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**When can National Human Rights Institutions successfully intervene
in the process of adopting legislation?**

by

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*HELLENIC REPUBLIC
NATIONAL COMMISSION FOR HUMAN RIGHTS*

The role of national human rights institutions in human rights proofing of legislation

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1. Introduction

The 1993 Paris Principles¹ provide that a national human rights institution shall, in principle, have the power 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 [relating, inter alia, to] any legislative or administrative provisions, as well as provisions relating to judicial organizations, 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'.

There is a growing recognition of the crucial importance of human rights proofing of legislation prior to the enactment of laws or regulations. First, preventing the violation of human rights by legislation is better, from the point of view both of the efficiency of parliamentary work and from the point of view of legal certainty, than remedying violations through courts, *post hoc*, where such violations are found to occur.² Second, where a debate on compatibility with internationally recognized human rights is formally part of the parliamentary process for the adoption of legislation, this ensures that such compatibility will be discussed in the open, with the participation of the parliamentary opposition and civil society organisations, and of the general public via the coverage of such debates by the media : the very fact that such a discussion takes place will contribute both to the quality of the legislation enacted and to the strength of the democratic control, by parliamentary assemblies, on the initiatives of the Executive. Third, a *post hoc* control by courts of the compatibility of legislative enactments with the international human rights obligations of the State concerned may be insufficient, not only because it intervenes after any violation if found to have occurred rather than preventively, but also because the negative censorship by courts may not ensure that the laws are drafted according to the requirements of human rights : as illustrated for instance by the case of *Sari and Colak v. Turkey*, where national legislation should organize the regime for the exercise of fundamental rights, it may not be

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¹ UN doc. A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, 'National institutions for the promotion and protection of human rights', initially approved by the Commission on Human Rights in resolution 1992/54 of 3 March 1992. See also Recommendation No R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997.

² Recommendation Rec(2004)5 of the Committee of Ministers of the Council of Europe to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, adopted by the Committee of Ministers on 12 May 2004 at its 114th Session. See also Michael Ryle, 'Pre-legislative scrutiny: A Prophylactic Approach to Protection of Human Rights', 1994 *Public Law* 192.

sufficient to disregard any provision or set of provisions which are incompatible with the requirements of international human rights – rather, a positive obligation is imposed on the State concerned, to provide the legislative framework required, which a judge will mostly find it beyond its powers to establish.³ Fourth, the existence of procedures which, prior to the adoption of legislation, seek to ensure that it will be in conformity with the human rights obligations of the State concerned, especially if such procedures include a wide-ranging consultation process and impact assessments, justify establishing a presumption that the legislation is in conformity with human rights, and in particular, that it complies with the requirement of proportionality.⁴ Fifth, pre-legislative scrutiny of draft legislation may contribute to creating a human rights culture within government, as well as within Parliament or among the other institutional actors involved in the legislative process : it serves a collective learning function. Sixth and finally, monitoring legislation also serves as a deterrent in the sense that the legislation drafters will by themselves endeavour to limit the negative impact of legislation on human rights, as they know that some form of verification for compliance with human rights will take place, resulting in a certain political cost if a proposal is found not to comply.⁵

2. The existing practices

Before presenting certain comments concerning the possible role of NHRIs in human rights proofing of legislation, it may be useful, in order to illustrate the range of possibilities which have been explored hitherto, to briefly review the practices which currently exist in this regard. While a systematic overview covering all the Member States of the Council of Europe may not be envisaged here, the situation in the 25 EU Member States may be described briefly in order to draw certain comparisons between them.⁶ The situation in the Member States with regards to the establishment of NHRIs remains varied. Three categories of situations may be identified.

2.1. The EU Member States where a NHRI exists

14 EU Member States may be said to have established a NHRI or, as in the case of the United Kingdom with the Commission for Equality and Human Rights, to be about to do so. These States are Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden, Spain and the United Kingdom.⁷ All of these institutions

³ Eur. Ct. HR (2nd sect.), *Sari and Colak v. Turkey* (Appl. N° 42596/98 and 42603/98) judgment of 4 April 2006, § 37.

⁴ Eur. Ct. HR (GC), *Hatton and Others v. the United Kingdom* (Appl. N° 36022/97) judgment of 8 July 2003, §§ 104-116, and § 128.

⁵ See M. Kjaerum, 'The Protection Role of the Danish Human Rights Commission', B. Ramcharan (ed.), *The Protection role of National Human Rights Institutions* (Leiden: Martinus Nijhoff Publishers, 2005) 23-42 at 28; M. Ryle, 'Pre-legislative scrutiny: a prophylactic approach to protection of human rights', cited above, at 194.

⁶ The EU Network of Independent Experts on Fundamental Rights prepared a comparative table of NHRIs within the EU Member States in March 2004 : this comparison, from which this contribution has borrowed extensively, was presented in Opinion n° 1-2004. It is available on :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

⁷ These institutions are : for Cyprus, the National Organisation for the Protection of Human Rights (1998); for the Czech Republic, the Ombudsman Office (1999); for Denmark, the Danish Institute for the Protection of Human Rights (2002) ; for France, the Commission nationale consultative des droits de l'homme (1984); for Germany, the German Institute for Human Rights (2001) ; for Greece, the Greek National Commission for Human Rights (1998) ; for Ireland, the Irish Human Rights Commission (2001); for Latvia, the National Human Rights Office (1995) ; for Luxembourg, the Consultative Commission on Human Rights (2000); for Poland, the Commissioner for Civil Rights Protection (1999); for Portugal, the *Provedor de Justiça* (1999); for Spain, the Ombudsman (*Defensor del Pueblo*) (2000); for Sweden, the Ombudsman against Ethnic Discrimination (1999); for the United Kingdom, the Commission for Equality and Human Rights (2007).

with the exceptions of four (Cyprus, the Czech Republic, Latvia and the United Kingdom) have been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles.⁸

It is striking that in the majority of these States however, the NHRI has been attributed no formal role in the human rights proofing of legislation. In **Cyprus**, a Decision of the Council of Ministers No.48.386, provided in 1998 for the establishment of the National Organization for the Protection of Human Rights was approved. However, this instance has no formal role in the preparation of legislation. Instead, all Bills are submitted to the Office of the Attorney General of the Republic for legal vetting before their submission to the Council of Ministers for approval. The Counsels of the Republic examine *inter alia* the compatibility of a Bill with the international obligations of the Republic including human rights. Subsequently they are transmitted to the House of Representatives for enactment. The competent Committee examining a Bill may consult and seek the approval of the Committee of Human Rights of the House, before its submission before the full House for enactment. In the **Czech Republic**, the Ombudsman Office was established in 1999 as an independent organ with a broad mandate concerning human rights, set by a law (Law No. 349/1999 Coll. of Laws) broadly following the Paris Principles.⁹ The Ombudsman Office however has no formal role in the preparation of legislation. The Legislative Council of the Government exams compliance of the legislation with the constitutional principles and international undertakings of the State before the legislation is drafted by the Government and adopted by the Government or submitted to Parliament and adopted by Parliament. The Government Council for Human Rights takes part in the procedure as well. In **Germany**, the German Institute for Human Rights established in 2001 has no formal role in the prelegislative procedure, in order to verify compliance of draft legislation with the international commitments of the Federal Republic of Germany in the field of human rights. The Common Rules of Procedure of the Federal Ministries, which regulate in detail the co-operation between the ministries while preparing draft law, provide instead that the Commissioner for Human Rights Issues in the Federal Ministry of Justice is involved in the preparation of draft legislative acts, which should ensure such compliance. In **Sweden**, the ombudspersons have no formal role in the legislative process.¹⁰ Rather, the compatibility of draft legislation with the international human rights treaties is in principle verified by the ministry responsible for drafting the legislation. All draft bills are thereafter sent to the Ministry of Foreign Affairs. A second control is done by the Law Council (*Lagrådet*), which consists of members of the Supreme Court and the Supreme Administrative Court. Similarly in **Portugal**, where the 1976 Constitution established the Ombudsman, called *Provedor de Justiça*, whose functions were defined by Law No. 81/77, as of November 22, 1977, and more recently by Law No. 9/91, as of April 9, 1991,¹¹ the Ombudsman has no formal role in the legislative process. In **Poland**, the institution of the Ombudsman has been established by the Constitution and its scope and mode of operation is specified in the Act of 15 July 1987 on the Ombudsman.¹² The Ombudsman may lodge proposals for a legislative initiative with the relevant governmental agencies, may approach the Constitutional Tribunal on matters of conformity of statutory laws, international treaties and other legal regulations with the Constitution and may participate in the proceedings before the Tribunal. He/she may approach

⁸ <http://www.nhri.net/ICCMembers.htm>

⁹ There also exists the Government Council for Human Rights (an advisory body of the Czech Government), but this organ does not fulfil all the requirements of the Paris Principles.

¹⁰ Six official ombudsmen exist: Office of the Parliamentary ombudsman (JO), Consumer Ombudsman (KO), Office of the Equal Opportunities Ombudsman (JämO), Ombudsman against Ethnic Discrimination (DO), Children's Ombudsman (BO), Office of the disability Ombudsman and Ombudsman against Discrimination because of Sexual orientation (HomO).

¹¹ <http://www.provedor-jus.pt/welcome.htm>

¹² See the consolidated text in: the Official Journal, 2001, No. 14, item 147.

the Supreme Court asking for an interpretation of the law. During the legislative process in the parliament, the Ombudsman may be consulted, along with representatives of the Department of International Co-operation and European Law of the Ministry of Justice and other experts, including representatives of non-governmental organisations. In cases involving significant human rights issues they express their opinions on the draft and its conformity with the Constitution and international human rights standards. Such a consultation however, would appear to be rather exceptional and thus is not in any way systematic. In **Spain**, the *Defensor del Pueblo* elected by the Cortes Generales (Senate and Congress) may issue opinions on his/her own initiative,¹³ but is not formally involved in the legislative process.

There are other, more encouraging, situations. In **Denmark**, the Danish Institute for Human Rights was founded by the Act on establishment of a Danish Centre for International Studies and Human Rights on 6 June 2002, and carries forth the mandate vested in the Danish Centre for Human Rights, established by act of parliament in 1987. The Institute is mandated according to the Paris Principles. The Danish Institute is heard on regulation within the field of human rights. The Institute considers the compliance of bills, decisions, opinions and government initiatives with the human rights conventions ratified by Denmark before the adoption of the regulation. The Institute is consulted by the Danish ministries and receives several consultation papers each year. The Institute replies to the consultation papers by describing the human rights concerns raised by the regulation. In **France**, the national consultative commission on human rights (Commission nationale consultative des droits de l'homme) delivers advisory opinions to remind the government of its human rights commitments, and may decide on its own motion to address certain issues, without having to be requested to act by the government. It may do so in the prior to the adoption of a legislative act, on the basis of any bill which is proposed. The **Irish** Human Rights Commission was established by statute (the Human Rights Commission Acts, 2000 & 2001) in July 2001. But the human rights proofing of legislative proposals still essentially takes place, at the drafting stage, in the Office of the Attorney General.¹⁴ Under Section 8 of the Human Rights Commission Act 2000 however, the Irish Human Rights Commission may, if requested by Government, examine any legislative proposal and report its views on any implications of such proposal for human rights ;¹⁵ it can also, of its own motion, make recommendations on measures to strengthen and promote human rights in the state. The Commission has exercised both of these powers since its establishment in the course of the legislative process and its representatives have also appeared before parliamentary committees to explain the Commission's comments on legislative and other proposals. While no formal system of parliamentary scrutiny of legislation for human rights compatibility exists and the opportunity to institute such a system was not availed of in the legislation to give further effect to the European Convention on Human Rights in Irish law (European Convention on Human Rights Act, 2003),¹⁶ issues of domestic human rights concern usually arise for consideration by the Oireachtas Committee on Justice, Equality, Defence and Women's Rights. In **Latvia**, the National Human Rights Office (*Valsts cilvēktiesību birojs*) was established initially on 18 July 1995 on the basis of the Cabinet of Ministers Regulations on the National Human Rights Office (NHRO), and subsequently, by the *Law on the National Human Rights Office* adopted by the *Saeima* (Parliament) on 5 December 1996.¹⁷ The NHRO has no formal role in the legislative process. Each draft legislation is accompanied by an annotation or explanatory statement in which the authors state whether any international law standards are applicable and how is the proposed draft meeting their requirements. Compliance with human rights standards is not the

¹³ Organic Law 3/1981 of 6 April 1981 (BOE du 7 mai 1981).

¹⁴ Sponsoring government departments may also comment on the compatibility of legislative proposals with international human rights obligations.

¹⁵ The Irish Human Rights Commission has a full-time Senior Legislation & Policy Review Officer (with an Assistant).

¹⁶ A Human Rights Sub-Committee (under the aegis of the Oireachtas Foreign Affairs Committee) does exist but its focus is largely human right and foreign policy.

¹⁷ Likums par Valsts cilvēktiesību biroju, Latvijas Vēstnesis [Official Gazette], No. 221, 17.12.1996.

subject of specific scrutiny, however, and the Ministry of Justice has not indicated that it assesses draft bills from the point of view of their compliance with human rights in any systematic way.¹⁸ Although the representatives of the NHRO regularly participate in the meetings of the Human Rights Committee of the Parliament in the discussions on the draft legislation and present their opinions and proposals to the other parliamentary committees, this participation remains *ad hoc* and does not ensure that the human rights proofing of legislation will be satisfactorily performed. In **Luxembourg**, the Consultative Commission for Human Rights established by the Government Council's regulation of 28 April 2000 delivers its opinions and prepares its studies at the request of the government, but also on its own initiative. In most cases, its opinions intervene prior to the adoption of legislative acts, when such acts are still in draft form.

In none of the cases cited above, is there an obligation to request an opinion from the NHRI prior to the adoption of legislation. This is only partly compensated for, either by a practice of the government (Denmark) or the national parliament (Latvia) to regularly consult the NHRI on draft legislation, or by the competence attributed to the NHRI to raise human rights issues in pending legislation on its own motion, or both (Ireland, France, Luxembourg). In the absence of any formal involvement, in all the States cited, of the competent NHRI, the human rights screening of draft legislation is performed either internally within the Ministry having authored the draft or within another government department, or by the relevant parliamentary committee, or both.

In this picture, the National Commission for Human Rights (GNCHR) founded in **Greece** by Law 2667/1998 appears to constitute a remarkable exception. The GNCHR has to be consulted prior to the submission of any draft law to the Parliament, if such draft law concerns, directly or indirectly, human rights. The GNCHR systematically verifies whether such draft law is in conformity with the Constitution and the international obligations of Greece in the field of human rights. Furthermore, when the draft law is submitted to the Parliament, it is immediately sent to the "Scientific Council" of the Parliament, which verifies, once more, its compatibility with the Constitution and the international commitments of Greece.

The **United Kingdom** deserves a separate comment, due to the recent changes which have occurred there. The principal responsibility for vetting the compatibility of proposed legislation with international undertakings in the field of human rights rests hitherto with the department bringing it forward. However, in the case of the European Convention on Human Rights a request may also be made for the matter to be checked by the Government Agent before the European Court of Human Rights (a legal adviser in the Foreign and Commonwealth Office) and in all cases it is possible that the Cabinet Committee responsible for legislation may raise particular issues about compliance. Furthermore there is an obligation under the Human Rights Act 1998, s 19 for the Minister in charge of a Bill to make a statement to the effect that either the provisions of the Bill are in his view compatible with the Convention rights ('a statement of compatibility') or the government wishes consideration of the Bill to proceed although he or she is unable to make a statement of compatibility.¹⁹ In the latter case there is no legal impediment to the adoption of the proposed measure but this may only be politically acceptable where a derogation is made under Article 15 of the Convention and section 14 of the 1998 Act. A statement of compatibility must be in writing but there is no requirement that the advice on which

¹⁸ Ministru kabineta Noteikumi: Tieslietu ministrijas nolikums, Nr. 243, 29.04.2003.

¹⁹ Sect. 19 of the 1998 Human Rights Act provides :

'(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate'.

the statement of compatibility is made be disclosed and it is not disclosed in practice. Following the introduction of a Bill its provisions may be considered by the Joint Committee on Human Rights which can examine them from the perspective of any of the United Kingdom's international obligations in the field of human rights (and not just the Convention). The Joint Committee will report on the proposed legislation that it examines before its adoption and comments made by it may lead to modification or withdrawal of particular proposals, and it is this committee which is so far charged with the proofing of legislation. As it is composed of members of both Chambers and different political parties, it is, moreover, very independent.²⁰ It has therefore been decided (according to the White Paper launched by the UK Government) that the new Commission for Equality and Human Rights will not taken over this role.

The Equality Act 2006 establishes the Commission for Equality and Human Rights. This new body shall take over the work of the three currently existing equality bodies, while also focusing on the three other equality strands (age, religion and belief and sexual orientation) and take responsibility for the promotional agenda which underpins the Human Rights Act, should be up and running in October 2007. Under sect. 11(2)(d) of the Equality Act 2006, chapter 3, part 1, the Commission shall 'advise central or devolved government about the likely effect of a proposed change of law'. It is at yet unclear how this function shall be exercised, and in particular, whether the new Commission will be consulted on a systematic basis before the 'statement of compatibility' of sect. 19 of the 1998 Human Rights Act is presented. However, considering the role fulfilled hitherto by the Joint Committee on Human Rights, it has been announced in the White Paper launched by the United Kingdom Government prior to the decision to establish the new Commission for Equality and Human Rights that this body will not take over this role. Therefore, any role of the new Commission in human rights proofing of legislation most likely will remain the exception rather than the norm.

2.2. *The EU Member States who have established an institution similar to a NHRI*

Apart from the EU Member States which have already been cited, who have established a national institution for the promotion and protection of human rights in accordance with the Paris Principles, a number of EU Member States have established an institution with certain powers equivalent to those of a NHRI. In particular, a number of Member States have ombudspersons, created following Recommendation No. R(85)13 of the Council of Europe Committee of Ministers on the Institution of the Ombudsman, adopted on 23 September 1985 at the 388th meeting of the Ministers' Deputies. This Recommendation encourages the Member States of the Council of Europe to 'consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved'; this to a certain extent aligns the mandate of the ombudsman with those normally entrusted to NHRIs.

Typically, ombudspersons – even where their mandate extends beyond bad administration and includes the protection and promotion of human rights – are not involved in human rights proofing of draft legislation. This is the case in **Slovenia**, where Article 159.1 of the Constitution established the Ombudsman as an institution for the out of court and informal protection of human rights and basic freedoms.²¹ In **Hungary**, which has no NHRI, four commissioners, the Parliamentary Commissioner for Human Rights, the Deputy Ombudsman, the Parliamentary Commissioner for Data Protection and Freedom of Information, and the Parliamentary Commissioner for Ethnic Minorities, are elected by the Parliament of the Hungarian Republic upon the proposal of the President of the Republic, for terms of six years. Although the mandate

²⁰ J.L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' 2006 (4/1) *International Journal of Constitutional Law* 1-38.

²¹ Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03.

of these Parliamentary Commissioners, as defined by the 1993 Act on the Parliamentary Commissioners,²² partly recoup those of a NHRI, they have no formal role in the drafting of legislation. Rather, the Human Rights Department of the Ministry of Justice examines whether the draft legislation is in accordance with the European Convention on Human Rights, and the similar department of the Ministry of Foreign Affairs does the same work in relation to the UN human rights treaties. Thus, any incompatibility with international treaties ratified by Hungary should be revealed during the drafting process. In **Estonia**, the Legal Chancellor of the Republic of Estonia is an independent official who is appointed to office by the Parliament (Riigikogu) on the proposal of the President of the Republic for a term of seven years; the Office of the Legal Chancellor currently consists of approximately 40 qualified lawyers and other staff. The Legal Chancellor not only acts as an ombudsman on the basis of individual complaints; he also controls the conformity with the constitution of all new laws, foreign treaties, regulations and other legal acts of state and municipal organs, and may recommend that these acts be modified in order to ensure compliance, and if the competent authority does not follow upon this recommendation, he may bring the issue to the Supreme Court. However, while both the Legal Chancellor of the Republic of Estonia and the Supreme Court may be consulted in the course of the legislative procedure in order to ensure that the draft legislation is compatible with the requirements flowing from international human rights treaties, this rarely happens in practice.

2.3. *The EU Member States who possess neither a NHRI nor an equivalent institution*

A significant number of EU Member States have not established a national human rights institution in conformity with the Paris Principles, nor any equivalent institution. It may or may not be the case that, in addition, no human rights screening of draft legislation takes place in these States. In **Italy**, there is no *ex ante* mechanism to ensure the compatibility of draft legislation with the requirements of international human rights treaties binding upon the State. In **Malta**, the office of the Attorney General is responsible for the drafting and review of national legislation, occasionally with the assistance of specifically appointed commissions ; but the legislative process does not include a specific human rights proofing mechanism.

Other States do have some human rights proofing of draft legislation, either within the government apparatus (as regards proposals emanating from the government) or within the parliamentary procedure. In **Slovakia**, the Slovak National Centre for Human Rights [*Slovenské národné stredisko pre ľudské práva*] established by the Act of the National Council of the Slovak Republic no. 308/1993²³ has no role in the legislative process. The human rights proofing of draft legislation is in the hands, rather, of the Legislative Council to the Government, and of the relevant parliamentary committee. Indeed, pursuant to the Rules of Procedure of the National Council of the Slovak Republic,²⁴ each bill submitted to the parliamentary discussion must contain an explanatory report, which must include a declaration that the bill is in conformity with the Constitution, constitutional laws, international treaties and the EU law. The Rules of Procedure of the Slovak Government also stipulate that the governmental decrees and other regulations must comply with the obligations of the Slovak Republic resulting from the international treaties and other international instruments, and they require that all relevant international treaties and international documents be enumerated in the explanatory report. Therefore, the compliance of any legislative proposal or regulation with the international undertakings of the Slovak Republic in the area of human rights must be evaluated from the beginning of the legislation process and before their adoption. The Legislative Council of the Government, as an advisory body to the Slovak Government, evaluates the compliance of the

²² However, the Commissioner for Data Protection and Freedom of Information (Data Protection Ombudsman) was already established under the 1992 Act on Data Protection and Freedom of Information.

²³ Coll. of 15 December 1993 on the Establishment of the Slovak National Centre for Human Rights, as amended by the Act no. 136/2003 Coll.

²⁴ Act no. 350/1995 Coll. on Rules of Procedure of the National Council of the Slovak Republic as amended.

governmental proposals of the legislation and regulations with the Constitution, constitutional laws, and international undertakings, including international treaties on human rights, before the proposals are submitted to the government for their adoption. Pursuant to the Rules of Procedure of the National Council of the Slovak Republic, the Constitutional and Legal Affairs Committee deliberates each bill, especially from the point of its compliance with the Constitution, constitutional laws, binding international treaties, laws of the Slovak Republic and EU law. At the final phase of the legislative process, the President of the Slovak Republic may veto a piece of legislation adopted by the National Council, and return it back to the parliament with his comments for repeated discussion and adoption. The President has used this power, in particular, where there were doubts about the compatibility of the adopted law with the international treaty on human rights.

In **Lithuania**, the Statute of the *Seimas* (parliamentary assembly) provides that the drafts of legal acts it is presented with have to be verified on their compliance with the European Convention on Human Rights. This imposes on the initiators of the draft to ensure such compliance. A special opinion on the issue could be obtained from the European Law Department under the auspices of the Government. Finally, a specific parliamentary committee, the Seimas Committee on Human Rights undertakes the parliamentary control on the compliance of the drafts of legal acts with the Lithuanian obligations in the field of human rights. The Ombudsman's Office, which Lithuania established on 8 December 1994 but whose powers are limited to traditional ombudspersons' functions – including protecting from abuse by public administrations but not including a general mandate to protect and promote human rights –, has no role in these procedures.

In **Austria**, it is the standard practice that every legislative bill drafted by any of the Federal Ministries is submitted to an extensive consultative assessment procedure, which involves many stakeholders, including other Federal Ministries, the social partners (Chamber of Commerce, trade unions etc.) and civil society organisations, among them human rights NGOs and the Ludwig Boltzmann Institute of Human Rights. At this stage, these institutions can, of course, raise human rights concerns, but very often these concerns are not taken into account. The Department on Constitutional Issues (*Verfassungsdienst*) in the Federal Chancellery checks whether draft legislation is in conformity with the Federal Constitution, including the domestic bill of rights. With the exception of the European Convention on Human Rights, the Convention for the Elimination of Racial Discrimination (Articles 1-2) and the Convention on the Elimination of all forms of Discrimination Against Women (Articles 1-4), international and regional human rights treaties have, however, not been directly incorporated into the Austrian Federal Constitution.

In **Finland**, which has no national human rights institution functioning according to the Paris Principles, the Parliament comprises a specialized Committee on Constitutional Law that examines all Bills that appear to raise questions of compatibility with the Constitution or with international human rights treaties. The Committee issues up to 70 opinions per year. These opinions are treated as *de facto* binding for other Committees that then modify the Bill so that it corresponds to the Constitution or to international human rights treaties. The Constitutional Law Committee always hears academic experts, typically three, before issuing an opinion. The experts are professors of constitutional or international law or other experts in constitutional and human rights.

In **Belgium**, the legislative section of the Council of State – the administrative jurisdiction established in 1946 and composed of independent magistrates²⁵ – may be asked to deliver an opinion on the compatibility with higher-ranking norms (the Belgian Constitution of international treaties to which Belgium is a party or, where executive decrees (*arrêtés royaux* and *arrêtés de*

²⁵ <http://www.raadvst-consetat.be>.

gouvernement de la Région ou de la Communauté) are concerned , ordinary legislation) of draft texts, of a legislative (laws, decrees, ordinances) or executive decrees. In certain cases this consultation is obligatory. In other cases it is optional : where a text has originated in a parliamentary bill (and unless two thirds of the members of the parliamentary assembly concerned request that such a consultation takes place), the president of the parliamentary assembly concerned may request the Council of State to deliver an opinion. The opinion delivered by the legislative section of the Council of State, even where it arrives at the conclusion that a particular piece of legislation or executive decree should not be adopted as it is in violation of the human rights guaranteed in either the Constitution or the international treaties to which Belgium is a party, is purely advisory in nature :

*‘La section de législation donnant des avis dépourvus de caractère contraignant, l'autorité qui les reçoit est en principe libre de les suivre ou non. Il faut cependant admettre que l'on ne peut normalement s'écarter de l'avis - tout au moins quant aux questions de fond qu'il soulève – que pour des motifs fondés en droit. Il est bien entendu préférable que l'autorité s'explique quant auxdits motifs. Elle en aura toujours l'occasion dans l'exposé des motifs joint aux projets de nature législative. Ces motifs peuvent également apparaître dans un rapport au Roi, au Gouvernement et au Collège, rapports qui ne sont cependant obligatoires que dans certains cas particuliers. La publication de ces derniers documents impliquant également celle de l'avis du Conseil d'Etat, les intéressés ont dès lors la possibilité de porter une juste appréciation sur l'ensemble des arguments de droit exposés. Par ailleurs, même dans les cas où les avis de la section de législation ne doivent pas être légalement publiés, ils sont cependant en mesure de recevoir une certaine publicité. C'est ainsi qu'en cas de recours contre des arrêtés réglementaires l'avis éventuel de la section de législation, qui fait partie du dossier administratif, devra être communiqué à ce titre. Ledit avis doit aussi, en vertu des règles constitutionnelles et législatives relatives à la publicité de l'administration, être en principe produit, à quiconque le demande, par le ministre à qui l'avis a été adressé’.*²⁶

The situation in the **Netherlands** is quite similar to that of Belgium. The Prime Minister issued in 1992 the *Aanwijzingen voor de regelgeving* [Directives for Law-making] which apply to those who are involved in the drafting of acts and other regulations of the central authorities. The Directives were most recently revised in 2000. The need to ensure compliance with international human rights standards is addressed in *Aanwijzing 18* [Directive 18], which provides that ‘When drafting regulations it shall be determined whether and if so how freedom to regulate the matter in question has been restricted by superior rules’. The explanations accompanying this directive specify that ‘As far as international rules are concerned, mention should be made in particular of European standard-setting, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. [...]’ Accordingly, the persons charged with the preparation of draft legislation and regulation are at the same time responsible to ensure that the new rules will be compatible with international human rights standards. In addition the Minister of Justice ought to review the constitutionality of draft acts. The *Raad van State* [Council of State, *Conseil d'Etat*], in giving advisory opinions to the Government on draft legislation, also pays attention to this issue. No systematic reference to relevant international human rights instruments is made in the explanatory memoranda that accompany the bills that are submitted to Parliament. It is therefore not always possible for the public to ascertain whether human rights were taken into account when the bill was prepared.

²⁶ Circulaire de légistique formelle, pp. 7-8.

3. Transversal considerations

3.1. *The combination of institutional techniques for human rights proofing of legislation*

The conclusions from this brief overview are clear. Where the consultation of the NHRI prior to the adoption of legislation is a possibility, but not compulsory – and not a formal requirement prescribed in law –, it is resorted to selectively. In order to ensure that the legislation or regulations they adopt will comply with the requirements of human rights, States rely preferably either on expertise within ministerial departments, or on the evaluation made in the course of the parliamentary procedure, quite frequently by specialist units or parliamentary committees. A number of States, moreover, ensure a systematic or quasi-systematic human rights proofing of draft legislation by an independent instance (such as in Belgium or in the Netherlands, the Council of State, whose consultation in many cases is obligatory).²⁷

What this seems to illustrate is that verification of compliance is perceived as a technical issue, not requiring input by an instance representative of a wide range of societal interests and, especially, of different segments of the civil society ; and requiring a purely legalistic approach, rather than an approach informed by the grass-roots knowledge civil society organizations may provide. Another indicia of this is the very weak role played by human rights impact assessments in such pre-legislative scrutiny for compatibility of draft legislation with human rights.

However, there is no need to make a choice between these two approaches. On the contrary, it is their complementarity which should be stressed. While the appreciation of the compatibility with human rights of certain draft legislative proposals requires a legal scrutiny, to be performed, preferably, by experts, such an evaluation also should be informed by an understanding of the impact the implementation of such proposals could have, for instance, on certain communities or in certain local settings. Indeed, each of the different institutional devices for human rights proofing of legislation which have been reviewed present certain advantages and, ideally, they should be combined with one another rather than a choice having to be made between these techniques :

Human rights proofing performed by	Advantages
Ministerial department taking the initiative of the proposal	Ensures a better understanding of human rights implications of their legislative proposals by public servants (serves the mainstreaming of human rights within public administration and the building of a culture based on human rights)
Specialized unit within the government	Ensures an expert approach to the human rights issues raised by the proposal, and an adequate use of the existing international and European standards
Parliamentary committee	Ensures a transparency in the evaluation and facilitates control by the public opinion and the media, facilitates societal debate Opens up the possibility of consultation of external experts, including NHRIs

²⁷ Recommendation Rec(2004)5 of the Committee of Ministers of the Council of Europe to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, cited above, paras. 18-24.

Specialized, independent instance located outside both government and Parliament	Guarantees an independency in the evaluation and ensures that the evaluation will not be subordinated to the need to reach political compromises Insulates the evaluation from the pressure of public opinion
NHRI of equivalent institution	Ensures that the impact of the proposed legislation on a wide range of interests will be taken into account, and that the existing standards of international and European human rights law will be taken into account

It is probably unrealistic to expect that all these devices will be used, at least on a systematic basis, in combination with one another. At the same time, it is important at the same time to note that the advantages of relying on each of these techniques may add up, where they are used in combination.

There are certain risks attached to the multiplication of fora where such human rights screening takes place. In particular, the authority of the findings made by each instance (for instance, by an independent body such as the legislative section of the Council of State in Belgium) may be threatened if another (such as, for instance, a NHRI or a parliamentary committee) arrive at a different conclusion as to the same question of compatibility. Similarly, if it is provided with different possibilities about the procedures through which vet the human rights compatibility of a draft proposal, the Executive may be tempted to 'forum shop', and choose the procedure which it considers the least potentially damaging to its proposal. However, while such a risk should not be underestimated, in most cases the advantages of multiplying procedures will by far compensate for any potential handicap such multiplication might imply. In fact, the most promising route may be not to organize simply the coexistence of these mechanisms, but to achieve their interaction, as when the opinion of a NHRI forms the basis for the work of a parliamentary committee or of a unit within government in charge of verifying compliance. What should be avoided in any case is to fall into the trap of thinking that the more one instance is consulted, the less any other instance will be influential in the debate concerning the compatibility with the requirements of fundamental rights of any legislative proposal : for instance, a parliamentary committee will be better equipped to deliver a robust position if this is based on an opinion sought from a NHRI ; the explanatory memorandum attached to a governmental legislative proposal will be richer, better informed, and more convincing, if it provides answers to certain concerns raised in consultations, for instance of an independent institution for the promotion and protection of human rights.

An example of such a combination maybe found in the recent developments in European Union law. Significant progress has been achieved in recent years to ensure compliance with fundamental rights of EU law- and policy-making, and to pay greater attention to the impact Union laws and policies may have on fundamental rights. By giving a renewed visibility to the fundamental rights recognized in the Union legal order, the adoption of the EU Charter of Fundamental Rights in December 2000²⁸ has constituted a major turning point in this process. The adoption of the Charter has led to a number of initiatives which converge to facilitate an *ex ante* evaluation of the impact on fundamental rights of measures adopted by the institutions of the Union. Of particular significance have been two recent initiatives adopted by the European Commission. In April 2005, the Commission has adopted a Communication²⁹ by which it seeks

²⁸ The Charter was solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000 (OJ C 364, 18.12.2000, p. 1).

²⁹ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

to improve the compliance of its legislative proposals with the requirements of the Charter.³⁰ On 15 June 2005, it has adopted a new set of guidelines for the preparation of impact assessments.³¹ Although the new guidelines are still based, as the former impact assessments,³² on a division between economic, social and environmental impacts, the revised set of guidelines pays a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights.³³ Impact assessments on the one hand, the legal verification of compliance with fundamental rights on the other hand, are treated as distinct but complementary tasks : according to the Communication of the Commission on Compliance with the Charter of Fundamental Rights in Commission legislative proposals, the impact assessment should be seen as 'an essential tool in preparing for the definitive legal verification of compliance with the Charter, as it provides the basic information without thereby taking the place of verification'³⁴: it is an 'aid to the legal analysis carried out by Commission departments',³⁵ not a substitute for such analysis. While the preparation of an extended impact analysis by the lead department having authored a legislative proposal ensures that a concern for human rights will be mainstreamed through the different services of the Commission,³⁶ the centralization of the verification of compliance with fundamental rights within the legal service of the Commission, in cooperation with the Directorate General Justice, Freedom and Security (DG JLS) and DG external relations (RELEX), should ensure a truly expert approach to the fundamental rights issues raised by any legislative proposal put forward by the Commission.³⁷ Although it is unlikely it will fulfill this role, the involvement of the EU

Fundamental Rights Agency, after it will have been set up in the course of 2007,³⁸ in the evaluation of legislative proposals by the European Commission, would further improve this process of pre-legislative screening for compatibility with human rights.

³⁰ On 13 March 2001 the Commission had already decided that any proposal for legislation and any draft instrument to be adopted by it would, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union (SEC(2001) 380/3). It also had decided that legislative proposals and draft instruments having a specific link to fundamental rights would incorporate a recital as a formal statement of compatibility. However, no specific methodology was prescribed to ensure that such scrutiny would effectively take place, on the basis of a well-defined division of tasks between the lead department, the legal service of the Commission, the Directorate General Justice, Freedom and Security (DG JLS) and DG RELEX.

³¹ SEC(2005)791, 15.6.2005.

³² See Communication of 5 June 2005 on Impact Assessment, COM(2002)276.

³³ Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) : see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

³⁴ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005, at para. 13.

³⁵ *Id.*, fn. 6.

³⁶ See O. De Schutter, 'Mainstreaming Human Rights in the European Union', in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, pp. 37-72.

³⁷ Moreover, in his testimony before the European Union Committee of the House of Lords, it has been emphasized by the member of the legal service of the Commission in charge of fundamental rights that '...the Legal Service of the Commission, while it is, of course, an internal service placed under the authority of the President, does perform a special role within the Commission. It is not a political service, it is an independent service and it is its task, though in purely internal dealings and, of course, not through its advice given in public to function as an independent reviser of fundamental rights questions' (Examination of Dr. Clemens Ladenburger, Legal Service of the European Commission, in *Human Rights Proofing EU Legislation*, Report with Evidence, European Committee of the House of Lords, 16th Report of Session 2005-06, HL Paper 67, at p. 16).

³⁸ Commission of the European Communities, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005)280, 30.6.2005. The discussion within the Ad hoc Working Group of the Council and in the framework of the 'Trialogue' initiated between the Commission, the Council and the European Parliament, have led to significant departures from this initial proposal, however. The original proposal provided in Article 2, d), that the Agency would 'formulate conclusions and opinions on general subjects, for the Union institutions and the Member States when

3.2. *Maximizing the potential of consultative processes in human rights proofing of legislation*

In order to maximize the potential of a combination of different techniques through which to vet the human rights impact of legislative proposals, while minimizing its risks, the setting up of a formal link between any of the mechanisms which may exist would be desirable. This could also avoid that the opinions delivered by independent instances consulted in the course of the legislative process will be ignored, or only selectively referred to, by the other institutional actors involved, when such opinions do not suit their interests. For example, one might easily conceive of an obligation of the body to which the opinion is addressed – in particular, the government having submitted a legislative proposal – that it provides a reasoned answer to the concerns raised in the opinion, even where it disagrees with the conclusion and feels that the opinion should not be followed. While national human rights institutions are purely advisory bodies, it should not be seen as incompatible with this character of a NHRI to impose on the author of a draft legislative or regulatory text to provide a reasoned answer to the objections raised by the NHRI.

Neither should be seen as in derogation with this advisory character of NHRIs to allow them to file legal proceedings in order to submit a question of constitutionality or of compatibility with international human rights treaties to a competent court, as according to the power recognized to the Ombudsman in Poland – which may challenge the constitutionality of legislation once it is enacted –, or to the Legal Chancellor of the Republic of Estonia. In Portugal, under the terms of Article 281, paragraphs 1 and 2 (d), of the Constitution, the Ombudsman (*Provedor de Justiça*) is empowered to request the Constitutional Court to pass a ruling on the unconstitutionality or illegality of any rules made by public entities³⁹; Article 283, paragraph 1, of the Constitution, also gives him/her the competence to request the Constitutional Court to take a stand and pass a ruling on unconstitutionality by omission.

Without either of these putting into question the advisory character of opinions delivered by NHRIs, both the obligation imposed on the author of a draft legislation to provide a reasoned answer to such opinions and the power afforded to NHRIs to submit a question to a competent court, may significantly augment the weight of such opinions in the legislative process. Softer mechanisms include making publicity on the issue (this solution is provided for under the Paris Principles) and reporting to the Parliament (whenever necessary or, minimally, in the annual reports) with whom formal links may also be established.

3.3. *Compatibility reviews in the ratification process of international human rights instruments*

While it is obviously crucial to ensure that new legislative or regulatory texts comply with the preexisting human rights obligations of the State concerned, it is equally important to review the compliance of existing laws and regulations when the State enters into new international commitments, or indeed, when its pre-existing legal obligations take on a new meaning due to the evolution of the case-law of the monitoring bodies or jurisdictions offering an authoritative interpretation of the instruments concerned.⁴⁰ The objective here is identical : it is to ensure, *ex ante*, that any inconsistencies are removed, without obliging an aggrieved party to file suit in order to have a court identify, *post hoc*, the existence of such an inconsistency.

implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission'. This would seem not to include opinions being delivered by the Agency on draft legislative proposals prepared by the Commission.

³⁹ A declaration of unconstitutionality may also be sought directly before the Constitutional Court, by the President of the Republic, the President of Parliament, the Prime Minister, the Procurador-Geral (*General Attorney*), or one tenth of the members of Parliament.

⁴⁰ See Recommendation Rec(2004)5 of the Committee of Ministers of the Council of Europe to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, cited above, paras. 7-8.

Therefore, the role of NHRI in the course of accession to a new international instrument in the field of human rights should be defined extensively to include a systematic verification of the compatibility with the existing laws and regulations with the requirements of the new treaty. In Estonia for instance, the Legal Chancellor's Office is consulted in the preparation of Estonia's accession to any new human rights treaty, and it must safeguard that all other laws lower than the Constitution comply with the new human rights treaty.

3.4. Human rights proofing of draft legislation and the interdependency and indivisibility of all human rights

In a number of cases where the human rights proofing of draft legislation is prescribed, certain international instruments – particularly the European Convention on Human Rights, more occasionally the International Covenant on Civil and Political Rights – are specifically highlighted as deserving particular attention. This reinforces a natural tendency to a relative neglect of other instruments, such as the European Social Charter or the International Covenant on Economic, Social and Cultural Rights, which are adopted in the field of economic and social rights, or such as the Framework Convention on the Protection of National Minorities, which is considered to set forth general principles, subject to further implementation by national laws or regulations, but not to contain justiciable rights. These traditional distinctions, however, are breaking down in international jurisprudence. The practice of human rights proofing of national legislation should adapt accordingly.

3.5. Human rights proofing of international agreements and EU Law

While the emphasis has been, in the preceding note, on the human rights proofing of draft legislation, concerns of a similar nature may be expressed as regards the conclusion by a State of international agreements whose provisions may be in violation of preexisting international human rights obligations of the State concerned – and prior to which, therefore, an examination of the human rights impact might be required. Indeed, a crucial question for the future will be how NHRIs, but also other instances currently involved in the pre-screening of draft legislation at the national level, can extend their role to the adoption of European laws in the framework of the European Union (in particular directives, regulations, or framework decisions). Some may consider that such screening should take place only at the European level, through the processes described above. However, we should recall that the human rights obligations of the EU Member States differ quite widely,⁴¹ leading to the existence of different standards which a screening as performed within the European Commission could hardly take into account fully. Moreover, the preventive mechanisms described above – extended impact assessments prepared by the lead department of the Commission proposing legislation, verification of

⁴¹ These commitments vary even if we consider only the instruments prepared within the framework of the Council of Europe. All the EU Member States are parties to the European Convention on Human Rights. But for instance, while all the Member States are parties either to the European Social Charter or to the Revised European Social Charter, Austria, the Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Netherlands, Poland, Slovakia, Spain and the United Kingdom have not ratified the Revised European Social Charter. And both within the 1961 European Social Charter and within the 1996 Revised European Social Charter, the commitments of the States parties are variable, as they may upon ratification accept only a limited number of the provisions of these instruments. Belgium, France, Greece and Luxembourg, have not ratified the Framework Convention for the Protection of National Minorities. Belgium, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Sweden and the United Kingdom have not ratified the Convention on Human Rights and Biomedicine.

compliance by the Legal Service of the Commission with DG JLS and DG RELEX – concern only the legislative proposals of the Commission. But under Title VI of the EU Treaty, the Member States may take the initiative of proposing the adoption of certain instruments, in particular framework decisions.⁴² No preventive mechanism, ensuring that the proposal will be compatible with fundamental rights, exists in that context. This would justify a more active role for instances which, at national level, are entrusted with ensuring that draft legislation complies with fundamental rights, in the monitoring of European instruments proposed in the fields of police cooperation and judicial cooperation in criminal matters.

⁴² Article 34(2) EU.