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THE NATURE AND DEVELOPMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS BASED ON PROHIBITIVE PROVISIONS

A national human rights institution is a body specialized in the promotion and protection of human rights within a state. There are clear prohibitions with respect to membership in national human rights institutions and to addressing complaints. These prohibitions set forth the limits of the functions of national human rights institutions; clarify their status and nature; elucidate the relationships between them and the legislative, executive and the judiciary; and direct future trends and development of national human rights institutions.

Keywords: national human rights institutions, membership, scope of addressing complaints, prohibitive provisions.

After more than half a century of development, the establishment and operation of national human rights institutions have been matured and perfected in many aspects, forming different types with typical representativeness. However, currently, there is no uniform definition for a human rights institution within the international community of the United Nations. A very important reason for this is that the international provision about the human rights institutions is open. So practices in different states are the only way to conclude and summarize the relationship between national human rights institutions, the legislature, the executive and the judiciary. The promotion and protection of human rights is an important function of national human rights institutions and any matter relating to human rights should fall within their competence. However, in the process of addressing complaints, many countries have prohibitive provisions regarding complaints that may not be heard by human rights institutions. Additionally, there are similar prohibitive provisions regarding the membership of national human rights institutions. In fact, these prohibitions clearly limit the functions of national human rights institutions. and upon which, this study and analysis will provide deeper understanding of the nature, status and development trends of human rights institutions within a state.

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1. The prohibitive provisions of membership in national human rights institutions

The prohibitive provisions relating to national human rights institutions are embodied in two primary aspects: membership qualifications for human rights institutions and the scope of addressing complaints. The composition of personnel is the first issue relating to the establishment and functions of a national human rights institution. The prohibitive provisions vary in different countries in terms of the specific conditions for membership in a human rights institution, but they are generally consistent with respect to situations that prohibit membership in a human rights organization. The consistency of the prohibitions on membership is a reflection of the nature and character of national human rights institutions. The membership prohibitions set forth by the Human Rights Commission of Thailand are representative. The relevant laws provide that members of the Human Rights Commission of Thailand shall not hold office as permanent civil servants or receive remuneration; they may not hold office in government agencies, state-owned companies or local government departments (including leadership positions or as staff members, directors or consultants); and they shall not hold office in other for-profit enterprises or be employed by an individual. In the event of such circumstances, the member may, with the consent of the Senate, be elected to act as a member of the Human Rights Commission and shall be able to commence his or her duties only after resigning from said body. Resignation shall be completed within 15 days from the date of election or the person will be deemed to have never been elected as a member and a new member shall be elected[1].

It can be seen from the above that a member of a human rights institution may not hold any office in any other national agency, and if that is the case, he or she can only choose one position and part-time positions are not permitted. After being elected as a member of a human rights institution, members must not use their power or influence to serve their own interests. The prohibitive provisions of membership in such human rights bodies highlight the characteristics of the independence of human rights institutions. The so-called independence of human rights institutions assists in the promotion and protection of human rights. While the functions of human rights institutions consist primarily of the effective oversight of the legislative, executive, and judicial branches, the quality of the supervision requires a higher level of independence. Only when independent of the legislative, executive, and judicial branches can human rights institutions effectively exercise the power of supervision. The exclusive appointment for membership in a human rights institution or the prohibition of a concurrent post is precisely to ensure the independence of these institutions. Of course, to ensure the independence of human rights institutions, the independent composition of personnel is an essential safeguard.

2. Prohibitive provisions on the scope of addressing complaints submitted to national human rights institutions

National human rights institutions with the function of addressing complaints can, in general, conduct investigations and make decisions on cases of suspected violations of human rights either on their own initiative or upon application. Before planning an inves-

[1] See Article 7 of the National Human Rights Commission Act of Thailand.

tigation, the human rights institution will conduct a preliminary review of the complaint to decide whether or not to accept it. Many national human rights institutions do not clearly define the types of complaints they accept but they do list the types of complaints that shall not be accepted, and such prohibitions form the limits of their duties.

First, if a complaint brought before a human rights institution is already being heard in accordance with judicial proceedings, then the human rights institution is not competent to accept it. If a human rights institution accepts a complaint and subsequently finds that it is being heard by the judiciary, the investigation should cease immediately. If the case has been tried by a judicial institution and a judgment has been rendered, the human rights institution may not investigate or otherwise address the complaint. The Human Rights Commission of Malaysia provides that it may not conduct an investigation on the incident of a complaint if the matter is being tried, including on appeal or if a decision has already been made by the court. Once the judiciary has begun to investigate, the commission must immediately stop investigating[2]. The legislation also makes it clear that complaints shall not be accepted by the Mongolian Human Rights Commission, including criminal or civil cases, if they are being tried or have been concluded[3]. Further, some national human rights institutions prohibit their members from bringing civil or criminal proceedings before the court on behalf of the complainant. In accordance with the relevant provisions of the Human Rights Protection Act, the Human Rights Commission of Mauritius has no power on its own to refer cases directly to the court. If the commission considers that a violation of human rights constitutes a crime, the case must be referred to the prosecutor to be charged[4]. In the case of human rights violations, the complainant may either file a suit in court seeking remedies through a judicial approach or initiate a complaint before a human rights institution for protection. However, if the complainant chooses the former, he or she cannot also bring a complaint to the human rights institution at the same time or the complaint before the human rights institution will not be accepted. The handling of complaints by human rights institutions is a useful and necessary supplement to the work of the judicial branch. National human rights institutions are not permitted to receive cases that are being tried by the judiciary mainly out of respect for the independence and authority of the judicial branch. This also reflects the fact that the promotion and protection of human rights by national human rights institutions should complement not substitute the legislative, executive, and judicial branches.

On the basis of the above, national human rights institutions may, under certain circumstances, investigate, participate in, or pay attention to cases before the judiciary. While national human rights institutions are complementary to the protection of human rights provided by the judicial branch, they still have the duty of oversight, the existence of which requires that human rights institutions exercise effective supervision of the judiciary on the basis of respect for judicial independence.

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[2] Article 12(2) of the Human Rights Commission of Malaysia Act 1999, Act 597 provides the following: 'The Commission shall not inquire into any complaint relating to any allegation of the infringement of human rights which— (a) is the subject matter of any proceedings pending in any court, including any appeals; or (b) has been finally determined by any court'.

[3] See the website of the Human Rights Commission of Mongolia: www.nhrc-mn.org, accessed on 20 September 2014.

[4] See the website of the Human Rights Commission of Mauritius: http://www.mhr.gov.mu, accessed on 5 September 2014.

In practice, human rights institutions in a number of countries may, in cases permitted by the court, investigate cases that are being tried by the judiciary. According to the Nepal National Human Rights Commission Act, the commission may, with the permission of the court, investigate any unresolved complaints of human rights violations[5]. A human rights institution may also apply to the court for appropriate participation in legal proceedings in accordance with the relevant rules of procedure of the court hearing the case in order to provide legal assistance to the complainant. Members of the Australian Commission on Human Rights and Equality of Opportunity can appear in court on human rights cases and provide expert advice on human rights law before the tribunal[6]. Even if the human rights institution can participate in and understand the cases that are being heard by the judiciary. The institutions' participation should also be subject to the consent of the judicial branch or in accordance with legal procedures. In conclusion, the functions of national human rights institutions must not undermine the independence and authority of the judicial branch and monitoring by the institution should be conducted pursuant to legal procedures.

Secondly, human rights institutions will not accept cases that fall outside their jurisdiction. The scope of jurisdiction is primarily to monitor human rights violations committed by national institutions such as the legislature, the executive, and the judiciary, to provide remedies to the complainant, and to urge the relevant state organs to make amends. Among such national institutions, their administrative organs are extensive and comprehensive and they are closely linked to the vital interests of the people. Thus, administrative actions have become the focus of supervision for human rights institutions. In general, cases of human rights violations are within the jurisdiction of human rights institutions as long as the cases involve the actions of national institutions. Ordinary civil and economic disputes between citizens and corporate legal entities do not fall within the scope of national human rights institutions. The Law of the Republic of Armenia on the Human Rights Defender clearly stipulates that the human rights defender shall consider the complaints of individuals (including citizens) regarding violations of human rights and fundamental freedoms provided by the constitution, laws and the international treaties of the Republic of Armenia, as well as the principles and norms of the international laws promulgated by state and local self-governing bodies and their officials[7].

Complaints heard by the Human Rights Commission of Costa Rica include complaints about administrative injustice or misconduct and complaints about abuses of power by government officials[8]. The law clearly stipulates that the following two cases do not fall within the jurisdiction of the Spanish Ombudsman: (1) relevant events in which the public administration departments are not involved and (2) conflicts and disputes among citizens[9]. Additionally, the National Human Rights Commission of Mauritius cannot accept and does not have the power to investigate private disputes or complaints against

[5] Article 9(2)(d) of the Human Rights Commission Act, 2053(1997) (Nepal): "The human rights commission can inquire into a matter with the permission of the court in respect of any claim on violations of human rights which is sub-judice in the court."

[6] Australian Human Rights Commission Act 1986: "In cases where the Human Rights Commission deems it necessary, it may, with the permission of the tribunal, participate in the proceedings and make recommendations on human rights issues."

[7] See Article 7(1) of the Law of Republic of Armenia on the Human Rights Defender.

[8] See the website of the Human Rights Commission of Costa Rica: http://www.dhr.go.cr, accessed on 20 September 2014.

[9] See the website of the Defensor del pueblo: www.defensordelpueblo.es, accessed on 22 July 2014.

private employers such as private lawyers and doctors[10]. It is evident that national human rights institutions are primarily responsible for monitoring violations of human rights by state institutions, with a focus on monitoring the actions of the executive. Ordinary civil and economic disputes between private persons do not fall within the jurisdiction of a human rights institution unless the dispute constitutes a manifest violation of one's fundamental rights or freedoms. For cases not falling within the jurisdiction of a human rights institution, the case will typically be referred to the competent authorities or may be rejected under specific circumstances.

In addition, a number of cases are excluded from the scope of human rights institutions due to the level of technicality or the specific facts of the situation. Cases outside the scope of the state do not fall within the competence of human rights institutions, such as cases involving intergovernmental or governmental relations with international organizations. This indicates that a national human rights institution is a national body, as a specialized agency, that specializes in the promotion and protection of human rights within the sovereignty of a country.

Lastly, human rights institutions will not accept cases that are submitted after a certain period of time, that are anonymous, or that are false. These provisions are rather technical and have little to do with the nature and status of national human rights institutions, many of which clearly state that the complainant will not be heard if he or she knows or should have known that his or her rights have been violated for more than a certain period of time. The primary purpose is to encourage the complainant to actively safeguard his or her legitimate rights and interests after the occurrence of the infringement so as to facilitate the investigation and evidence collection by the human rights institution. On the other hand, it is also intended to reduce the unnecessary workload of human rights institutions and to prevent them from being overwhelmed by a large number of aging cases. Anonymous or false complaints can make it impossible for them to verify relevant information, which can cause unnecessary work and a waste of resources.

3. The relationship between national human rights institutions and other national organs

National human rights institutions, when compared with the legislative, executive, and judicial branches, are a novelty. From the very beginning of their establishment, the development of human rights institutions has a history of only about 60 years. As a new type of national institution, it is of great importance to understand how national human rights institutions, as a whole, are related to the traditional three branches of government.

From the standpoint of the prohibitive provisions of national human rights institutions, they should be independent of the legislature, executive, and judicial branches, and supervising the activities of other state organs is one of their most important functions. At the same time, human rights institutions are also a useful complement to the promotion and protection of human rights provided by the three branches of government. This

[10] For example, several people have complained that their neighbours trespass over their property in carrying out construction projects. They claim that their rights to their property are sacrosanct and that the commission should intervene to protect such rights. These disputes among private parties can only be resolved by the courts. See page 10 of the 2001 Annual Report of the National Human Rights Commission of Mauritius.

oversight and complementarity have determined the independence of human rights institutions, which has become a fundamental principle for the establishment and functioning of human rights bodies and must be guaranteed in all aspects. First, as a legal safeguard, it should be clearly stipulated in the constitution or other related laws on the status of national human rights institutions that independence is the most fundamental condition. Second, concerning organizational structure safeguards, the institutions should not be attached to the three branches of government and must be independent, where national human rights institutions report directly to the heads of parliament or government but are not subordinate to the legislative or executive branches. Third, the composition of personnel safeguards focus on the broad and representative membership of human rights institutions in order to facilitate performance independent of government responsibilities. Lastly, financial security provides human rights institutions with sufficient funds that can be independently managed to ensure the fulfilment of their responsibilities. Of course, the above points should be specified clearly in the form of legal provisions.

Although human rights institutions are independent of the three power organs, they are not a fourth power organ, and the three branches of government are still the basic institutions for the protection of human rights, which are monitored and supplemented by the human rights institutions. Therefore, the independence of human rights institutions is not absolute and is closely tied to the three branches of government. First, regarding the legislature, the primary members of human rights institutions are generally elected by it, the budget is generally adopted by it, and the annual report is generally submitted to it. Oversight of the executive branch is the primary function of the human rights institution. In this process, the human rights institution must cooperate with other administrative agencies (in relation to the object being monitored) or must inform the parent body of the executive organ and draw attention to violations of human rights protection. Moreover, in practice, human rights institutions in a number of countries are directly accountable to the executive heads and report to them on their work. There is also a closer relationship between the judicial branch and human rights institutions. In practice, the exercise of the functions of the judicial branch represent trends in the exercise of the duties of national human rights institutions and should also represent the direction of their development. Many of them are given some degree of quasi-judicial power, which is a manifestation of the close relationship between the two parties.

In summary, the national human rights institution is independent of the legislature, executive and judiciary, but it is not a fourth type of power. The national human rights institution is closely linked to the three branches of the government. It supervise and supplement them, and it also rely on the traditional authority of the three branches in performing its duties. Therefore, the independence of human rights institutions cannot be absolute and in practice, the framework of the three branches of government relative to legislative, administrative, and judicial independence provides the actual degree of independence needed to perform their duties. The definition of the relationship between national human rights institutions and the three branches of government can be summed up as national institutions working in close cooperation with them and being dedicated to the promotion and protection of human rights and to the independent exercise of their functions.

4. The development patterns and trends of national human rights institutions

4.1. The emergence of national human rights institutions is an inevitable choice for a state to enhance the level of human rights protection. Compared with other state organs, such as the legislative, executive, and judicial branches, national human rights institutions have only a history of about 60 years, but they have been established in more than 100 countries and regions throughout 5 continents: Asia, America, Europe, Oceania, and Africa. The rapid growth in the number of institutions and in the broad scope of their distribution indicates that these institutions are widely supported and recognized by the international community and many countries around the world. The establishment of national human rights institutions accommodates the common understanding that human rights are essentially domestic matters of a state and these institutions are able to assume the responsibility for the promotion and protection of human rights in a country. At the same time, national human rights institutions have adapted themselves to the three-dimensional requirements of human rights protection, have performed their duties of protecting human rights in conjunction with international and regional human rights protection institutions, and have played an increasingly important role in this three-dimensional human rights protection system. In short, national human rights institutions can make up for the inadequacy of traditional domestic human rights protection and can form a secure three-dimensional human rights protection network with international and regional human rights protection institutions and can also serve to bridge and raise the level of the promotion and protection of human rights domestically and internationally. Therefore, whether across the globe or within the sovereignty of a country, national human rights institutions are the inevitable choice to adapt to new developments in the protection of human rights and to improve the human rights protection level.

4.2. There will be a long-term coexistence of different types of national human rights institutions. Pluralism is a salient feature of national human rights institutions. There are two main reasons for this. First, the national human rights institution, as a relatively new type of organization, is still in its developmental and exploratory period and universally accepted principles or standards have not yet been formed in many aspects. Thus, they must be accumulated and summarized through constant practice. Pluralism is therefore an inevitable choice in this stage. Second, economic conditions, political systems and the legal traditions in different countries vary, which is the foundation of the establishment of national human rights institutions. The different contexts also make it clear that human rights institutions cannot be of one type and that different types will coexist for a very long time. That, however, does not mean there will be increasingly more and more types. With the development of practice and the deepening of theoretical research, several models or types of human rights institutions will be formed throughout the world that will be recognized as suitable for different countries and representatives. Some of the existing national human rights institutions that do not follow the Paris Principles, for example, will continue to decline until they are eliminated.

4.3. The status and independence of national human rights institutions will be increasingly improved. Whether national human rights institutions can really play a role in the promotion and protection of human rights and whether the effectiveness of their functions can be improved depend, to a large extent, on ensuring their status and independence. Only by improving the status of human rights institutions so that they are at least 'equal' to other

state bodies can effective oversight and advice be exercised without interference from the legislative, executive or judicial branches in the performance of their duties.

To improve the status and independence of human rights institutions, we should consider the following aspects. First, establishing legal basis, a mode should be taken where the constitutional provisions are regarded as a principle with special legislation should be in place based on constitutional provisions at the same time. The constitutional authority is sufficient to safeguard the status of human rights institutions, while special legislation provides for the organization of the human rights institution, its personnel, funds, and other matters and also protects its functions. The establishment of human rights bodies in the form of presidential decrees and other administrative orders makes it difficult to ensure that the functions of the human rights institutions are not only consistent with the Paris Principles but will not be abandoned in practice. Second, regarding the structure, human rights institutions should not be attached to any other institution and should not be subject to legislative, administrative, or judicial authority. Human rights institutions should be directly accountable to and should also report to the parliament. If the institutions are attached to one of the three branches of the government or if they take orders from an executive head or a judicial officer, this will inevitably have a negative impact on the independence of the human rights institutions. Third, regarding personnel and funding issues, elections, appointments, and dismissals of personnel should be based on legal procedures and they should be elected or removed by the parliament. Budgets should be considered and approved by the parliament not by the relevant administrative departments.

4.4. The enforcement of national human rights institutions will continue to be strengthened. National human rights institutions have an independent status and do not belong to the legislative, executive, or judicial branches and therefore, do not have corresponding legislative, executive, or judicial powers. This guarantees the functioning of national human rights institutions for the promotion and protection of human rights only through special authorization of the law, giving them power to cooperate with other state organs. It is because of the independent status of national human rights institutions and the nature and quality of their functions that there is a need to empower national human rights institutions to carry out their mandates so as to ensure the effectiveness of those functions.

Addressing complaints is the core function of many national human rights institutions, most of which involve cases of human rights violations or the protection of human rights by state organs. In other words, the respondent is often a state organ or other official institution because it is clearly stated in many countries that disputes between individuals are inadmissible. As a respondent, that is, the party violating human rights, the relevant state organs in the field have the appropriate state power to exercise their duties. These organs are in a stronger position compared with the complainant and the human rights institution. It is therefore imperative that human rights institutions should be given a certain level of enforcement power in order to counterbalance the state organ violating human rights. Thus, the Paris Principles require the state to give quasi-judicial power to national human rights institutions. In practice, relevant legislation in many countries has stipulated to the mandatory and binding power of human rights institutions and confers on them the right to cooperate with other legally obligated state organs.

The three main functions of national human rights institutions are addressing complaints, monitoring and proposal, dissemination and education, which are presented from

the strongest function to the weakest according to the standards of enforcement. The function of addressing complaints must have enforcement power to ensure performance due to specific content. The functions of monitoring and proposal are generally non-binding as national human rights institutions only have the power to make suggestions and adopting such suggestions depends on the decisions of the relevant state organs. In practice, however, this function of the human rights mechanism has increasingly been showing a mandatory dimension. For example, faced with advice from human rights institutions, the relevant state organs must provide, within a certain period of time, a written reply to illustrate the corrective measures taken and the results achieved. Reasons for refusal should also be stated in writing. If the advice from human rights institutions is ignored, this should be reported to the parent institutions through supervision, or they should report to parliament on implementation. The compulsion of overseeing and advisory functions of national human rights institutions are still weaker than the functions related to addressing complaints due to different content, but are also constantly strengthening.countries have adopted annual plans or programs to enhance their programmatic pertinence, continuity, and stability. All of these are compatible with the trend towards increasing the enforcement power of national human rights institutions.

5. Summary

It is very important to clarify the relationship between the traditional three branches of government and national human rights institutions and the performance of exercising their functions to promote and protect human rights. Due to the openness of national human rights institutions provided by international instruments and different national circumstances, the type of the national human rights institution, the specific modalities of their functions and their relationships with other state organs vary significantly. The prohibitive provisions of national human rights institutions are, in fact, a direct limit to the functions of human rights institutions in some respects and a dividing line between human rights institutions and other state organs. These prohibitions are clearly defined and are fundamental, which also indicate the direction and trends of the development of national human rights institutions. The independent exercise of the functions of national human rights institutions towards the promotion and protection of human rights indicates a complementary, cooperative, and supervisory relationship with other state organs that jointly promote and protect the development of human rights.

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