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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

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1. Introduction

As the concept of human rights "stretches well beyond cases of extreme cruelty and injustice" (Freeman, 2002: 4), adequate protection of human rights is a constant challenge not only for democratising states, but also for societies based on democratic governance and rule of law. One of the ways to improve human rights protection, promoted by the UN, 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, including the countries of Central and Eastern Europe. In the Czech Republic, no NHRI has yet been established.

However, in the last five years, new and significant developments have occurred on the national institutional landscape, including 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. Being a product of domestic developments and not of UN involvement, as is the case of some NHRIs in other countries, 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 permits an examination of the functioning of these new institutions from the perspective of international standards developed in relation to NHRIs.

The proposal to study these supplementary, non-judicial bodies involved in human rights protection against the background of international standards has both international and domestic dimensions. Internationally, there is a need to respond to pressure regarding the setting up of an NHRI, which exists both on a general level and on a level of concrete recommendations by international bodies addressed to the Czech Republic.

At present, no binding international norm requests the setting-up of an NHRI. However, there are non-binding 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 its follow-up resolutions[1], and by the Council of Europe Recommendation No R (97) 14 on the Establishment of Independent National Human Rights Institutions. These soft law rules function as a normative measure to guide and assess state behaviour. States should consider them with a view of deciding whether to apply them or not. Evidence shows that democratic states adhering to international norms take these standards seriously. A recent example of such an approach is a resolution of the German Bundestag of 7 December 2000, which led to the establishment of "German Institute for Human Rights" in March 2001.

As regards the second component of international pressure, that is concrete requests by international bodies, in particular the recent criticisms by the UN treaty monitoring bodies, the Human Rights Committee (2001)[2], and the Committee on Economic, Cultural and Social

[1] UN General Assembly Resolution 48/134 of 20 December 1993, National institutions for the promotion and protection of human rights, A/RES/48/134; UN General Assembly Resolution 50/176 of 22 December 1995, A/RES/50/176, UN General Assembly Resolution 54/176 of 17 December 1999, A/RES/54/176.

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

Rights (2002)[3] are relevant. These bodies urged the Czech Government, in their respective concluding observations to the submitted reports, that it should adopt measures to establish effective independent monitoring mechanisms for the implementation of the respective covenant rights and should create an NHRI. Specialised monitoring bodies, such as the UN Committee on the Rights of the Child and the European Commission against Racism and Intolerance (a body of the Council of Europe) also raised concerns and made recommendations regarding proper institutional arrangements in their respective fields[4].

Domestically, 3-5 years after the establishment of the "triplet" of entities involved in human rights protection, there is a clear need for an initial evaluation of their performance. How do they meet the expectations, in particular in terms of greater accessibility and affordability of protection? Do they contribute significantly to a good human rights record? Are they a means of developing a real and reliable human rights culture or are they just specialised parts of bureaucracy whose proposals are filed unread in government dossiers? These issues have not been so far examined systematically.

The purpose of this paper is to review both the extent and the limitations of the present non-judicial mechanisms for the protection and promotion of human rights in the Czech Republic; to determine whether there is a need for additional institutions or institutional reforms, and if so, whether such reforms should take the form of setting-up a new NHRI or of other institutional arrangements.

The paper presents, in its section 3, a first study on the new Czech non-judicial bodies of protection, which have short histories and are still adapting to their environments and establishing their roles vis-à-vis other institutions. Therefore, the paper cannot provide in many regards definite judgements. In these cases, it draws attention to existing trends and the dynamics of the development. It was also not possible, for a study of this scope, to address the closely related, yet distinct issue of the implementation of EU anti-discrimination legalisation and the setting up of an "equality body" in a comprehensive manner. In this regard, the study limits itself to taking into consideration the key institutional implications of the implementation of the EU "Article 13" directives.

The paper opens with a global overview of issues related to NHRIs, based primarily on recent scholarly work (section 2). In the following section (section 3), after providing a brief overview of the current Czech situation regarding human rights protection and its institutional landscape, it presents recently established Czech non-judicial bodies for human rights protection. Section 4 is devoted to the non-state actors involved in human rights protection. The following section (section 5) examines human rights research and analysis, both at the academic and policy levels. Section 6 presents alternative proposals for reform and argues for the preferred approach. The paper closes with a set of recommendations.

2. National Human Rights Institutions

While the notion of a national human rights institution is old and dates back to 1946, a sharp growth of these institutions is a relatively recent development. The proliferation of these new

[3] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Czech Republic. E/C.12/1 Add.76. 5 June 2002.
[4] See 3.4.

actors after the end of the Cold War, in which the UN has played a key role, led at the turn of the century to more critical debates on the relevance, roles and impacts of these institutions. Based on official documents and studies of the topic[5], the first part of this section provides a brief overview of the concept and history of the NHRIs and focuses on the standards related to the creation and functioning of NHRIs. The second part elaborates a comprehensive typology of NHRIs. Finally, the third part sums up the opinions on positive and adverse effects of NHRIs.

2.1. Concept and History

The concept of the NHRI was developed within the context of the UN, and dates back to 1946.[6] Historically, the approach of the UN to NHRIs was pragmatic. The concept served primarily to encourage the establishment of national entities, which could assist UN bodies in securing implementation of UN treaty obligations. Initial standards for NHRIs were vague and NHRIs were viewed as subsidiary organisations. It was only in the late 1970s that the concept of the NHRI began to consolidate. In 1978, the UN Commission on Human Rights decided to organise a seminar on national and local human rights institutions to draft guidelines for the structure and functioning of such bodies. Accordingly, the seminar was held in Geneva from 18 to 29 September 1978 during which a historically first series of guidelines was approved, which were subsequently endorsed by the Commission on Human Rights and the UN General Assembly.[7] As Sonia Cardenas (2003: 28-29) suggests, several possible reasons explain why the UN activism *vis-à-vis* NHRI increased notably in the late 1970. The national human rights institutions could serve as local counterparts to international human rights mechanisms that were quickly gaining ground. Moreover, as human rights became politicised internationally and transnational activist networks solidified, it became increasingly likely that any state could come under assault for its human rights practices. For any state that was subject (or feared being subject) to international human rights pressure, an NHRI may have offered a way to avoid greater international pressure.

Nonetheless, it was only the global wave of democratisation after the end of the Cold War that brought about the unprecedented growth of these institutions. A decisive breakthrough for both the normative basis and the significance of the NHRIs was a workshop organised by the Commission on Human Rights 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. By this resolution, the Assembly adopted 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 began to outline a more ambitious role for the NHRIs. The Vienna Declaration, adopted by the World Conference on Human Rights in 1993, reaffirmed their new role.[8]

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[5] The most important scholarly studies include works by Valentin Aichele (2003), Sonia Cardenas (2001, 2003), Linda Reif (2000), and Anne Gallagher (2000). Policy papers, published by NGOs, include documents by the International Council on Human Rights Policy (2000), Human Rights Watch (2001) and Amnesty International (2001). For full references see ”References” section at the end of the paper.

[6] A brief official overview of the history of the NHRIs is provided by UN Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights (not dated, but issued later then 1993).

[7] For details, see Fact Sheet No. 19. The 1978 rules differ from the 1991 Paris Principles in several aspects. For instance, they did not lay emphasis on the independence of an NHRI.

[8] Article 36 of the Vienna Declaration states, ”The World Conference on Human Rights reaffirms 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 violations; in the

In the 1990s, the concept of the NHRI also gradually found its place within the **Council of Europe.** The first and second European meetings of NHRIs took place in 1994 and 1997, respectively. On 30 September 1997, the Committee of Ministers of the Council of Europe adopted **Recommendation No R (97) 14 on the establishment of Independent National Human Rights Institutions**, and **Resolution (97) 11 on co-operation between National Human Rights Institutions of the Member States and between them and the Council of Europe**. In the former document, the Committee recommends that the Governments of member states consider, taking into account the specific requirements of each state, the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralistic in their membership, ombudsmen, or comparable institutions. It also recommended that the states draw on the experience acquired by the existing national human rights commissions and other institutions, referring to the UN documents, as well as the experience acquired by ombudsmen, having regard to its Recommendation on the topic (Recommendation R (85) 13). In the latter document, the Committee decided to institute, within the Council of Europe, regular meetings of the NHRIs of the member states. Such meetings are held every year. Nonetheless, the regional network of NHRIs in Europe is less developed and active than other regional networks. Partly, we can explain this by the competing and overlapping structure of regional ombudsman arrangements.[9]

NHRIs are also gradually forming **a new category of international actors**. The former UN High Commissioner for Human Rights Mary Robinson declared NHRIs to be one of top priorities. First, her Office established a post of a "Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies", who is supported by a small National Institutions Team.[10] In 1994, the International Co-ordinating Committee of National Institutions (ICC) was established as a representative body of NHRIs, with the primary function of co-ordinating, at the international level, activities of the NHRIs. The ICC co-operates with the UN High Commissioner for Human Rights. In 2000, the ICC started the registration of membership procedures.[11] As of 24 June 2003, the list of the National Human

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dissemination of human rights and education in human rights. The Worlds Conference encourages the establishment and strengthening of national institutions having regard to the 'Principles relating to the Status of National Institutions' and recognising that it is the right of each state to choose the framework which is best suited to its needs at the national level."

[9] The first seven "Round Tables with the European Ombudsmen", held every two years further to a 1985 resolution, were organised until 2001 by the Council of Europe's Directorate General of Human Rights. This task has now been transferred to the Office of the Commissioner for Human Rights, which organised the eighth Round Table in Oslo in November 2003. The Office is also entrusted with the task of organising of the "Round Tables of European National Institutions for the Promotion and Protection of Human Rights". In addition, since 2000, regular annual meetings between the Central and Eastern European Ombudsmen and the Commissioner for Human Rights have been taking place. The first "sub-regional" annual meeting was held in Budapest in June 2000, followed by meetings in Warsaw in 2001 and Vilnius in 2003.

[10] Originally, the post was known as the "Coordinator for National Institutions." The position is held by Brian Burdekin, a former New Zealand Human Rights Commissioner.

[11] ICC Rules of Procedures. Adopted on 15 April 2000 and amended on 13 April 2002. Only NHRIs that comply with the Paris Principles shall be eligible to be members of the group of national institutions. An NHRI seeking membership shall apply to the Chairperson of the ICC. It shall supply in support of its application requested documents, including a copy of legislation or other instrument by which it is established and a detailed statement showing that it complies with Paris Principles, or alternatively, an outline of any respects in which it does not comply and any proposals to ensure compliance. The accreditation sub-committee examines the requests.

Rights Institutions compiled by the High Commissioner for Human Rights listed 102 institutions.[12]

Gradually, the NHRIs are acquiring official international status. NHRIs took their first steps in this direction when they participated as a group at the 1993 World Human Rights Conference in Vienna. Since the mid-1990s, the NHRIs can participate on a regular basis at the yearly sessions of the Human Rights Commission, and ICC holds annual meetings in conjunction with the sessions. Increasingly, international organisations treat NHRIs as autonomous actors. As observed by Cardenas (2001:6), formal links among NHRIs announce the emergence of a transnational network of government actors devoted to human rights issues, which she considers a ”noteworthy departure in a field dominated thus far by transnational advocacy and judicial networks”.

Until the present, the dynamics of the NHRIs proliferation has been sustained, with new institutions (such as Human Rights Commission in Scotland, 2003) being established and old ones being reformed (*e.g.* the Danish Centre for Human Rights, which in 2003 acquired a statutory basis and a competence to handle complaints in the field of racial and ethnic discrimination). The UN still attaches high priority to building strong national institutions. In his report to the UN General Assembly of 9 September 2002, General Secretary Kofi Annan even promised to strengthen the capacity of the UN to help individual countries to build strong NHRIs. To sum-up, NHRIs are emerging as a new, dynamic category of global actors embedded in both national and international areas.

2.2. Standards and Functions

“The Paris Principles” are an international non-binding standard, a part of the “appropriate arrangements at the national level to ensure the effective implementation of international human rights standards”, as expressed in its Preamble. They set standards for NHRIs as regards their “competence and responsibilities, composition and guarantees of independence and pluralism and methods of operation”. The brief summary of the Paris Principles appears in a figure below:

Figure 2.1

Summary of the Paris Principles

Competence and responsibilities

- ✓ A national institution shall promote and protect human rights
- ✓ It shall be given as broad mandate as possible, set out in legislation or in the constitution
- ✓ Responsibilities in relation to Government, Parliament or other competent bodes:

[12] List of National Human Rights Institutions, High Commissioner for Human Rights, United Nations. (The list is available on request.) The list says in the footnote, “the fact that an institution appears on the list does not indicate in any sense that it necessarily complies with the relevant United Nations principles relating to the status of National Institutions (Paris Principles)”. The distribution of the listed NHRIs is the following: 23 – African region, 25 – Americas and Caribbean region, 17 – Asia-Pacific and the Middle East regions and 37 – European region.

to advise these bodies and to submit opinions, recommendations, proposals and reports on any matter concerning human rights, any situation of violation of human rights; preparation of reports on the national situation, drawing government's attention to human rights violations
- ✓ To ensure the harmonisation of national laws and practices with international instruments
- ✓ To encourage ratification of international instruments
- ✓ To contribute to reports which state must submit to the UN
- ✓ To co-operate with the UN
- ✓ To increase public awareness of human rights through information, education, media

Composition and guarantees of Independence

- ✓ The plurality of society should be reflected in the membership of the institution
- ✓ It should have adequate funding, own staff and premises
- ✓ The appointment of members should be written in an official act to ensure a stable mandate

Methods of operation

The national institution shall:
- ✓ Consider any question falling within its competence
- ✓ Hear any person and obtain any information and any documents
- ✓ Address public opinion directly to publicise its opinions
- ✓ Meet on a regular basis, establish working groups, set up local and regional sections
- ✓ Consult with other bodies
- ✓ Develop relations with NGOs

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution *may be* authorized to consider complaints concerning individual situations. The functions entrusted to it may be based on the following principles:
- ✓ Seeking an amicable settlement
- ✓ Informing the party on the available remedies and promoting access to them
- ✓ Hearing complaints or transmitting them to other authorities
- ✓ Making recommendations to competent authorities

"The Paris Principles" is a policy document, easy to read, but lacking more systematic structure. For instance, the methods of operation involve such means as hearing persons and obtaining documents. Logically, they should be reflected in the competencies of the body, but this is not clearly spelled out. It is therefore useful to highlight some of the observations by academics who analysed the document systematically.

As observed by Valentin Aichele, the Principles contain various **rules** (*i.e.* rules with regard to competence, mandate, responsibilities, powers, legal foundation, composition, and

selection of members) and several **principles**, such as independence, pluralistic composition, co-operation, accessibility and transparency. As regards functions, Aichele argues that the "promotion" and "protection" of human rights written in NHRIs' mandate describe two distinct categories of functions that the institutions might perform. The obligations "to respect, protect and fulfil," which are entrenched in international conventions, need to be distinguished from "promotional obligations". The promotional obligations aim to support those social and cultural conditions which are essential for the protection of individuals and for the realisation of human rights on a more general level. An NHRI can explicitly be assigned by the state either to support public authorities in discharging their promotional obligations or it can be assigned to fulfil promotional obligations by itself, *e.g.* in the field of human rights education, dissemination or information (Aichele, 2003: 41-53, 85-109).

Cardenas, who also studied the function of the NHRIs, argues that we can classify the functions according to whether they are **regulative** or **constitutive** *(i.e.* that they are based on the distinction between regulative and constitutive types of norms). On the regulative side, all national institutions undertake multiple and often overlapping functions in three important spheres: government compliance (*e.g.* counsel government, lobby for treaty ratification), relations with the judiciary (*e.g.* assist victims in attaining legal redress, refer cases to courts) and independent activities (*e.g.* review national policies, investigate complaints or issue reports on national situation). On the constitutive side, NHRIs perform two fundamental sets of activities. The first involves socialisation (*e.g.* diffusing international norms domestically by means of media, grassroots campaigning, and education). A second set of constitutive activities moves beyond socialisation and addresses issues of international co-operation, *e.g.* networking with other NHRIs, co-ordinating activities with the UN (Cardenas 2003:25-27).

In conclusion, we can sum up some of the above observations, taking into account the practical aspects of the application of the Paris Principles. First, the Paris Principles set certain fundamental criteria as regards the institutional framework of an NHRI and its position within the structure of public institutions. In brief, the NHRI is an independent statutory body which is neither executive nor judicial nor legislative, but occupies a specific position. Second, the Paris Principles request that NHRI have certain core competencies and functions, both in relation to other state institutions and to the UN. These competencies and functions fall into several categories. While scholars present different categorisations of these functions, they agree that some functions pertain more to the human rights **protection** and other to human rights **promotion**. Protective functions can be carried out effectively only by an independent body (*e.g.* investigating complaints, conducting inspections, assisting victims); promotional obligations can be carried out well also by institutions that are "defective". Examples are public awareness raising, educational or research activities. Finally, it is also important to note that a complaint-handling function is not, under Paris Principles, an indispensable competence of NHRIs.

2.3. Definition and Types of NHRIs

Although the NHRIs acquired in the Paris Principles a normative basis, neither the Principles, nor any other UN document gives their precise definition and/or classification. We can explain this peculiarity by concerns of states that a standard concept of national institution could amount to interference with internal affairs. The drafters of the Paris Principles met these concerns by stressing, "Diverse approaches adopted throughout the world for the protection and promotion of human rights at the national level". Later, the UN recognised

explicitly that it is the right of each state to choose the framework for the national institutions best suited to its particular needs. The lack of any prescribed legal shape and insufficient clarification of the place of NHRIs in national landscapes, together with diverse cultural, societal and legal frameworks, in which the NHRIs operate, has resulted in a situation in which NHRIs have taken on the forms of an extremely wide range of distinct entities. On the one hand, this causes substantial difficulties for any researcher, who engages in definition and classification of these institutions. On the other hand, this makes such an endeavour even more important for policy makers. After all, an NHRI is always a concrete body and not a set of abstract principles, and a state considering the creation of one needs some practical guidance.

To fill the gap, this section brings an overview of existing definitions and classifications, and finally, constructs a more comprehensive classification.

There is no a single **definition** of an NHRI. A UN Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights remarks that it is evident that the concept of a national human rights institution is not yet fully evolved and describes a NHRI as "a body which is established by Government under the Constitution, or by law or decree, the functions of which are specifically defined in the terms of the promotion and protection of human rights".[13] UN Fact Sheet No. 19 opens the definition section with an observation that activities of a large number and range of institutions, such as churches, trade unions, the mass media and many non-governmental organizations touch directly on human rights issues, as do those of most government departments, the courts and the legislature. Against this background, it goes on to explain that: "The concept of a national human rights institution is, however, far more specific – referring as it does to a body whose functions are specifically defined in terms of the promotion and protection of human rights. While no two institutions are the same, a number of similarities can be identified which serve to separate these institutions from the various entities mentioned above. The national institutions being considered here are all administrative in nature – in the sense that they are neither judicial nor law-making. As a rule, these institutions have on-going, advisory authority in respect to human rights at the national and/or international level. These purposes are pursued either in a general way, through opinions and recommendations, or through the consideration and resolution of complaints submitted by individuals or groups."

Most scholars stick to the UN definition. Anne Gallagher (2000: 202), for instance, defines NHRIs as "independent entities which have been established by a government under constitution or by law and entrusted specific responsibilities in terms of the promotion and protection of human rights." Students of international law tend to emphasise the link between the NHRIs and international law. Cardenas (2003: 23, 24) defines NHRIs as "government agencies whose purported aim is to implement international norms domestically". Thus, "NHRIs are intended to be the permanent, local infrastructure upon which international human rights norms are built". Aichele argues that according to the Paris Principles, the mandate of a NHRI should clearly include reference to international law. Consequently, an absence of reference to international norms disqualifies the institution as an NHRI (Aichele, 2003).

[13] United Centre for Human Rights. (1995). *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.* Geneva: UN. Professional Training Series No.4 at 4-6, UN Doc. HR/P/PT/4, UN Sales No. E. 95. XIV.2, p. 6

When it comes to a **typology of NHRIs**, the picture turns even more colourful. According to UN documents, a majority of existing national institutions can be grouped together in two broad categories: human rights commissions and ombudsmen. However, in addition, a ”less common, but no less important variety are the specialized NHRIs, the function of which is to protect rights of a particular vulnerable groups, such as ethnic and linguistic minorities, indigenous populations, children, refugees or women”.[14] There is a certain degree of ambiguity in the UN documents as regards classification, which has also led to various interpretations by scholars. For instance, Birgit Lindsnoes and Lone Lindholt argue that according to the Paris principles ombudsmen, mediators and similar institutions form “other bodies” and are not defined as national institutions (Lindsnoes, Lindholt, 1998: 3-4). Consequently, they define national institutions narrowly. They also exclude human right commissions that are political in nature, formed by government and serving as an integral part of the state and parliamentary structure.

Valentin Aichele, the author of the first monograph dealing with national institutions, (Aichele, 2003) distinguishes four different models of NHRIs, to which he links four archetypal representatives: the advisory committee model (National Consultative Commission for Human Rights in France), the institute model (Danish Institute for Human Rights), the ombudsman model (El Defensor del Pueblo, Spain) and the commission model (Human Rights and Equal Opportunity Commission, Australia). After examining these models, he concludes that all four models obviously differ immensely and that, therefore, it is simply impossible to reduce the number of existing institutions to a single type. Linda C. Reif (2000), with special focus on “democratising states”, distinguishes: (classical) ombudsman, human rights commission and hybrid human rights ombudsman, favoured in Latin America and in Central and Eastern Europe. Morten Kjoerum, who is the executive director of the Danish Centre for Human Rights and Chairman of the European Coordinating Group for NHRIs, categorizes recognised institutions in five different groups. These are consultative commissions (*e.g.* French Human Rights Commission), commissions with judicial competence (*e.g.* India, Ireland and South Africa), commissions with judicial and ombudsman competence (*e.g.* Mexico, Ghana), national human rights centres (developed in Northern Europe) and finally, the grey zone of human rights ombudsmen (in Latin America and some Eastern and Central European countries) (Kjoerum, 2003: 636 - 637). Cardenas (2001) includes the following types: the three distinguished by the UN (that is ombudsman offices, national human rights commissions and specialized commissions), a hybrid institution (following Reif) and finally, adds two categories not mentioned previously, that is ”parliamentary bodies devoted to human rights issues” and ”national bodies devoted to implementing humanitarian law”.

Below, a “merger typology” is designed. It includes all the types identified by UN and scholars mentioned, with some exceptions and modifications. It does not include “parliamentary human rights bodies” as proposed by Cardenas (2001) as standing parliamentary committees are, normally, an integral part of law-making bodies and are composed of MPs. Further, the classification includes another type distinguished by Cardenas – “national bodies devoted to international humanitarian law” - under the broadly defined sub-category of ”specialised bodies”, that is those whose competence is limited to a category of potential human rights violations, such as discrimination, or protection of specific, vulnerable groups.

[14] See UN Fact Sheet No. 19.

NHRIs can be divided into two sub-categories: NHRIs with a general competence and specialised institutions with limited and focused remits. The five proposed types (1. classical ombudsman, 2. hybrid ombudsman, 3. commission, 4. institute and 5. advisory committee) reflect the institutional frameworks, compositions, and, partly the core functions of both NHRIs with general competence and specialised bodies. The proposed classification includes types which are frequent (1-3) and two rather marginal types (4-5). (For instance, from 37 institutions listed by the UN in the European region, roughly 15 institutions appear to be ombudsman institutions, 7 are human rights commissions, 5 institutes or centres, 6 specialised bodies with a mandate to combat discrimination or protect minorities and the remaining 4 present *sui generis* models, *e.g.* "human rights commissioner" in Kyrgyz Republic.) To some types, representative examples ("archetypes") are attached.

Table 2.3 Types of NHRIs and Similar Bodies

Types of NHRIs and Similar Bodies				
	Some functions of an NHRI	Full functions of an NHRI		Some functions of an NHRI
An NHRI with general competence	1. Classical ombudsman *Parliamentary Ombudsman - Sweden, Parliamentary Commissioner for Administration - UK*	2. Hybrid ombudsman *El Defensor del Pueblo - Spain, Commissioner for Human Rights Protection - Poland, Human Rights Ombudsman - Slovenia*	3.Commission *Human Rights and Equal Opportunity Commission - Australia, Human Rights Commission - Canada*	4. Institute *Danish Centre (Institute) for Human Rights - Denmark*	5. Advisory Committee *National Consultative Commission for Human Rights - France*
	Some Functions of the NHRIs		▲ ▼	Some functions of NHRIs	
Specialised institutions (equality bodies, bodies focused on vulnerable groups or humanitarian law)	Specialized ombudsman *Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights - Hungary*		Specialized commission *The Commission for Racial Equality - UK*	Specialized institute *Resource Centre for the Rights of Indigenous Peoples - Norway*	Specialized advisory committee *The Government Council for The Disabled- Czech Republic*

The most essential distinctive characteristics justifying the proposed five institutional types of NHRIs are following:

- **A Classical Ombudsman** is the oldest type of institution. The concept of ombudsman can be traced back to the Ombudsman for Justice of Sweden

established in 1809. The institution did not spread to other countries until the 20th century, when it was first adopted in other Scandinavian countries. The popularity of the ombudsman office has increased since the early 1960s, as various Commonwealth and other, mainly European, countries established ombudsmen offices. Unlike other NHRIs, classical ombudsmen do not have an explicit human rights mandate. Their principal function is to handle complaints of individuals and investigate allegations of maladministration by public bodies.[15] Accordingly, the ombudsman often acts as an impartial mediator between an aggrieved individual and the governmental agency, with the aim of ensuring fairness and legality in public administration. The ombudsman, who is usually an individual, is generally appointed by parliament acting on constitutional authority or through special legislation. Traditionally, an ombudsman has a wide range of powers enabling him to investigate effectively individual complaints (including to conduct on-site inspections and to compel production of documents). His independence from the government is ensured to a reasonable and adequate degree. Usually, an ombudsman can issue non-binding decisions. However, classical ombudsmen do not have power to examine complaints in the private sector. Taking into consideration that ombudsman offices, in practice, deal with complaints that may involve human rights issues, as well as the traditional approach by the UN to these institutions, we can consider - with reservations - the classical ombudsman also as an NHRI *sui generis*.

- A **Hybrid ombudsman** can be briefly characterised as ombudsmen whose mandates include human rights responsibilities. Historically, the adaptation of ombudsman to include new roles is linked to democratization movements since the mid-1970s. First established in Portugal (1975) and Spain (1978), "hybrid ombudsmen" are particularly favoured in Latin America and Central and Eastern Europe (*e.g.* Poland, Slovenia). Hybrid ombudsmen like other human rights protection mechanisms are sometimes products of the internationally brokered peace deals (*e.g.* Bosnia and Herzegovina). We can define hybrid "human rights ombudsman" as an institution that has been expressly given, or that in practice undertakes, two roles: to protect and promote human rights and to monitor government administration. In addition, hybrid ombudsman may have new powers not associated with the earlier institutions, such as the power to bring cases to constitutional courts. (Reif, 2000: 11-13).

- A **Commission** presents the classical, and at the same time an ideal, model of an NHRI, at least under the standards established by the Paris Principles, which stress the importance of pluralistic composition of an NHRI. As described in the UN Fact Sheet, commissions are generally composed of a variety of members from diverse backgrounds, but each with a particular interest, expertise or experience in the field of human rights. While commissions are linked to either the legislature or the executive, they are autonomous bodies and a constitution or law secures their independence. Human rights commissions, as reflected in their name, are concerned primarily with the

[15] The web site of the International Ombudsman Institute describes the role of ombudsman as follows. "The role of the ombudsman is to protect the people against violation of rights, abuse of powers, errors, negligence, unfair decisions and misadministration in order to improve public administration and make government action more open and the government and its servants more accountable to the members of the public".

protection of civil and other human rights. Their responsibilities usually include examination of existing laws and bills, conducting public inquiries into situations of human rights violations and monitoring government compliance with international human rights norms. Most commissions compile their findings regularly in annual and other reports, which they submit to Parliament and/or Government bodies. Additionally, almost all commissions engage in educational and awareness raising activities.

Unlike ombudsmen, commissions are not necessarily equipped with the competence to receive, handle and investigate complaints by individuals and with corresponding entitlements, (although some of them are).[16] A closer examination of the statutes and activities of some of the leading human rights commissions, such as the Canadian Human Rights Commission,[17] shows that a primary responsibility of the Commission is to give effect to the antidiscrimination legislation. Accordingly, it is obliged to deal with and to investigate complaints of alleged discrimination, whereas its competence as regards other human rights complaints is vague. (The Canadian Commission "may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source".[18]) Although it is risky to generalize, we may conclude that while some human rights commissions have a broad mandate to cover human rights issues in their recommendations, suggestions, reports and other activities, their power to investigate individual complaints is more narrowly defined and often limited to a specific instances discriminatory and violative conduct.[19] Frequently, the complaint-handling competence reflects the prevailing human rights abuses in a country. This also indicates, that the borderline between the NHRIs with general competence and the specialised national institutions is, in particular as regard equality and discrimination issues, not clear-cut, but blurred.

- An **Institute (or Centre)** is a less common type of NHRI. This type of institution is most common in Nordic countries, where human rights centres were established in the 1980s. The world's model institution of this type was for a long time the Danish Centre for Human Rights.[20] An institute's competences cover primarily education, research and projects. At least initially, the basis of the institute is not a statute, but it rather operates under a non-binding instrument (such as parliamentary resolution, *e.g.* Denmark and Germany). It often has a form of a private legal entity or of an independent research institution affiliated to a ministry. As such, an institute would not

[16] At The Sixth International Conference for National Human Rights Institutions, held in Copenhagen and Lund on 10-13 April 2002, out of 25 participating NHRI that submitted a questionnaire, a majority of 17 bodies answered that they do investigate individual complaints. See "The Sixth International Conference for National Human Rights Institutions", published by the Danish Centre for Human Rights, pp. 62, 68-69.
[17] Canadian Human Rights Act (R.S. 1985, c. H-6)
[18] Canadian Human Rights Act, Subsection 27(1), e.
[19] Another example is the Australian Human Rights and Equal Opportunity Commission, established in 1986, particular focus of which is on sex, race and disability discrimination and the protection of rights of Indigenous Australians. Similarly, the New Zealand Human Rights Commission has power to investigate, conciliate, and on occasion, prosecutes in a special tribunal – the Complaints Review Tribunal – cases of unlawful discrimination.
[20] Human right centres having the task of researching into and informing on human rights exist, for instance, in Nordic countries. The Danish Centre was a model for the German Institute for Human Rights, the Norwegian Centre for Human Rights and, likely, also for the Slovak Centre for Human Rights.

qualify as an NHRI. Nonetheless, a human rights institute deserves attention, as it has the potential of transforming into an NHRI. This is the case of the Danish Centre (now Institute) for Human Rights, which was included in a parliamentary law in 2003, after it had been operating on a non-binding parliamentary resolution in the period 1987-2002. The Danish Institute newly also investigates complaints of racial discrimination. A similar development may be expected as regards the German Institute for Human Rights.[21] A particular case is the Norwegian Centre for Human Rights, which provides a unique instance of creating an NHRI through transformation from an academic research institution. (See Appendix C).

- An **Advisory Committee**[22] is also a marginal type of NHRI, the single well known representative of which is the National Consultative Commission on Human Rights in France, whose origin dates back to 1947. The advisory committee, as a large multi-member institution, ideally meets the requirement of the Paris Principles, as regards the pluralistic composition of an NHRI.[23] The function of the advisory committee is, through its recommendations, to assist the prime minister and ministers with issues pertaining to human rights. The tasks of the advisory committee include, inter alia, the preparation of recommendations and studies, contributing to reports that France presents to international organisations, encouraging the ratification of international instruments, raising any problems concerning an emergency humanitarian situation and submitting to the Government an annual report on the fight against racism and xenophobia. The last mentioned competence is a statutory obligation (under Article 2 of the Law no 90-615 of 13 July 1990, aimed at suppressing all racist, anti-Semitic and xenophobic acts), which also presents a single legislative recognition of the body. The commission is established by prime ministerial decree and the members of the commission are appointed by the order of the prime minister. The Commission does not deal with individual complaints.

- **Specialised institutions** may have in principle the same institutional forms as institutions with general competence. In practice, specialised ombudsmen, such as ombudsmen for children and commissions for racial equality, seem to be most frequent. A single specialised institution - with the exception of equality bodies discussed below – by its nature cannot qualify as an NHRI. However, the ICC adopted a flexible approach. It allows a group of national specialised

[21] See Aichele, V. (2003). *Nationale Menschenrechtsinstitutionen.* Chapters 6 and 7, pp. 151-196. The idea to establish the institute for human rights in Germany was developed in the 1990s in parallel in the government and non-governmental spheres. The German Institute, coined by a resolution of the Bundestag 14/4801 of 7 December 2000, was established as a private legal entity (E.V.) in March 2001. Since 2002, the Federal Government is contributing to running costs of the German Institute. (In 2002, the contribution was 1.53 mil. euro.)

[22] As mentioned, this type of NHRI has been proposed by Aichele (Aichele, 2003) and Kjoerum (Kjoerum, 2003). It seems desirable to include this type as it has a specific relevance for Czech developments, as will be discussed in Section 3. This type of institution is also found in Greece, and in a number of francophone African countries.

[23] The French Human Rights Commission is a broad-based body with a membership consisting of key NGOs, academics, French experts in international bodies serving in their personal capacity, representatives from different religious communities and others – all together 119 institutions and individuals.

institutions to register as a single NHRI, as is the case of Swedish "ombud" institutions.

From the potentially large number of such specialised institutions in the world, the **anti-discrimination bodies** commonly referred to as **equality bodies**, are of particular importance. These institutions are found mostly in Commonwealth countries and include UK Commission for Racial Equality (1965), New Zealand's Human Rights Commission (1971), the Australia's Human Rights Commission (1978) and Australia's Human Rights and Equal Opportunity Commission (1986). Significantly, these are exactly the same bodies, which are considered the classical prototypes of the Commission type of NHRIs (see above).

There are at least two incentives, which support this modification of NHRI or, viewed from other perspective, allow the equality bodies to qualify as NHRIs. First, under the Paris Principles, NHRIs should have particular competence in relation to discrimination. They shall "publicise human rights 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." Second, as regards the EU member states, the combating of racial discrimination requests the **EU** "**Race Directive" of 2000**.[24] The directive, inter alia, requires that "Members States shall designate special body or bodies for the promotion of equal treatment of persons without discrimination on the grounds of racial or ethnic origin"; further, the directive specifies, "these bodies may form part of agencies charged at the national level with the defence of human rights or the safeguard of individuals' rights"[25]. The competence of these bodies shall include providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, concluding independent surveys about discrimination, and publishing independent reports and making recommendations on any issue relating to such discrimination.[26]

Historically, the source of inspiration for both developments, within the Commonwealth and the EU, is the UK Commission for Racial Equality. The overlapping between the human rights commissions and equality bodies raises a more substantial concern than the categorisation issue. It seems that most successful national institutions are *de facto* equality bodies existing within Commonwealth countries. If the common cause of their success is not only legal and societal traditions, such as respect for informal authorities, but also narrowly tailored competence, it has consequences both for the concept of the NHRIs and the "best practice" to be followed by other states.

Recently, the EU provided a new example of the blurred border lines between the equality bodies and human rights institutions at the supranational level. In 1997 the EU established as its special agency the Monitoring Centre on Racism and Xenophobia in Vienna. However, before the Centre became fully operational, the EU decided to replace it by a human rights institution. This happened at a surprise of many, at the meeting in Brussels in December 2003,[27] where the heads of EU Members States approved unanimously the Austrian proposal to convert the Monitoring Centre into the European human rights institution.[28]

[24] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180 Vol. 43 19 July 2000, p. 22-26.
[25] Article 13(1).
[26] Article 13(2).
[27] Conclusions of the Representatives of the Members States Meeting at Head of State or Government Level in Brussels on 13 December 2003.
[28] It definitely was a surprise for the European Commission which was just finalising a draft regulation to amend the statute of the Monitoring Centre to ensure that it operates more effectively.

In reality, there is, of course, not an ideal type of NHRI, but rather, each of the models is best equipped to fulfil certain functions, *e.g.* ombudsman to handle complaints, commission to issue comprehensive reports and institute to conduct research. If the "core functions" of one model are extended to an institution of another type, hybrid institutions arise, which are, in reality, rather the rule than the exception.

The above overview confirms that as regards their legal shape, focus and range of responsibilities, the institutions, traditionally considered NHRIs, differ immensely. Thus, it may be useful to conclude this section by stressing some of the features that these institutions have in common, and which justify their definition as a unique category of institution. As regards their position on the institutional landscape, all NHRIs clearly differ from human rights NGOs by their very establishment as quasi-governmental agencies. All NHRIs are state sponsored institutions, operating within the state structure. The ombudsman model functions as an auxiliary organ associated with Parliament, while the commission, the institute and the advisory committee model are linked to the executive. Yet, they are not part of the traditional executive, judicial or legislative branches of the government, but they occupy a unique place "between" the traditional state institutions and the civil society and maintain close ties with both spheres. Being neither a replacement for nor an alternative to other state institutions or non-governmental bodies, NHRIs are complementary institutions. As such, they may fulfil institutional gaps, in particular as regards the transpositions of international norms onto the practice at national levels. Their unique position can give specific strength to their actions. As observed by the Director of the Danish Centre for Human Rights: "A typical national institution, whether it is called Commission, Centre or Public Defender, will combine Government legitimacy and authorisation with independence and the watch-dog element usually associated with civil society." (Koerum, 2002).

2.4. Strengths and Weaknesses of NHRIs: Preliminary Assessment

The rapidly increasing number of NHRIs and the international recognition that they are gaining indicate that both the UN and the states which established such institutions attach a great importance to the role they play. The establishment and strengthening of the NHRIs became a key objective of the Office of the Human Rights Commissioner and a major component of its programme of advisory services and technical assistance in the field of human rights. Clearly, the UN and its organs view the creation of NHRIs as a manifest contribution to human rights promotion and protection, and, in particular, as unique mechanisms for the transposition of international norms into national jurisdictions.[29] However, how do these institutions carry out their assigned roles in practice? Are they effective? Do they contribute significantly to the improvement of human rights record? Their diversity, as well as the range of political contexts in which they operate, make this question difficult to answer. This sub-section does not have the ambition to compile a list of existing findings. Nonetheless, it highlights some of the potential weaknesses and strengths of NHRIs

[29] As expressed by UN Human Rights Commissioner M. Robinson, "National human rights institutions are by their very nature well placed to transform the rhetoric of international instruments into practical reality at the local level. Because they are national – they can accommodate the challenges posed by local conditions and cultures, respecting ethnic, cultural, religious and linguistic diversity in implementing internationally agreed human rights principles. And national institution can provide constructive, well informed criticism from within – a source of advice and warning which is often more easily accepted than criticism form outside sources."

which are of a general nature and have a direct relevance when contemplating the establishment of a new NHRI.

As UN documents indicate and recent studies confirm (Cardenas, 2001, 2003), the global rise of NHRIs would not be possible without the initial UN impetus and assistance. It is therefore surprising that official UN documents provide little critical assessment of the functioning of the NHRIs.[30] Documents, such as reports of the General Secretary to the General Assembly on the National Human Rights Institutions[31], include virtually no critical assessment, even of a general nature, as one could expect in such documents. The UN treaty monitoring bodies have also so far paid little attention to NHRIs. As observed by Gallagher, ”When an institution does exist in the country under review, its legislative basis, structure or activities are rarely examined and are never subject of in-depth consideration. Recommendations to state parties on the desirability of establishing such institutions are uncommon. The rare suggestions made in this direction are characterised by a breadth and generality which calls their usefulness into serious question.” (Gallagher, 2000: 208-209). The Human Rights Watch observations, based on the study of human rights commissions in Africa, confirm Gallagher's opinion. According to the Human Rights Watch, the UN should ”adopt a more nuanced and advocacy-oriented approach in advising governments on the creation of human rights commissions” and ”avoid taking a blanket approach that advocates for the creation of such commissions under any circumstances” (Human Rights Watch, 2002: 87-88).

Cardenas argues 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).[32] Cardenas, in her revealing critical discourses on NHRIs, takes as a starting point the dual role of states as “norm makers” and ”norm breakers” and shows how these new actors reshape state society-relations and form gradually new transgovernmental network of human rights bureaucracies, parallel to transanational networks of governmental groups. She argues that like other institutions in a globalising world, NHRIs can have both beneficial and perverse consequences. She highlights some of the unintended side effects: “NHRIs could exacerbate tensions between opponents and supporters of international norms; lead to a reassertion of state authority and dampening the role of civil society; and fail to satisfy the very human rights demands that they help to create.” (Cardenas, 2003: 36-38). Whether an NHRI will have these side effects, may depend on various factors, including the degree to which an NHRI is politically independent, inclusive of civil society and adequately funded. Cardenas suggests that NHRIs, which are not representative, independent and organizationally powerful, could be more adept at promoting rather than protecting human rights norms.

Common sense, as well as some empirical evidence, indicates that national institutions are not likely to fulfil their role, if they are created by governments who see an NHRI as a means to

[30] There is, however, some evidence that particular reports drafted by the UN evaluation missions, in the case of UN sponsored creation of the NHRIs, are more critical.

[31] See *e.g.* Reports of the Secretary General to G.A. of 9 September 1999, A/54/336 or Report of the Secretary General of 1 August 2001, A/56/255.

[32] Cardenas distinguishes three categories of states, to which the NHRIs may appeal. ”First, NHRIs appeal to states that are undergoing regime change and seeking to create democratic institutions (transitional states). Second, NHRIs appeal to states that violate international human rights norms but want to portray themselves as committed to these norms, perhaps going so far as to assert a leadership role (hypocritical states). Third, NHRIs entice even states with long-standing and relatively good human rights records, but face claims of discrimination at home or pressures from abroad to join the NHRI bandwagon (late bloomers). (Cardenas, 2003:35)

improve their image. A striking example from the Central European region was the case of the Slovak National Centre for Human Right*s* in the 1990s. The Slovak Government established the Centre with the help of the UN in 1993, shortly after the independent Slovak Republic came into being after the split of Czechoslovakia.[33] The two reports on the human rights situation in the Slovak Republic for 1994 and 1995, produced by the Centre, were criticised by both media and experts, as they tried to defend policies by the Slovak nationalist government against critique from abroad. For this reason, the Centre ceased publishing annual reports. The UN evaluation mission conducted two years after the creation of the Centre confirmed the unsatisfactory performance and recommended to the UN not to provide further funding.[34] The reforms of the Centre started only after the fall of the nationalist and populist Government in Slovakia and its replacement by open, liberal government in 1998.

Some studies (Venice Commission, 1999) also reveal that the high degree of complexity of human rights protection mechanisms in a country and the consequent duplication of competences may be detrimental to the effectiveness of protection.

Besides several studies in the nascent academic literature on the topic, critical evaluation of the NHRIs came, not surprisingly, mainly from the NGO sector.[35] The proliferation of NHRIs, with many established in repressive states, posed a dilemma for human rights activists who were more accustomed to challenging the state on human rights issues than collaborating with it. For them and others, the question to be considered was "are such state-sponsored human rights bodies to be regarded with suspicion or distrust or should their development be encouraged and supported?" (Human Rights Watch, 2002: 1). On the general level, the most interesting findings made by the NGOs reports and studies undoubtedly are 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. NHRIs are successful, if they operate well at several levels: they are perceived to be legitimate, make themselves accessible and build good working links with relevant institutions in civil society and the government (ICHRP, 2000). Another key observation relates to the "true role" of NHRIs: they may function well as a complementary mechanism, but they should never be seen as replacement or alternative to an independent and impartial judiciary.

3. Czech Republic: Non-Judicial Mechanisms of Human Rights Protection

[33] The Slovak National Centre for Human Rights was created by Act No. 308/1993 Coll., on the Establishment of the Slovak National Centre for Human Rights, according to the treaty between the UN and the Government of the Slovak Republic. From a legal point of view, the centre is an independent corporate body. As regards the competencies of the centre, they correspond fully with the tasks of this category of NHRIs, as described in this paper. Under the provisions of the Act, the centre shall primarily conduct research and educational activities, collect and spread information, and provide librarian and other services.

[34] Government of the Slovak Republic. (2000). *Report on the situation and respect for human rights in the Slovak Republic in 1993-1998*. Bratislava: author. The report was prepared by the Office of the Government of the Slovak Republic, section for human rights and minorities. The Vice Prime Minister for human rights, minority rights and regional development Pál Csáky submitted it to the Government. See explanatory report and part VII thereof.

[35] *E.g.* the documents by the International Council on Human Rights Policy (2000), Human Rights Watch (2001) and Amnesty International (2001). For full references see section "References".

As indicated in the opening section, significant institutional changes having direct impact on how human rights are protected and promoted in the Czech Republic have occurred in the last years. The purpose of this section is to set up briefly what has already been done; the examination should serve as background for discussing further actions needed. (See sections 6 and 7.)

3.1. Institutional Landscape and Recent Changes

The 1989 "Velvet Revolution" in the Czech Republic was understood from the outset as "a human rights revolution". Such understanding was a logical consequence of the leading role played in the revolution and the first years of transition by members of the main pre-1989 opposition grouping, Charter 77, which was a human rights advocacy group.[36] Thus, very speedily, in the first years following 1989, complex, modern constitutional provisions, namely the **Charter of Fundamental Rights and Freedoms**[37]**,** and laws to protect human rights were adopted. The Czech Republic also acceded to all major international human rights instruments. New institutions and mechanisms to enforce compliance with them, such as an independent judiciary and the **Constitutional Court**, were established. With the judicial protection of fundamental rights and freedoms entrenched in the Constitution[38], the Constitutional Court mandated to hear and decide on individual complaints[39] and the supremacy of the international human rights treaties to domestic legislation[40], the human rights protection was put on a high level. For most conservatives and liberals, who formed governments from 1992 until 1998 (and replaced as a leading political force the broad pro-reform grouping, the Civic Forum), the human rights mission was accomplished. This, of course is not to say that the Government would deny that any human rights abuses might occur. Yet, the prevailing opinion was that the standard state machinery should deal with any human rights issues: the legislature, the judiciary or the executive - whatever was appropriate for the individual cases.[41]

This understanding of human rights protection clashed with another vision based on the Charter 77 legacy of broad societal responsibility for human rights protection, the core elements of which are the direct involvement of the non-state actors and the existence of intermediary institutional structures between the private and the public spheres. (For further details, see also Section 6 below). Although until 1998 this platform was not clearly articulated in a coherent policy document, it was evident that civil society human rights

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[36] For authentic description of the Charter 77, see Skilling, G. (1981). *Charta 77 and Human Rights in Czechoslovakia*. London: George Allen & Unwinn

[37] Constitutional law No. 2/1993 Coll., which introduces the Charter of Fundamental Rights and Liberties. The Czechoslovak Federal Assembly originally adopted the Charter on 9 January 1991.

[38] Article 4 of the Czech Constitutions stipulates, "Fundamental rights and liberties are under the protection of the judiciary".

[39] Under Article 87(1) d) of the Constitution, a physical or legal person may lodge a constitutional complaint, if he claims violation of his fundamental rights or freedoms by a judicial or administrative decision, or by any measure or other act by a public authority.

[40] Article 10 of the Constitution (in its wording valid till 31 May 2002) stipulated that all ratified and published international treaties on human rights and fundamental freedoms, to which Czech Republic has acceded, are immediately binding and take precedence over the law. The amendment to the Constitution (Constitutional Law No. 395/2001 Coll.) stretched the supremacy over the domestic legislation to all international treaties ratified by the Parliament.

[41] Thus, for instance, in mid-1990s, the Government reacted to increase of racially motivated violence and adopted a set of legislative and police measure to combat this phenomenon, including the adoption of annual reports on extremism and racially motivated violence.

advocates (such as Czech Helsinki Committee) agreed on certain issues (the introduction of the ombudsman institution, for instance) with the opposition Social Democrats. The victory of the Social Democrats in 1998 election then opened the way for a new human rights programme, including changes in the institutional landscape.

Yet, before turning to these changes, let us briefly mention other public institutions, which in one way or another, were involved in human rights protection. Within the judicial branch, the new structure of **administrative courts** with **the Supreme Administrative Court** at the top was introduced as of 1 January 2003. The new structure provides for a full judicial review of administrative acts. Thus, it expands protection against infringements of human rights conducted by bodies of public administration (*e.g.* the right to asylum, citizenship issues).[42] The introduction of full judicial review of administrative acts is the major achievement enhancing judicial protection of human rights since the establishment of the Constitutional Court.[43]

On the parliamentary side, no focused, specific human rights committee or sub-committee has been established in either of the two chambers (the Chamber of Deputies and the Senate). Some human rights issues, in a broader understanding, fall within the remit of the **Chamber of Deputies' Petitions Committee**, which also has a special sub-committee on national minorities. The **Senate's Committee on Education, Science, Culture, Human Rights and Petitions** also involves human rights in its broad mandate.[44] Another parliamentary institution, relevant for the human rights promotion, is the **Parliamentary Institute**.[45] The Parliamentary Institute, the primary task of which is to provide information and conduct research for individual MPs and the bodies of both Chambers is, in practice, the only state policy centre which carries out research on topical human rights issues. Although the quality of the documents produced by the PI relating to human rights issues is good, the capacity of PI to conduct systematic research is limited.[46]

Before 1998, on the executive side, there was only one specific unit dealing primarily with the human rights issues: the **Human Rights Department at the Ministry of Foreign Affairs**. Being responsible both for the international and foreign human rights agenda, as well for domestic implementation of international treaties, the small unit was during the 1990s unable to act sufficiently as a government agency ensuring communication with international human rights bodies in a whole range of tasks. In particular, the unit has not managed to prepare and submit the requested reports to UN treaty monitoring bodies. This also was one of the causes which led to the establishment of the new human rights mechanism on the government side.

[42] Law No. 150/2002 Coll., on Judicial Review of Administrative Acts. The Law came into force on 1 January 2003. The system of administrative courts is composed of regional courts and the Supreme Administrative Court.
[43] The Supreme Administrative Court is anchored in the Constitution. Its creation and the establishment of the system of judicial review of administrative acts was, however, introduced only after the Constitutional Court declared the limited provisions on judicial review, which allowed only for the review of ”legality” of administrative acts, not to be in compliance with the Constitution.
[44] The committees are composed exclusively of MPs and reflect the political composition of the respective Chamber. Human rights issues do not seem to be a dominant preoccupation in either of the two committees.
[45] The Parliamentary Institute is an institution affiliated to the Parliament of the Czech Republic with its own statute. It plays the role of a research, information and educational Centre for both Chambers of the Parliament, its bodies and individual MPs. For further details, see http://www.psp.cz/kpi/pi.
[46] From the 16 full-time researchers employed by the Institute, only one covers human rights.

3.2. New Non-Judicial Human Rights Bodies: Establishment and Mandate

After the 1998 election, when the Social Democrats came to power, the goal of establishing an ”effective human rights protection machinery” was put on the government agenda. In the late 1990s, speedily, three relevant institutions were established: Human Rights Commissioner, Human Rights Council and the Ombudsman. The following three subsections introduce the three institutions; each subsection concludes by brief evaluation.

3.2.1 Human Rights Commissioner

In its Programme Statement of August 1998, the Social Democratic Government announced new measures in the human rights area, including ”the better co-ordination of human rights protection”. The statement was based on the Social Democratic Election Platform, the relevant section of which was drafted by leftist journalist and former hard-core dissident Petr Uhl. In October 1998, the Government appointed Petr Uhl the first Commissioner for Human Rights with a brief to “co-ordinate Government activities in the field of human rights”. On the eve of 50th anniversary of the adoption of the Universal Declaration of Human Rights, a new **Government strategy for the improvement of the human rights protection,** prepared by the commissioner, was adopted.[47] The document put strong emphasis on international norms and institutional arrangements and established the Human Rights Council (see below). The Human Rights Commissioner was assigned specific functions: to submit to the Government (through the responsible cabinet member) information, proposals and opinions concerning compliance with the duties and responsibilities stemming from international human rights treaties, to submit, in co-operation with the foreign ministry, reports to the international treaty monitoring bodies[48], and to submit to the Government annual human rights reports[49].

Originally, the commissioner was also appointed the head of two other councils, the Council for National Minorities and the Council for Roma Community Affairs. This changed in 2000. Nonetheless, he remains in a position of executive vice-chair of the two bodies.

The precarious position of the Commissioner stems from the fact that his post has no statutory basis. Set up through a government resolution, the post may be abolished by any single subsequent resolution.[50] This is, however, only a part of a problem. Another set of difficulties is rooted in the concrete institutional arrangements under which the Commissioner operates. Institutionally, his post is that of a high-ranking government official, organisationally

[47] Government Resolution no. 809 of 9 December 1998.

[48] Since his establishment, the Human Rights Commissioner has managed to prepare and submit all the “delayed” reports to the treaty monitoring bodies. At present, the drafting of the reports has became a “routine” work of the Commissioner and his staff.

[49] The first annual report (for 1998) on human rights in the Czech Republic was submitted in 1999. Since then, the reports have been submitted regularly.

[50] Although such a development is not normally very likely because of political considerations, including international aspects, it not to be excluded in case of major political earthquakes. Up to now, there is, however, no precedent by which to judge the future developments. The first Human Rights Commissioner resigned in 2000, because of a conflict of interests, after his wife Anna Šabatová had been elected the deputy ombudsperson. His successor, Jan Jařab, survived the 2002 election, but there was just a minor change in Government. (A coalition government formed by Social Democrats with the support of two minor centrist parties replaced the minority Social Democratic government).

affiliated to the Government Office.[51] There are no guarantees of even a narrowly defined sphere of independence. This is most clearly reflected in the fact that the Commissioner has no direct access to the Government (Cabinet); he has to submit all the documents "through" the responsible member of the cabinet.[52] This arrangement puts him in a weak and somewhat fragile position in two regards. For one thing, he has to reach a political consensus with the designated cabinet member on any proposals directed toward the government. This is in particular problematic, if the Commissioner, acting in his capacity of the chair of the Human Rights Council, submits to the government opinions and resolutions of the Human Rights Council.[53] For another, his position *vis-a-vis* the government is dependent on the position of the respective member of cabinet. While this is not a major problem in a single party government, it may undermine his position, if he falls under the competence of a cabinet member representing, *e.g.* a junior coalition party.

The position of the Commissioner is better as regards individual cabinet members (*i.e.* ministers) and other heads of central state offices. Based on Government Rules of Procedures and the Statute of the Human Rights Council (see below) he may address them directly. This is in particular important in relation to commenting on draft legislation and policy papers produced by ministries. If he raises objections of principle, the Government has to be informed on them.[54] In fact, except for the formal prestige attached to the title, this is the only practical measure which gives him more power than other officials on the same level ("director of department post") enjoy. What is, however, most problematic, is the position of the Commissioner vis-a-vis the Parliament. Since he is a part of the executive, he cannot engage in any relations with both chambers, which is the exclusive domain of the Cabinet.[55]

The ambiguity of the post of the Commissioner is reflected very well in relation to the preparation of the **annual human rights reports**, which are one of the major and publicly visible tasks of the Commissioner. These reports are compiled by the Commissioner and his staff based on information both from ministries and civil sector actors. They are subject to normal procedures of preparing government documents, *e.g.* they are submitted to comments by all ministries. The final draft is normally a document that incorporates many compromises. Finally, when a human rights report is submitted to the Government, the Government may resolve to alter or change it, which it most often does. Only the "final version", with all comments incorporated, represents the human rights report. Although, such an exercise is not without some benefits, as it requires that all the government departments analyse and take position on topical human rights issues falling within their competences, it clearly has drawbacks. Beside the obvious problem, that is the potential lack of a critical approach, there

[51] Within the structure of the Government Office, the Commissioner is a director of the Office's Human Rights Department. The location of the Human Rights Department and his director within the structure of the Government Office is dependent on the "Organisational structure of the office", which is a scheme, issued at own discretion by the head of the Office. This also means that the Commissioner is dependent on the head and managers of the Government Office as regards premises, staff and finances.

[52] Government Rules of Procedures.

[53] On the one hand, the Commissioner cannot alter the opinion of the Human Rights Council, once it has been adopted. On the other hand, there is no provision for the responsible cabinet member to act in these cases as a "post-master" only and to submit a proposal which he does not endorse. In practice, the frequently applied solution to this dilemma is that the Commissioner submits to Government "through" the cabinet member proposals which are less radical than the opinion of the Council and informs the Government of the Council's opinion.

[54] Otherwise, this rule applies in the formal consultation procedure only to objections raised and supported by the ministers.

[55] For example, the Commissioner cannot lobby openly against a governmental bill, once it has been approved by the Cabinet and submitted to the Parliament.

is also a problem with the types of information processed. For instance, one of major sources on the state of affairs in human rights protection are judicial judgments, in particular decisions by the higher courts. Nevertheless, the human rights reports refer to them at best marginally, as it is not for the executive (unlike civil society and academics) to express critical statements on court decisions. Surprisingly, however, there is little understanding among the relevant actors that governmental human rights reports cannot replace human rights reports drafted by a fully informed and qualified, yet independent body. [56]

As follows from what has been said, the main concern that the post of the Commissioner raises is if, and to what extent, the lack of independence impedes upon the effective carrying out of tasks assigned to him.

3.2.2. Human Rights Council

The establishment of the Human Rights Council in 1999 (further Council) is closely linked to the appointment of the first Human Rights Commissioner and was based, originally, on the above-mentioned Human Rights Strategy of December 1998. There were two main sources of inspiration for shaping the Council. The major foreign source of inspiration for the setting up of the Council was the statute of the French National Consultative Commission on Human Rights.[57] (See also the advisory committee model described in Section 2.3.) Domestically, the establishment of the Council followed the major lines according to which the two advisory bodies on national minority issues were structured.[58]

The Council is under its statute a permanent consultative body of the Government in the area of the protection of human rights. It is composed of representatives of the executive, at the deputy minister level, and representatives of the civil sector (*i.e.* representatives of civic associations, personalities of public life and independent experts). The Council is based on the principle of *balance of interest and powers*. The number of the representatives of the executive is equal to the number of representatives of the civil society. Currently, it has 20 members.[59] The head of the Council is the Human Rights Commissioner, who is accountable to the Government for its work. Originally, the Council was assigned two responsibilities: to monitor compliance with major international human rights treaties and to submit reports to international monitoring bodies ("through" its chairperson). Under its new statute adopted in 2001, the Council's general mandate comprises monitoring compliance of the state with the Constitution, including the Charter of Fundamental Rights and Liberties, international treaties on human rights, and other legislation regulating the protection of and respect for human rights, and acting to increase public awareness of human rights. More specifically, the status charges the Council with four major particular tasks:

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[56] The Czech Republic, thus, has a unique instrument of "governmental human rights reports". In the neighbouring Slovak Republic, when such a "government human rights report" was published in 2000, the explanatory report to it noted that it is not good and appropriate that a state organ prepares such report; the preparation of the report should be a task of a credible and independent institution. The document therefore envisaged this as a temporary solution, until the task is taken over by an independent institution.

[57] The former Commissioner Petr Uhl confirmed personally this observation

[58] The Council for National Minorities, which has its roots in 1970, the Commission for Roma Community Affairs, which was set up in 1997. In these advisory bodies to the Government, the representatives of national minorities sit with the government officials.

[59] In June 2003, the Council was composed of 20 members, plus a chair and a vice-chair (22 persons). The 10 representatives of civil society involved 6 human rights activists - representatives of major human rights NGOs, 2 experts (a judge and a university professor), the deputy ombudsman and a representative of the President's Chancellery (the last two appointed in their personal capacity).

1. To monitor domestic observance of commitments under the major UN human rights instruments and those stemming from the ECHR
2. To prepare for the Government proposals of strategies in distinct areas of human rights, proposals for concrete measures and initiatives aimed at improving human rights, either at its own initiative or at Government request,
3. To express opinions on measures proposed by the Government, ministries or on other measures concerning human rights,
4. To participate, jointly with governmental departments and NGOs, in drafting reports for the international treaty bodies on the implementation of international instruments.

In carrying out these tasks, the Council shall cooperate with relevant NGOs and organs of self-governments. As regards the methods of operation, the Council submits its proposals to the Government through a member of the government (*i.e.* Cabinet), within whose competence the Council falls, or to a responsible member of the Government (Cabinet), *i.e.* ministers directly. In fulfilling its tasks, the Council, its members and its sub-committees can request information and opinions from ministries and other bodies of the state administration. The Council has no specific power to investigate individual complaints.

From the organisational point of view, the Council is, like the Commissioner, affiliated to and served by the Government Office.[60] The expenditures of the Council are covered from the Government Office budget. The staffs of the Secretariat, as well as the Human Rights Commissioner and the vice-chair of the Council, are employees of the Government Office.[61] As of 31 December 2002, the Secretariat of the Council had five employees.

The Council usually meets four times in a year. Since 2003, the Council has been obliged to submit to the Government annual reports on its activities.[62]

The position of the Council, like that of the Commissioner, is not free of ambiguities. There are at least three categories of inconsistencies in its statute and position. The first follows from the fact that the Council is declared an "advisory body to the government", but *de facto* it operates as an advisory body to the Human Rights Commissioner. Second, the division of the roles between the Council and the Commissioner is imprecise, with many overlapping and indistinct competencies. Finally, the Council, though defined as an advisory body, is assigned some tasks of the Executive, *e.g.* to prepare strategies and concrete measures.

Another problem is the overrepresentation and the status of the public officials in the Council, who participate in the meetings on an equal footing and enjoy voting rights. Even if we forget about Paris Principles, it is not clear, what kind of "added value" should stem for the

[60] The Government Office is defined by the Law No. 2/1969 Coll., on ministries and other central organs of state administration, as a central body central of state administration. The Government Office is charged to fulfil tasks related to the expert, organisational and technical aspects of the operation of the Government and its organs.
[61] The Secretariat of the Council is a sub-unit of the Human Rights Department of the Government Office, which involves two other secretariats of advisory bodies, those of the Council for National Minorities and of the Council for Roma Community Affairs. The director of the whole department, as explained, is the Human Rights Commissioner.
[62] The Government took the decision to ask its advisory bodies to submit annual reports in February 2002 as a part of an effort to "rationalise" the functioning of these bodies. The Council submitted its first annual report on its activities in June 2003 (No. 748/03).

Government from being ”advised” by public officials. While we can explain these defects in the statute by a mixture of tradition and coincidence, it can hardly be sustained.[63]

3.2.3. Public Defender of Rights

The institution of the Public Defender of Rights (further Ombudsman) is a child of civil society. In particular, the major and for a long time ”the” human right NGO in the Czech Republic - the Czech Helsinki Committee – has campaigned vigorously since early 1990s for the establishment of the ombudsman office.[64] Originally, the ombudsman was conceived as a defender of fundamental rights and freedoms. Nonetheless, later an opinion prevailed that defining the Ombudsman's mandate specifically in terms of human rights would rather weaken his position and limit his competences than make him stronger, since ”normal” violations of rights and misconduct of state bodies would be beyond the scope of his mandate.

In 1990s, several private bills regarding the setting-up an Ombudsman office were introduced in the Parliament, but they failed. The opponents of the Ombudsman considered the institution redundant, as they believed that the judicial protection is sufficient; a liberal mood prevailing in the society nourished the popular opposition to building any new ”bureaucratic” institution, which could interfere with citizens' lives. A progress on this issue was brought about only with the change in government in 1998.

As the creating of the Ombudsman institution was part of the 1998 Government programme, the law was drafted swiftly (based on the previous “private bills”), and subsequently adopted by the Parliament in December 1999; it came into force in February 2000.

The Czech Defender is modelled on the British and Swedish predecessors (*i.e.* classical ombudsman model). In spite of that, the institution exhibits some features of the hybrid “human rights ombudsman” (indirect reference to human rights in his mandate, power to bring cases to Constitutional Court. These are ”remnants” of the original concept in which the ombudsman was to be charged with the protection of human rights, as historical and comparative research shows.) His primary function is to protect rights of individuals who are victims of unjust an improper treatment by state organs and agencies. Accordingly, the ombudsman acts as an impartial mediator between an aggrieved individual and the administrative agency concerned. The Lower Chamber of the Parliament elects the ombudsman. His role, as described in the law, is as follows. ”The Public Defender of Rights works to defend persons in relations to the actions of official bodies and other institutions listed in this law, should such actions be inconsistent with the law, in contradiction to the principles of a democratic legal state and good administration and also in the event of inaction by these Offices, thereby contributing to the defence of fundamental rights and freedoms.[65] This provision is complemented by an account of institutions falling within the competence of the Ombudsman; in principle, the competence of the Ombudsman encompasses executive branch of central government and institutions administered by or subordinated thereto. Such bodies are typically ministries. The remit of ombudsman also covers Police, Army, the Prague Castle Guards, and the Prison Service as well as detention, imprisonment and similar

[63] Most of the “advisory bodies” of the Government include public officials as full members. It is likely that this tradition stems from pre-1989 period. In addition, the model for the Human Rights Council - the French Advisory Commission on Human Rights - also involves public officials, but they do not have voting rights.
[64] The Czech Helsinki Committee commissioned the first draft of the law on ombudsman in 1993.
[65] Law No. 349/1999 Coll. of 8th December 1999, on the Public Defender of Rights, Section 1(1).

facilities. He does not have competence with regard to local self-governments, except for the situation when they carry out state duties. The scope of competence does not encompass the legislative and judiciary branch of the Government, the top executive (the President and the Cabinet), the intelligence services, Police investigators and state prosecutors.

The ombudsman can act on a motion by a physical or legal person seeking protection, if a case is referred to him by an MP, by a Chamber of Parliament and on its own initiative. The ombudsman has far reaching powers to investigate complaints (to enter premises, have access to all files, etc.). The offices have corresponding duties to co-operate. If he finds a violation of legal rules or other shortcomings, he acts toward eliminating them through conciliation. The procedure has several stages. In all stages of the procedure, the ombudsman makes recommendations only; he has no power to enforce his recommendations. If institutions concerned do not respect the Ombudsman's recommendation, he "complains" with hierarchically higher institutions or the government. If his complaint does not result in a positive response, he may inform Parliament. In addition, the Ombudsman has the power to recommend the adoption, change, or annulment of a legal or internal rule. In relation to the Chamber of Deputies[66], the Ombudsman has a set of reporting duties: to submit information on his activities every three months, to inform on cases in which a superior institution or the Government have not taken the remedial action requested, and to report on all recommendations concerning the adoption, change, or abolition of legal rules.[67] He also submits to the Chamber of Deputies annual reports on his activities.

The ombudsman has specific entitlements in relation to the **Constitutional Court.** He has the right to submit to the Constitutional Court a proposal for the annulment of any administrative provision (but not a law).[68] Moreover, the ombudsman is informed by the Constitutional Court on any proceedings aimed at the annulment of administrative provisions. If he decided so, he can join the proceedings as a party. The law also empowers the ombudsman to **participate in Parliamentary proceedings** should matters that fall within the spheres of his competence be dealt with.

As of 31 December 2002, the Office of the Ombudsman had 88 employees, 56 of them directly involved in processing complaints.

Although the Ombudsman is not charged with human rights protection directly, his position – as foreseen in the law – provides him with a unique opportunity to identify human rights violations or inadequacies in human rights protection standards. From the 5422 individual complaints received in 2001 and in 2002, approximately half of which fell within the ambit of ombudsman powers, we can classify only a few as true human rights cases. Nevertheless, some of the cases brought to the attention of the Government[69] and some of those in which the Ombudsman started investigation of its own initiative (*e.g.* situation in detention centres for foreigners, maltreatment in special foster homes for delinquent children), may surely be regarded major human rights cases. For instance, the surveys conducted in detention centres and in foster homes revealed that certain practices are unacceptable from the point of view of

[66] The responsible Committee is the Petitions Committee.
[67] In practice, if the Chamber of Deputies agrees with the legislative proposals, it informs in writing the prime minister on such proposals, thus giving more authority to the recommendations.
[68] Law No. 182/1993 Coll. on the Constitutional Court, Section 64(2) f.
[69] *E.g.* the Stojkovič case, dealing with the right of the relatives of persons who died in custody or cases dealing with access to information.

respect for rights of the persons in custody, such as rights to privacy or human dignity, though they may appear effective.

The role of the ombudsman in human rights protection is, however, not only a logical consequence of his competences as described in the law. Rather, as the category of cases in which the Ombudsman initiated the investigation indicates, it is the outcome of his **activist approach**, and, in particular, that of his deputy.[70] In line with this approach, the Ombudsman comments on draft legislation prepared by ministries, in spite of the fact, that this competence is not specifically mentioned in the law. The Ombudsman also reaffirmed his advocate approach when he decided on 14 May 2003, for the first time, to participate in Parliamentary proceedings to protest against certain provisions in draft asylum legislation.[71]

Positive achievements of the Ombudsman created a belief that a broader spectrum of problems can be addressed adequately by his office. In 2002 – 2003, discussions on improving independent monitoring of conditions in prisons, detention centres, asylums for lunatics and similar institutions, prompted by a critical Report of the European Committee against Torture and Other Cruel and Degrading Treatment from May 2001, resulted in a draft Amendment to Law on Ombudsman. Originally, the initiative stemmed from the Human Rights Council. The Council, having in mind the establishment of a new independent commission or similar body, requested that the Government set up a new control and monitoring organ for all forms of detention and deprivation or limitation of liberty. In response, the Government charged the Human Rights Commissioner with preparation of a respective legislative proposal (Resolution 679/2002). The process of interdepartmental consultations that followed resulted into a generally accepted understanding that extending the ombudsman's powers is the most adequate solution. The final agreement reflected not only the fact that the Ombudsman had already some relevant competencies, but also a very strong opposition against creating any new public body, articulated clearly by most ministries. The draft law was submitted to the Government in December 2003. The amendment to the Law on Ombudsman extends his powers and gives him ways and means to carry out systematic and preventive monitoring of all facilities, in which persons are restricted in their liberty. The new approach consists in covering all *de facto* situations involving limitations of liberty, such as is *e.g*. dependency of chronically ill patients on services of health care facilities, where they are placed. The bill, if approved by Parliament, will enter into force only on 1 January 2005.

3.3. Implementing the EU Anti-Discrimination Legislation: Establishment of an Independent Equality Body

The European Community has long been active in the fight against discrimination. “Indeed, at the time of its creation one of its most pressing missions was to reconcile a continent divided by nationalistic and ethnic conflicts. For many years, the focus was on preventing discrimination on grounds of nationality and sex discrimination. 1997 was a turning point when member States agreed to some far-reaching changes to the Treaty. Following the entry into force of the Amsterdam Treaty, the community was given new powers to combat discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and

[70] Another manifestation of the activist approach was the involvement of the ombudsman in the Lower Hrušov Case. In this case, the municipal authority in Ostrava was suspect of discriminating against Roma in allocation of substitute flats for flood victims. Although the Ombudsman has no competence vis-ŕ-vis municipal authorities, he launched an investigation in relation to the use of the state subsidy for the construction of new flats.
[71] His protest, however, was not successful.

sexual orientation, and the power to combat sex discrimination was widened". (New powers to combat discrimination:3). Using these new powers, the EU adopted two new directives, the *Racial Equality Directive 2000/43/EC* and the *Employment Equality Directive 2000/78/EC*. The ambitious *Race Directive* gives protection against discrimination in training, education, social security, healthcare and access to goods and services. It gives victims of discrimination a right to make a complaint through a judicial or administrative procedure, associated with appropriate penalties for those who discriminate. Most importantly from our point of view, it also provides for the establishment or designation in each Member State of a body to promote equal treatment, provide independent assistance to victims of discrimination and to conduct independent research.

In the Czech Republic, the transposition of the EU anti-discrimination *acquis* turned out to be lengthy and cumbersome process. As of March 2004, it is still not completed. In the following paragraphs the paper focuses on the relevant aspect, the establishing of an equality body. These developments are important for several reasons. The final decision on the structure and competences of the equality body will further change the non-judicial protection machinery as a whole. As the body takes over some of the functions attributed to the NHRI, it also puts the request for establishing an NHRI into new perspective. Equally important, it also presents a test case for any future proposal regarding the creation of a new public human rights institution. In this regard, it is significant that discussions concerning the equality body resemble discussions on the establishing of a control organ to oversee detention and similar facilities (see 3.2.3).

The preparatory expert legal analysis was carried out within the Phare 2000 twinning project *Promoting Racial and Ethnic Equality* implemented jointly by the Race Equality Unit of the British Home Office and the Human Rights Department of the Czech Government Office. The output of the project – the *Report on Possible Measures to Prevent and Eliminate Discrimination* was submitted to the Cabinet in February 2002. Relying on British expertise and influenced by radical views of Czech non-governmental experts involved in the project, the Report recommended establishing a single equality body able to address discrimination on all prohibited grounds, equipped with extensive powers, including conducting statutory investigation into discriminatory practices or initiating legal proceedings on behalf of a group of victims. The *Report* argued that a single body would offer advantages in addressing the overlapping and multiple forms of discrimination and developing effective cross-strand strategies and maximising the efficacy of protection. In February 2002, the Government took note of the Report and entrusted the Human Rights Commissioner with chairing the inter-departmental group to prepare the draft anti-discrimination law (Government Resolution 170/2002).

The sessions of the working group revealed that most ministries involved have lukewarm if not hostile attitude toward the creation of an independent equality body. These attitudes were argued for predominately on two grounds. The first cluster of arguments reflected the widespread underestimation of the scope of existing discrimination and its harmful effects. According to these views, discrimination in the Czech society is not such a burning issue as presented by various minority groups and their advocates. Consequently, an independent equality body is an unnecessary bureaucratic structure that would consume scarce resources ineffectively. Another, to a certain extent complementary, line of reasoning suggested that it would be preferable to deal with discrimination by sectoral policies and employ exiting institutions. Nonetheless, as the instruction of the *Race Directive* was a strong argument, the Commissioner decided to push forward the original proposal. In August 2003, the

Commissioner presented to the Cabinet a legal policy memorandum (white paper) [72] which proposed the establishment of an independent Equal Treatment Centre. The Equal Treatment Centre is defined in the memo as an independent body; its activities shall be governed solely by laws and regulations. The budget of the Centre is to be approved by the Parliament. The Centre shall have competencies to: (a) provide mediation, (b) arrange legal assistance to victims of discrimination (c) issue recommendations and opinions, (e) carry out independent research and (f) provide information to the public. The position of the Centre follows the position of Ombudsman: the director of the Centre is to be elected by the Chamber of Deputies; the particulars concerning the organisation of the Centre are to be provided in its statute issued by its director.

The Cabinet discussed the proposal on 22 September 2003 (Resolution No. 931/2003). Since there was no majority in the Cabinet in favour of the proposed institutional solution, the Cabinet instructed drafters to prepare the bill in two alternatives: a) to elaborate the model of the Centre and to b) to designate the Ombudsman as the body for the promotion of equal treatment and to adjust his powers and competencies accordingly. The draft legislation submitted to the Government in March 2004 presents the two options on an equal footing. However, the final decision of the Cabinet is not difficult to foresee. In the interdepartmental consultation procedures, which took place before the submission of the draft to the Government, only two ministries supported the Centre (Ministry of Foreign Affairs and the Ministry of Agriculture); most ministries recommended strongly the alternative solution.

Although the final draft legislation is modest compared to the range of proposals contained in the 2002 Report, it still contains some progressive elements going beyond what is requested by the EU directives. For instance, the Centre (or the Ombudsman, alternatively) shall provide mediation services to the parties of dispute. The draft law also contains a provision on "actio popularis". If a discriminatory action has affected rights of a number of persons, the case may be also brought to the court by a public interest law organisation. If the provision survives government and parliamentary scrutiny, it will be a landmark decision for the human rights advocacy networks.

In spite of the efforts of both the Commissioner and human rights advocacy groups[73], the preparation of new anti-discrimination legislation did not attract wider public attention. When the mainstream media covered the discussions occasionally, opinions expressed by commentators mostly mirrored negative attitudes prevailing in the administration.[74] The only supporters of the proposed new body remained human rights advocates from the non-governmental sphere, a handful of similarly minded MPs and politicians and the EU representation. The topic neither reached the sphere where politics is predominately made, that is apparatuses of political parties, nor was it reflected in scholarly writings.

[72] The process of government legislative drafting normally has two phases. In the first phase, basic principles of the future law are outlined and presented to the Government in a form of legislative white paper. Once approved by the Government, the document is transposed into the bill.

[73] For instance, a leading human rights advocacy group, the Counselling Centre for Citizenship, Civil and Human Rights organised in 2002 - 2003 several legal workshops on the issue.

[74] See *e. g*. DNES, 26.9.2003, p.A/9. Roman Joch of Civic Institute (see also chapter 5) opens his contribution by the following statement: "A couple of lunatics suggests adopting a new, strict law against discrimination and the establishing of a so-called Centre for Equal Opportunities. Given the giant deficit of the state budget, one would assume that useless offices should be abolished, and not created".

3.4. Non-Judicial Bodies: Some Preliminary Observations

No systematic attempt has so far been made, either on the policy or on the academic level, to examine the role and performance of the new non-judicial human rights institutions. This sub-section contributes to filling the gap by summing up against the background of the Paris Principles the mission and functions assigned to the above-introduced bodies. It opens with an overview of some external observations related to their performance. It continues with its own assessment, based on a comparison of the normative requirements, as expressed in Paris Principles, with the institutional and functional features of the triplet of the non-judicial human rights institutions. Finally, it concludes with observations related to the EU requirement of setting up an equality body. This exercise has two aims. First, it should assist in understanding the true role of the examined bodies. Second, it intends to identify the structural inadequacies and functional gaps.

The already introduced documents ("Concluding observations") produced by the treaty monitoring bodies, the Human Rights Committee (2001)[75] and the Committee on Economic, Social and Cultural Rights (2002),[76] express concern about the lack of independent mechanisms for monitoring practical implementation of the respective rights. The former document notes that the Ombudsman's powers are limited to recommendations covering the public sector; furthermore, it points out that the Commissioner on Human Rights is a government official and the Council for Human Rights an advisory body; they have no mandate to deal with individual complaints relating to human rights.[77] The latter document then urges explicitly that the Czech Republic should establish a national institution complying with the Paris Principles. Specialised human rights treaty monitoring bodies also took note of the situation in their respective areas. In its Concluding Observations of 18 March 2003[78], the UN Committee for the Rights of the Child notes that a Committee on the Rights of the Child has been set up within the Council for Human Rights of the Government. But, nevertheless, it remains concerned at the lack of a central adequately mandated and resourced coordination mechanism for all issues relating to the implementation of the Convention. Therefore, the "Committee recommends that the State establish or appoint a single permanent body, which is adequately mandated and resourced, to coordinate implementation of the Convention at the national level, including by effectively co-ordinating activities between central and local authorities and cooperating with the non-governmental organisations and other sectors of civil society." In its recent report of March 2004[79], the European Commission against Racism and Intolerance, referring already to the draft anti-discrimination legislation, called for giving the investigative powers to the Centre and the possibility for specialised bodies to initiate and participate in court proceedings.

On the other hand, Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights, in his Report on a visit to the Czech Republic in February 2003,[80] takes a more

[75] Concluding Observations of the Human Rights Committee: Czech Republic. UN CCPR/CO/72/CZE. 27 August 2001.
[76] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Czech Republic. E/C.12/1 Add.76. 5 June 2002.
[77] Point 7 of the Concluding Observations of the Human Rights Committee: Czech Republic. UN. CCPR/CO/72/CZE. 27 August 2001.
[78] CRC/15/Add.201
[79] ECRI. Draft Third Report on the Czech Republic. Adopted on 5 December 2003. The Report was submitted for final approval to the ECRI plenary on 16-17 March 2004.
[80] Alvaro Gil-Robles, Human Rights Commissioner of the Council of Europe: Report from visit to the Czech Republic, 24 - 26 February 2003.

sympathetic position: by establishing the post of the Human Rights Commissioner, the Czech authorities gained a unique collaborator, who thanks to the accuracy of the diagnosis and the appropriateness of the proposed solutions became indispensable. Therefore, Gil-Robles urges the Government to provide the Commissioner with more resources. The Report also notes that the setting up of the Ombudsman office met the pressing needs of the society. The report then concludes by recommending that the government should pay more attention to the complementary recommendations of these two institutions.

Domestically, knowledge and reflections related to the performance of these bodies are limited. The only research-based evaluation relates to the Human Rights Council. In 2000-2002, the then head of the Government Office, to which most of the advisory bodies of the Government are attached, commissioned several analyses of the functioning of these bodies.[81] The purposes of the analyses and evaluations were to stop the mushrooming of these bodies, reduce their number and to provide a uniform structure for those, which will survive the planned reforms. On a general level, the main report (Gallup Organisation, December 2001) argued that the 21 advisory bodies analysed are by their nature a non-systematic element of the state administration; as far as possible they should be replaced by the standard units of the bureaucracy, save exceptional cases, that is if they fulfil true cross-departmental tasks. As regards the Human Rights Council specifically, the analysis noted that it is one of the two advisory bodies which do not have a direct link to the Government. Although the predetermined results of the research cast some doubt on the general validity of the final reform proposals,[82] the study plainly revealed many existing structural and procedural shortcomings in functioning of the advisory and working bodies. They consist, in particular, in the lack of clearly defined mandates, procedures, responsibilities and accountability.

Let us turn now to the proposed examination of the non-judicial bodies against the Paris Principles. Annex A provides an overview of the comparison.

Interestingly, as regards the **overall competence and mandate,** the remits of the Commissioner and the Council seemingly mirror fully the Paris Principles standards, including the emphasis attached to international norms. From the **institutional point of view**, however, only two of the triplet of the human rights bodies, namely the Council and the Ombudsman, would deserve a closer examination. As regards the Commissioner, he clearly forms a part of the executive, lacking any degree of the independence requested for any body to qualify as an NHRI. This, of course, also holds true to a large extent for the Human Rights Council. Yet, there is a difference between the two institutions: while the Commissioner is a Government official, a part of the hierarchical structure of central state administration, directly subordinated and accountable to the Government, the Council's relation to the Government is lineal. While it is only an advisory body, whose opinion the Government may

[81] An important aspect of the endeavour was to enquire into the efficiency of these bodies in financial terms. At the time when the research was carried out, there were around two dozens advisory bodies to the Government. Only o few of them had statutory basis (*e.g.* Security Council of the Government, Legislative Council of the Government). Most of them, like the Human Rights Council, were established by a mere Government resolution. At present, there are 24 advisory and working organs of the Government.

[82] The analysis focused more on formal elements and did not go into the real "raison de etre" of the advisory bodies. In particular, it neglected the difference between bodies that provide government with additional expertise: those that co-ordinate activities of government departments ("working organs") and those which incorporate a representative element to ensure consulting with key stakeholders (often labelled "advisory organs"). Examples, beside the Human Rights Council, include the Government Committee for Disabled, the Government Council for National Minorities or the Government Council for Roma Community Affairs.

respect or neglect, the Government cannot alter the Council's opinion. This is mainly due to the collective nature of the body and the civic element present in it.

To complete the institutional perspective, we can have a look at the **classification** of the types of the NHRIs developed in Section 2.2. Evidently, we can classify the Ombudsman as a classical ombudsman, with some features of the hybrid ombudsman (indirect human rights mandate, relation to Constitutional Court); the Council then corresponds best to the advisory committee model. Of course, the Council is a "defective" institution. Besides severely limited independence, it suffers from other shortcomings as well. It has no statutory basis, and while its composition exhibits requested pluralistic features, it is not guaranteed by procedures. The full membership of government officials with voting rights is another anomaly.

The Ombudsman, as regards the institutional aspects, seemingly also deviates from standards set out in the Paris Principles in two main regards. First, his mandate involves human rights issues just marginally. Second, the ombudsman is not in any sense a body with a pluralistic composition. Yet, as also follows from the classification developed in section 2.2, these are characteristic features of any classical ombudsman office. Thus, from the institutional point of view, the ombudsman deviates from the Paris standards as any ombudsman institute by its very nature does.

Let us shift now to what we may call **functional analysis**. As indicated in the introduction, and described in detail above (Subsections 3.2.1-3.2.3), the triplet of examined non-judicial bodies are assigned under their statutes or carry out in practice, many of the **responsibilities** of an NHRI. The overview (Appendix A, point 3: Responsibilities) reveals several noteworthy particulars. First, it shows that there is no "wholly blank box". This means all the responsibilities listed in the Paris Principles are, at least partly, assigned to, or carried out in practice by, one or more of the existing bodies. Second, it indicates that some of the tasks and roles are assigned to or carried out in practice largely by the two "defect" bodies, that is, the Commissioner and the Council. Third, it reveals that some of the responsibilities are carried out without being entrenched in any official statutory document and on an occasional basis.

More concretely, the core functions of **monitoring, reporting, submitting opinions, recommendations and proposing changes** are partly carried out by all three bodies. Yet, the Commissioner and the Council have competences to submit opinions and recommendations only in relation to the executive, more precisely to the central bodies of state administration. Moreover, exactly in relation to the executive they lack the dimension of independence, and consequently, also authority. (A proposal by the Commissioner and the Council may, however, gain authority, if endorsed by the Government.) The Ombudsman can address almost all relevant bodies, including those on the legislative side,[83] but only in relation to his activities, which cover marginally, or at best partly, the full range of internationally recognised human rights norms. In particular, the ombudsman has neither mandate nor capacity to prepare reports on the national situation with regard to human rights. Nevertheless, he can effectively draw the attention of the government to particular situations when human rights are violated or where there is a danger that they will be violated. If we imagine the mandates of the existing bodies as circles, then they would overlap in relation to the spheres of competencies of state bodies, while some areas, such as the areas coming within the

[83] Some issues of the scope of competencies of ombudsman may arise in relation to the exclusion clause (Section 1(3) of the Law on Public Defender of Rights). The clause stipulates that the scope of activities does not encompass Parliament, the President, the Government, the Supreme Audit Office, intelligence services, Police investigators, state prosecutors and courts, with the exception of the state administration of courts.

competence of self-governing bodies (*e.g.* municipalities) and the private sector sphere would remain blank.

As regards **awareness raising activities**, these are, in general wording, assigned to the Human Rights Commission, which, under its Statute shall act to increase public awareness of human rights. However, the statute does not equip the Commission in this regard with any specific means, powers or financial resources. Thus, the awareness raising in practice does not play a major role of the Commission's activities. The only exception is organisation of the annual anti-discrimination campaigns, which are however, not prepared by the Commission, but by the Human Rights Commissioner.[84]

The situation is even worse as regards involvement of the bodies in **education and research.** Not only are research and educational activities not specifically mentioned in any statute, but also the exiting institutions are not equipped materially to carry out research in any reasonable extent or manner. This is particularly alarming; the understanding of human rights evolves constantly through various means, such as the jurisprudence of international and domestic courts or the adoption of new international and supranational instruments and standards, which often reflect societal changes. The lack of research into human rights issues also appears striking, if compared to recent efforts related to the establishing or restructuring of human rights bodies in European countries, such as Germany or Scotland.

In relation to the **international dimension,** which involves, inter alia, the harmonisation of Czech legislation with international standards and the encouragement of the ratification of the international treaties, the Commissioner and the Council do fulfil a role, in spite of their institutional defects.[85] Nevertheless, these two institutions cannot, due to their institutional deficiencies, **be involved in the international networks and co-operate effectively with other national institutions and the UN.** Their involvement to the communication with the treaty monitoring bodies; in this case, the Commissioner plays the role of a government representative. This is not just a marginal issue, as it might appear. The Council and the Commissioner are thus not only cut off from potential channels of influence, but more importantly, from the channels of information and communication. As regard the ombudsman, his office became recently involved in the universal and regional ombudsmen organisations; also visits to and from abroad are frequent.

Section 2.3 of the paper discussed at length the relations and overlaps between the concept of NHRI and that of **an equality body**, and introduced the institutional implications of the EU Race Directive. As the directive requests that States designate special bodies for the promotion of equal treatment of persons and suggests that these bodies may form part of agencies charged at the national level with the defence of human rights or the safeguard of individuals' rights, it is necessary to examine briefly the position of the discussed bodies also from this perspective. The overview of the responsibilities of the equality body and those carried out by the non-judicial bodies for human rights protection appear in Appendix B. It shows that the existing institutions cover none of the four main responsibilities of the equality body (*i.e.* provision of assistance to victims, conducting surveys, publishing reports and

[84] The campaigns have been organised since 1999. The amount of contracted money ranges between CZK 4 and 10 mil. The accountability and responsibility for the money spent rests with the head of the Government Office.

[85] The annual human rights reports prepared by the Commissioner include, in the introductory chapters, an overview of the accession to new international instruments by the Czech Republic. In addition, the Human Rights Council urged many times that the Czech Republic sign or accede to particular treaties. Obviously, advocacy for changes does not request such a strong position as the criticism of current activities.

making recommendations) adequately. While this paper does not intend to provide a solution to this challenge, it is necessary to take into account that any solution will involve some changes on the institutional landscape, most likely the establishment of a new anti-discrimination body.[86]

In conclusion, we can sum up that while the examined non-judicial bodies to a considerable extend carry out functions of an NHRI, they do not meet the standards fully. The main gaps and shortcomings relate to the lack of systematic, independent monitoring of the human rights situation and the absence of systematic research into human rights issues.

4. Civil Society Actors and Human Rights Protection

One of the astonishing developments since the end of the Second World War, and most especially since the end of the 1970, is the extent to which non-governmental organisations (NGOs) have come to play an increasingly important role in making human rights law, monitoring its implementation and campaigning for improved human rights performance by governments. The activities of many non-governmental organisations, charities, churches, civic movements and media touch directly on human rights issues in virtually all sectors of the society. This development is in particular striking on the international level, where the development of international human rights instruments and institutions has been matched by a corresponding growth in the number of NGOs.[87] The 1993 Vienna World Conference on Human Rights, in its Final Declaration and Programme of Action, recognised the important role which NGOs play in the promotion of human rights. More recently, on the 50th anniversary of the adoption of the Universal Declaration of Human Rights, the UN reaffirmed this role in the declaration on human rights defenders.[88]

Also in the Czech context, civil society actors play a unique and indispensable role in the human rights protection and promotion. Without considering the activities of these actors, we can neither fully grasp the scene on which the non-judicial institutions operate, nor design effective measures for human rights promotion. This section, therefore, introduces briefly the involvement of the civil society actors in the human rights protection in the Czech Republic. The first part gives a succinct historical account of the major lines of development. The second part provides a more systematic account of the major actors and describes the mutual relations between the private and the public bodies.

[86] The Draft law concerning the provision of equal treatment and the protection against discrimination, which was submitted to the Government in June 2003, proposes the establishment of an Equal Treatment Centre. The Centre shall be a statutory and independent body. Stretching the competencies of the Centre well beyond the requirement of the Race Directive, the draft law proposes that the Centre shall promote equal treatment of persons irrespective of not only racial and ethnic origin, but also sex, sexual orientation, age, disability, religion and faith. To this end, the Centre shall provide mediation, arrange legal assistance, issue recommendations and opinions, carry out independent research and provide information to public. The explanatory memorandum discusses in detail why these competencies cannot be assigned to any existing body.

[87] The number of the transnational human rights NGOs, that is those operating on the global level, is estimated to amount to 300. Of them, 46% operate from Western Europe and 17% from North America. See Nuschele, F.: NGOs in Weltgesellschaft und Weltpolitik: Menschenrechtsorganisationen als Sauerteig einer besseren Welt?

[88] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted in 1998, General Assembly resolution 53/144, A/RES/53/144 A/RES/53/144, 8 March 1999.

4.1. From 1989 to Present: The Changing Role of the Civil Society

In many communist countries, the opposition to the regime used human rights rhetoric. However, in no other country was the main opposition grouping so explicitly based on the public, open and legal defence of international human rights norms, as was the case of the Charter 77 in Czechoslovakia.[89] When, after November 1989, former dissidents represented, most notably, by Václav Havel, became "rulers", the distance between civil society and the state diminished and borders between both spheres blurred. Consequently, the first revolutionary period of the state – civil society relations (1989-1992) was characterised by direct involvement of human rights activists in implementing major institutional changes.

The situation changed when, in 1992, the liberals came to power. The liberals, represented by then Prime Minister (and today Czech President) Václav Klaus, had a lukewarm attitude toward the concepts of civil society (of which the independent advocacy groups were the core) and of human rights. They believed that in a rule-of law state, traditional institutions, such as responsible government or independent courts, and individuals alone should take care of their rights. In this vision, there was no space for civil society groups, except for some charitable work for the poor.

This dramatically changed the situation of those who decided to continue their involvement as human rights activists. They were pushed to establish a new independent platform. Institutionally, the **Czech Helsinki Committee** took the leading role in this process. (The Czech Helsinki Committee was established in 1987 by a group of dissidents, mostly from Charter 77. The aim was to monitor implementation of international human rights norms.[90]) The authority which the Committee had due to its pre-1989 roots[91] and personal affiliations was reinforced by money flows from foreign donors, for which the Committee was the most credible receiver of support. Gradually, the activities of the civil society in the human rights area became strongly dominated by the Helsinki Committee. The Helsinki Committee played a threefold role. First, it carried forth the legacy of Charter 77, namely the belief that the civil society should be a key human rights actor, not just a "watchdog", but also a partner of state

[89] The founding declaration of Charter 77 from January 1977, which started with the announcement that in the Czechoslovak Collection of Laws, texts were published of the International Covenant on Civil and Political rights and of the International Covenant on Economic, Social and Cultural Rights, illustrates this approach. The other important *human rights group in the 1980s was the Committee for the Defence of Unjustly Prosecuted.*

[90] Originally, a group of 30 persons formed the Czech Helsinki Committee. The announcement of the formation of the Czechoslovak Helsinki Committee is published as an appendix to the 1988 Report (pp. 49-50, see footnote below). The Committee was established in support of principles and resolutions of the Helsinki Final Act. The Committee's main task was to provide objective information about the Helsinki process. The announcement of 5 November 1988 explains: "Our committee will strive for a constructive dialogue and co-operation with the authorities of the Czechoslovak Federal Government and Federal Assembly, as well as with official and semi-official institutions such as the Czechoslovak Committee for European Security and with all interested citizens. (p. 50)." The authors also expressed a hope that "our activities which are in full agreement with the Czechoslovak legal system and international obligations that have been signed by the responsible constitutional authorities will be correctly understood and generally beneficial". In late 80s, the Helsinki Committee co-operated closely with other dissident groupings, the Charter 77 speakers and The Committee for the Defence of Unjustly Prosecuted. After November 1989, the grouping registered as an "organisation with an international element". The Committee is a member of the Helsinki Federation, which associates Helsinki committees from 38 countries. Currently, the Committee has two units: the legal analysis unit and the documentation and information centre.

[91] The first report produced by the Czechoslovak Helsinki Committee for the International Helsinki Federation for Human Rights deal with human rights situation in Czechoslovakia in 1988 and early 1989. It was published in the United States by the U.S. Helsinki Watch Committee and in Europe by the International Helsinki Federation for Human Rights. (See "References" below.) The report was 47 pages long.

bodies. Second, through organisations affiliated to it, the Helsinki Committee implemented most of the major human rights programmes. Thirdly, and perhaps most importantly, the Committee acted as civil society's official spokesperson on human rights issues. This role of the Helsinki Committee also manifested itself in the production of annual human rights reports, which were widely publicised.[92] Nonetheless, in spite of its "opposition" role, the period dominated by the Helsinki Committee (1993-1999) was a period of "search for consensus" with power.[93]

The situation changed in the late 1990s. The change was prompted from several directions, but two are most important. One source of changes was the increasing influence of the transnational human rights advocacy networks. They brought about not only more radical views, but also new, adversarial and litigious methods of work, such as bringing lawsuits in public interests (so called "strategic litigation") and advocacy before international organisations. Such activities went beyond the traditional concept of "dialogue", adhered to by the Helsinki Committee. The second major impetus for changes was the new situation after the Social Democrats came to power: the creation of the new institutions for human rights protection and the invitation to co-operate with the government.

These two developments resulted in a number of changes, which characterize the current period (since 1999 to the present) as period of "pluralistic dialogue" between the state and the civil society on human rights issues. The position of the Helsinki Committee as a single authority on human rights issues was diluted. Some of the organisations working under the umbrella of the Committee cut their ties and became independent, and new NGOs were established. The NGO scene became more pluralistic. With help and resources from the transnational human rights networks, some NGOs became more professional and self-confident. As a result, some NGOs are increasingly prone to design alternative policies. Because of the new approach by the state administration, the dialogue between public bodies and the civil society strengthened.

4.2. Components of the Human Rights Non-Profit Sector

At present, more entities of the civil society are engaged in human rights protection in the Czech Republic than ever before.[94] While no scheme can fully capture this colourful part of

[92] Czech Helsinki Committee's Human Rights Reports (1994-2000).The first report, published in 1994, was a thin booklet, rather a "new human rights platform". Gradually, however, the reports became more bulky and comprehensive.

[93] We can explain the "conciliatory" approach of the Helsinki Committee by several factors, including the generational aspect. Ideologically, the leaders around the Helsinki Committee believed that if proper persons were in power (or if the persons in power understand the right ideas), it is possible to work together on common solutions in harmony. There was little understanding of the inherently differing perspectives of the government and civil society: while the government must act according to a "principle of responsibility", civil society actors can act "on principle" only. Examples are attitudes towards refugees. While NGOs advocate for the acceptance of refugees on humanitarian grounds, (all) governments care, first, for the consequences of such decisions for the receiving society.

[94] This empirical observation is indirectly supported by the relatively high percentage (14%) of non-profit employment in the field of development, advocacy and environmental protection, which exceeds the average 9% of the 22 countries examined by a group of researchers within the project "Global Civil Society. Dimensions of the Non-profit Sector" (Salamon, L.M. and others. 1999). The authors of the study suggest that this perhaps reflects the civic activities that produced the Czech Republic's "Velvet Revolution" of 1989. (Ibid: p. 294).

the non-profit sector, the structural-operational definition (Salmon and Anheimer: 1997)[95] permits the range of entities it embraces to be spelt out more concretely. Using an adaptation of the definition, the "human rights non-profit sub sector" can be defined as collection of entities which are private, organised, non-profit distributing, self-governing, involving some meaningful degree of voluntary participation and which are engaged in activities having an impact on human rights protection and promotion.

The entities embraced in this definition can be grouped into three categories, according to their remit and mission. The first category involves entities which can be called **humanitarian and relief agencies**. These are relatively strong organisations, frequently affiliated with churches (*e.g.* Catholic Charita, ADRA). In such cases, they are often a part of a larger, transnational structure. Another example, not affiliated with any church, is the People in Need foundation. These agencies are typically not limited in their activities to the Czech territory, but often operate abroad. Their mission is not defined in the terms of human rights protection, but in a much broader humanitarian and charitable language. Nonetheless, at least part of their project-based activities aimed at the protecting and serving underprivileged and neglected populations (*e.g.* ethnic minorities, asylum-seekers and migrants) have direct impact on human rights protection. In addition to providing services, these agencies play an important role in awareness raising.

The second category is constituted by **human rights advocacy groups or ideal human rights NGOs.**[96] Human rights advocacy groups define their mission in terms of human rights protection and promotion, either in general terms or focusing on particular human rights issues, such as combating discrimination. The activities of the human rights advocacy groups typically involve human rights monitoring, advocacy, awareness raising and educational activities. Well-known representatives of these groupings are the Czech Helsinki Committee; the Counselling Centre for Citizenship, Civil, and Human Rights; and the League for Human Rights.

Finally, the third category embraces **specialised (or one issue) organisations.** Such entities focus on a particular societal problem or group of population (*e.g.* children, crime victims, asylum-seekers, the homeless, or cases of suspect improper functioning of the judiciary). Since the core activities of these organisations consist often in providing social services to needy or vulnerable groups or individuals, a substantial part of their income often comes from public budgets. While this does not necessarily undermine the independence of the organisations, it may be sometimes difficult to draw a dividing line between these specialised

[95] The structural-operational definition of the non-profit sector utilised here was developed by the *John Hopkins Comparative Non-profit Sector Project* and published in Salamon, L.M. and Anheier, H. K. (Eds.) 1997. Defining the non-profit sector. A cross-national analysis. Manchester and New York: Manchester University Press. See, in particular Chapter 3, p. 29-49.

[96] Laurie S. Wiseberg (1992:372-373) defines "ideal" or "exclusive" human rights NGOs as those whose *raison d'ętre* derives from the fight for human rights. This category includes international NGOs like Amnesty International and national bodies. According to Wiseberg, the "ideal human rights NGO is a voluntary organisation which is independent of both the government and all groups which seek direct political power, and that does not itself seek such power". The other category of NGOs engaged in the human rights struggle are NGOs which have broader mandate or different primary goals but which devote substantial resources to human rights struggle. This category includes a wide spectrum of entities, churches, professional associations or groups concerned with the handicapped or poor.

human rights organisations and a broader spectrum of charities and other organisations providing social services.[97]

As regards their legal form, all the above entities are, by definition private or civil law organisations: civic associations, public benefit organisations, foundations, church-affiliated organisations or "organisations with a foreign element".[98] The particular legal form, however, is not very significant for activities, as sometimes even the same grouping may operate as either civic association or a foundation, whatever suits better the purpose.

Many of the civil society actors have links to the public sector, either financial[99] or institutional and personal. From the perspective of this paper, the institutional and personal links are of particular interest. As have been said already, the main institutional channel of communication is the participation of representatives of the major human rights advocacy groups in the Human Rights Council and its sub-committees.[100]

The relatively strong and well-established human rights non-governmental sector is undoubtedly one of the pre-existing conditions that any future reform of the state human rights protection mechanisms shall take into consideration. While the state cannot dispose of its obligations to protect and promote human rights by pointing to the voluntary activities of the NGOs, it can effectively fulfil some of them either through sponsoring NGOs activities or thorough making use of co-operation with NGOs. An example of the former is the participation of the NGOs in carrying out state sponsored public awareness and educational campaigns; examples of the latter, even if more controversial, are commissioned studies related to particular situations of human rights violations or the involvement of NGOs in monitoring and the drafting of reports. The potential benefits for the state of making adequate use of input from NGOs are manifold. They involve, inter alia, a reduction of bureaucracy and direct access to information otherwise difficult to obtain.

5. Human Rights Research and Policy Analysis

As the concept of human rights has become influential in domestic and international politics, human rights research has developed in the Western world. Human rights law courses became a part of curricula at law faculties. Ruling governments, opposition parties and advocacy groups articulated their views on various aspects of domestic and foreign human rights policies, using the expertise of a wide range of university institutions and public policy centres. International organisations also stressed the need for independent research in human rights. The EU anti-discrimination legislation, which explicitly requests publicly funded

[97] Three criteria can be used to distinguish between "one issue human rights organisations" and other charities or similar organisations providing social services. They are the presence of some voluntary input, nature of the problem addressed and the presence of some advocacy aspects.

[98] All these particular forms are regulated by distinct laws. For details see: Frištenská, H. (1999). *Podmínky rozvoje občanského sektoru.* (Conditions for the Development of the Non-Profit Sector). In Czech Helsinki Committee, Human Rights Report for 1999. p. 115-119.

[99] The financial support from public budgets to these entities may take the form of subsidies (grants) or public tenders. In particular, in the latter case, used for financing major projects (*e.g.* awareness raising campaigns), the contracting organisation is often the co-author of the project. Thus, behind "financial links" a more substantive and active partnership between the private and public sector is often hiding. These relations and their impact on the formulation of human rights policies would definitely deserve a more thorough analysis.

[100] Through their participation in the Committees of the Council for Human Rights, several dozens of activists are involved in the co-operation.

research into discrimination issues, illustrates a common understanding. Independent professional research of human rights is *a condition sine qua non* for formulating adequate human rights policies by governments and other decision makers.

If policy makers are to take independent research findings into account, two primary conditions must be met: (1) an adequate research capacity and outcomes must be available and (2) intermediary structures bridging research and policy making must be functioning. In Czechoslovakia up until 1989, political circumstances did not allow for the development of these conditions. Some educational and research activities existed in the milieu of the opponents of old regime and other independent groupings,[101] but they were at best of embryonic nature. Given the role that a call for the respect of human rights played in the 1989 Revolution, one may logically assume that situation changed considerably in the last 15 years. But did it really happen really? The purpose of this chapter is to answer this question. It will examine briefly the current state of human rights research and analysis of human rights policies.

Since studies on the topic are not available, we have to use a pilot method to get some indicators. The study will proceed by mapping two sectors: (1) university and academic research and (2) think-tanks and human rights policy analysis sector. In the latter part (2), the paper relies on the recent book by Jiří Schneider on think tanks in Visegrad countries.

In the Czech Republic, as in other countries of Central and Eastern Europe, scholarly, academic research is traditionally at home at two types of institutions, universities and the Academy of Sciences. At present, there are four Law Faculties (Prague, Brno, Olomouc and Plzeň) in the Czech Republic. At all four faculties basic education in human rights is an integral part of mandatory courses in constitutional law and in international law. In addition, all law faculties provide specialised courses in human rights, mostly as selective courses for senior students. In academic year 2003-2004, law faculties offered following the human rights courses:

Table 5.1. Human Rights Courses at Czech Law Faculties (1993/1994)

	Law Faculty	**Mandatory courses**	**Selective/Optional Courses**	**Department**
1	Charles University Prague		Philosophical foundations of human rights	Philosophy and Sociology
			Protection of civil and human rights	Constitutional law
			Theory and practice of asylum and refugee law	International law
			The prohibition of discrimination in the international human rights protection system	International law
2	Masaryk University Brno		Universal and regional protection of human rights	International law
			Refugee law	International law
3	Palacky Univesity Olomouc		Freedom of expression and its limits	Constitutional law
		The European (EU) human rights protection - students in the 4th year		International and EU law

[101] For instance, small independent groupings organised various private lectures and seminars. Often, scholars from western universities participated. To give one example, we can mention the work of the Jan Hus Educational Foundation in the 1980s, which allowed participants to catch up with western political and philosophical thinking on human rights.

4	Westbohemian University Plzeň		Introduction into studies of human rights law	Legal theory
			Human rights and minorities	Constitutional law
			Human rights and constitutional courts in developed democracies	Constitutional law

Lecturing on human rights does not necessarily indicate human rights research. Yet, in given cases, the courses were taught by lecturers who published major studies on respective topics. The overview thus indicates that human rights research is at home at the Czech law faculties. Not surprisingly, however, the courses focus on the human rights theory, with the exception of refugee studies. Studies of the human rights dimensions of various specialist law disciplines (such as criminal law or administrative law) are lacking. There is neither a special human rights law department at any of the law faculties, nor is human rights law a discipline of postgraduate legal studies. There is not a single academic periodical devoted to human rights.

As in other central European countries, the legacy of the communist period is the existence of a colossal public institution devoted to academic research – the Czech Academy of Sciences.[102] The role of the Academy is to carry out primary research in a broad spectrum of natural and technical sciences as well as social sciences and humanities.[103] At the Academy, there is no human rights institute. Traditional legally oriented human rights studies can find a place at the Academy's Institute of State and Law. In the period 2002-2004, the Institute is carrying out a major project "Comparative Research on Human Rights in Unifying Europe". In line with the mandate of the Academy, the research is formulated as a broad, systematic investigation of human rights protection regimes.[104]

Having a quick glance at scholarly human rights research, let us turn now to mapping real blank places on the landscape, that is policy-oriented human rights research, research on human rights policies and the role of the think tanks in the Czech Republic. Unlike in the former part, here we have no pre-existing list of institutions whose performance we want to scrutinize. Instead, we have first to identify subjects for our examination. The focus of our attention is the phenomenon of think tanks as a specific product of the post World War II development of democratic governance. According to one of the many definitions, think tanks are "policy research organisations that have significant autonomy from government and from societal interests, such as firms, interest groups, and policy political parties". (McGann and Weaver, 2000:5). Typically, the autonomy of think tanks is emphasised as one of their principal characteristics. Nevertheless, the level of such independence may differ in various cultures. For this reason, Mc Gann and Weaver argue that the operational definition of think tanks must differ from region to region. Following this line of thinking, Jiří Schneider proposes to define think tanks more broadly in the Visegrad context. Think-tanks are institutions carrying out policy research or policy analysis that function as flexible networks at the cross-border of research and education, politics, business and the third, non-governmental sector and are financially and institutionally independent from state and particular interest groups (Schneider, 2003:31).

[102] The Academy of Sciences had its predecessors in former historical periods. For brief information on its history, structure and role, see http://www.cas.cz.

[103] At present, the Academy of Sciences has 59 research institutes and employs more then six thousand employees, half of which are researchers with university degrees.

[104] Internet search as well as personal enquiries did not reveal any other human rights project carried out by the Academy recently.

As already shown by researchers on think tanks in Central and Eastern Europe (Krastev, Schneider), think tanks were established in 1990s in the region as an integral element of the processes of establishing liberal and democratic system of governance. According to Krastev, think tanks in Central and Eastern Europe specifically constituted a break from the politics and influence of liberal intellectuals in the 1980s and early 1990s. In light of currently growing political and economic populism, the rise of think tanks can be interpreted as a new strategy for the institutilization of the liberal political agenda following the electoral failure of the liberal parties in the region… (Krastev, 2000: 276). Our assumption here is that think tanks are increasingly playing a role also in the human rights area, a field most typically dominated in the past by intellectuals and activists belonging to the old dissident groupings.

According to McGann and Weaver there four basic types of think tanks: (1) academic think tanks - university without students, (2) contract researchers, (3) advocacy tanks and (4) party think tanks, each with distinct characteristics as regards staffing, financing, agenda setting and typical products (2000: 10-11, table 1.1 and 1.2). In addition to classical types, McGann and Weaver also classify a number of institutions as "organisational siblings" or "functional substitutes". The main sibling forms are the following:

Table 5.2. McGann and Weaver: Think Tanks and Their Organisational Siblings

Academic Think Tank	University Research Centre
	Government Research Agency
Contract Researcher	For- Profit Consulting Firm
	Temporary Government Investigative Commission
Advocacy Tank	Interest Group
	Public Interest Non-governmental Organisation
Party Think Tank	Research Arm of Political Party

We will proceed in two steps. First, we will explore relevant broadly oriented think tanks. This category overlaps largely with the "classical" think tanks. Second, we will extend the examination to specialised human rights think tanks and will include a wider spectrum of functional substitutes. A regards the role and performance of the former group, the study builds on work by Jiří Schneider (Schneider: 2003). Schneider identified and described eight institutions as the broadly oriented think tanks, which are influential and operate nationwide in the Czech Republic.[105] My examination focused on the following points: (1) Does the ambit of activities of these think tanks involve human rights? (2) If so, how are human rights issues addressed?

The enquiries showed some interesting outcomes. From the eight institutions examined by Schneider, four have relevance for human rights research and policy. Two of them, the *Liberal Institute* and the *Civic Institute*, which are advocacy think tanks promoting libertarian and conservative political values, respectively, included human rights issues in their political discourses. The *Centre for Studies of Democracy and Culture (CDK),* based in Brno, was first

[105] These are the Centre for Democracy and Culture (CDK), the Liberal Institute, the Civic Institute, the Centre for Economic Research and Postgraduate Education (CERGE), Gabal Analysis and Consulting (GAC), the Centre for Economics and Policy (CEP), the Centre for Social and Economic Strategies, and the European-Czech Forum. (Names translated from Czech.)

to define human rights as a field of multidisciplinary studies. The private consultancy firm *Gabal Analysis and Consulting* came closest to the professional, practically oriented policy analysis in the field of minority rights.

The *Liberal Institute*, established in 1990 as a NGO with the aim of promoting classical liberalism (or rather libertarianism) and now functioning rather as an economic consultancy firm[106] has placed on its web site several articles concerning human rights. The main concern of contributions is the defence of individual rights (*e.g.* property rights, freedom of speech) against public interferences. The tone of the articles is aggressive and the views expressed sometimes simplistic. The article entitled "On the Right To Discriminate"[107] provides a good illustration. The essay defends service providers who discriminate against consumers, including on racial grounds, criticises the US and EU approaches to equality, and presents a theory in which a right to discriminate is embodied in property rights. Another article on tax policy reform questions not the extent of the solidarity principle, but its very existence. After reading several commentaries on human rights topics, it comes as no surprise that the Human Rights Commissioner's reference to the proposal to establish "an office for ethnic equality, which could fine an employer discriminating against a Roma on the labour market" was labelled "the silliest pronouncement for months".

The *Civic Institute,* which identifies itself as a non-partisan, non-profit cultural and educational institution, the goal of which is to support and disseminate conservative ideas, [108] also engaged in human rights debates on topical issues. Moreover, it tried to present a coherent, conservative approach to human rights. Unlike the belligerent statements of the Liberal Institute, the commentaries of Civic Institute offer a more sophisticated ways of defending its ideological premises by emphasising traditional community and family values, the relativity of rights and the importance of the private sphere. An enlightening demonstration is Roman Joch's contribution to the debate on the proposed anti-discrimination legislation entitled "Freedom = Private Discrimination". While the very line of reasoning does not differ significantly from the Liberal Institute's approach, the author respects a common minimum understanding of human dignity. Therefore, he excludes forms of discrimination which may amount to incitement to racial hatred from the scope of his defence.

A different approach to human rights is pursued at the *Centre for Studies of Democracy and Culture (CDK)*, a policy centre, the aim of which is to contribute to the development of political culture and to promote Christian values.[109] The main activity of the Centre consists in publishing. In writings published by CDK, human rights are recognised as ethical values and a part of common cultural heritage of mankind. The CDK made a noteworthy contribution to the development of Czech human rights science by publishing two volumes of essays, one on the universality of human rights and cultural differences and the other on Christianity and human rights. The new interdisciplinary approach[110] is demonstrated by a wide range contributions made by philosophers, political scientist and historians.

Finally, we have to mention *Gabal Analysis and Consulting*, *(GAC)* established in 1994 as a private consultancy firm with an objective of carrying out analytical and consulting projects in the area of public opinion, the social dynamics of political development, marketing and mass

[106] See http://www.libinst.cz
[107] The author is Josef Šíma. The article was published in the *Laissez-Faire* 7-8/1999.
[108] See http://www.obcinst.cz
[109] See http://www.cdkbrno.cz
[110] We can find the roots of this approach in the milieu of Christian independent groupings in the late 1980.

media.[111] The GAC produces reports in objective and non-partisan style, often on currently topical issues. It has special expertise in migration and minority issues, the Roma and fighting racism. Its clients are often public institutions (including the Czech Government) and international organisations. This private profit-making entity is so far the only think tank that produces policy studies that are neither academic papers nor partisan political essays.

After having examined broadly oriented think tanks, we should proceed to examining the specialised human rights think tanks. If we stick to classical definitions, we have to conclude that there is no human rights think tank in the Czech Republic. Nonetheless, if we extend the examination to a broader spectrum of functional substitutes, the conclusion is different. While it is unrealistic to attempt to give a full account of this sector, we can provide several examples showing that many organisations are involved in researching and analysing human rights policies.

An example of university research centre is *the International Institute of Political Science (IIPS)* at the Masaryk University in Brno.[112] The IIPS fits the classical type of a university research centre. Unlike the above-mentioned Liberal and Civic institutes and the CDK, its mission is not to defend philosophical and ideological values. It publishes monographs and journal articles in objective, non-partisan style. The IISP has published two edited legal books on human rights topics (human rights in jurisprudence and the Charter of Fundamental Rights), as well as several books relevant for human rights law.

When analysing the civil society and non-profit sector, we identified human rights advocacy groups (or ideal human rights NGOs) as a special types of entities. In pursuing their advocacy mission, some of these groups have started being increasingly involved in policy research and analysis. Illustrative examples are the legal component of the Migration Project funded by the OSI and carried out by the Counselling Centre for Citizenship, Civic and Human Rights and the Minority Rights Monitoring Project carried out by the same organisation within the OSI EU Accession Monitoring Programme. Another example is the joint project of the Ecological Legal Service and the Human Rights League, which involves the publishing of by-monthly "Via Iuris", a periodical to promote human rights by public interest law actions. These advocacy groups clearly fit the qualification as emerging human rights think tanks in the broader understanding of the term. We can assume that in the future, further transformation of some these organisations into specialised advocacy think tanks will take place.

Even if far from being exhaustive, the above examination allows for several concluding observations. In spite of sizeable progress at universities, scholarly human rights research is still at an early stage of development. In particular, there is an institutional gap, as there is no single university or academic unit which makes human rights a focus of its studies. In the academic field, the needed interdisciplinary approach to human rights is rather the exception than a rule. Scholars writing on human rights are mostly constitutional and international lawyers respecting requirements and paradigms of their own discipline, such as academic objectivity and neutrality, with focus on the human rights norms. The implementation of human rights standards in practice or their role in policy processes remains uncovered.

[111] See http://www.gac.cz The GAC can better be classified as a profit consulting firm than a contract researcher. The methodological incoherence here stems form the fact that Schneider defines think tanks more broadly than McGann and Weaver.
[112] See http://www.iips.cz

As regards the dynamically developing think tank sector, we demonstrated that it already has a potential to play a role in both human rights research and policy analysis. However, the existing think tanks and their siblings predominately operate in two distinct spheres. They are involved either in theoretically oriented academic research or in partisan, often ideologically biased discourses. The latter group, in spite of making little contribution to the development of serious policy analysis, influences substantially public understanding of human rights. Finally, in addition to the two dominant groups, a third segment is emerging. It represents practically oriented human rights policy analysis and public interest advocacy carried out mostly by the advocacy groups. However, these activities are still linked to particular projects carried out on demand of sponsors.[113] Their influence on public policy making is not systematic and their impact on public awareness has been rather marginal, yet with a promising tendency of progress.[114]

The relative weakness of human rights research coupled with the lack of links among existing institutions that work to safeguard human rights and the research sector block effective operation of these institutions. Most markedly, preparation of a new government policy, once the problem has been identified, is usually a lengthy process as the officials charged with preparation of the necessary background papers are left with no effective research assistance.[115] In other instances, the lack of adequate research and analysis can negatively influence agenda setting. This problem is most urgent in relation to the Human Rights Commissioner and the Human Rights Council, which do not work on case by case basis, but are charged with the preparation of overall strategies and policy proposals. Without coupling institutional reforms with fostering research and policy analysis, the outcome may turn out to be just a planting of seeds in a desert.

6. Towards Establishing a National Human Rights Institution

Our examinations showed that both the international concern as well as the internal reasons, in particular some weaknesses and defects in the functioning of the Human Rights Commissioner and the Human Right Council, substantiate suggesting changes, including institutional reforms. The aim of this chapter is to discuss whether such reforms should take theform of setting up a new NHRI or of other institutional arrangements, to outline options for the reform and to present arguments supporting the preferred approach.

Before turning to discussion of “pro” and “cons” of the alternative solutions, it is desirable to review briefly the most relevant findings. The starting point of our examinations was the

[113] Some studies are commissioned within the framework of grants provided by particular ministries, such as the Ministry of Foreign Affairs or the Ministry of Labour and Social Affairs. The Ministry of Foreign Affairs, for instance, provided grants for studies on the implementation of the Optional Protocol to the UN Convention Against Torture, on obligations arising from the Statute of the International Criminal Court and on the sexual exploitation of children.

[114] In particular, the public litigation activities of the Counselling Centre, which launched several law suits in the field of combating discrimination, are groundbreaking.

[115] When a new human rights policy is designed, the Government and the Parliament normally request information on developments and solutions applied abroad. Even if compiling of such information by government officials is possible, it causes undue delays. A good illustration is the Human Rights Commissioner's push for the reform of nationality legislation. In the first phase that led to several amendments to the existing legislation, the background policy paper, based on necessary primary research, was prepared by the staff of his office. After the Interior Ministry requested that a more comprehensive research and analysis be carried out before the second phase of reforms was considered, the whole matter went to sleep.

recognition that a pluralistic and accountable parliament, an executive that is ultimately subject to the authority of elected representatives and an independent, impartial judiciary are necessary, but not sufficient institutional prerequisites for the human rights protection. These basic institutions must be supported by other mechanisms. One particularly useful mechanism for protecting individual liberties and freedoms, located somewhere between the sphere of government and that of civil society is the national human rights institution (Burdekin, Gallagher, 2001: 816).

In chapter 2 we have demonstrated that the concept of an NHRI is not yet fully evolved. Neither is it free of ambiguities. While the functions of an ideal NHRI are well described in the Paris Principles, the corresponding operational structures have not been analysed and evaluated in a comprehensive manner. Existing models of the NHRIs obviously 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 the NHRIs, there are no apparent generally applicable conclusions regarding the nexus between distinct institutional types of the NHRIs and their performances. In practice, even a cluster of specialised institutions can collectively be recognised as a national institution. There is nothing in the existing soft law and legal literature that would prevent the logical conclusion that it is possible that the different functions of NHRIs could be performed by different bodies, so long as the functions are covered in some way.

We have also observed that the functions of the NHRI fall into several categories. Thus, for instance, protective functions are different in their nature from promotional obligations. While most of protective functions can be carried out adequately only by a NHRI meeting most of the criteria of the Paris Principles (*e.g.* monitoring, investigating, assisting victims participating in court proceedings), promotional obligations (*e.g.* functions relating to awareness arising, educational or research activities) may be carried out well also by institutions which are defective. Following this line of reasoning we can conclude that certain functions may be better performed by distinct, specialised bodies or even, in certain cases, by a part of the administration (*e.g.* promote and ensure harmonisation of legislation with international human rights instruments or encouraging the ratification of international treaties).

Another set of our observations is related to political feasibility of reforms. In chapter 3 we showed that there were two major waves of institutional reforms in the human rights field in the Czech Republic. The first wave was profound and speedy and was performed as an inherent part of the 1989 Revolution. In this phase, the fundamental institutional prerequisites for human rights protection were introduced, such are an independent judiciary and the Constitutional Court. The second wave of reforms came with the change of ruling parties in 1998 and brought about the establishment of the non-judicial mechanisms of human rights protection. This experience indicates that institutional reforms in the field of human rights are easily put forward either if they are supported by a national consensus or if they are embodied in a broader fresh government agenda and supported by decisive political forces. These observations are not truisms, if we interpret them correctly. It is in the very nature of human rights that a visible progress in the standards of their observance will never come in a short term. Therefore, a radical change of government is the best point where a critical assessment of the past is acceptable and the promise of improvement for the future is a political asset. The developments in Norway (see Appendix C) seems to support this hypothesis. What follows from these observations is that the agenda for reform should not be limited to what we calculate as politically feasible for tomorrow, but that a comprehensive and flexible plan of

institutional reforms has to be designed. Such a plan should include both strategic, long term goals as well as small remedial changes. But even small steps should be devised with regard to the existing political and societal conditions and restraints. Such conditions and restraints are most notably the coherence of the proposed steps with other government priorities, the proper sequencing of reforms, due regard to the existing administrative capacity for performing proposed reforms and last, but not least, the level of acceptance and support for the proposed measures in the public.

6.1. Policy Options

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). [116] 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

[116] Some countries, such as New Zealand, have a number of non-judicial institutions with various competencies in the field of human rights (the Human Rights Commission, the Race Relations Conciliator, the Ombudsman, the Privacy Commissioner, the Commissioner for Children and the Health and Disability Commissioner). In the UK, however, largely out of concern for older and traditional institutions, proposals to create a new human rights body with broad competences were rejected.

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 place 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.[117] 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 (Kjoerum, 2003:637).

Extending the mandate of the Ombudsman would not be possible without redrafting again the Law on Ombudsman, which thus will be amended for the third time in a relatively short period of time. Finally, we should not overlook that since the Ombudsman was established as an independent body with specific functions, it would not be politically correct to change his mandate without his consent. As the current discussions on the establishment of the equality body indicate – such consent or approval is not very likely.[118]

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 (see 3.4. and Appendix A) that if we look at the existing triplet of non-judicial institutions (the Human Rights Commissioner, the Human Rights Council and the

[117] This issue has been discussed in-depth in relation to the establishing of an independent "Centre for Equal Treatment", designed to fulfil functions according to Article 13 of the EU race Directive. See *Framework Bill on Equal Treatment and Protection against Discrimination, Explanatory Memorandum, Part II.B*.

[118] This position reflects, primarily, the concerns of the Ombudsman that new, extended responsibilities may have a negative impact on the effective management of his current tasks, that is, primarily, handling complaints without delay.

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.

6.2 Preferred Approach

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 sequence 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 (see below).

7. Conclusions and Recommendations

In times of democratic revolutions, human right issues rank high on societal and government agendas. The speedy and profound changes undertaken in the time of transition are, however, not usually followed by the same dynamics once the transitional period is over. Reforms and changes in the field of human rights in stabilised societies, in particular if they concern institutions, which not only consume scarce resources, but also threaten to further bureaucratise society, are subject to fierce political scrutiny. They are likely to be adopted only if society is persuaded that the potential benefits would outweigh the new burdens.

This paper discussed post-transitional proposals for the enhancement of the non-judicial human rights protection mechanism in the Czech Republic. Taking as a point of departure the international requests for establishing a national institution for the protection and promotion of human rights, the paper examined the concept of the national institutions and related standards. It then reviewed the limitations of the present non-judicial mechanism for the protection and promotion of human rights in the Czech Republic against this background. It concluded that there is a need for additional institutional reforms to enhance the effectiveness of the existing mechanisms. It proposed that, while in the long run, such reforms should take the form of setting-up a new NHRI; it is not a realistic option for the near future. Therefore, the current reform effort should primarily focus on consolidating, and making more effective, the exiting institutions and, thus, to pave the way for future reforms.

Recommendations:

The Commissioner and the Council

The Commissioner and the Council should clarify their respective roles and relations vis ŕ 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. [119] 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.

[119] Examples to follow are the annual reports concerning the situation of national minorities, produced by the Council for National Minorities. These reports include sections which articulate the position of the particular minorities.

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 composition 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. [120]

- *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.

[120] Ideally, such a measure shall also include the Commissioner. The side effects of such a step have yet to be considered very carefully.

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, the Academy of Sciences or affiliated to a government department[121] should also be discussed. The starting point here is launching a scheme supporting human rights research. The initial funds must not be necessarily high.[122] The grant scheme may be established following the model of the existing research grant scheme operated by the Ministry of Foreign Affairs.

[121] Such institutes are attached, for instance, to the Ministry of Foreign Affairs (The Institute of International Relations), the Ministry of Labor and Social Affairs (Research Institute of the Ministry of Labor and Social Affairs).

[122] Perhaps the easiest way to find initial resources is using the funds from the "Campaign Against Racism" administered by the Commissioner.

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