

ROLE AND FUNCTIONS OF THE NATIONAL HUMAN RIGHTS INSTITUTIONS

IN TRANSITIONAL COUNTRIES WITH RESPECT TO PARIS PRINCIPLES

The article observes legal status, role and functions of the National Human Rights Institutions (NHRI), in transition countries, based on the experience of CIS countries with respect to Paris Principles (1993) as set of international standards, that frame and guide the work of NHRIs. It is emphasized that there is no ideal or single accepted structure for NHRIs. At the same time the national human rights institutions have to comply with the general criteria, such as independence, human rights mandate, adequate funding, and transparent selection and appointment process.

Key words: Human rights, national institutions, UN, Paris Principles, international human rights instruments, Human Rights Commission, Ombudsman, legal status, United Nations Development Programme, Office of the High Commissioner for human rights.

Since the creation of the United Nation system the concept of human rights began widely spread all over the world. It became clear that international community has an obligation to ensure the governments to protect and respect the violated rights of citizens. Of course, governance of human rights is complex and diverse issue. While ratifying international human rights instruments the states are required to elaborate mechanisms to protect and promote human rights. The creation of such mechanisms involves all parts of government in conjunction with other kinds of national institutions and civil society, including independent judiciary, law enforcement agencies, legislature and education in human rights, that affects programmes at all levels. In this structure, national human rights institutions (NHRIs) stand in a very specific position.

Speaking about the National Human Rights Institutions special role belongs to the United Nations, primarily, OHCHR, which in cooperation with UNDP was mainly involved in establishing and strengthening NHRIs.

Since mid 1990s the number of NHRI steadily grows in the Commonwealth of Independent States countries. However, the evolution of NHRI in these countries was not at the same level. Depending on the country and its legal system, the mandates and powers of NHRIs vary significantly. Some institutions, such as public defenders and ombudsmen, have human rights mandates, but many do not have. In some countries, States have divided human rights responsibilities among several bodies with different mandates, for example gender commissions. In some countries we see so called "hybrid" bodies with mandates responsible to work against maladministration and anti-corruption.

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In this respect it worth to determine the term "national human rights institutions" and "national institutions", which are commonly used in the literature. "National human rights institutions" (NHRIs) is the term used in OHCHR publications, for example in the High Commissioner's Strategic Management Plan 2010-2011 and the UNDP Regional Programme document for Europe and the Commonwealth of Independent States (2011-2013); "National Human Rights Institutions", professional series by OHCHR, "Survey of national human rights institutions: report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide", 2009, available from www.nhri.net.

One of the key aspects of the NHRI is their thematic diversity. NHRIs are expected to be the basic foundation of efficient and strong national human rights protection system, helping to ensure the compliance of national laws and practices with international standards in the human rights area; supporting Governments to ensure implementation; monitoring and addressing at the national level basic human rights violations such as torture, arbitrary detention, human trafficking and the human rights of migrants; supporting the work of human rights defenders; and contributing to eradicating all forms of discrimination. At the national level, many actors and stakeholders share responsibility for promoting and protecting human rights: NHRIs can only be understood in this larger context.

First, it is States responsibility for respecting, protecting and fulfilling human rights. The Government, Parliament, the Judiciary and other bodies enact laws, set policy frameworks, take judicial decisions and monitor the impact of their policies and programmes. As well, the judiciary has a very important role, enforcing the rule of law, controlling the constitutionality of the acts of government and of Parliament, and applying a human rights lens generally to their work. The police and other bodies enforce the law and are of course required to comply with human rights standards.

Civil society plays a central role, whether through the dedicated work of NGOs at the grassroots level, or through religious institutions, community service organizations, professional groups or associations and trade unions. The media bring human rights issues and concerns to the attention of the broader public and provide a forum for discussion and debate. The education system ensures that students at all levels are exposed to human rights through awareness raising, sensitization and courses. The private sector plays an increasingly important role as well. Among all these actors, NHRIs are unique: they exist in a dynamic position between States, civil society and other actors, offering a neutral and objective space in which to interact, develop human rights laws and policy, and exchange ideas.

NHRIs use their expertise and on-the-ground experience as a basis for promoting and protecting human rights. They conduct public education, use media to build or strengthen a national culture of human rights and provide a focal point for human rights in the country. These efforts educate and inform, but they also serve to prevent abuses from occurring in the first instance. NHRIs bring a human rights-based approach to the activities of government, so that development and economic issues are analyzed through the lens of human rights principles, standards and corresponding obligations.

NHRIs play exclusive role in the interaction of non-governmental organizations (NGOs), citizens, networks and regional bodies, they also play strong role in the transitional justice reform, development issues and many others. While new instruments are adopted, NHRI are frequently at the place. For example, the Convention on the Rights of Persons with Disabilities gives a precise role to NHRIs under its article 33.

One of the mileages in the development of NHRIs is their compliance with the Paris Principles¹. The Paris Principles are a key evaluation criterion for human rights institutions. They were adopted unanimously in a Resolution by the UN Human Rights Committee in 1993 and in the final documents of the human rights conference the same year. The Paris Principles mark their 20th anniversary this year, and this date coincides with the 20th Anniversary of the Vienna Declaration and Programme of Action.

The Paris Principles list a number of responsibilities for national institutions, which can be divided into five fundamental aspects. First, the institution shall monitor any situation of violation of human rights which it decides to take up. Second, the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and general compliance and implementation with international human rights instruments. Third, the institution shall relate to regional and international organizations. Fourth, the institution shall have a mandate to educate and inform in the field of human rights. Fifth, some institutions are given a quasi-judicial competence².

«The key elements of the composition of a national institution are its independence and pluralism. In relation to the independence the only guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable.»³

Over the past two decades, the United Nations General Assembly and other bodies have issued resolutions of relevance to NHRIs:

- GA resolution 48/134 endorsing the Paris Principles;
- A number of HRC resolutions, of which the latest is A/HRC/RES/20/14;
- A number of GA resolutions on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, of which the latest is A/RES/67/163;
- A number of GA resolutions on national institutions for the promotion and

¹ The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991. They were adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by the UN General Assembly in its Resolution 48/134 of 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights. In addition to exchanging views on existing arrangements, the workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights institutions (NHRIs).

² National Human Rights Institutions - Implementing Human Rights», Danish Institute for Human Rights, 2003. ISBN 87-90744-72-1, page 6.

³ National Human Rights Institutions - Implementing Human Rights», Danish Institute for Human Rights, 2003. ISBN 87-90744-72-1, page 7.

protection of human rights, of which the latest is A/RES/66/169. Compliance with the Paris Principles is the central requirement of the accreditation process that regulates NHRI access to the United Nations Human Rights Council and other bodies. This is a peer review system operated by a subcommittee of the International Coordinating Committee of NHRIs.

In other words, the Paris Principles require national human rights institutions to be created under a constitutional or legislative provision, in which the tasks, composition and sphere of competence of the institution are set forth.

An institution must have an autonomous and independent status not only formally, but also financially and administratively.

The fourth aspect of the NHRI's functions relates to the importance of core protection activities. These include main activities, which are related to prevention of torture and arbitrary detention, detention monitoring and the protection of human rights defenders. This work cannot be overemphasized: it is the most scrutinized function of NHRIs, especially in countries with serious human rights issues.

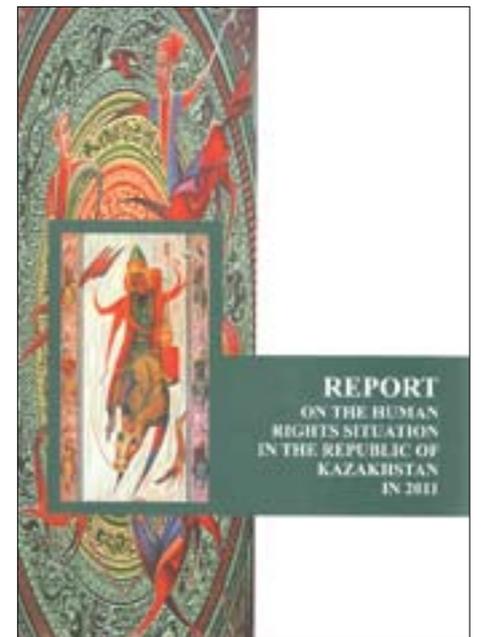
A human rights institution must also be vested with as broad competence as possible in order for it to promote and safeguard human rights.

Its responsibilities must include the following functions associated with promoting and safeguarding human rights:

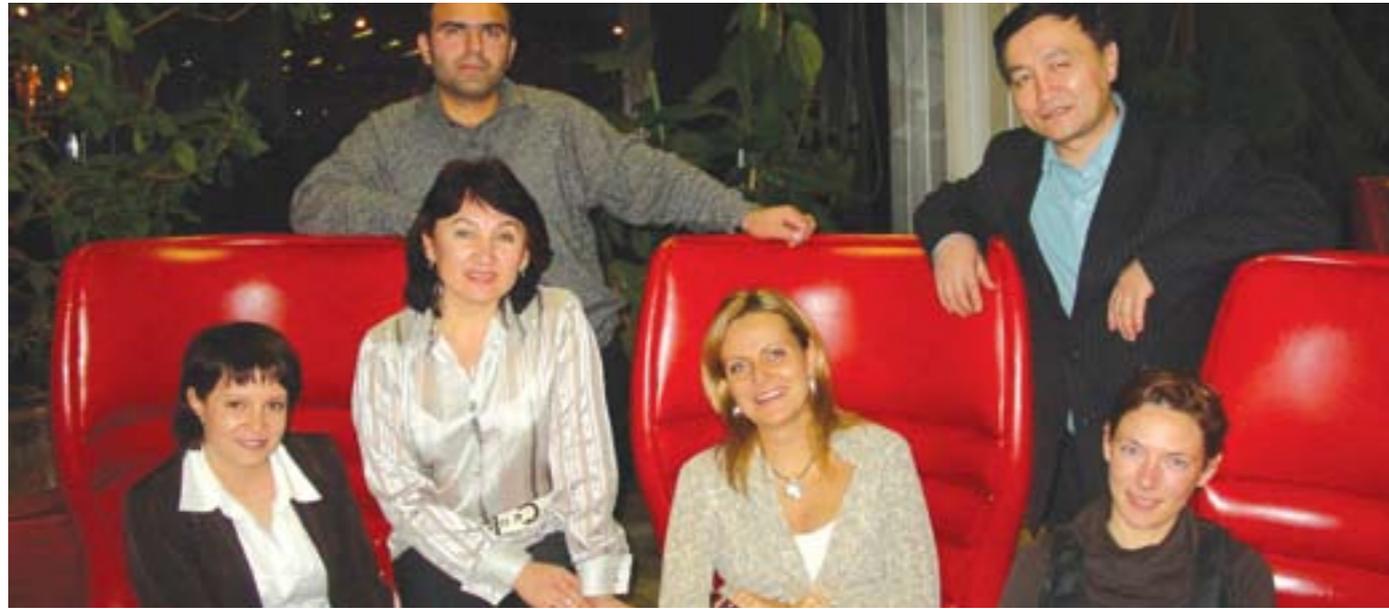
- expert, advisory and reporting tasks
- education, training and information relating to human rights
- tasks associated with monitoring compliance with international human rights commitments.

The institution also participates in international cooperation associated with tasks of this kind.

Institution may optionally be entrusted with the task of handling and mediating appeals and/or complaints and assisting appellants in individual



Report on Human Rights Situation in Republic of Kazakhstan in 2011. Under the general editorship of Kuanysht Sultanov and Tastemir Abishev. Astana, 2012, 127 p.



Круглый стол по Национальным институтам по правам человека в Карловых Варах

cases of human rights violations as well as making recommendations to authorities. Although national human rights institutions are state bodies, they can not be placed naturally within the institutional framework of the tripartite separation of state powers. (According to the doctrine of tripartite separation, legislative, judicial and executive powers must be separated from each other.)

The Paris Principles require that an institution has a pluralist composition, which encompasses the instances in society that are involved in human rights work at the national level. Government and executive-branch representatives may participate in an institution's decision making, but only in an advisory capacity. The institution is a body that complements the efforts of civil society, human rights research and government actions and strives to make its own contribution to safeguarding implementation of human rights by monitoring and evaluating, when necessary also critically, the actions of the aforesaid instances, helping them implement human rights better as well as making society more conscious of human rights protection and promotion.

The Paris Principles require the financial autonomy of the institution, its budget should not be under the government's control, but is preferably a separate budget item on which the parliament decides.

According to the Vienna Declaration and Programme of Action, States have the right to choose the framework, which is the most suitable for their systems and complies with international human rights standards. Although the Paris Principles set out the minimum standards for the roles and responsibilities of NHRIs, they do not dictate to the countries what kind of NHRI models or structures they should choose. Different institutional structures are evolving rapidly, and there are as many variations as there are geographic regions and legal traditions. In this

respect only by carefully reading the enabling law and the mandate can it be determined if an institution is an NHRI. That said, some ombudsman offices take the position that they can handle human rights matters in practice, even if the country has a separate NHRI. In such cases, the institutions should be encouraged to work together to avoid duplication or confusion. For example: the experience of Kazakhstan shows the efficiency of the complimentary work of the National Human Rights Commission under the President of Kazakhstan and the Ombudsman office in the promotion of human rights in the country.

In many countries, NHRIs are working for many years, which functions are regulating by national laws that were inspired or influenced by international human rights law. There are three general sources of international law: (1) treaty or conventional law, (2) customary international law, and (3) general principles of law. National human rights institutions are part of the State structure in terms of the laws they were created by — they depend on laws for their existence and to authorize their actions.

According to survey, conducted by OHCHR in 2009, a third of NHRIs are created by a constitution, about a third are created by legislation, and a further 15% have both⁴. In some countries legislation is passed by a national assembly in some by a parliament, or a state legislature. Enabling legislation may cover human rights generally, or it may define specific rights. Depending on the region, legal tradition and common usage the National Human Rights Institution have different names: civil rights protector, human rights commission, commissioner, institute or centre, ombudsman, parliamentary ombudsman or commissioner for human rights, public defender, protector, parliamentary advocate.

OHCHR survey results from 2009 show that while NHRIs vary considerably, there are dominant models. Human rights commissions comprise for more than half of NHRIs. Ombudsman institutions account the next largest group, especially in the Central and South America and comprise for about a third. The ombudsman model is also common in Eastern Europe and in the Commonwealth of Independent States. During the past years there has been growing recognition of the role of national human rights commissions and ombudsman institutions in the promotion and protection of human rights at the national, regional and international levels, and

⁴ UNDP-OHCHR toolkit for collaboration with National Human Rights Institutions, December 2010, United Nations Development Programme, p.4. Democratic Governance Group Bureau for Development Policy 304 East 45th Street, 10th Floor New York, NY 10017 USA www.undp.org/governance, Office of the High Commissioner for Human Rights Field Operations and Technical Cooperation Division National Institutions and Regional Mechanisms Section CH-1211 Geneva 10 Switzerland www.ohchr.org.

increased cooperation among regional and international associations of ombudsmen and NHRIs in the context of the Paris Principles, as well as between these organizations and the United Nations system as a whole, has been encouraged. As a former UNDP practitioner the author of this article could make a reference to the range of workshops and regional meetings organized by UNDP Regional Center in Bratislava greatly supported by OHCHR, for Ombudsman and Human rights Commissions of the Eastern Europe and CIS countries (ECIS region) within the framework of 2003 through 2009.

It should be stressed that there is no ideal or single accepted structure for NHRIs, beyond compliance with the Paris Principles. The Principles do not force countries to create a uniform model for carrying out these responsibilities and exercising these powers. The best strategy for supporting the work of NHRI in more effective way or helping to establish a new institution lays in understanding the surrounding legal, political and regional institutional culture of the country and region. In order to characterize a NHRI it's necessary to look carefully at the regional practice and accepted terminology from a legal or structural perspective, as well as what functions the NHRI has.

The Paris Principles help to ensure a minimum set of standards and therefore that NHRIs share certain similarities as regards powers and responsibilities. Moreover, even though institutions may share certain similar core responsibilities, the emphasis they put on these may differ significantly. Some institutions may emphasize their advisory, monitoring or promotion function, for example, while others may put a greater emphasis on investigation.

In December 2008, the United Nations General Assembly adopted two important resolutions. Of particular interest is Resolution 63/172 on the importance of NHRIs for the promotion and protection of human rights. In addition, Resolution 63/169 addresses the role of the Ombudsman, mediator and other NHRIs in the promotion and protection of human rights. These two resolutions are "testimony of the growing importance that the United Nations Member States attach to the role and potential of national human rights commissions and ombudsman institutions in the promotion and protection of human rights at the national, regional and international level.

Along with the Paris Principles, the UN Resolutions gave an important step forward to the recognition of human rights principles within the NHRIs. In the past 20 years, national human rights institutions have developed significantly, particularly in the CIS countries, actively engaging with the UN human rights mechanisms.

Л. Байшина: Өтпелі елдердегі адам құқықтары бойынша ұлттық институттардың рөлі мен қызметі Париж қағидалары тұрғысынан.

Мақалада өтпелі елдердегі, мысал ретінде ТМД елдеріндегі адам құқықтары бойынша ұлттық институттардың құқықтық мәртебесі, рөлі мен қызметі ұлттық құқық қорғау мекемелерінің жұмысын анықтайтын халықаралық стандарттардың жиынтығы ретінде БҰҰ Париж Қағидалары (1993 ж.) тұрғысынан қарастырылады. Бұл Қағидаларға сәйкес адам құқықтары бойынша ұлттық институттарды қалыптастыруда және жұмыс істетуде өте оңды немесе жалғыз мойындалған стандарт болмайтындығы атап көрсетіледі. Сонымен бірге, ұлттық құқық қорғау мекемелері өздерінің адам құқықтарын қорғау саласындағы тәуелсіздік, адам құқықтары бойынша мандат, жеткілікті қаржыландыру және іріктеу мен тағайындаудың ашық процесі сияқты міндеттерін анықтайтын жалпы өлшемдерге сәйкес болуы тиіс.

Түйінді сөздер: адам құқығы, ұлттық институттар, БҰҰ, Париж қағидалары, адам құқықтары саласындағы халықаралық құралдар, адам құқықтары бойынша комиссия, омбудсмен, құқықтық мәртебе, БҰҰ Дамыту Бағдарламасы, адам құқықтары БҰҰ Жоғарғы Комиссарының Кеңесі.

Л. Байшина: Роль и функции национальных институтов по правам человека в переходных странах с точки зрения Парижских принципов.

В статье рассмотрен правовой статус, функции и роль национальных институтов по правам человека в переходных странах, на примере стран СНГ, с точки зрения Парижских Принципов ООН (1993 г.) как набора международных стандартов, определяющих работу национальных правозащитных учреждений. Отмечается, что в соответствии с этими Принципами не существует идеального или единственно признанного стандарта в формировании и функционировании национальных институтов по правам человека. Вместе с тем, национальные правозащитные учреждения должны соответствовать общим критериям, определяющим их задачи в области защиты прав человека, таким как независимость, мандат по правам человека, достаточное финансирование и прозрачные процессы отбора и назначения.

Ключевые слова: права человека, национальные институты, ООН, Парижские принципы, международные инструменты в области прав человека, комиссия по правам человека, омбудсмен, правовой статус, Программа Развития ООН, Офис Верховного Комиссара ООН по правам человека.