

The Danish Centre for Human Rights



# National Human Rights Institutions

Articles and  
working papers

Input to the discussions on the establishment  
and development of the functions of national  
human rights institutions

Edited by  
Birgit Lindsnaes  
Lone Lindholt  
Kristine Yigen

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National Human Rights Institutions. Articles and working papers  
Birgit Lindsnaes, Lone Lindholt, Kristine Yigen (eds.)

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## Preface

In relation to human rights and democratisation, the year 1989 saw two significant developments: firstly, the end of the Cold War provided totally new opportunities for strengthening human rights because a number of communist countries and other totalitarian states all over the world began to establish democratic forms of government. From 1990 to 1996, over 60 countries were democratised, and this global wave brought forth great changes, i.e. in the form of democratic elections as well as the establishment of national parliaments and parliamentary institutions. Secondly, this was also the year when the international community of UN member states ratified the latest human rights convention, the Convention on the Rights of the Child.

All in all, this meant that not only was there the opportunity but also a need for the creation of institutions which could serve as implementation mechanisms for the commitment and aspirations of states and civil societies through the functions of monitoring, promoting and protecting human rights. In order to fulfil this role effectively such national institutions for the promotion and protection of human rights must cut across the traditional distinction between state and civil society, in so far as they combine state authorisation with independence and autonomy.

The need for such mechanisms of implementation was further exacerbated at the World Conference on Human Rights in Vienna in 1993, leading to an explosive growth in the number of these national institutions for the protection and promotion of human rights worldwide, particularly in developing countries and in states going through a process of transition to democracy.

Furthermore, since the establishment in 1994, the Office of the High Commissioner for Human Rights and her Special Advisor have played a particularly active role in promoting these institutions at a national level, assisting policy- and decision makers to creating the necessary enabling environment.

The normative framework for these institutions is the so-called Paris Principles of 1991, which define the criteria for functions, composition, financing and other criteria for ensuring the independent and effective functioning of the national institutions. These norms have been further elaborated on and now constitute a broad and constructive platform, where each society can make the necessary adaptations without compromising the main principles. Their elaboration has taken place through a participatory process in global and regional fora, where the exchange of experiences have contributed to ensuring their position in a domestic and international context, for instance through their increasing ability to participate in their own name before the United Nations bodies.

A number of national human rights institutions have now been in operation for a sufficiently long time that their experience can be analysed, for instance in relation to the handling of complaints, conflict resolution, advice to governments and state bodies, the effects of a particular mandate such as discrimination, and their relationship to other parallel institutions such as the courts and ombudsmen. This means that an evaluation of the effectiveness of these institutions can and will have to be based not just on their theoretical conformity with the Paris Principles but also on their work in practice. In return, such analyses of the practical experience of the institutions in implementing the Paris Principles may give rise to further discussions on the more detailed aspects hereof. Also, the compilation of articles and working papers include articles on the ombudsman institution in Europe and Latin America, because the ombudsman institution is the dominant complaints handling institution in these regions of the world and because few national human rights institutions have emerged yet.

The Danish Centre for Human Rights (DCHR) plays several roles vis a vis national human rights institutions: by functioning itself as a national institution since 1987; through the participation in European and international fora of these institutions; and through increasing activities of cooperation with and support for the establishment and functioning of these institutions in a number of countries.

It is on the basis of work in this area that the Danish Centre for Human Rights has decided to compile this collection of articles and working papers, showing the multiple aspects of the theoretical framework as well as the experience gathered through the daily work of these institutions. We believe this to be an area of increasing importance in the field of human rights protection and promotion, with a potential for significant impact, not just in relation to the overall discussions in the international and regional human

rights fora, but also directly affecting positively the lives of people suffering from all types of human rights violations around the world.

It is our hope that this collection of papers will serve as a point of departure for discussion and exchange of experience in the development of these institutions, and as a tool for education and capacity building in this field.

On 27 November 2001 a web-portal was launched, *www.nhri.net*, created and maintained in collaboration between and funded by the Office of the High Commissioner for Human Rights and the Danish Centre for Human Rights. This site will, once fully developed, include easily accessible key information on national human rights institutions at the global, regional and national levels as well as documentation, reports from regional and international fora, links to individual institutions, etc.

The articles and working papers in this publication contain the views of the authors, and do not necessarily correspond to those of their respective institutions or the Danish Centre for Human Rights.

December 2001

Morten Kjaerum  
Director, The Danish Centre for Human Rights

# Table of contents

## National Human Rights Institutions Articles and working papers

### Section I

#### General articles

1. National Human Rights Institutions:  
Standard-setting and Achievements  
*Birgit Lindsnaes and Lone Lindholt*  
*The Danish Centre for Human Rights* 1
2. The Effectiveness of National Human Rights Institutions  
*Mohammad-Mahmoud Mohamedou*  
*The International Council for Human Rights Policy* 49
3. Guarantees of Independence of National Human Rights Institutions:  
Appointment and Dismissal Procedures of Leading Members  
*Kristine Yigen*  
*The Danish Centre for Human Rights* 59
4. Jurisdiction and Subject Matter of Complaints:  
A General and Comparative Perspective  
*Lone Lindholt, Kristine Yigen, Birgit Lindsnaes*  
*The Danish Centre for Human Rights* 83
5. General Aspects of Quasi-judicial Competences of  
National Human Rights Institutions  
*Fergus Kerrigan and Lone Lindholt*  
*The Danish Centre for Human Rights* 91

## **Section II**

### **European perspective**

6. The Experiences of European National Human Rights Institutions  
*Morten Kjaerum*  
*The Danish Centre for Human Rights* 113
7. Implementation of the Western Ombudsman Model in Countries  
in Democratic Transition  
*Peter Vedel Kessing*  
*The Danish Centre for Human Rights* 121

### **Asian perspective**

8. The Asia Pacific Forum:  
A Partnership for Regional Human Rights Cooperation  
*Kieren Fitzpatrick*  
*The Asia Pacific Forum* 141
9. India's National Human Rights Commission:  
Strengths and Weaknesses  
*Vijayashri Sripathi*  
*The National Academy of Legal Studies and Research, India* 149

### **African perspective**

10. Uganda: Human Rights Protection by the State in Uganda  
*Marcus Topp*  
*University of Copenhagen* 169
11. The Ghana Commission on Human Rights and Administrative Justice  
*Kofi Quashigah*  
*University of Ghana* 199



## Latin American perspective

12. The Ombudsman Institution in Latin America: Minimum Standards for its Existence <i>Gonzalo Elizondo and Mrs. Irene Aguilar</i> <i>The Interamerican Institute of Human Rights</i>	209
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## Appendices

APPENDIX I	Table 1: Types of complaints handled by selected national human rights commissions	222
APPENDIX II	Table 2: Outcome of complaints handled by selected national human rights commissions	226
APPENDIX III	Table 3: National human rights commissions established / planned to be established according to the Paris Principles, March 2000	228
APPENDIX IV	Table 4: Degree of independence	230
APPENDIX V	Table 5: Mandate - aim of the national human rights institutions	233
APPENDIX VI	Table 6: Indicators	236
APPENDIX VII	Abbreviations and bibliography for studies (Section I, chapters 3, 4 and 5)	238
APPENDIX VIII	Checklists for studies (Section I, chapters 3, 4 and 5)	242
APPENDIX IX	Editors and contributors	250
APPENDIX X	Principles relating to the status of national institutions (“Paris Principles”)	252

# Section I



## CHAPTER 1

# NATIONAL HUMAN RIGHTS INSTITUTIONS - STANDARD SETTING AND ACHIEVEMENTS<sup>1</sup>

*Birgit Lindsnaes and Lone Lindholt*

### 1.1 Introduction

Since 1946 a new type of institution has evolved: the national institution for the promotion and protection of human rights. This type of institution has - although established nationally - been defined in the framework of United Nations with the primary aim of improving national human rights performance. Thus, as an institutional type national institutions are new in history and unique in focussing only on human rights promotion and protection.

The question that needs to be examined is whether this type of institution is likely to influence national human rights agendas and, in a long term perspective, the protection of human rights in states with differing political systems. It is, however, not possible to make such an exhaustive analysis in one article. Therefore, the article aims at making a preliminary study of a number of selected elements relevant to an overall analysis.

The aim of this article is to review the development of standard setting for national institutions, to examine the institutional framework that has a bearing on organisational performance and to provide some examples of achievements in implementing human rights at the national level.

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<sup>1</sup> The article was published in 'Human Rights in Development Yearbook 1998 - *Global Perspectives and Local Issues*', edited by Hugo Stokke and Arne Tostensen, Kluwer Law International (1998).

The article looks at four areas: 1) the background for the development of the United Nations' so-called Paris Principles of 1991 for the establishment and functioning of national institutions<sup>2</sup>; 2) the character of national institutions established before and after the adoption of the Paris Principles; 3) the contents of the Paris Principles in relation to the institutional framework and outputs of national institutions; and 4) examples of achievements.

The focus will be on the types of national institutions having a mandate in line with the framework laid down in the Paris Principles. They are characterized by a) having broadly defined mandates with emphasis on the national implementation of international human rights standards, b) being established by legislative means, c) being independent of the state in decision-making procedures, d) having a pluralist representation of civil society and vulnerable groups in the governing bodies, e) handling individual complaints.<sup>3</sup>

According to the Paris Principles "the ombudsmen, mediators and similar institutions form other bodies" and are thus not defined as a national institution.<sup>4</sup> The authors agree with this conceptual segregation because most ombudsmen institutions are rather specialised and do not meet the criteria of

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<sup>2</sup> The Paris Principles were defined at the International Workshop on National Institutions for the Promotion and Protection of Human Rights, Paris, 7-9 October 1991 (E/CN.4/1992/43 of 16 December 1991). They were further codified by the United Nations Commission on Human Rights in Resolution 1992/54, 1992, and in General Assembly resolution 48/134, 1993. They are included as an Annex to the United Nations Handbook on the Establishment and Strengthening of National Institutions, Professional Training Series No. 4, United Nations Centre for Human Rights, 1995 (hereinafter UN Handbook, 1995).

<sup>3</sup> See for example Brian Burdekin, *Human Rights Commissions, Workshop in Paris, 2<sup>nd</sup> European Meeting of National Institutions*, 1991; Morten Kjaerum, Council of Europe and Danish Centre for Human Rights, January 1997, pp. 41-57.

<sup>4</sup> Commission on Human Rights Resolution 1992/54, 1992, General Assembly Resolution 48/134, 1993, UN Handbook, 1995.

having “as broad a mandate as possible”.<sup>5</sup> The article will therefore not include institutions focussing on narrowly defined human rights issues or at specific target groups. This includes institutions such as the European type of ombudsman institution,<sup>6</sup> and commissions and councils concerned with issues such as equal opportunities, women, minorities, persons with disabilities, indigenous peoples and refugees.

Nor will the article include human rights commissions that are political in nature in the definition of national institutions. This type of human rights commission is formed by governments as well but serves as an integrated part of the state and parliamentary structure with parliamentarians as the main group of members. This type of commission or committee is often confused with the independent national institution frequently called a commission.

In relation to the normative framework established by the United Nations the main sources used in this article are documents and reports adopted by the various organs. The empirical part is based on legal texts and annual reports of the institutions themselves. From a methodological point of view it has only been possible to make an indirect assessment of the achievements of the national institutions reviewed due to lack of access to evaluation reports on most institutions. Also, field work has not been carried out.

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<sup>5</sup> The UN Handbook, *ibid*, para. 41, p. 7 enlarges the Paris Principles and includes the ombudsmen and similar institutions in the concept of national institutions. Although the arguments for widening the concept seem logical, because of similarities in complaints handling procedures, in this context it would be more meaningful to keep the two concepts distinct.

<sup>6</sup> Most European ombudsman institutions focus on the legality of administrative proceedings in the state administration, or on issues such as consumer protection or other specialised areas, in combination with complaints handling. See for example the International Ombudsman Yearbook, Linda C. Reif (ed.), vol. 1, 1997. Kluwer Law International.

Starting out from the Paris Principles, the article analyses the institutional framework which is the foundation for establishing and running national institutions. This encompasses analyses of the legal foundation, mandate and powers of the institutions, the conditions for appointment of leading members, e.g. commissioners and board members, the degree of transparency and independency in decision-making procedures, and the degree to which the actual institutional framework relates to the output of national institutions.<sup>7</sup>

The hypothesis behind an institutional framework approach is that the degree of political consensus behind creating such a type of institution (including such elements as political autonomy, independency in decision-making procedures, the professional approach to analyse human rights standards and national issues, the content of the mandate and powers of the institutions, the constituency and stakeholders behind and the actual size and capacity) is decisive for the achievements to be obtained by national institutions.

Even though it is difficult to set up benchmarks for the achievements of national institutions, at least some indicators can be set up for the majority of these institutions. This includes registering the number of complaints handled and solved by complaints handling national institutions and the number of cases that led to change in laws. This type of indicator has been included in the article to the extent possible at this stage.

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<sup>7</sup> Experience shows that there is a strong relationship between a thoroughly considered institutional framework and the output and impact of an institution. See for example David Korton, *Getting to the 21<sup>st</sup> Century. Voluntary Action and the Global Agenda*, Connecticut: Kumarian press, 1990; Kristina Hedlund Thulin, *Evaluation of the Legal Information Centre for Human Rights in Tallinn, Estonia*, Danish Centre for Human Rights, 1996; Birgit Lindsnaes, *Human Rights and Capacity Building - Experiences from Malawi and Estonia* (in Danish), Den Ny Verden 2, Center for Development Research, 1998.

## 1.2 The development of the concept of national human rights institutions

The historical process of external endorsement of national human rights institutions goes as far back as 1946, to the second session of the United Nations Economic and Social Council (ECOSOC). Here it was decided to invite member states to “consider the desirability” of establishing local bodies in the form of “information groups or local human rights committees” to function as vehicles for collaboration with the United Nations Commission on Human Rights.<sup>8</sup>

In 1960, the issue was raised again, this time indicating a sharpening of the mandate of these institutions beyond being mere agencies of information and encouraging them to enter into the field of active participation and monitoring.<sup>9</sup> The trend continued, in the wake of the growing recognition that with the continued expansion of human rights instruments during the 1960s and 1970s, there was an increasing need for mechanisms to ensure national implementation of these instruments as well. In this context, national institutions could obviously play a significant role, but since their number was still limited and experiences scattered, it was decided to convene a “Seminar on National and Local Institutions for the Promotion and Protection of Human Rights” in Geneva in September 1978.<sup>10</sup>

The seminar adopted the first set of guidelines outlining the general functions of national institutions. According to these guidelines, national institutions should fall into one of two categories, the first of which would be occupied with the general promotion of human rights (information and awareness raising). The other would take direct action in the form of reviewing national policy (legislative, judicial and administrative steps and decisions), reporting and making recommendations to the state. With regard to the organisational structure, it was recommended that national institutions should be composed in a manner reflecting a cross-section of society with a

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<sup>8</sup> ECOSOC Resolution 2/9 of 21 June 1946.

<sup>9</sup> ECOSOC Resolution 772 B (XXX) of 25 July 1960.

<sup>10</sup> St/HR/SER.A/2, chapter V.



view to facilitate popular participation. In addition, they should be immediately accessible to members of the public, function on a regular basis, and in appropriate cases be assisted by local or national advisory organs.<sup>11</sup>

The guidelines were endorsed by the United Nations Human Rights Commission and the General Assembly<sup>12</sup>, which urged member states to comment on the guidelines, and to provide the Secretary General with relevant information relating to their own experience of establishing national human rights institutions.

The General Assembly raised the matter again in 1979, recommending the member states to take the necessary steps to create and improve conditions for the establishment of national institutions, bearing in mind the guidelines adopted the previous year, and emphasizing the importance of ensuring the integrity and independence in accordance with national legislation.<sup>13</sup> Finally, the constructive role to be played by non-governmental organisations (NGOs) was brought to the attention of the states.

By virtue of these resolutions the United Nations Secretary General was requested to report to the Commission on a survey of national institutions, which he continued to do the following years.<sup>14</sup>

In the General Assembly's Resolution from 1981<sup>15</sup>, a section on the conceptual human rights foundation on which national institutions should be based is outlined. The Resolution further states that "all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social

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<sup>11</sup> *United Nations' Action in the Field of Human Rights*, United Nations, 1988, para. 83ff.

<sup>12</sup> A/RES/33/46 of 14 December 1978.

<sup>13</sup> A/RES/34/49 of 23 November 1979.

<sup>14</sup> Examples hereof are A/36/440 (1981) and A/38/416 (1983).

<sup>15</sup> A/RES/36/134 of 14 December 1981.

and cultural rights”. This statement and the underlying holistic approach to human rights, which we later find clearly expressed in the Preamble to the Declaration on the Right to Development from 1986<sup>16</sup> and in section 5 of the Vienna Declaration and Programme of Action from 1993,<sup>17</sup> stands out as distinct from most other human rights instruments in force at that time.<sup>18</sup>

Regardless of the reasons behind the inclusion of the formulation in the 1981 Resolution, the outcome is interesting. For the first time, there was a direct indication that national human rights institutions were not meant to occupy themselves merely with the judicial procedures and respect for civil and political rights. The monitoring of the implementation of the entire scope of human rights would fall within the scope of the national human rights institutions. This corresponds to the broad nature of the Secretary General’s early reports and is in conformity with his obligation to take into account “differing social and legal systems” (section 9 of the Resolution).

In the first and second reports of the Secretary General from 1981 and 1983<sup>19</sup>, the mandate was perceived in the broadest possible manner, encompassing the examination of almost all varieties of institutions even remotely concerned with human rights. As such, the reports reveal a lack of definite limitations on the scope of institutions to fall under the category of national human rights institutions. On the basis of information provided by

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<sup>16</sup> The Declaration reads “- and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”. United Nations General Assembly Resolution 41/128 of 4 December 1986.

<sup>17</sup> “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

<sup>18</sup> The Proclamation of Teheran by the International Conference on Human Rights in May 1968 expressed a similar notion: “Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible” (section 13).

<sup>19</sup> A/36/440 of 9 October 1981 and A/38/416 of 24 October 1983.

individual states, the report broadly categorises the activities rather than specifying the framework of the institutions themselves.

The mandate is twofold: the function of protection on one hand and the function of promotion on the other hand. The former includes the hearing of complaints, seeking of amicable settlements, bringing matters to the attention of the Courts or prosecutors' offices, providing legal counselling or instituting petition or inquiry procedures before national parliaments. However, it excludes the issuing of independent and final decisions and does not mention the more pro-active methods of investigation. In addition, a tentative distinction is made between judicial and non-judicial institutions where the latter category encompasses ombudsmen and similar bodies particular to each region, endowed with an independent status and the ability to hear complaints. Distinct from these bodies, the so-called 'national and local bodies for the protection of human rights, which report to the executive branch', are mentioned, giving as examples a number of national human rights commissions and committees.

In relation to promotional activities, the reports are extremely broad, listing those activities directly related to human rights and legislation, such as participation in the legislative process, the work of electoral commissions, the dissemination of information and public awareness campaigns. They also include functions carried out by educational institutions and those dealing with health care, social security, employment, working conditions, race relations and the rights of special groups such as children and young persons.

We can *conclude* that during this initial phase there were virtually no limitations on the definition of a national human rights institution. The bodies defining the scope and role of national institutions seemed to perceive this broad all-encompassing scope as a strength rather than a weakness in order to include as many tentative institutions as possible. The mandate of the individual institution was therefore not narrowly described. The earliest resolutions even saw the institutions as a service organ of the United Nations in distributing materials, perceiving them as a resource for the United Nations rather than the other way around.

During the 1980s the United Nations Commission on Human Rights

continued to place the question of national institutions on the agenda of its annual session, resulting in a series of resolutions subsequently endorsed by the General Assembly.<sup>20</sup>

In addition, regional cooperation in the field was encouraged and resulted in the holding of workshops for Africa (Lome, April 1988) and Asia-Pacific (Manila, May 1990).<sup>21</sup> These fora were mainly directed towards the exchange of ideas and experiences and distinguish themselves from later initiatives, which were meetings *of* rather than *on* national institutions.<sup>22</sup>

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<sup>20</sup> The resolutions from 1986 to 1991 stress that the issue should be given high priority, that funding and technical assistance should be ensured, and that the UN should play “a catalytic role in assisting the development of national human rights institutions by acting as a clearing house for the exchange of information and experience”. In return, the original intention that national institutions should serve as focal points for the dissemination of UN materials, is maintained. The need for a handbook on national institutions, based on and supplementing the demand for publication and dissemination of the Secretary Generals’ reports, is also voiced; Commission on Human Rights Resolution 1988/72 of 10 March 1988 and later resolutions by the General Assembly and the Commission.

<sup>21</sup> See Human Rights Commission Resolutions 1989/52 of 7 March 1989 and 1991/27 of 5 March 1991.

<sup>22</sup> Since the Vienna Conference in 1993 a number of regional and international workshops of human rights institutions and ombudsmen have taken place. Examples hereof are the First and Second European meetings of National Institutions (Strasbourg, 1994; Copenhagen, 1997); the First and Second Conferences of African National Human Rights Institutions (Cameroon, 1996; South Africa, 1998); the First and Second Asia-Pacific Regional Workshops (Australia, 1996; New Delhi, 1997); Human Dimension Seminar on Ombudsman and National Institutions (Poland, 1998); the Third International Workshop on Ombudsman and National Human Rights Institutions (Latvia, 1997); the First Meeting of Mediterranean National Institutions (Marrakesh, 1998), and the Second, Third and Fourth International Workshops of National Human Rights Institutions (Tunis, 1993; Manila, 1995; Mexico, 1997).

### 1.3 The Paris Conference: Laying down the general principles

A step of major significance was the holding of the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris, 7-9 October 1991.<sup>23</sup> The Workshop had a double basis: the resolutions of the Human Rights Commission as listed above and the need for implementation of the United Nations Programme of Advisory Services.

The output was a set of recommendations and principles entitled the *Paris Principles*, which were adopted and acclaimed by the Human Rights Commission the following year.<sup>24</sup>

The Paris Principles focus on three general areas: i) the *competence and responsibilities* of national institutions, concerning their legislative foundation as well as their primary tasks, ii) the *composition* of national institutions *and the guarantees of independence and pluralism*, listing criteria for appointment designed to ensure plurality of representation as well as financial independence; and iii) the *methods of operation* of national institutions including the mandate to take up matters as well as their cooperation with civil society. Finally, a specific section was added iv)

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<sup>23</sup> About 35 countries with an almost equal distribution between developed and developing countries were represented. The dominance of European and Latin American countries is striking, with only five Asia-Pacific countries (Australia, New Zealand, Japan, Philippines and Thailand) present as well as five from Sub-Saharan Africa (Benin, Uganda, Senegal, Togo and Namibia). The seminar had observers from the European Court as well as from the Inter-American Court and Commission, but none from the African Commission on Human and Peoples Rights.

<sup>24</sup> Human Rights Commission Resolution 1992/54 of 3 March 1992. The paper on Human Rights Commissions from the Workshop in Paris, unpublished, 1991, p. 103-143, drafted by the Federal Human Rights Commissioner of Australia, Brian Burdekin, was a significant contribution to the development of the Principles as well as to later United Nations initiatives in the field.

relating particularly to those institutions with *quasi-judicial*<sup>25</sup> competence, i.e the competence to hear, transmit and settle individual complaints.

The Commission on Human Rights decided to publish the proceedings, and the UN Handbook 1995 is a result hereof.

The process of formulation and elaboration of the concept of national human rights institution did not stop with the formulation of the Paris Principles; They became the starting point for further exploration and dialogue at the United Nations as well as various regional levels. One example is the transmission of the Principles to the Preparatory Committee for the World Conference on Human Rights in Vienna for consideration, leading to a stressing of the constructive role to be played by national institutions at the Vienna Declaration and Programme of Action (art. 36).<sup>26</sup> The Vienna conference in 1993 as well as the United Nations Commission on Human Rights in 1995 requested the Secretary General to accord high priority to requests from member states for assistance in establishing and strengthening

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<sup>25</sup> The headline in the original Paris Principles, contained in the original report of the workshop (E/CN.4/1992/43), reads *quasi-jurisdictional* rather than *quasi-judicial*. This creates a sense that something went amiss in the process, given that the contents of the section in the Paris Principles correspond to the definition of quasi-judicial, in “describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise on an executive discretion rather than in the application of the law” (The Concise Dictionary of Law, Oxford University Press, 1986). This would have been consistent with the text in the report which speaks solely of “quasi-judicial powers” (table of contents and sec. 188-200) and of “jurisdiction” - but no reference is found to the term “quasi-jurisdictional”. The power of precedence, however, is strong, since the headline is uncritically reproduced in different versions of the Principles, as found both in the a Annex to Human Rights Commission Resolution 1992/54 of 3 March 1992 affirming the Paris Principles, in the 1995 United Nations Handbook and in the United Nations Fact Sheet No. 19 on National Institutions for the Promotion and Protection of Human Rights from 1993.

<sup>26</sup> See para. 18, 36, 74 including section C, Co-operation, Development and Strengthening Human Rights in the Vienna Declaration and Programme of Action, 1993.

national institutions.”<sup>27</sup> The High Commissioner for Human Rights soon thereafter prioritised the strengthening of national institutions through technical assistance.<sup>28</sup>

Finally, the United Nations Secretary General and the Commission on Human Rights continued to focus on the subject, resulting in a number of reports and annual resolutions. In later years, the main themes have been cooperation between the various institutions through the establishment of a Coordinating Committee as well as with the United Nations in relation to technical cooperation.<sup>29</sup> The continuing work to enable the national institutions to represent themselves in international fora has moved forward in recent years, reaching a point where the national human rights institutions are given the opportunity to speak independently at the sessions of the United Nations bodies.<sup>30</sup>

## 1.4 Implementation of the Paris Principles

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<sup>27</sup> Commission on Human Rights Resolution 1997/40. National Human Rights Commissions - National and International Perspectives. Prepared for the Commonwealth Secretariat by the Special Adviser to the United Nations High Commissioner for Human Rights on National Institutions, Brian Burdekin, undated, p. 8.

<sup>28</sup> Ibid. The Office focuses on holding regional seminars and giving advice on national establishment. A Special Adviser to the High Commissioner of Human Rights gives technical assistance to governments on draft legislation, institutional set-up and counselling of national institutions, including ombudsmen. Funding is provided by the UN Voluntary Fund. In 1997, the total expenditures of the Fund were USD 5.6 mn. on these activities. ECOSOC E/CN.4/1998/92. March 1998.

<sup>29</sup> Reports of the Secretary General E/CN.4/1995/48, E/CN.4/1996/48, E/CN.4/1997/41 and E/CN.4/1998/47, and resolutions from the UN Human Rights Commission 1995/50, 1996/50, 1997/40 and 1998/55.

<sup>30</sup> See UN Human Rights Commission 1998 Resolution 1998/55 and report of the Secretary-General concerning the Participation of National Institutions in UN meetings E/CN.4/1998/47.

Between 1948 and 1990 only a few national institutions that embody the later Paris Principles were established. The first ones were established in France (1948<sup>31</sup>), New Zealand (1978), Canada (1978), Australia (1981, re-established in 1986), the Philippines (1987) and Denmark (1987). In addition, a number of government commissions were established in various countries. After the adoption of the Paris Principles in 1991 and the Vienna Declaration in 1993, making national institutions the focal point for implementation of human rights standards, such national institutions have mushroomed.

In the 1990s broadly mandated national institutions on the African continent have been set up in Cameroon (1991), Chad (1994) Ghana (1993), Nigeria (1996), Senegal (1997), South Africa (1995), Uganda (1996) and Zambia (1997).<sup>32</sup> Three have been established in the Asia-Pacific region: India (1993), Indonesia (1994) and Sri Lanka (1997). In the American region, at least two national institutions have been set up in Mexico (1990) and Costa Rica (1993), respectively. In Europe, one national institution has been established in Latvia (1995). Similar broadly mandated institutions have been set up in CIS countries<sup>33</sup> such as Kazakstan (1996) and Georgia (1997). In addition, plans to establish national institutions are evolving in Bangladesh, Ethiopia, the Federal Republic of Germany, Fiji, Ireland, Kyrgyzstan, Liberia, Malawi, Mongolia, Nepal, Pakistan, Papua New Guinea, Rwanda, Tanzania, Thailand and Uzbekistan.

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<sup>31</sup> The French Commission was established as a consultative body to the Government by initiative of René Cassin, judicial adviser of Général de Gaulle. In 1984 the Commission was reactivated and in 1993 the Commission achieved 'independent' status by constitutional decree. See the Annual Report, République Française, Premier Ministre, Commission Nationale Consultative des Droits de L'Homme, 1997.

<sup>32</sup> According to "Report of the Chairman of the Co-ordinating Committee of African National Institutions for the Second Conference of African National Institutions, Dr. Solomon Nfor Gwei, Durban, South Africa, 1-3 July 1998" there are about 20 African national institutions.

<sup>33</sup> Commonwealth of Independent States of the former Soviet Union.



In the following discussion the various sections of the Paris Principles will be analysed with examples of their implementation by some of these national institutions.

#### **1.4.1 Independence and capacity**

The Paris Principles state that national institutions should be vested with competence, founded on a legislative or constitutional basis and be given as broad a mandate as possible. The Principles address the question of composition, in the form of guarantees of pluralism in representation and composition, fixed terms of mandate for its members and of a suitable infrastructure with staff and premises. In addition, the national human rights institutions should be ensured guaranteed independence of decision-makers by having their own budget and not be subjected to financial restraints. Finally, the Principles address the methods of operation.

These requirements serve two purposes; to guarantee the independent functioning of national institutions and to limit their vulnerability to undue pressure or coercion from outside interests, typically the government; and to ensure the capacity and the effectiveness of the institutions.

#### **1.4.2 Legal foundation**

According to the Paris Principles, one of the most critical criteria for establishing national institutions is that the institutions “shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.”<sup>34</sup> The broadly mandated national institutions reviewed here have been established in three ways: i) by constitution or constitutional amendment; ii) by law or act of parliament; or iii) by presidential decree.

The establishment of national institutions within the constitution would normally be the most powerful option because the procedural requirements for changing constitutions in many countries are far stricter than requirements for changes of laws. National institutions established by constitution (in addition often also by law) are mainly found in countries which have recently undergone constitutional reforms and which have been

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<sup>34</sup> UN Handbook, Annex, 1992/54.

marked by grave human rights violations in the past.<sup>35</sup> In the 1980s a national institution was established by the Constitution in the Philippines.<sup>36</sup> In the 1990s, national institutions have been established by constitution in Ghana, Georgia, South Africa, Malawi, Uganda and Zambia.

The majority of national institutions are established by law or act of parliament in countries such as Australia, Benin, Canada, Chad, Denmark, India, Latvia, Mexico,<sup>37</sup> New Zealand, Senegal, Sri Lanka and Togo. Further, legislation to establish national institutions has been adopted in Nepal, Rwanda and Uzbekistan.

National institutions established by presidential decree are found in countries such as Cameroon, France, Indonesia, Kazakstan and Nigeria. There is also one national institution in the pipeline in Kyrgyzstan. Even though the institutions may live up to the Paris Principles,<sup>38</sup> the fact that these institutions have not been established by act of parliament, and thereby not necessarily fully supported by a majority in parliament, could effect the degree of independence of the institution. However, there is no evidence that these institutions are less independent than institutions established by parliament. There are also indications that establishment by decree in Kazakstan and Kyrgyzstan has been the only feasible political option

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<sup>35</sup> Establishment by constitution also depends on traditions for changing and amending constitutions. In Denmark, for example, the Parliament is very hesitant to make constitutional changes. The Constitution was adopted in 1849 and amended most recently in 1953.

<sup>36</sup> Executive Order no. 163 of 5 May 1987, art. XIII section 17 of the Constitution of the Philippines.

<sup>37</sup> Despite the fact that the Mexican Commission is established as a legally independent entity, it is structurally located as a department in the Ministry of Interior. Human Rights Commissions, Workshop in Paris, Brian Burdekin, 1991, p. 129. See also the 'Law on the National Commission for Human Rights (23 June 1992), temporary articles, art. 4, which states "[...] the national commission for human rights [...] is a semi-autonomous agency of the Ministry of Interior".

<sup>38</sup> In the UN Handbook on the Establishment and Strengthening of National Institutions, 1995, para. 39, the legal conditions for establishment includes the wording 'by law or decree'.

because the parliaments were thought not to approve the establishment of this type of institution.<sup>39</sup>

One of the early commissions illustrates the strengths and weaknesses of what was then characterized as a national institution. In the case of *El Salvador*, the Commission has been characterized as “not addressing what is now the main human rights issues [e.g. unlawful disappearances and death squads] in El Salvador, but, within the limited sphere in which it works, for being a constructive force.”<sup>40</sup> The functions of the Commission have been contradictory. “Since February of 1984, the Commission staff has had a regular program of visits to prisons and detention facilities, and has been increasingly successful in locating detainees and prompting their transfer to courts or their release ... While there is marked improvement in the performance ... other actions are less useful ... [such as] ... the misleading nature of its public statements.”<sup>41</sup>

A similar pattern seems to be developing in *Nigeria* where many political prisoners have been released recently.<sup>42</sup> The newly established Commission has surprised observers<sup>43</sup> by carrying out serious training activities, initiating studies and a comprehensive plan of action for 1998, even though it can still be regarded as an institution depending on political goodwill as

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<sup>39</sup> Lis Dhundale and Peter Vedel Kessing, *Report of missions to Kazakstan and Kyrgyzstan*, Danish Centre for Human Rights, OSCE/ODHIR, 1998.

<sup>40</sup> The America’s Watch Committee, *El Salvador reports*, January, 1984, August, 1984, March, 1985, quoted in the Human Rights Internet/Directory. 15.004. For an elaboration of the human rights violations in El Salvador, see Human Rights Watch Americas: *El Salvador - Darkening Horizons: Human Rights on the Eve of the March 1994 Elections*, vol VI no 4, March 1994.

<sup>41</sup> *Ibid.*

<sup>42</sup> Amnesty International, Press Release, 4 June, 1998.

<sup>43</sup> “Making human rights treaty obligations a reality at the national level: Identifying and working with new actors and partners”, Anne Gallagher in Alston and Crawford “*The Future of the United Nations Human Rights Treaty System*” (forthcoming).

reflected in its relatively restrained criticism of the governments human rights performance.<sup>44</sup>

In *Indonesia*, the priorities given in the plan of action of 1998 to ratify international conventions should be noted. Whereas the International Covenant on Economic, Social and Cultural rights, and the conventions against torture, elimination of discrimination, etc, are to be ratified in year one to four, the Covenant on Civil and Political Rights is to be ratified in year five. It follows in the plan of action that research into and harmonization of domestic laws in line with the ratified conventions will be carried out. The plan of action can be analysed in light of the fact that there still are political prisoners in Indonesia,<sup>45</sup> and that the one thousand man Peoples Advisory Council does not support political reforms.<sup>46</sup> The order of priority, however, shows that the Indonesian military government apparently does pay attention to the question of ratification and implementation of human rights law.<sup>47</sup>

### 1.4.3 Composition

#### *a. Appointment and dismissals of leading members*

The Paris Principles deal with criteria for the appointment of leading

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<sup>44</sup> Human Rights Newsletter, vol 1, No 3, 1998; National Plan for 1998; *Briefs on the National Human Rights Commission of Nigeria; Nigerian Human Rights Commission*. Training Workshop for Lower Court Judges in Cooperation with Civil Liberties Organisation and The Danish Centre for Human Rights, 1998.

<sup>45</sup> Amnesty International, Press Release, 4. June 1998

<sup>46</sup> This Council is appointed under the governance of the former dictator Suhaarto and includes representatives of the military. Politiken, Newspaper, 12 and 18 November, 1998.

<sup>47</sup> The President's recent announcement accepting the Commission's request to replace twelve members without the president's approval supports this argument. There are indications that the military government's attention to human rights is due to pressure from intergovernmental bodies such as United Nations and the European Union, and embassies located in the country. The Indonesian National Plan of Action on Human Rights, 1998-2003, June 1998; Report from Conference about human rights, European Union, Indonesia, Diego Bang, the Danish Centre for Human Rights, October, 1998, p. 28-29.

members in a general way. They state that “in order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.”<sup>48</sup> However, more specific criteria for appointment are crucial in guaranteeing the independence in decision-making procedures, the professional level of commissioners and staff, and, not least, public credibility. The terms of appointment should include definition of “method of appointment, criteria for appointment such as nationality, profession and qualifications, duration of appointment, whether members can be reappointed, who may dismiss members and for what reasons, privileges and immunities.”<sup>49</sup>

Laws and statutes of national institutions examined deal with the above sets of conditions and criteria in different ways. They can be divided into three models: 1) objective appointment criteria combined with appointment by president or parliament in which appointments depend on professional qualifications (academic degree, judge, etc) and institutional affiliation (e.g. courts, universities, NGOs, etc); 2) objective appointment criteria in which leading members are appointed by the institutions they represent and not by president or parliament, and 3) absent or weak objective appointment criteria combined with appointment by president or parliament.

With regard to the first model, the *Indian National Human Rights Commission* is probably applying the most elaborate and strict criteria. Although commissioners are appointed by the President, the three leading members of the Commission are recruited from the highest levels of the judiciary, and two members are to be knowledgeable of human rights. For certain functions of the commission, the chairpersons of the national commissions for minorities, the scheduled castes and tribes, and women’s

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<sup>48</sup> Ibid, UN Handbook, para. 78 and 79. In this aspect the UN Handbook strengthens the criteria agreed upon in the Paris Principles.

<sup>49</sup> Ibid.

affairs shall be members.<sup>50</sup> A commissioner may be removed from office if he “engages during his term of office in any paid employment outside the duties of his office.”<sup>51</sup> In addition, “on ceasing to hold office, a chairperson or a member shall be ineligible for further employment under the governments of India.”<sup>52</sup> The strict conditions of employment ensure the accountability of the commissioners towards the public, the full time engagement in work *inside* and not *outside* the commission<sup>53</sup> and that commissioners can neither be corrupted by nor be dependent on the public sector. In this respect the Indian Commission goes beyond the requirements of the Paris Principles. A number of countries such as Ghana, Uganda and Nigeria apply similar criteria but not to the same extent as found in the mandate of the Indian Commission.

Denmark seems to be the only country applying the second model. At the *Danish Centre for Human Rights*, half of the Board members are appointed directly by institutions with the right to a seat on the Board. The other half is appointed by a Council consisting of a wide range of non-governmental organisations, representatives of all political parties and individuals with specific knowledge and commitment in the field. In practice, the Board is composed of six university representatives, a member of the bar association, three members representing non-governmental organisations and two members of parliament.<sup>54</sup> The chairperson is elected among the twelve members. The centre has no commissioner but a director who represents the centre publicly.

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<sup>50</sup> Too strict criteria for professional background required for recruitment has a resource aspect. The fact that three commissioners must be former judges is hindering the establishment of national institutions in some Indian states because of the non-availability of judges. Annual Report of the National Human Rights Commission, India, 1996-97, p. 57. Similarly, in many developing countries there is a tremendous lack of jurists and judges.

<sup>51</sup> The Protection of Human Rights Act, National Human Rights Commission, India, 1993.

<sup>52</sup> Ibid.

<sup>53</sup> A number of commissions allow for academic work only outside the institution.

<sup>54</sup> Mandate of the Danish Centre for Human Rights, 1987, revised in 1998.

The third model is applied in most countries reviewed. According to the mandates, only few national institutions apply appointment criteria that go beyond requiring that the parliament, president or governor must pay regard to “their personal attributes .. and having knowledge of or experience in the different aspects of matters likely to come before the Commission”<sup>55</sup> or “knowledge of human rights”. Despite this, well established national institutions seem, in practice, to recruit members according to informal professional criteria.

In 1982, the responsible authority for the decision-making and priority setting procedures of the *El Salvadorian Commission* was noted as having had a direct involvement in human rights abuses. While the ‘Commission was headed by a lawyer who seemed sincere about human rights, ... the governments representative on the Commission was head of the National Police, which has committed many of the most serious violations.’<sup>56</sup> Such a composition must be said to be in contradiction with the later standards. In the 1980s, in *Guatemala*, a multi-party composition model was established which ‘appears to have politicized the Commission, and reduced its effectiveness’.<sup>57</sup> With the adoption of the Paris Principles, these two Commissions would probably not qualify as national institutions.

However, as late as in the 1990s, institutions have been established which do not apply any professional or institutional criteria for appointment of leading members. One example is the *Latvian National Human Rights Office* where the director shall be appointed by the parliament upon recommendation of the Cabinet of Ministers. The statutes also read ‘The Director may be discharged ... in the event he/she is elected to leadership of a political party or its auditing structure’.<sup>58</sup> The present Director has been appointed *from* members of the parliament. Even though a politically appointed Director can be - and seem to be - qualified for the position, it follows from this lack of

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<sup>55</sup> New Zealand, Human Rights Commission Act, 1977.

<sup>56</sup> America’s Watch Committee, El Salvador report, 1982, *ibid.*

<sup>57</sup> Amnesty International Report, Human Rights Violations Under the Civilian Government, 1989.

<sup>58</sup> Law on the Latvian National Human Rights Office, 1995.

objective appointment procedures, combined with a lack of demand for political neutrality, that the risk of politicisation of the position becomes high. This allegation in fact can be deduced from the change in leadership of the Latvian National Human Rights Office that led to a change in the interpretation of the right to citizenship. In its Activity Report of the first quarter of 1998, it reads that “the Office especially supports granting of citizenship to those children born in Latvia whose parents are permanent residents, because the rights of children to citizenship are absolute ...”. In the later Activity Report issued after the appointment of the present Director, the Latvian Government is advised to “delete the norm providing for citizenship for all children ... at birth”. It further reads: “The UN Convention on Children’s Rights provides that a child is entitled to citizenship at birth. This norm does not ... provide that a child should be granted citizenship immediately after birth ...”.<sup>59</sup>

The Paris Principles do not specify criteria for dismissals of leading members, but principles for dismissals have been elaborated on in the UN Handbook.<sup>60</sup> In the mandates of almost all the national institutions reviewed these criteria have been applied. In Denmark, where these principle are not formulated in the statutes of the Centre, the principles protecting government officials apply.

*b. Pluralistic reflection of society*

In order to ensure their independence, national institutions shall in their composition “ensure the pluralist representation of the social forces”<sup>61</sup> actively engaged in the promotion and protection of human rights, by ensuring cooperation with, or the presence of, wide sections of civil society. This includes non-governmental organisations, trade unions, social and professional organisations as well as those with a particular focus on vulnerable groups, representatives of “trends in philosophical or religious

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<sup>59</sup> Activity Report/Newsletter, January-March, 1998; p. 6; Activity Report, April-June, 1998, pp. 2 and 4.

<sup>60</sup> UN Handbook, sec. 80, 1995.

<sup>61</sup> Paris Principles, UN Handbook, 1995.



thought”,<sup>62</sup> universities and qualified experts. To these groups the Paris Principles add representatives of parliaments as well as of government departments, the latter, however, only in an advisory capacity in order not to endanger the independence of the institution. The composition of national institutions should be a reflection of its society, and accordingly its members should reflect diversity in sex, ethnic origin, language and political affiliation as appropriate.

The statutes of the majority of institutions reviewed ensures pluralistic representation in two ways. One model, applied in Australia, India and New Zealand, is to appoint commissioners representing specific vulnerable groups such as minorities and women. Another model, applied in Denmark and France, ensures that non-governmental organisations in the governing bodies represent vulnerable groups in society. Neither of the models applied ensure representation of all major vulnerable groups in society. This, however, would realistically speaking not be possible in any case without creating an unmanageably large governing body.

#### **1.4.4 Financial autonomy and capacity**

According to the Paris Principles, a key factor securing independence and accountability is the provision of ‘adequate funding’, e.g. that the institutions must be able to function independently according to their aims without any state interference or ‘financial control which might affect its independence’.<sup>63</sup> This condition poses two questions. The first, is whether the funding is secured in such a way that political discussion of the priorities set by the members of national institutions can be avoided - otherwise the consequence could be that the politicians or responsible ministries set the priorities instead of the national institution themselves. The second, is whether the funding is sufficient to secure a high level of activity and professionalism.

All national institutions examined are in principle financed by the state, but, many of them are also subsidised by donor funding. This is done in some

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<sup>62</sup> Ibid.

<sup>63</sup> E/1992/22. General Assembly Resolution 48/134, 20 December, 1993.

countries by establishing a trust fund independent of the state's interests. The majority are funded directly by the finance act of the parliament, while others have funds allocated by a ministry approving the proposed budget. Funding through the parliament is believed to give the highest degree of

independence in decision-making whereas funding through a ministry creates room for interference by political interests.

In the second and third annual reports of the *Commission on Human Rights and Administrative Justice, Ghana*, the Commission raised the view that it could only be fully independent if it could submit its budget directly to the parliament instead of to the Ministry of Finance and Planning, which can cut the budget "after a lengthy and cumbersome vetting process undermining the Commission's independence as provided for in article 222 of the Constitution".<sup>64</sup> The South African Human Rights Commission criticises the allocation of funding for the Commission by the Ministry of Justice. It argues that the budget of the Commission is given a lower priority than other activities of the Ministry and concludes that funding for the Commission should be granted directly by the Parliament.<sup>65</sup>

The question of resources is closely connected to the question of whether the institutions have sufficient staff members. Figures reveal that national institutions are differently staffed in total numbers. In *Australia*, there has been a substantial decrease in staff due to a reduction of about 40 percent of the Commission's budget. Today there are about 100 staff members plus eight staff in regional offices.<sup>66</sup> The population figure is 18,2 million. In *Ghana*, there are about 450 staff members and 38 district offices in ten regional capitals.<sup>67</sup> There are 17,5 million inhabitants in the country. The

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<sup>64</sup> Second and Third Annual Reports, *Commission on Human Rights and Administrative Justice - Ghana*, 1995 and 1996.

<sup>65</sup> Pityana, B., *National Institutions at work: The case of the South African Human Rights Commission*, British Council Seminar, Belfast, May 1998,.

<sup>66</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report 1997-98, pp. 22, 160 and 167.

<sup>67</sup> Annual Report, 1996, Ghana, Ibid.

*Indian* National Human Rights Commission has 300 employees and seven state commissions. The population figure is 1 billion inhabitants. The *Latvian* Human Rights Office has one office and about ten staff members. There are 2,5 million inhabitants in the country. In *South Africa*, there are about 60 staff members, one national and two regional offices. For the financial year 1998/99, the South African Human Rights Commission has been granted funding to establish six regional offices.<sup>68</sup> There are 49 million inhabitants in the country. The *New Zealand* Commission has 42 staff members and six commissioners in a country of 3,5 million people.<sup>69</sup> The *Ugandan* Commission has 1 office and about 30 staff members. There are plans to establish regional offices if funding is provided. There are 20 million inhabitants in the country. The *French* Commission has one office, four full time staff members and one part time president in a country with 58 million inhabitants. The *Danish* Centre for Human Rights has 65 staff members, a board of twelve members and one office in a country of five million people.

The last two institutions are not handling complaints and both focus on human rights nationally as well as internationally.<sup>70</sup>

#### **1.4.5 Mandate**

##### *a. Promotion*

Although there might be slight differences in the wording of the legal

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<sup>68</sup> The Commission has nine commissioners (five full time, two vacancies and two part time) while there seems to be a lack of staff. In this context it might be relevant to examine the distribution of resources between commissioners and staff. This discussion has taken place in Ghana, where, for lack of resources, the Consultative Assembly decided in 1992 to fuse the then existing ombudsman institution into the now established national institution. Working plan of the SAHRC 1998/99, The Commission on Human Rights and Administrative Justice in Ghana, Emile Francis Short, West African Human Rights Forum, Dakar 16-18 April, 1998.

<sup>69</sup> Annual Report, 1997, New Zealand, p. 7.

<sup>70</sup> The population figures are from the World Fact Book, 1997. USA Central Intelligence Agency, Washington DC, <http://ciapubs.bilkent.edu.tr/publications/factbook>.

foundations of the national institutions, they all have very similar mandates in line with the Paris Principles. They are usually commissioned to carry out promotion, information, education, documentation and research or analyses on human rights. They must promote ratification of international instruments, review national legislation's compliance with international law, report or make recommendations to governments or parliaments on legal changes or policy issues and cooperate with United Nations and regional agencies, including assisting governments in drafting state reports or themselves draft the so-called 'shadow reports' that serve to counter balance government reports to the United Nations system.<sup>71</sup>

*b. Protection*

The main difference between the mandates of national institutions is whether or not they are mandated to handle individual complaints. To the generally applicable Paris Principles is added a section on institutions with quasi-judicial competence. The findings at the Paris Workshop indicate that while such functions of protection would be appropriate in some states, it would not be the case in others, where this power was vested in other national bodies. In practice, only a few national institutions lack this competence (the Danish and the French).

The issue is the reverse in European countries that have not established broadly mandated national institutions. Most of these countries have established ombudsmen and similar bodies to handle individual complaints but do not have a broadly based national institution to monitor and review human rights issues in a strategic and structured way.

The review reveals major differences in the power of national institutions to handle individual complaints. As a minimum national institutions handling complaints are vested with the rights of *investigation, conducting hearings, settling of disputes, conciliation* and the right of deciding *not to proceed* with a complaint. These powers are found in combination with other powers

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<sup>71</sup> See Anne Gallagher, op. cit., who rightly points out that "the functions commonly assigned to human rights institutions - clearly indicate the links which exist - or should exist - between these bodies and the human rights treaty system".

in the mandate of various national institutions. They can include the entitlement to *request any relevant documentation* from state agencies, to *summon witnesses*, to *inspect private or public offices*, to *inspect police detentions, prisons and other institutions restricting freedom of movement* such as mental hospitals and to *investigate the acts of state agencies* such as the police and the army.

Whether national institutions can initiate investigation or inspection on their *own initiative* or if a *formal complaint must be lodged* varies. The investigative power might be compared to that of the police or the prosecution. One reason to justify the vesting of such extensive powers with national institutions is probably the need to have an independent investigative body to examine violations committed by the institutions that normally carry out this function such as the police and the prosecution.

Complaints-handling national institutions vested with all or part of the above listed powers normally do *not have the judicially binding power of the courts to enforce* their recommendations. They can recommend settlements of disputes or make decisions on complaints that are, however, not legally binding on the involved parties or the government. This is the case for the majority of national institutions, including Australia, Canada, Ghana, India, Latvia, Mexico, New Zealand and South Africa.

The advantage of this quasi-judicial mode of complaints-handling is that the procedures are less time consuming, more flexible, informal, non-confrontational, inexpensive and thus more accessible to vulnerable groups, than the courts.<sup>72</sup> Furthermore, “such power of a national institution may discourage acts or practices inimical to the enjoyment of human rights.”<sup>73</sup> However, as the New Zealand Human Rights Commission pointed out

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<sup>72</sup> Brian Burdekin, Human Rights Commission, Workshop in Paris, 1991, p. 120; Promotion of Human Rights and National Institutions, An Example from Ghana, E.V.O. Dankwa, July-September, 1997.

<sup>73</sup> Brian Burdekin, *National Human Rights Commissions - National and International Perspectives*. Prepared for the Commonwealth Secretariat by the Special Adviser to the United Nations High Commissioner for Human Rights on National Institutions, undated, unpublished, p. 3.

in its Annual Report, “dealing with complaints can only be a stop-gap measure. It is like treating the symptoms of a disease rather than eradicating the cause.”<sup>74</sup>

The power of the quasi-judicial bodies in general does not overlap with those of the courts. The majority of the complaints handling national institutions are vested with the power to *refer complaints to alternate redress such as complaints tribunals or courts*. In these cases, the recommendations of these institutions can be very strongly enforced. This has been experienced in *Ghana* where the former Ombudsman did not have the power of enforcement of his decisions, and the result was that his decisions were often neglected.<sup>75</sup> The later established Commission on Human Rights and Administrative Justice has been vested with this power and can reportedly enforce its decisions in the majority of cases. Since 1993, the commission has only referred thirteen cases to court action.<sup>76</sup> In *India*, the National Human Rights Commission uses this power to enforce decisions that state governments have not consented to carry out. The Commission reports that in 1996-97 there was only one such case, in Tamil Nadu. The case “related to the payment of compensation to a victim of police atrocities. The Commission has sought the intervention of the appropriate Court to have its recommendations implemented by the State Government.”<sup>77</sup>

Other powers vested in national institutions are the right of issuing *administrative fines* to witnesses failing to appear before a hearing (Latvia), and the right to recommend *compensation* to victims or members of his

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<sup>74</sup> Annual Report of the Human Rights Commission for the year ended 31 March 1979, New Zealand, p. 3.

<sup>75</sup> In Denmark, as in other European countries, the power of the ombudsman is only advisory. However, the customary practice of the parliament and other state institutions is to follow the recommendations of the ombudsman.

<sup>76</sup> Emile Francis Short, *The Commission on Human Rights and Administrative Justice in Ghana*, April, 1998.

<sup>77</sup> Annual Report, National Human Rights Commission, India, 1996-97, p. 60.

family (Australia, Canada, Ghana, India, New Zealand, Nigeria, Phillipines, South Africa and Uganda). In India, this power does not extend to recommending compensation to settle grievances brought under the complaint.<sup>78</sup> An example is a complaint lodged with the Indian National Human Rights Commission by the family of an inmate who died in police custody. The Commission found that the inmate had been subject to torture by the police only few hours before he committed suicide. On the basis of its recommendations, the family of the deceased was paid compensation of Rs. 100,000 and the Home Department, of the Government of Kerala asked the Director General of the police to register a case against the police officers responsible for torturing the deceased.<sup>79</sup>

At least two national institutions are vested with the power, however limited, of a civil court. The *Indian National Human Rights Commission* while inquiring into complaints has the powers of a civil court trying a suit under the Code of Civil Procedure.<sup>80</sup> The power mainly concerns omission to answer inquiries, produce documents and sign statements requested by the Commission, against which the Commission can take steps to prosecute persons refusing to cooperate by bringing the case to the Magistrate.<sup>81</sup> The *Ugandan Human Rights Commission* may under section 53(2) of the Constitution, in case of infringement of human rights, order the release of a detained person, payment of compensation or any other legal remedy or redress. Section 53(3) provides that orders made by the Commission can be appealed to the High Court.<sup>82</sup>

As a last resort, the most powerful tool of enforcing human rights standards is a court decision. A small number of national institutions can *intervene in*

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<sup>78</sup> Letter from Justice V.S. Malimath, Member of the Indian National Human Rights Commission, 28 December 1998.

<sup>79</sup> Indian National Human Rights Commission, Annual Report, 1996-97.

<sup>80</sup> The Protection of Human Rights Act, National Human Rights Commission, India, 1993, chapter III, art. 13, 1.

<sup>81</sup> Letter from Justice V.S. Malimath, *ibid.*

<sup>82</sup> Ugandan Constitution, 1995, section 53(2) and 53(3).

*court proceedings* (Australia, Canada, India). In 1990, the Australian Commission formally resolved to seek leave to intervene in one case only. "In this case, the Commission presented oral submissions and assisted the court in the role of *amicus curiae*, or 'friend of the Court'. ... The parents of a young girl with an intellectual disability had applied to the Court for appropriate orders relating to the authorisation of surgery for the sterilisation of the child."<sup>83</sup> However, in 1997 and 1998 the Australian Government announced the Human Rights Legislation Amendment Bill (one and two), intending to change the legislation governing the Commission. One of the proposed changes is to make the Commission's power to intervene in court proceedings subject to approval by the Attorney-General. The Commission responded to this proposal by presenting "a submission to the Senate Legal and Constitutional Legislation Committee which argues that the removal of the Commission's power to intervene in proceedings before the Courts and the failure to provide transitional provisions compromise the Commission's independence and integrity".<sup>84</sup> The draft also contains a proposal for an extension of the power of the Commission by suggesting the creation of the role of *amicus curiae* for all commissioners in proceedings under the amended legislation that are before the Federal Court.<sup>85</sup>

In 1996-97, the Indian Commission asked for permission to intervene in court proceedings in a case on alleged abduction and killing of an advocate by security forces.

"The High Court of Jammu and Kashmir permitted the Commission to intervene in the pending proceedings and, since then, the Commission has placed the report of its team before the High Court ... The case is pending."<sup>86</sup>

In a few countries, tribunals are established in relation to national

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<sup>83</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report, 1989-90, p. 35.

<sup>84</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report 1997-98, p. 24, 70 and 71.

<sup>85</sup> *Ibid*, p. 71.

<sup>86</sup> Annual Report, National Human Rights Commission, India, 1996-97, p. 80.



institutions. In Canada and New Zealand, the Human Rights Act's provide for the establishment of Human Rights or Equal Opportunity Tribunals that work closely with the commissions.<sup>87</sup> In *Canada* the Canadian human rights tribunals and courts ordered in 1993 a number of civil organisations to stop making available to the general public recorded hate messages concerning "recent immigrants, jews, lesbians and gay men. When some of those responsible refused to comply with a court order, they were sent to jail."<sup>88</sup> Their imprisonment was enacted by the court following from their lack of compliance with a decision by the Tribunal which has the force of a court order. Whether the goal of stopping the activities of such groups has been achieved can, however, be questioned. Reportedly, "after a lengthy proceeding initiated by the Commission, one of these groups announced the closure of its Toronto-based telephone hotline. It has, however, announced its intention to utilize the Internet to continue disseminating its message."<sup>89</sup>

### **1.5 Examples of specific human rights focus**

The focus of national institutions varies to some degree. Concentration on civil and political rights and the rule of law is found in all countries examined. Specific focus on economic, social and cultural rights is only clearly expressed in the mandate of a few national institutions such as the Indian, Ghanaian and South African commissions. A particularly strong focus on non-discrimination, equal opportunities and vulnerable groups' rights, reflected in the legislation of the institutions, is found in countries with a history of institutionalised discrimination or systems of inequity (Australia, Canada, India, and New Zealand).

While the concrete outputs of the activities of national institutions can be easily verified, the long term achievements and impact on state, laws and

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<sup>87</sup> The Canadian Human Rights Act, RSC., 1985, c. H-6, June 1998, art. 48 (1) and The New Zealand Human Rights Act 1993.

<sup>88</sup> Human Rights and the Canadian Human Rights Commission, Equality, 1996, p. 17; The Commissions Annual Report of 1997, p. 13.

<sup>89</sup> Ibid, p. 13.

society are difficult to assess because numerous other factors influence the developments in this field. In the following, we give examples of outputs and results achieved by various national institutions, structured according to categories of human rights. This exercise aims at indicating differences in performance that can partly be derived from differences in the mandate and institutional framework. It does not, however, pretend to be exhaustive or conclusive.

### **1.5.1 Examples of focus on non-discrimination and equal opportunity**

National institutions in Australia, Canada and New Zealand focus particularly on non-discrimination, equal opportunity rights and vulnerable groups such as indigenous peoples. While the Commissions of Australia and New Zealand rely on international law, the Canadian Commission relies on domestic legislation.<sup>90</sup> The powers of the Australian Commission take their point of departure in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Human Rights and Equal Opportunity Commission Act 1986 and the Disability Discrimination Act 1992. In the jurisdiction of the Australian Commission, nineteen grounds for resolving complaints of discrimination in employment and occupation are listed.<sup>91</sup> The powers of the New Zealand Commission are defined in the Human Rights Act 1993 listing grounds for unlawful discrimination. In addition, it provides for positive measures that can be taken to ensure equality.<sup>92</sup> In the Canadian legislation, grounds for discrimination are more explicitly spelled out than the formulations in most international instruments. Types discrimination, listed in international standards, are sometimes excluded. However, such clear-cut legislation establishes a precise field of competence of complaints

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<sup>90</sup> The Canadian Human Rights Act, R.S. C., 1985, c. H-6. June 1998 is by one author described as 'purely domestic legislation' but with expressed clear recognition of the relevance of international instruments. Brian Burdekin, Human Rights Commissions, Workshop in Paris, 1991, p. 114.

<sup>91</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report, 1989-90, p. 29.

<sup>92</sup> Section 73 of the Human Rights Act 1993 provides measures to ensure equality.

handling national institutions by which precedence in individual and principal cases can be established. Supported by a strong institutional framework, this will eventually result in standard setting and thus make an impact on state and society.

In the Canadian Human Rights Act, by which the *Canadian Human Rights Commission* is established, the prohibited grounds for discrimination are very clearly defined. They include, beyond grounds normally defined in international human rights law, 'age', 'sexual orientation', 'marital status', 'family status' and 'disability'. However, 'language', 'political or other opinion', 'social origin', 'property' and 'birth' (as found for instance in article 2.1 of the Universal Declaration and article 2.1 in the International Covenant of Economic, Social and Cultural Rights) are not included in this Act.<sup>93</sup> Most of these rights (except 'property' and 'birth') are, however, prohibited grounds in a number of or in all the ten provinces and two territories depending on the specific issue dealt with. There are, in other words, differences between those grounds for discrimination prohibited explicitly in relation to different areas covered and the standard setting in the provinces. 'Language' is, for example, accepted as a prohibited ground for discrimination in employment in two provinces, whereas disability is a prohibited ground in general.<sup>94</sup>

In 1997, the Canadian Commission completed 2,025 complaints. Some 300 were referred to alternate redress mechanisms, 200 were settled, some with the assistance of a conciliator, and 24 complaints were referred to a hearing before the Canadian Human Rights Tribunal. The remaining 1,500 were

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<sup>93</sup> Canadian Human Rights Act, RS.Co, 1985, c. H-6. June, 1998.

<sup>94</sup> In the jurisdiction of the Australian Commission, nineteen grounds for resolving complaints of discrimination in employment and occupation are outlined. Human Rights and Equal Opportunity Commission, Annual Report, 1989-90, p. 29. The powers of the New Zealand Commission are set out in the Human Rights Act 1993. After its establishment in 1978, the Commission emphasized discrimination against the individual citizen and women. The Commission in its first annual report emphasized that the women's movement recommended the establishment of the body. Annual Report of the Human Rights Commission for the year ended March 1979, New Zealand, p. 4.

unfounded, withdrawn, or not treated for other reasons.<sup>95</sup> Another achievement in 1997 was the Human Rights Tribunal's decision that "found evidence of systemic discrimination in one federal department."<sup>96</sup> While no immediate effect on the conduct of the federal department has been documented, the Commission reports that it "expects to see improvements

in the government's record, particularly in light of the new Employment Equity Act."<sup>97</sup>

On the impact side, in 1995, "a Human Rights Tribunal ruled that a federal department discriminated against two scientists of Asian descent who applied for positions as drug evaluators. The Tribunal found that the men had been discriminated against on the ground of race. In its decision, the Tribunal said both were qualified for the jobs and after the department refused to hire them, it continued to look for applicants that had the same qualifications as the two candidates."<sup>98</sup> The two complainants were awarded lost wages and directed that they be given the first available jobs as drug evaluators.<sup>99</sup> An example of a structural change brought about by a decision of the Human Rights Tribunal is the change of the Elections Act in 1992. The Act sets standards for the participation of people with disabilities in elections. According to the Act, "all polling stations and polling booths must be accessible to people with disabilities."<sup>100</sup>

### **1.5.2 Examples of focus on vulnerable groups' rights**

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<sup>95</sup> Canadian Human Rights Act, R.S., 1985, c. H-6. July, 1996.

<sup>96</sup> Canadian Human Rights Commission, *Celebrating our Progress, Facing our Future*, 1998, p. 3.

<sup>97</sup> *Ibid.* p. 3.

<sup>98</sup> *Human Rights and the Canadian Human Rights Commission, Equality*, 1996, p. 16.

<sup>99</sup> *Ibid.* p. 16.

<sup>100</sup> *Ibid.* p. 17.

A number of national institutions such as the Australian Commission and the Danish Centre regularly analyse the human rights situation of vulnerable groups such as children, the aged, those with senile dementia, minorities, indigenous peoples, migrant workers, asylum seekers and refugees.

*The Australian Human Rights and Equal Opportunity Commission* deals directly with legislation based on and incorporating international human rights instruments.<sup>101</sup> This includes conventions as well as declarations such as the Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the Declaration on the Rights of Persons with Disabilities, including persons with mental disabilities, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief and the ILO Convention against discrimination in employment and occupation.<sup>102</sup> The Commission carries out education, information and promotional activities and is empowered to hear individual complaints and to intervene in court hearings.

One specific characteristic of the Australian Commission is that it has developed a profound tradition of convening public inquiries focussing on vulnerable groups. Prior to the holding of the inquiries extensive research and consultations with individuals and organisations are conducted. The subjects have included a national inquiry into homeless children, a local inquiry on lack of services to particular Aboriginal communities, an inquiry on racist violence, a localised inquiry on health services to an Aboriginal community and a national inquiry on the rights of people with mental illness.<sup>103</sup> The output of these hearings has been a series of reports with recommendations to the Australian Government and local authorities on measures to be taken to remedy the shortcomings of rights and access to services. In the Annual Report of 1989-90, the Australian Commission reports significant initiatives announced by the Federal Government as a

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<sup>101</sup> Brian Burdekin, *Human Rights Commissions*, Workshop Paris, 1991, p. 110.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*, pp. 124-125.

result of the inquiry into homeless children. Its 1989-90 budget, outlined in the report 'Towards Social Justice for Young Australians' "commits the government to an expenditure of \$100 million over four years for services and accommodation for homeless and disadvantaged young people."<sup>104</sup> In its Annual Report of 1997-98, as the result of another series of hearings, the Commission reports that the Minister for Aboriginal and Torres Strait Islander Affairs in 1997 announced "a package providing \$63 million to be

delivered over four years. The response targeted health, counselling services and family reunions [children with their families. Authors note]."<sup>105</sup>

In relation to vulnerable groups, *the Danish Centre for Human Rights* has in a number of cases successfully managed to impact the adoption and amendment of laws. One example thereof is a memorandum submitted to the Ministry of Justice in 1997 on two laws concerning the law on names and the law on adoption in relation to the hearing of children and minors. Here, the Centre stressed the need to ensure compliance with all relevant sections of the Convention on the Rights of the Child to which Denmark is a party. The Ministry directly referred to the intervention of the Danish Centre in the *travaux préparatoires* to the Bill covering these amendments.<sup>106</sup> Another example, also from 1997, relates to a similar memorandum relating to the appointment of legal guardians for persons suffering from mental disorders. In this case the Centre stressed that in order to ensure compliance with fundamental human rights principles the point of view of individuals should actively be sought by the administration in spite of their health condition.

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<sup>104</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report, 1989-90, p. 26.

<sup>105</sup> Human Rights and Equal Opportunity Commission, Australia, Annual Report 1997-98, pp. 25-26.

<sup>106</sup> Report of the Expert Committee on Childrens' Law under the Ministry of Justice, (Børnelovsudvalgets Betænkning) no. 1350, Copenhagen, 1997.

The recommendations were followed by the Directorate for Civil Law.

The Danish Centre for Human Rights has also been active through its researchers in relation to administrative preventive detention of asylum seekers in Denmark. Following the arrival of an increased number of asylum seekers from Eastern Europe, which caused problems at the asylum centres and in the community, the police restricted the freedom of movement of a number of them, primarily young men. This practice was authorised by the municipal Court as well as by the High Court of Eastern Denmark, in spite of the fact that the relevant law pertaining to asylum seekers did not provide for this. The Centre's researchers addressed the issue in a memorandum to the Ministry of Justice in March 1995, questioning the practice as a violation of section 5 on the right to personal liberty and section 14 on freedom from discrimination in the European Convention on Human Rights.<sup>107</sup> Following this argumentation by the advocates that the practice went beyond the limits of the law in these cases, the High Court changed its position accordingly and declared the practice invalid in January 1995. As a consequence, the Parliament introduced the necessary legislation in 1995<sup>108</sup> without solving the basic conflict with the European Convention on Human Rights. The issue is still being addressed by the Centre.

Another area, also in relation to the laws concerning asylum seekers, where the Danish Centre for Human Rights has played an important role, concerns the introduction of the so-called "lunch box arrangements" in July 1998.<sup>109</sup> According to this arrangement, asylum seekers deemed unwilling to document their identity shall be "motivated" to do so. The chosen method involves keeping them on a tight leash by providing them twice a month with a box of food and essential toiletries, instead of a financial allowance including pocket money which is normally given to asylum seekers and consistent with basic respect for individual dignity, privacy and choice. An

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<sup>107</sup> "Note concerning administrative detention of asylum seekers from Eastern Europe" (Danish), The Danish Centre for Human Rights, March 1995; see also Kim Kjær in *Ugeskrift for Retsvæsen* 94B, p. 457ff.

<sup>108</sup> Law no. 282 of 14 June 1995.

<sup>109</sup> Law no. 473 of 1 July 1998.

example of its application was in relation to an asylum seeker suffering from the consequences of “ethnic cleansing” in former Yugoslavia, who simply lacked a passport, and was therefore deemed to be “uncooperative”. A newspaper article by a researcher in July 1998 led to the raising of the issue in Parliament, where the Minister of the Interior was asked to comment on it. He replied in September 1998 that the duty of cooperation only entered into force upon arrival and that examples such as the one mentioned above did not constitute sufficient grounds for assuming lack of cooperation, hereby contradicting the position taken by the authorities in the initial cases. The very same day the Ministry reviewed a case on this matter and changed its decision so as to conform to the recommended approach.

### **1.5.3 Examples of focus on civil and political rights**

The *Mexican National Commission for Human Rights* has as its primary focus the civil and political rights, even though it is not competent to deal with electoral questions, but also to a lesser extent occupies itself with other rights. The Commission is a good example of a national institution which gets results as well as has an impact. Still, it can only issue recommendations for administrative investigative action and, depending on the result, ask that a preliminary verification is processed by the Prosecutors’ Office which can then bring the matter before the judge.<sup>110</sup>

In the Annual Report 1997/98, the Commission reports that it has issued 1,315 recommendations during the last eight years, of which 931 have been complied with by the authorities, which should be seen in light of the fact that during the same period the authorities have taken actions against 3,029 public servants.

The Commission also criticises governments of various states for failing to comply with its recommendations, stating that “this aids and abets impunity; it

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<sup>110</sup> Letter from the Executive Secretary, Mr. Ricardo Camara, Mexico City, March 2, 1999.



protects, covers, ignores or tolerates the public servants who, (...) fail to keep to their legal mandate.”<sup>111</sup>

In 1997/98 the Commission reports that it completed six studies <sup>112</sup> and concluded 8,706 complaints. The main reasons given for the complaints were “unjustified denial of the benefits of the law to inmates of prisons, delay or administrative negligence in the jurisdictional process, refusal of the right to petition, illegal exercise of public power and arbitrary arrests”.<sup>113</sup> 58 complaints concerned torture where, as a “result of the recommendations issued on this matter (...) 24 public servants were handed over to a judge”. “In compliance with the recommendations of the commission, sanctions or criminal action has been brought against 287 public servants”<sup>114</sup>. Out of these, 48 public servants were handed over to a judge.<sup>115</sup>

In cases of alleged disappearances, the Commission reportedly made field trips to 28 states. 64 cases were cleared up out of which 51 reported disappeared persons were found alive. There is evidence that the remaining are dead. The Commission reported their findings to the United Nations Working Group on Forced or Involuntary Disappearances.<sup>116</sup> In addition, the

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<sup>111</sup> National Commission for Human Rights, Annual Report of Activities, Mexico City, May 1997-May 1998. Please note that quotations are taken from a synthesis and that the notes therefore do not coincide with those in the final Annual Report.

<sup>112</sup> On Mexican migrant Women; Elderly People; Latin American laws on the rights of the indigenous peoples in 16 countries; draft bill for setting up a Centre for victims of Crime; draft bill on Reforms to the Penal Code for the Federal District in matters of Common Law; Comparative analysis of local and international legislation on women and children. Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Out of the 48 public employees, 22 were members of the Federal Judicial Police, 12 of the State judicial Police, six military personnel, three of the Federal Highway Police, two of the Prosecutor’s office for State law, two from the Institute for Social Security and a former Mayor. Ibid.

<sup>116</sup> Ibid.

Commission carried out inspections on its own initiative and visited detentions and psychiatric hospitals. As a result of these visits, a number of recommendations were issued to various public authorities. The cooperation with the prison authorities on a programme of visit resulted in the release of 95 prisoners who had the right to an early release.<sup>117</sup>

The Commission seems to have attempted to play a role in relation to conflict resolution. In the troubled Chiapas province, the local office of the Commission in the last year processed 364 complaints, “of which 300 were concluded, for the most part through conciliation ... in favour of victims of human rights violations”<sup>118</sup>. The Commission recommended measures that all “were accepted by the state authorities” of Chiapas.<sup>119</sup> They included removal of twelve public higher level servants and proceedings started against them, indemnification of the victims or their relatives and compensation, the initiation of support to food productivity, health care, education etc., an administrative audit of the State Attorney General for Justice, and the judicial authorities issuing 111 arrest warrants out of which 101 were executed before May 1998.<sup>120</sup>

#### **1.5.4 Examples of focus on economic, social and cultural rights**

The *Indian National Human Right Commission*, *The Danish Centre for Human Rights* and *The South African Human Rights Commission* focus on civil and political rights<sup>121</sup>, vulnerable groups rights<sup>122</sup> as well as on

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<sup>117</sup> Mexican National Commission for Rights Commission. Annual Report May 1997 -May 1998, Mexico City 1998.

<sup>118</sup> Ibid.

<sup>119</sup> Recommendation 1/98 sent to Governor of the State of Chiapas and to the Attorney General of the Republic, letter from the Executive Secretary, Ibid, and Annual report, Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> In 1996-97, the Indian Commission completed 16,823 complaints. Out of 6,394 complaints considered, 888 were on custody and 1,643 on the police. The remaining complaints were unfounded, withdrawn, or not treated because of lack of evidence. An example of an outcome is that out of 259 cases registered against members of the border security force and the army, 81 were punished, including

monitoring the implementation of economic, social and cultural rights. While results of remedying acts of discrimination against individuals and of violations of civil and political rights can be measured immediately, fulfilment of economic, social and cultural rights primarily depend on political will and initiatives and on long term investments. The matter in this area is therefore far more difficult to evaluate. Judicially oriented national institutions primarily deal with these types of rights in the form of recommending political initiatives to be taken on an overall level. This includes providing access to education, health and housing as well as recommending changes of laws, rules and regulations for certain groups in society or giving them access to these rights. Until now, it seems that individual cases on economic and social rights have only rarely been dealt with by complaints handling national institutions.<sup>123</sup>

*The National Human Rights Commission of India* is probably one of the national institutions that have given most consideration to economic and social rights.<sup>124</sup> The Commission links the issue of child labour with the right to compulsory education free of charge based on a supreme court decision in the state of Andhra Pradesh which has made the right to education justiciable.<sup>125</sup> In addition, another Supreme Court decision in Tamil Nadu

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29 officers. The Commission also drafts laws (such as a model prison bill), carries out education, and, in relation to complaints handling, has the power of a court. *Ibid.*, p. 12 and p. 136.

<sup>122</sup> Which is particularly dealt with by the National Commissions for Minorities, for Scheduled Castes and Scheduled Tribes, and Women, all members of the Indian National Human Rights Commission.

<sup>123</sup> Regional and national courts are increasingly dealing with this type of cases. See Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights, A Textbook*, Martinus Nijhoff Publishers, 1995.

<sup>124</sup> The Annual Report of the National Human Rights Commission of India mainly emphasises problems faced and makes recommendations to the central and state governments. Thus, it does not emphasize results obtained.

<sup>125</sup> Andhra Pradesh Supreme Court, 1993-ISC645. "Article 45 of the Constitution, directing the providing of free and compulsory education for all of the children of India until completion of the age of 14 years, [must] be treated as an enforceable

confirmed this decision and added a set of recommendations for the implementation of these decisions, including a fine for employers using child labour.<sup>126</sup> On the basis of these court decisions as well as on reports on government officials employing child labour as domestic servants, the Commission in its Annual Report 1996-97 recommended to the Central and State Governments that they incorporate and prohibit such employment in the rules of conduct of government servants. Eight states agreed to this recommendation and prohibited employment of child labour as domestic servants. So far the Central Government has not agreed to the recommendation. It has, however, on renewed request from the Commission agreed to re-examine the matter.<sup>127</sup> The combination of the High Courts' decisions and the Commission's recommendations, reflecting a strategy of reaction as well as prevention, has beyond any doubt lead to extremely significant results.

*The Danish Centre for Human Rights* has included as one of four areas of competence in its newly adopted Strategic Plan of Action "Human rights and cultural practices". In addition a senior researcher has been appointed to cover the area of economic, social and cultural rights.

The *South African Human Rights Commission* is explicitly mandated to monitor economic, social and cultural rights, i.e. the right to access to education, housing, health care, food, water, social security and a clean environment.<sup>128</sup> In reinforcing the protection of these rights, the Commission must investigate, report and carry out research on the observance of economic and social rights, take steps to secure appropriate redress where these rights have been violated and educate organs of state and members of the public on the need for the protection and promotion of these rights. In addition, the Commission must, each year, request relevant organs of state to

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fundamental right." National Human Rights Commission, India, Annual Report 1996/97, p. 38.

<sup>126</sup> Tamil Nadu Supreme Court, AIR 1997 SC 699. Ibid, p. 38.

<sup>127</sup> Letter from Justice V.S.Malimath, ibid.

<sup>128</sup> Sections 24, 26, 27, 29, 28 (1c), 35 (2e) of the Constitution of the Republic of South Africa of 1996.

provide it with information on the measures they have taken towards the realisation of socio-economic rights.<sup>129</sup>

In relation to the monitoring process in 1997/98 the newly established Commission developed questionnaires and guidelines in order to assist state organs in fulfilling their reporting obligations. The Commission analysed the responses and made a report on the state's realisation of economic and social rights in South Africa. In addition, the Commission conducted a survey on the public perception of social and economic rights in South Africa and held public 'poverty hearings' in many parts of the country. It also held several consultative and educational workshops for government official and civil society organisations. Internally, the Commission has established a disability committee and a committee on children's rights.

Since the Commission's monitoring of economic and social rights is new, it is not possible to measure the output of this specific function of the Commission. So far, complaints relating to economic and social rights have not been subject to legal procedure and the work has mainly focussed on the research and educational aspects.

#### **1.5.5 Examples of focus on civil, political, economic, social and cultural rights**

*The Commission on Human Rights and Administrative Justice in Ghana* focuses primarily on investigation of complaints, on education in human rights and on making proposals for the Government on improvements in legislation. It is interesting to note that the emphasis in its Constitution is on both civil and political rights and on economic, social and cultural rights. The outputs reflect a focus on both types of rights such as labour rights and cultural practice in conjunction. The power of investigation is rather wide and encompasses the public sector, including the armed forces, the police and prison service, the investigation of corruption, and the private sector. In addition, the Commission has the power to restore "to any person any property confiscated by or under the authority of the Armed Forces

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<sup>129</sup> Ibid, Section 184.

Revolutionary Council and the Provisional National Defence Council under certain specified conditions”.<sup>130</sup> If a decision of the Commission is not complied with, it also has the power within three months to approach any Court on the matter.

Since 1993, the Commission has dealt with 8,775 cases out of 12,409 received. Among these, 40-50 percent are resolved by mediation. In the vast majority of the remaining cases, the recommendations of the Commission reportedly are accepted and implemented by the respondents. In 1996, the Commission received 5,200 petitions out of which 2,209 were labour-related<sup>131</sup> such as dismissals, salary issues, and termination of employment. The Commission has intervened in a number of cases of unlawful detention, confiscation of property by the Government without due compensation, gender discrimination, and women’s and children’s rights issues. It conducted a nationwide inspection of police cells and prisons, and issued a report on its findings. Reportedly, following the recommendations of the Commission, significant reforms were introduced by the Government, such as the increasing of feeding allowances for prisoners by 300 percent, the transfer of children to other institutions and the reviewing of sentences of selected inmates. With regard to a customary practice of keeping old women considered to be witches in so-called ‘witches’ homes’, the Commission has undertaken educational programmes in the relevant local communities. Finally, the Commission investigated allegations of corruption (illegally amassed wealth) against top government officials. As a result, two ministers and a staff member of the presidential office resigned and an investigation of another two was still pending in April 1998.<sup>132</sup>

## 1.6 Conclusion

In choosing our methodology two factors have been particularly important,

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<sup>130</sup> Third Annual Report, Ghana, 1996.

<sup>131</sup> Emile Francis Short, *The Commission on Human Rights and Administrative Justice in Ghana*, April 1998, p. 12 and *ibid*.

<sup>132</sup> *Ibid*, p. 1-19.

namely the availability of material as well as the issues raised by the contents. In relation to the first factor, the normative aspect has been reviewed through various United Nations materials, handbooks, resolutions and reports. The illustrative examples of shortcomings and achievements have been taken from materials produced by the various institutions themselves, recognising that an objective statistical and in-depth study could not be carried out on this basis.

With regard to the second factor, we have chosen to focus primarily on the section in the Paris Principles addressing the issue of independence of the national institutions, including criteria for appointment of staff, pluralism in their representation and financial autonomy. In addition, we have looked at other sections of the Principles addressing the legal foundation, activities and areas of competence and powers in relation to reception and treatment of complaints by the national institutions. Finally, we have examined the focus of the institutions on various categories of human rights.

The background for the development of national human rights institution was the United Nations' and its member states' need for an institution instrumental in servicing the United Nations system with information and, with the development of the Paris Principles, in promoting and protecting human rights standards at the national level. At the Vienna Conference in 1993, the importance of implementation through national institutions was further recognised and expressed in the Vienna Declaration and Programme of Action. Since its establishment in 1995, the Office of the High Commissioner for Human Rights has played a central role - through the position of a Special Adviser - in promoting the states' establishments of these institutions.

Between 1946 and 1993, a smaller number of national institutions and human rights commissions were established, parallel to the development of the Paris Principles. There was at this stage no clear distinction between the various types of institutions concerned with human rights established by the state. The efforts of evolving the criteria during this period is reflected by the fact that in the later part of this period, more institutions independent in their decision-making powers were established by constitution, by law or act of

parliament, or by decree. A few institutions such as the French Commission were re-established to conform to the Principles. The examples indicate that even though the legislative foundation is important to ensure the autonomy of the institutions, establishment by decree in itself does not exclude that the Commissions are functioning well. On the contrary, the examples of Nigeria and Indonesia indicate that these institutions seem to function well given the very difficult political environments.

The development and normative changes following from the Paris Principles are reflected in the strengthening of the appointment procedures of leading members. Examples are the Commissions in El Salvador and Guatemala which had among their leading members in the 1980s representatives of state institutions which themselves had violated human rights. These commissions today would not meet the standards as formulated in the later Paris Principles. As the examples show, national institutions such as the Indian, the Ghanaian and the Nigerian have proven able to address human rights issues in a professional manner. One reason for the success is the objective and professional appointment procedures combined with the institutions' independence in decision making procedures. It is also shown that new national institutions such as the Latvian with no objective appointment procedures tend to make rather political appointments leading to a politicised human rights approach.

The preliminary review indicates that there is a strong relationship between the institutional framework and capacity on the one hand and the output of these institutions on the other hand. Criteria for appointment and dismissal of leading members and staff, representation of civil society and vulnerable groups in the governing bodies, guarantees of independent, objective and professional decision-making procedures, financial autonomy, combined with courage and vision, are determining factors for the likely outputs and achievements. The examples of Nigeria and Indonesia are illustrative of national institutions that no observers expected to be able to function according to their mandates but which actually do professional work and seem to fulfil the Paris Principles.

Still, this depends to some extent on the type of government and state institutions in the particular countries. The political and historical context of any state establishes outer limitations to the functioning of national



institutions; they would rarely be found and be seen to be effective and autonomous in a society with no traces of pluralistic governance and rule of law. Consequently, no national institutions are found in countries with no separation of powers such as the remaining communist states. Another important condition for a well-functioning national institution is the existence of a vibrant civil society that can cooperate with but also act as a watch-dog over national institutions. While almost all institutions examined fulfil the criteria of the Paris Principles, there is still room left for adaptation to the particular context. It is therefore not possible to conclude that one model is better than another: a margin of choice should be left to the individual state to establish an institution suited to the particular context.

We can conclude that the institutional framework of the early established national institutions has served as a model and a source of inspiration for the development of the Paris Principles - in particular the Australian Commission; that some of the early established national institutions have developed quite elaborate criteria while some of the newly established ones have not; and that objective appointment procedures for leading members ensure greater independence in decision-making from party politics and political interests. With regard to a pluralistic representation of society in the leading bodies this representation usually is indirect so that vulnerable groups most often are not directly represented but indirectly through a commissioner appointed by the state or through non-governmental organisations looking after their interests. Also, not all major types of vulnerable group are represented in the governing bodies of any national institution (the homeless, children, etc.).

While financial autonomy of national institutions is crucial for their ability to be independent in decision-making of government interests, the autonomy in itself does not ensure a high quality of work seen in relation to the resources allocated. The material reviewed does not indicate that funding channelled through the parliament, a trust fund or through a ministry alone secures more or less independence in decision-making, which can also be said for the sufficiency of funding in itself. On the contrary, compared to similar institutions in other countries, institutions critical towards receiving funding through ministries, in fact seem to be relatively well funded in terms of the number of staff members. Independence in decision-making relies as much on the professional capacity and accountability of leading members

and staff, and, in particular, detachment from politics. Sufficient basic funding, however, is still a necessary precondition.

National institutions focus on a broad range of promotional activities and on the creation of conditions for implementing human rights at the national level. Here, they differ from traditional international non-governmental organisations such as Amnesty International, Human Rights Watch, etc., which concentrate exclusively on monitoring human rights violations. In this context, it should be noted that the word 'monitoring' is not used in the Paris Principles or in the various United Nations declarations and documents in this field - perhaps in order to avoid national institutions concentrating their efforts on documenting human rights abuses instead of on implementation. It could, however, also be seen as a reflection of the fear states may have of criticism from such institutions.

The function of protection includes the power to receive, investigate and settle disputes and claims of human rights violations. Most institutions examined have that capacity. They differ in that some institutions have a mandate to go beyond recommending settlements and into passing legally binding decisions. National institutions in many cases provide a vehicle for

conflict resolution which is cheaper, faster, more accessible, and thus more effective for the individual as well as for society.

Focus on civil and political rights, non-discrimination and equal opportunities for various vulnerable groups show the most immediate results, for example in relation to the number of persons held legally responsible for human rights violations. National institutions mainly seem to resolve the immediate conflicts by mediation, pinpointing structural or legal problems or, in a limited number of cases, by bringing cases to courts. However, there are also examples (Australia, Mexico and India) where the efforts of national institutions have led to major government initiatives directed at structurally changing the situation of vulnerable groups.

Focus on economic, social and cultural rights is perhaps the weakest part of the efforts of national institutions. Except in a few countries such as Australia, Denmark, Ghana and India, documentation of outputs or achievements in this area is not found. However, the documentation

indicates that national institutions have a potential for influencing the development in this field through promoting these rights as mandatory and absolute. In this work they have used public hearings, research, dialogue with the authorities or court decisions - making these rights judiciable - to underpin their efforts.

Finally, there is a number of relevant questions that cannot be dealt with within the limits of this article. They include questions such as the degree of access of vulnerable groups and the public to the national institutions, which are not specifically addressed in the Paris Principles, but which in the concrete situation will have a decisive influence on the functioning of the institutions in their respective societies.

It is difficult to sum up the main achievements of national institutions because of their very different history and the context in which they operate. Each institution has chosen a broader or narrower focus, dealing with very different problems and on the basis of various rights and standards. Nonetheless, it is possible to conclude that not only has their number increased in later years, and will continue to do so in the near future, but most of them have also been able to show concrete and constructive results from their work. By keeping the dialogue on how to improve human rights constantly open, this has had an immediate effect on those groups and individuals directly involved but also on their society. The next decades will show how much impact national institutions can make on the states protection and promotion of human rights.

## CHAPTER 2

# THE EFFECTIVENESS OF NATIONAL HUMAN RIGHTS INSTITUTIONS<sup>1</sup>

*Mohammad-Mahmoud Mohamedou*

### 2.1 Introduction

National human rights ‘institutions’ come in all shapes and sizes – human rights commissions, Ombudsmen, *Defensores del Pueblo*, Procurators for human rights, national advisory commissions on human rights, national anti-discrimination commissions, and so on. Excluding government departments and non-governmental organisations, they can best be defined as quasi-governmental or statutory institutions with human rights in their mandate. Autonomy and independence are fundamental to such institutions with the independence of the human rights institution from the executive branch of government generally regarded as the essential precondition for its effective functioning and credibility. Provided that it meets these basic standards of independence and impartiality, eventually, it is the practice and the performance of the institution as it performs that determines its effectiveness, and thus the perception that others – locally and abroad – have of it.

Largely, the variety of institutions is a function of the political circumstances in which they were formed. Whether a NHRI was created at a moment of transition to protect against a return to the human rights abuses of the past, or when a government under pressure over its human rights record establishes

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<sup>1</sup> This article is derived from *Performance and Legitimacy – National Human Rights Institutions* (2000), a report on a project conducted by the ICHRP in 1998-2000 for which Richard Carver acted as Lead Researcher.

such an institution in order to be seen to be doing something to address the problem, or yet again when a democracy decides to set up a commission to deepen its commitment to human rights and strengthen existing mechanisms, makes a significant difference. National human rights institutions are often developed in consonance with the political and institutional traditions of their country.

In October 1991, guidelines were agreed in the wake of an International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris. These so-called ‘Paris Principles’ recognised that national institutions should be formally established, that they must have some form of guarantee of independence, and that they ought to be distinguished from an ad hoc body. The Principles also outlined the commissions’ mandate with regard to the following activities: (i) publicly promoting human rights, (ii) advising governments on protection of human rights, (iii), reviewing potential human rights legislation, (iv) assisting governments in the preparation of reports, and (v) receiving and investigating complaints from the public or other bodies of alleged human rights violations.

From that period onwards, much of the research on NHRIs – including material produced by the institutions themselves, as well as literature propagated by international human rights NGOs – has been revolving around these Principles. To be certain, the Paris guidelines are an essential minimum as well as a useful roadmap. However, the debate around them has been largely normative and legal in character – not sufficiently analytical, international, and comparative. More importantly, the broader societal dynamics and the effectiveness of the institutions have been aspects absent from the discussion.

Although the credibility of national human rights institutions depends ultimately on their ability to earn and retain the trust of the public – whose interests they have been created to serve – their societal legitimacy is not understood adequately. It is particularly critical to find out, secondly, whether poor people and groups who are especially vulnerable to abuse are being protected by a national human rights institution. The crucial measure of the effectiveness of an institution, it would seem, resides in its capacity to

respond to the needs of those sections of society at risk of human rights violations.

## 2.2 Legitimacy

A constitutional foundation remains the foremost guarantee of legitimacy for national human rights institutions. The more fundamental the legal basis of the institution, the greater its public legitimacy is likely to be. Yet that is not sufficient. Legitimacy has to be won. Acquiring legitimacy – and retaining it – depends on three elements. First and foremost, the issue of *appointment* is a crucial marker of the institution's independence. Second, the *activity* of the institution, i.e., what it does, whom it serves, and what it focuses on, is an essential element of its legitimacy. Thirdly, the legitimacy of a NHRI is determined by the institution's ability to *help* those that seek its assistance.

It would seem tautological to assert that the personnel of a NHRI is key to its good performance. But it is not. The quality of the institution's staff is highly decisive. To have any credibility, the membership of the institution will need to be respected and independent. The institution's leadership has to gather experience and courage to be more independent of government in its functioning. Independence, public legitimacy and accessibility are all increased if there is diversity in the membership of a NHRI, including adequate representation of minority sectors.

A number of commissions demonstrate a tendency to regard complaints as discrete matters to be settled to the satisfaction of the individual complainant. This perception prevents the staff from understanding the cases before them as symptomatic of more systemic human rights problems. An individual complaint should be resolved in a manner that has an educational and preventive function as well as simply resolving the complainant's problem.

Some NHRIs have been enacting measures in that direction. For instance, in a case involving living conditions for migrant workers, the human rights commission of the state of Jalisco in Mexico has issued global recommendations addressed to various public authorities (the relevant municipality, the state government, and the ministry of health). By issuing a

recommendation to several different bodies, the commission was requiring them to take responsibility for protecting workers' rights.

The methods and style a commission adopts in settling cases is also an important marker of its identity. For many NHRIs, conciliation and mediation are the preferred methods of settlement. Friendly settlement is indeed a constructive problem-solving approach, but it should not be implemented systematically and, more importantly, to the detriment of the claim's merits *per se*. Legitimacy depends finally on an institution's ability to focus its activities on the areas of greatest need, and on vulnerable groups. Ultimately, for the complainant, a satisfactory resolution of his case is the most important measure of effectiveness.

Members of the public do not readily understand what constitutes a human rights issue. It is, therefore, crucial for the credibility of a national human rights institution that it be able to deal efficiently with whatever complaints are brought before it. An efficient complaint mechanism – free of costs, free of jargon, devoid of bureaucratic impediments, and with simplified procedures – is a means of ensuring accessibility to the most vulnerable sections of society.

The organisational culture of a national human rights institution should be suffused by the conscious implementation of a thematic programme. In so doing, the institution acts proactively rather merely reactively when processing complaints. The staff of commissions should always keep an eye on violations that reveal the existence of a systemic, society-wide phenomenon.

### **2.3 Accessibility**

The accessibility of a national human rights institution influences equally its legitimacy. An inaccessible institution is an ineffective one. Accessibility is assessed in relation to the *location* of the commission's offices, a commitment to *openness* and to a consultative approach, and the use of different *languages*.

An obvious yet often overlooked element of the accessibility of an NHRI is the location of its premises. These should not be in an upscale area of the city. Besides being inaccessible to many, these neighbourhoods actually deter poor complainants. More importantly, the commission should be on public transport routes. At issue here is both the actual remoteness of the institution – the physical distance could be a significant problem for a large segment of the population – and the perception that it is inaccessible.

The process of raising awareness of human rights is likely to lead to complaints being brought forward. (Sometimes, a low level of complaints can be an indication of a lack of public awareness about the commission's activities – if not existence.) For instance, the national office of the Indonesian national commission Komnas Ham is regarded as an informal and welcoming place that takes trouble to satisfy individual callers and process their complaints. This leads the population to co-operate with the commission, which then comes to be regarded as trustworthy.

The national institutions operating well are those that are able to communicate to the public in simple and readily understandable terms what they stand for and what their mechanisms are. This is particularly important in relation to the different vulnerable groups in the country. NHRIs need to be able to identify the different vulnerable groups in their society (children, women, indigenous or ethnic minority groups, prisoners, people with disabilities) and devise a way of working that enable them to reach out meaningfully to those groups. Thus doing, a NHRI sometimes has to confront local taboos or controversial cultural prohibitions. For instance, the Ghanaian Commission on Human Rights and Administrative Justice (CHRAJ) has managed to secure the release of a number of women and children that had been forced to endure *trokosi*, a traditional form of servitude and forced labour prevalent in the Volta region. This type of intervention is more effective when it is done in collaboration with civil society. In this case, the CHRAJ worked alongside a local NGO, International Needs Ghana. Similarly, in Mexico, the *Comisión Nacional de Derechos Humanos* is obliged by law to make its procedures as simple as possible to favour vulnerable groups. It has a specific unit within one of its four visitorships with responsibility for matters affecting women and children. The Indian and Latvian commissions have similar procedures.



The institutions also need the human and financial resources to act in ways that remedy the grievances of those groups. This implies that NHRIs have access to institutions within government and be in a position to interact with them from a strong position. To achieve this objective, institutions need to increase their contacts with civil society organs, and develop methods of working that encourage such access. International organisations that support NHRIs have a vital role to play in enabling NHRIs to strengthen their social accountability and institutional capacity in these areas, and in the area of planning.

## **2.4 Linkages**

The Paris Principles make specific reference to the linkages between national institutions and other bodies. It is, however, difficult to assess where a NHRI fits alongside all the other institutions and mechanisms that are essential to protect human rights – the judiciary, non-governmental organisations, the media, and international human rights mechanisms. This investigation seems to confirm the view that the effectiveness of a national human rights institution depends also on the institution's ability to open and maintain relations with a range of other institutions.

Effectiveness varies according to context. NHRIs stand at the crossroads of government and civil society. They occupy a no man's land. It is therefore vital for the credibility and effectiveness of NHRIs that they should define and delimit the space they occupy in relation to other institutions in the country, and in particular their place vis-à-vis the government and the judiciary, as well as civil society.

Locally, commissions interact with NGOs, groups from the voluntary sector, communities and community representatives, and a variety of vulnerable groups. In particular, collaboration between a NHRI and NGOs is crucial to the former's efficiency as NGOs can help channel complaints. A special effort should be made to distinguish NHRIs from NGOs. An NHRI has nation-wide statutory powers that no NGO enjoys. National institutions at their best act as a conduit through which the grievances of civil society are brought to the attention of government. They can only do so effectively if they stand somewhat apart from civil society.

National human rights institutions have to be carefully adapted to local circumstances. This contextualisation is key to achieving effectiveness. NHRIs have to recognise that they have an obligation to report to the public at large. However, it is not enough for an institution to be accountable. It must also be seen as being accountable. The perception of the commission determines its ultimate efficiency. In that regard, the commission must develop processes by which it publicises its work. A constructive, ongoing, and transparent relationship with the mass media is helpful in that regard. Well-circulated press releases, advertisements, and public statements have been known to increase a commission's publicity and moral pressure. For instance, the Indonesian commission, Komnas Ham, has managed its relationship with the local media rather efficiently.

At the national level, an NHRI works primarily with government agencies and departments in all branches, executive, judiciary, and legislative. People recognise that an institution that is directly created by the government is likely to belong to the government when it really matters. To achieve a constructive relationship, two elements are necessary; independence from the executive branch of government and accountability to the legislature. Accountability is partly about creating a line of authority that will ensure that the national human rights institution can fulfil its function without interference, and partly about ensuring that the public at large is able to see what the institution is doing and that it is doing it properly.

In particular, the institution's budget need to be debated, voted, and controlled by a public body in order to avoid budgetary constraints on the part of the executive. Annual reports by the national human rights institution, documenting all its findings and recommendations are another means to ensure accountability. Being open to scrutiny on a regular basis also improves the institution's effectiveness.

National human rights institutions should not be seen as an isolated solution to the problem of human rights violations. Consideration should be given to the interrelationship of the institutions in their functioning and to importance of not inhibiting the effective work of other institutions. A national human rights institution should not usurp the judicial function of the courts – although it may take on some of the investigative functions that would otherwise be the responsibility of security agencies such as the police, or the

prosecutorial arm of the administration or the judiciary. To avoid a situation, in which the NHRI substitutes itself for the judiciary, it is useful to allow the human rights institution the power to initiate cases before the courts, or to have a relationship with the prosecutorial authorities that automatically allow such cases to proceed. For instance, the Australian Human Rights and Equal Opportunity Commission has the authority to appear in court to support orders for the enforcement of its determinations.

NHRIs should cultivate and deepen their working relationship with a variety of organs of civil society, especially non-governmental organisations working either in the human rights field or with specific vulnerable groups. Such bodies should be represented in the membership of NHRIs, consulted regularly about the institutions' priorities and be regarded as partners in the day-to-day work of the institution. Collaboration, consultation and complementarity should be the essential characteristics of this relationship.

The creation and functioning of a national human rights institution should be a broad consultative process. Public consultation is key and failure to include target groups and the public in policy formation undermines the effectiveness and eventually the legitimacy of the institution. The fact that the Mexican *Comisión Nacional de Derechos Humanos* was set up hastily and unilaterally by the Mexican Government without consulting adequately human rights NGOs and other important civil society actors has hampered that commission's public legitimacy to this day.

The links that NHRIs have with international co-ordinating bodies is one of the important dimensions of their work. Since 1991 (Paris) and 1993 (Vienna), and increasingly as national human rights have been a priority at the office of the United Nations High Commissioner for Human Rights, many commissions have been formed. Yet they do not always get the financial and other support they need to perform well. Their usefulness, in the longer term, will come into question if they do not receive more support.

At the creation of a NHRI, potential donors offering technical or financial assistance should insist that governments have conducted a broad public consultation and should themselves solicit the views of civil society, especially non-governmental human rights activists, before launching a programme of assistance. When designing assistance programmes to new

NHRIs – such as programmes for the development of staff training and investigation skills – wherever possible technical expertise should be mobilised from countries with similar economic, social, and political background as the country with the new NHRI.

## **2.5 Conclusions**

The rapid proliferation of national human rights institutions in the 1990s bespeaks an increasing recognition that these bodies fulfil a crucial role. Still, an NHRI cannot be an answer to all prayers. It can, however, attempt to meet the justifiable demands placed upon it effectively. The effectiveness of an NHRI goes beyond successful investigation and resolution of complaints. It is the sum total of its ability to be legitimate, accountable, and accessible and the actual practice that emerges out of that performance that produces an effective institution.

Above all the legitimacy, accountability, and independence of NHRIs depend ostensibly on establishing a strong loyalty to them in all sectors of civil society, while maintaining effective access to government and judicial bodies (and international organisations working with NHRIs should work to help them achieve this). However, these sectors should have realistic expectations of the NHRI. Institutions and individuals interacting with national human rights institutions need to avoid excessive, mechanical, or dogmatic expectations of these institutions. NHRIs work to complement – not displace – other functioning institutions. In that respect, it might be argued that advanced democracies are not in need of NHRIs, either because they are allegedly less prone to violations of human rights, or because the existing judicial system is potentially better able to address what problems there are. In point of fact, the human rights mechanism of a national human rights institution – as an institutional guarantee – is as needed in the developed world as elsewhere.

To be sure, NHRIs belong to a particular historical moment in the changing political circumstances of their country. In the longer term, however, they need to adapt to new demands and become self-sustaining (while not losing sight of the realities of their operational environment). In addition, in this rapidly changing world, they need to develop methods beyond their Paris

Principles mandate to be able to reform from within and deal proactively with all manners of domestic challenges.

The broader question concerning the effectiveness of national human rights institutions is about the ultimate value of their contribution as generators of societal transformation for the impact of an NHRI does (or certainly should) reach beyond the settlement of discrete cases and redress of particular issues. An NHRI has the possibility of effecting positive change. Even national institutions established for cosmetic purposes can transcend the limitations initially imposed upon them. This transformative effect on the broader society is in fact vital to the inculcation and perpetuation of human rights awareness. To be certain, there is little question that national human rights institutions work most effectively when they are part of a functioning democratic framework. The absence of political and ethnic violence, acceptance of the rule of law, judicial independence, and a democratic or democratising framework go a long way in creating favourable conditions for a NHRI to be efficient.

## CHAPTER 3

# GUARANTEES OF INDEPENDENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS: APPOINTMENT AND DISMISSAL PROCEDURES OF LEADING MEMBERS

*Kristine Yigen<sup>1</sup>*

### 3.1 Introduction

The subject of this study is to discuss aspects relating to the independence of national human rights institutions. In this regard, the study deals with how appointment and dismissal procedures contribute to ensuring the independence of national human rights institutions, especially the independence of the leading members of the human rights commissions. The paper will outline the criteria of the Paris Principles (PP) and compare these with, mainly, three different national human rights institutions, respectively the Indian, the Ghana and Danish institutions. Other examples have been used in order to supplement the discussions. It is the intention of the paper to provide stakeholders with various aspects and examples which could be included in the appointment procedures of leading members of future institutions for the promotion and protection of human rights.

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<sup>1</sup> The study was prepared as part of a consultancy for the Royal Danish Ministry of Foreign Affairs ‘*Establishment of an independent Commission for Human Rights and Administrative Justice in Tanzania*’ October 1999. The team consisted of Morten Kjaerum, Birgit Lindsnaes, Lone Lindholt, Fergus Kerrigan, Kristine Yigen from the Danish Centre for Human Rights.

### 3.1.1 Core issues and major concerns

The core issues and major concerns with regard to appointment procedures of commissions can be defined as the following:

- How to ensure that human rights commissions (HRCs) are independent from party politics and governmental interests?
- How to ensure that HRCs are stable in its mandate and independent in decision-making?
- How to ensure financial independence and accountability of HRCs?
- How to ensure independence in administration and employment of the institutions own staff ?

### 3.1.2 Point of Departure: The Paris Principles on appointment procedures of national human rights institutions

The Paris Principles (PP) deal with criteria for the appointment of leading members of national human rights institutions and state that “*in order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.*”<sup>2</sup>

According to PP, specific criteria for appointments are crucial in guaranteeing the independence in decision-making procedures, the professional level of commissioners and staff, and, not least, public credibility. The conditions of appointment should include definition of “*method of appointment, criteria for appointment such as nationality, profession and qualifications, duration of appointment, whether members can be reappointed, who may dismiss members and for what reasons, privileges and immunities.*”<sup>3</sup>

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<sup>2</sup> UN Handbook (1995) para. 78 and 79. In this aspect the UN Handbook strengthens the criteria agreed upon in PP.

<sup>3</sup> Ibid.

## 3.2 The criteria of PP on the composition of national human rights institutions

### 3.2.1 Qualifications and number of commissioners

The UN Handbook elaborating the PP states, in relation to the composition of national human rights institutions, that: *“In keeping with their independent nature, commissions are generally composed of a variety of members from diverse backgrounds, each with a particular interest, expertise or experience in the field of human rights. Each country may have specific requirements or restrictions for the selection of members, such as quotas on the number of representatives or candidates from various categories, political parties or localities.”*<sup>4</sup>

According to PP, the criteria for appointment should set out prerequisites for nationality, profession, qualifications, etc.<sup>5</sup>, and the national institutions should reflect some degree of sociological and political pluralism as well as the social profile of the community within which it operates.<sup>6</sup>

With regard to the number of leading members, the question of resources has to be taken into consideration and in relation hereto the PP stress that *“Governments experiencing severe economic difficulties may be forced to establish small institutions [...] because they are unable to afford larger ... ones”*.<sup>7</sup>

### 3.2.2 Pluralistic representation

With regard to the representation of different interest groups, PP state that in order to ensure their independence, national institutions shall in their composition *“ensure the pluralist representation of the social forces (of*

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<sup>4</sup> UN Handbook (1995), para 47.

<sup>5</sup> Ibid, para. 79.

<sup>6</sup> Ibid, para 82 and 84.

<sup>7</sup> Ibid, 1995 para. 123



*civilian society*)”<sup>8</sup> actively engaged in the promotion and protection of human rights, by ensuring cooperation with, or the presence of, wide sections of civil society. This includes non-governmental organisations, trade unions, social and professional organisations including those with a particular focus on vulnerable groups, representatives of “*trends in philosophical or religious thought*”<sup>9</sup>, universities and qualified experts. To these groups, PP add representatives of parliaments as well as of government departments, the latter, however, only in an advisory capacity in order not to endanger the independence of the institution.<sup>10</sup>

### **3.2.3 Comparative discussion on the composition of the NHRI of India, Ghana and Denmark**

#### *a. Qualifications and number of commissioners including pluralism in the composition of the NHRIs*

Concerning the question of how many commissioners HRCs should have and what their qualifications should be, a variety of models exist.

The *Indian National Human Rights Commission (IHRC)* has nine leading members. The IHRC must have a chairperson who is qualified as Chief Justice of the Supreme Court, one member must be qualified as Judge of the Supreme Court, one member must be qualified as Judge of High Court, and two members should have practical experience in human rights. The IHRC should also consist of three chairpersons of other commissions such as, e.g. the ethnic commission. Finally, the secretary-general of the IHRC should act as chief executive officer.<sup>11</sup>

The requirements of composition of the IHRC ensure that members of the Commission have very good legal qualifications. Three leading members of the Commission are recruited from the highest levels of the judiciary, two

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<sup>8</sup> PP in section on “Composition and guarantees of independence and pluralism” sec.1.

<sup>9</sup> Ibid, sec. 1(b).

<sup>10</sup> PP in section on “Composition and guarantees of independence and pluralism” sec.1(e).

<sup>11</sup> Article 3, S 2a -2d, S 3, S 4 of IHRC Act of 1993.

members are to be knowledgeable of human rights and the chairpersons of the national commissions for minorities, the scheduled castes and tribes, and women's affairs are also members of the Commission. This composition reflects a high professional level and a very pluralistic representation.

Strict criteria for professional background in the recruitment of leading members have a resource aspect.<sup>12</sup> The fact that three commissioners must be former judges is hindering the establishment of commissions in some Indian states because of the non-availability of judges.<sup>13</sup> On the other hand, one could argue that judges symbolize impartiality and command respect and therefore are appropriate for leading positions at HRCs.

In order to decide on the qualifications of leading members, it should, in general, be clarified what the role and assignment of the leading members of national human rights institutions, should be, e.g. acting as its "public face", lobbying government, issuing judgements or mediating. The competences needed should be clarified in order to fulfill the aim of the HRC and, finally, the national capacity with regard to, e.g. judges and other academics have to be taken into consideration.

Finally, consideration should be given to the financial aspects of the HRC when determining how much should be allocated to salaries of the leading members (e.g. the employment of judges could be very expensive in terms of salaries). One way of getting around costly salaries for leading members is to appoint voluntary members. *An example of the latter is DCHR, where the board members are voluntary members.*

The *Commission on Human Rights and Administrative Justice of Ghana (CHRAJ)* consists of three commissioners, one Commissioner for Human Rights and Administrative Justice and two deputy commissioners.<sup>14</sup>

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<sup>12</sup> See also Lindsnaes and Lindholt.

<sup>13</sup> Annual Report of the National Human Rights Commission, India, 1996-97, p. 57.

<sup>14</sup> Article 1 of CHRAJ Act of 1993.

The Chief Commissioner of CHRAJ must have qualifications corresponding to those of required for a position as Justice of the Court of Appeal. The deputy commissioners must be qualified for a position as Justice of High Court.<sup>15</sup>

The leading members of the CHRAJ all have legal backgrounds and are recruited from the highest levels of the judiciary (similar to Indian model). In contrast to the Indian model, however, the Ghanaian Act does not provide for other sectors of society to be represented in the commission, e.g. the Act does not ensure that women or minority groups are represented.

The appointment procedures of the CHRAJ provide for fewer leading members than the IHRC. The advantages of only appointing three leading members are that CHRAJ can allocate more resources to activities and operating staff instead of spending on high salaries. On the other hand, few leading members make it more difficult to ensure that the maximum possible number of social forces in society are represented.

The *Danish Centre for Human Rights (DCHR)*<sup>16</sup> consists of a Council and a Board. 10 NGOs are entitled by statute to be represented in and may furthermore appoint two members each to the Council of DCHR. In addition, other NGOs can apply for membership of the Council. As a result, there are today more than 30 NGOs sitting on the Council. The Council also consists of representatives of all political parties represented in the Danish Parliament, including the ministries of Foreign Affairs, Justice, Education, Social Affairs and Labour, in addition to a number of human rights specialists. Finally, all Board members are members of the Council as well.

The Board of the DCHR consists 12 members in total. Six members are appointed by the Council, two members are appointed by the Rector of the University of Copenhagen, two members are appointed by the Rector of the

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<sup>15</sup> Article 3 of the CHRAJ Act of 1993.

<sup>16</sup> It should be noted that DCHR differs from other national human rights institutions in several aspects, primarily since DCHR does not handle individual complaints but take up more general complaints or issues.

University of Aarhus and two members are appointed by the Collegium of Rectors. At least, two members shall be attached to Departments of Law.

Pluralistic representation of NHRI's is ensured in two ways. One model, applied in India (and in Australia and New Zealand) is to appoint commissioners representing specific vulnerable groups such as minorities and women. Another model, applied in Denmark (and France and Nigeria<sup>17</sup>) ensures that non-governmental organisations in the governing bodies represent vulnerable groups in society. Neither of the models, however, ensure the representation of all major vulnerable groups in society.<sup>18</sup>

### 3.3 Questions to be considered in the composition of HRCs

#### 3.3.1. Number of commissioners

The advantage of appointing a small number of leading members, e.g. no more than three, would be that the funds can be allocated to activities and operating staff instead of costly salaries for commissioners. On the other hand, in case where only few commissioners are appointed, one should consider ensuring that at least one commissioner represents vulnerable groups, such as women, minorities or disabled persons, in order to ensure the representation of different societal forces among the leading members of the HRC.

In order to ensure a flexibility provision and to base the decision of the exact number of commissioner of the needs of the respective HRC, one could formulate a provision in the founding legislation of the HRC prescribing that the commission should consist of "not less than three and not exceed more than five /seven leading members". *Similar provisions are provided for in the Canadian Human Rights Act<sup>19</sup> and in the Uganda Human Rights Commission Act.<sup>20</sup>*

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<sup>17</sup> Article 2 of the Nigerian Human Rights Commission Act of 1995.

<sup>18</sup> See also Lindsnaes and Lindholt.

<sup>19</sup> Article 26 (1), Act of 1985.

<sup>20</sup> Article 3 (2), Act of 1997.

### 3.3.2 Qualifications of commissioners and pluralistic representation in the HRC

With regard to the qualifications of the chairperson and other leading members of the HRCs, it should be considered:

- C whether they should have the rank of a judge of, e.g. the Court of Appeal or High Court. *As in the HRCs of India and Ghana.*
- C - or whether they could also represent other academic fields such political science, sociology or vulnerable groups such as women and minority groups. *As in the HRCs of South Africa and Uganda.*

Furthermore, it should be considered:

- C whether appointed commissioners should have knowledge of, or practical experience in, matters relating to human rights. *Provisions similar to this formulation are to be found in the Human Rights and Equal Opportunity Act of Australia<sup>21</sup> and Human rights Commission Act of New Zealand<sup>22</sup>, the Human Rights Commission of Sri Lanka Act<sup>23</sup> as well as in the Mauritius Protection of Human Rights Act.<sup>24</sup> The Bangladesh Human Rights Commission Bill of 1999 adds a provision, which prescribes that civil society should be represented in the body of commissioners and that at least one member should be a woman.<sup>25</sup>*

Finally, it should be considered:

- C whether a pluralist representation is sought either in the form of appointing commissioners from other commissions, or by having

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<sup>21</sup> Article 8B (1), Act of 1986.

<sup>22</sup> Article 7 (3), Act of 1986.

<sup>23</sup> Article 3.1, Act of 1996.

<sup>24</sup> Article 3.3 (b), Act of 1998.

<sup>25</sup> Article 2, Bill of 1999.

different interest groups represented in the governing body of the HRC.  
*The former is the case with respect to India, the latter apply to DCHR.*

### **3.4 The criteria of PP on the method of appointment in national human rights institutions including rules of the appointing organ**

With regard to the method of appointment of leading members of national human rights institutions, PP recommend that the task is entrusted to a representative body such as Parliament and that the founding legislation of the institution specifies all matters relating to method of appointment including procedures of voting etc.<sup>26</sup>

#### **3.4.1 Comparative discussion on the method of appointment of leading members of the HRCs of India, Ghana and Denmark**

With regard to the appointment method, it should be considered whether a selection committee needs to be established.

The establishment of a committee appointed to recommend candidates for the positions as commissioners ensures pluralism in the appointment process through a formal structure. The positive aspect of creating such a structure is also that even though the President formally may have the power to appoint the commissioners, he would need very strong arguments to disregard the recommendations of the committee. Doing so will probably arouse the attention of the media and would also question the credibility of the commissioners.

At the IHRC, the chairperson and other leading members are appointed by the President. The Act provides that every appointment shall be made after obtaining the recommendations of a Committee consisting of: the Prime Minister, the Speaker of House of the People, Minister of Home Affairs, Leader of the opposition in the House of People, Leader of opposition in the Council of States and Deputy Chairman of the Council of States.

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<sup>26</sup> UN Handbook, 1995 para. 79.

Furthermore, the Act prescribes that no appointment is invalid merely by reason of vacancy in the committee.<sup>27</sup>

The fact that the chairperson and other commissioners of HRCs (*e.g. in the case of India and Ghana*) are appointed by the President does not ensure that the selected commissioners are independent of party politics and government interests. In fact, this way of appointing them might politicize the entire process. On the other hand, formal appointment by the President in some states gives the position as chairperson and commissioner of national human rights institutions status and underlines the importance of the institution.

In the case of CHRAJ of Ghana, the President appoints the commissioners in consultation with the Council of State.<sup>28</sup> This method of appointment is in many aspects similar to the Indian model, apart from the fact that the selection committee in the Indian case includes more representatives from different organs.

Another method of appointing the chairperson or the chief commissioner of the HRC (not the commissioners *per se*) is to elect the chairperson among the appointed commissioners.

In the case of the DCHR, the Council members elect the chairperson between themselves and the same principle is used by the Board. In this regard, it should be stressed that the organizational structure of DCHR appears to be different from the two other national institutions reviewed. The Danish procedure in appointing the chairpersons is also different from the procedures of the IHRC and GHRAJ. First of all, the appointment of the chairperson is taking place inside the relevant organ since he is elected from among the members (which is similar to the method used at the South African Human Rights Commission). The appointment of the board members and the chairperson of the Board at DCHR is not approved by Parliament or the Prime Minister. According to the statute of DCHR, the Council may appoint as members organisations, authorities and research

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<sup>27</sup> Article 4, S 1 and S 2 of IHRC Act of 1993.

<sup>28</sup> Article 1 and 2, CHRAJ Act of 1993.

institutions primarily engaged in human rights issues or which have in any other way considerable influence in the field of human rights. The Council decides whether newly appointed members shall have voting rights and the Council may appoint individuals who are engaged in human rights work as members without voting rights.

### **3.4.2 Questions to be considered regarding appointment method of leading members**

*a. Appointment method and rules of the appointing organ (selection committee)*

In this regard, it should be considered:

- C Whether commissioners should be appointed by a selection committee consisting of stakeholders representing the state, the courts and civil society? And also, what the contents of the internal rules of the committee should be?

Most important, in relation to such a selection committee, is the question of:

- C Who should sit on the committee ? *The selection committee in the India HRC Act of 1993 and the Bangladesh HRC Draft Bill of 1999 consists of the Prime Minister, the Leader of the opposition party and Minister of Home Affairs, etc., and other representatives from the state. See also p. 7 under IHRC.*
- C How should the voting procedures of the committee be ? And should there be rules prescribing when an appointment is invalid ? *The Indian Act prescribes that "no appointment of a chairperson or a member shall be invalid merely by reason of vacancy in the committee."*<sup>29</sup>
- C Should the committee's recommendation be subject to approval by Parliament or by the President ?

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<sup>29</sup> Article 4(2), Act of 1993.



### 3.5 The criteria of PP on dismissal procedures

The UN Handbook in elaborating the PP underlines that powers of dismissal are closely related to the independence of national institutions. It is stated that:

*“To avoid compromising independence, the founding legislation should specify, in as much detail as possible, the circumstances under which a member may be dismissed. Naturally these circumstances should relate to ascertainable wrongdoings of a serious nature. Failure to participate in the work of the institution may also be considered for inclusion as a ground of dismissal. The body or individual capable of removing a member of office should be specified. ... It is preferable that powers to dismiss are vested in parliament or at an equivalently high level.”<sup>30</sup>*

#### 3.5.1 Comparative discussion on dismissal procedures, including permission to work outside the HRC, of leading members of NHRI of India, Ghana and Denmark

The main issues relating to dismissal procedures are to define who should have the power to remove leading members and what the dismissal grounds should be.

In the case of the IHRC, the removal of the chairperson and members can take place by order of the President on grounds of misbehaviour or incapacity proved by Supreme Court.<sup>31</sup> The President can also remove commissioners if they are found to be mentally and /or physically incapable of performing their function. The used formulation requires that such an order is “declared by a competent court”.<sup>32</sup>

The Indian Act also provides for the President to remove a commissioner if he or she engages in any paid employment outside the Commission during his term of office. This provision ensures that the commissioners invest their

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<sup>30</sup> UN Handbook, 1995 para. 80.

<sup>31</sup> Article 5, S 1, S 2, IHRC Act of 1993.

<sup>32</sup> Article 5 (2) (d), IHRC Act of 1993.

full time engagement and commitment working inside and not outside the commission<sup>33</sup> and limits the possibilities of corrupted commissioners.

Finally, the appointment procedures of the IHRC ensure that commissioners convicted or sentenced for an offence which involves moral turpitude are removed.

Another model could be the removal procedures of commissioners follow the procedures provided for the removal of judges.

This is seen in the case of the CHRAJ, where the criteria for removal of commissioners and deputy commissioners are the same as those provided for the removal of a Justice of the Court of Appeal and a Justice of High Court under the Constitution article 146.<sup>34</sup> According to article 146 of the 1992 Constitution of Ghana, the Justice can be removed on grounds of misbehaviour, incompetence or inability to perform the function of the office arising from infirmity of body or mind. The procedure is to refer the petition for removal to a Justice of a Superior Court, to determine whether it is a prima facie case, and, after the determination, set up a committee consisting of three Justices of superior courts and two members who cannot be members of Parliament, Council of States or lawyers. This committee will forward its recommendations to the Chief Justice, who must forward it to the President.<sup>35</sup>

In relation to the death, resignation or removal of the commissioner or the deputy commissioners, the HRC should not be hindered from operating. In such a case, the President shall, in consultation with the Council of State, appoint a substitute who qualifies for appointment until a new appointment process is completed.<sup>36</sup>

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<sup>33</sup> See also Lindsnaes and Lindholt.

<sup>34</sup> Article 5 of CHRAJ Act of 1993.

<sup>35</sup> Article 146 (1- 4), Constitution of Ghana of 1992.

<sup>36</sup> Article 4 (3), Act of 1993 (Act 456).

The independence of the commissioners of CHRAJ is also protected in the Act, which provides that commissioners shall not be subject to the direction or control of any person or authority except as provided by the Constitution or by any other law not inconsistent with the Constitution.<sup>37</sup> This provision is very much in harmony with the elaboration of the PP in the UN Handbook.<sup>38</sup>

Another option could be to ensure that dismissal of commissioners is based on a request or a decision from a parliamentary committee. In the case of South Africa, the President shall remove a commissioner from office if such removal is requested by a joint committee composed of one member of each party in Parliament. Furthermore, such a request must be approved by a majority of a least 75 per cent of the members present voting at a joint meeting. *SAHRC Act article 15(a)(b)*.

In Denmark, where the principles of the dismissal procedures are not formulated in the statutes of the Centre, the general principles, which are agreed between the state and the respective unions, protecting government officials apply.

### **3.5.2 Questions to be considered concerning the dismissal procedures, including permission to work outside HRC, of leading members of HRCs**

The dismissal procedures of NHRI examined in this study vary. The IHRC provides for very elaborated rules in the dismissal of commissioners, while CHRAJ refers to the constitution and the rules applied for judges. The dismissal procedures should, in any case, take into account the following aspects:

- C Who should have the power to remove the commissioners, e.g. the President, Parliament or the courts? *IHRC Act, article 5.1: "removed by order of President, proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedures prescribed ... by the Supreme*

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<sup>37</sup> Article 6, *ibid*.

<sup>38</sup> UN Handbook, 1995, Chapter II, Section B, para. 70.

*court". SAHRC, article 15(a)(b): The President shall remove any member from office if such removal is requested by a joint committee composed as contemplated in S 115 (3a) of the 1993 Constitution (one member of each party in Parliament), and such request is approved by a majority of a least 75 per cent of the members present and voting at a joint meeting.*

- C On which grounds should the commissioners be removed ? *IHRC Act, article 2 (c)(d): "infirmary of body and mind or unsound mind declared by competent court". A very similar provision is to be found in the Bangladesh HRC Draft Bill, article 2 (c)(d). The Protection of Human Rights Act of Mauritius, article 7 provides that: The President may remove any member from office for inability to perform the functions of his office, whether arising from infirmity of body or mind, or for misbehaviour.*
  
- C Should the commissioner be removed if adjudged an insolvent ? *This would be the case according in the Indian HRC Act, article 2a and according the Bangladesh HRC Draft Bill, article 2a. The Sri Lanka HRC Act, article 4(i) provides that commissioners may be removed if adjudge an insolvent by a competent court.*
  
- C - or if he/she engages in any paid employment outside duties of HRC during the term of office ? *Again, this would be the case according to the Indian HRC Act, article 2 (b) and according to the Sri Lanka HRC Act, article 4(ii). The Mexican HRC Act, article 12 provides that the functions of commissioners are incompatible with any other position, post or job at the federal level, state or municipal level, or in the private organizations, or with the exercise of a profession other than academic activities.*
  
- C - or is convicted or sentenced to imprisonment for an offence which involves moral turpitude ? *In line with provision is the Sri Lanka HRC Act, article 4 (v), the Indian HRC Act, article 2(e) and the Bangladesh HRC Draft Bill, article 2(d).*
  
- C Should commissioners relinquish other public offices ? *According to the Uganda Human Rights Commission Act, 1997, article 5, a commissioner holding office as member of parliament, member of local government,*

*member of a political party or political organisation or public officer should relinquish that office on appointment as a member of the HRC.*

- C Should commissioners declare their assets upon appointment and resignation? *No Acts on NHRI examined includes such a provision. The Nigerian Constitution of 1999, however, provides that public officers shall, at the end of every year fourth year; and at the end of his term of office, submit a written declaration of all his properties, assets, and liabilities and those of his unmarried children under the age of eighteen years.*<sup>39</sup>

### **3.6 The criteria of PP on the duration of appointment and re-appointment of leading members**

With regard to the duration of the appointment, according to PP, it is “generally accepted that senior officials of national institutions should be granted guaranteed, fixed-term appointments which are not of short duration. Among existing institutions, reappointment for an additional term is generally permissible.”<sup>40</sup>

#### **3.6.1 Comparative discussion on duration of term and re-appointment of leading members of NHRI of India, Ghana and Denmark**

In respect of the duration of term and re-appointment rules, there should be considerations on how to ensure consistency in the leadership of the HRC. Also, attention should be paid to the mechanisms protecting the commissioners in their position for a fixed period, and preventing their removal because of unpopular decision making or statements. This is of great importance in order to ensure the accountability of the commissioners

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<sup>39</sup> Constitution of the Federal Republic of Nigeria of 1999 No. 24 (Promulgation), Fifth Schedule, Part I Code of Conduct for Public officers, article 1.

<sup>40</sup> UN Handbook, 1995 para 79.

towards the public including minimising the risk of commissioners being corrupted or dependent on the public sector.

At the IHRC, the chairperson and the commissioners shall hold office for a term of five years and shall be eligible for re-appointment for another term of five years. Furthermore, the Indian HRC Act provides that the chairperson and other members shall cease to hold office and be ineligible for further employment under Government of India and / or the Government of any state.<sup>41</sup>

In this respect, the Indian Commission goes beyond the requirements of PP. A number of countries such as Ghana, Uganda and Nigeria apply similar criteria, but not to the same extent as found in the mandate of the Indian Commission.<sup>42</sup>

At CHRAJ, the commissioner and deputy commissioners shall not hold any other public office while holding office as commissioners.<sup>43</sup> This criteria is similar to article 6 (3) in the IHRC Act. However, even though it may be for the credibility and independence of the HRCs, it goes beyond the requirements of PP.

### **3.6.2 Questions to be considered regarding the duration of appointment term and re-appointment of leading members of HRCs.**

#### *a. Duration of appointment*

With regard to the duration of the appointment, it should be considered:

- C How long should the duration of the appointment term be? The duration of appointment varies from institution to institution. *The leading members of DCHR are appointed for a two year period (the Director, however, for an indefinitely period). The commissioners of IHRC are appointed for five*

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<sup>41</sup> Article 6 of IHRC Act of 1993.

<sup>42</sup> Lindsnaes and Lindholt.

<sup>43</sup> Article 3, S 2 and Article 4, CHRAJ Act of 1993,

*years, and the commissioners of the SAHRC are appointed for a fixed period determined by the President, however, not exceeding seven years.*

*b. Re-appointment rules*

With respect to re-appointment procedures, it should be considered:

- C whether commissioners may be re-appointed for an additional term ? In most national HRCs, re-appointment is allowed. *SAHRC, art.3,3: one additional term, IHRC Act, art.6.2: shall be eligible for an another five year term, Mexican Act, article 11: re-elected for one additional period. Only the Bangladesh HRC Draft Bill, art. 5.2 provides that: no member shall be eligible for reappointment, (which might make it is difficult to find suitable persons for the positions). The Malawi HRC Act only prescribes that re-appointment should be allowed, but does not specify further conditions and therefore, it is not clear whether commissioners can be re-appointed more than once.*

Also, it should be considered:

- C whether leading members must cease to hold public office ? The *IHRC Act, article 6.3 and the Bangladesh HRC Draft Bill, article 5.3 provides that: on ceasing to hold office, a chairperson or members shall be ineligible for further employment under the government of India/Bangladesh.*

### **3.7 The criteria of PP on remuneration (salaries and allowances) of leading members**

For obvious reasons, PP do not specify the question of salaries and allowances. There is, however, a general principle that governments must ensure and commit funding to national institutions in order to maintain operational efficiency.

#### **3.7.1 Comparative discussion on remuneration (salaries and allowances) of leading members of the HRC of India, Ghana and Denmark**

A general protection measure of leading members of HRCs ensuring their

independence, could be that their salaries should not be subject to or affected by executive influence. *(In this regard, the Indian HRC provides that salaries and allowance of the chairperson and the members of the HRC is payable as prescribed and must not be varied to their disadvantage after the appointment.<sup>44</sup>)*

Another issue in this regard, is whether the salaries of the leading members should follow the salary level of the official standards *(as in the case of DCHR, where the salaries of the staff are similar to those in the public administration)*. One could argue that this would be appropriate since the HRC is created by act of the state even though it is independent. On the other hand, this might also be a problem in terms of attracting competent candidates, i.e not being able to compete with the private market.

Where judges are employed, the salaries are usually pegged to those of the judges of the courts *(In the case of CHRAJ, standards applied are those of the Court of Appeal and the High Court respectively)*.

### **3.7.2 Questions to be considered with regard to remuneration (salaries and allowance) of leading members of the HRCs**

In general, it should be considered:

- C Whether the official salary standards should apply to commissioners of HRC ?
- C Whether the standards of the judges in the court system should be applied to commissioners of HRCs ?

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<sup>44</sup> According to article 8 of IHRC Act of 1993.



### **3.8 Criteria of PP on rules with regard to employment of other staff members**

PP prescribe that “*A national institution should be given the power to recruit its own support staff.*”<sup>45</sup>

#### **3.8.1 Comparative discussion on rules with regard to employment of other staff members of HRC of India, Ghana and Denmark**

A relevant issue in relation to the rules concerning employment of other staff members in HRC, is whether it is acceptable that governments second employees to the HRC ? One could argue that such a policy might create problems in relation to the independence of the staff members and create loyalty conflicts especially in cases where academics and civil servants are seconded. On the other hand, one could argue that the secondment of police and similar staff members is appropriate, provided that the commissioners are capable of controlling and monitoring the work of such staff members, taking into consideration the financial situation of NHRI.

One example of such a secondment policy is to be found in the IHRC. The Central Government of India is obliged to make available to the HRC, a number of staff members including a secretary general, police and investigative staff and such officers and staff as may be necessary for the efficient performance of the functions of Commission. It is further stated that the IHRC may appoint other administrative, technical and scientific staff as it may consider necessary.<sup>46</sup> The fact that IHRC is given the power to appoint its own staff members, according to the needs of the institution, is consistent with the principles.

While some institutions, such as CHRAJ<sup>47</sup>, involve external parties such public service commissions or similar commission in the appointment of its staff members, other institutions, such as DCHR, only involve an internal

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<sup>45</sup> UN Handbook para. 126

<sup>46</sup> According to Article 11 of IHRC of Act 1993.

<sup>47</sup> Article 20 of CHRAJ Act of 1993

section e.g the Board of the institution, in the appointment of senior staff members (the executive director, heads of departments and scientific staff). The statutes of DCHR do not prescribe a formal procedure or formal criterias for the appointment method. In practice, however, appointment procedures follow the state regulations and must correspond to the appointment procedures of the public administration.

### **3.8.2 Questions to be considered with regard to rules on employment of other staff members of HRCs**

It should be considered:

- C Whether the commissioners shall have the power to appoint his own Secretary-General and staff members?
- C Whether government should be able to second staff members?
- C Whether rules of appointment of staff members of HRCs should be included in the internal procedures of the HRC?

### **3.9 Criteria of PP on privileges and immunities of leading members**

With regard to privileges and immunities, the UN handbook emphasizes that *‘The granting of certain privileges and immunities to members of national institutions is another legal means of securing the independence. Privileges and immunities may be especially important for institutions which are granted the authority to receive and act on complaints of human rights violations. Members of national institutions should enjoy immunity from civil and criminal proceedings in respect of acts performed in an official capacity’*<sup>48</sup>

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<sup>48</sup> UN Handbook, para. 79

### **3.9.1 Comparative discussion on privileges and immunities of leading members of the NHRI of India, Ghana and Denmark**

Neither the Act of IHRC, CHRAJ nor DCHR provide for privileges and immunities of leading members.

With regard to immunities and privileges, some HRCs refer to the rules applied for judges. Other HRC have specific provision relating to the immunity of commissioners and staff.

In this regard, the Mexican Act provides in article 13 that *“the chairperson and other members may not be arrested or subject to civil, criminal or administrative liability as a result of the opinions and recommendations they publish or the actions they carry out in the exercise of their functions as established by this law”*.

The Ugandan Law prescribes in article 12 that *“a member of HRC or any employee or other person performing any function of the HRC under the direction of the HRC, shall not be personally liable to any civil proceedings for any Act done in good faith in the performance of those functions”*.

Sri Lanka Act, article 26 (1) outlines that: *“No proceedings civil or criminal shall be instituted against any members of the HRC or any officer or servant appointed to assist the HRC, other than for contempt, for any Act which is done in good faith or omitted to be done, by him”*.

### **3.9.2 Questions to be considered with regard to privileges and immunities of the HRCs**

Issues of concern are:

- C Whether commissioners and staff members should enjoy civil and criminal immunity during service in line with the PPs?
- C Whether the rules applied for employment of judges should apply for commissioners (with judicial as well as non-judicial background)?

### **3.9.3 Citizenship, age and clean criminal record**

In order to ensure public credibility and integrity, some HRCs prescribe that appointed commissioners should be citizens of the respective state, should

have a certain minimum age and should have a clean criminal record or “not been found guilty in an intentional crime punishable for more than one year in prison or any crimes that seriously damages his good name and reputation in the public eye.”<sup>49</sup>

It should be considered whether such requirements are relevant in the appointment of commissioners.

### 3.10 Conclusion

The study reveals that the three HRCs examined are in line with the criteria of the PP even though different provisions are applied in order to ensure the independence of the institutions. The study clarifies that a number of issues has to be taken into consideration in relation to the appointment procedures of leading members of HRC. These issues are:

- C number of commissioners and qualifications of commissioners
- C appointment method and rules of appointing organ.
- C dismissal procedures, including permission to employment outside HRC
- C duration of appointment and re-appointment rules
- C remuneration: salaries and allowance
- C other staff members of the HRC
- C privileges and immunities
- C citizenship, age and clean criminal record

It should be noted that this study has not taken into consideration special circumstances and the recommendations in this study are merely based on desk studies.

This study has, hopefully, provided examples of the existing different opportunities and discussed some of the questions which should be considered in the drafting process of the appointment procedures of leading members of HRCs.

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<sup>49</sup> Article 9 of the Mexican HRC Act of 1992.



# CHAPTER 4

## JURISDICTION AND SUBJECT MATTER OF COMPLAINTS: A GENERAL AND COMPARATIVE PERSPECTIVE

*Lone Lindholt, Kristine Yigen and Birgit Lindsnaes*<sup>1</sup>

### 4.1 Introduction

The objective of this study is to analyse the issue of jurisdiction and subject matter of complaints of national human rights institutions. In particular, the various bases for a definition of the jurisdiction of an institution are analysed, looking at the scope of mandate in relation to human rights principles as formulated in its legislative basis. The study discusses the advantages and drawbacks of formulating the scope of a NHRC's jurisdiction either too narrowly or too broadly, including the extension of the competence to address complaints against government institutions and representatives as well as against private individuals. Finally, a rough overview of the type of cases handled by six institutions (Canada, Australia, South Africa, Ghana, India and Denmark) is provided, which illustrates the general issues discussed in the text.

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<sup>1</sup> The study was prepared as part of a consultancy for the Royal Danish Ministry of Foreign Affairs '*Establishment of an independent Commission for Human Rights and Administrative Justice in Tanzania*' October 1999. The team consisted of Morten Kjaerum, Birgit Lindsnaes, Lone Lindholt, Fergus Kerrigan, Kristine Yigen from the Danish Centre for Human Rights.

## 4.2 Core issues

The functioning of the HRC is governed by its mandate, which determines the scope of its work and areas of jurisdiction. According to *PP sec. 2*, the institution should be given “*a broad a mandate as possible - specifying - its sphere of competence*”. It should be both comprehensive enough to allow the HRC to address in various forms the pertinent human rights issues in society, and at the same time should be specific enough to provide a focussed direction for the work of the institution.<sup>2</sup>

The mandate should be included in the founding legislation of the HRC, since it provides the fundamental framework for its operation, and thus must be considered when setting up the structure of the institution.

The jurisdiction of a HRC concerns the areas in which it is mandated to work. It may be formulated in different ways, including a reference to:

- C Human rights principles, which can be more or less broadly formulated, i.e. civil and political as well as economic rights in general, or in the form of a more narrowly defined right or freedom, i.e. discrimination. *According to sec. 2 of the Act, the focus of CHRC in relation to complaints is restricted to discrimination, while sec. 27 e) and f) of the Act empowers it to address, through studies and research but not through an individual complaint procedure, other areas concerning human rights and freedoms than those encompassed by the Constitution. With respect to SAHRC, Sec. 184 of the Constitution and sec. 7 of the Act just mention “human rights” and “fundamental rights” and the IHRC is similarly general according to sec. 12 of the Act. According to sec. 52 of the Act, the UHRC has jurisdiction to investigate complaints against the violation of “any human right”.*
- C The categories or entities encompassed by its operation, i.e. government officials, private employers or individuals. The institutions used in this example do not limit themselves to cases where the state or one of its agent is the violator of human rights, and may not even make a

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<sup>2</sup> See also sec. 86 - 94 of the UN Handbook.

distinction as to whether the responsible party is a government representative, a private employer or institution, or an individual. *One exception is the CHRAJ, which according to its Act sec. 7 includes among the functions of the Commission the investigation of complaints of violations of “fundamental rights and freedoms” committed by a public officer. Complaints against persons, private enterprises and other institutions, however, are limited to violations of “fundamental rights and freedoms under the Constitution”. In relation to the discussion on human rights principles (see above), this in effect is also a more narrow jurisdiction, particularly since the Constitution only to a limited extent covers economic, social and cultural rights.*

- C The legislative basis, i.e. international instruments ratified by the state, the domestic constitution, or statutes. *According to sec. 11 of the Act, the AHREOC has jurisdiction in relation to four Acts concerning human rights and equal opportunities, racial discrimination, sex discrimination and privacy, and shall furthermore ensure compliance with any relevant human rights instruments, i.e. not simply those ratified by Australia. According to sec. 2 of the Act, the CHRC shall work in different ways to give effect to the Human Rights Act which concerns all aspects of equal opportunity and prohibition of discrimination. As discussed above, the CHRAJ distinguishes in this respect whether the complaint is lodged against a public or a private entity.*

The issue of jurisdiction should be viewed in parallel to the functions<sup>3</sup> of a HRC, which fall broadly in three categories: 1) general promotion, including popular education and facilitating a constructive dialogue in society; 2) advising and assisting the government, including the review of draft or existing legislation and international instruments by the institution, on the initiative of either the HRC, the government or others, and leading to recommendations concerning steps to be taken, as well as other forms of research and analysis; and 3) investigation of complaints, the so-called “quasi-judicial” function where the focus is on the individual case rather

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<sup>3</sup> PP section on “competence and responsibilities”, sec. 3 a - e in details outlines the various functions of the NHRC’s; see also sections 139 through 215 of the Handbook.



than at the level of policy. The institutions discussed in this example are mandated to perform all three functions; the DCHR, on the other hand does not have a mechanism of individual complaint. The CHRAJ has a comparatively limited mandate in relation to promotion, studies and research but a strong focus on the complaints mechanism.

The two approaches of function and jurisdiction are related, in the sense that the jurisdiction of the institutions to some extent logically determines its functions. For instance if a key objective of the HRC is to monitor and respond to violations committed by members of the police or security forces against individuals or groups, an important function will be the ability to hear and consider individual complaints. Similarly, if the key aim of the institution is to address discrimination in government policy, the jurisdiction should include the various public institutions. On the other hand, an outline of the functions of a HRC, for instance of protection and promotion, does not necessarily indicate its scope of jurisdiction, for instance the extent of the mandate to examine allegations against the police.

One problematic aspect follows from a narrow focus on the distinction of rights rather than on the institution or person responsible for violating human rights. In those cases it can lead to a breach with the traditional conception of human rights, where the responsibility for protecting human rights lies primarily with the state and its agents.

In some cases this may be legitimate, particularly where the alleged violator has some form of institutional status in relation to the victim, such as the case of a private company and an employee, where there is a need to protect him or her in a similar manner as in relation to a state institution. However, the application of human rights concepts in cases relating to private individuals, for instance in family law or financial disputes is doubtful.

In any case, the mandate of the HRC must be viewed as a whole, looking at the respective balance between the various aspects of its workload and the context in which it operates. For instance, a national human rights institution based in a society where there is a general respect for human rights, also among the various arms of government, and where abuses of this nature are infrequent, may spend a larger proportion of its resources in addressing other issues such as equal opportunities for men and women. In those cases, it

might frequently act as a less expensive and more informal forum of conciliation and mediation in complaints cases involving private citizens.

Similarly, a state in which abuses of civil and political rights, e.g. denial of the right to fair trial, political participation and freedom from torture and ill-treatment, are frequent, should probably spend much of its time and resources in dealing with such matters, rather than dealing solely with matters between private individuals which should be dealt with by the courts or other conflict resolution bodies.

Regardless of the context, the mandates of the institution should remain broad enough in order for serious human rights violations, unless clearly dealt with by another institution<sup>4</sup>, can be addressed by the HRC. In other words, even if the occurrence of such violations and the extent to which such complaints can be directed to the HRC is limited, the competence of the institution to deal with them in an appropriate manner should never fall outside its jurisdiction.

In this respect, it should be noted that although the institutions referred to in this study have an implicit or explicit mandate covering civil and political rights as well as economic, social and cultural rights, the latter is the subject of a very limited number of complaints, even when civil law cases are included. This could be explained both as a reflection of a lack of recognition of the inclusion of these rights under the general concept of human rights, but also indicating the difficulties in translating and measuring compliance with these standards in a domestic context.

### **4.3 Examples of types of complaints handling by HRCs**

The existence of other complaint handling institutions such as an ombudsman institution, public protector or commissions concerned with for example women or minority rights could probably have an effect on which

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<sup>4</sup> Examples hereof can be corruption cases going to a Corruption Board, complaints of mal-administration to an Ombudsman, labour cases to Labour Tribunals etc.

types of cases, national human rights commissions are receiving. At selected HRCs (see table 1) complaints are filed in areas traditionally known as the ombudsman areas such as mal-administration and other abuses committed by state officials as well as complaints concerning hard core human rights abuses such as torture, ill-treatment, custodial rape and death, disappearances, illegal arrest and jail conditions. Typically, the respondents in the above areas are in the public sector.

At the HRCs in Australia, New Zealand, Ghana and South Africa complaints are filed on grounds of discrimination in employment as well as labour law complaints which typically are cases dealing with dismissal, salary, pensions, salary, transfer etc. Among the selected institutions, most of them deal with complaints concerned with discrimination on grounds of gender, race, disability, age, nationality, marital status or sexual orientation. Finally, few institutions (South Africa and New Zealand) handle complaints filed regarding economic, social and cultural rights such as the right to education, food, housing etc. It has, however, not been possible to identify whether the violations in the above groupings are committed by the state or by private persons or organizations.

Out of six selected HRCs, four institutions handle complaints related to family disputes which are not conventional human rights issues. Typically, cases in this category deal with inheritance, confiscation, trespass, tenancy etc., and the violations are committed by private persons or organizations.

The outcome of the complaints handling process vary from institution to institution. Among the selected HRCs, a large number of complaints received are rejected because of lack of substance or lack of jurisdiction. The selected HRCs all have the power to conciliate and establish tribunals in order to decide on cases between parties. Out of the complaints accepted, most are conciliated or settled, or a decision is made by HRCs. Few complaints are transferred to other relevant institutions, or referred for hearing.

In light of the extensive variety in how various HRCs choose to register complaints, particular in light of their different mandates, the above information which is based on the data in table 1 and table 2, is subject to uncertainty with regard to the statistical evidence used.

#### 4.4 Conclusion

The framework and guidelines in the PPs relating to the jurisdiction of HRCs is not yet well developed, which reflects the variation in the mandates of the now existing HRCs. It indicates that there is a general lack of distinction between the violations committed by the state and its representatives on one hand and the conflicts involving private institutions, companies and individuals on the other.

The cases concerning discrimination, family and labour law reveal a need for other institutions than courts to deal with such matters. These cases take up a substantial amount of the case load in the HRCs examined - about 58% (ranging from 5% to 100%). It is important that the need for handling this type of cases is examined before defining the jurisdiction of a HRC.

A large number of complaints (*32% for Australia, 48% for NZHRC and 73% for CHRC<sup>5</sup>*) were rejected for various reasons. This may be explained by lack of public information in relation to its jurisdiction, for instance because complainants are confused on the differences between the mandate of the HRC and other institutions such as the ombudsman, labour tribunals, etc. It may also indicate that there is a need in society for a broadly based complaints and conflict resolution mechanism empowered to deal with matters that are not strictly human rights violations.

Finally, a communication strategy enabling a HRC to be accessible to a wide audience must take into account the general level of education. In such cases, it must be accepted, either that a number of complaints will be misdirected and consequently rejected, or that the institution must operate on the basis of a very broadly based mandate. *As a result of the latter approach, the CHRC only rejected 16 % of the cases submitted to it.<sup>6</sup>*

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<sup>5</sup> See table 2.

<sup>6</sup> Ibid.



## CHAPTER 5

### GENERAL ASPECTS OF QUASI-JUDICIAL COMPETENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

*Lone Lindholt and Fergus Kerrigan<sup>1</sup>*

#### 5.1 Introduction

The subject of this sub-study is an analysis of general aspects of the quasi-judicial competence of national human rights institutions. It deals with the question of complaints handling procedures by HRCs, and outlines the various issues to be considered when determining the scope of their powers in this area, i.e. the right, duty and ability for such an institution to take action in relation to alleged human rights violations. In this respect the relationship with, and delimitations of competence in relation to, domestic courts becomes particularly important, since the latter are also in many cases appropriate fora for addressing complaints. The primary objective of this study is therefore to outline the general framework of issues relating to the relationship between national human rights institutions and domestic courts.

A wide number of issues, relating to formal as well as practical aspects of the competence with which the national institutions are vested, must be considered. Some of them have been dealt with in different ways by the

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<sup>1</sup> The study was prepared as part of a consultancy for the Royal Danish Ministry of Foreign Affairs '*Establishment of an independent Commission for Human Rights and Administrative Justice in Tanzania*' October 1999. The team consisted of Morten Kjaerum, Birgit Lindsnaes, Lone Lindholt, Fergus Kerrigan, Kristine Yigen from the Danish Centre for Human Rights.

enabling legislation of each institution, indicating the contextual adaption of each.

## 5.2 Core issues

The essential question to consider, is the extent to which the HRC shall be vested with the competence to independently accept, investigate and settle a complaint, and ensure implementation of the decision or settlement reached. If the HRC is granted less than total independent competence in relation to all aspects of complaints handling, to what extent should they depend on the assistance of the Courts, in relation to which functions, and to what effect ?

### 5.2.1 Definition of “quasi-judicial” powers

The term “quasi-judicial” is defined as “having characteristics of a judicial act but performed by an administrative agency or official<sup>2</sup>”, and as “describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law<sup>3</sup>”. In those situations the particular procedural rules laid down by the institution itself or in its founding legislation, as well as principles of natural justice, apply. The latter is understood as rules of such a fundamental nature that they do not need a statutory basis, the two most important of which are *nemo iudex in parte sua*, that nobody can judge a case in which he or she is a party, and *audi alteram partem*, that all parties in a dispute have the right to be heard.<sup>4</sup>

“Quasi-judicial” indicates something which resembles a judicial function or act, but is distinct from this insofar as it rests with an administrative body. In this context the term refers to those functions of a national human rights institution, where complaints of human rights violations are received, examined according to procedures reflecting principles of fairness and

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<sup>2</sup> Webster’s Encyclopaedic Unabridged Dictionary of the English Language.

<sup>3</sup> A Concise Dictionary of Law, Oxford University Press.

<sup>4</sup> Duhaime’s Law Dictionary, [www.duhaime.org/dictionary.htm](http://www.duhaime.org/dictionary.htm)

flexibility, and settled in a manner appropriate to the nature of the complaint, but by a body other than a judicial instance.

This indicates that the functioning of the HRC is in this way made to closely resemble the work of the domestic courts, with the risk of overlapping jurisdiction. Therefore the jurisdictional limitations on the competence of both institutions must be precisely defined, and the procedural rules clearly stated. The HRC may establish some of these internally, while others are so fundamental that they must be contained in the founding legal provisions, i.e. the Constitution or legislation. In those situations where an Ombudsman or another similar body is already in existence, guidance on the drafting of such procedures may often be found here.

It should be noted that while the Paris Principles (PP) use the specific term “quasi-judicial” functions for national institutions, it is not found in national legislation. Also, we can not necessarily take this function for granted, as there are some national human rights institutions which do not have it. The Danish Centre for Human Rights is one example.

### **5.2.2 General questions concerning relationship between the HRC and domestic courts**

It is of vital importance that the proceedings of the national institution reflect the principles of transparency and fairness, and that the procedure before them in every respect instills a sense of justice in the public. What the HRCs and the courts have in common is their absolute requirement for independence, which must never be jeopardised by interference from the executive and political state bodies. This may also to some extent apply to the relationship between courts and HRCs, as discussed below.

First and foremost, it should be stressed that the national institution for the protection and promotion of human rights neither could nor should be viewed as a substitute for the mechanisms of the ordinary justice system. To some extent the institutions may play a role complementary to that of the courts, for instance in relation to alternative conflict resolution and the protection of vulnerable groups. Even if the matter has in some form or the other already been dealt with by the HRC, however, the fundamental prerogative of the court to hear all cases remains, and to the extent that legal remedies of human rights violations exist, they should be utilised the largest



extent possible. At the same time, the strength of the HRC is that in general it is a more easily accessible and cost-effective means of recourse. There may still be a need to ensure that procedures are not duplicated, for instance if both the courts and the HRC carry out an in-depth investigation of the same matter simultaneously without exchanging information.

There is a need for exploring and clarifying the areas of collaboration between the courts and the HRC, for instance where the competence of the latter is limited and depends on the assistance of the judicial system, in relation to deciding when cases shall be forwarded to the court at a given stage, or in relation to the implementation of the decision of a HRC.

When contemplating this, a number of fundamental concerns must be taken into account.

From the point of view of the individual complainant, the primary human rights concern is that violations are prevented in the first place. If they do occur, they must then be remedied as quickly and effectively as possible, and finally there may be an interest in seeing that the perpetrator is punished. Other human rights principles of importance are: the concept of *ne bis in idem*; respect for norms of due process, relating to impartiality, examination of evidence, witnesses, competence; confidentiality; and the right to compensation. Also the issue of who has legal standing, in the form of competence to bring and argue a case before the Commission, must be addressed since it is important in considering the merits and drawbacks of individual complaints versus a collective approach, i.e. complaints on behalf of an entire group.

Other concerns, relating more to the interests of society in general, include the need to strengthen the notion of justice and the rule of law in society and the eradication of impunity by ensuring that all human rights violations (in broadest sense) are heard by an appropriate body. This should in such a case be the one best in a position to examine the complaint and take remedial and/or punitive action, i.e. in the majority of cases the courts, but possible also the HRC, for instance in cases where the formalistic and procedural rules of the courts in effect make them inaccessible.

The respective competence of the domestic courts and the HRC must be closely specified, and areas of competence/jurisdiction may be sharply divided between them. In any case the jurisdiction of each institution should be clearly outlined to avoid confusion, particularly since those who seek redress for human rights violations even in an affluent society often have limited educational and financial capacity. It is therefore necessary that this is communicated clearly and simply in order to ensure that the public has real and not just formal access to the institution.

Also the limitation of resources in a developing country should be taken into account. Precautions should be taken to ensure that complaints do not need unnecessary transfers between different instances, hereby clogging up a system which may already be over-stretched, under-staffed and under-funded.

A HRC mandated to receive individual complaints should have its own legal unit, comprising qualified staff so that the HRC itself can deal with complaints. This is particularly relevant in a situations where the special circumstances of a complainant may require forceful intervention by the Commission's representative vis a vis officials who, for one reason or another, do not see the same need for urgent and protective action.

Another point stems from the fundamentally different in nature of then two types of institution, in the sense that HRCs may be more informal in their operation, with minimal requirements for the form in which a complaint is presented and a less intimidating atmosphere than that of a court, all of which makes them seem more accessible to the general public. HRCs may furthermore be competent in cases where the courts are not, either because they accept collective and representational complaints or because their mandate may include areas not sufficiently addressed by legislation. In their functioning they are more flexible and able to lay down their own norms and guidelines for treatment of various types of cases, rather than being bound by the strict rules of procedure of the courts. For instance, HRCs usually have greater freedom to decide which cases they wish to pursue, so while a court may not ignore any claim validly filed with it, the HRC may have the freedom to determine its priorities, for instance in relation to the availability of resources.

It is important to remember that in any tribunal there is a constant relationship between procedural rigour and adjudicative power. The harsher the sanctions, the greater the rigour required. Justice requires that before a tribunal can impose onerous decisions, it must get its facts and law right. There is no way of avoiding this equation that does not involve breaches of the very rights which HRCs are supposed to protect. HRCs basically trade the power to impose their findings in return for easier and more efficient casehandling. Standards of proof are lower in a HRC than in a court, meaning that a finding by a Commission may not necessarily hold up in a court of law. *With respect to SAHRC, sec. 9.2 (a) and 3 (a) of the Act state that any person with knowledge is compelled to answer, but that the testimony given is not admissible as evidence in criminal proceedings.* The greater procedural flexibility and lower standards of proof are of course offset by the nature of the HRC's findings and decisions. Their role therefore, however valuable, is a limited one, and the pre-eminence of the courts in enforcing respect for civil liberties must not be forgotten.

At the same time, however, hearings and enquiries before HRCs must conform to rules of natural justice. They must be fair and objective, and be seen to be so in the eyes of the public in order to be credible.

Courts have the advantage of greater judicial competence and even expertise, in many cases of more extensive powers of investigation and remedy, and the ability to enforce their decisions through power of compulsion by utilising the resources of the state apparatus. In criminal actions they must operate with strong guarantees ensuring the protection of the accused.

An example of useful complementarity between the Courts and HRCs is seen where the procedural requirements for hearing human rights cases in the courts are so strict that in reality few cases are ever dealt with. For instance, a minimum number of judges is required but rarely available. In this case the less demanding procedure before a HRC may well supplement the courts by acting as a necessary register for these cases, or even as a "fast track" procedure facilitating a quicker and more efficient handling of human rights cases.

A note should be made on the distinction, or lack hereof, between criminal and civil cases dealt with by HRC. Since the scope of the mandates enjoyed

by national commissions may vary, so do the procedures followed by them in handling complaints, as outlined below. It should be stressed, however, that to the extent that a preliminary investigation by a HRC reveals that a matter involves the possibility of criminal liability, for instance by a police officer or a school teacher, it should be handed over to the prosecutor or the courts for further action.

The issues relating to procedural safeguards outlined below therefore should be viewed in light of this limitation of competence of the HRC, as well as the fact that the investigation is often followed by a process of reconciliation or mediation. Therefore the need for protecting parties to the procedure, through strong safeguards similar to those applied in criminal cases, must be balanced with the need for a speedy and flexible procedure.

The right to have legal counsel in some legislation only applies to a hearing by the court (encompassed under the right to a fair trial), but not to a national human rights institution, based on the same considerations as mentioned above. In addition, it could be emphasized that the role of the HRC is to guard the interests of those parties who would otherwise need the protective measure of legal counsel, and therefore the need for flexibility and informality could have greater weight in these cases.

In the following a separation is made between different stages of procedure, where careful consideration is needed on the extent of powers to be given to HRCs and, following from this, the relationship to the courts in this area (i.e. choice of body, referral, appeal to courts).

### **5.2.3 The relationship between HRC and other NHRI**

The relationship with other domestic institutions, such as ombudsmen, may also have to be considered and outlined. However, given that this in most areas can be resolved already through the definition of spheres of competence/ jurisdiction, in contrast to the courts, this will not be dealt with further at this stage, except when examples from this institution are relevant.

### **5.2.4 HRC acting in a manner similar to that of a court (parallel)**

The complaint procedure may be divided into different stages. Each of these imply a series of decisions on the extent of powers to be given, and

consequences hereof. The chosen format resulting from decision of competence at one stage determines the next.

*a. Reception of the case*

General issues to consider at this level must include those outlined below.

- C Who has standing before the HRC ? It may be only the victim, as in most court cases, but, on the other hand, the potential of the HRC lies in its ability to supplement the courts, by allowing collective complaints, complaints by an NGO or other entity on behalf of a victim, and NGOs addressing the matter in the public interest. *According to the PP, cases may be brought before a HRC by individuals, their representatives, third parties, NGOs, associations of trade unions or any other representative organisation. The IHRC Act sec. 12 (a) mentions the victim or any person acting on his or her behalf. In contrast the CHRAJ, according to sec. 13.2 (a) of the Constitution, may reject a case if the complainant does not have sufficient personal interest.*
- C Against whom is the complaint directed ? Traditionally, human rights violations are considered as being only those committed by the state or its agents, including members of the police and the army. Complaints against non-state entities may thus not be accepted by some HRCs on the basis that they contradict the fundamental principle of international law, that it is only the state which can be held to be responsible for human rights violations. On the other hand the competence of a HRC may also in this respect be made broader in practice. The institutions may find it useful in practice to assist in solving the real problems brought before them by the people, i.e. the entity against whom the complaint is lodged could be a public or private institution, an organisation or even an individual.

In case of the latter, a distinction should be made between those situations which involve a case against a private person in his/her individual capacity, and those where the individual has acted in some official capacity, for instance as a school teacher or a police officer. In this latter type of case the complaint and a demand for the payment of compensation etc. may still be directed against that person directly and not exclusively against their government institution. A distinction must

be made here between the making of the complaint, which may aim at the private person and/or the state authority, and any legal determination. A policeman who has tortured someone may find himself personally liable because he has exceeded his authority, which did not permit him to torture the suspect. (His normal immunity from suit in respect of official acts not applying.) However, the state may also be liable, because it has allowed its servant to perpetrate the act in question. It should be noted, however, that most of the human rights commissions discussed in these studies do not clearly make a distinction between public and private actors (see study on the mandate of a HRC).

- C Some NHRIs have *ratione materiae* limitations placed on their mandates (See HB sec. 223.), for instance is restricted from taking up matters concerning the relationship between the government and another government or an international organisation or if the matter concerns prerogatives of mercy. *One example is the UHRC, sec. 53.4 of the Ugandan Constitution.* The case may also deal with complaints against public officer in the exercise of his official duties, persons, private enterprises and other institutions. However, in relation to the administration of state organs such as the armed forces and the police the power may be limited, e.g. only apply with respect to its “balanced structure”, equal access to recruitment and fair administration - i.e. structural matters as distinct from the potential violations committed by representatives of these particular branches of the administration. This is a significant omission, since those institutions are typically among those often accused of human rights violations. *This is the case of the CHRAJ, according to sec. 7 of the Act. The CHRC Act sec. 43 (2) states that its jurisdiction is subject to limitations concerning national defence and/or national security.*
- C Jurisdiction in relation to subject matter, in relation to another independent body (for instance an ombudsman); it should be considered whether the complaint concerns a human rights issue at all, regardless of whether another body has competence, and which areas and/or levels of legislation may serve as the basis for a complaint (see study on the mandate of the HRC).

- C The matter must not have been dealt with or pending before another body, either domestically or internationally, but this has of course no effect on rights of appeal from HRCs to the courts. The principle only applies to the extent that the HRC must be the first body to receive the complaint, which must not have been dealt with by the Courts or by another NHRI. It is also normal to exclude from a Commission's competence any matter pending before a court.
- C Other formalia, for instance whether a complaint is oral or written; it must not be anonymous, the language not abusive; it should address with some basic level of specification what the complaint concerns and against whom it is directed; and be within a certain deadline after the alleged violation has taken place. *According to sec. 13.2 (a) of the Constitution, the CHRAJ may decide not to take up a case if the complainant had knowledge for more than 12 months, if the matter is "trivial" or not brought forward in good faith.*

The HRC should only proceed with the case if these requirements are fulfilled; if they are not, they should either be remedied in collaboration between the complainant and the staff (for instance in relation to precision of subject, legal references, language etc.), or the case should be rejected.

In relation to the HRC's fundamental capacity to receive and handle complaints, several degrees of competence are possible:

One option is that the HRC has no mechanism for complaint handling, and all individual cases are rejected and returned to sender, or referred to the appropriate instance (a court or other body). In case of referral, see below for a discussion of issues to be considered. *The Danish Centre for Human Rights has no individual mechanism of hearing complaints. When these are nevertheless received, the complainant receives an answer suggesting more appropriate forms of action and the body to approach, in most cases the Labour tribunals, the Refugee Appeal Board, the office of the Ombudsman or the courts.*

Another option is that individual complaints are received, but not necessarily subject to individual decision. On the basis of any number of complaints received, the HRC may instead choose to address the issue concerned in

general, by making general observations, initiates studies, conduct hearings, seizing the authorities etc. In this case it should not prevent the complainant from seeking redress through an individual complaint with the Court or other body as well. These two approaches may supplement the individual handling of complaint. *Examples are CHRC which under sec. 48.1 of the Act is authorized to establish a so-called "tribunal" under it, and AHREOC which according to the Act sec. 14.1 can make examinations and hold inquiries.*

The final option is that all complaints which conform to the conditions of admissibility are individually dealt with by the HRC. In such a case there is the strongest resemblance between a domestic court and the HRC, and only in this case does the process continue to the next stages outlined below.

*b. Opening of case for consideration*

The issues to consider include:

- Internal procedures, including an efficient and reliable filing of cases in a system which will enable the most efficient way of proceeding, and internal monitoring of case progress, including the establishment of norms for the maximum time which may pass from reception of the complaint until actual consideration of the case. This must realistically reflect the mandate, overall caseload and ambitions for in-depth investigation of cases in proportion to the available manpower of the HRC secretariat.
- A preliminary procedure of admissibility will help the HRC in determining which cases should be taken up, and in choosing the most appropriate procedure and form;
- Instruction of complainant as to alternative and/or parallel options (i.e. appeal/address to court /other body), for instance on access to file individual court cases if complaints are only treated generally by the HRC.
- Information to party against whom complaint has been lodged; here the question of confidentiality and protection of the complainant from further abuse may necessitate that only a general mentioning is made (see discussion on confidentiality below). *See APP sec. (b); for the AHREOC sec. 27 of the Act stipulates that the person/institution against whom a complaint is lodged*



*must have the opportunity to present his submission to the HRC, either by personal appearance or written submission, allowing for a response*

In addition to the processing of complaints directed to the HRC, it should also be given the competence to decide to take up a case *suo moto*, and to investigate it in a similar manner. *See for instance IHRC, Act, sec. 12 and UHRC Act sec. 8, (a).*

*c. Investigation*

The essential issue here is how to ensure that cases are fully illuminated, in order that the decision of the HRC rests on a fair and impartial basis grounded in reality, i.e. conforming to a minimum standard of proof. As a minimum the HRC should be vested with the same degree of fact-finding powers as a civil court. *Examples of formulations are: IHRC Act sec. 13.4 - 5: "deemed to be a civil court"; UHRC Act sec. 21: any rules of court applicable to the civil or criminal procedure before the High Court may be applied by HRC; AHREOC Act sec. 14.1: HRC is not bound by the rules of evidence.*

The protection of witnesses is important, but again here there is a delicate balance between the protection of the individual and the need for full illumination of a given case, including the prevention of false accusations and statements. The public should be made to feel confident that they can contribute to the work of the Commission in its investigations and not hold back out of fear for their safety, but should also know that their statements will be tried and evaluated by the Commission. A fair, efficient and speedy procedure can enhance the protection of witnesses.

The communication channels of the HRC are also important, so that the staff has easy access to the public authorities for efficient retrieval of information relevant to a given case. A constructive relationship between the Commission and the various arms of government can increase the efficiency of its work, but must never jeopardise (or even appear to do so) the independence of the Commission. Therefore the accessibility of information between the Commission and the authorities has more the character of a one-way relationship, since the latter do not have a similar right of retrieving information from the commission.

Examples of fact-finding powers, which most of the HRCs in the examples are vested with, are:

- C Free access to documentation; may be restricted to public records, or include also the procuring of non-public records, if deemed necessary. Here other constitutional provisions or legislation may be helpful, such as a Freedom of Information Act granting public access to all official documents;
- C Power to hear anybody with relevant knowledge, including the power to hear and question individuals (government officials; experts; private individuals); to summon witnesses and to compel their appearance; to receive oral and written evidence under oath; to compel production of documents etc. Formal evidence may also take the form of affidavits, as long as this is not used to hamper or unduly prolong the procedure. The procedures for hearing witnesses and for compelling their attendance must be adapted in a realistic manner in accordance with the powers of the HRC to sanction lack of compliance etc. *See PP, methods of operation sec. (b): the HRC can hear any person and obtain any information and any documents necessary. All HRCs used in this study have such powers. In addition SAHRC Act sec. 9.4 grants witnesses the right to legal counsel.*
- C Power to conduct on-site investigation; access to non-public places (prisons, detentions, mental institutions, army installations). *The CHRC, according to the Act sec. 4.3, requires a warrant by a judge of a federal Court; with respect to SAHRC, the Act sec. 10.5 and 10.6 distinguish between private dwellings, where a warrant issued by a court is necessary, and all other premises where the Commission can authorise itself; for IHRC the Act sec. 12 (c) demands that this is done “under intimation” to the State Government; in relation to UHRC, the Act sec. 8 (c) states that in addition to the other restricted places, the Commission may also inspect any locality “- where a person is suspected of being illegally detained”.*
- C Power to issue penalties for non-cooperation in investigation, i.e. for failure to produce evidence, materials or statements, or for obstructing the case in other ways.

- C Power to issue interim injunctions and order temporary relief, or the power to order release of detained or restricted persons. *The UHRC has more extensive powers than the other institutions in this respect, since sec. 53 (2) of the Act gives the Commission itself the power to grant any legal remedy or redress, including the release from unlawful detention, and to order the payment of compensation to victims. See discussion above on this issue.*

These functions may either be exercised independently by HRCs, not at all, or through the assistance/sanctioning by a court. A HRC's founding legislation may for example penalise non-cooperation with the Commission with a fine, or even imprisonment. *See for instance AHREOC, sec. 14.7 of the Act.*

If all of the above mentioned powers are granted to HRCs, they have the full mandate to examine cases in the same way as a court does, with potential for impact. In such cases the institutions operate as parallel structures, divided by the outlines of jurisdiction. This requires that the HRC has the necessary manpower available, in the form of number as well as necessary qualifications of its staff members, to carry out the investigations satisfactorily. This places a heavy burden on the Commissioners and staff in collecting and evaluating evidence.

If only some of the fact-finding powers are given to the HRC independently and if it has to rely on the court, for instance for the procuring of evidence, it might hamper the effectiveness and scope of the investigation. The risk is then that the procedure will be delayed if the judicial administration is too slow or if the judiciary is less independent from undue influence than the HRC. Also it may give rise to confusion as to the real extent of powers of the HRC, causing problems and overstepping limits. Finally, it may mean that all aspects of a case are not sufficiently illuminated, resulting in a failure to do justice by the complainant, the institution against which a complaint is lodged and, in the long run, the integrity of the HRC in the eyes of the public.

If the HRC has none of these powers, it will be completely dependent on the Courts in carrying out its investigative function. In this case it should be considered not to give it competence to hear individual cases at all, since it

will most likely not be able to deal with them in an appropriate manner, at least looking from the point of view of the victim seeking redress.

*d. Settling of cases by the HRC*

After having examined a case, the HRC must bring it to completion and ensure the implementation of its findings. In any case a decision by a HRC in the form of a final settlement or finding should be preserved in writing, explaining the reasoning and considerations leading to the result, and in general conforming to the standards of a higher court. This is particularly important if there is a direct possibility of appeal to the court or if it forms the basis for administrative or court action.

As seen below, the settlement of complaints can take different forms, and generally falls within the following categories:

- C Friendly settlement or mediation, where no decision on the merits of the case is taken by a HRC. The procedure is optional, but once it has been accepted by the parties, they will also usually have agreed before hand that the decision must be followed; or in any case the agreement may state that either of the parties may appeal to court if not satisfied; the proceedings and outcome of the case may be either confidential or public. *With respect to CHRC, sec. 48 of the Act prescribes that a settlement reached by the parties must be referred to the Commission for approval;*
- C Conciliation, with a decision on a material subject matter by the HRC, followed by the issuing of recommendations to the parties, optional for them to follow. For instance the Commission may investigate a case concerning discrimination on the base of sex or ethnic origin in relation to employment and dismissal policies of a public institution, and suggest compensation in the form of employment or the payment of financial compensation in proportion to the actual effects for the person involved. *In relation to the CHRC sec. 48 of the Act states that a conciliator may be appointed by the Commission; according to the Act sec. 8 the SAHRC is mandated to carry out “- mediation, conciliation or negotiation”, and is furthermore empowered to “rectify any act or omission”, i.e. implying further powers as outlined below.*

- C Arbitration, i.e. a decision of the HRC with legally binding force for all involved parties, similar to those of a Court, and enforceable by the institution itself; *HB sec. 251; none of the institutions used as examples in this study have this power.*
- C Finally, referral of the case to the courts may also in effect constitute a final decision, since it completes the treatment of the case by the HRC. See below, in relation to the relationship between the HRCs and the courts.

These first three options are “internal” in nature, involving only the concerned parties, in contrast to those outlined below which involve other institutions as well. In this manner they elevate the status of the HRC to the level of and even above the government administration. Examples of such extensive powers include:

- C Pronouncing of recommendations or determinations, for instance concerning the reversal of administrative decision or public policy; this power is typically granted to an Ombudsman institution. The difference between the two forms lies with the extent to which the institution in question is bound to follow the statement of the Commission; *HB sec. 277.*
- C Power to provide legal remedies, either of a temporary or enduring nature. *See the example of Uganda where the Commission can demand the release of persons from detention (HRC Act sec. 53.2.a). However, in this situation it should be considered a remedial action based on the need for emphasizing the protection of individuals as part of the “watch dog” function of a HRC, and is distinct from the more substantial considerations of the case in general. Most HRCs are subject to this principle; see also HB sec. 231.*
- C Possibility of awarding compensation; such orders may be either enforceable by the HRC, or by the court. Here the enforcement procedure must be clearly laid out, including the powers to sanction non-compliance. *For AHREOC, Act sec. 29,: payment of compensation or other remedial action may be recommended;*

- C Referral to the prosecutor or Court for further action or a decision on findings, for instance if the matter relates to a criminal issue (see below), and usually at the earlier stages of the Commission's investigation;
- C Requesting the assistance of the Court in relation to the implementation of HRC's decision, which for instance will enable the Commission to seize the courts in case of non-compliance with the decision.

Issues to consider at this stage include:

- C Communication with concerned parties on the outcome of a case. This should be done within reasonable time, and state the reasons etc. for the decision.
- C Publication of findings in relation to complaints; here the obligation of confidentiality may dictate that decisions are published in a form which respects the anonymity of concerned individuals (but not the institutions against whom the complaint was lodged) if deemed appropriate and necessary to ensure their protection, either in relation to a specific case or generally in relation to a given subject. Nevertheless, there must be transparency and visible integrity in the decisions of the HRC, which necessitates a balancing with the issue of confidentiality. *According to the SAHRC Act sec. 9. (8), the Commission may direct that any person or persons or category of persons or all persons the presence of whom is not desirable, shall not be present at proceedings; the AHREOC Act sec. 14 states that the Commission may decide whether proceedings are public or not; the CHRC Act sec. 48.3 (6) requires publicity; according to the CHRAJ Act sec. 14 proceedings are public as a general rule, but the public may be excluded.*
- C It is vital that, where a HRC uncovers evidence of serious violations of human rights, it recognises the inappropriateness of "friendly settlements", which would in fact amount to a betrayal of principles of the rule of law and effectively condone violations. The HRC must establish clear lines in this regard if it is to preserve respect for its founding principles and for its own credibility.

### 5.2.5 Examples of interaction between courts and HRCs

In the following a number of areas are examined, where there is a direct interaction between HRCs and the domestic courts, i.e. where the two instances must cooperate and where rules of procedure must be elaborated to ensure that this is facilitated in the most appropriate manner, in light of the various issues outlined above. Generally, these issues have not been touched upon when outlining the competence and functions of the other national human rights institutions, but will only be reflected in a closer analysis of their practice so far, if the issue has been confronted at all.

- C The referral of cases from a HRC to the court may take place at any stage. *PP sec. c* even uses the more extensive formulation: “transmit to any other competent authority”. The court in question will then have to decide whether it is within its jurisdiction in relation to subject matter, the implications of the case (for instance relating to financial compensation), geographical competence; the need to protect the client, for instance in relation to confidentiality. A principle of consent should be balanced with the wider interest of justice presumably guarded by the commission.
  
- C One example of a situation where referral should be considered, is in those instances where the HRC has received a number of complaints on the same matter, and it should be determined whether they are then obliged to forward these to the court in connection with its handling of an individual case relating to the same matter, under an order from the court, and with or without the consent of those complainants. It also relates to the broader activities of the HRC, for instance in relation to the carrying out of analysis and submission of memoranda to government suggestion changes in law or administrative practice.
  
- C The question arises whether the HRC can institute cases directly on behalf of victims of human rights violations (on behalf of individuals or groups), i.e. where there is no complaint to refer to. Generally, this must be decided by the rules of standing before the court in question. Significant here is whether a civil action is pursued, i.e. instituted by the victim (or by the commission on his or her behalf) against the official or institution responsible for the violation, or whether it should be treated as a criminal case, i.e. instituted by the state on the basis of an individual

complaint (see discussion above on the question of civil and criminal procedures). *With respect to SAHRC, sec. 7 of the Act states that the Commission may bring proceedings before a competent court in its own name or on behalf of a person or a group of persons.*

- C Intervention in court cases, for instance through the issuing of *amicus curiae*<sup>5</sup> briefs, on matters of law, where the HRC states its view on the law in a case in which it is neither plaintiff nor defendant, in a case which has the potential of setting a legal precedent in their area of activity. This can only be done with the permission of the parties or the court. *HB sec. 296. The IHRC Act sec. 12 states that the Commission may intervene in any proceedings involving the investigation of any allegation of a human rights violation, but only with the approval of the Court.* In any case where a case has been referred to the court, the issue of confidentiality and protection of victims' interest arises, more delicately than just the initiation of the case with or without the consent of the complainant. One example is whether the HRC should be obliged to testify as witness and/or submit evidence and information, or should they be able to remain silent claiming to protect victim's interest. Similarly, there is the question of forwarding of (confidential) evidence from HRC to the court, for instance after some initial or substantial investigation has been carried out, evidence gathered, interviews or hearings conducted etc.
- C A case decided on by the HRC may be appealed to the court, with the implicit understanding that the complainant may always bring the matter before the regular courts. The question of jurisdiction of the courts arises, for instance in relation to material and/or geographical competence, if for instance only the High Courts are empowered to deal with human rights cases based on the Constitutional Bill of Rights. This is a situation similar to the situation of referral, and also in this respect it is the courts' rules of jurisdiction which apply.
- C Finally, the possibility of optional or automatic review by the courts of decisions taken by the HRC may be discussed. In case such a

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<sup>5</sup> Duhaime's Law Dictionary.



mechanism of review is in place, the question of means of response arises, for instance if the court may decide to return cases to the HRC for re-consideration, or the extent to which it may take up the matter of its own accord depending on its competence in this area. HRCs should themselves ensure rigorous respect for procedural rules applicable to their proceedings to avoid the damaging effect that criticism (or overturning of a finding) by a court would have.

### **5.3 Conclusion**

As shown above, there is variety between the normative framework for quasi-judicial competence of national human rights institutions as outlined by PP and the UN Handbook, and the interpretation and adaption hereof by each institutions.

Also, it is evident that although a number of issues have been dealt with in a common manner for all of the institutions, there is great variety stemming from the essentially indigenous nature of each institution, adapted to the specific context in which it operates. Here, the political climate of each country is also reflected in the extent to which the powers of the Commission are expanded or limited, the extent to which they depend on cooperation with the Courts and other government structures, and whether other conflict solving institutions exist such as labour courts etc.

Finally, the analysis above shows that many issues relating to both cooperation between and the parallel functioning of the commissions and the domestic courts have not been dealt with by their founding and enabling legislation. Even if a more in-depth scrutiny of their individual practice may indicate possible solutions to some of questions raised, in the end it will be up to the drafters of a commission's founding legislation and procedures to resolve them as appropriate in the given context.

# Section II



## CHAPTER 6

# THE EXPERIENCES OF EUROPEAN NATIONAL HUMAN RIGHTS INSTITUTIONS

*Morten Kjaerum*

### 6.1 Introduction

The present article explores the concept of national human rights institutions outlining and discussing their key functions as prescribed by the Paris Principles and illustrates, with several examples, how these have been implemented in the European context.

The purpose of this article is not to streamline the work of the institutions or to fit them into a certain framework or model, since diversity in the structure and working methods of national institutions must be considered as a strength and not a weakness. The purpose is therefore to highlight some of the core functions of national institutions and thereby identify a common ground for exchanging experiences on the operational level.

In 1993, at the UN World Conference on Human Rights in Vienna, the implementation of human rights at the national level was a key issue. The agenda of the conference was not the establishment of new human rights standards but rather the promotion of ideas on how the implementation of existing standards could be strengthened. The World Conference on Human Rights stressed that "the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in dissemination of human rights information, and

education in human rights."<sup>1</sup> Furthermore, governments were urged to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights. Finally the World Conference encouraged "the establishment and strengthening of national institutions, having regard to the principles relating to the status of national institutions and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."<sup>2</sup>

During the 1980s and 1990s, a number of national human rights institutions have been established in both Eastern and Western Europe. These institutions are very diverse but, basically, range from institutions almost exclusively dedicated to handling individual complaints to more research oriented advisory bodies. There are, however, some common features for national institutions. Firstly, a human rights institution is a resource for the whole population, ranging from the most vulnerable groups of society to parliamentarians. Secondly, the aim of the institution is not to bring as many cases as possible before the national courts or the European Human Rights Court, however in all matters, to work for the prevention of human rights violations. This approach has become more widespread, due to the changes in the 1990s throughout Europe regarding the status of international human rights norms in domestic legislation. In this regard, national institution can play an important role.

In recent years, several international fora and documents have contributed to bringing national institutions into focus as structures for the promotion and protection of human rights. On another level, the formulation of the Paris Principles in 1991 was a significant achievement in reaching a common understanding of the identity of national institutions based on minimum requirements for such institutions as:

- C established by Parliament - in the constitution or by law;
- C vested with competence to promote and protect human rights;

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<sup>1</sup> Article 36, World conference on Human Rights, Vienna Declaration and Programme of Action

<sup>2</sup> Ibid.

- C ensured real independence through, inter alia, a pluralist representation of the social forces of civil society.

These minimum requirements should not be compromised, as they secure the real independence of national institutions.

The key function of national human rights institution should, in order to implement domestic and international human rights norms, be the following:

- C monitoring state practices in relation to their compliance with international human rights instruments;
- C advisory functions;
- C information and education in human rights.

## **6.2 Monitoring state practices**

A key function of national human rights institution is to monitor state practises. An institution must follow the legislative process closely to check for compliance with international human rights standards. It should also forward its views, in cases where a proposed piece of legislation fails to comply with human rights norms. This work can be done from the institution's offices without attracting much public attention and with little community contact. But the legislative monitoring process is one aspect of the responsibilities of national institutions.

More importantly, national institutions should be aware of the actual implementation of laws, i.e. by maintaining community contact through well-established networks in society. These contacts provide the institution with the ability to identify areas where practices should be modified or changed in order to conform with, e.g. the European Human Rights Convention.

These networks or community contacts could take the form of strong links and relations with the national NGO community. One way of ensuring this is to engage civil society organisations in the governing structures of the national human rights institution.

Providing legal advice and handling of individual complaints is an effective way of maintaining the visibility of national institutions in society and thus ensuring common community contact. Both functions are also entries to gaining access to information about human rights violations in a country. Regardless of the method of operation applied, it is crucial to the monitoring of human rights that the institution is visible in society.

A useful methodology which the Danish Centre for Human Rights and other institutions have applied once a particular area of concern has been identified, is to assemble a group of professionals who have the capacity to study the subject in depth. In Denmark, for instance, the Danish Centre for Human Rights realised at a certain stage that old senile people were not always treated according to the standards set out in the European Human Rights Convention. The requirements of the Convention were not fulfilled, especially in relation to persons in arbitrary detention. The Danish Centre for Human Rights assembled a group of doctors, heads of old people's homes, the parliamentary ombudsman, psychologists and others, who met on a monthly basis over a period of one year. The group identified the problems in the light of the convention standards and developed possible solutions which could be implemented by the institutions. The suggested solutions were in compliance with the minimum standards set out in the convention. The report was forwarded to the parliament and introduced to the public in different ways - in the press as well as through public meetings and seminars. Following a lengthy public debate, new legislation and practices were introduced. The same method was used in relation to the protection of the most vulnerable children in Denmark. The study was carried out mainly in the light of the UN Convention on the Right of the Child. In this case, the Danish Parliament did not amend all the laws which were pointed out as being problematic and not in accordance with the standards in the convention. Consequently, the study was forwarded to the UN Committee on the Right of the Child. Eventually, the Committee raised the same concerns vis a vis the Danish government and, recently, the relevant laws have been amended. These cases, hopefully, illustrate some classical approaches from a national human rights institution.

The very last article in the Paris Principles address the issue of individual complaints handling, which is an important function in relation to the protection of human rights at the national level. In most European countries,

national institutions are not authorised to handle individual complaints. In part, this may be due either to a reluctance to extend such competence to institutions outside the judiciary, or because well-established and strong complaints structures are already in existence, e.g. an ombudsman

In relation to the function of monitoring, it should be stressed that the more vulnerable a group is in a respective society, the more reason there is for a national human rights institution to keep an eye on how this group is treated. One should not ignore the fact that even national institutions - as open as they may be - are often perceived as part of the establishment and thus very difficult to access for different groups in our societies. It is the obligation of national human rights institutions to communicate with these groups and the strength of the institutions is that people are often able to access them - unlike courts and other structures which also have an obligation to protect human rights. The treatment of the most vulnerable groups in our society is the ultimate test of our respect for human rights. It is the litmus test. This is why an increasing number of human rights institutions in Europe have directed their attention to the protection of refugees and ethnic minorities - an issue which was thoroughly discussed in 1994 in Strasbourg at the 1<sup>st</sup> European Meeting of National Institutions for the Promotion and Protection of Human Rights.

### **6.3 Advisory functions on legislation and state practices**

The advisory function is closely linked to the monitoring function. The institutions need to know what is going on in their respective societies in order to be able to offer serious and valid advice. If the institution wants to provide such advice, it is of primary importance that the public realises that this will be useful to them.

Since it is the government, the parliament, the ministries and other state structures which are entrusted with the protection of human rights of the people within their jurisdiction, the main target for the advisory function of human rights institutions is primarily interaction and dialogue with these governmental structures.



It is often seen that, over a period, the human rights institution raises different issues in relation to its mandate. These opinions, recommendations, proposals or reports are often neglected or ignored. However, if an institution is conducting professional work of high quality, governmental bodies will eventually recognise that it is fruitful to enter into a consultative process with the respective human rights institution. It should be perceived beneficial to seek their advice before new legislation is passed or to alter practices conflicting with the European Human Rights Convention or other mechanisms before they reach the attention of the media and the public.

There are, of course, many ways to carry out a consultative process. By looking at the European institutions it is possible to identify at least three distinct ways of carrying out the advisory function. Firstly, institutions give advice in relation to the law making process. Secondly, the institutions carry out their advisory function in informal fora with relevant governmental institutions. Thirdly, some institutions act as expert consultants in governmental delegations.

In the law-making process in most countries, different ministries, judges, municipalities etc. are consulted. However, in most cases, these entities will only have rudimentary and limited knowledge about the human rights responsibilities of the state. By offering advice on the conformity between proposed legislation and human rights law, national institutions will be fulfilling their advisory function, and in the process they will contribute towards reducing conflicts at a later stage.

The problem is often that civil servants in charge of specific legislation have limited knowledge of international law. Therefore, they may not realise when it is appropriate to ask the opinion of the human rights institution. An illustration of this can be given from Denmark, where all the parties in the parliament-minus-one voted for an amendment to the Income Tax Act. The Danish Centre for Human Rights was not consulted in relation to this amendment and when the law was passed, the Danish Centre for Human Rights noted that the amendment did not conform with The European Human Rights Convention article 8 'The right to privacy.' The act provided for the taxation authorities to register people's membership of particular labour unions. The Danish Centre for Human Rights notified the minister and the legal committee of parliament and after some discussions, the

parliament went through the entire process of amending the law to bring it into line with the Convention. Today, the Danish Centre for Human Rights is consulted in regard to many draft laws and the strategy seems to be that the authorities will rather forward ten draft laws to the Danish Centre for Human Rights than forget one law. Finally, it should be mentioned that when the Danish Centre for Human Rights receives draft laws which are still confidential, it has to respect this confidentiality and any other norms which go with this role.

The informal processes are developed according to the working methods of different countries. It is the Danish experience that dialogue between civil servants and human rights experts at all levels is valuable. Having both parties sitting around a table with no fixed agenda, discussing upcoming initiatives or practices in a certain institution, such as for example a prison, a hospital for psychiatric patients or a children's home, is extremely constructive. In this way, human rights are seen not as a threat by the employees or managers, on the contrary, principles of law are clarified and human rights norms may be perceived as a resource for finding better solutions to a specific problem. Human rights norms can then be perceived as a resource for making systems more humane or more protective of human dignity. This is what is meant by real implementation of international conventions.

An inherent risk is connected to this method of work. The institution may be co-opted by the state apparatus, to such an extent that it is no longer able to criticize policies or practices when necessary. In this regard, it is important to underline that the monitoring role is the most important function of national human rights institutions. This function must not be compromised because close working relations have been established with governmental bodies. It is a delicate and difficult balance which requires a great deal of professionalism on both sides. The governing bodies of the institution play a crucial role in giving guidance to employees on how to strike the correct balance between constructive dialogue and criticism.

The third way of promoting dialogue is for the institution's representatives to participate as expert consultants in governmental delegations. Expert knowledge built up in the human rights institution can be tapped by governmental delegations when they participate in international human

rights fora like the OSCE human dimension seminars, United Nations conferences and of course, conferences and meetings in the Council of Europe. The institution can play a co-ordinating role in relation to the national NGO community in feeding the delegation with concerns and ideas from the domestic civil society. It is a useful resource which is often not used by the relevant diplomats, who have no opportunity to achieve detailed knowledge about all the different human rights areas which concern the inter-governmental organisations. Thus, this kind of advisory function serves to add expertise to the government delegation, thereby improving its performance. Conversely, the advisory role will also strengthen the national human rights institution, as it acquires important knowledge about international discussions which may be beneficial to its domestic work. However, this function could also potentially conflict the independent role of the institution.

#### **6.4 Information and education**

The informative and educational function of national institutions should be seen as an obligation on the part of the national institutions and NGOs to provide information to all levels of society. Information and education are the only ways in which the European Human Rights Convention and other instruments can become a dynamic part of the democratic processes. The perception in some countries that human rights may be a potential threat to national sovereignty can only be effectively countered through impartial information and education aimed at developing a national culture of human rights. National institutions may provide assistance to states in implementing the call of the Vienna World Conference on Human Rights to have human rights as subjects in the curricula of all learning institutions in formal and non-formal settings. The most preventive strategy for human rights violations would comprise the introduction of human rights education in primary and secondary education as well as targeted education for professional groups, including lawyers, judges, police and civil servants in key positions.

This article has outlined some of the functions which national human rights institutions can fulfil in the implementation of international human rights standards and discussed some of the problems related hereto.

## **CHAPTER 7**

# **IMPLEMENTATION OF THE WESTERN OMBUDSMAN MODEL IN COUNTRIES IN DEMOCRATIC TRANSITION**

*Peter Vedel Kessing*

### **Summary**

The objective of this article is to describe different existing Ombudsman types and to try to identify and discuss a few but basic elements which in the view of the author should be taken into consideration when establishing or strengthening Ombudsman institutions in countries in democratic transition. The article is based on the authors limited experience from working for the Danish Ombudsman institution and from providing assistance and consultancy to newly established Ombudsman institutions in countries in democratic transition and does not pretend to be an exhaustive or scientific attempt to look at all sides of the question.

### **7.1 Introduction**

During the past teen to fifteen years there has been an almost explosive growth in the number of Ombudsman institutions, including national human rights institutions encompassing an Ombudsman function, around the world.

Whereas Ombudsman institutions previously were established and functioned in old and well-consolidated democracies, in the past decade an increasing number of Ombudsman institutions has been established in countries in transition to democratic forms of government, i.e. countries which are in the process of reforming their governmental institutions and structures.

It is a positive development that the Ombudsman model worldwide has proven to be a needed and useful mechanism to monitor and improve government administration.

However, it should be acknowledged that some of the newly established Ombudsman institutions in countries in transition have had difficulties in functioning in a fair and efficient way. This is no surprise. It is a lengthy process to establish a completely new institution, particularly such a complex, complicated and potentially influential and powerful institution as an Ombudsman institutions, including e.g. to identify most efficient internal procedures, to obtain a well-trained and professional staff, to interact with other existing institutions, to form opinions and establish a coherent and consistent practice, etc.

Despite the self-evident beginner difficulties, which all new institutions will have to manage over time, it is the opinion of the author of this article that many of the difficulties encountered by some of the newly established Ombudsman institutions to a large extent could have been reduced, or even eliminated, if more time would have been used on tailoring and adapting the Ombudsman model to the country in question.

To try to implement a western Ombudsman model into a country in democratic transition - which often also could be a developing country - without any adjustments or adaption to the circumstances and power structures in the country in question will most probably make it unnecessarily difficult - if not impossible - for the Ombudsman to function in a fair and efficient way.

The objective of this article is to describe different existing Ombudsman types, cf. below section 7.4, and to try to identify and discuss a few but basic elements which should be taken into consideration when establishing or strengthening Ombudsman institutions in countries in democratic transition, cf. below section 7.5. Prior to this, the Ombudsman concept and the role and functions of an Ombudsman institution will briefly be described below in section 7.2 and the evolution of the Ombudsman institution in section 7.3.

## 7.2 The Ombudsman concept and the role and functions of Ombudsman institutions

The main function of an Ombudsman institution is to deal with complaints from the public regarding decisions, actions or omissions of public administration. The Ombudsman is elected by parliament or appointed by the head of state or government by or after consultation with parliament.

The role of the ombudsman is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration in order to improve public administration and make the government's actions more open and the government and its servants more accountable to members of the public. The office of ombudsman may be enshrined in the country's constitution and supported by legislation, or created by an act of the legislature.

The ombudsman usually has powers to make an objective investigation into complaints from the public about the administration of government. Often the ombudsman may also have powers to initiate an investigation even if a complaint has not been registered. To protect people's rights, the Ombudsman has various powers, including to:

- C Investigate whether the administration of government is being performed contrary to law or unfairly;
- C If an objective investigation uncovers improper administration, make recommendations to eliminate the improper administrative conduct; and
- C Report on his activities in specific cases to the government and the complainant, and, if the recommendations made in a specific case have not been accepted by the government, to the legislature (or to an institution or person within the executive, e.g. the President of State or a minister).
- C Make an annual report on their work to the legislature (or to the executive body or person) and the public in general.

The ombudsman usually does not have the power to make decisions that are binding on the government. Rather, the ombudsman makes recommendations for change, as supported by a thorough investigation of the complaint.

A crucial foundation stone of the ombudsman office is its independence from the executive/administrative branch of government. In order that the ombudsman's investigations and recommendations will be credible to both public and government, the ombudsman maintains and protects the impartiality and integrity of his office.

### **7.3 The evolution of the Ombudsman institution**

The evolution of the Ombudsman institution can roughly be divided into three periods.

The roots of the modern Ombudsman institution can be traced back to the Justitieombudsman (Ombudsman for justice) of Sweden which was established in 1809. Ombudsman institutions were established in Finland in 1919, in Denmark in 1955 and in Norway in 1962 and until 1970 Ombudsman institutions were only found in the Nordic countries.

In the second period 1970 - 1985 Ombudsman institutions were established in a number of Commonwealth (New Zealand, Canada, Australia) and western European countries (United Kingdom, France, Portugal, Austria, Spain and the Netherlands).

In the third period 1985 - 1999 the Ombudsman model has gained worldwide recognition and Ombudsman institutions have spread to other parts of the world, including Latin America, Africa, Central and East Europe, and the Asia-Pacific.

Parallel with this worldwide recognition of the Ombudsman model there has been seen an almost explosive growth in the number of Ombudsman institutions around the world.

In 1985, there were around twenty-one national Ombudsman institutions, whereas in 1998 there were Ombudsman institutions in approximately ninety countries. Concurrently, a large number of National Human Rights institutions have been established, of which many also have a complaints-handling function similar to that of an Ombudsman institution. In practice it can be difficult to establish a clear border-line between a national human rights institution and the Ombudsman institution. However, in general terms national human rights institutions have an explicit and specific human rights mandate and often a broader mandate than the classical Ombudsman model, which also could include research, documentation and training and education in human rights issues. An attempt to make a more precise distinction between the two types of institutions will not be pursued in this article.

Furthermore, Ombudsman institutions or national human rights institutions encompassing an Ombudsman function are currently under establishment in a large number of countries around the world, including i.a. Georgia, Bangladesh, Tanzania, Thailand, Nepal, etc.

The main reason for this growth is the fact that many countries around the world have recently gone through transition to democratic forms of government. As part of the democratization of government, they have often created Ombudsman institutions in order to improve the government administration, make its actions more open and the government and its servants more accountable to members of the public.

#### **7.4 Different types of Ombudsman models**

As countries have established Ombudsman institutions, they have adapted the classical Nordic model and its functions in various ways, particularly in the past two decades. This has led to many different types and models of Ombudsman institutions. Also, the name of the institution itself has taken a myriad of forms.

Attempts have been made to try to categorize the many different Ombudsman models into different groups or types in order to clarify the difference between different models and to get an overview of development trends.



An overall categorization has been made between:

*“Legislative/Parliamentary Ombudsmen”*, whose legitimacy is based upon parliamentary decisions and who are responsible to parliament. This applies to most Ombudsmen;

*“Executive Ombudsmen”*, who are commissioners appointed by the government or the head of government. They do not hold the same level of independence as the legislative Ombudsmen and they can to some degree be dependent on those who have appointed them, e.g. in relation to dismissal, reappointment, financial autonomy, etc.

Another way of categorizing Ombudsman models is focussing on the substance-matter which the Ombudsman institutions deals with and the way they carry out their functions.

#### **7.4.1 The Court-like Model**

*“The Court-like Model”*, found a.o. in the West-Nordic countries, such as Denmark, Norway, Iceland and Greenland. In this kind of institutions the functions and methods applied are quite similar to those of the courts. There is no special administrative courts in Denmark, but during the last 40 years the Parliamentary Ombudsman has fulfilled almost the same function as the highest administrative courts have done in some other European countries.

To illustrate this Ombudsman model two examples can be mentioned, respectively the Danish Parliamentary Ombudsman and the European Ombudsman:

*The Danish Ombudsman* occupies a position midway between the Danish parliament, the civil service/ministers, and the citizen. With limited legal powers assigned to him, it is his task to ensure the “proper exercise” of administrative powers. After each election to the Danish parliament, the new parliament elects an Ombudsman who on its behalf is to “oversee the administration”. The Ombudsman has to report to the parliament, both in form of an annual report, and in connection with specific cases in which he finds errors or deficiencies of major importance. On the other hand the ombudsman is independent of the parliament, for instance deciding for himself whether complaints are to be subject to actual investigation. He hires

and fires his own staff. The Ombudsman's true power springs from his relationship to the parliament, which has appointed him and which has confidence in him. Thus, the Ombudsman's success is (particularly initially) depending on the unequivocal backing of the parliament.

Through his comments, the Ombudsman has tried to develop general basic principles for the correct exercise of administration. The Ombudsman has laid down requirements for the handling of cases and these have latter been incorporated into the Danish Administration Act. The Ombudsman has also expressed himself on how the civil service is to arrange its work so that the processing of cases does not drag on unnecessarily, and in general recommended to the administration on how to act to strengthen the relationship of trust with the citizens.

Another example of the "Court-like Model" is the European Ombudsman which is an Ombudsman at the supranational level:

*The European Ombudsman* was established in 1997 pursuant to the Treaty on the European Union (Maastricht Treaty) to monitor the activities of Community institutions and bodies.

All citizens of a Member State of the Union or persons living in a Member State can make a complaint to the European Ombudsman.

The Ombudsman investigates complaints about maladministration by institutions and bodies of the European Community, including i.a. the European Commission, the Council of the European Union, the European Parliament and the Court of Justice (except in its judicial role).

The Ombudsman cannot deal with complaints concerning national, regional or local administrations of the Member States.

Maladministration is described as poor or failed administration. This occurs if an institution fails to do something it should have done, if it does it in the wrong way, or if it does something that ought not to be done. Some examples are:

- C Administrative irregularities;
- C Unfairness;
- C Discrimination;
- C Abuse of power;
- C Lack or refusal of information;
- C Unnecessary delay

If the Ombudsman finds maladministration, as far as possible he cooperates with the institution concerned in seeking a friendly solution to eliminate it and to satisfy the citizen. If the Ombudsman considers that such cooperation has been successful, he closes the case with a reasoned decision. He informs the citizen and the institution concerned of the decision. If the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned decision that may include a critical remark or makes a report with recommendations, which is submitted to the European Parliament for consideration and possible further action.

#### **7.4.2 The Prosecutor-Disciplinary Model**

*“The Prosecutor-Disciplinary Model”*, mainly found in Sweden and Finland. The “Prosecutor Model” was invented in Sweden in the period before the 19<sup>th</sup> century constitutions containing the doctrine of the Separation of Powers became an essential part of the constitutional platform in the western countries.

As an example the Swedish Parliamentary Ombudsmen can be mentioned: Under Sweden's Constitution, the Parliamentary Ombudsmen form part of the mechanisms for parliamentary control. Their primary task is to exercise legal supervision of central and local government authorities (including the courts) and of their officials. First and foremost they shall ensure that administrative functions are performed according to laws and other statutes. The Ombudsmen may deliver critical (non-binding) opinions and propose improvements to administrative routines. The Ombudsmen are also entitled to initiate legal proceedings against public officials on account of criminal offences committed in the exercise of official duties. However, the Ombudsmen do not have the authority to change judgements or other decisions. The four Ombudsmen, who each have a particular area of

supervision, are elected by the Riksdag (Parliament) following a proposal by the Committee on the Constitution.

Ombudsmen are elected for a period of four years and can be re-elected.

#### **7.4.3 The Mediation Model**

*“The Mediation Model”* is found in France and in United Kingdom. The *“Mediation Model”* differs from the *“Court-like Model”* not as much in formal competence as in the *“style”* used by the institution. In the *“Court-like Model”* and (partly) in the *“Prosecutor Model”* the Ombudsman normally clarifies and points to the relevant legal basis etc. and in an authoritative way declares how the administration in his opinion has to act and solve a case. In contrary, the mediator can close the case by reaching a kind of reconciliation between the parties (the citizen and the administration) less bound to the strict legal basis, and more to using general principles of fairness and good administrative conduct. The distinction between the two models in practice is not very sharp; also the classic court-like Ombudsman could and would use the flexibility of his office in an effort to find a solution of *“reconciliation”* between the parties before taking up a more formal investigation, aiming for an opinion of a strictly legal nature.

As an example can be mentioned the Mediator of the French Republic: The Mediator of the French Republic intervenes in disputes between private individuals or corporate bodies (associations, charities, unions, companies, etc.) and statutory authorities, public services or local authorities in the case of misadministration, unfair decisions or a refusal to carry out a court decision.

The Mediator of the French Republic is neither a judge, nor an arbitrator. He cannot impose a decision upon the public authorities, intervene in a court action or refute a court decision. He can, however, make recommendations to the body concerned to negotiate a settlement, even when the matter has been taken to court.

Complainants can, if they so wish and if the dispute raises a point of law, take the matter to court.

The public authority in question must be approached first before applying to the Mediator. The person must contact the service concerned and ask for an explanation or a review of the disputed decision before beginning any other procedure.

In the event of persistent disagreement with the public authority, and if the complaint lies within the competence of the Mediator of the French Republic, the complaint must be lodged through a member of parliament or a senator freely chosen by the complainant.

When the Mediator of the French Republic finds that a complaint is well-founded, he seeks fair solution to the problem. He contacts the public body responsible for the disputed decision directly and, if circumstances so require, the relevant Minister. He can suggest a solution to the problem. If he does not consider the answer to be satisfactory, he can make recommendations which can then be published, particularly in his annual report to the President of the French Republic and Parliament.

If, during an investigation, it appears that a text or administrative procedure is no longer adapted to the way in which society has developed, the Mediator makes a reform proposal to the public body. In this way, the Mediator is able to help prevent further disputes from arising.

#### **7.4.4 The Specialized Ombudsman Model**

*“The Specialized Ombudsman Model”*, started appearing in various western European countries in the 1960s and can now be found in many parts of the world. Specialized Ombudsmen, e.g. Consumers Ombudsmen, Equal Rights Ombudsmen or Children’s Ombudsmen, are restricted to dealing with a specific area or type of complaints. They can be appointed both by the legislature and by the executive. Some of the institutions deal not only with public authorities, but also with complaints concerning private matters.

Furthermore, some of the institutions do not examine individual complaints. They may, however, take an individual case as the basis for issuing different general standpoints, recommendations and proposals for change of legislation, administrative practise and routines etc. One example of this model is the Swedish Children’s Ombudsman:

The Children's Ombudsman was established by an Act of Parliament in 1993. The Ombudsman is an independent non-political body, however, in purely administrative and financial terms the Agency belongs under the Ministry of Health and Social Affairs. He is appointed by the Government every sixth year.

The area of responsibility of the Children's Ombudsman in principle covers all issues concerning children and young people. The foundation of the work is the UN Convention on the Rights of the Child (CRC). When an issue is regulated under the CRC, it comes within the field of activities of the Children's Ombudsman. However, issues falling outside the scope of the convention can also be dealt with if they involve those rights and areas of interest monitored by the Children's Ombudsman.

The Children's Ombudsman works at a strategic level, which means that he monitors the application of the convention for all Swedish children as a group. The Ombudsman makes recommendations on e.g. changes in legislation, in order to bring about greater conformity between the Convention and Swedish law. The Children's Ombudsman does not exercise any supervision over other authorities, nor does he intervene in individual cases. However, the Children's Ombudsman can take an individual case as its starting point for interpreting the Convention from a Swedish perspective in order to give greater prominence to principles which could form the basis for different standpoints, recommendations and proposals for change. The Children's Ombudsman gives legal advice and information and acts as a consultative body in the process of drawing up legislation covering children and young people.

#### **7.4.5 The Hybrid Ombudsman/Human Rights Complaints Model**

*"The Hybrid Ombudsman/Human Rights Complaints Model"*, has been established during the past two decades in countries in transition in the regions of Latin America, Central and East Europe, Africa and the Asia-Pacific region.

As newly formed democratic governments have attempted to consolidate democratic reforms, one avenue has been through the establishment of an Ombudsman model, with a view to promoting implementation of democratic

development and good governance reforms, where the institutions have often been given an explicit mandate of/for human rights protection.

Many of these countries had encountered gross human rights violations and consequently the more quotidian administrative justice issues were of a lesser priority.

This stands in contrast to the more established institutions where often only administrative conduct was explicitly included in the legislative framework of the institution, and human rights issues were often seen as being outside the jurisdiction of the institution or peripheral to the enterprise. However, increasing numbers of the classical Ombudsman institutions have recognized that human rights issues do come into play in some investigations, that these matters can often be interpreted as being within their jurisdiction and that human rights norms are relevant in the resolution of these cases.

Many of these institutions have been established on the basis of and in line with the UN Paris “Principles Relating to the Status of National Human Rights Institutions” and many examples of such institutions can be found elsewhere in this publication.

### **7.5 Reflections in relation to the establishment and strengthening of Ombudsman institutions in countries in democratic transition**

In the following elements are identified and discussed, which is seen as essential when considering the establishment of Ombudsman institutions - or strengthening existing institutions - in countries in transition to a democratic system. Elements which should be thoroughly assessed and discussed prior to the set-up of an Ombudsman institution and carefully reflected in the founding law of the Ombudsman institution.

The identified elements are only some - but basic - elements, which should be taken into consideration. The UN Centre for Human Rights has made a more detailed and elaborated study of elements which may be considered essential to the effective functioning of National Institutions in “A Handbook on the Establishment and Strengthening of National Institutions

for the Promotion and Protection of Human Rights”, Professional Training Series No. 4, 1995.

### **7.5.1 Which type of Ombudsman model to choose for further elaboration and tailoring**

When considering the establishment of an ombudsman institution, including the preparation of the legal basis for the institution, in the form of a statutory law or a government decree, it seems important to be aware of the different types of existing Ombudsman models, cf above para. 7.4, and to identify the most suitable model for the country in question.

It should, however, at the same time be underscored that once the most suitable type of Ombudsman model has been identified it is essential to further elaborate on the model in order to tailor it to the legal environment and the given context of the country in question. This would i.a. include to assessing how to ensure independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency, accountability, etc. Some of these elements will briefly be touched upon below.

The identified model should, thus, only be seen as the starting point or overall framework for the establishment of an unique Ombudsman institution in the concerned country, which will be able to fit smoothly into the given environment and context and thereby eventually be able to function in a fair and efficient way.

The identification of the most suitable model should be based on a comprehensive and in-depth study and analysis of i.a.:

- C The rationale and vision behind the establishment of the institution;
- C The situation, context and legal environment in the given country.

The following elements could i.a. be mentioned as an illustration of this type of analysis:

*ad. 1:* If the vision, for example, is to try in general to strengthen the administrative performance and accountability of the public sector and try to develop general basic principles for the correct *legal* exercise of



administration (administrative justice), the Court-like model might be seen as suitable choice for further adaption to the national context.

If the vision is not primarily to promote a correct *legal* exercise of administration, but rather to target dissatisfied complainants who believe they have received an unfair or unreasonable administrative decision and to reach an amicable and reasonable agreement between the complainant and the concerned authority, the Mediator model would be a good starting point.

If the vision is to try to reduce corruption, etc., among civil servants, the Prosecutor-model may be a better choice.

*ad. 2:* First of all the question must be addressed whether there is a strong and well-functioning democratic parliament in the country. If this is the case it could speak in favour of the legislative Ombudsmen model, where the Ombudsman is appointed by the parliament, which in the last instance will be able to secure implementation and enforcement of opinions and recommendations from the Ombudsman.

If the parliament is described as weak, inefficient and undemocratic, a type of executive Ombudsmen model may be a better choice, cf. below.

It should be considered what kind of (administrative) weaknesses or shortcomings - i.e. which types of complaints - is it envisaged that the Ombudsman institution should remedy. Some types of complaints require a very high degree of independence from the bodies supervised, e.g. corruption cases, and calls for a model which will be able to secure this independence.

Also, a decision will have to be made on whether the institution should only address public sector activities - or also be in a position to handle complaints in relation to the private sector. If the latter is the case the Specialized Ombudsman model might be preferred.

Another issues to consider is which type of complaints it can be expected that the institution will most likely receive, and how the institution will be in a position to deal with these complaints, including the number. Consideration should be given to the establishment of a Specialized

Ombudsman model, if it is expected that many complaints will concern the same subject, e.g. children, equal opportunities. This will reduce the total number of admissible complaints and at the same time make it easier for the Ombudsman institution to attain the necessary professional qualifications and experience.

If the number of complaints are expected to be overwhelming it could be considered choosing an Ombudsman model - like the Swedish Children's Ombudsman - where examination of individual complaints is excluded. But an individual case can be used as the basis for issuing different general standpoints, recommendations and proposals for change of legislation, administrative practise and routines, etc.

Finally, there may be a risk of overlap with other existing institutions or bodies, e.g. the courts or complaints boards, etc. If, for example, administrative courts already exists, an Ombudsman institution based on the Court-like model would probably not be the most appropriate type of Ombudsman model.

An Ombudsman model with more than one Ombudsman - like the Swedish Parliamentary Ombudsman institution, which have four Ombudsmen - could be considered in order to strengthen the independence of the institution. It might be easier for a collegiate of four Ombudsmen to resist undue interference from the executive/administration, than for a single Ombudsman. Such a type of Ombudsman model could possibly also promote impartiality and integrity of the Ombudsmen, as a scheme could be established with "checks and balances" between the Ombudsmen.

Once the most suitable Ombudsman model is identified, the general basis or framework for the institution has been established and it should be easier in a more consistent way to assess, elaborate and clarify some of the important elements for the fair and effective functioning of the Ombudsman institution, including independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency, accountability, etc. Some of these elements will briefly be touched upon below.

### 7.5.2 Independence

As mentioned earlier a crucial foundation stone of an Ombudsman institution is its independence from the executive/administrative branch of government (or, in more general terms, independence from those bodies which it supervise).

Independence should be secured in different ways, e.g. through:

- C Legal autonomy ensured in the founding law, e.g. government agencies should not be allowed in any way to interfere in the Ombudsman's examination of complaints, to withhold information from the Ombudsman, etc.;
- C Operational efficiency, i.e. the Ombudsman institution should be in a position to draft its own internal rules and procedures on day-to-day affairs, and these rules and procedures should not be subject to external modification or approval;
- C Financial autonomy, i.e. the Ombudsman should be secured adequate and continued funding and be in a position to make his/her own decision on how to use the funding without approval from external authorities;
- C Appointment and dismissal procedures, i.e. requirements for appointment and dismissal of the Ombudsman should be clearly described in the founding law (decree), and the Ombudsman should be in a position to make his/her own independent decisions on appointment and dismissal of staff, etc.;

It has been claimed from different quarters that only the Legislative Ombudsman model - where the Ombudsman's legitimacy is based on a parliamentary decision and where he/she is responsible to parliament - can secure the essential independence of the executive/administration. Consequently, a tendency has therefore been seen to promote this type of Ombudsman model. From a strictly theoretical point of view this argument cannot be questioned. However, in practice it has to be kept in mind that there are many examples of parliaments in countries in democratic transition, which - of many different and often understandable reasons - are not yet able to function in a democratic and efficient way. If this is the case it can be

questioned - and has to be analysed - whether the Ombudsman's independence will be best secured through a legislative or executive Ombudsman model, where the Ombudsman e.g. are appointed by and responsible to the President of State.

Another important aspect, which should also be taken into consideration in this regard, is how to secure that the Ombudsman will be in a position to operate efficiently. For example, how can requests from the Ombudsman, e.g. to receive information from an administrative agency, and the Ombudsman's final opinions and recommendations be effectively implemented and enforced. The Ombudsman needs to derive his/her authority - and potentially to receive (often only psychological) back-up/support - from an institution or person, which is perceived by supervised bodies to be fair, efficient and powerful. A parliament which is perceived to be weak, inefficient and undemocratic, will not be able to provide the Ombudsman with the needed authority and potential support, and thus to secure that he/she will be able to perform in an efficient way. If this is the case the Executive model might be a better choice, e.g. if the Ombudsman could derive his/her authority from President of State or from a Minister/Ministry, who is perceived to be fair, efficient and powerful.

### **7.5.3 Jurisdiction - overlap with other institutions**

It is important that the jurisdiction of the Ombudsman institution is clearly described and clarified in the founding law (or decree) of the institution. Otherwise, it can be foreseen that discussions and problems in this regard will occur when the Ombudsman starts to function.

The overall framework of the jurisdiction of the Ombudsman institution has been set by that Ombudsman model which has been chosen as most suitable for the country in question, i.e. stating in more general terms which types of complaints the institution shall examine and on what basis the complaints shall be assessed. However, further elaboration and clarification of the jurisdiction of the Ombudsman institution is needed.

A well-defined jurisdiction should, as a minimum, include i.a.:

- C Which types of cases and complaints the Ombudsman can/shall investigate and examine;

- C On what basis shall the Ombudsman examine and assess complaints, i.e. on a strict legal basis, human rights norms (and principles) or more general principles of fairness and good administrative conduct;

When elaborating on the precise jurisdiction of the Ombudsman institution it is essential to secure that there will be no overlap - and eventually conflicts - with existing complaints handling institutions, including the courts, or an existing National Human Rights institution, which also handles complaints.

An Ombudsman institution is a vulnerable institution which needs to be recognized and accepted by other institutions and to a large degree is depending on good professional working relations with them. If major overlap in jurisdiction with other institutions exist, it could be feared that these institutions will perceive the Ombudsman as a threat or a potential competitor.

#### **7.5.4 Means of enforcement**

Adequate and efficient means of enforcement of requests, opinions and recommendations from the Ombudsman are important and should be clearly described in the founding law. Establishing a “toothless tiger” will most probably ruin the credibility and public confidence in the Ombudsman institution.

The general framework for the means of enforcement has been set by the Ombudsman model, which has been chosen as the most suitable. However, further elaboration is needed.

It should in this regard be borne in mind that it is one of the special characteristics of the Ombudsman concept that he/she cannot issue legally binding decisions, but “only” state his views, opinions and recommendations, etc. This should not be seen as a weakness, but as one of the potentials of the Ombudsman instead. The Ombudsman will in many situations be able to reach an amicable reconciliation of the dispute between the conflicting parties. Enforcement of opinions and recommendations to large degree depends on the Ombudsman’s ability to reach reconciliation and to present convincing arguments due to the high professional and moral qualifications and standards associated with his office.

However, the potential need for back-up/support and the possibility of the Ombudsman to turn to a body or authority which can issue legally binding decisions should not be ignored. The problem is briefly described above in para. 6.2.

Different ways of securing enforcement have to be assessed and the most suitable in the given context and legal environment has to be identified and elaborated on.

Different ways of enforcement can be found in different Ombudsman institutions, e.g. the Ombudsman can be given an opportunity to turn to:

- C The parliament;
- C The President of State or a Minister;
- C The Courts;
- C The prosecution service;
- C to recommend free legal aid in court proceedings, etc.

## **7.6 Conclusions**

When trying to establish a fair and efficient Ombudsman institution it is of utmost importance that the institution is tailored to the country in question and to the functions which the Ombudsman shall undertake.

In this regard, it seems useful and necessary to assess and identify the type of Ombudsman model that will be most suitable in the given context. The identification of the most suitable model should be based on a comprehensive and in-depth study and analysis of the situation and context in the given country and of the rationale and vision behind the establishment of an ombudsman institution;

Within the framework of the identified Ombudsman model it must further be discussed, elaborated and clarified which important elements may be

considered essential for the effective functioning of the ombudsman institution, such as i.a. independence, jurisdiction and means of enforcement.

Furthermore, it should be underscored as essential that all decisions concerning the establishment of the Ombudsman institution - including which model to choose and how to elaborate on the important elements for the effective functioning of the institution - is based on a broad and open public debate and in consultancy with relevant stakeholders and beneficiaries, including bodies and authorities that the Ombudsman eventually is going to monitor and supervise.

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## CHAPTER 8

### THE ASIA PACIFIC FORUM: A PARTNERSHIP FOR REGIONAL HUMAN RIGHTS COOPERATION

*Kieren Fitzpatrick*

#### 8.1 Human rights mechanisms in the Asia-Pacific

The Asia-Pacific region is unique in that it does not have an established government to government regional mechanism for the promotion and protection of human rights.

The Asia-Pacific is an enormously diverse region. It encompasses about a third of the world's area and two thirds of its population, stretching from the tiny island states of the Pacific, the vast nations of India and China to the states of West Asia. Engagement with the international human rights treaty system is uneven. Overall, there is less adherence to international human rights instruments in the Asia Pacific than in other regions, though there are a number of countries which have ratified all or most instruments. The reasons why countries have not ratified more of the international instruments are varied. It does not follow, however, that there is a lack of interest in the promotion and protection of human rights.

Whilst the Asia-Pacific region is without a formal human rights mechanism the development of national human rights institutions throughout the region has created a framework for cooperation on human rights which is focussed on practical measures that achieve effective outcomes.



## 8.2 The Asia-Pacific Forum of National Human Rights Institutions

### 8.2.1 Origins

The first Asia Pacific regional workshop of national human rights institutions was held in Darwin, Australia in July 1996. At this meeting, representatives of national human rights commissions from Australia, India, Indonesia and New Zealand agreed to the establishment of the Asia-Pacific Forum of National Human Rights Institutions. The meeting was also attended by observers from governments and non-government organisations throughout the region. At this meeting the four Commissions signed the *Larrakia Declaration*.

### 8.2.2 Objectives

The objectives of the Forum, as set out in the *Larrakia Declaration* are to:

- C respond where possible with personnel and other support to requests from governments in the region for assistance in the establishment and development of national institutions;
- C expand mutual support, co-operation and joint activity among member commissions through:
  - C information exchanges
  - C training and development for commission members and staff
  - C development of joint positions on issues of common concern
  - C sharing expertise
  - C periodical regional meetings
  - C specialist regional seminars on common themes and needs
- C responding promptly and effectively to requests from other national institutions to investigate violations of the human rights of their nationals present in a country that has a national institution;
- C welcome as participants in the Forum other independent national institutions to conform with the Paris Principles;
- C encourage governments and human rights non-government organisations to participate in Forum meetings as observers.

### 8.2.3 Membership of the Forum

Membership of the Forum is open to all national human rights institutions within the Asia-Pacific region. Newly created institutions can apply for membership of the Forum subject to meeting the fundamental criteria set out in the Principles Relating to the Status of National Institutions (the Paris Principles)<sup>1</sup> that have been endorsed by the UN Commission on Human Rights and the General Assembly. The key criteria in the Paris Principles are:

- independence guaranteed by statute or constitution;
- autonomy from government;
- pluralism, including in membership;
- a broad mandate based on universal human rights standards;
- adequate powers of investigation; and sufficient resources

There are currently seven national human rights institutions in the region which are members of the Forum: New Zealand (established 1977), Australia (1981), Philippines (1987), India (1993), Indonesia (1993), Sri Lanka (1997) and Fiji (1999). Work is well advanced toward the establishment of national institutions (or improving existing institutions to ensure their compliance with the Paris Principles) in Bangladesh, Iran, Malaysia, Mongolia, Nepal, Papua New Guinea, South Korea and Thailand. Other countries in the region are actively considering the establishment of a national human rights institution, such as Cambodia and Japan.

While the national institutions of the region vary in their structures, capacities and resources they are, in each case, substantial organisations for the strengthening of human rights, democracy and civil society in their countries. For example, in India, the National Human Rights Commission is presently taking action on more than three thousand complaints from individuals each month. The Philippines Commission on Human Rights has

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<sup>1</sup> Principles Relating to the Status of National Institutions, Commission on Human Rights resolution 1992/54 of 3 March 1992. General Assembly resolution 48/134 of 20 December 1993. Commission on Human rights Resolution 1999/69 of 28 April 1999.

pursued an ambitious program of public information and awareness raising for some years. In Indonesia, the National Human Rights Commission has recently conducted important investigations into human rights violations in East Timor.

#### **8.2.4 Funding of the Forum**

The Secretariat of the Forum is based at the Australian Human Rights and Equal Opportunity Commission and receives support from the Commission for its operations. The Secretariat is funded through donor funds. The Australian Government aid agency, AusAID, is the major donor – contributing AUD225,000 per year for Secretariat operations and further funds for specific projects. The United Nations Office of the High Commissioner for Human Rights (OHCHR) has co-sponsored the Forum's major meetings and provided financial assistance and expert advice. The New Zealand Government has strongly supported the Forum and contributed financially to its activities. The Forum has also received support from other donors and corporations and it continues to seek to diversify its source of donor funds in line with its expanding workload.

#### **8.2.5 Forum Activities**

The Forum undertakes a wide range of activities on human rights. The approach of the Forum is to focus on practical outcomes through constructive cooperation and dialogue.

##### *Annual meetings*

Since the first meeting of the Forum in Darwin in 1996 the members of the Forum have met annually – in New Delhi, 1997; Jakarta, 1998 and Manila, 1999. The Fifth Annual Meeting of the Forum will be held in Rotorua, New Zealand, from 7 to 9 August 2000. The annual meeting is the main decision making body of the Forum. All governments from the region are invited to attend these meetings and actively participate. The meetings also provide the opportunity for representatives of Non-Governmental Organisations to attend and participate. A wide range of issues are discussed at annual meetings and the concluding statements and discussion papers of the meetings can be found on the Forum's website (<http://www.apf.hreoc.gov.au>).

The annual meetings of the Forum have been co-sponsored by the United Nations Office of the High Commissioner for Human Rights (OHCHR) and they have now become one of the most significant vehicles for regional cooperation on human rights in the Asia Pacific. Member States of the United Nations Commission on Human Rights have welcomed “the establishment of independent national institutions in countries of the Asia and Pacific region and [recognised] their important contribution to the process of regional cooperation, inter alia, through the work of the Asia Pacific Forum of National Human Rights Institutions”. National institutions are seen “as one of the most important building-blocks necessary” in the development of regional arrangements for the promotion and protection of human rights in the Asia Pacific.

#### *Regional workshops*

In addition to the annual meetings, Forum members meet at regional workshops. These workshops are focussed on specific human rights issues with a view towards national institutions adopting practical measures which achieve effective outcomes. The workshops provide an opportunity for the staff of national institutions to meet at an international level to exchange information and develop expertise and common standards. Regional workshops have included:

- Role of Media and Public Affairs in the Promotion of Human Rights, Jakarta, 23-27 February 1998. This workshop was developed and implemented by the Forum Secretariat, funded by the New Zealand Government and hosted by the Indonesian National Commission on Human Rights (Komnas HAM).
- National Institutions and Non-Government Organisations: Working in Partnership, 26-28 July 1999, Kandy, Sri Lanka. This workshop was developed and implemented by the Forum Secretariat and the Asia Pacific NGO Facilitating Team, co-sponsored by the OHCHR and funded by the OHCHR and the Australian and New Zealand Governments. The Human Rights Commission of Sri Lanka was host institution.
- From 6 to 7 May 2000 the Forum will host a workshop in Fiji on the role of national human rights institutions in advancing the human rights of women. The workshop is being hosted by the Fiji Human Rights

Commission in collaboration with the University of the South Pacific. The workshop is being held to ensure that the outcomes will be available for the ‘Beijing plus 5’ Special Session of the United Nations General Assembly in New York in early June and the Forum’s Fifth Annual Meeting to be held in early August in New Zealand.

*Advisory Council of Jurists*

At the Third Annual Meeting of the Forum in Indonesia in 1998, Forum members established an Advisory Council of Jurists to provide national human rights institutions in the Asia Pacific region with jurisprudential guidance on contemporary human rights issues. The Council’s membership is made up of one eminent jurist nominated by each of the Forum members – these nominations were approved by Forum members at the Fourth Annual Meeting in the Philippines in 1999. The members of the Advisory Council of Jurists are:

New Zealand	Hon Justice Silvia Cartwright
India	Mr Fali S Nariman
Sri Lanka	Mr R K W Goonesekere
Philippines	Mr Sedfrey Ordonez
Indonesia	Professor J.E. Sahetapy
Australia	Sir Ronald Wilson

The most recent member of the Forum, the Fiji Human Rights Commission, will forward its nominee to the Forum for approval at the next annual meeting. It is anticipated that the Advisory Council of Jurists will hold its inaugural meeting alongside the Fifth Annual Meeting of the Forum in New Zealand. It will consider two references approved by Forum members on (i) the application of capital punishment and its consistency with international human rights law and (ii) child pornography on the internet and the imposition of reasonable restrictions on the right to freedom of expression.

*Focal points for trafficking of women and children*

At the Fourth Annual Meeting in Manila in 1999 the Forum and the Office of the High Commissioner for Human Rights (OHCHR) agreed to the establishment of a focal point network on women with a specific focus on the trafficking of women and children. The network will focus on information-sharing as well as trafficking-related research. Trafficking is a

high priority issue of the High Commissioner and the OHCHR has proposed to work with the focal points to develop practical guidelines which could assist national commissions to integrate the issue of trafficking into their programs and methods of work.

*Other forum activities*

The Forum conducts a wide range of technical cooperation projects with individual Forum Members, governments and non-governmental organisations. Projects include:

- human rights law courses
- strategic planning workshops
- training in alternative dispute resolution
- the development of computerised complaints processing systems
- training in the investigation of allegations of human rights violations
- training in project management, administration and financial skills
- the development of legal advocacy skills
- strengthening public affairs and information programs
- training community human rights workers.

### **8.3 Challenges and achievements**

The effectiveness of the Forum as a regional human rights organisation is dependent upon the commitment of its member organisations to the ongoing development of regional cooperation for the promotion and protection of human rights. Support for the Forum has been strong since its establishment four years ago – from national human rights institutions, the United Nations, governments, non-government organisations and the broader civil society. It is anticipated that the strong growth of the Forum will continue. In the short-term the region will see the establishment of new national institutions and the resultant expansion of the Forum’s membership; continued strengthening of existing national institutions; and the expansion of the Forum’s bilateral and regional projects. The Forum is preparing to meet these challenges by creating a new legal and management structure to enhance its existing democratic and participatory decision-making mechanisms. It is also anticipated that the Secretariat of the Forum will become a “stand alone”

organisation located centrally in the Asia Pacific region. The Forum is also working to strengthen and diversify its funding base.

The individual members of the Forum are also not without their challenges – developing and maintaining a capacity to meet their mandates with limited resources is an obvious challenge. So too is the need for national institutions to accurately reflect the pluralist societies which they are established to represent. Vigilance in establishing and maintaining autonomy and independence in the performance of their functions is a hallmark of the institutions in the region – and this often means that the work of institutions is characterised by tensions, particularly with governments.

The seven member institutions of the Forum are well placed to meet these challenges. Each Forum member commission has been established within a similar institutional framework - they are freestanding independent organisations with wide mandates and powers of investigation. Whilst many of the Forum members are relatively young institutions, the impact of their role in broader society has been significant. The influence of the Indonesian National Human Rights Commission on the process of democratisation in that country is a case in point.

#### **8.4 Future objectives**

The Asia-Pacific Forum of National Human Rights Institutions is dedicated to developing a partnership for human rights in the Asia Pacific. In a region that is remarkable in its diversity, the Forum is providing a framework through which the development of practical and effective human rights improvements can be implemented. The regular meetings of members and staff from the individual national commissions of the Forum are providing an arena in which information is shared, skills are developed and the effectiveness of individual institutions is strengthened.

The Forum actively seeks cooperative partnerships with the United Nations, governments, non-government organisations and broader civil society, including the private sector. Whilst the Forum has established a strong framework for regional cooperation on human rights it recognises that there is much to be learned from examining the practices of national institutions

beyond the region. Forum members encourage national institutions in Europe, Africa and the Americas in their initiatives to develop regional cooperation in the promotion and protection of human rights and look forward to the expansion of cooperation between regions.





## CHAPTER 9

# INDIA'S NATIONAL HUMAN RIGHTS COMMISSION: STRENGTHS AND WEAKNESSES

*Vijayashri Sripati*

### 9.1 Introduction

National Human Rights Commissions (NHRC) with their “complimentary mechanisms” are the new actors on the human rights landscape. Although the first human rights commission was set up in Saskatchewan way back in 1947,<sup>1</sup> the concept of a national rights institution gained prominence only in the 1990s when the UN began to actively promote it. The landmark event in this process was the formulation of the “Paris Principles” - Principles relating to the Status of National Institutions at the UN sponsored conference in 1991 in Paris.<sup>2</sup> These principles lay down the normative framework for these institutions. Today, there are a variety of national human rights commissions spread across different locales around the globe engaged in the

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<sup>1</sup> See Mario Gomez, Sri Lanka's New Human Rights Commission, 19 Hum. Rts. Q. 281, 283 (1998).

<sup>2</sup> Id. at 282. See UN Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights 37 (United Nations, Geneva, 1995) (Hereinafter UN Handbook). See generally Birgit Lindsnaes & Lone Lindholt, National Human Rights Institutions - Standard Setting and Achievements, in Human Rights Development Yearbook, 1998 [forthcoming]. [giving a detailed account of the background for the development of the United Nations ' Paris Principles of 1991 for the establishment and functioning of national institutions.

herculean task of protecting human rights.<sup>3</sup> While their role in promoting human rights is clearly complimentary it is well recognized that their strengthening will only enhance the existing mechanisms at the national and international level.

This article deals with India's National Human Rights Commission.<sup>4</sup> The NHRC is a part of a cluster of institutions of governance such as the Parliament and the Judiciary that have been envisaged for - and are engaged in - protecting the constitutionally enshrined basic human rights<sup>5</sup> of about a billion people in the Indian subcontinent. The NHRC is a body created by an act of Parliament with limited mandatory powers. But this factor does not diminish the magnitude of its task or its potential to add to India's efforts to protect its citizens and to develop a culture respectful of human rights and fundamental freedoms. This article probes the anatomy of the Commission, analyses its strengths and weaknesses and evaluates its functioning. This assessment of the Commission is undertaken against the Paris Principles and the standards laid down in the UN Handbook.

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<sup>3</sup> The decade of the 1990s has witnessed the establishment of national institutions in Africa: Cameroon (1991), Chad (1994), Ghana (1993), Nigeria (1996), Senegal (1997), South Africa (1995), Uganda (1996) and Zambia (1997). Asia-Pacific region : India (1993), Indonesia (1994) and Sri Lanka (1997). Americas: Mexico (1990) and Costa Rica (1993). Europe: Latvia (1995), Commonwealth of Independent States of the former Soviet Union: Kazakhstan (1996) and Georgia (1997).

<sup>4</sup> Hereinafter, the terms National Human Rights Commission, the NHRC and the Commission shall be used interchangeably.

<sup>5</sup> India has a written constitution that enshrines the following basic human rights: 1) Right to Equality 2) Right to Fundamental Freedoms - a) Freedom of Speech & Expression b) freedom to assemble peacefully and without arms c) freedom to form associations or unions d) freedom to practice any profession, occupation, trade or business 3) Right to life and liberty 4) Freedom against exploitation 5) Right to Freedom of religion 6) Cultural and Educational Rights for minorities and 7) Right to Constitutional Remedies. These rights are termed "Fundamental Rights" and are judicially enforceable. Under Article 32 of the Constitution any citizen can file a writ petition with the Supreme Court for the enforcement of her Fundamental Rights.

## 9.2 The birth of the NHRC

The NHRC was born in 1993 and the government's ostensible reason for creating it was to "better protect human rights." However, in establishing it, the Indian government was not responding to a burgeoning interest in the concept of national rights institutions. The government's repressive anti-terrorist measures<sup>6</sup> and its handling of secessionist movements in Punjab and Kashmir during the late eighties had provoked domestic and international complaints of massive human rights violations.<sup>7</sup> The scathing reports of Amnesty International and Asia Watch had sharpened the international visibility of these human rights abuses.<sup>8</sup> Fearing repercussions in the international diplomatic arena - where financial aid is dependent on an image of [a country's] conformity to human rights standards - the then Congress government led by Prime Minister Mr. P.V. Narasimha Rao cobbled together the NHRC in October 1993.<sup>9</sup>

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<sup>6</sup> The Government had enacted a draconian legislation called the Terrorists and Disruptive Activities (Prevention) Act, 1984. [hereinafter TADA]. The special provisions in this act made the confession before a police officer admissible in a court of law and thereby increased the potential of the police to abuse their powers. It must be noted that the Indian Evidence Act, 1872 renders inadmissible the confession made to a police officer. The TADA act also shifted the burden of proof on the accused requiring the accused person to establish his innocence.

<sup>7</sup> See generally Tarik Jain & Ghulam Sarwar, *Kashmir: Problems: Challenges and Response* (Institute of Policy Studies, 1990); Paula Newberg, *Double Betrayal: Repression & Insurgency in Kashmir* (Brookings Institution Press, 1995).

<sup>8</sup> See eg., Amnesty International Report, 1989 (Amnesty International Publications, United Kingdom).

<sup>9</sup> A bill to protect human rights and containing a proposal for a human rights commission was introduced in Parliament in May 1993. After the bill went to Parliament the committee procedure for debating its contents was skirted. While this bill was pending in Parliament, the NHRC was established by a pre-emptory ordinance promulgated on September 28, 1993. Subsequently, in November 1993 Parliament introduced a new bill in November 1993 to replace the ordinance. This Act came into force in the absence of an informed debate and received Presidential assent on 8 January 1994. This act provides for the

A national human rights commission is an institution set up by the state, funded by the state, but yet whose purpose is to investigate the state. Therefore a measure of ‘qualified independence’ from the government is a crucial prerequisite for its credible and effective functioning.

### 9.3 Independence

Accordingly, the overall theme of the Paris Principles is that the anatomy, fiscal set up and mandate of a national human rights commission must reflect its legal, financial and operational autonomy. The UN Handbook recommends entrenching the terms and conditions concerning method, criteria for and duration of the appointment of the members [of the commission] and their dismissal in the commission’s founding legislation as one method of ensuring its independence.<sup>10</sup> It also suggests entrusting a “representative body” with the power of appointing the commission’s members.<sup>11</sup>

The Human Rights Act sets out the legal framework of the NHRC. The Commission is primarily a judge-based body with three of its five members being judges.<sup>12</sup> In the six years of its existence, the Commission has only for the second time come to have a woman judge as a commissioner.<sup>13</sup> Further, the Act disallows any person other than a former Chief Justice of the Supreme Court to be appointed to head the Commission.<sup>14</sup> The remaining two members are to be men and women “who have knowledge and practical

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constitution of a National Human Rights Commission [NHRC] at the national level, State Human Rights Commissions [SHRC] in states and Human Rights Courts [HRC] at the district level for the “better protection of human rights.”

<sup>10</sup> See UN Handbook, supra note 2 at 11.

<sup>11</sup> Id.

<sup>12</sup> See the Protection of Human Rights Act, 3 (2) (a) -(c).

<sup>13</sup> On February 22, 2000 the Government inducted Ms. Sujata Manohar, former judge of the Supreme Court of India as a member of the Commission.

<sup>14</sup> See Protection of Human Rights Act, 1993 3 (2) (a).

experience in matters relating to human rights.”<sup>15</sup> Regrettably, the collegiate that recommends appointments has so far not chosen either a human rights activist or a woman to the Commission under this category. The NHRC’s composition also does not reflect the country’s “sociological and political pluralism” - a requirement emphasised by both the UN Handbook and the Paris Principles.<sup>16</sup> The only avenue for channelling the voices of vulnerable groups such as women, children, untouchables etc. to the Commission is through the following ex-officio members of the Commission namely, the Chairpersons of the National Commission on Minorities, Scheduled Castes and Tribes and Women.<sup>17</sup> As per the Act, the task of appointing members to the commission is entrusted to a collegiate comprising among others the Prime Minister and the Leader of the Opposition in Parliament. The collegiate has drawn criticism for not making comprehensive and effective consultations while making appointments. Under the Protection of Human Rights Act, a member can be removed from office if he “engages during his term in any paid employment outside the duties of his office.”<sup>18</sup> In addition, the Human Rights Act renders the commissioners ineligible for appointment under the Government of India, once their five-year term at the NHRC expires.<sup>19</sup> Clearly, the Human Rights Act lays down strict criteria for appointment and dismissal of the members and to that extent surpasses the requirements of the Paris Principles. The presence of judges lends prestige to the institution and a degree of solemnity to their recommendations. The Paris Principles call for “adequate funding” for a National Commission so as to insulate it from governmental financial control.<sup>20</sup> The NHRC however does not enjoy substantial financial autonomy since although it receives parliament-approved grants, the actual amount it is paid is determined by the

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<sup>15</sup> Id.3 (2) (d).

<sup>16</sup> See UN Handbook, supra note 2 at 12.

<sup>17</sup> See Protection of Human Rights Act, 1993 3 (3).

<sup>18</sup> Id. 5 (2) (b).

<sup>19</sup> Id. 6 (3).

<sup>20</sup> See Paris Principles, reprinted in, UN Handbook, supra note 2 at 11, 37.

Government.<sup>21</sup> Nonetheless, funding through parliament as opposed to a particular ministry has certain in-built checks in that the opposition parties [in parliament] can expose and/or thwart the government's attempts to starve the Commission. Also, this method ensures a greater degree of functional autonomy to the Commission.

#### **9.4 The definition of human rights in the Protection of Human Rights Act**

As mentioned earlier, the impetus behind the Commission's creation was to ensure a "better protect[ion of] human rights."<sup>22</sup> A thorough analysis of the Commission's emerging role in the Indian polity and the nature and scope of its functions necessitates a probe into the definition of "human rights" that it is mandated to protect. The Human Rights Act provides that "human rights" means the right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenant on Civil & Political Rights and the International Covenant on Economic Social and Cultural Rights *and enforceable by Courts in India.*<sup>23</sup> The Indian Constitution enshrines certain basic human rights pertaining to life, liberty and equality that are judicially enforceable.<sup>24</sup> These rights also find mention in the ICCPR<sup>25</sup> Therefore, the main catch in the statutory definition is that

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<sup>21</sup> 32 of the Protection of Human Rights Act provides: (1) The Central Government shall after due appropriations made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the *Central Government may think fit* for being utilised for the purposes of the Act.

<sup>22</sup> See Protection of Human Rights Act, Statement of Object and Reasons.

<sup>23</sup> Id. 2 (d).

<sup>24</sup> See supra note 5.

<sup>25</sup> The Indian Constitution came into force in 1950 and India signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social & Cultural Rights in 1979. The Indian Constitution and the International Bill of Rights have a common provenance: The U.S. Constitution and the U.S. Bill of Rights. Consequently, many of the ICCPR rights are explicitly mentioned in the Indian Constitution. As a consequence,

the Commission is mandated to protect only those rights in both the Covenants that are enforceable by the Courts in India. Since India subscribes to the dualist pattern with regard to the relationship between international treaty law and municipal law, theoretically speaking the Commission will not be responsible for protecting rights in the Covenants until and unless Parliament enacts domestic legislation incorporating those rights. While the Supreme Court has reiterated this dualist approach to enforcement of international treaty law in India,<sup>26</sup> its recent decision has however given an interesting twist to this issue.<sup>27</sup> The Court ruled that international treaty provisions which elucidate and effectuate the fundamental rights in the Indian Constitution are enforceable in India even in the absence of a legislative measure.<sup>28</sup>

## **9.5 The Commission's tasks**

The Paris Principles call for vesting a National Commission with "as broad a mandate as possible" that must be set forth in the Commission's founding legislation.<sup>29</sup> The PHRA sets out nine specific functions for the Commission that can be broadly clustered around the following four [4] heads: (1) Protective (2) Monitoring (3) Advisory and (4) Educational or Educative.

### **9.5.1 Protective functions**

The Commission's protective function is by and large its most important function. The Commission is empowered to receive complaints and initiate

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many of the rights in the ICCPR were available to Indian citizens 20 years before India became a signatory to the ICCPR.

<sup>26</sup> Jolly George v Bank of Cochin, AIR 1980 SC 470 (where the Supreme Court held that rights contained in an International treaty that India has signed do not become a part of the corpus juris of India until Parliament makes implementing legislation incorporating those rights).

<sup>27</sup> Visakha v State of Rajasthan, AIR 1997 SC 323.

<sup>28</sup> Id.

<sup>29</sup> See Paris Principles, in, UN Handbook, supra note 2 at 37.



investigations into violations of human rights.<sup>30</sup> However, all types of violations do not come under its purview; it can only investigate those violations that are committed and/or abetted by public servants.<sup>31</sup> Interestingly, the Commission can also receive complaints or investigate on its own about “negligence in the prevention of human rights violations by public servants.”<sup>32</sup> This provision is in tune with the raw realities of the Indian human rights scenario where violations occur as much from the abuse of power by public officials as by the non-performance of their statutory duties. In accepting complaints, the Commission is required to confine its substantive consideration to those complaints that have been filed within one year of the perpetration of the alleged human rights violation.<sup>33</sup> The Commission’s suo moto powers are an important aspect of its protective functions that must be fully utilised. Indeed, its “complimentarity” lies in this ability to “search” for human rights violations. Two other crucial functions linked to its role as a protector are the power to intervene in legal proceedings that involve the violation of a fundamental rights<sup>34</sup> and the power of initiating new litigation.<sup>35</sup>

### **9.5.2 & 3 Monitoring & advisory functions**

Prisons, detention homes and state-run welfare homes have sadly become seats of sadistic practices and theatres of torture in India. Accordingly, the Commission is entrusted with the task of visiting these institutions, studying their living conditions and recommending measures for improving them.<sup>36</sup> However, the Commission is required to obtain the permission of the concerned state government prior to making its visits to these institutions. The NHRC is also mandated to review the constitutional safeguards and existing laws and recommend appropriate amendments and measures for

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<sup>30</sup> See Protection of Human Rights Act, 1993 12 (a) (i).

<sup>31</sup> Id.

<sup>32</sup> Id. 12 (a) (ii).

<sup>33</sup> Id. 36 (2).

<sup>34</sup> Id. 12 (b).

<sup>35</sup> Id. 18 (2).

<sup>36</sup> Id. 12 (c).

their effective implementation.<sup>37</sup> Although the Human Rights Act does not expressly confer authority on the Commission to draft new legislation, this authority flows by implication from the powers vested in the Commission.<sup>38</sup> The Commission's advisory functions include advising and assisting the government in the domestic implementation of international human rights standards by studying treaties and other international human rights instruments, recommending measures for their effective implementation and advising the ratification of a particular human rights instrument.<sup>39</sup>

(D) Educative Functions: A valuable component of protecting human rights is to spread awareness about it among the citizenry. This task takes on special urgency in India, a country of enormous size and where a substantial tranche of the citizenry is ignorant of its rights and the avenues available for their vindication. The NHRC is required to disseminate information, spread human rights literacy through working with the media, releasing publications, conducting seminars and workshops and encouraging the activities of non-governmental organisations and other human rights institutions.<sup>40</sup> The Human Rights Act includes an umbrella clause under which the Commission can perform such other functions as it may consider necessary for the promotion of human rights.<sup>41</sup> The Commission thus not only has all the functions the Paris Principles articulate but also a potentially wider mandate.

The peculiar factors that ignited the birth of the Commission have influenced the nature of the commission's functions. For instance, the government's draconian anti-terrorist legislation had increased the potential of the police to trample on the civil liberties of citizens. Accordingly, the Human Rights Act specifies "reviewing the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend

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<sup>37</sup> Id. 12 (d).

<sup>38</sup> See NHRC Annual Report 18 (1995-96).

<sup>39</sup> See Protection of Human Rights Act, 1993 12 (f).

<sup>40</sup> Id. 12 (g) - (i).

<sup>41</sup> Id. 12 (j).

appropriate remedial measures” as one of the nine tasks of the Commission.<sup>42</sup>

## **9.6 Inadequate powers**

True the Human Rights Act vests the Commission with a fairly broad mandate. But many human rights activists and lawyers greeted the birth of the commission as nothing more than a display of the government’s formal allegiance to human rights rhetoric. The UN Handbook points out that an effective investigatory mechanism must have adequate legal capacity and organizational competence.<sup>43</sup> India’s National Human Rights Commission, however, suffers from the following few major structural weaknesses.

### **9.6.1 Meagre investigative powers & lack of an independent investigation team**

The Commission is rendered weak by its meagre investigative powers and by the lack of an independent investigation team at its disposal. As per the Human Rights Act, the Commission’s investigation team has to be drawn essentially from the existing police personnel - provided by the Central government<sup>44</sup> - who are usually the human rights violators themselves. Further, the NHRC has only in the course of conducting inquiries the powers of a civil court trying a suit under the Indian Code of Civil Procedure.<sup>45</sup> These include the power to compel the discovery and production of any documentary or other evidence, the power to summon the attendance of witnesses receiving evidence on affidavits, call for the production of any public records and examine such witnesses under oath.<sup>46</sup> In other words, these powers are not available to the NHRC or individuals undertaking

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<sup>42</sup> Id. 12 (e).

<sup>43</sup> See UN Handbook, *supra* note 2 at 28.

<sup>44</sup> See Protection of Human Rights Act, 1993 11 (1).

<sup>45</sup> Id. 13 (1).

<sup>46</sup> Id. 13 (1) (a) - (f).

investigations on its behalf in the course of its activities beyond the conduct of inquiries including when undertaking investigations.

### **9.6.2 Ineffective remedies for violations**

Secondly, the NHRC has no power to prosecute public servants for human rights violations or to order payment of compensation to the victims. All that the Commission is empowered to do is to make recommendations.<sup>47</sup> In cases where its inquiry discloses the violation of human rights or negligence in the prevention of its violation, it can only recommend to the appropriate authorities that the errant public servant be prosecuted or recommend that the appropriate authorities take appropriate action and/or recommend that the government pay compensation to the victim<sup>48</sup>. Regrettably, the Human Rights Act does not make the commission's recommendations binding on the concerned government. All that it does is to prescribe a time frame [one month] within which the government is required to get back to the commission about the action it has taken on the commission's recommendations.<sup>49</sup> The Commission has no powers to make determinations or enforceable orders. Its ability to provide remedies for violations is therefore extremely limited.

The Commission is empowered to publish the results of its investigations along with any recommendations made and the action taken by the government in that regard.<sup>50</sup> While publishing decisions is not a remedial power it nonetheless has some advantages in that it informs public opinion and assures future complainants that the Commission takes their complaints seriously. Also the Commission is mandated to submit an annual report to

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<sup>47</sup> Id. 18 (1).

<sup>48</sup> Id. 18 (1), (3).

<sup>49</sup> Id. 18 (1) (5).

<sup>50</sup> Id. 18 (6).

the government which in turn will place it before Parliament for discussion and debate.<sup>51</sup>

### **9.6.3 The Commission has reduced powers to investigate violations committed by the armed forces<sup>52</sup>**

Given the past dismal record of the armed forces and their potential to violate human rights, designating the armed forces as exempt from the Commission's probe has reduced the commission's potential effectiveness as a protector of human rights. When the Commission receives a complaint of human rights violations by the armed forces, the only action it can take is to call for a report from the government and make its recommendations.<sup>53</sup>

Justice Krishna Iyer, has perhaps best captured the true nature of the commission when he dubbed it a "beautiful and ineffectual angel beating in the void its luminous wings in vain."<sup>54</sup>

## **9.7 The Commission's functioning**

A majority of the complaints that the Commission received concerned police atrocities, police excesses, commission of torture and other abuses against women, excesses by the armed forces etc. Since investigating complaints about rights violations remains the Commission's most important function and its credibility as an institution depends and [will depend] on how

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<sup>51</sup> Id. 20 (1). Since its establishment in 1993, the NHRC has submitted 5 Annual Reports, i.e. the First Annual Report that covers the period of October 1993 to March 1994; the Second annual Report that covers the period of April 1, 1994 - March 31, 1995; the third Annual Report that covers the period of April 1, 1995 - March 31, 1996; the Fourth Annual Report that covers the period of April 1, 1996 - March 31, 1997 and the Fifth Annual Report for the period of April 1, 1997 - March 31, 1998. The NHRC has submitted the fifth annual report to the government which has not yet placed it before Parliament. [<http://www.nhrc.nic.in.html>] [visited October 8, 1999].

<sup>52</sup> See Protection of Human Rights Act, 1993 id. 19.

<sup>53</sup> Id. 19 (1) (a) - (b).

<sup>54</sup> V.R. Krishna Iyer, *Human Rights in India* 137 (Oxford University Press, 1999).

effectively it has performed this task, the author will first focus on the Commission's investigative work in analysing its functioning.

### **9.7.1 Investigative work**

Within the first six months of its inception, about 500 complaints had trickled into the Commission's office.<sup>55</sup> A substantial portion of these complaints pertained to police atrocities such as custodial deaths, rape, violence against women etc. Several innocent people who had been ensnared by the police under the TADA legislation also petitioned the NHRC for help.<sup>56</sup> Consequently, in its early years, the Commission prioritised the protection of civil liberties. Indeed, within a few days of its inception, the Commission gave two crucial directives to the state governments. Firstly, it directed that all custodial deaths and rapes anywhere in the country must be automatically reported to it within 24 hours of their occurrence and in case the government failed to do so there would be a presumption (by the Commission) of foul play.<sup>57</sup> Secondly, it required all state governments to submit to it video-tapes of all post-mortem examinations of custodial deaths along with the written medical reports of the same.<sup>58</sup> Although the Commission's directions carry no legal weight, yet they are a worthwhile practice that when entrenched can serve as a powerful disincentive to violative behaviour. Since these directions were given there has been an increase in the number of reported custodial deaths and many states have consented and complied with the Commission's direction to send video tapes of post mortem examinations.<sup>59</sup>

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<sup>55</sup> See NHRC Annual Report 9 (1993-94) (First Annual Report).

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> See NHRC Annual Report 15 (Third Annual Report).

<sup>59</sup> See NHRC Annual Report 12 (1995-96) (Third Annual Report); Lakshwadweep, Daman & Diu & Dadra Haveli Accepts the Commission's Recommendations on Compulsory Video-filming of post-mortems, Human Rights Newsletter (NHRC), Jan. 1999, at 2.

In order to be accessible to the common citizenry, the commission began to accept complaints in a variety of ways including by fax and telex messages.<sup>60</sup> The Commission also received many complaints from leading NGOs such as the Tamil Nadu State Legal Aid Board, Andhra Pradesh People's Union for Civil Liberties [APPUCL], All Assam Students' Union [AASU] etc.<sup>61</sup> However, since many of the NGOs were sceptical of the Commission's ability to redress citizens' grievances they have approached the Commission more to test its actual potential rather than to obtain concrete results. The complaint of the South Asia Human Rights Documentation Centre is a case in point.<sup>62</sup> The Commission also made full use of its suo moto powers and took cognizance of many journalistic items, news reports and reports by foreign NGOs. In exercising these powers it focussed on some key human rights issues such as custodial deaths, police atrocities including torture, violence against women etc.<sup>63</sup> The Commission made its maiden suo moto investigation into the Border Security Forces' indiscriminate firing resulting in the tragic death of about 60 innocent civilians in the Bijibehera district of the State of Jammu & Kashmir.<sup>64</sup>

However, a review of the Commission's initial handling of cases during its first few years, indicates that its treatment has been ad hoc, and that there is room for considerable improvement.<sup>65</sup> Another factor that has crippled the commission's work has been the recalcitrance on the part of state governments to submit reports to the Commission and the shoddy investigative work conducted by state-police personnel.<sup>66</sup> Consequently, the Commission has been compelled to conduct investigations on its own using

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<sup>60</sup> See NHRC Annual Report 37, 39 (1993-94) (First Annual Report).

<sup>61</sup> See NHRC Annual Report 14, 18, 20 (1993-94) (First Annual Report).

<sup>62</sup> Id. At 22.

<sup>63</sup> Id. 9, 11, 13, 17-18, 21-22.

<sup>64</sup> Id. at 9.

<sup>65</sup> See NHRC Annual Reports I, II, & III.

<sup>66</sup> See NHRC Annual Report 15, 44 (1995-96) [Third Annual Report]; See NHRC Annual Report 60 (1996-97) (Fourth Annual Report).

its own investigation team in some cases,<sup>67</sup> “monitor closely” the state police’s investigations in some other cases,<sup>68</sup> transfer certain cases to the CBI for investigation<sup>69</sup> and appoint sessions judges, chairmen of tribunals and even NGOs to assist it in investigation work.<sup>70</sup> The Commission has also taken many opportunities to strongly urge the state to pay compensation to victims or their families. It has recommended an adoption of a uniform rate of compensation in respect of death, permanent disablement and serious injury.<sup>71</sup> Interestingly, the Commission evolved an innovative procedure in this regard. It advised the governments concerned to recover the amount paid as compensation from the delinquent public servants. Surprisingly the state governments have abided by this directive and have accordingly recovered the amounts paid as compensation from the errant public servants.<sup>72</sup> But here too, the Commission has had to monitor the enforcement of this rule and in one case has sought the intervention of the Supreme Court to have its directions - that the state government was reluctant to implement - enforced.<sup>73</sup>

### **9.7.2 Monitoring and advisory work**

The monitoring and advisory functions of the Commission has borne fruit. Many of the victims who approached the Commission for help were TADA detainees. From day one, the Commission prioritised a serious study of TADA’s implementation. The Commission turned to a variety of sources - bureaucrats, police personnel, judges, journalists and non-governmental

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<sup>67</sup> See NHRC Annual Report 44 (1995-96) (Third Annual Report).

<sup>68</sup> Id. See also NHRC Annual Report 60 (1996-97) (Fourth Annual Report).

<sup>69</sup> Id.

<sup>70</sup> See NHRC Annual Report 13, 14, 42 (1993-94) (First Annual Report); NHRC Annual Report 27 (1994-95) (Second Annual Report); NHRC Annual Report 60 (1996-97) (Fourth Annual Report).

<sup>71</sup> See NHRC Annual Report 43 (1994-95) (Second Annual Report).

<sup>72</sup> See NHRC Annual Report 12- 15 (1995-96) (Third Annual Report).

<sup>73</sup> See NHRC Annual Report 59 (1996-97) (Fourth Annual Report).



organisations - to collect evidence of the nature of use and abuse of TADA.<sup>74</sup> Within a few months of embarking on its monitoring mission, the NHRC Chairperson made public his decision of seeking a review of the Supreme Court's decision that had upheld the validity of TADA.<sup>75</sup> By the time the date for the consideration of the extension of the dreaded statute neared, the Commission had weighed in, with other enthusiasts of civil liberties in pressurising Parliament to repeal the dreaded statute. In a letter addressed to the Prime Minister, the NHRC Chairman forcefully declared that "the TADA legislation was indeed draconian and incompatible with India's cultural traditions, legal history and treaty obligation."<sup>76</sup>

The NHRC deserves applause for drawing public attention to the increasing rise in custodial deaths and educating the government and the political parties of the desperate urgency of bringing the domestic treatment of detainees in consonance with international standards. The Commission had strongly urged the then Prime Minister, Mr. P.V. Narasimha Rao to accede to the UN Convention on Torture.<sup>77</sup> Although the Congress government failed to accept the commission's recommendations, the United Front government headed by Mr. I.K. Gujral acceded to the UN Convention on Torture in 1997.<sup>78</sup>

### **9.7.3 Protection of socio-economic rights**

It is encouraging to note that the Commission has underscored the indivisibility of human rights and the desperate urgency in implementing the constitutional mandate of providing free and compulsory education for children that has long been ignored by the Indian governments.<sup>79</sup> The Commission has accepted a few complaints concerning violation of socio-economic rights such as the death - by malnutrition - of children in the state

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<sup>74</sup> See NHRC Annual Report 8-10 (Second Annual Report).

<sup>75</sup> Id. at 9.

<sup>76</sup> See NHRC Annual Report 55 (1994-95) (Second Annual Report).

<sup>77</sup> See NHRC Annual Report 13 (1995-96) (Third Annual Report).

<sup>78</sup> India Accedes to the UN Convention on Torture, Hindu, Oct. 15, 1997, at 13.

<sup>79</sup> See NHRC Annual Report 39 (1994-95) (Second annual Report).

of Orissa<sup>80</sup> and deaths and disability arising from water supplies poisoned by arsenic or fluoride and where it strongly urged payment of compensation to the victims.<sup>81</sup> More recently, the Commission took suo-moto cognizance of press reports about the contamination of life-saving fluids at a major hospital in New Delhi<sup>82</sup> and large-scale performance of child marriages in the state of Rajasthan.<sup>83</sup> However, the Commission needs to evolve more concrete strategies if it has to succeed in gaining concrete results in the realm of promoting socio-economic rights. The Commission must continue to exert pressure on the government. The decision of the Commission to revive its original idea of working on an amendment to the Child Marriage Restraint Act, 1929 is encouraging in bringing about an end to child marriage.

#### **9.7.4 Human rights jurisprudence**

The Commission has taken the first steps towards creating a jurisprudence of human rights. By intervening in a case pending before the Supreme Court and expressing its view that the Armed Forces [Special Powers] Act, 1958 is draconian,<sup>84</sup> the Commission has injected some rigor into the statute as evidenced in the 1997 Naga Civil Liberties Case. Further, by filing a writ petition on behalf of the Chakma refugees and seeking their protection from possible expulsion from India by the All Arunachal Pradesh Students Union [AAPSU], the Commission made a meaningful contribution to refugee protection in India where there is no national refugee law.<sup>85</sup> The Supreme Court in this case held that the state was bound to extend the protection offered by article 21 to all people including non-citizens from any assaults including a group of persons, eg., the AAPSU.<sup>86</sup> These steps gradually allow the jurisprudence of the Commission to coalesce with the landmark decisions

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<sup>80</sup> See NHRC Annual Report 14 (1993-94) (First Annual Report).

<sup>81</sup> NHRC Annual Report 5 (1995-96)(Third Annual Report).

<sup>82</sup> See also Government Asked to Revamp I.V. Drug Supply System by the Commission, Human Rights Newsletter (NHRC), May 1999, at 2.

<sup>83</sup> See NHRC Annual Report 25 (1995-96) (Third Annual Report).

<sup>84</sup> See NHRC Annual Report 24 (1995-96) (Third Annual Report).

<sup>85</sup> See NHRC v State of Arunachal Pradesh, AIR 1996 SC 1234.

<sup>86</sup> Id. at 1239.

of the Supreme Court to form standards of conduct and behaviour for the nation.

## 9.8 Conclusion

On October 6, 1999 the NHRC marked its sixth anniversary. Although its initial performance in protecting human rights was high in profile but lacking in the Commission has since the last three years demonstrated a more pragmatic and realistic view of its potential, a less ad hoc approach to its functioning and has taken a more courageous stance where silence was an option. This is commendable. While it is fair to conclude that the Commission has since its inception done some constructive work and achieved a few positive and tangible results in the field of human rights there can be no doubt that much more remains to be fulfilled. However, it is equally true that, in many respects, the task of the Commission is onerous and that it confronts egregious patterns of violations within the context of a complex political and social climate.

Despite the fact that the Commission is merely a recommendatory body, its work has increased exponentially. While the commission's case load in its first year was a mere 500 complaints, it has received more than 40,000 complaints during the year 1998-99.<sup>87</sup> Whether the Commission will be perceived as an effective institution for the protection of human rights in India will largely depend on what powers the government is willing to concede to it and what parallel efforts the NHRC makes to strengthen its performance.

The Advisory Committee set up by the NHRC to assess the needs for structural changes and amendments in the Human Rights Act has recently submitted its report to the Commission.<sup>88</sup> The Committee has suggested

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<sup>87</sup> See NHRC Launches Human Rights Cells in State Police Headquarters, Human Rights Newsletter (NHRC), April 1999 at 1.

<sup>88</sup> See Panel Moots Changes to Human Rights Act, Hindu, Wed., Oct. 20, 1999 at 10.

several amendments to the Human Rights Act for removing impediments and inadequacies in the enforcement of human rights. The important changes proposed by the Committee included making it mandatory for the Central and State governments to intimate the NHRC within three months acceptance or other-wise of the Commission's recommendations and submission of reasons in the case of non-acceptance, financial autonomy for the NHRC, power to the NHRC to visit jails and other custodial institutions without prior intimation to the state governments; power and freedom to the Commission to select staff from the governmental as well as non-governmental sectors; change in the composition of the NHRC with two judicial and three non-judicial members of whom one shall be a woman and bringing the violations committed by the para-military forces within the scope of the Commission's investigative powers.<sup>89</sup> The Committee also emphasised that the Government give proper, faithful and time-bound consideration to the Commission's recommendations.<sup>90</sup> It is therefore imperative that the Government consider the Ahmadi Committee Report and take early action on the suggestions laid down therein.

Ultimately, the critical factors in the development of the NHRC as a powerful protector of human rights rest on a commitment by its members to breathe life into the Commission's mandate and by the political will of India's leaders to make the Commission more than a recommending body. Strengthening the representation of the civil society organisations and vulnerable groups in the governing bodies of the Commission, and added economic resources and punitive powers would, most probably, enhance the powers of the Commission.

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<sup>89</sup> Id.

<sup>90</sup> Id.



## CHAPTER 10

### HUMAN RIGHTS PROTECTION BY THE STATE IN UGANDA

*Markus Topp*

#### 10.1 Introduction

Since its independence, Uganda has had a very poor human rights record. During the two Obote regimes and the period under Idi Amin, power was held rather by way of ethnic affiliation and the use of force than through the application of competence and democracy. For this reason the National Resistance Movement (NRM), on coming into power in 1986, addressed the issue of human rights as one of its main priorities.

The Commission of Inquiry into Human Rights Violations (the Oder Commission) was established to facilitate the collating of evidence, in order that those responsible for violations of human rights prior to 1986 could be brought to justice.<sup>1</sup> The Ugandan ombudsman institution, Inspectorate of Government (IGG), was established simultaneously, and empowered with the function of dealing with corruption and violations of human rights from 1986 onwards. The Inspector General of Government Act<sup>2</sup> was not passed until 1988. Between 1986 and 1988, the IGG seems to have operated without an exact legal mandate, and to add to the legalistic confusion surrounding the IGG, it had been thoroughly regulated by Uganda's 1995 Constitution, and the regulation in the Constitution differed somewhat from that of the statute.

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<sup>1</sup> Uganda Commission of inquiry into the violation of human rights, p. 4.

<sup>2</sup> Statute No. 2 of 1988: The Inspector General of Government Statute, 1987. As of here the IGG act.

The Ugandan Human Rights Commission (UHRC) was established in 1995 by Uganda's new Constitution at the recommendation of the Oder Commission. The UHRC was assigned with functions earlier carried out by the IGG which, according to critics, had not been able to deal efficiently with the protection and promotion of human rights. The UHRC began its activities on November 16<sup>th</sup> 1996. Later came the Uganda Human Rights Commission Act of May 2<sup>nd</sup> 1997. Echoing the IGG situation, here was a period of time where the UHRC did not have an exact legal mandate to work from.

The aim of this article will be to *analyse the differences and similarities between the two main Ugandan institutions empowered with the task of protecting and promoting human rights*. On the basis of this, I will discuss some of the broader aspects of their roles in the Ugandan society. It is necessary first to elaborate on the concept of national human rights institutions (NHRI), and a discussion on whether the IGG can even be considered a NHRI. I will also analyse the relationship between human rights and corruption and argue that both are inseparable when it comes to the actual implementation in the societal context. Finally, I will look at the differences between the IGG and the UHRC. A few aspects of particular relevance from the Paris Principles have been singled out. These are independence, defined jurisdiction, adequate powers and accountability. These aspects are of vital importance to the functioning of NHRI. Furthermore, there seems to be some important differences between the IGG and the UHRC, when analysed in the light of these aspects. With a particular regard to the jurisdiction, the discussion will revolve around the complementarity of the two institutions, in other words, whether it is at all necessary to promote the existence of both institutions.

The research for this article was carried out from February to May 1999 during a stay in Uganda. Throughout this period, I collected material from the IGG and the UHRC relating to the establishment and functioning of them both. In addition, interviews were carried out with people from the IGG and the UHRC, as well as from the academic world and NGO community, where specific topics from the Paris Principles were discussed.

## 10.2 National Human Rights Institutions

The establishment of national institutions with the specific aim of protecting and promoting human rights has been going on for a long time. In Africa, Tanzania had established the Permanent Commission of Enquiry in 1966. Also established in 1966, was the Ghanaian Expediting Committee of the National Liberation Council, which in the Ombudsman replaced 1980, and the Ombudsman in Zimbabwe was established in 1980. Evidently, human rights protection and promotion can therefore be handled either by an ombudsman institution, as part of its assignments, or by a NHRI that deals exclusively with the protection and promotion of human rights.<sup>3</sup>

In the African context, the division between the ombudsman institution and the human rights commission is not always clear. One could say that an ombudsman treats human rights issues in connection with its broader activities, whereas human rights commissions deal only with human rights issues. It has been argued that there is a tendency to separate the office of the ombudsman from that of the NHRI, but there seems to be no pattern as to which model different countries have implemented.<sup>4</sup> This must be seen as connected to the assumption that post-independence Africa has been characterised by massive human rights violations, which should be handled separately from mal administration and corruption. Inherent in this argument is an assumption that institutions which are over-sized, are thereby inefficient and reversely, that smaller, specialised and flexible institutions are more efficient. I shall return to this aspect later on.

There have been doubts as to which institutions should be regarded as NHRIs according to the Paris Principles. Within the context of this article it is necessary to address the issue of whether an ombudsman institution should be included.

According to the Commission on Human Rights Resolution 1992/54 ombudsmen are defined as other bodies, and are not included. This view is

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<sup>3</sup> Sekaggya, Margaret, pp. 3-4.

<sup>4</sup> Ibid., pp. 3-5.



emphasised by the fact that ombudsmen are specialised in their approach to governance issues.<sup>5</sup> On the other hand, the manual published by the UN Centre for Human Rights proclaims that the distinction between human rights commissions and ombudsmen is, in practice, very inconsistent.<sup>6</sup> NHRI are multi-member bodies, whereas a single individual heads ombudsman institutions, and whereas an ombudsman in, for example, the Scandinavian model, only has recommendatory powers, a NHRI may have more extensive powers.<sup>7</sup> It has also been held that the jurisdiction of ombudsmen only covers the public sector, whereas that of human rights commissions includes the private.<sup>8</sup> Usually the human rights commissions will also have an advisory function, which is not so in the case of ombudsmen.<sup>9</sup> This distinction can, however, also have an impact on human rights, since the provision of certain human rights obliges the respective state, such as for instance the right to health or education. Equally, lack of good governance can lead to deprivation of the right to fair trial.

In Uganda, the ombudsman institution, as well as the UHRC, has a complaint handling function with the mandate to investigate cases against private individuals, and make binding settlements. Furthermore, the IGG has the powers of prosecution vested in the institution.

It can be argued that the standards inherent in the Paris Principles must be applied similarly to ombudsmen. First of all, ombudsmen are protectors of basic rights of the citizens of their respective countries. Secondly, scholars have been arguing that the ombudsman institutions should apply to such principles as impartiality, wide jurisdiction, visibility and competence, amongst others.<sup>10</sup> These criteria are very much like those of the Paris Principles in the sense that these protect the very same values, i.e.

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<sup>5</sup> Lindsnæs, B. & Lindholt, L., p. 2.

<sup>6</sup> UN Handbook, pr. 40-45.

<sup>7</sup> Hatchard, John: , p.p. 2-3.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ayeni, V., p. 555.

independence, defined jurisdiction and transparency. In spite of the terminology differentiations, the concepts are clearly congruent, as are the inherent values, which the institutions are supposed to work by and to protect; namely those of democracy and human rights. Accordingly, these two kinds of institutions should apply similar principles. This view is supported by the fact that priority, in this article, is given to the part of the Paris Principles concerned with the protection of human rights over the ones concerned with promotion.

This could lead to analytical problems as to which public institutions the principles should not be applicable to. It is obvious that one cannot say that all public institutions should necessarily apply to the Paris Principles. On the other hand, institutions like these, which are protectors of citizens' rights, must apply to standards which safeguard the interests of the citizens. A certain level of similarity as to the basic principles according to which they are supposed to operate is absolutely necessary.

### **10.3 Human Rights in Uganda**

Uganda is a signatory to many international human rights treaties besides the Universal Declaration of Human Rights (UDHR). The most significant ones being: the Covenant on Civil and Political Rights (ICCPR), the Covenant on Social, Economic and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights.<sup>11</sup> Furthermore Uganda has its own bill of rights in the Constitution of 1995, providing for civil and political rights as well as economic, social and cultural rights. Article 42 of the Constitution provides for the right to just and fair treatment in administrative decisions, and thus makes a connection between corruption and the violation of human rights, in the sense that the very aim of corruption is to gain an advantage from the administration which one is not entitled to.

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<sup>11</sup> Uganda Human Rights Commission: Annual Report 1997. p. 43.

In Uganda the widespread corruption has led some people<sup>12</sup> to argue that the fight against corruption is a prerequisite for the protection of human rights. The present Inspector General of Government holds that it is the economic, social and cultural rights, which are affected most by corruption.<sup>13</sup> That is, the fulfilment of these rights are, to some extent, dependant on being provided; this would be seriously hampered if the funds for these provisions were diverted elsewhere by corruption. Thus corruption deprives people of their very basic needs. However, even civil and political rights can be hampered by corruption, for example, the right to freedom of speech, which would be hampered if corrupt officials persecute citizens exercising that right.

In many people's view the *police* is probably the most corrupt state institution in Uganda.<sup>14</sup> There are many allegations concerning persons using the police to solve private disputes; persons who for example bribe the police to arrest a person with whom they have a quarrel. These arrestees are then detained without being charged and are often held beyond the statutory 48 hours.<sup>15</sup> This violates the individuals right to personal liberty as protected by Uganda's Constitution article 23, the UDHR article 3 and the ICCPR article 9. The Police are also said to torture suspects as a single matter of routine, and thereby violate the right to respect for human dignity and protection from inhuman treatment, which is protected in the Constitution article 24 and ICCPR articles 7 and 10. The UHRC, which in 1997 received 61 complaints about the Uganda Police Force, supports that these allegations are substantiated.<sup>16</sup>

Another state institution, which has been heavily criticised, is the *judiciary*. Corrupt practices of the Judiciary include bribery, magistrates colluding with

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<sup>12</sup> This is as argued by Sewanyana, L., p.p. 101-108. And to a certain extent Makubuya, Apollo, p.p. 245-253.

<sup>13</sup> Tumwesigye, J., p.p. 1-2.

<sup>14</sup> CIET International, p. ii-iii.

<sup>15</sup> Rukare, p. 48.

<sup>16</sup> Uganda Human Rights Commission: Annual Report 1997. P. 15-16.

parties in transactions regarding property and the refusal to give copies of judgements, and thereby effectively preventing appeal procedures and there are allegations of evidence going missing.<sup>17</sup> Some senior judiciary officers have even acknowledged that it threatens their credibility: "Justice cannot be seen to be done if it is administered under the smoke of suspicion of corruption".<sup>18</sup> All this constitutes a violation of the right to fair trial or fair hearing as protected in the Constitution article 28, and the ICCPR articles 14-15. The corruption within the Judiciary has not been as well documented as within the police. However, the allegations made are no less firm and the National Integrity Survey supports the tendency with the statistic that out of the 20,000 people interviewed 50 % allege to have paid a bribe to the Judiciary.<sup>19</sup>

A third area of complaints about corruption which are frequently reported, is *diversion of funds* intended for salaries to public employees.<sup>20</sup> This effectively deprives the employees of their rights to enjoyment of just and favourable conditions of work, as protected in ICESCR article 7 and the Constitution article 40.

In the Ugandan *health sector*, partly as a result of the non-payment mentioned above, it is alleged that people do not receive treatment or medicine until they have paid a bribe to the medical staff. Yet these services are supposed to be provided free of charge by the state for the citizens. Allegations of drugs being diverted from the public hospitals to private clinics having been embezzled by the medical staff are also being made.<sup>21</sup> The demands for bribes and the diversion of medicines are depriving the citizens of their right to health, which is protected in the UDHR article 25 and ICESCR article 12. Neglect in the health sector may even lead to a violation of the right to life.

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<sup>17</sup> Rukare, p. 53.

<sup>18</sup> Odoki, B.J., p. 5.

<sup>19</sup> CIET International, p. ii.

<sup>20</sup> Tumwesigye, Jotham, p. 4.

<sup>21</sup> Rukare, p. 58

In Uganda, primary *education* is officially provided free of charge for up to three children per family. It is nevertheless common that bribes are demanded in order to get your child placed in a good school, or even for the teacher to care about educating your child.<sup>22</sup> This constitutes a violation of the right to education as stipulated in the Constitution article 30 and ICESCR article 13.

On the basis of these examples it is obvious, that corruption has a strong impact on the violation of human rights in Uganda. The violations affect civil and political rights as well as economic, social and cultural rights. Consequently, one cannot consider protecting human rights in Uganda without considering the aspect of corruption. The question of defined jurisdiction becomes particularly relevant, as there is obviously not a clear distinction between corruption and human rights.

## **10.4 Analysis: The Ugandan Human Rights Commission and the Inspector General of Government**

### **10.4.1 Independence**

The fact that neither the IGG nor the UHRC are subject to the direction or control of any other authority is prescribed in the *founding legislation* of both institutions. According to the Constitution, the IGG is responsible only to parliament, whereas the UHRC is not subject to any formal control by any authority.<sup>23</sup> So both institutions possess legal independence.

The IGG and the UHRC prescribe the *procedures* for their own investigations, and these procedures are unquestionable.<sup>24</sup> The UHRC has even published pamphlets making it possible to get an overview of the

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<sup>22</sup> Rukare, p. 55.

<sup>23</sup> For the IGG, art. 227 of the Constitution and the IGG act section 2, 2; and for the UHRC, art. 54 of the Constitution.

<sup>24</sup> IGG act, sections 13-14. And Constitution of the Republic of Uganda, art. 52, 3, litra a.

process, and they have made their own procedural rules for the semi-judicial tribunal provided for in the Constitution. The daily work is also carried out without any interference. In none of my interviews were allegations made that the executive should have interfered directly in the work in any of the institutions at any time.<sup>25</sup> However, it was mentioned that there had been allegations of interference behind the scene when the former Deputy Inspector General of Government resigned.

Critics have argued that, even though they recognise that the UHRC is doing a good job, the commissioners have failed to give their views on controversial issues. It is claimed that they are afraid to “rock the boat”.<sup>26</sup> The controversial issues that the commissioners have been criticised for not addressing are, in particular, the questions concerning the death penalty and multi-partyism.<sup>27</sup> It must be maintained that the right to life is the most fundamental human right, and therefore one would expect that the NHRI takes a stand on the question of the death penalty. The debate on multi-partyism is quite heated in Uganda, and the right to freedom of association is also very much of concern. In the Ugandan society taking stands on human rights issues of national importance should be part of the advisory and monitoring function which the UHRC is supposed to implement.<sup>28</sup> Failure to comment on such widely debated issues could be interpreted as a protection of the interests of government. So one could question whether the UHRC is seen to be independent, and in return this could seriously threaten the credibility of the institution. Without credibility the UHRC will never be able to function effectively, as people would not forward their grievances to an institution in which they cannot put their faith.

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<sup>25</sup> Any such attempts were denied in any of the interviews conducted.

<sup>26</sup> Interview with Senior Lecturer at the Faculty of Law, Makerere University Apollo Makubuya on March 29<sup>th</sup> 1999. And Interview with Associate Professor of Law, Makerere University. Frederick W. Jjuuko on April 14<sup>th</sup> 1999.

<sup>27</sup> It should be acknowledged that Commissioner J. M. Waliggo has written articles in the *New Vision* on the subject of political parties. These are, nevertheless, considered to be written in a private capacity, as he does not state to be speaking on behalf of the UHRC.

<sup>28</sup> Constitution of the Republic of Uganda, art. 52, pr. 1, litra d and h.

The president, with the approval of parliament, *appoints* both the Inspector General of Government and the commissioners of the UHRC.<sup>29</sup> In both offices, appointment is for a fixed period of time with the possibility of one re-appointment, and the appointee must relinquish any membership of a legislative or administrative body. This ought to facilitate the possibility for the Inspector General of Government and the commissioners to free themselves of any undue political interest conferred upon them by a political party or constituency, and thereby enhance their independence. It will, however, require a strong parliament, which sees it as a feasible possibility to reject the president's appointees. At the IGG and the UHRC they are adamant that the approval of parliament is not a rubber stamp procedure.<sup>30</sup> It is argued that the parliament extensively scrutinises all the presidential appointees whereas critics, on the other hand, state that the parliamentary approval is merely a question of formality and has no significance.<sup>31</sup> In this vein, critics also argue that the present Inspector General of Government was formerly employed in the NRM-secretariat. Even though they have substantial respect for him personally, they believe that his ties to the NRM-government are too close for him to be considered independent by the general public.<sup>32</sup> This undermines the credibility of the institution as a public watch-dog. Moreover, all of the members of the IGG appointments board are appointed by the president. This gives the president considerable influence over the staff of the entire institution, and the potential to ensure that only government friendly employees are placed in the office of the Inspector General of Government. Regarding the UHRC, there is the difference that the president is appointing a commission. It has therefore been argued that presidential appointment is a necessity, as a way of securing that all sectors of society are represented in the commission.<sup>33</sup> However similar objections

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<sup>29</sup> Constitution of the Republic of Uganda, art. 51, 2 and 223, 4.

<sup>30</sup> Interview with Inspector General of Government Jotham Tumwesigye on February 24<sup>th</sup> 1999.

<sup>31</sup> Interview with Senior Lecturer at the Faculty of Law, Makerere University Apollo Makubuya on March 29<sup>th</sup> 1999.

<sup>32</sup> Interview with Dean of the Faculty of Law, Makerere University Joe Oloka-Onyango on April 15<sup>th</sup> 1999.

<sup>33</sup> Interview with Commission Father J.M. Waliggo on March 12<sup>th</sup> 1999.

to those about the IGG are raised. Some of the commissioners have previously worked in other commissions, for instance as members of the Constitutional Commission, the state organ which originated the recommendations for the new Constitution that established the UHRC. In this regard, the appointment procedure does not fully secure the independence of collegial commissions either. Finally it must not be forgotten that the Paris Principles clearly suggest that appointments should be made by a representative body, and that the government should, at most, have an advisory function.<sup>34</sup>

Where the appointment procedure of the two institutions is very similar there, seems to be a marked difference on the procedure for *dismissal*. The president possesses the power to remove the Inspector General from office, but only on the recommendation of a parliamentary tribunal, and on the grounds of inability, due to infirmity, misconduct or incompetence.<sup>35</sup> The parliamentary tribunal is not a standing tribunal and it will have to be formed when the question arises. Furthermore, the procedures are not laid down, as they too will be formed on occasion.<sup>36</sup> This could seem to give parliament sufficient power to secure the IGG to work independently of the executive. On the other hand, the procedures of establishment and decision-making of the tribunal has not yet been made. This will be left to the political climate of the day to decide. In this situation, there could be a danger of parliament being outmanoeuvred. By contrast, the rules of dismissal of commissioners of the UHRC are the same as those of judges of the High Court.<sup>37</sup> This is a very difficult procedure, which requires that the person in question be completely unable to perform his or her functions due to infirmity of body or mind, misbehaviour or misconduct, or incompetence. The President will remove the Commissioner if either the Judicial Service Commission or the Parliament has referred the question to him and the tribunal, appointed for

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<sup>34</sup> UN Handbook, pr. 43.

<sup>35</sup> Constitution of the Republic of Uganda, art. 224.

<sup>36</sup> Interview with M. Tumwesigye on February 12 1999.

<sup>37</sup> The Constitution of the Republic of Uganda, art. 56.



the purpose by the President, also recommends it.<sup>38</sup> This means that the procedures are stipulated in the Constitution and are, therefore, immediately operative. This gives the commission the safeguard that a case started for their dismissal, will not be subject to the political climate of the day as far as the proceedings are concerned. This seems to be a factor that can help the UHRC consolidate its independence, as it specifies ascertainable wrongdoings and a specific procedure, as proscribed in the Paris Principles.<sup>39</sup>

As to the aspect of *financial autonomy*, the IGG has its own budget and is supposed to dispose of funds as it finds best.<sup>40</sup> However, the office operates on a cash flow basis, meaning that the Minister of Finance can, when there is not sufficient cash in the treasury, suspend certain items on the budget. It is also up to the discretion of the Minister of Finance to decide which specific items are to be suspended.<sup>41</sup> This is a very ominous practice, as it is open to abuse by virtue of the fact that the executive can threaten to cut the budget of the IGG, and thus render it incapable of performing the functions assigned to it. All sides in the debate, nevertheless, maintain that the suspensions (which do happen) are made without malicious intent, and purely due to lack of funds. Either way, this practice constitutes a point of entry for an abusive administration to control the operations of the institution. Additionally, this seems to be a breach of the Constitution, as the IGG is not controlling its own budget.

Generally, the institution is under-funded, which hampers its independence and, moreover, its ability to carry out its functions satisfactorily.<sup>42</sup> Consequently, the IGG has to seek funding from foreign donors.

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<sup>38</sup> The Constitution of the Republic of Uganda, art. 144.

<sup>39</sup> UN Handbook, pr. 80.

<sup>40</sup> Constitution of the republic of Uganda, art. 229.

<sup>41</sup> Interview with Matthias Tumwesigye, Director of Education and Prevention, IGG. On March 5<sup>th</sup> 1999.

<sup>42</sup> Inspectorate of Government II, p. 20.

Formally the UHRC possesses financial autonomy, as it is the responsibility of Parliament to see to it that adequate resources and facilities are at the disposal of the UHRC.<sup>43</sup> All the expenses of the UHRC have to be drawn directly from the treasury.<sup>44</sup> This means that the UHRC is supposed to have all its expenses covered by the state. However, in reality this is not the case, as the UHRC, like most public offices in Uganda, is under-funded. The treasury does not release money in relation to the estimates of the UHRC, and not even the agreed budget was released for the UHRC in 1997.<sup>45</sup> This makes the UHRC likewise heavily reliant on foreign donors. For instance, the buildings that house the UHRC have recently been bought for them by the Swedish development agency, SIDA.<sup>46</sup> This could jeopardise its independence in another way, namely that it involves the danger of the UHRC taking a stand towards human rights in accordance with that of the donors, disregarding the particular needs in the Ugandan context. This would, in part at least, depend on the attitudes of the donors. Furthermore, the fact that different actors provide the needed funds for the UHRC may provide a dilemma for the institution in that, if the priorities of the state institutions differ from those of the donor community, it will be difficult for the UHRC to please both. Moreover, if the UHRC's analysis suggests a second or third approach to the human rights issue, the UHRC may be drawn into a balancing act, where it will try to please the state institutions as well as the donor community, in addition to attempting to apply its own agenda. This would inevitably lead to inconsistencies in the actions of the UHRC.

So, there are actual differences in the degrees of independence of the two institutions. First of all, whereas the procedure for dismissal is proscribed and ready to be put into function for the commissioners, the exact procedure for the dismissal of the Inspector General of Government is not clear.

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<sup>43</sup> Uganda Human Rights Commission Act of May 2nd 1997, art. 13.

<sup>44</sup> Constitution of the Republic of Uganda, art. 55. However, the salaries of the commissioners shall only be as parliament prescribes.

<sup>45</sup> Uganda Human Rights Commission: Annual Report 1997, p. 6.

<sup>46</sup> This was disclosed to me in a conversation with Chairperson of the UHRC, Margaret Sekaggya, on March 30<sup>th</sup> 1999.

Disregarding the fact that the necessary funds are, in reality, not forthcoming to either of the institutions, it must be maintained that the Constitution guarantees more financial autonomy to the UHRC than to the IGG.

#### **10.4.2 Defined jurisdiction**

The IGG and the UHRC have had their jurisdiction stipulated in the Constitution and thus fulfils one of the demands of the Paris Principles.<sup>47</sup>

The IGG has the jurisdiction to investigate into any acts of corruption and maladministration or any other matter specified by the president. However, this does not include court decisions or decisions made by tribunals established by law or any matter, which is sub judice. Matters relating to mercy or prerogative are excluded, as are matters which the president deems to be related to national security.<sup>48</sup> This last provision has not been nullified by the new Constitution and thus still provides a point of entry for an abusive executive. It should be mentioned, though, that this has not yet been perceived to be the case.

Many Ugandan institutions are dealing with corruption/abuse of office. The IGG will, however, as a general rule, not interfere with cases dealt with by other institutions. If qualified objections are raised to the way these matters are dealt with, the IGG may enter into the case and carry out investigations of its own or see to it that the institution in regard carries out its functions in a correct manner.<sup>49</sup> There may, nevertheless, be cases dealt with by the IGG, where the matter also is a violation of human rights. In the actual caseload of the IGG there are a lot of cases of embezzlement, victimisation/ oppression, property disputes and non-payment of salaries.<sup>50</sup> Where embezzlement means misallocation of funds diverting them away from the provision of rights according to the law, it will constitute a violation of the rights where the state is supposed to provide for the citizen, as for instance the right to

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<sup>47</sup> UN Handbook, pr. 86.

<sup>48</sup> IGG act, section 12.

<sup>49</sup> Interview with Director of Legal Affairs, IGG: Peter Nyombi on February 22<sup>nd</sup> 1999.

<sup>50</sup> Inspectorate of Government II, pp.59-60.

health or education. Victimisation/oppression, be it in the judicial or administrative sphere, is at least a lack of fair trial or equality before the law. Property disputes will concern the right to property as protected by the Ugandan Constitution article 26. Non-payment of salaries is also a diversion from human rights standards, i.e. workers rights. This clearly demonstrates a human rights aspect in the work of the IGG.

The UHRC is supposed to carry out the functions of protecting and promoting human rights, which corresponds to the responsibilities listed in the Paris Principles.<sup>51</sup> The UHRC is the competent authority in every case regarding a human rights violation. However, there may be cases with elements of both human rights violations and corruption/abuse of office where both the IGG and the UHRC could be said to be the competent authority as they are the all-encompassing authority in their respective field. The question of jurisdiction must, therefore, be answered by discussing the UHRC in connection with the IGG.

At the IGG's office they are stating that they decide on a case by case basis and consider it to be an IGG case if the human rights violation has its root in corruption or abuse of office.<sup>52</sup> Moreover, it was stated that there is close co-operation between the two institutions on this issue.<sup>53</sup> This co-operation is, however, not formalised. From the office of the UHRC it was stated that an assessment is made in each case, and they will then deal with the case if the element of human rights is larger than the one of corruption/abuse of office.<sup>54</sup> It is further stated that they are guided by the Constitution, but that they have complete discretion in determining whether they are competent to

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<sup>51</sup> Paris Principles. Competence and responsibilities, section 3.

<sup>52</sup> Interview with Matthias Tumwesigye, Director of Education and Prevention, IGG. On March 5<sup>th</sup> 1999.

<sup>53</sup> Interview with Inspector General of Government Jotham Tumwesigye on February 24<sup>th</sup> 1999.

<sup>54</sup> Interview with Commissioner for Legal and Complaints Department, UHRC on March 3<sup>rd</sup> 1999.

deal with a case.<sup>55</sup> The criteria for when the UHRC will refer a case to the IGG are thus not clear. The UHRC emphasised that the IGG and the UHRC work together closely to avoid dealing with the same cases.

When reviewing referred cases some matters of jurisdiction seem obvious. For instance a case received by the UHRC concerning extortion of money that the complainants should have received as salaries. Even though there is a violation of a right covered by ICESCR art. 7 and art. 40 of the Constitution it seems obvious that the substantial issue here is corruption/abuse of office, as the active act could be identified as abuse of office, the case was thus referred to the IGG.<sup>56</sup> In another case, referred from the UHRC to the IGG, workers in a district administration had not received their pay. This case was referred without any precise explanation.<sup>57</sup> On the other hand a case regarding lack of pay to a certain teacher was dealt with as a human rights violation by the UHRC.<sup>58</sup>

An assessment is not always easy. This is illustrated quite vividly by a case received by the UHRC from the IGG. The case concerned allegations of misuse and embezzlement of funds by the sub-county chief in Kakira. Furthermore, there were allegations of harassment and detainment of people in order to silence them. This case was reviewed by the UHRC and then referred back to the IGG on the grounds that: *“by nature of the issues being raised in the complaint, we feel your office can adjudicate upon this case and we accordingly refer it back to your office.”*<sup>59</sup> The fact that the case was actually referred back and forth between the two institutions show, that even if there is clarity within the institutions, there is not consensus among them. More than this, the arguments of the UHRC for referring it back to the IGG, seems not to be a result of an assessment of the mandates of the two

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<sup>55</sup> Interview with Chairperson of the UHRC, Margaret Sekaggya on March 11<sup>th</sup> 1999.

<sup>56</sup> Case: UHRC 888/98.

<sup>57</sup> Case: UHRC 15/99.

<sup>58</sup> Case: UHRC 49/98.

<sup>59</sup> Case: UHRC 940/98.

institutions, but rather as acting upon the fact that the case could be seen to be under the jurisdiction of the IGG. As a consequence the demarcation of jurisdiction seems obscure.

This does not help the citizens getting a clear picture of which institution is competent to deal with what cases. The fact that the demarcation is not clear can have several implications. It is assumed that the disclarity will weaken the institution and make it less efficient.<sup>60</sup> It is argued that the institution will more easily be made to stray from its purpose if the jurisdiction is not clear. Moreover, it will be a problem for those individuals or groups, which are to be protected by the institution.<sup>61</sup> In the sense that confusion may occur as to what forum is the relevant one. This could be imagined to lead some people, those deprived and lacking in resources, to abstain from making a complaint. It also makes the whole state structure seem even more insurmountable to the citizens. On the other hand, for the well-informed citizens this may lead to a variety of choice as to where they will submit their complaint. That is, they can go for the institution, which will deal with their case faster or will grant a more substantial compensation. This will widen the gap between different groups in society.

A lot of other public offices, which are also supposed to deal with cases of human rights violations and corruption/abuse of office, have been established recently. These are offices like the Auditor General, the Criminal Investigations Department of the Police and the Public Accounts Committee of Parliament,<sup>62</sup> as well as the newly established Ministry of ethics and integrity. The fact that many public offices are involved in the fighting of corruption and human rights violations can obscure the picture for the individual citizen even more, just as potential double standards could be the result. Moreover, the effort will lack in co-ordination and rationalisation, but

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<sup>60</sup> UN Handbook, pr. 88.

<sup>61</sup> UN Handbook, pr. 90.

<sup>62</sup> Inspectorate of Government: Report to Parliament, October, 1995 - June 1997. Pp. 7-11.

create an image of a lot of activity,<sup>63</sup> perhaps conducive to public opinion and the donor community. It could even be argued, that creating many institutions is a governmental smoke screen for not attending seriously to the problem. However, it was pointed out to me that there are certain advantages to the overlap in jurisdictions. First of all it makes sure that all violations are protected and that the citizen is secured of a forum to take his complaint to.<sup>64</sup> It is maintained that the problem will be solved as the institutions get a bit more time to work together, and that it is yet too early to make a judgement.<sup>65</sup>

The defined jurisdiction of the two institutions is not clear, and even though the institutions obviously need time to resolve, it must be maintained that there is a problem in not clearly demarcating the institutions from one another. It should be done as quickly as possible.

#### *Accountability and Accessibility*

Accountability is provided for in the Constitution, since both institutions are obliged to submit reports to parliament, concerning the performance of its functions and making recommendations.<sup>66</sup>

The institutions are not accountable to the general public in the sense that the Ugandan citizens do not have a legal claim to access to cases, annual reports or any other document of the IGG/UHRC. She/he can apply for access and the IGG/UHRC will then use its discretion to decide whether the citizen should be granted access. In the IGG they will decide on a case by case basis whether they will grant access to information.<sup>67</sup> Whereas at the UHRC all

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<sup>63</sup> Interview with Associate Professor of Law, Makerere University. Frederick W. Jjuuko on April 14<sup>th</sup> 1999.

<sup>64</sup> Interview with Dean of the Faculty of Law, Makerere University Joe Oloka-Onyango on April 15<sup>th</sup> 1999.

<sup>65</sup> Interview with Associate Professor of Law, Makerere University. Frederick W. Jjuuko on April 14<sup>th</sup> 1999.

<sup>66</sup> Constitution of the Republic of Uganda, art. 231 and 52.

<sup>67</sup> Interview with Director of Legal Affairs, IGG. Peter Nyombi on February 22<sup>nd</sup> 1999.

documents not relating to a pending case are considered public.<sup>68</sup> So access to information is the main rule, whereas denial of access would be the exception. However, this is not a legal right, but a question of how the Commission interprets its duty to promote the awareness of human rights. Even though it is not established in law as a right, it can be said to constitute a practice that the UHRC will have to follow. All the publications of the UHRC are considered public, but the UHRC recognises that it has not reached enough people with their first annual report, which mostly went to government, parliament and foreign donors. The commission, therefore, plans to publish the 1998 annual report in a cheaper format so as to distribute it wider among the population of Uganda.<sup>69</sup> If the institutions are not open towards the public, they may discredit and alienate themselves from the citizens. Even more, the Ugandan Constitution states that every citizen has a “right of access to information”.<sup>70</sup>

Consequently denial of access to information violates the human rights of the citizens. Finally one may fear that it could be used in conjunction with the practice, at the IGG, of distributing certain cases to entrusted officers,<sup>71</sup> to conceal information.

The founding legislation provides for the IGG as well as the UHRC to establish regional offices. This would greatly enhance the physical *accessibility* of the institutions and, moreover, it is in line with Uganda's official policy of decentralisation, which is one of the cornerstones of the new Constitution.<sup>72</sup> To date no such local branches have been established

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<sup>68</sup> Interview with Commissioner Aliro-Omara Joel Milton on March 2<sup>nd</sup> 1999.

<sup>69</sup> Ibid.

<sup>70</sup> Constitution of the Republic of Uganda, art. 41.

<sup>71</sup> Interview with Associate Professor of Law, Makerere University. Frederick W. Jjuuko on April 14<sup>th</sup> 1999. Who disclosed the practice of distributing sensitive cases to certain entrusted officers to me.

<sup>72</sup> Uganda Constitutional Commission, p. 7.



due to lack of funds.<sup>73</sup> This seriously hampers the accessibility of the institutions, since one cannot expect people to be able to travel to Kampala from the remotest regions of the country. Even though the staff of both the UHRC and the IGG attend meetings in the regions, it would be fair to say that accessibility is a problem for the effectiveness of the institutions.

The question of accessibility has a very close connection with *awareness*, as an unknown institution cannot be said to be truly accessible. In Uganda a survey was carried out in 1998 about a.o. people's awareness of the IGG.<sup>74</sup> The results of this survey bring some very discouraging facts to the surface. For instance in three of Uganda's 45 districts less than 10 % of the people are aware of the IGG. In Kampala 65 % are aware of the existence of the IGG. In no other district are more than 40 % aware of it.<sup>75</sup> Such a low awareness is bound to constrain the efficiency of the institution.<sup>76</sup> The IGG is, however, working on this awareness problem by participating in radio programmes and other media and through workshops. As the workshops take the IGG's officers out to the regions, where they can receive complaints, it is a good tool, but hardly sufficient.

Since the UHRC has been in function for less than two years, whereas the IGG has been in function for 10 years, the UHRC is probably less well known than the IGG.<sup>77</sup> This states that the UHRC probably has greater problems than the IGG in connection with awareness affecting the accessibility. The UHRC prioritises to solve this problem by participating in

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<sup>73</sup> Inspectorate of Government I, p. 21. And interview with M. Tumwesigye on February 12 1999. There were plans for such regional offices at the time of my research but the funds were lacking. It has been alleged that regional offices have now been established. However, I have not had this information confirmed.

<sup>74</sup> CIET International.

<sup>75</sup> CIET International, pp. vi-vii.

<sup>76</sup> UN Handbook, pr. 100.

<sup>77</sup> Interview with Research Officer, UHRC. Nathan Byamukuna on March 1<sup>st</sup> 1999.

different workshops, radio programmes and other activities.<sup>78</sup> But, as for the IGG, this will probably not be enough to solve the problem of awareness.

The provisions in the Constitution regarding the accountability of the UHRC and the IGG are rather similar.<sup>79</sup> But there are important differences as to the idea of accountability within the two institutions making the UHRC more open to the citizens. On the other hand, the IGG is probably more well known, due to the fact that it has been in operation for a longer period of time, and the IGG seems to have progressed the furthest in establishing regional offices.

#### *Adequate Powers*

The IGG has the powers to conduct inquiries, order public officers to answer questions as well as access to all public books, reports and other documents, and immediate access to all premises and vehicles covered by its jurisdiction,<sup>80</sup> the IGG is also empowered to investigate any bank account at his will,<sup>81</sup> and the IGG has the powers to summon anybody, whom he thinks able to give relevant information to the inquiry, to appear as a witness before him<sup>82</sup>. In case of failure to attend the IGG may issue an arrest warrant.<sup>83</sup>

These powers are only constrained by matters of national security.

Furthermore refusal to answer questions or appearing before the IGG are considered offences to be punished with a fine or even imprisonment.<sup>84</sup> All in all these are very wide powers as ombudsmen are, in most cases, confined to making recommendations and causing investigations.<sup>85</sup> Admittedly, though, it does widen the operational options of the IGG considerably.

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<sup>78</sup> Ibid.

<sup>79</sup> Constitution of the Republic of Uganda. Articles 52 and 231.

<sup>80</sup> IGG act, section 9.

<sup>81</sup> IGG act, sections 8-10.

<sup>82</sup> IGG act, section 19.

<sup>83</sup> IGG act, section 20 and Constitution of the Republic of Uganda, art. 230.

<sup>84</sup> IGG act, section 22.

<sup>85</sup> Ayeni, V., p. 545.

The Constitution of Uganda and the Operational Guidelines of the UHRC provide powers to the UHRC similar to those of the IGG, though not the power to arrest, and proscribe a procedure where the UHRC can facilitate a conciliation process.<sup>86</sup> This is most likely to be in disputes between individuals, such as for instance domestic violence or employment rights. If a complaint is not dealt with by conciliation the UHRC will investigate it. To this function the UHRC will constitute a tribunal consisting of no less than three commissioners. This tribunal exercises the powers of a court, vested in the UHRC by the Constitution.<sup>87</sup> The UHRC's sitting with court functions is an extension to its functions as an investigator. The idea is that the UHRC takes care of the interests of all parties involved. In the sense that the UHRC acts as the judge, as well as the representative of the complainant and the defendant respectively. The powers of a court vested in the UHRC raises some very serious human rights issues. First of all the UHRC is supposed to have the role of arbitrator as well as prosecutor and defendant. The parties are, however, allowed to bring their own representation into the process. Nevertheless, this potentially violates the human rights of the parties involved, in so far as it jeopardises the right to a fair trial as there is, probably, every possibility that the stand taken by the UHRC, towards the issue at stake, will be the one that prevails. Here one must remind oneself of the threats to the independence of the UHRC. Since the tribunal, if not independent of the executive, may have difficulties maintaining its objectivity. Even further, the tribunal is not a court as such, but a semi-judicial tribunal with the powers of a court.<sup>88</sup> The decisions of this tribunal can be appealed to the High Court. But as the first instance is in actuality not a court with all the necessary safeguards; that is lack of representation and lack of procedural safeguards of particular importance to the defendant. The right of appeal and thus fair trial seems illusory.

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<sup>86</sup> Uganda Human Rights Commission: Operational guidelines, p.p. 8-11. Which is in line with the Paris Principles. Additional principles concerning the status of commissions with quasi-judicial competence, *litra a*.

<sup>87</sup> Uganda Human Rights Commission: Annual Report 1997. P. 13. And interview with Senior Investigation Officer W. Byenka on March 5<sup>th</sup> 1999.

<sup>88</sup> Interview with Legal Counsel S. Mungoma on March 19<sup>th</sup> 1999.

The powers of the IGG provided by the new Constitution were conferred upon the institution due to an acknowledgement that the powers were needed for the IGG to actively fight corruption. Even though the powers are very wide for an ombudsman institution, objections were not raised to them in any of the interviews carried out. There seems to be consensus that the powers established in the act and the Constitution are necessary. Which is at the core of what the Paris Principles demands.<sup>89</sup>

My interviews, with people from the UHRC, were not able to conclude on whether the powers conferred upon the institution are actually necessary. It is said that they have not yet utilised them fully. Nevertheless, people outside the institution believe that the powers are necessary to deal with human rights violations in contemporary Ugandan.<sup>90</sup> This seems to be a contradiction in terms, and one should be wary that the UHRC is not getting too extensive powers, since too much power in one institution carries the danger of self-sufficiency and corruption of power. On the other hand, it could be argued that their investigatory powers are not sufficient, as they cannot do more than summon people. This has been a problem in connection with some people from the security forces who have been unwilling to co-operate.<sup>91</sup> In this regard they do not have sufficient powers. Even though it must be recognised, that the non co-operation is likely to constrain the efficiency of the institution, one should be careful before conferring too many powers on an institution just because one branch fails to co-operate.

The main difference in powers between the two institutions is thus that the IGG has the power to arrest and prosecute whereas the UHRC has the powers of a court of law. According to the IGG the delays in the courts has been one of the principal reasons for the backlog of cases at the IGG's office.<sup>92</sup> All in all, the UHRC has the most efficient powers, particularly as

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<sup>89</sup> UN Handbook, pr. 95-96.

<sup>90</sup> Interview with Dean of the Faculty of Law, Makerere University Joe Oloka-Onyango on April 15<sup>th</sup> 1999.

<sup>91</sup> Interview with Commissioner Aliro-Omara Joel Milton on March 2<sup>nd</sup> 1999.

<sup>92</sup> Inspectorate of Government II, pp.9-10.

the setting up of a tribunal, puts it into the hands of the UHRC to decide the speed of the process.

### **10.5 Discussing the Comparative Aspects**

From the above analysis, it has been made clear that there are significant differences in the frameworks of the two institutions, even in very central areas. The following discussion should attempt to elaborate on some of the potential wider consequences of these differences, and on some of the problematic issues regarding the composure of the institutions.

First of all, it has been made clear that there is insecurity as to the *jurisdiction* of the IGG and the UHRC, particularly regarding the demarcation between the two. This raises the question of whether the problems could be better dealt with by a single institution. This, however, was what was attempted between 1986 and 1995 via the IGG; the UHRC was established partly due to dissatisfaction with the way the IGG dealt with its human rights mandate. It has been argued that massive human rights violations should be dealt with separately, in order for the institution to be able to focus its attention and, furthermore, smaller units would supposedly be more flexible than large institutions. On the other hand, it has been argued that an integrated approach with only one institution dealing with all human rights issues can have several advantages, as for instance reduction of administrative costs, concentration of expertise, focusing peoples attention and signalling that all human rights are equally important.<sup>93</sup> Particularly the issue of cost reduction would seem to be important in the Ugandan context, as both institutions are currently under-funded and, consequently, in need of obtaining funds from overseas donors. This potentially jeopardises their independence, though this time not from the executive, but from the donor community. Returning to the aspect of demarcation, the disclarity will, inevitably, lead to insecurity as to what forum is the competent one and, furthermore, which rights are considered to be protected, particularly so in the deprived parts of the population. Even more so, as Uganda is a very

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<sup>93</sup> Hatchard, John., p.p. 11-12.

ethnically heterogeneous society, and awareness of the IGG and the UHRC outside Kampala is very low.

Closely linked with these problems is the aspect of the two institutions having very different enforcement *powers*. Leaving the UHRC substantially more powerful than the IGG. This, one may argue, will lead to preferences, among the more enlightened parts of the population, as to where they will direct their complaints. The UHRC has the powers of a court, and consequently is not dependent on the courts for the speed of their operations, whereas the IGG can only carry out prosecutions at the ordinary courts. Provided that people have this knowledge, they will probably direct their complaints to the UHRC. By providing the UHRC with powers of a court the Ugandan state could, furthermore, be seen to put more emphasis on the UHRC than on the IGG. Why else would they provide such differentiated instruments. This may, in turn, lead to a depreciation in the status of the IGG amongst the public and, eventually, a decline in the credibility of the institution.

This is enforced by the differences in *accountability* of the two institutions. Or, rather, in the way they interpret their responsibilities to the public. The UHRC is, undoubtedly, more open towards the public than the IGG. Particularly as the UHRC is interpreting its mandate, as including provision of legal aid to poor in simple matters or actively helping them to address the relevant authorities.<sup>94</sup> Whereas the IGG is more closed towards the public, not even considering access to documents as a legal right for the citizens. This would seem to make the IGG prone to alienation from the Ugandan public and thus make the UHRC the viable choice if ones rights are violated. This is underlined by the fact that there is no clear distinction between the jurisdiction of the two institutions. One may fear that the IGG, stemming from its unapproachable attitude, may make itself surplus to requirements. More and more people will, probably, direct their complaints to the UHRC if the case contains any element of human rights. This would mean that instead of having two smaller institutions dealing with each their cases within their respective jurisdiction, being focused on their task and possessing the

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<sup>94</sup> Interview with Chairperson of the UHRC, Margaret Sekaggya on March 11<sup>th</sup> 1999.

required flexibility, there would actually be only one institution working and, in the extreme, one being idle.

The trends outlined above can also be found when attention is turned towards the question of *independence*. Again it must be maintained, that focus seems to be directed towards the UHRC, since it has more substantial guarantees of independence than the IGG, particularly as regards the aspect of financial autonomy. This strengthens the UHRC's credibility and possibility of actually working independently in comparison with the IGG.

This will further emphasise the attraction for the people of Uganda to direct their grievances to the UHRC, rather than to the IGG.

Seemingly the attention of the state is directed towards the UHRC. On this basis one could hold that there is no need for two institutions as, particularly, costs could be reduced. Experiences elsewhere have shown that other options can be utilised. One option could be integrating the IGG and the UHRC into one institution. In doing so, a rationalisation of the working procedures would be possible; making the protection and promotion of human rights more cost-effective. An integration of the two institutions would, however, lead to an institution similar to the IGG before the new constitution. Since the IGG was previously criticised heavily for the way it dealt with human rights violations, this is probably not a viable solution in contemporary Uganda. It is, furthermore, being held that separate institutions can be more focused on their specific mandate, and will therefore, be more effective. Then again, this will not be the case if the institutions are lacking funds and, consequently, have to focus their attention on obtaining them from the donor community.

Another option could be to close the IGG altogether and refer all the human rights cases to the UHRC, whereas the corruption/abuse of office cases should be dealt with by the Auditor General. This would not solve all the problems of demarcating jurisdiction. But it would leave one institution less to be considered in that regard, and let the state, as a whole, seem more focused in its approach towards dealing with corruption and human rights violations. Moreover, fewer resources would be required, so it would be a more cost-effective solution. Finally, Uganda presently have several institutions empowered to deal with either human rights violations or

corruption/abuse of office or both, and a reduction in the number of institutions may in itself render the remaining institutions more focused and efficient.

## **10.6 Conclusion**

The UHRC and the IGG have been set up with legal frameworks, which may enable them to effectively protect and promote human rights in Uganda. But there are ominous signs in the differences between the two institutions stemming from the Constitution and statutes, particularly regarding the independence and jurisdiction of the institutions. First of all, the UHRC has been granted more substantial guarantees to its independence than the IGG and will therefore inevitably be a more viable institution. The demarcation between the two institutions seems so unclear that it will be impossible for the general public to get any impression of which institution will be competent to deal with their particular grievance. This demarcation should be clarified as quickly as possible since the insecurity is bound to hamper the efficiency by potential double standards.

The IGG, however, has the advantage of being the most well known of the two institutions, and the IGG has very extensive powers for an ombudsman institution. But though the UHRC is less well known it has more extensive powers, making it more efficient. One may, therefore, argue that the UHRC is better suited to carry out its task. This is, firstly, due to the framework of the institution, which grants it more independence and more efficient powers. Implying that there is an emphasis on behalf of the Ugandan state to make the UHRC work more independently and efficiently.

Furthermore, one may question whether it is necessary for Uganda to sustain both institutions. Particularly since there are already several institutions dealing with human rights or corruption/abuse of office in Uganda, and the state certainly could use the funds that would be saved, since resources in the country are scarce. The number of institutions dealing with human rights and corruption/abuse of office should, at least, be considered.



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## CHAPTER 11

### THE GHANA COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE

*Dr. E.K. Quashigah<sup>1</sup>*

#### 11.1 Introduction

The human rights situation in Ghana under the regime of the first President Dr. Kwame Nkrumah and the subsequent military regimes were not very pleasant, in the sense that human rights were abused with reckless abandon. During the Nkrumah period, the Preventive Detention Act allowed for arrest and detention without trial<sup>2</sup>, a situation which continued under the military regimes, where there was also scant respect for personal property.

In order to remedy this, subsequent democratic constitutions introduced institutions that would guarantee the respect for human rights. Under the 1969 and 1979 Constitutions, therefore, the Ombudsman institution was introduced, and was charged with the redress of complaints against administrative excesses. It was, however, never effective.

When, therefore, the opportunity arose for the formulation of a new constitution in 1992, it was thought that the Ombudsman institution could be fortified to provide a formidable means for the protection of administrative rights and human rights.

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<sup>2</sup> See the Re: Akoto Case reported in 1960 G.L.R p. 523.

Initially, the idea was mooted to establish two different institutions i.e. an Ombudsman to concern itself with administrative abuses and a Human Rights Commission that would deal with human rights issues. Upon consideration of the financial implications, it was eventually agreed upon that only one institution be established to perform the combined functions of an Ombudsman and a national human rights commission. Hence the creation of the Commission on Human Rights and Administrative Justice, the name implying that it is an agency that combined the functions of an Ombudsman and a National Human Rights Commission. The Commission on Human Rights and Administrative Justice (CHRAJ) was therefore created to suit the Ghanaian circumstances.

In the following the CHRAJ will be analysed in relation to the 1991 Paris Principles, i.e. independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability

## **11.2 Analysis of the CHRAJ in relation to the Paris Principles**

### **11.2.1 Independence**

The CHRAJ is a constitutional body, created by the Constitution as an independent institution, and answerable neither to the Executive nor to the Judiciary, and to the Legislature only to the extent that it is required in Article 218(g) of the 1992 Constitution to submit annual reports to Parliament. The independence of the CHRAJ is clearly stated in Article 225 that: “Except as provided by this Constitution or by any other law not inconsistent with this Constitution, the Commission and the Commissioners shall, in the performance of their functions not be subject to the direction or control of any person or authority”.

According to Constitutional Instrument No.7 of 1994, the CHRAJ may formulate its own rules of procedure.<sup>3</sup> According to these rules the Commission operates unhampered by the stratified rules of court that have

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<sup>3</sup> See Article 230.

so far operated to the point of grinding the ordinary courts to a halt due to over-emphasis on technicalities.

Perhaps a shortcoming in the constitutional provisions on the CHRAJ vis-à-vis the judiciary is the lack of express provision for independence in financial administration. According to article 127(1): “In the exercise of the judicial power of Ghana, the judiciary in both its judicial and administration is subject only to this Constitution ...” By this provision, budget proposals from the judiciary are not subject to cuts by the executive before presentation to Parliament for debate and approval thereof.

Financial insufficiency has been a problem for the CHRAJ. This is a general problem for all governmental agencies, but a provision similar to the one contained in article 127(1) could have strengthened the position of the CHRAJ if applied to it.

According to the Constitution, the Commissioner and his two deputies are appointed by the President in consultation with the Council of State.<sup>4</sup>

Even though the President has a hand in the appointment of the Commissioners, the most significant point in regards to independence of the Commissioners is that he has no hand in their removal. According to article 228 the procedure for the removal of the Commissioner and Deputy Commissioners shall be the same as that provided for the removal of a Justice of the Court of Appeal and a Justice of the High Court respectively under the Constitution.<sup>5</sup> The modes of removal are such as to guarantee their independence as is the case of the members of the judiciary. This means that the tenure of the Commissioners is very well guaranteed.

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<sup>4</sup> See article 70. The Council of State is a body of elder Statesmen, selected according to certain constitutional procedure to advise the government as provided in the Constitution.

<sup>5</sup> See Article 146 of the Constitution on the mode of Removal of Judges.

The CHRAJ consists of just three persons<sup>6</sup>, who in addition are supported by various categories of professional and administrative personnel. By comparison, the human rights commissions of some countries such as Nigeria and Cameroon are large bodies composed of individuals picked from all walks of life. The selection is often done to achieve a fair representation of all major sectors of the society, which have the advantages of representativity. Experience in the Cameroons has, however, shown that such big numbers often become liabilities when ineffective members frustrate the progress of the Commission through absenteeism.

### **11.2.2 Defined jurisdiction and adequate powers**

The scope of authority of the CHRAJ is very copiously set out under the Chapter Eighteen of the 1992 Constitution and also the Commission on Human Rights and Administrative Justice Act 456 of 1993.

By article 218 of the Constitution the functions of the Commission are stipulated as follows:

- C Investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;
- C Educate the public as to human rights and freedoms.

The CHRAJ therefore combines the functions of a typical ombudsman and a Commission on Human Rights. These functions are very extensive, and have led some commentators to express the fear that, eventually, the CHRAJ might be overwhelmed by the sheer weight and scope of its responsibilities. So far it is too early for one to establish whether these fears are well founded or not.

By the nature of its functions, the area of jurisdiction of the CHRAJ would traverse that of other organs of government, especially the judiciary. To forestall any conflict between the two agencies, article 219 (2)(a) of the 1992 Constitution therefore provided that the Commission shall not investigate a matter which is pending before a court or judicial tribunal. This

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<sup>6</sup> See Article 216.

notwithstanding, the Commission had on a few occasions had to contend with applications from aggrieved individuals complaining about delays in matters pending before the courts. The opinion of the Commission on these complaints is that the Commission is not precluded by article 219(2) (a) from drawing the attention of the court to the delay.

In spite of the fact that the CHRAJ is not a court, it has been endowed with some degree of similar competence. According to article 219 (1) of the Constitution, the commission has the following powers:

- C to issue subpoenas requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- C to cause any person contemptuous of any such subpoena to be prosecuted before a competent court;
- C to question any person in respect of any subject matter under investigation before the Commission;
- C to require any person to disclose truthfully and frankly any information within his knowledge relevant to any investigation by the Commissioner.

These are powers that are essential to the assertion of the jurisdiction of the Commission with authority and effectivity. Although the CHRAJ has some powers of the courts, the decisions of the CHRAJ require the support of the courts for enforcement. While decisions of the courts are final and have immediate compelling effect on the parties, the CHRAJ depends initially on the good will of the parties before it for the respect of its decisions. In the event of failure to obey the decisions of the CHRAJ, the Commission has the constitutional power to bring an action before any court in Ghana and may seek any remedy which may be available from that court.



### **11.2.3 Accessibility**

The Commission has the constitutional authority to establish regional and district branches throughout the country.<sup>7</sup> In line with this the Commission has since its creation been working within its budgetary scope to establish new regional and district offices from year to year. To date, all the ten regional capitals have been provided with regional offices but budgetary constraints have impeded the establishment of branches in some of the 110 districts in the country. The objective of the Commission, however, is to cover all the districts in the very near future.

The regional offices are manned by legal officers who are qualified lawyers. Constraint of resources does not allow for the provision of legal officers to the district offices, which are nonetheless managed by equally well trained non-legal personnel.

The CHRAJ, being a relatively new institution, is not as widely known as the courts of law. However, research has shown that it is quite well known and appreciated in the urban centres and in those districts where the Commission has branches.

With time, the influence of the CHRAJ may spread to the entire fabric of society, particularly in light of its well-publicised recent fights against corruption and certain dehumanizing cultural practices. In effect, many ordinary citizens could gradually come to see the CHRAJ as the ordinary person's hope for justice.

In contrast to the commissions of other African countries, e.g. Nigeria and Cameroon, the CHRAJ is not composed of appointed representatives. Instead it consists of constitutionally appointed individuals, i.e. the Commissioner and two Deputy Commissioners.<sup>8</sup> These are supported by a team of employees composed of legal staff, investigations personnel, bailiffs and administrative personnel. So far the manner in which the Commission is composed has not affected accessibility.

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<sup>7</sup> Article 220.

<sup>8</sup> See Article 216 of the 1992 Constitution.

#### **11.2.4 Cooperation**

Even though it may be perceived as a government institution, the CHRAJ in fact has a very cordial working relationship with relevant human rights NGOs. From time to time the Commissioner does organize meetings of human rights NGOs to plan human rights educational strategies. A good example is the annual International Human Rights Day celebrated on 10 December, which is normally planned under the aegis of the CHRAJ and the UN Information Centre at Accra together with various human rights NGOs.

The CHRAJ does co-operate with individual NGOs to work on specific human rights issues; an example is the cooperation with the national branch of the International Needs (an NGO) in the fight against the dehumanizing customary practice known as “Trokosi” (fetish slavery).

Unlike the obvious smooth relationship existing between the CHRAJ and the human rights NGOs, there may not be that same level of relationship between the Commission and some other national institutions.

From time to time the CHRAJ does co-operate with some inter-governmental organizations especially in the organization of seminars on topics relevant to its scope of authority, e.g. a seminar on economic, social and cultural rights organized in collaboration with the Commonwealth Secretariat in 1998 in Accra. Again in 1999, an international workshop on corruption was organized by the CHRAJ in cooperation with the United Nations in Accra. Without doubt the commission does possess some credibility with intergovernmental organizations, and the Commissioner is a very regular attendee at the annual meetings of the African Commission on Human and Peoples’ Rights.

#### **11.2.5 Operational efficiency**

There is no doubt that the Commission could do better with a higher level of funding, i.e. funding from governmental sources is definitely not sufficient at present. The good-will that the Commission has generated, however, enables it to have access to extra funding from a number of donors and foreign embassies in the country.

Lack of adequate resources has affected the capacity of the CHRAJ to establish its presence in all the districts of the country, as is required by the Constitution.

It has also affected the efficiency of the Commission in terms of unsatisfactory communication facilities between the head office and the districts.

Library facilities are also not adequate. Well stocked libraries are a necessity, at least for all the regional capitals, where the legal officers need to deliberate and give decisions on, often complex, legal issues.

As already stated, some donors have provided some of the requirements of the CHRAJ such as communication equipment, computers and motor cycles for the investigators and bailiffs.

According to the Constitution, decisions of the CHRAJ are to be regarded as coming from the Commissioners. It is, however, impossible to expect the commissioners themselves to involve themselves in all matters filed at all branches of the Commission. Nevertheless, all branches do report back to the Commissioner on the cases that go before them.

Research has shown that the turn-over of legal staff of the CHRAJ is comparatively high. This is the result of poor remuneration compared to legal staff in the Ministry of Justice and the Judiciary. Legal staff of the CHRAJ often resign to take up appointments in the Ministry of Justice and the Judiciary.

The effect of the high turn-over of the staff is that cases are often delayed, i.e. cases commenced by an officer who subsequently resigns have to be re-assigned to another officer who will then start from scratch.

Consequently, there is an obvious need to improve the job satisfaction level in the Commission if its effectiveness and efficiency are to be improved.

From discussions with the Commissioner, it is clear that the CHRAJ can only owe its effectiveness to the respect and confidence that are accorded it by the public. It is equally not lost on the Commission that the public respect and confidence can only come from the Commission's own respect for the law and financial probity. The Commission is therefore subject to the financial control of the Auditor General of the Country. Even donations

received from sources other than government are subject to scrutiny by the Auditor-General.

The Constitution requires the CHRAJ to make annual reports to Parliament. Since its creation the CHRAJ has published annual reports indicating its progress and problems.

Compared to other similar government agencies, the CHRAJ has acquitted itself well in this requirement for the report.

### **11.3 Conclusion**

There seems to be a general consensus that the CHRAJ, compared to the judiciary, has retained a higher degree of independence. Without doubt, the Constitutional and statutory provisions have given the CHRAJ the basis for assisting its independence and effectiveness. In spite hereof, lack of available resources continue to hamper the Commission in its work. Finally, it is recognised that the effectiveness and impact of the CHRAJ on the Ghanaian society could not have been achieved without the influence of the personality of the Commissioner.



## CHAPTER 12

### THE OMBUDSMAN INSTITUTION IN LATIN AMERICA: MINIMUM STANDARDS FOR ITS EXISTENCE

*Gonzalo Elizondo and Irene Aguilar*

#### 12.1 Introduction

Since the early years of the past decade, the Inter-American Institute of Human Rights has provided special attention and collaboration to those institutions that strengthen and promote the democratic consolidation process in Latin America.

Pursuant to this goal, one of the Institute's programs is dedicated to providing technical support in the creation of ombudsmen or human rights commissions in those jurisdictions where it does not exist, and to assist in the training of staff in existing offices.<sup>1</sup>

The institution of the ombudsman in Latin America has been given diverse technical names, such as *Defensor del Pueblo* in Ecuador, Bolivia, Perú, and Colombia, among others; *Defensor de los Habitantes* in Costa Rica; *Comisionado Nacional de Derechos Humanos* in Honduras and Mexico; or *Sindic de Greuges* in some localities in Spain.

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<sup>1</sup> IIDH has provided technical assistance in the creation of ombudsman offices in Paraguay, Nicaragua, Panama, Uruguay, Venezuela and Chile. It has held several training courses for ombudsman office staff in Guatemala, El Salvador, Honduras and Argentina. It organized the I Seminar on Ombudsman and Human Rights, and it has facilitated communication of Latin American ombudsman offices through the holding of regional meetings.

The plurality of concepts is not only a semantic problem. It also reflects a plurality of entities that control public administration using through differing instruments and powers.

The creation of these offices has been carried out using varying modalities. They have been created by parliaments, executive branches, police forces (as in the case of the *Ouvidor* of the Sao Paulo police), and even by mass media corporations (as in the case of the *Defensor* of Colombia's *El Tiempo* newspaper). Nevertheless, following a tradition of ombudsmen originated in Scandinavia, imported into Spain, and later into Latin America, we can suggest several basic elements that an ombudsman, properly speaking, must have. We do not wish to imply that institutions that do not meet the basic standards are not necessary. They continue to be of crucial importance in their relative jurisdictions.

It is important to point out that some of the governmental institutions that meet the necessary characteristics to be considered ombudsmen were created by the executive branch or by one of its administrative agencies, and were later able to transform, becoming institutions adscript to Congress. Such were the cases of the *Comisionado Nacional de los Derechos Humanos de Honduras* which was originally conceived as an agency of the executive branch for the protection of human rights; the *Defensor del Pueblo de la Nación* in Argentina, which started out as a Sub-Secretariat for Human Rights in the Ministry of the Interior and Foreign Affairs; of the Mexican *Comisión Nacional de los Derechos Humanos*, whose Commissioner was appointed by the Executive until the constitutional amendment of 1999; of the *Defensoría del Pueblo* in Panama, which was created under a Presidential Commission; and the *Defensoría del Pueblo* in Venezuela, whose designated officers were appointed temporarily until a final decision which will be rendered in the following months.

Furthermore, we can point out that the initiative for the creation of ombudsmen offices in states like Chile and Bolivia, did not originate in public entities, but rather in civil entities.

The working paper will analyse, in first instance, the conditions that we consider essential for the existence of the institution. Secondly, we will refer to standards that we deem quasi-essential. They are aimed to create a more

efficient institutions. Finally, we will refer to recommended standards. These are conditions that we deem relevant for the long-term sustainability of the institution. All these conditions support the ombudsmen as institutions that defend, promote and educate in human rights. In doing so, the ombudsmen offices collaborate in the democratic consolidation process in march in Latin America.

## **12.2 Essential conditions for the existence of the Ombudsman**

### **12.2.1 Legislative enactment**

It is imperative that the Ombudsman institution in Latin America be established by the Constitution, and regulated by a specific Act, foreseeing the possibility of further auto regulation through by-laws. This course of action will permit legitimacy and independence in actions, and would provide limits in case a future government intends to undermine, or isolate the institution.

A Constitutional rank will permit greater stability. The ombudsmen of Argentina, Colombia, El Salvador, Spain, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela have a Constitutional rank. On the other hand, those of Ecuador, Costa Rica and Panama were created solely by an act of Congress.<sup>2</sup>

The legislative and constitutional norms that regulate the institution, should grant jurisdiction to the ombudsman in a way that covers all sectors of public activity. Such broad scope will avoid a situation in which the ombudsman is isolated in a particular sector of public life. In this light, sectorial and specialized ombudsmen should also be avoided, since they tend to multiply inefficiencies, in detriment of the institution's public standing.<sup>3</sup>

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<sup>2</sup> Interamerican Institute of Human Rights, Compendio de Legislación de Ombudsman, *printed in* Basic Studies in Human Rights, Vol. VIII.

<sup>3</sup> Alvaro Gil Robles, El Defensor del Pueblo y su Impacto en España y América Latina *in* Basic Studies in Human Rights, Vol. II



### **12.2.2 Political, administrative and functional independence**

An adequate regulatory framework must provide functional, administrative, and political independence. Ample liberty in all these areas is essential, so that the ombudsman can fulfil its objective of controlling public administration.

In this sense, the ombudsman has to be legally and/or constitutionally endowed with independence in these fields. The ombudsman has to carry out its duties devoid of interference from any public power, and should also be granted with an annual budget, approved by the legislature. The budget should be drafted by the ombudsman, since the office is in the best position to consider the resources it needs, and how they should be allocated. Moreover, it should be free to organize itself, manage its own economic resources, and have the final say in matters of its incumbency.

The political and functional independence supposes that the appointment is the result of a multi-partisan political agreement, so that the holder of the office is no way compromised to any form of political partisanship that may question his or her general service duties. The officers should be free from particular political interests so that they may carry out their duties of control and supervision. The ombudsman office is functionally independent if no state power can issue to it specific instructions.<sup>4</sup>

The same requirements should also apply for the election of deputy ombudsmen, since in several jurisdictions they are appointed in the same fashion as their principal, by the legislative branch. In any case, the formula in which the holder of the office appoints his or her own deputies is also very useful, since this allows the designation of individuals who are trusted by the holder. This formula also avoids the problematic situation in which differing political forces in Congress appoint a principal from a certain side of the political spectrum, and a deputy from the opposing side of the spectrum as a counterbalance.

All of these factors illustrate the convenience of choosing an ombudsman that has not displayed partisan activities during the preceding years, and will

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<sup>4</sup> Jorge Carpizo. Derechos Humanos y Ombudsman.

not use the office as a platform for future political action. An interesting formula in this regard was presented to the Costa Rican Congress by its current ombudsman. She recently introduced a bill in Congress proposing that the holder of the ombudsman office shall not run for an elected position in the popular elections that follow his or her term in office.<sup>5</sup>

In turn, budget independence supposes that the holder of the office will have the liberty of managing resources and allocating them. It is not uncommon that when a government finds itself encumbered by control, it resorts to budget control or to deliberately slowing budget approval as a first line of defence. This situation was faced by the Panamanian ombudsman.

Having been duly appointed, he did not receive budgetary allowances nor official support to set up and organize the institution.<sup>6</sup>

A related point is that ombudsman offices should be sustainable in time. In order to achieve this, the State has to ensure their continuity, assuming full responsibility for its economic support.

### **12.3 Their mandate includes human rights protection**

The mandate of the ombudsman in Latin America includes the function of defending human rights. The creation of the offices responds to the need of incorporating at a state level, a credible mechanism for the protection, promotion, and education of human rights that aids in the democratization of a region that has suffered grave violation of human rights. Regretfully, these violations were in most instances incurred or condoned by the State.

In this manner, the institution of the *Defensor del Pueblo* in Spain, which is a variation of the Scandinavian European ombudsman, and foresees a human

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<sup>5</sup> Draft bill introduced by the Ombudsman of Costa Rica jointly with the filing of her annual report to Congress, June 1999.

<sup>6</sup> Statement from the Panamanian Ombudsman in response to the Ruling of the Supreme Court of Panama, dated 12 February 1998.

rights protection model, was the model for Guatemala. Guatemala was the first state that incorporated the ombudsman in Latin America. Subsequently, the office was created in Mexico, El Salvador, Colombia, Costa Rica, Panama, Honduras, Argentina, Peru, Ecuador, Bolivia, Nicaragua and Venezuela. It has also been constitutionally foreseen but not yet implemented in Paraguay, and it is now pending adoption in Uruguay and Chile.

The ombudsman office is a valuable tool in the fight against impunity and arbitrariness. Its real and transcending importance in our societies is the protection against human rights violations. Its implementation in several jurisdictions as a protector of human rights responds to the need of seeking ways that assist in the return to democracy, and the avoidance of dictatorial regimes endemic in the past.

While developed countries have ombudsman offices dedicated solely to supervise governmental administration, the ombudsman in Latin America has to deal with recent wounds, product of mass violations of human rights. The reality of Latin American states demands from the ombudsman mandate covering human rights protection and promotion.

#### **12.4 Quasi-essential conditions**

The preceding conditions properly define an ombudsman institution. However, an institution having only those minimum standards, runs the risk of becoming inefficient. Thus, we proceed to detail certain conditions that greatly enhance the efficiency of the ombudsman.

#### **12.5 Civil society should participate in the appointment procedure**

The ombudsman office finds its legitimacy mainly in the support received from the society it protects. This sets the stage for the crucial issue of interaction with civil society. This interaction should be a focus of attention from the same moment in which the institution begins its functions.

For example, when the Panamanian government created a special commission for the establishment of the local ombudsman office, the legislative process was characterized by an ample participation of Panamanian civil society. Diverse groups debated the effects of the bill sent to Congress.

If the ombudsman is supposed to be apolitical and non-partisan, the appointment procedure has to enjoy from the input of civil society. In any case, the ombudsman will be the defense against mismanagement of public affairs. Hence, the participation of civil society in the process will result in greater assurance that ombudsman recommendations will be objective and impartial.

As an illustration, the act that creates the ombudsman office in Nicaragua foresees a mechanism for the participation of civil society. The act stipulates that the principal and deputy ombudsmen will be elected by Congress, using lists elaborated in consultation with civil associations.<sup>7</sup>

## **12.6 The office should have the power to investigate any subject, including military matters**

The ombudsman should have the possibility of carrying out substantive investigations in any matter that pertains the services provided by government. The investigation should be informal, but the ombudsman should provide adequate basis for his or her recommendations.

This power allows the possibility of inspecting public offices without previous notice, as well as to require from them any type of information. These actions are foreseen by the act establishing the ombudsman office in Costa Rica. Moreover, El Salvador also gave the ombudsman the power of investigation and immediate access to penitentiary centers.<sup>8</sup>

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<sup>7</sup> Compendio de Legislación, *supra* note 4.

<sup>8</sup> *Ibid.*

The powers of investigation that we are discussing should not be confused with the possibility of carrying out a criminal inquiry. We can point out the great difficulty faced by the ombudsman of Guatemala, who can be ordered by the Supreme Court to participate in *habeas corpus* writs. This has sometimes encumbered the office with a role to which it is ill suited, resembling a prosecutor or court officer. Generally, the ombudsman does not investigate criminal matters, but rather recommends the appropriate organ to carry out the investigations.

The powers of investigation should extend to military institutions, since the ombudsman oversees the proper functioning of all public administration matters. It should also have the power to investigate the actions of the judicial branch, in what pertains to the public service that it provides. The regulatory framework of the ombudsmen of Nicaragua and El Salvador requires the military to collaborate if they are subject of an investigation.<sup>9</sup>

### **12.7 The Ombudsman should have the power to summon and request reports from public officers**

If the ombudsman has to act in case of administrative mismanagement, it is necessary for the institution to have the power to summon and request relevant information from the public officer.

After analysing Central American legislation, we can affirm that all the entities in this region have the possibility of requesting the public servant to appear at a fixed time and date, as well as to request reports and addenda, as necessary to carry out the investigation and issue the pertinent recommendations. The law of Costa Rica, Honduras and Nicaragua foresee a crime of disobedience in cases in which the public officer obstructs the investigations or does not collaborate with specific requests.

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<sup>9</sup> Comparative Chart of Ombudsman Institutions Prepared by Irene Aguilar.

## 12.8 Public awareness

We must recall that the recommendations issued by the ombudsman only have moral authority. Without publicity, its activity will have little effect. Publicity of issued recommendations and undergoing investigations is of vital importance for the strengthening and legitimacy of the ombudsman. This is reflected in the annual report provided to Congress, and especially in the public awareness of its activities and recommendations. Mass media is an effective channel of persuasion and dialogue, since no authority wishes to be publicly questioned, especially in matters relating to human rights issues.

Mass media action is of great importance in the resolution of myriads of cases, inducing public organs to rectify its actions and carry out recommendations that would otherwise have only moral value.

An interesting issue arises in this context, and it concerns the relations of the ombudsman with mass media entities. We believe that the ombudsman should seek a constant dialogue with the media, providing them with necessary information in each concrete case, building alliances in the publicity of its duties.<sup>10</sup>

## 12.9 Recommended conditions

Lastly, we refer to those conditions that would aid in the institutional consolidation of the ombudsman in Latin America. We have witnessed that in several instances governmental agencies have tried to undermine the ombudsman. For this reason, we refer to some conditions that would enhance the sustainability of the institution in the face of political interference.

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<sup>10</sup> See, Jorge Carpizo, *supra* note 6.

### **12.9.1 Professional staff retained by competition and statutory regulation**

The ombudsman office should have a clear set of objectives. These objectives should be set through strategic planning and scheduling. Strategic planning should take into account the type of personnel it requires. This is as important an issue as budgetary sufficiency, which we mentioned above. The ombudsman office needs unique skills to carry out its special activities.

The previous demands commitment from the office and from the staff that works in it. A competitive process should be established for personnel selection. The process should avoid the interference political preferences by decision-makers. The permanence of the staff should be stimulated, especially in cases in which efforts have been made for training in key areas. An agreement is thus reached between the staffer and the institution, in which the former undertakes training through the support of the office, in consideration for stability over a certain period of time. The stability and permanence of the staff is ensured through the use of mechanisms such as clear hiring conditions and a service manual.

### **12.9.2 Council of civil society advisors**

The credibility of the ombudsman is measured by civil society and the general population through the efficiency and publicity of its actions, as well as by achieved results.<sup>11</sup> In the vast majority of cases, the ombudsman is perceived by organized civil society as an entity which enhances its relations with government.

Hence, it seems important for the ombudsman to enjoy the advice of a council that would provide consistency to the mentioned relations. In such a way, civil society would consider the ombudsman as an institution that represents its interests, and the ombudsman office will guide its actions with input from the society it is destined to serve.

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<sup>11</sup> Conclusions of the Workshop on the Central American Ombudsman, celebrated by IIDH in September, 1999.

### **12.10 International networking through the Ibero American Federation of the Ombudsman, the Central American Human Rights Ombudsman Council, and the International Ombudsman Institute**

Present realities demand international alliances with sister entities in other jurisdictions. The ombudsman offices of Latin America, Spain and Portugal (national, state, provincial and local) meet in the Ibero American Federation of the Ombudsman --FIO--, and the Central American organs have also formed the Central American Human Rights Ombudsman Council.

FIO was created in 1995, with the purpose of strengthening the ombudsman institution, as well as providing technical assistance for the creation of these offices in jurisdictions in which it did not exist. FIO provided valuable support to the Honduran ombudsman, when Congress tried to interfere with its faculties last year. FIO also visited different Panamanian officials, when government was denying necessary budget allocations to the local ombudsman. Currently, FIO's President is Mr. Leo Valladares Lanza, ombudsman of Honduras. Its Vice-Presidents are Jorge Santistevan de Noriega and Anton Cañellas, respectively the ombudsmen of Perú and Cataluña (Spain). Its permanent Technical Secretariat is in the hands of the Interamerican Institute of Human Rights.

The Central American Human Rights Ombudsman Council was created in 1994 with the fundamental mission of promoting and protecting human rights in the new areas of social activity triggered by the process of Central American integration. Currently, it is presided by Mr. Julio Arango, ombudsman of Guatemala, and the remaining ombudsmen serve as Vice-Presidents. Its permanent Technical Secretariat is in the hands of the Interamerican Institute of Human Rights.

These alliances have greatly contributed not only in the creation or implementation of the institution in various jurisdictions, but also in institutional support when governmental action aims to undermine local offices.



## **12.11 Conclusions**

The ombudsman in Latin America, with its specific function of protecting and promoting human rights, has proven to be a very effective mechanism in the control of the public sector. It has also served as an important channel between civil society and the state, and it has contributed in the improvement of administrative functions, namely in the areas of accountability and supervision.

These supervisory activities have generated resistance among public officers, who on several instances have tried to undermine the institution in several ways. For example, by holding back implementation measures after constitutional or legislative enactment, or by delaying appointment of replacements for indefinite periods of time.

As officers of the technical secretariats of FIO and the Central American Council, we can attest that the current political context is not lacking in enemies for the ombudsman. Some of these enemies are powerful, some are hidden from public light. We must strive to strengthen the ombudsman offices by ensuring the mentioned conditions, in order to improve their activities and avoid frequent threats of denaturalization.

# Appendices



## Appendix I

**TABLE 1 A**  
**Types of complaints handled by selected national human rights commissions**

Identification of violator	I Ombudsman institution exists	II Other complaints handling institutions exist	PUBLIC	
			A Abuse by state officials, ministries, public service organs, the judiciary mal-administration	B Abuse by the police, Prison guards, security forces, and military: torture and ill-treatment
Countries				
Australia 2)		x	619 (23 %)	15 (1 %)
Canada 3)		x	-	-
Ghana 4)		x	1586 (29 %)	375 (7 %)
South Africa	x	x	277 (33 %)	327 (29%)
India		x	901 (13 %)	2800 (41 %)
New Zealand 5)	x	x	-	-

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- Ad 1) Please note that some institutions register the same complaints under several complaints matters.
- Ad 2) AHREOC's reporting does not clarify whether the violator is the state or a private person. Under Australia "abuse by the state" includes the right to equality before the law, "provision of goods and services", "education" and "adm. of federal laws", incl. "other law courts matters", "immigration" and "state agencies" have been included.
- Ad 3) The CHRC only registers complaints on grounds of discrimination due to the fact that it solely addresses such issues according to its mandate. Other broader HC questions are enforced by the judiciary.
- Ad 4) In 1996, approximately 60% of the respondents of CHRAJ of Ghana were private individuals and organizations. Ghana deals with economic, social and cultural rights cases. This is, however, not reflected in the statistics.
- Ad 5) The reporting of NZHRC on complaints handling does not identify the violator.

**TABLE 1 b**  
**Types of complaints handled by selected national human rights commissions**

Identification of violator	PUBLIC/ PRIVATE	D	E	F
	C Discrimination in Employment	Labour Law	Discrimination: Gender, Race, Dis-ability, Age, Nationa-lity, Marital status, Sex	Economic, Social and cultural rights, incl. land issues
<b>Countries</b>				
Australia 2)	942 (35%)	59 (2 %)	1014 (37%)	
Canada 3)	-	-	1525 (100%)	-
Ghana 4)	183 (3 %)	2137 (38%)	-	-
South Africa	4 (0%)	23 (3 %)	79 (9%)	57 (7%)
India			317 (5 %)	
New Zealand 5)	67 (33 %)	5 (2.5 %)	104 (52 %)	5 (2.5%)

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- Ad 1) Please note that some institutions register the same complaints under several complaints matters.
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- Ad 5) The reporting of NZHRC on complaints handling does not identify the violator.

**TABLE 1 C**  
**Types of complaints handled by selected national human rights commissions**

Identification of violator	PRIVATE		Total complaints registered on area/ 100% 1)	Year
	G Family Law: Inheritance	H Others		
Countries				
Australia 2)	26 (1%)	36 (1%)	2711	1997/98
Canada 3)	-	2	1527	1997
Ghana 4)	129 (23 %)		5571	1996
South Africa	-	78 (9%)	845	1997/98
India	317 (5 %)	2485 (37%)	6820	1996
New Zealand 5)	8 (4 %)	10 (5%)	199	1998

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- Ad 1) Please note that some institutions register the same complaints under several complaints matters.
- Ad 2) AHREOC's reporting does not clarify whether the violator is the state or a private person. Under Australia "abuse by the state" includes the right to equality before the law, "provision of goods and services", "education" and "adm. of federal laws", incl. "other law courts matters", "immigration" and "state agencies" have been included.
- Ad 3) The CHRC only registers complaints on grounds of discrimination due to the fact that it solely addresses such issues according to its mandate. Other broader HC questions are enforced by the judiciary.
- Ad 4) In 1996, approximately 60% of the respondents of CHRAJ of Ghana were private individuals and organizations. Ghana deals with economic, social and cultural rights cases. This is, however, not reflected in the statistics.
- Ad 5) The reporting of NZHRC on complaints handling does not identify the violator.

## Appendix II

**TABLE 2 A**  
**Outcome of complaints handled by selected national human rights commissions**

Countries 1)	<b>Rejected:</b> lack of substance, mis-conceived, rejected in exercise of discretion, lack of jurisdiction.	<b>Conciliated:</b> settled by HRC	<b>Transferred to other relevant institution</b>
Australia 2) in pct.	32 %      1356	11 %      481	3 %      117
New Zealand 3) in pct.	48 %      157	52 %      170	-
Ghana in pct.	16 %      1265	25 %      2050	5 %      377
Canada in pct.	73 %      1483	11 %      217	15 %      301

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- Ad 1) South Africa and India do not register outcome of complaints in ways which make the registration useful for this study.
- Ad 2) In the Australian case, the main reasons for declining cases are lack of substance or vexatious, misconceived or frivolous complaints. Furthermore, a number of complaints are withdrawn and not wished to be pursued. The complaints have, in these cases, been advised by the HRC. A number of cases are declined due to the fact that the complaints do not constitute discrimination and are not human rights matters.
- Ad 3) NZHRC does not register whether complaints are referred to a hearing or transferred to another institution.

**TABLE 2 B**  
**Outcome of complaints handled by selected national human rights commissions**

Countries 1)	Decisions made	Referred for hearing	Total
Australia 2) in pct.	2140 50 %	186 4 %	428 100 % 0
New Zealand 3) in pct.		-	
Ghana in pct.	4009 50 %	317 4 %	801 100 % 8
Canada in pct.	-	24 1 %	202 100 % 5

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- Ad 1) South Africa and India do not register outcome of complaints in ways which make the registration useful for this study.
- Ad 2) In the Australian case, the main reasons for declining cases are lack of substance or vexatious, misconceived or frivolous complaints. Furthermore, a number of complaints are withdrawn and not wished to be pursued. The complaints have, in these cases, been advised by the HRC. A number of cases are declined due to the fact that the complaints do not constitute discrimination and are not human rights matters.
- Ad 3) NZHRC does not register whether complaints are referred to a hearing or transferred to another institution.



## APPENDIX III

**Table 3 A**

**National Human Rights Commissions Established /  
Planned to be established according to the Paris Principles, March 2000**

Regions	Establishment of NHRI planned	Established / Reestablished Year	Legal foundation			Centralisation/decentralisation			
			By Constitution / Constitutional amendment or Decree	By Law or Act of Parliament	By Presidential Decree	Federal, national, regional, state, local level	Headquarters Federal / National	No. of Regional offices	No. of local offices
<b>AFRICA</b>									
Benin		--		1989			1	--	--
Cameroon		1991			1990		1		
Chad		1994		1994			1		
Ghana		1993	1992	1993			1	10	64
Malawi		1999	1995	1998			1	0	0
Niger			1996	1999			0		
Nigeria		1996			1995		1	2	
Rwanda				1999			0		
Senegal		1970, 1997		1997			1		
South Africa		1995	1993	1994, 1996			1	4	
Togo		--		1987			1		
Uganda		1996	1995	1997			1		1
Zambia		1997	1996	1996			1		
<i>Ethiopia *</i>	X						0	0	0
Liberia	X						0	0	0
<i>Mauritius</i>	X			1998			0	0	0
<i>Tanzania</i>	X						0	0	0
<b>ASIA-PACIFIC</b>									
Australia		1981, 1986		1981, 1986			1	4	
Fiji		1999	1997	1999			1	0	
India		1993		1993			1	8	
Indonesia		1994			1993		1	3	0
New Zealand		1978		1977, 1985			1	2	0
Philippines		1987	1987				1	12	4
Sri Lanka		1997		1996			1	10	0
<i>Bangladesh</i>	X						1	0	0
<i>Mongolia</i>	X						0		
<i>Nepal</i>	X			1997			0		
<i>Pakistan **</i>	X						0		
<i>PNG</i>	X			1996			0		
<i>Thailand</i>	X			1999			0		
<i>Malaysia</i>	X			1999			0		
<b>EUROPE/CIS</b>									
Denmark		1987		1986			1		
France		1947, 1987	1993	1984, 93, 96			1		
Georgia		1997	1995				1		
Kazakhstan		1996			1994, 97		1		
Latvia		1991, 1995		1995			1		
<b>THE AMERICAS</b>									
Canada		1962, 1978		1977			1	10	
Costa Rica		1993					1		
El Salvador					1992		1		
Guatemala		1984	1984				1		
Honduras		--	1994		1992, 95, 96		1		
Mexico		1990		1992***			1		32****

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Italics = Plans to establish NHRI      \*\* The Ministry of Foreign Affairs of Pakistan  
 -- = information not available      \*\*\* Amended 1999  
 X = confirmed      \*\*\*\* Independent Commissions

Sources: In general, the information in appendix I - III is based on the statutes and annual reports of the concerned NHRI

\* The information on Ethiopia is based on: Electronic Newsletter on African Media Issues, "Ethiopia moves to create Human Rights Commission", May 18 1998.

**Table 3 B**

**National Human Rights Commissions Established / Planned to be established according to the Paris Principles, March 2000**

Regions	Other Independent Human Rights Protection Institution			Country specific comments
	Ombudsman [Complaints, legality of adm. proceedings]	Other institutions such as equal opp. women, minorities, caste, aboriginals, race relations	Presidential, parliament or governmental HR committee, standing committees	
<b>AFRICA</b>				
Benin	--	--	X	
Cameroon			--	
Chad	--	--	--	
Ghana	fused into NHRI	X	--	
Malawi	X	X	X	
Niger				
Nigeria	X			
Rwanda			X	Regulation on NHRI
Senegal		X		
South Africa	X	X	X	
Togo				
Uganda	X	X	X	Commissioners are all members of the Uganda's Resistance Movement
Zambia		X	--	Comm. appointed by Pre., ratified by Parliament
Ethiopia *	--	X		Plans to establish NHRI
Liberia	--			Draft Law on NHRI
Mauritius	--	--		
Tanzania		X	--	Draft Bill on NHRI, tabled in Parliament
<b>ASIA-PACIFIC</b>				
Australia		X	--	
Fiji		--	--	Organisation not established yet
India		X	--	
Indonesia			--	Board members app. by Pre. Subsequently members will be app. by members of NHRC through election
New Zealand	1962,1975	X	X	Amendments in NHRI Law in 1981, 1982,1983,1985,1993,1994
Philippines	X	X	X	
Sri Lanka	--	--	--	
Bangladesh	X			Draft Bill on NHRI, tabled in Parliament
Mongolia			--	Plans to establish NHRI
Nepal				Institution not established yet.
Pakistan **			--	Plans to establish NHRI
PNG			--	Draft Organic Law
Thailand			--	HRC Bill passed in Parliament
Malaysia				Legislation passed in 1999
<b>EUROPE/CIS</b>				
Denmark	X	X	X	
France	X Mediateur		--	
Georgia			X	NHRI= Public defender
Kazakhstan			X	NHRI established under the President
Latvia	X		X	
<b>THE AMERICAS</b>				
Canada		X	--	
Costa Rica			X	
El Salvador	X			
Guatemala	X	X	X	NHRI = Procurador de los Derechos Humanos
Honduras	X			
Mexico			--	

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Italics = Plans to establish NHRI  
 -- = information not available  
 X = confirmed  
 \*\* The Ministry of Foreign Affairs of Pakistan  
 \*\*\* Amended 1999  
 \*\*\*\* Independent Commissions

Sources: In general, the information in appendix I - III is based on the statutes and annual reports of the concerned NHRI  
 \* The information on Ethiopia is based on: Electronic Newsletter on African Media Issues, "Ethiopia moves to create Human Rights Commission", May 18 1998.  
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# APPENDIX IV

## Table 4 A

### Degree of Independence

Regions	Criteria for appointment of commissioners / Board members			
	Appointment acc. to criteria of institutional affiliation / professional background	Appointment by President or Parliament in add. to criteria of institutional affiliation / professional background	Appointed by President / Parliament / Governor - no objective criteria in law	Board members, political appointees from e.g. Parliament, political parties, local govt., other elected bodies
<b>AFRICA</b>				
Benin	X			
Cameroon		X		
Chad				
Ghana		X		
Malawi		Law Comm + ombudsman automatic members		
Niger				
Nigeria		X		
Rwanda		X		
Senegal		X		
South Africa			X	
Togo	X			
Uganda			X	
Zambia			X	
Ethiopia				
Liberia				
Mauritius				
Tanzania		X		
<b>ASIA-PACIFIC</b>				
Australia			X	
Fiji			X	
India			X	
Indonesia			X	
New Zealand		X partly objective		
Philippines			X	
Sri Lanka			X	
Bangladesh		X		
Mongolia				
Nepal		X		
Pakistan				
PNG		X		
Thailand				
Malaysia				
<b>EUROPE</b>				
Denmark	X NGO rep. in board			
France		X NGO rep. in board		
Georgia			X	
Kazakhstan			X	
Latvia			X	
<b>THE AMERICAS</b>				
Canada			X	
Costa Rica			X	
El Salvador		X		
Guatemala			X elected in Congress	
Honduras		X		
Mexico		X		X

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**Table 4 B**

**Degree of Independence**

Regions	Chairperson / Other members			
	Criteria for appointment former judge or similar qualifications	Incompatible with other positions / paid employment outside duties	On ceasing to hold office ineligible for employment by government	Appointed for a fixed period
<b>AFRIKA</b>				
Benin				X
Cameroon				X
Chad				
Ghana	X	X		X
Malawi	X		X	X Ombudsman
Niger				
Nigeria	X			X
Rwanda	X		X	
Senegal				X
South Africa				X
Togo		X		X
Uganda		X	X	X
Zambia	X			X
<i>Ethiopia</i>				
Liberia				
<i>Mauritius</i>				
Tanzania	X	X	X	X
<b>ASIA-PACIFIC</b>				
Australia				X
Fiji				
India	X	X	X	X
Indonesia				X
New Zealand				X
Philippines				
Sri Lanka				X
Bangladesh	X	X	X	X
<i>Mongolia</i>				
<i>Nepal</i>	X			X
<i>Pakistan</i>				
PNG	X			X
<i>Thailand</i>				
<i>Malaysia</i>				
<b>EUROPE</b>				
Denmark				X
France		X		X
Georgia		X	X	X
Kazakhstan				
Latvia				X
<b>THE AMERICAS</b>				
Canada				X
Costa Rica		X	X	
El Salvador		X	X	X
Guatemala	X	X	X	X
Honduras				X
Mexico		X	X	X

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APPENDIX IV

**Table 4 C**  
**Degree of Independence**

Regions	Funding		Number of Commissioners and full time staff	Financial control State auditors / inspection / treasure board financial reporting to parliament
	By Parliament / Financial Act	Through Ministry / State sector / Financial Act		
<b>AFRICA</b>				
Benin			45 members	
Cameroon	X		X	
Chad				
Ghana	X		600	X
Malawi	X		7 Comm. (2 ex-officio)	X
Niger				
Nigeria	X		X	X
Rwanda			X	
Senegal	?	?		
South Africa		X	9 Comm. and 60 staff	X
Togo	?	?	17 members	
Uganda	X		30	
Zambia	X		5 Comm. and 2 Deputies	X
Ethiopia				
Liberia				
Mauritius				
Tanzania	X			X
<b>ASIA-PACIFIC</b>				
Australia			5 Comm. and 122 staff	X
Fiji	X			X
India	X		300	X
Indonesia	X	X	25	
New Zealand	X		6 Comm and 42 staff	X
Philippines			800 staff incl. Comm.	
Sri Lanka	X		5 Comm.	?
Bangladesh	X		X	X
Mongolia				
Nepal	\$ 15			X
Pakistan				
PNG	X			
Thailand				
Malaysia				
<b>EUROPE</b>				
Denmark	X		12 Board m. and 70 staff	X
France		X	5 full t. staff +1President	
Georgia	X		X	?
Kazakhstan			15 without remuneration	
Latvia	X			
<b>THE AMERICAS</b>				
Canada		X	X	X
Costa Rica	X			
El Salvador				
Guatemala				
Honduras			X	
Mexico	X		1 president and 700 staff	

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# APPENDIX V

## Table 5 A

Mandate / Aim of the NHRI

Regions	Objective of NHRI		
	Promotion, information education, documentation	Research, analyses, proposals to government for law revision and reform	Handling of individual complaints / investigations
<b>AFRICA</b>			
Benin	X	X	
Cameroon	X	X	X
Chad	X	X	
Ghana	X	X	X
Malawi	X	X	X
Niger			
Nigeria	X	X	X
Rwanda	X		X
Senegal	X	X	
South Africa	X	X	X
Togo	X		X
Uganda	X	X	X
Zambia	X	X	X
Ethiopia			
Liberia			
<i>Mauritius</i>			
Tanzania	X	X	X
<b>ASIA-PACIFIC</b>			
Australia	X	X	X
Fiji	X	X	X
India	X	X	X
Indonesia	X	X	X (not in mandate)
New Zealand	X	X	X
Philippines	X	X	X
Sri Lanka	X	X	X
Bangladesh	X	X	X
<i>Mongolia</i>			
Nepal	X	X	X
<i>Pakistan</i>			
PNG		X	X
<i>Thailand</i>			
<i>Malaysia</i>			
<b>EUROPE</b>			
Denmark	X	X	No
France	X	X	No
Georgia			X
Kazakhstan		X	X
Latvia	X	X	X
<b>THE AMERICAS</b>			
Canada	X	X	X
Costa Rica			X
El Salvador	X	X	X
Guatemala	X	X	X
Honduras	X	X	X
Mexico	X	X	X

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APPENDIX V

**Table 5 B**

**Mandate / Aim of the NHRI**

Regions	Rights and powers of NHRI				
	Right to summon witness to inspect private or public offices	Inspection of detentions, prisons, closed institutions	Armed forces can be investigated	Settling of disputes / conciliation / not proceed with complaints	Recommend or order compensation / damages to victims or victims family
<b>AFRICA</b>					
Benin				X	X
Cameroon	X			X	
Chad	X				
Ghana	X	X		X	X
Malawi	X	X		X	
Niger					
Nigeria					X
Rwanda					
Senegal					
South Africa	X	X		X	X
Togo					
Uganda	X	X			X
Zambia	X	X			
Ethiopia					
Liberia					
Mauritius					
Tanzania	X	X		X	X
<b>ASIA-PACIFIC</b>					
Australia		X		X	X
Fiji				X	
India	X	X	X	X	X
Indonesia					
New Zealand		X	X	X	X
Philippines		X			X recommend.
Sri Lanka	X	X		X	X
Bangladesh	X	X			X
Mongolia					
Nepal	X	X			X
Pakistan					
PNG				X	X
Thailand					
Malaysia					
<b>EUROPE</b>					
Denmark					
France					
Georgia		X	X		
Kazakhstan					
Latvia	X			X	
<b>THE AMERICAS</b>					
Canada	?	X	§ 64	X	X
Costa Rica				X	X
El Salvador	X	X		X	
Guatemala					
Honduras	X		X		
Mexico	X	X	X	X	X

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APPENDIX V

**Tabel 5 C**

**Mandate / Aim of the NHRI**

Regions	Quasi jurisdictional competences similar to courts or referral cases to courts			Specific human rights focus			Reporting	
	Refer complaints to alternate redress / courts	Intervene in court proceedings - amicus curiae	Hr's courts/ tribunals can be established in connection to NHRI	Eco., social and cultural rights	Civil and political rights	Focus on vulnerable groups / discrimination	To the president / selected ministries / prime minister	To Parliament / Annual or Status Reports on national human rights situation
<b>AFRICA</b>				?	?		X	X
Benin							X	
Cameroon			X		X		X	
Chad						X		
Ghana			X	X		X		X
Malawi	X							X
Niger								
Nigeria							X	
Rwanda								
Senegal								X
South Africa	X		X	X	X	X		X
Togo								
Uganda	X				X			X
Zambia	X		X	X	X	X	X	
Ethiopia								
Liberia								
Mauritius								
Tanzania	X							X
<b>ASIA-PACIFIC</b>								
Australia		X		X	X	X	X	X
Fiji	X					X		
India	X	X	X	X		X		X
Indonesia						X	X	X
New Zealand	X	X	X		X	X	X	X
Philippines	X				X			
Sri Lanka	X	X						
Bangladesh	X	X	X					X
Mongolia								
Nepal	X Authorities							X
Pakistan								
PNG	X	X	X					
Thailand								
Malaysia								
<b>EUROPE</b>								
Denmark				X	X	X		X 1999
France				X	X	X	X	X
Georgia	X						X	X
Kazakhstan	X Authorities						X	
Latvia						X		X
<b>THE AMERICAS</b>								
Canada	X	X	X			X		X 1997
Costa Rica	X							X
El Salvador	X							
Guatemala	X							X
Honduras	X							X
Mexico	X			X	X	X	X	X 1999

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# APPENDIX VI

## Table 6 A

### Indicators

Regions	NHRI indicators for 1996 / 1997					
	No. of cases registered 1)	No. of cases completed 2)	Population figure in million 3)	Studies and recomm. to governments and ministries re. law revision and reform 4)	Emphasis on co-operation with associations and NGOs in mandate or in annual reports	Newsletters, info-material, website
<b>AFRICA</b>						
Benin	--	--	6,3			
Cameroon	--	--	15,5			
Chad	--	--	7,6			
Ghana	5.200	4.009	18,9	--	--	
Malawi	0	0	10	X mandate	X	
Niger	0	0	10			
Nigeria	--	--	113,8		X	X
Rwanda	0	0	8,2			
Senegal	--	--	10,1			
South Africa	2200	2200	43,4	X	X	X
Togo	--	--	5,1			
Uganda	352	209	22,8	X		X
Zambia	--	--	9,3		X	
Ethiopia	0	0	59,7			
Liberia	0	0	2,9			
Mauritius	0	0	1,2			
Tanzania	0	0	31,3	0		
<b>ASIA-PACIFIC</b>						
Australia	1.552 (97-98)	2.150 (97-98)	18,8	X	X	X
Fiji	--	--		--	X	
India	20.514	16.823	1.000,8	--	X	X
Indonesia	1.927	1.406	216			X
New Zealand	285	285	3,7			X
Philippines	--	--	79,3			
Sri Lanka	--	--	19,1			
Bangladesh	0	0	127,1	--	X	--
Mongolia	0	0	2,6			
Nepal	0	0	24,3	X		--
Pakistan	0	0	138,1			
PNG	0	0	4,7	X		--
Thailand	0	0	60,6			
Malaysia	0	0				
<b>EUROPE</b>						
Denmark	0	0	5	X	X	X
France	--	--	58			
Georgia	--	--				
Kazakhstan	--	--		X		
Latvia	3206	531	2,5	X		
<b>THE AMERICAS</b>						
Canada	1.527	2.025	31		X	X
Costa Rica	12.931	12.931	3,7			X
El Salvador	--	--	5,8			
Guatemala	--	--	12,3			
Honduras	--	--	6			X
Mexico	10.092	8.706	90	136 recomm.	X	X

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1+2) According to annual reports of the HRCs from 1996/97.

3) Source: World Fact Book 1999.

4) Source: Annual reports of the HRCs or the legal mandate.

APPENDIX VI

**Table 6 B**  
**Indicators**

Regions	Human rights indicators						
	Death penalty abolished by law / year 5)	Death penalty abolished de facto / year 6)	No legal or de facto restrictions on forming associations and NGOs 7)	Democratic Constitution, Bill of Rights / Amendments Year 8)	Main international conventions ratified: ICCPR (a) ICESCR (b) CAT (c) CRC (d) 9)	Main regional instrument ratified 10)	Ratification of instruments enabling individuals to file complaints with regional HR courts 11)
<b>AFRICA</b>							
Benin			X	1990	a1992, b1993, c1992, d1990	1986	
Cameroon			LX, F -	1972	a1984, b1984, c1986, d1993	1989	
Chad			LX, F -	1995	a1995, b1995, c1995, d1990	1986	
Ghana			LX, F -	1992	d1990	1989	
Malawi			X	1995	a1993, b1993, c1996, d1991	1989	
Niger		1976	LX, F -	1993, 1996	a1986, b1986, c1981, d1990	1986	
Nigeria			LX, F -	1970, 1979, 1995	a1993, b1993, d1991	1983	
Rwanda			LX, F -	1991, 1995	a1975, b1975, d1991	1983	
Senegal		1967	LX, F -	1963, 1991	a1978, b1978, c1986, d1990	1982	X
South Africa	1997	1991	X	1996	a1998, c1998, d1995	1996	
Togo		X	LX, F -	1992	a1984, b1984, c1987, d1990	1982	
Uganda			LX, F -	1995	a1995, b1987, c1986, d1990	1986	
Zambia			LX, F -	1991, 1996const.amen.	a1984, b1984, c1998, d1991	1984	
Ethiopia			LX, F -	1994	a1993, b1993, c1994, d1991	1998	
Liberia			X	1986	d1993	1982	
Mauritius	1995	1987	X	1968, 1992	a1973, b1973, c1992, d1990		
Tanzania			LX, F -	1977, 1984	a1976, b1976, d1991	1986	
<b>ASIA-PACIFIC</b>							
Australia	1985	1967	X	1900, 1910, 1991, 1997	a1980, b1975, c198, d1990	0	
Fiji		1964	LX, F -	1970, 1990, 1997	d1993	0	
India			LX, F -	1950	a1979, b1979, d1992	0	
Indonesia			LX, F -	1945, 1959	c1998, d1990	0	
New Zealand	1989	1957	X	1852, 1986, 1990 BoR	a1978, b1978, c1989, d1993	0	
Philippines			X	1987	a1986, b1974, c1986, d1990	0	
Sri Lanka		1976		1978	a1980, b1980, c1994, d1991	0	
Bangladesh				1972, 1986	b1998, c1998, d1990	0	
Mongolia			X	1992	a1974, b1974, d1990	0	
Nepal	1997	1979		1990	a1991, b1991, c1991, d1990	0	
Pakistan				1973, 1985	d1990	0	
PNG		1950	LX, F -	1975	d1993	0	
Thailand			X	1997	a1996, b1999, d1992	0	
Malaysia				1957, 1963	d1995		
<b>EUROPE</b>							
Denmark	1978	1950	X	1849, 1915, 1953	a1972, b1972, c1987, d1991	1953	X
France	1981	1977	X	1958, 1962, 1992, 1993	a1980, b1980, c1986, d1990	1974	X
Georgia	1997	1994		1995	a1994, b1994, c1994, d1994	1999	X
Kazakhstan				1993, 1995	c1998, d1994		
Latvia		1996		1922, 1991	a1992, b1992, c1992, d1992	1997	X
<b>THE AMERICAS</b>							
Canada	1998	1962	X	1867, 1982	a1976, b1976, c1987, d1991		
Costa Rica	1877		X	1949	a1968, b1968, c1993, d1990	1970	
El Salvador	1983	1973	X	1983	a1979, b1979, c1996, d1990	1978	X
Guatemala			X	1985, 1993	a1992, b1988, c1990, d1990	1978	X
Honduras	1956	1940	X	1982	a1997, b1981, c1996, d1990	1977	X
Mexico		1937	X	1917	a1981, b1981, c1986, d1990		X

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5) Amnesty International 1999

6) Amnesty International 1999

7) U.S. State report on human rights practises 1998. X = No legal or de facto restrictions, LX = Legally no restrictions, F- = De facto restrictions

8) World Fact Book 1999.

9) Source: U.N website, status of ratifications of 1999. ICCPR = Int. Convention on Civil and Political Rights,

ICESCR = Int. Convention on Economic, Social and Cultural Rights, CAT= Conv. Against Torture, CRC = Conv. of the Rights of the Child.

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# Appendix VII

## ABBREVIATIONS AND BIBLIOGRAPHY (CHAPTERS 3, 4 AND 5)

### Abbreviations

AHREOC	Australian Human Rights and Equal Opportunity Commission
CHRC	Canadian Human Rights Commission
DCHR	Danish Centre for Human Rights
CHRAJ	Commission on Human Rights and Administrative Justice (Ghana)
HRC	Human Rights Commission (general)
IHRC	Indian Human Rights Commission
NHRI	National Human Rights Institution (Paris Principles concept)
NZHRC	New Zealand Human Rights Commission
PP	Paris Principles
SAHRC	South African Human Rights Commission
UHRC	Uganda Human Rights Commission

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## APPENDIX VII

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## Appendix VIII

### CHECKLISTS OF STUDIES (SECTION I, CHAPTERS 3, 4 AND 5)

#### Summary of study:

#### Guarantees of independence, appointment and dismissal procedures of leading members

This study has discussed how to ensure independence in the appointment and dismissal procedures of leading members of national human rights institutions. In this respect, the criteria of the Paris Principles has been outlined and compared with mainly three different national human rights institutions, i.e. of India, Ghana and Denmark.

The study clarifies that a number of issues has to be taken into consideration in relation to the appointment procedures of leading members of a HRC. These issues are:

- C number of commissioners and requests for qualifications of commissioners;
- C appointment procedures and rules of appointing organ;
- C dismissal procedures, including permission to employment outside the HRC;
- C duration of appointment and re-appointment rules;
- C remuneration: salaries and allowances;
- C other staff members of the HRC;
- C privileges and immunities;
- C citizenship, age and clean criminal record.

Questions to be considered include:

- C How many commissioners should be appointed and should the number be determined in the founding legislation or should the legislation be flexible and provide 'not less than e.g. three and not exceed more than e.g. five leading members?
- C Should the HRC have different forces of society represented? Should this be in the form of appointing commissioners from other commissions or should different interest or vulnerable groups be represented in the governing body of the HRC?

- C In terms of the requirements for qualifications of commissioners, should there be an inter-disciplinary approach? Should commissioners have the rank of a judge, should they be drawn from academic fields such as political science or sociology, or should they represent vulnerable groups such as women, minorities and disabled people?
- C Should appointed commissioners have knowledge of, or proven experience in, matters relating to human rights? Should members of political parties be excluded from being appointed? Should such criteria be explicitly laid down in the founding legislation?
- C With regard to the appointment method, who should appoint the commissioners, e.g. the president or the parliament?
- C Should a selection committee be established, and who or which institutions should be represented on it (e.g. members of parliament, the judiciary, university or representatives of civil society organisations)?

With regard to dismissal procedures, the following aspects should be considered:

- C Who should have the power to remove a commissioner (e.g. the president, the parliament or the courts)?
- C Should the grounds of dismissal always be declared by a competent court?
- C On which grounds could a commissioner be removed from office?  
for instance:
  - C - on grounds of serious mental or physical illness?
  - C - if adjudged an insolvent?
  - C - if he/she engages in any paid employment outside duties of HRC during the term of office?
  - C - if he/she is convicted or sentenced to imprisonment for an offence which involves “moral turpitude”?
- C Should commissioners relinquish other public and private offices?
- C Should the removal procedures of commissioners follow the procedures provided for the removal of judges?



C In relation to death, resignation or removal of the chief commissioner, should the president, parliament or selection committee appoint a substitute qualified to be appointed until a new appointment process is completed, in order not to hinder the HRC from operating?

C Should commissioners declare their assets upon appointment and resignation?

It should also be considered:

C What the duration of the appointment of commissioners should be and whether the term should be for a fixed period determined by president or parliament?

C Whether commissioners should be allowed to be re-appointed for an additional term(s)?

C Should full or part time commissioners be appointed?

With regard to remuneration, it should be considered:

C Whether and which official salary standards should be applied to commissioners and other staff members?

C Whether the standards of the judges in the court system should be applied to commissioners at HRCs?

C Whether the chairperson or chief commissioner shall have the power to appoint his own Secretary and staff?

C Whether government should be able to second staff members?

C With regard to the employment of staff, it should be considered whether the appointment procedures, terms and conditions of staff should be included in the internal procedures or if the state regulations should apply?

In relation to immunity and privileges, it should be considered:

C Whether the same rules applied for judges should apply for commissioners?

C Whether commissioners and other key staff members may not be arrested or subject to civil, criminal or administrative liability as a result of the opinions and recommendations they publish or the actions they carry out in the exercise of their functions (in line with the Paris Principles)?

Finally, it should be considered:

- C Whether requirements such as citizenship, age and clean criminal record are relevant in the appointment of commissioners?

### **Summary of study: Jurisdiction and subject matter of complaints**

This study analyse the issue of jurisdiction and subject matter of complaints of HRCs. The study discusses the advantages and drawbacks of formulating the scope of the jurisdiction in various ways, including the extension of the competence to address complaints against government institutions, public employees, private individuals and enterprises, and family disputes. An overview, although not complete, of the type of cases handled by six institutions is provided, which serves to illustrate the general issues discussed in the text.

The study clarifies that consideration should be given to determining:

- C if the human rights principles should be narrowly or broadly formulated in the mandate of the HRC?
- C which categories or entities should be encompassed by its operation, i.e. government officials, private employers or individuals?
- C the legislative basis should be international human rights standards, regional human rights standards, human rights instruments ratified by the state, the domestic constitution or national legislation in which human rights standards are incorporated?

It should be considered whether the mandate:

- C should cover promotion, monitoring and protection? Should the mandate include research, analysis, documentation, education and complaints handling?
- C should cover advising the government on steps to be taken to ratify international human rights instruments, review of legislation with the aim of bringing it into conformity with international human rights law and on concrete actions to be taken?
- C should focus on the distinction of types of rights, or on institutions or person responsible for committing human rights abuses?

- C should cover civil and political rights as well as economic, social and cultural rights?
- C should include violations committed by the state and its representatives, including the police, armed forces and prison service?
- C should include violations committed by private institutions, companies and individuals?
- C should include issues relating to family law and labour law?

It may be considered:

- C whether there is a need to establish other complaints handling bodies with a particular focus (such as a tribunal dealing with labour law, discrimination, etc)?

### **Summary of study:**

#### **Quasi-judicial competence: mechanism of complaints handling**

A summary of the contents indicates that a wide number of issues relating to formal and practical aspects of the quasi-judicial competence with which the HRCs are vested must be considered. Not all aspects, however, are regulated in the legal framework.

A summary of questions to be considered includes the following issues (which must also be seen in relation to the study on the jurisdiction of the HRCs):

- C How are the various competences of the HRCs outlined, and how are the needs for a broad and a sufficiently specified mandate balanced?
- C Is there an overlap between the functions of the HRC and those of the domestic courts?
- C Is there an overlap between the functions of the HRC and other human rights institutions?
- C How does the distribution of tasks between the various institutions best ensure the complainants' right to a fair and effective remedy for human rights violations?

- C Is the mandate and scope of work of the HRC in a relative proportion to the allocation and availability of resources?

When the HRC and the court work in complementarity, i.e. when the HRC has an independent complaints handling function, a number of issues arise.

In relation to the reception of the case by the HRC, it should be considered:

- C Who has standing before the HRC, i.e. only the victim or others as well, either on their behalf or from a point of general interest, and does it allow for both individual and group action?
- C Against whom can complaints of violations be directed? Is the mandate of the institution limited to cases against the state or persons acting in an official capacity (police officers, members of the armed forces, school teachers), or does it include private employers and institutions as well as private persons in general?
- C How to avoid confusion caused by overlaps in jurisdiction, for instance if the powers of a HRC are extensive in relation to remedial action such as ordering the release of persons from unlawful detention.
- C What will be the formalia pertaining to submission of cases to HRC, i.e. in relation to whether they can be oral or must be in writing, must indicate their author, and not be abusive?
- C Must all cases received by the HRC be dealt with individually, or can they be dealt with generally and serve the basis for research, studies and hearings, or in the form of complaints on behalf of an entire group instituted by HRC before the courts?

Once the case has been received by the HRC, it progresses to the next step, i.e. where it is opened for consideration. Here the following issues must be taken into consideration:

- C The internal procedures of HRC, including the establishment of an effective case filing system and other safeguards to ensure that the case progresses swiftly and effectively through the HRC.
- C Should a preliminary procedure of admissibility be established?
- C Instruction of the complainant, for instances whether other options for complaint also exist, and how the procedure will progress.

- C Information to the person or institution against whom a complaint is lodged, allowing for their response.

The next step concerns the actual investigation of the complaint by HRC, giving rise to a number of questions:

- C What should be the requirements for the procedure, i.e. similar to those of a civil court?
- C How shall the protection of witnesses be ensured?
- C Which procedures shall guide the flow of information between the various arms of government, for instance the police, and the HRC? - and in particular, what shall be the extent of the powers of the HRC to:
  - C have free access to all necessary documentation?
  - C hear anybody, the power to compel the production of documents and to receive evidence?
  - C conduct on-site investigations, and have access to non-public institutions, such as detention centres, police, army installations and mental institutions?
  - C issue penalties for lack of cooperation with HRC?
  - C grant interim relief and injunctions?

Following the investigation, the case proceeds to settlement. Different options for the HRC should be considered, such as the power to:

- C carry out a process of friendly settlement/mediation, conciliation or arbitration?
- C pronounce recommendations?
- C issue determinations?
- C award compensation?
- C refer the matter to the courts?
- C require the assistance of the courts?
- C order punitive action (even though it represents a problematic interference with the jurisdiction of the courts )?

In addition, two issues to address at this stage is the extent of the obligation on the HRC to:

- C communicate with the concerned parties about the outcome of the case; and
- C publicise its findings.

If the HRC and the courts work in cooperation rather than parallel, a number of questions arise:

- C What should be the extent of the powers and procedures relating to the referral of cases from the HRC to the courts?
- C Can the HRC institute a case on behalf of the victims before the courts?
- C To which extent and under which conditions should the HRC have the power to intervene in cases before the courts, including the question of the submission of *amicus curiae* briefs?
- C How should the question of confidentiality be enured, and what should determine the outcome of a balancing of individual and society interest?
- C If the powers of investigation of the HRC are closely linked to the courts, to what extent is the court obligated to cooperate?
- C Can a decision by the HRC be appealed to the court and what is the procedure?
- C Should the courts have the power to review the procedures for complaints handling, and if yes, how to balance it with the need to secure the independence of the HRC and to avoid the risk of undue interference with its functions?

# APPENDIX IX

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## APPENDIX X

### PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS (“PARIS PRINCIPLES”)

UN Commission on Human Rights Resolution 1992/54  
of 3 March 1992, annex (E/1992/22);  
General Assembly Resolution 48/134 of 20 December 1993, annex

#### *Competence and responsibilities*

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
  - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
    - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
    - (ii) Any situation of violation of human rights which it decides to take up;
    - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
- (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

*Composition and guarantees of independence and pluralism*

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

*Methods of operation*

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combatting racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

*Additional principles concerning the status of commissions  
with quasi-jurisdictional competence*

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.



**T**his publication is launched by the Danish Centre for Human Rights. It presents different general aspects relating to national institutions for the promotion and protection of human rights, as well as comparative perspectives on the work of these institutions in the African, Asian, European and Latin American contexts.

The focus of the publication is on a number of key questions of relevance to both practitioners and analysts of institutions for the protection and promotion of human rights, relating to the role and functioning of the national institutions, viewed from a practical as well as a theoretical angle. The analyses relate to various challenges, e.g. how to ensure the integrity, independence and effectiveness of the institutions through the constitution and enabling legislation. This include adopting appropriate procedures for the appointment of leading members of the institution, outlining its jurisdiction, and establishing the quasi-judicial function related to complaints handling.

In addition to individual case studies, a comparative overview of the activities and achievements of the individual institutions is included.

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