

## On the Establishment of a National Human Rights Institution in China

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### Abstract

Contemporary human rights have universal values, and human rights issues are important factors in assessing the legitimacy of a government. The Paris Principles provide an international standard to establish a national human rights institution in each country. To comply with the development of international human right cause and overcome deficiency of decentralized domestic human rights institutions, it is necessary to establish a kind of national human rights institution which is in line with international standards as well as the situation of China. Based on a number of conditions that has been initially possessed for the establishment of a national human rights institution, China should make further preparations progressively for the institution's establishment in order to implement the constitutional principles and fulfill its international obligations.

**Key words:** The Paris principles; A national human rights institution; Human rights protection

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### 1. CONCEPTS, TYPES AND FUNCTIONS OF NATIONAL HUMAN RIGHTS INSTITUTIONS

The expression of "National Human Rights Institutions" (NHRI) is a generic term that has been widely recognized

by the international community and can be used in a broad and a narrow sense. In a broad sense, it refers to all official and non-official institutions intended to promote and protect human rights. In a narrow sense, it refers only to the official full-time human rights institutions established by a country under the Constitution or the law. According to scholars' investigations, in the early days of the establishment of the United Nations, national human rights institutions actually included all national institutions that have direct or indirect influence on the promotion and protection of human rights, such as the judiciary, the executive, the legislature, non-governmental organizations, social welfare agencies, the National Commission, the Office of the Ombudsman, and etc. With the development of the United Nations in the promotion and protection of human rights, the concept of national human rights institutions is constantly shrinking for its gradual specialization of functions. (Zhang, 2010) In 1993, the UN General Assembly adopted the Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (the Paris Principles), which provided international standards for member states to establish national human rights institutions. This article explores national human rights institutions in the narrow sense. (Huang & Chen, 2005)

The Paris Principles are considered a significant attempt to clarify the concept of national human rights institutions and are regarded as a benchmark for measuring national human rights institutions as well. On this basis, more and more countries in the world have established national human rights protection institutions in various forms and in accordance with their national conditions. According to the latest statistics from the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC), so far, a total of 125 countries and regions have established national

human rights institutions, including 34 in Africa, 25 in the Americas, 20 in the Asia-Pacific region, and 46 in Europe.<sup>1</sup> These most representative and typical national human rights institutions can be divided into four types: The first is the benchmark national human rights institution, whose functions and powers are mainly to handle individual complaints, conduct human rights education and review legislation. The second is the National Advisory Commission on Human Rights. Compared with the first and the most typical type, the second one does not have the function of investigating and processing individual complaints. Its intention is more about to provide suggestions on how to establish good human rights policies and positions, etc. The third is the National Antidiscrimination Commission. It has the same function with the first type, but all these functions are confined to the specific area of anti-discrimination. The fourth is the Ombudsman system, which is a single member institution, differs from the first type in terms of functions and focuses. For example, it focuses on women's discrimination, religious discrimination, gender discrimination and protection of children's rights.<sup>2</sup>

According to the Paris Principles, national human rights institutions have the following functions:

(1) 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; ... 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; any situation of violation of human rights which it decides to take up; the preparation of reports on the national situation with regard to human rights in general, and on more specific matters; 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;

(2) 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;

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

(4) 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;

(5) 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;

(6) 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;

(7) 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.

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## 2. THE BASIC CONDITIONS AND CERTIFICATION OF THE ESTABLISHMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS

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The Paris Principles set minimum standards for the organization and establishment of national human rights institutions. These standards include the following ones:

First, there must be independence given by the Constitution and laws which prevent it from government's intervention. Only when a national human rights institution has relative independence and could not be interfered by the state administrative organs when exercising its functions and powers according to law, it can exercise effective supervision over the state administrative organs. In order to avoid interference in their work, national human rights institutions should not be subordinated to state administrative organs. In practice, some national human rights institutions are established or initiated by state administrative organs, and staff members of national administrative organs participate in the daily work of national human rights institutions. This kind of institutional arrangement will affect the independence of national human rights institutions to varying degrees. (Yang, 2011)

Second, the membership must be diverse. The composition of a national human rights institutions and the appointment of its members, whether through election or otherwise, must be determined in accordance with a

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<sup>1</sup> <http://nhri.ohchr.org/>

<sup>2</sup> See International Council on Human Rights Policy: *National Human Rights Institutions: Impact Assessment Indicators*, 2005, Versoix, Switzerland.

procedure which should provide all necessary guarantees to ensure the diversity of social forces involved in the promotion and protection of human rights, and in particular, to ensure the establishment of effective cooperation depending on representatives from all walks of life and the participation of these representatives. If government agencies must be included, their representatives can only participate in the discussions as consultants.

Third, the functions must be given adequately. In order to ensure the stability of the mandate of national human rights institutions' members (without which there would be no real independence), their appointment should be implemented through a formal decree, which should specify a clear mandate. As long as the diversity of the institutions' membership is assured, this mandate can be extended.

Fourth, the resources must be adequate to maintain the institutions' operation. National human rights institutions should have the basic structure to carry out their activities smoothly, especially sufficient funds, including independent budgets and national financial appropriations. The purpose of this funding is to enable a national human rights institution to have its own staff and office premises, based on which to be independent of the government without financial controls that may affect its independence.

The Sub-Committee on Accreditation of the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) under the leadership of the Office of the High Commissioner for Human Rights is responsible for the accreditation of national human rights institutions. After the Paris Conference in 1991, the second seminar on national institutions for the promotion and protection of human rights was held in Tunisia in December 1993. The participating national institutions decided to establish an international coordinating committee of national human rights institutions to coordinate the work between the various institutions to promote and strengthen the compliance of national human rights institutions with the provisions of the Paris Principles. Since 1998, the committee has started to create a complete set of the accreditation system and established a "Sub-Committee on Accreditation" to review and analyze applications for accreditation, and make recommendations to the members of the Presidium of the Coordinating Committee on whether the applicant country complies with the Paris Principles. The proposal was finally endorsed by the Presidium of the Coordinating Committee. In this process, whether the national human rights institution of each country meets the requirements of the Paris Principles is the key to certificate the classification. Those who are in full compliance are deemed to be grade A; those who are not fully in compliance or the information provided is not sufficient to make a decision are given a grade

B qualification; those who are not in compliance are considered to be grade C. This accreditation rule currently applies to all national human rights institutions. (Zhang, 2011)

### 3. THE NECESSITY TO ESTABLISH A NATIONAL HUMAN RIGHTS INSTITUTION IN CHINA

At present, China has not established a special national human rights institution. From the perspective of human rights upheld by Chinese government, the right to subsistence and development are undoubtedly the most important human rights. In this regard, the promotion, protection, and even education and publicity of human rights involve almost every government agency and official organization. Taking the composition of the National Human Rights Plan Joint Meeting Mechanism as an example. In the formulation process, in addition to the leading institutions of the State Council Information Office and the Ministry of Foreign Affairs, members also include the Legal Work Committee of the Standing Committee of the National People's Congress, the Social and Legal Committee of the CPPCC, the Supreme People's Court, the Supreme People's Procuratorate, the National Development and Reform Commission, the Ministry of Education, the National Ethnic Affairs Commission, the Ministry of Civil Affairs, the Ministry of Justice, the Ministry of Human Resources and Social Security, the Ministry of Health, the China Disabled Persons' Federation, the China Society for Human Rights Studies, and etc. There are 53 units in total.<sup>3</sup> With more and more emphases are put on the human rights cause, it is certain that the principles on respect and protection of human rights stipulated in the Constitution will be increasingly embedded in the work of various government's departments. In fact, in our country, the functions of the national human rights institution established by the Paris Principles are performed by different national institutions. Some scholars have pointed out that, at present, China's "investigations on human rights violations cases are carried out by procuratorates, judicial organs, administrative supervision organs and the disciplinary procuratorial organs of the Communist Party of China; the inspection of existing legislation with human rights standards is implemented by the Standing Committee of the National People's Congress; human rights policies and international human rights cooperation plans are implemented by national legislatures, administrative supervisory agencies, and relevant foreign affairs departments such as the Ministry

<sup>3</sup> State Council Information Office of People's Republic of China: "National Human Rights Action Plan (2009 - 2010)", Foreign Languages Press, 2009.

of Foreign Affairs, etc.; promotion of human rights education, training, and research inside and outside schools is implemented by the education and scientific research departments; annual and special national human rights reports are currently implemented by the State Council Information Office and the China Society for Human Rights Studies". (Huang & Chen, 2005) Such a decentralized institutional arrangement has certain advantages, that is, each department can perform its own duties, exert its expertise in their respective professional fields, and jointly fulfill international human rights obligations. Since the reform and opening up, China's human rights cause has achieved world-renowned results, which is inseparable from the determined progress, reform and innovation of many relevant government departments. However, it is also not realistic to say the work of the current human rights protection mechanism is complete and comprehensive.

According to the requirements of the Paris Principles, China's human rights protection institutions are mainly inadequate in the following aspects: First, from the perspective of institutional composition, the legal positioning of China's human rights protection institutions is not high enough, and the functions of various departments are scattered and overlapping, and the scope of protection is narrow and difficult to arouse these functional departments' human rights awareness to examine their respective work. Many government departments are concerned about the achievement of their work targets, and do not realize that their work actually involves the protection of human rights, which not only is not conducive to human rights promotion and education, but also easily leads to perfunctory responsibilities of departments, inconsistent with the role of modern government that should have in guaranteeing human rights and public services. Second, from the perspective of institution operation, China's human rights protection institutions are mainly composed of official institutions. The operation mode is single, and lacks a flexible and fast dispute settlement mechanism to some extent. The handling of a social event often requires administrative approval at various levels. During this gradual reporting process, information and time costs are gradually high, which can easily lead to delays in work. Third, from the perspective of the interaction between institutions and social forces, the role of non-governmental organizations and other social forces should be obtained sufficient attention.

Under these circumstances, it is necessary to establish a national human rights institution that meets the requirements of international human rights law and suits China's national conditions.

First of all, the establishment of a national human rights institution is to continue to promote the domestic human rights cause, and coordinate various government

departments in fulfilling their human rights protection obligations. In China, the then Premier Wen Jiabao stated in the 2011 government work report that all government powers are conferred by the people. The government must be accountable to the people, work for the people's benefit, and accept people's supervision; must mobilize and organize the people to manage the social affairs, economic and cultural undertakings; must adhere to the basic strategy of rule by law, strengthen the construction of the legal system that safeguards the interests of the people; must safeguard people's legitimate rights and interests, and maintain social fairness and justice. From the perspective of government work report, the establishment of a national human rights institution in line with the Paris Principles is very necessary and expected effect to "protect human rights and promote work to a higher level" (Qi, 2005) will also be significant.

Second, the establishment of a national human rights institution is to fully mobilize social forces such as non-governmental organizations that are conducive to human rights protection, to effectively meet the needs of the people's various interests. The Paris Principles noted that "In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas". In a mature society, its government and the NGO should have a balanced development. NGOs, because of their special status, can penetrate into all aspects of social life and understand and help resolve conflicts of rights. With the deepening of China's reform and opening up, the entire society is becoming more and more diversified. Especially in some areas such as environmental rights and social security rights, the activities of non-governmental organizations are particularly active and concentrated. The establishment of a national human rights institution can effectively mobilize these social forces that are conducive to human rights protection, and serve as a bridge for active and pragmatic interaction between the government and society.

Third, the establishment of a national human rights institution is a requirement for Chinese government to carry out human rights diplomacy and fulfill its obligations under international human rights law. (Qi, 2005) After the end of the Cold War, major transition in international political thinking occurred when the military confrontation was replaced by cooperative dialogue, and the traditional diplomatic model was replaced by human rights diplomacy. China's concept of human rights has undergone major changes in more than 20 years since

1979, during which China has experienced three waves of discussions on human rights issues. As a result, China's understanding of human rights has changed from seeing it as a "synonymous to bourgeois private privileges" to believing that human rights are not bourgeois patents. Socialist countries must also speak with respect to human rights, and the government is increasingly attaching importance to human rights and earnestly fulfill its international human rights obligations. Therefore, starting from seizing the right to speak in the field of international human rights diplomacy can also constitute a practical reason for the establishment of national human rights institution. However, it is worth noting that this article only considers it as a "reason" here, because if human rights are only regarded as a tool for international political forces to attack each other, there would be nothing valuable left to establish a so-called "national human rights institution" which is, at best, an accessory to meet the government's external propaganda needs. Such an institute that can be used freely or abandoned may have a dim outlook. As a human rights researcher, nothing would be more disappointing than that.

#### 4. THE FEASIBILITY OF ESTABLISHING A NATIONAL HUMAN RIGHTS INSTITUTION IN CHINA

The path of government institution reform in any sovereign country would not be a comfortable journey, during which are full of difficulties at most cases. Deng Xiaoping once called the first institutional reform as "a revolution" of the Chinese government after the reform and opening up in 1970s, therefore he proposed to use the spirit of revolution to overcome the hardships in the process of reform. This is because reforms will trigger the allocation of power and the distribution of benefits, and will be constrained by many deep-seated political, economic, cultural, and historical factors. Likewise, the establishment of a specialized national human rights institution that meets the minimum standards of the Paris Principles is also a new attempt to "feel the stones when crossing by the river". Therefore, the reformers must be able to deeply understand the actual political situation and the current limit social conditions, so that the feasibility of building national human rights institutions may be enhanced gradually. In the context of the reform of government institutions, China has initially met a number of preparatory conditions for the establishment of a national human rights institution. This article will analyze and demonstrate these foundations separately as follows.

First, the breakthroughs and advances in human rights theories and practices. Since the reform and opening up, a series of breakthroughs in China's human rights theory have laid the foundation for the progress of human rights practice, such as the judgment that human rights are not

bourgeois patents, the theory that the universal principles of human rights must be combined with national conditions at the local level, and that human rights are an organic and unified rights system, etc. At the institutional level, China has formulated a series of human rights protection laws, implemented constitutional principles, and actively signed and ratified various international human rights conventions. In addition, China has also adopted a series of specific measures to improve the status of human rights protection, including the State Human Rights Action Plans, special actions and international communication and cooperation and so on (Li, Chang, and Wang, 2011). In the field of human rights research, China's government has also established several national human rights education bases in cooperation with several universities or agencies. With the development of China's democratic politics and the improvement of the awareness of civil rights, China's conditions for establishing a national human rights institution will become more and more mature.

Second, the favorable conditions for the change in the positioning of government functions. The functional orientation of the contemporary Chinese government is gradually shifting from economic construction to public services, and more emphasis is placed on protecting human rights as the core goal of its work. Since 1978, economic construction has become the primary task of governments at all levels from central to local levels. The central government has also used economic growth as the main criterion for judging officials' performance, and has formed a "political tournament based on economic growth, that is, the promotion of local officials is closely linked to the local economic growth situation." (Zhang, 2011) For the time being, economic development still plays a leading role in the reform of local government institutions, and public service functions are not enough to constitute a logical transition guide for the reform of Chinese government institutions. However, the government's attitude in improving people's livelihood and promoting human rights is still positive. For example, on February 14, Xi Jinping stated during his visit to the United States: "The Chinese government will continue to proceed from its own national conditions, adhere to the people-oriented principle, and always put people's wishes and requirements as priorities. We must take heart to adopt effective policies and measures, vigorously promote social equity, justice and harmony, and continue to make new progress in the process of human rights protection in China. "4 All of these factors are undoubtedly very beneficial to promote the establishment of human rights institutions in future.

Third, the preparatory bases of existing human rights

<sup>4</sup> China News Network: "Xi Jinping: There is no best, only better on human rights issues", <http://www.chinanews.com/gn/2012/02-15/3671518.shtml>, access time: February 15, 2020.

protection institutions. In recent years, the CPC Central Committee and the State Council have attached great importance to solving people's livelihood issues. The State Council's Institutional Reform Program focuses on protecting people's livelihood and improving people's livelihood. In the institutional reform program, some departments closely related to social management and public services have been strengthened and integrated, including: (1) Establishing the Ministry of Human Resources and Social Security to implement the social security barriers rights. (2) Establishing the Ministry of Environmental Protection to enhance the protection of environmental rights. (3) Establishing the Ministry of Housing and Urban-Rural Development to accelerate the institutionalization of guaranteeing the right to basic living standards. (4) Integrating the State Food and Drug Administration to the management of the Ministry of Health, and rationalizing the relationship between food and drug management. According to the Chinese tradition, the concept of "people" can be seen as an universal resources of human rights, so focusing on improving people's livelihood and social construction, in fact, reflects precisely respecting and safeguarding human rights principles in the new era of Chinese reform. The establishment of a new national human rights institution will not cut off the ties with the existing human rights protection government agencies, but will have extensive cooperation and dialogue with them. The gradual improvement of the protection level of existing human rights institutions is very important for the establishment and development of specialized national human rights institutions.

Fourth, the successful practices of countries that have established national human rights institutions have accumulated valuable experience. For example, the more mature human rights protection mechanisms such as Norway and Sweden have achieved relatively satisfactory results. Many countries in the world have followed these models and established national human rights institutions. The Norwegian Human Rights Center also set up a China project in 1997, and the exchanges and cooperation between the two parties in the field of human rights have been fruitful (Dong, 2011, pp.400 & 500). For another example, human rights committees established by Asian countries such as South Korea and India, which have similar national conditions to Chinese culture or population, have also made important progress in the protection of human rights. As of March 2003, the total number of cases submitted to the Indian Human Rights Commission amounted to 43,010. In the more influential "National Human Rights Commission v. Arunachal Pradesh" case, the Commission's timely intervention saved thousands of lives of innocent people and upholds their rights. The Korean National Human Rights Commission has also gained recognition and

support from the public through practice and efforts, and has played an important role in several influential human rights protection cases (Dong, 2011, pp. 26 & 76). All of these provide practical experience that can be used for reference in the construction of China's national human rights institution in the future. It can be said that China has a certain advantage in the development of human rights institutions to some extent.

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## CONCLUSION

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The Paris Principles are a major attempt to clarify the concept of a "national human rights institution" and has become a benchmark for measuring national human rights institutions. On this basis, 125 countries and regions have established national human rights protection institutions in various forms and in accordance with their national conditions. These national human rights institutions have fulfilled their respective functions in accordance with the minimum standards established by the Paris Principles and ICC certification requirements, accumulated their successful experiences, and laid a good foundation for international human rights communication and cooperation. The establishment of a future China's national human rights institution has become a consensus of all circles to a certain extent. China should fully evaluate the status and conditions of its own government agency reforms, combine international standards with domestic realities, and prepare conditions for the establishment of national human rights institutions in a timely and stable manner. At the same time, the government should further implement constitutional principles and fulfill its international obligations.

As for the establishment of the national human rights institution, political experiences empirical investigations on the overall state of government institutions are indispensable in this reform, so only a rough idea can be lay down in this article. Some scholars have put forward ideas and proposals, for instance, to reform the current petition system into an independent national institution dedicated to the protection of human rights so that it could take the commissions and functions of the Commission on Human Rights (Li, 2010). Although the two are the closest in terms of functional positioning, the author believes that due to the large branch and comprehensive functions of China's administrative institutions, streamlining and thinning has always been the direction of its reform efforts. Moreover, if a national human rights institution is established under the State Council, its independence and the legitimacy of oversight functions will be doubted and challenged. Therefore, in accordance with China's current constitution and other relevant laws and regulations, the establishment of an independent human rights commission under the People's Congress shall be the goal of future efforts.

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