

Keynote speech of Prof. Brian Burdekin AO

at opening session of the OSCE Supplementary Human Dimension Meeting on National Human Rights Institutions (Ombudsinstitutions, commissions, institutes and other), Vienna, 14 – 15 April 2011

If I might, so that I'm not misunderstood, make a couple of preliminary observations. First, I am going to talk mainly about National Human Rights Institutions (NHRIs) as we use the term relating to national institutions (NIs) set up in accordance with the Paris Principles. But all institutions, including the more traditional ombudsman and a number of other institutions represented here which have a mandate relating to protecting human rights, are extremely important and play a critical role ensuring that human rights are both promoted and protected. I am going to refer to several international and regional organizations outside the OSCE region, not because I think this is essential, but because the standards we are talking about we originally developed in the Paris Principles in 1991 and because they were accepted by the international community at the World Conference on Human Rights in Vienna in 1993.

A small group sat on the sidelines of the World Conference and drafted the text which in the Vienna Declaration and Programme of Action referred to the obligation of all member states to set up independent human rights institutions according to the Paris Principles (PP) which we drafted in 1991 and made it clear that it was the prerogative of each state to set up their national institution in accordance of the structure and the needs of that state. What is equally important is that the PP lay down half a dozen minimal standards for what those structures should be, regardless of the particular circumstances of each state.

I want to talk about that based on my experience in many of the countries represented here where we already have NIs most of which have been set up in the last ten or twelve years. I will draw on the experience we have had in other regions because I think that, while it's true that the rest of the world has a lot to learn from Europe, I think in the area of NHRIs in Europe and in the other parts of the OSCE, there are lessons we can learn from Asia and other areas.

Twenty five years ago when I had the privilege of being the federal human rights commissioner in my country we only had three in the entire Asian region, we only had 8 in the world. I want to talk about the historical context in which NIs now find themselves because they are very new institutions.

The resistance and the misunderstanding sometimes comes from executive governments who understand in theory what independence is but don't seem to understand in practice what it means, sometimes comes from NGO who see NHRIs as some sort of competitor. That is simply not the case. We are NIs in the sense that we are established by legislation

(or we should be), with clear mandate, and therefore unlike NGO we are set up with the imprimatur of the legislature of the state in which we work, and should be set up with powers that are commensurate with our responsibilities.

One of the problems in this very large and diverse area the OSCE represents is that some of the institutions have not been given a clear mandate and some of them have not been given a clear legislative basis for their operations. That makes it difficult to operate effectively and independently.

If I may reflect on the role of NIs which is essentially one of implementation- what we are about is trying to ensure that the international human rights standards are translated into reality. Where do these standards come from?

Part of the challenges to NIs is that we all work within national legal frameworks and whether it is the Common law or the European Code systems, or Islamic law, all of these systems came into existence before the international treaties that we are charged to monitor. Coming out of the Universal Declaration of 1948, not until 1966 (45 years ago) did we begin to develop the two basic international Covenants on Civil and Political Rights in 1966 then in the next 45 years the Core on Human Rights Conventions which are a major part of the responsibility of NIs. Generally states will agree of them having a mandate that includes the human rights in the conventions the state has ratified.

In 1991 in Paris what we were trying to do as practitioners (and those of us who were there from the very small number of NIs) and what we achieved in Vienna in 1993 at the World Conference and then later that year in the General Assembly, when virtually every government was there and voted unanimously, is the establishment of independent institutions based on the Paris Principles. You as member states of the OSCE, of the UN voted for this twice: at the World Conference and also at the UN General Assembly through your ambassadors, ministers or the representatives there.

A fair question is why did we feel we need to do this?

Because as a former adviser to the political leaders of my country, as a former service officer or diplomat, what I had seen was that you could have a democratic system, an executive government responsible to a parliament, you could have independent courts, but all of that put together did not necessarily mean that you had the protection of the rights of some of the most vulnerable groups in society including minorities be they religious, linguistic, ethnic or whatever.

It is governments which are the primary duty bearers, they ratify the treaties, we are simply monitors, human rights educators and in some cases institutions which investigate violations of human rights.

Some of us had been involved in negotiating human rights conventions, we were just finishing the Convention on the Rights of the Child and frankly I knew from my contact as a former diplomat that a number of governments were trying to set up a Children's Commission.

One of the problems had been the very evolution of international norms because as the Elimination of the Discrimination Against Women was ratified, states set up sometimes a Commission on Women Rights, an Equal Opportunity Commission or Native

Discrimination Commission. As the Convention on Racial Discrimination was ratified a number of states set up institutions, Ombudsman institutions or commissions focused on that. But some of us believed very strongly that if human rights are universal and equally important, we can't be leaving any groups out: we need an organization which has a holistic approach to human rights and which doesn't leave out any sector of society be it women, children, minorities, indigenous groups etc. And that was really the motivation behind the PP.

The PP spell out that national institutions have half a dozen basic functions: research and advice, education and promoting an understanding of human rights, monitoring compliance with international human rights treaties and norms, investigating violations of human rights and providing remedies, cooperating with international and regional human rights mechanisms and interacting with the judiciary.

Some of these are elements which I see beginning to be discussed in some states within the OSCE, some of those are elements which are not included in NIs. It is important that the OSCE is bringing to bear its collective institutional focus on the need to provide national institutions with a clear and effective mandate. We need to bear in mind that in many cases they are given a very broad mandate with sometimes very limited resources and that in itself creates problems.

Key characteristics

To be independent - they are set up by the state, in fact in many countries by the executive government operating in conjunction with the legislature and that was why in 1991 we argued that they should be set up on the basis of a legislative text.

The reason the phrase "legislative text" is important is that it does not mean a presidential decree, it means a text adopted by the elected representatives of the people of the country. Because in our view as practitioners it was part of endowing the institution with the legitimacy, the authority and the support of the parliament because in many countries in other regions we had seen is that what can be set up by a presidential decree can sometimes be disestablished by presidential decree. Part of being independent is being able to do your job fearlessly and get on with, if necessary, giving frank advice to the government and to the parliament. This is one of our challenges as national institutions, we are essentially advisory. Nobody elected us, we are not the government, we are not the parliament, generally we should always try to function as an advisory body, but if there are violations of human rights by the military, by the police, by the government itself, then maybe we have to move to adversarial and not advisory mode. Maybe sometimes we have to be consultative. Maybe occasionally we have to be what the government would regard as confrontational. That is not an easy balance to strike, but it is a balance which is one of the challenges for all national institutions in all regions, including the OSCE.

I want to talk briefly about the evolving international order because we as national institutions face the same problems in the rapidly evolving and globalizing world as

many of our governments do. I want to touch what some of the key changes are from a national institution's point of view.

There is a greater recognition: thirty years ago most of the countries in regions like Latin America or in my region were actually autocratic and military dictatorships or governments that were not democratic. That has changed. The understanding of human rights has changed. During the Cold War the constant conflict was between what is more important civil and political rights or economic, social and cultural rights, we now have a more holistic approach that was set to bed in Vienna in 1993. All of the states agreed that human rights are equally important, universal and need to be seen in that light. So whereas NHRIs are originally focused on violations of civil and political rights, most of the eight years that I was Federal Commissioner in my country I spent looking at the rights of homeless people, mentally ill people, people with disabilities.

Challenges:

Increasingly the challenges we face are the challenges governments face. The next challenges in this increasingly globalised world are that governments are privatising and outsourcing services that governments used to provide: education, healthcare. 200 million people now have to buy their water. That is a human rights issue for NIs based on the PP, because of the mandate that some of them have.

We are living in a world fortunately where back in the 1970s we had international human rights standards but we had very little accountability. We are witnessing in North Africa in the minute the most recent expression of a relatively new international doctrine on the right to protect of the international community. We are living in a world where increasingly there is recognition. In the last 12 to 15 years, 15 to 20 presidents and prime ministers have been made accountable for violations of human rights. We are living in a world where there is a much greater expectation at these international human rights treaties and just norms created by diplomats out there but to be translated into reality at the national level.

Yet as NIs we face the problem of a broad mandate, very limited resources, the government being the primary duty bearer. We need a very clear mandate to fit in.

As much as needs to be said about civil society and NGOs is in the Paris Principles. We constantly repeated throughout that document the importance of NHRIs working in close cooperation with civil society, not just NGOs, but human rights defenders, advocates, leaders of the profession. In my own country I had to make it clear to Church leaders that we were dealing with human rights issues that involved them as people concerned about the most vulnerable and disadvantaged in their community. So working in conjunction with civil society is the only way that a broad based national institution can focus effectively because civil society is our eyes and ears. We may have staff, but we can't be out there seeing what is happening around our respective countries in the detail that many NIs have to have in order to provide authoritative and accurate advice to government and parliament. In order to do that with limited resources we must cooperate closely with civil society.

I will use the example of my own country, which is in a way similar to Austria and to wealthy developed countries: in the 8 years that I had as head of institution as Federal Commissioner, we handled almost 10,000 cases. In relation to the cases of discrimination against women or violations of women's rights, 70% came from the private sector, we got the message through to our government, but we hadn't got the message through to the private sector. Now if we take seriously our role of monitoring the international Covenant on Civil and Political Rights which obliges governments to respect and ensure that mains of governments outsource or license the provision of something, that needs to be done consistent with the human rights treaty that the state has ratified. There is still a wide spread misunderstanding that as NIs we should hardly be concerned with the private sector, but more and more there are violations of human rights in the private sector. Of the 100 largest economic entities in the world today, 49 are countries, 51 are corporations. In my country the biggest operating mining company's turnover last year was 167 000 million dollars which is more than about 50 of the poorest countries in the world put together.

The corporate world is beginning to understand that human rights do not merely affect the public sector. That creates very serious challenges for those of us given the responsibility to monitor and advise the parliament and the government.

Democracy is very important, but what is democracy? By definition it is the rule of the majority, so the 2.4% of Australians who are aboriginal or indigenous were never meant to make or break a government. The mentally ill, people with multiple disabilities, a lot of groups we spent time working with trying to protect their rights were not politically powerful.

So the NHRIs actually play an advocacy role. In some countries including the OSCE member states there was a very strong view that human rights commissions or institutions must not be political. We are not party political, but I am not aware of a human rights issue that does not have political consequences, whether you are talking about torture on the one hand or about the right to health, including for people with mental illnesses as well as physical sicknesses, on the other.

If we are going to understand where we are going, we have got to understand where we have been. In terms of NHRIs the good news is that in the late 80s and early 90s I had to sit as an advisor to my government delegation, throughout the 90s and early 2000s with the assistance of the High Commissioner for Human Rights, we managed to get NIs sitting in their own spots in the room. This has significance as to where the OSCE is going in terms of focusing on this area.

The most recent developments in Geneva a couple of weeks ago confirmed that NHRIs are independent entities that speak in their own right in the Human Rights Council or the Human Rights Commission.

Over the last 15 years there has been a progressive evolution in the direction of a recognition by the international community of the role which NHRIs play not only in the Human Rights Council but by the international treaties bodies of experts who monitor the Covenant on Civil and political rights, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, etc.

NHRIs are increasingly consulted by and engaged by special rapporteurs and by what we call the special procedure mechanisms of the UN. Years ago that was very often a dialogue between governments or governments, NGO and the UN councils or the special treaty bodies, or the special rapporteurs.

Now national institutions are an increasingly important part of that which poses challenges in terms of their mandate and their resources to work collectively and effectively, primarily at the national level but also on an increasing amount of cross-border issues which are human rights issues: human trafficking, migrant workers, asylum seekers, refugees.

It would be tremendously valuable if the OSCE could give support to the idea of a regional secretariat or body to help NIs talk to each other and exchange experience.

Evolution is not just at that level, there is also an evolution in terms of international human rights conventions and treaties. During the 80s and 90s the first time we succeeded was in the Optional Protocol to the Torture Convention and some of us fit in the idea that the NHRI should be the body which monitors the Op-CAT. This specifically refers to NIs as does the latest Convention of the Rights of People with Disabilities because NIs were very closely involved in the negotiation of that convention. So two of the latest international conventions about very important issues: torture and the rights of people with physical or psychiatry disabilities specifically focus on the potential of NIs to be the national body.

Of course, if the government needs to confer that responsibility, it needs to give the institution adequate resources to deal with that responsibility, which is another challenge.

Finally the mandate of NIs is evolving. There are a number of countries that are looking at this question: if they have existing Ombudsman that have human rights responsibilities, what is the best thing to do? Is it to broaden the mandate of those institutions; is it to bring them together into one institution? I am not suggesting there is any perfect formula, but what the PP mean and what all the governments committed themselves to was appropriate mechanisms to protect human rights across the country and not just of a particular section or group.

Speaking from my own experience, one of the reasons I brought them up together is that I couldn't win any arguments on human rights in Australia without the women's lobby behind me. If I hadn't had the Sex Discrimination Commission as part of Human Rights Commission we wouldn't have won the battles on the rights of aboriginal people and so on. Every country will decide on its own appropriate formula.

The last thing I want to focus on is **what we have learnt**.

We have learnt the importance of the universally accepted standards which were endorsed in the Vienna Declaration and Programme of Action.

We have learnt the necessities of NIs to have a clear mandate.

We have learnt the absolute necessity to give them powers which are commensurate with the responsibilities they are given. If you give them the responsibility to protect human rights or to investigate human rights violations as many institutions do in Africa and Asia you had better give them the power that goes with that and that is the reference in the PP to quasi judicial powers. Many NIs have the power to get evidence, to hear witnesses.

We learnt that changing the law is very often a necessary but not a sufficient pre-condition if we are going to ensure the protection of human rights. Sometimes some of our politicians if they amend a law or if they to comply with international treaties that the job is being done (about 10% of the equation). What is critical is changing public attitudes: we are going to get rid of discrimination against minorities or people with disabilities, etc. then our educational role is fundamentally important. If you are talking about people with disabilities, you can pass all the laws you want, but until the public understands that people should be treated with dignity and that we are all equal, then we haven't achieved what we are obliged to do.

We have learnt that many violations of human rights can be dealt with most effectively at the national level. Wouldn't it be a good idea to have mechanisms at a national level which actually deal effectively with human rights violations which don't necessarily need to go to Geneva, New York or Strasbourg. I am puzzled because in Asia we don't have the choice of having a regional mechanism, we have got 4500 million people and I am not sure where we will ask them to go- in New Delhi or Bangkok. If we are serious about making human rights a reality, we need to be accessible. Strasbourg is not accessible to most of the people to most of your countries and that is why in a number of other regions we have given NIs the right to investigate human rights violations and engage in alternative dispute resolution. About 70-80% of the cases we handled we resolved by reconciliation. They were not constitutionally complex, they did not need to go to our supreme court, nor a regional court, we needed to get the parties together and get the offending party to address and redress the violation that had occurred. Sometimes we had to have formal hearings, but generally not.

This is something worth a consideration for your organization; the OSCE not only represents countries from North America and Central Asia but also countries from Europe. If you have not got accessibility in terms of human rights than we need to stand back and have a serious look at whether the institutions we have assumed are the ones we need and are actually performing the job. One of their most important roles is prevention. After the Second World War the whole basis of the Universal Declaration of Human Rights was never again: since we have had Uganda, Cambodia, Rwanda, Sierra Leone, East Timor, Sudan, and Bosnia.

One of the things we have learnt is that as the international community we are not very good at picking up the peaces. It would be better if we put more resources into NIs which have a mandate to promote societies of respect of individual difference because once the genie of racial hatred and ethnic or religious intolerance is out of the bottle, we are not very good at trying to put it back in. That is what NIs are in large part mandated to do: to promote an understanding of human rights, an acceptance of individual dignity and

respect. In many countries national institutions had move in to defuse or address discrimination against a particular minority that can lead to violence or even quite horrific violations of human rights.

At the practical level priorities is always a big and difficult issue for national human rights institutions with a broad mandate. We have got limited resources. We have a particular responsibility for most vulnerable groups in our community: the homeless, the ill, the elderly, children, those with physical and mental disabilities, those that live in isolated areas, prisoners.

The reality is that the Member states, the governments must recognize when they give the mandate to a national institution in legislation. The NI itself must have a certain amount of discretion as to what it does and how it does it because with a broad mandate you can't do everything.

In conclusion, the challenge for those of us from member states and NIs set up by member States include:

- cross border issues;
- the necessity with respect for executive government to recognize the independence of NI (there are 4 aspects of independence: in the law setting up the institution, in the integrity, commitment and capacity of the commissioners or the people who run the institution);
- that the government respects that independence;
- to give the institution adequate resources because you cannot function effectively and independently if the state itself will not recognize, acknowledge and give you the way with all to get to up what you are charged to do;

The Paris Principles were drawn as some States that were looking up at setting some window dressing institutions.

In conclusion therefore I would say to those of you who think that the courts protect human rights that they play an extremely important role but if you look at actually implementing the international human rights conventions, many of the most egregious human rights violations were not against the law. The way we treated mentally ill people was a matter of omission and neglect, there was nothing the judges were able to do about it. To many of the most disadvantaged and vulnerable people the law is not a complete answer, to many of them the courts are not accessible. Human Rights Institutions are free, you don't pay fees to come and see us.

Essentially, in conclusion, the judges are reactive: they can only deal with issues brought before them, NHRIs under the PP can play a proactive role.

The great challenge for those of us who work in NIs is to ensure that international norms that states have voluntarily, solemnly undertaken to respect are translated into reality.

Ambassador Lenarcic commended the keynote speaker for highlighting themes of importance, such as the principle of independence, and the need to secure for NHRIs a clear mandate, adequate resources, and commensurate powers. The Ambassador welcomed the focus on the importance of these institutions for the most vulnerable groups, the very groups that often fall through the gaps and expressed his confidence that the keynote speech provided an excellent basis for the work that would follow over the two day meeting.

***Prof. Brian Burdekin AO:** former Adviser to the Australian Prime Minister, several ministers and the Federal Attorney General, former Federal Human Rights Commissioner and International Adviser to a number of National Human Rights Institutions in the OSCE region, Asia and Africa.*