

SAg.b.1

국가인권기구 자료집

1998. 3

민주사회를 위한 변호사모임 국제연대위원회

국가인권기구 자료집

1998. 3

민주사회를 위한 변호사모임 국제연대위원회

국가인권기구 자료집 목록

- * 국가인권기구를 만들자 - 조용환(변호사) 참여사회 98년 1-2월호
- ✓ * 인권전담 국민기구는 왜 필요한가 - 브라이언 버디킨(유엔인권위원회) 계간 사상 96년 겨울호
- ✓ * 인도의 국민인권위원회 - 강 경선(방송대 법학과) 계간 사상 96년 가을호
- ✓ * 호주의 경험과 한국의 전망 - 곽노현(방송대 법학과) 인권하루소식 98년 12-3월 특집
- * A handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights (UN Centre for Human Rights, 1995)
- * Checklist for the evaluation of the work of National Human Rights Commissions(NHRC) by AI
- * Human Rights Commission of Sri Lanka 법률 1995
- ✓ * 한국의 인권보장과 증진을 위한 국민인권기구 - 김 한균(민주주의법학연구회) ⇒ 주발계위서 꼭 읽은 것

[자료]

- ✓ * 국민인권기구의 구조와 역할에 관한 지침 (Guidelines for the structure and functioning of national institutions, 1978)
- * 인권보장 및 증진을 위한 국민인권기구의 지위와 역할에 관한 원칙 (Principles relating to the status and functioning of national institutions for protection and promotion of human rights, 1992)
- * 국민인권기구 관련 민변소장자료 리스트

국가인권기구를 만들자

조용한
변호사

세 계화의 폭풍 속에서 온 나라를 뒤 흔들고 있는 경제위기는 우리 사회가 나아가는 방향과 그것을 떠받치고 있는 가치를 근본에서부터 다시 검토하도록 강요하고 있다. 그러나 한국사회의 과거와 현재를 반성하고 미래를 모색하는 진지한 토론의 장이 되어야 했던 대통령선거는 우리의 공동체를 절망 속에서 견져올릴 전망을 제시하는 데 실패했다.

온갖 사람들의 수많은 진단과 처방이 난무했으나 우리 사회는 서서히 혹은 급격하게 무너져내리고 있다. 초현대식 장비와 화려한 상품들이 부실한 기초 위에 덩지덩지 타고 앉았던 삼풍백화점처럼. 벼랑 끝에 몰려 있는 우리 사회가 다시 일어설 수 있는 희망의 씨앗은 어디서 찾아야 할 것인가.

국제사회의 인권보장체제와 그 한계

희망을 찾아내는 첫걸음으로 나는 국가인권기구의 설립을 제안한다. 국가인권기구(National Human Rights Institution)란, 헌법 또는 법률에 따라 인권의 보장과 향상을 임무로 하고, 시민사회의 전면적인 참여를 통하여 구성되며, 입법·사법·행정부로부터 독립하여 기능하는 새로운 개념의 국가기구를 말한다. 말하자면 사람을 사람으로 존중하는 것이 국가의 궁극적인 목표임을 확인하고 국가체제를 그런 방향으로 움직여가는 계기로 만들어지는 것이 바로 국가인권기구다. '새로운 개념'의 국가기구라고 했듯이 이 기구는 인권문화를 길러내고 인권의 관점에서 법률과 제도, 정책과 관행을 점검하게 하는 국가적인 '반성장치'로서, 기존의 국가체제가 가진 본질적인 한

인권의식과 제도는 여전히 후진적이고, 국제인권조약은 그저 외교적 장식물에 불과한 나라. 그런 이 땅에 국가와 시민사회가 참여해 국가인권기구를 만드는 것은 천박한 인권의식을 바로세우고, 인권과 민주주의의 가치를 재확인하는 길일 것이다.

계를 극복하고자 하는 것이다. 국가인권기구는, 1970년대부터 본격적으로 시작되어 1992년 유엔 총회에서 채택한 '인권보장과 증진을 위한 국가인권기구의 지위와 기능에 관한 원칙(Principles relating to the status and functioning of national institutions for protection and promotion of human rights)'으로 일단락된 논의의 산물이다. 그 결과 1993년 세계인권회의에서 채택한 '비엔나 선언과 행동계획'에서는 한국을 포함한 모든 참가국이 자기 나라의 실정에 맞는 국가인권기구를 설치하고, 그 기능을 강화하기로 약속했다. 1993년까지 35개국이 국가인권기구를 설립했고 그 숫자는 점점 늘어나 국제사회의 대세가 되고 있으며 많은 나라에서 인권보장에 큰 기여를 하고 있다. 국내에서는 아직도 생소하지만 인권단체협의회가 1993년 이래 국가인권기구의 설치를 요구해왔고 법무부가 1996년 국정감사에서 이 기구의 설치를 검토하겠다고 답변한 일도 있으며 이번 대통령선거 과정에서 김대중 후보가 공약으로 제시하는 등 점차 관심

이 높아지고 있다. 나라에 따라 차이는 있지만 국가인권기구가 하는 일은 대체로 다음과 같다. 인권 상황과 인권에 관련된 법률과 제도, 정책과 관행의 연구와 조사, 인권문제와 관련하여 정부·국회·법원 등 국가기관에 의견을 제출하고 개선안을 제안, 국제인권기준에 맞게 국내법과 관행이 이루어지도록 노력하고 인권조약에 따른 구체적 조치의 이행을 지원, 인권교육과 홍보를 통해 인권의식을 고취하고 시민사회와 협력, 유엔, 지역인권기구, 다른 나라의 인권기구와 협력, 인권침해에 대한 조사 및 평화적인 해결과 권리구제를 위한 적절한 조치.

이와 같은 새로운 국가기구가 필요하다는 데 국제사회가 합의한 것은 기존의 국가 및 국제체제가 인권을 보장하는 데 근본적인 한계를 가지고 있기 때문이다.

과거의 논의에 따르면 인권은 각국의 국가기구와 유엔을 중심으로 한 국제체제에 의해 보장된다. 국가차원에서는 기능별로 나누어져 있는 국가기관 사이의 견제와 균형에 의해 권력남용을 예방하고 침해된 인권을 구제하게 되어 있다. 다원적이고 책임 있는 의회, 의회의 권위를 존중하는 행정부, 독립적이고 공정한 사법부가 서로 견제하게 한다는 권력분립사상은 실제 민주주의의 발전과 인권보장에 획기적인 공헌을 했다.

여기에 덧붙여 국제사회가 '위로부터' 국가권력을 견제함으로써 인권을 보호한다. 국제인권제도도 인류가 '극단의 20세기'를 겪으며 깨달은 산물이다. 한 나라의 인권침해는 그 나라를 분열시키고 구성원을 희생시키는 데서 끝나지 않고 국제분쟁의 원인이 되며 인류 모두에게 재앙을 줌으로 인권

과 평화를 보장하기 위한 국제체제가 필요하다는 것이다. 그 내용으로 유엔을 중심으로 한 국제기구와 유럽, 미주, 아프리카의 지역인권기구 등 인권보장을 위한 체제를 발전시키는 한편 세계인권선언과 국제인권규약을 비롯하여 고문, 인종차별, 여성, 어린이, 난민, 외국인노동자 등 각 분야의 국제조약과 다양한 인권기준을 만들어왔다.

그런데 기존의 제도는 인권침해의 사전 예방기능이 미흡하다는 결정적인 약점을 가지고 있다. 침해된 인권의 사후구제도 복잡한 절차와 시간과 비용을 요구하기 때문에 비효율적일 뿐 아니라 사회적 약자와 심각한 인권침해에 노출되어 있는 사람일수록 제도에서 소외되기 마련이다. 국제기구의 판단과 권고를 무시해 버리는 인권침해국들에 대하여 마땅한 강제수단을 아직 마련하지 못하고 있는 국제인권제도의 문제점 역시 심각하다.

국가인권기구는 인권의 '사전경보장치'

국가인권기구는 국제인권기준과 어긋나는 법률과 제도, 관행을 개선함으로써 인권침해와 국제분쟁으로 번질 수 있는 원인을 사전에 평화적으로 해결함으로써 인권에 관한 '사전경보장치'의 역할을 한다. 자기 권리를 지킬 능력이 없는 약자들에게 국내법과 국제법을 통털어 '비공식적이고 빠르게

효과적이고 비용이 적은 해결책'을 강구해 주며 인권단체들과 협력하여 사회적으로 중대한 의미를 가지고 있지만 피해자가 분명치 않은 문제들을 해결하는 데 초점을 맞춘다. 또 국가권력의 담당자들과 시민들에게 인권을 교육하고 인권문화를 고취함으로써 민주주의와 인권보장을 위한 밑바탕을 건설하는 일 역시 기존의 국가기구가 감당하지 못하는 것이다.

요컨대, 국가인권기구는 인권의 관점에서 국가기구를 감시하고 견제하는 동시에 인권의 사각지대를 줄여나감으로써 그들의 기능을 보완하는 역할도 맡고 있다. 인권의 관점에서 제도와 정책, 관행을 체계적으로 검토하고 개선하게 함으로써 국가기구의 경직된 권력적 속성을 부드럽게 하고 국가와 시민사회 사이에서 가교 역할을 하는 새로운 개념의 국가기구인 것이다.

물론 이 기구가 설치된다고 하여 모든 문제가 해결되는 것은 아니다. 이 기구는 국가를 더욱 인권보장적인 체제로 발전시켜 나가는 촉매 역할을 할 수 있을 뿐이기 때문이다. 그런 반면 실질적 권한이 없는 기구를 만들어내 인권상황을 호도하는 정치적 장식물로 이용하거나 인권운동의 동력을 떨어뜨리는 데 악용할 위험도 없지 않다. 권한이 줄어들까 염려하는 검찰, 경찰, 안기부, 법원 등 권력기관의 견제와 비협조로 제 역할을 다하지 못하게 될 수도 있고 오

늘날 유행하는 '작은 정부론'에 역행한다는 비난을 받을지도 모르겠다.

그럼에도 불구하고 한국은 국가인권기구가 절실히 필요한 나라다. 지금 무능하고 부패한 정치와 경제권력은 사태를 인식하여 올바른 방향으로 해결해 나갈 수 있는 능력을 잃어버린 지 오래이다. 인권의식과 제도는 일제 식민통치와 한국전쟁을 치르던 수준에 머물러 있고 국제인권조약은 국민생활과 아무 관련이 없는 외교적 장식물에 지나지 않는다. 앞으로 진행될 통일과정에서 일어날 수도 있는 대규모 인권침해를 막고 평화적으로 관리하는 문제와 이를 위하여 국내외 국제사회의 협력체제를 건설하는 문제는 아직 시야에도 들어오지 않고 있는 실정이다.

이렇게 볼 때 시민사회의 참여를 통하여 인권기구를 설치함으로써 기대할 수 있는 제일 큰 성과는 정부당국과 우리 사회의 천박한 인권의식을 바로 세우는 것이라고 생각한다. 국민의 선거에 의하여 대통령을 뽑는다는 사실과 정치, 경제적 민주주의의 실현, 그리고 모든 인권의 보장을 동일시하고 인권의 천국이 이루어진 것처럼 생각하는 어처구니없는 망상을 깨지 않는 한 한국사회가 더 이상 앞으로 나아가는 것은 불가능할 것이다. 위기는 단지 문제가 많다는 데서 오는 것이 아니라 문제가 있는 것을 알려고 하지 않는 데서 비롯되는 법이다.

갈갈이 찢어진 우리 사회가 공동체의 통합을 유지하면서 난마 같은 어려움들을 평화롭게 풀어가기 위해서는 인권과 민주주의의 가치를 재확인하고 끊임없이 제도와 관행과 정책을 개선해 나가지 않으면 안 된다. 국가인권기구 설립을 제안하는 뜻은 기존의 국가제도에 단순히 또 하나의 기관을 만들어 덧붙이지는 것이 아니라 시민사회와 국가가 모두 참여하여 우리 사회가 지향해야 할 가치와 나아갈 방향을 진지하게 모색하고 합의점을 찾아내는 계기를 만들자는 것이다. 21세기가 눈앞에 다가온 가운데 새 정권을 맞이하는 1998년은 국민적인 참여와 토론을 통하여 국가인권기구를 설립함으로써 '좋은 정부'를 향한 첫 걸음을 떼는 한 해가 되기를 기대한다.

인권전담 국민기구는 왜 필요한가

브라이언 버디킨

1. 머리말

인권문제는 오늘날 국제관계에서 핵심적인 쟁점이다. 1948년 '세계인권선언'이 채택된 이래로, 인간의 삶에 관한 포괄적 규칙을 제정하는 국제기구가 발전해 왔다. 그 후 설립된 국제적, 지역적 인권기구의 네트워크는 이들 국제기구들이 보다 효율적인 업무수행을 하도록 보조하는 데 중점이 두어졌다. 1993년 비엔나에서 열린 세계인권대회는 인권에 관한 국제협력의 중요성을 다음과 같이 표현했다.

브라이언 버디킨(Brian Burdikin): 제네바 소재, 유엔 인권위원회 인권전담 국민기구, 지역조정 및 예방전략 특별자문관(원). 1986~94년 오스트레일리아 인권위원회 회장 역임. 주요 저술로는 "Human Rights Commissions" 등이 있다. 여기에 실린 그의 논문, "National Human Rights Commissions: National and International Perspectives"를 서울대 대학원 사회학과 석사과정 구성우가 우리말로 옮긴 것이다.

우리 인권의 현주소? 인권의식과 제도를 바로세워야 한다. 사진은 지난 여름, 민기협 주최 '양심수 석방을 위한 하루 굶욕 체험'



세계인권대회는 인권진담 국민기구의 중요성과 긴밀적인 이합을 제차 강조하고자 한다. 국민기구는 특히, 해당 정부에 대한 조언, 인권침해 방지, 인권정보의 유통과 교육 등을 통해 인권의 보호와 촉진에 기여한다. 우리는 국민기구의 위상과 각 나라의 특수성에 잘 부합하는 국민기구의 틀을 선택하는 것이 개별 국가의 고유 권한임을 인정하는 가운데, 국민기구의 설립과 강화를 장려한다.¹⁾

국제적, 지역적 인권기구의 네트워크는 그 자체로 중요하고 강화되어야 하지만 인권보호의 구체적인 임무는 기본적으로 개별 국가의 책임하에서 진행될 수밖에 없다. 즉, 그것은 실질적으로 국내적인 문제이다. 지구적, 지역적 체계의 한계는 현실적으로 평가되어야 한다. 가령, 유럽 인권법정과 미국 인권위원회는 인권침해에 관한 경미한 부분 이상을 다룰 수 없을 것이다. 그리고 국제인권문제 연구자들은 문제점을 지적하는 것 이상의 거의 아무런 조치도 취할 수 없다. 따라서 개별 국가가 인권문제에 관하여 어느 정도 효과적으로 책임을 질 수 있는가는 국내 제도들의 능력에 크게 의존할 것이다. 다원적이고 책임있는 의회, 의회의 권위를 존중하는 행정부, 그리고 독립적이고 공정한 사법부의 존재는 이러한 측면에서 최소한의 요구이다.

이러한 기본적인 '제도들'은 명백히 다른 기제들의 도움을 필요로 한다. 인권문화의 발전은 국내적으로 활력있는 시민사회의 존재에 의존한다. 시민사회는 공동체 집단들을 활성화시키며 다양성을 인정하고 고무한다. 또 자유롭고 책임있는 언론을 발전시켜 간다. 정부와 시민사회 영역 사이의 어딘가쯤에 위치하는 중요한 기제가 있다. 이는 개인의 자유와 자유권을 보호하는 특별히 유용한 도구인데, 이른바 '인권진담 국민기구'(National Human Rights Institutions)가 그것이다. 이 용어는 인권의 보호와 촉진이 라는 특수한 목적을 위하여 법이나 정부를 통해 설립되는 기구를 지칭하기 위해 일반적으로 사용된다. 이러한 국민기구의 예로서 옴부즈맨 제도와 인권진담 국민위원회 등과 같은 다양한 기구들이 있다.

이 짙막한 논문은 국민기구의 일종인 '인권진담 국민위원회'(National

Human Rights Commissions)에 초점을 맞춘다. 이에 대한 개념 정의는 2절에서 내려질 것이다. 3절에서는 국민위원회의 업무를 이론적이라기보다는 여러 나라들에 대한 실증적인 사례 연구를 통해 규정하고자 한다. 4절에서는 국민위원회의 업무 중 특히 최근 각광받고 있는 군사부문에 대한 교육기능을, 군사력의 역할 변화와 연결시켜 좀더 상세히 논의한다. 인권진담 국민위원회와 법원이 맺는 여러 가지 관계가 5절에서 논의될 것이고, 6절에서는 효과적인 국민위원회의 기본 상이 제시될 것이다. 7절에서 인권진담 국민위원회와 관련된 최근의 국제적인 논의들 소개하고, 끝으로 8절에서는 아시아-태평양 지역에서 현재 진행되고 있는 국민기구/국민위원회의 발전상에 관해 언급하고자 한다.

2. 인권진담 국민위원회란?

일반적으로 국민위원회는 시민적, 정치적 권리의 보호 및 차별 방지 등의 광범위한 이슈들을 다룬다. 몇몇 위원회는 공적, 사적 영역에서 인권 문제에 관한 사법권을 갖고, 그밖의 위원회들은 사법권을 갖지 않은 체로 다만 공적 영역에서 발생하는 여러 가지 인권문제들을 해결하고자 한다. 국민위원회는 경제적, 사회적, 문화적 권리들의 보호와 촉진에 주력하게 된다. 각각의 특수한 위원회의 정확한 권한과 기능은 위원회의 설립근거가 되는 헌법조항, 법령 또는 명령에 규정되어 있다. 몇몇 위원회는 국내 헌법에 규정된 권리를 보호하는 데 업무가 제한된다. 그러나 점점 더 많은 위원회들이 국제인권조항이나 다른 국제조항들이 규정하는 인권을 보호하고 촉진하기 위해 노력하고 있다. 파푸아뉴기니 등과 같은 연방국가에 설립될 예정인 여러 위원회들은 국내 헌법에 의해 인정될 뿐만 아니라, 관련 국제기구들 사이에서 인정되는 인권에 대한 보호의 책임을 떠맡을 것이다.

히 법(humanitarian law)에 근거하여 여러 가지 교육을 받아 왔다. 그러나 인권이라는 보다 넓은 원칙에 근거하여 적절한 훈련을 받아본 적은 거의 없다. 본질적으로 인도주의적 법률은 전시 상황에서 제한된 인권개념을 적용한다. 필자의 경험으로는 이러한 협소한 인권개념과 보편적 인권개념 사이의 차별점은 군사부문 종사자들이나 방위, 안보 부서에서 일하는 민간사무원들 사이에서 결코 이해되지 않고 있다.

많은 나라에서 군사력의 역할은 급속히 변화하고 있다. 첫째, 방위, 안보력은 점차 본질적으로 '국내 정책 수행과정'에서 빈번히 사용되고 있다. 최근에 일어난 심각한 인권침해 사건 중 상당수는 적어도 부분적으로는 군대와 준군사력이 시민들에 대한 통제 그리고 정책의 원활한 집행을 위하여 과도한 폭력을 사용한 결과라고 할 수 있다. 인권의 관점에서, 이러한 상황은 지양되어야 한다. 그러나 실제로 시민들에 대한 군사력의 남용은 앞으로 끊이지 않을 것으로 예측된다.

둘째, 방위, 안보력은 비용절감을 피하는 정부에 의해서 — 홍수, 지진, 태풍, 산불 등의 — 재난구호 또는 재난방지의 목적으로 빈번히 활용되고 있다. 이와 같은 예들이 아시아-태평양 지역에 적지 않다. 많은 경우에 재난구호와 방지에 동원되는 병사들은 인도주의적인 법률을 통하여 어느 정도의 교육은 받았다. 게다가 아주 극소수의 경우에 그들은 인권에 대한 어느 정도의 교육도 받은 것 같다. 그러나 그들은 일정 기간 동안 시민들과 필연적으로 접촉하게 되므로, 전사를 위한 인도주의적 법률의 원리가 아니라 인권에 관한 근원적인 원칙을 준수해야 한다.

셋째, 아시아-태평양 여러 나라의 군대가 국제 감시업무와 평화유지 활동에 점점 더 관여하게 된다는 것은 일반적인 현상이다. 이러한 상황 역시 대부분의 경우에 전시 규정이나 인도주의적 법률이 적용되는 문제라기보다는 일정 기간 시민들과 대면한다는 의미에서 보편적 인권 원칙과 관계된다. 그러나 대부분의 병사들은 기본적인 인권에 관해 거의 혹은 전혀 교육받지 못했다.

넷째, 군이 전통적으로 관여해 왔던 갈등상황이 종식됨에 따라 병사들의 역할은 국토방위의 영역으로부터 '국내의 안전'에 관련되는 영역으로

직접 옮겨지고 있다. 많은 경우에 군은 단지 행사보시만 훈련되었을 뿐이지 새로운 역할을 직접 수행할 수 있도록 재교육받지 못했다.

인권의 보호와 촉진에 책임을 지는 국민위원회는 이와 같은 방위, 안보, 군사력의 변화와 관련하여 대단히 중요한 역할을 수행할 수 있다. 아시아-태평양 지역의 정부와 국민위원회 관계자가 함께 참여한 최근의 모임에서는 방위, 안보 관계자들이 인권에 관한 적절한 교육을 받지 못한다면 인권을 실질적으로 존중하기 어려울 것이라는 일지된 합의가 있었다. 이는 기존의 군위 역할, 문화와 탈냉전 시기에 개인의 권리를 존중하고 그에 대해 훈련하는 것 사이에는 큰 차이가 있다는 중요한 인식에 근거한다.

필리핀과 인도와 같은 여러 아시아 국가의 인권전담 국민위원회는 이미 군의 교육에서 중요한 역할을 담당하고 있다. 필리핀 국민위원회는 최근에 약 5만여 명의 군, 정책 관계자들에 대한 교육을 진행했다. 이러한 훈련은 다만 인권의 맥락에서만 중요한 것이 아니라 — 최근 몇 개월의 경험을 통해 알 수 있는 것처럼 — 그것이 정부에 대해 '효과적인 비용효과'를 낳는다는 면에서 역시 중요하다. 즉 정부가 시민들의 인권을 침해했을 경우, 정부가 시민들에게 보상해야 하는 상황을 막을 수 있다는 것이다.

5. 국민위원회와 법원의 관계

국민위원회가 효율적으로 기능한다 하더라도 그것은 결코 사법부의 대체물이 아니다. 그러나 최근 선진국에서조차 실제로 법원은 높은 비용부담 때문에 많은 인구가 접근하는 데 용의치 않다는 인식이 확산되고 있다. 심지어 인권문제에 관한 실질적인 법체계를 갖추고 있는 나라에서도 인권침해를 고발하는 데 돈을 여유있게 낼 수 있는 사람은 그리 많지 않다. 따라서 어느 나라든 인권고발에 대한 해결책을 제시하는 데 비용이 적으며, 빠르고 효과적인, 그리고 비용부담이 작은 기제가 강력히 요구되고 있다.

몇몇 선진국에 설립된 인권전담 국민위원회가 효율적으로 이러한 요구를 만족시키고 있다는 사실은 고무적인 일이다. 많은 국민위원회의 유

사 사법적인 속성은 위원회가 법원에 비해 더욱 접근하기가 용이하고 고발된 문제를 훨씬 빠르게 해결할 수 있다는 것을 의미한다. 대부분의 위원회는 고발된 문제를 심의하는 데 관련 증거와 진정에 관한 기초장서로운 규칙들을 배제한다. 앞서 언급된 '화해와 조정의 원리'는 이러한 맥락에서 진행된다. 거추장스러운 규칙들을 배제하는 그런 절차는 국민에게 적대적이고 종교재판식과도 같았던 전통적 법절차보다도 저렴한 비용효과를 갖는다. 또한 그럼에도 불구하고 때론 법원의 장식물조차 혐오했던 소외된 국민들에 대해 '친밀한 느낌'을 부여한다. 덧붙여, 법원과는 달리 국민위원회가 인권침해에 관한 고발을 화해의 원리를 통해 해결하려는 것은 문화적으로 대단히 적절한 방법이라고 할 수 있다.

6. 효과적인 국민위원회의 상

각 나라의 특수성에 가장 잘 부합하는 위원회의 틀을 선택하는 것은 개별 국가의 권리이다. 국가는 위원회를 설립하는 데 있어 정치, 경제, 문화 등을 포함하는 다양한 요소들을 고려해야만 한다. 이러한 맥락에서 보편적이고 단일하게 적용 가능한 국민위원회의 규준은 존재하지 않는다.

그러나 지난 몇 년의 경험을 통해서, 우리는 '효과적인 위원회의 평가 지표'를 제시할 수 있다. 다음의 지표들은 그간 널리 수용되어 왔고, 따라서 위원회와 그것의 발전을 평가하는 데 유용한 도구라고 할 수 있다.

1) 독립성

국민위원회는 독립적이어야 한다. 물론 이 독립성이 '절대적'이 된다면 일정한 정도의 제약이 필요하다. 하지만 이러한 제약이 업무를 효과적으로 수행하는 국민위원회의 능력을 방해해서는 안된다. 위원회는 정부 또는 어떤 공적, 사적 제도가 그것의 업무에 개입하거나 방해할 수 없다는 의미에서 법적, 정치적 자율성을 가져야 한다. 또한 위원회는 자원활동과 재정보고에 대해 자율적으로 검토, 평가함으로써 자체 제정에 대한 책임

을 지야 한다. 명백히 어느 위원회에서든 위원들의 독립성이 보장되어야 한다. 개인적이거나 집단적으로 행동하는 모든 위원들은 행위의 독립성을 승인받고 유지시켜야 한다. 위원들이 임명되고 해임되는 방법 및 절차는 이러한 측면에서 대단히 중요하다.

2) 적절하고 명백히 규정된 권한

효율적인 국민위원회는 명확히 규정된 사법권을 가져야 한다. 위원회에 부여되는 법적 권한은 주어지는 업무에 비례해야 한다. 관련 증거와 증인을 한데 모으는 권한을 부여받지 못한 채 고발에 대한 심의권을 갖는다는 것은 무용한 일이 될 것이다. 조심스레 규정된 위원회의 권한은 음부즈맨 제도나 각종 재판소 등이 갖는 여러 가지 사법권과의 갈등 혹은 권한 중복을 피하는 데에 기여하게 될 것이다.

3) 다원적이고 대표성이 있는 인적 구성

위원회를 구성하는 여타의 조건들 중에서 무엇보다도 다양성이 중요하다. 효율적이고 신뢰받는 국민위원회는 시민사회의 다양성을 적절히 대표하도록 구성되어야 한다. 가령, 단지 남자들로만, 혹은 특수한 종족, 종교그룹에 의해서만 위원회가 구성된다면 사회의 다양성은 무시될 것이며, 위원회의 공정성은 인정되기 어려울 것이다.

4) 접근 가능성

인권전담 국민위원회는 권리를 보호하고 촉진하려는 개인들과 집단들, 다시 말해 위원회의 '고객'이 충분히 접근할 수 있도록 개방적이어야 한다. 이러한 측면에서 다음과 같은 인식이 필수적이다. 즉, 도움이 필요한 '고객' 중의 상당수는 공식적인 이용절차를 활용하는 데 어려움을 느낄 것이라는 인식이다. 따라서 효율적인 위원회는 가장 상처받기 쉽고 약한 사람들의 입장에서 도움을 제공하는 선진적 이니셔티브를 발전시켜야 한다.

국민위원회는 물론 물리적으로도 접근이 쉬워야 한다. 가령 인도나 오

스트레일리아와 같은 여러 인방국가들은 위위회의 지부를 지방에 모두 설립함으로써 신적 집단의 용이성을 크게 향상시키고 있다. 이러한 '탈집중화'가 실현되기 어려운 곳에서는 다양한 지역에서 일하는 현지 사무원을 고용할 수 있을 것이다. 또한 절차에 대한 유연한 규칙 적용이 위원회에 대한 집단의 용이성을 향상시킬 수 있을 것이다.

5) 비정부기구(NGOs)와의 협력

모든 효율적인 국민위원회는 인권 관련 비정부기구들과 밀접한 관계를 형성시켰고 또한 유지하고 있다. 비정부기구는 국민위원회에 대한 활력있는 정보자원이며, 때로는 특히 교육과 훈련의 영역에서 매우 효과적인 파트너이기도 하다.

여러 인방국가에 이미 정착되었고, 파푸아뉴기니와 같은 나라들에서 곧 제정될 예정인 국민위원회 헌장은 비정부기구에 의해 수행되는 중요한 역할을 포괄적이고 함축적으로 인정하고 있다. 그리고 비정부기구와 관련 위원회의 협력을 장려하고 있다. 최근 아프리카와 아시아에서 인권위원회와 관련되는 두 개의 지역모임이 각기 개최되었는데, 참석한 모든 국민기구 대표들이 비정부 공동체와의 효과적인 협력의 중요성을 역설했다.

최근 이러한 측면에서 중요한 현상이 있다. 즉, 국민위원회와 비정부기구의 상호작용의 효과가 독립적인 국민위원회를 설립하려는 여러 정부에 의해 인정되고 있다는 것이다. 일각에서는 인권보호에 있어서 활력있는 비정부 부문이 수행해야 하는 중심적 역할이 위원회의 설립을 통해 최소화되거나 훼손될 수도 있다는 오해가 존재한다. 그러나 국민위원회와 비정부기구의 연계 메커니즘이 이런 식으로 정착된다면 그러한 오해는 불식될 수 있을 것이다.

6) 충분한 자원

충분한 인적 자원과 적합한 예산은 인권위원회의 효율적인 작동을 위한 필수 전제조건이다. 따라서 우선적으로 이러한 문제에 대한 보증이 위원회

체내된 이래로 짧은 기간 동안에, 인권헌장을 갖춘 국민기구가 이러한 지위보다 특히 아시아 지역에서 급속히 발전해 왔다.

아시아-태평양 지역에서 국민기구와 관련된 최근의 발전은 다소 거친 구분이지만 세 가지 유형으로 나뉜다. 그 유형은 최근 국민기구의 설립을 위하여 법안의 통과를 고려하고 있는 국가들(에티오피아, 네팔, 파푸아뉴기니, 스리랑카 등), 최근 국민기구를 설립한 국가들(인도와 인도네시아), 그리고 아시아 국민기구를 강화하고 있는 국가들(벨리자와 오스트레일리아)이다.

2년 전에 인도와 인도네시아에 설립된 새로운 인권전담 국민위원회는 대단히 특징적이며, 두드러지게 발전하고 있다. 아시아의 복잡성 및 근원적 차이와 관련한 최근의 논의에서 주목해야 할 점이 있다. 즉, 이 두 국가들이 세계에서 가장 인구가 많고 문화적으로 다양하며 지형학적인 특이성을 갖는다는 사실이다. 그러나 그럼에도 불구하고 두 나라의 경우, 국민위원회는 인권에 관한 깊은 이해를 돕는 데 크게 이바지하고 있다.

9. 결 론

정직하게 말한다면, 독립적인 위원회를 가장 의미있게 만드는 것은 역시 인권 실현에 구체적으로 공헌하는 위원회 자체의 능력이다. 결코 민주주의는 그 자체가 인권보호를 보증하지 않는다. 이는 그간의 민주주의의 역사가 웅변하는 바이다. 법률가들이 선호하는 인권에 관한 헌법적인 규정 역시 현실적으로 권리가 빈번히, 극심하게 억압되는 것을 막는 '보증자'가 되기는 어렵다.

그러나 만약 인권을 보호하고 그것의 침해를 방지하는 데 적절한 권한을 갖는 독립적이고 자율적인 국민위원회 혹은 유사기구가 존재한다면, 정부나 헌법 그리고 법원이 해결하기 어려운 많은 부분이 극복될 수 있을 것이다.

마지막으로 인권전담 국민위원회의 장점을 요약해 보면 다음과 같다. 먼저, 인권전담 국민위원회는 많은 구체적인 업무를 담당함으로써 '인권

의 실행장면에 수복되어야 한다. 자원의 부족은 위원회의 효율성을 위태롭게 할 뿐 아니라 그것의 신뢰성도 잠식할 수 있다. 위원회를 설립한 이후에 적절한 자원 배정에 실패하는 정부의 태도는 분명히 비판받아야 한다.

7. 국제적 차원

서론에서 이미 언급된 것처럼 인권전담 국민기구의 한 유형인 인권전담 국민위원회와 그밖의 유사 기구들은 현재 국제적인 네트워크를 형성하고 있다. 1991년에 국민위원회 대표자 모임이 파리에서 열렸다. 이 모임은 최종적으로 국민위원회를 포함하는 여러 국민기구의 설립과 그것의 효율적인 기능을 권고하는 '국민기구에 관한 파리 원칙'(Paris principles on National Institutions)을 제시하였다. 이 원칙은 1993년 유엔 총회에서 공식 승인되었다. 그 해는 마르 비엔나 세계인권대회에서 인권을 보호하고 촉진하는 국민기구의 중요한 역할이 강조되었던 해이기도 하다.³⁾

1995년에 유엔 인권위원회는 사무총장으로 하여금 국민위원회의 설립과 강화에 대한 지원을 요청하는 회원 국가들을 우선적으로 고려하도록 요구했다(CHR 해결책). 따라서 유엔 인권고등자문관은 위원회의 설립, 강화를 위해 회원국가에 대해 지원하는 일을 가장 중요한 업무로 여기고 있다.

8. 국민기구/ 국민위원회의 최근의 발전상:

아시아-태평양 지역의 경우

분명, 아시아-태평양 지역에는 대단히 복잡적이고 문화적으로 다양한 여러 나라들이 존재한다. 그러나 인권의 보호와 촉진을 위한 인권전담 국민기구의 최근의 발전상은 — 세계인권선언, 시민적 정치적 권리에 관한 국제협약, 경제 사회 문화적 권리에 관한 국제협약에 구현된 바 — 아시아-태 지역의 문화적 다양성이 근원적 권리를 효율적으로 구현하는 데 결코 장애가 되지 않음을 보여준다. 1993년 6월 비엔나 선언과 행동강령이

이런 용어가 아무런 의미도 없는 수백만의 사람들에게 비충분적인 각종 지역, 국제기구에 비해 실질적인 도움을 줄 수 있다. 둘째로, 국민위원회는 이러한 과정을 국제조약에 규정된 표준과 일관성을 유지하면서 수행한다. 그러나 한편, 각 헌법의 특수성과 특히 — 인종, 문화, 종교 그리고 언어적 다양성과 관련된 — 지역적 조건과 문화에 의해 부각되는 근본적 차이들을 포용하는 데 주력한다. 세번째로 위원회는 이러한 일을 단지 소수의 권리만을 강력히 옹호함으로써가 아니라, 종종 압도적인 인종적, 언어적 또는 종교적 다수의 요구에 주목함으로써 수행할 수 있다. 이것은 때때로 인권이 추구하는 것과는 별개로 다만 다수결의 원리인 '투표'에 따라 정적을 피는 — 민주적으로 선출된 — 정치인들의 능력을 넘어서는 장점이 있다. 네번째, 위원회는 국내 자원에 의존하는 관료들의 인식을 넘어서 인권의 실체를 반영하는 가운데, 국제조약기구에 대한 정부 보고서가 성실히 작성되도록 감시할 수 있고 또한 그것에 상헌할 수도 있다. 다섯번째, 위원회는 진취적이며 생생하게 정보를 수집하여 내부적인 안목을 통한 비판을 수행한다. 이러한 비판은 인권침해에 관해 간혹 은밀하고 부당한 동기를 통해 비판하는 외국인들에게 확증을 주며 그들의 시각을 바꾸는 데에 크게 기여할 것이다.

이상의 그리고 그밖의 이유들로 인해, 국민위원회는 민족의 안정과 안전성을 확보할 수 있고 따라서 각종 근원적인 인권을 보호하고 촉진함과 동시에 민족의 발전에 공헌할 수 있다. 모든 나라들에서 좋은 정부와 개인의 선한 삶을 위하여 국민위원회의 설립과 발전이 촉진되어야 할 것이다.

[주]

1) '비엔나 선언과 행동강령', A/CONF. 157/24 1부 36번째 문단. 비엔나 선언과 행동강령은 1993년 6월 25일 비엔나에서 열린 세계인권대회에서 채택되었다.
2) 이번 회의 지지 많은 부분이 '국민기구의 지위에 관한 원칙'에 규정되어 있다. 이 원칙은 1993년 12월 20일, 48/134 해결책으로 유엔 총회에서 결의되었다.
3) '비엔나 선언과 행동강령' 주해 (note) 3.

인도의 국민인권위원회*

강정선
방송대 교수 / 기초법

1. 국민인권기구

1993년 6월 25일 비엔나 세계인권대회에서 채택된 비엔나선언과 행동강령은 모든 국가는 인권침해사항에 대한 효과적인 기구들을 마련해야 할 것을 요구하고 있다. 인권의 충분하고 반차별적인 시행, 민주주의와 발전을 위해서는 국제적인 기준에 전적으로 부응하는 독립적인 사법부와 검찰, 법조직업 등 일체의 기구들이 필수불가결한 것으로 인식되었다.

국민인권기구들은 민주적 정부를 위해서 반드시 필요한 것으로 보인다. 권력이 없고 특권층에 속하지 않은 많은 사람들을 위해서 국민인권기구들이 요청된다. 기존의 헌정기구들과 통치원리들만 가지고는 충분하지 않다. 소수자 집단의 사람들과 경제적, 교육적으로 미비된 사람들, 미성년자와 같이 법률적으로 미숙한 지위에 있는 국민들을 위한 별도의 인권배려기구가 필요한 것이다. 이런 맥락에서 국민인권기구의 선치가 제안된 것이다. 국민인권기구의 설치와 그의 성공을 위해서는 무엇보다도 현정부의 이에 대한 절실한 인식과 정치적 의지가 절대적으로 요청된다. 집권자측에게도 국민인권기구들이 현재의 정부를 위해서도 유익하다는 점이 이해되어야 한다. 인권과 국가발전의 간격을 매개하는 기능을 담당할 기구가 필요한 것이다. 이를 위해서 외국들의 선례와 모델에 관한 관심이나 연구가 행해져야 한다. 국민인권기구에는 첫째, 옴부즈만제,

* 원어 National Human Rights Commission를 '국가인권위원회'로 하지 않고 '국민인권위원회'로 번역한 것이다.

함께, 인권위원회가 있다.

1. 옴부즈만

옴부즈만제는 잘 알려진 바와 같이 '행정부에 대한 경비전', 혹은 '작은 사람들에 대한 호민관' 등의 뜻을 갖는 제도이다. 정부의 권력행사에 대한 민주적 통제를 할 수 있는 일련정부를 만드는 것이 옴부즈만제의 목적이다. 개발도상국에서는 정부와 관리들이 제량권을 많이 가져 권력남용의 가능성이 많다. 옴부즈만은 헌법이나 법률에 의해 설치되는 제도로서, 독립된 공무원의 지위를 가지고 의회에 책임을 진다. 그는 정부기관, 공무원 혹은 정부에 고용된 사람들에 의해서 피해를 입은 사람들의 불만이나 이견을 들어 자주적으로 문제를 조사하거나 그의 시정조치를 요구하거나 보고서를 작성할 수 있는 권한을 가진다. 일반적으로 인격이나 평판이 높은 판사나 변호사 혹은 고급관료가 옴부즈만이 된다. 그는 정당원이 될 수 없고, 항상 독자적으로 생각하고 판단할 수 있어야 한다. 의회에 제출하는 그의 보고서는 행정부의 권한남용을 진제하고 국민들의 인권을 보호하는 데 대단히 중요한 가치를 갖게 된다.

다른 한편 옴부즈만제는 국민들의 정부에 대한 근거없고, 악의에 가득차고 불공정한 비난에 대한 사전예방을 한다는 면에서 정부에게 도움이 된다. 인도의 구자라뜨주에는 록카유타(Lok Ayukta) 법률이 있는데, 이것은 1966년 10월 14일 행정개혁위원회의 제안으로 중앙에는 록팔(Lok Pal)을, 주에는 록카유타를 설치할 것을 주장하였다. 1968년부터 1989년까지 이에 관한 많은 노력이 있었으나 거의 실패로 돌아갔다. 중앙에 록팔은 설치되지 않았다. 하지만 록카유타는 몇몇 주에 설치되었다. 오리사(1970), 마하라슈트라(1971), 라자스탄(1973), 비하르(1973), 마디아 프라데쉬(1975), 웃다르 프라데쉬(1975), 카르나타카(1979), 히마찰 프라데쉬(1983), 안드라 프라데쉬(1983) 등이다.

2. 인권위원회

일반적으로 인권위원회에 대한 개념규정은 다음과 같다. "인권위원회

는 시민들이 인권을 보호하는 한편 차별로부터 보호하는 일을 한다. 위원회는 헌법준수를 위한 인권침해와 차별적 행위에 대한 개별적 사례들을 청취하고 조사하는 일을 한다. 대부분의 경우 위원은 집행부에 의해서 구성된다. 그리고 위원회는 신중심상의 독립을 유지하고 입법부에 보고하고 책임을 지는 형태를 취한다." 위원회의 성격은 그 직무의 범위와 권한을 어떻게 정하느냐에 따라 국내적일 수도 있고, 국제적일 수도 있다. 위원회를 헌법기관으로 정하는 것이 보다 유리하다. 최고법원 헌법에서 정함으로써 권한행사의 실효성담보는 물론 이에 관한 폐지 등 외부적 견제에 대하여 개정을 어렵게 하는 것이 유리할 것이다. 전통적인 인권보장기구에 대신해서 새롭게 국민인권기구를 설치하는 것이 필요하다. 예전대 상상의 법원은 소송비용, 소송지연, 장시간의 조사 등 불리한 점이 많다. 그리고 법원은 소송의 청구내용에 의해서 재판이 제한받으며 그 이상의 심사를 할 수 없다. 동시에 입증책임문제는 정말 까다롭다. 법원의 복잡한 절차규정은 많은 인권침해 사안들을 배제시키는 결과를 가져온다. 그 결과 법원은 인권과 관련해서 부수적 기능만 할 뿐이고 전 작업과정에 걸친 깊이있는 심사를 할 수 없다. 대부분의 인권위는 고발된 문제를 심의하는 데 관련 증거와 절차에 관한 거추장스러운 규칙들을 배제한다. 이는 국민에게 적대적이고 종교제판식과도 같았던 전통적 법절차보다도 저렴한 비용효과를 갖는다. 법원과는 달리 인권위는 인권침해에 관한 고발을 '화해와 조정의 원리'를 통해 해결하고자 한다.¹⁾

집행부는 자신이 초래한 불법행위에 대해서 '공공기관으로서 갖는 선입견'으로 인하여 공정한 자세를 견지하기 어렵다고 할 수 있다.

마찬가지로, 입법부의 경우 조사할 시간을 충분히 갖지 못하다는 약점이 있다. 정보에 대한 접근에서도 취약하며, 정치적으로 민감한 사안의 경우, 의원들은 조사를 기피할 것이다. 그리고 입법부에 의한 조사는 정치적으로 편파성을 나타낼 위험이 많은 것 또한 사실이다. 의회내에서 개인의 인권문제를 깊게 처리하는 것은 부적절한 일이기도 하다.

이상의 선명들은 행정부의 통제권 벗어나는 독립적인 기구들을 진심으로

1) 브라이언 비디킨(B. Burdikin), 「인권전담 국민기구는 왜 필요한가」, 개간 '사상', 93년 겨울호, 사회과학원, 205-206쪽.

요청한다. 옴부즈맨제도가 인권위원회이 설치가 특별히 필요한 이유가 바로 여기에 있다.²⁾

II. 1993년의 [인권보호법]

1. 입법의 역사적 배경

인도에서의 인권은 우선 자유권의 확보를 위한 민권운동으로 시작하였다. 민권(civil liberty)운동의 발달은 독립이전 영국식민지 통치시절로까지 소급된다. 식민지정부는 재판권이 무기한 인신을 구속하는 등의 권리침해적인 행위를 많이 하였다. 당시의 국민운동은 어느 의미로 볼 때 민권운동의 역사이기도 하였다. 1931년 이미 J.N.네루에 의한 민권연합(civil liberties union)이 결성된 바 있다. 자유를 쟁취하기 위한 한 국민운동은 간디의 영도하에 전개되었다.

그러나 정작으로 독립 후에는 국민회의당의 소극적 태도로 인해서 국민의 인권관념은 축소되는 분위기로 변화하였다. 집권 정부는 인권을 오히려 법률적 의미로 축소시켜 이해하였고 이제 권리는 헌법구조내의 작은 그릇에 담겨지게 되었다. 특히 인디라 간디 수상에 의해 취해진 1975년부터 1977년 사이의 비상조치는 국민의 기본권을 크게 위협하는 사건이었다. 이에 저항하기 위한 민권운동단체들이 조직되었고, 1980년 들어서 테러사태가 만연함에 따라 국민들은 민간테러와 국가테러의 양 측면으로부터 시달리게 되었다. 그 어느 때보다 심각한 폭력과 범죄, 전투적 상황이 20년 동안 지속되었다. 국가제도의 구심력이 이완되고 정당과 압력단체가 그 기능을 상실하게 되었을 때 민간 인권운동의 대두는 불가피한 것이었다. 조직적인 민권운동은 주로 정치범석방, 인권침해의 폭로, 국가권력의 헌법준수, 공정한 재판의 실시 등을 주장하였다. 운동이 시간을 더하면서 인권침해사태에 대한 조사와 치료의 촉진이 이루어

2) P.S. Jaswal & N. Jaswal, *Human Rights and The Law*, APJ Publishing Co., 1996, 234쪽

졌고, 1980년대에 와서는 보호적 방위적 성격의 운동이 전개되어 공익소송과 같은 개방주의적 방법이 선례되는 모습을 보였다. 1980년대에는 뭄바이 등 북부지방에서의 테러가 다발함에 따라 민방 테러리스트에 대응하기 위한 국가권력이 과도하게 폭력적인 모습을 띠기 시작하였다. 경찰의 고문과 대표적인 악법들 [국가보안법(NASA), [테러리스트 및 파괴활동방지법(TADA)과 같은 가혹한 예방적 처벌법들이 출현하였던 것이다. 카쉬미르분쟁의 고조는 국가권력의 폭력성을 더욱 부채질하였다. 카쉬미르분쟁과 관련한 인권운동단체의 활약은 인도의 인권문제를 국제화시키는데 성공을 거듭으로써 인도는 국제적인 압력을 받는 바가 되었다. 그 결과 인도 정부는 어느 정도 이제 국제적인 인권준칙에 적극적인 입장으로 변화되었다.³⁾

동시에 인권의 개념은 이제 국가권력의 남용을 배제시키는 것을 넘어 교육권, 건강권, 사회보장권, 노동자의 경영참가권, 최저임금보장 등과 같은 사회경제적 권리의 보장까지를 국가가 적극적으로 담당해야 하는 것으로 인식되는 시대에 들어섰다. 이런 시대적 요구는 개발도상국가의 국민들에게도 '새로운 인식'(new consciousness)으로 다가왔고 헌법은 이를 국가의 과제로 규정하기에 이르렀다.⁴⁾

위와 같은 시대적 배경하에서 1993년 5월 14일 국민인권위원회, 주인권위원회, 인권법원 등의 설치를 위한 [인권위원회법률안(Human Rights Commission Bill)이 의회에 제출되기에 이르렀다. 의회에 법률안이 상정되어 있는 동안, 1993년 9월 28일 대통령은 우선 헌법 제123조 제1항에 의거 [인권보호령(The Protection of Human Rights Ordinance, 1993)을 발령하였다. 이 명령은 공포와 더불어 당일부터 시행에 들어갔다. 법안은 [인권보호법(The Protection of Human Rights Act)으로 확정되었고, 대통령의 재가가 있는 1994년 1월 8일 시

3) Shashi Kumar, Human Rights Movements in India and National Human Rights Commission, in: *Human Rights in India* (ed. by B.P. Singh Sehgal), Deep & Deep Publishing Co., 1993, 540-541쪽

4) B.V. Somasekher, Programmes and Perspectives of NHRC Towards Protection of Human Rights in India: An Appraisal, in: *Human Rights in India* (ed. by B.P. Singh Sehgal), 1993, 547-548쪽

행에 들어갔다. 그러나 법의 효력발생은 [인권보호법이 공포되었던 1993년 9월 28일부터 소급적용되는 것으로 간주되었다(제1조 제3항). 총 8개장 43개조문으로 구성된 이 법은 정부와 카쉬미르에 대해서 예외를 둔 것을 제외하고는 전 인도에 걸쳐 효력을 발생하였다(제1조 제2항).

2. 인권의 개념

법 제2조 1에 의하면 인권은 "헌법의 규정과 국제규약의 내용이 보장하고, 인도 법원의 판결에 의해서 집행가능한 개인의 생명, 자유, 평등, 존엄과 관련되는 권리를 뜻한다" 동조 1에서는 '국제 규약'이란 1966년 12월 16일 유엔 총회가 채택한 [시민 정치적 권리에 관한 국제규약] 및 [경제 사회 문화적 권리에 관한 국제규약]을 의미하는 것으로 본다. 이 점에서 [인권보호법]이 정하는 인권 개념은 헌법상의 기본권 개념보다 범위가 넓다고 보인다.

이같이 확대된 인권개념은 '법원에 의해서 집행가능한' 권리어야 한다는 점에서 제약된다. 국내법에 의한 국제법의 집행은 법적으로 많은 논란이 있는 부분이다. 기본적으로는 오늘날 국내법이 국제법들을 존중해야 한다는 점에서 이견이 없다. 국가간의 예양은 국내법과 충돌되지 않는 한 국제법규들을 국내법으로 수용하는 것으로 하고 있다. 물론 상호 충돌을 일으키는 경우 일반적으로는 국내법이 우선된다.⁵⁾

III. 국민인권위원회

1. 설치의 논거

중앙정부는 국민인권위원회(이하 '인권위'로 약칭함)를 설치할 권한이 있다. 이의 설치를 위한 논거는 다음과 같다.

(1) 인도는 두 개의 국제인권규약에 관한 당사국이다. 이 규약들이 정

5) Paras Diwan & Peeyushi Diwan, *Human Rights and The Law*, Deep & Deep Publication, 1996, 544-545쪽

하고 있는 규약들은 헌법에 의해 보장되어야 한다.

(2) 인권에 관하여 국내, 국제적인 관심은 현재 증대되고 있다. 이와 관련해서 민화하는 사회현상과 범죄와 폭력의 새로운 양상의 출현은 정부로 하여금 현상하에 보다 효율적이고 책임있게 대처할 수 있도록 현재의 법령 및 제도들을 재고하도록 요구하고 있다.

2. 구성

(1) 인권위는, 1993년의 [인권보호법]에 근거하여 창설되었다. 이 법은 인권위의 구성에 관하여 다음과 같이 규정한다(제3조 제2항).

- 1) 위원장은 대법원장을 역임한 자로 한다.
- 2) 위원의 1인은 현재 대법원판사 혹은 역임한 자 중에서 정한다.
- 3) 위원의 1인은 현재 고등법원판사 혹은 역임한 자 중에서 정한다.
- 4) 2명의 위원은 인권과 관련한 지식이나 실제 경험이 많은 인물 중에서 임명한다.

또한 3명의 당연직 위원이 있다. [소수자를 위한 국가위원회], [지정카스트와 지정부족(部族)을 위한 국가위원회], [여성을 위한 국가위원회]의 위원장들이 바로 그들이다(제3조 제3항). 이들은 인권위의 다른 위원들과 동일한 권한을 갖는다.

인도정부의 서기적 서원의 공무원이 이 위원회의 사무총장이 되며 그는 그에게 위임된 모든 권한과 기능을 행사하여야 한다(제3조 제4항, 제1조).

인도정부는 인권위를 구성하였다. 전임 대법원장이었던 미스라(Misra)씨가 초대위원장이었다.

(2) 본부

위원회는 델리에 본부를 두고 있다. 인권위는 중앙정부의 허락을 얻어 인도의 다른 지역에도 사무소를 설치할 수 있다(제3조 제5항).

(3) 추천위원회

위원장을 비롯해서 모든 위원들의 임명은 대통령에 의해서 임명되는데, 이들에 대한 추천은 다음과 같은 추천위원회에서 이루어진다(제1조).

- 1) 추천위원장: 총리
- 2) 위원: 하원의장, 인도정부의 내무장관, 하원의 야당대표, 주위원회

(실원)의 헌법재판, 주권위원회(실원) 부속

(4) 위원의 면직(제5조)

헌적 내비인판사나 고등법원장이 위원회의 위원으로 임명된 경우 대법원장과의 협의를 거쳐야 한다. 위원장이나 위원은 다음과 같은 경우에 한하여 대통령의 명령에 의해서 직을 면하게 된다. 즉 대통령의 조처에 응해서 대법원이 대법원의 내부절차에 따라 심사한 후 위원장이나 위원의 행동이 잘못되었거나 무능한 것으로 판정되었을 때이다. 이런 경우 외에도 대통령은 만약 위원장이나 위원,

- 1) 파산선고를 받은 경우, 또는
- 2) 임기중 직무범위 밖에서 유적 입부에 종사한 경우, 또는
- 3) 정신이나 신체상의 질환으로 인하여 직무를 더 이상 수행할 수 없을 경우, 또는
- 4) 정신이상이나 있어서 법원으로부터 선고를 받은 경우, 또는
- 5) 대통령의 의견으로 볼 때 만도되지 임의로 인하여 유기징역의 형이나 선고를 받은 경우 등이다.

(5) 위원의 임기(제6조), 보수(제8조)

위원장의 임기는 5년으로 한다. 단, 70세를 정년으로 한다. 다른 위원의 임기는 5년으로 하되, 1차에 한하여 연임이 가능하다. 단, 정년은 70세이다. 임기만료와 함께 위원장이나 위원은 더 이상 중앙정부나 주정부의 일에 종사할 수 없다.

위원장이 사망, 사임 등의 이유로 궐위가 될 경우, 대통령은 차기 위원장이 선출될 때까지 위원 중에서 한 사람을 지명해서 위원장의 직무를 대행하도록 한다. 위원직의 임기와 조건, 급여 및 수당은 임명이후 불이익하게 변경되지 아니한다. 이 규정은 직무상의 독립성을 보장하기 위함이다.

3. 위원회의 기능과 권한

(1) 기능

[인권보호법]의 기본적 목적을 수행하기 위해서 인권위는 무리없이 그 기능을 원활하게 수행할 것이 기대된다. 이 법의 제12조는 다음과 같

은 기능을 위원회의 임무로 규정하고 있다.

1) 인권희생자가 직접 혹은 그를 대신한 다른 사람에 의해 제기된 다음 사항의 청원에 대한 조사,

가) 인권침해 혹은 그의 교사, 또는

나) 그와 같은 침해사실에 대한 방지를 공무원(형법 제21조에 따른)이 태만하였을 경우

2) 법원에 계류중인 인권침해사안에 대해서도 해당 법원의 승인을 얻어 개입한다

3) 주정부의·협조아래 주정부 소관의 수행시설에 대한 방문을 한다. 여기에 있는 교화나 보호 등 일정 목적하에 수용되어 있는 제소자들의 수용환경에 대해서 살피고 그에 대한 견해 표명

4) 헌법 등 법령에 정해진 바에 따라 기준이 잘 지켜지고 있는가와 법령의 취지에 따른 시행 분리

5) 인권의 향유를 방해하는 테러 등의 요인들에 대한 심사와 그 개선책 강구

6) 인권에 관한 조약과 국제규약들의 검토와 그의 적절한 시행 권고

7) 인권분야에 관한 연구와 증진

8) 사회에서의 다양한 분야에서 인권계몽, 간행과 매체, 세미나 기타 유용수단을 동원해 인권보호에 관한 안전대책 교육

9) 인권분야에 종사하는 비정부단체와 시설에 대한 지원

10) 기타 인권향상을 위해 필요하다고 보이는 모든 기능

(2) 권한

그러나 다음과 같은 사안에 대해서는 인권위는 관계하지 아니한다 ([절차규정(1994)] 제8조).

1) 고지가 행해졌을 당시보다 1년 이상 전에 발생했던 사안

2) 사법적 사항이 아니거나 헌법법정, 주인권위원회, 또는 기타 다른 위원회에 계류된 사안

3) 보호하고 위망 혹은 가명으로 제기된 사안

4) 진지성을 결여한 사안

5) 인권위의 관장사항 밖의 사안

제12조에서 위키된 지휘를 수행하기 위해서 인권위는 법원의 권한을 부여받아야만 한다. 제13조는 인권위는 이 법에 의하여 조사를 행할 경우, 특히 다음 사항들을 심판함에 있어서 1908년의 민사소송법상의 민사법원의 권한을 부여받고 있다(제13조 제1항). 즉,

1) 증인을 소환하고 강제출석케 하고 선서를 시키는 경우,

2) 사실자료에 대한 조사와 작성

3) 선서후 제출된 증거의 수령

4) 법원이나 판사가 가진 공적 기록에 대한 조사 혹은 복사

5) 증인이나 사실자료에 대한 조사를 위한 위원회의 선지

6) 기타 규정되어야 할 모든 사항들

인권위는 자체의 의견으로 볼 때 유익하다고 보이는 사안에 관해서 현행법상 일정한 특권을 가지고 있는 사람들에게도 정보를 제공할 것을 요청할 수 있다. 이에 관해서는 형법 제176조와 제177조의 규정을 준용한다(제13조 제2항).

인권위와 인권위로부터 위임받은 관리들은 권고에 개제된 관리들 제외하고는 누구든지 조사와 관해서 필요한 경우 1973년의 형사소송법 제100조에 따른 권한행사로서 일정 서류에 대한 일체 혹은 일부에 대한 확보와 복사를 할 수 있다(제13조 제3항).

인권위는 민사법원에 준하며, 인권위가 판단할 때에 형법 제175조, 제178조, 제179조, 제180조, 제228조에서 정한 범죄가 발생했다고 보이는 경우, 인권위는 범죄를 구성하는 해당 사실에 대한 기록과 형소법이 정한 바와 같은 피고소인에 대한 조서를 작성한 다음 이 사실을 심리할 권한있는 참심원에 보내 거기에서 형소법 제346조에 따라 이 사건을 심사하도록 한다(제13조 제4항).

인권위에서 행해지는 모든 절차는 형법 제193조, 제228조, 제196조의 의미에 따른 재판절차와 같은 것이며, 인권위는 형소법 제195조와 제26장의 목적에 따른 민사법원이 되어야 한다(제13조 제5항).

4. 조사활동

(1) 징부의 협조

1) 인권위는 조사에 관계되는 어떤 활동을 행함에 있어 중앙정부와 주정부의 협조에 해당 수사기관 및 관리를 활용할 수 있다(제14조 제1항).

2) 위에서 정한 관리 혹은 조사기관은 인권위의 지시와 통제를 받아 다음과 같은 일을 행한다(제14조 제2항).

가) 사람에 대한 소환 혹은 출석의 강제 및 심문

나) 사실자료에 대한 발견과 조서작성

다) 어떤 기관과 관련하여 공적 기록에 대한 조사 혹은 복사

3) [인권보호법] 제15조의 규정 즉 "인권위에서 인권위가 조사를 위해 필요로 하는 질문에 대한 증인 중에 행해진 모든 발언은 그가 위증을 한 경우를 제외하고는 그에게 불리한 형태로 다른 민사상, 형사상 처벌을 할 수 없다"는 것은 이들 관리 혹은 조사기관의 활동에도 적용된다(제14조 제3항).

4) 제1항에서 정한 관리와 기관의 활동은 인권위가 정한 대상범위에 해당하는 모든 것을 조사할 수 있으며 정해진 기간 내에 보고서를 제출해야만 한다(제14조 제4항).

5) 인권위는 이들 관리나 기관이 행하고 제출한 보고서의 내용이 사실에 부합함을 확인한 다음 조사를 종결한다. 이를 위해 조사를 행하거나 조력한 모든 사람들에 대한 조사를 별도로 할 수 있다(제14조 제5항).

(2) 피조사자에 대한 보호

제15조에서 정한 인권위에서의 발언에 대한 불리한 처벌을 받지 않는다는 내용 이외에, 제16조에서는 인권위가 조사를 함에 있어서 피조사자가 조사를 받는다는 그 이유로 인하여 처하게 될 불이익이 있다고 판단되는 경우 인권위는 피조사인으로 하여금 조사중 발언의 합당한 기회를 제공할 것과 자신을 변호할 증거를 제시할 수 있도록 하여야 한다. 다만 그의 증인이 신뢰성을 의심받는 경우에는 예외로 한다.

(3) 절차

1) 고발에 대한 조사(제17조)

가) 인권위가 인권침해사안에 대해 조사를 하는 경우 인권위는 중앙정부, 주정부 혹은 기타 관청 혹은 기관에게 일정한 기한을 정하여 정보나 보고를 요청할 수 있다. 다만, 인권위가 정한 기한 안

에 정보와 보고가 해제되지 않은 경우, 인권위는 자체적으로 조사를 실시할 수 있다. 또한 ...인 정보와 보고가 있었을 때 더 이상의 조사가 필요하다고 보거나 이미 해당 정부에 의해서 일정한 조치가 취해지고 있다고 보아 인권위가 더 이상 일용할 필요가 없는 경우에는 고발인에게 이 사실을 통보해주는 것으로 사건을 종결지을 수 있다.

나) 위의 규정에도 불구하고 인권위가 사건의 성질상 만약 필요하다고 생각할 때는 인권위는 조사를 스스로 행할 수 있다.

2) 조사의 단계(제18조)

가) 인권위는 다음과 같은 수순으로 일을 처리한다. 즉, 조사결과 인권침해사실과 공무원에 의한 인권방지에 대한 태만함이 있음이 밝혀진 경우, 인권위는 해당 정부와 관청에게 관련인들에 적합한 처벌이나 조치를 밝히고 그 시행을 권고한다.

나) 법원이 할 때 필요하다고 판단되는 경우, 대법원이나 해당 고등법원으로 하여금 일정한 지시, 명령, 영장 등을 청구할 수 있다.

다) 해당 정부, 관청에게 피해자나 그 가족에 대하여 인권위가 볼 때 필요하다고 보이는 즉각적인 구호와 보상을 행하도록 권고한다.

라) 인권위는 관계 정부, 관청에게 권고안과 함께 조사보고서를 송부해 주어야 한다. 해당 정부, 관청들은 정한 기한 혹은 1개월 이내에 혹은 인권위가 허용하는 기한 내에 보고서에서 요구하는 내용에 대한 시정조치 혹은 제안을 포함한 답변서를 제출해야 한다.

마) 인권위는 이상의 보고서를 고발인 혹은 친족에게도 1부 송달해 주어야 한다.

바) 인권위는 시정조치와 제안의 내용까지 포함하는 조사보고서를 간행하여야 한다.

5. 군대와 관련된 절차(제19조)

(1) 이 법이 정한 절차에도 불구하고 군대와 관련해서 발생한 인권침해사실에 대해서는 인권위는 다음과 같은 절차를 따른다. 즉, 인권위는 독자적으로 혹은 청원에 기초해서 중앙정부에게 보고서를 제출해 줄 것

을 요구한다. 보고서를 받은 후에 인권위는 내용에 따라 시정을 종결짓거나 혹은 정부에 자신의 권고안을 제출한다.

(2) 중앙정부는 인권위에게 권고내용에 대한 시정조치를 3개월 이내 혹은 인권위가 허용한 기한 내에 통보하도록 한다.

(3) 인권위는 중앙정부에 보낸 그의 권고안과 이에 따른 정부의 시정조치를 담은 내용을 보고서로 간행해야 한다.

6. 인권위의 연례보고서와 특별보고서(제20조)

(1) 인권위는 연례보고서를 중앙정부와 해당 주정부에게 제출해야 한다. 그리고 연례보고서가 간행되기 전에 특별한 사유로 인해 긴급히 발간할 필요가 있다고 판단되는 경우 특별보고서를 제출할 수 있다.

(2) 중앙정부와 주정부는 연례보고서와 특별보고서를 연방의회와 주의회에 제출해야 한다. 이때 인권위의 권고내용에 대한 행정부가 취한 시정조치 혹은 제안, 혹은 인권위의 권고안을 수용할 수 없는 특별한 이유를 첨부해야 한다.

7. 주인권위원회

인도에서의 주인권위원회에 관해서는 [인권보호법] 제5장 제21조에서부터 제29조까지 규정되어 있다. 대체로 국민인권위원회의 내용에 준하여 주에 맞게 편성을 요구하고 있다. 현재 4개의 주(서벵골, 히마찰 프라데쉬, 마디야 프라데쉬, 아삼)만이 구성되어 있는 형편이다.

8. 인권법원

인권침해사안과 관련해서 신속한 제판을 보장하기 위해서 주정부는 해당 지방의 특정 재판부를 인권법원으로 지정하여 해당사건을 재판하도록 할 수 있다. 그러나 이 규정에는 다음과 같은 예외가 있다. 1) 해당 재판부가 이미 특별법원으로 지정되어 있는 경우, 2) 이미 특별법원이 설치되어 있는 경우가 바로 그런 예이다. 즉 어떤 재판부를 인권재

판부로 임명하는 것은 강제사항이 아니며 개별사항이기는 하다. 다시 말해서 인권법원이 특별히 없는 경우, 어떤 재판부나 혹은 이미 구성된 특별법원이 인권침해행위를 재판해야만 하는 것이다(제30조). 인권법원에 주정부가 공익검사를 지정하거나 7년 이상 변호사로서 개업한 경력이 있는 변호사 중에서 특별검사로 임명할 수 있다(제31조).

9. 제정과 회계, 감사(제7장)

(1) 중앙정부로부터의 출인(제32조)

중앙정부는 의회의 적절한 절차를 거쳐 [인권보호법]의 목적으로 사용되어야 할 적정 금액을 인권위에게 출연하여야 한다.

(2) 마찬가지로 주정부는 주의회의 적절한 절차를 거쳐 적정금액을 주인권위에 출연하도록 하는 규정을 두고 있다(제33조).

(3) 인권위는 감사원장과의 협의하에 중앙정부가 정하는 양식에 따라 예산사용과 회계에 관련된 장부를 기록 유지해야 한다. 예산사용에 대해서는 감사의 일반원칙에 따라 감사원의 감사를 받는다. 주인권위에 대해서도 같은 방식의 내용이 적용된다(제34조, 제35조).

10. 기타

(1) 인권위의 관할 밖의 사항(제36조)

인권위는 이미 주인권위나 기타 현재의 법령에 기하여 인권관계 위원회에 계류중인 사항에 대해서는 조사를 할 수 없다. 그리고 고발 당시부터 1년 이전에 발생한 사안에 대해서는 조사를 하지 않는다.

(2) 특별 조사팀의 구성(제37조)

현행법상의 어떤 규정에도 불구하고 정부는 만약 필요하다고 생각하는 경우에는 인권침해를 조사하고 소추하기 위해 경찰로 구성되는 1개 혹은 그 이상의 특별조사팀을 구성할 수 있다.

(3) 중앙정부, 주정부, 인권위, 주인권위, 또는 그 소속위원 등은 그가 행한 선의의 행위 혹은 관계 법령을 준수하면서 이루어진 행위와 출판 행위, 보고서, 서류, 소송절차 등에 관하여 소추당 당하지 않는다(제38조).

(4) 인권위와 주인권위의 위원과 사무원들은 형법상의 공무원에 해당한다(제39조).

(5) 중앙정부의 시행규정제정권(제40조)

중앙정부는 [인권보호법]의 시행규정을 제정할 수 있다. 여기에는 다음과 같은 사항들을 포함한다.

1) 인권법 제8조에 따른 위원들의 급료, 수당, 기타 제 근무조건

2) 인권위가 임명하는 행정, 전문, 과학 요원들에 대한 근무조건과 제11조 제1항의 사무인 등에 관한 치우

3) 제13조 제1항 1에서 정한 민사민원으로서의 권한

4) 제34조 제1항에 따른 위원회의 연간 회계내역의 양식

(6) 이 법의 시행규정은 제정과 동시에 의회의 양원에 제출되어야 한다. 의회의 양원에서 수정을 요하거나 혹은 폐지를 요하는 경우 그 규칙은 각각 수정되거나 효력을 상실하게 된다. 그러나 그 때까지 발생한 효력에 영향을 주지는 않는다(제40조 제3항).

(7) [인권보호법]의 시행에 장애가 예상되는 경우 그런 내용물을 제거하는 것이 필요하다고 판단될 때에는 중앙정부는 관보에 명령을 공시함으로써 이 법의 규정에 위배되는 것으로 조치해야 한다(제42조).

(8) 1993년의 [인권보호령]은 이 법의 제정과 동시에 폐지된다. 그러나 그 영 아래에서 행해진 조치와 행위들은 새로운 법의 내용에 합당한 것으로 간주된다(제43조).

IV. 인권위 1995-1996년 연례보고서

시행규정 제14조에 따르면 인권위는 4월 1일부터 이듬해 3월 31일까지의 활동상황을 보고서로 작성한다. 원본에는 위원장과 위원들의 서명이 이루어져야 하며, 진실에 기한 보고서는 매년 5월 말일까지 해당 정부로 송달되어야 한다. 다음은 1995년 4월에서 1996년 3월 사이의 인권위 활동보고서의 요약문이다.⁶⁾

6) National Human Rights Commission Annual Report 1995-96, Sardar

1. 중립적 주권을 갖는 인권위는, 실적을 중의하여 명백적 권의 권으로부터 인권에 관한 목소리를 들을 수 있었다. 그 결과 7843건의 고발을 접수하였다. 인권위는 이 많은 사건들을 우선순위를 정하여 처리함으로써 자신의 인권을 위협받고 있는 사람들에게 동지가 되어주고, 신뢰할 만하고 신실한 동료로 필요로 하는 사립들에게 친구가 되어 주었다.

인권위는 제2조 제1항의 d(인권의 개념)와 f(국제규약의 의미), 제11조 제1항의 b(경찰장부위의 활동자격) 및 제2항(일반직원과 전문위원의 임용), 제32조(중앙정부의 기능추진), 제33조 제1항의 f(조사활동의 기타 사항), 제18조(조사단계), 제30조(인권위원), 제36조(인권위 관할사항) 등이 인권위의 권한, 자율성 등과 관련하여 애매하고 불명확하다고 판단하고, 1994년 연례보고서에서도 주장한 바와 같이 [인권보호법]의 개정을 이번 연례보고서에서도 촉구하는 바이다. 위원장과 함께 개정작업을 추구한 내무장관은 이미 법무부, 재무부와 협의한 바를 검토한 후 결론에서 "우리는 이미 잘 성안된 규정에 대한 실제적인 변화의 필요성을 평가하기에 앞서 인권위의 직무중에서 더 많은 경험을 얻은 필요가 있다."고 하였다. 인권위는 이런 견해가 시급히 재고되기를 희망한다.

2. 우리 인권위는 인권은 평화와 투명성이 견지될 때 최대화된 것이고, 테러와 비밀이 가득찬 곳에서는 최악의 상황에 빠진다는 것을 확신하고 있다. 이런 전제하에서 인권위는 모든 분쟁의 해결방법은 곧 테러와 총포의 지배를 포함한 일체의 폭력형태의 포기라고 본다. 특별히 헌법은 우리나라와 같은 민주국가에서의 분쟁해결방법이 평화적인 것이 되어야 함을 규정한다. 더욱이 인권위는 개방성과 책임성이야말로 양질의 지배와 통치행위에서의 필수요소라는 사실을 반복해서 권고하며, 우리들의 행위기준은 헌법과 국제조약에 입각해야 한다는 것을 확신하는 바이다.

테러와 전부가 발생한 지에서의 인권문제들은 정치적 성격을 띠게 된다. 인권위는 이 문제들은 해결함에 있어서는 마찬가지로 정치적으로 해결해야 할 것이라는 것을 지지한다. 그런 지역에서 경제, 사회, 문화적

Patel Bhawan, Sansad Marg, New Delhi, 93-103쪽

요인들이 더 고려되어야 할 경우, 인권위는 해당지역의 인권문제에 관한 개인적 보고서에서 그런 요인들이 충분히 고려되어야 할 것을 권고하였다. 여러 예를 통하여, 인권위는 그와 같은 사항에 관하여 특별한 제안은 한 바 있으며, 점진적인 계획안들이 위원장이 총리와 함께 추진되어 왔다.

나아가서 인권위는 테러발생지역 및 치안부제지역에서의 민간행정을 지원하기 위해서 일반적으로 투입되는 보안군이 민간행정의 준칙에 따라 행동해줄 것을 권고해왔다. 인권위는 경험을 통해서 민간장부당국의 역할과 책임이 무늬에 불과하고, 특히 통제금지, 수색작전, 체포, 신문, 구속 등의 경우에 이런 원칙이 준수되면 인권침해가 현저히 줄어들 수 있다는 것을 알게 되었다.

3. 테러와 군사적 분쟁에서의 희생자의 권리는 무시되어서는 안되며 적절한 수단으로 지원되어야만 한다는 것을 인권위는 잘 인식하고 있다. 몇몇 해당 주에서 그런 사람들에게 대한 구조와 복구를 위해 지원하고 있는데, 인권위는 이런 경우에 자의적으로 지원이 배제되는 일이 없도록 특별히 주의할 것을 요구한다.

카쉬미르계곡의 35만명의 주민들은 30만이 힌두이고 5만은 무슬림이다. 그들은 그들의 주거지를 떠나 임시적으로 다른 지역으로 이주할 것을 강요받았다. 인권위는 이 사실과 관련하여 중앙정부와 주정부에 대해서 이들에 대한 특별한 배려 즉 월정 구제급여, 수용, 고용과 교육의 기회를 제공하는 등의 조치를 취해줄 것을 특별히 권고하였다.

4. 인권위는 일부 주에서 아직도 구금중 사망에 관한 보고가 충분치 않다는 사실에 대해서 실망을 하고 있다. 그래서 위원장은 개별적으로 각 주의 주지사나 주수상에게 서한을 보내 이와 관련된 관심증대와 주의를 촉구한 바 있다.

인권위는 인도는 [모든 기타 잔혹하고 만인간적 모욕적인 취급이나 처벌에 반대하는 규약(1984)]에 가입해야 한다는 권고가 받아들여지지 않고 있는 것을 개탄하였다. 정부는 이 가입안을 주수상 회의의 의제로

내용은 바 있으며 대다수가 아직 사기심조치는 빈번을 하고 있거나 혹은 의사표현을 하지 않으므로써 보류되었다는 설명을 해왔을 뿐이다. 그래서 인권위는 주수상들에게 자신의 주에서 이 시대에도 고문이 행해지고 있다는 인상을 준다던 일이나 이상한 일인가에 대하여 인에게주는 통보를 한 바 있고, 한시바삐 이 문제가 중앙과 주의 정부로부터 처리될 것을 권고하였다.

인권위가 구금중 사망이나 폭력에 관하여 이를 사후적으로 대응하는 것은 부적절한 것임을 인식하고 있다. 그런 일들은 사전에 예방되어야만 한다. 인권위는 인도법률위원회(Indian Law Commission)가 1985년 7월 29일 제113차 보고서에서 대법원의 의견에 따라 발표한 권고안에 동조한다. 이 권고안에서 법률위는 1872년의 [인도증거법] 제114조(B)에 경찰구금중에 발생한 사상은 경찰관에 의해서 저질러진 것으로 추정한다는 조항을 신설하자는 의견이었다. 인권위의 견해도 이런 규정의 신설이 고문감소의 효과를 가져오리라는 것이다. 나아가서, 인권위는 법률위가 형사소송법 제197조를 개정하여 구금중 사고와 관련하여 특별재판부 판사가 조사를 하는 경우 소명된 증거(prima facie)의 원칙에 의거, 경찰관에 대한 정부의 처벌 필요성을 삽입하자는 견해에 찬성한다. 동시에 인권위는 국립경찰위원회가 1979년 2월의 제1차 보고서에서 구금중 사망, 강간 혹은 상해가 발생했을 경우 특별재판부 판사에 의한 강제조사가 행해져야만 한다는 의견에도 찬성한다.

인권위는 구금중의 폭력을 제거하고 감소시키기 위해서 수시로 많은 사건을 처리한 바 있다. 그 가운데 인권위는 특별히 대법원이 1994년 싱(Joginder Singh) 대 웃따르 프라데쉬 등의 사건에서 가졌던 입장 즉, 구금된 피의자는 그가 요청하는 경우, 친구, 친척 등 그를 알고 있거

나 혹은 그의 안전에 대해 관심을 갖고 있는 어떤 사람에게라도 그의 체포사실과 구금장소를 통지받을 수 있는 권리를 보유한다는 견해에 찬성한다. 대법원의 이와 같은 견해를 인권위는 모든 주의 경찰장부에게 통지해 대법원의 견해에 준해서 사무를 처리해 줄 것을 밝혀하였다. 인권위는 또한 유엔의 [모든 형태의 구금자 및 제소자의 보호원칙과 제소자 처우에 관한 유엔의 표준 최소규율]의 준수가 아주 필요한 것임을 확인한다. 인권위는 중앙정부가 각 지방의 권한기관들로 하여금 이런 규정이 있다는 사실을 상기시켜주는 적절한 지시가 발행될 것을 권고한다.

구금중 폭력을 종식시키기 위한 노력의 하나로 인권위는 타밀나두와 라자스탄주에서 발생한 최근의 사건에서 구금중 사망한 사람의 친족들에 대한 보상은 주정부만의 책임이 아니라, 이 일을 지지한 경찰관 자신도 책임을 지야 한다는 견해를 가진다.

구금중 사망사건을 조사하면서 인권위는 때때로 검사의사들조차도 경찰당국의 압력에 굴복해서 의견서를 왜곡시킨다는 경악할 사실을 알게 되었다. 그 결과 위원장은 1995년 8월 10일 각 주의 수상들에게 서한을 보내 경찰이나 수형시설에서 사망한 사건에 대한 검사과정은 비디오로 녹화하여 검사보고서와 함께 인권위에 제출해줄 것을 요청하기에 이르렀다. 이런 요청에 응하여 적극적인 반응이 13개의 주와 1개의 연방직할 지역으로부터 도착하였다. 인권위는 계속 이를 독려할 계획이다.

효율적이면서도 정직한 경찰이야말로 인권침해에 대한 국가의 방벽이라 할 수 있다. 인권위는 경찰의 질적 개선과 그의 품위 및 명성을 국가의 견지에서 회복시킬 것을 기대한다. 인권위는 그래서 이미 1979년에 작성된 [경찰개혁위원회의 제2차 보고서]의 제15장에 포함된 내용을 지체없이 시행에 옮길 것을 기대한다. 이 보고서는 정치권, 집행부 등 외부로부터의 불법적이고 부적절한 명령이나 압력에 의해서 경찰이 간섭 혹은 난용 등을 행하지 않도록 보안조치를 강구한 비판적 내용을 담고 있었다. 특히 이 보고서는 1986년 218호의 형사사건에서 대법원의 결정 즉 경찰의 수사업무는 집행부와 이타의 기관으로부터의 간섭보다 중시되어야 한다는 결정을 존중할 것을 내용으로 하고 있다. 그 보고서의 15장 43절은 경찰장부의 임기를 명문화할 것을 촉구하였다. 그것은 경찰장

7) 법률위원회는 이미 1835년 조직되어 인도의 형법과 민법, 민형사소송법을 제정 하였던 주요 조직이다. 독립이후 형소법과 형법, 증거법의 전면개정을 주도하기도 하였다. 1994년 9월부터 제1차 위원회가 구성되어 법관 등 4인의 위원으로 되어 있다. 현재의 논의 주제는 1) 법과 민권, 2) 신속한 재판에 관한 개혁, 3) 헌법상 국가지도원리의 견지에서 입법의 정리, 4) 연방입법의 정돈, 개정, 단순화작업, 5) 법과 사법행정에 관련하여 정부에 의견제출 등을 과제로 하고 있다.

상의 미리 위에는 진술이러는 메모를레스의 길이 그리워지 있다고 믿인
되기 때문이다. 더구나 같은 보고서 15장 40장은 각 주 단위에 실정
법상의 후보안위원회를 구성해서 주정부가 공개적이고 민명의 범위 안
에서 감독기능을 수행할 수 있도록 조력할 것을 내용으로 하고 있다.

인권위는 이런 경찰개혁위원회에 대한 주요 제안이 신속히 고려될 것
과 적극적으로 결정해 줄 것을 권고하고 기대한다. 동시에 인권위는 이
문제가 필요하다면 모든 주와 연방직할지역의 수상들의 모임에서 숙의
된 것과 또 중앙정부가 경찰개혁의 사명을 인식하여 연방직할지역에서
경찰개혁위원회의 제안을 시행에 옮겨줄 것을 권고하는 바이다.

6. 관계자문단체의 자문과 동시에 몇몇 전문위원회의 연구결과를 고
려해볼 때 인권위는 현재 1894년의 [인도형무소법]을 대체할 [교도소법
(안)]을 마무리하여 놓았다. 가급적 조기에 이 초안을 기초로 한 임박적
조치가 취해진 것을 권고한다. 인권위는 전국의 수형시설의 현상현황 개
선할 특별한 조치를 강구할 것을 강력히 요청한다. 특히 교도소내의 과
도한 여성과 청소년의 수를 줄이기 위한 특별조치가 절실히 요청된다.

7. 인권위는 상당부분의 사안에서 조기석방 특히 중신형자에 대한 조
기석방에 관하여 법률과 규칙의 해석과 시행에서 일관성을 잃고 있다는
사실을 알게 되었다. 위원장은 이에 관한 시행상의 원칙과 일관성을 유
지시켜줄 것을 서한을 통해서 권고한 바 있다.

8. 인권위의 조사팀은 남부 비하르의 교도소에서 일반화되어 있는 불
만족스런 수용환경에 대해서 많은 고발을 접수한 후 조사를 하고 이에
관해 특별보고서를 작성하였다. 그 결과 비하르의 고위공직자들이 회합
을 갖고 인권위의 이런 신속한 처리를 요구하는 권고안에 대한 후속처
리문제를 논의하였다.

9. 인권위는 사회 각계 각층의 지도층 인사들이 사회에 만연된 폭력
의 원인들에 관해서 깊은 심각한 고려를 할 필요가 있다고 생각한다. 이

지역에 필요함을 제안하였다.

12. 1929년의 [아동결혼제한법]에 대한 분석은 함에 있어서, 인권위는
이에 관련한 세밀한 토론을 가졌다. 이 토론에는 국가여성위원회 위원장
과 중앙정부의 유관 부서가 참석하였다. 인권위는 이 법이 보다 실효성
을 갖기 위해서는 여러 점에서 개정되어야 함을 알게 되었다. 더욱이 아
동결혼을 방지하기 위해서는 결혼에 대한 강제적 등록을 요하는 제도의
도입이 전제적으로 필요한 것으로 보였다. 인권위는 인도에서의 결혼과
관련된 법률을 강화하면서 수정하기 위해서 국가이성위원회와 이성과
아동 발달분과가 [결혼법안]을 준비중이라는 사실에 동감을 표한다. 이
법안은 현재 내무부와 법무부에서 심사 중인데 결혼등록을 강제하는 내
용을 포함한다. 인권위는 이 법안의 내용이 아동결혼사례를 실질적으로
원저히 감소시킬 것을 믿기 때문에 이 법의 조속한 시행을 권고하는 바
이다.

13. 인권위는 인도가 당사국으로 되어 있는 조약과 특히 동시에 국제
회의에서 제정된 인권과 관련된 일반원칙들에 대한 책임을 항상 기억하
고 있다. 1995년 베이징에서 개최된 제4차 유엔여성회의에서 채택된 선
언과 행동계획에 대해서도 그에 상응하는 조치를 취할 것을 권고한다.
동시에 여성에 대한 모든 형태의 차별에 대한 제거에 관한 협약과 관련
한 인도의 사명감과 시행에 대한 책임을 이행하도록 해야 한다.

14. 최근들어서 아동매춘이 위협적으로 증대되고 있다고 한다. 물론
이런 인식은 공식적인 기관이나 자료에 의해서 파악되고 있는 것은 아
니다. 인권위는 현실을 파악해야 한다는 것과 법령과 국가행위가 인권과
관련하여 이 문제에 대한 올바른 치방이 되도록 방향을 잡아야 한다고
생각한다.

15. 인권위는 지속적으로 아동노동에 관하여 관심을 쏟고 있다. 현재
의 정부계획을 의미있는 것으로 평가하면서, 무엇보다도 중요한 것은 한

편 위한 인권위 자체로서의 노력은 먼저 인간의 존엄과 가치에 대한 권
용과 지속적인 존중에 기초하는 인권문화를 이 사회에 창출시키는 노력
이 인권위 본연의 임무로 생각하고 있다.

이런 견지에서 대규모의 폭력이 발생하고 살륙과 혼란 속에서 생명
들이 상실될 때 국가가 이런 범죄를 정돈해서 범을 모든 사람에게 평등
하게 적용하고 정의가 깃드는 원칙을 확립하는 것은 국가의 의무이다.
이런 점에서 인권위는 96년 1월 23일 마하라슈트라 정부가 93년 1월 봄
베에서 발생한 폭동을 조사하기 위해 구성된 스크리슈나 위원회의
활동을 중단시킨 사실을 알고 정학을 금지 못하였다. 스크리슈나 위원
회는 이미 상당한 정도의 활동을 하고 있었는데, 인권위는 그 위원회의
활동이 제개된 것을 희망한다.

10. 1987년 제정된 [테러리스트와 파괴활동방지법]이 1995년 5월 23
일 기해시 실효되었음에도 불구하고 많은 주와 특히 친디가르 연방직할
지역에는 몇 천명이 구속된 상태에서 재판울 기다리고 있으며 이들의
권리는 망각될 우려가 있다. 그래서 인권위는 이들에 대한 자료를 수집
한 결과 1995년 6월 30일 현재 6060명에 달하는 것을 알게 되었다. 인
권위는 대법원의 지침도 있었고 구금기간이 최장이며 피구금자 수가 최
대에 이르는 그런 주들 사이에 상호접촉이 있었던 것처럼 개별 주에 심
사위원회가 설치되어 정기적 회의를 가질 것과 심사법원의 수를 늘릴
것을 촉구하고자 한다.

11. 1985년의 [마약과 향정신성 물질에 관한 법률]에 따라 장기간 불
합리한 구금에 대한 많은 청원이 있었고, 이에 따라 인권위는 이 법에
관한 조사를 하기에 이르렀다. 재판의 신속성을 위하여 인권위와 재무부
와의 의견교환이 있었다. 재무부가 이런 목적을 위하여 또 보다 향상된
치벌체계를 도입하기 위해서 이 법의 개정을 위한 인원의 제안은 기초
한 것에 대해서 인권위는 반감게 생각한다. 또한 인권위는 일반국민이
이 법과 관련한 사안을 처리하는 것이 부적절하다는 결론을 갖게 되었
으며, 이와 관련한 사안을 처리할 수 있는 법원의 중설이 주나 연방직할

시에서 시행에 들어가야 한다는 것이다. 매우 위험한 산위헌성에서 아동
노동이 사라지는 남은 14세까지의 자유로운 의무교육이 완전히 실시되
는 그 때이라고 본다. 인권위의 견해로는 이 문제와 관련하여 진지한
토론이 있어야 한다고 보는데, 아동들의 장래는 물론 나라의 장래가 여
기에 직결되고 있다고 믿기 때문이다. 새로 구성된 의회에서는 이에 관
한 토론의 기회를 만들 것으로 기대해 본다. 인권위는 몇 백만의 아동들
이 노동과 빈곤에 빠지게 될 이 문제에 대하여 총력의 관심을 기울일
것이다.

16. 인권과 관련해서 교육체계를 환용하기 위한 인권위의 노력은
1994-1995년 사이에 인간자원개발부의 적극적인 지원을 얻어냈다. 그레
서 지난 한 해 교육부와, 인간개발부, 국가교육, 연구 및 훈련위원회
(NCERT), 국가교사교육위원회가 인권의 가치가 모든 교육과정에 반영
되어야 한다는 데 의견을 모았다.

NCERT가 준비한 교재는 헌법 부칙 제8조에 열거된 언어로 번역되
기를 권고한다. 대학수준에서는 인권위 위원장이 모든 대학총장들에게
학부와 대학원과정에서 가능한 인권교과목을 포함시킬 것과 인권에 관
한 연구, 세미나 그리고 출판 등을 장려해줄 것을 서한을 통해 당부하였
다. 원격교육과 관련해서 인권위는 국립개방학교가 인권의 전과교육을
위해 가능한 모든 수단을 활용할 것을 결정해준 데 대해서 환영하는 바
이다.

17. 인권위는 경찰인원들에 대한 교육과 재교육을 실시하는 것이 우
선적으로 필요하다는 생각을 갖고 있다. 그래서 하이드라바드에 있는 사
다르 파텔 국립경찰학교를 비롯한 전국에 소재한 연수시설의 교육과정
에 인권교육에 대한 강조를 하기로 하였다. 물론 인권위는 연수교과과정
에서의 내용상의 수준과 일관성을 확보하기 위해서 그 기준을 향상시켜
야 한 필요가 있음을 인식하고 있다. 따라서 모든 주와 연방직할지역의
경찰총장과 진지한 토론을 거쳐 경찰일반과 간부직원, 고급간부들에 대
한 3단계의 모범교안을 만들어 내었다. 이 모범교안은 각 주에 배포되었

고 이 일에 위키에서 모든 주의 경찰관들에게 교육을 시켜줄 것을 권고하였다.

인권위는 또한 전국의 군대는 물론 준군사력의 해당 지도자들과 긴밀한 접촉을 가짐으로써 모든 병력에 대한 교육에 인권내용을 포함시키기로 하였다. 인권위는 계속해서 준군사력에 대하여 그들의 간부교육에 대해서도 인권교육을 강화시켜줄 것을 요구하고 있는 중이다.

18. 인권위는 의회와 각주 의회의 정당지도자들의 위조를 구하고 있다. 이에 따라서 정당들은 중앙정부와 각주, 그리고 지방차원에서 '인권분소'(Human Rights Cells)를 설치할 것을 강구중에 있고 이를 통해서 인권증진과 보호 및 관리들의 행동에 대한 감독 등을 기대하고 있다. 또한 고급 관리들 인권담당자로 지정해서 인권위와 긴밀한 연락을 취해줄 것을 의뢰하였다.

19. 인도와 같은 광활하고 다양한 나라에서 고발사건은 특별히 신속하게 처리될 것이 요구된다. [인권보호법]이 정한 바와 같이 주단위에 인권위가 설치된다면 비용과 시간, 노력이 엄청나게 절약될 뿐만 아니라 서비스도 향상될 것이다. 따라서 인권위는 이를 위해 지속적으로 노력을 기울여 왔고 그 결과 1996년 3월말까지 서벵골, 히마찰, 브라데쉬, 마디아, 브라데쉬, 앓삼에 주인권위원회가 설치되는 기쁨을 얻게 되었다. 여타의 주에서도 계속 구성되기를 기대한다.

연방직할지역에서의 인권에 관한 살만을 시정하기 위한 기구에 관해서 내무부는 1994-1995년 인권위 보고서에 대한 대답으로 고등법원의 예에 따라 해당지역과 인접한 주인권위의 관할을 확장시킴으로써 처리하는 것이 바람직하다는 견해를 가졌다. 그러나 많은 주는 위원회의 구성을 지체시켜왔기 때문에 인권위는 내무부로 하여금 다만-디우, 다드라-나가르하벨리의 예에 따라 연방직할지역의 경우에는 우선 '인권분소'를 설치하는 것이 이질 것인가라는 견해를 보냈다.

인권위는 깨달아에서와 같이 지방단위의 인권위가 설치된 것을 환영한다. 현지에서의 인권문제에 대해 가장 신속한 방법으로 인권침해사항

을 시정하는 이런 불권적인 경향은 아주 바람직스런 것이다. 주와 연방 직할지역에서도 같은 방식으로 일이 진행되기를 권고한다.

V. 인권위에 대한 평가 및 문제점

국민인권의 파수꾼으로 인권위는 이제까지의 활동으로 어느 정도 신용을 얻었다. 인권위는 국민들에게 객관성, 공정성, 성실성 등의 이미지를 구축함으로써 무기력하고 안일한 정부의 한 기관에 불과한 것으로 끝나리란 우려를 관식시켜 주었다. 동시에 의회와 집행부의 촉매역할로서의 새로운 모델을 어느 정도 성공적으로 수행하였다. 그렇지만 다음과 같은 점에서 더욱 보강을 하지 않으면 [인권보호법]과 인권위의 본래 목적을 달성하지 못하리라는 판단이 제기되었다.⁸⁾

1. 군대와 관련하여 발생한 인권침해 사안에 대해서는 정부의 책임으로 맡길 뿐 인권위가 개입할 여지가 너무 적다. 이 부분에서 인권위의 직접적이고 독자적인 조사권을 확보하도록 해야 한다.

2. 국민들로부터의 고발사건이 증가 추세에 있음을 감안할 때, 인권위의 조직과 인원은 강화되어야 한다.

3. 인권위가 발행하는 뉴스레터는 현재 힌디와 영어판으로만 발간되는데, 인권인식의 확대를 위해서는 더 많은 언어로 번역되어 발행되어야 하리라고 본다.

4. 인권위의 눈과 귀가 될 지역 사무소가 전국 곳곳에 더 많이 개설되어 직접적인 감독과 대응조치를 취할 수 있도록 해야 할 것이다.

5. 행정관리와 법집행을 맡는 관리들에 대하여 인권교육을 의무화하

8) B.P. Somasekher, 앞의 논문, 559-560쪽

는 것은 인권위의 개선을 위해 전례적으로 요긴하다.

6. 아시아의 인권영역은 상호간 동질성이 별로 없는 것이 사실이다. 서구국가와 같은 국가간 인권조약이 체결되지도 않고 있다. 각국의 국민 인권위원회 활동을 통하여 아시아의 인권향상을 위한 연대작업이 바람직하다.

7. 현재 고발사건은 발생 1년 이내의 것으로만 제한하고 있는데, 바람직하기로는 고발을 즉각 하기 곤란한 사회 문화적 요인을 살펴 고의성이 없거나 합당한 이유가 있는 경우에는 기한의 제한에 구애받지 않고 고발의 기회를 주는 것이 보다 현실적으로 생각된다.

8. 무엇보다도 인권위의 최대의 관건은 독자성을 확보하는 데 있다. 변화하는 세상에 부응하여 인권의 새로운 주제들, 즉 자원분배를 둘러싼 분쟁, 성의 평등, 카스트와 종교공동체주의와 종족에 관한 문제들, 환경 문제들과 같은 것에 최선의 대처를 할 수 있어야 할 것이다. 인권위가 신뢰를 얻기 위해서는 그동안 아무도 풀지 못했던 인권의 숙제를 독자적으로 해결하는 본보기를 보여주어야 한다. 정부에 대한 발언에서 주저함이 없어야 하고, 어디든지 대담하게 접근하여 문제를 해결하는 능력을 발휘해야 한다. 인권위의 성공을 위해서 비정부단체들(NGOs)과의 긴밀한 협조를 취하는 것이 매우 중요하고 현명하리라고 본다. 현재의 인도 인권위가 국제엔네스티로 하여금 카쉬미르 분쟁지역을 방문케 해서 인권의 실태를 직접 파악할 수 있는 기회를 마련한 것은 좋은 선례가 될 것이라고 믿는다.⁹⁾

9) Iqbal Hussain Butt & K.A. Qazi, Analysis of the Provisions of the Protection of Human Rights Act, 1993- A Plea for its Active Working in Jammu and Kashmir State, in: Human Rights in India (ed. B.P. Singh Sehgal), 591쪽.

인권하루소식 특집 <국민인권기구>

호주의 경험과 한국의 전망

- 광노현 교수 (방송대 법학과)

(1) 보편적 인권규범 실현을 위한 강력한 수단

국민인권기구(National human rights institution, 원래 인권은 외국인에게도 적용되기 때문에 '국민'인권기구라는 용어보다는 국제기구가 아니라는 뜻의 '국가'인권기구라는 용어가 보다 적합하지만 어감이 별로 좋지 않은 관계로 국민인권기구라는 용어를 쓰는 것)은 인권의 보호와 증진을 유일한 목적으로 설립된 인권진담 국가기구를 일컫는 용어이다. 국민인권기구는 대개 위원회 형식으로 조직된다. 따라서 노동위원회나 공정거래위원회가 하는 역할을 인권분야에서 수행하는 위원회로 생각하면 이해가 빠를 것이다. 실제로 대부분의 국민인권기구는 인권위원회나 인권 및 반차별위원회라는 간판을 달고 있다.

민주화 이행기의 나라들에 인기

국민인권기구는 현재 호주, 뉴질랜드, 캐나다, 필리핀, 남아공, 에스토니아, 몰도비아, 인도, 인도네시아, 멕시코, 스리랑카 등에서 운영되고 있으며 러시아와 태국에서도 근거법령이 통과하여 설치를 눈앞에 두고 있는 상태다. 이 명단에서 엿볼 수 있듯이 국민인권기구는 매우 다양한 나라들에서 운영되고 있는 바, 특히 대규모 인권침해를 경험하고 현재 민주화 이행기에 있는 나라들에서 인기가 높다. 필리핀과 남아공의 경우 과거청산의 차원에서 아예 국민인권기구를 새로운 헌법기구로 격상시켰을 정도다. 앞으로도 국민인권기구는 적지 않은 나라들에서 꾸준히 신설될 것으로 전망된다. 각국의 인권단체들이 이를 요구할 뿐 아니라 정부로서도 국내외에서 생색내기에 좋은 측면이 있기 때문이다. 우리나라에서의 전망 역시 밝다. 정부가 몇해 전부터 국제사회에서 거듭 약속해온 테다 새 대통령의 집권공약사항이기도 하기 때문이다.

국민인권기구에 대한 이해를 심화하고 바람직한 입법안을 마련하기 위한 노력의 일환으로 이하에서는 세계 각국의 국민인권기구중 가장 먼저 설치되었을 뿐 아니라 가장 모범적으로 운영되는 것으로 알려져 있는 호주의 인권 및 기회균등위원회(Human Rights and Equal Opportunity Commission, 이하 "위원회")의 조직과 구성, 성과와 한계에 대해 소개하겠다.

81년 설치된 인권위원회가 표시

위원회는 1986년 인권의 날(12월 10일)에 설치되어 오늘에 이른다. 그러나 호주국민인권기구의 효시는 그 전신으로서, 1981년 인권의 날에 설치되어 86년까지 존속한 인권위원회(Human Rights Commission)다. 인권위원회는 호주정부가 1977년에 비준한 [시민적, 정

치적 권리에 관한 국제규약(International Covenant on Civil and Political Rights)의 실효성을 보장하는 차원에서 논의가 시작되어 79년에 입법되었으나 81년에 비로소 설치되었다고 한다.

탄생 배경에서도 알 수 있듯이 국민인권기구는 애초부터 국제사회의 보편적 인권규범을 적극적으로 국내에서 집행하는 수단으로 강구된 것이었다. 이를 위해 국민인권기구는 인권관련 법제, 정책, 관행에 대한 조사연구, 인권외교, 법제, 정책, 관행 등에 대한 대정부 자문과 조인, 인권교육과 훈련 및 홍보 등의 다양한 권한을 갖게 되었다. 또한 국민인권기구는 인권침해행위에 대한 구제기능도 갖고 있는 바, 이는 인권피해자에게 법정소송보다 신속, 간이한 구제수단을 제공하기 위한 것이다. 특히 일상생활에서 흔히 발생하는 사소한 인권침해, 예컨대 직장에서의 성희롱이나 성, 인종, 지역, 혹은 장애 차별적 인사 등에 대해서는 법원의 복잡하고 지리한 절차 때문에라도 그냥 지나치는 경우가 허다한 것이 현실이다. 국민인권기구의 신속, 간이한 구제기능은 주로 이러한 경우를 시정하기 위한 것으로 볼 수 있다.

신속, 간이한 인권침해 구제수단

결론적으로 국민인권기구는 인권침해에 대한 보다 효과적인 구제 제공, 국내 인권현황에 대한 조사연구 수행, 국제인권규범에 바탕한 대정부 조인과 자문 제공, 인권교육과 훈련 실시 등 매우 종합적인 인권보호 및 증진 활동을 수행하는 국가기구로서 국제인권시대의 국가내 인권파수꾼으로 고안된 국가기구라 할 수 있다.

(2) 호주 인권및기회균등위원회의 권한과 활동

호주 인권및기회균등위원회법에 따르면 위원회의 목적은 인권과 기회균등에 대한 이해, 승인 및 실천을 증진시키며 인권을 보호하고 국제인권법상의 의무를 다하게 함으로써 보다 공정한 사회를 촉진하는데 있다. 이러한 목적을 달성하기 위해 위원회는 다음과 같은 일을 수행한다.

인권관련진정사건의 처리

위원회는 국제인권규약B(시민적, 정치적 권리에 관한 국제인권규약), 국제노동기구 제111호 조약(고용과 직업에서의 차별금지조약), 어린이권리조약, 어린이권리선언, 장애인권리선언, 정신지체자권리선언, 모든 형태의 불관용 및 종교나 신념을 이유로한 차별 철폐선언 등의 국제인권법과 성차별금지법, 인종차별금지법, 장애인차별금지법, 원주민토지권리법, 프라이버시보호법 등의 국내법 위반사안을 조사, 처리할 권한을 갖는다. 여기서 알 수 있듯이 위원회는 국제인권규약A, 곧 경제, 사회, 문화적 인권과 관련해서는 아무런 진정처리권한도 갖지 못한다. 이 점은 현행 위원회가 갖는 가장 큰 한계의 하나로 지적된다.

진정이 제기되면 위원회는 일단 양당사자를 불러 사안을 들어본 후 일단 조정(conciliation)을 시도한다. 국제인권법과 관련된 진정사건의 경우 위원회는 조정권한만을 갖는다. 즉, 조정이 성립하지 않을 경우 위원회로서는 더 이상 아무런 조치도 취할 수 없다. 반면 국내법 위반사건의 경우 조정이 성공하지 못하면 위원회 내부의 반차별심판부(Anti-discrimination Tribunal)에 사건을 회부한다. 이런 경우는 총 진정건수의 약 5%선을 넘지 않는다. 당사자주의로 진행되는 법정소송과 달리 위원회의 심판절차는 직권주의로 진행된다. 따라서 변호인이 없어도 된다.

위원회의 결정에는 하지만 아무런 구속력이 없다. 한때 위원회 결정에 구속력이 주어진 적이 있었지만 이는 대법원의 93년도 Brandy 판결에 의해 위헌으로 선언되었다. 정부기관의 하나인 위원회에 사법부만이 가질 수 있는 집행력을 부여하는 것은 권력분립원칙에 위배된다는 이유에서였다. 그럼에도 불구하고 대부분의 피진정인들은 여전히 위원회의 결정(공개사과, 원직복귀, 손해배상등)을 순순히 따른다고 한다.

인권관련소송에의 참가

위원회는 국내에서 진행되는 어떤 인권관련 소송에도 해당 재판부의 허가를 얻어 참가할 수 있다. 고르고 골라 1년에 서너건 정도 참가하지만 법원에 대한 영향력은 매우 크다. 위원회의 개입가능성이 상존하므로 인권사건 재판부가 아무래도 심사숙고하지 않을 수 없기 때문이다.

인권관련쟁점에 대한 공개조사

인권침해의 여지가 있는 관행에 대해 위원회는 대규모 공개조사를 벌일 수 있다. 보통 1년 이상씩 계속되며 결과는 두툼한 보고서로 나온다. 피해자나 관련단체, 인권전문가 기타 이해관계인들은 청문회에 출석, 발언하거나 의견서를 제출할 수 있다. 정신지체인의 인권에 관한 조사, 집없이 떠도는 이들(homeless)에 대한 조사, 원주민들의 구금중 사망에 대한 조사, 원주민 신생아를 백인가정에 강제입양시켜온 관행에 대한 조사등이 유명하다.

인권관련 연구 및 교육, 훈련, 홍보

인권교육과 훈련도 매우 활발하다. 이를 위해 포스터, 안내서, 해설서, 비디오등을 제작하며 끊임없이 인권의식 제고를 위한 활동을 하고 있다. 예컨대 성희롱의 경우 두툼한 교육자료가 사기업 관리직용, 공공부문용, 대학용등으로 별도로 나와있을 정도다. 또한 위원장과 위원은 물론 직원들도 매우 왕성한 강연 및 기고 활동을 수행한다.

인권관련 국가 법령, 정책, 관행과 관련한 대정부 조언 및 자문

예컨대 위원회는 법령과 관련하여 외국인수감자국제인도법, 나이차별금지법 등을 새로 제정하자는 제안을 내놓고 있으며 정책과 관련해서는 보트 피플(곧 선상난민들)에 대한 호주정부의 무조건적 구금관행을 난민 권리 침해행위로 규정하고 이의 시정을 요구하고

있다. 또한 위원회는 국제인권조약에 따른 정부의 정기보고서 작성이나 국제인권회의에 파견되는 정부대표단에 대해 의견을 제시하고 자문을 제공하고 있다.

인권상 수여

매년 인권의 날, 곧 12월 10일에 수여한다. 인권메달과 인권상 두가지가 있다. 인권메달은 호주 최고의 인권상이다. 인권상은 단체상, 영화상, 문학상, 르포기사상등 8개부문으로 시상된다. 인권상의 관변화를 막기 위해 수상자는 외부인사로 구성된 선정위원회에서 선정한다.

(3) 정부 및 민간단체와의 관계

국민인권기구가 제대로 기능하기 위해서는 무엇보다도 정부로부터 독립해 있을 것과 민간단체와 긴밀한 협조관계를 유지할 것이 요구된다.

국민인권기구의 주요 업무는 인권의 관점에서 국가기관들의 정책이나 행위를 문제삼고 그 시정을 요구하는 것이다. 따라서 대정부 독립성은 국민인권기구의 업무 수행을 위해 필수적이다. 인권위원회의 위원에 대해 임기 보장, 해임 제한등 강력한 신분보장책이 주어져야 하는 것은 이 때문이다. 물론 국민인권기구도 정부의 조직 및 예산 통제를 받는 국가기구의 하나만큼 정부의 이해와 협력을 구하는 것도 중요하다. 그러나 국민인권기구의 진가는 역시 정부의 잘못을 지적하고 시정을 요구할 때, 즉 정부에 대해서도 비판하고 적언할 때 드러나는 법이다. 국민인권기구는 이런 경우를 통해 국민의 신뢰를 얻게 된다. 실제로 민감한 인권문제에 대해 적언하지 못하는 국민인권기구란 정부의 하수인이나 대변인으로 전락한 또하나의 관료적 국가기구일 뿐이다.

대정부 독립성 필수적

법령으로 독립성을 보장하고 있어도 그 실효성은 위원 개개인의 독립성 수호 의지가 얼마나 강한지, 나아가서 국가의 전반적 통치구조가 얼마나 민주주의에 충실한지에 따라 다를 것이다. 이를 가능케할 수 있는 가장 현실적 척도는 국민인권기구와 인권관련 민간단체와의 관계다. 즉, 국민인권기구가 민간단체와 긴밀한 협력적 관계를 구축하고 있다면 일단 위원 개개인의 독립성 수호 의지가 강하고 사회의 전반적 분위기가 민주적이라 보아 무방할 것이다. 민간단체들은 인권 관련 현장 정보와 교육의 통로이자 원천이다. 국민인권기구가 이들 단체를 통하지 않고 '국민'들과 직접 접촉하는 경우는 거의 없다. 실제로는 이들이 바로 국민인 것이다. 따라서 일반대중이나 공동체에 뿌리내리고자 하는 국민인권기구는 일차적으로 민간단체들의 이해와 협력을 구할 수밖에 없다. 실제로 이들의 강력한 지지와 성원이 없이는 어떤 국민인권기구도 정부의 부당한 압력과 요구를 이겨낼 정치력을 가질 수 없다. 또한 민간단체들의 강력한 비판과 감시가 없이는 국민인권기구 역시 타락하기 쉬운 국가기구의 하나에 불과하다는 점을 잊어서는 안된다.

민간단체와의 관계가 가능자

호주 국민인권기구도 민간단체들의 중요성을 감안하여 민간단체들에 대한 홍보와 대화를 게을리하지 않는다고 했다. 그래서인지 민간단체들도 인권위원회를 쉽사리 접근할 수 있는 기구로 여기는 듯한 인상을 받았다. 그러나 호주의 경우 민간단체와의 협의는 비공식적으로 이뤄질 뿐 법적으로 강제되거나 일정한 방식으로 제도화된 것은 아니다. 이 점에 대해서는 많은 민간단체들이 아쉬워했다. 정례화, 제도화되어야 한다는 것이었다. 나아가서 호주의 민간단체들은 인권위원 임명에 대해서도 아무런 공식 권한이 없었다. 추천권도, 비토권도, 청문권도 없었다. 이러한 권한을 부여할 경우 민간단체와 위원회가 너무 밀착할 가능성을 우려하기 때문이라고 했다. 그러나 민간단체들에 대해 공식적으로 후보 추천권이나 청문권을 부여한다고 해서 독립성이 손상되거나 양자의 역할에 혼동이 초래되는 것인지 의문이다.

예산의 독립성 확보도 관건

예산의 독립성 확보도 독립성과 관련한 중요한 문제의 하나다. 호주에서는 지난 96년 3월에 출범한 보수연립정부가 자신들의 집권기간중(3년간) 무려 42%의 예산을 삭감한다는 방침 아래 국민인권기구의 조직과 인원을 대대적으로 축소하고 있는 중이다. 원주민 인권이나 반차별정책을 '무책임할 정도로 지나치게' 옹호해온 죄값이란단.

반면 노동당 정부가 집권했던 지난 13년간 호주의 국민인권기구는 예산과 조직 면에서 대대적인 지원을 받았다고 한다. 국민인권기구가 행정부에 속해있는 이상, 정권의 성격에 따라 가용예산과 조직이 어느 정도 바뀔 수밖에 없기는 하겠지만 이러한 현상을 최소화하기 위해 관련법에 국민인권기구의 예산에 대해서는 상당한 정도의 독자성을 인정할 것이 요구된다는 취지의 문언을 넣도록 노력해야 할 것이다.

정부와의 긴장관계 불가피

요컨대 제대로 기능하는 국민인권기구는 정부와 어느 정도 긴장과 갈등 관계를 유지할 수밖에 없다. 또한 이러한 사실을 인식하는 국민인권기구는 민간단체와의 협력관계에 신경을 쓸 수밖에 없다. 민간단체의 지지를 통해 확인되는 국민의 성원이 없이는 어떤 국가기구도 정부와의 긴장관계를 감내할 수 없기 때문이다. 나아가서 민간단체들은 국민인권기구의 성과를 감시하고 비판하는 역할을 담당한다. 이 점에서 국민인권기구는 민간단체들과도 일정한 정도의 긴장관계를 면할 수 없다.

(4) 호주인권위 차별금지영역에서 눈부신 성과

호주 인권 및 기회균등위원회는 모범적인 국민인권기구로 널리 알려져 있다. 호주 인권 위에는 국민인권기구에 관심있는 세계 각국 방문조사단의 발길이 끊이지 않는다. 호주 정

부도 호주 인권위를 자랑거리로 알고 인권외교의 중심축으로 삼고 있다. "아시아-태평양 지역 국민인권기구 포럼"의 결성을 주도하고 그 운영비를 대고 있을 정도다. 호주 인권단체들의 평가도 대체로 긍정적이다. 가장 비판적인 이들조차 "인권위는 유엔이 그렇듯이 불만족스럽긴 하지만 없는 것보다는 훨씬 낫다"는 평가를 내리곤 했다. 호주 인권위는 특히 차별금지영역에서 눈부신 성과를 거둔 것으로 평가된다. 법원까지 가기에는 사소해 그냥 지나치곤 했던 각종 차별사건과 까다로운 재판절차로 말미암아 포기하곤 했던 차별사건들이 인권위를 통해 다뤄지면서 차별금지법제가 실효성을 갖게 되었을 뿐 아니라 인권위의 주도 아래 차별금지법제 자체가 대폭 정비, 강화되었다. 나아가서 호주 인권위는 인권관련 소송에 선별적으로 참가함으로써 국제인권법에 대한 호주 법원의 관심과 수용 태세를 현저히 높여온 것으로 평가된다. 또한 대규모 조사작업과 다양한 연구활동을 통해 인권실태와 쟁점에 대한 이해를 높인 점도 호주 인권위의 성과로 꼽힌다.

차별금지법제 실효성 갖는 성과

한편 호주 인권위는 다음과 같은 문제점과 한계를 안고 있는 것으로 지적된다. 첫째, 호주 인권위의 준사법적 권한은 현재 시민·정치적권리에 관한 국제인권조약 사안, 즉, 시민정치적 권리 위반 사안과 각종 차별금지법 위반 사안에만 미친다. 즉, 호주 인권위는 경제·사회·문화적 권리에 관한 국제인권조약 위반 사안에 대한 심결권을 갖고 있지 않다. 경제사회적 인권 침해를 바로잡기 위해서는 정부의 예산지출이나 정책 변경등이 필요한 경우가 많다. 이렇게 되면 일개 위원회의 결정에 정부가 휘둘리게 된다는 것이 그 이유인 듯하다. 그러나 경제사회적 인권을 인권의 구성요소로 파악하는 이상 이러한 논리는 잘못된 것이라 할 수 없다. 특정한 경제사회적 권리를 인권으로 파악하는 이상 그 보장과 실현에 타협이 있을 수 없을 뿐 아니라 권리 관정을 이행하는 데 반드시 정부의 특별한 예산지출이 필요한 것은 아니기 때문이다. 사회경제적 인권을 인권위원회의 관할대상에 포함시킬 필요는 우리나라와 같이 오랫동안 성장 일변도의 경제체일주의에 매달려온 나라들에서 더욱 절실하다.

사회경제적 인권을 관할대상으로

둘째, 호주 인권위원회의 결정은 구속력을 갖지 못한다. 93년의 브랜디 판결에서 호주 대법원은 행정부의 일원인 위원회의 심결에 구속력을 부여한 당시의 위원회법을 위헌으로 판시하였다. 그 결과 위원회에서 심결과정은 법적으로 볼 때 전적으로 낭비다. 피진정인이 불복할 경우 진정인은 법원에서 1심 절차부터 완전히 새로 시작해야 하기 때문이다. 그럼에도 위원회는 여전히 연간 수백건씩 배상 결정을 내리고 있으며 피진정인들 역시 대부분의 경우 심결 내용을 이행하고 있다고 한다. 하지만 현 보수연립정부의 위원회 개편안에 따르면 위원회의 조정 노력이 실패할 경우 사건은 위원회의 손을 떠나도록 되어 있다. 그나마 위원회의 심결권마저 박탈될 위기상황인 것이다.

셋째, 호주 인권위는 민간단체와 의견을 나누고 협력을 이끌어낼 공식적 수단을 갖고 있지 못하다. 인권위를 구성하는 6인의 커미셔너 임명과정에 민간단체들이 공식적으로 개입

할 여지는 전혀 없다. 또한 인권위와 민간단체들간의 협의도 임의적일 뿐, 정례화, 제도화된 것이 아니다.

인권위와 민간단체 협의 임의적

넷째, 호주 인권위는 예산을 전적으로 정부에 의존하고 있다. 예산상의 독립성이 거의 없는 것이다. 그 결과 정부여당에 밀보일 경우 인원과 조직이 대폭 감소될 수 있다. 실제로 호주 인권위는 현재 대폭적인 예산감축으로 인해 대대적인 인원 및 조직 축소 작업에 나서고 있는 중이다.

끝으로 위원회의 커미셔너 체제도 문제라는 지적이 있다. 호주 인권위원회를 구성하는 6인 커미셔너 각자는 각각 근거법령을 달리하는 독립관청으로 독자적 관할 영역을 갖는다. 예컨대, 장애차별 관련 사건이나 정책은 장애차별금지법에 의해 독립관청으로 임명되는 장애차별담당 커미셔너의 관할에 속한다. 실제로 호주 인권위원회는 공동사무국을 두고있는 독립관청 6개가 가끔 공동 관심사를 협의하는 구조로 보면 적절할 것이다. 이러한 구조는 권한과 책임의 소재를 분명히 하는 데 장점이 있지만 전체의 응집력이나 기획력이 떨어지는 것이 단점이다.

(5) 새 정부의 방침과 인권운동의 의무

다행스럽게도 국민인권기구 설치에 새 정부의 100대 과제중 하나로 이미 확정, 공표되어 있는 상태다. 국민인권기구는 하지만 '장기과제'의 하나로 분류되어 있기 때문에 그 실현 여부를 전혀 낙관할 수 없다. 국민인권기구 창설을 서두르지 않겠다는 새 정부의 방침에는 두가지 이유가 있는 듯하다. 첫째, 현재의 경제난국이 지속되는 이상 정부기구를 신설하는 것은 부적절하다는 것으로 일종의 상황론이다. 둘째, 국민인권기구에 대해 충분히 연구, 검토할 시간이 필요하다는 것으로 일종의 신중론인 셈이다.

인권운동의 입장에서는 국민인권기구 설치를 이처럼 미뤄야 할 하등의 이유가 없다. 오히려 금년 12월 10일(인권의 날)까지는 필요한 입법을 완료하도록 새 정부에 최대한의 압력을 가해야 한다. 그 이유는 다음과 같다.

첫째, 국민인권기구의 설치에 100대 과제 중에서도 새 대통령의 민주개혁의지를 드러낸다는 점에서 핵심과제의 하나다. 국민인권기구 설치를 미룰 경우 인권과 민주화를 향한 새 정권의 의지가 퇴색한 것으로 오인되기 쉽다.

둘째, 유례없는 경제위기를 맞아 인권도 위기상황에 처해있다. 벌써부터 갖가지 고용차별이 기승을 부리는가 하면 인권은 뒷전이라는 인식이 팽배한 상태다. 이런 상황에서 국민인권기구 설치를 미루는 것은 인권침해를 조장하는 것과 마찬가지다.

셋째, 금년은 50년만에 정권교체를 이룩한 해이자 헌법이 제정되고 세계인권선언이 반포된지 50년이 되는 해이다. 국민인권기구의 취지가 헌법과 세계인권선언에 실효성을 부여하지는 못해 있는 것이니만큼 국민인권기구를 설치하기에 금년만큼 좋은 해는 없다.

넷째, 99년서부터 내각제 개헌으로 몸살을 앓을 예정인 새 정권 아래서는 '장기과제'의

CENTRE FOR HUMAN RIGHTS
Geneva



PROFESSIONAL TRAINING SERIES No. 4

National Human Rights Institutions

*A Handbook on the
Establishment and Strengthening of National Institutions
for the Promotion and Protection of Human Rights*



UNITED NATIONS
New York and Geneva, 1995

실현 여부가 매우 불투명한 상태다. 설령 내각제 개헌정국이 순조롭게 진행된다고 해도 국민인권기구처럼 개혁적 색채가 짙은 핵심과제의 경우 기득권세력의 저항이 덜한 정권 초기에 추진하는 것이 바람직하다.

늦출 이유가 없다

국민인권기구에 대해 충분한 연구검토가 필요한 것은 사실이다. 하지만 지금부터 서두르면 연말까지 얼마든지 법안을 작성하고 공청회를 개최하는등 필요한 입법절차를 마칠 수 있다. 간단히 말해서 국민인권기구 설치를 늦출 이유가 없다.

다만 국민인권기구를 설치할 때 다음 사항에 대해서도 충분히 고려해야 할 것이다.

첫째 대정부 독립성을 보장해야 하며 사회경제적 인권도 확장하도록 해야 한다. 이는 호주의 교훈이다.

둘째, 국내인권법을 정비하는 것은 물론 무엇보다도 차별금지법을 제정하여 국민인권기구의 활동기반을 강화해야 한다. 현재 우리나라에는 헌법과 노동법의 추상적 차별금지 조항을 제외하고는 구체적 차별금지입법이 없는 상태다. 그 결과 일상적으로 발생하는 불합리한 차별행위에 대해 실효성있는 구제방법이 없는 경우가 많다. 포괄적 차별금지법의 제정은 이러한 상태를 종식시키는데 필수적이다. 그밖에도 행정정보공개법이나 사생활정보 보호법등 인권관련법들을 대폭 정비하여 국민인권기구의 활동기반을 강화해주는 것이 바람직하다.

셋째, 이미 존재하는 관련위원회들과의 관할권 중첩문제를 처리해야 한다. 이는 특히 고충처리위원회, 언론중재위원회, 노동위원회, 남녀고용평등위원회, 각종 장애인관련위원회 등의 권한과 관련하여 검토될 필요가 있다.

'타락'을 피해야 한다

끝으로 국민인권기구의 문제점은 자칫 또하나의 관료적 국가기구로 타락하기 쉽다는 데 있다. 이러한 위험을 피하기 위해 국민인권기구는 한편으로는 국내민간단체들과 다른 한편으로는 국제인권기구들과 부단히 접촉함으로써 스스로의 국가기구적 성격을 최대한 약화시켜야 한다. 즉, 국민인권기구는 보다 투명한 국내인권단체를 통해 밑으로부터 수혈 받아 '국민'인권기구가 되어야 하며, 나아가서 보다 보편적인 국제인권법을 통해 위로부터 수혈받아 국민'인권'기구가 되어야 한다. 이럴 때만이 국민인권기구는 인권의 전(前)국가적 성격과 초(超)국가적 성격을 동시에 반영하면서 국제인권시대의 인권과수꾼 노릇을 제대로 수행할 수 있다. 한마디로 국민인권기구는 국제사회와 시민사회의 국가내 접속 통로로 고안되었으며 그렇게 기능해야 한다. 향후의 국민인권기구 설립과정은 이러한 인식을 확산하고 실질화하는 과정이 되어야 한다.

NOTE

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

*
* *

Material contained in this publication may be freely quoted or reprinted, provided credit is given and a copy of the publication containing the reprinted material is sent to the Centre for Human Rights, United Nations, 1211 Geneva 10, Switzerland.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.

VIENNA DECLARATION AND PROGRAMME OF ACTION
(Part I, para. 36)

HR/P/PT/4

UNITED NATIONS PUBLICATION

Sales No. E.95.XIV.2
ISBN 92-1-154115-8

ISSN 1020-1688

FOREWORD

It is with great pleasure that I introduce this handbook, the fourth publication in the *Professional Training Series* launched by the United Nations Centre for Human Rights in 1994. Like the other publications in the series, the handbook is designed to complement the Centre's technical cooperation programme, while at the same time providing information and assistance to all those involved in developing the structures necessary to promote and protect human rights.

Human rights involve relationships among individuals, and between individuals and the State. The practical task of protecting human rights is, therefore, primarily a national one for which each State must be responsible. United Nations efforts to encourage the creation and strengthening of national human rights institutions can be traced back to 1946. However, it is only over the past few years that the international community has come to agreement as to the optimal structure and functioning of these bodies. A landmark in this process was the formulation of the Principles relating to the status of national institutions, which were endorsed by the General Assembly in 1993. The same year, the World Conference on Human Rights reaffirmed the important and constructive role played by national human rights institutions and called upon Governments to strengthen such bodies.

In the course of its work in the area of national institutions, the United Nations has come to realize that no single model of national institution can, or should be, recommended as the appropriate mechanism for all countries to fulfil their international human rights obligations. Although each country can benefit from the experience of others, national institutions must be developed taking into account cultural and legal traditions, as well as existing political organization.

The United Nations has also recognized that not all States eager to establish or strengthen national institutions have the necessary technical and financial capacity to do so. The Centre for Human Rights, under its technical cooperation programme, has provided expert and material assistance in this area to a number of countries in the past few years. The Centre encourages States to request assistance in building or strengthening national human rights institutions.

Human rights machinery of the kind which forms the subject-matter of this handbook cannot be expected to address all the human rights issues which are currently occupying governments and the international community. Nor are such institutions set up to replace the human rights organs of the United Nations or non-governmental organizations working in the same area. The role of national institutions is clearly complementary, and their strengthening can only enhance the effectiveness of both national and international systems for the promotion and protection of human rights.



José AYALA LASSO
United Nations High Commissioner
for Human Rights

ACKNOWLEDGEMENT

This handbook was prepared by the Technical Cooperation Branch of the United Nations Centre for Human Rights. Special thanks are due to those national institutions and private individuals who offered comments and suggestions on an earlier draft.

CONTENTS

	<i>Page</i>
Foreword.....	v
Acknowledgement	vi
International instruments cited in the present handbook	xi
	<i>Paragraphs</i>
GENERAL INTRODUCTION	1-8 1
A. Aims of the handbook	1-4 1
B. Organization of the handbook	5-8 1
<i>Chapter</i>	
I. NATIONAL HUMAN RIGHTS INSTITUTIONS: BACKGROUND AND OVERVIEW	9-62 3
A. Human rights systems	9-19 3
1. The United Nations and human rights	10-13 3
2. Regional human rights systems	14 3
3. Non-governmental organizations	15 3
4. Governments	16-19 3
B. United Nations activity in the area of national institutions	20-35 4
1. Early activities of the Economic and Social Council	20-21 4
2. Establishing standards and goals for national institutions	22-24 4
3. The 1991 first international meeting in Paris	25-27 4
4. Activities during 1991-1993	28 5
5. The 1993 World Conference on Human Rights	29-31 5
6. The 1993 second international meeting at Tunis	32 6
7. Activities outside the United Nations system	33-35 6
C. Defining a national human rights institution	36-39 6
D. National institutions in practice	40-62 6
1. Classification difficulties	41-45 7
2. Human rights commissions	46-52 7
3. Specialized institutions	53-55 8
4. The ombudsman	56-62 8
II. ELEMENTS FOR THE EFFECTIVE FUNCTIONING OF NATIONAL INSTITUTIONS	63-138 10
A. Introduction	63-67 10
B. Independence	68-85 10
1. Independence through legal and operational autonomy	70-72 10
2. Independence through financial autonomy	73-76 11
3. Independence through appointment and dismissal procedures	77-81 11
4. Independence through composition	82-85 11
C. Defined jurisdiction and adequate powers	86-97 12
1. Subject-matter jurisdiction	86-90 12
2. Avoiding conflicts of jurisdiction	91-94 12

Chapter	Paragraphs	Page
3. Adequate powers	95-97	13
D. Accessibility	98-105	13
1. Awareness of the institution	100-101	13
2. Physical accessibility	102-104	13
3. Accessibility through representative composition	105	14
E. Cooperation	106-118	14
1. Cooperation with non-governmental organizations	108-111	14
2. Cooperation between national institutions	112-115	14
3. Cooperation with intergovernmental organizations	116-118	15
F. Operational efficiency	119-135	15
1. Adequate resources	121-124	15
2. Working methods	125	15
3. Personnel matters	126-130	15
4. Review and evaluation	131-135	16
G. Accountability	136-138	17
III. THE TASK OF PROMOTING AWARENESS AND EDUCATING ABOUT HUMAN RIGHTS ...	139-180	18
A. Introduction	139-146	18
B. Promotional strategies	147-163	18
1. Collecting, producing and disseminating information materials	147-153	18
2. Organizing promotional events and encouraging community initiatives	154-155	19
3. Working with the media	156-159	19
4. Ensuring the visibility of the institution and its work	160-163	20
C. Education and training	164-180	20
1. Professional training	164-174	20
(a) Identifying the audience	166-167	21
(b) Formulating a programme	168-169	21
(c) Selecting suitable trainers	170-171	21
(d) Maximizing the effectiveness of training exercises	172-173	21
(e) Conducting evaluations	174	21
2. Seminars	175-176	21
3. Education programmes	177-180	22
IV. THE TASK OF ADVISING AND ASSISTING GOVERNMENT	181-215	23
A. Introduction	181-182	23
B. Basic issues	183-189	23
1. Requested or self-initiated advice?	183	23
2. An appropriate mandate	184-185	23
3. Developing effective procedures	186	23
4. Responsibilities of recipients	187-189	23
C. Reviewing existing and proposed legislation and assisting in the drafting of new legislation	190-199	24
1. National institutions as legislative watchdog	191	24
2. Relationship between the legislative advisory role and other functions	192	24
3. Identifying the recipient	193-194	24
4. Proposed legislation	195	24
5. Existing legislation	196	24

Chapter	Paragraphs	Page
6. Drafting new legislation	197	25
7. Maximizing effectiveness	198-199	25
D. General policy and administrative advice to government	200-206	25
1. Policy advice on national issues	201-203	25
2. Advice on administrative arrangements and practices	204	25
3. Advice on judicial process	205	26
4. Advice on international human rights issues	206	26
E. Advice and assistance in implementation of international standards	207-215	26
1. Advice on implementing international instruments	209-210	26
2. Contributing to the drafting of reports	211-214	26
3. Assisting in the development of national action plans	215	27
V. THE TASK OF INVESTIGATING ALLEGED HUMAN RIGHTS VIOLATIONS	216-297	28
A. Introduction	216-218	28
B. Investigating complaints	219-282	28
1. Importance of a complaints mechanism	219-221	28
2. Establishing a complaints mechanism	222-250	28
(a) What complaints should be investigated?	222-228	28
(b) Are restrictions appropriate?	229-234	29
(c) Who may complain?	235-241	30
(i) Complaints by third parties	237-238	30
(ii) Class actions	239-241	30
(d) Procedure for submitting complaints	242-245	30
(e) Issues of confidentiality	246-247	31
(f) Rejecting a complaint	248-250	31
3. Conciliating a complaint	251-255	31
4. Conducting an investigation	256-267	31
(a) Powers of investigation	257-260	32
(b) Investigatory procedures	261-267	32
5. Remedies for violations	268-282	33
(a) Power to recommend	271-272	33
(b) Powers of referral	273-276	33
(c) Power to make determinations	277-278	33
(d) Power to make enforceable orders	279	34
(e) Publishing decisions	280-282	34
C. Investigations or public inquiries <i>suo moto</i>	283-294	34
1. Selecting the issue for investigation	287-289	34
2. Conducting an investigation <i>suo moto</i>	290-292	35
3. Follow-up	293-294	35
D. Intervening in legal proceedings	295-297	35
CONCLUSION	298-300	36

ANNEXES

	<i>Page</i>
I. Principles relating to the status of national institutions	37
II. Contacts and resource points	39
III. Information note on the technical cooperation programme of the United Nations Centre for Human Rights as it relates to national institutions	40
IV. International Bill of Human Rights	41
Select Bibliography	55

INTERNATIONAL INSTRUMENTS
cited in the present handbook

ABBREVIATION

Compilation Human Rights: A Compilation of International Instruments, vol. I (2 parts), Universal Instruments (United Nations publication, Sales No. E.94.XIV.1)

	<i>Source</i>
<i>International Bill of Human Rights:</i>	
Universal Declaration of Human Rights	General Assembly resolution 217 A (III) of 10 December 1948; <i>Compilation</i> , p. 1.
International Covenant on Economic, Social and Cultural Rights	General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; <i>Compilation</i> , p. 8.
International Covenant on Civil and Political Rights	General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; <i>Compilation</i> , p. 20.
Optional Protocol to the International Covenant on Civil and Political Rights	General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; <i>Compilation</i> , p. 41.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	General Assembly resolution 44/128 of 15 December 1989, annex; <i>Compilation</i> , p. 46.
International Convention on the Elimination of All Forms of Racial Discrimination	General Assembly resolution 2106 A (XX) of 21 December 1965, annex; <i>Compilation</i> , p. 66.
Convention on the Elimination of All Forms of Discrimination against Women	General Assembly resolution 34/180 of 18 December 1979, annex; <i>Compilation</i> , p. 150.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	General Assembly resolution 39/46 of 10 December 1984, annex; <i>Compilation</i> , p. 293.

	<i>Source</i>
Convention on the Rights of the Child	General Assembly resolution 44/25 of 20 November 1989, annex; <i>Compilation</i> , p. 174.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	General Assembly resolution 45/158 of 18 December 1990, annex; <i>Compilation</i> , p. 554.
Vienna Declaration and Programme of Action	Adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24 (Part I), chap. III).

GENERAL INTRODUCTION

A. Aims of the handbook

1. This handbook is based on the premise that strong and effective national institutions can contribute substantially to the realization of human rights and fundamental freedoms. As more countries take the decision to establish national human rights institutions, the need for guidelines on how such bodies can be created and operated for maximum effectiveness becomes increasingly evident.

2. Actual or potential strength and effectiveness are directly related to the legal mandate of the institution. A national institution which is rendered weak or ineffective by its constitutive law can increase its technical competence, but in the absence of legislative change it will never completely overcome its structural inadequacies. For this reason, the first target group of the handbook is Governments and other groups considering, or actually involved in, the planning process for the establishment of new institutions. For this group the handbook provides a summary of the various purposes for which a human rights institution may be established; an overview of elements necessary for its effective functioning; and a detailed analysis of the various responsibilities with which such an institution may appropriately be entrusted. Practical assistance in the drafting process is given in the form of legislative examples applicable to particular purposes, elements or responsibilities.

3. The second target group of the handbook is existing institutions, their establishing Governments and those involved in their operation. The strengthening of existing institutions can take a number of different forms. Governments may decide to improve an existing national institution by amending its founding legislation in order to provide for a broader mandate or otherwise increased powers. In such a situation the handbook can serve purposes similar to those outlined above in respect of institutions yet to be established. Of course, in the absence of such amendments, an existing institution must operate in accordance with the legislative framework within which it was created. In that case, the handbook may be used in order to maximize the effectiveness of those functions and powers with which the institution is vested.

4. The great differences in structure and functioning between existing national institutions clearly reflect cultural, political, historical and economic dissimilarities. For this reason, the handbook is not a blueprint for legislation. It is not prescriptive, and it does not set out to create a prototype or "ideal" institution against which the effectiveness of all others may be measured. There can be no model institution and there are no set rules. The user of this handbook will instead find a series of guidelines and recommendations based on a careful analysis of the achievements and difficulties of a wide range of

institutions in many countries. Information in the handbook is also based on the results of conferences and meetings convened both within and outside the United Nations and on the experience gained by the United Nations Centre for Human Rights in providing technical assistance to Governments in this area. It should be noted that the Principles relating to the status of national institutions (the "Paris Principles"), which are discussed below (see paras. 25-27 and annex I), have been particularly important in this respect.

B. Organization of the handbook

5. Chapter I provides an overview of the historical and legal context within which present developments relating to national institutions are occurring. An introduction to the human rights system and the place of national institutions in that system is followed by a brief summary of United Nations activity in this field from 1946 to the present day. The problem of definition is then addressed and an outline provided of the features generally associated with the most common classifications: national commissions, specialized commissions and offices of the ombudsman.

6. Chapter II discusses the elements which may be considered necessary for the effective functioning of a national human rights institution and explains how these elements may be incorporated into the structure and operation of an institution for optimal effect.

7. Chapters III, IV and V are devoted to discussion of the three main tasks which national institutions may perform. Chapter III deals with promoting awareness and educating about human rights; chapter IV, with advising and assisting government; and chapter V, with investigating alleged human rights violations. In relation to each of the three tasks, information is provided on the various methods which can be adopted and the strategies which may be employed to maximize their effectiveness.

8. The handbook also includes a number of annexes. Annex I reproduces the Principles relating to the status of national institutions (see paras. 25-27 below). Annex II provides a list of contacts and resource points which may be of use to Governments and others involved in establishing a new institution or in strengthening an existing one. Annex III summarizes the technical cooperation programme of the United Nations Centre for Human Rights as it relates to national institutions. Annex IV reproduces the International Bill of Human Rights. A select bibliography includes mainly United Nations documents and other publications relating to national human rights institutions.

I. NATIONAL HUMAN RIGHTS INSTITUTIONS: BACKGROUND AND OVERVIEW

A. Human rights systems

9. National institutions are but one component of a complex, multi-level system which has been developed for the promotion and protection of human rights. The following paragraphs provide a brief overview of this system in order to illustrate the place of national institutions, and the functions and responsibilities with which they may appropriately be entrusted.

1. *The United Nations and human rights*

10. In the Preamble to the Charter of the United Nations, the peoples of the United Nations declare their determination "to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights . . . and to promote social progress and better standards of life in larger freedom". Accordingly, Article 1 of the Charter proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

11. In the 45 years since the adoption of the Universal Declaration of Human Rights, the United Nations has developed a comprehensive strategy aimed at achieving the human rights objective set out in the Charter. The basis of this strategy is the body of international rules and standards which now cover virtually every sphere of human activity.

12. Upon this strong legislative foundation has been built an extensive network of human rights machinery designed further to develop international standards, to monitor their implementation, to promote compliance, and to investigate violations of human rights. The strategy is reinforced by a wide variety of public information activities and a technical cooperation programme designed to provide practical help to States in their efforts to promote and protect human rights.

13. These structures and activities permit the United Nations to play a pivotal standard-setting and leadership role in the struggle for human rights and fundamental freedoms. The task of promoting and protecting human rights, however, is not one which could or should be assumed by only one organization. United Nations practice in the field of human rights is based on the fundamental premise that universal respect for human rights requires the concerted efforts of every Government, every individual, every group and every organ in society.

2. *Regional human rights systems*

14. The international system relies heavily on the support it receives from regional human rights systems such as those operating in Africa, the Americas and Europe. Regional human rights systems have played an important complementary role in reinforcing interna-

tional standards and machinery by providing the means by which human rights concerns can be addressed within the particular social, historical and political context of the region concerned.

3. *Non-governmental organizations*

15. Additional support for implementation of international human rights standards comes from concerned community and non-governmental organizations, which have a special role to play in the development of a universal culture of human rights. Non-governmental organizations, by their very nature, have a freedom of expression, a flexibility of action and a liberty of movement which, in certain circumstances, allow them to perform tasks which Governments and intergovernmental organizations are unable or even unwilling to perform.

4. *Governments*

16. In the past two decades many countries have become parties to the major human rights treaties, thereby incurring a legal obligation to implement the human rights standards to which they subscribe at the international level. Human rights involve relationships among individuals, and between individuals and the State. The practical task of protecting human rights is therefore primarily a national one, for which each State must be responsible. At the national level, rights can be best protected through adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment and strengthening of democratic institutions. Activities aimed at the promotion of human rights and the development of a human rights culture should also be viewed as primarily national responsibilities. The most effective education and information campaigns, for example, are likely to be those which are designed and carried out at the national or local level and which take the local cultural and traditional context into account.

17. When States ratify a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake to comply in other ways with the obligations contained in the instrument. Therefore, universal human rights standards and norms today find their expression in the domestic laws of most countries. Often, however, the fact that a law exists to protect certain rights is not enough if that law does not also provide for all the legal powers and institutions necessary to ensure the effective realization of those rights.

18. This problem of effective implementation at the national level has, particularly in recent times, generated a great deal of international interest and action. The emergence or reemergence of democratic rule in many countries has focused attention on the importance of

democratic institutions in safeguarding the legal and political foundations on which human rights are based.

19. It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their promotion and protection. In recent years, many countries have established institutions with the express function of protecting human rights. While the specific tasks of such institutions may vary considerably from country to country, they share a common purpose, and for this reason are referred to collectively as national human rights institutions.

B. United Nations activity in the area of national institutions

1. Early activities of the Economic and Social Council

20. The question of national human rights institutions was first discussed by the Economic and Social Council (ECOSOC) in 1946, two years before the General Assembly proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and all nations".

21. At its second session, in 1946, ECOSOC invited Member States "to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights".¹ Fourteen years later the matter was raised again, in a resolution which recognized the important role national institutions could play in the promotion and protection of human rights, and which invited Governments to encourage the formation and continuation of such bodies as well as to communicate all relevant information on the subject to the Secretary-General.² This process is an ongoing one, and reports on information received are regularly submitted by the Secretary-General to the Commission on Human Rights, to the General Assembly and to States.

2. Establishing standards and goals for national institutions

22. As standard-setting in the field of human rights gained momentum during the 1960s and 1970s, discussions on national institutions became increasingly focused on the ways in which such bodies could assist in the effective implementation of these international standards. In 1978, the Commission on Human Rights decided to organize a seminar in order, *inter alia*, to draft guidelines for the structure and functioning of national institutions. Accordingly, the Seminar on National and Local Institutions for the Promotion and Protection of Human Rights was held in Geneva in September 1978³

and approved a set of such guidelines. These guidelines suggested that the functions of national institutions should be:

To act as a source of human rights information for the Government and people of the country;

To assist in educating public opinion and promoting awareness of and respect for human rights;

To consider, deliberate upon and make recommendations regarding any particular state of affairs that may exist nationally and which the Government may wish to refer to them;

To advise on any questions regarding human rights matters referred to them by the Government;

To study and keep under review the status of legislation, judicial decisions and administrative arrangements for the promotion of human rights, and to prepare and submit reports on these matters to the appropriate authorities;

To perform any other function which the Government may wish to assign to them in connection with the duties of the State under those international instruments in the field of human rights to which it is a party;

As regards the structure of such institutions; the guidelines recommended that they should:

Reflect in their composition wide cross-sections of the nation, thereby bringing all parts of the population into the decision-making process in regard to human rights;

Function regularly, and that immediate access to them should be available to any member of the public or any public authority;

In appropriate cases, have local or regional advisory organs to assist them in discharging their functions.

23. The guidelines were subsequently endorsed by the commission on Human Rights and the General Assembly. The Assembly invited States to take appropriate steps for the establishment, where they did not already exist, of national institutions for the promotion and protection of human rights, and requested the Secretary-General to submit a detailed report on existing national institutions.

24. Throughout the 1980s, the United Nations continued to take an active interest in this topic and a series of reports prepared by the Secretary-General was presented to the General Assembly. It was during this time that a considerable number of national institutions were established—many with the support of the United Nations Centre for Human Rights

3. The 1991 first international meeting in Paris

25. In 1990, the Commission on Human Rights called for a workshop to be convened with the participation of national and regional institutions involved in the promotion and protection of human rights. The workshop was to review patterns of cooperation between national institutions and international organizations, such as the United Nations and its agencies, and to explore ways of increasing the effectiveness of national institu-

tions. Accordingly, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris from 7 to 9 October 1991.⁴ Its conclusions were endorsed by the Commission on Human Rights in resolution 1992/54 as the Principles relating to the status of national institutions (the "Paris Principles"), and subsequently by the General Assembly in its resolution 48/134 of 20 December 1993. The principles affirm that national institutions are to be vested with competence to promote and protect human rights and given as broad a mandate as possible, set forth clearly in a constitutional or legislative text.

26. According to these Principles, which represent a refinement and extension of the guidelines developed in 1978 (see para. 22 above) a national institution shall, *inter alia*, have the following responsibilities:

To submit recommendations, proposals and reports on any matter relating to human rights (including legislative and administrative provisions and any situation of violation of human rights) to the Government, parliament and any other competent body;

To promote conformity of national laws and practices with international human rights standards;

To encourage ratification and implementation of international standards;

To contribute to the reporting procedure under international instruments;

To assist in formulating and executing human rights teaching and research programmes and to increase public awareness of human rights through information and education;

To cooperate with the United Nations, regional institutions, and national institutions of other countries.

The Principles also recognized that a number of national institutions have been given competence to receive and act on individual complaints of human rights violations. They stipulate that the functions of national institutions in this respect may be based on the following principles:

Seeking an amicable settlement of the matter through conciliation, binding decision or other means;

Informing the complainant of his or her rights and of available means of redress, and promoting access to such redress;

Hearing complaints or referring them to a competent authority;

Making recommendations to the competent authorities, including proposals for amendment of laws, regulations or administrative practices which obstruct the free exercise of rights.

27. The Principles also include detailed guidelines on the composition of national institutions and the appointment of members; on guarantees of independence and pluralism; and on methods of operation. The full text

of the Principles is reproduced in annex I to this handbook and their spirit is reflected in the guidelines and recommendations made below.

4. Activities during 1991-1993

28. Since 1991, the work of the United Nations in relation to national institutions has gained considerable momentum. A number of important meetings have been convened, including the Second United Nations Workshop for the Asian and Pacific Region on Human Rights Issues (Jakarta, January 1993),⁵ at which the establishment of national institutions in the Asian and Pacific region was discussed; the meeting of Representatives of National Institutions and Organizations Promoting Tolerance and Harmony and Combating Racism and Racial Discrimination (Sydney, April 1993);⁶ and the second International Workshop on National Institutions for the Promotion and Protection of Human Rights (Tunis, December 1993).⁷

5. The 1993 World Conference on Human Rights

29. During preparations for the 1993 World Conference on Human Rights, it was decided to organize a meeting of national institutions parallel to the Conference itself. This meeting examined, *inter alia*, the purposes of national institutions; the key requisites for appropriate and effective functioning, including representative nature and accessibility; and mechanisms for coordinating inter-institutional activities.

30. The Vienna Declaration and Programme of Action adopted by the World Conference confirmed many important principles, including that of the indivisibility and interdependence of all human rights, as well as establishing an ambitious agenda for human rights into the twenty-first century. With regard to national institutions, the World Conference reaffirmed therein:

... 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 human rights violations, in the dissemination of human rights information, and education in human rights. ... (Part I, para. 36.)

It also encouraged:

... the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" ... (Ibid.)

and recognized:

... the right of each State to choose the framework which is best suited to its particular needs at the national level. (Ibid.)

31. The World Conference also called upon Governments to strengthen national institutions; recommended the strengthening of United Nations activities and programmes to meet requests for assistance from States in the establishment or strengthening of national institutions; encouraged cooperation between national institutions, particularly through exchanges of information and experience, as well as through cooperation with

¹ Economic and Social Council resolution 2/9 of 21 June 1946, sect. 5.

² Economic and Social Council resolution 772 B (XXX) of 25 July 1960.

³ See ST/HR/SER.A/2 and Add.1.

⁴ See E/CN.4/1992/43 and Add.1.

⁵ See HR/PUB/93/1

⁶ See A/CONF.157/PC/92/Add.5.

⁷ See E/CN.4/1994/45 and Add.1.

regional organizations and the United Nations; and recommended, in that regard, that periodic meetings be convened between representatives of national institutions, under the auspices of the Centre for Human Rights, in order to share experience and examine ways and means of improving their mechanisms.

6. The 1993 second international meeting at Tunis

32. The second International Workshop on National Institutions for the Promotion and Protection of Human Rights was held at Tunis from 13 to 17 December 1993,⁸ and brought together representatives of more than 28 institutions from around the world. Workshop participants discussed a number of topics of mutual concern, including relations between the State and national institutions, between national institutions themselves, and between national institutions and the Centre for Human Rights. As part of an effort to improve cooperative relationships, the workshop formally established a Coordinating Committee (see para. 115 below). It also adopted a number of recommendations, including one which called upon individual institutions to take measures to ensure that their status and activities are consistent with the Paris Principles relating to the status of national institutions (see paras. 25-27 above).

7. Activities outside the United Nations system

33. Several international organizations, particularly the Commonwealth Secretariat and the International Ombudsman Institute, have been active in promoting the establishment and development of national human rights institutions.

34. The Commonwealth has sponsored a number of international and national workshops and has developed extensive materials. These include a directory of existing institutions in Commonwealth countries and a manual which provides comparative legislation and guidance for States wishing to establish new institutions.

35. The International Ombudsman Institute has, in recent years, paid increasing attention to the human rights dimension of the work of ombudsmen. The Institute, located in Alberta, Canada, gathers information on all ombudsman offices throughout the world and, through publications and conferences, attempts to strengthen relations between individual institutions.

C. Defining a national human rights institution

36. Despite the existence of comprehensive standards relating to practice and to functions, an analysis of activities conducted both within and outside the United Nations system reveals that there is not yet an agreed definition of the term "national human rights institution". The conceptual framework for early United Nations activities in the area was flexible enough to include virtually any institution at the national level having a direct or indirect impact on the promotion and protection of human rights. Accordingly, the judiciary, administra-

tive tribunals, legislative organs, non-governmental organizations, legal aid offices and social welfare schemes were all given equal attention, along with national commissions, ombudsman offices and related structures.

37. This broad formulation, however, has been gradually pared down by the subsequent work of the United Nations on the subject to the point where a more narrow group of institutions has emerged, on the basis of particular common functions, including: educational and promotional activities; the provisions of advice to government on human rights matters; and the investigation and resolution of complaints of violations committed by public (and occasionally also private) entities. However, while operating to exclude previously included institutions such as the judiciary, the legislature and social welfare structures, this "functional" approach to categorization has not yet resulted in an ultimate definition of what constitutes a national institution for the promotion and protection of human rights.

38. The Paris Principles relating to the status of national institutions (see paras. 25-27 above) represent an important step in the evolutionary process. The Principles attempt to clarify the concept of a "national institution" by providing standards on the status and advisory role of national human rights commissions. If these standards are applied to the general class of national institutions, not only those designated as "commissions", then a national institution must be a body established in the constitution or by law to perform particular functions in the field of human rights. This process will then operate to exclude not only governmental instrumentalities with more general functions (such as administrative tribunals), but also all organizations not founded in law.

39. Despite these refinements, it is evident that the concept of a national institution is not yet fully evolved. At the same time, the practical utility of establishing boundaries, however flexible, has been recognized. For the purposes of United Nations activities in this field, therefore, the term "national institution" is taken to refer to a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.

D. National institutions in practice

40. In practice, the institutions included in the above definition are all "administrative" in nature—in the narrow sense that they are neither "judicial" nor lawmaking. As a rule, they are endowed with ongoing, advisory authority in respect of 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. In some countries, the constitution will provide for the establishment of a national human rights institution. More often, such institutions are created by legislation or decree. While many national institutions are attached, in some way or another, to the executive branch of government, the actual level of independence which they enjoy will depend on a number of factors, including

composition, financial basis and the manner in which they operate.

1. Classification difficulties

41. The existence of such common characteristics has not prevented significant classification difficulties. At present, the majority of national institutions are identified as belonging to one of two broad categories: "human rights commissions" or "ombudsmen".

42. Human rights commissions are generally involved in one more specific functions directly related to the promotion and protection of human rights, including an advisory function (with regard to law and government policy on human rights), an educative function (oriented towards the public), and what may be termed an impartial investigatory function. Differences between various commissions are often related to differences in the weight given to particular functions. The focus of a commission may range across a broad spectrum of rights or, conversely, may be restricted to protection of a particular vulnerable group.

43. From a comparative perspective, the institution of ombudsman is generally associated with an emphasis on the impartial investigatory function. Many long-established offices of the ombudsman do not concern themselves directly with human rights except in so far as they relate to their principal function of overseeing fairness and legality in public administration. Others, particularly the more recently created offices, have been given specific human rights protection mandates, often in relation to rights set forth in national constitutions or other legislation.

44. Despite the existence of such indicators, precise classification of a particular institution is complicated by the fact that functions implied in these designations are not always reflected in the work of institutions so categorized. An "ombudsman", for example, may be engaged in a broad range of promotional and protective activities generally recognized as characteristic of a commission. An entity identified as a "human rights commission" may be operating exclusively within the sphere of public administration—a domain traditionally associated with the office of the ombudsman.

45. In view of such inconsistencies, it is clear that any attempt at nominal classification will be somewhat arbitrary and that a functional approach to defining national institutions may be more appropriate. It is in accordance with such a functional approach that the substantive parts of this handbook have been organized. However, as distinctions and categorizations continue to exist in practice, they cannot be ignored. In providing an overview of existing national institutions, the following sections outline the features, generally associated with national commissions, specialized commissions and offices of the ombudsman.

2. Human rights commissions

46. In many countries, commissions have been established to ensure that the laws and regulations concerning the protection of human rights are effectively applied. Most human rights commissions function

independently of other organs of government, although they may be required to report to the legislature on a regular basis.

47. In keeping with their independent nature, commissions are generally composed of a variety of members from diverse backgrounds, each with a particular interest, expertise or experience in the field of human rights. Each country may have its specific requirements or restrictions for the selection of members, such as quotas on the number of representatives or candidates from various professional categories, political parties or localities.

48. Human rights commissions are concerned primarily with the protection of persons against all forms of discrimination and with the protection of civil and political rights. They may also be empowered to promote and protect economic, social and cultural rights. The precise authority and functions of a particular commission will be defined in the legislative act or decree under which it is established. This law or decree will also serve to define the commission's jurisdiction by, *inter alia*, specifying the range of discriminatory or violative conduct which it is empowered to investigate or otherwise act on. Some commissions concern themselves with alleged violations of any rights recognized in the constitution. Others may be able to consider cases of discrimination on a broad range of grounds, including race, religion, gender, national or ethnic origin, disability, social condition, sexual orientation, political opinion, ancestry, age and marital status.

49. One of the most common functions vested in a human rights commission is to receive and investigate complaints from individuals (and, occasionally, from groups) alleging human rights abuses committed in violation of existing national law. In order to carry out its tasks properly, the commission will usually be capable of obtaining evidence relating to the matter under investigation. Even if used only rarely, this power is important in that it guards against the possibility of frustration through lack of cooperation on the part of the person or body complained against. While there are considerable differences in the procedures followed by various human rights commissions in the investigation and resolution of complaints, many rely on conciliation and/or arbitration. In the process of conciliation, the commission will attempt to bring the two parties together in order to achieve a mutually satisfactory outcome. If conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination.

50. It is not common for a human rights commission to be granted authority to impose a legally binding outcome on parties to a complaint. However, this does not mean that the settlement or appropriate remedial steps recommended by the commission can be ignored. In some cases, a special tribunal will hear and determine issues outstanding from an unresolved complaint. If no special tribunal has been established, the commission may be able to transfer unresolved complaints to the regular courts for a final and binding determination.

51. Another important function of many commissions is systematically to review the Government's hu-

⁸ Ibid.

man rights policy in order to detect shortcomings in human rights observance and suggest ways of improving it. Human rights commissions may also monitor the State's compliance with its own legislation and with international human rights laws and, if necessary, recommend changes. The ability of a commission to initiate inquiries on its own behalf is an important measure of its overall strength and probable effectiveness. This is particularly true in regard to situations involving persons or groups who do not have the financial or social resources to lodge individual complaints.

52. The full realization of human rights cannot be achieved solely through adequate legislation and appropriate administrative arrangements. In recognition of this fact, commissions are often entrusted with the important responsibility of improving community awareness of human rights. Promoting and educating about human rights may involve informing the public about the commission's own functions and purposes; provoking discussion about various important questions in the field of human rights; organizing seminars and training courses; arranging counselling services and meetings; and producing and disseminating human rights publications.

3. Specialized institutions

53. Vulnerable groups differ from country to country, but the most common problem affecting them all is discrimination. Members of the community who are most often recognized by Governments as needing specialized human rights bodies to protect their interests are persons belonging to ethnic, linguistic and religious minorities, indigenous populations, non-nationals, migrants, immigrants, refugees, children, women, the poor and the disabled.

54. Specialized human rights institutions are generally established to promote government and social policy which has been developed for the protection of one or more of these groups. For the most part, these institutions perform functions similar to those of the less specific human rights commissions described above. They are usually authorized to investigate instances and patterns of discrimination against individuals in the group and against the group as a whole. While generally able to investigate complaints brought by a member of the group against another person or against a government body, these specialized institutions are, like other national human rights institutions, rarely empowered to make binding decisions or to initiate legal action.

55. As well as providing material and consultative assistance on an individual and collective basis, such institutions will frequently be responsible for monitoring the effectiveness of existing laws and constitutional provisions as these relate to the group. In this way, they often act as consultants and advisers to parliament and the executive branch of government.

4. The ombudsman

56. The office of "ombudsman" is now established in a wide range of countries, some of which use other designations to describe institutions in this category, such as *Avocat du peuple*, *Defensor del Pueblo*,

Médiateur de la République, etc. The ombudsman (who is often one person but may also be a group of persons) is generally appointed by the parliament acting on constitutional authority or through special legislation. However, in parts of Africa and the Commonwealth, the ombudsman's appointment is the responsibility of the head of State, to whom the institution may also be required to report.

57. The primary function of this institution is to oversee fairness and legality in public administration. More specifically, the office of the ombudsman exists to protect the rights of individuals who believe themselves to be the victim of unjust acts on the part of the public administration. Accordingly, the ombudsman will often act as an impartial mediator between an aggrieved individual and the Government.

58. While the institution of ombudsman is not exactly the same in any two countries, all follow similar procedures in the performance of their duties. The ombudsman receives complaints from members of the public and will investigate these complaints provided they fall within the ombudsman's competence. In the process of investigation, the ombudsman is generally granted access to the documents of all relevant public authorities and may also be able to compel witnesses, including government officials, to provide information. He or she will then issue a statement or recommendation based on this investigation. This statement is generally transmitted to the person lodging the complaint as well as to the office or authority complained against. In general, if the recommendation is not acted on, the ombudsman may submit a specific report to the legislature. This will be in addition to an annual report to the same body, which may include information on problems which have been identified and contain suggestions for legislative and administrative change.

59. While any citizen who believes that his or her rights have been violated may submit a complaint to the ombudsman, many countries require that the complainant first exhaust all alternative legal and administrative remedies. There may also be time-limits imposed on the filing of complaints. Moreover, while the ombudsman's authority usually extends to all aspects of public administration, most ombudsmen are prevented from considering complaints involving members of the legislature or the judiciary.

60. Access to the ombudsman also varies from country to country. In many countries, individuals may lodge a complaint directly with the ombudsman's office. In other countries, complaints may be submitted through an intermediary, such as a local member of parliament. Complaints made to the ombudsman are usually confidential, and the identity of the complainant is not disclosed without that person's consent.

61. The ombudsman is not always restricted to acting on complaints and may be able to begin an investigation on his or her own initiative. As with human rights commissions, self-initiated investigations by ombudsman offices often relate to issues which the ombudsman may have determined to be of broad public concern, or

issues which affect group rights and are therefore not likely to be the subject of an individual complaint.

62. In many respects, the powers of the ombudsman are quite similar to those of human rights commissions with competence to receive and investigate complaints. Both are concerned with protecting the rights of individuals and, in principle, neither has the power to make binding decisions. There are nevertheless some differences in the functions of the two bodies which reveal why some countries establish and simultaneously maintain both types of institution. As explained above, the primary function of most ombudsmen is to ensure fairness and legality in public administration. In contrast,

commissions are more generally concerned with violations of human rights, particularly discrimination. In this respect, human rights commissions will often concern themselves with the actions of private bodies and individuals as well as of the Government. In general, the principal focus of activity for an ombudsman is individual complaints against public entities or officials. However, distinctions are becoming more and more blurred as ombudsman offices engage in a wider range of activities for the promotion and protection of human rights. Increasingly, offices of the ombudsman are assuming responsibilities in the area of promoting human rights, particularly through educational activities and the development of information programmes.

II. ELEMENTS FOR THE EFFECTIVE FUNCTIONING OF NATIONAL INSTITUTIONS

A. Introduction

63. The Vienna Declaration and Programme of Action adopted by the 1993 World Conference on Human Rights specifically recognized the right of each State to choose the framework for a national human rights institution which is best suited to its needs (see para. 30 *in fine* above). This provision represents a clear acknowledgement of the fact that the great differences which exist between States will necessarily be reflected in the structures which they create to implement international human rights standards.

64. As pointed out earlier (para. 4 above), it is not the purpose of this handbook to ignore essential differences and to promote a prototype or model institution. Instead, its principal objective is to encourage and facilitate the development of appropriate and effective institutions. "Appropriateness" may be evaluated by reference to the extent to which the structure of a particular national institution takes account of national conditions and circumstances, including political, cultural and economic realities. "Effectiveness", on the other hand, can only ever be measured by reference to the extent to which a national institution positively affects the human rights situation of individuals and groups in a given society.

65. Appropriateness is a prerequisite for effectiveness. An inappropriate institution (in terms of jurisdiction, powers, or any other measures) will be an ineffective one. It is difficult, and perhaps not particularly useful, to lay down one set of rules for developing an appropriate institution. The present chapter will therefore not deal with the issue of appropriateness except to provide general guidelines within specific contexts. In their efforts to establish and develop appropriate, relevant institutions, States will benefit from the experience of others, particularly those in geographical, political, economic or cultural proximity.

66. The primary purpose of this chapter, therefore, is to identify those elements which may be considered essential to the effective functioning of national institutions. The basic differences which exist between States and between institutions make it both difficult and unwise to formulate inflexible guidelines for ensuring effectiveness. Nevertheless, the fact remains that, by definition, all national institutions share certain common goals. This commonality of objectives permits the following "effectiveness factors" to be identified as generally applicable:

- Independence;
- Defined jurisdiction and adequate powers;
- Accessibility;
- Cooperation;
- Operational efficiency;
- Accountability.

67. This chapter is divided into six further sections, each devoted to consideration of one of the elements set out above. In each section, an analysis is made of the way in which the subject factor can influence the effective functioning of a national institution. This analysis is followed by an examination of the mechanisms by which the element can be incorporated into both the structure and functioning of a national institution.

B. Independence

68. An effective national institution will be one which is capable of acting independently of government, of party politics and of all other entities and situations which may be in a position to affect its work. Independence is, however, a relative concept. The very fact that a national institution is granted a certain independence of action distinguishes it from government instrumentalities. On the other hand, independence for a national institution can never mean a total lack of connection to the State. The definition of a national institution includes the requirement that it be established by law. The founding law of a national institution will identify specific links with the State and define the limits within which the institution is to function. All institutions are necessarily restricted by their links with the State and by the need to conform to their legislative mandates. Other realities precluding full independence include reporting obligations and a lack of full financial autonomy. It is, in fact, this legislative basis, and the restrictions which accompany it, which distinguish a national institution from a non-governmental organization.

69. At best, therefore, a national institution will enjoy a measure of qualified independence the implication of which must be considered contextually. The following discussion is based on the view that it is the functions of a national institution which are important in this regard. While the establishment of every institution will necessitate the imposition of certain limitations, restrictions on independence should not be such as to interfere with the ability of an institution to discharge its responsibilities effectively.

1. Independence through legal and operational autonomy

70. The founding law of a national institution will be critical in ensuring its legal independence, particularly its independence from government. Ideally, a national institution will be granted separate and distinct legal personality of a nature which will permit it to exercise independent decision-making power. Independent legal status should be of a level sufficient to permit an institution to perform its functions without interference or obstruction from any branch of government or any public or private entity. This may be achieved by making the institution directly answerable to parliament

or to the head of State. Other mechanisms for securing both legal and actual independence are discussed below.

71. Operational autonomy refers to the ability of a national institution to conduct its day-to-day affairs independently of any other individual, organization, department or authority. An effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification. Nor should the recommendations, reports or decisions of the institution be subject to review by another authority or entity, except where specified in the founding legislation.

72. The legal authority to compel cooperation of others, particularly government agencies, is another prerequisite for full operational autonomy of a national institution which is vested with the power to investigate complaints. The founding legislation of a national institution may usefully set out the circumstances in which government entities are compelled to cooperate with the institution. Such legislation could, for example, state that all officials and public authorities are to facilitate the work of the institution, including answering requests for information and assisting in investigations.

2. Independence through financial autonomy

73. The link between financial autonomy and functional independence is a strong one. A national institution with no control over its finances will be dependent on the government ministry or other body which exercises such control.

74. Where possible, the source and nature of funding for a national institution should be specified in its founding legislation. Drafting of such provisions should be undertaken with a view to ensuring that the institution will be financially capable of performing its basic functions. An institution may, for example, be entrusted with responsibility for drafting its own annual budget, which would then be submitted directly to parliament for approval. The role of that body in the institution's fiscal affairs would then be limited to a review and evaluation of financial reports.

75. Regardless of the particular strategy adopted, it will generally be advisable to ensure that the budget of a national institution is not linked to the budget of a government department or ministry. Furthermore, the budget of the institution should be "secured", so that no official decision or action of the institution will affect its budget allocation. This will be especially important if the institution has a complaints procedure or the capacity to advise government. In such circumstances, a financial connection between the institution and a particular ministry or department may give rise to a damaging conflict of interests.

76. Financial autonomy must be accompanied by adequate, continuing funding. This matter is considered in detail under "operational efficiency" (see paras. 121-124 below).

3. Independence through appointment and dismissal procedures

77. Any institution can only ever be as independent as the individuals of which it is composed. The granting of legal, technical and even financial autonomy to a national institution will be insufficient in the absence of specific measures to ensure that its members are, individually and collectively, capable of generating and sustaining independence of action.

78. The terms and conditions applicable to members of national human rights institutions should be specifically set out in the founding legislation. These terms and conditions should address the following issues:

- Method of appointment;
- Criteria for appointment;
- Duration of appointment;
- Whether members may be reappointed;
- Who may dismiss members and for what reasons;
- Privileges and immunities.

79. The method by which members of national institutions are appointed can be critical in ensuring independence and, for this reason, consideration should be given to entrusting the task to a representative body such as parliament. The founding legislation of the institution should specify all matters relating to method of appointment, including voting and other procedures to be followed. Criteria for appointment should set out the prerequisites (including nationality, profession, qualifications, etc.) for appointment to a national institution. With regard to duration of appointment, it is generally accepted that senior officials of national institutions should be granted guaranteed, fixed-term appointments which are not of short duration. Among existing institutions, reappointment for an additional term is generally permissible.

80. Powers of dismissal are closely related to the independence of a national institution. To avoid compromising independence, the founding legislation should specify, in as much detail as possible, the circumstances under which a member may be dismissed. Naturally these circumstances should relate to ascertainable wrongdoing of a serious nature. Failure to participate in the work of the institution may also be considered for inclusion as a ground for dismissal. The body or individual capable of removing a member from office should be specified. In view of the nature of the activities of a national human rights institution, it is preferable that power to dismiss be vested in parliament or at an equivalently high level.

81. The granting of certain privileges and immunities to members of national institutions is another legal means of securing independence. Privileges and immunities may be especially important for institutions which are granted the authority to receive and act on complaints of human rights violations. Members of a national institution should enjoy immunity from civil and criminal proceedings in respect of acts performed in an official capacity.

4. Independence through composition

82. The composition of a national institution can be a further guarantee of its independence *vis-à-vis* the public authorities and should reflect a degree of sociological and political pluralism. True pluralism requires the greatest diversity possible.

83. The Paris Principles relating to the status of national institutions (see paras. 25-27 above) emphasize the importance of pluralism in the composition of national institutions. Specifically, the Principles call upon national institutions to develop procedures which ensure the representation of all relevant social forces, in particular non-governmental organizations, trade unions, professional organizations and trends in philosophical and religious thought. Representative nature and accessibility may also be enhanced by including parliamentary or government officials in an observer or advisory capacity.

84. A genuine representative nature requires respect for diversity as well as pluralism. The composition of a national institution should, as far as possible, reflect the social profile of the community within which it operates. A national institution composed solely of men, for example, or of one particular ethnic group, is unlikely to reflect the diversity of society and cannot, therefore, be regarded as truly representative.

85. Representative composition will, of course, be difficult to achieve in situations where a national institution is composed of one person, as is the case of many offices of the ombudsman. Institutions adopting a commission-like structure or multiple-member ombudsman offices, however, are generally composed of a number of individuals and therefore in a better position to use this instrument of independence fully and effectively.

C. Defined jurisdiction and adequate powers

1. Subject-matter jurisdiction

86. An effective national institution will possess clearly defined subject-matter jurisdiction. Such jurisdiction will usually be set out in its founding legislation. Jurisdiction can be ascertained, at least partially, from functions. A particular national institution may, for example, be established to educate about human rights; to assist government in legislative matters; and to receive and act on complaints of human rights violations. These are the areas in which that institution may exercise competence and are therefore part of its subject-matter jurisdiction.

87. However, while they are generally indicative, it will not always be possible to ascertain the true nature of an institution's subject-matter jurisdiction solely from an examination of its functions. Jurisdiction also involves consideration of the precise legislative basis of specific functions. An institution may, for example, be restricted to discharging its functions only in so far as activities can be related to rights protected in the constitution. Another institution may have its legislative basis in international human rights instruments to which the State is a party. This latter approach offers certain distinct advantages. A national institution with a charter based on in-

ternational instruments will be well placed to oversee domestic implementation of those standards; to identify gaps in protective legislation; and to provide valuable assistance in the process of reporting to treaty bodies (see paras. 211-214 below).

88. Precisely defined subject-matter jurisdiction serves a number of concrete purposes. First, the process of elaborating such precise jurisdiction can be extremely useful for a Government. The establishment of a carefully planned national institution presupposes detailed consideration of priorities and of ways in which those priorities could be most constructively met. An institution with a broad or vaguely defined subject-matter jurisdiction will often be less strong and less effective than one which operates within identifiable limits. The possibility of straying from its central purpose or of being persuaded to take up less important tasks will always be greater for the institution which lacks a clearly defined mandate.

89. Related to subject-matter jurisdiction is the question of the categories of individuals or entities on which a national institution may focus in the course of its work. These categories will generally be related to the functions which a particular institution is established to perform. For example, an ombudsman-type institution responsible for overseeing fairness and legality in public administration will generally restrict its attention to government departments, government instrumentalities and civil servants. By contrast, an institution with broader functions may, in addition to focusing on government, extend its range to include individuals, public or private companies, and organizations.

90. Finally, a defined structure offers distinct benefits to those individuals and groups which a national institution was established to assist and protect. Cultivating an informed constituency is itself an essential element of effectiveness. This process will generally be easier for national institutions which are able to point to specific, ascertainable objectives.

2. Avoiding conflicts of jurisdiction

91. It may be the case that the subject-matter jurisdiction of a national institution will at times overlap with the jurisdiction of another entity. It is necessary to ensure that such technical conflicts do not obstruct the effectiveness of either body. Clarity of purpose during the pre-establishment process is the easiest way to prevent conflicts between similar institutions. A Government intending to create a national institution should consider carefully the human rights, law reform and administrative review structures which already exist. The purpose of a new national institution is to perform tasks which cannot be (or are not being) performed by others. The new institution should therefore be structured in such a way as to complement existing bodies, not to compete with them.

92. Where a national institution is empowered to receive and act on complaints of human rights violations, its jurisdiction may coincide with that of the judiciary. Coincidence will be especially likely if human rights legislation has been enacted or if the State possesses a judicially enforceable bill of rights. In such situations,

the individuals or groups alleging a violation may be expected to resort to national human rights institutions as an alternative dispute-resolution mechanism. As discussed in chapter V below, a properly functioning complaints machinery will often be utilized in reference to a court for reasons of accessibility, flexibility and rapidity of action, availability of expertise, and lower relative (or no) cost. However, regardless of its strengths, a national institution may only complement—never replace—a properly functioning judiciary, and the final jurisdiction belongs with the courts. A complainant does not waive his or her right to bring a judicial action by invoking the procedure of a national human rights institution. For this reason, coincidence may be common, but conflicts should not arise.

93. Furthermore, in some cases, the matter at hand may not involve a justiciable claim under national law. In these instances, the availability of complaints procedures of national human rights institutions is particularly important.

94. An increasing number of States are choosing to create two or more bodies which may be considered national human rights institutions. A human rights commission, for example, may be set up alongside an office of the ombudsman. A series of commissions are sometimes created within a single State to deal with different human rights concerns or to address the problems facing specific vulnerable groups. While an increase in the number of national institutions may generally be considered a positive development, it is important that potential conflicts and duplication at the national level between such similar bodies are avoided. Such conflict and duplication may be avoided by ensuring that each institution is given distinct responsibilities which do not overlap. Inter-agency referral is another way of strengthening complementarity, as are the development and maintenance of good communications between similar institutions. Such cooperation may be encouraged by a provision in the founding legislation of an institution mandating it to establish and maintain close contact with similar bodies in order to promote common policies and avoid conflict in cases of overlapping jurisdiction.

3. Adequate powers

95. Power, in this context, refers to the ability of a national institution to perform a certain act or to compel such performance by an individual or other entity. Power must be enforceable. The powers of a national institution should be established by law. Provision should also be made for the imposition of legal or administrative sanctions when the free exercise of a national institution's powers is obstructed.

96. It is not useful to set out a list of basic or even minimum powers with which a national institution should be vested. Power can only ever relate to purpose. For a national institution, excessive powers may be as damaging as insufficient powers. A national institution must be granted adequate powers to permit the effective discharge of its responsibilities. In the first instance, an evaluation of the adequacy of a national institution's powers should be made with reference to the functions which it was established to perform.

97. Further information on adequate powers may be found in chapters III to V under the separate function headings.

D. Accessibility

98. An effective national institution will be one which is readily accessible to the individuals and groups it is established to protect or whose interests it exists to promote. Accessibility cannot be achieved solely through structural measures but will be influenced by all aspects of an institution's organization and procedure. An institution which is perceived as responsible and effective and which has the public trust will automatically enhance its own accessibility. An institution which devotes attention to cultivating relationships with individual clients and with other relevant institutions and departments will be similarly well regarded.

99. The following practical matters should also be taken into account when attempting to improve accessibility.

1. Awareness of the institution

100. A national institution cannot be accessible to a constituency which is ignorant of or ill-informed about its existence and functions. Like any other public or private body offering a service, the institution should be especially careful to make itself known to those who are most likely to benefit from what it can offer. The institution must be aware that the individuals or groups who are most vulnerable to human rights violations will quite often be difficult to reach through standard channels of communication. These same persons may in fact be reluctant to voice their concerns to an "official" body. A national institution must therefore be willing to develop creative means of ensuring its visibility among these particularly vulnerable groups and of gaining their trust.

101. Additional information on strategies for disseminating knowledge of national institutions may be found in chapter III below, which deals with promoting and educating about human rights.

2. Physical accessibility

102. In addition to promoting widespread knowledge of the institution itself, efforts should be made to ensure that a national institution is physically accessible to its constituency. Many institutions maintain only one office in a major population centre. While often the result of unavoidable financial constraints, this practice may obstruct accessibility for those living in remote areas or those who are otherwise unable to travel. A number of national institutions have sought to improve physical accessibility by decentralizing. Regional or local offices may be established to provide a full range of services or to act as a communication channel or "consultation point" between the population of the region and the headquarters of the institution.

103. Despite obvious advantages, decentralization can be an expensive solution to the problem of inaccessibility. A national institution may choose instead to recruit field officers to serve in different regions. In addition to performing tasks such as information

dissemination and witness interviewing, field officers may also fulfil a useful monitoring function—should this be part of the institution's mandate.

104. A national institution must be aware of the impact of its own working methods on physical accessibility. A complaints procedure which requires physical attendance of complainants and witnesses, for example, may be inaccessible to a great part of the population. By developing rules of procedure which obviate the need for personal attendance, a national institution can immediately increase its physical accessibility.

3. Accessibility through representative composition

105. The composition of a national institution should be such as to maximize its accessibility as well as its independence. In order to achieve this goal, composition must be representative of all components of civil society, including those whom the institution has been established to serve. Additional comments on composition may be found above (paras. 82-85).

E. Cooperation

106. According to the Paris Principles relating to the status of national institutions (see paras. 25-27 above) national institutions should "cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights". This principle was included in recognition of the fact that an effective national institution will not function alone but will establish and strengthen cooperative relationships with a wide range of other organizations and groups. Two such groups have already been mentioned in this chapter: similar human rights institutions and the judiciary. Both often work to promote the same patterns of rule observance as a national institution. Cooperation and collaboration will reinforce an institution's own initiatives, thereby enhancing its overall effectiveness.

107. As the Paris Principles recognize, a national institution may also develop useful cooperative relationships with the organizations discussed in the following paragraphs.

1. Cooperation with non-governmental organizations

108. A national institution should establish and maintain close contact with non-governmental organizations (NGOs) and community groups which are directly or indirectly involved in the promotion and protection of human rights. There are several important reasons for this. First, the support of these bodies can be extremely useful in enhancing the visibility of an institution by informing the general public of its existence (see paras. 160-163 below). Non-governmental organizations are often behind efforts to establish and strengthen national human rights institutions. Increasingly, NGOs are involved in the actual process of drafting laws establishing national institutions. It is also not uncommon for NGO representatives to be formally attached to an institution in an advisory or even decision-making capacity. These links should be fully utilized in order to highlight the institution and secure community support for its work.

109. A second, practical reason for national institutions to cooperate with NGOs is that the persons most vulnerable to human rights violations are often unwilling to approach any official body directly to lodge a complaint or to seek redress. In such situations, non-governmental organizations can serve as intermediaries between victims of violations and national institutions. NGOs can also provide the support and information necessary to encourage personal contact.

110. Thirdly, non-governmental organizations possess certain skills and characteristics which make them ideal partners in efforts to develop a national climate conducive to respect for human rights and fundamental freedoms. Because of their greater operational flexibility, NGOs will often be able to provide a national institution with detailed information on the domestic human rights situation and on structural or legislative inadequacies, as well as alert it to social and other changes. This information can be used to inform and guide the institution's own work in an effort to maximize relevance and effectiveness. Information may be acquired on an ad hoc basis, or the process may be institutionalized through regular (formal or informal) consultations.

111. Finally, non-governmental and community organizations can be recruited as useful partners for individual projects and programmes. Education, training and information dissemination are especially suitable areas for cooperation and collaboration. An organization with special expertise may even be recruited by a national institution to conduct a particular inquiry or study. Many national institutions routinely consult relevant NGOs when undertaking research or investigation.

2. Cooperation between national institutions

112. The phenomenal growth of national institutions in recent years has led to a significant expansion in opportunities for inter-institutional cooperation.

113. Many cooperative relationships are designed to facilitate the provision of assistance from a relatively strong, developed institution to a newer or smaller one. Actual methods vary according to the specific objectives of cooperation. A State in the process of creating a new institution, for example, may call upon an established institution to provide practical support and guidance in the drafting of legislation; in the recruitment and training of personnel; and in the elaboration of effective working methods. The decision to develop a complaints mechanism within an existing institution may be made following consultations with other national institutions which possess such capacity and are therefore able to provide advice and assistance.

114. Many national institutions share similar goals, and cooperation is often a mutually reinforcing experience. National institutions may decide to cooperate on a practical level by conducting joint activities and collaborating in studies or research projects on topics of mutual concern. Information exchange is another mechanism of practical cooperation which can be implemented in a number of different ways. Institutions may decide to convene regular meetings in order to compare experience and methods of work, to exchange reports and publications and perhaps even to address issues of common

interest. Two or more institutions may decide to develop a programme of regular staff exchanges in an effort to institutionalize cooperation and reinforce the flow of information.

115. At the second International Workshop on National Institutions for the promotion and Protection of Human Rights, held at Tunis in December 1993,⁹ representatives of national institutions established a Coordinating Committee, composed of national institutions from Africa, Asia, Australasia, Europe, Latin America and North America. The Coordinating Committee was entrusted with the task of ensuring follow-up to the recommendations adopted at the Tunis meeting, as well as maintaining regular contacts with the Centre for Human Rights in an effort to coordinate initiatives and develop a joint programme of action. It was also given the task of convening the third International Workshop on National Institutions for the Promotion and Protection of Human Rights, which is scheduled to take place in the Philippines in 1995. The decision to establish the Coordinating Committee was welcomed by the Commission on Human Rights in its resolution 1994/54 (para. 7).

3. Cooperation with intergovernmental organizations

116. National institutions can increase their effectiveness by drawing on the resources and expertise available within intergovernmental organizations.

117. In addition to providing resources and expertise, however, intergovernmental organizations can be useful in facilitating contacts between national institutions. The United Nations, as noted above, regularly convenes meetings of representatives of national institutions for the specific purpose of encouraging the exchange of information and experience. National institutions are often present (in an official or unofficial capacity) at many of the international meetings of human rights bodies held each year. The opportunity presented by these meetings can be, and has been, utilized by national institutions to hold their own gatherings.

118. Additional practical suggestions on strengthening contacts with intergovernmental organizations are made throughout this handbook (see, especially, annex II).

F. Operational efficiency

119. A national institution, like any other organization, must take care to ensure that its methods of work are as efficient and effective as possible. Operational efficiency touches all aspects of an institution's procedures, from the recruitment and selection of personnel, to the development of working methods and rules of procedure, to the implementation of regular performance reviews. In larger bureaucracies, a measure of inefficiency may be inevitable and may not substantially interfere with the achievement of goals. As a general rule, however, national human rights institutions are not large organizations and are often understaffed, under-resourced and overburdened. In such a situation, operational ineffi-

ciency may well have a serious impact on the capacity of the institution to discharge its responsibilities adequately.

120. Operational efficiency is a broad and complex topic which cannot be addressed fully within the confines of this handbook. The following observations are consequently far from exhaustive and their objective is to highlight certain aspects of operational efficiency particularly relevant to the type of institution under discussion. It should be noted at this point that external expertise can often be extremely useful to national institutions interested in establishing and implementing efficient administrative and management policies.

1. Adequate resources

121. It is evident that, regardless of its specific responsibilities, a national institution will have certain fundamental requirements (e.g. staff and premises) which must be fulfilled before it can even begin operating. Sufficient human resources and adequate, continuing funding are therefore prerequisites for operational efficiency. Where possible, funding should be guaranteed by law (see paras. 73-76 above).

122. In addition to jeopardizing efficiency, inadequate funding or insufficient personnel can also damage an institution's external credibility. The motives of a Government which establishes and then fails properly to staff and finance a national institution may be called into question. This in turn can seriously harm public perception of the institution as an independent, effective body.

123. The issue of adequate staffing and funding levels is not, however, merely one of political will. The granting of comprehensive responsibilities to national institutions presupposes the availability of substantial financial and human resources. It is no coincidence that most of the bigger, influential human rights institutions have been established in developed countries of Europe, North America and Australasia. Governments experiencing severe economic difficulties may be forced to establish small institutions with limited mandates because they are unable to afford larger, more powerful ones.

124. It is unlikely that any national institution will operate with excess staff or with a comfortable budget surplus. For this reason, all institutions should endeavour to develop methods of managing scarce resources. The effective management of resources requires a strict setting of priorities and adherence to a fixed and approved budget plan. A national institution may also usefully develop contacts in order to obtain external financial and technical support. Annex II to this handbook contains a list of organizations which may be able to provide national institutions with assistance in capacity building, as well as in regard to specific projects or programmes.

2. Working methods

125. A national institution will almost invariably be required to establish its own working methods and rules of procedure. Such rules may govern any number of matters, including criteria for the establishment of working groups, procedures to be followed for investigating complaints, and the timing and frequency of staff meet-

⁹ See E/CN.4/1994/45 and Add.1.

ings. The objective of developing and promoting adherence to certain methods and procedures should always be to maximize operational efficiency. Rules established for personal convenience or in unreflecting accordance with tradition are unlikely to be respected and may obstruct efficient functioning by creating unnecessary bureaucracy.

3. Personnel matters

126. The efficiency, representative nature and impartiality of individual staff members can have a crucial effect on the operation of an institution as well as on its public image. A national institution should be given the power to recruit its own support staff. In matters relating to the recruitment, selection and training of personnel, it may be useful to consider the following elements:

- Basic functions;
- Job descriptions;
- Personal qualifications;
- Candidate profiles;
- Recruitment and selection;
- Training;
- Performance assessment.

127. The basic functions of a national institution will provide the foundation for development of detailed job descriptions setting out the task to be performed. These descriptions should then be supplemented by the necessary personal qualifications. The result should form the foundation of candidate profiles. For example, a national institution charged with advising government on matters relating to human rights may seek to recruit a person to analyse existing and draft legislation in relation to domestic and international standards. This function becomes the foundation of a job description. The necessary personal qualifications which may be derived from this description include: a legal background, editing skills, experience in parliamentary drafting procedures, analytical ability, etc. A candidate profile will relate these qualifications to the functions to be performed.

128. It is important that the recruitment and selection process be based on candidate profiles and be guided by established procedures; that it be conducted openly; that each vacancy be advertised widely and publicly; and that national institutions set an example in the non-discriminatory hiring of staff. The importance of pluralism and diversity should be kept in mind at all times. These matters are especially important with respect to recruitment, selection and appointment of senior staff members. A national institution's credibility can be either enhanced or diminished in direct proportion to the level of public esteem accorded its leaders.

129. A national institution will be called upon to perform tasks which require certain unique skills. Training of both new and established staff will therefore be an integral aspect of the personnel policy of an efficient institution. Training is a function-specific activity. By virtue of the common function to promote human rights, all national institutions will generally require staff to be familiar with relevant international and domestic human rights standards. The maintenance of an acceptable level of knowledge in this area may entail in-house continuing

education programmes. An institution involved in training and educational activities itself may seek to train its staff in drafting programmes, selecting experts and conducting seminars. The efficient investigation of human rights violations requires staff trained in special investigatory skills, including witness interviewing and follow-up procedures. A national institution with the capacity to advise and assist government may wish to provide staff with training in negotiating techniques and report writing.

130. An effective national institution will develop and implement procedures for regular assessment of staff performance. A personal path for development of knowledge and skills may be drafted for each staff member and assessments conducted on the basis of progress achieved. Close monitoring of individual staff performance is also a useful means by which to evaluate the effectiveness of internal working methods and procedures. An underperforming workforce may be indicative of other problems existing within the institution which require attention and correction.

4. Review and evaluation

131. Most national institutions will be obliged to issue regular detailed reports of their activities. Such reporting is a matter of accountability and is therefore dealt with in section G below. Review and evaluation are quite different, referring to self-examination undertaken by an institution with a view to improving its effectiveness.

132. Constructive review and evaluation presuppose the existence of specific goals. While objectives will often be set and evaluated externally, this should not prevent a national institution from determining its own standards, which then become the criteria against which results are measured. Standards will most usefully relate to individual performance of staff members, as well as to more general goals and objectives for the institution as a whole.

133. In regard to a specific activity or programme component, a national institution may conduct reviews based on the goals it has set for that activity, as well as the expectations of the individuals or groups presumed to derive some benefit from the activity. A training course, for example, may set out to improve the technical capacity of the target audience to respect human rights while discharging their professional responsibilities. The course itself will be formulated to achieve this objective taking into account the (previously ascertained) expectations of participants. In conducting its immediate post-course review, the institution will attempt to ascertain whether the course lived up to mutual expectations. Subsequent reviews will be conducted in order to determine whether the specific objective of the course—to "improve technical capacity to respect human rights"—was, in fact, achieved. The results of both sets of evaluations will be utilized by the institution to improve future training activities.

134. Evaluation of an entire programme or of a specific function can be conducted along similar lines. A national institution seeking to review and evaluate its information programme will be required to do so in rela-

tion to the goals which have been set for that activity. One goal may be to improve the visibility of the institution itself. The extent to which this goal has been achieved may be measured by reference to several different factors, including the quantity of information disseminated and the number of inquiries or requests received.

135. As these examples illustrate, the actual process of review requires input of accurate, adequate information acquired both externally and internally. External information will come from the constituency of a national institution. Internal information will be based on an assessment of actual processes in relation to the institution's own expectations.

G. Accountability

136. A national institution is not an end in itself and can only be as strong or as humble as its achievements. Institutional effectiveness requires the development of a system of accountability based on specific, ascertainable goals.

137. In accordance with its legislative basis, a national institution will invariably be legally and financially accountable to the Government and/or parliament.

This aspect of accountability is most usually dealt with through reporting obligations. National institutions are generally required to submit detailed reports of their activities to parliament or a similar body for consideration. In view of their essential link with accountability, reporting requirements should be specified in the founding legislation of the institution and include as much detail as possible on the following points:

- Frequency of reports;
- Possibility of submitting ad hoc, special reports;
- Issues to be reported on;
- Procedure for examining reports.

138. A national institution should also be directly accountable to its clients, i.e. to the constituency which it was established to assist and protect. Public accountability can be achieved in a number of ways. A national institution may, for example, be compelled to conduct public evaluations of its activities and to report on the results. All official reports of the institution should, of course, be subject to open scrutiny and comment. By encouraging public debate, a national institution can motivate internal excellence as well as ensure that the public is aware of the institution and of the standards of achievement it has been set. Transparency, through publication and dissemination of reports, will inevitably enhance an institution's external credibility.

III. THE TASK OF PROMOTING AWARENESS AND EDUCATING ABOUT HUMAN RIGHTS

A. Introduction

139. Full realization of human rights cannot be achieved solely through the development of protective law and the establishment of mechanisms to implement that law. National human rights institutions, along with intergovernmental and non-governmental organizations, can play an important role in promoting human rights at the domestic level.

140. Promotion is a very general term and encompasses a wide range of possible activities. A national institution will be engaged in promoting human rights if its goals and functions include the following:

To inform and to educate about human rights;

To foster the development of values and attitudes which uphold human rights;

To encourage action aimed at defending human rights from violation.

141. To inform and to educate is to create awareness and impart knowledge of human rights. The protection of human rights depends on people knowing about the rights to which they are entitled and the mechanisms which are available to enforce those rights. In the same way, all members of society should be made aware of their own personal responsibilities under international and domestic law. They should be alerted to their own potential both to violate and to protect human rights and made aware of the duties which they owe to others.

142. While information is essential, it cannot be sufficient to ensure the development of values and attitudes necessary for the full enjoyment of human rights. Promoting human rights means working towards the development of a culture of respect for and observance of human rights at the national level, a culture in which knowledge of rights and responsibilities is reinforced by a determination to transform that knowledge into practical reality.

143. Respect for human rights requires constant internal and external vigilance. Internal vigilance is instilled by sensitizing an individual to his or her own potential for violative behaviour. External vigilance is aimed at encouraging groups or individuals to act in defence of human rights. Such defensive action presupposes the existence of adequate protective mechanisms and of programmes which seek to promote knowledge and utilization of those mechanisms.

144. Many human rights promotional activities are initiated and carried out at the international level by intergovernmental and non-governmental organizations. Increasingly, however, domestic human rights actors, including national institutions, are acknowledging the fact that responsibility for implementation of human rights standards rests primarily at the national level. Promotion

of human rights is now widely agreed to be one particular mechanism or strategy of implementation which should be adopted as part of a State's commitment to respecting its international obligations.

145. Almost without exception, national institutions are entrusted with the important responsibility of promoting awareness of human rights. In some cases, the law or decree establishing the institution will specify the activities which are to be conducted in pursuance of this goal. In other cases, only the goal will be set out and the institution itself will have to develop a plan of action to ensure its realization.

146. This chapter sets out the activities which can be pursued by national institutions in an effort to promote human rights by informing and educating; by shaping values and attitudes; and by encouraging action in defence of human rights.

B. Promotional strategies

1. *Collecting, producing and disseminating information materials*

147. A national institution should have at its disposal a range of information materials on human rights. It must also have the capacity to disseminate this information efficiently and effectively.

148. The nature of the institution should be reflected in the type and range of information which it makes available. Information materials emanating from an ombudsman-type institution, for example, will probably be more narrowly focused than the materials collected by a commission-type body with broad responsibilities in the field of human rights. A centre for documentation and training may be expected to make available a variety of research and teaching materials on human rights topics.

149. In addition to obtaining materials relevant to their particular responsibilities, all national institutions should endeavour to collect and make available the following basic information materials:

Information on the institution itself, including annual reports;

International human rights instruments and standards (including information on ratifications and reservations by the State in question);

Reports of the State to treaty bodies and comments made by treaty bodies on those reports;

Domestic legislation relating to human rights and relevant administrative and judicial decisions which have interpreted or applied that legislation;

Information on domestic mechanisms for protection of human rights (including other national institutions,

parliamentary commissions, ministerial committees and non-governmental organizations);

Information on the structure and functioning of implementation mechanisms which exist at the international level.

Such information, as well as additional materials relevant to the institution's particular fields of activity, can be obtained from intergovernmental organizations such as the United Nations, from government departments and from non-governmental organizations. National institutions can ask to be included in the mailing list of many organizations active in the field of human rights. They can also ask to become a depository for human rights documentation emanating from the United Nations and from regional human rights bodies. A select list of the major organizations (both intergovernmental and non-governmental) issuing human rights information materials and documentation is given in annex II to this handbook.

150. The information stock of a national institution should, of course, include the fruits of its own work. Many institutions, in the course of carrying out their functions, have access to important statistics on the domestic human rights situation. The great majority of existing institutions are empowered to engage in research on human rights issues or situations. In some cases, such research will be the first step in an investigation conducted by the institution. In other situations, the results of research will be transmitted to the appropriate government department or agency for action. Some research projects may be undertaken with the sole purpose of raising public consciousness about a particular human rights problem. In all these situations, the results of research undertaken should form part of the institution's collection of information materials, thereby contributing to community awareness of important human rights issues.

151. There is no need for a national institution to restrict its production of materials to research reports. Many institutions produce their own information materials on general or specific human rights issues. Self-produced materials can be precisely targeted to those sectors of society most in need of information and education. By producing its own materials, the national institution can incorporate local laws and realities in a way which may make these materials more accessible than those produced elsewhere.

152. Information collection and production is of little value without a strategy for ensuring the effective dissemination of materials. A dissemination strategy must begin with identification of appropriate target audiences. Once the target audiences have been selected, available information should be reviewed and, if necessary, the format or style altered to ensure its suitability for the target audience. If, for example, information is intended for widespread public distribution, then a national institution may need to synthesize the data it has available on a particular subject into an easily readable and readily accessible style. If more than one language is spoken in the country of operation, material should be made available in those different languages. Ensuring the accessibility of documentation materials for students and scholars

may only be a matter of developing an appropriate classification system and providing facilities for reading, writing and copying.

153. The next step in an effective dissemination strategy is to identify appropriate vehicles for the dissemination process. Once again, this will largely depend on the target audience of the materials in question. A national institution's capacity to provide human rights documentation should be made known to those most likely to benefit from such a service. General information materials intended for widespread distribution may be effectively disseminated via schools, libraries, government offices and community organizations. The results of research projects could be made known through other organizations or groups interested in the research topic, as well as through universities and relevant ministries. Both general and specialized media can be useful vehicles for information dissemination.

2. *Organizing promotional events and encouraging community initiatives*

154. Through organizing promotional events and encouraging initiatives within the community, national institutions can play an important role in facilitating widespread awareness of human rights. Promotional events can include any number of activities, such as drawing competitions with a human rights theme for school-age children; the organization of lectures at universities and other institutions of higher education; and exhibitions and special events to mark anniversaries such as Human Rights Day (10 December). Some national institutions sponsor human rights prizes, which are awarded to individuals or groups within the community who have made a significant contribution to the realization of human rights and fundamental freedoms.

155. Not all promotional activities need be carried out alone. A national institution can work effectively with structures already existing within the community by encouraging or participating in initiatives of others aimed at promoting awareness and knowledge of human rights. The institution should familiarize itself with the resources available within the community and examine the ways in which those resources can be most effectively used.

3. *Working with the media*

156. In many countries, communications media have come to be a dominant force in the process by which ideas are formed and opinions expressed. Because of their ability in this regard, the media, like many other influential elements of society, can be an instrument of empowerment as well as one of repression.

157. The role of the media in promoting human rights will depend, to a great extent, on the social and political structure within which they operate. International human rights law clearly affirms the right of all people to freedom of opinion and expression and the absolute right to hold opinions without interference (art. 19, Universal Declaration of Human Rights; art. 19, International Covenant on Civil and Political Rights). To be a useful partner in a human rights promotion strategy, the national media must be free to express themselves.

Ideally, they should not be subject to government control (except within clearly defined limits), nor should their freedom of expression be hampered by undemocratic private interests.

158. In view of their importance in formulating and expressing public opinion, the media can be an extremely valuable partner of a national institution which is vested with a responsibility to promote awareness of human rights. A national institution should develop a strategy for identifying the areas of its promotional programme which would benefit from media involvement. These are some of the ways in which the media can assist a national institution:

Informing the public about the existence of the institution, the functions with which it is entrusted, and the activities in which it is engaged;

Educating the community about the human rights to which they are entitled, the duties which they owe to others and the structure which have been developed to implement those rights and duties;

Disseminating general human rights information, as well as opinions and recommendations of the national institution, including the results of investigations or inquiries;

Highlighting national or international situations or issues and expressing the opinion of the institution on the human rights aspects of those situations or issues.

159. A number of national institutions employ public relations experts or press officers to ensure that all avenues of the media are fully exploited in the effort to promote human rights. Even in a situation where no such experts are available, a national institution should ensure, as an important first step, that its existence is widely known in newspaper, television and radio circles. Active solicitation of free or subsidized air time or newspaper space can be an important strategy in this regard. The institution should also take measures to ensure that staff receive training in communications skills, including conducting interviews and writing press releases.

4. Ensuring the visibility of the institution and its work

160. A national institution cannot function properly unless the community is aware of its existence. For this reason, each institution should set itself a policy goal of high visibility. It must then devise a strategy or programme to achieve this goal which is targeted towards those individuals or groups most likely to benefit from what it has to offer. As with information dissemination, the actual contents of the strategy will, of course, depend on factors such as the particular functions which the institution has been established to fulfil; the current human rights situation; and the resources available to the institution for public relations and awareness activities.

161. While a national institution should be able to enlist the help of other entities to secure its visibility (see paras. 162-163 below), the ultimate responsibility for ensuring that the public is aware of its existence must rest with the institution itself. Perhaps the best way of ensuring high visibility is to disseminate widely the proceedings and results of work undertaken. If the institution has decided to take a position on a draft law cur-

rently before parliament, then it should make an effort to ensure that the general public is aware of this activity. In this way, it can gain public support for its position, as well as use the opportunity to publicize the fact of its own existence. The same may be said for publicizing the terms of reference of a public inquiry which the institution is to undertake, as well as the final results of any such investigation. There are numerous other areas where a national institution can combine its efforts to secure public support for its activities with the more immediate goal of ensuring widespread knowledge of its existence.

162. In the quest for high visibility, national institutions can enlist the cooperation and support of other entities, including government departments and non-governmental organizations. Government agencies and departments should be encouraged to inform their constituencies of the existence of a national human rights institution and of the services it is able to offer. This is particularly important where the institution is empowered to examine complaints of administrative injustice. Such a power can be useful only if potential complainants are made aware of their right to complain and of the necessary procedures for filing a complaint. The relevant agencies and departments should therefore be encouraged to inform their clients of the possibility of complaining or appealing against a decision. This can usefully be done by including details of the institution in information materials prepared by each department. The institution itself can also prepare targeted information materials and use government agencies as points of distribution. National institutions should be able to expect a high level of support from government agencies in this regard. The establishment, by government, of a body entrusted with responsibility to oversee fairness and legality in public administration presupposes a willingness to ensure that persons who may have cause to use that service are fully and promptly informed.

163. A national institution should establish and maintain close contact with non-governmental organizations (NGOs) and community groups which are directly or indirectly concerned with human rights. Such contact can facilitate the work of the institution and increase its effectiveness (see paras. 108-111 above). NGOs can also be extremely useful in enhancing the visibility of the institution by informing the public of its existence. Often NGOs are in a unique position to identify those individuals and groups within a society who are most vulnerable to human rights violations and therefore in a position to obtain greatest benefit from the services of a national human rights institution.

C. Education and training

1. Professional training

164. National institutions can play a valuable role in educating various groups about international and domestic human rights standards. They can also go further by developing training courses which transform knowledge about human rights into operational skills. There are a number of professional groups whose ability to affect human rights practice within a society make them appro-

priate target audiences for training. These groups include, but are not limited to, the following:

Administration of justice

Lawyers, judges and prosecutors;

Law enforcement personnel, including police and security forces;

Prison officials;

Paralegals;

Government and parliament

Members of the legislature;

Public officials involved in legislative drafting and reform;

Public officials involved in policy development and implementation;

Public officials responsible for compiling reports to international human rights treaty bodies;

Other

Social workers;

The armed forces;

The media;

Non-governmental human rights and community organizations;

Teachers and teacher-trainers;

Trade union officials;

The medical profession;

Community leaders.

165. To undertake the task of training in the most efficient way, various steps should be followed, as described below.

(a) Identifying the audience

166. The mere recitation of vague principles of general applicability offers little hope of affecting the actual behaviour of a given audience. To be effective—indeed, to be at all worthwhile—training and education efforts must be directly targeted and appropriately addressed to a particular audience.

167. The target audience can be selected in a number of ways. A national human rights institution may be approached by a government department or organization with a request for training. The institution itself may, in the course of its work, identify key groups who are in a position to benefit from a human rights training course. There may be some situations in which a general human rights training course addressed to a variety of participants will be appropriate. Almost invariably, however, a course directed towards a specific group will have a greater and more lasting impact.

(b) Formulating a programme

168. It is impossible to develop one generic training course which would be suitable for all professional groups. Each course must be structured around its audience. This means that emphasis should be given to the international and national human rights standards which are applicable to the day-to-day tasks of the participants. Training should also focus on the human rights issues or problems which a particular target group is most likely to encounter.

169. Regardless of the audience, however, it is important that all participants in all human rights training courses are provided with an overview of the international human rights system and of the domestic rules and mechanisms which have been developed to ensure the application of international standards at the national level.

(c) Selecting suitable trainers

170. A practical approach to human rights training presupposes the selection of trainers who are experienced in the field from which participants have been drawn. It is not particularly useful, for example, to engage a panel of professors and theorists to each police about human rights. It is likely that much more will be accomplished if instruction is given, to the greatest extent possible, by persons familiar with the background and working environment of the audience.

171. It is also important that trainers be well versed in effective techniques for the training of adult audiences. Emphasis should be given to creative, interactive teaching methods which offer the best hope for securing the active, engaged participation of the audience.

(d) Maximizing the effectiveness of training exercises

172. To maximize the effectiveness of a national institution's training programme, efforts should be made to ensure that participants are equipped and motivated to continue the training process after completion of the course. This can be done by selecting participants on the understanding that each will be charged with conducting training, or with dissemination efforts, upon return to his or her normal duty station. In this way, the impact of each course is multiplied as the information imparted is disseminated throughout the institutions concerned. Another method of maximizing effectiveness is to focus training on trainers—to equip those persons already involved in educating others with the knowledge and skills necessary to incorporate human rights effectively into their own teaching programmes.

173. Information dissemination can be greatly facilitated by the availability of written materials both during and after the course. Compilations of international human rights standards relevant to the participants' area of work are particularly useful. A national institution involved in multiple training exercises for a particular target group may consider developing its own materials for distribution.

(e) Conducting evaluations

174. Training should include pre-course and post-course evaluation exercises. Carefully worded pre-course questionnaires allow trainers to tailor a programme precisely to the educational needs of the audience and provide trainers with information about expectations. Post-course evaluations allow trainers to gauge what participants have learned from the course. They can also assist in what should be a continuous process of modification and improvement in courses offered by a national institution.

2. Seminars

175. Unlike training courses, seminars are a vehicle for transferring knowledge and insights without necessarily setting out to impart operational skills. Human rights seminars can provide professionals and other groups with the opportunity to exchange views and information on a wide variety of human rights problems and possible solutions. These objectives suggest that the atmosphere of a seminar is likely to be more collegial than that of a training course, where the instructor-student approach will generally be more appropriate. National human rights institutions can utilize their knowledge of the human rights situation to identify priority areas for discussion. Through the medium of a seminar, a national institution can bring together key people to discuss important issues, stimulate their thinking and, through their leadership, encourage greater awareness of human rights problems in official and unofficial circles.

176. The principles set out above in relation to training courses (paras. 164 ff.) apply, with some modifications, to seminars. The preliminary process of audience identification should be done carefully, keeping in mind the issues to be discussed. Seminars provide an excellent opportunity to bring together a variety of people. Participants should be selected on the basis of their ability to influence public opinion and/or government policy on human rights. It is important that presenters are recognized experts in the identified subject area with the ability to facilitate and moderate discussion.

3. Education programmes

177. National human rights institutions are in a unique position to forge useful alliances with organiza-

tions, institutions and individuals already involved in the educational process.

178. Many national institutions have taken the position that development of a human rights culture within society must begin with its youngest members. These institutions have therefore focused their educational initiatives on school-age children. The range of possibilities for this group is considerable. National institutions can work towards encouraging the inclusion of human rights concepts in existing programmes; provide expert assistance in the adaptation or modification of curricula where this is necessary; provide instruction and assistance to teachers and teacher-trainers; and work together with educators in producing educational resource tools.

179. Similar initiatives can be undertaken at the tertiary level. Human rights can be a field of study within almost every discipline, including law, media studies, medicine, and political and social sciences. National institutions can encourage university administrators and teachers to develop specific courses on human rights or to include human rights elements in existing programmes. They can also act as a resource tool for students engaged in research, as well as for teachers interested in elaborating courses or providing information materials to their students.

180. It is equally important, of course, to develop human rights programmes outside the formal education system. National institutions can usefully collaborate with professional groups, trade unions, and community and non-governmental organizations to develop non-formal educational materials for particular constituencies.

IV. THE TASK OF ADVISING AND ASSISTING GOVERNMENT

A. Introduction

181. As recognized in the Paris Principles relating to the status of national institutions (see paras. 25-27 above), a national institution may be granted the authority to

submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; . . .

182. The great majority of national institutions are empowered to advise parliament, the executive and/or the judiciary on human rights issues and to assist these branches of government in promoting and protecting human rights. Mandates to this effect can be framed in many different ways. National institutions may be given a general authority to bring matters concerning human rights to the notice of the relevant ministry, department or official. They may be able to submit opinions on proposed or existing legislation directly to parliament; to initiate and assist in the drafting of new legislation; or to intervene in legal proceedings involving questions of human rights (e.g. as *amicus curiae*). They may also be entrusted with responsibility for drawing the Government's attention to situations of human rights violations and for making concrete proposals for initiatives to end such violations. Many national institutions are plying an increasingly important role in overseeing the implementation of international human rights standards and assisting Governments in fulfilling their reporting obligations under international treaties to which the States in question are parties.

B. Basic issues

1. Requested or self-initiated advice?

183. Whether or not a national institution can advise or assist government on its own initiative will generally be a matter for its founding legislation. An institution may be empowered to advise at the request of the authorities concerned or it may be granted a wider authority to submit unsolicited recommendations. Rarely, however, will a Government be legally compelled to refer any legislative or other matter to a national institution. In view of its presumed expertise in the field of human rights and knowledge of the domestic human rights situation, a national institution may properly be granted a broad advisory role, including the right to present unsolicited opinions or recommendations. A national institution with general competence in the field of human rights or one with specific competence in a particular area (e.g. racial discrimination, women's or children's rights) may be well placed to assist the State in discharging its reporting obligations under relevant international conventions (see paras. 211-214 below).

2. An appropriate mandate

184. The appropriate advisory mandate of a particular institution will depend, to some extent, on its other functions and powers. A national institution with a complaints mechanism, for example, will almost invariably be empowered to submit recommendations regarding a particular complaint or series of complaints to the relevant arm of government for information or action. If the institution is granted the authority to conduct self-initiated investigations, then an ability to report the results of such investigations directly to the Government is clearly consistent with such authority.

185. The functions and powers of a particular institution will often be a good indication of the ultimate value of its advisory role. A national institution with a narrow, carefully circumscribed mandate and little independent authority may lack the knowledge, experience and will to advise wisely. Conversely, an institution with a broad mandate and independent status will, by definition, possess a greater capacity to acquire and synthesize information and, thereby, to develop sophisticated opinions on human rights matters for transmission to those able to effect substantial change.

3. Developing effective procedures

186. Irrespective of its precise advisory capacity, each institution will find it useful to develop procedures for effectively communicating information and opinions to government. To use its advisory capacity fully, a national institution may need to acquire or develop certain skills, including legislative analysis, negotiation, report writing and oral presentation.

4. Responsibilities of recipients

187. A capacity to advise, no matter how broadly framed or expertly used, is of little value in the absence of a corresponding willingness on the part of the recipient to consider and act on the information it obtains. Governments granting advisory capacity to institutions should therefore ensure the development of appropriate mechanisms for acquiring, channelling and utilizing this advice. Establishing such procedures in the founding legislation of the institution can be particularly helpful. Such legislation could, for example, provide that the Government is responsible for tabling recommendations in parliament together with an indication as to whether, and if so how, it intends to take action.

188. Regardless of how procedures for channelling and acting on recommendations are developed, it is important to recognize that, if the recommendations of a national institution are ignored or passed over without reason, the institution will have little incentive to continue performing this function to the full extent of its ability. Unexplained failure to consider or respond to

recommendations may also have an adverse impact on public perception of a Government's willingness to promote human rights at the domestic level.

189. Many national institutions have found it useful to keep a record of follow-up on recommendations. Such information is also suitable for inclusion in annual reports.

C. Reviewing existing and proposed legislation and assisting in the drafting of new legislation

190. In the same way that a complaints mechanism can never substitute for a properly functioning judiciary, the power of a national institution to review existing or proposed legislation cannot affect in any way the responsibility of all other agencies of government to ensure that legislation is consistent with human rights. In a functioning democracy, such responsibility must ultimately lie with parliament itself, with the judiciary, and with the executive. A national human rights institution can only ever function as an additional safeguard in the lawmaking process.

1. National institutions as legislative watchdog

191. There are several reasons why a national institution is particularly well placed to advise and assist government in respect of legislation and to act as a watchdog in the legislative process. Perhaps most importantly, a national institution, in the course of performing its functions, will generally be closely involved in legislation having a direct or indirect impact on human rights. Such proximity places the institution in an excellent position to evaluate the practical effectiveness of existing laws; to identify problems which may have escaped the attention of the legislature or other implementing agencies; and to suggest amendments or improvements. Improvements or even new legislation may be required because of technical defects in a law which have come to the attention of the institution during its overseeing of the law's implementation, or because of certain human rights problems which have been identified by the institution during its work as areas not adequately addressed by existing legislation.

2. Relationship between the legislative advisory role and other functions

192. A national institution with the power to conduct in-depth investigations of human rights violations or particular human rights issues will be especially well placed to comment on legislative inadequacies. An examination of prison conditions, for example, could reveal a lack of legally established safeguards regarding detention or a legislative failure to provide avenues through which detainees and prisoners may seek redress for violations of human rights. In the same way, an inquiry into discrimination on the basis of gender could indicate a need for affirmative-action legislation in a particular area. Similarly, an institution vested with the power to receive and act on individual complaints will be well placed to identify areas where legislative improvements or other changes are needed.

3. Identifying the recipient

193. The logical recipient of advice on existing or proposed legislation will often be parliament itself. A national institution may also deal with a group within parliament vested with specific responsibilities with regard to drafting or to a particular area of legislative activity. In some countries, parliamentary or congressional human rights bodies have been established. These bodies are often very active in promoting human rights and can be important vehicles for transmitting recommendations of national institutions directly to the legislature. A senior member of the executive can also be empowered under the founding law of an institution to act as an intermediary, receiving proposals and submitting them to parliament.

194. Recommendations on existing or proposed legislation can also be channelled indirectly. A national institution may, for example, be empowered to propose to different authorities that, in their respective areas of competence, they suggest such changes and modifications to laws, regulations and administrative practices as, in the opinion of the national institution, will lead to improved protection of human rights. On such a basis, an institution may decide to approach a particular ministry or government department in order to secure its support for a legislative change.

4. Proposed legislation

195. The ability to comment or advise on proposed legislation can be especially important as it will always be easier to change a draft law than amend or repeal an existing one. A national institution with authority in this regard will generally undertake the following steps:

Identify legislative drafts with a human rights content or with human rights implications. These may include, *inter alia*, proposed laws relating to crime and the administration of justice, the family, immigration, elections, nationality, or social welfare;

Ascertain compliance of the draft law with the State's international and domestic human rights obligations;

Assess the potential human rights implications of the proposed legislation;

Submit a report based on the latter two steps to the executive, to a parliamentary drafting group or to any other relevant body.

5. Existing legislation

196. As already indicated, a national institution may, during the course of its activities, identify problems or inadequacies, from a human rights perspective, in existing legislation. The mandate of the institution may specify the procedure to be followed in such a situation. Generally, however, the institution will be required to take the initiative at each stage and will therefore have to:

Detect legislative inadequacies;

Conduct a study of their human rights implications with reference to both national and international standards;

Identify the relevant branch or agency of government responsible for implementing or otherwise overseeing the legislation under review;

Communicate with or report to that branch or agency or to parliament itself.

6. Drafting new legislation

197. In addition to reviewing existing or proposed legislation, a national institution may be mandated to assist in the process of drafting new legislation. This new legislation may be the result of a prior initiative of the institution, as discussed above. New legislation may also be necessary to incorporate international human rights standards into domestic law. A national institution with the necessary authority and technical competence can play a vital role in this important process. In order to maximize its effectiveness in this regard, a national institution should endeavour to establish or strengthen relationships with groups; both within and outside government, which are in a position to provide input. Acquiring technical drafting skills is also important.

7. Maximizing effectiveness

198. It has been the experience of a number of national institutions that their recommendations concerning legislation (whether proposed, existing or in the process of being drafted) are not acted on or even acknowledged by the legislature or relevant branch of government. In some situations, the failure to take account of opinions and recommendations emanating from a national institution can be due to a basic lack of political will. A Government may be unwilling to accept advice or guidance from the institution. It may, indeed, consider that human rights issues are not a priority consideration in the legislative process. These problems are not easily resolved and, in such circumstances, a national institution may decide to engage in discussions with the Government regarding the role and functions of the institution as set out in law.

199. In many situations, however, a national institution can take a number of concrete steps to enhance its influence in the legislative process. Some of the basic steps, including adequate and appropriate training of staff, have already been mentioned. A national institution should, in such matters, consider itself to be an interest group like any other. The development of effective communication and negotiation skills, for example, can be crucial in ensuring that information is transmitted to persons in a position to act on it. Even the timing of reports may be important, and every effort should be made to ensure that the release of reports coincides as closely as possible with any appearance before a parliamentary committee or other body.

D. General policy and administrative advice to government

200. In addition to reviewing legislation, national institutions are often able to submit general policy advice to government bodies and to comment on existing administrative arrangements. This particular function can be of great practical benefit and may result in significant improvements in the day-to-day human rights situation for many individuals. In all cases, an advisory capacity of a national institution will be enhanced by an

ability to express an opinion on the positions and reactions of the Government.

1. Policy advice on national issues

201. As already noted (paras. 184-185 above) the ability of a national institution to offer general policy advice to governments on national human rights issues, and the scope of its potential effect in this regard, will usually be related to other responsibilities with which it has been entrusted. In the course of conducting its inquiries, a national institution may become aware of government policies or practices having a detrimental effect on the human rights of individuals and groups. A study of homelessness, for example, could ascertain the precise scope of the problem and the inadequacies of the current government response, as well as form the basis of policy recommendations on health care, social security and family law. An examination of sentencing patterns or of the ethnic profile of persons in detention could indicate apparent discrimination against certain groups in the administration of justice. By conducting such an examination, the national institution is able to alert the Government and the general public to the existence of a problem, as well as suggest ways in which the problem might be addressed.

202. National human rights issues not directly related to government policies or practices may also be identified by a national institution and brought to the attention of the relevant bodies. An investigation into excessive use of force by the police, for example, may uncover a lack of understanding of national and international standards and/or a technical incapacity on the part of the police force to translate those standards into effective practice. On the basis of such an inquiry, a national institution may make recommendations concerning recruitment, training and management of law enforcement officials.

203. Not all situations of human rights abuse can be traced directly back to legislative inadequacies or unfair administrative practices. Human rights violations also occur in the private sphere: in the workplace, in the local community and in the family. Discriminatory hiring policies, incitement to racial hatred, and violence against women are all problems which exist largely in the private sector and therefore away from public scrutiny. A national institution can play a vital role in identifying and highlighting such "hidden" human rights violations. The institution can also call attention to the need for public education or other initiatives aimed at developing a social culture of human rights in which violations of this kind will not occur, or at least will not be ignored.

2. Advice on administrative arrangements and practices

204. An active national institution may be the first point of contact for a person who feels that his or her rights have been violated by the administrative practices of a certain government department or agency. Investigations of individual allegations can be a useful means of detecting widespread problems. A complaint of discrimination, for example, may reveal a pattern of

bureaucratic conduct which violates or affects the full enjoyment of human rights and consequently warrants modification. It may also expose fundamental problems in coordination, allocation and acceptance of responsibilities between different government departments and levels of government. The national institution can identify such conduct or arrangements and suggest methods by which their discriminatory effects could be overcome.

3. Advice on judicial process

205. It may be useful for a national institution to be able to comment on matters relating to judicial process where such matters could affect the full enjoyment of human rights. The rights which are particularly important in this regard and which may be monitored by a competent national institution are set out in article 14 of the International Covenant on Civil and Political Rights and include the right to a fair and public hearing by a competent, independent and impartial tribunal; the presumption of innocence; the right to be tried without undue delay; the right to legal representation; the right to free assistance of an interpreter; and the right to review by a higher tribunal. These and other rights recognized by the State with regard to judicial process and practice can be monitored by the national institution and form the basis of any recommendations which are made for improvement.

4. Advice on international human rights issues

206. The great majority of national institutions focus their attention on the domestic human rights situation and there are obvious reasons why an institution charged with promoting and protecting human rights within a particular country will not concern itself with international problems or problems in other countries. However, while the domestic situation must remain its principal focus, the fact that a national institution may be able to offer valuable advice on international issues should not be ignored. In its efforts to improve the domestic human rights situation, a national institution may gain valuable insights into how the problems encountered could or should be addressed at the international level. Such insights may be channelled by way of advice to government concerning its policy towards a particular country or situation.

E. Advice and assistance in implementation of international standards

207. The relationship between national and international human rights standards varies from State to State. Some national constitutions stipulate that particular international instruments have the force of law. Even in the absence of such a specific constitutional provision, certain legal systems provide for automatic incorporation into domestic law of standards contained in the international human rights instruments to which the State in question is a party. In other systems, international human rights instruments, even if accepted by the State through ratification or accession, must be formally incorporated into domestic law before taking effect.

208. A national institution providing advice and assistance to government on the implementation of interna-

tional standards will be guided by the particular legal traditions which exist in the country in question.

1. Advice on implementing international instruments

209. Governments may be directly advised on a range of matters relating to international human rights instruments. A national institution may, for example, be empowered to advise government on acceptance of international conventions. Such a general advisory power will permit a national institution to inform the Government as to the precise nature of the obligations it would assume upon ratification of a particular instrument and to give an opinion on the advisability of ratification. Advice on international human rights instruments may also involve consideration of whether domestic law is already in conformity with standards contained in those instruments or whether additional legislative initiatives would be required. In a federal system, advice could be given on the implications of acceptance for relations between the central Government and the constituent states.

210. While the establishment of a legal basis for human rights is essential, practice has shown that full promotion and protection of human rights cannot be achieved solely through legislation. Thus the incorporation of international standards into domestic law is often only the first step towards full implementation of those standards. A national institution may be able to advise those governments as to other measures which could or should be taken in fulfilment of the State's international obligations. Such measures may involve, *inter alia*, modifications in fiscal or monetary policy; alterations to priorities and practices regarding the provision of social services; the establishment of reporting machinery within and between ministries; and the implementation of affirmative-action programmes and public-education activities. A national institution can familiarize itself with these less direct and often overlooked implementation mechanisms and, through its advisory function, ensure that the Government is aware of the scope and extent of the State's existing or potential international obligations.

2. Contributing to the drafting of reports

211. States parties to the following international human rights instruments are required to submit regular reports to the committees established under the respective instruments to oversee their implementation:

International Covenant on Civil and Political Rights (Human Rights Committee);

International Covenant on Economic, Social and Cultural Rights (Committee on Economic, Social and Cultural Rights);

International Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination);

Convention on the Elimination of All Forms of Discrimination against Women (Committee on the Elimination of Discrimination against Women);

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture);

Convention on the Rights of the Child (Committee on the Rights of the Child);

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not yet in force; committee not yet established).

Reports generally contain information concerning the national situation with regard to a particular right or set of rights protected by the relevant instrument. They will also include details of the ways in which the reporting State is working towards implementing its international obligations. Each Committee is composed of a number of experts who examine individual reports, question State representatives and make either specific or general recommendations concerning ways in which rights may be implemented at the national level. An accurate, detailed and properly drafted report will ensure that the submitting State receives maximum benefit from the expertise of the Committee.

212. Increasingly, State parties' reports to the various committees are including information on the activities of national institutions in so far as these activities relate to the area covered by the report. A national human rights institution is, by definition, itself an implementation mechanism and for that reason an appropriate subject for inclusion in reports. The institution will assume even greater prominence in a report where its activities directly relate to the rights in question. A national institution dealing with the problem of racial discrimination, for example, will presumably be conducting activities relevant to implementation of the State's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee on the Rights of the Child may be expected to receive information from States parties on the existence and functioning of any national institutions which are directly involved in promoting and protecting the human rights of children.

213. In addition to being the subject of part of a report, a national institution may be able to contribute to the reports which States are required to submit to United

Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations. The importance of accurate, detailed and properly drafted reports has already been stressed. National institutions, by virtue of their particular expertise, are often in an excellent position to ensure that reports conform in these three important respects.

214. The contributions of national institutions to the reporting process will vary according to a number of factors, including the functions of an institution and the willingness of the Government to seek its assistance. In many cases, a national institution will be able to offer information, data or statistics directly to the government department charged with preparing the report. Some institutions may review draft reports in order to ensure their accuracy and completeness. Others may be used as a coordinating point through which information from various ministries, departments and organizations is channelled. In this latter case, a national institution itself may be entrusted with the responsibility of compiling a draft report, which would then be submitted to the relevant authorities for review.

3. Assisting in the development of national action plans

215. In the 1993 Vienna Declaration and Programme of Action (Part II, para. 71), the World Conference on Human Rights recommended that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights. In developing their respective action plans, States will be required to set priorities in the field of human rights as well as to identify the appropriate vehicles through which the plan is to be implemented. In recognition of their expertise and experience, national institutions should be recruited to assist in the drafting of action plans and utilized as much as possible in the implementation process.

V. THE TASK OF INVESTIGATING ALLEGED HUMAN RIGHTS VIOLATIONS

A. Introduction

216. One of the most important functions with which a national human rights institution can be entrusted is the investigation of alleged human rights violations. The existence of a national mechanism with the power to investigate abuses and provide relief to victims can act as a powerful disincentive to violative behaviour. It is also a clear indication of a Government's commitment to human rights and of its genuine willingness to take international and domestic obligations seriously.

217. An effective investigatory mechanism will be characterized by:

- Adequate legal capacity;
- Organizational competence;
- A defined and appropriate set of priorities;
- The political will to pursue its work.

This chapter focuses principally on the first two of these four basic requirements. The setting of priorities and the existence of the necessary political will, while referred to incidentally, are matters which must be addressed and resolved within each society and each institution. However, with regard to the latter point, it should be stressed at the outset that an investigatory mechanism cannot function properly without a certain measure of support from the Government. Experience has repeatedly shown that, regardless of legal powers, a mechanism which does not enjoy such support will not be able to operate effectively.

218. This chapter has two main sections. Section B deals with the structure and functioning of mechanisms for receiving, acting on and resolving complaints from individuals and groups. Section C examines the procedure for investigating human rights situations *suo moto*, i.e. at the institution's own initiative and not on the basis of a complaint received.

B. Investigating complaints

1. Importance of a complaints mechanism

219. The judiciary is the basic structure for protection of human rights at the national level. A national human rights institution, no matter how wide the powers or efficient its operation, can never adequately substitute for a properly functioning judiciary.

220. The ability of a national institution to receive and act on complaints should therefore be seen as an additional measure of security—a complementary mechanism established to ensure that the rights of all citizens are fully protected. This complementarity implies that the complaints function of a national institution should be able to offer something which the legal system or

other institutionalized processes cannot. The particular focus of a national institution—human rights—and its ability to develop expertise in this area already offer some concrete advantages to persons who feel that their rights have been violated. The structure and functioning of the complaints mechanism should be such as to allow the national institution to guarantee accessible, rapid and inexpensive resolution of a matter.

221. Whatever the style of the complaints mechanism established by the institution, it is essential that procedural aspects be clearly defined, legally entrenched and rigorously adhered to. Consequently, it will always be preferable that the scope of the institution's powers be founded in law and that its responsibilities towards complainants be precisely defined. The success of any complaints procedure will depend, to a great extent, on the external credibility of the institution. Potential complainants are usually persons who have suffered at the hands of private parties, government officials or administrative bodies. By its actions, a national institution must be in a position to reassure complainants that their grievances will be seriously received and acted on.

2. Establishing a complaints mechanism

(a) What complaints should be investigated?

222. It is essential that the criteria for admissibility of complaints be clearly established. The first matter to settle is the kind of complaints which will be accepted for investigation. This requires a determination of both the object and the subject-matter of admissible complaints.

223. The object of an admissible complaint is the entity or group of entities against which it can be made. Many offices of the ombudsman, for example, in accordance with their basic objective of ensuring legality and fairness in public administration, restrict the range of possible objects to government departments, government instrumentalities and public officials. A complaint will be considered only if it concerns an action of government. By contrast, a number of other national institutions are empowered to receive and investigate not only complaints against government, but also complaints of human rights violations occurring in other spheres of public life, for example in employment or housing. In these cases, the entity complained against could be an individual, a public or private company, or an organization.

224. The issue of whether a national institution with power to investigate human rights violations should concern itself with acts committed by revolutionary forces and armed opposition groups is a difficult one. Some argue that acts of violence by such groups are clear violations of human rights and, for that reason, must not be

excluded from the institution's mandate. On the other hand, consideration should be given to the fact that, by definition, insurgent groups operate outside national law. For that reason, allegations made against such groups or against individuals associated with them are unlikely to be openly challenged or refuted. Accordingly, it would be virtually impossible for a national institution to conduct an impartial investigation. Ultimately, the matter must be considered within the social and political context of each country, keeping in mind the purposes for which the institution was established; the priorities which it should be encouraged to set; and the fact that acts of violence, whether committed by organized groups or by individuals, are within the jurisdiction of the criminal justice system.

225. A complaints mechanism should clearly define the subject-matter of admissible complaints, i.e. the type of action which can be the basis for complaint. In some cases, the subject-matter will be directly related to the range of permissible objects. An ombudsman-type institution, for example, will generally be restricted to examining allegations of unfairness or illegality in the administrative process.

226. The criteria of admissibility for other institutions may be more directly related to the subject (human rights violation) than the object of a complaint. A national institution may, for example, be generally empowered to investigate violations of civil and political rights, irrespective of who is alleged to have committed the violation.

227. Many provisions establishing the subject-matter of admissible complaints refer to the human rights guarantees contained in constitutions or domestic legislation. The subject-matter of admissible complaints may also be established by specifically setting out the rights to be protected, or the international instruments containing protected rights, violation of which may give rise to an investigation. An institution may, for example, be empowered to investigate violations of human rights defined as all rights guaranteed by the Constitution or embodied in international human rights instruments to which the State in question is a party.

228. In all cases, the subject-matter of admissible complaints should be specified as precisely as possible, avoiding a vaguely worded mandate or a mandate subject to excessively broad interpretation. The power to investigate "human rights violations", for example, would not usefully be interpreted to encompass matters which could properly be handled by other structures, such as breach of contract, defamation or crimes arising out of purely private disputes. Even with a strictly defined mandate, a national institution will almost always be required to establish priorities regarding issues to be considered. While human rights elements may be found in almost every area of human activity, an effective national institution must interpret its subject-matter mandate in a way which avoids misallocation of human and financial resources. An effective national institution will also ensure that nothing in this regard negatively affects external perceptions of its competence, thereby discouraging the submission of genuine grievances.

(b) Are restrictions appropriate?

229. Many national institutions impose restrictions on both the object and subject-matter of complaints. The issue of restrictions is a delicate one and it must be recalled that each State has the right to establish the type of institution best suited to its own cultural and legal traditions. At the same time, it is essential that restrictions do not prevent the institution from fulfilling the purposes for which it was established.

230. Restrictions on the object of a complaint are common. For example, a national institution will not generally be granted the power to deal with complaints against members of the legislature or the judiciary. Other restrictions may relate to the institution's specific functions. For example, an institution established to oversee fairness and legality in public administration will naturally be precluded from acting on complaints of violations committed by private entities or individuals.

231. Most national institutions will not be permitted to consider issues which are already the subject of scrutiny by another body. Electoral complaints, for example, could be specifically excluded from the field of competence of a particular institution if the granting of such power would conflict with the mandate of another agency. Such restrictions are also important where there is a possibility of a conflict of jurisdiction between the institution and another body, for example where a particular matter is already under judicial consideration (see paras. 91 ff. above).

232. Other restrictions on the object of a complaint may be more problematic. It is clear, for example, that preventing a national institution from investigating violations committed by the police severely reduces the institution's potential effectiveness as a protector of human rights. Designating the military as exempt from the complaints mechanism may also have a detrimental effect on an institution's effectiveness, particularly in view of the strength of the military in many States and its corresponding potential to violate human rights. While respecting differences between national institutions, it may be said that an "inappropriate" restriction on the object of a complaint will be one which prevents or restricts the capacity of the institution to perform the functions or discharge the responsibilities with which it has been entrusted.

233. As already mentioned (para. 227 above), complaints must generally relate to constitutionally conferred rights or rights embodied in legislative provisions or otherwise recognized as part of national law. Restrictions on the subject-matter of a complaint will generally reflect this requirement as well as the specific responsibilities with which the institution has been entrusted. A commission against racial discrimination, for example, will, by virtue of its specific mandate, be prevented from conducting examinations of other forms of discrimination, except in so far as these can be related to its principal focus.

234. A number of national institutions are empowered to investigate only complaints of violations of civil and political rights. While this may be a means of ensuring an appropriate workload for the institution, it is im-

portant to recognize that all human rights have equivalent and indivisible status in international law and that violations of economic, social and cultural rights are equally capable of documentation and investigation.

(c) *Who may complain?*

235. Most of the complaints mechanisms of national institutions specifically provide that any person is entitled to lodge a complaint against the objects over which the institution is granted jurisdiction. In some legislative provisions the term "any person" is defined to include non-citizens and refugees. Legislation may also proclaim the right of children and prisoners to make a complaint.

236. The question whether "any person" includes an association of persons should be directly addressed in the legislation establishing the complaints procedure. Some national institutions have taken the position that, if the alleged violation of rights affected an organization as an identifiable entity and not just one of its members, then the organization has standing to complain. Specificity in legislation is desirable as detailed provisions can prevent technical arguments over standing to complain.

(i) *Complaints by third parties*

237. It is generally accepted that, in principle, a complaint should be lodged by the person against whom the alleged violation(s) occurred. There are good reasons for such a requirement. It is the alleged victim who has the best knowledge of the incident and who should properly have the freedom to decide whether or not to make a complaint.

238. Nevertheless, it is sometimes the case that those most vulnerable to human rights violations are not in a position to invoke protective mechanisms such as a complaints procedure. There are many reasons why it may be impossible for a complaint to be lodged by the person who has suffered the violation. It may be that that person is a child or is disabled by physical or mental incapacity. In other situations, the victim of a human rights violation may have disappeared, be held in custody incommunicado, or be dead. Because of these very real possibilities, it is essential that formal provision be made for representative complaints which may be lodged by a relative, friend, legal representative or concerned non-governmental organization on behalf of an alleged victim.

(ii) *Class actions*

239. A number of national institutions have developed a procedure for receiving class actions, whereby an individual affected by a human rights violation is able to complain not only on his or her own behalf, but also on behalf of others who are similarly affected.

240. This possibility of representative complaints helps to ensure that widespread problems are treated as such and are not approached as isolated aberrations. In addition, regardless of how thorough the investigative process has been and how appropriate the remedies are, resolution of an individual complaint may not always be enough to secure the necessary changes within government or wider society.

241. Where class actions are possible, strict guidelines are usually established to determine the suitability of an issue or complaint for this kind of resolution. A national institution may, for example, require some or all of the following conditions to be fulfilled before a complaint is accepted as a class action:

The complainant must be a member of the class affected or likely to be affected;

The complainant must personally have been affected by the alleged violation;

The class of persons affected or potentially affected is so numerous that it is impossible to deal with the matter simply by joining a number of specified individuals to the complaint;

There are questions of law or fact common to the members of the class, and the claims of the complainant are typical of the claims of the class;

Multiple complaints would be likely to produce inconsistent results;

The grounds for action appear to apply to the whole class, making it appropriate to grant remedies to the class as a whole.

(d) *Procedure for submitting complaints*

242. A complaint is usually submitted by way of written statement, although there should be capacity to receive and act on an oral complaint, if necessary. The lodging of a complaint should be free of charge and efforts should be made to ensure that, as far as possible, complainants incur no direct or indirect costs. In this context, it may be useful to consider establishing contact points throughout the country, particularly in remote areas, to accept and assist in the preparation of complaints. It will always be preferable for a complaint to be lodged directly with the institution: use of intermediaries, such as government bodies or members of parliament, will invariably delay and complicate the process.

243. National institutions should ensure the availability of information materials in appropriate languages, which set out the procedure for lodging complaints in clear terms. The provision of such information will eliminate any need for a complaint to be lodged in person. To require personal attendance at the office of the national institution would disadvantage complainants living in remote areas and those without ready transportation.

244. Consideration should be given to implementing procedures which encourage and facilitate the lodging of complaints. The social and ethnic profile of a community may require, for example, provision of interpreters or trained assistants. The possibility of electronic communication of complaints may, in other circumstances, be an important factor in expediting the process. An independent analysis of the constituency of each institution is necessary in order to determine the ways in which submission of complaints can be made easier.

245. It is important to note that excessively formal procedures for submitting complaints may discourage victims from seeking help from the institution and result in unacceptable delays in initiating investigations. In the same way, procedures which are inappropriate to the cul-

tural traditions and economic status of those whose rights are most likely to be violated will not facilitate the complaints process. A requirement that allegations be confirmed by affidavit, for example, may be inappropriate and unnecessarily onerous in situations where vulnerable groups are poor, live in remote areas and have neither the physical means nor the necessary legal literacy. Formalism and unnecessary bureaucratic procedure can cause irreparable damage to an institution's public image, as well as to its efficiency. For these reasons, national institutions should make every effort to ensure that procedures for submitting complaints are as simple as possible.

(e) *Issues of confidentiality*

246. It is a usual requirement that written complaints be signed by the victim or by the person lodging the complaint on his or her behalf. There are logical reasons for not permitting anonymous complaints, including the fact that national institutions have no way of verifying the validity of an anonymous complaint and cannot provide redress to an unknown victim. However, the fact that complaints cannot be made anonymously requires steps to be taken to ensure confidentiality.

247. In the case of all complaints, and particularly in circumstances involving allegations of human rights violations by public officials, victims must be left in no doubt that their decision to come forward does not compromise their safety in any way. To be in a position to offer such a guarantee, a national institution must develop confidentiality structures and procedures—beginning with receipt of the complaint and continuing, as far as possible, throughout the investigatory process. Confidentiality should not, of course, be imposed on complainants against their wishes.

(f) *Rejecting a complaint*

248. All preconditions regarding the object and subject-matter of a complaint must be met before the complaint can be formally accepted. If a condition in this regard is not met, a national institution is entitled to reject the complaint on the grounds that it does not fall within the institution's jurisdiction.

249. Other grounds for rejection of a complaint at the preliminary stage are common. National institutions are generally entitled to reject a complaint which, even without further investigation, is clearly frivolous, unwarranted or unfounded in law. Rejection may also occur when it is decided that the connection between the complaint and the complainant is not sufficiently direct. This latter situation is generally referred to as a question of standing. If a time-limit has been established (between commission of the act complained of and lodgement of the complaint), a complaint made outside that time-limit may legitimately be rejected.

250. In all situations where a complaint is rejected, it is essential that the institution inform the complainant of the precise reasons for the rejection. Where appropriate, the institution should also inform the complainant of the existence of any alternative procedures which may be available. National institutions should always ensure that the party who filed the petition is informed of his or her rights and that he or she has access to all available

remedies. Any delay in formulating or communicating a decision to reject a complaint should be avoided. Quick action at this preliminary stage will ensure that the complainant is able to take full advantage of alternative means of redress. It will also enhance the public image of the institution as a competent and helpful body.

3. *Conciliating a complaint*

251. As already noted, national human rights institutions are an alternative dispute-resolution mechanism. There are three general variants of dispute resolution: arbitration, in which a third party such as a national institution can make binding decisions; conciliation, in which the third party makes strongly weighted although non-binding recommendations; and mediation, where the third party controls the process without having any influence on the content and, again, without issuing a decision. National institutions are especially involved in the two latter procedures.

252. Many national institutions are directed to encourage the settlement of complaints by conciliation instead of, or before, launching their own investigation into the matter. Conciliation will involve bringing the two parties together in an effort to ascertain the facts of the case and to effect a mutually acceptable resolution. The advantages of such an approach have been amply demonstrated at the international level, particularly by the International Labour Organisation, which now emphasizes the practice of conciliation in its own work, as well as in the instruments which it adopts.

253. At the national level, conciliation of complaints regarding violations of human rights, particularly with regard to allegations of discrimination, has proved very successful. Conciliation obviates the need for a formal investigation, which can be both expensive and time-consuming. It is also less confrontational in procedure and effect and, for this reason, is particularly valuable in situations where securing a change in attitude or behaviour is considered more important than punishing a violation.

254. The cooperation of both parties is essential for conciliation to be a useful means of dispute settlement. For that reason, the ultimate success of the procedure will often depend on the existence of other recourse mechanisms which may be invoked if the conciliation process is a failure.

255. It should be noted that, in the same way that an investigation of the facts of a case will benefit from the expertise of trained personnel, effective conciliation requires the participation of skilled conciliators. The question of training in these and other areas has already been discussed (paras. 126 ff. above). The task of conciliation can also be eased by the drafting of guidelines which are made available to the parties as well as to the conciliator. The application of guidelines to particular cases may also result in the development of useful precedent, for consideration in subsequent, similar cases.

4. *Conducting an investigation*

256. Once a complaint has been formally accepted (i.e. when all the conditions for admissibility have been met), the national institution may begin an investigation

of the complaint on its merits. The aim of the investigation is to ascertain whether a violation or illegality (as defined by the mandate of the institution) has occurred and, if so, which person or agency is responsible.

(a) *Powers of investigation*

257. In most situations, the investigation of a complaint will be carried out by the national institution or by persons acting under its direct authority and control. To conduct an effective investigation, the institution must have certain resources at its disposal, including trained staff and sufficient financial means.

258. In the same way, the granting of certain basic powers to an institution is essential in order to permit efficient investigations. There are no universally appropriate rules in this regard, and the powers with which a national institution is vested will vary according to the nature of its complaints machinery and the functions which it was established to fulfil. In all circumstances, however, the institution must be granted the legal capacity to discover whether the complaint is founded and, if so, who is responsible. Without this capacity, the complaints mechanism will be useless.

259. Both investigative and adjudicative powers are fundamental to conducting an efficient and effective investigation of an alleged human rights violation. These powers may include the following:

Power to inform the object of the complaint of the allegations made, in order to permit that person or body to reply to such allegations;

Free access to all documents, including public records, which, in the opinion of the investigating body, are necessary for proper investigation of the complaint;

Power to compel the production of relevant information (either in the form of documents or by means of oral evidence);

Freedom to conduct on-site investigations if necessary, including visitorial powers over jails, detention facilities, etc.;

Power to call parties to a hearing;

Power to grant immunity from prosecution to persons giving testimony or otherwise appearing as witnesses;

Power to hear and question every individual (including experts and representatives of government agencies and, if appropriate, private entities) who, in the opinion of the investigating body, has knowledge concerning the alleged violation or is otherwise in a position to assist the investigation;

For the latter purpose, power to summon witnesses and compel their appearance; to receive oral and written evidence under oath; and to compel the production of such documents or other material evidence from public agencies and authorities as the investigating body considers necessary for proper investigation of the complaint.

260. The investigatory powers of a number of national institutions are supplemented by a general clause granting the institution the power to engage in all other (unspecified) activities which, in its opinion, are necessary for conducting a proper investigation. Such an umbrella clause will permit a certain flexibility in the inves-

tigatory procedure which may be highly desirable. It is, however, important for an institution granted discretionary powers to remain aware of its own obligations to respect the human rights of all persons at every stage of the investigation.

(b) *Investigatory procedures*

261. The granting of sufficient and appropriate powers is not, in itself, enough to ensure the conduct of a proper investigation. A national institution must also develop its own standards and guidelines (including rules of procedure) to be applied to all investigations.

262. While each institution must formulate its own procedures in this regard, a few general comments here may be useful. First, guidelines should reflect the responsibilities which the institution has been given and the powers which it has been granted to discharge those responsibilities. Secondly, while providing the necessary operational flexibility, they should also establish a fixed procedure which is not deviated from except in certain clearly defined circumstances. Thirdly, they should set measurable goals of efficiency and timeliness.

263. Specific issues which should be addressed in connection with the investigatory process include the standard of proof to be adopted. The investigatory body can rightly be considered the best judge of evidentiary matters, and therefore may be permitted a certain degree of flexibility in this regard. In situations where a matter is not covered by legislation, consideration should be given to the adoption of a civil "balance of probabilities" standards rather than the criminal-law standard of "beyond reasonable doubt". The adoption of the former type of standard may be justified in view of the evidentiary problems which can exist in many situations of suspected human rights violations and the fact that the objective of most investigatory mechanisms is remedial rather than punitive.

264. The ability of a national institution to call upon expert assistance may be crucial to the efficient performance of its investigatory tasks. Some institutions are able to choose government officials and members of the police or other forces who are, in the institution's opinion, best suited to the task at hand. Where such a possibility exists, it is essential that provision be made to ensure that experts seconded from government forces or offices are able to work independently of their parent unit. In this regard, it is important to avoid a situation where expert assistance is recruited from the same branch or area of government as the individual or agency under investigation.

265. Investigatory procedure should include provision for specific legal protection from retaliation for individuals who have filed a complaint or participated in the investigation of a complaint. The nature of many human rights violations renders it likely that victim or witnesses will fear reprisals for their decision to come forward. The national institution should be able to adopt its own procedures for protection of witnesses and sufficient resources should be allocated for that purpose.

266. A number of national institutions have recognized the importance of a power to impose sanctions on individuals and agencies who obstruct or fail to cooper-

ate in an investigation. At the very least, a national institution should be empowered to refer the matter to another body for consideration or action where it is of the opinion that its investigation cannot be properly conducted because of obstruction or failure to cooperate.

267. It is important that guidelines and standards for investigating complaints be made public. This will serve to inform complainants of the investigatory process in which they are involved and is also likely to enhance public confidence in the institution as a competent body for receiving and acting on allegations of human rights violations. The same advantages may be derived from holding all hearings in public and permitting public scrutiny of the investigatory process. Private or closed hearings should be held only in exceptional cases and then only following a public statement of the reasons why a particular hearing must be held in camera.

5. *Remedies for violations*

268. The powers of national institutions to take action or provide remedies following conclusion of an investigation (or failure to conciliate a dispute) vary widely. Some institutions have been granted considerable authority in terms of imposing penalties or referring a matter to a higher body. Other institutions must restrict their follow-up activities to recommendations which are transmitted to parliament or to the appropriate government agency for further action.

269. As with the investigatory process itself, there are no universally applicable rules on the subject of remedies. What is appropriate for a particular institution will depend on the structure of its complaints mechanism and the particular goals which it was established to fulfil. However, while recognizing inevitable differences, it is also important to acknowledge that powers to receive and investigate violations are of little utility without a corresponding ability to provide remedies for violations. The lack of such ability, as well as operating to discourage the submission of complaints, is likely to undermine the credibility of the complaints procedure itself.

270. The powers which may be granted to a national institution to facilitate follow-up of complaints and remedial action in the case of violations are discussed below.

(a) *Power to recommend*

271. In almost all situations, a national institution will be empowered to submit recommendations concerning matters which it has been conciliating or investigating. Depending on the jurisdiction of the institution, a recommendation may be addressed to a government agency, a public official, a private individual or an organization. It may propose the adoption of measures to prevent or lessen the effects of a human rights violation; it may suggest a change in practice or procedure or a reconsideration or reversal of a decision; or it may advocate an apology or payment of damages, or advise on alternative remedial action. Recommendations may concern one particular case or be made within a broader context of attempting to prevent a reoccurrence of detrimental activity or behaviour.

272. Irrespective of its object or subject-matter, a recommendation, by definition, will never be binding; its acceptance by any party must be voluntary and cannot be forced. In certain situations, however, failure to take account of recommendations made in respect of a complaint may entitle the national institution to refer the matter to another body for consideration (see paras. 273 ff. below).

(b) *Powers of referral*

273. A national institution may be empowered to refer a case which it has investigated or attempted to conciliate to another responsible agency. Referral could be made to the relevant ministry, to another government agency or a tribunal established for that purpose, to parliament, to the judiciary, or to prosecuting authorities.

274. Powers of referral will generally be invoked as a second or subsequent step in the process of resolving a complaint. A national institution may, for example, be entitled to refer a complaint if:

The entity in respect of which a recommendation has been made, or against which a decision has been taken, does not take account of the recommendation or refuses to comply with the decision within a specified time-limit;

A settlement of the case cannot be secured;

The terms of an agreed settlement have not been met;

The national institution is of the opinion that its own investigation cannot be properly conducted because of obstructions or failure to obtain necessary cooperation;

The investigation gives rise to reasonable suspicion that a criminal act or disciplinary offence under law has been committed which warrants intervention by prosecuting authorities;

The investigation reveals that the matter may be more appropriately dealt with by another body or agency.

275. Referral may also be appropriate where one or both parties are dissatisfied with the results of an investigation or with a decision taken by the national institution in regard to a complaint. Any avenues of review or appeal which are available should be specifically set out in the law or guidelines under which the institution operates and be communicated to all parties affected by a decision of the institution.

276. The responsibilities of a national institution with respect to a particular case will not necessarily end when the matter has been referred elsewhere. If the matter has been referred to a court or tribunal, for example, the national institution should be able to appear before such a body in support of the complainant's case. In all situations, however, guidelines and procedures for following up referred complaints should be elaborated in order to ensure that the complaints are dealt with fully and appropriately.

(c) *Power to make determinations*

277. A national institution may be granted a variety of specific powers beyond recommendation and referral with the aim of providing relief to victims of human rights violations. The type of relief awarded is largely dependent on the nature of the violation. In cases where

the violation can be neutralized or its effects lessened, the national institution may order the reversal of a particular administrative decision or a change in practice or policy. Where the situation cannot be restored to that which existed prior to the violation, methods of redress may include the ordering of a public apology or the award of damages or compensation.

278. The ability of a national institution to order interim injunctions or interim relief during the course of an investigation can be extremely valuable. Such interim measures are generally directed towards ensuring that the position of the complainant is not made worse during the investigation or conciliation process, or that this process is not obstructed by subsequent events.

(d) Power to make enforceable orders

279. A national institution may be granted the power to make legally enforceable orders and binding decisions. Such power will generally permit the institution to seize a higher body (e.g. a tribunal, court or prosecutor's office) in the event that a party refuses to comply with a decision within a given time. Even if the actual enforcement procedure is entrusted to another body, the power to make enforceable orders will benefit the national institution by considerably strengthening its authority with regard to complaints of human rights violations.

(e) Publishing decisions

280. In addition to other specific capacities to effect redress, national institutions will generally be empowered to publish the results of an investigation or conciliation, along with any recommendations made or decisions taken in that regard. This is not, strictly speaking, a remedial power, and competence in this respect should generally co-exist with other mechanisms for remedy and redress. Nevertheless, the ability to make public its findings is an essential prerequisite for establishing the credibility of a complaints mechanism and ensuring maximum effectiveness within the limits of its prescribed powers.

281. Publication also serves several other identifiable purposes, not least of which is to inform public opinion and provoke discussion. This can be particularly important in situations where the basis of the subject complaint exists within wider problems of discrimination or unfairness which may subsequently need to be addressed by parliament or another branch of government. Publication of the results of an investigation can also be an effective means of assuring both present and future complainants that such matters are taken seriously by the institution.

282. As far as possible, publication of investigation results and decisions should take into consideration the confidentiality needs of the parties. It may not always be necessary, for example, to publicize details of the complainants.

C. Investigations or public inquiries *suo moto*

283. National institutions may have jurisdiction to initiate investigations or inquiries into possible situations of human rights violations without the need to receive a

formal complaint or invitation from a government agency.

284. The power to conduct investigations *suo moto* can be an extremely important and far-reaching one. Children, women, the poor, the homeless, the mentally or physically incapacitated, prisoners, and members of religious, ethnic and linguistic minorities are all, due to their unequal status, especially vulnerable to human rights abuses. It is ironic but generally true that these same vulnerable groups are also most likely to be unaware of their rights and of the mechanisms which exist to protect those rights. Even where knowledge does exist, victims of human rights violations do not often have advocates to act on their behalf and may be extremely reluctant to approach an official agency in order to lodge a formal complaint.

285. It is occasionally said that, since ministries and government departments are legally and administratively capable of conducting inquiries, there is little need to duplicate this function by granting to national institutions the right to launch their own investigations. This assertion must be answered by referring to the fact that, in almost every part of the world, national and international human rights standards have not yet been sufficiently integrated into the administrative infrastructure or into the consciousness of government officials. For example, an inquiry into housing conducted without reference to human rights principles may look at homelessness purely as a problem in the supply of housing. A human rights approach will consider, *inter alia*, the issue of accessibility to adequate housing as well as the rights of particular groups to special protection. An inquiry into mental illness conducted with reference to human rights will go beyond an analysis of legal protection to consider a much wider range of rights, including entitlement to treatment, rehabilitation, education, counselling, economic and social security, and protection from discrimination.

286. A national institution with the capacity to initiate its own investigations may be able to make a significant contribution to ensuring that vulnerable groups are given a public voice and that human rights violations, wherever they occur, become a matter of general knowledge and concern.

1. Selecting the issue for investigation

287. In some circumstances, an effective complaints procedure can operate as a barometer of the current social situation with respect to human rights, at least in so far as the mandate of the national institution is concerned. Complaints procedures which exist within the international human rights system have been performing this indicative function for many years. Communications received under a particular instrument or in relation to a particular issue are scrutinized in an effort to isolate particularly acute problems and identify negative trends. Where such problems or trends emerge, the body concerned may use this information as a basis for launching an investigation.

288. National institutions vested with competence to receive individual complaints and to initiate their own inquiries can usefully follow this practice by screening

all complaints received in order to determine the existence of any trend or pattern which may indicate the need for further investigation.

289. However, for the reasons already stated (paras. 284-285 above), a complaints mechanism will not always accurately reflect the current human rights situation. A national institution must therefore ensure that it establishes alternative procedures by which to identify existing and potential problems. Such procedures will include developing and strengthening relationships with community and non-governmental organizations, which, because of their functions, are likely to be aware of difficulties and problems existing within society. A national institution can also conduct its day-to-day affairs in such a way as to ensure maximum contact with its constituency. The media may be another useful focal point for identifying cases of maladministration, illegalities and human rights violations committed by both government and private entities.

2. Conducting an investigation *suo moto*

290. As regards both necessary powers and desirable procedures, there will be little distinction between an investigation of an individual complaint and a more general inquiry into a particular issue or situation. In addition to obvious dissimilarities in scope, differences will generally relate to the objective of the investigation or inquiry.

291. As already indicated, the aim of an investigation into an individual complaint will be to ascertain whether a violation or illegality has occurred and, if so, which person or agency is responsible. While a general inquiry can have similar aims, it will also be concerned with the wider implications of the issue or situation. This wider concern will require the investigators to address more difficult and far-reaching questions, including how such violations came about; what practices, arrangements or policies contributed to them; and what measures should be taken to ensure that the situation improves or the violations do not reoccur. Rarely will such questions be satisfactorily addressed by providing redress to individual victims. Instead, a national institution may find it necessary to address a range of political, social and economic variables in an effort to ascertain the cause and thereby make useful suggestions as to the cure.

292. If an inquiry is designated as "public", a national institution should take concrete steps to ensure that background documents and other information are made available for general scrutiny and that all hearings are conducted openly. Efforts should be made to publi-

cize the inquiry in a way which ensures that ready access is available to persons in possession of information or in a position to hold an opinion on the subject under consideration.

3. Follow-up

293. The question of follow-up will usually relate to the specific powers which have been granted to a national institution with regard to self-initiated investigations. As with individual complaints, the institution is likely to be empowered to transmit recommendations, based on its findings, to the relevant government department or agency. It may also be able to use other powers to lobby parliament for legislative reforms (see paras. 190 ff. above).

294. Regardless of its specific powers of follow-up, a national institution should make every effort to ensure that the results of its inquiries are made public and disseminated as widely as possible. Measures taken with respect to recommendations made should be carefully monitored and an account of action by government agencies or the legislature in response to such recommendations should be incorporated into the annual report of the institution.

D. Intervening in legal proceedings

295. A national institution may be granted the power to intervene in legal proceedings (usually by submitting *amicus curiae* briefs) in cases brought under human rights legislation or which otherwise involve human rights issues over which the institution has competence. The institution can use this opportunity to ensure that the court is made aware of the human rights implications of the case at hand and of the relevant national and international standards.

296. The capacity to intervene in judicial proceedings is not automatic and leave of the court to intervene must be sought. The granting of such leave will generally be conditional on the institution demonstrating an interest in the matter at hand. This should not be difficult if the case is brought under domestic human rights legislation. In other situations, the national institution may need to show that human rights considerations are involved and, in the absence of a directly applicable legislative provision, that there is a basis in domestic law for the application of international human rights standards.

297. A national institution may also be able to appear in court to support orders for the enforcement of its determinations.

CONCLUSION

298. There are some who see no good reason for establishing special machinery devoted to the promotion and protection of human rights. They may argue that such bodies are not a wise use of scarce resources and that an independent judiciary and democratically elected parliament are sufficient to ensure that human rights abuses do not occur.

299. Unfortunately, history has taught us differently. An institution which is in some way separated from the responsibilities of executive governance and judicial administration is in a position to take a leading role in the field of human rights. By maintaining its real and perceived distance from the Government of the day,

such a body can make a unique contribution to a country's efforts to protect its citizens and to develop a culture respectful of human rights and fundamental freedoms.

300. This handbook has attempted to identify the main elements which can contribute to the effective functioning of national human rights institutions in their efforts to enhance public awareness, educate about human rights, advise and assist government on legislation and policy, and investigate alleged human rights violations. The handbook is the result of expertise developed both within and outside the United Nations Centre for Human Rights and will provide a framework for the further development of the Centre's programme in this area.

ANNEXES

Annex I

PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS^a

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

- (i) Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
- (ii) Any situation of violation of human rights which it decides to take up;
- (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

^a Commission on Human Rights resolution 1992/54 of 3 March 1992, annex (*Official Records of the Economic and Social Council, 1992, Supplement No. 2 (E/1992/22)*, chap. II, sect. A); General Assembly resolution 48/134 of 20 December 1993, annex.

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and 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.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members; whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;