

## COMPARATIVE LEGAL ANALYSIS OF INSTITUTIONS ENSURE PROTECTION AND OBSERVANCE OF HUMAN RIGHTS

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**Annotation:** This article examines the specifics of institutions that ensure the observance of human rights, provides a variety of mechanisms that guarantee the protection of human rights. Based on a deep analysis of the opinions of the founding scientists, the authors studied the main points of the application of human rights protection procedures at the national level using comparative analysis methods.

## СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ ИНСТИТУТОВ, ОБЕСПЕЧИВАЮЩИХ ЗАЩИТУ И СОБЛЮДЕНИЕ ПРАВ ЧЕЛОВЕКА

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**Аннотация:** В данной статье рассматривается специфика институтов, обеспечивающих соблюдение прав человека, приводится разновидность механизмов, гарантирующих защиту прав человека. На основе глубокого анализа мнений ученых-основоположников, авторами были изучены основные моменты применения процедур защиты прав человека на национальном уровне с использованием методов сравнительного анализа.

Human rights have been a core concern of the United Nations since its inception. The responsibility to respect, protect and fulfil human rights lies with States. They ratify international human rights instruments and are required to create mechanisms to safeguard human rights.

The governance of human rights is complex and diffuse. All parts of government are involved, together with other kinds of national institutions and civil society: an independent judiciary, law enforcement agencies, effective and representative legislative bodies, and education systems with human rights programmes at all levels. Among these, national human rights institutions (NHRIs)<sup>1</sup> occupy a unique position.

National human rights institutions are State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State.

National human rights institutions—at least those that are in compliance with the Paris Principles—are the cornerstone of national human rights protection systems and, increasingly, serve as relay mechanisms between international human rights norms and the State.

In the past 15 years, the number of NHRIs has surged, largely as a result of United Nations support for these institutions “on the ground.” While all NHRIs should have a broad mandate to protect and promote human rights, this growth has brought with it substantive and operational challenges.

The first challenge is rapid growth and institutional diversity. A 2009 survey by OHCHR shows rapid growth in the number of NHRIs in the Americas in the early 1990s, in Africa in the mid-1990s, and in Asia and the Pacific in the late 1990s, while Europe has seen a steady growth since the mid-1990s.<sup>3</sup> However, this evolution has been neither orderly nor linear

Depending on the region, the country and its legal system, the mandates and powers of NHRIs vary widely. Some institutions, such as public protection offices and ombudsmen, have human rights mandates, although many do not. Some States have added other types of mandates, such as maladministration or anti-corruption, resulting in “hybrid” institutions. In some countries, States have divided human rights responsibilities among several bodies with different mandates—gender commissions, for example.

The second challenge is thematic diversity. NHRIs are expected to be the “key elements” of a strong and effective national human rights protection system, helping to ensure the compliance of national laws and practices with all international human rights norms; supporting Governments to ensure implementation; monitoring and addressing at the national level core human rights concerns 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.<sup>4</sup> As new instruments are adopted, NHRIs are frequently called on to play a role. For example, the Convention on the Rights of Persons with Disabilities gives an explicit role to NHRIs under its article 33. National human rights institutions are also expected to interact with an ever-growing group of non-governmental organizations (NGOs), citizens, networks and regional bodies, and to take on new issues: transitional justice, climate change and development, for example.

The third challenge is the need for minimum standards so that NHRIs, regardless of their structure or mandate, can be assessed fairly and accredited. The Paris Principles play this role. Accreditation under the Paris Principles is the responsibility of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

The fourth challenge relates to the importance of core protection activities. These include general activities relating to the 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.

In the face of this complexity and rapid change, NHRIs and those who work with them need to understand the broader context in which they operate. Targeted and effective support for NHRIs is more important than ever. Responses from more than 60 NHRIs to the above-mentioned OHCHR survey identified challenges and weaknesses, including inadequate funding, a need for technical assistance related to organizational and resource management, knowledge of the international human rights system, the importance of fostering relationships with public bodies and civil society, and the follow-up to NHRI recommendations by their Governments. In the survey many NHRIs called, among other things, for greater action and support from UNDP and OHCHR on these and other related matters. The General Assembly recognizes these needs and, in its resolution 63/172 (see annex VII below), it encouraged the United Nations High Commissioner for Human Rights, “in view of the expanded activities relating to national institutions, to ensure that appropriate arrangements are made and budgetary resources provided to continue and further extend activities in support of national human rights institutions” and invited Governments “to contribute additional voluntary funds to that end”.

The central responsibility for protecting human rights rests with Governments. In recent decades, most countries have become parties to the major human rights treaties. Each instrument imposes legal obligations to implement, nationally, the human rights standards contained in those treaties. In ratifying an international human rights treaty, a State assumes the responsibility to respect, protect and fulfil the rights it contains. To respect means that the State cannot take any action or impose any measure that is contrary to the rights guaranteed by the treaty. To protect means that the State must take positive action to ensure that an individual is not denied his or her human rights. Mechanisms through which human rights are protected must be put in place. Adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment and strengthening of democratic institutions—all require State action. The responsibility to fulfil requires a State to take positive steps beyond mere prevention. This might, for example, go beyond the enactment of laws to promoting human rights through national education and information campaigns. When States ratify a human rights instrument, they have to ensure that the rights become part of or are recognized by the national legal system. States are required to take “all appropriate steps”, including but not only legislative steps, to ensure that rights are

realized at the State level. These steps are what is meant by “effective national implementation” and this has generated much international interest and action. The emergence or re-emergence of democratic rule in many countries has focused attention on the importance of democratic institutions like NHRIs as one of the key factors in implementing international obligations.

According to the Vienna Declaration and Programme of Action, States have the right to choose the framework that best suits them, subject to international human rights standards. Although the Paris Principles set out the minimum standards for the roles and responsibilities of NHRIs, they do not dictate NHRI models or structures. Different institutional structures are evolving rapidly, and there are as many variations as there are geographic regions and legal traditions.

There are many different kinds of “national institutions” in the broad sense of that term. Auditors-general and “classic” ombudsmen with no human rights mandates in their enabling laws are autonomous, national institutions that may touch on human rights issues in their work, but are not NHRIs. On the other hand, ombudsman institutions often have specific responsibility for human rights.

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.

Survey results from 2009 show that while NHRIs vary considerably, there are dominant models. Human rights commissions account for more than half of NHRIs. Ombudsman institutions are the next largest group, especially in the Americas, accounting for about a third.

The ombudsman model is common in Eastern Europe, Central and South America and in the Commonwealth of Independent States. 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 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. Reference should be made to the results of meetings of the Human Rights Council in September 2009, on the role of the ombudsman, the mediator and

national human rights institutions in the United Nations system of promotion and protection of human rights, as framed by General Assembly resolutions 63/169 and 63/172.<sup>21</sup> Hybrid, consultative and research bodies make up a small number of NHRIs.

Finally, some countries have more than one national institution with human rights responsibilities. In some, the constitutional structure may dictate different commissions for different regions. In others, institutions have a different thematic responsibility (e.g., women's rights, racial equality or children's rights). Where this is the case, the sum total of the "coverage" provided by all the institutions may come close to that afforded by a single institution with wide powers. However, it should be noted that a consolidated NHRI with broad promotion and protection powers represents the most effective model and the one to recommend when considering setting up an NHRI in line with the Paris Principles or working with a country to consolidate different institutions.

"Commission-style" models share the following attributes: They are State institutions with an explicit mandate to protect and promote human rights. While many have broad mandates, others have a specific focus, such as women's rights; They are typically headed by a number of full-time and/or part-time members, who are decision makers; Investigation is a core function; Many can receive individual complaints (this is referred to as "quasi-jurisdictional competence" in the Paris Principles); Many have the authority to make recommendations only, following investigation (the more typical model).<sup>1</sup>

Human rights commissions generally have several members. This ensures pluralism or diversity of membership, a basic standard in the Paris Principles. Members may be fulltime or part-time, although the chief commissioner is a full-time position. While pluralism is a plus, a diffuse leadership may slow down decision-making and increase cost.

The long ombudsman tradition significantly pre-dates NHRIs. Ombudsmen have existed for centuries in Nordic countries such as Sweden. They focus on mediation, use "good offices" to investigate and resolve complaints, and they prize confidentiality. They favour quick resolution and so generally are not as focused on formal legal investigations.

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National human rights institutions that are ombudsmen (defensor del pueblo in Spanish-speaking countries or public defenders in parts of Central and Eastern Europe) are generally structured around a single head of the institution, similar to its counterpart in “classic” ombudsman offices. However, these institutions specifically promote and protect human rights, and are not principally focused on promoting good governance in public administration. This model is heavily dependent on the reputation, integrity and leadership of the ombudsman herself or himself, as well as on the authority that the position exercises in society. “Ombudsman-like” NHRIs generally have the following features:

They are State institutions, with a mandate to protect and promote human rights;

They are usually headed by a single member, who is the decision maker (although some have deputies); They have a mandate to deal principally with human rights, although they may be specialized in single human rights issues such as women’s rights. They investigate human rights and can often receive individual complaints; They are generally limited to making recommendations. More recently, however, some have been given authority to go to court or to a specialized tribunal in specific instances where their recommendations have been ignored or rejected. So this distinction does not always hold.

Ombudsman institutions with powers to make recommendation—the majority—may be more flexible and faster in handling complaints. While their decisions must be reasoned and supported by evidence, they are not generally binding. Having a single member at the helm complicates the requirement for pluralism; a single member from the majority or dominant group may diminish the institution’s credibility among other parts of society. There are ways to get around this, for instance with advisory boards or councils. Their importance was emphasized in General Assembly resolution 63/169 on the role of the Ombudsman, mediator and other NHRIs in the promotion and protection of human rights. In it, the General Assembly underlined the importance of the autonomy and independence of the ombudsman, mediator and other national human rights institutions. It also encouraged Member States to consider the creation or the strengthening of independent and autonomous ombudsman, mediator and other national human rights institutions, and to develop, where appropriate, mechanisms of cooperation between these institutions in order to coordinate their actions, strengthen their achievements and exchange lessons learned.

“Hybrid” NHRIs are single State institutions with multiple mandates. They deal with human rights, but may also address maladministration, corruption or environmental matters. In Spain and some Latin American jurisdictions, for instance, the practice has been to create a single institution that combines human rights and traditional ombudsman functions. They usually share certain attributes of “ombudsman-like” NHRIs, that is, they are headed by a single person, they have recommendatory powers only, etc.

Consultative commissions tend to have a very broad membership, with participation from many segments of society. While they have the authority to both protect and promote human rights, not all may investigate individual complaints. Consultative commissions tend to focus on advising the Government on major human rights issues and reporting on particularly significant problems. They can make recommendations only and tend to have broad research and advisory mandates across the full range of human rights recognized by the State, but do not generally have authority to entertain or investigate individual complaints. Some operate on a cost-recovery basis (i.e., they sell services), while others extend their work internationally. Other features are:

1. They are drawn from a plurality of social forces and tend to have a large membership;
2. They are usually not mandated to investigate cases, but may advise or consult broadly on a wide range of human rights issues;
3. They focus on advising the State on human rights issues and/or conducting human rights research.

These NHRIs are highly pluralistic, which can lend them credibility with both the population and the Government, with the latter because their opinions will carry the weight of these social forces. A large membership may, however, be expensive and inhibit swift decision-making. The focus that such institutions put on advising and human rights research encourages in-depth analysis and makes for better results. While their research may be more academic in focus, the main concern with such institutions is that they have no direct experience of individual complaints, which distances their work from direct protection of human rights. The absence of a mandate to investigate individual complaints, which is true of many (but not all) such institutions, may be seen as limiting their effectiveness. On the other hand, the institution will have the time and resources to devote to examining broader, systemic human rights issues. As with most other models, these institutions can only provide advice or make recommendations. If their advice is not followed or routinely



ignored, their credibility will suffer. These kinds of institutions are found mainly in Europe, but also in Africa, especially in countries where French is spoken.

A few institutions fall into the category of human rights institutes or centres. Like consultative commissions, human rights institutes or centres tend to have a very broad membership that brings diverse representatives of society together. They have not traditionally had the power to deal with individual complaints. They differ from consultative commissions in that the broad membership does not usually participate directly in decision-making, which is left to a professional staff, but rather sets the general policy framework within which the centre operates. Centres also tend to focus more on human rights research.

An increasingly common phenomenon is multiple institutions in the same country with responsibility for promoting and protecting specific rights (e.g., rights related to gender, children or indigenous peoples). Coordination among such NHRIs is recommended so that their functions and powers are used in a way that ensures the protection and promotion of human rights. The International Coordinating Committee and its Sub-Committee on Accreditation have acknowledged this development, which occurs in several regions of the world, and noted that when dealing with multiple national institutions, there are demonstrated strategies for improving collaboration, including memorandums of understanding or other agreements to address overlaps of competences and handle complaints or issues, and informal arrangements in which institutions transfer individual cases to the most relevant mechanism. This is the case in some countries where ombudsman institutions and NHRIs coexist (although care should be taken to ensure that complainants are not sent from pillar to post).

As a result of the ongoing reforms, according to the Reporters Without Borders World Press Freedom Index, from 2017 to 2020, the country improved its rankings by 13 positions. Also, in the reports of Human Rights Watch, which in November 2017, for the first time in a decade, had the opportunity to conduct research directly in the country, it was indicated that under President Shavkat Mirziyoyev "there was an improvement in the situation with freedom of the press, the media environment entered a stage of change ". The government released several formerly imprisoned prominent journalists.

One of the main achievements in ensuring human rights in the country has been the systematic work to eradicate torture and cruel, inhuman or degrading treatment or punishment. Strict liability has been established for the use of evidence obtained

as a result of illegal methods. Article 235 of the Criminal Code (torture) has been brought into line with Article 1 of the UN Convention against Torture. In accordance with the recommendations of international organizations, the President of Uzbekistan signed a Decree on the liquidation of the infamous Jaslyk colony in Karakalpakstan.

Since March 2019, the Authorized Person of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman) has been performing the functions of a “national preventive mechanism”. This mechanism provides for the organization of monitoring of institutions for the execution of punishment, places of detention and special receivers in order to study the provision of human rights and freedoms there, guaranteed by law. When considering complaints, as well as when checking on its own initiative cases of violation of the rights, freedoms and legitimate interests of citizens, the Ombudsman has the right to freely visit institutions for the execution of punishment, places of detention and special reception centers

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