40] Gonzalo Elizondo, former Director for Public Institutions, Inter-American Institute of Human Rights, interview by author, San José, Costa Rica, 1 September 2007.
[41] Senior functionary of the Defensoría, interview by author, San José, Costa Rica, 1 October 2007.
[42] Ibid.
[43] As a senior functionary explains it, "Carazo was a principled man, but also a realist". Ibid.

Operational autonomy manifested itself in the internal structures and function of the office. For instance, the Directorate of Defence of Human Development pioneered and prioritised by Carazo was subsequently disbanded by Piszk who, through a newly created Unit for Economic Matters, oriented the Defensoría toward her priority area: the fiscal realm of the public sector and corruption.[44] In sum, all Defensors (and sometimes Deputy Defensors) have left their impression upon internal structures.

The Defensoría also has a legal duty to enhance access to the institution through decentralisation. Despite this obligation, decentralisation has been prone to stagnation and even reversal. The first permanent office was created in 1998 followed by five further regional offices, most created since 2001. Under Carazo and Piszk mobile units were relied upon to receive cases from outside San José and promote the institution's rights discourse. The withdrawal of EU funds in 1997 forced a scaling back of decentralised operations and the temporary closure of a local office in 1998.[45] A policy of establishing a permanent local presence was advanced by Echandi who established four further offices throughout Costa Rica. This push toward decentralisation took place in the context of systemic structural reforms and the creation of a local municipal tier of government in 2002.[46]

7.3.5. Appointment procedures

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[44] Sandra Piszk, Defensora 1997-2001, interview by author, San José, Costa Rica, 21 August 2007.
[45] Defensoría Annual Report 1997-1998, p. 172.
[46] See J. M. Alfaro, *El Sinuoso camino a la descentralización y el necesario fortalecimiento del gobierno local*, (San José: FLACSO 2009).

Contrary to the regional norm, designation of the Costa Rican Defensor requires only a simple, as opposed to a qualified, majority. The original legal project included a two-thirds majority, a provision supported by President Calderón to encourage cross-party consensus.[47] However, the Sala Constitucional ruled this higher vote to be unconstitutional. The resulting arrangement has encouraged partisan designations that reflect the existing balance of power within Congress, initially between a dominant PLN and Social Christian Unity Party (PUSC). Indeed, it was widely reported in 1993 that prior political negotiation meant that the first Defensor would be PUSC-aligned, with a PLN candidate elected as deputy.[48] This duly occurred with the election of Rodrigo Carazo and Joyce Zürcher.[49] Nevertheless, Carazo emerged as a highly credible and consensual candidate given the circumstances, receiving 32 of the 42 votes cast. [50] This outcome is likely attributable to the novelty of the Defensoría.

A key dimension to the Costa Rican experience is the rotation of Defensors within a strong political party system. As Table 7.3 shows, the first two appointments have conformed to what Muñoz terms a form of "political equilibrium" within the Defensoría.[51] Subsequent to 1993, elections have been hotly contested by overtly party political candidates. The election of Piszk was criticised for the negotiated manner in which votes were secured but it was the apparent executive imposition of Echandi that provoked serious backlash, resulting in a

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[47] Hugo Muñoz [Jurist], 15 August 2007.
[48] *La Nación*, 5 February 1993. Ex-President Rafael Calderón confirmed that this was the arrangement. President Rafael Ángel Calderón, President of the Republic 1990-1994, interview by author, San José, Costa Rica, 12 September 2007.
[49] Despite Carazo's lack of party militancy, he is the son of ex-PUSC President Rodrigo Carazo Odio. Zürcher has strong party political ties to the PLN.
[50] *La República*, 17 March 1993.
[51] Hugo Muñoz [Jurist], 15 August 2007.

three-month delay and a majority of only 53 percent.[52] Unlike Piszk, the PUSC were unable to negotiate a single PLN vote for Echandi's candidature.[53] A volatile electoral picture has since emerged, with Quesada an 'outside the system' candidate and Taitelbaum representing the polar opposite. Broadly speaking, the two most recent elections reflect the breakdown of the traditional two-party system; a growing PLN dominance, the ascendance of the PAC, and a much-diminished PUSC presence.[54]

Table 7.3: Rotation of Defensor candidates and central government 1993-2009

Executive	Calderón Fournier (PUSC)	Figueres Olsen (PLN)	Rodriguez Echaverri (PUSC)	Abel Pacheco (PUSC)	Oscar Arias (PLN)
Year	1990-1994	1994-1998	1998-2002	2002-2006	2006-2010
Defensor	Rodrigo Carazo: Economist. Son of PUSC President Carazo (1978-82). Elected a PAC Deputy 2002-06.	Sandra Piszk: Politician. Deputy for PLN 1990-1997, Vice-Presidential candidate in 2002.	José Echandi: Politician. 2nd Cousin of President Echaverri (1998-02). Elected PUN Deputy in 2006.	Lisbeth Quesada: Doctor. No party affiliation. PAC and PLN support in 2005.	Ofelia Taitelbaum: Politician. Deputy for PLN 2006-2009.
Year	1993-1997	1997-2001	2001-2005	2005-2009	2009-2013
Election %	32 of 42 (76%)	37 of 51 (73%)	29 of 55 (53%)	31 of 54 (57%)	30 of 54 (56%)
Deputy	Joyce Zürcher: Politician (PLN). Vice-Presidential candidate in 1998.	Roberto Vega: Judge. Elected Magistrate on Sala IV in 2000	Max Esquivel: Lawyer. Elected TSE Magistrate in 2006.	Daniel Soley: Politician (PLN). Son of Tomás Soley, a founder of the PLN.	Luis Gerardo Fallas Acosta: Judge. No party affiliation.

Source: compiled by author from multiple sources.

In order to mitigate the effects of partisan influence, the designers of the Defensoría also instituted a novel Legislative Commission of Nomination to rank applicants on a scale of 1

[52] Echandi received only four votes more than his rival, Max Esquivel.
[53] See *La Nación*, 'Echandi a la Defensoría', 6 June 2001.
[54] The PUSC won only 5 seats or 7.8 percent of the vote in the 2006 parliamentary elections following a series of corruption scandals.

to 10 points.[55] The Commission, made up of three to seven legislators, has been criticised for a lack of citizen participation.[56] That said, civil society organisations can make submissions. Most damaging has been a gradual erosion of public perceptions of procedural meritocracy. Quesada is the only successful candidate to have received the highest points by the Commission. Her election was notable for its lack of prior political negotiation, with her candidacy put to a vote upon three occasions.[57] However, the designation of her President-endorsed successor in 2009, Taitelbaum, was widely criticised. Most controversially, it emerged that a highly qualified candidate had been awarded a zero by one legislator on the PLN dominated Commission of Nomination.[58]

In sum, the Costa Rican Defensoría has not been immune to the informal practices of a highly organised political elite. With the exception of Carazo and Quesada, legislators have repeatedly elected one of their own as head of an ostensibly independent horizontal agency. In turn, the partisan election of a deputy Defensor has produced a destabilising internal dynamic.[59] Despite an apparent reversal of this trend in 2005 with the election of the apolitical Quesada, Taitelbaum's election in 2009 has cemented a perception of executive control over the Defensor (and by extension the legislature). Indeed, the manner of Taitelbaum's appointment led one legislator to declare "they exchanged the Presidency of the Legislative Assembly for the Defensoría and in so doing decreed the death of the

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[55] See G. Trejos, *El Defensor de los Habitantes: el Ombudsman*, (Editorial Juricentro, San José 1992).
[56] *La Prensa Libre*, 'Carazo critica sistema de escogencia del Defensor', 10 February 2001.
[57] *La Prensa Libre*, 'Congreso se pone flor en el ojal con elección de Quesada', 5 August 2005.
[58] *La Nación*, 'Legislador puso un cero para descalificar a candidato a defensor', 12 December 2009.
[59] Conflict between the titular heads of the Defensoría is a feature of the Costa Rican case. See *La Republica*, 'Ratifican potestad de Piszk', 24 January 1999.

Defensoría".[60] Within civil society, the designation of the President's preferred candidate was described in strong terms as one more expression of Costa Rica's "dictatorship in democracy".[61]

7.4. Relations

The Defensoría's experience demonstrates a more angular framing of accountability relations within the state and the challenge of mobilising relatively weak social actors within Costa Rican society.

7.4.1. Vertical relations (executive branch)

The Costa Rican executive is one of the weakest in the region.[62] Nevertheless, the President has historically retained significant authority through supportive legislative coalitions and strong party loyalties.[63] Furthermore, the 2003 decision by the Sala Constitucional to permit Presidential re-election has arguably served to 're-equilibrate the balance of power between the legislative assembly and the executive'.[64] The collapse of the two-party system in 2006 also strengthened presidential authority under Oscar Arias. The experience of the Defensoría is testimony to the importance of this actor in processes of institutionalisation.

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[60] *Informa-Tico*, 'Oposición repudió elección de Taitelbaum, PLN dio espalda a Chinchilla', 16 December 2009.
[61] *La Nación*, 'Taitelbaum elegida Defensora con votos aliados al PLN', 15 December 2009.
[62] S. Mainwaring and M. S. Shugart (eds.), *Presidentialism and democracy in Latin America* (New York: Cambridge University Press, 1997), p. 432
[63] See F. Lehoucq, *Instituciones democráticas y conflictos políticos en Costa Rica*, (San José: National University Press, 1998).
[64] Bruce M. Wilson, 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court', in Rachel Sieder et al. (eds.), *The Judicialization of Politics in Latin America*, (New York: Palgrave, 2005), p. 54.

President Calderón gave his approval, over the objections of many PUSC colleagues, to the Defensoría project and relations between the first Defensor and Calderón proved fruitful. Indeed, Calderón personally intervened in order to ensure legislative support for Carazo's candidacy.[65] For Calderón, the Defensoría served as a valuable corrective to an unpopular process of state reform. As he states, "above all, the Defensoría provided citizens with a place where they would be listened to, a place where they could affirm their rights".[66] Carazo echoed this message in his first annual address to the legislative assembly.[67] Notably, the executive also expedited an extraordinary budget through the legislature at the request of Carazo.[68]

Relations with Calderón's successor, President José Figueres, were also cordial, despite Carazo's familial connections to the PUSC. Good relations were enhanced by Joyce Zürcher's strong ties to the PLN and the President. According to Carazo, problems arose not with Figueres so much as an increasingly ideologically-opposed and powerful PUSC bloc in Congress.[69] Nevertheless, tensions did emerge with the executive as the Defensoría began to find its feet. The Defensoría opposed the highly unpopular Figueres-Calderón pact of 1995,[70] noting a lack of civic participation.[71] In response, the Defensoría was shut out of

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[65] "It was a very personal decision and request to Congress that they elect him [Carazo]." Rafael Calderón [President], 12 September 2007.
[66] Ibid.
[67] Address to the Legislative Assembly, 27 June 1994.
[68] Rodrigo Carazo [Defensor], 31 August 2007.
[69] Ibid.
[70] This pact detailed a bipartisan agreement on how the future of state reform would be 'resolved', encompassing public institutions, fiscal policy and the opening of the banks to competition, among others.
[71] Defensoría Annual Report 1995-1996, p. 398.

executive policy initiatives.[72] By 1996, public approval for the Defensoría had risen from 49.9 percent in 1994 to 81 percent.[73] Carazo successfully secured independence from the executive and, in so doing, could credibly claim autonomy from 'conventional politics'.

Sandra Piszk became Defensor in 1997 within an increasingly conflictive political setting. Piszk's background as a PLN deputy and the personal support of Figueres for her candidature informed vertical relations. However, Piszk continued her predecessor's stance on government structural reform efforts, criticising the method rather than the objectives of the process. Significantly, Piszk also directed the Defensoría's attention toward concrete and high profile rights violations. Action over the deaths caused by faulty radiation equipment, for instance, led to direct conflict with the Minister in charge of the Institution for Social Security (CSS). As Piszk recalls:

> With President Rodríguez and Figueres, with whom I had been a party colleague, there were difficult times as well as moments of negotiation. I always tried to seek resolution through negotiation before confrontation, but in the absence of results I would initiate confrontation...[74]

Piszk's decisive intervention, particularly in the areas of education, health, and public services was often resisted by the Ministries concerned. Accusations of non-transparency by

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[72] For instance, the Defensoría was not invited to join from a National Commission for the Promotion of Mechanisms for Conflict Solution created by executive decree in 1996. Defensoría Annual Report 1995-1996, p. 551.
[73] Reprinted in M. Esquivel and M. Montiel, *"Doña Marta ya tiene quien le escriba..."*, pp. 357-359. For additional data and extended discussion of what these approval ratings actually mean in the Costa Rican context see pp. 336-338.
[74] Sandra Piszk [Defensora], 21 August 2007.

the Defensoría were strengthened by the spectacle of Ministers refusing to respond publicly. However, public attention often eventually compelled a response.[75] The Defensoría was not averse to strongly criticising executive actions.[76] However, it is important to note that the target of criticism was often state institutions rather than the President directly. For instance, the Defensoría's allegations of corruption within the CSS in 2001 were highly polemical.[77] Despite an angry response from the CSS, the report's findings were positively received by President Rodríguez.[78]

A number of factors help explain this juncture in relations: the public popularity of the Defensoría, affinity with the President's own reformist agenda, and the imminent end of his term in office. By June 2000, the Defensoría's approval ratings were 71 percent to the government's 12 percent.[79] Above all, relations between Piszk and Rodríguez must be placed in the context of the defining event of 2000: the 'El Combo' crisis.[80] Polarisation over government reform legislation spilled over into violent conflict in March 2000, exacerbated by the intransigence of all parties. On 16 March confrontation led to the death of one protester and the wounding of several others. Rodriguez refused to concede defeat despite the danger of conflict escalation and overwhelming public opposition. The Defensoría emerged as a key interlocutor in seeking a solution to this impasse. As Piszk recalls, "the

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[75] *La Prensa Libre*, 'Cuestionan Informe de Defensoría', 10 June 1999.
[76] *La Nación*, 'Ratifican fondos para educación', 20 December 2000.
[77] *La Nación*, "No me retractaré", 9 February 2001.
[78] *La Nación*, 'Gobierno aprueba informe', 11 March 2001. Although the CCSS is one of Costa Rica's 'autonomous institutions', three members of the CCSS board – including the Executive President – are appointed by the President of the Republic and ratified by the Minister's Council.
[79] *La Nación*, 'Dardos y Flores', 25 June 2000.
[80] El Combo refers to the nation-wide protests of March and April 2000 following an attempt by government to push through the 'Energy Combo' bill to open up the energy and telecommunications sector to private investment. The scale of protest was unprecedented in recent Costa Rican history. There is a large literature on this complex event. For example, see Bert Hoffman, 'Why Reform Fails: The 'Politics of Policies' in Costa Rican Telecommunications Liberalization', *European Review of Latin American and Caribbean Studies*, vol. 84, April 2008, pp. 3-19.

Combo is a very concrete case where we eventually confronted the executive with the message "enough"".[81] Piszk proposed, convened and chaired a Facilitating Commission that managed to open up a process of dialogue. On 3 April 2000 Rodriguez withdrew the bill for further consultation. Piszk's decisive role in this episode was widely recognised within Costa Rican society.[82]

Wary of the power accrued by Pizsk, Rodríguez and the PUSC majority in Congress manoeuvred to ensure their candidate's election as Defensor in 2001. As a second cousin of Rodríguez and nephew to former PUSC President Mario Echandi (1958-62), Echandi's candidacy provoked alarm across the political spectrum and claims of executive imposition.[83] Protracted resistance by the PLN could not prevent his eventual election by a simple majority. Echandi's agenda was modest in comparison to his predecessors, focusing in the first year on children's rights, drinking water, the indigenous population and decentralisation. He was subject to criticism for not following up on earlier recommendations and avoiding conflict with Rodríguez.[84]

However, despite their shared party affiliation, relations between President Pacheco and the Defensor quickly became conflictive. Echandi began to widen the scope of interventions into health and social policy, alluding to corruption within Ministries and the failure of Pacheco to honour campaign pledges on poverty reduction. However, it is Echandi's highly political

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[81] Sandra Piszk [Defensora], 21 August 2007.
[82] In a dedication the following week, *La Nación* wrote 'In the midst of a conflict that threatened the social peace of our country, Sandra Piszk demonstrated that not only is she the Defensora she is also a master of dialogue'. See *La Nación*, 9 April 2000.
[83] *Al Día*, 'Frustrada elección de Defensor', 5 June 2001.
[84] *La Republica*, 'Defensor busca consolidar identidad', 10 November 2001.

pronouncements on executive decision-making that rapidly led to outright hostility. The rhetorical ultimatum issued by Echandi to the President that Costa Rica withdraw from the Iraq War 'Coalition of the Willing' was not well received.[85] In turn, Pacheco's sliding approval ratings contrasted markedly with the Defensoría's strong showing of 69 percent in 2004.[86] Echandi's opportunistic interventions are attributable to his personal ambition, but also to exploitation of extremely high levels of popular dissatisfaction with government. Pacheco dismissed the Defensoría's 2004 annual report as a "book of terror" as relations deteriorated into personal animosity.[87] Echandi attributes the "personal aggressions" he encountered to a sense of betrayal by Pacheco who had voted for Echandi in 2001.[88]

Quesada's successful election was, in part, a response to Echandi's populist political style. Quesada was a doctor by training with no party-political affiliation. Pacheco allegedly intervened to deny Echandi the possibility of re-election.[89] Quesada did not emerge as a consensus candidate but did receive support from the PLN benches. Distant relations with a popular Arias administration are attributed by Quesada to the "current national situation".[90] More specifically, this refers to the Defensoría's controversial intervention on a key plank of government policy: the Free Trade Agreement (TLC) with the US.[91] The Defensoría emerged early on as a high profile critic of the TLC with Quesada emotively describing it as

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[85] *La Nación*, 'Defensoría emplazó al Gobierno', 4 April 2003.
[86] *Al Día*, 'Imagen del Presidente sigue a la baja', 8 June 2005.
[87] *La Prensa Libre*, 'Defensoría y Gobierno enfrentados por informe', 24 June 2004.
[88] Juan Manuel Echandi, Defensor (2001- 2005), interview by author, San José, Costa Rica, 18 September 2007.
[89] *La Prensa Libre*, 'Echandi acusa a mandatorio Pacheco de injerencia', 29 April 2005.
[90] Lisbeth Quesada, Defensora 2005-2009, interview by author, San José, Costa Rica, 28 September 2007.
[91] A national referendum on the TLC in October 2007 became the defining event of the year. The treaty was finally approved by a vote of 51.7 percent. With 60 percent of Costa Ricans casting a vote, the referendum was hailed by some as an advance for citizen participation. However, the campaign process also provoked high levels of social polarisation and political conflict.

a "treaty without soul".[92] This prompted an angry response from TLC supporters, with Quesada threatened with prosecution for 'public intimidation against the state of Costa Rica'.[93] Government officials were further irritated by the constitutional challenge brought by the Defensoría against the TLC.[94] The Defensoría also pursued charges against two individuals close to Arias following the discovery of a Machiavellian strategy to undermine opposition to the treaty.[95]

The Defensoría argues that it was merely fulfilling its institutional duty.[96] However, as will be further analysed, intervention on the TLC was subject to severe backlash. Before leaving office, Quesada criticised Arias' choice of successor declaring the Defensoría to be "the last bastion of institutional independence".[97]

7.4.2. Horizontal relations (state checks and balances)

Costa Rica displays some of the highest rule of law indicators in Latin America and the judiciary consistently receives robust public approval ratings.[98] More broadly, Costa Rica displays high levels of institutional innovation, density and stability, with 107 new public entities created between 1990 and 2003.[99] However, legislative paralysis and resource

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[92] *La Prensa Libre*, 'Defensoria afirma que el TLC carece alma', 31 March 2006
[93] *La Prensa Libre*, 'Denuncian penalmente a la Defensora', 1 April 2006.
[94] Daniel Soley [Deputy Defensor], 20 September 2007.
[95] See *Diario Extra*, 'Defensoría denuncian a Casa y Sánchez', 13 September 2007.
[96] Daniel Soley [Deputy Defensor 2005-2009], 20 September 2007.
[97] *Informa-Tico*, "Defensoría es el último bastión institucional independiente", 15 August 2009.
[98] Public confidence in the judiciary from1996-2001 is among the highest in the region, second only to Uruguay. See Observatorio Electoral Latinoamericano, 'Valores, percepciones y actitudes hacia la democracia: Una visión comparada latinoamericana 1996-2001':
http://www.observatorioelectoral.org/biblioteca/?bookID=8&page=4
[99] Programa Estado de la Nación, *Undécimo Informe*, p. 309.

constraints pose a challenge to the effective functioning of horizontal accountability.[100] The Defensoría has had limited success in stabilising relations within a competitive arena of horizontal accountability.

Relations with the judiciary were set in motion early on with the Supreme Court rejecting any oversight provision of administrative or jurisdictional activity in the Defensoría's establishing law.[101] An administrative oversight mandate was nevertheless retained in Law 7319. According to Carazo, relations with the judiciary were openly hostile, "with judicial resolutions against the Defensoría and the doors closed on many subjects".[102] The judiciary rejected any oversight of its activities, claiming infringement of its constitutional independence.[103] The Defensoría continued to highlight violations of the right to effective and timely justice in its annual reports. However, Carazo had little success in breaking down judicial resistance.[104]

A gradual sea change in relations can be attributed in large part to the robust interventions of Rolando Vega. Vega was a career judge with an indepth understanding of the internal workings of the judiciary. Vega while highly critical of Defensoría intervention in judicial matters, saw no conflict between administrative oversight and judicial independence.[105] As Vega recalls, "the Defensoría clearly had competency in this area but they [the judiciary] had maintained a very rigid position, a very negative position and it is here we clashed".[106] Vega

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[100] Ibid., p. 241.
[101] The Supreme Court, Plenary Session, 23 June 1986.
[102] Rodrigo Carazo [Defensor], 31 August 2007.
[103] Defensoría Annual Report 1995-1996, p. 514.
[104] The level of judicial cooperation with Defensoría resolutions is not reported in the annual reports.
[105] Rolando Vega, Deputy Defensor 1997-1999, interview by author, San José, Costa Rica, 11 September 2007.
[106] Ibid.

adopted a two-pronged strategy toward the judiciary: (1) cooperation through an Inter-institutional Commission of the Defensoría and Judiciary created in 1998,[107] and (2) public censure of judicial intransigence in the media.[108] This bore results with the Defensoría noting in 2000 'the attentive and adequate response of judicial functionaries'.[109] Contemporary relations are much improved although they lack active coordination. According to Luis Paulino Mora Mora, President of the Supreme Court, this represents a process of institutional learning:

> Before we had to constantly respond to complaints including reprimands from the Defensoría detailing our failings. The situation has improved as we have adjusted our conduct to the concerns raised and continue to try and satisfy the demands of the user.[110]

The Sala Constitucional is the most important institutional innovation of recent times in Costa Rica.[111] The Sala is the apex constitutional authority and constitutes a key horizontal relationship. Significantly, the Defensoría can consult the court on matters of constitutionality where a legal project may infringe fundamental rights as well as present emergency amparo and habeas corpus actions. In practice, with the exception of amparos, it has exercised these powers sparingly. Carazo was particularly attentive to the need to establish the profile of the Defensoría independent of the Sala.[112] Both entities were

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[107] Defensoría Annual Report 1998-1999, p. 71.
[108] *La Prensa Libre*, "No puede haber un poder absoluto", 2 July 1998.
[109] Defensoría Annual Report 1999-2000, p. 206.
[110] Luis Paulino Mora Mora, President of the Supreme Court, interview by author, San José, Costa Rica, 4 September 2007.
[111] See Bruce M. Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rica', *Comparative Political Studies*, vol. 29, no. 3, April 2006, p. 325-351.
[112] "If the Defensoría sent everything to the Sala it would undermine its own standing, it is not enough just to have the formal power..." Katía Rodriguez [Defensoría], 21 September 2007.

introduced almost simultaneously, with the Sala created in 1989. In turn, both entities have enjoyed consistently high public approval ratings. Despite the Sala's hostility toward Law 7319, relations with the Defensoría have generally been positive.

That said, formal coordination of activity has not materialised despite the potential for the Defensoría to assist the Sala in dealing with a vast caseload.[113] Carazo argues that Sala Magistrates have been receptive to the Defensoría as a more agile and informal complaints mechanism for appropriate grievances. However, formalisation has been resisted by Sala administrators. [114] More broadly, both of these accountability institutions are subject to similar tensions as the gap between democratic reality and citizens' demands translates into increasing caseloads and inflated public expectations. Also, similar to the Defensoría, while the Sala has maintained high levels of credibility it has not been immune to alleged politically motivated appointments, with observers noting the election of magistrates favourable to Arias' reelection in the early 2000s.[115]

A shared responsibility to advance horizontal accountability has not translated into coordinated action by the Defensoría and Congress. Indeed, the Defensoría project was subject to robust opposition within Congress. Despite more persuasive voices prevailing, the passage of reform owed more to political negotiation than consensus on the merits of the Defensoría. Following activation many legislators viewed the Defensoría as a subordinate office subject to their control. An initial offer of an office within the Legislative Assembly

[113] The Costa Rican Sala received 18,000 cases in 2008 compared to 6,898 received by its Peruvian equivalent.
[114] Rodrigo Carazo [Defensor], 31 August 2007.
[115] Bruce M. Wilson, 'Changing Dynamics', p. 54.

was quickly dismissed by Carazo.[116] Relations over time have continued to reflect dominant regional norms of political competition, with the Defensoría consistently out-polling Congress in public approval.[117] As Programa Estado de la Nación conclude in their 2001 report:

> ...a good number of legislators do not consider these institutions [the Contraloría General and Defensoría] as contributors to political control...Adopting partisan criteria, such institutions are frequently viewed as regrettable obstacles to the work of government...[118]

The Defensoría has found allies within Congress but they are often transient, based on inter-personal norms, as opposed to formal arrangements, and reflective of short-term particularistic interests.[119] Stable coordination has been undermined by the prevalent congressional view of the Defensoría as a 'political trampoline'.[120] This perception has been reinforced by the seeking of public office by former Defensoría personnel.[121] However, this dynamic is also reinforced by the actions of the legislature itself. Electing individuals with close ties to the political elite has on occasion backfired upon the political elite. Echandi provoked legislators to complain that "the Defensoría has exceeded its fundamental role and intervened in areas that are the prerogative of the Legislative Assembly or Executive".[122]

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[116] Rodrigo Carazo [Defensor], 31 August 2007.
[117] The corruption scandals that engulfed Costa Rica in 2004 had a severe impact on public perceptions of the political elite. A survey conducted in November 2004 gave political parties an approval rating of 15 percent to the Defensoría's 75 percent. See *La Nación*, 13 December 2004.
[118] Programa Estado de la Nación, *Sétimo Informe Estado de la Nación en Desarrollo Humano Sostenible*, (San José, Programa Estado de la Nación, 2001), p. 212.
[119] The alternation of governments every four years effectively undermines the development of political careers.
[120] *La Nación*, 'Evalúan poner límites a cargo de defensor', 7 December 2003.
[121] Piszk introduced a bill to Congress in 1999 proposing that the Defensor shall not run for elected office in the elections that immediately follow their term in office. Piszk subsequently ran for the Vice-Presidency in 2002.
[122] *La Nación*, 'Confusión sobre potestades', 11 July 2004.

Piszk attributed the hostility of Congress to a lack of understanding, a tradition among legislators to support the government of the day, and an inability to countenance criticism.[123] Carazo further highlights the challenge of countering the claim among legislators that "in Costa Rica there are no human rights violations".[124] The lack of legislative responsiveness to the Defensoría not only reflects poorly on Congress but also jeopardises the credibility of an entity without coercive faculties. This may explain why Piszk increasingly adopted an aggressive approach toward the accountability of elected officials, even while pursuing a carefully calibrated message. Echandi directly attributed his frequent use of amparos – 180 in four years – to paralysation within the legislative assembly and its failure to uphold citizens' rights.[125]

The reassertion of executive authority within the legislature is a defining feature of the Arias administration. Quesada's opposition to the TLC was forcefully denounced by PLN legislators as selective and ideologically motivated.[126] Months later, the Defensora was subject to an unprecedented congressional investigation for alleged negligence following a successful amparo before the Sala.[127] Quesada was ultimately cleared of wrongdoing.[128] However, this episode marked a new low for horizontal relations. Taitelbaum pointedly criticised her predecessor prior to her election as Defensora, reflecting the attitude of much of the political elite toward Quesada:

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[123] *La Nación*, 'Defensora firme en criticas', 4 July 1999.
[124] Rodrigo Carazo [Defensor], 31 August 2007.
[125] *La Prensa Libre*, "No hay liderazgo para combatir la pobreza", 3 June 2005. Amparos are emergency writs for the protection of constitutional rights.
[126] See *La Nación*, '¿Defensora de algunos?', 26 March 2007.
[127] Agreement no. 6358-07-08, *La Gaceta*, no. 39, 25 February 2008.
[128] It transpired that the case in question that led to the claim of negligence had actually occurred during the tenure of Echandi, not Quesada. Ibid.

> What is achieved with a Defensora totally disconnected from the government? Make a scandal: nothing...If you tell me that Lisbeth Quesada was not biased you are mistaken. She was biased, she became involved in things she should have left alone. She entered situations where negotiation would have achieved much more than fighting.[129]

The Defensoría also forms part of a network of principal entities responsible for legal control and investigation: the Tribunal Supremo Electoral (TSE), Contraloría General, Ministerio Público and Procuraduría General. The initial Defensoría legislation received the support from the TSE and the Procuraduría, with the proviso that the mandate excludes electoral oversight.[130] However, the Defensoría's early efforts to differentiate itself from other public institutions may have complicated relations moving forward. As Esquivel outlines: "the public sector now see [the Defensoría] as an organ of control and here [in Costa Rica] there is no culture of control".[131] A lack of accountability within the public administration has been exposed in a succession of corruption scandals. According to Lehoucq, the collapse of Banco-Anglo in 1994 perhaps best illustrates 'the effects of flawed mechanisms of horizontal accountability'.[132]

A rigid framing of institutional jurisdictions has not encouraged coordination across agencies with multiple instances of agencies investigating the same case and arriving at conflicting

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[129] *Informa-Tico*, 'Taitelbaum responde: hay que ser beligerante pero con inteligencia', 11 August 2009.
[130] Session 8499 18 July 1986.
[131] Max Esquivel [Deputy Defensor], 28 September 2007.
[132] Lehoucq, 'Paradise in Doubt', p. 148. The collapse of Banco-Anglo in 1994 wiped out 1.3 percent of GDP. In the face of official inaction, the Defensoría launched a lengthy investigation into the collapse and demanded the names of approximately 190 people who owed money to the Bank.

conclusions.[133] Furthermore, the relationship of the Defensoría to principal control entities must also be placed in the context of dominant vertical relations. As President Rodríguez makes clear:

> With the Procurador I had frequent relations...it was the relationship of a client with their lawyer. With the Contralor it was the relationship of a company with its external auditors. With the Defensoría it was the relationship between a company and a local community organisation...[134]

The Pacheco administration did lead coordination initiatives among control agencies in the wake of corruption scandals but they lacked continuity.[135] A Network of Transparency was also initiated by the Defensoría in 2004. Given the Defensoría's lack of coercive authority, access to information is particularly important to the effective activity of the office. However, horizontal information exchange remains the exception rather than the rule.[136] Finally, coordination is also a matter of personalities. The controversial actions of Quesada have been viewed with concern by her peers. The Contralora partly attributes a lack of coordination to the "taking of position in subjects where the Defensoría needs to be more neutral".[137] Finally, it is also important to highlight that vertical interference extends to this

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[133] This is apparent in the case of Banco Popular where the Bank Directors effectively played control agencies off each other. See *Al Día*, 'Eluden investigar uso de autos, 5 April 2001.
[134] Miguel Rodríguez [President], 28 September 2007.
[135] Max Esquivel [Deputy Defensoría], 28 September 2007.
[136] Ibid.
[137] Rocio Aguilar Montoya, Contralora General 2005-2012, interview by author, San José, Costa Rica, 22 August 2008.

tier of agencies, with the highly controversial dismissal of the former Contralor General recently ruled illegal.[138]

Coordination between the Defensoría and a new generation of specialised regulatory entities has not materialised. Many new regulatory bodies, such as the Service Controllers and ARESEP, have been created by the executive and government retains control of their operations.[139] A proposal that the Defensoría coordinate the activities of Service Controllers across the public sector was ignored by the legislature.[140] In practice, the Defensoría is "effectively excluded" from oversight of public services and coordination with ARESEP is "almost non-existent".[141] The perception exists that such regulatory agencies have failed to fulfil their mandates.[142] As such, the impact of these entities on the Defensoría is arguably negative, serving to duplicate functions as well as erode the novel profile of the Defensoría within an ever denser state apparatus.

7.4.3. Social relations (organised civil society)

Relations between the Costa Rican Defensoría and social actors are notably lower in intensity than many of its regional peers. Sporadic interaction over time can be attributed to the nature of state-society relations in Costa Rica. Specifically, the historical capacity of the Costa Rican state to meet social needs as well as channel social organisation has diminished

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[138] *Diario Extra*, 'Condenan al Estado por destituir a Alex Solís', 4 June 2010.
[139] Service Controllers were created by Executive directive in 1993 to serve as internal channels of complaint redress within public sector institutions. Another significant entity, the Regulatory Authority for Public Services (ARESEP) was created in 1996.
[140] Max Esquivel [Deputy Defensor], 10 August 2007.
[141] Juany Guzmán, Senior Researcher FLACSO, interview by author, San José, Costa Rica, 4 September 2007.
[142] Ibid.

incentives for autonomous social mobilisation.[143] For the Defensoría this local panorama has resulted in fewer opportunity structures for meaningful coordination with organised social actors.

According to Carazo the coverage of the Defensoría's creation was almost entirely academic, receiving little attention within the media or interest among those outside a small circle of academics.[144] As discussed above, there was little civil society engagement in the drafting of the establishing or regulative law. Nevertheless, upon assuming office Carazo did reach out to civil society organisations as a source of support. The imprint of such engagement on Defensoría structures is evident. A change of name from Defensor to Defensoría reflected Carazo's receptiveness to this NGO's concerns of "subliminal discrimination".[145]

The Defensoría went onto achieve widespread recognition for advancing apparently intractable investigations in the face of official stonewalling, notably in the cases of Banco-Anglo and radiation poisoning. Campaigns by senior Directors within the Defensoría on the rights of people living with AIDS/HIV as well as women's rights and the environment have also resonated at the national and regional levels.[146] The growing credibility of the Defensoría also directly contributed to its bridging role during the El Combo crisis. Significantly, Piszk maintained a discrete distance from social actors opposed to the ICE bill.

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[143] Costa Rica has the lowest scores across a range of citizen participation indicators in Latin America. See Red Interamericana Para la Democracia, *Índice de Participación Ciudadana en América Latina 2005*, (Buenos Aires: Red Interamericana, 2005), p. 23.
[144] Rodrigo Carazo [Defensor], 1 September 2007.
[145] Ibid.
[146] Lorena González Volio, Ombudsman Officer for IIDH, interview by author, San José, Costa Rica, 6 September 2007.

This contrasts with Quesada who publicly appeared to align with social opposition to the TLC.[147] Importantly, Quesada herself traces her formation to the NGO community.[148]

Despite Quesada's identification with the NGO cause, the Defensoría has struggled to establish continuity of relations with this group of actors and there has been little exchange of personnel with a comparatively small and under-funded NGO sector.[149] Partly this is due to the make-up of a Costa Rican civil society comprised of highly diverse organisations pursuing a myriad of causes often with material support from the state. In contrast to the rest of Latin America, human rights do not figure prominently as a mobilising theme within civil society. As Aguilar claims:

> NGOs in Costa Rica are not belligerent. I would say the protection of human rights is not the strength of the NGO community. Analytical studies and promotional work are, on the other hand, well represented.[150]

The Defensoría has done little to address this deficit, with insufficient attention to articulating the valid social and economic grievances of Costa Ricans in the globalising terms of human rights.[151] In this regard, the relationship between the Defensoría and the prominent research institute Programa Estado de la Nación (PEN) is highly significant. PEN has established an international reputation for rigorous diagnostic analysis on sustainable

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[147] *La Nación*, 'Ciudadanos llevan flores a su defensora por cuestionar TLC', 5 April 2006.
[148] Lisbeth Quesada [Defensora], 28 September 2007. Quesada is the founder of the NGO Fundación Pro Unidad de Cuidado Paliativo (The Foundation for Palliative Care).
[149] Irene Aguilar, Researcher in Centro de Acción Pro Derechos Humanos, interview by author, San José, Costa Rica, 17 August 2007.
[150] Irene Aguilar [NGO], 17 August 2007.
[151] Early efforts by Carazo and his team to articulate a broad spectrum rights-approach are evident. See Alfredo Blanco Odio, *Derechos e Intereses de los Habitantes*, (San José: Defensoría de los Habitantes, 1995).

human development.[152] Close relations between Carazo and the head of PEN, Miguel Gutierrez, resulted in an early alliance between the two entities, with the Defensoría becoming something of a "laboratory" for PEN.[153] Initially, PEN benefited from association with a highly credible state actor and information resource and, in turn, the Defensoría drew on PEN's sophisticated analyses to better understand its operational environment.[154] Nevertheless, as Esquivel suggests, "I feel that the Defensoría has never managed to fully capitalise upon the findings of PEN studies".[155]

The election of politically ambitious individuals as Defensor has also fomented distrust of the office in the eyes of civil society. Following Piszk's departure, social actors mobilised to exhort the legislature to raise the election threshold to a qualified majority.[156] This demand was ignored by the legislative assembly. Under Echandi, the boundaries between citizen as rights claimant and citizen as client became increasingly blurred, with former beneficiaries of Defensoría assistance subsequently working for Echandi's election campaign.[157]

Guzmán argues that relations between the Defensoría and the media are contingent upon two critical factors: (1) inter-personal relations between senior figures, and (2) the real and objective value attributed to the institution by the media's informational agenda.[158] The

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[152] See: http://www.estadonacion.or.cr/
[153] Miguel Gutierrez, Director of PEN, interview by author, San José, Costa Rica, 9 August 2007.
[154] See M. Esquivel and J. Guzmán, *El Trato Ciudadano en Costa Rica: Apuntes sobre la Vivencia cotidiana de la Democracia*, (Estado de la Nación: UNDP, 1999).
[155] Max Esquivel [Deputy Defensor], 28 September 2007.
[156] *La Nación*, 'Piden Variar Elección de Defensor', 22 March 2001.
[157] Angela Avalos, health correspondent for *La Nación*, interview by author, San José, Costa Rica, 26 September 2007.
[158] Juany Guzmán, 'El Desafío Democrático de una Cultura de Rendición de Cuentas en Costa Rica', in Roy Rivera et al. (eds.), *La Democracia del Nuevo Milenio: Transformaciones Políticas e Institucionales en la Costa Rica Contemporánea*, (San José: FLACSO-UNDP, 2006), p. 189.

activity of the press in the exercise of political control marks it out as a potentially key ally for the Defensoría. However, it is also important to reflect on 'the dual function of the media as a private enterprise that seeks to maximise profits as well as exercise a social function'.[159] The disputed neutrality of the media during the 2007 TLC referendum was a central bone of contention.[160] Drawing on Guzmán's dual criteria, the Defensoría has intermittently appealed to the informational agenda of, primarily, the print media in Costa Rica. Positive coverage intensified under the highly strategic direction of Piszk, with the Defensoría often held up by the media as an example to other public institutions.[161]

Echandi sustained a high profile while pursuing a less strategic and more political vision of relations. Despite Echandi's populist style arguably diminishing the Defensoría's strategic impact, the office nevertheless retained a substantive presence within the media.[162] In contrast, media exposure under Quesada has fallen dramatically:

> Each Defensor has been highly visible and left their specific mark, I felt that the Defensoría often assumed positions, achieved a lot, now when people think of rights they also think of the Defensoría. But with the new Defensora I feel that the institution's voice has greatly...[163]

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[159] Juany Guzmán, 'El Desafío Democrático', p. 167.
[160] Jorge Vargas Cullell, 'Costa Rica: una decisión estratégica en tiempos inciertos', *Revista de Ciencia Política*, vol. 28, no. 1, 2008, p. 159.
[161] 'The poor rating attributed to the judiciary should be of great concern to all of us while the prestige of the Defensoría offers a clear lesson to the government and legislative assembly that by listening attentively and faithfully to the people – without demagoguery – the right path may be found'. *La Nación*, 'En Vela' [Julio Rodríguez], 25 October 1999.
[162] *La Nación*, 'Recomendaciones de la Defensoría', 28 June 2004.
[163] Angela Avalos [journalist], 26 September 2007.

Beyond strategic disconnect with the informational agenda of the media, Quesada's public absence is also attributable to negative relations with senior media figures. A breakdown in relations with powerful media groups is observed following Quesada's controversial intervention on the TLC in 2007. In particular, escalating animosity with *La Nación* – a vocal supporter of the TLC – is observed in a series of scathingly critical pieces on the Defensora's conduct.[164] In turn, near the end of her term the Defensora accused *La Nación* group of serving the interests of powerful political and economic interests and ignoring the Defensoría.[165] This contrasts starkly with earlier Defensors who all sustained broadly positive working relations with media groups, including *La Nacíon* group.

Table 7.4: Public confidence in the Defensoría de los Habitantes and other state and non-state institutions (2002-2008)

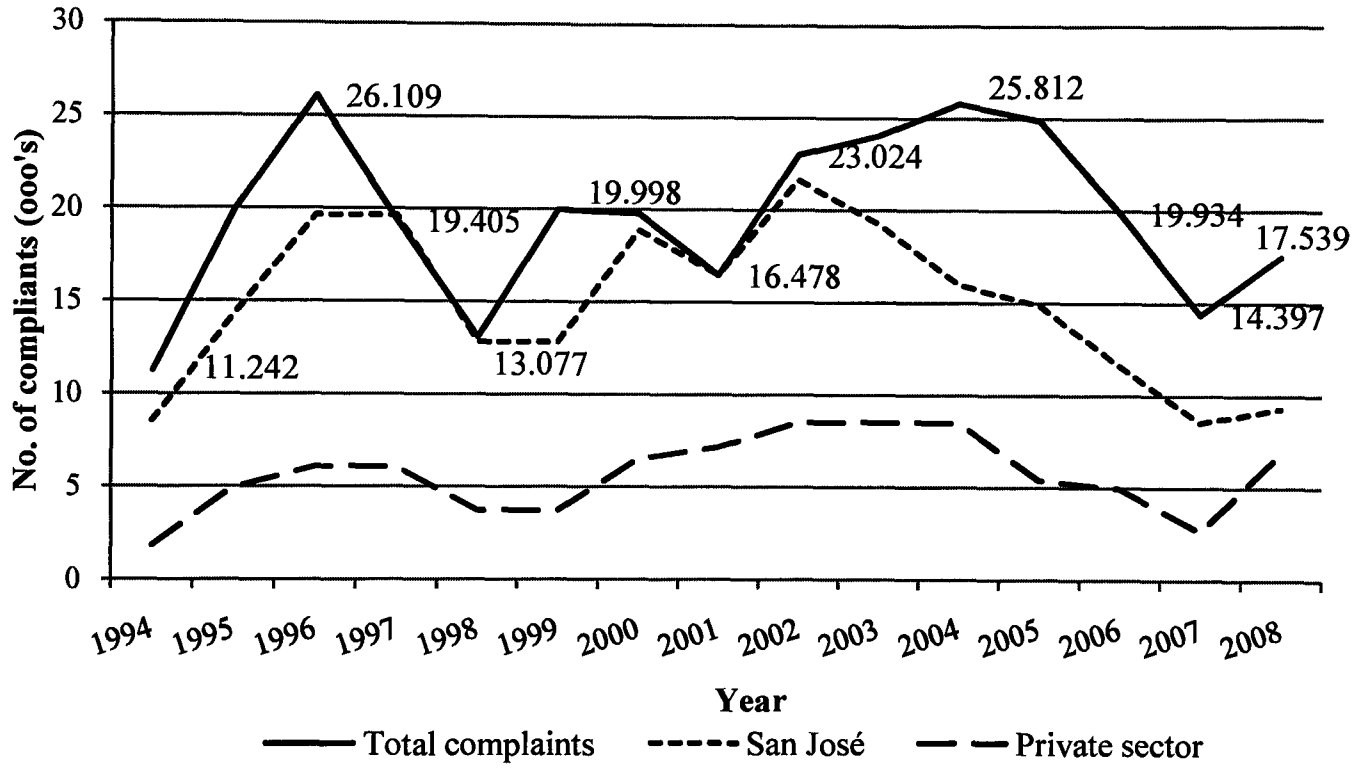
Unimer Research International-La Nación[166] Do you have confidence in the following institutions (yes)?						
	Defensoría	**Congress**	**Judiciary**	**Church**	**Govmt**	**Pol. parties**
2002	72%	43%	63%	54%	67%	18%
Vanderbilt University: LAPOP - Latin American Public Opinion Project[167] Do you have confidence in the following institutions (yes)?						
	Defensoría	**Congress**	**Judiciary**	**Church**	**Govmt**	**Pol. parties**
2004	77.1	49.9	60.0	65.7	56.7	24.9
2006	73.8	42.4	46.7	63.0	47.1	24.2
2008	64.6	38.1	42.8	65.2	51.6	20.2

Table 7.4 demonstrates the robust public standing of the Defensoría in Costa Rican society averaging 72 percent over the period 2002 to 2008. High public approval of the Defensoría

[164] See *La Nación*, 'Personaje del día: Lisbeth Quesada Tristán', 29 March 2008; *La Nación*, 'Editorial', 2 August 2009.
[165] *Informa-Tico*, 'Defensora: Independiente y sin miedos', 13 August 2009.
[166] For methodology see: http://www.nacion.com/ln_ee/encuestas/unimer/10-2002/Parte4.htm
[167] LAPOP uses a confidence scale of 1 (low) to 7 (high). The chart displays total scores of 5 to 7. See: http://lapop.ccp.ucr.ac.cr/Novatos.html

has been a feature of institutional development since its creation.[168] No other state or non-state entity has maintained such high popular approval over time although confidence in public institutions – with the exception of political parties – is higher overall in comparison to many countries in Latin America. Interestingly, in this case, the lower profile of Quesada does not appear to have affected institutional approval ratings with a score of 64.6 percent in 2008. Another indication of the public support enjoyed by the institution was evident in significant, if diffused, popular anger over the election of Taitelbaum in 2009.[169]

Figure 7.3: Total complaints received by the Costa Rican Defensoría 1994-2008



Source: data compiled from Annual Reports 1994-2009. Data not available for cases received outside San José or private sector for 1997 and 1999. Duplicate data from the previous year has been replicated in these instances.

A number of factors underpin this apparently robust public approval. The historical legacy of the Defensoría's activity combined with the residual novelty value of a rights institution continues to exert a hold over popular imagination. Attacks by establishment media outlets

[168] See Esquivel and Montiel, *"Doña Marta ya tiene quien le escriba..."*, pp. 357-359.
[169] *La Nación*, 'Taitelbaum esquiva a manifestantes para ingresar a Defensoría', 4 January 2010.

such as *La Nación* resonate among the political elite but Quesada's outspoken position inspired support among sectors of the population that feel disenfranchised by the traditional political system. Fundamentally, the public standing of the Defensoría reflects a disjuncture between state and society, the office providing "a small but significant window into a largely opaque and unresponsive state apparatus".[170]

On the other hand, the evidence suggests that public opinion data tells us very little about the actual functioning of the office. As Figure 7.3 shows, few Costa Ricans actually use the services of the Defensoría and complaint reception has been subject to fluctuation over time. The fall in complaints in 2007 was seized upon by *La Nación* as a sign that the Defensoría was losing the confidence of the citizenry.[171] Certainly, this drop in cases is a cause for concern. However, the disparity between confidence indicators and complaints reception suggests it may not reflect a fall in confidence in the Defensoría per se so much as a fall in confidence in the effective ability of the office to resolve grievances, even as a last resort. It is under the two Defensors who most actively reached out to the citizenry that complaints peaked in 1996 and 2005 (note cases received from outside San José). It is under the centralising direction of Piszk that the Defensoría experienced its most dramatic fall in demand from 26,109 cases in 1996 to 13,077 in 1998.[172] A further important caveat to the 2007 figure is the number of complaints that fall outside the Defensoría jurisdiction – referring to the private sector – which constituted 22 percent of complaints in 2005.

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[170] Juany Guzmán [NGO], 4 September 2007.
[171] *La Nación*, 'La Defensoría debe aterrizar', 27 March 2008.
[172] 13,077 complaints is the official reported figure for 1998. However, human error may have led to some complaints received by telephone not being registered correctly. See Defensoría Annual Report 1998-1999, pp. 476-477.

It is not within the scope of this chapter to explore indepth the local mechanics of Defensoría institutionalisation in Costa Rica. However, the importance of Defensoría engagement at the local level should not be understated, especially in relation to those most vulnerable in Costa Rican society. Carazo initiated a programme of public consultations throughout the country in an effort to encourage press coverage and plant the institution in the national consciousness.[173] However, local penetration was reversed under Piszk, with 98 percent of all complaints in 1998 received in San José (see Figure 7.3). The result has been a deficit in the Defensoría's engagement with vulnerable groups, as Varela elaborates:

> The great majority of complainants come from San José and are public employees...but of those that have an equal or even greater need of assistance but are hundreds of kilometres from here? They are not going to travel for two days to place a complaint against the Ministry of Agriculture...[174]

Echandi did make significant inroads into decentralising the operations of the Defensoría. In 2005 the number of complaints received from outside San José rose to 40 percent (see Figure 7.3). Quesada has continued to oversee the regionalisation of Defensoría operations with total complaints received from outside San José of 47 percent in 2008 (see Figure 7.3). Nevertheless, local Defensoría officials point to a number of structural obstacles that impede progress on this front, including under-funding, the building of expertise, and insertion into the local state apparatus.[175]

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[173] *Diario Extra*, 18 June 1993; *La República*, 22 June 1993.
[174] Ricardo Varela [Defensoría], 6 August 2007.
[175] Roberto del Prado, Head of the Defensoría office in Pérez Zeledón, interview by author, Pérez Zeledón, Costa Rica, 13 September 2007.

7.4.4. External relations (international actors)

For many observers, the creation of the Defensoría owes more to Costa Rica's regional standing as a human rights referent point than to domestic demand for such an entity.[176] The Defensoría inserts into the global UN community of NHRIs and enjoys an A status rating by the International Coordinating Committee for National Human Rights Institutions (ICCNI).[177] The office regularly sends representatives to UN meetings and was the first NHRI in Latin America to be formally designated a National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT).[178]

The Defensoría has also applied itself to engaging regional networks as a route to expertise and resources. The office has built links to INGOs such as the Commission for the Defence of Human Rights in Central America (CODEHUCA) and IIDH. The Defensoría has also been an active member of the Council of Central American Human Rights Ombudsman (CCPDH) with all four Defensors assuming leadership roles. Relations within the Ibero-American Federation of Ombudsman (FIO) have been more problematic, with Costa Rica a vocal critic of the Federation's exclusion of Caribbean countries.[179] Bilateral relations are also evident in the sharing of good practices. Costa Rica's mobile units inspired similar initiatives in Bolivia and Peru. In turn, Peru and Panama's pioneering transparency network was emulated by the Costa Rican Defensoría. [180]

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[176] Juan Carlos Rodríguez Cordero, Costa Rican academic and Jurist, interview by author, San José, Costa Rica, 19 September 2007.
[177] See http://nhri.net/nationaldatalist.asp
[178] See http://www.apt.ch/content/view/138/152/lang,en/
[179] Defensoría Annual Report 2003-2004, p. 757.
[180] Defensoría Annual Report 2004-2005, p. 82.

7.5. Rules of access

The Costa Rican Defensoría operates in a social setting characterised by reasonably stable and enforced formal rules over time. Nevertheless, it is still the interaction of formal rules and informal norms that ultimately shape access to accountability arenas within and outside state structures.

7.5.1. Vertical access

In general, the executive has viewed the Defensoría as a hindrance or, more often, an irrelevance to achieving its policy objectives. Two principal factors underlie this dynamic. First, for the executive, coordination with control institutions other than the Defensoría offers more concrete benefits. Second, the Defensoría has used vertical state access to capitalise on confrontation over coordination with the executive branch.

Carazo maintained cordial relations with Calderón and Figueres but beyond an initial symbolic endorsement of the Defensoría's work neither President showed much interest in coordination initiatives.[181] In part, this lack of access was due to Carazo's leadership style. Initially, Carazo firmly believed that the Defensoría's principal duty was to respond to individual complaints rather than to prioritise issues.[182] This approach meant few resources were devoted to developing a strategy of upward vertical state engagement and the executive

[181] A reminder by Carazo to President Calderón to honour an invitation previously given to the Defensor to attend a Government Council's meeting went unfulfilled. Defensoría Annual Report 1994-1995, p. 372.
[182] Rodrigo Carazo [Defensor], 31 August 2007.

rarely felt compelled to work with, or even respond to, the Defensoría. Carazo concedes that as the caseload and profile of the Defensoría grew he accepted that engaging with violations of a more structural nature required a strategic approach:

> I realised that when we intervened in the Directorate of Pensions in favour of someone, they told us that they would attend to it immediately. That case would then go to the top of the pile and the rest would be forgotten.[183]

Institutional learning also extended to asserting the Defensoría's voice. By 1995 the Defensoría was beginning to challenge vertical authority on key planks of government policy. Internal efforts to develop a rights-based discourse toward human development in Costa Rica were important in consolidating the image of the Defensoría. The office's growing impact on the national stage was also attributable to high-profile investigations and declarations on state reform and irregularities within the public sector.[184] On occasion, the Defensoría was able to solicit a response from the executive and even alter executive policy.[185] Such heightened activism was not, however, well received and intervention on public policy was subject to Presidential criticism.[186] However, the executive reply was more often than not silence. The Defensoría documents a litany of proposals that 'found no echo whatsoever'.[187]

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[183] Ibid.
[184] See Defensoría Annual Report 1994-1995, p. 340. A rights link was not always self-evident, for instance Defensoría intervention on the question of road tax levies.
[185] For instance, following a recommendation by the Defensoría, the President stopped issuing contracts to building firms that committed rights. Defensoría Annual Report 1995-1996, p. 497.
[186] Following statements on economic policy, the President criticised the Defensoría for unsolicited advice "[they] have had the government jumping from one place to another because they want to suggest corrections to the policy". Defensoría Annual Report 1995-1996, p. 499.
[187] Defensoría Annual Report 1995-1996, p. 498.

The Defensoría's incipient strategic challenge to executive authority through vertical channels was consolidated under Piszk. Carazo had discovered that the very act of seeking access to vertical state actors yielded dividends in terms of the Defensoría's public standing and authority. Piszk excelled at such political manoeuvring and was also highly strategic, viewing "the subject of individual attention as very important in providing the material for large cases [of violations]".[188] The Defensora was able to access Ministries directly and vice versa, with Piszk fielding meeting requests from Ministers.[189] On rare occasions, Defensoría reports exposing violations were jointly-signed by executive officials and acted upon by the President.[190]

However, while coordination was possible, the Defensora did not shy away from confrontation with executive entities, most notably in holding the CCSS accountable for the catastrophic exposure of patients to radiation poisoning.[191] From the outset, Piszk declared her intentions to "launch a frontal attack on corruption".[192] This focus took on momentum following the appointment of Max Esquivel as Deputy Defensor in 1999. Investigations into privileges enjoyed by public employees in the Costa Rican Petrol Refinery (RECOPE) and the misuse of funds in Banco Popular exposed a permissive public sector culture. The Defensoría also continued to pursue the Banco-Anglo investigation. [193]

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[188] Sandra Piszk [Defensora], 21 August 2007.
[189] *La Nación*, 'Desorden en vivienda popular', 5 June 1998.
[190] *La Nación*, 'Estado apoyará a esterilizados', 20 November 1998.
[191] *Al Día*, 'Caja decepciona a sobreirradiados', 7 August 1997.
[192] *La Nación*, 'Quiero detener la corrupción', 25 February 1997.
[193] *La Republica*, 'Privilegios, no derechos', 14 September 2000.

Increasingly, it appeared that vertical state access was not negotiated so much as dictated by the Defensoría. This is most evident in the 'El Combo' crisis where the Defensoría experimented with the limits of its vertical authority in the face of executive paralysis and political fragmentation. In directive DH-190-2000 Piszk notified President Rodríguez of her intentions to monitor public protests to ensure respect for civil and political rights.[194] In a defensive reply, Rodríguez affirmed the government as the guarantor of the "public rights and liberties of all Costa Ricans".[195] Crucially, it was the Defensora who provided Rodríguez and his advisors with access to a negotiated settlement to the crisis.[196]

Experimentation with the Defensoría's vertical authority reached its apogee under Echandi. His profile as the President's handpicked Defensor did not translate into enhanced access to vertical state channels. Indeed, six months into his tenure observers were noting (approvingly) that "[Echandi] has not drawn closer to government but rather the people, as is the duty of the institution".[197] Echandi did initially focus attention on his campaign pledges to decentralise the Defensoría and enhance access for Costa Rica's indigenous minority. However, the office also quickly resumed an aggressive political accountability agenda. An investigation into the improper compensation of former executive Presidents of autonomous institutions in 2002 led to the President proposing reform of this long-established system of patronage.[198]

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[194] Defensoría de los Habitantes, *Informe Anual 1999*, (San José: DHR, 2000), p. 4.
[195] Ibid.
[196] *La Nación*, 29 March 2000.
[197] Hugo Muñoz quoted in *La Prensa Libre*, 'Destacan labor del Defensor', 4 May 2002.
[198] Defensoría Annual Report 2002-2003, p. 176.

Such accountability actions against the executive branch were due, in part, to the internal influence of Esquivel re-elected as Deputy Defensor in 2001. Esquivel effectively ring-fenced such investigations as his sphere of activity independent of Echandi.[199] However, it was Echandi's decision to launch a series of opportunistic attacks on government decisions that removed any possibility of vertical state access to an, albeit much weakened, Pacheco administration.[200]

Quesada entered office highly aware of her status as a political outsider, promising to: "take up my 'Excalibur' and I hope that each one of them [Defensoría personnel] will take up theirs as we are guerrillas, we are fighters, we are defenders". Quesada was effectively isolated from vertical state actors. In part, this reflects a loss of strategic direction on the part of the apolitical Quesada. This strategic deficit was particularly costly when placed in the context of a relatively effective Arias administration and an increasing array of control entities competing for space within the state apparatus. As Ríos states:

> The style has been very reactive and opportunistic. This has not been in the best interest of the institution. So there is a strike in Limon "*Vamos!*" So patients are being harmed by cancer treatment "*Vamos!*" So the issue is the TLC, are we for or against it? "*Vamos!*"[201]

Coordination with the executive branch was therefore largely absent under Quesada, with sporadic interaction with individual Ministers. Pacheco effectively ignored the

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[199] Max Esquivel [Deputy Defensor], 30 August 2007. Also *La Republica*, 'Esquivel fustiga privilegios', 5 July 2001.
[200] *La Nación*, 'Pacheco arremete contra Defensor', 16 June 2004.
[201] Frankin Ríos [Defensoría] 13 August 2008.

recommendation of the Defensoría.[202] Under the Arias administration there was very limited direct contact with the President's office.[203] Quesada directly challenged the vertical authority of the executive and its ministries on a range of issues from migration, to citizen security, labour standards, and, most decisively, the TLC. However, unlike Carazo and Piszk, Quesada was far less effective in converting the Defensoría's political capital into access to vertical state actors. Quesada also failed to utilise conflict with vertical state actors to project the Defensoría's distinctive profile onto the national stage.

7.5.2. Horizontal access

For the Defensoría, horizontal access is crucial to its accountability function but remains a highly negotiated affair due to intra-agency competition. Fundamentally, what Mora Mora distinctively terms the Defensoría's "jurisdiction of influence" is subject to resistance across a highly legalised setting.[204]

Access to the legislature has been complicated by official resistance to oversight of legislative activities as well as backlash against the very notion of human rights violations in Costa Rica.[205] Inaction by Congress has been a constant theme for the Defensoría with public rebukes highlighting its lack of access to this accountability arena.[206] Invitations for the Defensoría to participate in public debates convened by the legislature were a feature of

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[202] Defensoría Annual Report 2005-2006, p. 180.
[203] There are very few references to the executive in Defensoría Annual Reports 2006-2009.
[204] Luis Paulino Mora Mora [Supreme Court], 4 September 2007.
[205] Rodríguez [Defensoría], 21 September 2007.
[206] Carazo's early rebukes for the legislature's failure to act in the case of Banco-Anglo were a prelude to the vociferous criticism of his successors. See Defensoría Annual Reports 1996-1997, p. 677.

Carazo's tenure but have since not been forthcoming.[207] Access is primarily through the presentation of an annual report to Congress. This mandatory point of access is a vital tool for the public accountability function of the Defensoría. However, the reaction to a document cataloguing a lack of compliance across the public sector in the full glare of the media has often been dismissive.

The ability of the Defensoría to submit legal projects to Congress has also rarely been exercised with success. Indeed, Carazo's protestation that 'the Defensoría "can and must" involve itself in the legislative process' was put to the test in 2004 with official attempts to impose a more restrictive definition upon the Defensoría's formal mandate.[208] One high profile Defensoría proposal that has been enacted is the Special Permanent Commission for Human Rights established in 2006 and made permanent in 2010.[209] However, the degree to which Defensoría advocacy contributed to the laws approval is debateable. Thus far, in its brief operational life the Commission has not institutionalised relations with the Defensoría. Instead, it has focused on review of legislation without consultation with the Defensoría, effectively duplicating functions. Given precedent, such an outcome may be predictable but, according to Esquivel, is no less unfortunate:

> The principal task of the Commission should be to call public officials to account for failure to comply with Defensoría's recommendations. This would not only guarantee a

[207] In 1996 the Defensoría participated in eight public debates convened by the legislature on the reform of the Costa Rican Electricity Institute (ICE).
[208] *La Nación*, 'Confusión sobre potestades de Defensoría', 11 July 2004.
[209] Project no. 16262, Special Commission of Human Rights, 25 May 2010.

significant strengthening of the Defensoría. It would also benefit Congress and its ability to exercise control over power.[210]

It is within the judiciary that resistance to the Defensoría's 'jurisdiction of influence' has been particularly apparent. Despite attempts at design stage to paradoxically restrict an institution without coercive powers to a control function, the final text is oriented toward a 'control of rights' rather than legality.[211] In recent years receptiveness to the office's mandate over the administration of justice has grown. For instance, public communiqués to the President of the Supreme Court expressing concern at procedural delays and case backlogs have become less frequent.[212] However, the Defensoría's access to the legal arena is most evident in the area of human rights protection and petitions to the Sala IV.

Although systemic analysis on human rights petitions before the Sala IV is not obtainable, data suggests sporadic use of such powers. On rare occasions, the Defensoría has submitted habeas corpus actions.[213] During Piszk's tenure, the Defensoría submitted 23 amparo actions to the Sala.[214] Amparos have been used to gain access to information, redress denial of medical treatment, and to force legislative action on the right to referendum, as well as a range of other urgent actions.[215] Piszk's infrequent use of amparos contrasts with the approximately 180 amparo actions submitted by Echandi, who also claims a 98 percent

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[210] Esquivel [Deputy Defensor], 28 September 2007.
[211] Hugo Muñoz [Jurist], 15 August 2007.
[212] Defensoría Annual Report 1996-1997, p. 78.
[213] For instance, the Defensoría submitted a number of habeas corpus actions on behalf of detained protestors during El Combo of March 2000. See Sala IV, *expediente* no. 00-002465-007-CO.
[214] Defensoría Annual Reports 1997-2002.
[215] See *Seminario Universitario*, 'Hay un interés de deslegitimar los controles', 29 July 2004.

success rate in favour.[216] Annual reports document the submission of only five amparos between 2005 and 2007.[217] Variation in the use of amparos responds in part to the preferences of individual Defensors. Similar to Merino in Peru, observers point to Piszk's "more political vision" of Defensoría power and possible reticence to confront Congress through the courts.[218] Despite his political style, Echandi identified a strategic affinity between the simultaneous use of public denunciation and amparos:

> We would pressure from both sides: we would present an amparo in favour of a child denied medicine while at the same time we would call the media to ensure exposure for the child's situation and to tell them we had launched an amparo...[219]

Legal scholars accept the importance of individual amparos but also point to their limitations as vehicles for addressing structural violations, with the Defensoría effectively working as a lawyer on behalf of aggrieved individuals.[220] Rather, the ability of the Defensoría to challenge the constitutionality of laws and norms before the Sala IV is a potentially powerful means of effecting systemic change. However, the Defensoría has not capitalised on this point of access, partly due to a lack of legal training among successive Defensors.[221] Nevertheless, constitutional review powers have been exercised, for instance to oblige government to honour spending pledges on social policy commitments.[222]

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[216] *La Prensa Libre*, 'Acciones y recursos marcan la salida de Defensor', 31 May 2005.
[217] Defensoría Annual Report 2005-2006, p. 357; Defensoría Annual Report 2006-2007, p. 494.
[218] Roberto Vega [Deputy Defensor], 11 September 2007.
[219] Juan Manuel Echandi [Defensor], 18 September 2007.
[220] Hugo Muñoz [Jurist], 15 August 2007.
[221] Ibid.
[222] See Sala IV, *expediente* no. 5676-95, 18 October 1995.

Beyond leadership style, access to the Sala is also influenced by strategic and structural factors. For instance, the Defensoría has also expressed frustration at extended delays within the Sala with a number of supposedly urgent consultations stretching into months and years.[223] In terms of strategic considerations, some observers claim the ultimately unsuccessful constitutional challenge against the TLC bill in 2007 exposed Quesada's political naivety. First, a similar consultation submitted by 17 legislators neutralised, to an extent, the impact of the Defensoría's action.[224] Second, Quesada failed to appreciate the internal politics of the court:

> ...the constitutional action was an error because the matter is now in the hands of seven magistrates that recently approved the reelection of Oscar Arias...she [Quesada] needs to foresee that irrespective of how grave the constitutional problems might be with the TLC bill, she has permitted a very legitimate but manipulated authority...to pronounce judgement...[225]

Finally, intersection with specialised control and investigative entities is not synonymous with access. Incidental coordination of activities with the Contraloría and Procuraduría has often been predicated on media exposure by the Defensoría and subsequent public pressure to act.[226] Carazo loudly denounced the inaction of all control agencies over the Banco-Anglo collapse.[227] The Contraloría, in particular, has been singled out by observers as highly

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[223] Piszk address to congress, acta de la sesión plenaria no. 031, Monday 26 June 2000, p. 37.
[224] *Expediente* 07-005632-0007-CO; Resolution no. 2007-09469.
[225] Gonzalo Elizondo [NGO], 1 September 2007.
[226] A good example of this is the case of Banco Popular. An earlier ruling by the Contraloría declaring the discretional use of public vehicles by Bank employees illegal was ignored for six years until the Defensoría's very public intervention in 2001. See *Al Día*, 'Atacan privilegios en el Popular', 3 April 2001.
[227] Rodrigo Alberto Carazo Zeledón, 'Fue una época de siembra', in Defensoría Annual Report 1997-1998, p. 685.

risk-averse.[228] Nevertheless, the Defensoría has at different intervals worked in a complementary, if not coordinated, fashion with the Contraloría and Procuraduría to achieve significant accountability outcomes.[229] Beyond legal control activities, the Defensoría has also prompted action on more political questions of a legal nature.[230] In other instances, the Defensoría has extended the initial remit of investigations conducted by these control agencies.[231]

7.5.3. Social access

The ability of the Defensoría to review and submit law projects, publish annual and extraordinary reports, and encourage civic mobilisation all point to an important vertical social role. However, access has often been destabilised by practical capabilities and contrasting expectations from within and outside the Defensoría. Civil society observers express concern at the politicisation of the Defensoría and a lack of strategic engagement with urgent – if less visible – matters of national consequence.[232] Uncertainty over the direction of the Defensoría is echoed from within:

> The Defensoría has combined the defence of the interests of the population with the defence of human rights. It may seem that these two things are complementary but often they are

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[228] Hugo Muñoz [Jurist], 15 August 2007.
[229] See Defensoría Annual Report 1996-1997, p. 473.
[230] Notably, the Procuraduría followed the Defensoría's lead in declaring Costa Rica's inclusion in the Iraq war 'coalition of the willing' unconstitutional. See *Al Día*, 'Apoyo a guerra inconstitucional', 26 May 2003.
[231] In 2001 the Defensoría extended an initial Contraloría investigation into the contracting of private public service providers by the Ministry of Public Works and concluded that there had been improper conduct by the Ministry. See Defensoría Annual Report 2001-2002, p. 570.
[232] Juan Carlos Rodríguez Cordero [Jurist], 19 September 2007.

not...If you asked me is the Defensoría de los Habitantes a Defensoría de los Derechos Humanos? Sometimes yes and sometimes no...[233]

Under the leadership of Carazo and Piszk, the Defensoría invested significant resources into building ties with the NGO community. In particular, individual defence areas within the Defensoría continue to work closely with specialised NGOs engaged in thematic work on health and the environment as well the defence of vulnerable groups including migrants, women and children. To this end, the Defensoría has initiated forums on the rights of these vulnerable groups to encourage participation by grass-roots organisations.[234] Continuity has nevertheless often relied on the personal ties of highly credible individuals within the Defensoría with civil society, such as the Director for Women's Rights until 2008, Ligia Martín Salazar.

Underlying the unstable quality of social vertical access are two fundamental issues: (1) heightened exposure of the Defensoría's limitations, and (2) the erosion of organisational credibility. The Defensoría's focus on highly publicised individual cases has generated support within civil society.[235] However, a focus on individual violations is a limited terrain for the Defensoría. Legal access is not necessarily the Defensoría's strongest card as there is no guarantee that such actions will be successful.[236] In turn, delays in the handling of Defensoría's petitions on the part of third party control agencies can rebound negatively

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[233] Vernor Muñoz [Defensoría], 18 September 2007.
[234] Katía Rodríguez [Defensoría], 21 September 2007.
[235] Legal advocacy on behalf of victims of radiation poisoning or those denied liver transplants has done much to consolidate the image of the Defensoría. Angela Avalos [Journalist], 26 September 2007.
[236] Indeed, the unsuccessful petition to the Sala to rule on the constitutionality of the TLC was widely viewed as a defeat for the Defensoría. *La Nación*, 'Sala IV resuelve que el TLC es constitucional', 4 July 2007.

upon public perceptions of the Defensoría itself.[237] It should also be remembered that citizens can themselves launch emergency proceedings before the Sala.

The media has been receptive to the work of the Defensoría, with successive Defensors skilfully scaling up the impact of investigations and legal claims by generating headlines around the violation in question. Nevertheless, social actors have also criticised the Defensoría for over-emphasising legal advocacy to the neglect of broader rights mobilisation tools, such as extraordinary reports and legislative initiatives.[238] In the case of the latter, limited access to the legislative arena undermines the ability of the Defensoría to appeal to organised social interests as a conduit for legislative reform. As to the former, there has been very little effective use of extraordinary reports as an advocacy tool. The impact of a highly detailed 2006 report on the TLC bill was derailed by Quesada's public criticism of the treaty:[239]

> Our interest was to serve as an objective entity that could inform the population: "the TLC is a treaty with these benefits but there are also a series of risks"...Unfortunately the Defensora did not know how to present this position, issuing a declaration which gave the impression the Defensoría was against the treaty. At this moment, we [the Defensoría] lost impact and we lost credibility...now we are isolated.[240]

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[237] Delays by the public prosecutor in investigating the claims of the Defensoría have led to citizens pursuing alternative avenues of redress, including issuing their own amparos before the Sala. See Sala IV, *expedientes* no. 15389-24-01; 15390-24-01; 15391-24-01.

[238] Echandi objected to the release of a special report on the case of radiation poisoning preferring instead to focus on individual cases. Following concerted lobbying by the IIDH, Echandi finally relented and a special report was released. Volio [NGO], 6 September 2007.

[239] See Defensoría de los Habitantes, *Informe de la Defensoría de los Habitantes en relación con el proyecto de ley 16047: Tratado de Libre Comercio República Dominicana, Centroamérica, Estados Unidos,* (Costa Rica: EUNED, 2006).

[240] Ricardo Varela [Defensoría], 6 August 2007.

Social access is also affected by the expectations attached to the Defensoría as a distinctive citizen's advocate that stands within but apart from an indifferent state apparatus. The willingness of Costa Ricans to mobilise in support of the Defensoría has been largely predicated on the diffused popularity and, crucially, presence, of the institution. Carazo saw the construction of institutional identity as imperative, extensively touring the country to personally address civic meetings with the question: "what do they expect of the Defensoría?"[241] In turn, the Defensor began to mobilise civic organisations and encourage the articulation of social demands in terms of human rights.[242] This level of local civic engagement was abandoned by Piszk. Nevertheless, Piszk won over many of her detractors with a finely-judged performance on the national stage. The 'El Combo' crisis as well as a combative defence of victims of rights violations cemented the credibility of the Defensoría.

In contrast to this earlier formative period, the Defensoría's reserves of credibility have been slowly but significantly eroded in recent years due to a perception of organisational assimilation of widely accepted informal (and undesirable) practices. Echandi's highly political interventions overshadowed the Defensoría's continued accountability activities, serving to generate publicity but also compromising the image of the Defensoría as above 'conventional politics'. Social actors have further voiced their concern that under Quesada the institution has succumbed to internal vices common to the public sector:

[241] Max Esquivel [Deputy Defensor], 28 September 2007.
[242] Katía Rodríguez [Defensoría], 21 September 2007.

> The Defensoría should be different to other public institution because it must defend the citizen against other institutions but sometimes I wonder whether it has fallen into the same bureaucratisation, the same red tape, the same idleness...one time I was with them [the Defensors] in the Legislative Assembly...but they were just one actor more, not *the* actor...[243]

7.5.4. External access

In general, the Costa Rican Defensoría has not sought nor benefited from access to the UN, the traditional civil and political rights agenda finding little domestic resonance. An IHRL mandate has remained largely symbolic with little reference to international human rights instruments in annual reports.[244] That said, some significant recent developments are worth noting. In 2008 the Defensoría signed an inter-institutional agreement with the United Nations High Commissioner for Refugees (UNHCR) to coordinate activities on refugee flows.[245] Reflecting growing interaction between NHRIs and UN Treaty Bodies the Committee for the Rights of the Child (CRC) has begun to request shadow reports by the Defensoría to verify official claims.[246]

At the regional level the Defensoría has made no submissions to the IACHR. Indeed, Defensors have on occasion declared their intention to lodge a legal petition before the IACHR, unaware that this is not technically possible.[247] The Defensoría has very rarely

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[243] Angela Avalos [Journalist], 26 September 2007.
[244] Vernor Muñoz [Defensoría], 18 September 2007.
[245] Defensoría Annual Report 2008-2009, p. 394.
[246] Katía Rodríguez [Defensoría], 21 September 2007.
[247] Lorena González Volio [NGO], 6 September 2007.

advised aggrieved individuals to seek redress through the IACHR.[248] A lack of active engagement with the IACHR is explained in large part by Costa Rica's robust domestic legal capacity and the role of the Sala IV as a highly credible authority on matters of human rights.[249] The consultation on the TLC legislation submitted to the Sala in 2007 alleged various violations of IHRL as well as constitutional infractions.

The Defensoría has been active within regional peer networks, especially the CCPDDHH.[250] As Vice-President of the organisation, in 2003 Echandi coordinated electoral observation missions to Guatemala, El Salvador and Panama, with logistical support from the IIDH. Regional INGOs such as IIDH and the CODEHUCA have been important interlocutors with the international donor community as well as defenders of the Defensoría against political interference.[251] These avenues of external access have nevertheless diminished in recent years with the dissolution of CODEHUCA and the IIDH's decision in 2008 to no longer designate an official Defensoría coordinator.

7.6. Politics and institutionalisation: the Costa Rican Defensoría de los Habitantes

The Costa Rican Defensoría presents a complex picture of institutional innovation. Defying linear classification, nevertheless at a general level the analysis has mapped the ascendance of a Defensoría engaged in generating a space within a densely packed state apparatus and a

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[248] One instance is the case of 'Barco D' involving missing persons presumed lost off the coast of Nicaragua during the conflict of the 1980s. The Defensoría advised the concerned families to seek resolution through international channels but did not lodge an *amicus curiae* petition before the IACHR. See Defensoría Annual Report 1998-1999, pp. 188-195.
[249] Esquivel [Deputy Defensor], 28 September 2007.
[250] See *El Heraldo*, 'Defensores preocupados por Centroamérica', 8 August 2001.
[251] *La Republica*, 'Defensor busca consolidar identidad', 10 November 2001; *La Prensa Libre*, 'La Defensoría llega a zonas rurales', 2 March 2001.

gradual decline as the autonomy of the office has been progressively encroached upon. The experience of the Costa Rica office provides important insights into political institutionalisation in the region. Specifically, formal rules do appear to matter more in the Costa Rican setting than in much of Latin America. The Defensoría has been effectively constrained within a relatively stable and enforced framework of formal rules. However, this finding does not diminish the importance placed upon the interplay of formal and informal dimensions of institutionalisation. Indeed, the analysis shows that it is political factors, not formal rules, which have been decisive in shaping the trajectory and impact of the Defensoría. In sum, the Costa Rican case is *not* exceptional to the Latin American experience.

Formal rules have exercised an important influence over both the autonomy and power of the Costa Rican Defensoría. A lack of constitutional status and the decision by the Sala to strip the office of immunity and reduce the vote threshold for designation have negatively impacted upon autonomy from dominant political forces and may also have discouraged more robust, but potentially litigious, interventions. The lack of constitutional status while not posing an existential risk diminishes the authority of the office's 'jurisdiction of influence'. It has also been cited by the Procuraduría as grounds for giving the legislature control of the Defensoría's salary scale, effectively depressing wages. The formal limitations of the Defensoría have also impinged upon its accountability impact, with the Defensoría's jurisdiction disputed and lack of binding authority used as grounds for non-compliance. Furthermore, the Defensoría's ability to address violations of a more systemic nature over and above individual complaints has been hampered by formal constraints. The

Defensoría has been subject to amparos and even congressional investigation for failure to attend adequately to individual complaints as stipulated in its establishing legislation.

The Costa Rican office has struggled to appeal to state and social actors as a framework through which to pursue mutual interests. Relations along vertical and horizontal lines have generally been defined more by competition than coordination, with the Defensoría finding it hard to integrate into a dense apparatus of inter-locking agencies. A natural alliance with Service Controllers, for instance, has not materialised due to political pushback. Relations have also been exacerbated by a public sector culture resistant to horizontal oversight and control. A recently strengthened executive branch has attempted to impose its will on the Defensoría and reacted with hostility when the office has responded by challenging core political elite interests. This is evident in President Pacheco's labelling of the Defensoría's 2004 annual report as a "book of terror" as well as the reaction to Quesada's interventions on the TLC. In turn, the Defensoría has had limited success in building sustainable relations within a comparatively weak and disorganised social accountability arena. The absence of a robust human rights NGO sector is a significant deficit within the Costa Rican context. External relations have been largely peripheral to the activity of the Defensoría, at least in comparison to regional peers.

Vertical state access is largely absent in the Costa Rican experience. Operating within a dense institutional environment among myriad executive agencies has reduced the potential for the Defensoría to operate 'extra-jurisdictionally' through vertical state channels. Horizontal access is the natural terrain of the conventional ombudsman and also applies to

the Costa Rican Defensoría. The study has demonstrated the ability of the Defensoría to seek enforcement of rights claims through legal channels. However, it has also reflected on the challenges posed to horizontal access by rigid jurisdictional boundaries, organisational inertia, and resistance from within other control agencies. Notably, the receptiveness of Sala Magistrates to the auxiliary role of the Defensoría has confronted resistance from court administrators. In practice, horizontal access has often been predicated on the mobilisation of public opinion around the violation in question. However, social access to civic mobilising coalitions and media exposure are also conditioned by institutional frameworks of participation that inhibit autonomous social organisation.

Each feature of institutionalisation, therefore, constitutes an important element to understanding the institutional outcome in this case. However, it is necessary to interrogate the interaction across these three features to fully appreciate the interlacing dimensions of the Defensoría's political institutionalisation. An instructive contrast can be drawn, for instance, between the Defensoría's role in 'El Combo' of 2000 and the TLC seven years later. An expansive interpretation of the formal mandate was employed during 'El Combo', most notably in the adoption of a novel mediation role. During the TLC campaign the Defensoría adopted a more conventional rights-focused interpretation of mandate, pursuing legal action before the Sala, an extraordinary report on the rights implications of the treaty, and making public statements. In El Combo the Defensoría achieved primacy over the outcome of political processes. In the TLC, the office was rendered largely irrelevant. To explain such variable outcomes it is necessary to place formal rules in the context of political relations and rules of access.

Relations are largely defined by the personal profiles of the Defensoras. Piszk as a member of the political elite enjoyed working relations with high-level figures within government and the legislature who were receptive to her proposals. Quesada, on the other hand, was a political outsider with few personal ties to organised state actors. Quesada also followed the highly divisive tenure of Echandi. As such, Piszk pursued access to accountability arenas largely in negotiation with powerful state actors – giving prior notice to Rodríguez of her intentions to intervene, and working with a plurality of actors to arrive at a political solution. In contrast, Quesada sought access to available legal channels and social arenas rather than to vertical state channels – issuing a special report based on human rights criteria. Importantly, Piszk avoided pronouncing judgement on the ICE reform legislation. Quesada voiced her objections to the TLC. Quesada is rightly criticised for tactical shortcomings. Nevertheless, it is interesting to note that her approach conforms more readily to the human rights advocacy witnessed among Defensorías in Latin America. On the other hand, Piszk's mediation access is highly idiosyncratic, reflecting the relational position of a 'political insider' facilitating rather than challenging the interests of organised state actors (i.e. crisis resolution). The TLC presented a very different set of challenges to the Defensoría, which it proved unable to navigate.

The above contrast of experiences is emblematic of the overall findings of this chapter. Above all, it highlights some of those factors that have had a particularly influential bearing on the Defensoría's political institutionalisation. Once again, the individual qualities of Defensors emerge as a key factor. Carazo proved to be a highly adept first Defensor who

quickly established the Defensoría as a credible and authoritative voice on the national stage. However, it is important to also recognise that Carazo was unable to develop a sustainable strategic vision of the Defensoría as a human rights actor. In part, this is due to the complex panorama of human rights violations in Costa Rica which, in contrast to Peru, rarely concern gross human rights violations. Rather, violations of an economic, social and cultural nature that speak to more circumscribed accountability gaps in the Costa Rican context have often proven controversial and difficult to assess for the Defensoría.

However, it also reflects a strategic leadership deficit which has hamstrung the institution moving forward. Emphasis has fallen too often on the 'control of administration' of individual complaints rather than the 'control of rights' on a systemic level.[252] Strategic leadership also has important implications for the question of what holds the Defensoría accountable to its mandate. Echandi's highly political interventions and Quesada's inability to articulate an effective human rights position on the TLC may explain, to some extent, why Arias was later able to impose his own candidate upon the Defensoría. The Costa Rican experience suggests that successive Defensors have misinterpreted, wilfully or not, the mandate of the office, leading to a scope shift away from human rights criteria to a more partisan realm of public policy debate. This observation defies expectations that, operating in such a highly structured setting, the Costa Rican office would be well versed in its respective powers and responsibilities. The partisanship of the Costa Rica Defensoría would likely be viewed by many Western NHRI practitioners as an extraordinary, and unwelcome, adaptation on the classic ombudsman model.

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[252] This formulation of 'control of rights' was suggested by Hugo Muñoz. Muñoz [Jurist], 15 August 2007.

The chapter confirms the utility of accountability theory and that Costa Rica is more amenable to the angular framing of relations along vertical and horizontal dimensions. However, the experience of the Defensoría suggests avenues for further refinement. Notably, the distinction between vertical and horizontal accountability is not always rigidly observed. For instance, the apex constitutional authority – the Sala IV – operates horizontally but also has had a significant vertical impact on important matters of public policy such as Presidential reelection and most recently its ruling on the TLC. This observation can also be applied to the Defensoría on a more modest scale. The analysis also suggests particular attention should be given to relations with constitutional courts, in particular the potential for such apex courts to facilitate or conversely 'crowd-out' the Defensoría. The accessibility and activism of the Sala have contributed to the difficulties encountered by the Defensoría in stabilising a position within the Costa Rican political system.

As O'Donnell states 'achieving a significant degree of...accountability requires the coordination of several agencies'.[253] The experience of the Defensoría validates this claim. The lack of coordination across Costa Rica's horizontal agencies poses a serious impediment to the accountability function of an institution that relies on third parties for information and closure of the legal accountability cycle. Also, the Defensoría's dependence upon social mechanisms – particularly media exposure – to compel other horizontal agencies to act highlights the media as a powerful facilitator, as well as gatekeeper, of accountability in Costa Rica.

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[253] Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', in Andreas Schedler et al. (eds.), *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder: Lynne Rienner, 1999), p. 45.

To end, the institutional life of the Defensoría has been eventful. This new oversight agency has made a significant contribution to accountability politics in Costa Rica. Compared to the Sala IV the effects of the Defensoría on the legislative process and broader distribution of power within society have been modest but real. Nevertheless, the findings of this chapter suggest that the assertion that the office constitutes a 'notable democratic success' may need to be tempered in light of recent developments. The autonomy and power of the Defensoría appears to be currently in flux with resistance building to the work of the office. The increasingly peripheral role of the Defensoría may simply reflect a relatively functional and effective democratic setting capable of managing social needs and demands. However, the analysis suggests otherwise. The Defensoría's importance as a bridge between state and society is evident if as yet not fully realised, offering weak social actors with a rare point of access to the state and, most importantly, a venue for affirmation of their rights. As Piszk recollects:

> It surprised me a lot, I realised in the Defensoría that despite this being such a well-educated country the people do not know what their rights are. It's very striking. It affected me deeply the things people would come in search of. Not only do they not know what their rights are, they have no idea how to defend them...[254]

7.7. Conclusion

[254] Sandra Piszk [Defensora], 21 August 2007.

This chapter has assessed the impact of formal and informal dimensions of political institutionalisation upon the outcome of Defensoría reform in Costa Rica. The chapter began with a typological illustration of the institutional development of the office across the four types of Defensorías identified in this study. Contrary to formalist assumptions, the Costa Rican case does not conform to a linear trajectory but rather has experienced significant instability. This study suggests that the institutionalisation of the Costa Rican office displays greater movement across types of Defensoría than its Peruvian peer. Indeed, this case study has exposed the difficulty of maintaining autonomy and influence even in a highly credible democratic context. In contrast to the Peruvian case, the shifting orientation of the Costa Rican Defensoría appears to correspond to internal instability within the institution itself – epitomised in partisan leadership characteristics – resulting, in part, from external cross-cutting pressures within the Costa Rican political setting. For this reason, the claim cited in the introduction that the Costa Rican case constitutes 'a notable democratic success' requires some qualification.

Nevertheless, the study has documented the significant contribution of the Costa Rica Defensoría to accountability politics at crucial moments across a range of issue areas, from health rights, to social conflict, public administration and corruption. The Costa Rican experience supports the claim that the Defensoría can play an important bridging role in promoting and scaling up accountability action across actors and agencies within and outside state structures. This is particularly evident in the collective action pursued on behalf of radiation victims. As such, not-withstanding multiple challenges, the study affirms the value of the Defensoría within a highly institutionalised setting such as that of Costa Rica. The

historical record remains relatively robust, with the office so far resisting an enduring status of regime proxy or façade. However, the trend is not positive; recent events highlighting the vulnerability of the office to politicisation and official backlash. Whether the Defensoría can restore the credibility achieved in the 1990s and 2000 will depend upon its willingness to comply with the formal prerequisites of its mandate as well as whether it can reinvent itself in light of the accountability challenges that confront contemporary Costa Rican democracy and its citizens.

Chapter 8: Conclusion

This thesis has focused on the origins and subsequent institutionalisation of National Human Rights Institutions (NHRIs) in Latin America. It began from the premise that the rapid spread of NHRIs beyond liberal Western democracies constitutes an important, and overlooked, example of global norm diffusion to the local level. The thesis has argued that the creation of NHRIs across all types of political regimes corresponds to a powerful international process of organised and coordinated norm diffusion. More specifically, the diffusion of such institutional forms has been most evident in norms relating to human rights, as well as to political democracy and regulatory practices. In Latin America, the spread of the Iberian variant to the generic NHRI category – the Defensoría del Pueblo – has been spurred on by domestic processes of democratisation and new political openings for local accountability actors. In sum, the thesis has shown that the interaction of external agency and internal political forces is central to explaining the creation of NHRIs across international boundaries.

By asking why contemporary states have created NHRIs, the thesis has directed attention to the factors underlying the spread of NHRIs. It also contributes to the still incipient field of diffusion analysis. It asks not only why states create NHRIs but also why a dwindling number have resisted the impetus for reform. Within the Latin American cluster of cases, the negative cases of Brazil and Chile were shown to correspond to an absence of compelling external incentive combined with ideational resistance at the local level. Despite the relevance of diffusion scholarship to broader debates on democratisation, political

science has consigned such inquiry to the periphery of scholarly concerns. One of the principal objectives of this research has been to address this theoretical and empirical gap.

This research question has raised a number of theoretical issues relevant to broader debates on norm diffusion. According to rationalists, Defensoría reform was unlikely to come about, due to a lack of enforceable compliance frameworks. However, for the purposes of explaining Defensoría reform, a coercion-based logic was of limited use given the absence of external control and the role of powerful normative forces at the international and regional level. Indeed, the thesis uncovered an unusually dense arena of regional norm activity in Latin America. Conversely, constructivist or persuasion-based models were found to underplay the power of incentives arrayed in support of NHRI reform acting upon internal political actors. Cases of Defensoría reform in the illiberal democracies of Mexico and Peru amply demonstrated the inadequacies of a purely persuasive-based explanatory model.

A more promising avenue of inquiry was found to be the category of acculturation, with its emphasis on 'the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture'.[1] In this context, the key political science question that arose was: under what conditions does acculturation operate powerfully across institutional cultures in Latin America? The thesis proposed three intermediate categories of diffusion: compulsion, inducement and framing of ideas. All cases of Defensoría diffusion in Latin America were shown to correspond to a greater (Peru) or lesser (Guatemala) extent to general cultural processes. However, acculturation provided only partial insight into how enabling cultural

[1] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law', *Duke Law Journal*, vol. 54, no. 3, December 2004, p. 626.

conditions have been levered by highly coordinated external norm platforms such as the United Nations and IFIs (Uruguay). In sum, the comparative evidence showed enabling cultural conditions were important but not necessarily determinative on the outcome of Defensoría reform efforts (Brazil and Chile).

The thesis probed the relationship between diffusion process and outcome. The analysis demonstrated that the common trend of Defensoría creation across Latin America belied significant variation in structural outcomes. Without equating diffusion logics with reform outcomes in a one-to-one relationship, the thesis supports the idea that the manner of diffusion affects the outcome, especially in terms of norm durability and depth of compliance. The empirical evidence showed that reform processes largely dictated by domestic political elites resulted in formally constrained Defensorías (Mexico and Colombia). In contrast, formally unconstrained Defensorías emerged where political elites were peripheral to reform processes (Peru and Nicaragua). The thesis further developed the idea of incomplete institutionalisation outcomes not only in terms of deviation upon standard NHRI templates but also the normative understandings and expectations attached to Defensorías within their local settings.

As such, processes of diffusion have informed the resulting legal form of the Defensoría. However, a focus on formal design principles is insufficient to account for the outcome of Defensoría reform over time. Formalist approaches which have emphasised legal compliance frameworks and formal design principles have struggled to explain the important contribution of formally constrained Defensorías to accountability politics (Colombia) or

conversely a slide into obsolescence of formally unconstrained models (Nicaragua). The notion of 'path dependent' institutional outcomes predicated on structural forms has proved to be flawed in light of the comparative evidence. Instead, the thesis has developed a comparative political approach to explain the variable institutionalisation of Defensorías once activated. From this perspective, institutional development is decisively shaped by the relationships and complex interplay of actors based within and outside state structures. To understand the outcome of Defensoría reform a domestic level of analysis grounded in local institutional frameworks and political processes is necessary.

8.1. The comparative argument and empirical observations summarised

In order to explain the variable institutionalisation of Defensorías following activation, the thesis has relied on a historical institutionalism approach alongside a comparative case study method that combines a search for causal processes with sensitivity to context. The thesis has argued that this historical variant to the 'new institutionalism' school, with its focus on questions of agency, distributional effects, and the conflictive nature of institutional development, is an important corrective to conventional approaches that have tended to overstate the stability, coherence and independence of formal structures. It has drawn on the early work of scholars such as Paul DiMaggio and their emphasis on open-ended, complex and dynamic processes of institutionalisation.[2] In sum, the conceptualisation of institutions as distributional instruments capable of shifting power resources has been harnessed to explain institutional trajectories characterised by conflict and instability.

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[2] Paul DiMaggio, 'Interest and agency in institutional theory', in Lynne G. Zucker (ed.), *Institutional Patterns and Organizations: Culture and Environment* (Cambridge: Ballinger, 1988), pp. 3-21.

In order to explain how Defensorías actually work in practice, and why and when they matter, the thesis proposed the working hypothesis that institutionalisation is the result of a dual process whereby: (1) development of formal design principles is important in explaining institutionalisation. However, (2) the informal dimension of Defensorías' relations with organised state and social actors and rules of access across accountability arenas is often decisive. In developing this argument, the thesis concentrated on two key sources of institutional stability and change: first, exogenous pressures borne of broader institutional settings expressed in historical institutionalism's emphasis on temporality and the contingent assemblage of institutional arrangements; second, endogenous dynamics of conflict over resources and decision-making within a framework of accountability theory.

The power of formal rules within local institutional contexts is affirmed by this thesis. Accountability theory provided a general framework to understand the formal design principles, relations and rules of access that inform the institutional development of similar legal forms across different contexts. Hence, the thesis adopted a concept of 'accountability politics' developed by observers of Latin American politics, one that associates the exercise of accountability not exclusively with legal control but rather with the 'arenas of conflict over whether and how those in power are held responsible for their decisions'.[3] Applying these explanations to the experience of the Defensoría, the thesis found that in all cases institutional development was contextually shaped by the interaction of formal and informal features with no combination of factors guaranteed to stabilise the Defensoría permanently.

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[3] J. Fox, *Accountability Politics: Power and Voice in Rural Mexico*, (New York: University Oxford Press, 2008), p. 3.

Above all, the analysis reframed the Defensoría as instrumentally embedded rather than autonomous to its social setting.

In order to explain variation in institutionalisation outcomes, the thesis developed a four-fold typological classification. This typology is built upon the metaphor of the Defensoría as a potential 'institutional bridge' or, more accurately, point of intersection between organised state and social accountability actors.[4] Guillermo O'Donnell's concept of 'horizontal accountability' served to frame the two dimensions, with state actors understood as occupying 'vertical' (the executive branch) and 'horizontal' (state checks and balances) arenas and social actors located outside state structures and operating through 'vertical' (citizen-state) channels.[5] The thesis argued that the interactive effects of these two dimensions or clusters of actors upon formal and informal features of political institutionalisation produced different types of Defensorías over time.

The findings of the thesis showed that few – if any – cases in the region have achieved an enduring position of *institutional bridge*. Political contexts displaying high levels of conflict and asymmetries of power have not been conducive to the Defensoría assuming such a theoretically optimal position within the political system. Unconstrained formal design did not necessarily lead to a bridging function in contexts of instability where broader cross-pressures within social systems have worked to subvert design compliance. The empirical findings of Chapter 5 confirmed the episodic and intermittent nature of this type of

[4] Ana María Romero Campero, 'El Defensor del Pueblo Como Puente Entre la Sociedad y el Estado', in Pilar Domingo (ed.), *Bolivia: Fin de un Ciclo y Nuevas Perspectivas Políticas [1993-2003]*, (Barcelona: Ediciones Bellaterra, 2006).
[5] Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', *Journal of Democracy*, vol. 9, no. 3, 1998, p. 112-126.

Defensoría. Bridging moments, as in El Salvador in 1993, proved highly specific to historical circumstances and subject to rupture. This was further evidenced in closer assessment of individual Defensorías in Costa Rica and Peru. The evidence shows that this type of Defensoría has often subsequently risked capture and instrumentalisation by actors within the state or has strayed into oppositional politics. The Costa Rican experience highlights the latter negative outcome whereby ambitious Defensors have subverted the formal mandate and ventured into partisan political territory.

The institutional bridge Defensoría has, nevertheless, made important contributions to accountability politics, decisively influencing the outcome of political processes in the cases of El Combo in Costa Rica and the Ad Hoc Commission of the Innocents in Peru. However, such bridging moments are subject to the temporal instability inherent to weakly institutionalised systems. The evidence shows rights defenders, regime proxies, and even façades, may become institutional bridges temporarily, with all of these institutions under pressure to meet expectations attached to their formal mandates at least some of the time. However, such episodic incursions are generally followed by retreat as conditions change. As such, the finding of the thesis is that rather than there being no institutional bridge types, there are no 'core cases' of institutional bridge over time. In reality, the ideal of a stable, consolidated and permanent institutional bridge must contend with powerful cross-pressures that make such a position untenable. Attempts to control and curb the Defensoría's actions from inside the state are pitted against the inflated expectations within society that the office deliver what the state is incapable of delivering.

Given the concentration of authority in the state, and in particular the executive branch, it is perhaps surprising that more Defensorías have not assumed the position of *regime proxy*. According to the empirical evidence, only Nicaragua, Mexico, Venezuela and, most recently, Honduras conform to this type of Defensoría in terms of general trends. A distinction can be drawn between political capture as the dominant trend from point of origin (Mexico and Venezuela) and its subsequent occurrence over time (Honduras and Nicaragua). In the former group, regime proxy reflects the influence of political elites over the Defensoría at point of origin within highly vertical and reasonably effective state structures. An attempt by the strictly constrained Mexican office in 1999 to assert its independence was met with a decisive backlash. This category also raises the question: why is the Defensoría worth capturing? The answer appears to lie with the institution's political capital. The Defensoría's popularity within democratizing contexts where most institutions linked to democracy lack such political capital is a highly desirable commodity. Even in Mexico, the office's failings are not reflected in high public approval ratings.[6]

The Defensoría's gravitation toward political elite control over time generally corresponds to politicians' desire to harness a growing political capital to their own ends. This is often observed within a context of gradual or abrupt deceleration, even reversal, of processes of democratisation and the shutting down of plural space within the state, notably in Nicaragua. In all four cases, Defensorías have been unable to resist powerful countervailing pressures that have left the institution structurally intact but with a normatively undesirable profile – in the worst cases, serving as institutional cover for rights abuses. In such scenarios, advocates of Defensorías might be best advised to oppose the institution's creation. Notably,

[6] See Chapter 5, p. 208, fn. 103.

institutional credibility can rapidly evaporate under new and abusive leadership, as witnessed in El Salvador. The ability of the Peruvian office to avoid partisan politicization or irrelevance has hinged largely on the personal qualities of Defensors, reflecting an inherent limitation of the Defensoría.

The majority of Defensorías have assumed the role of *rights defender*. A distinction can be drawn between those cases that have maintained a rights defender profile without interruption (Bolivia, Colombia and Peru) and other cases subject to fluctuation over time. This outcome has often been facilitated by processes of democratisation and the expansion of plural political space, sometimes leveraged by external actors such as the UN (El Salvador and Colombia). Such a deviation on the institutional bridge type whereby the Defensoría positions itself in opposition to the state appears to correspond to two key drivers: (1) internal instability within the Defensoría itself (Costa Rica), and (2) the external cross-cutting pressures and incompatible demands and expectations from the law on one side and society on the other (Peru). This finding also points to degrees of opposition, with some rights defenders acting without restraint and even actively seeking confrontation with the state, while others seek to fulfil their formal mandate through coordination where they can, confrontation when they must.

The thesis also attests to the high costs incurred by rights defenders where the breadth and depth of democratic processes are in doubt (El Salvador). Rights defenders have proved to be most durable where organised social actors have retained or increased authority relative to the state (Bolivia). In political systems where social actors are in retreat or under attack by

powerful political forces, the institutionalisation of the rights defender model is more precarious. A key factor that emerges within this category is strategic leadership, specifically the ability of Defensors to accurately assess the opportunity costs, as well as gains, of Defensoría intervention for itself and other stakeholders. An important caveat to this discussion is the potential for back-sliding. This refers to the eventuality that a Defensoría, widely perceived to be a rights defender, is in fact a covert regime proxy or façade intended to de-radicalize and pacify social mobilisation. Some concerns have arisen surrounding the alleged suppression of human rights violations by the Guatemalan office, as well as institutionalised racism.[7]

Finally, the thesis has provided evidence of how formal, even if shallow, commitments by political elites to international Defensoría norms have been translated into meaningful change by motivated domestic actors.[8] However, a number of Defensorías confirm the claim that these offices, created for the purpose of deflecting domestic and international criticism, are little more than *façades*. This is applicable in the cases of Argentina, Ecuador and Paraguay. However, a number of other offices intermittently occupy this position. In terms of causal mechanisms, formal design is significant, with the Argentinean case displaying the weakest set of powers of any Defensoría in the region. Notably, the office has neglected to fulfil its human rights mandate. Ecuador and Paraguay display patterns of highly politicised activation processes and subsequent inaction. Common to this type of Defensoría are two key factors: (1) the installation of leadership that lacks credibility within and outside state

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[7] See Chapter 5, p. 200.
[8] This corresponds to what Jon Elster calls the 'civilizing force of hypocrisy'. See John Elster (ed.), *Deliberative Democracy*, (New York: Cambridge University Press, 1998), pp. 109-112.

structures,[9] and (2) a narrow interpretation of mandate regardless of the office's formal scope of activity. These factors also hold the key to understanding incipient positive trends in Argentina and Ecuador.[10]

Figure 8.1: A summary of results (2009)

Formal design compliance	**Type 1: Institutional Bridge**		
Observable outcomes	**Type 2: Regime Proxy**	**Type 3: Rights Defender**	**Type 4: Façade**
	Honduras Mexico Nicaragua Venezuela	Bolivia Colombia Costa Rica El Salvador Guatemala Panama Peru	Argentina Ecuador Paraguay

The results summarised in Figure 8.1 demonstrate the explanatory power of the political institutionalisation approach developed by this thesis. The outcome of Defensoría reform is shaped not so much by formal rules but rather the complex interplay of powerful forces within and outside state structures. This does not deny the potential for formal properties to influence outcomes. However, from a political science perspective, interaction within

[9] Intermittent façades often reflect the damage that can be administered by high levels of political backlash, with Defensorías effectively undermined and isolated through highly politicised (Costa Rica), incompetent (Guatemala) and even corrupt (El Salvador) appointments.
[10] The appointment of Fernando Gutiérrez Vera, a law professor and human rights activist, as Ecuadorian Defensorías in 2008 has been viewed as a positive development.

broader institutional settings is crucial. In contrast to the formalist ideal of an institutional bridge, the findings of the thesis point to no core cases of institutional bridge. Rather, the observable outcome is an array of three alternative types of Defensoría, all of them partially corresponding to the formal design.

8.2. Contribution of the thesis to the literature

This thesis has exposed a number of gaps in the literature on processes of institutional change, political accountability and NHRIs that merit further reflection. Beyond such questions of why states have created Defensorías in the first place, this thesis also advances the debate by inquiring why Defensorías matter, how they work in practice, and, crucially, under what conditions can they fulfil a political accountability function. The implications of this analytical shift from questions of why such institutions exist to how they meaningfully affect change at the local level have been underscored with reference to general developments in political science scholarship. An incipient body of research on endogenous dynamics of institutional change and the role of informal norms in shaping political behaviour has opened the way for building better explanations of the experience of existing organisations.[11] However, there remains much to be uncovered regarding the factors and conditions which explain variation in the political outcome of institutional processes.

[11] D. Rueschemeyer, *Usable Theory: Analytical Tools for Social and Political Research*, (NJ: Princeton University Press, 2009).

Situating the study of Defensorías within the framework of institutional analysis and political accountability, the thesis responds to a number of converging developments as political and legal scholars turn their attention away from legal compliance frameworks toward building better explanations of the factors and conditions that shape the experience of existing organisations. The disjuncture between formal rules and political reality in many domestic jurisdictions presents a direct challenge to neo-functionalist accounts of political and institutional outcomes. To explore this disjuncture the thesis has moved the Defensoría from the periphery of debate to the centre and has applied a more critical lens. The empirical record shows that while some Defensorías are effective in promoting political accountability, others are also effective at undermining liberal democratic frameworks on behalf of partisan interests, or may simply be rendered inactive.

The typology of political institutionalisation developed in this thesis rests on the assumption that an 'accountability gap' between formal rules of the game and widely accepted informal practices varies across cases. The idea of the accountability gap builds on O'Donnell's conceptualisation of 'brown areas' in Latin America.[12] In developing the argument, the thesis has provided some conceptual tools for understanding the contours of the accountability gap, the way in which it drives political behaviour, and how it can assist in understanding different patterns of institutionally-driven political outcomes. In particular it has highlighted the formation of a distinctive NHRI profile in Latin America based on an ability to apply wide-ranging mandates to the task of challenging such gaps. The evidence

[12] O'Donnell identifies 'brown areas' where formal rules of the game bear little resemblance to widely accepted informal practices as a defining feature of regional democracies. Guillermo O'Donnell, 'On the State, Democratization and some Conceptual Problems', The Helen Kellogg Institute, Working Paper 192, April, 1993.

indicates that Defensorías have achieved their greatest political impact where accountability gaps are most visible (Peru). In contexts where accountability gaps are more narrowly circumscribed, the Defensoría has struggled to assert its presence (Costa Rica). The contextual backdrop to this observation is the presence or absence of relatively reliable and effective democratic structures.

This thesis has argued that the political impact of the Defensoría depends less on the circumstances and outcome of the initial foundational moment than on specific political, structural and normative conditions under which the institution continues to evolve and adapt following its creation. In this sense, the study provides a significant supplement to a primarily practitioner-oriented literature by conceptualizing the Defensoría in form and context. It has shown that within the broad designation of Defensorías there exists significant design variation across a range of dimensions as these entities have been institutionalised in diverse local settings. As highlighted in various cases, the diffusion of Defensorías to unstable regimes which display only a loose adherence to constitutional liberalism has subjected the institution to new and competing demands and expectations. Such contextualization of NHRI form challenges the conventional focus on formal rules. The thesis argues instead that to deepen understanding of the impact of Defensorías in processes of political accountability and even, more broadly, democratization depends upon factors outside formal structures.

Despite the conclusions of this thesis being grounded in the Latin American experience, this does not necessarily preclude broader comparative application. Certainly, the majority, if

not all NHRIs, operate in less stable institutionalized environments than that presupposed by formal institutional theory. What has enabled Defensorías to make a difference on the ground under far from optimal institutional conditions is a central aspect to this thesis. Examples include: the promotion of human rights in contexts of high impunity and toleration of violations; the importance of non-formal Defensoría attributes, such as mobilising public awareness through the media or issuing of special reports in institutional contexts lacking reliable and effective democratic structures; and, the importance of wider systemic factors in the development of anomalous Defensoría features, including intervention in political corruption and social conflict mediation. This shaping of the content of Defensoría formal structures by the interplay of powerful political and normative forces at the local level is likely to be of particular interest to social science scholars.

Breaking down the constituent parts of processes of political institutionalisation focuses attention at the level of domestic politics and the mobilising impact of Defensorías upon elected officials, state bureaucrats and also on the general public. This analytical approach shares an affinity with scholarship in the social sciences on opportunity structures and accountability theory which focus on the contingent and contextual interaction between agency, structure and norms in domestic settings. Understanding the structural features – and impediments – of Defensorías has demonstrated two important lessons. Firstly, these insights underscore the importance of investigating diverse modes of institutional influence in promoting political accountability. Secondly, a fuller understanding of the mechanism of social influence helps to explain the puzzling origins of these entities and, despite often

inhospitable political and institutional settings, their ability to make important contributions to political accountability at the domestic level.

Conceptualising the ability of Defensorías to achieve significant accountability outcomes through channels outside of legal enforcement authority, this study has drawn on a growing body of research which points to other sources of institutional restraint and forms of social accountability that may nevertheless entail 'material consequences'. The work of scholars such as Guillermo O'Donnell and Enrique Peruzzotti has provided the building blocks to advance a conceptualisation of the Defensoría's functional relationship with other actors, such as the courts and civil society. The thesis has also parsed out highly idiosyncratic but significant factors that may be decisive in shaping institutional development, above all the leadership of the Defensor in the elaboration of a political accountability mandate and willingness to confront illiberal vertical authorities. The prominence of leadership within this study contrasts with formal institutional analyses which often underplay or neglect all together this vital feature of institutionalisation.[13]

Finally, it is incumbent upon social scientists to be aware of the attendant expectations and relationships of the organisation to other actors within their broader institutional setting. Formal analyses often fail to declare the role they are assigning to the Defensoría and make explicit any assumptions such a conceptualisation entails. For instance, a lack of compliance with Defensoría recommendations may reflect less the structural limitations of the office and

[13] The question arises as to why individual leadership take it upon themselves to assume a rights defender profile sometimes at great personal risk. This study does not offer a causal explanation for what motivates individual Defensors. Nevertheless, such inquiry into the bases of good leadership would further enrich our understanding of institutional development.

more the failure of complementary actors to fulfil their democratic function. In other words, baselines for evaluating the impact of Defensorías should be calibrated in light of political and institutional conditions. What might look like a modest accountability gain or assertion of authority in one case versus another may take on new significance upon closer inspection.

8.3. Questions for future research and final remarks

In presenting this fine-grained political study of the Defensoría in Latin America the thesis has also attempted to provide an insightful comparative angle of vision on the institutionalisation of democracy in Latin America. What emerges from the analysis is the institutionalisation of a kind of democracy in these societies which, while addressing the accountability gaps that are there to some extent, cannot fully and routinely overcome them, and which does not fully consolidate any of these democracies, not even within the highly institutionalised setting of Costa Rica. The experience of the Defensoría over time supports an influential body of research which conceives of democratisation in Latin America as 'a complex, long-term, dynamic and open-ended process' rather than an orderly procession toward the formalised consolidation of democracy.[14]

Indeed, scholars have increasingly contested 'illusions about consolidation' and a concern in particular for 'the quality, in some cases rather dismal, of the social life that is interwoven with the workings of various types of polyarchy [democracy]'.[15] Investigation into the 'quality' of democratic regimes animates some of the most promising contemporary

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[14] L. Whitehead, *Democratisation, Theory and Experience*, (Oxford: Oxford University Press, 2002), p. 27.
[15] Guillermo O'Donnell, 'Illusions About Consolidation', *Journal of Democracy*, vol. 7, no. 2, April 1996, pp. 34-51

scholarship on democracy.[16] This study has demonstrated that the institutionalisation of the Defensoría is compromised by volatile processes of democratisation in Latin America, reflected in unstable rights frameworks, low-quality democracy, and insistent demands for more responsive government. Morlino emphasises a multi-dimensional approach toward framing the variable quality of democracy.[17] Studies, such as this thesis, can contribute to the debate by showing one way to approach questions of democratic quality in a grounded and empirical manner that attempts to avoid reduction. A focus on one institution not subject to systematic comparison previously, and which displays many characteristics relevant to processes of political competition, participation, and responsiveness, gives substance to broad claims of democratic improvement and deterioration over time.

If this burgeoning literature is correct in pointing out the unpredictable and complex nature of institutionalisation in Latin America's democracies, there remains much work to be done on empirical investigation into the reasons that underlie why certain democratic institutions become more or less institutionalised, as well as into what governs the trajectory of democratic actors over time. Without attempting to offer a definitive answer to such questions, this research offers a number of clues to where answers may be found. The experience of the Defensoría highlights some of the principal factors that inform the interplay of democratic change agents, politics, and structures. These include competition for influence within dense formal *and* informal power structures, the personalisation of politics and institutional leadership, the ambiguity of mandates and jurisdictional disputes

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[16] L. Diamond and L. Morlino (eds.), *Assessing the Quality of Democracy*, (Baltimore: Johns Hopkins University Press, 2005).
[17] Leonardo Morlino, 'Legitimacy and the quality of democracy', *International Social Science Journal*, vol. 60, no. 196, June 2009, pp. 211-222.

across accountability arenas. Above all, the findings of the thesis point to a primarily political causal mechanism underpinning the institutionalisation of democratic practices in Latin America. It also highlights the vulnerability of even modest democratic gains and the need for constant vigilance in settings where the fit between liberal formal rules and behaviour and expectations is loose or practically nonexistent.

Above all, the findings of this thesis, alongside insights generated by the above scholarship on democratisation, present a challenge to persistent formalist preoccupations with the architecture of democracy. Institutions matter, but politics determines when, how and to what extent. At its most provocative, the findings of the thesis cast doubt on fundamental assumptions that predominate within the literature. For instance, an important background factor to the experience of the Defensoría in Latin America is the political role of the courts – understood not so much in the generic sense of judicial reviews but also in their broader political and social impact on democratic mobilisation. The thesis documents various instances where the courts have failed to address accountability gaps and have even actively undermined democratic and rule of law frameworks. Such a finding may be counterintuitive to US-centric notions of the courts as a universal good for liberal constitutional democracy.[18] It certainly alters the playing field radically when the courts themselves are a threat to rights frameworks and democracy. Future research might cast a more critical light on the political profile of the judiciary, the informal rules embedded within the organisation, and its impact upon democratic actors, structures and processes.

[18] Bruce Ackerman, 'The New Separation of Powers', *Harvard Law Review*, vol. 113, no. 3, January 2000, pp. 633-729.

In exploring the limitations of formal institutional analysis, the thesis also raises the issue of how to measure the impact of Defensorías and the evidence required to determine whether the office is achieving accountability. To put the most onerous requirement on the method, this study has shown various instances where Defensorías' actions, often in concert with other actors, have changed state actor behaviour. However, this research has also discussed a wide range of accountability outcomes such as agenda-setting, mobilisation of citizens, the monitoring and supervision of state actors, and inclusion of actors within decision-making arenas that, while significant, do not necessarily produce observable or immediate behavioural change on the part of the state. If these formal and informal accountability procedural effects are achieved, according to this thesis and other literature, under certain conditions, political accountability and human rights frameworks can be upheld and strengthened. That said, this research is focused as much at on a penultimate stage of social and political change as on the ultimate stage of changing individual agent behaviour. Future research might harness these findings to analyse indepth the impact of such prior accountability effects on achieving concrete accountability gains.

Finally, a further area of research which this thesis touches upon is the relationship between institutionalisation, political accountability and effective power. Theories of power stress various forms of constraint on actor behaviour as well as those enabling forces which make its exercise possible.[19] The potential range of power-enabling factors goes beyond the scope of this thesis to include social processes, the uneven distribution of power at all levels of interaction, and how the struggle for power is conducted. One particularly notable lesson of this study for democratic advocates is the potential for positive feedback effects to occur

[19] S. Lukes, *Power: A Radical View*, (London: Macmillan Press, 1974).

between Defensorías and organised social actors. The evidence shows that, working together, these actors can elevate one another in stature and influence far beyond what would be possible working alone. Implicit to this observation is the vital question of how these actors are using mutual resources to, in a sense, generate effective power. It is not the intention of this thesis to conduct a systematic exploration of effective power within a framework of political accountability. Nevertheless, the findings of this thesis point to a number of promising avenues of inquiry that can generate further valuable insights into how democratic actors can narrow the gap between democratic ideal and reality.

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Appendix 1: Primary Sources

List of Interviews

Interviews in alphabetical order and by country

The majority of interviews were tape recorded and subsequently transcribed in full. In some cases, I took extensive notes during the interview and then typed them up in full immediately afterwards. I obtained authorization from each of the interviewees to quote their testimonies and list their names in the thesis. Where requested, interviewees have not been named and instead their organisational affiliation and status has been noted.

Argentina (July and August 2008)

1. Alicia Pierini, Defensora del Pueblo de la Ciudad Autónoma de Buenos Aires, interview by autor, Buenos Aires, Argentina, 5 August 2008.
2. Catalina Smulovitz, Professor of Political Science at the University Torcuato Di Tella, interview by author, Buenos Aires, Argentina, 12 August 2008.
3. Fernández Valle Maríano, Centre for Implementation of Public Policies for Equity and Growth (CIPPEC), interview by author, Buenos Aires, Argentina, 7 August 2008.
4. Gaston Chillier and Diego Morales, Executive Director and Litigation and Legal Defense Director of CELS, the Central for Legal and Social Studies, interview by author, Buenos Aires, Argentina, 11 August 2008.
5. German Stalker, Coordinator for the Implementation of Participatory Policies, Office of the Cabinet Chief of Ministries, interview by author, Buenos Aires, Argentina, 6 August 2008.
6. Leandro Garcia, Legal advisor to Defensor de la Nación, interview by author, Buenos Aires, Argentina, 7 August 2008.
7. Martin Sigal, Director of Civil Association for Equality and Justice (ACIJ), interview by author, Buenos Aires, Argentina, 1 August 2008.
8. Matías Blasco, Coordinator, Defensoría del Pueblo de la Ciudad Autónoma de Buenos Aires, interview by author, Buenos Aires, Argentina, 31 July 2008.
9. Pablo Fernández, Head of Publications, Defensoría del Pueblo de la Ciudad Autónoma de Buenos Aires, interview by author, Buenos Aires, Argentina, 1 August 2008.
10. Varina Suleiman, Legal Coordinator at Poder Ciudadano, interview by author, Buenos Aires, Argentina, 8 August 2008.
11. Violeta Quesada, Advisor in the Defensoría General de la Nación Argentina, interview by author, Buenos Aires, Argentina, 12 August 2008.

Bolivia (July 2008)

1. Ana María Romero Campero, former Bolivian Defensora (1998-2003), interview by author, La Paz, Bolivia, 15 July 2008.
2. Antonio Aramayo Tejada, Secretary General of the Bolivian Defensoría del Pueblo 1998-2003, interview by author, La Paz, Bolivia 28 July 2009.
3. Claudio Rosales, Department of Statistics, Defensoría del Pueblo, interview by author, La Paz, Bolivia, 15 July 2008.
4. Diego Pary Rodríguez, Senior advisor to Confederación Sindical Unica de Trabajadores y Campesinos de Bolivia (CSUTCB), interview by author, La Paz, Bolivia 17 July 2008.
5. Erick Torrico, National Coordinator of Communication and Investigation for UNIR Foundation, interview by author, La Paz, Bolivia 28 July 2009.
6. Marina Vargas Sandoval, functionary of the El Alto office of the Bolivian Defensor (1998-2005), interview by author, La Paz, Bolivia, 17 July 2008.
7. Roberto Quiroz, Representative of the Defensor in the city of El Alto, interview by author, El Alto, Bolivia, 15 July 2008.
8. Sonia Cuentas, functionary in the Bolivian Defensor del Pueblo since 2002, interview by author, La Paz, Bolivia 17 July 2008.
9. Waldo Albarracín, Defensor del Pueblo of Bolivia (2003-2009), interview by author, La Paz, Bolivia, 15 July 2008.

Costa Rica (July to September 2007)

1. Ahmed Tabash, Director of Press and Communications, Defensoria de los Habitantes, interview by author, San José, Costa Rica, 14 August 2007.
2. Alvaro Paniagua, Director of Special Protection, Defensoria de los Habitantes, interview by author, San José, Costa Rica, 17 September 2007.
3. Ana-Karina Zeledon, Director of Economic Matters, Defensoria de los Habitantes, interview by author, San Jos, Costa Rica, 17 September 2007.
4. Angela Avalos, health correspondent for La Nación, interview by author, San José, Costa Rica, 26 September 2007.
5. Arnoldo Brenes, Advisor at the Foreign Ministry, interview by author, San José, Costa Rica, 21 September 2007.
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Amnesty International Press Release
BBC Mundo
The Economist
United Nations Press Office

Regional media sources

Argentina

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Colombia

El Tiempo
Primera Página

Costa Rica

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Al Día
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El Heraldo
Informa-Tico
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Appendix 2: Primary Empirical Material and Sources

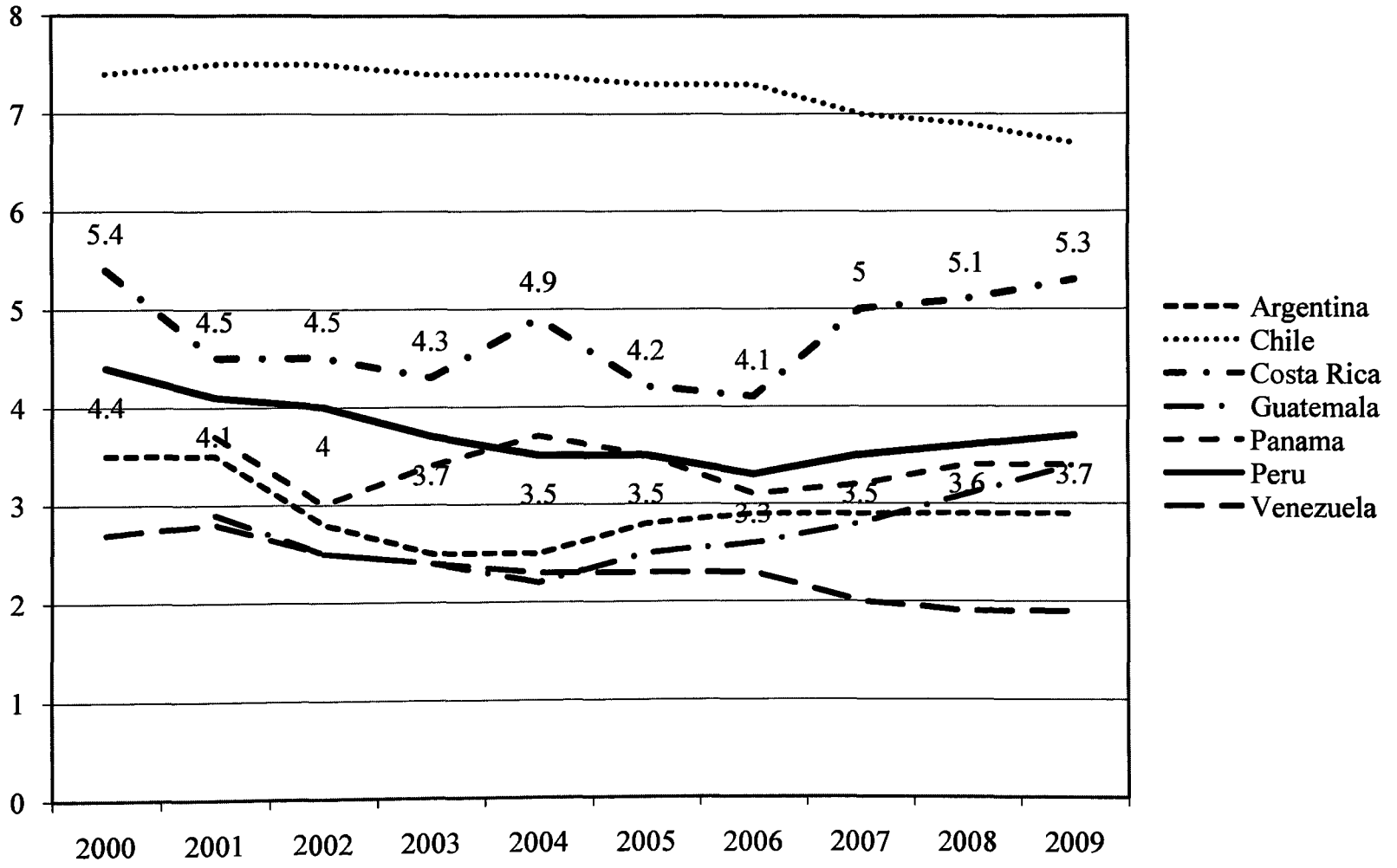
Chapter 1

Figure 1.1: World Bank Governance indicators on rule of law 1996-2007 (page 39-40)

The study acknowledges the methodological pitfalls of relying on World Bank data. However, it is one of few sources of time-series data on rule of law. Notably, Transparency International's 'Corruption Perception Index' on levels of corruption in the region produces a similar spread of cases. Transparency International's Corruptions Perceptions Index is an aggregate indicator that ranks countries along a scale of 0 (high) to 10 (low) in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index drawing on corruption-related data by a variety of independent and reputable institutions. See:

http://www.transparency.org/policy_research/surveys_indices/cpi/2009

Corruption Perception Index (CPI) for a sample of Latin American Countries (2000-2009)



Chapter 1

Table 1.2: Selected social and economic indicators for Costa Rica and Peru (page 42)

A detailed breakdown of sources:

- United Nations Human Development Report, 2007/2008: http://hdr.undp.org/
- *Instituto Nacional de Estadística e Informática* (INEI), 2007: http://www.inei.gob.pe/
- CIA World Factbook 2008: https://www.cia.gov/library/publications/the-world-factbook/
- CEPAL: http://www.eclac.org/, data refers to 2008.
- Data for income distribution shows the ratio of the income or expenditure share of the richest 10% to that of the poorest 10%.
- The GINI Index: A value of 0 represents perfect equality, a value of 100 represents perfect inequality.
- HDI data refers to 2005. The Human Development Index (HDI) provides a composite measure of three dimensions of human development – a long and healthy life, knowledge and a decent standard of living – the HDI sets a minimum and a maximum for each dimension, called goalposts, and then shows where each country stands in relation to these goalposts, expressed as a value between 0 and 1. For further information see http://hdr.undp.org/en/statistics/indices/hdi/

Chapter 3

Figure 3.1: Formal institutional strength of Defensorías in Latin America at point of origin (page 103)

Having surveyed the literature and drawing in particular on Volio and Elizondo and Aguilar's treatment of formal 'minimum standards' for Defensorías del Pueblo, Figure 3.1 corresponds to the below tables. The data refers to formal design features at point of creation and each variable is weighted in accordance with its expected impact upon the dimension in question, according to formalist literature. As such, important safeguards of institutional autonomy such as constitutional status count for more than other variables of lesser causal significance such as the possibility of re-election.

			ARG	BOL	CHI	COL	CR	ECU	ELS	GUAT	HOND	MEX	NIC	PAN	PARA	PERU	SPA	URU	VEN
AUTONOMY	3	Constitutional status	0	3	0	3	0	3	0	3	0	0	3	0	3	3	3	0	3
	2	Elected by congress	2	2	0	0	2	2	2	2	0	0	2	2	2	2	2	2	2
	2	Absolute majority + required	2	2	0	0	0	2	2	2	0	0	2	0	2	2	2	2	2
	2	Budget allocated by legislature	2	2	2	0	2	0	2	0	0	0	0	2	2	0	0	2	0
	2	Immunity	2	2	0	0	0	2	0	2	2	0	2	2	2	2	2	0	2
	1	No dismissal without good cause	1	1	0	1	1	1	1	1	1	0	1	1	1	0	1	1	1
	1	Term of 5 years +	1	1	0	0	0	1	0	1	1	0	1	1	1	1	1	1	1
	1	Possibility of re-election	1	1	0	1	1	1	1	0	1	1	1	1	1	1	0	1	0
	14	**TOTAL**	**11**	**14**	**2**	**5**	**6**	**12**	**8**	**11**	**5**	**1**	**12**	**9**	**14**	**11**	**11**	**9**	**11**

			ARG	BOL	CHI	COL	CR	ECU	ELS	GUAT	HOND	MEX	NIC	PAN	PARA	PERU	SPA	URU	VEN
POWERS	3	Broad and unrestrictive rights mandate	3	3	0	3	3	3	3	3	3	3	3	3	3	3	3	3	3
	2	Mandate to receive complaints	2	2	0	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	2	Power to investigate ex officio	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	2	Actions of const. review	0	2	0	2	2	2	2	2	0	0	2	2	0	2	2	0	2
	2	Habeas corpus powers	0	2	0	2	2	2	2	2	0	0	0	0	2	2	0	2	2
	1	Legal obligation to cooperate	1	1	0	1	1	1	0	0	1	1	1	0	1	0	1	1	0
	1	Oversight of the military	0	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1
	1	Promotional mandate	0	1	1	1	1	1	1	1	1	1	1	1	1	0	0	1	1
	14	TOTAL	8	14	3	14	14	14	13	13	10	9	12	11	12	12	11	12	13

Sources:

Argentina: Defensor del Pueblo de la Nación, Ley de Creación del Defensor del Pueblo, Ley No. 24.284 y su modificatoria, Ley No. 24.379, 1 Diciembre 1993.
Bolivia: Ley del Defensor del Pueblo, Ley No. 1818, 22 Diciembre 1997.
Chile: Ley número 20.405 del Instituto Nacional de Derechos Humanos, 12 Octubre 2009.
Colombia: Ley de la Defensoría del Pueblo, Ley No. 24, 15 Diciembre 1992
Costa Rica: Ley de la Defensoría de los Habitantes, Ley No. 7319, 17 Noviembre 1992.
Ecuador: Ley de Orgánica de la Defensoría del Pueblo, Ley No. 1, 20 Noviembre 1997 (mediante Res. R-22-058 (R.O. 280, 8-III-2001).
El Salvador: Ley de la Procuraduría para la Defensa de los Derechos Humanos, Decreto Legislativo No. 183, 20 Febrero 1992.
Guatemala: Ley de la Comisión de los Derechos Humanos del Congreso de la República y del Procurador de los Derechos Humanos, Decreto No. 54-86, 1 Octubre 1986.
Honduras: Ley del Despacho del Comisionado Nacional para la Protección de los Derechos Humanos, Decreto Ejecutivo No. 26-92, 8 Junio 1992.
Mexico: Ley de la Comisión Nacional de los Derechos Humanos, 29 Junio 1992.
Nicaragua: Ley de la Procuraduría Para la Defensa de los Derechos Humanos, Ley No. 212, 13 Diciembre 1995.
Panama: Ley de la Defensoría del Pueblo, Ley No. 7, 5 Febrero 1997.
Paraguay: Ley Orgánica de la Defensoría del Pueblo, Ley No. 838, 13 Julio 1995.
Peru: Ley Orgánica de la Defensoría del Pueblo, Ley No. 26520, 8 Agosto 1995.
Spain: Ley Orgánica 3/1981, de 6 de abril.
Uruguay: Ley de la Institución Nacional de Derechos Humanos, Ley No. 27661, 27 Enero 2009.
Venezuela: Ley Orgánica de la Defensoría del Pueblo, Ley No. 37.995, 5 Agosto 2004.