

Weak institutions, rights claims and pathways to compliance: the transformative role of the Peruvian Human Rights Ombudsman

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Abstract

This paper examines the contribution of the Peruvian human rights ombudsman toward upholding an important component of an inclusive democratic political regime – a stable and enforceable rights framework. The paper argues that the ombudsman may play a significant role in advancing social transformation through the articulation and facilitation of rights claims in an institutional terrain informed by the politically contested nature of formal rules. The analysis goes beyond formal legal channels of redress to consider innovative social accountability levers of influence, including non-judicial remedies, policy and legislative initiatives, media advocacy, and conflict mediation. The paper suggests the ombudsman is well placed to advance rights claims through legal, institutional and social pathways, with particular focus on the question of compliance – understood as a matter of both enforcement and management.

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Acronyms and Foreign Language Terms

<i>Acronym/Term</i>	Explanation
ALEGRA	Asistencia Legal Gratuita (Free Legal Assistance)
APRA	Alianza Popular Revolucionaria Americana (American Revolutionary Popular Alliance)
<i>APRODEH</i>	Asociación pro derechos humanos (Pro Human Rights Association)
AQV	Anticoncepción Quirúrgica Voluntaria (enforced 'Voluntary' Anti-contraceptive Surgery)
<i>CCRs</i>	Consejos de Coordinación Regional (Regional Coordination Councils)
<i>CEAS</i>	Comisión Episcopal de Acción Social (Episcopal Commission for Social Action)
CEPAL	Comisión Económica para América Latina y el Caribe (Economic Commission for Latin America and the Caribbean)
Chicha	Chicha is a fermented maize-based drink widely consumed in rural parts of Peru.
<i>CNDH</i>	Nacional de Derechos Humanos de Perú (Peruvian National Coordinator for Human Rights)
<i>Consejo de Paz</i>	Council of Peace (a grass-roots NGO)
CPN	Cadena Peruana de Noticias (national radio channel)
CT	Constitutional Tribunal
Defensor	Ombudsman (titular head)
Defensoría del Pueblo – DP	The Human Rights Ombudsman
DIRCOTE	Dirección Contra el Terrorismo (The Counter-Terrorist Directorate)
DO	Decentralized ombudsman offices
ESSALUD	Seguro Social del Perú (Peru's Health Care System)
FEDEPAZ	Fundación Ecueménica Para el Desarrollo y la Paz (Ecumenical Foundation for Development and Peace)
<i>FREDEMO</i>	Frente Democrático (The Democratic Front)
IACHR	Corte Interamericana de Derechos Humanos (The Inter-American Court of Human Rights)
<i>IDL</i>	Instituto de Defensa Legal (Institute of legal Defence)
INPE	Instituto Nacional Penitenciario (National Penitentiary Institute)
JNE	Jurado Nacional de Elección (National Elections Jury)
MINSA	Ministerio de Salud del Perú (The Health Ministry)
NHRI	National Human Rights Institution
ONP	Oficina de Normalización Previsional (Office of Standards for Welfare – pensions)
PCM	Presidencia del Consejo de Ministros (Presidential Council of Ministers)

PNP	Policía Nacional del Perú (Peruvian National Police)
MPN	Ministerio Público de la Nación (Public Prosecutors Service)
<i>Propuesta Ciudadana</i>	Citizens' Proposal Group (a national NGO)
<i>RENIEC</i>	RENIEC - Registro Nacional de Identificación y Estado Civil (National Register of Identification)
<i>Rondas campesinas</i>	Local self-defence committees
RPP	Radio Programas del Perú (national radio channel)
SEDAPAL	Peru's state water utility agency
<i>Sendero Luminoso – SL</i>	Shining Path (Maoist guerrilla organization)
<i>SER</i>	Rural Education Service
<i>Asociación Civil Transparencia</i>	Civil Association for Transparency (national NGO)
TRC	Truth and Reconciliation Commission (in Spanish: Comisión de la Verdad y Reconciliación)

Weak institutions, rights claims and pathways to compliance: the transformative role of the Peruvian Human Rights Ombudsman

By Thomas Pegram¹

The compelling challenge in ‘societies marked not only by pervasive poverty but also, and even more decisively for our theme, by deep inequalities, is how to ensure that the weak and poor are at least decently treated by [state] agents,’
Guillermo O’Donnell (1998: 116)

1. Introduction

An important element of democracy in deeply divided countries such as Peru is its design as an inclusive system of government. This paper addresses the contribution of the Peruvian National Human Rights Institution (NHRI), the human rights ombudsman or *Defensoría del Pueblo*, toward upholding an important component of an inclusive democratic political regime – a stable and enforceable rights framework.² Recent scholarship has emphasized the transformative potential of courts to act as channels of social redress for marginalized sectors of society (Gargarella, Domingo, and Roux 2006). Gargarella (2006: 2) defines ‘social transformation’ as ‘the altering of structured inequalities and power relations in society that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or social orientation.’ With a function to uphold the tenets of liberal democracy and rights protection, this paper argues, the *Defensoría* may play a significant role in helping to advance transformative social change in an often adverse political and institutional terrain, through the articulation and facilitation of rights claims.

Such an outlet is particularly relevant in new democracies such as Peru where ongoing human rights violations, severe and manifold inequalities, combined with a weak state apparatus that is unable or unwilling to address the demands of the polity, are a potent recipe for social conflict (Stewart 2008). In contrast to other countries in the region,³ and despite repeated attempts at judicial reform (CERIAJUS 2004), Peru displays weak rule of law and multiple structural, social and institutional barriers to justice (Giugale, Fretes-Cibils and Newman 2006). In a context where legal mobilization is severely curtailed and even discouraged,⁴ what alternative avenues of redress exist to challenge perceived injustices? The urgency of this inquiry is heightened by a growing level of social unrest in Peru and the fragility of its

¹ I am grateful to the participants in the workshop organised by CRISE at University of Oxford in May 2009. I also thank John Crabtree and Laurence Whitehead for their comments on earlier drafts of this paper. All errors are my own.

² Reif (2000: 11) defines the hybrid human rights ombudsman as ‘an institution that expressly has been given or that in practice undertakes two roles: to protect and promote human rights and monitor government administration.’ This paper will use the Spanish title *Defensoría* to refer to the Peruvian institution and *Defensor* to refer to the office-holder throughout.

³ This is particularly true of Costa Rica and Uruguay. See Sieder et al. (2005).

⁴ As Paulo Drinot (2006: 21) writes, ‘Peruvians, I would suggest, perceive organizations such as the judiciary or the political parties to be illegitimate because they are inefficient and corrupt, but also, and perhaps most importantly, because they are seen to be the expression of an institutional system that they have come to understand, and for good reason, as responsible for, and dependent on, their exclusion from full citizenship.’

democratic regime.⁵ Unlike most state institutions in Peru, the *Defensoría* since its inception in 1996 has remained widely trusted by the public. This paper argues that the institution, in its distinctive position as an agency of horizontal accountability, represents a valued – if insufficient – institutional resource for otherwise weak rights claimants in the absence of an accessible or responsive judicial and political institutional framework (O'Donnell 1999).

Importantly, the institution is capable of directly receiving complaints and facilitating legal mobilization as well as activating institutional and social mobilization strategies in coordination with civil society actors. Building upon the work of Peruzzotti and Smulovitz (2006), the analysis in this paper goes beyond formal legal channels of redress to consider innovative 'social accountability' mechanisms that may also shape the behaviour of state actors, including non-judicial remedies, policy and legislative initiatives, media advocacy, and conflict mediation. These strategies do not necessarily entail legal sanction, but may nevertheless have 'material consequences' – including, eventually, compelling the legal system to act. The search for creative pathways to compliance by rights advocates, in tandem with, but separate to, legal parameters, largely reflects the politically contested nature of formal rules in many new democracies in Latin America such as Peru. As Levitsky and Murillo (2009: 115) have observed, 'variation in the stability and/or enforcement of formal rules shapes actors' expectations and behavior.' Given the politically contingent nature of legal compliance and judicial administration in the Peruvian context, this paper emphasizes the strategic capability of the *Defensoría* to amplify the voices of marginalized actors and, in turn, enhance the responsiveness of the state apparatus to broader social needs and demands.⁶

The *Defensoría* has a mandate over the full gamut of rights and has begun, in recent years, to articulate a position on social, economic, and, increasingly, environmental rights claims. As will be explored, the institution can be highly effective in traversing different rights groups, identifying a group-based dimension to civil and political violations, and tying particular issues to broader patterns of rights violations, such as when the *Defensoría* blames social conflict on the economic deprivation, environmental degradation and land confiscation suffered by indigenous communities. Advocacy in the field of social conflict has, in turn, led to the *Defensoría* gaining prominence as a conflict mediator in disputes often sparked by unresolved socio-economic inequalities. The high profile of the *Defensoría* in national policy debates, most visibly as the guardian of the Truth and Reconciliation Commission's (TRC) legacy, further points to an evolving (and possibly novel) local constitutive role, beyond a conventional regulative function.⁷ With this constitutive function in mind, attention is paid in this paper to the ability of the *Defensoría* to intervene in matters of public policy and their impact on the rights of traditionally vulnerable groups in Peruvian society, particularly the indigenous population and native or rural communities, but also others including children, women, the elderly, and persons living with HIV/AIDs.

⁵ The 2008 *Latinobarómetro* survey worryingly shows only 45% of Peruvian respondents agree with the statement that 'democracy is preferable to any other type of government.' *Latinobarómetro Informe 2008*: 109.

⁶ 'Voice' requires, first, that citizens should be aware of their rights, right-violations and the possibility for redress through the courts. Second, citizens may face motivational and psychological barriers to accessing justice such as the possibility of alternative mobilization strategies and fear and mistrust of the judicial system. This definition follows Gloppen (2006: 46).

⁷ Regulative functions are those focused on state compliance with international and domestic legal obligations. Constitutive functions are those intended to transform the underlying preferences of state or social actors, for example through educational campaigns.

The paper begins by providing an overview of the origins and structural features of the *Defensoría* as well as how the institution has developed since its creation in 1996. Particular emphasis is placed on evaluating questions of institutional access, responsiveness and legitimacy within Peruvian society. The first part of the paper also addresses the political and institutional challenges of constructing an institutional rights profile in the highly centralized Peruvian political context, as well as the challenges of relational leadership norms. The second part of the paper asks whether and how the institution serves to protect, monitor and promote human rights. It assesses the impact of internal agency and external conditions on the formulation of the *Defensorías* rights agenda following national political transition in 2000 and under the stewardship of three distinctive leaders. Part three focuses on the viability of legal, institutional and social pathways through which the institution has advanced rights claims, with a particular focus on compliance – understood both as a matter of enforcement and management of normative pressures. This discussion further evaluates the impact of the *Defensoría* in encouraging a rights-discourse, not only by advancing rights claims through legal channels but, and often with higher political returns, intervening in national public policy debates. Finally, the paper reflects briefly on the challenges of engaging with the most vulnerable groups within Peruvian society and the distinctive role of the institution as a mediator in situations of social conflict.

2. The *Defensoría del Pueblo* – human rights ombudsman

Paradoxically, emerging from a process of institutional deconstruction and the aftermath of widespread human rights violations and quasi-civil war throughout the 1980s, the *Defensoría* nevertheless performed a valuable democratic role under the authoritarian government of Alberto Fujimori (1990-2000). Not only did it become a viable institutional mechanism for defending citizen rights, it eventually assumed an influential supervisory role in the troubled elections of 2000 (Pegram 2008). From its creation in 1996 to the fall of the Fujimori government in November 2000, the *Defensoría* practically became the sole democratic agent of accountability within the state and was recognized as such by civil society and international observers (Kenney 2003: 65). Following the democratic transition of 2001, the *Defensoría* has continued to assert its presence on the public stage in a partially restored democratic context under the administrations of Valentín Paniagua (2000-2001), Alejandro Toledo (2001-2006) and the incumbent President Alan Garcia. Despite a radically altered institutional context, the *Defensoría* remains a key human rights defender in Peru – maintaining a high level of public confidence while also adapting to new ‘structures of opportunity’ and a more expansive rights agenda. The focus of this paper is on the post-transition trajectory of the *Defensoría* without discounting the importance of the initial, but highly idiosyncratic, experience of the institution under the authoritarian Fujimori government.

The *Defensoría* is elected to office by a two-thirds majority for a term of five years, may be re-elected once, and enjoys the same immunity as a member of Congress. As with other offices in the region, the legislature has attempted to interfere with the institution through the appointment process.⁸ However, the *Defensoría* has been surprisingly effective in maintaining its autonomy – arguably, at times, at the cost of institutional authority. Following the resignation of the first *Defensor*, Jorge Santistevan and his ill-advised bid for the Presidency during the 2000 democratic

⁸ In order to ensure a modicum of plurality, successful appointment of the Peruvian Defensor requires a legislative two-thirds majority. In practice, unfortunately, this arrangement frequently leads to protracted horse-trading among political blocs in Congress.

transition, under Santistevan's successor, Walter Alban, the *Defensoría* struggled to assert its presence on the public stage. This can be attributed in large part to Alban's interim status as Defensor, with his attempts to be appointed *Defensor* subjected to repeated rebuffs by Congress. In September 2005, after four years of congressional intransigence, the Peruvian Congress finally achieved the cross-party consensus necessary to appoint Beatriz Merino Lucero, a former Prime Minister of the Presidential Council of Ministers (PCM), as the new *Defensora*. Under Merino, the institution has undergone something of a revival. Despite the fears of many, it has avoided partisan politicization, instead providing a robust human rights referent point in public discourse and tackling an increasing array of structural rights violations as is demonstrated further below.

The ability of the *Defensoría* over time to effectively navigate the official interests within the state, as well as build a plural support base within (a primarily urban) civil society, has been crucial to developing its profile as an independent and forceful human rights interlocutor. Beyond external conditions, the importance of political leadership for institutional preservation, strategic positioning, and defining a rights agenda, vis-à-vis other actors, should not be under-estimated in the Peruvian context. Each *Defensor* – all lawyers – has brought distinctive qualities to the position and a particular conception of the function of the institution. Santistevan, a former UN diplomat in Central America, sought to generate institutional credibility, redress civil and political violations and, above all, maintain autonomy. With no political debts to pay, he proved highly capable of navigating Fujimori's labyrinthine regime, assisted by functionaries with impeccable rights credentials within civil society.⁹ One of these recruits was Alban, originally of Peru's grass-roots human rights movement. Interim *Defensor* for five years, Alban nevertheless oversaw an extensive 'horizontalization' of the institution in the new democratic context – most notably, in the decentralization of its operations through the creation of local offices (DOs) outside Lima and continuity among high-level functionaries. As one observer commented, "Alban had the virtue of understanding his role."¹⁰

Merino, in comparison to her predecessors, is a political insider. Entering parliament with the centre-right coalition, The Democratic Front (FREDEMO), in 1992, a former Prime Minister of Congress, and more recently a World Bank bureaucrat, she initially inspired little confidence among human rights advocates. However, she has surprised many of her detractors with her stabilizing influence, high profile, and robust rights advocacy position, in particular on structural violations around health, discrimination, the environment, and TRC recommendations. Arguably swayed, not only by personal conviction, but also by personnel of high calibre within the institution and existing institutional structures that were able to exert influence, Merino "appears to feel great responsibility when it comes to issues of poverty and social exclusion."¹¹ As will be further developed in the following section, the rights agenda of the institution displays both change and continuity, especially with regard to protecting the most vulnerable. However, the neglect by Merino of legal prerogatives before the Constitutional Tribunal and an ambiguous stance on certain core civil rights – especially police conduct in situations of violent confrontation – are sources of tension for some observers.

⁹ Including Samuel Abad, Gino Costa, Rocio Villanueva, and Vladamir Huaroc.

¹⁰ Ismael Muñoz, Professor of Economics at La Católica University. Interview by author in Lima 19-06-08.

¹¹ Wilfredo Ardito, coordinator for economic, social and cultural rights in the NGO APRODEH. Interview by author in Lima 10-06-08.

2.1 Access, responsiveness and legitimacy

Questions of institutional access, responsiveness and legitimacy take on a particular significance in the Peruvian context. Issues such as the persistent asymmetry between institutions and leaders, the often-antagonistic relationship between state and citizens, an ambiguous attachment to democratic practices, and a profound lack of rights in Peruvian society, all resonate strongly in the institutional sphere. The following discussion relies on the little reasonably reliable empirical data that is available which may act as a proxy to evaluate the *Defensoría* within these three dimensions.

In terms of case data, the institution received 574,550 cases from the Peruvian public between 1999 and 2007. Table 1 shows the total caseload increased incrementally throughout this period, experiencing a rapid acceleration in 2005. At a basic level, the data points to the willingness of Peruvians to approach the institution with their grievances. The steady growth from 12.7 complaints per 10,000 inhabitants in 1999 to 39.9 in 2007 suggests enhanced access to and awareness of the *Defensoría*. Available empirical evidence for 2003 suggests that complaints to the *Defensoría* per 10,000 inhabitants compared favourably to the Public Prosecutors Service (4 complaints), Superior Attorney's Office (34 complaints) and the judiciary (415 complaints) – especially, when resource disparities across these institutions are taken into account.¹²

Table 1: Cases received by the *Defensoría del Pueblo* (1999-2007)

Year	Total cases	Complaints (%)	Petitions (%)	Consultations (%)	Lima % of total	Per 10,000 inhabitants	DOs
1999	32,543	28.0	8.8	63.2	38.0	12.7	5
2000	40,073	33.8	9.7	56.5	38.7	15.6	9
2001	50,520	36.9	11.2	51.9	38.2	19.4	10
2002	52,180	37.4	13.6	49.0	23.4	19.8	23
2003	68,913	26.7	20.9	52.4	13.4	25.9	28
2004	70,907	33.9	20.4	45.8	7.0	26.3	28
2005	62,419	38.6	18.9	42.5	12.6	22.9	28
2006	85,658	33.0	13.9	53.1	32.9	31.1	28
2007	111,337	29.6	9.0	61.4	29.1	39.9	28

Source: DP Informes Anuales 1999-2007, Lima: *Defensoría del Pueblo*. Population data collected from Economic Commission for Latin America and the Caribbean (CEPAL).

Accessibility has been facilitated by the decentralization of operations throughout the country, initially in the form of mobile units in the 1990s, followed by an increase in the number of permanent offices, from five installations in 1999 to 28 in 2003. Although, many of these offices remain in urban centres, the *Defensoría* has gained recognition as one of few Peruvian institutions to successfully decentralize.¹³ However, while Table 1 shows a degree of correlation between decentralization of operations and percentage of cases received from outside Lima, this trend is reversed in 2006 and 2007. Changes in the organizational structure of the

¹² Calculations based on 2003 data from *Consortio Justicia Viva*, <http://www.justiciaviva.org.pe/indicadores/> (accessed 26-02-09). The 2006 budget for the *Defensoría* was 10.98% of the overall judicial budget (\$10.8 million to \$98.9 million).

¹³ Salomón Lerner, jurist and Ex-President of the Peruvian Truth and Reconciliation Commission. Interview by author in Lima 10-08-05.

Defensoría may also provide an indication of the institution's responsiveness to citizen demands and expectations. Initial special programs for human rights advocacy, public administration, women's rights, prison reform, and support for people with disabilities, have in recent years expanded to encompass environmental rights, the protection of populations affected by violence, decentralization and good governance, and social conflict mediation, among others.

However, one senior official admits, "we have not yet resolved the matter of how to be the *Defensoría* of the most vulnerable."¹⁴ Certainly, the scarce data on the demographics of claimants indicate that clear challenges remain in engaging with vulnerable groups in society that confront serious obstacles to effectively seeking redress for rights violations, such as women and indigenous peoples. 72% of claimants in 1998 were male, between the ages of 36 and 65, and either freelance workers or pensioners (*Defensoría del Pueblo* 1998: 91).¹⁵ In 2005, the *Defensoría* conducted an evaluation of a sample of 19,591 complaints received from designated 'priority vulnerable groups' or 31.3% of a total of 62,419 complaints for that year (DP 2005a: 371).¹⁶ Within the selective focus of this data, complaints from women constituted 34.2% of complaints and, as such, only 10.7% of all complaints received in 2005. Of particular note, just 4.8% or 949 complaints were categorized as having been received from indigenous communities. Given indigenous peoples make up approximately 45% of the total Peruvian population, this figure indicates an acute disconnect between this demographic and the *Defensoría*.¹⁷

In 2004, the *Defensoría* carried out an internal evaluation which identified social exclusion as a key but to date an unfulfilled priority for the institution. Case analysis revealed that it was often public servants, not vulnerable groups, who were making use of the institution. Martin Tanaka believes the institution lacks a methodology to assist the most vulnerable communities, asserting that, "in fact, they have difficulty understanding what they [the vulnerable communities] require."¹⁸ This evaluation is also acknowledged by some within the institution. Nora Loredo admits that despite the work of decentralized offices, radio advocacy and other initiatives, socio-economic groups D and E are far more complicated to engage.¹⁹ The lack of penetration in rural zones is often put down to the difficulties entailed in physically accessing remote areas. A lack of knowledge of the institution is compounded, according to civil society actors, by a common, if often misguided, perception outside Lima that the *Defensoría* is a very conservative institution, serving the provincial elite and hiring only *gente blanca* (white people).²⁰ Suffice to say the complex insertion of the *Defensoría* at the local level has been far from homogeneous and is a theme we return to in Section 4.4. There is very little robust empirical data on perceptions of the institution outside Lima (the graph below refers only to Lima and metropolitan

¹⁴ Rolando Luque, former personal advisor to Alban and current head of the Unit for Social Conflict. Interview by author in Lima 15-07-05.

¹⁵ *Defensoría del Pueblo*, cited henceforth as 'DP'.

¹⁶ Designated vulnerable groups included the elderly, women, victims of the armed conflict, prisoners, indigenous communities, children, migrants and the disabled.

¹⁷ CIA World Factbook 2010: <https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html> (accessed 08-05-10).

¹⁸ Martin Tanaka, political scientist at Institute for Peruvian Studies (IEP). Interview by author in Lima 29-08-05.

¹⁹ Nora Mora Loredo de Izcue, Head of Office of Communication and Institutional Image within the *Defensoría* (2007-2008). Interview by author 11-06-08. Groups D and E, in this instance, refer to the bottom two quintiles of a commonly used A to E five-fold classification of citizens' socio-economic status.

²⁰ Ardito, coordinator for economic, social and cultural rights in the NGO APRODEH. 10-06-08.

areas). However, an unpublished qualitative survey conducted by Belgian Technical Assistance (2004: 46) in Trujillo, Cusco and Ayacucho reveals respondents are highly critical of the *Defensoría's* lack of penetration beyond urban centres, but that they are also strongly supportive of an institution that 'listens to the people and treats all equally.'

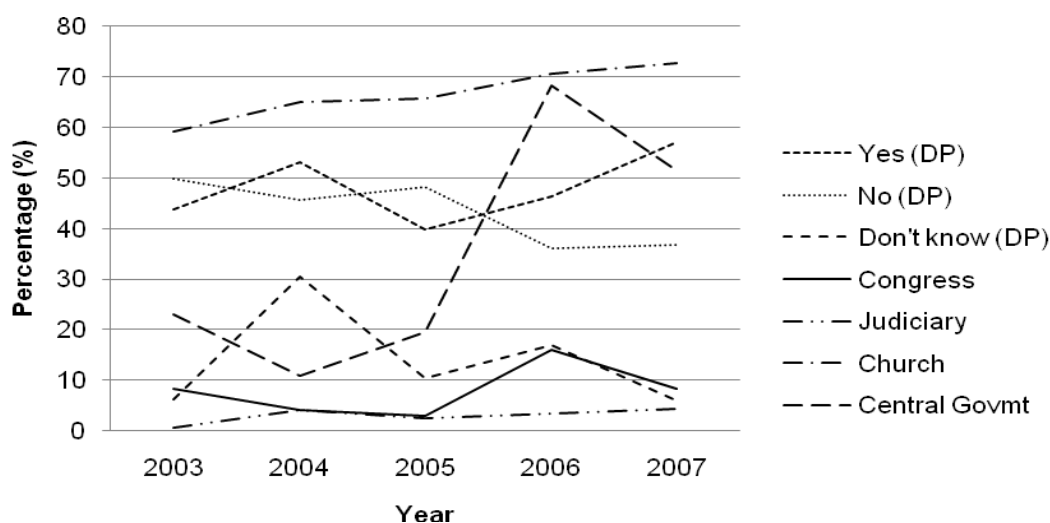
Awareness of the institution is one thing, knowledge of its function another. In a survey conducted in 1998, 72% of respondents believed the *Defensoría* had the power to sanction public officials for misconduct (DP 1998a: 91). The institution appears to have tackled this misconception with some success in the intervening years, with a recent survey recording 65.2% having 'some idea' or 'knowing well' the function of the *Defensoría*.²¹ However, Table 1 appears to offer conflicting evidence of this claim. There is a steady reduction in consultations (cases received that are outside the jurisdiction of the institution) until 2005 followed by a sharp rise in 2007.²² This sharp rise in consultations coincides with the election of Merino as *Defensora* in 2005. Merino's public approval rating of 55.7% in November 2008 far exceeds any other public figure in Peru, with President Alan Garcia languishing at 23.1%.²³ Arguably, her high public profile and, crucially, robust popularity has encouraged many more Peruvians to access the *Defensoría* irrespective of whether their claim falls within the jurisdiction of the institution. Furthermore, media exposure and national campaigns have generated many more cases, especially in Lima.

²¹ Question: *Y respecto al Defensor del Pueblo, ¿diría Ud. que conoce bien, que tiene alguna idea o que, por el contrario, no conoce las funciones que desempeña el Defensor del Pueblo?* [Question: with respect to the Defensor del Pueblo, would you say you know well, have some idea, or, alternatively, do not know the function that the Defensor del Pueblo performs?] Centro de Investigaciones Sociológicas, Barómetro de Noviembre, Nationwide and sample of 2,448, Estudio 2,778, November 2008.

²² A complaint refers to the violation of a fundamental right or illegal acts committed by an entity (of the public administration or public service provider) and/or public servants in the carrying out of their legal duties. A petition refers to any claim presented requiring the intervention of the *Defensoría* in order to attend to and/or solve a situation where constitutional rights are affected but no violation of legal duties or misconduct has been committed.

²³ Compañía Peruana de Estudios de Mercado y Opinion Publica, Estudio de Opinión Publica a Nivel Perú Urbano, sample of 1,550, 3.4% +/- margin of error, 23-28 November 2008.

Figure 1: Public confidence in the *Defensoría del Pueblo* [DP] (yes, no, and don't know) and other state and non-state institutions (2003-2007)



Source: Grupo de Opinión Pública de la Universidad de Lima, Estudio 387, Barómetro Social: IV Encuesta Anual Sobre Confianza en las Instituciones, Lima Metropolitana y Callao, 27-28 October 2007. Responses to the question: '¿Confía o no Confía en la Defensoría del Pueblo?'

The public authority of the institution is borne out in Graph 1, with public confidence in the *Defensoría* largely correlating with Merino's personal approval ratings (although, disapproval ratings for the institution are markedly higher). The stability and levels of confidence in the institution stand in stark contrast to other state institutions, with congress and the judiciary vying for bottom place. Notably, institutional support for the *Defensoría* remains relatively high from 2003 to 2007, irrespective of the election of a new titular head to the institution in 2005. Compare this to the volatility of confidence in central government, closely tracking the handover of power from the ineffectual President Toledo to an initially resurgent APRA administration under the leadership of Alan Garcia in 2006. Graph 1 further suggests that awareness of the *Defensoría* has increased, with the number of those unaware of the institution falling from 30.4% in 2004 to 5.9% in 2007. Finally, Graph 1 also reflects the historically high levels of public legitimacy enjoyed by the Catholic Church in Peru.

3. Fulfilling a rights mandate: to protect, monitor and promote

Alongside independence, comprehensive and far-reaching powers of investigation are an essential cornerstone of the ability of the institution to fulfill a mandate to protect, monitor and promote human rights. The Peruvian *Defensoría* can initiate investigations proactively, or respond to submitted complaints. Public entities, with few exceptions,²⁴ are legally obliged to cooperate with the investigation – though the *Defensoría* has no powers of enforcement beyond referral to the appropriate superior authority. Potent non-judicial actions used by the institution to advance rights claims include issuing: an annual report, frequent resolutions, other reports and recommendations. Although lacking in binding authority, these documents contain a high level of academic and legal analysis and are intended to apply pressure on those institutions or actors implicated in the violations of citizens' rights. Although the

²⁴ This legal obligation of cooperation is limited in relation to (a) judicial secrecy (including military courts); (b) national security, defence and international relations.

Defensoría may lack coercive faculties, it does enjoy certain legal prerogatives, particularly regarding the protection of human rights. The institution can take cases of unconstitutionality, *habeas corpus*, *amparo*, *habeas data* actions and collective actions before the Constitutional Tribunal.²⁵ It can also advance *amicus curiae* or ‘friend of the court’ submissions and, upon the exhaustion of domestic remedy, submit these to the Inter-American Court of Human Rights (IACHR). The institution can also draft and submit legislative projects.

The *Defensoría* has institutionalized its position as an independent and persuasive rights voice within the Peruvian state apparatus. It has, with increasing success, begun scaling up activities to seek redress for individual rights grievances through legal, institutional and social channels as well as relate individual claims to broader structural violations. The institution’s agenda has been guided by pragmatic considerations: maximizing its impact with finite resources, and recognizing the potency of subverting a traditional dialectic of clientelistic subjects as complainants to one that recognizes the citizen as a victim and rights claimant entitled to redress through official channels. The Fujimori government initially pigeonholed the institution as one that only pronounced in legal terms. But the *Defensoría* applied itself to emulating the political function that such offices have assumed throughout Latin America, namely, turning rights claims into larger social issues. Using its mandate in the broadest sense, it has frequently made politically potent links between different human rights issues which officials often prefer to approach separately (Ungar 2002: 37). The evolution of a rights agenda within the institution also reflects shifts in the institutional context as new opportunity structures present themselves.

Given the threat posed by the Fujimori government toward civil and political rights, as Francisco Soberón, the Secretary of the National Coordinator of Human Rights *Coordinadora Nacional de los Derechos Humanos* (National Coordinator for Human Rights – *CNDH*)²⁶ explains, “for the *Defensoría*, as with ourselves, the priorities were very clear, from a legal and political perspective the right to life had to take priority.”²⁷ During this period, the focus of the *Defensoría* was on the civil and political realm, particularly on reforming the military justice system, eradicating compulsory military service, torture, and upholding freedom of the press. The office also applied itself to advancing more peripheral rights issues that, in some cases, became high profile following their exposure.²⁸ These included enforced ‘Voluntary’ Anti-contraceptive Surgery (AQV) and arbitrary police detention, as well as other issues which remained largely unreported, such as pushing for conflict reparation for *rondas campesinas* (local self-defence committees), and public interest legal action on a range of matters.²⁹ In the absence of an independent judiciary, the *Defensoría* during this period assumed the role of guardian of the constitution. However, as will be explored in the following section, redress for civil and political violations also contained a group-based dimension. The discussion highlights that the work of the Ad-Hoc Commission of the Innocents resonated strongly among an Andean population

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

²⁶ *CNDH* was created in 1985 as a reaction to widespread human rights violations during the civil war. It acts as an umbrella organization for many Peruvian NGOs working in the area of human rights and offers a collective voice on the national and international stage.

²⁷ Francisco Soberón, Executive Secretary of *CNDH* and currently of *APRODEH*. Interview by author in Lima 16-08-05.

²⁸ See the special reports produced by the *Defensoría*. Available at www.ombudsman.gob.pe.

²⁹ *Ibid.*

disproportionately affected by civil war and the arbitrary acts of the state. The *Defensoría*'s actions within the electoral sphere further exposed the multiple obstacles confronted by Andean communities in exercising that most basic of civil rights, the right to vote, due to internal displacement, lack of identity documentation, military supervision, among other factors (DP 2000a).

In the radically altered institutional conditions of post-transition, the rights agenda of the *Defensoría* initially displayed considerable continuity, producing two follow-up reports on AQV, successfully advocating for military justice reform, the undocumented, further release of innocents, and the repeal of anti-terrorism legislation. Under the Paniagua transitional government where many members of the human rights community were drafted into government,³⁰ the *Defensoría* assumed a principal advisory function on questions of 're-institutionalization of the country.' This involved addressing issues as diverse as electoral reform, decentralization, improved transparency and access to information, as well as judicial reform. Of particular significance was *Defensoría* support for the creation of the TRC in 2001. Its auxiliary function was to provide the TRC with data on the disappeared. It also became the formal guardian of the TRC following its deactivation in 2003 (DP 2002a). In a context of rising social protest, and spurred on by violent events in Arequipa in 2002 and Tambogrande in 2003, the *Defensoría* also began monitoring social conflicts in 2003. However, it did not initially elaborate a methodology of intervention.

Due to Alban's (2000-2005) interim status and non-political background, throughout his tenure the public profile of the institution diminished. This was compounded by a difficult internal transition from that of a core focus on civil and political to a more integrated vision of rights advocacy. Senior personnel appeared to be uncertain and, to a degree, unwilling to engage in the political advocacy entailed by intervention in more contentious rights arenas.³¹ Following an internal review in 2004, the institution did begin to orient itself toward applying a rights optic to issues of public policy, conducting influential investigations into pensions, health, and the right to water. The internal structure of the institution during this time further reflected the nascent systematization of a new rights approach. The most significant of the few innovations in the final years of Alban's tenure being a specialized environmental area within the office of public services.

In her inaugural address in 2005, Merino dedicated herself to being "the voice of the voiceless" and emphasized social rights, public services and the TRC as personal priorities.³² Under her leadership, the *Defensoría* has continued to respond to urgent petitions concerning civil and political violations, including allegations of police brutality, torture, arbitrary detention and electoral supervision (DP 2006b). Notably, the institution does not use the term 'systematic violation' of rights in respect to egregious violations such as torture – although such a practice is suspected.³³ However, Merino's priorities are structurally-oriented, possibly reflecting her background in the World Bank. This has been a transition away from the legal role of constitutional guardian envisaged by Santistevan and Alban. Instead it has been one of facilitating rights claims through political discourse. As such, the institution has

³⁰ Prominent human rights advocates such as such as Pedro Franke, Fernando Tuesta, De La Jara, Susana Villaran, and others were incorporated into Paniagua's ministerial cabinet.

³¹ Javier Torres, Director of Servicios Educativos Rurales (SER). Interview by author in Lima 19-06-08

³² 'Eligen a Merino Nueva Defensora del Pueblo,' *Perú 21*, 30-09-05.

³³ Eduardo Vega, *Defensor* for Human Rights and Disability. Interview by author in Lima 30-06-08.

dedicated itself to introducing a rights-based discourse in public policy debates, emphasizing mobilization through institutional and, to a lesser extent, social channels outside the courts, as well as working more in tandem with state institutions and officials where possible. For many, a rights focus on issues of poverty, social exclusion and discrimination is long overdue and Merino's introduction of the term racism in official discourse has been saluted.³⁴ However, concern has also been expressed at the perceived muted stance of the *Defensoría* toward certain egregious violations, such as police killings during social protests, which have sharply increased under the Garcia administration.³⁵

The *Defensoría* under Merino has turned the spotlight on a myriad of issues, including road safety, municipal government, public services, education, and indigenous and native communities. Many of these areas are cross-cutting. For instance, the *Defensoría* has pursued a national campaign against corruption through the prism of the education system. The focus of the campaign is not just on monetary corruption but also broader systemic irregularities within the education system such as dubious hiring practices and the failure of teachers to attend class (DP 2009a). This initiative followed the publication of the 2007 annual report identifying the Ministry of Education as the most complained against state institution (DP 2008a: 338). Despite potential antagonism, the Ministry of Education has reportedly been receptive to the work of the *Defensoría*.³⁶ The sensitivity of corruption as a rights issue and, as such, the selection of education as a cross-cutting, but discrete, domain of action is emphasised by one senior functionary who observes that "the discourse of corruption can have a very corrosive effect on political processes and should be used with care."³⁷ Similarly, the issue of transport and road safety has amplified a wider concern on discrimination, citizen security and public services.

The organic structure of the institution has also evolved rapidly in recent years with the creation of various new specialized programs, such as a Social Conflict Unit in 2006, a Public Policy Unit in 2007, and an Anti-Corruption Unit in 2008. This expansion has been facilitated by a dramatic increase of 33.5% in budget from \$11 to \$15 million between 2005 and 2007 (DP 2008a: 25). Some observers caution that the institution may be over-extending itself, and is at risk of politicization, with institutional priorities being guided by opinion polls rather than by strategic planning. Similarly, others argue that if there was more social pressure on the institution from the public, the *Defensoría* would be more aggressively pursuing the TRC recommendations rather than seeking out new advocacy terrain.³⁸ Other cross-cutting policy terrain, such as drug-trafficking which has a normative span across corruption, fundamental rights and the environment, have also received attention by the office, reflecting the wide scope of its activities. However, an initiative coordinated by the Program of Environment and led by the local office of Pucallpa was quickly shut down following death threats against *Defensoría* personnel.³⁹ As the next section details, human rights advocacy in Peru is a fundamentally political and contingent endeavour.

³⁴ Ardito, coordinator for economic, social and cultural rights in the NGO APRODEH. 10-06-08.

³⁵ In the five years of Toledo's government, 15 individuals died at the hands of the police. 18 individuals died in the first two years of the Garcia government. See APRODEH (2008).

³⁶ Eliana Alvites, *Defensora* for Good Government. Interview by author in Lima 13-06-08

³⁷ Claim made by senior functionary within the *Defensoría* to author 17-06-08.

³⁸ Carlos Ivan Degregori, Director of the Peruvian Studies Institute (IEP). Interview by author in Lima 30-06-08.

³⁹ *Ibid.*

4. Pathways to compliance

Compliance in the Peruvian context is not straight-forward. In situations where formal rules are widely contested, routinely violated, and frequently changed, compliance is contingent as much on political and social factors as it is on legal enforcement. Lacking formal coercive faculties, compliance with many of the rights claims advanced by the *Defensoría* may be less a matter of enforcement through formal sanctions than a matter of management. This involves the ability to alter the behaviour of state agencies and agents through persuasive argumentation, informal mediation toward a solution, and the generation of social momentum, possibly public censure, around the rights claim in question.

According to *Defensoría* statistics, despite the overall political context, the institution achieved a reasonable degree of compliance from 1996 to 2001, with 52% of total recommendations issued over the period being responded to by recipient state institutions.⁴⁰ Following the transition, the institution has made several attempts with limited success to better capture the level of cooperation and, importantly, compliance with *Defensoría* investigations and recommendations. Time series data from 2002 to 2007 reveals that 59.7% of all complaints received were concluded and substantiated with the cooperation of the state agency in question. In terms of actual compliance with recommendations, the *Defensoría* has devised a new measurement device termed the '*defensómetro*'. This device gauges both the level of cooperation and the impact of the intervention on the rights grievance in question along a scale of 1 to 20. Table 2 presents the results for 2006 on levels of cooperation. Those institutions falling between 0 and 11 are considered deficient, those between 11 and 15 insufficient, and those scoring more than 15 are considered adequate.

Table 2: Level of cooperation by institutions at the national level (2006)

Institution	Score
National Pensions Office (ONP)	8.49
Judiciary	9.77
Ministry of Agriculture	11.17
Metropolitan Municipality of Lima	11.77
Peruvian Armed Forces	11.84
Ministry of the Interior	12.68
National Elections Jury (JNE)	12.97
Education Ministry – Regional Offices	13.39
National Police of Peru (PNP)	13.69
Social Health Security (ESSALUD)	13.73
Ministry of Health (MINSA)	14.59
Public Prosecutors Service (MPN)	14.83
National Registry of Identification (RENIEC)	14.96
National Penitentiary Institute (INPE)	16.45
Private water provider (SEDAPAL)	16.62

Source: DP 2006a: 265.

This exercise has been criticized from within the institution for a lack of clarity over variables and, crucially, a residual emphasis on the level of cooperation rather than compliance with recommendations.⁴¹ The creation of an effective monitoring tool

⁴⁰ DP Informes Anuales 1996-2001. Data for 1998–1999 is not available.

⁴¹ Rosalia Uzategui, Case commissioner at Lima office. Interview by author in Lima 21-06-08.

remains a pending task and, tellingly, the *defensómetro* was not used in the 2007 annual report. It has, however, since re-emerged in a revised form as an interactive tool on the *Defensoría* website. However, despite its flaws, this exercise serves the purpose of highlighting the myriad of difficulties in fulfilling a rights mandate in the Peruvian context, where even basic tasks such as gaining access to information present serious challenges. It is worth noting that exercises such as these may carry risks for an institution that models itself on a results-driven image of efficiency. Inadequate or deficient cooperation on the part of the majority of other agencies and institutions reflects negatively on the state and on the persuasive authority of the *Defensoría*. The breadth of institutions presented in the table indicates the range of rights claims being handled by the *Defensoría* and the complexity of tailoring each intervention to the bureaucratic idiosyncrasies of the entity in question. Unsurprisingly, it is the worst performers, such as the National Pensions Office, the judiciary and the Education Ministry, which present some of the most intractable structural and normative obstacles to realizing group-based rights claims. Conversely, the table also points to more fruitful intra-institutional relationships and potential structures of opportunity such as in the cases of SEDAPAL, RENIEC, the Public Prosecutors Office and Ministry of Health. As the following two sections outline, the *Defensoría* has advanced rights claims through both formal and informal channels, often in tandem with one another, with variable, but instructive results.

4.1 Judicial pathways to compliance

The courts and in particular the Constitutional Tribunal (CT) is a key legal alliance for the *Defensoría* in articulating group-based rights claims. The *Defensoría* enjoys a range of emergency and normative prerogatives before the CT. The autonomy of the judiciary was severely compromised under the Fujimori government and as yet, few structural reforms have been undertaken to address this historically-subjugated institution, despite a comprehensive reform package languishing in the legislature since 2003 (Dargent 2006). Despite its lack of formal powers to initiate criminal proceedings, the *Defensoría* does have a mandate over the administration of justice and has dedicated itself to monitoring the many obstacles to accessing formal justice. It has tended to rely on publicly exhorting the courts to act or, in rare cases, launching *amicus curiae* briefs before the courts on behalf of vulnerable groups, such as in the case of alleged corporate manslaughter.⁴² It has launched similar actions in the case of children subjected to sexual abuse and who have been subsequently discriminated against by public officials.⁴³

The trial of former President Fujimori for human rights violations, while important in its own right, does not reflect the dysfunctional, sometimes corrupt and almost always highly inefficient nature of the workings of the judicial sector. Despite the positive role of certain individual judges in the field of human rights, the judiciary is widely perceived as the weakest of Peru's burgeoning democratic institutions and is deeply mistrusted.⁴⁴ The hostility of the judiciary to external reform initiatives extends to internal relations, with the CT being unable to elicit policy responses from the judiciary branch on the question of administrative reform.⁴⁵ Of most concern is a deep institutional ambivalence, even wilful violation, of human rights by the judiciary. For instance, in many cases of torture, the *Defensoría* has documented presiding

⁴² Amicus curiae briefs relating to the fires at the Nightclub Utopia in 2001 and Mesa Redonda in 2002. See press releases N° 071/CII/DP/2009 and 011/CII/DP/2009.

⁴³ DP (2007a: 185).

⁴⁴ In the 2008 Latinobarómetro survey, with only 15% of respondents believing there is 'equality before the law' – the lowest level in the region.

⁴⁵ Sentencia 4-CC-TC del 10 de noviembre del 2004.

judges handing down lesser sentences than the minimum stipulated by law without explaining their decisions (DP 2007a: 52).

Ignorance of human rights is particularly pronounced in remote rural areas. In the words of one functionary of the *Defensoría*, “When you talk of powers of *amparo* and *habeas corpus* to local court personnel you might as well be describing different types of *chicha*.”⁴⁶ That said, the institution has on occasion advanced important rights claims through the local court system. The case illustrated in Section 4.1.1 became a recent symbol of the persistent violation of political and civil rights suffered by the Andean communities. The physical absence of the judicial apparatus is particularly acute in rural areas where the typical peasant must travel an average of 73 miles to reach a courthouse in order to appear at a hearing (Prillaman 2000: 24). Such barriers to access are highly detrimental to vulnerable groups such as women, children and the elderly. Access for women, for instance, is often further undermined by discriminatory stereotyping and the sexist application of the law. Rural women, in particular, have been failed by the system. Typically having less education, less knowledge of their rights, and scant economic resources, the *Defensoría* has documented that few (of the many) victims of domestic violence seek assistance through the courts (DP 2006a: 226). Although legal aid is available, primarily for alimony proceedings and those on subsistence incomes, judges are not accustomed to granting legal aid (Armas 2002: 20). Furthermore, the eleven Legal Assistance Centres (ALEGRA) created nationwide since 2004 remain under-resourced and geographically limited in scope. In Huancavelica, a town in the central highlands, where 44.3% of the local population speaks Quechua as their first language, the majority of local magistrates and court personnel have no language training or translation facilities (DP 2006a: 223).

Of particular note is the normative affinity between the *Defensoría* and the CT as guardians of the Constitution. However, unlike other CTs in the region, notably Colombia and Costa Rica, the Peruvian Tribunal has made few inroads into jurisprudence outside a core civil and political domain focused on individual violations.⁴⁷ Furthermore, concerns have been raised as to the CT’s independence from the Executive. The abrupt resignation of the President of the CT in July 2008 was widely regarded as a response to external interference (Huerta 2008). Opinion varies within the *Defensoría* as to whether effective interaction with the CT in the protection of rights should be considered the result of a “key strategic alliance” or simply two institutions fulfilling their function along parallel but complementary tracks. Intermittent coordination with a revived CT has led to occasional progressive legal actions, for example, on the denial of treatment for persons with HIV/AIDs and a recent action of unconstitutionality against Legislative Decree 1015 on the right to cultural identity.⁴⁸ Of the 149 demands of unconstitutionality placed before the CT from 1996 until 2004, 13.42% of those were presented by the *Defensoría* (DP 2004a: 60). The previous *Defensor*, Alban, argues that “we need to intensify the use of [legal] tools that allow the DP to intervene.”⁴⁹ However, Merino has been reluctant to confront the legislature through the courts, resulting in a marked drop in legal actions.⁵⁰ Beyond strategic rationale, the *Defensoría* also confronts structural

⁴⁶ Fernando Castañeda Portocarrero, *Defensor* for Constitutional Affairs. Interview by author in Geneva, Switzerland 27-03-09. *Chicha* is a fermented maize-based drink widely consumed in rural parts of Peru.

⁴⁷ For an example of an activist court see Yamin and Perra-Vera (2009).

⁴⁸ Exp. No. 24256-2002, Quinto Juzgado Especializado en lo Civil de Lima.

⁴⁹ Walter Alban, ex-*Defensor* 2000-2005. Interview by author in Lima 23-06-08.

⁵⁰ See demanda de inconstitucionalidad contra artículo de ley No. 28996, EXP N° 00023-2008 PI/TC, 22-09-08.

obstacles, with 221 complaints received in 2006 concerning excessive delays in processes before the TC, pointedly noting the fundamental urgency of many of these claims (DP 2007a: 226).

4.1.1 Unlawful detention under anti-terrorism legislation

On 18 December 2006 eight *campesinos* (peasants) were detained in Ayacucho on terrorism charges following the deadly ambush of a police patrol. The detainees were transferred to Lima on 2 January 2007, where they were formally charged with the crime of belonging to the Maoist guerrilla organization Shining Path (*Sendero Luminoso – SL*). Following the Third District Court of Lima’s decision that the case was not admissible, the *campesinos* were returned to Ayacucho and placed in the custody of the local police ‘Division of Terrorism’ stationed in the town at the order of a local court in Ayna-San Francisco. Having been informed of the case through its local office, the *Defensoría* began investigating the legality of their prolonged detention. A formal request by the *Defensoría* and analysis of the detention order issued by the Department against Terrorism (DIRCOTE), showed that the accused had been exonerated by DIRCOTE’s own investigations. The *Defensoría* also highlighted a lack of due process in their return transfer from Lima to Ayacucho. On 10 January 2007, the *Defensoría* presented a demand of *habeas corpus* before the Constitutional Court of Huamanga to nullify the detention order. The court declared the order null on 13 January and the *campesinos* were immediately released. This case had national repercussions. Growing public concern over the lack of due process led to an embarrassing u-turn by the Executive, with Garcia eventually calling for the release of the *campesinos* on 13 January and in effect contradicting earlier statements condemning the detained individuals made by the Defence Minister, Allan Wagner, and Prime Minister Jorge del Castillo.⁵¹

4.2 ***Institutional pathways to compliance***

The courts present a key legal alliance for the *Defensoría* in the implementation of rights norms. However, despite isolated gains, in practice, this relationship is tested by the dysfunctional state of the judiciary and its reticence to engage in normative rights claims beyond the civil and political domain. Furthermore, under the stewardship of Merino, the *Defensoría* has instituted a focus on public policy and modes of influence outside legal channels. In addressing structural violations of rights, the *Defensoría* is well positioned to scale up individual grievances into the policy domain. Conceptually, intervention in the realm of public policy moves attention away from compliance with human rights norms through coercive enforcement or sanctions. Rather, public policy advocacy focuses upon ‘managerial’ compliance engineered through changes in public policy, rights education attainment, and enhanced use of rights language with a view to permanently altering the behaviour of state actors and, ideally, underlying values. Such a role emphasizes the function of the *Defensoría* not only to protect, but also to monitor and promote compliance with rights, especially regarding the treatment of vulnerable groups by public officials. This entrance onto the national public policy stage has met with resistance, not only from within the state that claims that the *Defensoría* has exceeded its original mandate, but also from individuals in civil society who question whether this activity is appropriate given ongoing systematic violations of civil and political rights by state agents.

⁵¹ See ‘Liberan a ocho campesinos acusados injustamente de matar a policías,’ *La República*, 13-01-07.

Working through horizontal channels is nothing new. Under Fujimori, the degeneration of horizontal institutions led to the *Defensoría* assuming an almost executive function. For example, the institution drafted and advanced legislative project No. 26655 through Congress to create the Ad Hoc Commission of the Innocents, following informal deliberations with Fujimori.⁵² Between 1996 and 2001, public pronouncements and special reports were the tools most commonly used by the *Defensoría* to maintain a presence in the public domain and to exert some compelling influence on state authorities. These special reports – 79 issued over the period in question – were targeted toward strategic campaign issues and attracted both media attention and the collaboration of civil society and international agencies. The reports resulted in eventual changes to anti-terrorism legislation, AQV, and military justice in the civil and political realms and highlighted issues of administrative inefficiency and inadequate public services.⁵³

However, relations between the *Defensoría* and other state institutions were almost uniformly hostile at the time. Instead, they were relations of convenience informed by the client status of the respective institution with the executive. This adverse terrain was reflected internally within the *Defensoría* which publicly shunned taking on an overtly political profile.⁵⁴ Building on this legacy, since 2001 the institution has emphasized special reports and recommendations as potent tools with which to transcend individual claims, going on to feed into public policy debates.⁵⁵ However, reflecting the radical shift in context and given Merino's background, senior functionaries are much less fearful of political contamination, asserting that "the *Defensoría* forms part of the politics of this country. For this reason, we have to take great care and sustain its voice."⁵⁶

As was highlighted above, under Merino the principal task of the *Defensoría* has shifted toward the monitoring of legislation. A key difficulty in this area is quantifying the work or impact of the institution, due in part to the dispersed nature of norm creation in Congress as well as informal preventive action on the part of the state which has tended to result in some speculative projects being shelved. Despite reservations, proponents of a more legal-sector approach accept that this is a legitimate, if secondary, task: "We all know that flawed law could always be worse."⁵⁷ Under the Paniagua administration, the *Defensoría* was instrumental in advancing the TRC initiative in 2001 and the Transparency and Access to Public Information Law (no. 27806) passed in 2002.

The *Defensoría's* tying of the issue of transparency and lack of formal accountability provisions to endemic corruption and the phenomenon of increasingly violent social conflict resonated strongly within Peruvian society. However, given executive dominance in Peruvian politics, the indifference of Toledo and hostility of Garcia toward the work of the *Defensoría* has meant in practice coordination with official bodies such as the National Council of Human Rights and the legislative committee for Justice and Human Rights has been largely ceremonial. Garcia has become

⁵² Samuel Abad, Deputy *Defensor* (1996-2006). Interview by author in Lima 14-07-05.

⁵³ See the special reports produced by the *Defensoría*. Available at www.ombudsman.gob.pe.

⁵⁴ "I am convinced that the task of representing the citizen before the state has to be, by definition, apolitical, completely apolitical." Jorge Santistevan in interview, *Cuestión de Estado*, 1997. *Instituto de Dialogo y Propuestas*. No.27, April 1997, 18-19.

⁵⁵ See the special reports produced by the *Defensoría*. Available at www.ombudsman.gob.pe.

⁵⁶ Susana Silva Hasembank, *Defensora* for Public Administration. Interview by author in Lima 16-06-08.

⁵⁷ Cesar Landa, President of the Constitutional Tribunal (2006-2008). Interview by author in Lima 20-06-08.

increasingly intolerant of an institution relatively free from executive control and also capable, up to a point, of checking executive discretion.⁵⁸ In contrast, Merino has, on occasion, exercised a decisive moral authority over rights-discourse in the public sphere, resulting on a number of occasions in embarrassing about-turns on government policy that contravened human rights standards.⁵⁹ The *Defensoría* has also challenged Congress to revisit their granting of wide-ranging legislative powers to the executive. This legislative abrogation of authority to the executive has led to numerous executive decrees which jeopardize a range of social and economic rights including the right to protest, police immunity, and land rights (DP 2008b).

However, while Garcia has never invited Merino to the Presidential Palace, this intolerance is not necessarily reflected among government ministers. The institution has advanced rights claims on various occasions through alliances with top-level government officials, in particular the PCM under the direction of then Prime Minister Jorge Del Castillo (2006-2008).⁶⁰

The influence of the *Defensoría* is discernible in its ability to identify and alter behaviour *ex post*, but also in its potential to alter norms of conduct and even exert 'a demonstration effect' on other agencies. For example, the Unit for Social Conflict created by the *Defensoría* in 2006 was swiftly emulated by the creation of the largely ineffectual Unit of Conflict Analysis and Prevention within the PCM.⁶¹ The release of an extraordinary report on socio-environmental conflict by the *Defensoría* in 2007 recommending the creation of an independent environmental authority, combined with heightened media and social pressure around the issue, galvanized the government into creating the Ministry of the Environment in 2008 (DP 2007b). A report issued by the institution on the question of citizen security pressured the Ministry of the Interior to pass law no. 27933 in 2008, creating a multi-sector National Council on Citizen Security (DP 2008c).

However, such policy intervention has also led to resistance. In reference to the increasing profile of the *Defensoría* in education, Nicolas Lynch, a former Education Minister under Toledo, insists "such interventions undermine the rule of law."⁶² On the one hand, such actions may give the *Defensoría* access to a larger group of actors within the public sphere. On the other, the institution must also guard against undue politicization. Furthermore, such policy actions do not necessarily signify compliance on the ground. Transparency reform, in particular, has been shallow, a deficit that often inflames local tensions.

Examination of the health sector is also instructive in this regard. The *Defensoría's* campaign, alongside civil society, against forced sterilization of women in Andean

⁵⁸ See 'La Defensora y el atacante,' *La República*, 11-11-07.

⁵⁹ The *Defensoría* publicly denounced the government's failed attempt in 2007 to re-instate the death penalty for child sex offenders jeopardizing Peru's membership of the IACHR. At the end of November 2007, the administration proposed to publish the names of all ex-felons convicted on terrorism charges. Merino, alongside other public figures such as Eduardo Pérez Rocha ex-General of the National Police of Peru, strongly criticized this initiative as counter-productive.

⁶⁰ Jorge Del Castillo is a member of the APRA party and was Prime Minister of Congress from 2006 until the resignation of his cabinet in October 2008. During the Fujimori government, Del Castillo cultivated a public liberal democratic advocacy position distinct from the governing regime.

⁶¹ Fernando Rospigliosi, 'Unidad de Prevención de Conflictos de la PCM es Dirigida por Incompetentes,' *El Comercio*, 21-08-08.

⁶² Nicolas Lynch, Academic and former Minister of Education under Toledo. Interview by author in Lima 10-06-08.

and indigenous communities in 1997 cemented its profile in the area of women's rights. Introduced by Fujimori in September 1995, AQV was aggressively implemented by Ministry of Health personnel from spring 1996. Furthermore, this was conducted with considerable international support and funding, the project briefly becoming the largest recipient of USAID family planning funds in the Western Hemisphere.⁶³ Rumours of forced sterilization of Andean women began to circulate among local grassroots NGOs and the church. National NGOs, such as the Legal Defence Institute (IDL), Pro-Human Rights Association (APRODEH) and the CNDH acted as vital interlocutors between women's rights NGOs, such as Flora Tristan and Manuela Ramos, and the *Defensoría*. With claims arriving at the institution, an official investigation was announced on 27 December 1997 (DP 1998a: 294). The report, published one month later, documented in detail nine cases of sterilization that contravened the victims' human rights and official government guidelines (DP 1998b). The exposure and subsequent public and international censure surrounding this abusive intervention of the state led to a dramatic reduction, though not eradication, in AQV procedures, falling from 120,086 in 1997 to 27,996 in 1998. It was also of serious embarrassment to Fujimori (DP 2002b: 136).

Under the leadership of Rocio Villanueva, the *Defensora* for Women's Rights until 2006, the *Defensoría* maintained a strong monitoring presence in the area of women's reproductive rights and family planning, releasing two follow-up reports on AQV, documenting continuing abuses as well influencing the reform of MINSA operational norms. Despite compliance on individual cases of abuse, as civil society observers note, 'the actual implementation of [a] new norm has been haphazard' (Physicians for Human Rights 2007: 118). As one functionary concedes, "we are not necessarily generating a change in the system. This is the challenge, to actually change the conduct of the institution."⁶⁴

4.2.1 The legacy of the Truth and Reconciliation Commission

Justice for the approximately 70,000 victims of conflict following the release of the TRC final report in 2003 has also been slow in coming. Of the 58 cases referred to the MPN for prosecution by the TRC and the *Defensoría* in 2003, 21 remain at the investigation stage, 24 have gone to trial, 10 have received sentences, and three have been archived (DP 2008d: 124). By November 2008, 16 sentences were issued by the Peruvian judiciary, including nine cases supervised by the Inter-American Court of Human Rights (IACHR). The cases resulted in eight convictions and eight acquittals (DP 2008d: 149). Notwithstanding such challenges in the legal sphere, the coordination between the *Defensoría* and the MPN in the exhumation of common graves in Putis and Cabitos has proceeded despite resistance from the Ministry of Defense and the military.⁶⁵ This has been driven by the human rights community and Superior Prosecutor Victor Cubas who has been receptive toward addressing the human rights legacy of the conflict.⁶⁶ This activity combined with repopulation programs in severely affected native communities such as Ayacucho and Huancavelica, as well as in indigenous Amazon communities such as the Ashaninkas, leads one civil society observer to conclude, "the *Defensoría's* balance sheet remains positive."⁶⁷

⁶³ Hearing of the US Congressional Committee on International Relations, 25-02-98.

⁶⁴ Rosalia Uzategui, Case commissioner at Lima office. 21-06-08.

⁶⁵ 'Oficiales del ejército y la marina son citados por la matanza de Putis,' *La República*, 25-02-09.

⁶⁶ Eduardo Vega Head of Human Rights and Disability. Interview by author in Lima 30-06-08.

⁶⁷ Torres, Director of Servicios Educativos Rurales (SER). 19-06-08.

Furthermore, the *Defensoría*, in close collaboration with the National Register of Identification (RENIEC), galvanized a national campaign throughout 2005 to address the estimated 1,071,420 adults who still lack identity documentation in Peru. In April 2008, Congressman Washington Zeballos Gámez introduced a bi-partisan legislative project No. 2240 to address the problem of non-existent or often inaccurate identity documentation among victims of the violence. Informal processes of consultations between Congressional aides and *Defensoría* personnel are increasingly common and this project followed the release of a special report by the institution on the subject (DP 2008e). RENIEC has emulated the *Defensoría* model, decentralizing throughout the territory and proactively fulfilling its function – a factor in explaining public confidence ratings of 70% in 2006 and 2007.⁶⁸

The work of the TRC, tolerated by the administration of Toledo, has been publicly attacked by the García government.⁶⁹ It is interesting to note that the human rights community is not necessarily a natural associate for Merino, given her background. However, many members of civil society were surprised at the robustness of her words during a commemoration event of the TRC report in 2007. Despite powerful opposition, the *Defensoría*, alongside civil society actors such as IDL and ARODEH, has continued to lobby for implementation. Progress has been made, most notably in the area of victim reparations and in the creation of a Program of Collective Reparations in 2007, which has so far channelled \$27,904,820 to affected communities (DP 2008f: 53). Despite these important steps, the *Defensoría* has arguably not realized the potential of the TRC legacy. Merino does not appear convinced that the issue of the TRC can generate social momentum or resonate sufficiently outside a core liberal human rights constituency. Advocates for the TRC, such as Carlos Degregori, argue that this is mistaken, especially when one considers that “in the case of the victims of violence many of them are the most poor and excluded in Peruvian society. Furthermore, these groups often guard their silence, fearing repercussions for their links to *Sendero Luminoso*.”⁷⁰

4.3 Social pathways to compliance

In conceptual terms, Smulovitz and Peruzzotti (2000: 3) define social accountability mechanisms as ‘actions carried out by actors with differing degrees of organization who recognize themselves as legitimate claimants of rights.’ They also identify a potentially complementary interaction between horizontal institutions, such as the *Defensoría*, and social accountability actors when they coordinate actions that may lack mandatory effects but can still have ‘material consequences’ such as reputation costs. The *Defensoría* has cultivated a strong support base in society. To withstand the most repressive years of the Fujimori regime, relationships with diverse actors were developed to create what Santistevan describes as the institution’s “four shields.”⁷¹ These principle allies are identified as civil society (chiefly the human rights community and civic and consumer associations), the church, the media, and international donors. High profile national campaigns, discussed above, publicized through the still-independent printed press have stood out as important achievements and quickly cemented the alliance between the institution and an organized, primarily

⁶⁸ Apoyo Special Survey, *El Comercio*, 17-09-07.

⁶⁹ ‘Luis Giampietri afirma que la CVR no aportó nada a la pacificación del país,’ *El Comercio*, 24-08-08.

⁷⁰ Degregori, Director of IEP. 30-06-08.

⁷¹ Jorge Santistevan, ex-*Defensor* 1996-2000. Personal communication with author, 22-02-08.

urban, human rights community. As one observer puts it, “if NGOs were brokers, then the *Defensoría* was a broker with muscle.”⁷²

Access to information is a core component in addressing power asymmetries within Peruvian society and the media is a powerful tool in this regard. The co-option or purchase of almost all terrestrial television channels and the tabloid press by Fujimori has been well documented (Conaghan 2005: 140-162). However, the return to democracy in 2000 did open up important space in the public sphere for the watchdog media. But it should be noted that the majority of media outlets in Peru remain in the hands of a small group of private interests.⁷³ Under Fujimori, the *Defensoría* developed a publicity strategy that relied on the media as an essential conduit to a wider constituency and exposure. However, access was largely dictated by the independence of the media outlet and, among captured outlets, the political criteria dictated by their paymasters. Under more democratic conditions, the *Defensoría* has exploited a more accessible media environment to project its institutional profile. Under Merino, assisted by a highly-resourced Communications and Institutional Image Office, the institution has achieved greater media exposure – breaking into national television and radio. During the Fujimori period, visibility for the *Defensoría* was largely restricted to investigations and the exposure of wrongdoing.

The contemporary media has on occasion provided a platform for the institution’s message on public policy reform, the non-exclusivity of human rights, as well as channelling rights information to citizens and encouraging individual mobilization.⁷⁴ Despite a relatively low profile on national broadcast media, the *Defensoría* has succeeded in introducing rights information into the public domain, especially relating to indigenous communities. However, the institution confronts a number of structural and commercial challenges. For instance, almost without exception media outlets are highly supportive of Garcia’s liberal economic agenda and his controversial stance on a host of economic, social and cultural rights.⁷⁵ Furthermore, outside Lima, the majority of people listen to local radio stations rather than national networks such as RPP and CPN (Novarro 2009).

Santistevan frequently referred to the role of the *Defensoría* as a bridge between the state and civil society. During his tenure much emphasis was placed on coordinating actions with prominent human rights NGOs such as the *CNDH* and *Transparencia*.⁷⁶ In turn, NGOs such as the *Fundación Ecuμένηca Para el Desarrollo y la Paz* (Ecumenical Foundation for Development and Peace – *FEDEPAZ*) recognized the *Defensoría* as a valuable ally in formulating legal reform projects and placing them on the national agenda.⁷⁷ Joint mobilization through horizontal and social pathways was achieved for a host of rights initiatives, possibly with most impact in the case of the Ad Hoc Commission of the Innocents (Pegram 2008: 67-8).⁷⁸ The relationship

⁷² Torres, Director of Servicios Educativos Rurales (SER). 19-06-08.

⁷³ A large but volatile printed press of about 27 dailies, including tabloids, is concentrated in Lima, due primarily to distribution problems and lower literacy rates in rural areas. See Schmidt (2000).

⁷⁴ Television interview with Beatriz Merino, *Pulso*, broadcast 10.30 PET, 29-06-08.

⁷⁵ Alan García, ‘El síndrome del perro del hortelano,’ *El Comercio*, 28-10-07.

⁷⁶ Jorge Santistevan, 1999. ‘Defensor que no critica, que renuncie.’ Interview in *Ideele, Revista del Instituto de Defensa Legal*, No.119: 22.

⁷⁷ Ana Leyva, Environmental Officer for NGO FEDEPAZ. Interview by author in Lima 23-08-05.

⁷⁸ Established in August 1996, the Ad Hoc Commission of the Innocents was the culmination of years of pressure from the human rights community and seven failed legislative initiatives to address the issue of releasing thousands of innocent Peruvians in jail on dubious terrorism

across these two domains was reinforced by the transfer of prominent personnel from human rights and progressive Church-aligned NGOs, including Alban, Samuel Abad and Rocio Villanueva, into the *Defensoría*, as well as the isolation of these institutions produced by the political context. Under the tenure of Alban, a close relationship was maintained with NGOs such as *Propuesta Ciudadana* (Citizen Proposal) advancing work initiated by the *Defensoría* on decentralization, participation and transparency reform. However, following transition in 2001, the institution confronted the problems of occasional heated internal debate on how or whether to move from a core civil and political focus toward encompassing the more overtly political terrain of social rights. Such tensions also played out within a Peruvian human rights community which was increasingly divided along 'democratic liberal' and more 'politically militant' lines.

In contrast, Merino has introduced a new dynamic (and personnel) into the *Defensoría*, intended to assert its institutional independence from the human rights community. For instance, unlike Santistevan and Alban, Merino is dubious of the value of signed agreements signifying cooperation with NGOs. Instead, she views NGOs as partners on discrete projects and one of many sources of information that inform internal analysis and priorities.⁷⁹ In part, this stems from her liberal political approach. It also stems from the highly politicized nature of human rights discourse under Garcia and her fear of contamination by radical groups in civil society. Human rights NGOs have faced severe hostility from government officials and politicians linked to the previous Garcia (1985-1990) and Fujimori administrations. Actions in 2008, such as the expulsion of all civil society observers from the National Human Rights Council,⁸⁰ a proposed congressional investigation into alleged terrorism crimes by human rights defenders,⁸¹ and the passing of law no. 28925 in 2007 to regulate the financial activities of all NGOs operating in Peru, amount for many to an official campaign waged against the human rights community. The level of acrimony has greatly restricted the ability of the *Defensoría* and the targeted group of human rights NGOs to jointly mobilize through social pathways. Despite claims that Merino has distanced herself from these NGOs as a concession to detractors,⁸² the evidence suggests otherwise. The *Defensoría* has been the only state institution to publicly challenge the measures taken against such NGOs and Merino has gone head to head with the congressional leader of the APRA party on the issue.⁸³ Notably, however, Del Castillo intervened in support of Merino.⁸⁴

4.4 Social pathways to compliance at the margins

Outside of the organized human rights community based in Lima, civil society in the fluid margins between urban and rural Peru and in more remote areas, remains fragmented and often regionally isolated. Grassroots organizations suffered

charges. The credit for overcoming resistance in Congress and for the executive and human rights organizations reaching a consensual solution is largely attributed to Santistevan (Costa 1998: 127-42).

⁷⁹ Silva, Defensora for Public Administration, 16-06-08.

⁸⁰ 'Ejecutivo no permitirá observadores en el Consejo Nacional de DDHH,' *La República*, 28-04-08.

⁸¹ 'Investigarían a ONGs incómodas,' *La República*, 30-04-08.

⁸² The absence of a high-level official from the *Defensoría* at the inauguration of the new Executive Secretary of the CNDH, Ronald Gamarra, in May 2008 was noted by observers in civil society.

⁸³ 'Ley contra ONGs enfrenta a Beatriz Merino con Mercedes Cabanillas,' *La República*, 07-11-06.

⁸⁴ 'Del Castillo pide respetar opinión de Merino sobre ley que regula ONGs,' *Agencia Perú*, 08-11-06.

considerably from the extended economic crisis of the 1980s and a quasi-civil war context that inflicted considerable damage on mobilizing strength. The *Defensoría* has mustered social forces with limited success outside Lima. Coordination with NGOs that have national reach such as *APRODEH*, *IDL*, *CNDH* and Rural Education Service (*SER*) has been sporadic. The offices of these NGOs are often also based in urban centres and joint mobilization with the *Defensoría* is complicated by the diversity of interests found within coordinating NGOs such as the *CNDH*. However, there is precedent for effective intervention in rural areas. In 1998, the *Defensoría* alongside the NGOs *SER*, *Transparencia* and *Consejo de Paz* (Council of Peace), developed a limited, but significant, supervisory role in the municipal elections, primarily in those areas subject to state of emergency provisions in the high Andes.⁸⁵ In one instance, this collective exposed evidence of voting irregularities leading to the annulment of the election in the district of Vinchos, Ayacucho (DP 1998c). The *Defensoría* further produced a number of reports on the barriers to voting confronted by the populations of these areas, and others focused on vulnerable groups such as native communities and the disabled. As the Director of *SER* recalls, “this focus opened the door to a host of related concerns, not just fraud, but also extravagant penalties, distances involved in the Amazon region, and the undocumented.”⁸⁶

Such early interventions signalled the intent of the *Defensoría* to penetrate rural areas. However, articulating and facilitating rights claims through local social mobilization poses a series of challenges to the institution. One component is the perception of local *Defensoría* offices by the local community. The appointment of local representatives that do not reflect the demographic of the zone, or are unable to effectively articulate the interests and values of the local community, have the potential to undermine the legitimacy of the office. Although many of the provincial offices have succeeded in gaining the confidence of local communities, as one observer comments, “the Directors in Ayacucho, Apurímac and Huancayo appear to be more from San Isidro [an exclusive neighbourhood in Lima] than the local areas.”⁸⁷ The head of the Cusco office recognizes this problem of local legitimacy and argues for direct local election of the *Defensor* to ensure that the institution “remains close to the people.”⁸⁸

Despite a growing volume of investigations into local concerns such as access to water and disposal of residual waste in rural areas (DP 2007c), a recurrent theme is that the personnel of the *Defensoría* struggle to ascertain local needs or place them on the national agenda. In the words of one civil society organizer, “it is not that they are racist but rather there is a problem of bureaucratization within the *Defensoría*. They come with good intentions but their social stratum is divorced from that of the community.”⁸⁹ He further adds that the personnel in Piura (many of them trained at the local Opus Dei University) lacks the appropriate training to deal with serious violations of rights such as torture. A compounding factor has been command and control from Lima to the local offices, with no national campaigns initiated at the provincial level, and often unclear protocol regarding urgent actions in particular.

⁸⁵ In the 1998 Municipal elections the *Defensoría* fielded 25 people to supervise in the cities of Huamanga, Huancavelica, Huancayo, Andahuaylas, and nearby districts.

⁸⁶ Torres, Director of Servicios Educativos Rurales (*SER*), 19-06-08.

⁸⁷ Ardito, coordinator for economic, social and cultural rights in the NGO *APRODEH*, 10-06-08.

⁸⁸ Silvio Campana, *Defensor* for Cusco office. Interview by author in Cusco 10-07-08.

⁸⁹ Gorge Farfan, Works for the *IDL* and often in the Piura region. Interview by author in Lima 26-08-05.

Underlying the confusion often shown by citizens toward the institution at the local level, is a profound lack of a rights culture in Peruvian society. This is exacerbated by a general scarcity of institutional resources, negative perceptions of the state and, in the case of human rights, the pre-existence of a range of agencies. The Catholic Church and other denominations have remained potent social forces in Lima and many areas of the country. The local configuration of agencies informs the reception of the *Defensoría*. For instance, in departments with conservative bishops aligned with Opus Dei, such as Juan Luis Cipriani in Ayacucho (but also in Arequipa, Huancavelica and Trujillo), mobilization around human rights has traditionally been weak or non-existent. In such contexts, the *Defensoría* has often become an important human rights counterweight to conservative constituencies. In other locations where the church is more socially progressive and a range of local agencies already exist, such as in Cusco, Puno and Piura, the *Defensoría* has had to negotiate its insertion within the local context. Crucial to this is the ability of the institution to forge alliances with local actors. It has employed a particularly successful strategy in Puno where almost all the office personnel have been recruited directly from the locally respected Church organizations *Comisión Episcopal de Acción Social* (Episcopal Commission for Social Action – CEAS) and *Vicariías de Solidaridad* (Vicariate of Solidarity). However, even in Puno, with the appointment of an Opus Dei bishop in 2000, the office has had to seek alternative allies within the local community.

A restricted notion of an accountability agency may require that individuals can only be considered ‘social accountability actors’ if their grievances are framed in a language of rights and legality and do not appeal, at least directly, to material interests (O’Donnell 2006: 342). This is pertinent to the Peruvian rural context where individuals may have little recourse to collective organization. It also applies where local communal structures do exist, but there is little, if any, awareness of human rights standards. In Lima, the *Defensoría* clientele are frequently not the most vulnerable, but rather are professionals such as lawyers, teachers, and policemen with access to various legal and institutional channels of redress and who often have a grasp of rights discourse. Eliana Revollar, current head of the Lima office and formerly based in the Ayacucho and Huancayo offices, identifies the phenomenon of “varying levels of citizenship” across departments in Peru.⁹⁰ The experience in Ayacucho of a pervasive culture of submission and clientelism toward public authority contrasts with that of Huancayo where local people have been far more ready to make demands of public officials. Revollar attributes these differential levels of citizenship to contextual factors, primarily rooted in Ayacucho’s experience as the epicentre of recent mass violence and impunity, as opposed to Huancayo where the effects of civil war have been less devastating.⁹¹ Where local communal judicial structures exist, there is often little connection to the formal judicial sector. Most prominent is the case of the *rondas campesinas* set up by local communities, which commonly administer their own justice systems (Gitlitz 1983).⁹² Where such structures exist, for instance in Cajamarca and Trujillo, the local *Defensoría* office has organized workshops, alongside the Church, with committees to promote

⁹⁰ Eliana Revollar, *Defensora* for the Lima office, previously based at the Ayacucho and Huancayo offices. Interview by author in Lima 01-07-08.

⁹¹ *Ibid.*

⁹² An important distinction should be drawn between those *rondas campesinas* set up in the 1970s by local communities in response to cattle rustling and other local grievances and others set up in the 1980s, with the assistance of central government and the military, to act as local militias to repel Sendero Luminoso (see Taylor 1998).

adherence to human rights norms.⁹³ At the national level, the institution has pushed for reparations for members of the committees killed during the civil war as well as formal legal recognition for these organizations (2000b; DP 2002c).

Both the *Defensoría* and national NGOs are searching not only for concrete issues but also mechanisms through which to build alliances and scale-up human rights mobilization at the local level. One arena which is receiving growing attention within the *Defensoría* is regional and municipal-level government. The process of decentralization initiated in 2002 led to the instalment of regional governments in the same year and municipal governments in 2003.⁹⁴ There now exist 1,832 local governments at the provincial and district level and they have rapidly become a prominent source of complaints to the *Defensoría* (DP 2008g: 16). The institution has adopted a three-pronged strategy toward local government focused on expanding participation through norms contained within the legislation, monitoring the new Regional Coordination Councils (CCRs) consisting of both civil society and government representatives, and promoting implementation of transparency legislation. The *Defensoría* has begun to mobilize on new participative budget and public accountability mechanisms, such as mandatory 'public accountability audiences,' contained within the legislation on local government. Already the institution confronts multiple obstacles: the intransigence of local officials to hold audiences or release the minutes of meetings, language barriers among Quechua speakers, civil society representatives' tendencies to represent their own rather than their community's interests, and the degeneration of public audiences into highly politicized and often hostile exchanges.⁹⁵ Despite the challenges, these new strata of government represent important new structures of opportunity for local voice in what is traditionally a highly centralized political system.

Finally, escalating violent social conflict between multiple actors presents a highly complex and unstable rights terrain for the *Defensoría* to navigate locally. According to the Unit of Social Conflict, as of February 2009 there are 211 social conflicts in Peru, of which 150 are active and 61 latent (DP 2009b). The tragic events of llave in 2004 have spurred the *Defensoría*, with some reluctance, to articulate a position on social conflict.⁹⁶ Conflict in Peru is fuelled by socio-economic disparities and often a lack of transparency over resource allocation at the local level, a focal point being tensions between local communities and the transnational extractive industry. Conflict mediation is a politically hazardous arena in Peru. The *Defensoría* has, as in the case of Tambogrande in 2003, failed to instil neutrality in its intervention and borne the political cost. However, increasingly, the institution is viewed as the only credible mediator within the Peruvian state. As attested to by various NGO representatives:

The *Defensoría* always arrives. Even to places where the police will not enter. For instance, during the 2004 conflict in Puno the police requested that the *Defensoría* enter the conflict zone first. In the case of llave, the people

⁹³ Maria Castañeda, commissioner at the Cajamarca office (1999-2001). Interview by author in Liverpool, UK 03-02-06.

⁹⁴ Ley de Bases de la Descentralización (Ley N° 27783), 20 de julio del 2002; Ley Orgánica de Gobiernos Regionales (Ley N° 27867), 18 de Noviembre del 2002; and Ley Orgánica de Municipalidades (Ley N° 27972), 26 de Mayo del 2003.

⁹⁵ Alvites, *Defensora* for Good Government. 13-06-08.

⁹⁶ In April 2004, the local mayor of llave, a small district of Puno was lynched by the local populace for alleged financial irregularities. This was one of 19 lynching incidents in Peru in 2004. However, the graphic nature of the confrontation generated national and international headlines. Local *Defensoría* personnel were, alongside the local church, a solitary and ultimately impotent state presence during these events. The local police refused to intervene.

recognized that the *Defensoría* arrived and tried. All other institutions refused.⁹⁷

This credibility extends to the executive, with Del Castillo repeatedly requesting the *Defensoría* to intervene in escalating conflict scenarios. Such intervention has, on occasion, been decisive. For example, this was the case in the conflicts in the Ashuar community in 2006 and, most recently the taking of police hostages in Moquegua.⁹⁸ Danger resides not only in the potential for the institution to be painted as partisan but also, and possibly most troublingly, in its failed intervention serving as the pretext for conflict escalation and the intervention of security forces, as occurred in the case of Combayo, Cajamarca in 2006.⁹⁹ The insistent demands of the polity, combined with the institutional deficits of an incipient democratic regime, especially in the interior of the country, place novel demands on the mandate of the *Defensoría* that are likely to intensify. But as Merino has stated, in direct challenge to the 'law and order' discourse of the Garcia government, "we shouldn't fear mobilization as it means Peruvians are willing and able to realize their rights. It's the violence we must avoid."¹⁰⁰

5. Conclusion

The *Defensoría* constitutes a distinctive and significant human rights referent point within the Peruvian state apparatus. Despite the myriad of challenges confronted by the institution, it has managed to not only maintain its autonomy, but also to make an important contribution toward articulating and facilitating rights claims across an entrenched divide between state and society. Originating under authoritarian conditions, the institution has proven itself capable of adapting to the shifting political and institutional contours presented by transition to democracy in 2001 and subsequent rotations of democratically elected government. In exercising a rights mandate, emphasis has been placed on the enmeshment of the *Defensoría* within the pre-existing constellation of actors in the judicial, institutional and social domains. Under Fujimori and in response to its isolation within a degenerate state structure, the *Defensoría* developed a strong alliance with actors outside the state. Under the most recent stewardship of Merino during the more democratic era of Peruvian politics, the institution has begun to expand both its normative reach across the gamut of human rights, and its coordination with a restored, though still fragile, democratic order.

As opposed to seeking to advance compliance with individual rights claims through legal channels, the *Defensoría* has re-oriented its attention to scaling up individual claims to intervening in policy debates, pushing for the redress of structural inequalities and society wide issues. A discourse that views public policy through the optic of human rights is a natural extension of the core protection function of the office. However, such intervention may risk the over-extension of institutional resources with a detrimental effect on impact. Furthermore, by shifting into the public policy realm, the institution is exposed to higher levels of political resistance which may, if not pre-empted, jeopardize the institution's autonomy in the long-run. On a conceptual level, this transition in institutional intervention reflects a

⁹⁷ Torres, Director of Servicios Educativos Rurales (SER). 19-06-08.

⁹⁸ 'Defensora Merino defiende a nativos Ashuar y aclara al premier Del Castillo,' *La República*, 20-10-06. Also, 'Manifestantes liberan a un grupo de policías heridos para que reciban asistencia médica,' *El Comercio*, 17-06-08.

⁹⁹ Assertion made by senior functionary within the *Defensoría* to author 17-06-08. See 'PNP disparó contra campesino en enfrentamiento de Combayo,' *La República*, 20-08-06.

¹⁰⁰ Television interview with Beatriz Merino, *Pulso*, broadcast 10.30 PET, 29-06-08.

fundamental understanding of rights contestation as essentially political, and one that is contingent upon the strategic interaction of agency and structure. This is true of rights debates everywhere, but particularly within the Peruvian context where human rights discourse is highly politicized and compliance is predicated on the ability and willingness of legal institutions to fulfil their function.

It is not uncommon to hear the sentiment that in Peru, if you fulfil your function, you achieve something extraordinary. This brings us to the question of compliance. Specifically, in a context where legal mobilization is severely curtailed and even discouraged, how can rights claimants achieve redress for perceived injustices? This paper, drawing on theories of political accountability, has demonstrated that the *Defensoría* occupies a distinct position within the political system which allows it to creatively access – even combine – legal, institutional and social mechanisms or pathways toward compliance. The paper presents a picture of an institution that is actively identifying progressive actors within the state in order to facilitate mobilization around rights claims. Similarly, the institution continues to work with diverse civil society actors to disseminate information on rights into the public sphere and investigate rights violations. Within this framework of transversal mobilization across domains, the challenge for the institution is to maintain sufficient autonomy and credibility with both state officials and civil society organizations.

On a final note, both the institution's lack of coercive faculties and its inability to enforce compliance through sanctions are often perceived as the institution's Achilles heel. Clearly, the institution might gain some 'hard' power were it to have legal faculties. However, the model of influence developed by the *Defensoría* – within the broad tradition of ombudsmen and advisory commissions – is based not on coercion but rather consent, even persuasion. It makes effective use of the threat of indirect but material consequences if another institution or agency chooses not to abide by the proposed recommendations. In a context where formal rules are neither stable nor uniformly enforced, authority based on a platform of social legitimacy, combined with the ability to generate momentum behind the rights claim in question, may prove particularly potent. Indeed, the evidence suggests that the *Defensoría* achieves a surprising degree of compliance on those cases of individual violations that come to light. The real challenge remains to not only achieve redress for individual transgressions but to transform the behaviour, and even underlying values, of the state and its agents.

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