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Andrea Baršová

Enhancing the Effectiveness of the Non-Judicial Human Rights Protection Mechanisms in the Czech Republic
An Analysis of the Need for a National Human Rights Institution

Summary

One of the ways to improve human rights protection is the building of "national human rights institutions" (further NHRIs), that is quasi-governmental, non-judicial bodies, the functions of which are specifically defined in terms of protection and promotion of human rights. Since the early 1990s, these institutions have expanded considerably around the world. In the Czech Republic no NHRI has yet been established. This paper argues that, while the long-term goal should be setting up a new independent, statutory human rights body as requested by UN international standards, the interim solution consists in adjusting and strengthening the existing model of non-judicial mechanisms to promote and protect human rights, complemented by flanking measures, such as encouraging human rights research and developing effective communication networks.

Introduction

International standards, both at the UN and regional levels, represented, respectively, by the UN General Assembly Resolution 48/134 (1993), commonly known as the *Paris Principles* and by the Council of Europe Recommendation No R (97) 14 on the Establishment of Independent National Human Rights Institutions request that states establish independent non-judicial human rights bodies. Evidence shows that democratic states adhering to international norms take these standards seriously. Latest examples are the establishment of German Institute for Human Rights in March 2001 and the ongoing transformation of the Norwegian Centre of Human Rights into a national institution. Recently, the UN treaty monitoring bodies, the Human Rights Committee (2001)[1], and the Committee on Economic, Social and Cultural Rights (2002)[2] urged the Czech Government that it should adopt measures to establish effective independent monitoring mechanisms for the implementation of the respective covenant rights and should create an NHRI.

Domestically, several years after the establishment of the triplet of entities involved in human rights protection, the Human Rights Commissioner (1998), the Human Rights Council (1999) and the Ombudsman (2000), there is a need for an initial evaluation of their performance. Being a product of domestic developments and not of UN involvement, as is the case of some NHRIs in other countries (*e.g.* in neighbouring Slovakia), these institutions diverge from the UN concept of an NHRI. Nonetheless, they fulfil many of the functions assigned to NHRIs. The functional overlapping between the UN-sponsored NHRIs and the new Czech non-judicial bodies involved, in various ways, in human rights protection calls for an examination of the functioning of these new institutions from the perspective of international standards developed in relation to NHRIs. If improvements of institutional arrangements are needed, as indicated by the UN bodies, should they take the form of setting up a new NHRI or should a different type of reorganization be initiated?

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[1] Concluding Observations of the Human Rights Committee: Czech Republic. UN CCPR/CO/72/CZE. 27 August 2001.

[2] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Czech Republic. E/C.12/1 Add.76. 5 June 2002.

National Human Rights Institutions

While the notion of a national human rights institution dates back to 1946, it was only the global wave of democratisation after the end of the Cold War that brought about the unprecedented growth of these institutions. At present, there are more than a hundred NHRIs around the world. A decisive breakthrough for both the normative basis and the significance of the NHRIs was a workshop in Paris in October 1991, where a common charter for NHRIs emerged. The workshop was followed by the adoption of the UN General Assembly Resolution 48/134 on 20 December 1993, which defines the *Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights*, commonly referred to as the Paris Principles.

The *Paris Principles* define competences and responsibilities, composition and guarantees of independence and methods of operation of NHRIs. An NHRI shall promote and protect human rights. It shall be given as broad mandate as possible, set out in legislation or in the constitution. It shall fulfil a range of responsibilities in relation to the Government, the Parliament or other competent bodies. For instance, it shall advise these bodies and submit opinions, recommendations, proposals and reports on any matter concerning human rights or any situation of violation of human rights. It shall prepare reports on the national situation, drawing the Government's attention to human rights violations, ensure the harmonisation of national laws and practices with international instruments, encourage ratification of international treaties and contribute to reports that states submit to UN bodies. It shall also increase public awareness of human rights through information, education and the media. A national institution may be authorized to consider individual complaints. The central characteristic of an NHRI is its independence. An NHRI is a body which is neither executive nor judicial nor legislative; it is located somewhere between the sphere of government and that of civil society.

The *Paris Principles* began to outline a more ambitious role for the NHRIs. NHRIs are also gradually forming a new category of international actors. Most scholars distinguish various types of the NHRIs, such as advisory committees (*e.g.* French Human Rights Commission), commissions (*e.g.* Human Rights Commission in Canada), hybrid ombudsmen (Poland, Slovenia) and human rights institutes, with specific focus on research (Nordic countries). Existing models of the NHRIs differ immensely and it is simply impossible to reduce the number of existing institutions to a single type. In spite of a boom of studies focusing on the performance of NHRIs, there are no apparent conclusions regarding the nexus between distinct institutional types and performance. Neither is it clear, if ideally, a NHRI should be a single body. Current practice of the UN organs concerning the accreditation of NHRI indicates that different bodies could perform different functions of NHRIs, so long as the functions are covered in some way. This leads to the conclusion that the concept of the NHRI is not yet fully evolved. Some critical scholars argue that UN succeeded in diffusing the NHRIs because they tap into a cross section of more basic state interests. The broad-gauged manner in which the UN framed NHRIs may contribute to the fact that even hypocritical states that violate human rights norms establish NHRIs to improve their international images (Cardenas, 2003:35-38). In addition, critical scholars point out that suggestions regarding the reforms of particular NHRI made by the UN bodies are characterised by a breadth and generality that calls their usefulness into serious question (Gallagher, 2000: 208-209). Still more interestingly, some students of NHRIs argue that some of the NHRIs made little impact although they apply *Paris Principles*, while others are widely respected though they appear compromised or constitutionally defective.

The Non-Judicial Bodies of Human Rights Protection

After 1989, very speedily, complex, modern constitutional provisions and laws to protect human rights were adopted in the Czech Republic. New institutions to enforce compliance with them, such as an independent judiciary and the Constitutional Court, were established. For most conservatives and liberals, who formed governments from 1992 until 1998, the human rights mission of the Velvet Revolution was thus accomplished. This understanding clashed with another vision based on the Charter 77 legacy of broad societal responsibility for human rights protection. The victory of the Social Democrats in 1998 election opened the way for a new human rights programme. In 1999-2000, new and significant developments have occurred, including setting-up of the new, non-judicial mechanisms involved in the human rights protection. These were the appointment of a Government Human Rights Commissioner in 1998, the creation of a Government Human Rights Council in 1999, and the establishment of an Ombudsman office in 2000. The institutional landscape will soon be further altered by implementation of the new EU anti-discrimination legislation, which requests the establishment or designation of an independent equality body.

Currently, the non-judicial protection apparatus is composed of (1) the classical parliamentary ombudsman, with a limited human rights mandate, (2) a high-ranking government official responsible for the human rights area and (3) the advisory council to the Government. The Human Rights Council is composed of representatives of the executive, at the deputy minister level, and representatives of the civil sector (*i.e.* representatives of NGOs and independent experts). The responsibilities of the Commissioner, who is the head of the Council, and of the Council, are not clearly detached, but overlap. They consist in four major tasks (1) monitoring domestic observance of commitments under major human rights treaties; (2) preparing strategies and concrete measures for the Government, either at its own initiative or at the Government's request; (3) expressing opinions on measures proposed by the Government and governmental departments or on other measures concerning human rights; and (4) participating, jointly with governmental departments and NGOs, in drafting reports for the treaty monitoring bodies. In practice, the Commissioner and the Council's Secretariat fulfill most of these tasks.

The existing institutional arrangements diverge from the UN concept of an NHRI, in particular since the Commissioner and the Council are bodies subordinated to the Government. Still they evidently fulfil many of the functions assigned to NHRIs. If we look at the existing triplet of non-judicial institutions as a single institutional structure and compare it with the requirements of the *Paris Principles*, we see that most of the functions are actually covered by one or more bodies. (For details, see the table in appendix). Yet, some manifest gaps and shortcomings exist. Obviously, there are many institutional defects stemming from the fact that both the Commissioner and the Council lack any reasonable degree of independence. Moreover, the defects also concern other issues. For instance, there is a lack of relations to Parliament. The requirement that the NHRI assists in the formulation of programmes for teaching of and research into human rights and takes part in their execution in schools, universities and professional circles is not effectively carried out by any of the existing institutions either.

Towards Establishing a National Human Rights Institution

Both the international concern as well as internal reasons, in particular weaknesses and defects in the structure and functioning of the Human Rights Commissioner and the Human Right Council, substantiate suggesting changes, including fundamental institutional reforms.

The question is whether such reforms should take the form of setting up a new NHRI or of other arrangements. Basic policy options that we suggest for further examination are devised on the combination of three elements: the ideal normative goals, projection of existing trends and feasibility considerations. The basic three alternatives thus determined are:

- a) establishing of an independent statutory NHRI;
- b) extending the mandate of Ombudsman to cover human rights issues;
- c) adjusting and strengthening the decentralised, functional model of non-judicial mechanisms to protect and promote human rights

a) Establishing of an Independent Statutory NHRI

Establishing a new statutory body would be the most straightforward response to the international concerns related to the lack of independent non-judicial mechanisms for human rights protection and promotion. Ideally, a new NHRI should be established by an Act of Parliament, should be accountable to Parliament and its budget should be determined by Parliament as well. A new statutory body, whose financial and institutional independence will be thus reasonably secured, could be composed of a small number of full-time commissioners.

As regards the election or appointment of the commissioners, either the model for the election of the Ombudsman (*i.e*. election by Parliament from a group of candidates proposed by the president and the Senate) or, preferably, that for the appointment of judges of the Constitutional Court (appointment by the President with the consent of Senate) can be used. The chief commissioner may appoint commissioners to cover specific rights areas or to ensure a good coverage of key issues. (This model turned out to function very well with the Ombudsman and his deputy.) In keeping with the procedure followed by the Ombudsman and many NHRIs in the world, the commission should have the authority to appoint its own staff.

As regards the remit and the responsibilities of the commission, these have to be construed carefully, bearing in mind that the commission would appear in an already cluttered institutional landscape (which is likely to encompass not only the ombudsman institution, but possibly also a new equality body). The competencies of the commission should be broad-based, covering the full spectrum of human rights. Existing non-judicial bodies however, should retain specific functions, in particular complaint handling. Consequently, core functions of the new institution should consist in independent monitoring, research and educational activities. To secure the needed communication with other bodies and input from civil society, the establishment of a consultative body to the commission should be considered.

Benefits

Clearly, the establishment of a new independent statutory body would allow best for a comprehensive revision and remedying of all existing shortcomings and gaps. It would bring the human rights agenda into a new place within society, visualising its unique nature as an area of common concern and responsibility. The independence and position of the institution between the sphere of government and that of civil society would allow the body to function as a vehicle for collaboration with national as well as international institutions, thus bridging the existing division of human rights into their domestic and foreign aspects.

Disadvantages

The creation of a new NHRI requests adequate funding, including the high set up costs. This clashes with the current government top priorities, namely cutting the budget deficit and reducing numbers of officials paid from public budgets. Political will to pass such legislation and to ensure resources currently do not exist. Moreover, if presented as a proposal for immediate reform, it would coincide with the establishment of a new equality body. The ongoing difficulties with the establishment of the equality body also show that it would be difficult to gain reasonable support for the proposal from within the state administration. Extensive awareness-raising work would also be needed to overwhelm popular feelings that documents and institutions do not bring any improvement to the situation of individuals.

With regard to the low political feasibility, this option could only be reasonably promoted as a strategic, long-term goal.

b) Extending the Mandate of Ombudsman to Cover Human Rights Issues

As the institution of ombudsman turned out to be a great success, it might seem to be natural to try to write more human rights issues into his mandate or in other words, to shift his position from a classical ombudsman to one of a hybrid ombudsman and gradually to transform the Ombudsman into the full NHRI. This idea would not be a new one. The original intention, supported by the civic sector in early 1990s, was to have a human rights ombudsman.

More importantly, we can observe that, in reality, this tendency is currently gaining new ground. Although prompted by different motives, the ombudsman's mandate is very likely to be extended in the near future by assigning him the responsibilities of the control organ for the limitations of liberty and those of the equality body. Merging the two institutions, the Ombudsman and the NHRI, into one body would not be unique either, as it is happening in other countries as well.

Benefits
The combined functions of the national institution and the ombudsman offer a strong protection of the individual. This solution would enable savings of administrative and financial cost, if compared to option a). Recent experiences also show that extension of the mandate of an existing institution is preferred by the administration to the creation of a new body, if institutional reforms turn out to be indispensable.

Disadvantages
There are, however, several weighty arguments against modifying the remit of the Ombudsman to cover the full range of human rights issues. Entrusting the Ombudsman with a cluster of diverse responsibilities and tasks, stemming from the *Paris Principles*, would, in combination with his current mandate result in an incoherent, overbroad, and diverse jurisdiction of a single body. If his powers to investigate remained limited to maladministration by public bodies (and possibly also cases involving discrimination), while the reporting and other obligations were to cover a broadly defined human rights area, the means in different areas of his jurisdiction would be imbalanced. Combining two distinct roles - that of enhancing good governance and that of promoting human rights - is also likely to have an unintended detrimental effect on the societal understanding of human rights.

The extension of the Ombudsman’s mandate may be not seen as ideal from the point of view of the development of a pluralistic society. In a pluralistic society, diversity of opinions and

institutions and their mutual dialog are vehicles of progress. The single giant ombudsman institution does not necessarily promote such development. Ombudsmen as single member institutions also often fall short of the formal institutional input from civil society.

Extending the Ombudsman's jurisdiction to cover human rights issues is only seemingly a simple, cost free solution. In reality, the disadvantages may outweigh potential benefits.

c) Adjusting and Strengthening the Decentralised, Functional Model of Non-Judicial Mechanisms to Protect and Promote Human Rights

The proposed solution of strengthening and improving the decentralised, functional model of non-judicial mechanism to protect and promote human rights is based on three suppositions. These are the assumptions that (1) several bodies can carry out various functions assigned to a NHRI and that (2) distinct tasks require differing actual levels of independence. Institutional defects do not in practice present a central problem with regard to carrying out a number of functions ascribed to the NHRI, if such functions are carried out in a pluralistic society which contains a vigorous civil sector, free media and an even distribution of power and influence among competing political parties. Finally (3), the option assumes that the functional model already exists, even if in a nascent form.

We have demonstrated that if we look at the existing triplet of non-judicial institutions (the Human Rights Commissioner, the Human Rights Council and the Ombudsman) as a single institutional structure and compare it with the requirements of the *Paris Principles*; we see that most of the functions are actually covered by one or more bodies. The third option for reform consists in designing a series of reform steps, concerning the non statutory bodies, the Human Rights Commissioner and the Human Rights Council, which will bring them as far as possible into line with the spirit of international standards. The main line of changes concerns the Human Rights Council, which should be adjusted to the maximum extent possible to the model of the advisory committee, following the French National Consultative Commission on Human Rights.

Benefits
Evidently, a major principal comparative advantage of the proposed solution stems from its conservative nature. Unlike option a), outlined above, it does not imply a need of waiting for a change on the political scene and it does not necessitate a long preparatory phase. It would allow an immediate launching of the reform scenario. Further, with limited exceptions, the proposed transformations would not request legislative changes. The proposed reforms do not alter the role of other institutions and thus we can assume that the resistance from within the state administration would be low. Finally, it is also important that the reforms would not prevent any further future developments, either toward the a) or b) options.

Disadvantages
Clearly, the reform proposals as outlined above have inherent limits. For instance, they can never transform the existing institutions so profoundly as to bring them fully into line with the standards stemming from the *Paris Principles* as regards independence. It is not guaranteed that the reformed Human Rights Council will qualify as an NHRI and could thus benefit from being a part of the global network of NHRIs. Some of the proposals also touch upon the current role of the Human Rights Commissioner, shifting the symbolic role of “the human rights defender” to the Council. Therefore, the Commissioners conviction that proposed reforms are necessary and beneficial will play a key role.

Well-tailored adjustments and strengthening of existing non-statutory bodies could bring substantial progress with limited resources. At the same time, this is also the only option that is politically feasible at present.

Conclusions and Recommendations

Assessing the benefits and the disadvantages of the above three possible arrangements, the recommendation is that while the preferable long-term goal should be the establishment of an independent, statutory human rights commission a), the interim solution consists in adjusting and improving the functional model of non-judicial mechanisms to promote human rights c). The two policy options are not exclusive, but should be implemented in sequences whereby the incremental changes with long-term perspective c) should pave the way for a more radical policy reform a). Such a reform would require a longer preparatory phase, the mobilisation of political support, and would only be feasible after the framework political conditions have been met. Therefore, a set of policy recommendations aimed at improving the existing mechanisms, in particular the tandem of the Human Rights Commissioner and the Human Rights Council is proposed:

Recommendations:

The Commissioner and the Council

- *The Commissioner and the Council should clarify their respective roles and relations vis a vis each other*

The Commissioner as a government official responsible for human rights should re-formulate his tasks in terms of co-coordinating activities within the Executive, while the Council should play an advisory role to the Government. This necessary conceptual separation would amount to a number of small, yet significant changes. For instance, when the Commissioner compiles reports to treaty monitoring bodies, or prepares annual human rights reports, and the Council contributes to such documents, it should make sure that its position is clearly spelled out. The clarification of the respective roles shall be incorporated in the revised statute of the Council.

- *The Commissioner and the Council should make all efforts to gain more public visibility and authority*

The Council should publish its proposals extensively before they are submitted to the Government. In this regard, a set of improvements in communication with the public and special audiences, such as journalists, is indispensable. The top item on the list is establishing an adequate web page.

- *The Commissioner and the Council shall prepare an Action Plan on Human Rights*

In order to ensure openness as regards the efforts of government authorities, the World Conference on Human Rights in Vienna in 1993 recommended that all countries draw up action plans on human rights. The Czech Republic has not followed the recommendation. Nonetheless, an Action Plan could bring benefits. It could serve as a communication instrument, not only with relevant government departments, but also with the Parliament. It may be an important tool in efforts to create a more consistent and coordinated policy in the

field of human rights. Moreover, it can secure a reasonable degree of integrity of human rights policies, if there is a change of a Government. The Action Plan, if elaborated jointly with the Foreign Ministry, may also be a tool for ensuring, that the Government pursues a holistic policy on human rights both at home and abroad. Finally, the preparation of the Action Plan would be helpful for defining special priority areas and may encourage the needed strategic thinking in this field.

The Human Rights Council

- *The Council should be reformed as regards its compositions to respect the criteria of minimum independence, impartiality and neutrality of its members*

The statute of the Council should be changed to withdraw full membership with voting rights away from the government officials. The representatives of the concerned ministries shall participate with the right of discussion only.

- *The Council should be reformed towards gaining a reasonable degree of autonomy*

The autonomy of the Council should be enhanced by appointing members (with right of vote) for a fixed period or for the duration of the term of their office. The current situation, when the term of the Office of the Council expires with the term of the Office of the Government is highly unsatisfactory. Ideally, the Council should also try to gain a statutory basis, which does not necessarily involve adopting a new law. The role model here would be that of a governmental Legislative Council, the role of which is entrenched in the Competence Law.

- *The Council should establish relations to the Parliament*

The Council should establish at least informal links to both chambers of the Parliament, preferably by including the representatives of the relevant Parliamentary committees as full members or, alternatively, in the position of permanent guests.

- *The Council shall use all efforts to establish contacts on the international level*

While it may be unrealistic to try to gain the status of an NHRI and thus be involved in the global network of national institutions, the Council shall try to establish bilateral relations with the most relevant NHRIs, first of all within the European group. Following the French model, Czech experts sitting in international human rights bodies shall be members of the Council in their personal capacity.

The Human Rights Commissioner

- *The Commissioner shall broaden and revitalize his contacts with civil society and create a functioning communication network*

  At present, cooperation of the Commissioner with the civil society sector is mainly through the Human Rights Council and its committees. Nonetheless, these interactions take place within the rigid hierarchical structure of the Council and its working groups. As a result, members of all the working groups actually never meet. They are not informed about what is happening outside their group either. Therefore, it is proposed

that at least once upon a time a more informal gathering of human rights advocates and researchers is organised.

- *The Commissioner shall establish networks of international contacts to similar governmental institutions abroad*

  This task is not easy, as unlike in the case of ombudsmen or NHRIs there is no existing network, a part of which the Commissioner would become. Yet, the lack of international contacts on the working level is not only a barrier for his more effective work, *e.g.* with regard to the lack of exchange of current information on topical issues. It also pushes him into an insular position on the domestic scene. This problem becomes more acute as the Czech Republic becomes a member of the EU and some aspects of human rights issues necessarily gain new European and transnational dimensions.

- *The Commissioner shall launch a human rights research support scheme and work toward establishing an institutional basis for the development of the human rights research*

  One of the most serious problems is the lack of research into human rights. It has a detrimental effect on how efficiently the Council and the Commissioner carry out their assigned tasks. Therefore, the promotion of human rights research is critical. While establishment of a research centre as an independent entity would be an ideal solution, other more feasible options, such as creating a human rights centre within the Parliamentary Institute, at a university or the Academy of Sciences should also be discussed. The starting point here is launching a scheme supporting human rights research. The grant scheme may be established following the model of the existing research grant scheme operated by the Ministry of Foreign Affairs.

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