

UNIVERSITY OF COPENHAGEN  
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## **PhD Thesis**

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# **The institutional turn of international human rights law and its reception by state administrations in developing countries**

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*In loving memory of my father*

*To my mother and my siblings*

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## Abbreviations

CCWB	Central Child Welfare Board (Nepal)
CIFDHA	Centre d'Information et de Formation en matière de Droits Humains en Afrique ( <i>Centre for Human Rights Information and Training in Africa</i> , Burkina Faso)
CNDH	Commission Nationale des Droits de l'Homme ( <i>National Human Rights Commission</i> , Burkina Faso)
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DPOs	Disabled Persons Organisations
ECtHR	European Court of Human Rights
EU	European Union
GANHRI	Global Alliance of National Human Rights Institutions
HURIST	Human Rights Strengthening
ICRC	International Committee of the Red Cross
IDA	International Disability Alliance
IDPG	International Development Partner Group (Nepal)
ILO	International Labour Organisation
MBDHP	Mouvement Burkinabè des Droits Humains et des Peuples ( <i>Burkinabe Movement for Human and People's Rights</i> , Burkina Faso)
MDAC	Mental Disability Advocacy Center
NDC	National Dalit Commission (Nepal)
NGO	Non-Governmental Organisation
NHRAP	National Human Rights Action Plan
NHRC	National Human Rights Commission (Nepal)
NHRI	National Human Rights Institution
NMRFs	National Mechanisms for Reporting and Follow-up
NPM	National Preventive Mechanism
NWC	National Women Commission (Nepal)
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OPMCM	Office of the Prime Minister and Council of Ministers (Nepal)
PTF	Partenaires Techniques et Financiers ( <i>Technical and Financial Partners</i> )
RIP	Recommendations Implementation Plans
SCA	Subcommittee on Accreditation
SDGs	Sustainable Developments Goals
SPT	Subcommittee on Prevention of Torture
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UN DESA	United Nations Department of Economic and Social Affairs
UPR	Universal Periodic Review



# **PART I**

## **Introductory part**

### **The institutional turn of international human rights law**



## **Introduction: An overview**

The thesis explores the institutional turn of international human rights law and its reception by state administrations in developing countries. The remarkable propagation of distinct institutional innovations across states since the 1990s has highlighted the emergence of public *human rights administrations* in many countries. International law too has been transformed, going beyond the expression of norms and the imposition of boundaries onto states' activities. It now increasingly prescribes institutional prerequisites necessary to enhance state capacities to operationalise human rights commitments.

This legalisation buttresses the ambition by international organisations, norm entrepreneurs and development agencies to design and diffuse models for national human rights systems. A central dimension of this systemic approach is the objective of coordination amongst all actors involved in human rights protection, with key state actors and processes in place. Three institutional arrangements have become paradigmatic elements of this approach and therefore serve as threads for the present research: national human rights institutions, national human rights action plans, and national coordination mechanisms in government.

The overarching objective of the research is to critically assess the significance of this human rights institutional turn. The research relies upon a two-fold postulate. First, this evolution cannot be understood in isolation from the wider normative disputes over ideal models for public administrations, with *new governance* currently serving as a dominant ideology. Second, these institutional arrangements must be understood within the context of their diffusion and practice, in particular how they transform, and are transformed by, national public administrations.

As such, the research seeks to answer three questions:

- (1) What is the contribution of law to the prescription of national institutional features?
- (2) How do these prescriptions connect with wider institutional models and redefine strategies for the advancement of human rights?
- (3) What are the effects of these prescriptions on public administrations in developing countries?

To answer these questions, the research takes a distinctly socio-legal approach, and identifies one legal and two empirical case studies. In relation to question (2), I delve into the 2006 Convention on the Rights of Persons with Disabilities (CRPD) as a catalytic moment in the institutional turn of international human rights law. Its corresponding body of interpretation enlightens the discussion about the relevance of new governance ideology to the law. In relation to question (3), Burkina Faso and Nepal serve as case studies to investigate the conditions of reception of these norms in the context of developing countries. Taken together, the two countries are prototypical sites where these international scripts have been rolled out, with elements of human rights administrations in operation for two decades. The thesis investigates this experience and the concrete exercise of coordination and systemic roles as key aspects of the institutionalisation of human rights, with due attention given to the dynamics and everyday routines of the public servants working in, or organising, these institutional innovations.

The thesis is divided into three main parts, each investigating one research question. The present introductory part aims at presenting the issue at stake and the conditions of its study. Chapter 1 has the aim of making a case for a scientific investigation of what I preliminarily call the “institutional turn of international human rights law”. It points out the paradigmatic features of this phenomenon and generates hypotheses, with a view to focusing its investigation to salient dimensions. Accordingly, Chapter 2 breaks down the problem into core research questions and designs a research project apt to answer them. Methodological considerations are addressed first, in light of the interdisciplinary nature of the project. It therefore includes a discussion of the relevant literature from fields other than law. On the basis of these methodological reflections and choices, I identify the relevant research methods, select case studies suitable to inform them, and discuss reflexivity issues. Chapter 2 concludes with an overview of the thesis.



# 1 Field of enquiry and scope of investigation

*“When the Map of Freedom in lobby of the Freedom House building was first unveiled [in 1972...t]he government of Sweden [...] reacted to its surprisingly low rating in light of its high reputation for quality of life, social order, and freedom. [...Freedom House had to spell out] precisely why [it] warned about the trend toward ‘bureaucratization’ in Sweden and perhaps other free but highly bureaucratized countries.”*

Christopher Bradley (2015, 56)

## 1.1 Genesis: Human rights as limits to state power

“‘Human rights administration’ is so widely practiced in modern life that it is not perceived as a special field of study.” With these words, John Montgomery, professor in public administration and development studies, opened his 1999 piece on the “Administration of Human Rights.” The article is a plea to fill the vacuum of scholarly attention on the matter, which Montgomery explains by three “critical problems” that any such study faces: human rights’ “complexity as they infuse other public policy issues; their universality as they interact at all levels of public and private society; and their ubiquity, which renders coherent bureaucratic structures and reforms difficult” (ibid, 323). The responsibility for human rights is “so pervasive that no single department can take responsibility for human rights as a whole,” even when a specialised agency exists.

Studying ‘human rights administrations’ is not only difficult, it is also contentious. A daunting conundrum for researchers is the inherent ambivalence of public administrations: they are both the primary guarantors and abusers of human rights. To overcome this essential challenge, one may either decide to disassociate the study of protective and abusive dimensions; or to break down ‘government’ into rule-abiding administrations versus discretionary political leadership. Whether these distinctions are feasible and desirable is subject to controversy. For Koskenniemi (1999, 99), the institutionalisation of human rights within administrative cultures amounts to a “colonization of political culture by a technocratic language,” with public servants instrumentalising rights to bolster their own positions and minimising the political dimension of rights. Human rights ‘mainstreaming’

becomes a strategy for institutional power. Koskenniemi (2010, 55; original emphasis) argues that human rights and human rights experts must stay “*outside regular administrative procedures*, as critics and watchdogs.” Going further, Sjoberg, Gill and Williams (2001, 41) argue that the threat to human rights is large-scale bureaucracies themselves, more than governments. For them, human rights, as moral and social tools of accountability, protect individuals against the invasive power of bureaucratic organisations, including those of private companies, by acting as a “counter-system.” For Dembour (2010), these positions reflect one distinct stream of human rights scholarship emanating from “*protest scholars*.” These tend to associate human rights with social struggles and “view[s] human rights law with suspicion as participating in a routinization process that tends to favour the elite and thus may be far from embodying the true human rights idea” (ibid, 3).

While other streams of scholarship may not share this ideological bias, the bulk of it has in fact tended to study other phenomena than the role of human rights administrations. A significant level of attention has been devoted to the reconfiguration of states’ sovereignty under international law, allowing the international community to protect one state’s nationals in another country, including through coercion. Popular theories, for instance, explained change through a combination of infra-national and international pressures on governments (Keck and Sikkink 1998). Scholarship – possibly more so legal scholarship – has long satisfied itself with approaching states as monolithic entities where political will dictates the state’s approach to human rights, with bureaucracy serving it.

In addition, in many countries, the predominant approach to human rights has long been legal-positivistic, drawing on a liberal tradition considering rights as individual civil rights and assuming that the state is a threat to liberty, thus regarding bureaucracy with inherent suspicion, as the anecdote in the epigraph of this chapter illustrates. Consequently, the legal recognition of rights by the legislature and their judicial enforcement has so far been an important dimension of the emergence of human rights, and the scholarship concentrated on these (Madsen and Verschraegen 2013, 8-11).

“Human rights administrations” have therefore long been too complex, too controversial or unprioritised to be considered as a field of academic enquiry. Why – and how, then, should one study human rights state actors? I contend that a sharp evolution of human rights *practices, law and scholarship* occurred around the turn of the millennium. The surge in National Human Rights Institutions (NHRIs) has captured much of the attention and provided for a clear anchorage for this three-fold evolution, with scholars arguing that “NHRIs signal[ed] the entry of the modern-

bureaucratic state into the domestic human rights arena – institutionalizing practices designed to regulate human rights locally” (Cardenas 2012, 29). Yet NHRIs are only one of many converging trends observable in reforms, standards and research. These trends buttress a significant reorientation that I propose to call the *institutional turn of international human rights law*.

The aim here is not to conduct a comprehensive exploration of the validity and implications of this turn. This chapter rather seeks to make a case that this phenomenon constitutes an empirical-legal problem that warrants investigation. I wish to highlight some questions that this evolution triggers and to generate hypotheses as to what may be the salient features of this evolution. The aim is to recalibrate an otherwise elusive field of enquiry into a circumscribed number of paradigmatic dimensions on which to articulate my research questions and methodology (Chapter 2). To describe the field of enquiry, the chapter takes as an organising principle its constitutive elements and follows the choice of terms. In what sense is it a *turn*? Is it a *legal* problem? What does *institutional* mean?

## **1.2 An institutional human rights turn**

The notion of a ‘turn’ suggests an evolution characterised by its intensity or a novelty, that may serve to reorient previous paradigms and courses of action. This section suggests that, in the 1990s, various trends led states to cohesively invest into administrative and institutional infrastructures and processes specialised on human rights, underpinned by renewed perspectives on how to improve compliance with human rights commitments. The legal dimension of this turn is addressed in Section 1.3.

### **1.2.1 New focus of international human rights agenda**

In 2002, United Nations (UN) Secretary-General Kofi Annan used his hallmark address on UN reform to underscore the importance of national institutions for human rights protection. For him (para. 50):

Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organization.

The novelty is not that human rights commitments shall be primarily addressed by states, with support from the international community. This fundamental tenet was already expressed in 1948 by the Universal Declaration of Human Rights. Its Article 22 foresaw that economic, social and cultural rights be realised “through national effort and international co-operation and in accordance with the

organization and resources of each State.” The novelty lies in the fact that that onus on national efforts had so far been accompanied with a strong margin of appreciation safeguarding states’ discretion in the selection of implementation means, and even more in their organisational setup.

The Secretary-General’s formula builds upon the emergence of institutional prescriptions for organisational structures and processes at the national level. The 1993 World Conference on Human Rights in Vienna was pivotal in this respect and called for the establishment of NHRIs in line with the Principles relating to the status of national institutions (the Paris Principles) written by NHRIs in 1991 (UN 1993, para. 36). It also encouraged states to adopt National Human Rights Action Plans (NHRAPs) (para. 71). States requested the UN to invest in “programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures” (para. 34) and created the Office of the High Commissioner for Human Rights (OHCHR).

These developments were states’ political commitments rather than law, with a series of international conferences and their final declarations constituting milestones in the 1990s (see sub-Section 4.3.1). Such conferences acted as a meeting place of ideas, with civil society playing an increasing role and contributing to the promotion of specific institutional visions (see Gaer 1995).

### **1.2.2 Turn in states’ practice**

Intense or novel diffusions of human rights institutional structures or systems unfolded in the 1990s. The most spectacular spread was that of *NHRIs*. Twenty-eight existed in 1990, against 131 in 2015, with a drastic uptake in the 1990s – so much so that Linos and Pegram (2016, 1116) speak of a global “common shock” provoked by the Paris Principles and their endorsement by states at the Vienna Conference. This development has captured considerable attention and many scholars have equated the “institutionalisation” of human rights with the diffusion of NHRIs (Kumar 2003).

Other types of state actors emerged for the first time. In addition to one 1986 prototype in the Democratic Republic of Congo (then Zaire), *human rights ministries* increasingly appeared in the 1990s. Ministries were established in Mali and Morocco in 1993, in Pakistan in 1995 and other countries followed suit. Although no study has ever been dedicated to their spread, the present thesis exposes that, today, 32 states have a human rights ministry, along with many more other types of ministerial human rights structure (see Chapter 4).

Over the same period, specialised *parliamentary human rights committees* also proliferated. Only three countries had one prior to 1990. However, today, 71 additional countries have had at least one specialised parliamentary committee, all of them established in the period 1990-2008.<sup>1</sup>

Institutional changes did not only pertain to the establishment of state organisations, but also to institutional techniques. In the aftermath of the Vienna Conference, the first ever *NHRAP* was adopted, by Australia in 1994, followed by Latvia and Malawi in 1995. While their diffusion was initially limited, the present thesis, as the first global stock-taking exercise since 1999, reveals that, today, at least 114 plans in 71 countries have been adopted since 1993 (see Chapter 3 and Annex 4).

Another technique that has dramatically pervaded human rights institutions' work is the reliance on the measurements and *human rights indicators*. A stepping-stone was the 1993 Vienna Declaration and its call on states to examine approaches such as a "system of indicators to measure progress in the realisation" of economic and social rights (UN 1993, para. 98). This technique grew to play a central role and structures human rights work, as demonstrated by Rosga and Satterthwaite (2009).

### 1.2.3 Paradigm shifts in compliance theories

These evolutions were accompanied by a renewed thinking as to why and how states implement their human rights commitments, reflected in scholars' and practitioners' debates over compliance. The departure point was the identification of an *implementation gap*, i.e. the tendency to ratify treaties while not implementing them (Landman 2005), and the willingness to formulate adequate responses.

A long focus had been to approach state compliance primarily as an issue of political will – or its lack thereof. States could be coerced into compliance through endogenous and external pressures – their combined effect creating a virtuous "spiral model" from commitment to compliance (Risse, Ropp, and Sikkink 1999). Such scholarship underlined how treaty ratification may be a perfunctory gesture designed to shield against domestic or international critics (Hathaway 2002), or else attributed weak compliance to an absence of coercive mechanisms associated to treaties (Hafner-Burton and Tsutsui 2005; Simmons 2012). This approach underpinned *enforcement* strategies, seeking to coerce states into compliance, through sanctions, material inducement or name-and-shame strategies.

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<sup>1</sup> Sources: for committees established before 2004, IPU 2004; for committee established after 2004: PARLINE Databased of parliamentary human rights bodies, available at: <http://archive.ipu.org/parline-e/Instance-hr.asp>, accessed on 24/07/19.

Building on international relations scholarship on regulatory practices, known as the *managerial model*, a new take emerged assessing that “compliance problems often do not reflect a deliberate decision to violate an international undertaking on the basis of a calculation of interests” (Chayes and Chayes 1993, 176). Issues that prevent compliance were held to include insufficient “state capacities” (Englehart 2009), defined as the ability to effectively enact and enforce rules and to control the national territory, as well as the “concrete set of material and human *resources* that governments have to implement norms, rules and policies” (Anaya-Muñoz 2019, 447). Reflecting these conceptual evolutions, in 2013 Risse, Ropp and Sikkink revised their “spiral model” to acknowledge that they initially under-theorised the domestic conditions under which implementation is likely to take place, such as regime types, decentralisation and the level of “statehood” including state capacities.

This change of approach pays more attention to bureaucratic structures and agency, including the role of public officials, approached either as a resource or as a target of normative transformation. In striking contrast with “protest scholars” such as Koskenniemi, scholars such as Cole (2015, 434) held that a state bureaucratic strength primes any other variable to explain compliance, arguing that “bureaucratic efficacy exert[s] the strongest independent effect on countries’ human rights practices [...]. Effective, autonomous, and stable bureaucracies not only enable governments to fulfil ‘positive’ empowerment rights, but they also empower them to protect ‘negative’ physical integrity rights.”

Rather than coercion, managerial approaches focus on cooperation and interactions as avenues to persuade states to comply with certain norms. Building on insights from social psychology, this line of thinking insists that states adopt and internalise certain structures and norms through various micro- and cognitive processes. Goodman and Jinks (2013a, 41) promote a compliance strategy based on “state socialisation” defined as “a process grounded in the beliefs, conduct, and social relations of individuals [relying on] various causal pathways through which global (or regional) norms are internalized by relevant individuals associated with the state” – including public servants. Managerial compliance strategies also stimulate attention to institutional design. As Galligan and Sandler (2004, 52) posit, human rights implementation “depends crucially on their penetrating the world of administrative institutions and their officials,” yet such actors tend to develop autonomy from external influences. Accordingly, “the most important variable among many in the behaviour of administrative institutions and officials towards human rights standards is the stage of development of the system of government and administration” (*ibidem*).

While enforcement and managerial compliance approaches are not necessarily opposed, with compliance necessitating both political will *and* state capacities, there are tensions between the two and possibly a paradigm change within the human rights movement. For Anaya-Muñoz (2019, 446), the capacity argument has captured significant attention and has tended to bracket or assume the condition of willingness. The proponents of managerial approaches suggest that socialisation necessitates to tone down punitive approaches, as the simultaneous maintenance of sanctions or material inducement to force state behaviours undermines the conditions for successful persuasion (Goodman and Jinks 2013b). Managerial approaches did not, however, fully replace enforcement strategies. The adoption of the Statute of the International Criminal Court in 1998 and the endorsement in 2005 of the Responsibility to Protect doctrine justifying international interventions to respond to the most severe violations, are significant examples of new breakthroughs in enforcing rights protection. These cases, however, remain “distant possibilit[ies] of coercive enforcement” that act as “a back-up system for extreme cases” (Risse and Sikink 2013, 281), while more encompassing options, such as the proposal to create a World Court of Human Rights (Nowak 2014), remain controversial (Alston 2014).

#### **1.2.4 Reorientation of human rights interventions in developing countries**

The belief that non-compliance is as much an issue of administrative capacity as one of political will sheds new light on explaining the poor human rights records of countries with limited resources or weak administrations. Therefore, authors have argued for new intervention approaches, with capacity-building strategies becoming one “major remedy” for promoting human rights in developing countries (Risse and Ropp 2013, 19). Capacity-building is defined as “a highly institutionalized process of social interaction aiming towards education, training and the building up of administrative capacities to implement and enforce human rights” (ibid, 15). In line with the socialisation theories, capacity-building of national public servants is held to be a tool to raise their knowledge and skills, but also an opportunity for carrying persuasion strategies.

More generally, there is a symbiotic link between the human rights institutional turn and changes in the development cooperation paradigm, marked by a rapprochement of the two fields. Within the context of a wider UN reform aimed at linking human rights, development and peace, in 1998 the United Nations Development Programme (UNDP) adopted a policy document on *Integrating Human Rights with Sustainable Human Development*. This milestone and other key policies such as the 2000

Human Development Report entrenched a human rights-based approach to development (see SIDA 2001). The UNDP's policy on human rights rested on two pillars: the mainstreaming of human rights in all activities, and working on governance arrangements. This enmeshing partly explains the forms taken by the new human rights institutional blueprints. For Rajagopal (2007, 229), the "NHRAP concept [is] the most definite example of the developmentalization of human rights."

Human rights institutional prescriptions also partly appeared as a tool for external interventionism, to be exported onto others. For the Australian diplomat at the 1993 Vienna Conference who promoted NHRAPs, "Australia had advanced the concept of national action plans in the context of the World Conference with the idea that it would be implemented by other countries, not by Australia. However, it was apparent that, having successfully pushed for endorsement, Australia had to demonstrate credibility by preparing and adopting its own plan" (Barker 2011, 6). Similarly, Mertus (2009, 138) argues that "some of the biggest supporters of NHRI establishment view them as necessary mechanisms, not for themselves but for other states."

The related *good governance* agenda flourished in the 1990s in development cooperation. The concept refers to "predictable, enlightened and open policy-processes, bureaucracy with a professional ethos, a government accountable for its actions, a strong civil society participating actively in public affairs, and all under the rule of law" (World Bank 1994, iiv). Kjær and Kinnerup (2002) showed that human rights and good governance are mutually reinforcing in many aspects, for instance their insistence on accountability, yet in practice may lead to contradictory donor practices, with good governance programmes running in parallel with human rights deterioration. A trend emerged, under the prism of good governance-framed, capacity-building programmes, to transform human rights into a set of technical skills, "part of the professional disposition that government workers are expected to acquire in order to become proper governmental agents" (Babül 2018, 62), with the underlying hope of de-politicising human rights.

### **1.2.5 World order changes**

The institutional turn cannot be seen in isolation from the deep transformations taking place in the 1990s. As Finnemore (1993) has shown, states adopt global models not because they accept the validity of the agenda, but because they associate it with what it means to be a modern state. The proliferation of state human rights institutions, too, can be analysed against the wider background of renewed perspectives on the characteristics of modern statehood.



First, the 1990s were marked by the end of the Cold War and the establishment of new democracies. In this context, the “logics and expectations of human rights coalesced into [...] the world’s only supernormativity” (Goodale 2013, 6), becoming the language of transitions, reforms and state-building. A number of works have associated the multiplication of both governmental and non-governmental human rights actors with these historical developments (Mertus 2009, 6). The adhesion to human rights and its international oversight mechanisms has been assessed by some as a process of willingly restraining a country’s sovereignty to prevent returning to past authoritarian regimes (Moravcsik 2000). At a national level, human rights institutions may also signal the commitment to human rights while at the same time safeguarding sovereignty. For Cardenas (2014, 356-7):

the post-Cold War diffusion of NHRIs signals a historic normative shift: the implementation of international human rights norms, or their institutionalization in domestic structures, has become a measure of state legitimacy. [...] Neither human rights nor NHRIs displace state sovereignty, or serve as an alternative focal point of authority. Rather, [they] constitute historically coevolving standards, infusing the state’s sovereign legitimacy and authority with new meaning in a changing world. Indeed, if the Cold War saw the internationalization of human rights norms, the end of the Cold War gave way to their internalization.

Second, the emergence of a range of human rights administrations occurred while dominant views on institutions were undergoing drastic changes. In the 1980s and into the 1990s, *new public management* was the widely dominant paradigm for public administration. It prioritised the market and entailed a privatisation of state functions and a curtailing of public bureaucracies. The effects of those reforms, notably on social cohesion, were greatly criticised in the 1990s and were replaced by *new governance* approaches. At the core of the new ideology lay a vision of public service reform that changes the organisational form of the state, and especially the relations between the state, citizens, users and local communities (Clark 2004, 494). *Third-way* political platforms (Giddens 1998) gave resonance to this model and were implemented by many Western governments (Canada, Germany, the Netherlands, Portugal, the United Kingdom, etc.) and some Global South countries (Brazil, Peru, South Africa, etc.) around the turn of the millennium.

Third-way politics and new governance thinking therefore rehabilitated the importance of institutions, but did not return to welfare state bureaucracies of the 1960s where the states provide for services. New governance values collaboration and partnership, “active citizenship” and decision-making based on deliberations and learning through practice, with institutions organising these processes. A second key notion is that of “joined-up governance”, which implies that all agencies and state actors should be coordinated (Newman 2006). While the objective of coordination is valued, it is also

particularly elusive, and many reforms therefore focus on it. As stated by Rhodes and Tiernan (2015, 93), “coordination is the holy grail of modern government, ever sought, but always beyond reach.”

This general (re)turn to institutions is the part of the context in which the developments in the field of human rights are nested. It can be hypothesised that the former influenced the latter. One evidence is the adoption of the “joined-up” rhetoric by actors such as the European Union (EU) Fundamental Rights Agency (FRA 2013). Nonetheless, how dominant public administration ideologies influence the emergence of institution-based innovations is not necessarily linear. Feminist scholarship invites some caution as, paradoxically, gender-specific institutions rapidly expanded in a period marked by a significant considerable roll-back against administrations in the 1980s (Squires 2007, 33-8). Another question that new governance raises is the impact that such approaches may have on international human rights law. This may entail a redefinition of formerly traditional approaches, including the role of courts, litigation and norms. For Scott and Sturm (2007, 566):

New governance moves away from the idea of specific rights elaborated by formal legal bodies and enforced by judicially imposed sanctions. It locates responsibility for law-making in deliberative processes which are to be continually revised by participants in light of experience, and provide for accountability through transparency and peer review. [...] Courts should occupy at best the peripheral role of stepping in when new governance fails, and they bear an uneasy and potentially contradictory relationship to new governance.

In short, the evolutions outlined in this section appear strongly converging, and possibly mutually reinforcing. They seem to constitute a rupture point, although this might not be immediately discernible to today’s observer, since the vigorous diffusion of the institutional thinking is to a great extent still the *nostrum* we live in, and makes these changes appear as taken-for-granted. However, assertions such as the belief that “the only way to achieve promotion of human rights is by building national capacities through the expansion of NHRIs” (Kumar 2003, 287) resolutely contrast with the anterior paradigms presented in the introduction above. It therefore appears justified and crucial to investigate these evolutions in a more in-depth fashion, notably to analyse their effects on their primary targets, which are the administrations of developing countries. With more than two decades of experience, it is now possible to review the quality of the institutionalisation processes that those models sought to trigger. This section generated the hypothesis that these evolutions may be influenced by the wider rise of new governance ideologies, which potentially carry with them a redefinition of past human rights praxis.

### 1.3 A turn of *international human rights law*

There are many ways to define what human rights are (Goodale 2013, 5-10). The ways in which a researcher defines them frame the condition of their study. My point of departure is to approach human rights as expressed by international human rights law, defined by the Universal Declaration of Human Rights and human rights treaties. These rights are associated with claims of universality, yet their expression through international human rights law is the result of international processes of deliberation and acceptance. This approach does not minimise other understandings of human rights, as objects of discourses and practices, or as moral and social norms, nor does it reduce the meaning of human rights to a legalistic matter, based on obligations and entitlements. My objective is rather to recognise the foundational role played by international law as an expressive and organising force and a reference point within a multi-faceted human rights movement, and how this role may be reconfigured by practices and discourses *about* the law.

Creating international institutions, such as treaty bodies, has long been part of international treaties. But human rights treaties have tended not to be prescriptive regarding the means of operationalising commitments by states and have largely stayed silent on issues relating to the division of responsibilities at the level of national administrations. Treaties expressed norms, committing states to attain these goals through steps and measures to be defined by them. The turn of the millennium has been held to mark a transition from norm expression to norm implementation. On the occasion of the creation of the Human Rights Council, the then UN Secretary-General (2005) avowed that:

The cause of human rights has entered a new era. For much of the past 60 years, our focus has been on articulating, codifying and enshrining rights. That effort produced a remarkable framework of laws, standards and mechanisms – the Universal Declaration, the international covenants, and much else. Such work needs to continue in some areas. But the era of declaration is now giving way, as it should, to an era of implementation.

In this context, are the prescriptions of national institutional features described in Section 1.2 a legal matter? In this section, I observe that the law itself has partaken in these evolutions, with some contributions in both soft law and the most recent treaties, and with a discourse on the law, used to engineer coordination and models for human rights systems.

#### 1.3.1 Increasing institutional prescriptiveness

The primacy of states and domestic actors in giving effect to treaty obligations is an important tenet of international law – the requirement of exhaustion of local remedies is, for instance, premised on

this basis. At the level of the European Court of Human Rights (ECtHR), the “margin of appreciation” doctrine is emblematic of this deference as regards the means to be used by states to fulfil human rights. Nonetheless, international courts and treaty bodies have increasingly resorted to the “proceduralisation” of rights, investigating state actors’ *conduct*. This includes an appreciation of the quality of the domestic processes that lead to a measure or situation – including the procedures before the courts, but also administrative and legislative processes, such as giving due respect to the organisation and results of public consultations on draft policies (Brems 2017). The “procedural turn” of the ECtHR (Arnardóttir 2017) has been assessed as falling within a “systemic objective,” with the Court being “subsidiary to the *national systems safeguarding human rights*,” but increasingly controlling the quality of the procedures within these systems, as expressed by former ECtHR President Spielmann (2014, 53). For some, such evolutions underline a more robust role of the ECtHR in controlling states, while for others it reflects a retreat from the Court in the face of political and judicial backlashes. This poses a fundamental question as regards the intentions behind, and the effects of, increasingly assessing the processes that result in a decision or policy, and whether it substitutes or complements substantial control.

The development of procedural obligations also occurred at the level of UN treaty bodies (McCall-Smith 2015). An anchorage point was the conceptualisation, initially based on debates over the right to food, of obligations of states not only to respect human rights, but also to protect (obligation of the state to prevent other individuals or groups from violating an individual’s rights) and fulfil (the obligation to take measures necessary to ensure that each person may attain his/her rights). This trichotomy consolidated as a prevalent conceptual approach to rights implementation in the 1990s (Koch 2005). Traditionally, treaty bodies were cautious not to overstep boundaries. Nonetheless, when they felt on safe grounds (extrapolating a treaty obligation or referring to prescriptions validated by international conferences), they have suggested to states a panoply of institutional arrangements.

The first such step drew on one of the rare obligations of conduct already enshrined in a treaty. Article 14 of the International Covenant on Economic Social and Cultural Rights obliged states that had not secured compulsory primary education to “adopt a detailed plan of action for the progressive implementation”. The corresponding Committee found that a comparable obligation to adopt a detailed plan of action applied to each of the rights in the Covenant and was implied in Article 2’s obligation for States Parties “to take steps ... by all appropriate means” (CESCR 1989, para. 4). Later, the General Observations of the Committee on the Rights of the Child epitomised the consensus

emerging around the different elements for an efficient national human rights system. In its General Comment no. 2, the Committee found that the establishment of an NHRI falls within the commitment made by States Parties upon ratification of the Convention (CRC 2002, para. 1). More holistically, its General Comment no. 5 of 2003 suggested a comprehensive set of administrative measures to operationalise the Convention, with a focus on national planning, coordination, protection safeguards, inspection of privatised activities, self-monitoring and independent monitoring, data collection, child-sensitive budgeting, cooperation with civil society, etc. (CRC 2003, para. 26-65).

Human rights treaties adopted after the Vienna Declaration followed suit, prescribing the structures and processes that states should set up domestically in order to implement treaties. The 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) establishes a proactive system of monitoring, through visits to places of detention by independent international and national bodies. At the international level, a Subcommittee on Prevention of Torture (SPT) is in place (UNGA 2002, Art. 1). Nationally, States Parties must “set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture,” referred to as the National Preventive Mechanisms (NPMs) (Art. 3).

The 2006 Convention on the Rights of Persons with Disabilities (CRPD) constituted a catalytic moment in the institutional turn. The Convention prescribed an ensemble of institutional arrangements and administrative actions. At the centre of this exercise lies Article 33 on “National Implementation and Monitoring”, which foresees that States Parties establish or appoint focal points within government coordination mechanisms and independent monitoring bodies, in accordance with the Paris Principles. The Convention further enshrines the principle of participation of persons with disabilities in monitoring and decision-making. A dedicated article on data collection (Art. 31) features in the Convention, and procedural and positive obligations run throughout the rights it enunciates. OHCHR has found Article 33’s inclusion of a norm detailing national implementation and monitoring structures “unprecedented in a human rights treaty” (OHCHR 2009, para. 15), and commentators point to the fact that the Convention “introduces a structural shift in international law [by creating] obligations of conduct” (de Beco and Hoefmans 2013, 18).

The CRPD points to the fact that, in the transition from an “era of declaration” of human rights to the “era of implementation”, the law itself plays a role and its role is transformed. Strikingly, the negotiations of the CRPD were premised on the understanding that the treaty would not recognise

any new rights, but rather clarified the existing legal duties of states to respect and ensure the equal enjoyment of all human rights by persons with disabilities. As expressed by the then chairman of the drafting Committee, the treaty was to be an “implementation Convention, dealing with existing – though neglected – rights set out in other treaties, and how to help persons with disabilities realize those” (MacKay, UN Enable 09/08/05). Put simply, while long being a matter left to states’ discretion, institutional design and conduct has become a legal matter, to the extent that it might be changing the nature of the law and the role of treaties, away from their role of expressing normative standards.

### **1.3.2 Coordination and systems approaches as central features**

To understand these changes, it is important to observe that these legal developments have been accompanied by a resolute discourse on the need for national human rights systems of protection, composed of multiple, yet coordinated, actors. In this sub-section I contend that coordination and reliance on models for national human rights systems are essential dimensions of the institutional turn of international human rights law, that can serve as a thread for its study. I also make the case for selecting three institutional “solutions” as primary units of enquiry for the present thesis: NHRAPs, NHRIs and national coordination mechanisms within government.

#### *Designing models of “national human rights systems”*

Attempts to outline and roll out ideal models for “national human rights systems” have been a central yet under-researched force at the core of UN-led processes in the field of human rights, notably since the Secretary-General’s (2002, para. 50) assertion that the “enhancement of a national protection system in each country [should be] a principal objective” of the UN. The human rights systems approach has permeated the work of many organisations (see Ramcharan 2009). In 2008, the new Child Protection Strategy adopted by the United Nations Children's Fund (UNICEF) shifted the approach to child protection away from “issue/response” dynamics to create proactive protective environments guaranteed by child protection *systems*. The EU (2009) and the Council of Europe (CoE) (2009) adopted similar approaches.

The Commonwealth Secretariat (2007, 15-6) defined a national human rights protection system as:

a coherent deliberately maintained and interlocking system of different national agencies and institutions, standards and procedures that provide the means by which human rights violations are prevented and remedied, by which awareness of human rights is spread, and by which the basic entitlements of all persons can be claimed and realised.

Based on this definition, the Commonwealth Secretariat inferred the need for states to adopt NHRAPs. Indeed, the way international organisations use the notion of systems seems to serve several functions, explored below.

First, the concept is performative. Associated with a description of what the system should include, and, if possible, legal prescriptions detailing them, the concept of “national human rights system” becomes a heuristic tool that international and regional organisations, or bilateral cooperation agencies involved in human rights promotion, use to guide or justify interventions. A powerful assumption underpins these interventions. As summarised by Lagoutte (2019, 10):

the core purpose of prescribing the establishment and maintenance of an effective [national human rights system] is this: when all actors, frameworks and procedures are in place at the domestic level, the state is in a better position to comply with its human rights obligations. [...], while an [system] is not the solution to all human rights compliance problems, it is a prerequisite for compliance by the state.

Accordingly, the notion appears at programmatic (see UNDP 2005, 13-4) as well as operational levels, where cooperation agencies facing implementation challenges attempt to “reconceptualise” their action. For instance, in Nepal in 2010, the United Kingdom commissioned a study on its support to the OHCHR-Nepal Office, and notably the Office’s conflicts with the local NHRI. A conceptual model for functional human rights systems was developed by the experts to justify the ideal positions of these actors and select areas of interventions (Mahony, Nash, and Taladhar 2010, 8-10).

Second, invoking a systemic discourse and standardised models implicitly provides a neutral and almost scientific aura to what is essentially normative prescriptiveness. In its 2017 report on *Strengthening UN action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, the UN Secretary-General recalled the general objective of promoting national systems and defined “key elements of this uniform and objective approach” (para. 13-14). Similarly, UNICEF commissioned a study to scientifically define what a systems approach means (Wulszyn et al. 2010). On this basis, UNICEF (2011, 10) produced a toolkit for the country-specific “mapping and assessment” of child protection systems in a standardised manner. It tests whether a series of elements are in place, acting as a sort of neutral audit undertaken against the blueprint provided by the study and the toolkit.

Third, the systemic approach deprives political will from playing a central role in human rights protection. As per the Vienna Declaration (UN 1993, para. 68), the approach should be “coherent and comprehensive.” The Council of Europe puts forward this dimension by labelling its approach a

“systematic work” on human rights (Hammarberg 2009). The institutional ensemble should, almost mechanically, work by itself, through the generation of solutions through participatory processes, independent monitoring and the production of data. This might, however, lead to an agenda that focuses on infrastructures rather than in fact covering all rights holistically. In its manual on *Strengthening the National Human Rights Protection System*, the EU (2009, 18) highlights that one “benefit” of working on national systems is that it “offers a means to bypass conflicting views on human rights (such as on the universality of human rights) through a practical and collaborative focus on capacity-building and institutional-strengthening.” This raises a question that extends the debate over the effects of the proceduralisation of jurisprudence (see above) about intentions. Certain actors may embrace of the systemic approach as a way to disengage from substance and avoid disagreements in their human rights interventions abroad.

*Coordination at the centre of institutional prescriptions*

We might have entered an age when policy processes are more important than their substance. In the 2017 World Development Report, the World Bank President enjoined the “global development community [...] to move beyond asking ‘What is the right policy?’ and ask instead ‘What makes policies work to produce life-improving outcomes?’”, answering that “commitment, coordination and cooperation [are] the three core functions needed to ensure that policies yield their desired outcomes” (World Bank 2017, xiii). Coordination is paramount to success and “collective capability” more important than capacity-building focused on one institution (Andrews et al. 2017, 51).

The need for coordination has also been a driving force in the field of human rights. By the end of the 1983-1992 UN Decade of Disabled Persons, reviews of the 1982 World Programme of Actions concerning Disabled Persons “identif[ied] the lack of national coordinating mechanisms as the major obstacle to the implementation of the World Programme” (UNGA 1991a, para. 14). In 2003, the Committee on the Rights of the Child (2003, para. 37) asserted that “in examining States parties’ reports, [it] has almost invariably found it necessary to encourage further [...] coordination among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society.”

The emergence of the human rights systems thinking corresponded closely to these objectives. The study commissioned by UNICEF in 2010 to underpin its new strategy built upon “systems theories” (Hoos 1972; Jervis 1997) to devise a system that is not so much an ensemble of specific components,



but rather what links them together: a common goal, coordination within and between other (sub)systems, collaboration with all stakeholders, determination of specific functions, structures and capacities necessary for the components to play their part and the possibility for those structures to be held accountable for their performance (Wulszyn et al. 2010, 2-3). In the last two dimensions, the law may be instrumental – to spell out mandates and underpin accountability mechanisms.

A hypothesis is that the central objective of coordination has increasingly been taken as an object of reforms in and of itself. This resonates with ongoing reflections at the international level too, notably the UN treaty bodies reforms (UNGA 2018). As summarised by UN Human Rights Committee member Sarah Cleveland (2016, 1-2; original emphasis): the “proliferation of multilateral human rights mechanisms [...] has raised significant concerns regarding resource duplication, [...] substantive overlap, and coherence.” For her, the reform shall depart this “*age of institutionalization*” and enter the “*age of connectivity*, in which we need to better develop the substantive, communicative and institutional relationships, or synapses, among these structures, and with States and civil society.”

International and national institutional reforms are linked: with the growing complexity of the international machineries comes a “corresponding burden of reporting obligations” that strains states’ resources (UNSG 2002, para. 52). In parallel to the treaty body reform, OHCHR has therefore proposed a new idea, calling on states to establish a “new type of governmental structure known as a national mechanisms for reporting and follow-up [which have] the potential to become one of the key components of the national human rights protection system, bringing international and regional human rights norms and practices directly to the national level by establishing a national coordination structure” (ibid, para. 15). This exemplifies how international actors tend to approach national systems through the promotion of single actors or frameworks able to ensure coordination.

*Focus on state actors with specialised, comprehensive and coordinating functions*

As the EU (2009, 31) warns, “the most ideal approach towards working on [national systems] is through comprehensive and large-scale reform programmes [...] that address [...] elements simultaneously [, yet this goal is] not always obtainable and, because of capacity, embassies cannot work intensively on all identified elements [and should] strengthen certain elements.” Inevitably, this leads donors and international organisations imbued with systems thinking to focus their efforts on what they perceived to be key techniques and actors in the system – typically, those with a national reach, specialised on human rights and mandated to comprehensively cover all rights, and with the

adequate powers to “deliberately maintain” and ensure “coherence” in the system, as per the objective set by the Commonwealth Secretariat for human rights systems (2007, 15-16).

This approach places particular onus on *state* actors and processes that can either directly regulate and organise the necessary processes and partnerships, including with private actors (Lagoutte 2019). Several countries have started to build “national human rights systems”, that exclusively refer to administrative and executive actors, and their structuration around national human rights strategies or action plans (see example of Colombia in Herrera Kit and Taylor 2012; the Georgian case is presented in Chapter 4). While NHRIs may not directly be able to “coordinate” national actors and play a number of functions, it is hoped that they may play a structuring role, notably by “expos[ing] fundamental problems in coordination, allocation and acceptance of responsibilities between different government departments and levels of governments” and to suggest responses (UNCHR 1995, para. 204).

Accordingly, three distinct coordination mechanisms (through the identification of national coordination mechanism/focal points in administrations; under the implementation policy and framework of an NHRAP; and spearheaded by the NHRI) regularly appear as national, dedicated attempts to articulate human rights implementation by an ensemble of national actors since the 1990s. They correspond to relatively well-formulated prescriptions by the international human rights actors and now treaties, and have had a bearing in the practical experiences of states. While these mechanisms are not necessarily mutually exclusive, neither are they inevitably mutually reinforcing. They also come in addition to other well-established state actors, not least courts and parliaments. By investing coordination authority in different locations, they may engender dynamics of competition that serve to weaken the overall system or of some of its constituent components.

While these three models for coordination took different paths since their emergence in terms of standards development, state practices and scholarly attention – with some developing incrementally and others undergoing periods of de-prioritisation or re-definition, they were still – or again – heralded by the UN Secretary-General, in 2017, as the “key elements” nationally. For Guterres, national human rights action planning, NHRIs and national human rights coordination structures in government form the core of the UN’s “uniform and objective approach” to supporting national human rights system (UNSG 2017, para. 13-37).<sup>2</sup> While each is different (one is a framework and

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<sup>2</sup> For the first time, the Secretary-General also mentions the possibility for states to establish human rights parliamentary committees. Contrary to other elements for national systems models, this option is not extensively reflected in international human rights (soft) law, thus making them of limited relevance for a legal enquiry. A recent evolution, one

two are “actors”, including one within government, and the other independent), they are held as “cornerstones” of a standardised vision for national human rights systems. I therefore selected them as primary units of enquiry.

This section has confirmed that the institutional turn of human rights is also a legal matter. The content and possibly the function of the law seem to have evolved. Could this set international human rights law on a new course? Slaughter and Burke-White (2006) have predicted that the future of international law would primarily be to strengthen domestic institutions, and de Búrca (2017) suggests that human rights treaties should only express flexible norms and prescribe dedicated national institutional frameworks and processes in charge of their contextualisation. For her, the CRPD epitomises this new approach.

A specific discourse on the law accompanies the institutional turn. The institutional standards are used to outline models for *national human rights systems*. The latter notably serves to justify external human rights interventions, a prime target being developing countries. Understanding the connection between models and practice has implications for research design. For Lagoutte (2019, 21), the emergence of legal systemic prescriptions can only be understood as both a “top-down” and “bottom-up” phenomenon. She therefore calls on researchers to trace how international blueprints for national human rights systems are implemented at a domestic level, and how the empirical work of domestic actors feeds back into supranational human rights thinking.

#### **1.4 An institutional turn**

Taken together, the sharp developments in state practices, compliance theories and international human rights law point in the direction of a turn that I preliminarily labelled ‘institutional’. The seemingly self-explanatory notions of ‘institution’ or ‘institutionalisation’ are, in fact, ambivalent, and are conceptualised differently across disciplines. This section can by no means encompass the full breadth of knowledge on institutions, but argues that these different perspectives are a critical reminder of the various dimensions of the phenomenon at stake, justifying the use of “institutional” as a framing description of the field of enquiry.

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that occurred during the course of my research, is OHCHR’s publication in 2018 of “Draft Principles on Parliaments and human rights” that encourage states to establish parliamentary human rights committees (OHCHR 2018). These draft principles have not yet been endorsed by states. I briefly discuss them at the end of Part II (in Chapter 5).

#### **1.4.1 Institutionalisation as international acceptance of norms**

The notion of ‘institutionalisation’ of human rights has been extensively used by international relations scholars to describe the processes through which norms emerge and become reflected in international law and are adopted by international organisations, with treaty ratifications being signposts of institutionalisation (Finnemore and Sikkink 1998; Ruggie 1998). Seen from this perspective, institutionalisation focuses on the level of international norm formation and acceptance, with a presupposition that it will cascade into norm internalisation by states. The focus is less on implementation, understood as “a parallel process to institutionalization which draws attention to the steps necessary to introduce the new international norms’ precepts into formal legal and policy mechanisms within a state of organization to routinize compliance” (Orchard and Betts 2012, 2).

#### **1.4.2 Institutionalisation as national organisational choices**

With the compliance gap between norms and implementation increasingly identified by practitioners and scholars, a stream of literature has suggested that one of the causal mechanisms to bridge this gap is institutional in nature, yet this time focusing on the national level and on the organisational structures of the civil service, i.e. the division of responsibilities and competences across different levels of government (ibid, 17). The process of national institutional reception is marked, first, by an adoption of international norms in domestic discourses, and, second, by a formal alteration and sustainable changes in domestic administrations. These changes should be strong enough to shift behaviours and routines – a sign of this being the decrease in the contestation of the norm within the organisation (ibid, 17-8; Cortell and Davis 2000; Zida et al. 2017, 2).

The proliferation of NHRIs from the 1990s has led to a primary focus on this specific organisational embodiment (Kumar 2003; 2006). For Cardenas (2012, 29), NHRIs are the key medium “to routinize compliance with a given set of rules, making it more likely that the rules will be followed regardless of changing circumstances or turnovers in leadership.” As such, the question of NHRIs’ organisational design has garnered a great deal of attention, with a view to developing standards prescribing minimal core features for these institutions (Linos and Pegram 2015; Lacatus 2016).

A rarer perspective is to look at national institutional landscape as an ensemble, for instance explaining choices in the establishment of structures. One contribution in that regard is Meydani’s (2014) investigation of the “anatomy of human rights in Israel”, in which the author confronts

constitutional rights guarantees with the state's organisation, and shows that choices may be informed by political platforms and voter preferences but are also largely framed and constrained by public servants. The prevalent bureaucratic culture impacts practices and choices. Meydani highlights the processes through which public servants use their position to redirect activities and undermine initiatives put forward by politicians, including suggestions for establishing or reforming institutions, including an NHRI. Within these dynamics, some public servants, such as ministry of finance officials, might curtail the dynamics triggered by other corners of the civil service.

This leads us to hypothesising that public bureaucracies, made up of both structures and individuals, hold a dual role in the transportation of systemic human rights models: they are both targets and agents of internationally inspired institutional reforms.

### **1.4.3 Institutionalisation as a process of legitimation**

Political scientists have addressed "institutionalisation" processes in relation to social movements or minorities. From this perspective, institutionalisation refers not only to the creation of new state organisations and processes, for instance specialised commissions, but also other techniques such as setting up quotas and positive discrimination within civil service, federalisation and decentralisation reforms, as well as the adoption by social movements of conventional forms of political action. These techniques abandon confrontational strategies and adopt state systems' repertoire of actions, for instance political participation and interest representation (Della Porta and Diani 1999, 148). In other words, institutionalisation means that disenfranchised groups or controversial ideas go from being peripheral to being "mainstream", a legitimate and acceptable concern.

This approach echoes one of the rationales that have been advanced to promote NHRAPs, as a tool adopting the regular state planning and resource allocation processes. For the UN, "so long as human rights are regarded as a field in which results are produced by methods outside normal government processes, such processes will not be effectively used to promote and protect human rights. Human rights will tend to be left in the hands of those who do not have the means to bring about human rights improvements directly" (UNCHR 2002, 94).

A wealth of literature exists on the institutionalisation of social movements. Gorringer, Jeffery and Waghmore (2016) point out that many marginalised groups pursue institutionalisation as a way to gain political recognition. Yet the scholarship has drawn attention to various ambivalent effects. For

instance, the continuance of poverty and discrimination despite the establishment of institutions, such as specialised commissions, leads concerned groups to lose faith in the institutions (Chandhoke 2005). For Coy and Heeden (2005), institutionalisation increases the likelihood that the movement will become bureaucratised and technique-centred. In addition, institutionalisation diminishes marginal actors' range of political expression and their capacity to challenge power-holders, as they now also have a stake in the system (Dryzek 2003). The institutionalisation of one group may serve to further marginalise others, especially in ethnically diverse countries – such as Nepal (Sharma 2016, 102-3).

This last point raises the question as to whether it is possible to see the human rights movement as a single entity that goes through an “institutionalisation” process in the sense described here. Categories of rights-holders may have diverging views on preferred institutional solutions, as Meydani (2014, 190-1) showed in the case of Israel, with women's platforms eventually advocating for thematic institutions rather than a broad-mandate NHRI. These differences pose an important question for comprehensive human rights structures. Such structures might respond to the cardinal principles of universalism and indivisibility of human rights, but might be in tension with diverging views of categories of rights-holders over institutional preferences. Sectoral insights, are therefore important to consider, and will be discussed in Chapter 4 and Part III.

#### **1.4.4 Institutions as social norms**

Last, while ‘institutions’ generally refer to formal structures (NHRIs, ministries, etc.), scholars from the fields of sociology and anthropology use the notion to refer to the “systems of established and prevalent social rules that structure social interaction,” while “organisation” “refer[s] to social units of people that are managed to meet a need or pursue collective goals” (Sano and Martin 2017, 254; Hodgson 2006). There is an increasing attention to the “societal” institutionalisation of human rights, which goes beyond legal norms. As shown by Madsen and Verschraegen (2013, 8), this approach builds on the presumption that “to have social meaning, [human rights] must become institutionalised socially and become embedded in people's mindsets as well as in the day-to-day workings of societal institutions such as the judiciary, the schooling systems and the family.”

Henceforth, two definitions arise that could be labelled ‘institutions-as-organisations’ and ‘institutions-as-norms’, with the understanding that norms mostly refer to commonly held social beliefs, which may or may not be reflected in legal standards. It could be posited that both definitions fit the trends observed in international human rights law. Treaties go beyond imposing obligations on

states, and academics have established how human rights law is localised by non-state actors (Goodale and Merry 2007; De Feyter et al. 2011). For Merry (2006b, 220) it is best to imagine human rights “as a social practice, as a means of producing new meanings and actions.” International law is only part of the process, articulating normative visions: “over time, a gradual expansion of norms creates institutional structures, leading ultimately to a norms cascade as the ideas of human rights become widespread and internalized” (ibid).

International human rights law itself is also increasingly focused on people’s role in upholding rights. The CRPD strikingly taps into both definitions of ‘institutions’: it clearly seeks to transform the institutions-as-organisations by prescribing how states should structure themselves organisationally, yet it also aims at transforming society, with the overarching objective of shifting prevailing views on disability from the medical- and charity-based approaches to social and human rights-based models. As de Beco and Hoefmans (2014, 15) noted, the CRPD embodies a “shift from a pure individual rights-based treaty to a convention with a mission for society as a whole.” The recommended organisational features of the state, emphasising co-production and co-implementation of standards and policies by both state actors and rights-holders, are therefore a means to an end. Institutions-as-organisations become both agents and structures in changing institutions-as-norms.

To summarise, given the topic of the research, when speaking of “institutions” or “institutional arrangements” in the thesis, I will refer to organisations – both public administrations and hybrid structures such as disability councils, or processes, such as participatory planning organised by public servants. But I do so with due awareness that the terms are ubiquitous. The multi-faceted notion of *institutional* turn is nonetheless a stimulating point of departure. As posited in Jensen, Lagoutte and Lorion (2019), “this terminology fits well the international human rights field and its ongoing ambition to reorient and transform both organisations and social norms.” It aptly serves as a descriptive notion for the phenomenon under investigation, as it compels one to think about the various stakes at play, and connects the enquiry to literature from various perspectives, as described in this section. I will therefore regularly engage with these insights.

## **1.5 Scope of the enquiry and research questions**

The present section spelled out the imperative for academic research into a distinct empirical-legal problem, described as an “institutional turn of international human rights law”. Its overview helped

in circumscribing it to a number of paradigmatic dimensions and hypotheses. First, the evolutions that generate this turn are not dissociable from a wider re-invention of public institutions. One hypothesis is that the predominance of new governance ideologies affects human rights law's evolution in significant ways. Second, one such implication is to use the law to enhance the coordination of actors and buttress the promotion and standardisation of models for national human rights systems. Third, the latter attempts are performative. The crafting of institutional blueprints cannot be understood in isolation to their exportation to encourage human rights implementation in third countries, with a main target being developing countries and development agencies acting as a unique conduit for their diffusion. A hypothesis here is that these trends have re-oriented international cooperation towards institution-building, persuasion and capacity-development, and that, on the receiving end, contextual practices, notably of public servants acting as both target and agents of reforms, condition the effectiveness of the models, and shall be better accounted for.

The field of enquiry may therefore be broken down into three paradigmatic dimensions: the legal expression of institutional innovations, with a focus on their ability to coordinate states actors and the interplay between law and empirical diffusion; the crafting of international models for national human rights systems, including the question of the influence of dominant ideologies for public administration, in particular new governance theories; and the transportation and reception of these models in practice, with a focus on developing countries and the role of public servants in these processes. Each of these dimensions inform each other.

Based on the above identification and overview of the field of enquiry, the overarching objective of my research is to clarify how significant is the institutional turn of international human rights law. To do this, I shall examine and answer three research questions:

- **RQ(1):** What is the contribution of law to the prescription of national institutional features?
- **RQ(2):** How do these prescriptions connect with wider institutional models and redefine strategies for the advancement of human rights?
- **RQ(3):** What are the effects of these prescriptions on public administrations in developing countries?



## 2 Research methodology

*“Minister, I am neither pro nor anti anything.  
I am merely a humble vessel into which Ministers pour the fruits of their deliberations.”*

Sir Humphrey  
*Yes Minister* (‘The Devil You Know’, 1980)

### 2.1 Introduction

Having carved out a distinct case for scientific enquiry, and identified core research questions, I now turn to outlining a research project organising the conditions of its investigation. A point of departure is the necessary interdisciplinary nature of the project. In and of themselves, doctrinal research methods are insufficient to decrypt the complex institutional dynamics that legal prescriptions seek to transform, and tend to rely on behavioural and causal assumptions (Schaffer and Ginsburg 2012, 45). Legal research has only recently been moving away from considering public bureaucracies as merely the instrument at the service of government, with behaviours harmonised by administrative law, and deviations corrected through administrative litigation.

Social sciences have, on the other hand, long recognised that large complex organisations cannot be reduced to unitary and integrated entities with single decision-makers. This has an impact precisely on the ability to oversee the action of administrations, which is a key predicament of human rights goals. According to Brehm and Gates (1997, 12) it is:

largely meaningless to think of bureaucracies as unitary actors with homogeneous preferences. To the extent that bureaucrats hold heterogeneous preferences among themselves and wield significant degrees of discretion about how to achieve those preferences, agencies will never behave as a cohesive unit. This has extremely important implications for understanding bureaucratic accountability. To understand issues of accountability, responsiveness, oversight, and control, we must focus on individual bureaucrats rather than aggregated bureaus.

The scarcity of human rights legal literature on dynamics within administrations contrasts with a wide array of empirical and theoretical studies grounded in organisational sociology, political sciences, international relations, anthropology or history. Another challenge is that there is no pre-established

synthesis of these disciplinary approaches into a “human rights studies” methodology (see Madsen and Verschraegen 2013, 4), and engaging in theory-building would go beyond the scope of this doctoral project. I therefore attempt to build a methodological canvass that is informed by and engages with these insights (their theorisation, conceptualisation and empirical findings), while remaining guided by answering my research questions. Given the importance of this step, I address these epistemological considerations and conceptual framings in Section 2.2. From this the selection of research methods is outlined in Section 2.3, where I present the selection of analytical tools and of Burkina Faso and Nepal as case studies. I present the data effectively collected during the research and provide some considerations on reflexivity. Section 2.4 offers an overview of the thesis structure.

## **2.2 Interdisciplinary research project**

The objective of this section is to outline the research methodological framework. I find that the interdisciplinary nature of the research is best accommodated by New Legal Realism approaches to legal research, with a focus on neo-institutionalist theories. These are relatively broad and the type of knowledge that social sciences may contribute is vast. I therefore take some time to analyse the scholarly insights that best inform my research questions.

### **2.2.1 New Legal Realism and neo-institutionalism**

As defined by Klug and Merry (2016, 2), New Legal Realism “highlights the interconnections between an understanding of law that acknowledges both the coercive and the normative aspects of law – but also requires any understanding of law to be grounded in empirical knowledge of law in action.” The role of institutions is put into the foreground by new legal realism “contextualists”, with a value placed on research projects that “enter the institutions of the world and observe, systematically interview, and survey individuals within them” (Nourse and Shaffer 2009, 81). A primary focus of New Legal Realism has been the study of judicial behaviour, with a focus on sociological approaches to judges and courts, including international human rights courts (see Madsen 2014). Beyond this, Mertz (2016) advocates a “big tent” definition of New Legal Realism, that widens the forms of disciplinary knowledge to be drawn on and the units of enquiries, including administrative agencies. In this version, there is no single field or preordained methodology to be privileged: “all methods and fields exist to be drawn on as needed in addressing particular questions” (ibid, 4-5).

As outlined in Chapter 1, the research project addresses a relatively new phenomenon, at a level that has rarely been explored (see also Lagoutte 2019). This justifies adopting an exploratory methodology, rather than an explanatory and causation-oriented one. The New Legal Realism approach accommodates this well. In the words of McCann (2016, xvii):

identifying the indeterminate, contingent, context-specific character of legal meaning and practice is a hallmark of much NLR research. [...] Much NLR scholarship does not offer the simple, confident explanations of the kind that [Empirical Legal Studies and Law and Economics] tend to offer, but for many analysts that is its appeal; [...] offering instead rich intellectual analysis and practical skills of informed interpretation and assessment in sorting out complex, contingent, dynamic, multidimensional features of real-life situations.

This approach is not without its challenges. First, as Madsen and Holtermann (2016) make apparent, there are entrenched positions in the legal field as regards the “empirical turn” of legal studies, some welcoming it with hostility. A parallel position is at times taken by scholars from other disciplines, notably by anthropologists reclaiming the uses of their concepts and methods from other actors misusing them (see Jean-Klein and Riles 2005, 187). This discomfort is accentuated by the absence of a blueprint for what would be the orthodox canon of research methods under New Legal Realism. It is a capacious approach, especially in its “big tent” version. It generously advocates disciplinary pluralism, while warning that “it does not mean that anything goes.” This mantra is often repeated, but seldom declined into an explicit methodology. When methodologies and methods research are spelled out, these are usually those of the complementary disciplines brought in. New Legal Realism proponents argue that the difference is the strong focus on the law and legal argumentation. My answer to these concerns is to construct a methodological framework, that does not dissolve itself in a patchwork of disciplinary approaches, despite the wide spectrum of disciplines informing aspects of my field of research.

I chose to principally engage with neo-institutionalist theories. These theories conveniently look into institutions defined both as norms and as organisations, whether formal or informal. They bridge the traditional divide between agency and structure: the individual agents and their interactions participate in shaping structures, and the structures constrain and guide agents (Jessop 2001). As defined by Sano and Martin (2018, 4), compared to other approaches that:

embark[...] on comparative studies of formal organizational set-ups and their functions, the neo-institutional perspective emphasize[s] historical, sociological, political and economic factors to examine what happen[s] inside the “black box” of formal institutions. Power relations, rules and procedures, behavioural responses, and norm affected actions are some of the principal research dimensions of the neo-institutional perspective.

In particular, I draw upon insights from organisational sociology and organisational/developing administration anthropology, as defined below. My purpose is to underline how these fields and their research tools can bring fundamental value to decrypting the empirical-legal problem under scrutiny.

From a methodological perspective, I intend to structure these interdisciplinary framings as follows:

*To answer RQ(1)*, I engage in analytical legal research, and draw on existing legal research as regards NHRIs; I engage with neo-institutionalist insight marginally, where it has generated relevant data on institutional norms formation (on the institutionalisation of women's movements in Chapter 4);

*To answer RQ(2)*, I conduct analytical legal research but also apply and test the explanatory power of one conceptual apparatus on norm diffusions (Hibou's work on neoliberal bureaucratisation – see below) to understand the process of codification of institutional norms and their recasting by norm entrepreneurs as models for the future of international human rights law.

*To answer RQ(3)*, I primarily engage in interpretative, qualitative analysis based on case studies. Using ethnographic research methods, I take observation and empirical findings informing my research question as a starting point, rather than theory and concepts. As Bierschenk and Olivier de Sardan (2019, 245) contend, “investigating bureaucracy ethnographically [...] is a form of grounded theory production [...]. This means not applying and testing ready-made theories, but discovering the unknown.” However, crafting entirely new concepts would go beyond the scope this research.

My intention here is therefore to identify a range of relevant scholarship and concepts, and, based on the findings of my case studies, to discuss in greater depth the applicability of those that present the best explanatory potential, and to analyse how my findings may help to fine-grain these concepts. In other words, I follow della Porta and Keating's (2013, 26) proposal that “interpretative analyses keep a holistic focus, emphasizing cases [...] as complex entities and stressing the importance of context. Concepts are orientative and can be improved during the research.”

### **2.2.2 Scholarship overview**

Accordingly, and in addition to Chapter 1 (Section 1.4) where I discussed various disciplinary approaches to the phenomenon of “institutionalisation”, this sub-section outlines the range of neo-institutionalist literature that informs my research. It is also the occasion to clarify my use of terms that may not hold the same definitions across disciplines, and to identify gaps in literature that the present thesis seeks to fill. The sub-section is organised around three main dimensions: the question of ideal models and norms for state institutions (bureaucracy; neo-Weberianism); the mechanisms of

diffusion of such norms; and the dynamics that frame their reception locally. These three dimensions are inseparable and inform each other. The sub-section ends with a review of the limited scholarship that addresses human rights administrations and their interactions with other public servants.

### *Bureaucracy*

Following Weber, bureaucracy is considered to be the core apparatus of rational-legal domination. There is a selective affinity between the modern state and bureaucracy, as the state apparatus is organised in bureaucratic forms. However, bureaucracy is not limited to state administrations: it is also a mode of control within organisations, whether public (universities, prisons, etc.) or private (enterprises, civil society organisations, etc.). I therefore refer to bureaucracy and bureaucratisation as a mode of organisation that encompasses public and private actors, and its expansion. “Bureaucrats” however are usually understood to designate the employees of public bureaucracies, and this terminology was used by many interviewees as well as in the literature. To avoid confusion, I will designate public bureaucracies as administrations, and bureaucrats as public servants or officials (or by their formal staff category titles). Public service is defined broadly, including the narrow civil service (tenured personnel), and other types of employees (contractual staff), and I discuss differences when relevant. Public service designates both office workers and officials interacting with the population (prison guards, judges, teachers) and covers all levels of administration, including local public bodies staff (for a similar taxonomy, see Bierschenk and Olivier de Sardan 2015, 5; 2019, 244).

One bureaucratic model is Weber’s ideal-type of bureaucratic rationality, which aims at implementing rules-based principles efficiently, through specialisation – division of tasks and knowledge and predictability, requirements, hierarchical authority, formal selection, merit and career orientation, impersonal interactions with the population and assessment by impartial procedures. As Weber (1978) showed, this is an ideal, never an empirical reality, and a wide variety of literature across social sciences has investigated how bureaucratic dynamics unfold in practice.

In the field of sociology, Bourdieu conceptualised public bureaucracies as a social force field, relatively autonomous and occupying a complex social space. Within this field, individual bureaucrats may have dynamic interactions or conflicts, but do not challenge the social field they constitute (Bourdieu and Wacquant 1992, 103). This is attributable to the *habitus* of the agents, which “refers to the shared set of dispositions that orient the agents in a particular field and with regard to

other fields” (Madsen 2013, 88). Multiple studies inform bureaucratic and organisational dynamics (see Mahoney and Thelen 2010; Barnett and Finnemore 2004), both looking at the structures and the agents (Jessop 2001). For instance, Mosse (2005, 104) argues that bureaucracies are not an instrument of policy, but independently generate ideas, goals and interests. They tend towards organisational maintenance and survival and lead to practices which revolved around the “preserv[ation] of rules and procedures, its systems of rank and administrative order, and relationships of patronage.”

Anthropological and ethnographic studies largely contributed to the understanding of these processes, and notably of a basic paradox: public bureaucracies aim at organising society through formal ordering, yet are characterised by their constitutive agents’ efforts to circumvent rules. This informality is not random. Rather “informal practices [...] are widely shared among actors, highly structured and relatively predictable for anyone familiar with the daily routines of a bureaucratic unit” (Bierschenk and Olivier de Sardan 2019, 248). For Meyer and Rowan (1991, 343), such deviations undercut coordination at systemic level. Bureaucratic day-to-day action subverts rules and does not necessarily implement actions, or at least their effects are, in fact, uncertain. In such a system, organisations are only loosely coupled with policy-makers’ intentions and, therefore, structures are loosely linked to each other.

#### *Neo-Weberian states and new governance*

New models for organisational control have emerged and have sometimes been perceived as competitors to Weberian ideals. The *new public management* model (see sub-Section 1.2.5) for instance, aimed at curtailing state bureaucracies (Bezes 2007). The rejection of this model in the 1990s signalled a return to institutional solutions arranged according to *governance* models, more compatible with Weberian ideals (Drechsler 2005). These contemporary evolutions can be broadly termed as “neo-Weberian”. As defined by Byrkjeflot, du Gay and Greve (2018, 994), states remain ‘Weberian’ in the sense that they still play a central role in government, ensure equality for all and protection against arbitrary and unpredictable actions by state agencies, and preserve public service with a distinct status. But they have become neo-Weberian because they are marked by direct citizen involvement, greater orientation towards results – with a focus on monitoring and evaluation, management professionalism. Neo-Weberianism<sup>3</sup> is not one single model, it is the shared essential

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<sup>3</sup> Hibou (2015, 13-37) calls roughly the same set of characteristics “neoliberal bureaucracy”. One difference is that Hibou considers New Public Management has falling part of this trend. I follow Bezes (2007) and Dreschler (2005)’s definition. While I extensively engage with Hibou’s conceptual framework and use her terminology when referring to her

characteristics of various governance models. Amongst these, in order to have one model serving as a reference point, I selected “new governance” as a paradigmatic model.

One specific dimension of neo-Weberian influence on human rights institutional practices has already received substantial academic attention, namely the surge in the use of human rights indicators. The production of measurements and corresponding verification techniques inspired from the corporate world have spread into international regulatory regimes and states in the 1990s, characterised by an indicator and “audit explosion” taking roots “in a programmatic restructuring of organizational life and a new rationality of governance” (Power, in Rosga and Satterthwaite 2009, 256). One strand of literature supports the use of such quantitative techniques in the field of human rights (Asher, Banks and Scheuren 2008; Landman and Carvalho 2010; McInerney-Lankford and Sano 2010). In contrast, a growing body of scholarship has underlined how the focus on human rights indicators is connected with new governance thinking (Rosga and Satterthwaite 2009) and analysed its implications. These include the tendency of measurements to “obscure evidences of the human judgement involved in statistical production” (ibid, 283-4) or to “become substitutes for the phenomena that they are measuring, rendering the indicator itself [...] the focus of social action” (Cooley 2015, 5). Measurements displace and submerge contestation over substantive rights issues into seemingly bureaucratic and technical decisions (Merry 2011). For Merry, Davis and Kingsbury (2015, 2), the “production of indicators is itself a political process, shaped by power to categorize, count, analyze, and promote a system of knowledge that has effects beyond the producers [...] comparable to law.”

#### *Institutional norm diffusion and translation*

Neo-institutionalist scholarship has made key contributions to the understanding of norms diffusion, including organisational and institutional norms. These approaches “take local variation seriously without discounting the salience of globalization and the constitutive role of the external environment” (Suárez and Bromley 2016, 141). Central concepts include *path dependence*, which stresses self-reinforcing dynamics within organisations that reinforce the recurrence of a pattern – in other words, past choices influence subsequent developments; *isomorphism*, which points to the fact that actors are not solely driven by the strategic pursuit of an inherent self-interest, but that their interests are constructed and constituted by their environment, including international practices that

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scholarship, I prefer to refer to “neo-Weberianism”. “Neoliberalism” is connoted, and may mislead the readership as regards the research intentions, anticipating a left-wing critical scholarship denouncing a “project” imposed on society.

a state may emulate; and *translation*, which refers to the process by which external elements are reshaped while moving and in each new instantiation: the concept “draw[s] attention to the fact that management practices, formal structures, or ideas are typically not passively transferred wholesale from one setting to another. Instead, they are changed as they are copied in new contexts” (ibid, 145).

Law plays a role in these processes. Finnemore (1996, 342) claims that the precision and consistency of legal obligations is an essential dimension: “common global norms may create similar structures and push both people and states toward similar behaviour at given times, but if the body of international norms is not completely congruent then those isomorphisms will not be stable.” However, it is only one dimension. Notably, individuals at various levels constitute determinative elements in the propagation of norms. For Finnemore and Sikkink (1998, 914), these “norm entrepreneurs” attempt to convince through persuasion a critical mass of states to embrace new norms: “they seek to change the utility functions of other players to reflect some new normative commitment.” Suárez and Bromley (2016, 147) point to the role of donors and experts as “merchants of meaning [...] play[ing] a pivotal role in carrying [...] ideas across time and space.”

A major anthropological contribution to the understanding of translation processes in the field of human rights is the scholarship on the “vernacularisation”, which investigates negotiations and adaptations of “universal” norms to produce local meanings and discourses (Merry 2006a; Goodale and Merry 2007). Related scholarship in other disciplines focuses on the “localisation” of human rights (Acharya 2004; De Feyter et al. 2011) or on human rights local “receptors” (Zwart 2014; Fraser 2019). This literature has predominantly focused on the role of communities, activists, non-governmental organisations (NGOs), academics, and private groups, and on their interactions with international bodies, networks or foundations. This focus may in part be intentional, aiming to understand, if not produce, an empowering discourse of human rights purposely bypassing nation-state institutions (Wilson 2007, 355), and tending to align human rights with oppositional movements and projecting an image of human rights as a counter-culture.

The rare investigations of institutions as sites of vernacularisation have focused on hybrid courts (Anders 2009) or institutions bringing together state and non-state actors, which Merry (2006a) suggests may be likely to prosper in non-Western contexts. Some studies highlight the potential role of NHRIs in localisation processes (Ray and Purkayastha 2012; Wolman 2013b), yet reach inconclusive findings, pointing to NHRIs’ “intriguing” official status (Hafner-Burton 2013, 175).



Ulrich (2011, 338) argues that a complementary undertaking to localisation should look into the role of administrative practices in translation processes, despite the fact that these are necessarily ambivalent. This thesis responds to this call by analysing the role of, and dynamics of, human rights administrations' sites of human rights translation (see, in particular, Chapter 11).

Neo-Weberian institutional models, which insist on the collaborative operationalisation of international standards by public and private actors, offer new framings for localisation processes and are a further incentive for scholars to investigate institutions as sites of vernacularisation. To investigate how neo-Weberian models are adapted to the field of human rights, I draw on the research on norm diffusion of bureaucratic prescriptions. For Bierschenk and Olivier de Sardan (2019, 253), bureaucracies are “an almost paradigmatic case of travelling models [...] made up of elements which were invented somewhere else, standardized, exported, and then locally adapted and adopted. This can concern elements which make up a bureaucracy [such as logical frameworks and indicators... or] it can also concern state bureaucracy as a whole [e.g. new public management].” This literature helps in approaching bureaucratic norms diffusion along three entangled dimensions: a competition between other normative ideas over institutional models; a variety of actors and processes for the diffusion of elements of these models; and local adaptation of these elements, with feedback loops informing the designing and standardisation of models. The conceptualisation of models for ideal “national human rights systems” can be analysed in such a three-fold perspective.

*Institutional norm diffusion and new governance: Neoliberal bureaucratisation*

One hypothesis raised in Chapter 1 is that models for national human rights systems may be influenced by dominant ideologies for public administrations at large, in particular *new governance* theories. As seen, the trust in human rights indicators confirms the influence of such theories on human rights. For a scholar, there are two ways to approach this issue.

The first option, which has been embraced by many international legal scholars to the extent that Cryer et al. (2011, 55-57) identified a “new governance” international legal research approach alongside “constitutionalist”, “feminist” or “Marxist” approaches to international law, is to interpret and ideally transform the law so that it is adapted to new governance ideals. Initially emanating from EU legal research (Scott and Trubek 2002), this literature has spread in other fields of international law, and authors such as de Búrca (2010, 2015, 2015) expanded this approach to human rights law, precisely taking the CRPD as a case-in-point. The implications of this approach for legal research are

significant yet not completely understood (Cryer et al. 2011, 56). One effect is that “governance perspective transforms legal knowledge from questions of legality to questions of optimal institutional arrangements” (Möllers 2006, 336). In other words, this scholarship engineers through law institutional ‘solutions’ to problems, by drawing on new governance techniques.

The second option, which is in line with my research questions and therefore the road chosen in this thesis, is to take the law as a point of departure and seek to analyse to what extent it is influenced by such models, and the effects of the resulting standards. Besides the above-mentioned scholarship on indicators, the question of the influence of new governance on human rights in general, and on human rights law in particular, largely remains unexplored. I therefore take inspiration from the scholarship investigating the effects of new governance more broadly. A seminal contribution in that regard is Hibou’s (2015) work on the “neoliberal bureaucratisation”.

Hibou’s conceptual apparatus decrypts the processes through which new governance are diffused, and helps in understanding its effects. “Neoliberal bureaucratisation” is not a single model, it results from various reforms put forward since the 1970s, from new public management to new governance. It is not the simple addition of these models: it is fed by multiple inherent problems in the diffusion of governance reforms. As already shown by Büttner (2012, 98-9), bureaucratisation expands as a corollary even of reforms that aim at cutting red tape or moving to “results-based management”, and structures of past reforms become the target of new rounds of rationalisation. In other words, “reforms tend to generate reforms” (Brunsson and Olsen 1993, 33). Hibou (2015, 16) adds that neoliberal bureaucracy is characterised, in particular, by an exacerbation of formalism and a high degree of generalisation, and therefore may be associated with multiple and diverging interests. It further thrives on uncontested concepts and the repertoire of practices that originate from corporate logics of management, such as “benchmarking”, “rating”, “certifications”, and loses precision and meaning as they migrate to the realm of state institutions.

Hibou also identifies the pitfalls that can be associated with neoliberal bureaucratisation. It may induce a “managerialization” of politics and participation that produces indifference, for instance, to inequalities, with processes becoming more important than outcomes (ibid, 85-110). The creation of formal processes may be instrumentalised to escape the obligation of results (ibid, 81). At an individual level, the focus on procedures rather than substance and results destroys the meaning that

underpins jobs, and notably the values of associated to the public service. As stated by Hibou (ibid, viii), a:

feeling of malaise and futility arises when work is invaded by ‘extras,’ which often form [...] a major part of working time, and take people away from the heart of their jobs, forcing them to undertake administrative tasks [...] and to an ever greater extent ascertain and demonstrate that this has indeed been done, by filling forms, ticking boxes, giving feedback on actions that have been carried out, quantifying the activity, [etc.].

This conceptual framework has not yet been applied to the field of human rights law. I intend to test its relevance and some of its insight in Part III, in order to respond to my second research question.

### *Institutional norm diffusions and the specific case of developing countries*

The mechanisms through which bureaucratic models are transported and edited, and impact national institutions, do not essentially differ between countries with diverging levels of development, yet the scholarship has discussed whether specific dynamics may be at play in certain types of countries.

In relation to African countries, for instance, neo-patrimonialism has been used to refer to the tendency for leaders to privately manage public resources (Médard 1996). Bayart (2000) identified processes of “extraversion” that transform situations of donor-dependence into opportunities to exercise power and domination within political societies. Samuel (2013) expands on this notion to assess how neo-Weberian reforms are embraced by Burkina Faso. For him, Burkina Faso readily volunteers for any new state-building paradigms devised by donors in order to cultivate a reputation of the ‘good pupil’ and leverage this status to maximise cooperation inflows (ibid, 374-380). Such practices create figurative states creating a reformist and legalistic ‘façade’ obscuring informality and undemocratic forms of governance. The tendency to constantly update practices and laws to bring them in conformity with new models becomes a ‘game’ played notably by public servants, with reforms becoming a resource for the state to seek rents (ibid, 386; see Olivier de Sardan and de Herdt 2015 on the “game of the rules”). These logics have been used to explain the failure of transforming sub-Saharan states according to Weberian or neo-Weberian bureaucratic ideals (Blundo 2006, 21).

Another factor that conditions the reception of such reforms is the high level of fluidity in the range of actors performing state functions, even sovereign ones – justice and security, in many developing countries. This situation is partly explained by governmental weaknesses, as well as popular legitimization of self-organised groups. Public authority “is not the exclusive possession of government institutions” and a range of “twilight institutions” and power centres adjacent or partially intertwined

with the governmental structures may exist (Lund 2006, 674). In this context, the introduction of new governance reforms, precisely aimed at privatising or hybridising state functions, tends to further distort and blur the distinctiveness of the “state”, including its responsibilities in upholding rights (Hibou, Samuel, and Fourchard 2017).

Studies have also largely questioned the internal dynamics of donor organisations. For Mosse (2005, 184-204), aid agencies structurally tend to perpetuate a logic which sees intervention as necessary for improvement, and interprets failure to improve as a call for further interventions, and each aid project’s tendency to call for new institutional arrangements, staff and expertise. Bierschenk (2014) argues that none of these externally promoted reforms tend to replace pre-existing arrangements, but rather accumulate as geological sediments, thus resulting in an organisational “sedimentation” in which new arrangements concur with the legacy of the past, creating intra-bureaucratic heterogeneity. The seminal contribution of Ferguson (1996) further shows that it is not only donors’ projects focused on institutional reforms that influence national administrations. Development projects by their nature entail an increasing bureaucratisation of developing. Ferguson shows how the transformation of intervention objectives, for instance the reduction of poverty, into politically neutral and technical capacity-building issues serves to reinforce bureaucratic power, as a mode of governance that relies on, yet exceeds, state institutions. This enhanced bureaucratic power, Ferguson argues, does not necessarily mean that the capacities of the state to achieve results have increased.

These insights, that stress the specificities of developing contexts in terms of actors involved in the diffusion of institutional models and conditions of their reception locally, further justify the selection of developing countries as a distinct object of enquiry, adding to the reasons discussed in Chapter 1.

#### *Human rights administrations and the question of interaction and coordination*

There is a nascent body of anthropological research on bureaucratic activities and the day-to-day work of public servants involved in human rights. In 2005, a symposium at Cornell University aimed to “introduce a discipline” of Anthropology and Human Rights Administration (Jean-Klein and Riles 2005), yet referred to “administration” in a wide sense – including for instance NGOs. Existing work on human rights *public* administrations tends to primarily focus on the citizens’ interactions with public bureaucracies, notably as their victims (e.g. on Moroccan victims of torture: Slyomovics 2005), or on public servants involved in the delivery of public services and acting as an “interface” with the population. The internal dynamics of bureaucracies are less widely addressed. In addition, existing

research tends to focus on specific types of administration: an expanded body of research now exists on prisons (e.g. Martin 2015; Drake, Sloan, and Earle 2015), on the police (e.g. Jefferson and Jensen 2009) or on truth and reconciliation commissions (see Richards and Wilson 2017). Similar literature on specialised human rights institutions is largely non-existent for the moment, despite the abundant scholarship on NHRIs. Some of this adopts ethnographic research methods (Mertus 2009; Setiawan 2013; Liljeblad 2017) to a limited extent, but rarely analyses bureaucratic routines within NHRIs.

Interactions between public servants around human rights issues have rarely been studied (Lagoutte 2019, 20). One important exception is Babül's (2017) work on human rights training programmes for Turkish public servants. It investigates one crucial dimension of the diffusion of both normative and institutional models crafted by international organisations, and their translation through a chain of individuals – including EU-funded expert trainers. Training sessions constitute a site of encounter between international and national public servants. Babül shows how training sessions translate human rights into the governmental domain by attempting to dissociate them from political connotations, and reframe them as a required set of skills that professional government workers shall hold. She demonstrates that the:

reorganization of the bureaucratic field according to stipulations of professionalism and expertise ultimately transforms state violence into governmental force by rendering it more calculable, technical and exacting. Human rights training programs add a further twist to this transformation by expanding the boundaries of the bureaucratic field in Turkey, providing spaces for experimenting with what is sayable within that expanded field, and drawing out the shame by playfully performing public secrets. (ibid, 182)

In short, besides identifying important scholarly insights that serve to situate the present research, and notably the gaps that it seeks to fill, the above review helps clarifying some methodological choices. This includes definitions on terms used and, most crucially, a foundational choice as regards how I intend to address the relation between institutional models and the law. Contrary to “new governance legal scholars” whose recommendations for improving the law are grounded on references to pre-defined models, I rather seek to understand to what extent these models are influencing the law, and to what effects in terms of terms of legal and institutional practices.

## **2.3 Research methods**

Based on the above framings, I now turn to identifying the research methods, and the data generated and other material collected during this research, and the approach taken in their analysis. I first

address legal research methods, then turn to discussing case studies and corresponding research methods, mostly borrowed from ethnographic studies. I end this section with a discussion on reflexivity and my subjectivity as a researcher.

### **2.3.1 Legal research methods and data**

The primary method is doctrinal analysis, as adapted to legal human rights research (see, e.g., McInerney-Lankford 2018). The material for such an analysis is drawn from two sources: international treaties on human rights – in particular the CRPD (as justified in Chapter 1), and soft law on human rights (see Lagoutte, Gammeltoft-Hansen, and Cerone 2017). Although treaty bodies' General Comments have special authority (Alson 2001, 764), human rights soft law may also encompass:

resolutions and other pronouncements of representative organs of [intergovernmental organisations] (including declarations, principles, rules, and guidelines), opinions of experts [...] endorsed by states directly or through [intergovernmental organisations] organs, ad hoc intergovernmental processes for the elaboration of standards, and treaty body jurisprudence (including general comments [...], views, enquiries). One might also include [...] decisions of regional and international courts and quasi-judicial bodies. (Cerone 2017, 22-3)

Guidance produced by OHCHR (handbook and manuals), or by networks of NHRIs, fall into a grey area in this respect, but play an influential role in interpreting and detailing prescriptions, as well as serve as references to states and international organisations. Their weight and role are discussed in the relevant thesis chapters. Much of the cooperation-oriented guidance serves not as a source of law, but rather as a companion for legal interpretation. I therefore use this material for documentary rather than legal analysis purposes (see below).

Legal analysis is concerned with a description and clarification of what the international human rights law prescribes as regards: 1) distinct corpuses of prescriptions for institutional coordination arrangements; 2) models for national human rights systems emerge.

#### *Corpuses of international prescriptions for coordination arrangements*

To answer RQ(1), I analyse the corpuses of international prescriptions for coordination, through NHRAPs, national coordination/focal points in government, and NHRIs. For the latter, I rely on an extensive existing scholarship. The approach taken is principally expository, which does not mean that it is only descriptive. Drawing on Finnemore's hypothesis that consistent legal corpuses are

important factors contributing to model diffusion and isomorphism, I seek to analyse the content but also the quality of the norms, i.e. their precision and coherence and their legal status.

I hypothesised in Chapter 1 that institutional prescriptions and models have an inherently performative dimension. As models are created to influence reality, they are also iteratively influenced by actual diffusion or practices. I therefore analyse legal evolutions against the background of the spread of the institutional arrangements they prescribe. In that regard, an immediate challenge was the absence of overall data on NHRAPs and on focal points/coordination mechanisms in government. I therefore generated my own original datasets, which I present in Chapters 3 and 4. This was performed through desk-based research. For Human Rights Ministries, collecting information was possible online, as all countries' governments are publicised (see Chapter 4 and Annex 5), yet information on other forms of governmental focal points is too fragmented to create an accurate representation of reality. As regards NHRAPs, an outdated list is accessible on OHCHR's website, and an updated yet geographically limited one on the Council of Europe's website. Online information is parsimonious. To collect information, I pooled efforts with former OHCHR Regional Representative David Johnson. Together, we mobilised a variety of sources, notably networks of former colleagues, and generated a unique dataset that I present in Chapter 3 and Annex 4.

#### *Analysing models for national human rights systems*

To answer RQ(2), I explore how these institutional corpuses, built in relative isolation, are integrated as part of comprehensive models for national human rights systems. To do so, I chose to focus on the 2006 CRPD as a catalytic moment codifying many of these institutional prescriptions under a single, legally binding source. Much has been written on the CRPD's institutional provisions, and I shall therefore not repeat existing comprehensive overviews. Rather, my point of departure is the identification of two claims relentlessly made by this scholarship: that the CRPD revolutionises human rights law by creating a new institutional systemic model applicable to all human rights; and that a central characteristic of this model relies on new governance theories.

To assess the legal validity and implications of these claims, I first interpret the Convention's provisions against new governance theories, relying on classic methods of interpretation of the law of treaties (see Scheinin 2018). This includes an analysis of the *travaux préparatoires* of the Convention. Second, based on the discrepancies and grey zones that this analysis reveals, I test the conceptual approach developed by Hibou (2015) on neoliberal bureaucratisation, which casts light

on an ensemble of mechanisms through which managerial bureaucratic techniques are transported across fields. The aim is to verify the relevance of this theory to decrypt the diffusion of new governance principles into human rights law, and anticipate some of its potential consequences. Third, I undertake a critical review of existing commentaries pertaining to CRPD Article 33 as well as a review of the position of the CRPD Committee, with a view to understanding the contribution of interpretative works to the formation of models for national human rights systems, and their acceptance by the authoritative treaty body. To achieve this, I analysed all the Committee's General Comments as well as all its concluding observations in response to states' reports – from the Committee's establishment until July 2017, i.e. 55 concluding observations (full corpus presented in Annex 1).

As a complementary source of information, I conducted eight interviews in Geneva in May 2018 (see Annex 2), notably with the Secretariat of the CRPD Committee, a former Committee member, and with several OHCHR staff, the Global Alliance of National Human Rights Institutions (GANHRI) and international NGOs actively working on the three institutional arrangements described in Part II. This helped constructing a more acute representation of the evolution of systemic models' promotion by Geneva-based actors.

### **2.3.2 Case studies and ethnographic research methods**

*Country-based* case studies seem the most obvious choice to analyse multi-actor national landscapes and their reception of models to transform them into well-oiled *systems*. In line with della Porta and Keating's (2013), the objective of my case studies is not to discover universal laws about causal relationships between variables, but rather to identify the types of mechanism at play in the reception of international scripts by the national actors it targets, and how it contributes to further understanding the main field of enquiry, namely the institutional turn of international human rights law.

The selection of case studies responds to a number of research design imperatives. It must be an adequate research terrain in relation to the field of enquiry, by offering a meaningful instantiation of the phenomenon the researcher wishes to observe, and ensure the possibility to collect data and deploy research methods (Venesson 2013). In order to fulfil this ambition, as well as the criteria set out below, I selected two case studies. More case studies might have impoverished the quality of ethnographic fieldwork, already limited given the constraints associated with an interdisciplinary research project anchored primarily in law. However, the selection of two case studies should not be



interpreted as designing comparative research. The selection of two countries as case studies is also not the organising principle for Part IV: findings are presented following the types of institutional prescriptions analysed in Part II and III, not per country. This said, I found that a number of patterns emerged as strikingly consistent in both case studies and seem supported by empirical evidence from other contexts. When that was the case, I highlighted the potential for generalisation – which could be confirmed by future research, including using quantitative or explanatory approaches.

### *Selection of case studies*

I selected case studies on the basis of the following, cumulative criteria:

- (1) ratification of major human rights treaties – including the CRPD;
- (2) adoption of the institutional arrangements under scrutiny – with an empirical embodiment (as legal reality does not always correspond to facts – see below) and sufficiently long experience;
- (3) developing status (a restrictive doctoral funding requirement was to focus on priority countries of DANIDA – Danish Cooperation Agency – or the Danish Institute for Human Rights);
- (4) access to institutions and documentation.

The fulfilment of criteria (2) and (4) was tested in practice through short fieldwork missions of two weeks in each of the prospective case studies, before longer, six-week stays after definitive selection.

Based on these criteria, I selected Burkina Faso and Nepal. Taken together, the two case studies not only cover the full range of institutional prescriptions under scrutiny, they are in fact prototypical sites for these international scripts. Nepal is the country with the highest number of NHRAPs adopted – four since 2004 (on a par with only four other countries in the world), with the adoption of a fifth one pending at the time of writing. Burkina Faso appears to be the country with the longest uninterrupted experience of having a Human Rights Ministry in place, and the only country that has established a designated cohort of specially trained human rights public servants. Since the creation of this specialised public service scheme in 2006, more than 200 human rights public officers have been specifically trained to be human rights experts during their studies at the National School of Administration and Justice.

Perhaps surprisingly, the two countries share a number of characteristics in terms of committing to human rights norms and engaging in their institutionalisation. Burkina Faso and Nepal followed a roughly similar trajectory: popular uprisings in 1990s led them to ratify most human rights treaties and enshrine fundamental freedoms in their constitutions. Both established specialised institutions in

2000, although with different emphases, as Nepal focused on the establishment of an independent institution (the National Human Rights Commission) and Burkina Faso on a ministerial human rights portfolio (the Human Rights Ministry). Nepal also has a governmental human rights unit (in the Prime Minister's Office), and Burkina Faso an NHRI, but these are substantially smaller.

Both countries attach great importance to international machineries and reputation. Their institutional strengthening strategies have been partly correlated with a political objective of meeting international requirements. Both invested significant political capital in being elected members of the UN Human Rights Council – successfully so for Nepal in 2017 and for Burkina Faso in 2018, for the third time. They have engaged with various implementation models suggested by OHCHR, notably human rights planning: Nepal has adopted NHRAPs since 2004, and Burkina Faso produces multiple recommendations implementation plans following reviews by UN bodies. The two low-income countries are heavily donor-reliant, with institutional strengthening largely supported by international aid, and a primary focus of donors' human rights interventions being on states actors' capacities.

One additional shared feature makes these two countries specifically interesting for the present research. After around a decade of investing in building human rights administrations and testing international blueprints, they both went through a regime change significantly informed by human rights considerations, providing an occasion to revisit institutional choices made in the early 2000s and prompting them to assess and redesign their national human rights landscapes. While not equating the nature and severity of the decade-long conflict in Nepal (1996 to 2006) and the people's insurrection in Burkina Faso in 2014, it is significant that in both cases, public demands for inclusion, equality and justice were central dimensions in the subsequent transition periods and led to institutional adaptations enacted through organic laws and constitutional reforms. This sequence is a fertile ground of investigation, as it produced discourses and data directly connected to my research questions, notably as regards the number and relations of human rights institutions. In Nepal the new Constitution of 2016 created eight new human rights institutions, while in Burkina Faso the first law to be adopted by the first elected parliament after the Transition was, in 2016, the new law aimed at setting-up a Paris Principles-compliant National Human Rights Commission.

Of course, the above factors of closeness and adequacy to the case selection criteria should not conceal discrepancies that impact institutional dynamics. Burkina Faso and Nepal have distinct administrative cultures, and historical backgrounds, such as the colonial legacy in Burkina Faso. In

Nepal, the post-conflict situation is likely to influence international agencies' conceptual approach to state- and administration-building (d'Aspremont 2008). Regional organisations and standards on human rights are different, as are regional geopolitical dynamics impacting each of the two countries.

### *Case studies research methods*

As suggested by Lagoutte (2019), a starting point to investigate how national human rights systems and interactions work in context should always be to document and analyse the legal mandates of the various actors and verify if they exist in reality. It is not unusual for actors to be formally established on paper, only to discover that never work or meet. Mappings of human rights state actors already existed in both Burkina Faso and Nepal, undertaken by NGOs, state actors themselves or donors (on Burkina Faso: Coulibaly, Bayala, and Konaté 2012; CGD 2013; PRGP 2015; on Nepal: Pradhananga and Upreti 2016; TAF 2012b; DIHR 2017). These served as a basis for this initial review, and proved valuable to inform my selection of case studies. These reviews further exempt me from an exhaustive presentation of both countries' systems in Part IV, allowing me to focus on findings and analyses.

I largely drew on Sano and Martin's (2018) piece on neo-institutionalist research methods adapted to the study of human rights administrations. For the main part, techniques used draw on classic qualitative research through ethnographic fieldwork. In that regard, a range of literature on distinct research methods now exists (Cane and Kritzer 2010; Thuesen 2011; O'Reilly 201), including on methods used for ethnographic studies of bureaucracies (see 2019 Special Issue of Critique of Anthropology on "Immersion in the bureaucratic field: Methodological pathways"), notably methods for ethnography of meetings (Brown, Reed, and Yarrow 2017) or documents (Hull 2012). While much derives from the field of anthropology, I by no means claim to undertake an anthropological study (see Bray 2013 on the borrowing of ethnographic methods by other disciplines).

When adapting these methods to human rights bureaucracies, Sano and Martin (2018) recommend researchers to, in particular, consider several dimensions that are not unique to this field yet may play out in different ways given the sensitive nature of human rights issues. One relates to locating and accessing the right public servants. Access may be possible through internal gatekeepers or by means of formal authorisation, yet on politically sensitive issues, having informal ties inside an organisation proves to be crucial (ibid, 274). Once the relevant informants are located and accessed, they may still be reluctant to share information: "formal hierarchy may offer some guidance especially in public organizations bound by norms of transparency, but it may not tell the whole story" (ibid, 273). This

is not new: Weber (1978, Ch. 9) noted that every bureaucracy conceals its knowledge and strives to increase a superior position by keeping its intentions secret and guarded (or acts as if guarding) official secrets. Bureaucrats may “tend to represent researchers as having ‘hostile interests’ in order to protect themselves” (Sano and Martin 2018, 274), but they may be exceptions, as specific public servants may invite constructive attention, and seek opportunities to exchange with a researcher affiliated with – in the present case – an NHRI with an established international reputation. When that is the case, a possible bias is to end up primarily accessing public servants displaying an openness to human rights promotion, who may be outliers in their own administrations.

To overcome these effects, Sano and Martin suggest triangulating sources from both outside and inside organisations. In addition to following this advice, I found it insightful to also interview officials who had left the administration – for an NGO or an international organisation, or to retire. I also sought to interview several officials within the same organisation. For eight interviews conducted in the fieldwork, follow-up interviews were organised during the second mission. This proved to be insightful, especially to measure the rapidity with which international prescriptions and bureaucratic dynamics evolve and are impacted by factors such as changes in the staff. When, despite these efforts, I assessed that segments of the case studies were not sufficiently informed by trustworthy data and an appropriate range of sources, I excluded them from my findings. For instance, I managed to interview four current and former senior officials from the Nepalese Prime Minister’s Office, yet it did not suffice to build a solid representation of its inner dynamics. However, these interviews did corroborate and complete other sources on the Nepalese NHRAPs.

To raise the validity and trustworthiness of my findings, I used three complementary research methods: semi-structured interviews, observation and documentary analysis.

#### (1) Interviews

I conducted 51 semi-structured interviews including 67 individuals in Burkina Faso and 60 semi-structured interviews including 64 individuals in Nepal (in addition to eight interviews in Geneva). The sampling was not random but rather based on an intentionally stratified approach, to ensure that the sample included individuals in specific functions. I identified three categories of interviews: with individuals directly involved in the institutional system structuration and populating the institutional coordinating arrangements under scrutiny; interviews with participants in the system (especially

public servants in various ministries who serve as focal points for the human rights administrations); contextual interviews (donors, civil society, academics).

Consequently, the largest category of interviewees was public servants of national administrations. In Burkina Faso I conducted interviews with 33 representatives of executive bodies, in the Human Rights Ministry and in 12 other governmental structures (focal points in sectoral ministries and Prime Minister's Office). The NHRI was almost inoperative at the time. In Nepal I conducted interviews with 10 officials from NHRIs, and 14 with representatives with executive administrations. In both contexts, I also conducted elite interviews with presidents of the highest courts and of the parliamentary human rights committees. For contextual interviews, I selected civil society organisations that had taken positions on preferred institutional arrangements through reports or in consultations I observed, as well as cooperation agents and their experts commissioned by cooperation agencies directly involved in either the programming or the implementation of capacity-building of human rights institutions. I focused on the latter category in Nepal, first because OHCHR-Nepal Office had, until 2012, been an integral component of the Nepalese human rights system, and second, as a mitigation strategy to access information and data that diplomats had either produced or had collected from administrations over the years (see below). The complete breakdown of interviewees is presented in Annex 2.

A contrast in access and openness was apparent. In Burkina Faso, access to public servants was facilitated by my affiliation with the Danish Institute for Human Rights. Here, the Institute and local institutions enjoy long-lasting and solid relations. I manifestly enjoyed a quasi-immediate transfer of trust, and could reach many public servants, as well as two former ministers. In contrast, in Nepal, gaining access was more arduous, and informal intermediaries were necessary – aid experts, academics or NGO representatives enjoying the personal confidence of specific public servants. Most public servants within the executive, when currently in post, tended to filter information by markedly reiterating the content of laws, policies or official briefings.

An information sheet on the conditions of research and participation in interviews was shared with the studied institutions and interviewees, by default before interviews, or at the outset of the interviews. I sought interviewees' iterative informed consent at the start of the interviews. Interviews were coded using the Nvivo software program. In the thesis, references to all interviews are anonymised. Interviews are referred as "N" for Nepal, "BF" for Burkina Faso and "IOs" for

international organisations in Geneva, with a sequential number reflecting the order of interviews. Functions and institutional affiliations are indicated when relevant and in a way that does not point to a specific person (e.g. there may be more than one individual being “a Director-General” in a specific ministry). The data were dealt with in accordance with privacy and ethical standards. Last, I intend to ‘give back’ to the interviewees by sharing the results of my research through targeted restitutions events in both countries. In Burkina Faso, a first such event is planned with the Human Rights Ministry in Ouagadougou for 21 October 2019.

## (2) Observation

My ambition was to be embedded in one institution in each country: the Human Rights Ministry in Burkina Faso and the National Human Rights Commission in Nepal, and from there observe sites of inter-institutional encounters. However, formal requests remained unanswered and access had to be arranged *in situ*. In Nepal, this proved to be complicated, yet I volunteered to support the Commission in the organisation of a conference, which raised confidence and built inroads to new contacts. I also observed a series of interactions between various categories of public officials and other stakeholders, but mostly those open to selected foreign diplomats.

In Burkina Faso, I met various officials from the Human Rights Ministry during my first research stay, which allowed me to spend a considerable portion of my second, six-week fieldwork inside the Ministry. Although not fully embedded in the Ministry, I spent significant time in its buildings, to attend internal meetings or run interviews, but also in sharing lunch breaks and ‘off-duty’ moments with the staff, including transportation to activities run outside Ouagadougou. At first, I was involved as a participant-observant in a series of activities organised with the technical support of the Danish Institute for Human Rights: I was the external guest, occasionally invited to provide ‘expert’ opinions. It usually involved several units within the Ministry, as well as other stakeholders, such as officials from the penitentiary guard. Very quickly, the Ministry officials invited me to also participate, as an observer, in coordination meetings between public servants from various ministries, in the different configurations analysed in Chapter 10, such as meetings of the Interministerial Committee for Human Rights and Humanitarian Law. These are exclusive sites with limited access, where public servants across institutions meet and discuss how to translate human rights commitments with a view to operationalising them, distributing actions, or what and how to communicate rights to the population. Official meetings were all organised in French and displayed a high level of frankness (as evidenced

by the content of discussions – see Chapter 10) that was surprising given my noticeable presence as a foreigner and the topics discussed (for instance torture).

### (3) Documentary analysis

Documentary collection and analysis served as an additional research tool. To start with, constitutional, legal and regulatory documentation served to ascertain the degree of harmonisation of domestic norms and the correspondence of institutional mandates to international human rights law, and therefore underpinned legal analysis. Some are available online, notably through the International Labour Organization's database on national legislations. In Nepal, the proceedings of the Constituent Assemblies were recorded by various entities, including the Nepal Law Society and partly inform about the considerations that ultimately helped to reshape the Nepalese institutional system in 2016.

Documentation collection served a second purpose, one that was particularly important in the context of the study of administrations. Administrations produce a wealth of documents that do not only contain factual data, but also inform even more about their authors, and to some extent their addressees – typically another state actor or an international organisation. These include draft legal texts, proceedings of meetings held with other public servants or consultations with rights-holders, project reports, administrative notes, draft state reports to international organisations, studies, internal strategies, multi-actor roadmaps, etc. As demonstrated by Riles (2006) and Hull (2012) analysing the production of bureaucratic artefacts is a key source of insights to grasp agency and dynamics.

Two genres of bureaucratic artefacts are particularly noticeable in observed institutions.

One of these is human rights indicators. The production of measurements is an essential dimension of the work of public servants. They are enshrined in matrixes or tables that populate roadmaps, strategies, plans, studies and various forms of administrative documents. Indicators and data play an essential dimension of inter-institutional interactions and coordination processes. To some extent, they have become the administrative *lingua franca* between administrations, and beyond them of many actors involved in the human rights system, such as donors, international and national monitoring actors, even legislative bodies and judicial decisions (see Nelken 2015, 321). Analysing them enables the research agenda to undertake process-tracing by investigating how an indicator navigates across administrative drafts and combines various inputs while circulating between state actors. At times, indicators express decisions in a much more straightforward manner than discursive documents, e.g. some rights might simply be crafted out. Indicators are the language of

operationalisation: they spell out concrete actions in the face of usually undetermined or broadly defined rights. Last, indicators are usually drafted at a technical staff level and mirror the public servants' views.

A second type of abundant documentation is the one produced by or for international cooperation. The setting-up of specific committees, units, working groups in or by administrations in developing countries is more often than not supported by donor cooperation (see Bhatta 2013 on external influence on state-building in Nepal). Donors, embassies and involved consultants collect administrative documents from recipient organisations, produce evaluations, studies and advice, draft internal assessments, etc. As exemplified in Chapter 1, one aspect that makes such literature important for this research is that this literature frequently endeavours to assess institution-building and developments against international prescriptions and models, and to discuss how to adapt and transport them into contexts. Their analysis traces the choices made and the steps in editing and contextualising blueprints. Part of this documentation is accessible, in line with transparency requirements of public donors. Many additional documents were given to me in confidence by involved individuals. These sources supported the validation of data and notably helped to historicise the diffusion of international prescriptions through donors. In addition to interviews of past and current officials and cooperation experts, access to the comprehensive records of two key donors' support projects helped me construct the longitudinal analysis of NHRAPs in Nepal presented in Chapter 9. Annex 3 more precisely describes this original dataset, and how I used, translated and referenced it while respecting sources.

Last, local academic works also provided useful insights, especially in Nepal. It partly made up for challenges faced in deploying other research methods, and helped to confirm certain findings as well as understanding the culture of administrations. In Nepal, a vibrant stream of scholarship has invested these issues, with dedicated documentation centres (Martin Chautari Library), research networks (Social Science Baha), and specialised journals (*Studies in Nepali History and Society*).

### **2.3.3 Notes on reflexivity**

Any research, especially interpretative research, is likely to be impacted by the prior assumptions of the researcher, informed by a variety of life and professional characteristics and experiences. Some of these characteristics are also known to interviewees and may influence responses. There is a need to constantly question “what sorts of factors influence the researcher’s construction of knowledge and



how these influences are revealed in the planning, conduct and writing up of the research” (Guillemin and Gillam 2004, 275), and engage with issues of perceptions. I here discuss two relevant points.

### *Institutional affiliations of the researcher*

The research project was co-hosted by the Danish Institute for Human Rights (DIHR). In 2014 the Institute took the decision to focus its international cooperation on state actors, and the generation of research was a dimension of that priority. While my research project may inform future practice of the DIHR, it is by no means aimed at self-legitimising predefined institutional priorities; in fact, several findings question some of the choices made by the DIHR (see Chapter 12). Throughout the research, I strove to maintain critical distance and objectivity, while drawing on the opportunities offered by the DIHR, for instance by verifying how my findings resonated with observations from other contexts (through access to project records and presentation to colleagues). Also, I did not limit myself to the local contacts of the DIHR in Burkina Faso, and almost exclusively relied on other intermediaries in Nepal.

I was careful to ensure that this affiliation would not distort responses. The risk was for interviewees to imagine that my research was linked with DIHR support opportunities or a project evaluation. To mitigate this perception, I diligently informed interviewees of the objectives and modalities of my research. The written informative notes given to interviewees (see above) included a clarification of my independence as a researcher. In practice, this did not prove to be a major difficulty.

### *Positionality of the researcher*

Prior knowledge and personal involvement may sometimes be an advantage in a research project. To mention but one example, my past professional life as an international cooperation officer on human rights for the European Commission certainly helped me ‘see’ and ‘talk’ like a public servant. This entailed having certain views of how institutions may support, but also frustrate, human rights promotion, through an increasing bureaucratic approach to human rights. Engaging in academic research was one way of taking a step back and attempting to scientifically reflect upon issues at stake, and an overall willingness to contribute to better enjoyment of human rights.

As highlighted by Johnson (2007, 42), when immersed in a field, and “in contrast to the often spurious ‘objective’ or ‘detached’ perspective of traditional ethical approaches, researchers care about the

outcome of the study they undertake. In short, they want to make a difference.” Reflexivity is necessary, and I think that there is a scientific necessity to spell out biases I might have with regards to the field of research, especially as legal research entails suggestions of improvements to the law. At least, there should be some clarity as to what my markers would be. This explication does not “absolve the researcher from attempting to maintain academic integrity in reporting research outcomes as they were rather than as they would like them to be” (ibidem). This may be particularly true on issues as normatively loaded as “human rights” and “bureaucracies”.

As seen in Chapter 1, there are different normative positions in the field of human rights as regards the study of human rights, and in particular how to address the role of administration therein, which “protest scholars” (Dembour 2010), viewing both human rights law and institutionalisation with suspicion, as an elite capture. Researching state actors is still controversial, and some might argue that it is futile to discuss human rights systems without due consideration of all actors including civil society, or without considering the ultimate results for the enjoyment of rights by individuals.

In addition to this, there is also diverging positioning amongst social scientists studying bureaucracies. As Bierschenk and Olivier de Sardan (2019, 244) scholarship is “often based on a critical positioning, either from the left or the right,” as David Graeber and Robert Merton archetypically represent. Researchers “should try to bracket, as far as possible, these preconceived judgements [...and] take into account the double face of bureaucracy, as a form of domination and oppression as well as of protection and liberation, and all the ambivalences this entails” (ibidem).

I value human rights ideals and the need to find effective tools to ensure their enjoyment, seek prevention and address violations. This should be held as my ‘marker’ for the reflections at the end of my thesis as to how the knowledge I generated could be taken into consideration for future developments of international human rights law and practice. Nonetheless, I did not approach the research, especially the ethnographic work, with the resolute intention to discover what “needs to be fixed”, but first to decrypt scientifically the mechanisms at play.

For me, zooming in on state actors is not an endorsement of a primary role they play as a purveyor of human rights. I am *a priori* agnostic as regards the means to enhance rights enjoyment, whether by focusing on duty-bearers, or on judicial redress, or localisation in protest movements or the empowerment of rights-holders. My past experience has certainly sharpened my interest in understanding the role of institutional actors and coordination. One conundrum I had struggled with

as a cooperation agent was the recognition that coordination of multiple local actors potentially triggered powerful transformative dynamics, yet that coordination was extremely challenging to systematise or provoke. This influenced how I framed my field of enquiry, but not findings and conclusions. Furthermore, my professional trajectory also led me to sympathise with Hibou's work – notably her remarks on the feeling of futility that overly abstract bureaucratic tasks engenders. However, the findings I analyse in Part IV precisely led me to nuance the applicability of Hibou's conclusions to the public servants I focused my research upon.

Last, I do not believe that focusing on state actors means discarding the importance of considering the results for rights-holders, as protest scholars might argue. Institutional structures are increasingly presented as protection opportunities, and in order to 'make a difference' for rights-holders, it is important to understand how intra- and inter-institutional arrangements work. Authors have justified looking only at institutions in different ways. One is to adopt a narrow and legalistic definition of human rights implementation. For Galligan and Sandler (2004, 29), since international standards address the state, then "the test of success in implementation is whether the human rights standards are accepted as authoritative by national institutions and officials in such manner that their practical actions and decisions are in compliance with them." Others justify their focus on institutions by presuming a causal relation between the respect of international blueprints, or seemingly operational institutions, and impact. For instance, Vandenhole and Gready (2014, 292) claim that "whereas organisational and social change are to be distinguished analytically, in practice they are often intrinsically linked. [...] The main emphasis of [their] article is therefore on organisational change as the logical precursor to social change." I neither presume that institutional actions by themselves equal implementation, nor that they are necessary prerequisites for impacting reality. In order not to forgo rights-holders, I explore the synapses for engagement of institutions with civil society throughout the research. Chapter 12, in particular, touches upon the actual use of innovative institutional set-ups by rights-holders. I also critically discuss the space that institutional solutions have taken in human rights discourses and cooperation practices.

## **2.4 Thesis structure overview**

**Part II** analyses the legal prescriptions of national institutional arrangements. It focuses on the paradigmatic elements identified by the UN to maintain and enhance coordination with national

human rights systems, as identified in Chapter 1. Each chapter corresponds to an in-depth review of one element: national human rights action plans (**Chapter 3**), national coordination mechanisms and focal points (**Chapter 4**) and national human rights institutions (**Chapter 5**). Part II exposes the diffusion of each of these elements and analyses the interplay between law and empirical diffusion. It finds that one core tension lying within each of them is that they tend to set in motion unifying dynamics (one plan, coordination structures and independent institutions instead of sectoral ones), erasing the divergences in the needs and in rights-holders' preferences prevalent in various human rights sub-fields, and raising the question of the ideal number of organs in an institutional landscape. Part II also demonstrates that institutional models, even when consolidated and expressed as legal requirements, constantly undergo renewals, as they remain amenable to challenges and contestations as regards their effectiveness. NHRIs are a special case, with a legal corpus incrementally reinforced, in particular towards an ever-stricter focus on independence. Ironically, while each of the institutional arrangement aims at enhancing fluidity and connectivity within national human rights systems, they themselves lack integration and their supporting guidance is fragmented and not entirely coherent.

**Part III** seeks to qualify the nature of the institutional turn of human rights law. It departs from the identification of distinct coordination institutional tools to focus on attempts to recast them as part of holistic systemic models, and analyses the influence of dominant ideologies for public administration, in particular new governance theories, on such attempts. Taking the 2006 CRPD as a legal case study epitomising the codification of institutional prescriptions in one single framework, Part III analyses the crafting of international models by both treaty drafters and norm entrepreneurs. **Chapter 6** analyses the Convention, including its *travaux préparatoires*, to assess whether drafters sought to adopt a new governance approach. Engaging with the Hibou's scholarship, it demonstrates how neo-Weberian principles permeate the Convention in powerful yet non-linear ways. The contradictions, loopholes and ambiguities that characterise the resulting treaty are also the conditions for the spread of neoliberal bureaucratisation to the field of human rights. **Chapter 7** complements this analysis with a critical review of the commentaries pertaining to Article 33 as well as an appraisal of the jurisprudence of the CRPD Committee. Norm entrepreneurs have resolutely extrapolated a model for national human rights systems valid beyond the Convention, that privileges institutional and process-oriented techniques inspired from new governance. This tendency is nonetheless thwarted by a maximalist interpretation of the principle of independence of monitoring frameworks, and by a lopsided jurisprudence of the CRPD Committee. Nonetheless, even these inconsistencies lead to further neo-Weberian forms of bureaucratisation of the human rights field. Part III identifies a number

of potential pitfalls and dangers that uncritically pursuing this road may entail – for instance the risk that institutional reforms and processes might become an end in and of themselves. It alerts us to the idea that international human rights law may become a powerful conveyor, yet at the same time a victim, of new governance principles.

**Part IV** empirically explores the reception of such models by those they seek to influence – the public administrations of developed countries, as a first attempt to measure whether both the models’ intended effects but also potential pitfalls identified in Part III materialise in practice. To do so, Part IV draws on findings from two case studies: Burkina Faso and Nepal. The exploration of these institutional landscapes illuminates how international models are diffused, received and translated locally. Part IV’s organisation mirrors Parts II and III: three chapters are devoted to the distinct institutional arrangement analysed in Part II, and two chapters take a bird’s eye view to analyse the resulting landscapes: one focusing on the number of institutions and coherence of mandates (a key point identified in Part II) and the other covering the results for other actors, notably the participation of rights-holders and policy implications for donors and cooperation agencies (two questions identified as central in Part III).

**Chapter 8** analyses the NHRAPs of Nepal and their evolutions since 2004. This longitudinal approach is key to assessing that the process is “institutionalised” that ideally aims for a process to become a sustainable administrative routine over time. This approach allows me to analyse how models first enter a domestic context through the interactions of international and national bureaucracies, yet thereafter evolve under the influence of a variety of interests and factors.

As a complement, **Chapter 9** explores other contextual specificities, including pre-existing institutional landscapes that frame institutional reforms. It also measures endogenous factors influencing organisational reforms, and notably the extent to which international models are taken into account at the occasion of constitutional reforms.

**Chapters 10 and 11** delve in the internal dynamics of “human rights administrations”, respectively focusing on the National Human Rights Commission of Nepal and the Human Rights Ministry of Burkina Faso. Public human rights administrations are characterised by their position within the national landscape, and notably their practical understanding of the concept of independence, as well as by their expertise, working methods and the *habitus* of public servants within these administrations. These condition how they serve as a site of coordination and localisation of human rights norms, and

how internationally supported efforts towards a ‘professionalisation’ of the human rights field influence practices.

Last, two decades into the creation of human rights institutions in Nepal and Burkina Faso, what are the effects of these models? **Chapter 12** questions the impact on rights-holders and the conundrum in which donors placed themselves by pursuing an institution-building strategy.

**Part IV** shows how national administrations confirm, thrive upon, and exacerbate some of the risks identified in Part III, and points to the need to reinstate attention to political will and normative authority, notably through justiciability and legal avenues.

Finally, in **Part V**, based on the analyses of the previous parts, the thesis draws conclusions as regards the general question of the significance of the institutional turn of international human rights law. The thesis confirms that international human rights law is placed at a crossroads, and suggests a new path that would not negate earlier strategies. It also points to questions that will outlive the current thesis.